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INTERPRETING THE WELFARE CLAUSE:
AUTHENTICITY AND FICTION.

The Ohio State University, Ph.D., 1966
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INTERPRETING THE WELFARE CLAUSE:
AUTHENTICITY AND FICTION

DISSERTATION

Presented in Partial Fulfillment of the Requirements for the Degree Doctor of Philosophy in Political Science of The Ohio State University

By

Ivan Brychta, J.U.Dr., M.A.

The Ohio State University
1966

Approved by

[Signature]
Adviser
Department of Political Science
When the roll was called we heard the names of departed colleagues. Each and every one of them knew the spirit of the founders as expressed in the Constitution. The general and permanent interest and welfare of the United States.

(Congressional Record, Volume 76, Part 4, page 4345.)

"Traditionally, Americans are regarded as worshippers of their Constitution - the basic document that sets up the rules, procedures, and principles of the democratic Republic of the United States. Traditionally, also, Americans are credited or charged, as the case may be, with veneration of 'The Founding Fathers'."¹

The stability of the Constitution - it may be added - is itself probably to be credited, in part, to the affection and high regard which the Constitution enjoys from those who live by it.

And the feelings of the people are not divided between the Constitution and the Founders who created it, but the object of regard is one: the Founders are loved because the

ideals they bequeathed to the people are lovable. The abstractness of the principles is humanized by the mythical reality of the persons who proclaimed them.

It follows that in the ordinary thinking given to the Constitution it is assumed that the "intent of the Constitution," and the "intentions of the Founders," are the same thing. The meaning given to each clause of the document is expected to be the authentic content contemplated by the Founders in Convention.

The language of the courts, the Presidents, the Congress, and other public and learned men, with which they usually open statements of constitutional interpretation, reflects and supports this belief.

And yet, in many instances it happens that two or more conflicting interpretations simultaneously claim each to be the true and authentic version of meaning springing from the bosom of the Founding Fathers. In such cases we usually declare that both or all three or four cannot be true, and we intensify the analysis with a view of ultimately attaining a conclusive determination of what the Founders really meant.

But suppose that a long undiscovered piece of evidence should suddenly prove that a practice established for a hundred years, happens to contravene the sense of the Founders: how should then the dilemma be disposed of?
Thirty years ago the Supreme Court of the United States established an interpretation of the general-welfare clause of Article I of the Constitution, which provides the basis of legitimacy for a superstructure of federal governmental activities reaching practically every aspect of life in contemporary America. In the current fiscal year, the quantitative measure of the involvement of the Federal Government in activities which are made accessible to its jurisdiction by virtue of the welfare clause under the 1936 interpretation, is upwards of 15 billion dollars.

What would happen if the legal basis of this whole complex of unifying concepts and functions should be suddenly overturned, cannot be realistically imagined.

Yet even as the Supreme Court formulated its version of the welfare clause three decades ago, there were reasons to believe that its position was not true to the authentic intentions of the Founders in the Federal Convention, and that no such idea was foreseen in the various assemblies which ratified the Constitution. A perennial conflict between at least two schools of thought had persisted for a century and a half before the Supreme Court settled it by decision in 1936, and the substance of the doubt was not dissolved by the formal determination. The Court did not dispose of the argument of the school which it repudiated by adopting the other view.

Out of curiosity to find out whether the historical evidence did or did not authenticate the juridical direction of the modern times, there emerged the motivation for collecting the information which is now the content of this essay. The original purpose was not to prove a thesis to others but to find out the truth for oneself. But of course the same information which will illuminate the face of verity for a person's own purposes, will also support a thesis in confrontation with the outside world; and in that sense it may be said that the present writer "proposes to prove" a certain proposition.

The proposition which the writer believes to be proved by the evidence assembled in this thesis is that while the judicial choice of our times has established a doctrine which represents the thought of Alexander Hamilton, the actual intent of the Convention when adopting the clause in point was nothing of the sort. The Convention never anticipated the idea which was to be engrafted upon the welfare clause a few years later by Hamilton (who in that respect was briefly preceded by Roger Sherman). Rather, the thinking of the Convention in writing the welfare clause into the Constitution was subsequently represented by the proposition urged by James Madison. And the currently accepted interpretation of the welfare clause is, insofar as it purports to express the authentic ideas of the Founders, a fiction.
But insofar as it claims to meet the needs of the modern times and the future, its position is perfectly "valid," i.e. useful.

There being thus two criteria of verity, the one looking to historical authenticity and the other to practical actuality, the two theories have maintained themselves side by side, both true by their respective modes of justification.

From the vantage point of the Founders' outlook, the superimposition, upon their original meaning, of an interpretation more suitable to the needs of a growing society is not an unforgivable heresy. For their basic idea concerning the interpretation of the Constitution was that the document should be expounded on the merits of its own language and not from the recorded traces of the proceedings which led to that language. The Founders caused the records to vanish from the public view for decades. The basic understandings of the nature of the Constitution were worked out in the absence of those records. It was meant by the Founders to be that way. The Constitution was to be the public property of the whole Nation, and the potential of the words making up its text was to be filled from the sources of the public life itself with such meanings as would bind the future and the past together.

In this larger sense, the current interpretation of the welfare clause is within the abstract anticipations of the Founders. In the factually concrete sense, it is not.

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And to the extent that the specific inconsistency may be looked upon as a disturbing fact by a sufficient number of people to constitute a movement, an amendment to the Constitution might be expected to set things right. Otherwise, the whole matter may be simply ignored.

In short, the present thesis confines its ambitions to the purely academic realm where a search for truth for the truth's own sake is its own reward. To stabilize the sands of Sahara or stop the winds with a sieve is not the writer's goal.

In spite of the significance and the controversial nature of the welfare clause, only one comprehensive study in the format of a book has been written about it, and that was forty years ago. This work is accordingly somewhat out of date, and moreover its informative value was from the first impaired by the zealous efforts of its author to prove a preconceived idea. It is hoped that the present study will be found useful as a fairly objective and complete statement of the subject matter.

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ACKNOWLEDGMENTS

Dr. Francis R. Aumann, Professor of Political Science at Ohio State University, saw the origins of the present writing in a transitional state from a small monograph to the relatively extensive statement which it is now. With unlimited generosity, he provided of his time for sessions where this writer was free to view his own half-formed ideas in the objective mirror of a larger and more orderly mind. Not only did this expedite business, but there was the aesthetic experience of emerging from a flux into a world of form, proportion, and perspective.

This influence expressed itself at a slightly later stage of development in a close conjunction with the perceptive judgment of Dr. Lawrence Herson, Professor and Chairman of the Department of Political Science. Dr. Herson made observations contributing to the unity of arrangement and the logic of sequences. He made bibliographical suggestions and raised questions conducive to material supplements. His good offices were moreover instrumental in providing the writer with practical accommodations excellently suited to speed the work on hand.

Dr. Harvey Walker, Professor of Political Science and Attorney at Law, and Dr. Francis Weisenburger, Professor of
History, viewed the manuscript in its final stages. Dr. Weisenburger's notes enabled the writer to see the larger historical context surrounding some of the episodes to which the manuscript had referred in a perfunctory manner and solely for reasons of their legalistic relevancy. Professor Weisenburger also stabilized the orthography of certain proper names whose spelling fluctuates in the documents of history.

Professor Walker raised several substantive questions. He pointed out sentences and paragraphs for clarification. Issues were rediscussed and reformulations made in the text as a result. But he furthermore relieved the writer of a great bulk of the exacting task of systematically cleansing the manuscript of formal defects. Dr. Walker's eminently competent editorial erudition has made a thankfully received contribution to bringing the whole matter to order in time.

Helena Brychta has a tacit endurance without which survival itself would be but an illusory ambition. As for specifics, she organized the bibliography and found a case in Sheppard citations (by accident).

If in spite of all the assistance received the essay is still far from perfection, it is no fault of those who helped to improve it. The writer, at all times a free agent, is solely responsible for the views expressed in his thesis.
VITA

Ivan Brychta was born in Brno, Czechoslovakia, on February 22, 1920. After attending grammar school, he studied at the Klassicke Gymnasium in Brno from 1931 to 1939, majoring in Latin and Greek. He graduated with honors in the spring of 1939. In the fall of that year he commenced studies at the Faculty of Law of Masaryk University in the same city. For a time these studies were interrupted by foreign invasion and occupation, but were completed in the autumn of 1946, at which time Mr. Brychta received the degree of Doctor Utiusque Juris (J.U.Dr.). He was subsequently a staff member of the Ministry of Codification of Law (Ministerstvo Unifikaci) in Prague, until recurrences of political unrest in 1948 occasioned his departure. He took up residence in the United States in the autumn of 1949, and studied philosophy at Oberlin College, Oberlin, Ohio, receiving the degree of Master of Arts in Philosophy in the spring of 1951. Later that year he became a graduate assistant and a candidate for the degree of Doctor of Philosophy in Political Science at Ohio State University in Columbus, Ohio. From time to time, Mr. Brychta discontinued the study at Ohio State University and taught political science at various colleges in the United States.
He returned to complete the studies and received the PhD in Political Science in winter 1966.
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WE THE PEOPLE OF THE UNITED STATES, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, DO ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Taxes and Imposts shall be uniform throughout the United States;

To borrow Money on the credit of the United States;
To ........................................................................
To ........................................................................
To ........................................................................

Etc.,
eetc.,
eetc.,

And -

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9 ........................................................................

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INTRODUCTION

The Constitution postulates the idea of equality in several senses and contexts, and the fulfilment of the idea presupposes a certain evenness of conditions throughout the realm to which the Constitution applies—that is to say a certain uniformity. Although a bit of the required uniformity of conditions can be secured by multilateral actions of the several states, the decentralized process of equalization and unification is found scarcely less impractical than it was under the Articles of Confederation. The same reasons which impelled the conversion of the Articles into the Constitution in 1787, make it desirable in 1967 that public concerns which are regarded as national should be processed through a central government. The difference is that the areas of human concern which call for the recognition of their status as national have augmented and multiplied.

What, in the opinion of the Founders, was of national significance, was enumerated and stated in the Constitution. The rest was to be none of the central government's concern.

But the Constitution was barely three years old when many in the nation saw a good reason to wish that a few more bits of jurisdiction should be added to the existing powers
of the government, and soon the activities exercised by the Government began slightly to surpass the ideal line with which the originally intended jurisdictional orbit of the governing power was circumscribed.

The amount of the excess depended, of course, on the position in which the limiting line was visualized properly to be, and this differed as between the various observers, interests, and groupings of interested persons. But since, as has been said, even rubber can be stretched only so far, there were even in the old days objects which, even in the admission of those stretching the given powers to the maximum perimeter, were outside of the legitimate sphere of the Government's power.

This obstacle they did not, however, take lying down. For it occurred to them that while the governing power of the Government be limited to a certain orbit, this did not necessarily mean that the Government could not make free allotments of money for purposes and objects over which it did not have any governing jurisdiction, provided that the practice of giving money did not become a pretext for governing the aspects of life into which the money was invested. This position based itself upon the fact that in Article I, Section 8, paragraph 1, the Constitution authorized Congress "to lay and collect Taxes . . . to . . . provide . . . for the general Welfare of the United States."

This idea did not set well with all. Many, perhaps most, people sided with the opinion that, in the first place, the
Constitution did not suggest by any of its provisions, that the fiscal span of the Government was supposed to be larger than the sphere over which the Government was to govern. For if the Government was limited to certain enumerated purposes, surely its finances were meant to subserve those purposes, and no others. On the other hand, if the Government was meant to take care of everything which in its opinion called for its cares, why did the Constitution pretend otherwise by specially pointing out the enumerated fields of action? Surely it was illogical—contended the opposition to the generous concept of the scope of the Government's functions—that the fiscal jurisdiction should be larger than the governing jurisdiction. But moreover, it was also illogical that the power to govern should be confined to a lesser orbit than the power to spend money, for how could the Government, how could the people, afford to pay for something over which the Government had no say?

If the giving away of the money was not intended to influence the events of life in line with the public policy, it was a frivolous waste. But if it was designed to influence them, what else was it than an arrogant circumvention of the intent of the Constitution?

To this the broad constructionists answered that there was nothing in the Constitution limiting the fiscal powers of the Government to the enumerated fields of action. Not only was there no such restriction, but the Constitution did
explicitly say that taxes were authorized to be levied for the general welfare of the United States.

Thus was begun a perennial conflict between two schools of constitutional interpretation, one adhering to certain statements of Alexander Hamilton, and the other to expressions by James Madison.

The target of the conflicting opinions was the provision of the Constitution's Article I, Section 8, paragraph 1, a lengthy sentence which speaks of taxes, debts, defense, the general welfare, and the idea of uniformity of taxes. Either the whole sentence, or so much of it as may be, in a given context, connected with the words "general welfare of the United States," is usually called "the general-welfare clause," herein-after simply "the welfare clause."

Throughout the present paper, the phrase "the welfare clause" refers to the aforementioned provision of the Constitution, unless it is specially pointed out that the reference is to a similar clause in the Preamble to the Constitution or to either or both of the welfare clauses in the Articles of Confederation (Article 3 or 8 or both). The present paper is ultimately a study of the powers of Congress under the present Constitution; hence we are not directly interested in a charter which no longer is, though once it was, the legal constitution of the Union. However, the Articles of Confederation cannot be wholly put out of view when interpreting the Constitution, and we shall have an
occasion when it will be appropriate to deal with the welfare clauses of that older charter.

As for the Preamble to the Constitution, it has been settled for a long time that in itself it is no provision creating rights, duties, or jurisdictional powers of a legal nature. In early times, however, occasional efforts were made to regard it as a source of power.

The conflict between Hamilton's and Madison's respective views of the import of the welfare clause of Article I of the Constitution began to develop in the year 1791. The two men never met in direct debate over the clause, nor was there ever any exchange of views between them in any form. The quasi-dialogue is scattered over decades, and has been carried on by numbers of public men on both sides of the issue.

Both Hamilton and Madison reject the view that the welfare clause is a plenary empowering provision. Both agree that it relates to the taxing power, and that it circumscribes the purpose for which tax-money may be spent. But they differ on the latitude of the concept "general welfare" itself.

The idea that the clause is a plenary enabling provision had made its first appearance a few years before the Hamilton-Madison conflict developed. It was voiced at least as early as October 16, 1787, just barely a month after the publication

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of the draft of the Constitution. It is important to take notice that this proposition was not "advocated" in the sense of applauding a constitution which proposes to create a central government of plenary powers, but, on the very contrary, the plenary character of the welfare clause was being asserted as a part of the movement seeking to discredit the Constitution.

Without exception, all those who, during the ratification proceedings, asserted the plenary import of the welfare clause, were opposed to the adoption of the Constitution, precisely on the ground that it sought to give too much power to the central government. Had the opinion prevailed that the welfare clause had the threatened meaning, the Constitution would not have been adopted.

