

Spring 4-1-2001

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### Recommended Citation

John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001).  
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## Restoring the “General” to the General Welfare Clause

By John C. Eastman<sup>1</sup>

Over the past decade, the Supreme Court of the United States has, in a series of important cases, reinvigorated the twin doctrines of enumerated powers and federalism, restoring to our constitutional order some semblance of the founders’ original vision of a national government that was strong within the sphere of power assigned to it but limited by the extent of that sphere. Whether invalidating acts of Congress that “commandeered” state officials to do Congress’s bidding,<sup>2</sup> trimming the sails of Congress’s powers under the Interstate Commerce Clause,<sup>3</sup> or setting up sovereign immunity barriers to private enforcement of statutory schemes enacted by Congress,<sup>4</sup> the Court has reasserted its role to hold

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<sup>2</sup> *New York v. United States*, 505 U.S. 144, 146 (1992); *see also* *Printz v. United States*, 521 U.S. 898 (1997).

<sup>3</sup> *See* *United States v. Lopez*, 514 U.S. 549 (1995); *see also* *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 121 S. Ct. 675 (2001); *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>4</sup> *See* *Seminole Tribe of Fla. v. Florida* 517 U.S. 44 (1996); *see also* *Board of Trustees of Univ. of Ala. v. Garrett*, 2001 WL 173556, \_\_ U.S. \_\_ (Feb. 21, 2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261 (1997). Unfortunately, the Court’s enthusiasm for federalism has sometimes caused it to forget the other half of the founders’ vision, namely, that the federal government was to be supreme within the spheres assigned to it. Several of the decisions cited here interpret the Eleventh Amendment in a way that is arguably contrary to that vision. That is not necessarily to disagree with the outcome of these cases, only with their reasoning. In *Seminole Tribe*, for example, the correct holding from the view of the framers would have been that Congress had exceeded the scope of its authority under the Indian Commerce Clause, much as the Court had held in *Lopez* that Congress had exceeded the scope of its authority under the Interstate Commerce Clause. By relying instead on a non-textual reading of the Eleventh Amendment, the Court essentially erected an artificial barrier to an artificial power—producing the correct outcome in the case but creating real analytical problems for future cases where a power clearly given to Congress was at issue. I take up this subject in greater detail in “*Justice David Souter: Partial*

Congress to both the textual and structural limitations of the Constitution.

Some have argued, however, that all of these cases are much ado about nothing. Congress, they contend, can simply re-enact the same restrictions, the same commandeering, the same private causes of action against state governments merely by imposing them as conditions on any of the myriad spending programs that the Congress provides to state and local governments.<sup>5</sup> If Congress wants a Gun Free School Zones Act despite its lack of authority under the Commerce Clause, all it need do is re-enact the identical provision struck down in *United States v. Lopez*<sup>6</sup> as a condition on education grants to the states or local school districts. Thus far, the Supreme Court has not given any signal to suggest that it would apply its federalism rulings in the Spending Clause context, and the last major precedent on the subject strongly suggests that it would not.<sup>7</sup> Drawing on language in *South Dakota v. Dole*, much of the debate has focused, and undoubtedly will continue to focus, on whether the conditions Congress would seek to impose are closely enough related to the spending grants to which they are attached as to make them constitutionally permissible.<sup>8</sup> But the

*Originalist*," in THE STRUCTURE OF REHNQUIST COURT JURISPRUDENCE (working title) (Earl Maltz, ed., forthcoming 2001).

<sup>5</sup> See, e.g., Richard E. Levy, *Federalism: The Next Generation*, 33 LOY. L.A. L. REV. 1629, 1643 (2000); Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1615 (2000); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 116 ("[A]ny time that Congress finds itself limited by [its] delegated regulatory powers, . . . [it] need only attach a condition on a federal spending grant that achieves the same (otherwise invalid) regulatory objective"); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1913-14 (1995) [hereinafter Baker, *Conditional Federal Spending*] (noting President Clinton's contention, after the Supreme Court's decision in *Lopez*, "that Congress would not run afoul of the Constitution if it now chose to 'encourage states to ban guns from school zones by linking Federal funds to enactment of school-zone gun bans'"); see also Denis Binder, *The Spending Clause As A Positive Source Of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147 (2001); see also William E. Thro, *The Education Lawyer's Guide to the Sovereign Immunity Revolution*, 146 ED. LAW REP. 951, 977-79 (2000) (noting that *South Dakota v. Dole* allows in the spending clause context what *United States v. Lopez* forbids in the commerce clause context, and suggesting that the Court will ultimately have to reconcile the conflict).

<sup>6</sup> 514 U.S. 549 (1995).

<sup>7</sup> See *South Dakota v. Dole*, 483 U.S. 203 (1987).

<sup>8</sup> See, e.g., James Leonard, *The Shadows Of Unconstitutionality: How The New Federalism May Affect The Anti-Discrimination Mandate Of The Americans With Disabilities Act*, 52 ALA. L. REV. 91, 177-78 (2000) (describing the relatedness inquiry as one of the "true issues"); see also Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163 (2001). As Professor McConville rightly contends, the relatedness prong of the Dole test does not carry much water; almost anything can be made to appear "related." The Court should have limited congressional conditions to those that would ensure the federal funding was being used for the intended purpose. Highway funds should be used to build highways, not parks near the mayor's house, etc. That would be a "relatedness" requirement with some teeth. See generally Baker, *Conditional Federal Spending*, *supra* note 5; *South Dakota v. Dole*, 483 U.S. at 213-16 (O'Connor, J., dissenting).

renewed attention to Spending Clause issues affords us an opportunity to revisit the analytically distinct and prior question of whether the spending grants are themselves constitutional. In Part I of this paper, I contend that our view of the Spending Clause since *United States v. Butler*<sup>9</sup> has been wrong; that James Madison rather than Alexander Hamilton had the better argument about the limitations of that clause; that it was not just Madison, but Jefferson and numerous others as well, who subscribed to Madison's position; and that the Election of 1800 was in part fought over this issue. In Part II, I take up an additional limitation found in the text of the Spending Clause that is only implicitly addressed in the dispute between Madison and Hamilton and therefore has largely been overlooked in the last century and a half of our nation's history. Congress, I contend, has only the power to spend for the "general" welfare and not for the special welfare of particular regions or states, even if the spending was undertaken in all regions or all states and therefore might be said to enhance "general" welfare in the aggregate.<sup>10</sup>

These matters are more than simply of historical interest and more is at stake than just constitutional purity. The line between "general" and non-general welfare drawn by the founders makes good policy sense, as well. In his message vetoing the college land grant bill, President James Buchanan cogently described the policy considerations that underlay the constitutional mandate:

The representatives of the States and of the people, feeling a more immediate interest in obtaining money to lighten the burdens of their constituents than for the promotion of the more distant objects intrusted [sic] to the Federal Government, will naturally incline to obtain means from the Federal Government for State purposes. If a question shall arise between an appropriation of land or money to carry into effect the objects of the Federal Government and those of the States, their feelings will be enlisted in favor of the latter. This is human nature; and hence the necessity of keeping the two Governments entirely distinct . . . Besides, it would operate with equal detriment to the best interests of the States. It would remove the most wholesome of all restraints on legislative bodies—that of being obliged to raise money by taxation from their constituents—and would lead to extravagance, if not to corruption. What is obtained easily and without responsibility will be lavishly expended.<sup>11</sup>

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<sup>9</sup> 297 U.S. 1, 65 (1936).

<sup>10</sup> *Cf. Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>11</sup> President James Buchanan to the House of Representatives of the United States (Feb. 24, 1859), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 3074, 3076-77 (James D. Richardson ed., 1897) [hereinafter MESSAGES AND PAPERS].

With such policies in mind, we turn to the Constitutional language and the epic dispute between James Madison and Alexander Hamilton about the meaning of the General Welfare clause.

PART I. THE MADISON-HAMILTON DISPUTE OVER THE MEANING OF THE "GENERAL WELFARE" CLAUSE.

Congress's spending power is derived from Article I, Section 8 of the Constitution, which provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."<sup>12</sup>

On its face, the clause allows Congress to levy taxes only for two purposes: 1) to pay the debts of the United States; and 2) to provide for the common defense and general welfare of the United States.

