

2013

Unconstitutionality of Government-Funded Foreign Humanitarian Aid from the Originalist Perspective

Christina A. Alkire

Follow this and additional works at: <http://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Alkire, Christina A. (2013) "Unconstitutionality of Government-Funded Foreign Humanitarian Aid from the Originalist Perspective," *California Western Law Review*: Vol. 50: No. 1, Article 4.
Available at: <http://scholarlycommons.law.cwsl.edu/cwlr/vol50/iss1/4>

This Comment is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized administrator of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

COMMENT

UNCONSTITUTIONALITY OF GOVERNMENT-FUNDED FOREIGN HUMANITARIAN AID FROM THE ORIGINALIST PERSPECTIVE

TABLE OF CONTENTS

I. INTRODUCTION	76
II. METHODS AND CANONS OF CONSTITUTIONAL INTERPRETATION	79
III. GRAMMAR AND USAGE DEMONSTRATE CONGRESSIONAL AUTHORITY TO TAX AND SPEND IS LIMITED TO ENUMERATED PURPOSES	84
IV. CONGRESSIONAL AUTHORITY TO TAX AND SPEND IS LIMITED TO THE “COMMON DEFENSE” AND “GENERAL WELFARE OF THE UNITED STATES”	89
A. <i>Grammar and Usage Demonstrate Congressional Authority to Tax and Spend Is Limited to the “Common Defense” and “General Welfare” of the United States</i>	90
B. <i>Foreign Humanitarian Aid Is Not for the “General Welfare” or “Common Defense” of the United States</i>	93
1. <i>Any Connection between Bilateral Foreign Humanitarian Aid to the Welfare and Defense of the United States Is Unproven and Attenuated</i>	98
2. <i>Any Connection between Multilateral Foreign Humanitarian Aid to the Welfare and Defense of the United States Is Virtually Nonexistent</i>	100
3. <i>Neither Bilateral nor Multilateral Humanitarian Foreign Aid Serves Any Purpose Directly Related to the Defense and Welfare of the United States</i>	101
V. HUMAN SUFFERING ELICITS EMOTIONS THAT CAUSE CONGRESS TO IGNORE ITS CONSTITUTIONAL LIMITATIONS	104
VI. CONCLUSION	108

I. INTRODUCTION

Virtually nonexistent until the aftermath of World War II,¹ government-funded foreign humanitarian aid has become a significant part of United States foreign policy.² The United States allocates billions of dollars to foreign humanitarian aid annually. In fiscal year³ 2011, the United States obligated⁴ approximately \$31.7 billion dollars in bilateral⁵ economic assistance. In calendar year⁶ 2011, the United States disbursed⁷ \$3.7 billion through multilateral⁸ organizations.⁹

1. The rebuilding of Europe after World War II via the Marshall Plan is cited as the beginning of foreign aid. MARIAN LAWSON & CURT TARNOFF, CONG. RESEARCH SERV., R40213, FOREIGN AID: AN INTRODUCTION TO U.S. PROGRAMS AND POLICY 2 (2011); Steven J. Wiese, Note, *U.S. Foreign Aid Reform: Changing Institutional Problems in Order to Meet Modern Day Needs*, 8 WASH. U. GLOBAL STUD. L. REV. 747, 747-48 (2009).

2. See LAWSON & TARNOFF, *supra* note 1, at 2; see also Wiese, *supra* note 1, at 747-55 (discussing the evolution of U.S. government-funded foreign humanitarian aid); Andrew S. Natsios, *Foreign Aid Programs Are Important for American National Security*, U.S. NEWS (Oct. 11, 2011), <http://www.usnews.com/debate-club/given-the-current-deficit-crisis-should-foreign-aid-be-cut/foreign-aid-programs-are-important-for-american-national-security> (noting that “nearly every American president since WWII . . . has supported a robust [foreign] aid program”); Carol Adelman, *Foreign Aid Effectively Advancing Security Interests*, HARVARD INT’L REV., Fall 2007, at 62-63, available at [http://gpr.hudson.org/files/publications/Harvard %20Review%20-%20Adelman.pdf](http://gpr.hudson.org/files/publications/Harvard%20Review%20-%20Adelman.pdf) (discussing the “two rationales” for U.S. foreign aid: “economic development and US national security”).

3. The U.S. defines a fiscal year as beginning on October 1 and ending on September 30. *U.S. Overseas Loans and Grants: Glossary of Terms*, USAID, <http://gbk.eads.usaidallnet.gov/about/glossary.html> (last updated Jan. 2013). Each fiscal year is “designated by the calendar year in which it ends.” *Id.*

4. An obligation is “[a] binding agreement that will result in outlays, immediately or in the future.” *Id.*

5. *U.S. Overseas Loans and Grants: Foreign Assistance Fast Facts*, USAID, <http://gbk.eads.usaidallnet.gov/data/fast-facts.html> (last visited Mar. 22, 2013).

6. “Bilateral aid is aid provided directly by a donor country to a recipient country.” Sophie Smyth, *World Bank Grants in a Changed World Order: How Do We Referee This New Paradigm?*, 30 U. PA. J. INT’L L. 483, 497 (2008); 1-A H.R. COMM. ON INT’L REL. & S. COMM. ON FOREIGN REL., 108TH CONG., LEGISLATION ON FOREIGN RELATIONS THROUGH 2002, at 23 (J. Comm. Print 2003) (discussing how bilateral assistance should be used for projects without “large-scale capital transfers”). The majority of American bilateral aid is administered by the U.S. Agency for International Development. LAWSON & TARNOFF, *supra* note 1, at 21.

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 77

Following the State Department's conceptual "framework," the Congressional Research Service separates American foreign aid into "five strategic objectives."¹⁰ "Humanitarian [aid]" is one of those objectives.¹¹ This Note's definition of humanitarian aid is broader than the one used by the Congressional Research Service. Rather, this Note defines humanitarian aid as

unilateral transfers of U.S. resources (funds, goods, and services) by the U.S. Government to or for the benefit of foreign entities (including international and regional organizations) without any reciprocal payment or transfer of resources from the foreign entities [It] is not just confined to funds or commodities, [but] also includes the provision of technical assistance, capacity building, training, education, and other services, as well as the direct costs required to implement foreign assistance.¹²

6. A calendar year begins on January 1 and ends on December 31. CAL. TAX SERV. CTR., *Calendar Year vs. Fiscal Year*, CA.GOV, http://www.taxes.ca.gov/Small_Business_Assistance_Center/Calendar/jan.shtml (last visited Mar. 9, 2013).

7. Disbursements are the amounts the U.S. pays through its federal agencies "during the fiscal year to liquidate its obligations." *U.S. Overseas Loans and Grants: Foreign Assistance Fast Facts*, *supra* note 5, at 1.

8. 1-A H.R. COMM. ON INT'L REL. & S. COMM. ON FOREIGN REL., 108TH CONG., *supra* note 5, at 23 (stating that projects involving "large-scale capital transfers" should be disbursed "with contributions from other countries working together in a multilateral framework"). "Multilateral aid serves many of the same objectives as bilateral developmental assistance, although through different channels." LAWSON & TARNOFF, *supra* note 1, at 3.

9. *U.S. Official Development Assistance (ODA) Fast Facts: CY2011*, U.S. OFFICIAL DEV. ASSISTANCE DATABASE, http://usoda.eads.usaidallnet.gov/data/fast_facts.html (last visited Mar. 9, 2013).

10. LAWSON & TARNOFF, *supra* note 1, at 3. The five objectives are "Peace and Security; Investing in People; Governing Justly and Democratically; Economic Growth; and Humanitarian Assistance." *Id.*; see generally Wiese, *supra* note 1, at 754 (discussing the evolution of U.S. foreign aid).

11. LAWSON & TARNOFF, *supra* note 1, at 3, 6 ("Humanitarian assistance responds to both natural and man-made disasters as well as problems resulting from conflict associated with failed or failing states.").

12. *Frequently Asked Questions: General Information*, FOREIGNASSISTANCE.GOV, <http://foreignassistance.gov/FAQ.aspx> (last visited Feb. 12, 2013). Humanitarian assistance has also been defined as "assistance to meet humanitarian needs, including needs for food, medicine, medical supplies and

The United States currently provides humanitarian aid¹³ in response to “natural and manmade disasters” and conflicts in “failing or failed states.”¹⁴ It also provides foreign humanitarian aid in response to human rights abuses,¹⁵ to “promot[e] economic growth and reduc[e] poverty, . . . address[] population growth, expand[] access to basic education and health care, protect[] the environment, promot[e] stability in conflictive regions, . . . [and to] promot[e] trade.”¹⁶

The constitutional authority to spend taxpayer dollars on foreign humanitarian aid has never been seriously questioned.¹⁷ Most challenges have addressed whether government-funded foreign humanitarian aid is good policy.¹⁸ Rarely is government-funded foreign humanitarian aid analyzed in terms of its constitutionality, as this Note does.

Under the Constitution, Congress only has the authority to spend for the “common [d]efense” and “general [w]elfare” of the United States.¹⁹ Foreign humanitarian aid does not qualify. In the words of Justice Story, the Constitution is ““of special and enumerated powers,

equipment, education, and clothing” and the provision of mental and physical healthcare and shelter. 1-A H.R. COMM. ON INT’L REL. & S. COMM. ON FOREIGN REL., 108TH CONG., *supra* note 5, at 224-25; LAWSON & TARNOFF, *supra* note 1, at 23-24 (noting forms of aid include cash, equipment, food, economic infrastructure, training, expertise, and small grants).

13. Black’s Law Dictionary uses the term “humanitarian intervention” rather than humanitarian aid. BLACK’S LAW DICTIONARY 897 (9th ed. 2009).

14. LAWSON & TARNOFF, *supra* note 1, at 6.

15. BLACK’S LAW DICTIONARY 897 (9th ed. 2009).

16. LAWSON & TARNOFF, *supra* note 1, at 3.

17. *See* Wiese, *supra* note 1, at 747.