The adoption was made possible only by emphatic efforts to make it clear that such was not the intended meaning of the welfare clause. After the adoption, all those who had at first asserted, now naturally denied, the plenary import of the clause, since it was only on the condition that the suspected meaning be rejected, that they had consented to adopting the Constitution.

Throughout a body of literature originating for the most part some forty years or so after the adoption of the Constitution, repeated assertions were found to the effect that there had always existed a school of thought maintaining that the welfare clause conveyed to Congress plenary powers
to legislate for the general welfare. From the context of these reports it is evident that they assert the existence of a school advocating and recommending such an interpretation.

The present writer has been unable to verify this contention, and it is his opinion that the assertions arise from certain misunderstandings. Only in very recent times have writings appeared in which the idea that Congress ought to assume plenary powers under the welfare clause, is advocated.

The proposition which we consider the result of a misunderstanding is expressed clearly in certain statements by Joseph Story in 1833. Somewhat vaguely, it is asserted by Madison and Jefferson in 1791, 1797/8, and 1799-1800.

But the statements dating from the aforementioned years of the late eighteenth century refer mainly to the practices of the Congress, not to explicit declarations of the thesis. And the relevancy of the congressional practice for the point which Jefferson and Madison make is itself a matter of interpretation.

These two anti-federalists moreover misunderstood the position of Alexander Hamilton, and their misconstruction has resulted in a proposition distinct from the three alternatives which we have so far considered in the above. It constitutes a fourth possibility.

For completeness, a fifth function of the welfare clause may be added as it emerges from the study of the materials,
but this fifth alternative played no important part in the history of the welfare clause as traditionally understood.

On the next page, the five possible interpretations of the welfare clause are synoptically arranged for comparison. The Roman numerals with which the several variants are designated in the table are maintained throughout the sequel hereof for quick identification.

All the main possibilities of interpretation were discovered and stated before the eighteenth century was over. After that, a struggle among the proponents of the various alternatives dragged on without ever reaching an entirely convincing settlement.

During the primary formative period in which the main types of interpretation of the welfare clause were established (1787-1800), and for a number of decades after that, the statesmen of the new republic had no access to the written records in which the proceedings of the Federal Convention were described. In 1819 the meager Journal of the Convention was published, but the Debates did not see the light of day until 1840.

The first systematic effort to establish the authentic meaning of the welfare clause from the proceedings of the Convention was published by Joseph Story in 1833, on the basis of the Journal alone. Story concluded that the Convention had intended Variant (II) as the true meaning of the welfare clause. A hundred years later Story's authority
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<td>I:</td>
<td>Congress has power to make all laws necessary for general welfare, regardless of specific grants of power enumerated in Constitution</td>
<td>Anonymous in old days. Recently adopted by J.F. Lawson (1926). On other grounds advocated by W.W. Crosskey (1953).</td>
<td>Never officially admitted</td>
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<td>II:</td>
<td>Congress may govern in enumerated fields only; but may appropriate public funds for any purpose within concept of general welfare regardless of enumeration of powers in Constitution</td>
<td>Roger Sherman: 2-4-1791 A. Hamilton: 12-5-1791 J. Monroe: 1822 A. Jackson: 1832 J.Q. Adams: 1833 J. Story, 1833 E.S. Corwin, 1923 U.S. Supreme Court, 1936</td>
<td>Competed for recognition with Variant number(III) until 1936.</td>
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<td>III:</td>
<td>Congress may govern in enumerated fields only. It may spend money only in those fields</td>
<td>J. Madison at all times J. Monroe at first Charles Warren (modern)</td>
<td>Repudiated in 1936 by U.S. Sup. Court.</td>
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<td>IV:</td>
<td>Congress may govern in the enumerated fields; but may appropriate for general welfare as (II), above; and when it does appropriate, it may govern the field into which its money is put, regardless of the enumeration of powers. In results, this theory tends to agreement with (I), above.</td>
<td>Attributed by mistake to Hamilton by Madison.</td>
<td>Emphatically rejected by Story, Monroe, &amp; other Hamiltonians of 19th cent. but practised by Sup. Ct. in 1952.</td>
</tr>
<tr>
<td>V:</td>
<td>Concerns regulatory not fiscal aspects of taxation.</td>
<td>Problems raised in case Cunard Steamship Co. v. Robertson, 112 U.S. 530 (1884).</td>
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**TABLE I**

FIVE VARIANTS OF MEANING OF THE WELFARE CLAUSE
played an important part in forming the opinion of the Supreme Court, which decided in favor of the Hamiltonian concept of the clause.

But about the same time, in the late twenties of the twentieth century, renewed studies of the records of the Convention led some scholars to the conclusion that the Federal Convention had intended the clause to have the meaning which has since been associated with Madison. Meanwhile in 1926 an effort was made to establish the proposition that the Variant (I) was the authentic reading of the clause.

At the present time the characteristic structure of the Union is predicated upon the leadership of the central government in every aspect of life which has been recognized as having national relevancy. The central government controls vast topical areas of which there is no mention in the Constitution. This phenomenon is superimposed upon the original constitutional pattern by making a Hamiltonian use of the welfare clause, which sustains the principle of federal grants in aid for purposes exceeding the enumerated fields of federal action. More than fifteen billion dollars a year are currently allotted by the Federal Government to the several states as a means of extending federal leadership into spheres in which the Government would otherwise lack jurisdiction.

Our present study was begun with the purpose of finding out the validity of the grounds on which the Hamiltonian
position was affirmed against that of Madison’s. The purpose of presenting the findings, which negate the official position, is to share a demonstration of the truth we have found as we have found it.

The act of declaring the found verity is not predicated in this case upon any manner of expectation that it should be "put to use." How could it? The functional vacuum that would arise from discontinuing established forms of the federal grant would, in all probability, fill with chaos. Besides, the fact that a given practice is not supported by anticipations which belong to a remote era of history would no longer appear to be regarded as a sufficient reason for abandoning it if it is otherwise useful or even necessary.

On the other hand, historical research cannot bow to present or future demands of policy to the extent of distorting the realities of the past.

In short, all we have to do to satisfy the various postulates involved is to recognize that in application to the officially adopted doctrine of the welfare clause, the idea of its historical authenticity is a fiction.
NOTE INTRODUCING PART I

This essay is composed of Part I and Part II. These two are functionally related in such a manner that the first part is, in substance, a process in which a question, or questions, are formulated. From the second we expect the solutions.

In Part One we move through historical time from the moment the first interpretations of the constitutional clauses which interest us were made, to the present. In the course of this journey we encounter the various types of views which have been taken of the Constitution and, especially, of those portions of it which form the object of our enquiry.

The range of the possible alternatives of interpretation was shown synoptically on a table we have already seen. The narrative of Part I, which follows, presents them in the historical context in which they have arisen. In the course of the survey of these developments, the reader remains in suspension as to the answer to the problem unfolded in Part I. He becomes acquainted with the various interpretations, without knowing in advance which is the authentic version.

The analysis of the process which formed the Constitution and the determination of the authentic meaning of the welfare clause, is reserved for Part II of this essay.

Thus the two main parts are presented in a reversed chronological order as far as the relationship between them
is concerned. Within each of them, however, the sequence of presentation is essentially chronological, although to some extent the purely mechanical chronology is subordinated to requirements of inherent logical connections of phenomena and ideas.
PART I
CHAPTER I

THE WELFARE CLAUSE IN RATIFICATION DEBATES

The Constitution was authored by the Federal Convention, but authorized by the People in a series of separate ratification acts performed respectively in the several states.¹

The ratification proceedings are the source of evidence of two types. First, as supplementary to the proceedings of

¹The draft of the Constitution was received as a report of the Federal Convention to the Second Continental Congress. The Congress followed Article VII of the draft of the proposed Constitution in transmitting the draft to the several state legislatures for further proceedings. The resolution of Congress transmitting the draft to the states, is reprinted in Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, Together with the Journal of the Federal Convention, Philadelphia, J.B. Lippincott Co., 5 vol's., 1937; Vol. I, pp. 318 ff. Elliot's compilation is cited hereafter as "El." The present chapter relies primarily on the records of the ratification proceedings contained in El., volumes II, III, and IV. Additional information on the ratification proceedings is found in various sources, among which especially helpful to us have been Albert J. Beveridge, The Life of John Marshall, Boston and New York, Houghton Mifflin Co., 1916; and Jackson T. Main, The Anti-Federalists, Crisis of the Constitution, 1751-1788, Chicago, Quadrangle Paper Backs, 1964. The events of the several ratifications from state to state are moreover reviewed in George Ticknor Curtis, History of the Constitution of the United States (1865), Vol. II, pp. 479 ff. For complete data on Mr. Curtis's work, see infra, pp. 171 ff.
the Federal Convention, in that they contain presentations by former members of the Federal Convention itself, frequently members of important committees. Since the committees had left no official records, the expressions made by the former members in the ratification conventions and elsewhere, are the nearest available approximation to authentic evidence as to the intentions of the committees and of the Federal Convention.

Secondly, the ratification on proceedings exhibit the will of the People in whose name the Constitution was inaugurated.

The problem of the relationships between and among the ratification assemblies themselves on the one hand, and between them and the Federal Convention on the other, has remained an open question in the sense that no satisfactory theory exists to indicate which interpretation should prevail in case a constitutional provision was understood differently among these various bodies. It is to be presumed that the controlling factor is the opinion of the People for whom the Constitution was drafted, and not the intentions of the draftsmen. The accepted practice of interpretation, however, seems to place a higher priority upon the views of the Federal Convention itself.

Fortunately, the dilemma need not disturb us exceedingly in our present enquiry, because, as will be seen, an essential unity of opinion was eventually achieved as between
the views of the Federal Convention as represented by its former members on the one hand, and the ratification conventions on the other.

From some of the states no official record of the ratification proceedings has been preserved. In some cases only incoherent fragments remain. And in some states from which we do have a reasonably complete record, the welfare clause was not discussed. In such cases we have taken notice of statements that come nearest to offering a basis for inference.

II The Ratification Assemblies

I. Delaware

The state of Delaware was first to ratify the Constitution; but otherwise nothing is known about its proceedings except that the ratification was unanimous.

II. Pennsylvania

The state ratification convention met two months after the adjournment of the Federal Convention, and ratified on December 12, 1787, by a vote of 46 to 32, following bitter controversies.

The main defender of the Constitution was James Wilson, a one-time member of the Committee of Detail of the Federal

2El. II:415-546.
Convention. Explaining the nature of the union intended by the Constitution, he observed, inter alia:

There are two kinds of governments— that where general power is intended to be given to the legislature, and that where the powers are particularly enumerated. In the last case, the implied result is that nothing is intended to be given than what is so enumerated, unless it results from the nature of government itself.3

Whoever views the matter in a true light, will see that the powers are as minutely enumerated as possible, and will also discover that the general clause, against which so much exception is taken, is nothing more than what was necessary to make effectual the particular powers that are granted.4

We have heard much about a consolidated government... I apprehend that the term, in the numerous times it has been used, has not always been used in the same sense. If it is taken in this view (that the consolidated government is such as will absorb and destroy the several states), the plan before us is not a consolidated government... On the other hand, if it is meant that the general government will take from the state governments their power in some particulars, it is confessed, and evident, that this will be its operation and effect.5

As for state sovereignty, Wilson distinguished between the sovereignty of the governments and the sovereignty of the people. The latter he affirmed with enthusiasm. The former he disdained. Concerning the relation between the two levels of government, federal and state, he regarded

3El. II: 454.
4El. II: 481.
5El. II: 443.
them as two equipoised depositories of the people's trust, as above made clear. In case of doubt he preferred presumption in favor of the federal government "because that government is founded on a representation of the whole Union; whereas the government of any particular state is founded only on the representation of a part . . . . Is it not more reasonable that the counsels of the whole will embrace the interest of every part, than that the counsels of any part will embrace the interests of the whole?"  

III. New Jersey

There are no official records preserved from the proceedings.

There appears to have been no opposition to the Constitution.7

IV. Georgia

Also in this state, the nature and content of the ratification proceedings is beclouded by the absence of any authentic records. From contemporary correspondence it is known that the Constitution was read in Georgia paragraph by paragraph "with a great deal of temper,"8 but nevertheless its adoption was unanimous in the end.

6 El. II: 425.


8Main, 195, and note 22 at p. 196. Beveridge, Ibid.
While in Delaware and New Jersey a general satisfaction with the relatively important position given to small states by the Constitution seems to have been a significant factor, in Georgia the primary concern at the time was the threat of Indian aggression. Joining the Union promised protection from this peril.9

V. Connecticut

To the state of Connecticut the main features of the Constitution were first presented in a message written by Roger Sherman and Oliver Ellsworth, both of whom had been important members of the Federal Convention. The message, dated September 26, 1787, was addressed to the legislature of the state, with a view of recommending the Constitution for ratification.10

In the light of the role Sherman appears to have played in the insertion of the welfare clause into the Constitution, the following excerpt from the message is interesting:

The objects for which Congress may apply moneys are the same mentioned in the eighth article of the Confederation, viz., for the common defence and general welfare, and for payment of the debts incurred for those purposes.11

Just precisely what was the intended scope of the spending

10 El. I: 491 f.
11 El. I: 492.
power under the Articles of Confederation, was argued in the old days by Madison and Story,\textsuperscript{12} and again by Edward S. Corwin in more recent times.\textsuperscript{13} The issue has not been satisfactorily settled to the present day.

The message by Sherman and Ellsworth, further, represented the Constitution as creating a general government whose powers were "specially defined," and concerned only "matters respecting the common interest."

These ideas were repeated in the ratification convention itself by Ellsworth, who was the main speaker.

The power of Congress to lay and collect taxes was a cause of concern in the ratification convention. There were voices contending that the taxing power was too extensive, and there were those who maintained that Congress should have no taxing powers at all.