To the modern reader, those two purposes are so broad as to amount to no limitation at all. Indeed, the contemporary view is that Congress's power to provide for the "general welfare" is a power to spend for virtually anything that Congress itself views as helpful.<sup>13</sup> The courts have essentially treated whatever limitation the clause might impose as essentially a nonjusticiable political question.<sup>14</sup> Although some of the founders, most notably Alexander Hamilton, expansively interpreted the clause in a way similar to the current understanding,<sup>15</sup> most did not. Thomas Jefferson,

<sup>12</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>13</sup> See, e.g., *South Dakota v. Dole*, 483 U.S. at 208; see also Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 93 (2001) ("It is hard to imagine a broader statement of the scope of Congress's powers" than the "common defence" and "general welfare" language of the Spending Clause). Professor Chemerinsky argues that the spending power is "virtually infinite," *id.*, and tellingly does not offer a single example of *unconstitutional* spending, see *id.* at 92. Some of his examples, such as defense spending and foreign aid, are clearly within the "general welfare" spending power; others, such as dealing with interstate pollution that does not respect state boundaries, are more properly dealt with under the Compacts Clause, U.S. CONST. art. I, §10, cl. 3; but the remainder, such as redistribution of wealth among the states for which Professor Chemerinsky argues on policy grounds, are not only *not* covered by the General Welfare clause, but are arguably at odds with the uniformity requirement of Art. I, § 8, cl. 1, and the proportionality requirement of Art. I, § 9, cl. 4. See discussion *infra* at Part II.C. Indeed, under Professor Chemerinsky's broad reading of the Spending Power, it is hard to imagine why the constitutional convention even bothered enumerating any other powers, since they would all be redundant. See *infra*, note 16. Professor Chemerinsky's position pushes past the limits set even by the broad reading given the clause by the Supreme Court in *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (recognizing that Congress must be acting in pursuit of the "general welfare").

<sup>14</sup> See *South Dakota v. Dole*, 483 U.S. at 208 n.2 ("The level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all") (citing *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976) (per curiam)).

<sup>15</sup> In his Report on Manufactures, for example, Hamilton contended that the only limits on the tax and spend power were the requirements that duties be uniform, that direct

for example, repudiated Hamilton's expansive reading as a "sham limitation."<sup>16</sup> But the most vigorous opponent of Hamilton on this subject was James Madison, who repeatedly argued that the power to tax and spend did not confer upon Congress the right to do whatever it thought to be in the best interest of the nation, but only to further the ends elsewhere specifically enumerated in the Constitution.

It is commonly thought that in the dispute between Madison and Hamilton about the scope of the Spending Clause, Hamilton carried the day before the close of the 18<sup>th</sup> century. Indeed, both parties in the New Deal-era case of *United States v. Butler* relied upon the Hamiltonian position, and both the majority and dissenting opinions facially accepted the correctness of Hamilton's position even though the majority ruled that the particular tax and regulatory program at issue in the case was unconstitutional.<sup>17</sup> Justice Roberts, writing for the Court, acknowledged the "sharp differences of opinion" on the subject that have persisted "[s]ince the foundation of the nation," but then concluded that the Hamiltonian position, as espoused by Justice Story in his Commentaries on the Constitution, was "the correct one." "While, therefore, the power to tax is not unlimited," he wrote, "its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress."<sup>18</sup> In other words, the Court concluded in this opening

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taxes be apportioned by population, and that no tax shall be laid on articles exported from any state. ALEXANDER HAMILTON, REPORT ON MANUFACTURES (1791), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 446-47 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter FOUNDERS' CONSTITUTION]. The power to raise money was otherwise "plenary, and indefinite," he argued, "and the objects to which it may be appropriated are no less comprehensive. . . ." *Id.* Yet even Hamilton recognized that the clause had a qualification, namely, "[t]hat the object to which an appropriation of money is to be made be *General* and not *local*." *Id.* He simply avoided this limitation by arguing for what we would today call an aggregation principle. *Id.* Cf. *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>16</sup> Thomas Jefferson to George Washington (Sept. 9, 1792), in THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES (Paul Leicester Ford, ed.) (visited Mar. 6, 2001) <[http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field\(DOCID+@lit\(tj070029\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(tj070029)))>; see also THOMAS JEFFERSON, OPINION ON THE CONSTITUTIONALITY OF THE NATIONAL BANK (1791), *reprinted in* THOMAS JEFFERSON, WRITINGS 416, 418 (Merrill D. Peterson, ed., Library of America 1984) [hereinafter WRITINGS] (arguing that, by Article I, § 8, the two houses of Congress "are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be good for the Union, would render all the preceding and subsequent enumerations of power completely useless.").

<sup>17</sup> 297 U.S. 1, 66 (1936); *id.* at 81 (Stone, J., dissenting).

<sup>18</sup> *Id.* at 65-66. Jeffrey Renz has described the Story interpretation of Hamilton's position embraced by the *Butler* Court as the "weak" Hamiltonian position. The "strong" Hamiltonian position was that the power to tax and the power to provide for the general welfare are separate powers, and that Congress could therefore enact any law, not just spending laws, in order to further the general welfare. Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL

section that the only limitation on Congress's power to tax and spend was that the spending be for the "general welfare," and it effectively eviscerated even that limitation by giving virtually unbridled discretion to Congress.<sup>19</sup> This interpretation of *Butler* was reaffirmed without further analysis a year later in *Steward Machine Co. v. Davis*<sup>20</sup> and *Helvering v. Davis*,<sup>21</sup> and is now "so widely recognized that '[n]o one today candidly denies that Hamilton's view of the spending power was correct.'"<sup>22</sup>

There is, however, more to the Madisonian position than was credited by the *Butler* Court. Indeed, it was much more than just Madison's position. In the Kentucky Resolution, for example, Thomas Jefferson directly challenged Hamilton's view of the spending power, stating that the words of the General Welfare clause "ought not to be construed as themselves to give unlimited powers, . . . so taken as to destroy the whole residue of [the Constitution]."<sup>23</sup>

The principles outlined in the Kentucky Resolution (and the parallel Virginia Resolution authored by James Madison) became the platform for Jefferson's emerging political party and the primary grounds on which Jefferson challenged the incumbent President John Adams in the election of 1800. Indeed, Thomas Jefferson was later to write that the different interpretations of the general welfare clause put forward by Hamilton, on the one hand, and Madison and Jefferson, on the other, was "almost the only landmark which now divides the federalists from the republicans. . . ."<sup>24</sup> Thus, although Hamilton's reading carried the day for a while in the Executive branch during the 1790s,<sup>25</sup> the issue remained hotly disputed and Hamilton's view was essentially repu-

L. REV. 81, 87 (Fall 1999) [hereinafter Renz, *What Spending Clause?*]. Hamilton had taken the "strong" position when he proposed his alternative to the Randolph Plan during the 1787 Convention, but his proposal was soundly rejected by the convention. *Id.* at 103 (quoting 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 127 (Jonathan Elliot ed. & rev., 2d ed. 1996) [hereinafter ELLIOT'S DEBATES]; 1 ELLIOT'S DEBATES at 179); see also MAX FARRAND, 3 THE RECORDS OF THE FEDERAL CONVENTION 627 (Yale University Press rev. ed., 1937) [hereinafter FARRAND]. Because the remainder of Article I, Section 8 would be redundant (and the doctrine of enumerated powers rendered nugatory) by the "strong" Hamiltonian interpretation, that interpretation is manifestly erroneous.

<sup>19</sup> *Butler*, 301 U.S. at 66.

<sup>20</sup> 301 U.S. 548 (1937).

<sup>21</sup> 301 U.S. 619 (1937). The Court in *Helvering* upheld the Social Security Act as within the "penumbra" of the General Welfare Clause. *Id.* at 640.

<sup>22</sup> David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 5 (1994); see also Renz, *What Spending Clause?*, *supra* note 18, at 86.

<sup>23</sup> DRAFT OF THE KENTUCKY RESOLUTIONS, *reprinted in* WRITINGS, *supra* note 16, at 452.

<sup>24</sup> Thomas Jefferson to Albert Gallatin (June 16, 1817), in 2 FOUNDERS' CONSTITUTION, *supra* note 15, at 452.