18. *See, e.g.,* Doug Bandow, *Foreign Aid and International Crises*, THE FREEMAN (Dec. 1, 1996), http://www.fee.org/the_freeman/detail/foreign-aid-and-international-crises/#axzz2NqzGdPO (discussing how foreign assistance has failed to accomplish its goals and contributes to the survival of brutal regimes); *U.S. Aid by the Numbers*, CENTER FOR AMERICAN PROGRESS (July 31, 2008), <http://www.americanprogress.org/issues/economy/news/2008/07/31/4673/u-s-aid-by-the-numbers/>.

19. U.S. CONST. art. I, § 8, cl. 1. The original text of the U.S. Constitution spells “defense” as “defence.” This was the proper spelling when the Constitution was drafted. However, this Note will spell the word with an “s” because that is consistent with its current spelling.

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 79

and not of general and unlimited powers.”²⁰ Specifically, the “power to lay taxes for the common defen[s]e and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them.”²¹

This Note focuses on the unconstitutionality of government-funded foreign humanitarian aid, arguing that foreign humanitarian aid is neither for the “common [d]efense” nor the “general [w]elfare” of the United States.²² What is for the common defense and general welfare of the United States is limited to those powers enumerated in Article I, Section 8, of the Constitution. Furthermore, even if government-funded foreign humanitarian aid were found not to be limited to those enumerated powers, congressional authority to tax and spend is limited to the common defense and general welfare of the United States. There are three reasons why foreign humanitarian aid does not meet either of these two requirements. First, any connection between bilateral foreign humanitarian aid and the welfare and defense of the United States is unproven and attenuated. Second, there is no connection between foreign humanitarian aid through multilateral organizations and the welfare and defense of the United States. Third, neither bilateral nor multilateral foreign humanitarian aid serves any purpose directly related to the defense and welfare of the United States. Finally, this Note contends that Congress ignores its constitutional limitations when it comes to foreign humanitarian aid chiefly because of the powerful emotions that human suffering elicits. While emotions justify *private* humanitarian aid, emotions do not justify unconstitutional government spending.

II. METHODS AND CANONS OF CONSTITUTIONAL INTERPRETATION

There are various competing sources of legal textual interpretation.²³ The two interpretive theories that have come to the

20. *United States v. Butler*, 297 U.S. 1, 66 (1936) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 909 (5th ed. 1905)).

21. *Id.* (quoting 1 STORY, *supra* note 20, § 922).

22. U.S. CONST. art. I, § 8, cl. 1.

23. Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN. ST. L. REV. 837, 851 (2011).

forefront in recent times are Originalism²⁴ and Evolving Constitutionalism.²⁵ Originalists restrict constitutional interpretation to the Framers' words and the assumptions of their era.²⁶ Evolving Constitutionalists interpret the Constitution to reflect changes in law and society.²⁷ Both Originalists and Evolving Constitutionalists first look to the text of the Constitution when analyzing whether something is constitutional.²⁸ Here the similarities in interpretive methods end. If the text's meaning is unclear, Originalists look to the legal and social tradition of the text's time.²⁹ Evolving Constitutionalists do not.³⁰ Instead, Evolving Constitutionalists look to the prevailing morality or social consensus and "mega-conceptions" of justice of their own time.³¹

Evolving Constitutionalists are critical of Originalism.³² They claim that the Framers expected the interpretation of their words

24. GLENN C. SMITH & PATRICIA FUSCO, CONSTITUTIONAL LAW FOR DUMMIES 44-46 (2012).

25. *Id.* at 47-48. Evolving Constitutionalism is also referred to as belief in a "[l]iving Constitution." See RON PAUL, THE REVOLUTION: A MANIFESTO 48-49 (2008).

26. SMITH & FUSCO, *supra* note 24, at 44. The era for constitutional interpretation refers to the time the Framers of the text adopted the text. This Note focuses on the Bill of Rights and references the Articles of Confederation. The Framers of the Bill of Rights were James Madison and others in the First Federal Congress in 1789. *Id.* at 45. The Framers of the Articles of Confederation were the men from the Philadelphia Constitutional Convention in 1777. *Id.*

27. *Id.* at 44; see also Landau, *supra* note 23, at 854-55. Evolving Constitutionalists argue that because the "Framers intended the [Constitution] to serve as a general charter," "constitutional interpretation must be informed by contemporary norms and circumstances, not simply by its original meaning." GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, AM. CONST. SOC'Y FOR LAW & POL'Y, KEEPING FAITH WITH THE CONSTITUTION 25 (2009).

28. SMITH & FUSCO, *supra* note 24, at 45-47.

29. See Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws (Mar. 8 & 9, 1995), in THE TANNER LECTURES ON HUMAN VALUES, at 79, 112-20 (1995), available at http://tannerlectures.utah.edu/lectures//_documents/a-to-z/s/scalia97.pdf; see also SMITH & FUSCO, *supra* note 24, at 45-47.

30. SMITH & FUSCO, *supra* note 24, at 47.

31. *Id.*; see also Landau, *supra* note 23, at 854-55.

32. See Landau, *supra* note 23, at 852-55.

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 81

would evolve over time.³³ This Note demonstrates that this assertion does not find much support in history. For example, Daniel Webster³⁴ opined that “[w]e must take the meaning of the Constitution as it has been solemnly fixed.”³⁵ Alexander Hamilton’s writings support his belief in an Originalist approach.³⁶ William Blackstone was also an

33. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 79 (2012); *see also* Scalia, *supra* note 29, at 112. Ron Paul notes that a “living” Constitution is something any government would want because whenever people claimed the government overstepped its constitutional authority, the government could claim the Constitution had evolved. PAUL, *supra* note 25, at 49; *see also* Joseph P. Viteritti, *A Truly Living Constitution: Why Educational Opportunity Trumps Strict Separation on the Voucher Question*, 57 N.Y.U. ANN. SURV. AM. L. 89, 89 (2000) (quoting Justice William Brennan as saying that “[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs”) (alteration in original); LIU ET AL., *supra* note 27, at 25 (noting that Evolving Constitutionalists believe the Constitution was intended to “grow and evolve” to reflect the changing “conditions, needs, and values of our society”).

34. Daniel Webster served in Congress and was Secretary of State in both the early 1840s and early 1850s. PAUL, *supra* note 25, at 56.

35. SCALIA & GARNER, *supra* note 33, at 80 (quoting DANIEL WEBSTER, *THE WORKS OF DANIEL WEBSTER* 164 (1851)).

36. THE FEDERALIST NO. 83 (Alexander Hamilton) (“The rules of legal interpretation are rules of *common sense*, adopted by the courts in the construction of the laws. The true test, therefore, of a just application of them is its conformity to the source from which they are derived.”); *see also* THE FEDERALIST NO. 84 (Alexander Hamilton) (“For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government.”). These quotations demonstrate Hamilton’s Originalist stance. He was worried that a Bill of Rights would result in people interpreting the Constitution so as to grant the federal government powers it did not have. After all, why grant freedoms (e.g., through a Bill of Rights), if the federal government does not have the power to restrain those freedoms?

Originalist.³⁷ As were James Madison,³⁸ Cesare Beccaria,³⁹ Supreme Court Justice David Brewer,⁴⁰ Chief Justice Roger Taney,⁴¹ Thomas Jefferson,⁴² and Supreme Court Justice Hugo Black.⁴³

37. William Blackstone (1723-1780) was an 18th-century English jurist. SCALIA & GARNER, *supra* note 33, at 79-80; *see also* *Sir William Blackstone*, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/EBchecked/topic/68589/Sir-William-Blackstone> (last visited Mar. 29, 2013). Blackstone's belief in Originalism was evident when he discussed an 11th-century law that forbid all "ecclesiastical persons to 'purchase provisions at Rome.'" SCALIA & GARNER, *supra* note 33, at 79-80 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 60 (4th ed., 1770)). Blackstone noted that those words "'might seem to prohibit the buying of grain or other victual.'" *Id.* However, such an interpretation is incorrect because "provisions" in the eleventh century referred to ecclesiastical-office appointments. *Id.* Therefore, giving "provision" any other meaning would be incorrect. *Id.*

38. James Madison, one of the Constitution's architects and an author of the Bill of Rights, questioned how laws could be fixed in their meaning and operation if the meaning of the Constitution was not. SCALIA & GARNER, *supra* note 33, at 80 (quoting Letter from James Madison to C.E. Haynes (Feb. 25, 1821)).

39. "Cesare Beccaria, the . . . son of an Italian nobleman, published a short treatise, *Dei delitti e delle pene*, that was translated into English as *On Crimes and Punishments*." John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195, 196 (2009). He influenced many thinkers, including the American Founding Fathers as his writings "profoundly shaped the country's founding era and the Bill of Rights." *Id.* at 207.

When the code of laws is once fixed, it should be observed in the literal sense, and nothing more is left to the judge, than to determine, whether an action be, or be not conformable to the written law. When the rule of right, which ought to direct the actions of the philosopher, as well as the ignorant, is a matter of controversy, not of fact, the people are slaves to the magistrates.

CESARE BECCARIA, ON CRIMES AND PUNISHMENT 24 (Henry Paolucci trans., 1963) (4th ed. 1793).

40. *See* *South Carolina v. United States*, 199 U.S. 437, 448 (1905) ("The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.").

41. *See* *Scott v. Sandford*, 60 U.S. 393, 425-26 (1856) ("[A]s it is a Government of special, delegated, powers, no authority beyond . . . can be constitutionally exercised.").

42. *See* GEORGE FRATER, OUR HUMANIST HERITAGE 126-27 (2010) ("The Constitution on which our Union rests, shall be administered by me [as President] according to the safe and honest meaning contemplated by the plain understanding of the people of the United States at the time of its adoption — a meaning to be

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 83

Furthermore, if the Constitution were intended to evolve, including an amendment to change the Constitution would be superfluous.⁴⁴ For example, the Thirteenth and Nineteenth Amendments would have been unnecessary.⁴⁵ In the words of Alexander Hamilton, “the present Constitution is the standard to which we are to cling. Under its banners, . . . must we combat our political foes—*rejecting all changes but through the channel itself provides for amendments.*”⁴⁶

According to some, Originalism is the only method of interpretation compatible with democracy.⁴⁷ Giving legal texts new meaning is changing the law.⁴⁸ Another word for change is amend.⁴⁹

found in the explanations of those who advocated, not those who opposed it, and who opposed it merely lest the construction should be applied which they denounced as possible.”) (quoting Letter from Thomas Jefferson to Messrs. Eddy, Russel, Thurber, Wheaton and Smith (Mar. 27, 1801)). Thomas Jefferson’s Originalist stance is important because Jefferson was the principal author of the Declaration of Independence. The fact that Congress appointed Jefferson as one of five men to draft this document is demonstrative of the respect Jefferson engendered. FOUNGING FATHERS, *available at* <http://www.smithsonianeducation.org/spotlight/july4.html>; THOMAS JEFFERSON (1743-1826), AM. HIST. CENT., *available at* <http://www.americanhistorycentral.com/entry.php?rec=453>.