The welfare clause was not mentioned in the debates under that description. But it seems that it occurred to someone that the power to tax and spend might become the tool whereby the general government would open its way into fields of legislation not entrusted to it by the several specific grants of power. That such anticipations were expressed, may be inferred from a response with which Oliver Ellsworth undertook to refute them, and which was in part as follows:

\begin{quote}

\end{quote}
pressed, may be inferred from a response with which Oliver Ellsworth undertook to refute them, and which was in part as follows:

"But," says the honorable objector, "if Congress levies money, they must legislate." I admit it. "Two legislative powers," says he, "cannot legislate in the same place." I ask, Why can they not? . . . I grant that both cannot legislate on the same object at the same time, and carry into effect laws which are contrary to each other. But the Constitution excludes every thing of this kind. Each legislature has its province; their limits may be distinguished. . . .14

Speaking on the nature of the Constitution in general, Ellsworth said:

This Constitution defines the extent of the powers of the national government. If the general legislature should at any time overlap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and upright, independent judges will declare it so. Still, however, if the United States and the individual states will quarrel, if they want to fight, they may do it, and no frame of government can possibly prevent it. It is sufficient for this Constitution that, so far from laying them under any necessity of contending, it provides every reasonable check against it. But perhaps, at some time or other, there will be a contest, the states may rise against the general government. If this does take place, if all the states combine, if all oppose, the whole will not eat up the members, but the measure which is opposed to the sense of the people will prove abortive. In republics, it is a fundamental principle that the majority govern, and that the minority comply with the general voice. How contrary, then, to republican principles, how humiliating, is our present situation! A single state can rise up, and put

14 El. II:195 f.
a veto upon the most important public measures. We have seen this actually take place. A single state has controlled the general voice of the Union; a minority, a very small minority, has governed us. So far is this from being consistent with republican principles, that it is, in effect, the worst species of monarchy.\textsuperscript{15}

Also to the point is the presentation made after Illsworth's by Governor Huntington, who said among other things:

The state governments, I think, will not be endangered by the powers vested by this Constitution in the general government. While I have attended Congress, I have observed that the members were quite as strenuous advocates for the rights of their respective states, as for those of the Union. I doubt not but that this will continue to be the case; and hence I infer that the general government will not have the disposition to encroach upon the states. But still the people themselves must be the chief support of liberty. While the great body of freeholders are acquainted with the duties which they owe to their God, to themselves, and to men, they will remain free. But if ignorance and depravity should prevail, they will inevitably lead to slavery and ruin. Upon the whole view of this Constitution, I am in favor of it, and think it bids fair to promote our national prosperity.\textsuperscript{16}

Other speakers made statements in the Connecticut convention. Among them only Oliver Wolcott made further allusions to the possibility of a danger to the liberties of the people or to the position of the states, from the central government to be created.

I have given it all the consideration in my power, and I have, a considerable time since, made up my mind on the subject, and think it my duty to give my voice in favor of adopting

\textsuperscript{15}\textit{El. II:196 ff.} Italics in the original.

\textsuperscript{16}\textit{El. II:199 ff.}
It. It is founded upon the election of the people. If it varies from the former system or if it is to be altered hereafter, it must be with the consent of the people. This is all the security in favor of liberty that can be expected. Mankind may become corrupt, and give up the cause of freedom; but I believe that love of liberty which prevails among the people of this country will prevent such a direful calamity.

The Constitution effectually secures the states in their several rights. It must secure them for its own sake; for they are the pillars which uphold the general system. . . So well guarded is this Constitution throughout, that it seems impossible that the rights either of the states or of the people should be destroyed.17

In sum, it appears that the ratification proceedings in Connecticut did not shed much light upon the spending powers of Congress, but it is clear that the welfare clause was not regarded there as a generally empowering provision.

VI. Massachusetts

Ratification in Massachusetts was a turbulent controversy. Almost equally divided loyalties contended in vigorous arguments whether to adopt or reject the Constitution. From January 9 to February 4, 1788, the document was debated clause by clause,18 and nearly a third of these debates concerned Section 8 of Article I, where the welfare clause is located. About forty persons spoke out during these arguments, about half of whom were opposed to or severely critical of the Constitution.

17El. II:202
18El. II:1 ff.
There was not one voice complaining that the powers proposed to be given to the general government were too few or too insufficient. On the contrary, all those adverse to the Constitution were of opinion that the power was too much.

The welfare clause was mentioned three times as a part of the taxing provision, but otherwise ignored. It is plainly evident that it was neither considered a grant of power, nor a true limitation worthy of mentioning. None of the most powerful onslaughts on the proposed Constitution on the alleged ground that it was designed to create too much power in Congress, pointed to the Welfare Clause as the (or as one) source of that power. Outside of the discussions addressed to Section 8 of Article 1, the clause was never mentioned either. In one of the three instances which cited it, the speaker showed insight that the Welfare Clause is a potential vehicle of an infinite spending power. This man, Mr. Symmes, came the closest of all those who dealt with the clause in any of the ratification conventions, to anticipating the possibility which later became the Hamiltonian theory of the clause. Mr. Symmes was opposed to the Constitution as conveying too much power, including too much power to tax and too much power to spend.

The accusers of the Constitution in the Massachusetts convention never took issue with the assurances of its defenders, that only the enumerated powers would constitute Congress' jurisdiction. Waiving the point seems to bespeak
their opinion that nominally the Constitution might very well be of limited powers, but legalistic formalism was of little concern to them in contrast with what they conceived to be the overpowering reality of an unlimited right of taxation.

Among the several aspects of the taxing power which are relevant for estimating the scope of the supremacy which the Congress can assert by those means, are (1) the things or activities upon which tax can be laid, (2) the purpose of the tax, as revenue or regulation, and (3) the manner in which and the objects for which the money will be spent. The classification of taxes into (a) taxes proper (and these in turn into direct and indirect), (b) duties, (c) imposts, and (d) excises, arises under the criterion (1), above. Excises are understood to be payments which the importer of foreign goods must make as a condition of being permitted to bring the load into the country for commercial disposition. This particular tax is an especially convenient tool of economic regulation (criterion 2, above) aimed at improvements in the condition of the domestic industries; it is a tool for the fostering of one category of Internal Improvements.

These excise practices were anticipated, recommended, and the granting to Congress of the power to exercise them, was welcomed, in several speeches made in the Massachusetts convention, and on that score those speakers were unopposed. Much in the presentations then made reads like an outline for the Hamilton program of national development in manufactures, commerce and agriculture. Thus Mr. Dawes—
thought the powers in the paragraph under debate should be fully vested in Congress. We have suffered... for want of such authority in the federal head. This will be evident if we take a short view of our agriculture, commerce, and manufactures. Our agriculture has not been encouraged by the imposition of national duties on rival produce; nor can it be, so long as the several states may make contradictory laws. This has induced our farmers to raise only what they wanted to consume in their own families. . . .

Our manufactures are another great subject, which has received no encouragement by national duties on foreign manufactures, and they never can be any authority in the Confederation. It has been said that no country can produce manufactures until it be overstocked with inhabitants.

He explained that immigration of industrial workers supplies this lag, and continued:

Besides, this, the very face of our country leads to manufactures. Our numerous falls of water, and places for mills, where paper, snuff, gunpowder, iron works, and numerous other articles are prepared, --these will save us immense sums of money, that would otherwise go to Europe. The question is, Have these been encouraged? Has Congress been able, by national laws to prevent the importation of such foreign commodities as are made from such raw materials as we ourselves raise?

Failure so to protect the country from dependency on foreign sources, foreign merchants and manufactures, implies potentially a loss of the country itself.

So Corsica was once mortgaged to the Genoese merchants for articles which her inhabitants

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19El. II:57.
20El. II:59.
21Ebid.
did not want, or which they could not have made themselves; and she was afterwards sold to a foreign power.22

He concluded:

If we wish to encourage our own manufactures, to preserve our own commerce, to raise the value of our own lands, we must give Congress the powers in question.23

But since there was a strong tendency in the Massachusetts convention to think of Congress as being a foreign power, more alien at any rate than their own institutions, it is easily seen how the above argument would add fuel to the fire nourished by the anti-federalist element. Thus,

Mr. Bodman said that the power given to Congress, to lay and collect duties, taxes, &c, as contained in the section under consideration, was certainly unlimited, and therefore dangerous; and wished to know whether it was necessary to give Congress power to do harm, in order to enable them to do good. It had been said, that the sovereignty of the states remain with them; but if Congress has the power to lay taxes, and, in cases of negligence or non-compliance, can send a power to collect them, he thought that the idea of sovereignty was destroyed. ... The power in the 8th section, he said, ought to have been defined; that he was willing to give power to the federal head, but he wished to know what that power was.24

On the other hand,

Mr. Sedgwick, in answer to the gentleman last speaking, said, if he believed the adoption of the proposed Constitution would interfere with the state legislatures, he would be the last to vote for it; but he thought all the

22Ibid.
23Ibid.
24El. II:60. (Original Italics)
sources of revenue ought to be put into the hands of government, who were to protect and secure us; and powers to effect this had always been necessarily unlimited. . . .25

Another gentleman (Singletary)

thought no more power could be given to a despot, than to give up the purse-strings of the people. . . .26

and another (Thompson) added

I totally abhor this paragraph /Section 8 of Article I of the Constitution/.25

Some (as Kingsley) feared that "... our federal rulers will be masters, and not servants," because--

after we have given them all our money, established them in a federal town, given them the power of coining money and raising a standing army, and to establish their arbitrary government; what resources have the people left?27

Others (Neal) feared not so much despotism as "consolidation" and this particularly because it would imply fraternization with the South, which adhered to a "different way of life," and even the best of them were really contemptible: "O! Washington! what a name has he had! How he has immortalized himself! But he holds those in slavery who have as good a right to be free as he has. He is still for self. . . ."

Concerning the purposes of spending, Mr. Symmes said:

To pay the debts, etc. These words, Sir, I confess, are an ornament to the page, and very musical words; but they are too general as any kind of limitation of the power

25Ibid.
26El. II:61
of Congress, and not very easy to be understood at all. When Congress have the purse, they are not confined to rigid economy; and the words "debts, here, is not confined to debts already contracted; or, indeed, if it were, the term "general welfare" might be applied to any expenditure whatever.  

On the whole, then, the Massachusetts approach to the Constitution was not primarily legalistic, as was the case in Pennsylvania whose ratification convention was dominated by James Wilson. Unconvinced by "Wilsonian oratory," as someone in the Massachusetts convention (which appears to have been familiar with the Pennsylvania developments) called it, the Massachusetts homo economicus planted his sight upon the boundless potential of the Tax Clause, "The keystone or ... the magic talisman, on which the fate of the supreme law of the land depends."

Here, Sir (however kindly Congress may be pleased to deal with us,) is a very good and valid conveyance of all the property of the United States, -- to certain uses indeed, but those uses capable of any construction the trustees may think proper to make.

Symmes then condemned as illusion the confidence "that this body [Congress] never will do any thing but what is for the common good."

"Let us consider that matter," said Symmes.

Faction, sir, is the vehicle of all transactions in public bodies; and when gentlemen know so well, I am rather surprised to hear them so sanguine in this respect. The prevalent faction is the body; these gentlemen, therefore, must mean that the prevalent faction will be always

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28 El. II:74. (Original Italics)
right, and that the true patriots will always outnumber the men of less and selfish principles. From this it would follow that no public measure was ever wrong, because it must have been passed by a majority; and so, I grant, no power ever was, or ever will be, abused. In short, we know that all government have degenerated, and consequently have abused the powers reposed in them and why should we imagine better of the proposed Congress than of myriads of public bodies who have gone before them, I cannot at present conceive.29

This analysis has well anticipated the observation, found in modern textbooks of constitutional and administrative law, that blanket clauses, such as "public interest," "general welfare," or "common good," invite pressure groups to plunge into a mutual fight each doing its best to preempt the meaning of the clause. Nor can it be said that Symmes was wrong in predicting the power of the Taxing Clause.

Only his pessimism as to the quality of the use of the power (in contradistinction to its extent) seems to have been excessive, for the quality of congressional legislation can hardly be said to have deteriorated in time.

Eventually, the cleavage dividing the Massachusetts convention was lessened by proposals made by the Governor of the state, suggesting a system of limitations (bill of rights) to be considered for adoption by way of amendments to the Constitution. Although this was not formulated to mean that the acceptance of the Constitution by Massachusetts, if it is accepted, would be conditional and contingent upon the passage (under Article V of the Constitution) of those

29El. II:71.
amendments, nevertheless, the suggested amendments expressed the sense of the convention, and proclaimed the moral and political weight of the state of Massachusetts to be on the side of restrictive interpretations of the Constitution.

The first of the Massachusetts resolutions to restrict the Constitution, expressed the idea which later became the Tenth Amendment.

On all this plain evidence, any contention that the state accepted the Constitution with the understanding that it, through any part of its text or all of it, conveyed plenary powers to the Congress of the United States, would be crudely false.

VII. Maryland

From this state there has survived a fragmentary record revealing splits and confusions.

There was a group which would not accept the Constitution without prior amendments, but it yielded for a moment, and the Constitution was adopted. Then, however, the demands were renewed and amendments proposed. One of them provided:

That Congress shall exercise no power but what is expressly delegated by this Constitution.30

This was accompanied by a commentary directed at the welfare clause and the sweeping clause, as follows:

30El. II:550.
By this amendment, the general powers given to Congress by the first and last paragraphs of the 8th Section of Article I . . . would be in a great measure restrained; those dangerous expressions, by which the bills of rights, and the constitutions, of the several states may be repealed by the laws of Congress, in some degree moderated; and the exercise of constructive powers wholly prevented. 31

Meanwhile, however, the majority of the ratification convention revived the already-voted adoption of the Constitution, and the convention was adjourned. Some of the adherents of the amendments then met in a caucus, and made out an Address to the People of Maryland, under the date of April 21, 1788, in which the above quoted amendment and commentary are made public.

The nature of the internal dissensions of the Maryland convention appears to be analogous to those which divided the convention in Virginia, below.

The refusal of the majority of the convention to adopt restrictive amendments was predicated upon the fact that the demand of prior amendments would necessitate another Federal Convention, and upon the fear that in that case no constitution would ever be adopted.

Aside from the ratification convention's proceedings, certain proceedings in the legislature of the state should be considered in connection with an enquiry into Maryland's adoption of the Constitution, and the interpretation put upon the Constitution by that state.

The legislature considered a long report prepared during the autumn and winter, following the drafting of the Federal

31 Ibid.
Constitution, by the state's attorney general, Mr. Luther Martin. Mr. Martin had departed from the Federal Convention in protest, essentially on the ground that the Constitution was not compatible with the sovereignty of the states.

The letter, dated January 27, 1788, and addressed to the Speaker of Maryland's House of Delegates, Thomas C. Deye, was subsequently amplified by Martin's oral presentations in the House. Martin opposed the Constitution throughout, and elaborated upon a number of its provisions to show that the instrument was unduly centralistic. But he never mentioned the welfare clause as a source of general powers, nor in any other connection.

VIII. South Carolina

In this state, the Constitution was first debated in the House of Representatives, in sessions which lasted from January 16 to January 19, 1788. Afterwards a ratifying convention met in May of the same year. Although the sessions of the convention extended over more than ten days, there is less available information from the convention than from the ratification proceedings of the House of Representatives, for the records of the convention are fragmentary.