<sup>25</sup> Actually, it was only the "weak" Hamiltonian position that gained some acceptance during the Washington and Adams administrations, not the "strong" Hamiltonian position.

diated by the election of 1800. What is more, the election of 1800 was not a revolution in thought about the expanse of the spending power,<sup>26</sup> but a return to what had been the common understanding of the phrase employed and the underlying principle it codified that had been in place almost since the new nation was created in 1776. And from 1800 to 1860, almost every President held to the Jeffersonian/Madisonian position by vetoing as unconstitutional various internal improvement bills enacted by Congress, oftentimes explicitly relying upon Madison's views.<sup>27</sup>

In the closing days of his second term as President, for example, Madison himself vetoed an internal improvements bill that would have funded the construction of roads and canals "in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defence. . . ."<sup>28</sup> Madison rejected the contention that the Spending Clause authorized such expenditures, stating that such a broad reading would render "the special and careful enumeration of powers, which follow the clause, nugatory and improper."<sup>29</sup> In what is perhaps the best articulation of his position, Madison rejected both the "strong" and the "weak" Hamiltonian positions:

Such a view of the Constitution would have the effect of giving to Congress a general power of legislation, instead of the defined and limited one hitherto understood to belong to them; the terms "common defence and general welfare," embracing every object and act within the purview of a legislative trust . . . . A restriction of the power "to provide for the common defence and general welfare," to cases which are to be provided for by the expenditure of money, would still leave within the legislative power of Congress all the great and most important measures of

<sup>26</sup> The election of 1800 is therefore not a "constitutional moment" that implicitly ratified an unwritten amendment to the Constitution. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 256-57, 279-81 (1998); 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 42-43, 100-104 (1991).

<sup>27</sup> See discussion *infra* Part II.

<sup>28</sup> 30 ANNALS OF CONG., Senate, 14<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 211 (1817), available in *A Century of Law Making* (visited on Mar. 12, 2001) <<http://memory.loc.gov/ammem/amlaw/lwaclink.html>> [hereinafter *Annals Website*]. Today, such projects would appear to be clearly within Congress's authority to regulate commerce among the states, or at least within Congress's authority to enact laws that are a "necessary and proper" means of furthering its enumerated power over interstate commerce. In addition to rejecting the Spending Clause as a source of authority for the Act, Madison summarily rejected the Commerce Clause as authority. The limitations the Court has recently re-imposed on the Commerce Clause are therefore still a long way from the original understanding of that clause. See, e.g., *United States v. Lopez*, 514 U.S. 549, 588 (1995) (Thomas, J., concurring).

<sup>29</sup> 30 ANNALS OF CONG., *supra* note 28, at 212, available in *Annals Website*, *supra* note 28.



Government; money being the ordinary and necessary means of carrying them into execution.<sup>30</sup>

Nearly half a century later, President James Buchanan still adhered to the same position. In his message vetoing the college land grant bill, President Buchanan took it as a given that the funds raised by Congress from taxation were “confined to the execution of the enumerated powers delegated to Congress.” The idea that the resources of the federal government—either taxes or the public lands—could be diverted to carry into effect any measure of state domestic policy that Congress saw fit to support “would be to confer upon Congress a vast and irresponsible authority, utterly at war with the well-known jealousy of Federal power which prevailed at the formation of the Constitution.” “The natural intentment” of those who drafted and ratified the Constitution, he continued,

would be that as the Constitution confined Congress to well-defined specific powers, the funds placed at their command, whether in land or money, should be appropriated to the performance of the duties corresponding with these powers. If not, a Government has been created with all its other powers carefully limited, but without any limitation with respect to the public lands.<sup>31</sup>

The *Butler* Court did not even consider this nearly uniform historical evidence and practice. Moreover, the *Butler* Court’s initial embrace of the Hamiltonian position cannot be reconciled with the actual holding of the case. “Wholly apart from” the question “whether an appropriation in aid of agriculture falls within” “the scope of the phrase ‘general welfare of the United States,’” the Court held that the Agricultural Adjustment Act was unconstitutional because its purpose was to regulate and control agricultural production, “a matter beyond the powers delegated to the federal government.”<sup>32</sup> In other words, Congress could not use its power to tax and spend for the “general welfare” as a means to accomplish some end “not expressly granted, or reasonably to be implied from such [powers] as are conferred,” even if the spending itself might

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<sup>30</sup> *Id.* Madison also contended that an expansive view of the General Welfare clause would have the effect of excluding the judiciary from its role in guarding the boundary between the Federal and State governments, “inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsuited to judicial cognizance and decision.” In this, Madison appears to be deliberately discounting the limitation that spending be for the “general” welfare as opposed to merely local welfare—a limitation that even Hamilton recognized—in order to strengthen his contention that the other enumerated powers were themselves limitations on the Spending Power. As I describe below, it is a concession that Madison did not need to make, since the enumerated powers were themselves drafted with a “general welfare” understanding in mind. See *infra* Part II.

<sup>31</sup> President James Buchanan to House of Representatives (Feb. 24, 1859), in 7 MESSAGES AND PAPERS, *supra* note 11, at 3079.

<sup>32</sup> *Butler*, 297 U.S. at 68 (emphasis added).

be said to be for the “general welfare.”<sup>33</sup> Notwithstanding the *Butler* Court’s opening embrace of Hamilton, that holding is much closer to Madison’s position than to Hamilton’s.

Even if the *Butler* holding could somehow be reconciled with the Court’s earlier rejection of the Madisonian position, however, both Justice Roberts for the Court and Justice Stone in dissent recognized in *Butler* that the “general welfare” clause imposed another limitation on Congress’s spending power, namely, that the purpose of the spending “must be ‘general, and not local.’”<sup>34</sup> But again, that restriction is much more consistent with Madison’s position than with Hamilton’s, once one fully appreciates the principle underlying the doctrine of enumerated powers and its consistency with the historical understanding of the phrase, “general welfare.”

The enumerated powers given to Congress in the rest of Article I, Section 8 were themselves limited to matters that required national rather than local legislation. For example, early in the convention, Roger Sherman proposed that Congress should have power to legislate “in all cases which may concern the *common interests* of the Union: but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned.”<sup>35</sup> His proposal, and others like it, were referred to the Committee of Detail, which on August 6, 1787 gave substance to his proposal by reporting back a list of enumerated powers that was eventually to become Article I, Section 8—powers designed to further the common interests or general welfare of the nation without interfering unnecessarily with the internal police powers of the states.

Thus, the limitations implicit in the very idea of the enumerated powers doctrine paralleled the “general welfare” limitation in the spending clause. In the next section, I explore just what the historical understanding of the “general welfare” limitation was.

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 66-67 (quoting ALEXANDER HAMILTON, REPORT ON MANUFACTURERS, *reprinted in* 3 WORKS OF ALEXANDER HAMILTON 250); *Butler*, 297 U.S. at 87 (Stone, J., dissenting) (“The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national.”); *see also infra*, Part II.

<sup>35</sup> 2 FARRAND, *supra* note 18 at 21 (proposal by Roger Sherman, July 17, 1787) (emphasis added); *see also id.* (proposal of Gunning Bedford) (giving to Congress the power “to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent. . .”).

PART II. THE "GENERAL WELFARE" WAS ORIGINALLY  
UNDERSTOOD AS A LIMITATION ON CONGRESS'S SPENDING  
POWER, NOT A GRANT OF POWER.

Madison's view that the power to spend for the "general welfare" was limited to spending that furthered one of the other enumerated powers is only an *implicit* limitation, drawn not from the text of the clause itself but from the overall structure and underlying principles of the Constitution. But the Spending Clause also contains an *explicit* limitation, albeit one that is not readily apparent to the modern reader. Spending had to be for the "general," or national welfare, not for regional or local welfare.

In order to understand fully the meaning that the framers attributed to this "general welfare" limitation, it is perhaps best to begin with the document from which the clause was derived. The "general welfare" language of Article I, Section 8 is drawn from two clauses in the Articles of Confederation<sup>36</sup> that were commonly understood as imposing restrictions on the Confederation Congress. And those clauses had a parallel in an important document by which Virginia ceded to the United States her claims over the vast tracts of undeveloped land in the west, a document and controversy to which I now turn.

A. The Virginia Cession of Lands and the Ohio Land Sales.

On June 7, 1776, when Richard Henry Lee made his famous call for independence—"[t]hat these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved"—his motion included a request "[t]hat a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation."<sup>37</sup> That committee, consisting of one member from each colony,<sup>38</sup> issued its report and proposed articles of confederation to the Congress on July 12, 1776, just one week after the Declaration of Independence was enacted. But the Articles of Confederation was not finally approved until November 1777; and the new government authorized by it did not take effect until 1781, when Maryland finally ratified the document. One of the principal reasons for the delay was a festering dispute over the conflicting claims to the

<sup>36</sup> See, e.g., 2 ANNALS OF CONG., House of Representatives, 1<sup>st</sup> Cong., 3<sup>rd</sup> Sess. 1946 (1791), available in *Annals Website*, *supra* note 28 (James Madison noting during debate on the Bank Bill that the terms of the General Welfare Clause were "copied from the articles of Confederation").