43. Justice Hugo Black is cited as the most prominent Originalist from the 1940s through the 1960s. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 8 (2010). His belief in an Originalist interpretation is noteworthy because of his “liberal-humanist-individualistic philosophy.” Raymond G. Decker, *Justice Hugo L. Black: The Balancer of Absolutes*, 59 CALIF. L. REV. 1335, 1344 (1971).

44. See U.S. CONST. amend. V. Evolving Constitutionalists deny this assertion. Citing changes to population and technology as examples, they claim that, because the process of amending the Constitution is lengthy and difficult, it is unrealistic to expect this process to keep up with the frequent changes to U.S. society. See STRAUSS, *supra* note 43, at 8-9.

45. If the Constitution were intended to evolve with society, constitutional amendments would have been unnecessary to give African Americans and women the right to vote. See SCALIA & GARNER, *supra* note 33, at 80-81.

46. Letter from Alexander Hamilton to James A. Bayard (April 1802), in 10 *THE WORKS OF ALEXANDER HAMILTON*, at 434 (Henry Cabot Lodge ed., G.P. Putnam’s Sons 1904) (emphasis added), *available at* http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=1387&chapter=93528&layout=html&Itemid=27.

47. SCALIA & GARNER, *supra* note 33, at 82-85.

48. *Id.* at 82.

To amend the Constitution, however, requires compliance with the Fifth Amendment.⁵⁰ For these reasons, and because Evolving Constitutionals believe the Constitution “must keep changing in its application or lose even its original meaning,”⁵¹ this Note largely focuses on the Originalist method of interpreting the Constitution.

Consistent with the Originalist method of interpretation is the use of interpretative canons.⁵² These interpretative canons are not found within any one source.⁵³ Rather, they are gathered from various legal sources.⁵⁴ A canon of construction “guides the interpreter of a text on some phase of the interpretive process.”⁵⁵ Some of these canons will be used throughout this Note to interpret relevant parts of the Constitution to show that Congress does not have the constitutional authority to spend tax revenue for foreign humanitarian aid.

III. GRAMMAR AND USAGE DEMONSTRATE CONGRESSIONAL AUTHORITY TO TAX AND SPEND IS LIMITED TO ENUMERATED PURPOSES

Government-funded foreign humanitarian aid is unconstitutional because it does not fall within the enumerated powers of Congress, which limit what is for the general welfare and common defense.⁵⁶

49. BLACK'S LAW DICTIONARY 94 (9th ed. 2009) (defining “amend” as “[t]o change the wording of; specif., to formally alter . . . by striking out, inserting, or substituting words.”).

50. See PAUL, *supra* note 25, at 45-46 (discussing the Founders' concern that there would always be temptation to take more power than the Constitution authorized and the time consuming process of amending the Constitution increased this temptation to just take the power without amending the Constitution); see also U.S. CONST. amend. V.

51. Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the 'Living Constitution'*, 76 N.Y.U. L. REV. 1456, 1463 (2001).

52. SCALIA & GARNER, *supra* note 33, at 78-79.

53. *Id.* at 9 (discussing that this book is arguably the first modern attempt to compile and arrange valid canons and explain their validity).

54. *Id.*

55. *Id.* at 426.

56. See e.g., PAUL, *supra* note 25, at 44 (noting that Article I, Section 8 provides an exhaustive list of congressional powers).

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 85

This conclusion is supported by the grammar and usage of Article I, Section 8, of the Constitution.⁵⁷

Semicolons may be used “between items in a list that already involve commas.”⁵⁸ The use of the semicolons in Article I, Section 8, “preserves the unity of the clause” and the “true intention of the parties to the Constitution.”⁵⁹ It preserves the clause’s unity because it unites two parts in one substantive clause.⁶⁰ The first part of the clause gives Congress the power “[t]o lay and collect Taxes, Duties, Imposts and Excises” and is called the “first” part of a “single” clause.⁶¹ The second part limits and explains what is in the general welfare and for the common defense of the United States.⁶² The limiting and explanatory nature of the second part of the clause is thus supported by the clause’s structure. The remainder of Section 8 is separated into clauses that are divided by semicolons.⁶³ This creates a list of enumerated powers that explain what is for the common defense and in the general welfare. Had the Framers, therefore, intended to separate the first clause from the following enumerated powers, they would have used more than a semicolon.⁶⁴

After the initial section that gives Congress the power to tax and spend, the enumerated powers are listed and each power begins with “To.”⁶⁵ This shows that these enumerated powers are explanations of what is in the common defense and for the general welfare.⁶⁶ If taxing and spending for the general welfare and common defense were meant to stand alone, Section 8 would have included these two things as part

57. U.S. CONST. art. I, § 8, cl. 1.

58. Jaclyn M. Wells, *Semi-Colons, Colons, and Quotation Marks*, PURDUE OWL, http://owl.english.purdue.edu/engagement/index.php?category_id=2&sub_category_id=1&article_id=44 (last edited Mar. 29, 2013).

59. Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), in *THE FOUNDERS’ CONSTITUTION* (Philip B. Kurland & Ralph Lerner eds., 2000).

60. *Id.*; U.S. CONST. art. I, § 8, cl. 1.

61. Letter from James Madison to Andrew Stevenson, *supra* note 59.

62. James Madison, *The Bank Bill* (Feb. 2, 1791), in *THE FOUNDERS’ CONSTITUTION*, (Philip B. Kurland & Ralph Lerner eds., 2000).

63. U.S. CONST. art. I, § 8, cl. 1.

64. *See* *THE FEDERALIST NO. 41* (James Madison).

65. U.S. CONST. art. I, § 8, cl. 1.

66. James Madison, *supra* note 62.

of the list. For example, Section 8 would have begun by giving Congress the power to tax without including that this power is to “provide for the common Defen[s]e and general Welfare.”⁶⁷ Rather, if what is in the general welfare and for the common defense is not limited to the enumerated powers that follow, it would have been included as another enumerated power in the list.⁶⁸

Furthermore, not limiting congressional power to tax and spend to these listed purposes would give Congress the equivalent of unlimited power and the listing would therefore have been unnecessary.⁶⁹ If not limited to those enumerated powers, Congress could tax and spend for reasons other than to pay debts or for the general welfare and common defense of the United States.⁷⁰ Congress would not be confined to its enumerated powers and could interfere with powers reserved to the states.⁷¹ Instead, Congress would simply be able to justify any actions in excess of those enumerated as in the general welfare and for the common defense of the United States.⁷²

If these terms were not limited to the succeeding enumerated powers, the terms would be unnecessary.⁷³ There would be no reason to include the enumerated powers if the terms “common [d]efense” and “general [w]elfare” were general terms not limited to those enumerated powers.⁷⁴ “For what purpose could the enumeration of powers be inserted, if these and all others were meant to be included in the preceding general power?”⁷⁵ Therefore, the proper way to look at these terms is as limits on congressional power to tax and spend. “Nothing is more natural nor common than first to use a general

67. U.S. CONST. art. I, § 8, cl. 1.

68. See James Madison, *supra* note 62.

69. *Id.*; PAUL, *supra* note 25, at 47 (noting that there would be no point of listing the enumerated powers in Article I, Section 8 if they were to be included within the broad definition of “general welfare”).

70. See James Madison, *supra* note 62. It would have been unnecessary to include the subjoined “To” clauses if those clauses were not meant to define what was in the general welfare or for the common defense of the United States. *Id.*

71. *Id.*

72. THE FEDERALIST NO. 41 (James Madison).

73. James Madison, *supra* note 62.

74. THE FEDERALIST NO. 41 (James Madison); see also PAUL, *supra* note 25, at 47.

75. THE FEDERALIST NO. 41 (James Madison).

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 87

phrase, and then to explain and qualify it by a recital of particulars.”⁷⁶ As such, what is in the general welfare and for the common defense is limited by the section’s enumerated powers.⁷⁷

This argument is consistent with the Originalist belief that the delegates at the Constitutional Convention would not have given Congress unbridled discretion.⁷⁸ If not limited to those enumerated powers, Congress would have so much discretion that it would have the equivalent of unlimited power. Congress could arguably tax and spend for any purpose it justified as being for the general welfare and common defense of the United States.⁷⁹ This argument that congressional power to tax and spend is limited to those enumerated powers is supported by Jefferson’s belief that a proposed federal law was unconstitutional if not listed among the powers granted to Congress in Article I, Section 8.⁸⁰

The argument that the delegates and ratifiers of the Constitution would not have given Congress unbridled discretion is further supported by the “peculiar” structure of the federal government.⁸¹ The government “combines an equal representation of unequal

76. *Id.*

77. *See id.*

78. *See e.g.*, THE FEDERALIST NO. 84 (Alexander Hamilton) (noting that bills of rights historically served to limit a government’s otherwise unlimited power, which was unnecessary with the U.S. Constitution because it is “founded upon the power of the people . . . [and where] . . . the people surrender nothing; and as they retain every thing, they have no need of particular reservations”). Hamilton opined that bills of rights were unnecessary to the U.S. Constitution because “[t]hey would contain various exceptions to powers not granted.” For example, Hamilton thought a provision granting freedom of the press was unnecessary because the Constitution did not give the federal government the power over the press. *Id.*

79. *See* PAUL, *supra* note 25, at 48 (referencing Patrick Henry’s concern when the ratification of the Constitution was being debated in Virginia). Henry was concerned that the government could do anything it claimed was in the general welfare. *Id.* In response, constitutional supporters noted this phrase did not authorize such broad meaning. *Id.*

80. *Id.* at 45. Jefferson is quoted as saying that “Congress has not unlimited powers to provide for the General Welfare, but only those specifically enumerated.” GEORGE M. STEPHENS, LOCKE, JEFFERSON & THE JUSTICES: FOUNDATIONS AND FAILURES OF THE US GOVERNMENT 99 (2002); *see also* THOMAS JEFFERSON (1743-1826), *supra* note 42 (discussing why Jefferson’s opinion is highly relevant to what the Framers intended when drafting and ratifying the Constitution).