The proceedings of the House were participated in by four members of the former Federal Convention, namely, Messrs. Charles Pinckney, Charles Cotesworth Pinckney, Pierce Butler, and John Rutledge, the last of whom had been a member of the Committee of Detail.
The opponents of the Constitution in the House do not appear to have been numerous, but they were determined and eloquent. Most prominent among them was Delegate Rawlins Loundes, who, among other things, charged that "the gentlemen who went to represent us from this state, in the Convention," had proved by "the very little they had gained . . . what we might expect in the future," namely, "that the interest of the Northern States was so predominate as to divest us of any pretensions of the title of a republic . . ." And he also contended that the South Carolina delegation had exceeded its powers in that it assented to the drafting of a new Constitution. Then, it is recorded, General Charles Cotesworth Pinckney,

in answer to Mr. Lowndes's objections, that the powers vested in the general government were too extensive, enumerated all the powers granted, and remarked particularly on each, showing that the general good of the Union required that all the powers specified ought necessarily to be vested where the Constitution had placed them; . . .

Among them, he discussed the power of taxation, but not the welfare clause or the extent of the spending power.

Further, "Hon. Edward Rutledge proved . . . that they had not exceeded their powers. He then compared the powers given under the

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32 El. IV:272 ff.
33 El. IV:302 ff.
34 El. IV:299.
old and new constitutions, and proved that they differed very little, except in that essential point which gave the power to government to enforce its engagements; and surely no person could object to this. . . ."

The statement by Rutledge, as a former member of the Committee of Detail, and indeed its chairman, is significant evidence of the intended meaning and status of the enumerated powers.

All this did not convince Mr. Lowndes, who wished for no other epitaph, than to have inscribed on his tomb, "Here lies the man who opposed the Constitution, because it was ruinous to the liberty of America." 35

Thereupon, the Honorable John Rutledge declared that he had often heard the honorable gentleman with much pleasure; but on the present occasion, he was astonished at his perseverance. Well might he apologize for taking up the time of the gentlemen. . . . 36

Both in the House of Representatives, and later in the ratifying convention, the introductory statement presenting the Constitution was made by Charles Pinckney, the author of one of the plans of a constitution submitted to the Federal Convention. Both speeches are well worth reading for the depth and extent of his political learning.

Opposition to the Constitution, nevertheless, was at least as intense in the ratification convention as it had been

35 El. IV:311.
36 El. IV:311 f.
in the House of Representatives, although in the end the Constitution was adopted, on May 23, 1788.

IX. New Hampshire

There was no official transcript of ratification proceedings in this state. It is known, however, that opposition was strong; indeed, at first only about a third of all the delegates to the ratification convention (which met in mid-February, 1788), favored the Constitution. The convention then adjourned, and reconvened in June, and finally ratified by a vote of 57 to 47.

The power of taxation is said to have played a very important role in the deliberations of the convention.37

X: Virginia

In the ratification debates of Virginia, the welfare clause played an important, and a decisive, role. Even before official proceedings began, and scarcely a month after the release of the draft of the Constitution by the Federal Convention, a bitter attack was made on the Constitution generally, and upon the welfare clause in particular, by the much esteemed statesman Richard Henry Lee.

He was a member of the Continental Congress at that time, and wrote as follows from New York to Edmund Randolph, who

37Main, "cit.", pp. 65, 222, 143. El. II:203 f.
had just returned from Philadelphia to resume his functions as Governor of the state of Virginia:

It cannot be denied that this new Constitution is, in its first principles, highly and dangerously oligarchic; and it is a point agreed, that a government of the few is, of all governments, the worst.

But what is the power given to this ill-constructed body? To judge of what may be for the general welfare; and such judgments, when made the acts of Congress, become the supreme laws of the land. . . .

But this was merely a prelude to the storms to come. For when finally a convention was called, in the late spring of 1788, to decide whether or not Virginia would join the Union under the Constitution, an even more forceful opponent to the Constitution arose in the person of Mr. Patrick Henry; and it was with him that Randolph fought the most passionate duels witnessed by the delegates of the ratification convention of Virginia. During these critical events, political differences between the principal adversaries disrupted personal friendships. On one occasion, Randolph exclaimed, referring to Henry:

And if our friendship must fall, let it fall, like Lucifer, never to rise again!

On another occasion, Henry excited his audiences to a frenzy as he declaimed in a tone of profound pessimism:

He tells you of the important blessings which he imagines will result to us and mankind in

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general from the adoption of this system. I see the awful immensity of the dangers with which it is pregnant. I see it. I feel it. I see beings of a higher order anxious concerning our decisions. When I see beyond the horizon that bounds human eyes, and look at the final consummation of all human things, and see those intelligent beings which inhabit the ethereal mansions reviewing the political decisions and revolutions which, in the progress of time, will happen in America, and the consequent happiness or misery of mankind, I am led to believe that much of the account, on one side or the other, will depend on what we now decide. All nations are interested in the determination. We have it in our power to secure the happiness of one half of the human race. Its adoption may involve the misery of the other hemisphere.41

The speech of Mr. Patrick Henry ends at this point, and the recorder observes:

Here a violent storm arose, which put the house in such disorder, that Mr. Henry was obliged to conclude.

The welfare clause, sometimes by itself and sometimes in conjunction with the "sweeping clause," was repeatedly attacked as an alleged source of general jurisdiction.42 And, again and again, Randolph and others undertook to explain that such is not the intended meaning of the Constitution.43

To quote a few examples from Randolph's rebuttals of the interpretations put upon the welfare clause by delegates who were alarmed by what appeared to them to be an exorbitantly centralistic and consolidationist tendency of the Constitution.44

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41 El., III:625.
42 El., III:441, 443, 590, 608 f.
43 El., III:444, 463, 466, 559.
44 El., III: 463 f., 464, 466.
The gentleman supposes that complete and unlimited legislation is vested in the Congress of the United States. This supposition is founded on false reasoning. What is the present situation of this State? She has possession of all rights of sovereignty, except those given to the Confederation. She must delegate powers to the Confederate government. It is necessary for her public happiness. She trusts certain powers to the general government, in order to support, protect, and defend the Union. There is not a word said, in the state government, of the powers given to it, because they are general. But in the general Constitution, its powers are enumerated. Is it not, then, fairly deducible, that it has no power but what is expressly given it? — for if its powers were to be general, an enumeration would be needless.

But the rhetoric of the gentleman has highly colored the dangers of giving the general government an indefinite power of providing for the general welfare. I contend that no such power is given.

Here Randolph quotes the welfare clause in its context, and proceeds with his analysis as follows:

Is this an independent, substantive, separate power, to provide for the general welfare of the United States? No, Sir. They can lay and collect taxes, etc., For what? To pay the debts and provide for the general welfare. Were this not the case, the following part of the clause would be absurd.

Having repeated his explanations several times, Randolph finally grew impatient:

I appeal to the candor of the honorable gentleman, and if he thinks it an improper appeal, I ask the gentleman here, whether there be a general infinite power of providing for the general welfare? The power is ... so that they can only raise money by these means, in order to provide for the general welfare. No man who reasons can say it is general, as the honorable gentleman represents it. You must violate every rule of construction and common sense, if you sever it
from the power of raising money, and annex it to any thing else, in order to make it that formidable power which it is represented to be.\textsuperscript{45}

All this is perfectly clear. Furthermore, the principle of enumerated powers, as explained by Randolph, is represented in the same light as it was understood, and presented, by the other members (except Mr. Gorham) of the former Committee of Detail of the Federal Convention in their respective states during the debates on ratification, namely, Wilson in Pennsylvania, Ellsworth in Connecticut, and Rutledge in South Carolina. Mr. Gorham, of Massachusetts, made no expression on that point.

XI. New York

The state legislature of New York provided on February 1, 1788, for an election by all free male citizens of the age of 21 and upwards of deputies to a convention which was to pass on the Constitution.\textsuperscript{46} The election took place in April and the convention met in Poughkeepsie on June 17, 1788.

The Constitution was severely attacked in the convention from the outset of the proceedings. Deputy John Williams pointed to the welfare clause of the Preamble and to the "sweeping clause" of Article I, Section 8, par. 18, and remonstrated:

It is therefore evident that the central legislature under this Constitution, may

\textsuperscript{45} El. III:599 f.
\textsuperscript{46} El. II:205.
pass any law which they may think proper.
Sir, Congress have authority to lay and
collect taxes, duties, imposts, and excises,
and to pass all laws which shall be necessary
and proper for carrying this power into exe-
cution; and what limitation, if any, is set
to the exercise of this power by the Constitution?

Another speaker, Melancthon Smith, said:

Sir, I contemplate the abolition of the
state constitutions as an event fatal to the
liberties of America. These liberties will
not be violently wrested from the people.
They will be undermined and gradually consumed. 47

And again on the day which followed, John Williams repeated
his theme:

Sir, I yesterday expressed my fears that this
clause would tend to annihilate the state
governments. I also observed, that the powers
granted by it were indefinite, since the
Congress are authorized to provide for the
common defence and general welfare, and to
pass all laws necessary and proper for the
attainment of those important objects. . . .
Whatever they judge necessary for the proper
administration of the powers lodged in them,
they may execute without any check or
impediment. Now, if the Congress should judge
it a proper provision, for the common defence
and general welfare, that the state governments
should be essentially destroyed, what, in the
name of common sense, will prevent them? Are
they not constitutionally authorized to pass
such laws? Are not the terms, common defence and
general welfare, indefinite, undefinable terms? 48

These and similar invectives against the Constitution were
eventually answered by Alexander Hamilton, who, however, did
less endeavor to prove that the Constitution provides limi-

47 El. II:334. Original italics.
48 El. II:338.
tations that would curb the suggested encroachments, than to persuade the convention that the national government can never conceive the desire to abolish the states. He avoided any commitment on the score of limitations upon the power of the national government.

Among other things, he said:

The Union is dependent on the will of the state governments for its chief magistrate and for its Senate. The blow at the members must give a fatal wound to the head; and the destruction of the states must at once be a political suicide. Can the national government be guilty of this madness?49

And then Hamilton proceeded toward a conclusion, as follows:

I wish the committee to remember that the Constitution . . . is framed upon truly republican principles; and that, as it is expressly designed to provide for the common protection and the general welfare of the United States, it must be utterly repugnant to this Constitution to subvert the state governments, or oppress the people.50

XII. North Carolina

The convention began on July 24, 1788, by debating the Preamble to the Constitution. The only aspect of the Preamble interesting to the North Carolina convention was the phrase "We the People of the United States," which was accordingly debated for some time. The rest of the Preamble was not discussed. Then for two days the power of taxation was discussed, but not in connection with the welfare clause of either the Preamble or of Article I.

49 El. II:353. 50 El. II:356.
It seems that no one in the convention supposed that the welfare clause of Article I— to say nothing of the clause in the Preamble— was a jurisdictional grant.51

XIII. Rhode Island

The anomalous and complicated proceedings of this state leave us with nothing from which valid inferences could be made concerning the state's views of the welfare clause. From known facts of history, however, we may conclude that political centralism under a national government was not Rhode Island's favorite idea.

Conclusions

On the basis of the facts reflected in the ratification conventions, several propositions can be established, among which are the following:

1. No state desired a consolidated union under a generally empowered national government.

2. The states which ratified without significant expressions of reluctance, understood the Constitution to provide for a federal system in which the sovereignty of the member states was to be preserved intact as to all matters not particularly delegated to the national government.

3. No state complained that the powers assigned by the proposed Constitution to the National Government, were inadequate, and should be enlarged.

51El. IV:1-252.
4. A number of states vigorously protested against the new Constitution on the ground that the powers of the national government, as provided by the new Constitution, were excessive, and incompatible in actual practice (if not in legal theory) with the preservation of any significant degree of state sovereignty.

5. Of the states described sub (4), above, some demanded restrictive amendments, and ratified the Constitution only with the understanding that such amendments would be forthcoming.

6. In some states, the welfare clause of Article I, and occasionally also the welfare clause of the Preamble, were attacked vigorously as a presumed source of a general jurisdiction; but the attacks were eventually assuaged by repeated explanations and assurances given by the former Delegates of the Federal Convention, and by other respected patriots, that the welfare clauses had never been meant to have, could not have, and would not in the future be given, this formidable meaning. In order to fortify the dependability of these oral assurances, written guaranties in the form of amendments were demanded, and, in due course, provided.

7. The fear that the welfare clause of Article one, or both this clause and the welfare clause of the Preamble, might be perverted and used as a general enabling clause, continued even after the adoption of the amendments, and gave rise to rumors that there existed a school of thought.
proposing to place the generally unwanted interpretation upon the clause or clauses.

8. In its capacity as a provision defining the scope of the power to spend tax-obtained funds, the welfare clause of Article I was never methodically analyzed during the ratification period, either in the ratification assemblies, or outside by the daily press or in periodicals or otherwise.

* * *

In short, the only point which the ratification conventions determined, was that the welfare clause (or clauses) must not be given the meaning of the Variant (I), while the dichotomy between Variants (2) and (3) was not yet realized to exist: and neither were the other alternatives.52

Views Expressed Outside The Ratification Conventions

The same controversies which agitated the ratification assemblies, animated also the political life of the nation at large. The well-known Federalist Papers represent only a portion of the press publicity given during the ratification period both to the Federalist and the Anti-federalist point of view.53 Although most newspapers were owned by men of

52 For the five variants of the meaning of the welfare clause of Article I of the Constitution, see supra, Table I on page 99.

Federalist persuasion, \textsuperscript{54} "both sides received a fair hearing." \textsuperscript{55} Scores of writers contributed, usually under pseudonyms, on each side of the controversy.

It is not within our present purpose to attempt a comprehensive account of the abundant literature of the period. \textsuperscript{56} It is the function of the present pages to state a selection of representative arguments on both sides, and this preferably from competent authors with whose ideas we have not become yet acquainted in the discussion of the ratification conventions. Moreover, our interest is restricted mainly to statements which with a reasonable directness pertain to the welfare clause, or clauses, of the Constitution (and its Preamble).

The anti-federalist literature includes, \textit{inter alia}, essays by an eminently competent author writing under the \textit{nom-de-plume} of "Brutus," who has been tentatively identified as being either Robert Yates or Thomas Treadwell. \textsuperscript{57}

\begin{flushleft}
\textsuperscript{54} Borden, \textit{op. cit.}, "Introduction," p. viii.

\textsuperscript{55} Ibid.

\textsuperscript{56} Aside from published articles, much valuable thought is accumulated in private correspondence of the era—some of which has been eventually published in later times. We are including excerpts from a letter discussing the welfare clause.

\textsuperscript{57} Borden, \textit{op. cit.}, p. 42.
\end{flushleft}
Brutus's first conception of the welfare clause runs along the same path which R. H. Lee took in his letter to Edmund Randolph in the autumn of 1787, and which was to be trodden again, as we have already seen, in the ratification conventions of New York and Virginia in early parts of 1788.