<sup>37</sup> 5 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 425, (Worthington Chauncey Ford ed., 1906) [hereinafter JOURNALS].

<sup>38</sup> *Id.* at 433.

western lands. As the North Carolina delegates to the Continental Congress wrote home to their state's Governor, Maryland's objection was "that some States should claim and possess vast tracts of vacant unappropriated lands, protected and rescued from the Crown of Great Britain by the joint efforts of the United States which should become a fund for the payment of the national debt."<sup>39</sup>

Several states had claims to the vast western lands, but Virginia's claim, being the oldest, was the strongest. The delegates from Maryland, and to a lesser extent from Delaware, were greatly concerned that their already large and powerful southern neighbor would become oppressively powerful if it was able to vindicate its claim to the western lands. Thus, a precondition of a viable confederation was that Virginia quit her claims. She ultimately did so, offering in 1781 to cede the lands to the United States under certain conditions, including "that all the lands thus ceded be considered a common fund for the Confederation."<sup>40</sup> Virginia's conditions were the subject of much debate over the next three years,<sup>41</sup> but ultimately Virginia's deed of cession contained the following language:

That all the lands within the territory so ceded to the United States . . . shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and

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<sup>39</sup> Benjamin Hawkins and Hugh Williamson to Alexander Martin, Governor of North Carolina (September 26, 1783), in 7 *LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS* 313 (Edmund C. Burnett ed., 1936) [hereinafter *LETTERS*].

<sup>40</sup> MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 229 (Univ. of Wisconsin Press 1976) (describing Virginia's offer of cession); see also 17 *JOURNALS*, *supra* note 37, at 808 (Sept. 6, 1780) (similar proposal by Virginia delegates to the Continental Congress); *Id.* (providing that any territory ceded would be used for the common benefit of the United States); 23 *JOURNALS*, *supra* note 37, at 550 (Sept. 5, 1782) ("That it is [the opinion of the committee] that the western lands, if ceded to the United States, would be an important fund for the discharge of the national debt"). The idea that the western lands would provide a common fund for the payment of the national debt first arose soon after the start of the war. JAY A. BARRETT, *EVOLUTION OF THE ORDINANCE OF 1787*, 4 (G. P. Putman's Sons, 1891, reprinted by Arno Press, 1971).

<sup>41</sup> The debate also involved acrimonious disputes over the validity of claims by land speculators that had purchased land from Indians residing in the territory. When Virginia refused to honor the claims, the speculators petitioned Congress for relief, leading the Virginia legislature to pass a remonstrance challenging Congress's authority even to consider the speculators' petition. See JENSEN, *supra* note 40, at 191, 216-18; see also 12 *JOURNALS*, *supra* note 37, at 224-31 (May 1, 1782). It was in large part because Virginia wanted her cession of western lands to redound to the benefit of the whole nation rather than enrich a few land speculators that it imposed the conditions it did.

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shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever.<sup>42</sup>

A review of the uses to which the lands ceded by Virginia were put and, perhaps more importantly were not put, will indicate just how the grantor Virginia and the grantee United States (through the delegates in the Continental Congress) viewed the "common fund" condition imposed by Virginia.

It was generally understood that the lands ceded by Virginia would immediately be used for two purposes: to provide land bounties to soldiers who fought in the Continental Army, and to retire the national debt.<sup>43</sup> By definition, retiring the national debt met the terms of the Virginia cession because the obligation for repayment of the national debt was, under the Articles of Confederation, owed by the states in the same proportion as the benefits of the Virginia lands were to be distributed.<sup>44</sup> Although less self-evident, the provision of land bounties to former members of the Continental Army also complied with Virginia's condition; lands had been promised to army soldiers, as pay supplement or enlistment inducement, almost from the outset of the Revolutionary War.<sup>45</sup> The land bounties were thus as much payment of the na-

42 Virginia Act of Cession, (Oct. 20, 1783), in 26 JOURNALS, *supra* note 37, at 115 (Mar. 1, 1784); *see also* 25 JOURNALS, *supra* note 37, at 559-64 (Sept. 13, 1783) (Congress's counter proposal to Virginia); 34 JOURNALS, *supra* note 37, at 332 (July 17, 1788) (discussion of same); JUSTIN WINSOR, *THE WESTWARD MOVEMENT: THE COLONIES AND THE REPUBLIC WEST OF THE ALLEGHENIES, 1763-1798*, (Houghton, Mifflin & Co., 1897).

43 *See, e.g.*, Letter from Arthur Lee to Joseph Reed (April 5, 1784) ("The [Virginia] cession . . . will . . . enable us to satisfy the demands of the Army, and sink the public debt by the sale of the Lands"), in LETTERS, *supra* note 39, at 485; Letter from North Carolina delegates to Alexander Martin, Governor of North Carolina (Sept. 26, 1783) ("Congress being possessed of both [the New York and Virginia] claims may be enabled to pay off the army and perhaps a considerable part of the national debt"), in LETTERS, *supra* note 39, at 313; Letter from David Howell to William Greene, Governor of Rhode Island (Dec. 24, 1783) ("I consider the Western Country as an important fund, and I hope that it will prove . . . a sufficient fund to secure the final payment of the national debt"), in *id.* at 397; New Hampshire delegates to the President of New Hampshire (May 5, 1784) ("It has been in contemplation to render these Lands productive for the purpose of discharging the engagements to the Officers and Soldiers, and defraying other debts contracted in the late War"), in *id.* at 513; Report of Public Land Commission, 1880, 46<sup>th</sup> Cong., 1<sup>st</sup> Sess., Exec. Doc. No. 47, at 196 ("The western lands were looked upon by all the financiers of this period as an asset to be cashed at once for payment of current expenses of the government and extinguishment of the national debt") (cited in George Knight, *History and Management of Land Grants for Education in the Northwest Territory*, in PAPERS OF THE AMERICAN HISTORICAL ASS'N, vol 1, no.3, at 10 (G.P. Putnam's Sons, 1885)).

44 *See* ARTICLES OF CONFEDERATION, art. 8 ("All charges of war and all other expenses, that shall be incurred for the common defence or general welfare, and allowed by the United States, in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each State . . ."). This was the "usual" proportion referred to in the Virginia deed of cession.

45 *See, e.g.*, 5 JOURNALS, *supra* note 37, at 763 (Resolution of Sept. 16, 1776); 17 JOURNALS 726-27 (Resolution of Aug. 12, 1780); 18 JOURNALS, *supra* note 37, at 887-88 (Resolution of Sept. 30, 1780). Indeed, by the end of the war, officers and enlisted men were owed so much in back pay that George Washington feared dismissing the army without making some provision to cover the debts. *See, e.g.*, Letter from George Washington, "Circular Let-

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tional debt incurred for the "common defence and general welfare"<sup>46</sup> as were the monetary obligations owed by the new government.<sup>47</sup>

Within a few years, however, Congress was making outright gifts of land to local governments in the new territories for the support of churches and schools that were primarily, if not exclusively, of benefit to the local community rather than to the nation as a whole.<sup>48</sup> These "Section 16" land grants on their face do not appear to meet the conditions contained in the Virginia cession, suggesting either that the "common fund" condition imposed by the Virginia cession was quickly ignored or that it was understood much more broadly than described above. But a more careful review of the circumstances surrounding the land grants demonstrates that the Virginia condition was taken quite seriously and that the Section 16 land grants actually satisfied the narrow, literal interpretation of that condition.

After the Virginia Deed of Cession was executed, Thomas Jefferson was appointed to head a committee to draft an ordinance for the disposition of the western lands. His handiwork, the Land Ordinance of 1784, patterned land sales on the New England township model, but contained no grant of lands for education purposes as was common in New England and that had been requested in a plan to pay army officers from the war, which had been submitted to Congress in 1783. This omission is particularly surprising given Jefferson's own strong support for public education.<sup>49</sup> Jefferson apparently thought such a grant would violate the condition in the Virginia deed of cession that all the lands be used for the common benefit of the United States, for in the report accompanying the bill, he wrote, "The monies arising from the sale of warrants shall be applied to the sinking such part of the princi-

ter" to the States, June 14, 1783, and letter to Joseph Jones (Mar. 18, 1783), in *GEORGE WASHINGTON: A COLLECTION* 227-228, 245-46 (W.B. Allen ed., 1988); Letter from Thomas Jefferson to the Marquis de Chastellux, (Jan. 16, 1784), ("There was indeed some dissatisfaction in the army at not being paid off before they were disbanded, and a very trifling mutiny of soldiers in Philadelphia"), in *6 THE PAPERS OF THOMAS JEFFERSON* 466 (Julian P. Boyd ed., 1958); Letter from Stephen Higginson to Samuel Adams (May 20, 1783), ("The particular situation of Our Affairs at this time was such, that had the Army been broke up, it must have been fatal to Our Cause"), in *LETTERS*, *supra* note 39, at 168.

