The United States Constitution created a federal government with limited, enumerated powers and powers implicitly necessary to those specifically enumerated. In the founding era, the President, Congress, the courts, and the states scrutinized the taxing and spending of Congress against the proper scope of authority granted by the Constitution. In the founding era, and indeed in any other age of our republic, the modern day's bloated budget would have been thrown out of Congress by the very body of Congressmen assembled. The budget would have been rejected by the watchful gaze of a judiciary standing guard over the Constitution. The states would have opposed it. Our President would have vetoed it. The checks and balances of our nation would have worked. May we begin to remember, before it is too late, the warnings from our past - by the founding fathers, by early leaders, and by the courts that studied the intent behind the Constitution's provisions - that the federal government is indeed limited in its authority.

If today's federal government actually tried to justify the federal budget under the Constitution, the argument could not be based on the enumerated powers of the Constitution because the scope of federal spending reaches far beyond those enumerated powers. The argument would likely be based, in part, on a misapplication of the General Welfare Clause of Section 8 of Article I. The pertinent portion of Article I Section 8 of the Constitution states, "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . ." Perhaps today's bureaucrat would protest, "This provision of the Constitution includes the specific words, 'general welfare.' That must mean we can spend money on all the local..."
pork projects that we want, as long as we say the projects are good for the people. The Representative down the hall tacks on his project to a bill and I will add mine. Enough taxpayer money exists to spread around to every pet project in Congress. We can, and in 2009 we did, allocate money for fourteen local bike path and trail projects, a museum of natural history, a tattoo removal program, a water taxi service for a beach, and much, much more - 10,160 pork projects costing taxpayers $19.6 billion, actually.4

Simply put, the bureaucrats of the beltway are wrong. The General Welfare Clause is not an independent grant of power to Congress. It is not a grant of authority for Congress to pass social legislation. It is not a special grant to spend money on anything. Instead, the General Welfare Clause places restrictions on the reasons for which taxes are levied and restrictions on how those taxes are designated.

Unfortunately, modern-era courts have taken the position that all of Congress’s spending is presumed constitutional. The courts have created a burden of near impossibility for proving that a power is not within the scope of the federal reach under the Constitution. As the United States District Court for the Western District Court of New York held in 1939, “What makes for general welfare is necessarily in the first instance a matter of legislative judgment” and “Congress has declared the purpose to be a public use, by implication if not by express words . . . . Its decision is entitled to deference until it is shown to involve an impossibility.”5

This judicial presumption of expanded federal power is inconsistent with the founding fathers’ intentions. Instead, the burden properly belongs with lawmakers in Washington D.C. to prove to the American people why and how the government is constitutionally authorized to spend the money that hard-working, tax-paying citizens have earned. This judicial presumption in favor of expanded federal power also seems no longer justified in an age when massive spending bills are preceded by no analysis or consideration on the part of legislators for the proper constitutional limits of federal spending. In the current debate over a proposed national health care plan, for instance, almost none of the discussion and debate centers on whether the federal government is permitted to manage, provide for, and even require citizens to obtain health care or whether the reform proposals properly belong, if anywhere, before the general assemblies of the states.


This Article explores the founding fathers' intent for the General Welfare Clause, judicial application of the clause, and the federal government's divergence from original intent. The General Welfare Clause, which is one of the modern-era justifications for federal excess, was never intended as a broad grant of authority. The original intent for the clause is a pole apart from the manner in which the clause is used today, which is as a justification for unlimited taxing and spending.

A. THE FOUNDING FATHERS' EXPRESSED INTENT REGARDING THE GENERAL WELFARE CLAUSE

The founding fathers agreed that the General Welfare Clause is a limitation on the preceding taxation clause and not its own independent grant of power. In the first draft of the Constitution, the provision related to taxation read, "The legislature of the United States shall have power to lay and collect taxes, duties, imposts, and excises." The clause related to general welfare was not present. If this additional clause is not a limitation on the taxing provision and instead is its own grant of power, then the preceding taxing provision is left meaningless. Thomas Jefferson stated, "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 for the good of the union, would render all the preceding and subsequent enumerations of the power completely useless." Jefferson wrote that the consequence of such an unintended meaning would carry with it great peril, stating that this misinterpretation "would reduce the whole instrument to a single phrase, that of instituting a congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would also be a power to do whatever evil they pleased." Nonetheless, even understood as a limitation on the taxing power, differences existed about the breadth of this limitation. Both prior to the ratification of the Constitution and afterward, James Madison stated that the purpose of the General Welfare Clause is to limit