Wrote Brutus:

In the 1st article, 8th section, it is declared, "that 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." In the preamble, the intent of the constitution, among other things, is declared to be to provide for the common defense, and promote the general welfare, and in this clause the power is in express words given to Congress "to provide for the common defense and general welfare." And in the last paragraph of the same section there is an express authority to make all laws which shall be necessary and proper for carrying into execution this power. It is therefore evident, that the legislature under this constitution may pass any law which they may think proper.

But within a fortnight he seems to have abandoned the above interpretation (which corresponds to Variant (I), page , supra), and adopted the notion that the welfare clause, rather than constituting an independent power, is merely a component of the taxing power; and now he attacks it in its

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58Richard Henry Lee's letter to Randolph, dated New York, Oct. 16, 1787, is quoted in part supra, p. 38. Source, Elliot, Debates, I:503 f. The essay where "Brutus" expounds the welfare clause in the sense of Variant (I) (see Table on p. 9, supra), is dated Dec. 13, 1787. Borden, op. cit., p. 82.

59Supra, pp. 38ff, 45ff.

60Borden, op. cit., p. 89.
capacity of a purported qualification on the taxing power.\textsuperscript{61}

But it is said, by some of the advocates of this system, that "the idea that Congress can levy taxes at pleasure is false, and the suggestion wholly unsupported. The preamble to the constitution is declaratory of the purposes of the union, and the assumption of any power not necessary to establish justice, etc., provide for the common defense, etc., will be unconstitutional. . . . Besides, in the very clause which gives the power of levying duties and taxes, the purposes to which the money shall be appropriated are specified, viz., to pay the debts and provide for the common defense and general welfare.\textsuperscript{62}

Brutus continues:

I would ask those, who reason thus, to define what ideas are included under these terms, to provide for the common defense and general welfare? Are these terms definite, and will they be understood in the same manner, and to apply to the same cases by everyone? No one will pretend they will. It will then be matter of opinion, what tends to general welfare; and the Congress will be the only judges in the matter . . . the most opposite measures may be pursued by different parties, and both may profess, that they have in view the general welfare;

With an excellent wit, Brutus then points out that even as he is writing, one party contends that the general welfare requires that the Constitution should be adopted, and the other party contends, in the name of the general welfare, that it ought to be rejected.\textsuperscript{63}

\textsuperscript{61}In other words, now he identifies himself with Variant (II) or (III), \textit{supra}, p. 9.

\textsuperscript{62}At this point Brutus inserted a note referring to a pamphlet by Noah Webster expounding the Constitution. Webster's essay, observes Professor Borden, is on p. 50 of Paul L. Ford, ed., \textit{Pamphlets on the Constitution of the United States}, Boston (1888).

\textsuperscript{63}Borden, \textit{op. cit.}, p. 90.
The anti-federalists did take notice of the fact that the Constitution contained a list of specifically enumerated powers. But in spite of Madison's reasoning in Federalist Number 41, they continued to suspect that the several comprehensive clauses would be applied in their unqualified extent regardless of the enumeration.

Meanwhile Alexander Hamilton published several essays on the principles of taxation in Federalist Numbers 30 to 36 inclusive. In Number 30, first paragraph, he states that the jurisdiction of the Union, in respect to revenue, "must necessarily be empowered to embrace a provision . . . for all those matters which will call for disbursements out of the national treasury."

This statement has sometimes been taken as an augury of the idea which Hamilton presented a few years later in the report on manufactures, which latter paper is regarded as containing the classic statement of the Hamiltonian doctrine of the welfare clause. However, the above-quoted statement from Federalist Number 30 is too vague, for it leaves it an open question to say what class of expenditures Hamilton thinks can legitimately call for disbursements from the national treasury.

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65 See, e.g., Borden, op. cit., 122, 124, 131 ff.

66 Charles A. Beard, The Enduring Federalist, New York, Doubleday and Co., 1948, pp. 91-93, observes, at pp. 92-93, that although Hamilton sometimes referred, in Federalist #30-36, to specific provisions of the proposed Constitution, on the whole he kept his exposition and argument high above the particular items in dispute—in the realm of general principles.
Generally, then, it may be concluded that while the adoption of the Constitution was predicated on the rejection of the idea that the welfare clause is a mandate for general legislative powers, as is evident from the requirements of the amendments, especially the Tenth, nothing specific was decided as between the two alternatives of interpretation which were later to become known as the Madisonian and the Hamiltonian interpretations, respectively, of the welfare clause of Article I of the Constitution. 67

We have already noted 68 that an early alarm about the consolidationist tendency of the welfare clause was sounded by R. H. Lee in a letter to Edmund Randolph, dated October 16, 1787. 69 Now we wish to mention a minor historical curiosity attaching to that letter.

In some way, the content of the letter, expressed to a great extent in a style repeating word-by-word the original, was printed as an article in the London Times over the pseudonym "Leonidas," and from there it was reprinted in an American periodical 70 on July 30, 1788. The plagiarism has been so far unnoticed, it seems.

The whole phenomenon offers an opportunity for speculation and research of some interest. But the nature of our present study does not permit us to branch out along this tangent.

67 See Table I, p. 2, supra.
68 supra, p. 38. 69 El. I:503 f.
As we now take a general survey of the events which occurred during the period of ratification, to the extent that they refer to the welfare clause or clauses of the Constitution and its Preamble, we note that no systematic effort was undertaken to find out the authentic meaning intended to be embodied in those clauses by the Federal Convention.

Of the eleven members of the Committee on Unfinished Portions, which had written the provision containing the welfare clause of Article I of the Constitution, only Madison presented, in his Federalist Number 41, an analytical exposition of the clause in a public written statement; and he concerned himself only with its logic, not its genesis. The probable author of the clause, Sherman, supplied no major statement concerning its intended meaning.

Quite understandably, the concern given the welfare clause during the ratification period was not so much with the past which had engendered the phrase, as with the future which was to give it a jurisdictional significance. And on this point, looking to the future, the general sentiment expressed in the ratification period was to make sure that the constitutional phrases referring to general welfare would not be used as grants of general jurisdiction.

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The Federalist Papers

This literature is too well known to need a great deal of repetition, and therefore only a few remarks will be made here, amplified with a minimum of direct quotation.

Sufficiently well-known also is the paradoxical nomenclature which consists in attaching the name "Federalists" to those who, under the terminology then in use, ought to have called themselves "Nationalists," meaning, simply, centralists. Speaking properly in terms then current, "federalists" should have been those whose primary insistence was upon state sovereignty, and whose conception of the Union resembled the formula of a relatively loose league. The people of the states largely favored the latter form of Union. The term "federal union" was popular, while "national union" was not. Therefore the centralists preempted the name "Federalists," as a strategic move.

Their opponents, although they were, in fact, the ones who advocated the federal concept in opposition to the "national," had consequently to satisfy themselves with the designation of "Anti-federalists."

The Federalist Papers themselves disclose, however, a dual trend of thought, the one more nearly decentralist, which was represented by Madison. The other, proceeding from Hamilton, exhibits a more emphatically centralistic drift.

Among the 80 or so essays of which the series is composed, there is hardly one that would not have a direct or indirect
bearing upon the concept of the Constitution as a whole, and accordingly none is wholly irrelevant to our topic of enquiry. But some numbers are more significant in this respect than others. For example Number 10 of the Federalist is a prelude, especially in the third paragraph from the end of the essay,\textsuperscript{72} to the theme of "Internal Improvements:"\textsuperscript{73}

An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from the free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity of the productions of different states.

\ldots
The above was written by Hamilton and paralleled in Number 14 by Madison, who wrote, among other thoughts:

Let it be remarked \ldots that the intercourse throughout the Union will be facilitated by new improvements. Roads will everywhere be shortened, and kept in better order, accomodations for travellers will be multiplied and meliorated; an interior navigation on our eastern side will be open throughout, or nearly throughout the whole extent of the thirteen States. The communication between the Western and Atlantic districts, and between different parts of each, will be rendered more and more easy by those numerous canals with which the beneficence of nature has intersected our country, and which art finds it so little difficult to connect and complete.

\textsuperscript{72}Beard, The Enduring Federalist (1948), pp. 75, 79.\textsuperscript{73}

For which topic see infra, 109, 119, 166.
Quoting from this essay by Madison, Professor Edward S. Corwin remarks: 74

"The assumption seems to be that the new government will have an important hand in this work." Corwin infers from this assumption that the instances in which Madison negated the proposition that the Federal Government had legal power to construct internal improvements, was "formulated on rather short notice," for such denial on Madison's part is incompatible, according to Corwin's observation, with the original affirmative position.

However, to make the argument complete, it is necessary to consider that in the same Federalist, Number 14, Madison first dwelt upon the notion that the Federal Government had only enumerated powers:

In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. . . . (Id., 87)

In Number 23, Hamilton makes a somewhat beguiling argument which, upon analysis, reduces itself to the tautological exhortation that the powers given to the Federal Government by the Constitution, ought not to be denied it. A sensible application of this proposition would seem to be, that the Constitution ought to be adopted. But read in a different

light, after the adoption of the Constitution, it might be interpreted to mean that no power should be denied the Government if its exercise by that Government is for the national interest.

Every view we may take of the subject . . . will serve to convince us, that it is both unwise and dangerous to deny the federal government an unconfined authority, as to all those objects which are intrusted to its management. It seems very difficult not to observe that the concept of an "unconfined authority" which is nevertheless confined to certain selected objects, is scarcely possible of envisioning, and even more difficult to practice.

The sentence, it would seem, is either a tautology or a contradiction, or somehow, per impossibile, both.

Numbers 30 to 36, inclusive, were all written by Hamilton, and all deal with taxation. Of these Number 31 has been interpreted as expressing, or at least giving all necessary support to, the proposition that Congress may, in its discretion, legislate for the general welfare.

Thus Professor Harry V. Jaffa, in his essay "The Case for a Stronger National Government," makes the following observation concerning Hamilton's position in the aforementioned Federalist paper:

Why the powers of the central government, because of its responsibility for national security,

cannot be defined or limited by any enumeration, is irrefutably set forth by Alexander Hamilton in the thirty-first number of The Federalist. The illimitable nature of these powers results, says Hamilton as observed by Professor Jaffa from the following maxims, maxims which must command the assent of every mind capable of grasping them:

Now Jaffa quotes from Hamilton:

A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people.

As the duties of superintending the national defense and of securing the public peace against foreign or domestic violence involve a provision for casualties and dangers to which no possible limits can be assigned, the power of making that provision ought to know no other bounds than the exigencies of the nation and the resources of the community.

Then Professor Jaffa comments as follows:

"What objection can be made now to the simple proposition that, in an age of nuclear technology and of the ideological competition of whole societies, the national government has the power to do whatever a majority in Congress, with the approval of the President, regards as desirable to be done 'for the common Defence and general Welfare of the United States', providing only that such things are not actually prohibited by the Constitution?" 76

This, of course, is a view essentially identical with the basic conclusions of James Francis Lawson or William

76 Id., 116, 117.
Winslow Crosskey, and it is the position which if asserted during the ratification of the Constitution, would have resulted, most probably, in the rejection of the whole charter. So much is obvious from the evidence which we have just examined.

It was for this precise reason that the Founders went to so much effort to demonstrate that this plenary view never was intended and never would be insisted upon. The Number 41 of the Federalist, which was written by Madison, has become famous as being the first written and systematic argument disclosing the aforementioned proposition (that the welfare clause gives plenary powers) as a misinterpretation.

Wrote Madison in Federalist Number 41:

... 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 defence 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 defence or general welfare. No stronger proof could be given to the distress under which these writers labor for objections, than their stooping to such a misconstruction.

Had no other enumeration or definition of the powers of the Congress been found in the Constitution, than the general expression just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms "to raise money for the general welfare."

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77Infra, pp. 268-275.

78The amendments constituting the Bill of Rights, of which the First prohibits Congress from inhibiting the freedom of the press, were at that time not in existence.
But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than a semicolon? . . . . For what purpose could the enumeration of particular powers be inserted, if these and all others were intended to be included in the preceding general power? Nothing is more general nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either the authors of the objection or the authors of the Constitution, we must take the liberty of supposing, had not its origin with the latter.79

The argument contained in Federalist 41 does not originate with Madison. We have seen (on page 40, above) that Randolph argued the same points in the Virginia ratification convention; and we shall see that the same position was a common understanding of the Federal Convention from the moment it began, on August 18, to debate the powers enumerated in the first draft of the Constitution.80

But Federalist 41 became the classic statement of the doctrine, and was repeated on innumerable occasions ever after.

79Beard, ed., Enduring Federalist, pp. 179 f.
80Infra, pp. 325 ff.
CHAPTER II

UNDER THE CONSTITUTION:
THE FIRST DOZEN YEARS

We have just seen that the period of ratification produced certain definitions of the meaning of the welfare clause and, by negating some and affirming others, it fixed in rough terms the mainstream of the future interpretations. With these preliminaries done, it remained for the subsequent period of the constitutional history to formulate further refinements of the meaning of the clause.

We noted in the introduction that within the short interval of the first twelve years following the adoption of the Constitution all the main interpretative alternatives of the clause were formulated, except such as had been already expressed during the period of ratification.

During this primary formative period whose end coincides with the turn of the century, the main source of constitutional interpretation was the Congress itself. A few opinions on the constitutionality of proposed legislative measures originated in the President's Cabinet. But the Presidents themselves did not issue, during the period, any contributions to the interpretation of the welfare clause or related aspects of the Constitution.
The congressional (and otherwise) interpretations of the Constitution in that period were formulated without the benefit of access to written records of the Federal Convention. However, a considerable number of the Framers held now positions in the Government, and thus the intentions of the drafting Convention were still in living memory, as were also the understandings of the ratifying assemblies.

James Madison was, of course, in possession of the most complete minutes of the debates of the Federal Convention, having been himself their recorder; and he was a member of Congress during the formative years in which the welfare clause was being interpreted into its several basic meanings. But he never attempted to make his own notes the basis of his arguments, and he never used the privileged status accorded him by the epithet "the father of the Constitution," to speak authoritatively for the Founders' Convention. His manner of speaking in Congress about the Constitution and its authors was—

I, Sir, have always conceived—I believe those who proposed the constitution conceived, and it is still more fully known, and more material to observe that those who ratified the constitution conceived—that this is not an indefinite government. . . . [etc.]¹

In these and similar forms Madison expressed himself, with restraint, about the intentions of the Founders, as though he were another outsider to the writing of the Constitution.

Neither he, nor any other former member of the Convention, attempted to reconstruct the genesis of the Constitution from notes taken in the Convention.

It would have been contrary to a resolution of secrecy passed in the Convention, which banned, for all foreseeable future, the publication of any written records. It did not, however, forbid its members to serve as explainers and advocates of the Constitution in the ratification conventions, or to draw upon their memories in explaining the Constitution to the ratification bodies or to the public.