81. Letter from James Madison to Andrew Stevenson, *supra* note 59.

numbers in one branch of the Legislature . . . an equal representation of equal numbers in the other” and “invests the Government with selected powers only.”⁸² These peculiarities were intended to be safeguards against government persecution of minorities or institutions.⁸³ The peculiar structure of the government proves that the ratifiers were apprehensive of “abuse from ambition or corruption.”⁸⁴ Therefore, it is unreasonable to suggest that these same men would allow the government to have unbridled discretion in determining what was in the general welfare or for the common defense of the United States.

Furthermore, the Framers would not have used the terms “general [w]elfare” and “common [d]efense” if they were not limited to the enumerated powers that followed those phrases.⁸⁵ If not limited, they would be general terms.⁸⁶ It is hard to conclude that such general terms would be used in the Constitution, when the Framers were otherwise so precise.⁸⁷

Limiting what is in the general welfare and for the common defense of the United States to those enumerated powers is also supported by the lack of attention the Framers paid to these terms. Framers who were particularly fearful of a strong central government never addressed the terms “general [w]elfare” or “common

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Letter from James Madison to Andrew Stevenson, *supra* note 59; PAUL, *supra* note 25, at 47 (quoting Madison as saying that “[w]ith respect to the words general welfare, I have always regarded them as qualified by the detail of powers connected with them. To take them in a literal and unlimited sense would be a metamorphosis of the Constitution into a character which there is a host of proofs was not contemplated by its creators”).

87. Letter from James Madison to Andrew Stevenson, *supra* note 59. For example, Article I, Section 8, specifically authorizes Congress to tax “for the Erection of Forts, Magazines, Arsenals.” U.S. CONST. art. I, § 8, cl. 16. These provisions would be for the common defense of the United States. Therefore, if “common [d]efense” was intended to encompass anything Congress could arguably say was for the common defense of the United States, it is nonsensical to suggest that the delegates would have included these specific examples. Rather, it is more likely that these examples were specifying what was for the common defense. Letter from James Madison to Andrew Stevenson, *supra* note 59.

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 89

[d]efense.”⁸⁸ “[F]or it exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant and cautious definition of Federal powers should have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions and definitions elaborated by them.”⁸⁹

A majority of the proposed amendments at the Constitutional Convention were to “circumscribe the powers granted to the General Government, by explanations, restrictions, or prohibitions.”⁹⁰ At least seven states proposed one hundred twenty-six amendments for this purpose.⁹¹ These states “saw [the] danger in terms and phrases employed in some of the most minute and limited of the enumerated powers.”⁹² However, not one state addressed the terms “common defense” and “general welfare” as a source of concern.⁹³ It therefore follows that the ratifying states believed the terms were “explained and limited, as in the ‘Articles of Confederation,’ by the enumerated powers which followed them.”⁹⁴

IV. CONGRESSIONAL AUTHORITY TO TAX AND SPEND IS LIMITED TO
THE “COMMON DEFENSE” AND “GENERAL WELFARE
OF THE UNITED STATES”

Congress has the power to “lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises, to pay the [d]ebts and provide for the common [d]efense and general [w]elfare of the United States.”⁹⁵ This section of the Constitution gives Congress the power to tax and appropriate.⁹⁶ These are words of limitation and would not have been used if they were “meaningless.”⁹⁷

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Letter from James Madison to Andrew Stevenson, *supra* note 59.

93. *Id.*

94. *Id.*

95. U.S. CONST. art. I, § 8, cl. 1.

96. *United States v. Butler*, 297 U.S. 1, 65 (1936).

97. *Id.*

The terms “general [w]elfare” and “common [d]efense” were not novel to the Constitution.⁹⁸ These terms were carried over from the Articles of Confederation.⁹⁹ They “were regarded in the new as in the old instrument, merely as general terms, explained and limited by the subjoined specifications.”¹⁰⁰ One way the Constitution altered the Articles of Confederation was by providing the federal government the means to generate revenue.¹⁰¹ However, the Constitution did not alter the purpose of that revenue and the terms “general [w]elfare” and “common [d]efense” were maintained.¹⁰²

The following sections will show that the grammar and usage of Article I, Section 8, Clause 1, as well as the intent of the Constitution’s Framers and ratifiers, was to limit Congress’ taxing and spending powers to the common defense and general welfare of the United States.¹⁰³ They will also show that foreign humanitarian aid is neither for the common defense nor the general welfare of the United States.

A. Grammar and Usage Demonstrate Congressional Authority to Tax and Spend Is Limited to the “Common Defense” and “General Welfare” of the United States

“Words are to be given the meaning that proper grammar and usage would assign them.”¹⁰⁴ In the words of Chief Justice Warren, the Supreme Court does not “regard ordinary principles of English prose as irrelevant to a construction of [congressional] enactments.”¹⁰⁵ This canon and Chief Justice Warren’s insight show that the use of semicolons and the structure of Section 8 limit Congress’ authority to

98. James Madison, *supra* note 62 (“These terms are copied from the articles of confederation . . .”).

99. ARTICLES OF CONFEDERATION of 1781, art. VIII, para. 1; Letter from James Madison to Andrew Stevenson, *supra* note 59.

100. Letter from James Madison to Andrew Stevenson, *supra* note 59.

101. Brutus, No. 7 (Jan. 3, 1788), in THE FOUNDERS’ CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 2000).

102. Letter from James Madison to Andrew Stevenson, *supra* note 59.

103. U.S. CONST. art. I, § 8, cl. 1.

104. SCALIA & GARNER, *supra* note 33, at 140.

105. *Flora v. United States*, 362 U.S. 145, 150 (1960).

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 91

tax and spend for the common defense and general welfare of the United States.¹⁰⁶

The first session of the First Federal Congress further demonstrates that the terms “common [d]efense” and “general [w]elfare” were meant to limit congressional power.¹⁰⁷ The representatives’ discussion of proposed constitutional amendments demonstrated their desire to limit the federal government’s power.¹⁰⁸ However, no amendment or proposal was made regarding the terms “common [d]efense” and “general [w]elfare.”¹⁰⁹ It is unreasonable that men who “[criticized] and combated” the “many inferior and minute powers” in the Constitution would ignore these terms if they imposed “*unlimited taxes for unlimited purposes.*”¹¹⁰ Rather, by these terms, taxes were limited to providing for the common defense and general welfare of the United States.¹¹¹

Consistent with the lack of concern of the constitutional delegates and the First Congress, there was a lack of reliance on these terms to justify congressional action.¹¹² For example, the First Bank of the United States¹¹³ was justified as being

of primary importance to the prosperous administration of the finances, and . . . of the greatest utility in the operations connected with the support of the Public Credit . . . which will entitle it to the

106. James Madison, *supra* note 62.

107. Letter from James Madison to Andrew Stevenson, *supra* note 59.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*; Justice Story also noted that Congress may only tax for the common defense and general welfare of the United States. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 381-82 (1833), *available at* http://www.constitution.org/js/js_314.htm.

112. *See infra* text accompanying notes 114-25.

113. The First Bank was “conceived in 1790” and created in 1791 to “help fund the [United States’ war] debt and issue currency notes.” *A History of Central Banking in the United States*, FED. RESERVE BANK OF MINNEAPOLIS, http://www.minneapolisfed.org/community_education/student/centralbankhistory/bank.cfm? (last visited Mar. 29, 2013).

confidence, and be likely to render it equal to the exigencies, of the public.¹¹⁴

Hamilton noted the importance of a national bank “in dangerous and distressing emergencies.”¹¹⁵ It is noteworthy that Hamilton did not support these justifications as being for the welfare or defense of the United States.¹¹⁶ Rather, he relied on the Constitution’s concern with protecting property.¹¹⁷ In his opinion, the First Bank would attract foreign capital and provide consistency and stability.¹¹⁸

Similarly, prior to the adoption of the Constitution, Representative Wilson justified the constitutionality of a national bank in 1785 from the text of Article V of the Articles of Confederation, “that for the more convenient management of the *general interests* of the United States, delegates shall be annually appointed to meet in congress.”¹¹⁹ Wilson looked at a national bank as a way of managing the nation.¹²⁰ He believed the Articles of Confederation authorized a national bank because an “institution for circulating paper, and establishing its credit over the whole United States” was within the “general powers” and in the “*general interests* of the United States.”¹²¹ Wilson was “justly distinguished for his intellectual powers” and was “deeply impressed with the importance of a bank at such a crisis.”¹²² However, Madison

114. ALEXANDER HAMILTON, THE REPORT OF THE SECRETARY OF THE TREASURY ON THE SUBJECT OF A NATIONAL BANK 3 (1790), *available at* http://fraser.stlouisfed.org/docs/bankunitedstates/bankoftheunitedstates_hamilton_1790.pdf.

115. *Id.* at 4.

116. *Id.* at 4-9.

117. *See id.*

118. *Id.* at 20.

119. JAMES WILSON, CONSIDERATIONS ON THE BANK OF NORTH AMERICA (1785), reprinted in 1 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 64 (Kermit L. Hall & Mark David Hall eds., 2007), *available at* http://files.libertyfund.org/files/2072/Wilson_4140_EBk_v6.0.pdf (quoting ARTICLES OF CONFEDERATION OF 1781, art. V, para. 1). Representative Wilson was only one of six individuals who signed both the Declaration of Independence and the U.S. Constitution. *Id.* at 2-3 (discussing Wilson’s impact on the founding of the United States).

120. *Id.* at 64.