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7. Id. at 438.
8. Id.
9. The United States Constitution was adopted on September 17, 1787, by the Constitutional Convention in Philadelphia, Pennsylvania, and thereafter ratified by each state. By May 29, 1790, all 13 states, Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island, had ratified it. The Constitution was made effective after the ninth state, New Hampshire, ratified it on June 21, 1788.
spending to only the powers specifically enumerated in the Constitution. “To understand” the General Welfare Clause “in any sense,” James Madison explained to Congress in 1791, and not “limited and explained by the particular enumeration subjoined,” would “give to Congress an unlimited power.”\(^{10}\) If Congress could tax and spend for whatever purpose it desired, Madison argued, this “would render nugatory the enumeration of particular powers” and it “would supercede all the powers reserved to the state governments . . . .”\(^{11}\) Again in 1830, in a letter to Andrew Stevenson, Madison penned that the framers never “understood [the General Welfare Clause to] invest Congress with powers not otherwise bestowed by the constitutional charter.”\(^{12}\)

On January 19, 1788, prior to ratification of the Constitution, Madison authored *The Federalist No. 41* to advocate for ratification. In *The Federalist No. 41*, Madison stated that the General Welfare Clause refers only to other enumerated powers. He wrote, in part:

> Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution, on the language in which it is defined. It has been urged and echoed, that the power “to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,” amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.\(^{13}\)

The final version of the clause - “to pay the debts and provide for the common defence and general welfare of the United States” - states that Congress may provide for the general welfare of the *United States*. The words “the people of” do not appear in the clause. The clause does not read “general welfare of the people of the United States.” Certainly, this omission provides support for Madison’s intent that the clause restrict spending to other enumerated powers held by the *United States*.

\(^{10}\) James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791) in *James Madison, Madison Writings* 483 (Jack N. Rakove, Ed. The Library of America (1999)).

\(^{11}\) *Id.*


Others, however, such as Justice Joseph Story, Supreme Court of the United States Justice from 1811 to 1845, viewed the General Welfare Clause differently than Madison and Jefferson. Story argued that the clause is a prohibition on spending that is not national in scope. In *A Familiar Exposition of The Constitution of The United States*, Story wrote that the clause requires that "[t]he taxes . . . cannot be levied solely for foreign purposes, or in aid of foreign nations, or for purposes not national in their objects or character."\(^{14}\)

Story's opinion closely tracked Alexander Hamilton's view of the General Welfare Clause that Hamilton expressed after ratification of the Constitution. Madison wrote *The Federalist No. 41*, of course, with the knowledge and assent of Hamilton and John Jay, the authors of other *Federalist Papers*. In Hamilton's *Report on Manufacturers*, published on December 5, 1791, Hamilton wrote that the term "general welfare" extended to a "vast variety of particulars, which are susceptible neither of specification nor of definition."\(^ {15}\)

The federal judiciary has adopted the more expansive interpretation of the General Welfare Clause articulated by Hamilton and Story. But perhaps the judiciary erred in selecting Hamilton and Story over Madison and Jefferson. A maxim in legal interpretation of ambiguous language is that "the intention of the parties" at the time of drafting is generally controlling, as opposed to the "interpretation of those who subsequently read it."\(^ {16}\) Justice Story was only a child when the ratification debates were held, and he wrote *A Familiar Exposition* decades later. Hamilton drafted his *Report on Manufacturers* only after the first thirteen states ratified the Constitution. As the dissent in a 1938 United States Court of Appeals for the Seventh Circuit opinion stated:

> So far as we are informed Madison is the only witness whose testimony prior to the adoption is preserved, in relation to the Convention's intention with respect to the general welfare clause. Certainly there is none other more worthy of belief, and it enjoys the distinction of having been approved by both Hamilton and Jay and questioned by no one, prior to the adoption, except those who were fearful of subsequent legal construction to the contrary.\(^ {17}\)

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\(^ {16}\) First Fed. Savings & Loan Ass'n of Wisconsin v. Loomis, 97 F.2d 831, 844 (7th Cir. 1938).