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<sup>46</sup> ARTICLES OF CONFEDERATION, art. 8.

<sup>47</sup> Moreover, as part of the compensation that was promised to soldiers *ex ante* or that was offered as back pay, the land bounties are readily distinguishable from individual grants made *ex post*.

<sup>48</sup> Even if the provision of education to the settlers in the new territories could be said to be in the national interest, the grants did not meet the "proportionality" requirement of the Virginia cession.

<sup>49</sup> Jefferson had in 1779 introduced in the Virginia legislature his *Bill for the More General Diffusion of Knowledge*, providing for a broad system of public education. See THOMAS JEFFERSON, A BILL FOR THE MORE GENERAL DIFFUSION OF KNOWLEDGE (1779), reprinted in *WRITINGS*, *supra* note 16, at 365.

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pal of the national debt as Congress shall from time to time direct, and to no other purpose whatsoever.”<sup>50</sup>

Only after it became clear that likely land purchasers objected to the 1784 plan drafted by Jefferson did Congress add a provision reserving certain lands for educational purposes.<sup>51</sup> But this reservation was inserted in the Land Ordinance of 1785 not because a different view of the limitation imposed by the Deed of Cession had prevailed,<sup>52</sup> but because Congress by then had realized that such a provision was necessary as a sales inducement.<sup>53</sup> Indeed, there is pretty strong evidence that the reservation was inserted into the land ordinance at the request of Thomas Pickering, an army colonel who had played an active role in submitting

50 7 PAPERS OF THOMAS JEFFERSON, *supra* note 45, at 145. One historian contended that “whether the three southern members [of the committee] objected to supporting a system new to them, or whether the members generally questioned the right of Congress to devote any portion of the public domain to such purposes, will probably never be known.” PAYSON JACKSON TREAT, *THE NATIONAL LAND SYSTEM, 1785-1820*, at 264 (E.B. Treat & Co., 1920). But Julian Boyd has suggested that the “emphatic words in the stipulation that revenues from land sales should be applied to the NATIONAL DEBT . . . AND TO NO OTHER PURPOSE WHATSOEVER indicate [Jefferson’s] reluctance to accept [a lack of grants to actual settlers, another of Jefferson’s pet projects] on any other ground than inescapable necessity.” 7 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 45, at 148.

51 Timothy Pickering, an army colonel who had played an active role in submitting the Army Plan to Congress in 1783, strongly objected to Jefferson’s proposal, for example, because there was “no provision made for ministers of the gospel, nor even for schools or academies.” 1 *LIFE OF TIMOTHY PICKERING* 509 [hereinafter PICKERING] (quoting Letter to Rufus King); see also JOSEPH SCHAFER, *THE ORIGIN OF THE SYSTEM OF LAND GRANTS FOR EDUCATION* 39-40 (Bulletin of the University of Wisconsin at Madison, History Series No. 63 (1902)).

52 Elsewhere in the 1785 Act, the “common fund” requirement of the Virginia Cession was complied with by assigning to each of the states a proportional amount of the lands that were to be surveyed, according to the quotas assigned to the states under the Articles. 28 *JOURNALS*, *supra* note 37, at 375, 377 (May 20, 1785); see also 34 *JOURNALS*, *supra* note 37, at 244 (June 19, 1788). On related issues, Congress treated the language of the cession deed quite seriously. For example, after James Madison visited the Ohio valley in 1785 and determined that the size of the new states needed to be larger than was allowed by Congressional resolution of 1780 and by the Virginia deed of cession, he moved to refer the entire matter to a grand committee. The committee report recommended that Virginia modify her act of cession. See 30 *JOURNALS*, *supra* note 37, at 392 (July 7, 1786) (“That it be recommended to the legislature of Virginia, to take into consideration their act of cession, and revise the same, so far as to empower the United States in Congress assembled, to make such a division of the territory of the United States lying northerly and westerly of the river Ohio, into distinct republican states, not more than five nor less than three, as the situation of that country and future circumstances may require”). See also 34 *JOURNALS*, *supra* note 37, at 246 (June 19, 1788) (recognizing and complying with the requirement in the Virginia Cession that certain lands be reserved to honor the land bounties that Virginia had pledged to her own military officers—land that ultimately became known as the “Western Reserve,” from which Case Western Reserve University in Cleveland, Ohio derives its name); 28 *JOURNALS*, *supra* note 37, at 316 (April 28, 1785).

53 See, e.g., William Grayson to George Washington (April 15, 1785) (“The idea of a township, with the temptation of a support for religion and education, holds forth an inducement for the purpose of purchasing and settling together”), in TREAT, *supra* note 50, at 31. Grayson was Chairman of the Committee that reported the revised land ordinance. See also Knight, *supra* note 43, at 14 (“the [school] reservation clause was finally inserted as an inducement to purchasers. Congress unquestionably expected that the value of the remaining lands would be increased . . . .”); 4 *JOURNALS*, *supra* note 37, at 520-22 (July 5, 1776).

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the Army officer petition to Congress in 1783 and who was trying to arrange for the purchase of a large tract of land for a group of former army officers.<sup>54</sup>

Other provisions in the 1785 ordinance, such as a high minimum price, proved too great a discouragement to land sales, so Congress made another attempt with what became the Northwest Ordinance of 1787. The first draft of the ordinance, reported by a new committee composed of members unversed in the prior western lands disputes, contained no provision for education land grants,<sup>55</sup> but on the same day the draft ordinance received its second reading in Congress, General Parsons, representing the Ohio Company, submitted a memorial to Congress to purchase 1.5 million acres of land in the northwest territory.<sup>56</sup> The offer specifically required that the sale include reservations of land for education and religion (one section in each township was set aside for education, and two whole townships were set aside for a university). By now, Congress had enough experience with attempted land sales in the western territories to know that without such an inducement, the sale would not be consummated.<sup>57</sup> The Committee made revisions to accommodate the Ohio Company's offer, and the ordinance as finally passed contained the following provision: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."<sup>58</sup> Ten days later, Congress approved a large sale of land to the Ohio Company in which Section 16 in each township was to be reserved for education, Section 29 for religion, and in addition two whole townships were to be reserved for the support of a university.<sup>59</sup>

Because the education and religious grants were conditions of sale, they did not violate the "common fund" requirement of the Virginia Deed of Cession. The entire country benefited by the reservations because of the enhanced price of the surrounding lands

<sup>54</sup> Rufus King to Timothy Pickering (date unknown) 1 PICKERING, *supra* note 51, at 511; *see also* SCHAFER, *supra* note 51, at 40 ("You will find thereby, [in the enclosed plan] that your opinions [regarding school lands] have had weight with the committee that reported this ordinance").

<sup>55</sup> *See* 32 JOURNALS, *supra* note 37, at 238-41 (April 25, 1787); SCHAFER, *supra* note 51, at 40.

<sup>56</sup> *See* 32 JOURNALS, *supra* note 37, at 276 (May 9, 1787).

<sup>57</sup> On July 9, 1787, Congress returned the proposed ordinance to the committee to see if it could be brought into conformity with the Ohio Company's purchase offer. 32 JOURNALS, *supra* note 37, at 310 n.3 (July 9, 1787); WINSOR, *supra* note 42, at 283; *see also* Knight, *supra* note 43, at 17 ("The same play of forces which brought about the school reservation in 1785 compelled the grant for a university in 1787. The latter was fairly wrung from the hands of an unwilling Congress").

<sup>58</sup> An Act to provide for the Government of the Territory Northwest of the river Ohio, 32 JOURNALS, *supra* note 37, at 340 (July 13, 1787), *recodified* at 1 STAT. 50, 51 n.a (Aug. 7, 1789).

<sup>59</sup> *See* 32 JOURNALS, *supra* note 37, at 400 (July 23, 1787).

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that resulted from it.<sup>60</sup> In contrast, efforts by the original states to obtain payments in support of their own education efforts were refused, despite claims that such support would support “the general welfare of the people.”<sup>61</sup>

#### B. The Articles of Confederation.

As described above, the dispute over the western lands was so significant as almost to derail the efforts by the several states to enter into even the loose confederation proposed in the Articles of Confederation. Virginia’s cession of lands eliminated that hurdle, but the language of the Articles of Confederation itself showed that there were similar concerns that went beyond the land question.