121. *Id.*

122. Letter from James Madison to Andrew Stevenson, *supra* note 59.

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 93

found Wilson's justification for a national bank "particularly worthy of notice" because it shed light on the proper interpretation of the common defense and general welfare provisions in both the Articles of Confederation and later the U.S. Constitution.¹²³ Wilson justified a national bank from the "*nature*" of the "*union*" and the "tenor of the 'Articles of Confederation' themselves," without considering the "terms 'common defen[s]e and 'general welfare' as a source" of that power.¹²⁴

Wilson's lack of reliance on the terms "common defense" and "general welfare" is of particular importance because, while pre-Constitution, the terms of "general welfare" and "common defense" were carried over from the Articles of Confederation to the Constitution.¹²⁵ Thus, the rationales provided by both Hamilton and Wilson would arguably work for the general welfare and common defense of the United States. However, *neither* Hamilton nor Wilson relied on these terms to justify a national bank.¹²⁶ This lack of reliance shows the limitations of the "general [w]elfare" and "common [d]efense" provisions.

B. Foreign Humanitarian Aid Is Not for the "General Welfare" or "Common Defense" of the United States

The Constitution should be interpreted as reflecting "what an informed, reasonable member of the community would have understood at the time of adoption according to then-prevailing linguistic meaning and interpretive principles."¹²⁷ One limitation on Congress' authority is the qualifier that taxing and spending be for the common defense and general welfare "of the *United States*."¹²⁸

The Journals of the Continental Congress repeatedly reference the general welfare clause being for the general welfare of the United

123. *Id.*

124. *Id.*

125. *Id.*

126. *See supra* text accompanying notes 113-26.

127. BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 642 (3d ed. 2011).

128. *See* U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

States and its citizens.¹²⁹ With phrases such as “of these States”; “frontier inhabitants”; “common benefit of the Union”; “the people of these United States, by whose will, and for whose benefit the federal government was instituted”; and “the interest and welfare of those whom [Congress] represent[s],” there is no question that the general welfare was of the United States and its citizens.¹³⁰

Congress largely ignores this limitation that taxing and spending be for the general welfare and common defense of *the United States*. This is evident in the language of congressional legislation. For example, the Foreign Assistance Act of 1961 states that a

principal objective of the foreign policy of the United States is the encouragement and sustained support of the *people of developing countries* in their efforts to acquire the knowledge and resources essential to development and to build the economic, political, and social institutions which will improve the quality of their lives.¹³¹

American history shows that foreign humanitarian aid was not considered to be for the general welfare or in the common defense of the United States.¹³² In 1794, the House of Representatives addressed the constitutionality of federal spending on humanitarian grounds.¹³³ French refugees fled to the United States in response to the French Revolution.¹³⁴ Maryland’s legislature requested that the federal

129. See Journals of the Continental Congress (Feb. 15, 1786) in THE FOUNDERS’ CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 2000), available at http://press-pubs.uchicago.edu/founders/documents/a1_8_1s1.html (last visited Mar. 30, 2013).

130. *Id.*; Alexander Hamilton also noted the necessity of the Constitution to advance the “safety and welfare of the parts of which it is composed.” THE FEDERALIST NO.1 (Alexander Hamilton).

131. 1-A H.R. COMM. ON INT’L REL. & S. COMM. ON FOREIGN REL., *supra* note 5, at 19 (emphasis added).

132. See *infra* text accompanying notes 135-50.

133. 4 ANNALS OF CONG. 169-73 (1794). Though the discussion concerned humanitarian aid within the United States, it applied to federal spending on humanitarian causes in general, both domestic and foreign. *Id.*

134. *Id.* at 169. See generally OFFICE OF THE HISTORIAN, U.S. DEP’T OF STATE, *The United States and the French Revolution*, <http://history.state.gov/milestones/1784-1800/FrenchRev> (last visited Mar. 30, 2013) (discussing the French Revolution, America’s involvement, and French emigrants in the United States).

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 95

government provide funds to aid the emigrants.¹³⁵ In response, James Madison “acknowledged . . . he could not undertake to lay his finger on that article in the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents.”¹³⁶

Madison distinguished the British Constitution from the U.S. Constitution. He stated that the British Constitution gave the British Parliament an “indefinite and absolute right in disposing of the money of their constituents.”¹³⁷ In contrast, the House of Representatives did not “possess an undefined authority correspondent with that of a British Parliament.”¹³⁸ Therefore, while Madison sympathized with the French emigrants, he believed Congress simply did not have the authority to grant them aid.¹³⁹

Representative Giles also doubted that such spending was legal.¹⁴⁰ He disagreed with those representatives who would authorize spending based on “humanity.”¹⁴¹ Giles stated that the proper question was not whether such spending was humane.¹⁴² Rather, the question was whether, “under the Constitution, we have a right to make such grant?”¹⁴³

Justice Story also believed foreign humanitarian aid was unconstitutional.¹⁴⁴ Story provides examples of expenditures that

135. 4 ANNALS OF CONG. 169 (1794).

136. *Id.* at 170. James Madison “wished to relieve the sufferers, but was afraid of establishing a dangerous precedent, which might . . . be perverted to the countenance of purposes very different from those of charity.” *Id.*

137. *Id.* at 171 (citing an instance when the British Parliament authorized one hundred thousand pounds to support Lisbon after an earthquake).

138. *Id.* at 171-73 (noting that the various state legislatures had “more extensive” “power over the purses of their constituents” than is afforded to Congress under the U.S. Constitution). Madison noted that “[h]e was satisfied that the citizens of the United States possessed an equal degree of magnanimity, generosity and benevolence, with the people of Britain, but this House certainly did not possess an undefined authority correspondent with that of a British Parliament.” *Id.*

139. *Id.* at 170-72.

140. *Id.* at 173.

141. *Id.*

142. *Id.*

143. *Id.*; see also *Reid v. Covert*, 354 U.S. 1, 6 (1957) (noting that the government may only act within constitutional limitations).

144. See 3 STORY, *supra* note 112, at 381-82.

were not for the common defense or in the general welfare of the United States.¹⁴⁵ He notes that purposes “wholly extraneous”¹⁴⁶ to the common defense or general welfare of the United States included “giving aids and subsidies to a foreign nation.”¹⁴⁷ According to Story, such foreign aid and subsidies were “wholly indefensible upon constitutional principles.”¹⁴⁸

Despite this history and the lack of connection between foreign humanitarian aid and the common defense and general welfare of the United States, Congress spends billions of dollars on foreign humanitarian aid every year.¹⁴⁹ Foreign humanitarian aid is justified for reasons that include promoting economic growth and reducing poverty; improving governance; addressing population growth; expanding access to basic education and health care; protecting the environment; promoting stability in conflict regions; protecting human rights; curbing weapons proliferation; strengthening allies; and addressing drug production and trafficking.¹⁵⁰ Those justifications that are related to democratizing foreign countries are arguably the most related to the general welfare and common defense of the United States.

Much of the time, proponents of foreign humanitarian aid do not attempt to link these justifications to the common defense or general

145. *Id.*

146. *Id.*

147. *Id.* Justice Story also notes that taxing for the purpose of “propagating Mahometanism among the Turks, or giving aids and subsidies to a foreign nation” is not constitutional because it is not for the common defense or in the general welfare of the United States. *Id.*

148. *Id.*

A power to lay taxes for the common defen[s]e and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them. If the defen[s]e proposed by a tax be not the common defen[s]e of the United States, if the welfare be not general, but special, or local . . . it is not within the scope of the [C]onstitution.

Id.

149. *U.S. Overseas Loans and Grants: Foreign Assistance Fast Facts*, USAID, <http://gbk.eads.usaidallnet.gov/data/fast-facts.html> (last visited Mar. 22, 2013).

150. LAWSON & TARNOFF, *supra* note 1, at 3.

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 97

welfare of the United States.¹⁵¹ When they do attempt to make this connection, the connections are inadequate because proponents do not explain *how* foreign humanitarian aid is for the welfare and defense of the United States.¹⁵² Any cause-and-effect between the aid and the desired result is unproven and attenuated.¹⁵³

151. *See, e.g.*, Consolidated Appropriations Act, Pub. L. No. 108-199, 118 Stat. 3 (2004) (justifying foreign aid spending for agriculture, rural development, food and drug administration); Bretton Woods Agreement Act, Pub. L. No. 79-171, 59 Stat. 512 (1945) (justifying U.S. participation in multilateral development banks for reconstruction and development); Support for Eastern European Democracy (SEED) Act of 1989, Pub. L. No. 101-179, §§ 2, 801, 103 Stat. 3, 26 (justifying foreign aid spending to support East European democracy; only mention of U.S. national security is Act's authorization to allow President to cut off aid to countries engaged in activities deemed contrary to U.S. national security); United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2012, Pub. L. No. 108-25, 117 Stat. 711 (2012) (no attempt to justify this aid as being for the common defense or general welfare of the United States); Millennium Challenge Act of 2003, Pub. L. No. 108-199, 118 Stat. 211 (2004) (justifying foreign aid for "economic growth and the elimination of extreme poverty and [to] strengthen[] good governance, economic freedom, and investments in people"); *but see, e.g.*, Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 83-480, 68 Stat. 454-55 (1954) (justifying foreign aid spending "[t]o increase the consumption of United States agricultural commodities in foreign countries, to improve the foreign relations of the United States, and for other purposes" and to "promote the economic stability of American agriculture and the national welfare").

152. *See, e.g.*, Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (1961) (claiming foreign aid for economic development and internal and external security promoted the security and general welfare of the United States); Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 83-480, 68 Stat. 454-55 (1954) (justifying foreign aid in the form of agricultural commodities as in the "national welfare" of the United States); *see also* Andrew S. Natsios, *Foreign Aid Programs are Important for American National Security*, U.S. NEWS (Oct. 11, 2011), <http://www.usnews.com/debate-club/given-the-current-deficit-crisis-should-foreign-aid-be-cut/foreign-aid-programs-are-important-for-american-national-security> (making the conclusory statement that cutting foreign aid will "diminish our position in the world as a great power" and weaken U.S. national security); *Bureau for Democracy, Conflict and Humanitarian Assistance*, USAID, <http://www.usaid.gov/who-we-are/organization/bureaus/bureau-democracy-conflict-and-humanitarian-assistance> (last visited June 15, 2013) (justifying U.S. foreign aid as "furthering United States national security broadly defined").

153. Simeon Djankov, Jose G. Montalvo & Marta Reynal-Querol, *Does Foreign Aid Help?*, 26 CATO J., 1 (2006), *available at* <http://www.cato.org/sites/cato.org/files/serials/files/cato-journal/2006/1/cj26n1-1.pdf>; *see also* PAUL, *supra* note 25, at 18-19.