\(^ {17}\) Loomis, 97 F.2d at 844.
Consider also that the federal judiciary's approach is incongruent with the Tenth Amendment, a pillar of law near-forgotten in modern-era jurisprudence, which states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."\(^{18}\) The Tenth Amendment is consistent with the oft-repeated judicial rule that the federal government is "a limited government of enumerated powers," which is a statement found at the opening of many case opinions just before those same courts proceed to issue opinions entirely at odds with this bedrock statement.\(^{19}\) The Tenth Amendment, indeed, is not only consistent with Madison's view of the General Welfare Clause, but it contradicts Hamilton's statements in his Report on Manufacturers. As the Supreme Court of the United States stated in *Kansas v. Colorado*,\(^ {20}\) the Tenth Amendment:

> Disclosed the widespread fear that the national government might, under the pressure of supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act.\(^ {21}\)

Nonetheless, similarities exist between Madison's intent and Hamilton and Story's post-ratification view. The post-ratification Hamilton and Story view and the pre-ratification Madison view both place limitations on the government. In Madison's perspective, the federal government is limited to spending on only enumerated powers. In Hamilton and Story's view, taxes cannot be levied and apportionments cannot be made for local or state projects or for purposes that encroach upon the powers reserved to the states.

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18. *U.S. Const.* amend. X.

19. Criticizing the federal government's expansion through judicial construction, Jefferson wrote that the judiciary is "construing our constitution from a co-ordination of a general and special government to a general and supreme one alone. This will lay all things at their feet, and they are too well versed in English law to forget the maxim, 'boni judicis est ampliare jurisdictionem.'" Thomas Jefferson letter to Thomas Ritchie (Dec. 25, 1820), in *Thomas Jefferson, Thomas Jefferson Writings* (1446) (M. Peterson, Ed., The Library of America (1984)).

20. 206 U.S. 46 (1907).

21. *Kansas v. Colorado*, 206 U.S. 46, 90 (1907). This principle of limited, enumerated federal powers was likewise found in the Articles of Confederation, America's first constitution, which was in effect from March 1, 1781 until the ratification of the Constitution. Article II of the Articles of Confederation stated, "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."
Under neither view is the General Welfare Clause an independent grant of power. Story wrote that if the General Welfare Clause were its own grant of power, “then it is obvious, that the powers of the National Government, under color of the authority of the clause to provide for the common defence and general welfare, would be practically unlimited.” To the contrary, viewing the General Welfare Clause as a limitation on taxing and apportionments is “the more just and solid interpretation of the words, and most comfortable to the true spirit and objects of the instrument.” Under both views, much of the current federal spending, and in particular, nearly all pork barrel spending, is unconstitutional.

B. ADDITIONAL EVIDENCE OF THE FOUNDING FATHERS’ INTENT FOR THE GENERAL WELFARE CLAUSE

Beyond the writings of our founding fathers directly discussing the General Welfare Clause, additional insight about its intended meaning comes from the actions of our early leaders and from the framers’ intent for the reach of the federal government. In the early years of the republic, for example, leaders actually attempted to make appropriation decisions based on what they were permitted to do under the Constitution.

On December 2, 1806, in his Sixth Annual Message to Congress, President Jefferson suggested that a federal surplus be applied 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 federal powers” but “an amendment to the constitution” would be necessary for this “because the objects now recommended are not among those enumerated in the constitution . . . .”

In vetoing an internal improvements bill in 1817, President Madison wrote that “the terms ‘common defence and general welfare’ do not give “to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them.”

In 1822, President Monroe vetoed an act allocating spending for “the Preservation and Repair” of a local road (“the Cumberland

22. See Story, supra note 12, § 154.
23. Id.
In connection with his veto, Monroe wrote an explanation for the House of Representatives:

Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not. The United States government is a limited government, instituted for great national purposes, and for those only. Other interests are committed to the States, whose duty it is to provide for them. Each government should look to the great and essential purposes for which it was instituted and confine itself to these purposes.

Finally, in 1859, President James Buchanan, in vetoing an agricultural college land grant, wrote in a message to Congress that "the natural intendment" of the framers "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."