Article 3 of the Articles of Confederation specifies that the States “entered into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and *general welfare*. . . .”<sup>62</sup> And article 8 provided:

All charges of war and all other expenses, *that shall be incurred for the common defence or general welfare*, and allowed by the United States, in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each State, granted to or surveyed for any Person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the united states, in congress assembled, shall, from time to time, direct and appoint.<sup>63</sup>

During the debates over the ratification of the Constitution, James Madison would later note that the language of Article I, Section 8 was drawn from these provisions of the Articles of Confederation, where it was never thought to give to the Confederation Congress “a power to legislate in all cases whatsoever.”<sup>64</sup>

#### C. Internal Improvements and Bounty Debates in the early Congresses.<sup>65</sup>

Once the new government was in place, there were early efforts by certain members of Congress to obtain funding from the

<sup>60</sup> President Buchanan would later make this same point in his message vetoing college land grants. *See infra*, Part II.D.

<sup>61</sup> Knight, *supra* note 43, at 19-20 (*citing* State Papers, 4 PUBLIC LANDS 750 (date unavailable for this journal)).

<sup>62</sup> ARTICLES OF CONFEDERATION, art. III (emphasis added).

<sup>63</sup> *Id.* at art. VIII (emphasis added).

<sup>64</sup> THE FEDERALIST NO. 41, 264 (James Madison) (Clinton Rossiter ed., 1961); *see also* 3 ANNALS OF CONG., House of Representatives, 2<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 387 (1792), *available in Annals Website*, *supra* note 28.

<sup>65</sup> Professor Erwin Chemerinsky dismisses the evidence cited in this section and the next as merely examples of “the political branches of government choosing not to spend

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national treasury for various parochial interests, despite the fact that the constitutional convention had expressly rejected an amendment that would have given Congress the power to fund internal improvements.<sup>66</sup> In the First Congress, for example, Congress refused to make a loan to a glass manufacturer after several members expressed the view that such an appropriation would be unconstitutional.<sup>67</sup> And the Fourth Congress did not even believe it had the power to provide relief to the citizens of Savannah, Georgia after a devastating fire destroyed the entire city.<sup>68</sup>

During the Second Congress, a protracted debate that occurred over a bill to pay a bounty to New England cod fishermen demonstrates just how solicitous of the "general welfare" limitation Congress was. Representative Giles contended that paying a bounty on certain occupations was of "doubtful" constitutionality.<sup>69</sup> Representative Williamson argued that the "general" welfare limitation was parallel to the requirement in Article I, Section 9 that direct taxes could be levied only in proportion to state population. The Spending Clause afforded no power "to gratify one part of the Union by oppressing another," he contended.<sup>70</sup> Any other reading of the clause would render the restriction on direct taxes "meaningless." In remarks that are an uncanny description of contemporary politics, he continued:

Establish the doctrine of bounties, set aside that part of the Constitution which requires equal taxes, and demands similar distributions, destroy this barrier, and it is not a few fishermen that will enter, claiming ten or twelve thousand dollars, but all manner of persons — people of every trade and occupation — may enter in at the breach, until they have eaten up the bread of our children.<sup>71</sup>

money." Chemerinsky, *supra* note 13, at 90 n.5. The examples cited here demonstrate much more than a decision not to engage in discretionary spending, however; they demonstrate that Congress itself, and in the next section almost every President from 1800 to 1860, believed that such spending was not constitutionally authorized. That the members of the political branches once took seriously their oath "to support this Constitution," U.S. CONST., art. VI, cl. 3, should come as no surprise. As the founders understood the oath clause, each branch of the government, not just the courts, had a similar obligation to comply with the Constitution. *See, e.g.*, DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS* 13 (The University of Chicago Press 1997). Moreover, the failure of the political branches to continue to inquire about the constitutionality of their own actions is no excuse for judicial officers likewise to ignore their own oaths.

<sup>66</sup> *See* 2 FARRAND, *supra* note 18, at 615-16.

<sup>67</sup> *See* 2 ANNALS OF CONG., House of Representatives, 1<sup>st</sup> Cong., 2<sup>nd</sup> Sess. 1686 (1790), available in *Annals Website*, *supra* note 28.

<sup>68</sup> *See* 6 ANNALS OF CONG., House of Representatives, 4<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 1712-1727 (1796), available in *Annals Website*, *supra* note 28.

<sup>69</sup> 3 ANNALS OF CONG., House of Representatives, 2<sup>nd</sup> Cong., 2<sup>nd</sup> Sess. 363 (1792), available in *Annals Website*, *supra* note 28.

<sup>70</sup> *Id.* at 379.

<sup>71</sup> *Id.* at 381.

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James Madison also weighed in, elaborating on the position he had first articulated in Federalist 41:

It is supposed by some gentlemen, that Congress have authority not only to grant bounties in the sense here used [as a rebate for a duty previously paid on salt used to preserve fish destined for export], but even to grant them under a power by virtue of which they may do anything which they may think conducive to the “general welfare.” This, sir, in my mind, raises the important and fundamental question, whether the general terms which had been cited, are to be considered as a sort of caption or general description of the specified powers, and as having no further meaning, and giving no further power than what is found in the specification; or as an abstract and indefinite delegation of power extending to all cases whatever; to all such, at least, as will admit the application of money, which is giving as much latitude as any Government could well desire.

I, sir, have always conceived—I believe those who proposed the Constitution conceived, and it is still more fully known, and more material to observe that those who ratified the Constitution conceived—that this is not an indefinite Government, deriving its powers from the general terms prefixed to the specified powers, but a limited Government, tied down to the specified powers which explain and define the general terms . . . .

It will follow, in the first place, that if the terms be taken in the broad sense they maintain, the particular powers afterwards so carefully and distinctly enumerated would be without any meaning, and must go for nothing. It would be absurd to say, first, that Congress may do what they please, and then that they may do this or that particular thing . . . . In fact, the meaning of the general terms in question must either be sought in the subsequent enumeration which limits and details them, or they convert the Government from one limited, as hitherto supposed, to the enumerated powers, into a Government without any limits at all.<sup>72</sup>

The cod fisheries bill was ultimately approved, but only after an amendment making clear that Congress was not providing a “bounty,” but only issuing a refund of duties previously paid on salt that was used to prepare fish for export, lest the salt duty amount to a tax on exports prohibited by Article I, Section 9.<sup>73</sup>

<sup>72</sup> *Id.* at 386-87.

<sup>73</sup> *Id.* at 397-98; see also U.S. CONST. art. I, § 9. Professor Chemerinsky cites two cases in which Justice O'Connor and Chief Justice Rehnquist state that Congress may fund programs it believes to be “in the public interest” while refusing to fund alternatives. See Chemerinsky, *supra* note 13, at 97 (quoting *National Endowment of the Arts v. Finley*, 524 U.S. 569, 588 (1998) (O'Connor, J.); *Rust v. Sullivan*, 500 U.S. 173, 193-94 (1991). While I believe those holdings are accurate statements of current Spending Clause jurisprudence, the “public interest” was simply not synonymous with the “general welfare” when the Constitution was ratified. Justice O'Connor had it right in her *South Dakota v. Dole* dissent: “If

Some appropriations for apparently local projects were approved, but on careful examination those projects were of general benefit and hence within the authority conferred by Article I, Section 8. At the same time it was denying a request to fund the dredging of the Savannah River, for example, Congress approved an appropriation for a lighthouse at the entrance of the Chesapeake Bay.<sup>74</sup> Both measures were important for navigation, but the lighthouse was of benefit to the entire coastal trade, while the dredging operation was primarily of benefit to the people of Georgia, and hence fell on the "local" rather than the "general" side of the public welfare line.<sup>75</sup>

Various appropriations to fund a road across the Cumberland Gap were also approved. The larger appropriation for internal improvements of which the Cumberland Gap road project was a part was rejected on constitutional grounds, however; the Cumberland Road project is therefore a special case, and the authority for it parallels the authority to provide the Section 16 school lands discussed above. The Admission Act for the State of Ohio specifically required the federal government to devote 1/20 of the proceeds arising from the sale of lands in Ohio to the construction of a road "leading from the navigable waters emptying into the Atlantic, to the Ohio [River]." In exchange, the new State of Ohio agreed not to tax any land sold by the federal government for five years.<sup>76</sup> The contractual trade-off thus protected the "general" welfare obliga-

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the spending power is to be limited only by Congress's notion of the general welfare, the reality . . . is that the Spending Clause gives 'power to the Congress . . . to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.' This, of course, . . . was not the Framers' plan and it is not the meaning of the Spending Clause." 483 U.S. at 217 (O'Connor, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).