A number of the Founders became Congressmen or Senators in the new Government, and some became judges of the Supreme Court or held high administrative positions. Thus a continuity of basic understandings permeated the incipient phases of the Government and connected them organically with the writing of the Constitution itself.

Curiously and yet understandably, these large realities did not preclude the necessity for endless arguments about the nature of the Union, as though the unquestioned understandings were not really understood after all. The constitutional controversies significantly relevant to our subject-matter arose from certain political and economic events the general features of which are well known from historical studies. Among them are: The charter of the Bank of the United States. The bounty to cod fishing industries. The proposed grant in aid of political refugees from Santo Domingo
who were granted asylum in Baltimore, Maryland; and a similar proposal to grant monetary relief to the city of Savannah, Georgia, which had suffered severely from a fire. Certain laws to restrain inimical aliens at times of declared war, and laws seeking to control the press and speech ("Alien and Sedition Acts"). Some of these measures involve the spending powers of Congress and not the governing powers; others are instances of the governing power without spending implications; and some represent both categories of jurisdiction.

In all the cases, the questions were essentially two: (1) whether the act in point could be subsumed under the powers enumerated in the Constitution. And (2) if not, did the welfare clause provide authority for its passage?

The latter question in turn differentiates into two possibilities: assuming that the welfare clause is a source of jurisdiction, then (a) does its language authorize that the general welfare should be provided for by spending money, or (b) by the exercise of all governmental powers, including monetary appropriations?

Let us now follow a part of the path which the course of the arguments took in the actual proceedings of the government.

The Case of the National Bank

The act of Congress, "to incorporate the subscribers to the Bank of the United States," was approved on February
25, 1791 after a keen struggle both in Congress and the Cabinet.  

The act creating the Bank was partly a spending measure (Section 11 of the Act), but moreover, and on the whole, it was an assertion of federal governmental powers making certain not inconsiderable inroads into the principle of sovereignty of the several states. But it was not immediately obvious which, if any, of the powers enumerated in the Constitution would support either an act of incorporation generally, or of a bank in particular.

Madison's reaction, on February 2, 1791, in the House of Representatives, is reproduced as follows in the records of the Congress:

He ... expressly denied the power of Congress to establish banks. And this, he said, was not a novel opinion; he had long entertained it.

He adverted to the clause in the Constitution which had been adduced as conveying this power of incorporation. He said he could not find it in that of laying taxes. He presumed it was impossible to deduce it from the power given to Congress to provide for the general welfare. If it is admitted that the right exists there, every guard set to the powers of the Constitution is broken down, and the limitations become nugatory.


3Cf. McCulloch v. Maryland, 4 Wheat. 316 (1819).

4Reprinted in El. IV:413.
It will be observed that the idea of the above position is of the same essence as that in Madison's Federalist Number 41, but it is now addressed in the opposite direction. In the Federalist, Hamilton was facing the "alarmists" who were warning that a formidable latitude of interpretation could and would be placed upon the welfare clause. Now he finds himself confronted with what looks like an imminent fulfillment of those old anti-federalist warnings by unmindful extremists in the Federalist camp.

But the constitutional status of the proposed act of incorporation appeared in a different light to Roger Sherman, who on February 4 expressed an opinion which is probably the first statement of the doctrine which was to become known, within a year, as Hamilton's theory of the welfare clause. Sherman supposed that the bank bill was essentially a spending measure, and that Congress had the power to make appropriations for the general welfare. More than that, he appears to have assumed that Congress had in its power the general governance of all fiscal matters insofar as they had to do with the general welfare; and not merely the power of appropriation.

Sherman handed to Madison a written note which read:

You will admit that Congress have power to provide by law for raising, depositing and applying money for the purposes enumerated in the Constitution and generally of regulating the Finances. That they have power so far as no particular rules are pointed out, in the constitution to make such rules and regulations as they may judge necessary and proper to effect these purposes. The only question that
you will admit that Congress have power to provide by law, for raising, depositing & applying money for the purposes enumerated in the Constitution.

That they have power so far as no particular rules are pointed out, in the Constitution, to make such rules & regulations as they may judge necessary & proper to effect these purposes. The only question that remains is - Is a Bank a proper measure for effecting these purposes? And is not this a question of expediency rather than of rights?

Feb 1791. This speech by Mr. Hamilton during the debate on the constitutionality of the Bill for a National Bank - the basis much of what was said by him on the objection of Mr. - the introduction of expediency by Mr. 6 which is same as we shew who the veto would
remains is - Is a Bank a (*) proper measure for effecting these purposes? And is not this a question of expediency rather than of rights?5

Madison encircled the words "and generally regulating the Finances" and placed a cross before them as a sign of negation, and moreover he inserted "a necessary &" before the word "proper," as shown above by asterisk (*).

At the bottom of the note it is written by Madison:

Feb-y 4. 1791.
This handed to J.M. by Wm (?) Sherman during the debate on the constitutionality of the Bill for a National Bank - The line marked x given up by him on the objection of J.M. - The inter-lineation of "a necessary &" by J.M. to which he gave no answer other than a smile.

So at least on Madison's testimony, it would appear that Sherman at first contended for the Variant (II) but settled for the Variant (III)--see Table I, supra--p. 9 --of the possible interpretations of the welfare clause.

The episode would seem of particular interest in view of the probability6 that Sherman was the source from whom the language "general welfare" was derived.

In the debates on the bank bill, an occasional reference was made to the phrase "general welfare," without always making it clear whether reference was had to Article I of the Constitution or to the Preamble. In the language of the debates frequent use is made of idioms and phrases which in


6Infra, pp. 343 ff.
common language would be fairly equivalent to the idea of "general welfare," but which in themselves are not found in the Constitution.

For example, from presentations by Representative Fisher Ames, Federalist from Massachusetts:

The first question that occurred on this subject was, whether the powers of the house were confined to those expressly granted by the letter of the Constitution, or whether the doctrine of implication was safe ground to proceed upon. . . . If the powers of the house were circumscribed by the letter of the Constitution, much expense might have been saved to the public, as their hands would have been completely tied. But, by the very nature of government, the legislature had an implied power of using every means, not positively prohibited by the Constitution, to execute the ends for which that government was instituted. Every constitutional right should be so liberally construed as to effect the public good. This, it has been said, was taking too great a latitude. But certainly to promote the ends of government was the end of its existence; and by the ties of conscience, each member was bound to exercise every lawful power which could have a tendency to promote the general welfare.

(Feb. 2, 1791. 4 El. 415.)

By Representative John Lawrence, Federalist of New York (apparently he is identical with the Congressman whose name is sometimes spelled Laurance):

The principles of government, and ends of the Constitution, he remarked, were expressed in its preamble. It is established for the common defence and general welfare. The body of that instrument contained provisions the best adapted to the intention of those principles and attainment of those ends. To these principles, ends, and provisions, Congress was to have, he conceived, a
constant eye; and then, by the sweeping clause, they were vested with the power to carry the ends into execution.\(^7\)

Statements like these do indeed have a tendency toward broadening the Government's powers under the Constitution, but as is clearly apparent, they are guarded expressions far removed from a straight advocacy of the doctrine that Congress has plenary powers to provide for the general welfare under Article I, Section 8, of the Constitution.

Our enquiries have not enabled us to find evidence that the latter view was ever directly advocated in the formative decades of the Constitution. Therefore Mr. Justice Story's information asserting the existence of such a trend of constitutional opinion poses a challenge which only future research can adequately answer, if it can be answered.\(^8\)

\(^7\)Date of statement, Feb. 2, 1791. 4 El. 418. The "sweeping clause:"—"And - To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof." Con. I:8:18.

\(^8\)Story, op. cit., observes in sec. 908: "The former opinion has been maintained by some minds of great ingenuity and liberality of views. The latter has been the generally received sense of the nation, and seems supported by reasoning at once solid and impregnable." The "former view" is the position designated herein as "Variant I." Table I, supra, p. 9. The "latter view" negates Variant I, and may itself take the form of either Variant 2, 3, and possibly 4.
After the bank bill passed Congress, it confronted doubts in the Executive branch. President Washington requested opinions on its constitutionality from the main protagonists of the mutually opposing views, Jefferson and Hamilton, and presumably also from Attorney General Edmund Randolph. 9

Jefferson's was submitted first, and Washington gave it to Hamilton for rebuttal. Thus Hamilton had advance notice of the opposing argument, and enjoyed full opportunity to avoid possible pitfalls. Jefferson had anticipated that Hamilton would try to make a use of the general-welfare clause, hence he (Jefferson) concentrated upon a demonstration of the point that the welfare clause was not a plenary enabling grant.

Responding, Hamilton omitted the clause altogether, and built his own argument upon the concept of an intercombination of the enumerated powers. The enumerated powers, when combined together—he argued—yield further powers. Hamilton called them "resulting powers." Thus another doctrine was born. 10 But for our purposes the document is not

9John C. Miller, Alexander Hamilton: Portrait in Paradox, New York, Harper and Bros., 1959, p. 263. We have been unable to verify that Randolph submitted an opinion on the constitutionality of the Bank. There is no such document among the preserved opinions of U.S. Attorneys General.

directly relevant, for aforementioned reasons. Jefferson's opinion, on the other hand, is reprinted herein\(^{11}\) as another statement interpreting the welfare clause.


The bill for establishing a National Bank undertakes among other things:--

1. To form the subscribers into a corporation.
2. To enable them in their corporate capacities to receive grants of land; and so far is against the laws of Mortmain.*
3. To make alien subscribers capable of holding lands; and so far is against the laws of Alienage.
4. To transmit these lands, on the death of a proprietor, to a certain line of successors; and so far changes the course of Descents.
5. To put the lands out of the reach of forfeiture or escheat; and so far is against the laws of Forfeiture and Escheat.
6. To transmit personal chattels to successors in a certain line; and so far is against the laws of Distribution.
7. To give them the sole and exclusive right of banking under the national authority; and so far is against the laws of Monopoly.
8. To communicate to them a power to make laws paramount to the laws of the States: for so they must be construed, to protect the institution from the control of the State legislatures; and so, probably, they will be construed.

I consider the foundation of the Constitution as laid on this ground: That "all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people." \(^{\text{XIIth amendment.\}}}\)** To take a single step

\(^{11}\)Immediately following.

*Though the Constitution controls the laws of Mortmain so far as to permit Congress itself to hold land for certain purposes, yet not so far as to permit them to communicate a similar right to other corporate bodies. \(^{\text{Note by Jefferson}}\)

**What eventually became the Tenth Amendment, was at that time the Twelfth. (Note by I.B.)\]}
beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.

The incorporation of a bank, and the powers assumed by this bill, have not, in my opinion, been delegated to the United States, by the Constitution.

I. They are not among the powers specially enumerated: for these are: 1st. A power to lay taxes for the purpose of paying the debts of the United States; but no debt is paid by this bill, nor any tax laid. Were it a bill to raise money, its origination in the Senate would condemn it by the Constitution.

2d. "To borrow money." But this bill neither borrows money nor ensures the borrowing it. The proprietors of the bank will be just as free as any other money holders, to lend or not to lend their money to the public. The operation proposed in the bill, first, to lend them two millions, and then to borrow them back again, cannot change the nature of the latter act, which will still be a payment, and not a loan, call it by what name you please.

3. To "regulate commerce with foreign natures, and among the States, and with the Indian tribes." To erect a bank, and to regulate commerce, are very different acts. He who erects a bank, creates a subject of commerce in its bills; so does he who makes a bushel of wheat, or digs a dollar out of the mines; yet neither of these persons regulates commerce thereby. To make a thing which may be bought and sold, is not to prescribe regulations for buying and selling. Besides, if this was an exercise of the power of regulating commerce, it would be void, as extending as much to the internal commerce of every State, as to its external. For the power given to Congress by the Constitution does not extend to the internal regulation of the commerce of a State (that is to say of the commerce between citizen and citizen), which remain exclusively with its own legislature; but to its external commerce only, that is to say, its commerce with another State, or with foreign nations, or with the Indian tribes. Accordingly the bill does not propose the measure as a regulation of trade, but as "productive of considerable advantages to trade." Still less are these powers covered by any other of the special enumerations.

II. Nor are they within either of the general phrases, which are the two following:--

1. To lay taxes to provide for the general welfare of the United States, that is to say, "to lay taxes for
the purpose of providing for the general welfare." For the laying of taxes is the power, and the general welfare the purpose for which the power is to be exercised. They are not to lay taxes ad libitum for any purpose they please; but only to pay the debts or provide for the welfare of the Union. In like manner, they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It 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 be also a power to do whatever evil they please.

It is an established rule of construction where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, and not that which would render all the others useless. Certainly no such universal power was meant to be given them. It was intended to lace them up straitly within the enumerated powers, and those without which, as means, these powers could not be carried into effect. It is known that the very power now proposed as a means was rejected as an end by the Convention which formed the Constitution. A proposition was made to them to authorize Congress to open canals, and an amendatory one to empower them to incorporate. But the whole was rejected, and one of the reasons for rejection urged in debate was, that then they would have a power to erect a bank, which would render the great cities, where there were prejudices and jealousies on the subject, adverse to the reception of the Constitution.

2. The second general phrase is, "to make all laws necessary and proper for carrying into execution the enumerated powers." But they can all be carried into execution without a bank. A bank therefore is not necessary, and consequently not authorized by this phrase.

Jefferson's paper was followed by a rejoinder by Hamilton. Contrary to expectations reflected in Jefferson's
above statement, Hamilton, as we have pointed out above, made no use of the welfare clause on that occasion, but rather proffered the doctrine of "resulting powers," based on the idea that even though no particular power enumerated in the Constitution may sustain a congressional act, a combination of several such powers may do so.

Finally, then, the Bank was approved, and later judicially upheld, on the basis of the "resulting powers," and no part of the sustaining argument depended on the welfare clause.

**Hamilton's Report on Manufactures**

But a use of the welfare clause was made by Hamilton less than a year later, in the "Report on Manufactures" which he submitted on December 5, 1791, to the House of Representatives.

The "Report" is actually a comprehensive outline of a whole system of governmentally sponsored semi-planned economy. An important element in the program is the proposal of several types of subsidies, grants and bounties to nationally relevant private industries. Anticipating constitutional objections to such appropriations, Hamilton answered in advance in the "Report" itself, as may be seen from the following excerpts.

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A question has been made concerning the constitutional right of the Government of the United States to apply this species of encouragement, but there is certainly no good foundation for such a question. The National Legislature has express authority "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare," with no other qualifications than that "all duties, imposts, and excises shall be uniform throughout the United States; and that no capitation or other direct tax shall be laid, unless in proportion to numbers ascertained by a census of enumeration, taken on the principles prescribed in the Constitution," and that "no tax or duty shall be laid on articles exported from any state."