Madison, Hamilton, and indeed all of the federalist framers intended that the federal government be a limited body with limited authority and a restricted reach. In An Examination into the Leading Principles of the Federal Constitution, which Noah Webster authored in October of 1787 to advocate ratification of the Constitution, Webster wrote:

The constitution defines the powers of Congress; and every power not expressly delegated to that body, remains in the several state-legislatures. The sovereignty and the republican form of government of each state is guaranteed by the constitution; and the bounds of jurisdiction between the federal and respective state governments, are marked with precision.

In The Federalist No. 45, Madison wrote that the federal government's powers under the Constitution would be narrowly tailored to mostly external affairs:

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indef-

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inite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce, with which last the power of taxation will for the most part be connected. *The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.*

In his speech before the Pennsylvania ratifying Convention, James Wilson stated:

The states should resign, to the national government, that part, and that part only, of their political liberty, which placed in that government will produce more good to the whole than if it had remained in the several states. While they resign this part of their political liberty, they retain the free and generous exercise of all their other faculties as states....

As the federalists who supported ratification advocated a limited Constitution, the anti-federalists who opposed ratification were even more fearful of unrestrained federal power. During the New York Ratifying Convention, Melancton Smith argued, “The state constitutions should be the guardians of our domestic rights and interests; and should be both the support and check of the federal government.”

In a speech before the Virginia Ratifying Convention, Patrick Henry argued, “Here is a revolution as radical as that which separated us from Great Britain. It is as radical, if in this transition our rights and privileges are endangered and the sovereignty of the States be relinquished: And cannot we plainly see, that this is actually the case?”

George Mason wrote:

Under their own Construction of the general Clause at the end of the enumerated powers the Congress may... extend their Power as far as they shall think proper; so that the


State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights.\textsuperscript{34}

With both federalists and anti-federalists opposed to expansive federal power, construing the General Welfare Clause not as a limitation on power but as a grant of additional power certainly cannot be said to be consistent with the framers' intent.

As the federal government has only limited authority, America's founding fathers considered that federal spending would likewise be limited. They understood the domain of the federal government as national defense, foreign affairs, and matters truly national in scope. The founding fathers could not conceive that such limited scope of responsibility would create any need for enormous budgets and spending into perpetual debt. Certainly, one of the significant concerns of America's early leaders was retiring the debt from the Revolutionary War. Once that debt was gone, it was next to unimaginable that, barring another major war or a calamity, America would ever carry a significant debt again. Consider the words of Alexander Hamilton, who wrote in his Report on Manufacturers, published on December 5, 1791, that:

And as the vicissitudes of Nations beget a perpetual tendency to the accumulation of debt, there ought to be in every government a perpetual, anxious and unceasing effort to reduce that, which at any time exists, as fast as shall be practicable consistently with integrity and good faith.\textsuperscript{35}

In a separate document, Hamilton wrote of the importance of organizing any federal debt for its "speedy extinguishment," stating also, "[s]ome gentlemen seem to forget that the faculties of every Country are limited. They talk as if the Government could extend its revenue ad libitum to pay off the debt."\textsuperscript{36} Thomas Jefferson similarly opposed borrowing in excess, stating, "the principle of spending money to be paid by posterity under the name of funding is but swindling futurity on a large scale."\textsuperscript{37}

James Madison, an ardent opponent of federal excess and debt, wrote in the National Gazette:

\begin{footnotes}
\item[34] George Mason, Objections to the Constitution of Government Formed by the Convention (Nov. 1787), quoted from, Hamilton, Madison, & Jay, supra note 27, at 3.
\end{footnotes}
The Union: Who Are Its Real Friends?

Not those who promote unnecessary accumulations of the debt of the Union, instead of the best means of discharging it as fast as possible; thereby increasing the causes of corruption in the government, and the pretexts for new taxes under its authority, the former undermining the confidence, the latter alienating the affection of the people.

Not those who study, by arbitrary interpretations and insidious precedents, to pervert the limited government of the Union, into a government of unlimited discretion, contrary to the will and subversive of the authority of the people.38

When was the last time the budget debate in Congress and the White House was accompanied by a genuine inquiry into where Congress and the President are constitutionally permitted to allocate spending and whether the spending would be consistent with the Constitution and intent of the founding fathers? And where are the courts in all of this? Perhaps a critic could argue that a Representative in Congress may have some difficulty turning away pork barrel spending that would benefit that Representative's district. However, the people should at least be able to depend on the judiciary as a neutral arbiter to stand up to the unconstitutional excesses of Congress. The people should also be able to depend on a President who will veto any bill laden with the slightest morsel of pork or that over-reaches the Constitution by even a mote.