<sup>74</sup> See Act of July 22, 1790, 1 STAT. 53, 54. Congress also authorized funding for the maintenance and repair of existing lighthouses, beacons, buoys, and public piers within "any bay, inlet, harbor, or port of the United States" if such were ceded to the United States. See *id.* As such, these appropriations were authorized under Congress's power "to exercise exclusive legislation" in federal territories (U.S. CONST. art. I, § 8, cl. 17) not under the spending power.

<sup>75</sup> President Andrew Jackson drew the line between permissible and impermissible navigation improvements at the ports of entry or delivery established by law. Appropriations for harbor improvements, lighthouses, beacons, buoys, and public piers located on the seaward side of the ports of entry were permissible, but others were not. Message Vetoing "An act to improve the navigation of the Wabash river," 50 H.R. JOURNAL 27, 30 (1834). President Polk went further, persuasively arguing that even seaward-side improvements were to be funded not by general appropriations but by state duties on tonnage, with the consent of Congress pursuant to Article I, Section 10, Clause 3. Veto Message, 65 H.R. JOURNAL 87 (1847); see also *id.* at 93 (criticizing Jackson's position as leaving open "an immense field for expending the public money and increasing the power and patronage of [the national] government" that would result in an unjust "distribution of public burdens and benefits," "fatal encroachment" upon the States, and an "equal danger of consolidation" in the national government).

<sup>76</sup> 2 STAT. 173, 175 (April 30, 1802)

tion, since the higher price that could be obtained for tax-exempt lands was designed to offset the cost of the road construction.

Indeed, Congress accepted the view that it had no power under the Constitution to open roads and canals in any State; its power to fund the Cumberland Road was the result only of the compact with Ohio "for which the nation receive[d] an equivalent."<sup>77</sup>

#### D. The Presidential Veto Messages.

The Cumberland Gap measure was enacted during Thomas Jefferson's presidency. Although Jefferson vehemently disagreed with Hamilton's interpretation of the General Welfare clause, he nonetheless saw some utility in federal financing of internal improvements projects, for such projects would open the channels of communication with the western territories and thereby help solidify the union. But for Jefferson, utility did not give rise to constitutional authority. Therefore, in his 1806 State of the Union Address, Jefferson proposed an amendment to the Constitution that would give Congress authority to spend an anticipated surplus to "the great purposes of the public education, roads, rivers, canals, and such other objects of public improvement as it may be thought proper to add to the constitutional enumeration of the federal powers."<sup>78</sup> The amendment was necessary, he noted, "because the objects now recommended are not among those enumerated in the Constitution, and to which it permits the public monies to be applied."<sup>79</sup>

Jefferson's proposed amendment was never adopted, but within a decade Congress nevertheless passed an internal improvements bill, amendment or no. The bill fell to then-President James Madison's veto pen.<sup>80</sup>

Madison's successor, James Monroe, initially followed the Madisonian line, contending in his first annual message that Congress had no power to spend for internal improvements because such was "not contained in any of the specified powers granted to Congress" nor was it "incidental to, or a necessary means . . . for carrying into effect any of the powers which are specifically

<sup>77</sup> 29 ANNALS OF CONG., House of Representatives, 14<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1252 (1816), available in *Annals Website*, *supra* note 28.

<sup>78</sup> WRITINGS, *supra* note 16, at 529; 5 H. R. JOURNAL 469 (1806), available in *Journal of the House of Representatives of the United States* (visited on Mar. 10, 2001) <<http://memory.loc.gov/ammem/amlaw/lwhj.html>> [hereinafter *Journal Website*]; see also 4 S. JOURNAL 109 (1806).

<sup>79</sup> Jefferson to William Branch Giles (December 26, 1825), in WRITINGS, *supra* note 16, 1509-12.

<sup>80</sup> 30 ANNALS OF CONG., *supra* note 28, at 212, available in *Annals Website*, *supra* note 28. See also *supra* Part I.

granted.”<sup>81</sup> In his 1822 message to Congress vetoing as unconstitutional a bill to preserve and repair the Cumberland road, however, Monroe rejected Madison’s position that the spending power was limited by the ends otherwise enumerated in Article I, Section 8. Instead, he placed stock in the textual limitation found in the General Welfare clause itself. Congress’s power to spend, he stated, was restricted “to purposes of common defence, and of general, not local, national, not state, benefit.”<sup>82</sup> Monroe was not able to distinguish between appropriations that were of general benefit from those that were merely of local benefit, however, and in the final years of his administration, he signed several bills appropriating funds to survey various harbor obstructions and the routes of proposed roads and canals.<sup>83</sup> Although these appropriations were very modest, the old limitation was nevertheless abandoned in principle. As President Polk would later contend, “the flood-gates being thus hoisted, . . . applications for aid from the treasury, virtually to make harbors as well as improve them, clear out rivers, cut canals, and construct roads, poured into Congress in torrents, until arrested by the veto of President Jackson.”<sup>84</sup>

The Hamiltonian position was fully resurrected during the administration of President John Quincy Adams, but Adams served only one term, defeated in 1828 by Andrew Jackson in part over the issue of the constitutionality of federal funding of internal improvements. Jackson, as President, promptly put to rest “this dangerous doctrine” which was “apparently proceeding to its final establishment with fearful rapidity” during the Adams administration.<sup>85</sup> He vetoed as unconstitutional bills appropriating upwards of two hundred million dollars to purchase stock in the Maysville and Lexington Turnpike Company and for the direct construction of other “ordinary” roads and canals by the Government itself.<sup>86</sup> So strong was his veto message that for four years Congress did not even try to pass another such bill. When, in 1834, Congress passed an Act to improve the navigation of the Wabash River, Jackson again responded forcefully:

<sup>81</sup> 31 ANNALS OF CONG., Senate, 15<sup>th</sup> Cong., 1st Sess. 18 (1817), available in *Annals Website*, *supra* note 28.

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<sup>82</sup> 39 ANNALS OF CONG., House of Representatives, 17<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1838, 1849 (1822), available in *Annals Website*, *supra* note 28.

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<sup>83</sup> See, e.g., Act of April 30, 1824, ch. 46, 4 STAT. 22; Act of May 26, 1824, ch. 153, 4 STAT. 38; see also President Polk Veto Message, Dec. 15, 1847, in 43 H. R. JOURNAL 82 (1847), available in *Journal Website*, *supra* note 78.

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<sup>84</sup> *Id.* at 92.

<sup>85</sup> 28 H. R. JOURNAL 29 (1834), available in *Journal Website*, *supra* note 78.

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<sup>86</sup> *Id.* at 30; 6 REGISTER OF DEBATES 133, House of Representatives, 21<sup>st</sup> Cong., 1<sup>st</sup> Sess. (1830), available in *U.S. Congressional Documents and Debates, 1774-1863* (visited Mar. 6, 2001) <<http://memory.loc.gov/cgi-bin/ampage?collId=llrd&fileName=009.llrd009.db&recNum=572>>.

We are in no danger from violations of the constitution, by which encroachments are made upon the personal rights of the citizen. The sentence of condemnation long since pronounced by the American people upon acts of that character, will, I doubt not, continue to prove as salutary in its effects as it is irreversible in its nature. *But against dangers of unconstitutional acts which, instead of menacing the vengeance of offended authority, proffer local advantages, and bring in their train the patronage of the Government, we are, I fear, not so safe.* To suppose that, because our Government has been instituted for the benefit of the people, it must therefore have the power to do whatever may seem to conduce to the public good, is an error, into which even honest minds are apt to fall. In yielding themselves to this fallacy, they overlook the great considerations in which the federal constitution was founded. They forget that, in consequence of the conceded diversities in the interest and condition of the different States, it was foreseen, at the period of its adoption, that although a particular measure of the Government might be beneficial and proper in one State, it might be the reverse in another—that it was for this reason the States would not consent to make a grant to the Federal Government of the general and usual powers of Government, but of such only as were specifically enumerated . . . In addition to the dangers to the constitution springing from the sources I have stated, there has been one which was perhaps greater than all. I allude to the materials which this subject has afforded for sinister appeals to selfish feelings, and the opinion heretofore so extensively entertained of its adaptation to the purposes of personal ambition.<sup>87</sup>

Jackson conceded that Congress had power to fund navigational improvements below ports of entry, but the Wabash River Act funded improvements beyond that line; Jackson thus deemed it an unconstitutional appropriation for local improvements rather than improvements in the general welfare.<sup>88</sup>

The next major effort at internal improvements came in 1847. On the last day of the session, the 29th Congress foreshadowed the kind of pork barrel legislation to which we have grown accustomed in recent years. The Act was entitled “An act to provide for continuing certain works in the Territory of Wisconsin, and for other purposes.”<sup>89</sup> Although the expenditures in the territory would have been permissible under Congress’s plenary power over the territories,<sup>90</sup> the devil was in the “and for other purposes” part of the Act. President Polk noted that only \$6,000 was appropriated

87 28 H. R. JOURNAL 28 (1834), available in *Journal Website*, supra note 78 (emphasis added). Lynn Baker’s work on the disparate allocation of federal funds to the states confirms Jackson’s concerns. See Lynn Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195 (2001) [hereinafter Baker, *The Spending Power*].