These three qualifications excepted, the power to raise money is plenary and indefinite, and the objects to which it may be appropriated are no less comprehensive than the payment of the public debts, and the providing for the common defence and general welfare. The terms "general welfare" were doubtless intended to signify more than was expressed or imported in those which preceded; otherwise, numerous exigencies incident to the affairs of a nation would have been left without a provision. The phrase is as comprehensive as any that could have been used, because it was not fit that the constitutional authority of the Union to appropriate its revenues should have been restricted within narrower limits than the "general welfare," and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition.

It is, therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, as far as regards an application of money.
The only qualification of the generality of the phrase in question, which seems to be admissible, is this: That the object to which an appropriation of money is to be made be general, and not local; its operation extending in fact or by possibility throughout the Union, and not being confined to a particular spot.

No objection ought to arise to this construction, from a supposition that it would imply a power to do whatever else should appear to Congress conducive to the general welfare. A power to appropriate money with this latitude, which is granted, too, in express terms, would not carry a power to do any other thing not authorized in the Constitution, either expressly or by fair implication.

Encouragement of Cod Fisheries

The report on manufactures was never adopted by Congress officially and in toto, but apparently it influenced Congress sufficiently, for there soon appeared legislative bills seeking to fulfill portions of Hamilton's economic plan.

The report on manufactures, as we have seen, was dated December 5, 1791. Then on December 15, the Bill of Rights--first ten amendments to the Constitution--were ratified, stressing once again the notion that the Government had only certain powers delegated to it, while all others were reserved to the states or the people. The promulgation of the bill of rights occurred subsequently in March 1791, by Secretary of State Jefferson.

Meanwhile on Friday, February 3, in the House of Representatives, there was taking place the first discussion of "An act for the encouragement of the Bank and other Cod
Fisheries, and for the regulation and government of the fishermen employed therein."  

The constitutional validity of the measure was contested in a series of arguments, of which the following seem of a major interest:

(In the House of Representatives)

Mr. Giles: The present section of the bill appears to contain a direct bounty on occupations; and if that be its object, it is the first attempt as yet made by this Government to exercise such authority; and its constitutionality struck him in a doubtful point of view; for in no part of the constitution could he, in express terms, find a power given to Congress to grant bounties on occupation: the power is neither directly granted, nor (by any reasonable construction that he could give) annexed to any other power specified in the constitution.

Then a Representative (Mr. Goodhue) argued that the support of the industry would benefit the national defense. Subsequently Congressman Laurance asserted (p. 361, id.) that the general welfare is inseparably connected with any object or pursuit which in its effects adds to the riches of the country.

Perhaps this is a disguised form of contending that the Congress may legislate for the general welfare apart from the enumerated powers; but in subsequent sequences of his state-

13The debate of the bill, 1 Abridgment 350-370. As finally enacted, the statute was entitled "An act concerning certain Fisheries of the United States, and for the regulation and government of the Fishermen employed therein." Approved, Feb. 16, 1792. 1 Stat. 229, ch. VI.

14John Laurance, also spelled "Lawrence."
ment Mr. Laurance argued moreover that the fishing vessels were a potential part of the national navy, and hence a support given for their development was actually appropriated for the common defense. Then there followed a comprehensive statement by James Madison:

It is supposed by some gentlemen, that Congress have authority not only to grant bounties in the sense here used, merely as a commutation for drawbacks, but even to grant them under a power by virtue of which they may do any thing which they may think conducive to the "general welfare." This, Sir, in my mind raises the important and fundamental question, whether the general terms which have been cited, are to be considered as a sort of caption or general description of the specified powers, and as having no further meaning and giving no further power than what is found in that specification; or as an abstract and indefinite delegation of power extending to all cases whatever; to all such at least, as will admit the application of money,

There was an impost on importing salt. The fishermen had to buy the salt to preserve their herrings, and so paid the tax. But even before the bill debated above, the fishing industry seems to have enjoyed the benefit of some remissions of the salt-tax, and these remissions seem to be called here "drawbacks." The "bounties" were to replace the "drawbacks."

This is probably the first instance of the explicit suggestion that the welfare clause "has no meaning," i.e., no jurisdictional import. This statement was later sought, by Joseph Story and others, to be turned against him: for how can it be supposed that the Founders, in their undoubted wisdom, placed into the Constitution something which "has no meaning"? Was it not Madison's own (and Jefferson's) argument that if the welfare clause be given a certain interpretation, then the particular enumeration which follows, "had no meaning?" But that, in Madison's own light, could not be. By same token, argued Story and others, it cannot be that the welfare clause had no meaning. Such argument is not fair to Madison. He did not deny that, the welfare clause had a function. Its function was to introduce the subsequent enumerated cases. That was its meaning. But not its jurisdictional import.
which is giving as much latitude as any government could well desire.

I, Sir, have always conceived - I believe those who proposed the constitution conceived, and it is still more fully known, and more material to observe that those who ratified the constitution conceived - that this is not an indefinite government, deriving its powers from the general terms prefixed to the specified powers, but a limited Government, tied down to the specified powers which explain and define the general terms. The gentlemen who contend for a contrary doctrine are surely not aware of the consequences which flow from it, and which they must either admit or give up their doctrine. 17

The following phases of Madison's continuing discussion illustrate the ambivalence of the situation with which Madison was dealing, namely, the fact that while on the one hand the doctrine of plenary powers had never sought to establish itself in a legitimate argument, there existed a recurrent tendency to disregard the enumeration of powers and go ahead with any measure deemed desirable, as if under the aegis of the welfare clause. - Madison continued:

The language held in various discussions in this House, is a proof that the doctrine in question was never entertained by this body. Arguments have constantly been drawn from the peculiar nature of this Government, as limited to certain enumerated powers, instead of extending, like other Governments, to all cases not particularly excepted.

In short, Sir, without going further into the subject, . . . I venture to declare it as my opinion, that were the power of Congress to be established in the latitude contended for, it would subvert the very foundation, and transmute the very nature of the limited government established by the people of America; and what

17Id., p. 362.
inferences might be drawn, or what consequences ensue from such a step, it is incumbent on all of us well to consider.

This was further amplified by another Congressman, Mr. Page, who remonstrated:

If Congress intermeddle with the business of sailors, why not in that of manufactures and farmers? Where, I may ask with my colleague Madison may they not go on in their zeal, and, I may add, in their laudable pursuit, of promoting the general welfare - and how totally may they be mistaken? 18

Characteristically, however, Jefferson even then, several years before ascension to Presidency, and while he was still George Washington's Secretary of State, reported in favor of the bounty to the fishing industries. 19

And in Congress, those who were for the bill did not go into further strain by undertaking to refute the arguments of Madison and his partisans, but contented themselves with expressing their sentiments by vote. And so the motion to strike out the provision offering the bounty to the cod fishermen, was defeated 32 to 26, and the whole bill passed favorably in a vote of 38 to 21, 20 which means that almost two thirds of the House supported the bill.

The whole phenomenon represents what is sometimes called "construction of the Constitution" by legislative practice,"

18Abr. 366.
19Id., p. 366, note.
20Id., pp. 367, 369.
a factor to which the judiciary has professed to ascribe considerable weight. But the above instance of construction by legislative practice demonstrates also, on the other hand, a consideration which, when given the weight it deserves, diminishes the significance that such practice may claim in determining constitutional questions. For it is clear that the prevailing proponents of the bill failed to confront the opposing minority with an argument worthy of its counterpart; and that consequently the action of Congress in passing the act was an expression of legislative will rather than legislative reason. But will alone can not be an instrument of any interpretation, although it can set precedents.

An unreasoned precedent may be as easily unconstitutional as constitutional. An action unilluminated by argument proclaims itself well enough for what did in fact happen, but this has no bearing on the question of whether it ought to have happened.

Even so, the bounty bill of 1792 was later cited, among several others, as precedent establishing the principle that the Government is not restricted in taxing and spending to the enumerated purposes of the Constitution, and that the general welfare is itself an enumerated purpose of the fiscal powers.

This was the contention of John C. Calhoun, speaking
on February 4, 1817, in the House of Representatives,21 where he argued in part as follows:

Why should we be confined in the application of money to the enumerated powers? There is nothing in the reason of the thing that I can perceive, why it should be so restricted; and the habitual and uniform practice of the Government coincide(s) with my opinion. Our laws are full of instances of money appropriated without any reference to the enumerated powers.

We granted, by a unanimous vote, or nearly so, fifty thousand dollars to the distressed inhabitants of Caracas, and a very large sum, at two different occasions, to the Saint Domingo refugees. If we are restricted in the use of our money to the enumerated powers, on what principle, said he, can the purchase of Louisiana be justified? To pass over many other instances, the identical power which is now a subject of discussion, has, in several instances, been exercised. To look no further back, at the last session a considerable sum was granted to complete the Cumberland road. In reply to this uniform course of legislation, Mr. Calhoun expected it would be said, that our constitution was founded on positive and written principles, and not on precedents. He did not deny the position; but he introduced these instances to prove the uniform sense of Congress, and the country (for they had not been objected to,) as to our powers; and surely, he said, they furnish better evidence of the true interpretation of the constitution than the most refined and subtle arguments.

By giving a reasonable extent to the money power, it exempted us from the necessity of giving a strained and forced construction to the other enumerated powers. . . .22

21Abr., 704, 707.

22Correction. Contrary to my above statement that the bounty to cod fisheries was cited by Calhoun in 1817 as precedent, the truth is that he does not specifically name that bill among the instances to which he refers directly. But it may be presumed that he subsumes that bill under the "other instances," those which he "passes over." See above, this page. - I.B.
If we discount the National Bank bill, then the Cod Fishery bill heads the list of the major measures which may be regarded as appropriations for the general welfare made regardless of the enumerated powers, and hence as examples of Congress's affirmation of Hamilton's conception, suggested in the report on manufactures, supra, of the welfare clause. Let us now proceed to examine briefly the other major instances of the same category.

Grants for Charitable Purposes:

Relief of Refugees Arrived at Baltimore from Santo Domingo

In November 1793, the legislature of Maryland appointed a committee with a view of providing relief for some persons of French nationality who had been compelled to leave the island of Santo Domingo for political reasons, and found themselves in Baltimore. The state of Maryland itself appropriated a sum of money for them, but moreover the legislature petitioned Congress, it seems, to make a contribution from the federal funds. The House of Representatives appointed a congressional committee to explore the matter, which reported on January 10, 1794, a resolution recommending that the committee of the state legislature be given power "to draw on the treasury of the United States" a sum (unspecified) each month for a period of time (left unspecified), for the proper purposes.23

It was then proposed, in the alternative, "that the

231 Am. State Papers 308. 1 Abr. 474.
President be authorized to pay $10,000 of the public money for the use of the refugees, and to negotiate the payment of it, with the Ministry of France."

The debate then assumed a wider scope. There was a brief assertion of the power of Congress to make grants for the satisfaction of human needs, and it was further proposed, in a surprising anticipation of the relief measures which were to be debated again in Congress 140 years later, that federal money should be appropriated for the relief of all indigent persons suffering from the hardships of winter and starvation. Thus,

Mr. Boudinot was convinced, that, by the Constitution, the House had a right to give it in the first instance. He considered the committee as too confined, and thought that it should have comprehended all the people of this sort in North America. Many of these people since the winter set in, must have perished of cold and want in the streets of Philadelphia, but for the benevolence of some well-disposed people. He urged the committee /of the Whole Congress, now considering the proposals of the specialized ad hoc committee/, in the most pathetic language, to extend immediate and effectual help.

Mr. Smith was confident that Congress would be repaid with thanks by the Republic of France.

Mr. Smith said that these distressed people were all women and children, except three old men.

It had been alleged that there was no precedent for relieving these people. He mentioned two:

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24 i.e., thought that the congressional committee's proposal was not generous enough.
25 1 Abr., 474.
The Americans in captivity in Algiers had been assisted by the British Consul. Some years ago, the crew of an American vessel had been shipwrecked at the coast of Portugal. They were assisted with the utmost generosity by a private gentleman. In both cases, Congress thankfully repaid the money. . . .

And are we to stand here, and tell the world that we dare not perform an act of benevolence? Is this to be the style of an American Congress? . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

Mr. Madison possessed constitutional scruples. He thought that the gentleman from Maryland (Mr. Smith) would not have injured his cause by a greater moderation of language, nor his credit for benevolence by not saying that his sympathy arose chiefly from being an eye-witness.

Then a committee was appointed to bring in a bill in conformity with an adopted resolution which provided authority for granting a relief.

We do not find in the records of Congress for the above session that any further action was taken, but it appears from other sources of information that the sum of $15,000 was appropriated for the purpose. (See the statement, which follows presently, on negotiations for the relief of Savannah, Georgia.)

Moreover it appears from still other sources that a relief appropriation for refugees from Santo Domingo was made twice, not only once. This and a number of other doubtful matters and uncertainties would each call for a minor

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26Congressman John C. Calhoun made this allegation in 1817 when arguing for the proposition that Congress has for a long time appropriated for objects not enumerated in the Constitution. Supra, p. 32.
historical monograph to clarify. Within the scope of the present enquiry, the complete investigation of all such secondary matters is impossible.

Relief to Savannah, Georgia

If the case, or cases, of the refugees of Santo Domingo represent positive precedents as instances of congressional spending for charitable purposes, the present case constitutes a negative precedent.

The town of Savannah, in the state of Georgia, was laid waste by fire, and one of Georgia's Representatives in Congress, Mr. W. Smith, introduced a resolution proposing federal aid to the sufferers of the disaster. Extensive discussions, portions of which follow, took place in the House of Representatives, but in the end the vote which was taken denied the relief prayed for.

The constitutionality of the measure was among the most important points which were debated, perhaps the most important one. The issue whether Congress may spend for general welfare at large or merely for purposes enumerated, was formulated with precision. The fact that the constitutional issue was explicitly formulated, in conjunction with the negative vote, may be inferentially taken to mean that Congress at that time adhered to the doctrine of Madison, although it was a predominantly Federalist Congress.

It seems that the case has never before been reported in the constitutional treatises which undertake to catalog congressional cases pertaining to grants-in-aid. It would appear that the most energetic researches in recent times have been undertaken by adherents of the Hamiltonian school, who did not regard it as incumbent upon them to report precedents which negate the proposition for which their school contends.

The debate in the House of Representatives on the Savannah case began December 22, 1796, and was, in part, as follows:

Mr. W. Smith said he wished to lay a resolution on the table. It was well known that the city of Savannah, in Georgia, had suffered in the most alarming manner, by that greatest of all calamities, fire, so that four fifths of the whole town was reduced to ashes.