C. THE EARLY JUDICIARY'S DISCUSSIONS REGARDING THE SCOPE OF FEDERAL POWER

While some of the judiciary's decision-making regarding the General Welfare Clause has been questionable, such as the judiciary's reliance on Hamilton's post-ratification statements rather than Madison's pre-ratification intent, in other circumstances, the courts have properly cautioned against unconstitutionally expanding the reach of lawmakers in Washington D.C., consistent with the intent of the founding fathers. For instance, in *McCulloch v. Maryland*,39 the Supreme Court of the United States recognized its duty to restrain the federal reach:

Should congress, in the execution of its powers, adopt measures which are prohibited its powers, or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case

39. 17 U.S. 316 (1819).
requiring such a decision come before it, to say, that such an act was not the law of the land.\textsuperscript{40}

The question before the Supreme Court in \textit{McCulloch} was whether Congress has the power to incorporate a bank as an implied power among the enumerated powers of taxation. The Supreme Court answered this question in the affirmative, but not without extensive analysis and lengthy consideration of the Constitution and, most importantly, examining the intent of the founding fathers.\textsuperscript{41} In its opinion, the Supreme Court observed, “This government is acknowledged by all, to be one of enumerated powers.”\textsuperscript{42}

In the 1824 case of \textit{Gibbons v. Ogden},\textsuperscript{43} the Supreme Court again cautioned that the federal government was not permitted to intrude upon the province of the states:

\begin{quote}
Congress is authorized to lay and collect taxes, \&c. to pay the debts, and provide for the common defence and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States, an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States.\textsuperscript{44}
\end{quote}

About one-hundred years later, in \textit{Linder v. United States},\textsuperscript{45} the Supreme Court echoed its \textit{McCulloch} reasoning, stating:

\begin{quote}
Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the federal government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid and cannot be enforced.\textsuperscript{46}
\end{quote}

A few years after \textit{Linder}, the Supreme Court considered the constitutionality of a federal statutory plan to regulate and control agricultural production; the Court held that “The act invades the reserved rights of the states. It is a statutory plan to regulate and control agri-
cultural production, a matter beyond the powers delegated to the federal government." In United States v. Butler, the Supreme Court reasoned:

From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people . . . . The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.

Likewise, some early courts attempted to articulate the meaning of the General Welfare Clause by studying the intent of the founding fathers. For example, in 1864, the Supreme Court of Indiana analyzed at length the General Welfare Clause. Notably, the Indiana court, in contrast to federal court opinions, appears to have adopted Madison's intent instead of Hamilton's post-ratification view. The Supreme Court of Indiana articulated the following inquiry:

The Union and general government, then, were formed to provide for the general welfare of the United States, but what was embraced by the term, general welfare; what powers might Congress exercise, and over what, in promoting it; what subjects were considered as pertaining to the general welfare designated in the organic law of the government?

And the following was the Supreme Court of Indiana's conclusion:

Congress . . . takes no power under the General Welfare Clause, as that is not a grant of any power, but a mere expression of one of the ends to be accomplished by the exercise of the powers granted. And should Congress assume, upon its own ideas of general welfare, to exercise other powers than those granted, to carry them out, it would simply, to that extent, set up a despotism.

In a 1936 Supreme Court of the United States case, Carter v. Carter Coal Co., the Supreme Court re-affirmed that the General Welfare Clause cannot be used to pass social legislation. In Carter, the Supreme Court considered a challenge to legislation fixing minimum and maximum prices on coal and requiring compliance with particular labor requirements. The title of the act stated in part that a

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49. Butler, 297 U.S. at 1 (emphasis added).
51. Thayer, 1864 WL 1937 at *11.
52. 298 U.S. 238 (1936).
purpose of the act was “to provide for the general welfare[.]” The Supreme Court held that the act passed under the premise of the “fallacy” that “constitutionality c[an] be sustained under some general federal power, thought to exist, apart from the specific grants of the Constitution.” The Supreme Court observed that while the “objects” of the act were “of great worth . . . nothing is more certain than that beneficent aims, however great or well directed, can never serve in lieu of constitutional power.” The Supreme Court concluded that Constitutional Convention:

Carefully limited the powers which it thought wise to intrust to Congress by specifying them, thereby denying all others not granted expressly or by necessary implication. It made no grant of authority to Congress to legislate substantively for the general welfare, and no such authority exists, save as the general welfare may be promoted by the exercise of the powers which are granted.