1. Any Connection between Bilateral Foreign Humanitarian Aid to the Welfare and Defense of the United States Is Unproven and Attenuated

Proponents of foreign humanitarian aid claim this aid helps the democratization of recipient countries.¹⁵⁴ Democratic countries are seen as U.S. allies,¹⁵⁵ most recently in the War on Terror.¹⁵⁶ Therefore, a common argument is that foreign humanitarian aid promotes the general welfare and common defense of the United States by limiting potential adversaries and strengthening allies.¹⁵⁷ Evidence from history does not give this proposition much support.¹⁵⁸

For several reasons, foreign humanitarian aid has little or no favorable effect on democratizing foreign countries.¹⁵⁹ One reason is

154. SUSAN B. EPSTEIN ET AL., CONG. RESEARCH SERV., RL34296, DEMOCRACY PROMOTION: CORNERSTONE OF U.S. FOREIGN POLICY? 7-9 (2007), available at <http://www.fas.org/sgp/crs/row/RL34296.pdf>.

155. *Id.* at 8; *but cf. id.* at 10 (citing JOANNE GOWA, *BALLOTS AND BULLETS* 113 (1999)). Gowa argues that history does not support the so-called “democracy peace theory.” *Id.* at 10. Rather, she attributes the so-called “democracy peace theory” to similar interests and the “bipolar balance in the world after World War II.” *Id.* Gowa also notes that “democratic peace [was] a Cold War phenomenon . . . limited to the years between 1946 and 1980.” *Id.*

156. *See* EPSTEIN ET AL., *supra* note 155, at 7-8; *cf.* Alope Chakravarty, *Feeding Humanity, Starving Terror: The Utility of Aid in a Comprehensive Antiterrorism Financing Strategy*, 32 W. NEW ENG. L. REV. 295 (2010) (arguing that foreign humanitarian aid will help delegitimize terrorist organizations and promote goodwill towards the United States).

157. *See FPI Analysis: Foreign Aid Advances U.S. Security, Prosperity, and Global Leadership*, FOREIGN POLICY INITIATIVE (Feb. 25, 2013), <http://www.foreignpolicyi.org/content/fpi-analysis-foreign-aid-advances-us-security-prosperity-and-global-leadership>; *see also* Chakravarty, *supra* note 157 at 326 (arguing that “[b]y supporting development goals, such as educating governments, building up civil institutions, and buttressing the economic infrastructure, as well as humanitarian goals, such as reducing poverty, increasing food assistance, and providing access to basic medical care, the United States['] interests will slowly, but deeply, be reinforced in the psyche of the citizens of the recipient countries”).

158. For example, the U.S. government has provided foreign aid to Pakistan for over 20 years. Adelman, *supra* note 2, at 65. Despite this aid, “anti-American sentiment” in Pakistan has not diminished. *Id.*

159. Stephen Knack, *Does Foreign Aid Promote Democracy?* 5, 15, 18-20 (IRIS Center Working Paper No. 238, 2000), available at

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 99

that “most aid goes to [the foreign] government[] [rather than the actual people in need], which “strengthen[s] the role of the government in [the economy compared] to the private sector.”¹⁶⁰ Democracy is not likely to result when the government controls much of the economy.¹⁶¹ Because foreign humanitarian aid strengthens the government’s role in the economy, and because strong government involvement in the economy hinders democratization, foreign humanitarian aid does little to bring democracy to foreign countries.¹⁶²

Foreign humanitarian aid is, furthermore, an ineffective tool for democratization, despite the often futile conditions that usually accompany this aid.¹⁶³ Aid and the conditions on it may weaken government accountability and the rule of law,¹⁶⁴ Government accountability and the rule of law are two important foundations of democracy.¹⁶⁵ Aid also “can reinforce ‘presidentialism.’”¹⁶⁶ “Presidentialism” occurs “in new democracies [when a] weak legislature provid[es] few checks on the president and cabinet, which dominate political decision-making.”¹⁶⁷ Conditions on aid can give the executive branch of recipient countries the power to “exact

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=260047 (noting that even aid from USAID, which directs aid towards countries progressing towards democratization, has no significant association with democratization); *see also* Katherine Erbeznic, Note, *Money Can’t Buy You Law: The Effects of Foreign Aid on the Rule of Law in Developing Countries*, 18 IND. J. GLOBAL LEGAL STUD. 873 (2011).

160. Knack, *supra* note 160, at 5 (quoting Milton Friedman).

161. *Id.*

162. *See id.* at 1 (noting that successful democratizing programs are rare).

163. *Id.* at 6 (citing INT’L FIN. INST. ADVISORY COMM’N, FINAL REPORT TO THE JOINT ECONOMIC COMMITTEE (2000)). For example, section 7046(c) of the Consolidated Appropriations Act of 2012 conditioned U.S. aid to Pakistan on Pakistan’s cooperation with U.S. counterterrorism efforts and Pakistan allowing humanitarian organizations access to detainees, civilians, and internally displaced people. SUSAN B. EPSTEIN & K. ALAN KRONSTADT, CONG. RESEARCH SERV., R41856, PAKISTAN: U.S. FOREIGN ASSISTANCE 32-33 (2013), *available at* <http://www.fas.org/sgp/crs/row/R41856.pdf>.

164. Knack, *supra* note 160, at 5-6.

165. *Id.*

166. *Id.* at 6.

167. *Id.* (citing DEBORAH BRAUTIGAM, AID DEPENDENCE & GOVERNANCE 29 (2000)); *see also* Djankov et al., *supra* note 154, at 11.

concessions from their legislatures.”¹⁶⁸ This results in a shift of power within recipient countries “that distort the constitutionally established system of checks and balances” that are required in a democracy.¹⁶⁹

2. Any Connection between Multilateral Foreign Humanitarian Aid to the Welfare and Defense of the United States Is Virtually Nonexistent

Foreign humanitarian aid through multilateral agencies is also ineffective and similarly does not promote the defense and welfare of the United States. Such aid is ineffective partly because “[m]ultilateral donors such as the World Bank are generally precluded by their charters from explicitly advocating or promoting democratization.”¹⁷⁰ Therefore, multilateral agencies are not allowed to further the one purpose of aid that is at least arguably related to the defense and welfare of the United States.

In addition to this limitation, multilateral agencies have a history of ineffectiveness.¹⁷¹ For example, the World Bank spent \$180 million dollars on the Chad-Cameroon oil pipeline.¹⁷² The World Bank tried to prevent corruption by conditioning the pipeline on Chad’s promising to spend the revenue on education, health, and infrastructure.¹⁷³ This did not happen.¹⁷⁴ Once the Chad government started receiving revenue from the pipeline, it “renege[d] on its deal with the World Bank,” “weakened the regulation” that allocated “most of its oil revenue to . . . poverty reduction programs,” and “diverted” some of the revenue towards arms acquisitions.¹⁷⁵

168. Knack, *supra*, note 160 at 6 (quoting INT’L. FIN. INST. ADVISORY COMM’N, FINAL REPORT TO THE JOINT ECONOMIC COMMITTEE (2000)).

169. *Id.* (quoting INT’L. FIN. INST. ADVISORY COMM’N., FINAL REPORT TO THE JOINT ECONOMIC COMMITTEE (2000)). *See generally* Erbeznik, *supra* note 160 (discussing in detail how foreign aid negatively affects reform efforts).

170. Knack, *supra* note 160, at 3.

171. *E.g.*, Djankov et al., *supra* note 154, at 7.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 7-8.

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 101

Similarly, the United Nations (U.N.) gave food aid to Somalia in the early 1990s.¹⁷⁶ It was not effective.¹⁷⁷ Indeed, “[d]uring the famine of 1991 and 1992, warlords and militiamen looted a substantial amount of the food distributed by aid groups”¹⁷⁸ Evidence suggests that this looting resulted in Somalia’s civil war and subsequent fighting over which faction would control the aid.¹⁷⁹ Despite this, USAID recently announced \$20 million in new American food aid to Somalia.¹⁸⁰

Thus, any connection between multilateral foreign humanitarian aid to the welfare and defense of the United States is virtually nonexistent for two reasons. First, multilateral organizations are generally precluded from promoting democratization, which is arguably the most related justification to the defense and welfare of the United States. And, second, foreign humanitarian aid through multilateral organizations has proven ineffective.

3. Neither Bilateral nor Multilateral Humanitarian Foreign Aid Serves Any Purpose Directly Related to the Defense and Welfare of the United States

Whether through bilateral or multilateral methods, foreign humanitarian aid does not plausibly contribute to the defense or welfare of the United States.¹⁸¹ Democratization is the only congressional justification for spending on foreign humanitarian aid that comes close to being for the common defense and general welfare of the United States. However, most multilateral agencies are

176. Marion Nestle & Sharron Dalton, *Food Aid and International Hunger Crises: The United States in Somalia* 11 AGRIC. & HUM. VALUES 19 (Fall 1994); Eleanor West, *Stolen Food Aid Crisis Hits Somalia*, FOOD REPUBLIC (Aug. 17, 2011, 4:01 PM), <http://www.foodrepublic.com/2011/08/17/stolen-food-aid-crisis-hits-somalia>.

177. Nestle & Dalton, *supra* note 177, at 19; West, *supra* note 177; Djankov et al., *supra* note 154, at 8; Knack, *supra* note 160, at 6.

178. West, *supra* note 177.

179. Djankov et al., *supra* note 154, at 8; Knack, *supra* note 160, at 6.

180. Mohammed Ibrahim, *Somalia: U.S. Promises More Food Aid*, N.Y. TIMES, Feb. 22, 2013, at A6.

181. See James Bovard, *The Continuing Failure of Foreign Aid*, CATO INST. (Jan. 31, 1986), <http://www.cato.org/pubs/pas/pa065.html>, for a discussion on the ineffectiveness of foreign humanitarian aid.

precluded from promoting or advocating democratization,¹⁸² and the previously mentioned evidence shows that bilateral and multilateral aid are ineffective.¹⁸³

Examples of these propositions in action are the fairly recent events in the West Bank and Egypt. The United States has spent billions of dollars in bilateral and multilateral foreign humanitarian aid for the West Bank and Gaza Strip alone.¹⁸⁴ Instead of promoting democracy, both Egypt and the West Bank “elected” anti-U.S. governments.¹⁸⁵ The Muslim Brotherhood took power in Egypt¹⁸⁶ and Hamas took control of the Palestinian Legislative Council in the West Bank.¹⁸⁷ Each of these newly elected governments is anti-United States. Therefore, any positive connection between the

182. Knack, *supra* note 160, at 3.

183. *See supra* text accompanying notes 155-81.