88 See 28 H. R. JOURNAL 32 (1834), available in *Journal Website*, supra note 78.

89 43 H. R. JOURNAL 82 (1847), available in *Journal Website*, supra note 78.

90 U.S. CONST. art. IV, § 3, cl. 2.

for Wisconsin territory projects; the remaining \$1/2 million in the appropriation bill was for "the improvement of numerous harbors and rivers lying within the limits and jurisdiction of several of the States . . . ."<sup>91</sup> Polk thought that Congress's power to give or withhold consent to the imposition of tonnage duties by the states to fund internal improvements was the only power over the subject of internal improvements held by Congress. For Polk, the mechanism provided by the Constitution was a wise one because it provided some important safeguards:

Its safeguards are, that both the State Legislatures and Congress have to concur in the act of raising the funds; that they are, in every instance, to be levied upon the commerce of those ports which are to profit by the proposed improvement; that no question of conflicting power or jurisdiction is involved; that the expenditure being in the hands of those who are to pay the money and be immediately benefited, will be more carefully managed and more productive of good than if the funds were drawn from the national treasury and disbursed by the officers of the General Government; that such a system will carry with it no enlargement of federal power and patronage, and leave the States to be the sole judges of their own wants and interests, with only a conservative negative in Congress upon any abuse of the power which the States may attempt.<sup>92</sup>

In addition to the constitutional objection, Polk also argued, with uncanny prescience, that endorsement of such a bill would have disastrous consequences:

[W]hen the system [of federal funding for internal improvements] prevailed in the General Government, and was checked by President Jackson, it had begun to be considered the highest merit in a member of Congress to be able to procure appropriations of public money to be expended within his district or State, whatever might be the object.<sup>93</sup> We should be blind to the experience of the past, if we did not see abundant evidences that, if this system of expenditure is to be indulged in, combinations of individual and local interests will be found strong enough to control legislation, absorb the revenues of the country, and plunge the government into a hopeless indebtedness.<sup>94</sup>

Polk also predicted that "[s]uch a system could not be administered with any approach to equality among the several States

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<sup>91</sup> 43 H. R. JOURNAL 83 (1847), available in *Journal Website*, *supra* note 78.

<sup>92</sup> *Id.* at 88.

<sup>93</sup> *Id.* at 85. I was reminded of this phenomenon on a recent trip to West Virginia, where I was privileged to participate in a symposium at Marshall University commemorating the bicentennial of John Marshall's appointment as Chief Justice of the United States. While there, I witnessed first hand the extraordinarily high merit on this score that had been achieved by Senator Robert Byrd during his extended service as Chairman of the Senate Appropriations Committee.

<sup>94</sup> *Id.*



and sections of the Union.” “There is no equality among them in the objects of expenditure,” he argued, and even “if the funds were distributed according to the merits of those objects, some would be enriched at the expense of their neighbors.”<sup>95</sup> Polk also seems to have anticipated our contemporary concern with campaign finance reform and quid pro quo corruption of public officials:

But a greater practical evil would be found in the art and industry by which appropriations would be sought and obtained. The most artful and industrious would be the most successful; the true interests of the country would be lost sight of in an annual scramble for the contents of the treasury; and the member of Congress who could procure the largest appropriations to be expended in his district would claim the reward of victory from his enriched constituents. The necessary consequence would be sectional discontents and heartburnings, increased taxation, and a national debt, never to be extinguished.<sup>96</sup>

This view of the subject continued to the very eve of the Civil War. President Pierce vetoed as unconstitutional an act granting land for state insane asylums,<sup>97</sup> and President Buchanan vetoed as unconstitutional the act donating public lands to the several states for the establishment of agricultural colleges. He found it “undeniable” that Congress did not have the power to appropriate money, raised by taxes on the people of the United States, for the purpose of educating the people of the respective states. “Should Congress exercise such a power,” he wrote,

this would be to break down the barriers which have been so carefully constructed in the Constitution to separate the Federal from State authority. We should then not only “lay and collect taxes, duties, imposts, and excises” for Federal purposes, but for every State purpose which Congress might deem expedient or useful. This would be an actual consolidation of the Federal and State Governments so far as the great taxing and money power is concerned, and constitute a sort of partnership between the

<sup>95</sup> *Id.* at 87. Polk’s predictions appear to have been correct. See Baker, *The Spending Power*, *supra* note 87, at 211, 212. Professor Chemerinsky finds Professor Baker’s argument flawed because it is based on a normative assumption that is not constitutionally justified. See Chemerinsky, *supra* note 13, at 94 n.16. However, as I describe in this paper, the “general” welfare limitation provides such a normative command. Moreover, even were spending for local benefit to be allowed on a national basis, the uniformity principle of Art. I, § 8, cl. 1 and the proportionality principle of Art. I, § 9, cl. 3, are additional normative commands. See *supra* note 13, 70 and discussion *supra* Part II.C.

<sup>96</sup> 43 H. R. JOURNAL 87 (1847), available in *Journal Website*, *supra* note 78. For a more complete elaboration on the connection between the spending power and campaign finance, see Bradley Smith, *Hamilton at Wits End: The Lost Discipline of the Spending Clause vs. the False Discipline of Campaign Finance Reform*, 4 CHAP. L. REV. 117 (2001).

<sup>97</sup> See 45 S. JOURNAL 361 (1854).

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two in the Treasury of the United States, equally ruinous to both.<sup>98</sup>

Perhaps most importantly for present purposes, Buchanan's veto message harkened back to the Virginia cession of land in 1783 and to the first education land grants in 1787. He rejected a claim that Congress could make the grant under its power to dispose of the lands of the United States, noting that the federal lands were held in trust for the whole people of the United States as a result of the cession of those lands from Virginia and other states.<sup>99</sup> On the other hand, the 1787 education land grants were constitutional, in his view, only because they were an inducement to potential settlers to purchase the lands.<sup>100</sup>

Thus, with the exception of only half a dozen years, the nearly unanimous position of every President from Jefferson in 1800 to Buchanan in 1859 was that Congress did not have constitutional authority to make appropriations for internal improvements.

### III. CONCLUSION.

For the first eighty-five years of our nation's history, under both the Articles of Confederation and the Constitution, the language of "general welfare" was viewed as a limitation on the powers of Congress, not as a grant of plenary power. If the Court would re-assert that limitation as it has reasserted the original limitations of the commerce clause, the major federalism decisions of the past decade would be anything but much ado about nothing. The decision about whether to spend would be restored to the people who benefit, so that real responsibility for setting priorities on spending could be restored. We would avoid many of the looming fights over "relatedness of conditions to spending" that we are likely to see in the coming decade. And perhaps best of all, we would restore the original constitutional check on the insatiable appetite of Congress to spend not just our own hard-won earnings but the future earnings of our children as well. Lest we forget, we once fought a revolution over just such an abuse of power. One of the charges leveled against King George III in the Declaration of Independence was that "He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harass our People, and eat out their Substance."<sup>101</sup> It is time to restore the "general" to the General Welfare Clause, before Congress eats out any more of our substance.

<sup>98</sup> President James Buchanan to House of Representatives (Feb. 24, 1859), in 5 MESSAGES AND PAPERS, *supra* note 11, at 3078.

<sup>99</sup> *Id.*; see also *supra* Part II.A.

<sup>100</sup> President James Buchanan to House of Representatives (Feb. 24, 1859), in 5 MESSAGES AND PAPERS, *supra* note 11, at 3078; see also *supra* Part II.A.

<sup>101</sup> THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).