The two seminal federal circuit court opinions on the General Welfare Clause, both from 1935, each attempted to explore the original intent of America’s founding fathers with regard to taxing and apportionments under the clause. In a case from the United States Court of Appeals for the Tenth Circuit, Kansas Gas & Electric Co. v. City of Independence, Kan., the Tenth Circuit held that:

[Section 8 of [A]rticle 1 gives Congress the power of taxation and limits the purposes for which may be levied and appropriated, namely, to pay the debts and provide for the common defense and general welfare of the United States . . . .] The phrase ‘general welfare’ . . . must be national or general as contradistinguished from local or special.

Similarly, in United States v. Certain Lands in the City of Louisville, Jefferson County, Ky., the United States Court of Appeals of the Sixth Circuit denied the federal government’s effort to use the General Welfare Clause as an empowering provision to expand its taking power, rather than as a limitation. In that case, federal government agency sought to condemn a four block slum in Louisville and to build in its place new low cost housing. Acknowledging that the new

55. Id. at 290-91.
56. Id. at 292 (citations omitted).
57. 79 F.2d 32 (10th Cir. 1935).
59. 78 F.2d 684 (6th Cir. 1935).
project would be beneficial to society, the Sixth Circuit nevertheless ruled that the project is not one within the scope of federal powers and rejected the government’s attempt to use the General Welfare Clause to expand the government’s authority. The Sixth Circuit stated that the scope of federal authority:

Does not carry with it the power here claimed, to condemn private property to the end that appropriations of tax funds may be made for purposes deemed by Congress to be for the public welfare. . . . The tearing down of the old buildings and the construction of new ones on the land here sought to be taken would create, it is true, a new resource for the employment of labor and capital. It is likewise true that the erection of new sanitary dwellings upon the property and the leasing or the selling of them at low prices would enable many residents of the community to improve their living conditions. It may be, too, that these group benefits, so far as they might affect the general public, would be beneficial. If, however, such a result thus attained is to be considered a public use for which the government may condemn private property, there would seem to be no reason why it could not condemn any private property which it could employ to an advantage to the public. There are perhaps many properties that the government could use for the benefit of selected groups. It might be, indeed, that by acquiring large sections of the farming parts of the country and leasing the land or selling it at low prices it could advance the interest of many citizens of the country, or that it could take over factories and other businesses and operate them upon plans more beneficial to the employees or the public, or even operate or sell them at a profit to the government to the relief of the taxpayers. The public interest that would thus be served, however, cannot, we think, be held to be a public use for which the government, in the exercise of its governmental functions, can take private property. The taking of one citizen’s property for the purpose of improving it and selling or leasing it to another, or for the purpose of reducing unemployment, is not, in our opinion, within the scope of the powers of the federal government. 61

These two opinions from 1935 are among the first federal appellate judicial opinions specifically discussing the purpose of the General Welfare Clause. With ballooning federal budgets and spiraling pork in those budgets in recent decades, one would expect to find these two case opinions cited many hundreds of times by other courts in recent years alone, in connection with numerous analyses that one would expect to find. To the contrary, only twenty-one court opinions

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61. Certain Lands in the City of Louisville, Jefferson County, Ky., 79 F.2d at 686-88.
have cited *Kansas Gas & Electric* since the ruling in 1935. A mere three courts have cited to the case since 1944. Remarkably, since 1973, there has not been a single citation in a reported judicial opinion to *Kansas Gas & Electric*. Similarly, just thirty reported judicial opinions cited to *Certain Lands in the City of Louisville* since the 1935 ruling. Only eight of those opinions are from years after 1944 - one in 1946, three in the 1950s, two from the 1980s, one from the 1990s, and one in 2007. Moreover, some of these citations to the two opinions relate to aspects of the opinions other than the federal circuit courts’ exploration of the General Welfare Clause.