184. JIM ZANOTTI, CONG. RESEARCH SERV., RS22967, U.S. FOREIGN AID TO THE PALESTINIANS 26 (2013), *available at* <http://www.fas.org/sgp/crs/mideast/RS22967.pdf> (noting that, since “the mid-1990s, the U.S. government has committed more than \$4 billion in bilateral assistance to the Palestinians . . . who are among the largest per capita recipients of foreign aid worldwide”).

185. Bureau of Counterterrorism, *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE (SEPT. 28, 2012), <http://www.state.gov/j/ct/rls/other/des/123085.htm> (noting that Hamas was designated a foreign terrorist organization by the State Department on October 8, 1997); Erick Stakelbeck, *Muslim Brotherhood: A Global Terrorist Influence*, CBN NEWS (Feb. 1, 2011), <http://www.cbn.com/cbnnews/world/2011/february/muslim-brotherhood-a-global-terrorist-influence/> (noting that Hamas considers itself the “Palestinian branch” of the Muslim Brotherhood); Mary Crane, *Does the Muslim Brotherhood Have Ties to Terrorism?*, COUNCIL ON FOREIGN REL. (April 5, 2005), <http://www.cfr.org/egypt/does-muslim-brotherhood-have-ties-terrorism/p9248> (noting that while Egypt’s Muslim Brotherhood is not listed by the U.S. State Department as a terrorist organization, Hamas, Jamaat al-Islamiyya, and al-Qaeda are all designated terrorist organizations with historical and ideological ties with the Egyptian Muslim Brotherhood).

186. Zachary Laub, *Egypt’s Muslim Brotherhood*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/africa/egypts-muslim-brotherhood/p23991> (last updated Jan. 15, 2014).

187. EPSTEIN ET AL., *supra* note 155, at 10; *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/we.html> (select “Background”) (last updated Mar. 21, 2013); *see Profile: Hamas Palestinian Movement*, BBC (Dec. 6, 2012, 10:31 ET), <http://www.bbc.co.uk/news/world-middle-east-13331522> (discussing Hamas’ Palestinian victory).

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 103

billions in foreign humanitarian aid to the welfare and defense of the United States is questionable at best.

Michael Scheuer, head of the CIA's Osama bin Laden unit in the late 1990s, expands on this lack of a positive connection between U.S. intervention and the welfare and defense of the United States.¹⁸⁸ Scheuer notes that bin Laden's followers are held together by a hatred for U.S. foreign policy.¹⁸⁹ Thus, rather than humanitarian aid contributing to the welfare and defense of the United States, Scheuer argues the opposite: U.S. foreign humanitarian aid jeopardizes the safety of Americans.¹⁹⁰

Robert Pape provides support for this argument.¹⁹¹ Pape, a specialist in international security affairs and director of the Chicago Project on Security and Terrorism,¹⁹² analyzed 462 suicide terrorist attacks conducted between 1980 and 2004.¹⁹³ He noted that rather than religious fundamentalism, the primary motivation of the terrorists he studied was to force democracies out of the terrorists' "homeland."¹⁹⁴ Pape supports this assertion by noting that al-Qaeda followers are ten times as likely to come from countries with a U.S. presence.¹⁹⁵ These facts demonstrate that U.S. foreign humanitarian aid does not have a positive effect on the welfare and defense of the United States. Rather, it puts U.S. welfare and defense in jeopardy.

The Founding Fathers likely foresaw the negative effect that foreign entanglements would have on the welfare and defense of the

188. PAUL, *supra* note 25, at 15, 18-19.

189. *Id.* at 18 (citing Michael Scheuer, Press Conference at the National Press Club (May 2007)).

190. *See id.* at 18-19 (citing Michael Scheuer, Press Conference at the National Press Club (May 2007)) (noting that Philip Giraldo, a former CIA counterterrorism expert, agrees that the U.S. intervention has the consequence of anti-U.S. sentiment and actions); *see also* Adelman, *supra* note 2, at 64 (citing economists as arguing that aid incentivizes governments *not* to make changes as long as they continue to expect aid from foreign donors).

191. Robert Pape, UCHICAGO NEWS, <http://news.uchicago.edu/profile/robert-pape> (last visited Mar. 29, 2013).

192. *Id.*

193. PAUL, *supra* note 25, at 20. Pape compiled the suicide terrorist attacks into a database and analyzed them for his book, *Dying to Win: The Strategic Logic of Suicide Terrorism* (2005). *Id.*

194. *Id.*

195. *Id.*

United States. In his 1801 inaugural address, Jefferson famously stated, “Peace, commerce, and honest friendship with all nations—*entangling alliances with none*.”¹⁹⁶ Washington similarly stated that the United States’ “true policy [is] to steer clear of permanent alliances with any portion of the foreign world.”¹⁹⁷ He believed the United States should work with foreign countries in the commercial arena, but apply its commercial policy equally and impartially without special favors or preferences.¹⁹⁸ The more involved the United States was with foreign countries, the more the United States’ destiny, peace, and prosperity would become intertwined with the international community.¹⁹⁹

V. HUMAN SUFFERING ELICITS EMOTIONS THAT CAUSE CONGRESS TO IGNORE ITS CONSTITUTIONAL LIMITATIONS

If foreign aid is unconstitutional, why has Congress continually allocated billions of taxpayer dollars for it? Human suffering naturally elicits strong emotional responses.²⁰⁰ For example, when

196. PAUL, *supra* note 25, at 9 (citing President Thomas Jefferson, First Inaugural Address (1801)) (emphasis added).

197. President George Washington, Farewell Address (1796), *in* S. DOC. NO. 106-21, at 27 (2000). Washington cited Europe as a prime example of why the United States should maintain as “little political connection as possible” with foreign nations. *Id.* at 26. Europe’s numerous foreign connections meant “she must be engaged in frequent controversies.” *Id.* at 26. Therefore, the United States should limit foreign connections to avoid foreign entanglements. *Id.*

198. PAUL, *supra* note 25, at 9 (citing President George Washington, Farewell Address (1796)).

199. *Id.* (citing President George Washington, Farewell Address (1796)). President John Quincy Adams would likely have rejected U.S. membership in international organizations such as the United Nations. *Id.* at 13 (citing John Quincy Adams, Speech to the U.S. House of Representatives on Foreign Policy (July 4, 1821)). Adams stressed that once the United States acted “under other banners than her own,” it would not be able to “extricat[e]” itself. *Id.* (Adams also stated that America “is the champion and vindicator only of her own. She will commend the general cause by the . . . benignant sympathy of her example. [America] knows that by once enlisting under other banners than her own, were they even the banners of foreign independence, [America] would involve herself beyond the power of extrication, in all the wars of interest and intrigue, of individual avarice, envy, and ambition, which assume the colors and usurp the standard of freedom”).

200. *See, e.g., infra* text accompanying notes 202-33.

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 105

discussing whether to aid French refugees, Representative Nicholas agreed with both Madison and Giles that he did not know “upon what authority the House were to grant the proposed donation.”²⁰¹ He stated that while providing this “charity” would be “extremely laudable,” it was beyond congressional authority.²⁰² Despite its unconstitutionality, Nicholas admitted he would vote for granting aid because of the emigrants’ suffering.²⁰³ He reaffirmed his belief in the unconstitutionality of the aid when he stated he would have to return to his constituents and “honestly tell them that he considered himself as having exceeded his powers.”²⁰⁴

Emotions have not always resulted in the disregarding of the Constitution. An example of this occurred in 1796.²⁰⁵ That year much of Savannah, Georgia was destroyed by a fire.²⁰⁶ Though he did not cite Madison, Representative Macon used Madison’s constitutional interpretation to explain why the federal government could not provide aid to Savannah.²⁰⁷ Macon sympathized with Savannah’s residents.²⁰⁸ Although he felt sympathy for them, he “felt as tenderly for the Constitution.”²⁰⁹ The damage was confined to Savannah and was therefore not “general” for purposes of Congress’ spending power.²¹⁰ Therefore, relief would not be for the “*general* welfare of the United States.”²¹¹ Because the Constitution only authorized relief for the “common defense” or “general welfare,” it

201. 4 ANNALS OF CONG. 172 (1794); *see supra* notes 134-44.

202. 4 ANNALS OF CONG. 170 (1794); *see also* Chakravarty, *supra* note 157, at 310 (“humanitarian and developmental aid” is a “laudable moral objective . . . that captures the spirit of [Americans]”).

203. 4 ANNALS OF CONG. 172 (1794).

204. *Id.*

205. 6 ANNALS OF CONG. 1712 (1796).

206. *Id.*

207. *See id.* at 1717.

208. *Id.* Macon’s sympathy for those who were suffering was reminiscent of Madison’s sympathy for the French emigrants two years before.

209. *Id.*

210. *See* U.S. CONST. art. I, § 8, cl. 1.

211. *Id.* (emphasis added).

did not authorize this aid; Macon would therefore not vote to authorize it.²¹²

Several representatives agreed that the federal government could not constitutionally provide aid to Savannah because the government was limited to spending for the “general welfare” and “common defense” of the United States.²¹³ For example, Representative Moore noted that *individuals* could contribute to those suffering in Savannah.²¹⁴ However, it was not constitutional to provide federal relief.²¹⁵ The federal government only has the power that the Constitution gave to it.²¹⁶ Charity simply does not fall within Congress’ spending authority under the “general [w]elfare” clause.²¹⁷

Proponents of authorizing aid to Savannah cited two examples of when the federal government had provided what they called foreign aid.²¹⁸ The first was when the United States gave aid to French refugees from St. Domingo.²¹⁹ The second was when the United States gave money to the daughters of the Count de Grasse.²²⁰ However, these cited examples were notably different from the case of the people of Savannah.²²¹ For the French refugees, the aid was a

212. 6 ANNALS OF CONG. 1719 (1796) (Representative Kitchell also doubted the constitutionality as well as the effectiveness of the proposed aid).