**D. WHY DOES ORIGINAL INTENT EVEN MATTER?**

Some critics may question why the framers’ intent is significant at all, and why courts today should study original intent. Among manifold reasons are the controlling legal principles that common law must give way to legislation and furthermore, that drafting intent clarifies any legislative uncertainty.

A fundamental maxim of law is that legislation controls over common law, which are the “maxims and customs” and the decisions of courts. William Blackstone wrote that “[w]here the common law and a statute differ, the common law gives place to the statute[.]” Thus, court opinions must be consistent with controlling legislation, and the Constitution is paramount over all legislation.

In addition, “[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made[.]” Blackstone wrote, “the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it.” To understand the Constitution, therefore, we must first look to the Constitution’s plain words. Should uncertainty remain, we then must explore the opinions of the Constitution’s authors and those who debated its ratification so that we can understand their intent.

The Constitution stands above men, and it stands above all other laws, to protect men from men. The Constitution binds us all, including our government and the courts. The framers wisely included within the Constitution an amendment process that is deliberative

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63. *Id.* at 89.

64. *Id.* at 59.

65. *Id.* at 61.
and has checks and balances. The framers intended that no one person or group of individuals—not the executive, the legislature, nor the courts—have unchecked jurisdiction over the other branches. The breakdown of checks and balances, as Hamilton wrote in *The Federalist No. 78*, would be perilous—“liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments.”66

Finally, we should remember the sacrifices of those who secured the Constitution, and all that they risked. As Story wrote:

To those great men, who thus framed the Constitution, and secured the adoption of it, we owe a debt of gratitude, which can scarcely be repaid. It was not then, as it is now, looked upon, from the blessings, which, under the guidance of Divine Providence, it has bestowed, with general favor and affection. On the contrary, many of those pure and disinterested patriots, who stood forth, the firm advocates of its principles, did so at the expense of their existing popularity. They felt, that they had a higher duty to perform, than to flatter the prejudices of the people, or to subserve selfish, or sectional, or local interests. Many of them went to their graves, without the soothing consolation, that their services and sacrifices were duly appreciated. They scorned every attempt to rise to power and influence by the common arts of demagogues; and they were content to trust their characters, and their conduct, to the deliberate judgment of posterity.67

All of the judicial opinions that I have read discussing the purpose of the General Welfare Clause cited only a few selected thoughts of the framers, typically a couple of quotations from Hamilton and a couple more by Madison. If the courts had a more comprehensive recitation of the framers’ intent before them, we should wonder whether the decisions of our courts throughout our history would have been what they were and whether the line of precedent following those decisions would have followed an entirely different path. When judicial inquiry reached the question of what powers belong to the states, perhaps the courts would have remembered the Tenth Amendment and the framers’ intent that “[t]he powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.”68 Perhaps they someday will.

67. JOSEPH STORY, supra note 12, § 40.
68. *The Federalist* No. 45 (James Madison) (emphasis added).
Indeed, we still have, as we have always had before us, two paths. We can drift at the whims of society, without rudder or sail, allowing the dictates of a few in society and the decisions of one branch to supplant the higher law that should stand above all three branches. Or, we can trust and understand that our intended system of governance with its federal restraint and checks and balances — and indeed the intent of the framers who created this system — is absolutely essential to America’s continued prosperity. The former path is but a step away from tyranny while the latter is grounded in the liberty on which this nation was founded. Unfortunately, traveling much farther down the former path will leave the American people with no recourse to reach the latter.

E. DOES $3.6 TRILLION OF FEDERAL SPENDING PROVIDE FOR THE GENERAL WELFARE?

The current administration’s $3.6 trillion federal budget increases government spending as a percentage of gross domestic product ("GDP") on a scale that rivals and will soon surpass the spending of socialist states in Europe. Much of this budget consists of non-enumerated spending that is not justified by or granted expressly by any provision in the Constitution or the intent of the founding fathers. Setting aside a line by line refutation of the budget, does such a massive budget itself actually provide for the general welfare? Many experts conclude that it does not.

A research study from the Federal Reserve Bank of Dallas concluded, “growth in government stunts general economic growth. Regardless of how it is financed, an increase in government spending leads to slower economic growth.”69 The study also observed that “[i]ncreases in government spending or taxes lead to persistent decreases in the rate of job growth.”70 A study in Public Finance Review similarly reported, “higher total government expenditure, no matter how financed, is associated with a lower growth rate of real per capita gross state product.”71 Likewise, the Congressional Budget Office explained:

This paper concludes that additional federal spending is unlikely to have a perceptible effect on economic growth . . . . Many federal investment projects yield net economic benefits that are small, or even negative . . . . Increases in federal investment spending that are not targeted toward cost bene-

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70. Id. at 10.
ficial projects can reduce growth . . . . Federal spending that displaces other investment is unlikely to have a positive effect on growth . . . . Many federal investments are motivated primarily by noneconomic policy goals . . . . Others are influenced by political considerations. 72

These studies and reports are just a few of the numerous studies and reports with similar conclusions. Simply put, these studies show that wading any deeper into big government and socialism will only mire our nation's people in declining capital markets, private sector job losses, and endless economic depression.

In 2000, the United States government's spending was thirty-four percent of total spending in the economy, 73 whereas spending by the social welfare states in the sixteen nation "eurozone" was 48.2 percent of GDP. 74 In 2010, federal spending is expected to be 39.9 percent of GDP, compared with 47.1 percent in the eurozone. 75 This does not take into account fifty additional state budgets and countless local budgets. In March 2009, the Congressional Budget Office estimated that the cumulative deficit from 2010 to 2019 under the current administration's proposed budget would total $9.3 trillion, which would nearly double the nation's current $11 trillion national debt. 76 The Congressional Budget Office also concluded that as a result of the White House's proposed budget "[debt held by the public would rise from [fifty-seven] percent of the GDP in 2009 to [eighty-two] percent of the GDP in 2019."

The American people must demand accountability by the federal government to the founding documents of our nation. The federal government's current size is leagues beyond the founding fathers' intent.

75. Karen Hart, Obama's budget will make us the most socialist country in the world, The EXAMINER, Apr. 21, 2009, http://www.sf examiner.com/opinion/Obamas-budget-will-make-us-the-most-socialist-country-in-the-world-43396137.html. The eurozone is a currency union of 16 European states which have adopted the euro as their sole legal tender. The eurozone currently consists of Austria, Belgium, Cyprus, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain.
77. Id. at 13.
We can decide to stay on this path of big government socialism that will inevitably descend into bankruptcy for ourselves and our posterity. Or, we can recall the foundation of this nation, the wisdom of our founding fathers and the great documents they gave us that have led us to the blessing of prosperity for close to two and one-half centuries.

F. DOES THE GENERAL WELFARE CLAUSE JUSTIFY A NATIONAL HEALTHCARE PLAN?

A federally created and controlled national health care system is the administration’s current proposal to spend taxpayer money. Such a proposal has no legitimacy under the General Welfare Clause, especially because it is included in the states’ domain. The federal health care proposal contemplates a detailed regime of the government making decisions about the type of care individuals receive, not to mention it necessarily must address particularly sensitive issues such as abortion and euthanasia. The General Welfare Clause cannot serve as the justification for such social legislation. The better option is that this issue should be handled at the state level, by individual states and the citizens of those states.

For the federal government to find constitutional support for a nationalized health care program, it will need to look elsewhere in the Constitution for support. Explanation of the problems with those additional arguments is beyond the scope of this Article, except to comment that those additional arguments are likewise frail.

Nonetheless, do not expect the courts to stand in the way of health care legislation or the excesses in a $3.6 trillion budget, regardless how far a field of the Constitution the government strays. The burden that some courts have created to strike down even blatantly unconstitutional spending is nearly insurmountable.

Instead, as it always has been, the way back to our Constitution today must rest with the people of this nation. The people must insist on elected officials who will adhere to the Constitution and maintain the integrity of the Constitution. Our government was established with a few powers held by the federal government and the rest by the states. The federal government has proven time and again that it is unable to properly manage programs, or even the federal budget, without mismanaging each program into bankruptcy. Socialized medicine would have the same end.

The liberty and prosperity of our posterity depends on returning to original intent. May we begin to remember before it is too late to save America’s future.