213. *Id.* at 1719-20 (Representatives Kitchell and Moore agreed aid to Savannah was not general enough to justify aid under Congress’ taxing and spending authority).

214. *Id.* at 1718.

215. *Id.*

216. *See id.* at 1723.

217. *Id.* In 1827, Congressman (and Colonel) Davy Crocket addressed the unconstitutionality of federal government charity. STEPHENS, *supra* note 80, at 100. He noted that individuals have the right to give *their* money for charitable purposes. *Id.* However, Congress does not have the same power with the public’s money. *Id.* President Franklin Pierce similarly believed that government funded charity was unconstitutional. *Id.* at 100-01. In 1854, he vetoed a bill to “help the mentally ill.” *Id.* He stated that he “cannot find any authority in the Constitution for public charity. To approve such spending would be contrary to the letter and spirit of the Constitution and subversive to the whole theory upon which the Union of these States is founded.” *Id.*

218. *See* 6 ANNALS OF CONG. 1723-24 (1796).

219. *Id.* at 1724.

220. *Id.*

221. 4 ANNALS OF CONG. 169 (1794); 6 ANNALS OF CONG. 1712-27 (1796).

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 107

loan that was repaid to the United States.²²² In the case of the daughters of the Count de Grasse, the federal government paid in consideration of their father's past services to the United States.²²³ Therefore, these two cases were arguably authorized by Congress' taxing and spending power.²²⁴

These historical debates demonstrate how emotions can result in a disregarding of the Constitution. This is likely the reason that foreign aid for humanitarian reasons or in response to natural disasters is the least contested form of foreign aid.²²⁵

Closely tied with the emotional aspect of humanitarian aid is the argument that the United States has a moral imperative to offer this kind of assistance.²²⁶ Proponents of foreign humanitarian aid argue that foreign humanitarian aid "advances American moral values . . . by saving lives, fighting poverty and hunger, combating infectious diseases like HIV/AIDS, promoting education, and bolstering democratic institutions."²²⁷ This argument ignores the duty that is owed to support and defend the Constitution of the United States.²²⁸

As Alexander Hamilton eloquently put it:

What is the most sacred duty, and the greatest source of security in a republic? [T]he answer would be, [a]n inviolable respect for the Constitution and laws—the first growing out of the last

. . . .

222. 6 ANNALS OF CONG. 1724 (1796).

223. *Id.* The Count de Grasse led a French fleet at the battle of Yorktown against the British during the American Revolution. *Victory at Yorktown*, HISTORY CHANNEL, <http://www.history.com/this-day-in-history/victory-at-yorktown> (last visited Mar. 31, 2013).

224. *See* U.S. CONST. art. I, § 8, cl. 1.

225. LAWSON & TARNOFF, *supra* note 1, at 3.

226. *Id.*; Wiese, *supra* note 1, at 763; *see, e.g., FPI Analysis, supra* note 158 (arguing that foreign aid "advances America's moral values").

227. *FPI Analysis, supra* note 158; *see also supra* text accompanying notes 161-71 (discussing the ineffectiveness of foreign humanitarian aid in advancing democratization).

228. *See* Act to Regulate the Time and Manner of Administering Certain Oaths, 1 Stat. 23-24 (1789).

... [A] sacred respect for the constitutional law is the vital principle, the sustaining energy, of a free government.²²⁹

Duty to support the Constitution was important to the Framers of the Constitution.²³⁰ Article VI of the Constitution mandates that senators, representatives, and executive and judicial officers of the federal and state governments take an oath to “support the Constitution of the United States.”²³¹ It was the first session of the First Congress that specified the time and manner of these oaths.²³²

One’s own idea of morality may not always be supported by the Constitution. For instance, congressional representatives may decide government-funded foreign humanitarian aid is consistent with their *own* morals. However, the oath public officeholders take upon entering office means that whether an act is consistent with one’s beliefs is irrelevant. The question is whether such an act is constitutionally authorized.²³³

VI. CONCLUSION

John Quincy Adams proclaimed that rather than intervene, the United States needed to respect the sovereignty of other countries.²³⁴ The United States must abstain from intervention, “even when the conflict has been for principles to which she clings as to the last vital

229. ALEXANDER HAMILTON, TULLY NO. III (Aug. 28, 1794), *reprinted in* 17 THE PAPERS OF ALEXANDER HAMILTON, AUG. 1794-DEC.1794, 159-61 (Harold C. Syrett ed., Columbia University Press 1972), *available at* <http://founders.archives.gov/documents/Hamilton/01-17-02-0130>.

230. *See* U.S. CONST. art. VI.

231. *Id.*

232. *See* Act to Regulate the Time and Manner of Administering Certain Oaths, 1 Stat. 23-24 (1789).

233. *See* 4 ANNALS OF CONG. 173 (1794). “Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations.” *Twining v. New Jersey*, 211 U.S. 78, 106-07 (1908).

234. PAUL, *supra* note 25, at 12-13 (citing John Quincy Adams, Speech to the U.S. House of Representatives on Foreign Policy (July 4, 1821)).

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 109

drop that visits the heart.”²³⁵ Adams believed that while the United States “is the well-wisher to the freedom and independence of all. She is the champion and vindicator only of her own.”²³⁶ Rather than intervene, the best thing the United States could do is provide an example of true democracy.²³⁷

Henry Clay reiterated Adams’ thoughts when he stated that the United States should refrain from intervening in the affairs of other countries and instead provide a “model” that other countries could follow.²³⁸ Clay noted that the United States served its own interests and the interests of liberty by avoiding foreign attachments and living according to its democratic values.²³⁹

Despite the wise words of Adams and Clay, the warnings of our Founding Fathers about foreign entanglements, constitutional limitations, and the unwise policy of foreign intervention, the United States provided 149 countries foreign humanitarian aid in 2011.²⁴⁰ Unfortunately, neither the Supreme Court nor Congress is likely to stop the unconstitutional practice of foreign humanitarian aid. The Supreme Court is not likely to stop this unconstitutional spending because it has held national security and foreign policy nonjusticiable political questions.²⁴¹ Nonjusticiability means that Congress is

235. *Id.* at 13 (quoting John Quincy Adams, Speech to the U.S. House of Representatives on Foreign Policy (July 4, 1821))

236. *Id.*

237. *Id.*

238. *Id.* at 14 (citing Henry Clay).

239. *Id.*

240. John Norris, *Interactive Map: Foreign Aid, Country-by-Country Assistance for 2011*, CENTER FOR AM. PROGRESS (Mar. 19, 2012), <http://www.americanprogress.org/issues/security/news/2012/03/19/11328/interactive-map-foreign-aid/>. Paul D. Miller, a former Director for Afghanistan in the National Security Council under Presidents Bush and Obama, is cited as saying the United States provides foreign aid to “select countries.” *FPI Analysis*, *supra* note 158. Considering that the United States only recognizes 195 independent states, providing aid to 149 is hardly selective. *Independent States in the World*, BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEP’T OF STATE (Dec. 9, 2013), <http://www.state.gov/s/inr/rls/4250.htm>.

241. *See e.g.*, *Johnson v. Eisentrager*, 339 US 763, 789 (1950) (dismissing claims by enemy aliens that effectively challenged the propriety of US military presence in China); *see also Sarnoff v. Connally*, 457 F.2d 809 (9th Cir. 1972)

relatively unchecked in its foreign policy.²⁴² Congress is similarly unlikely to stop this unconstitutional spending.²⁴³ Therefore, because neither Congress nor the Supreme Court is likely to do their respective jobs of upholding the Constitution, it is up to the American people to redress this unconstitutional spending.²⁴⁴

Ending the federal funding of foreign humanitarian aid would not mean, however, the end of *all* foreign humanitarian aid. A “Hudson Institute study found that in 2006, Americans *voluntarily* contributed three-times” the amount of aid provided by the government.²⁴⁵ Therefore, proponents of foreign humanitarian aid do not need to worry that ending *government-funded* foreign humanitarian aid would end all U.S. foreign humanitarian aid.²⁴⁶ It will only end aid that is taken from Americans in the form of taxes.

(noting that foreign affairs are within the “exclusive province of Congress and the Executive”).

242. See Christopher R. Chase, Note, *The Political Question Doctrine: Preventing the Challenge of U.S. Foreign Policy in 767 Third Avenue Associates v. Consulate General of Socialist Federal Republic of Yugoslavia*, 50 CATH. U. L. REV. 1045, 1045-46 (2001) (stating that the “political question doctrine limits judicial” intervention into questions “best left to the discretion of Congress or the Executive Branch”).

243. See *supra* Part V (discussing the sympathy factor that contributes to unconstitutional spending).

244. See THE FEDERALIST NO. 33 (Alexander Hamilton).

245. Adelman, *supra* note 2, at 64 (citing the Hudson Institute’s 2007 Index of Global Philanthropy); see also PAUL, *supra* note 25, at 102.

246. *But cf.* Natsios, *supra* note 2 (arguing that privatizing foreign humanitarian aid is not a sufficient substitution for government-funded foreign humanitarian aid because private aid “does not go to the countries and challenges U.S. government policy makers deem central to U.S. national interest”). Natsios argues that minimal private aid “supports democracy and good governance programs” despite their importance to “build[ing] functioning states in countries coming out of a period of dictatorship.” *Id.*

2013] UNCONSTITUTIONALITY OF GOV'T-FUNDED FOREIGN AID 111

The government works for the American people. It is therefore up to the American people to ensure the government is abiding by its constitutional limitations. If proponents of foreign humanitarian aid feel strongly enough about foreign humanitarian aid, they can donate privately or amend the Constitution consistent with the Constitution's Article V.

*Christina A. Alkire**

* Christina Alkire will receive her JD from California Western School of Law in May 2014. She is the Executive Lead Articles Editor for CWSL's International Law Journal. Christina is an Army veteran who spent January-December 2004 serving in Iraq as an intelligence analyst. She has a bachelor's degree in Criminology and Justice Studies from California State University San Marcos, and a master's degree in Homeland Security from San Diego State University.