He was desirous that some relief should be afforded to the unhappy sufferers from the Treasury of the United States. He believed there was no precedent wherein similar relief had been granted: they had, indeed, afforded relief to sufferers from the West Indies. He did not mean that a large sum should be granted; but he thought such a sum might be given, as, in conjunction with the support which they might receive from other quarters, might relieve the distress which must be the consequence of such a calamity.

The debate was resumed on December 28, 1796. There was at first a long statement contending that such and similar needs exist and arise everywhere at all times, and that if Congress appropriates for one place it would have to appropriate to all. Then occurred references to the Constitution:

Mr. Kitchell said, he felt as much as any man for the deplorable state of this people, and, if it was consistent with the Constitution, would wish them to have relief. But, said he, let us now decide. If it is unconstitutional, I would not wish to grant it; and if we are not now to grant relief, let the committee be discharged, to open the way to other benefactions.

Mr. Sprigg said, he had not made up his mind how far they had power to afford relief in a case like the present. There was an instance in the relief afforded to the daughters of the Count de Grasse, as well as that given to the sufferers at St. Domingo. If there were not insuperable objection to the measure, he hoped relief would be afforded. (Id., p. 1715)

Mr. Harper thought it was the duty of Government to alleviate such peculiar distress as the present. It was said this would prove a dangerous precedent and prevent necessary provisions against fire; i.e., it would discourage individual insurance. But such fears were exaggerated, and he favored granting the relief.

Mr. Hartley called for the reading of the act allowing relief in the sufferers by fire at St. Domingo. It was read. It allowed 15,000 dollars for their relief, which sum was to be charged to the French Republic, and if not allowed in six months, the relief was to be stopped after that time.

Mr. Macon wished the act allowing a sum of money to the daughters of Court de Grasse to be read also. He did not think either of them in point. The sufferings of the people of Savannah were doubtless very great; no one could help feeling for them. But he wished gentlemen to put their finger upon that part of the Constitution which gave that House power to afford them relief.

Many other towns had suffered very considerably by fire. If the United States were to become

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29 Id., p. 1714.
30 Emphasis added, here and in the subsequent instances, through to p. 193, incl.
underwriters to the whole Union, where must the line be drawn when their assistance might be claimed? . . . . If the Government were to come forward in one instance, it must come forward in all, since every sufferer's claim stood on the same footing.

The sum which had been given to the sufferers at St. Domingo was to be charged to the French Republic, and that given to Count de Grasse's daughters was in consideration of their father's services.

But New York had as great a right to come forward and expect relief as Savannah. He felt for the sufferers in all these cases, but he felt as tenderly for the Constitution; he had examined it and it did not authorize any such grant. He should, therefore, be very unwilling to act contrary to it. (Id., p. 1717)

Mr. Rutherford said . . . . There were two circumstances which were perfectly conclusive in his mind. He saw it our duty to grant relief from humanity and from policy. Savannah was a city in a minor helpless State; it was a very young State, yet was a part of the Union, and as such, was as much entitled to protection as any State under such dire misfortune; and it became Congress to alleviate their dire distress. . . . To say that we will not assist to relieve, when almost every State in the Union is putting their shoulder to support these people's burden, is wrong. The State of Pennsylvania has done itself immortal honor in the relief it has afforded, and shall we not help to support this part of the family in their distress?

Mr. Moore said, the laws which had been adduced as precedents were not in point. . . . The distress of the people in Savannah was not an object of legislation . . . it was not Constitutional for them to afford relief from the Treasury.

If, however, the principle was adopted, it should be general. Every sufferer has an equal claim. Lexington [Virginia] contained only one hundred houses, and all except two had been destroyed by fire. He should therefore move to add Lexington to Savannah in the resolution before them; though he would . . . vote against them both.
Mr. Smith... did not think there could be a comparison... between... a fire in a small town and one in a populous city. The destruction of Savannah was a great loss in a national view, as it would cause a considerable defalcation in the revenue, and probably any money [Congress] might advance... would be amply compensated, by enabling the city the sooner to resume its former importance in the commercial scale. (P. 1713)

Mr. Wenable did not see the difference... Because Savannah was a commercial city, its distress, according to that gentleman was indescribable, but when a like scene was exhibited in a small town, it was no longer an object which touched his feelings. His humanity went no where but where commerce was to be found.... But humanity was the same everywhere. A person who lost his all in a village, felt the misfortune as heavily as he who had a like loss in a city, and perhaps more so, since the citizen [urban dweller] would have more opportunity by means of commerce of retrieving his loss. He [Mr. Wenable] was against the general principle, as he believed, if acted upon, it would bring such claims upon the Treasury as it would not be able to answer.

Mr. Murray... was of opinion that the lines which separated individual from national cases, were very observable; the one was happening every day, the other seldom occurred.... It [the present case] was not only a claim upon the humanity of the nation, but also upon its policy, as, by restoring it to its former situation, it would be able to bear its wonted part in contributing to the revenue of the country, and would continue to carry population, arts, and wealth into that distant part of the Union. In case of war, Wavanah was a most important place. (P. 1719)

Mr. Kitchell had doubts as to the constitutionality of the measure; he thought the Constitution did not authorize [Congress] to make such a use of public money; however, he thought it might be a very flexible instrument; it would bend to every situation, and every situation to that. He thought, in this instance, while we attempt to serve, we shall eventually injure. [Etc.]

Mr. Clairborne... was not certain whether he could vote upon Constitutional grounds or not.
It was a sharp conflict between humanity... and the Constitution. /Etc./

Mr. Baldwin... was sure it was not a want of disposition to relieve the unhappy sufferers that had or would draw forth an observation on this occasion, but merely doubts as to the powers of the Federal Government in money matters. The use of a written Constitution, and of that provision in it which declared that no money should be drawn from the Treasury but under appropriations made by law, was very manifest from the caution which it gave in the expenditure of public money and in laying burdens on the people; yet he believed it impossible to derive absolute directions from it in every case.

The following sentence of Mr. Baldwin's is directly to the point:

The objection is, that Congress is empowered to raise money only to pay the debts and to provide for the common defence, and the other purposes exactly as specified in the 8th section /of Article I of the Constitution/. (P. 1722)

Baldwin continues:

The objection has often been made, but many laws have passed not exactly specified in that section. He mentioned the private acts before alluded to, the law for establishing light-houses, to aid in navigation in the improvement of harbors, beacons, buoys, and public piers, establishing trading houses with the Indians, and some others, to show that though the Constitution was very useful in giving general directions, yet it was not capable of being administered under so rigorous and mechanical a construction as had been sometimes contended for. (Ibid.)

Baldwin continued further:

No doubt the usual pressure of public misfortune is relieved by the poor-laws, and other acts of the State Governments; but, suppose a State, belonging to the Union, ..., by some of the great causes which we know operate in nature, by tremendous convulsions and earthquakes, ..., was to be thrown into such a situation as some parts
of the world have been, not only the whole prop-
erty of the wretched survivors destroyed, but their place no longer habitable, would the Federal Government think they had no powers even to grant them some of their new land as a place of refuge?

He only wishes to establish the principle that there were possible instances in which it would be the duty of the Federal Government to interpose relief.

Then Congressman Rutherford -

... presumed the rising dignity of this great Confederation demanded mutual assistance in dis-
tress. ... But for gentlemen to say the law [the Constitution] is to have its full operation at this time, is saying nothing at all. ... I't is as though you were to say to a man that is drowning, stay while and we will come and assist you. This would be poor comfort. Policy, humanity, and justice, should prompt the House to the noble action. If one part of a system is injured, the whole suffers by it. ...

Mr. Nicholas then said,

he meant to have given a silent vote upon this subject, and have left other gentlemen to follow their own inclinations in the business; but an attempt had been made to ridicule the opinion which he and others held of the sacredness of the Constitution.

Gentlemen had said [that the Congress] stood in the same situation as individual states. That opinion, he said, had gone too far. Government [i.e. the Federal Government] had no power but what was given it, but the State Governments had all power for the good of their several States.

If the general welfare was to be extended (as it had been insinuated it ought) to objects of charity, it was undefined indeed. Charity was not a proper subject for [Congress] to legislate upon. (P. 1723)

Subsequently Congressman Giles expressed the opinion that the needs of Savannah were being taken merely as a pretext
for establishing a principle, i.e., the broad interpretation of the scope of the spending power:

Mr. Giles said, if the present resolution passed it would make them answerable for all future losses by fire. The small sum . . . was not of any consequence when compared with the establishment of a principle of that House acting upon generosity. He believed that neither the money nor humanity, but the establishment of a principle, was the thing aimed at.

The unanimity with which a resolution had passed the Pennsylvania legislature, was a proof that they believed they had the power to pass such a law. It was said the General Government possessed the authority. The gentleman from Georgia had said that the "affairs of men" made it necessary to depart from the strict constitutional power. For his part, he did not think they ought to attend to what "the affairs of men" or what generosity or humanity required but what the Constitution and their duty required. (P. 1724)

The authority of that House, he said, was specified, beyond which they ought not to go. This was a principle not within the Constitution, but opposed to it.

The claim was eventually disallowed. (Id., p. 1727)

### Alien and Sedition Laws

In contrast to the instances of legislation which we have considered heretofore, namely, the National Bank, the bounties to the fishing industry, and certain charitable grants, --all of which have in common the characteristic of being applications of the spending powers--the group of laws we are presently to consider are not, in any significant sense,  

31 Mr. Giles was quite consistent, having opposed bounties to fisheries as well. Supra, p. 77.
manifestations of the spending power. They are assertions of the power to govern, not the power to give.

In truth, of the legislative acts considered herein so far, only the charitable grant constituted an act of giving in pure form. All the other measures were in the nature of appropriations combined with elements of governing power. But then, there was some pretense at relating them, in each case, to some of the enumerated powers. The bank was referred to the whole group of the various fiscal functions—taxation, borrowing, remittance of the debts, coinage and regulation of money, and so on. The cod fisheries were regulated, it seems, in view of a vague reference to the power to maintain a navy and also to regulate aspects of commerce. Side by side with the references to the specific powers there has always been present a more or less obscure reference to the idea of providing for the common defense, apart from the specific military clauses; and, of course, the perennial semi-tendency to invoke the concept of general welfare in case that may have some value of moral persuasion if not the merit of constitutional logic.

Now the set of statutes passed in the summer of 1798 with the two dominant ideas, one, to restrain potentially inimical aliens in times of a declared war, and two, to restrain the press and spoken expression in similarly perilous circumstances, contrasted with the antecedent legislation in at least three ways. In substance, the alien and sedition
laws are a much more radically cutting interference with individual human action than any preceding legislation of Congress. Secondly, it seemed even more difficult to relate them to any specific enumerated power, than the other laws to which objection had been made; and moreover, the provisions curbing the freedom of the press ran point-blank against the Bill of Rights.32

To the query of how was it possible that bills of a nature so admittedly, or, at least, so seemingly unconstitutional, were passed in Congress, the answer is found in the same principle with which we have already met before; namely, the majority desirous to pass the law, conscious of its numerical strength, preferred to rely on vote rather than on argument. To a greater extent still than instances earlier herein considered, the legislation in point rests, from the standpoint of constitutionality, upon an act of will which subordinates the Constitution, in silence, to some other consideration.

Only a handful of Representatives argued against the Alien and Sedition laws in Congress. From their remonstrations, we read the following excerpts:

Mr. Livingston could not see how acts made contrary to the constitution could be binding upon the people; unless gentlemen say Congress may act in contravention of the Constitution.

Mr. Otis asked who were to be the judges? Mr.

Livingston answered, the people of the United States. We, he said, are their servants, when we exceed our powers, we become their tyrants.

Mr. Macon. No gentleman, in support of the bill, has gone into the constitutional question; no one has shown what part in the constitution will authorize the passage of a law like this. He believed none such could be adduced.\(^{33}\)

Then the bill passed in the affirmative, in a vote of 47 to 36.

There followed an avalanche of protest springing mainly from Jefferson and Madison, for the expression of which some of the states, to wit, Kentucky and Virginia, provided official instrumentalities.

The basic ideas of the protests raised by Kentucky and Virginia in the late Nineties of the Eighteenth Century were the same as the reservations expressed so generally in the times of the constitutional ratification a decade before, but nevertheless this time the protestations of the two states gathered little or no support from other states, and some states even condemned the protests.\(^{34}\)

It has been speculated that in spite of the Alien and Sedition Acts, the Federalist Party would have prevailed in the elections of 1800 if George Washington had agreed to a third presidential candidacy.\(^{35}\)

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\(^{33}\)Abr. 308. July 5, 1798. Original italics.


The set of documents in which the protests challenging the Alien and Sedition Laws particularly, and alleged congressional usurpations generally, were stated, is comprised of the following:


The ideological basis of the whole set is the principle earlier proclaimed in Federalist Number 41, and Jefferson's "Opinion on the Constitutionality of the National Bank," supra; but there are some additions and variations.

Resolution 7 of the first Kentucky protest declaims:

That the construction applied by the General Government (as is evidenced by sundry of their proceedings) to those parts of the Constitution which delegate the Congress a power "to lay and collect taxes . . ." [etc.,] and to "make all laws which shall be necessary and proper . . ." [etc.,] goes to the destruction of all limits prescribed to their power by the Constitution;

The Virginia Resolutions charge:

. . . that a spirit has in sundry instances been manifested by the Federal Government to enlarge its powers by forced constructions of the constitutional charter which defines them; and that indications have appeared as a design to expound certain general phrases . . . so as to destroy the meaning of the particular enumeration. . . .

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36 Commager, op. cit., pp. 178 ff. Quaere, who authored these Second Resolutions.

374 El. 546-580.
The second resolutions of Kentucky further proclaim:

... That if those who administer the general government be permitted to transgress the limits fixed by that compact (the compact implicit in the union of states, upon which the Constitution rests), by a total disregard to the special delegations of power therein contained, an annihilation of the state governments, and the creation upon their ruins of a general consolidated government, will be the inevitable consequence. . . .

The "Report on the Virginia Resolutions," by Madison, contains some testimony as to the intentions of the Federal Convention in adopting the phraseology "common defense and general welfare," which Madison says gave no governmental jurisdiction to the Continental Congress in the first place, and were meant to give none to the Congress under the Constitution either.

Although this is obvious enough, Madison further contends, the Government seems to act as though these empty but vast expressions, not the specific and limited grants enumerated in the sequel of the Constitution, were the source of its jurisdiction.

For his examples Madison points to Hamilton's report on manufactures, and to the fact that in 1797 a congressional committee was created, to deal with matters of agriculture. 38

Madison's treatment of Hamilton's report on manufactures exhibits a tendency toward distortion. He correctly recounts

38 Madison's complaint in the "Report on Resolutions," see 4 Elliot 546-580, at 551. For Hamilton's "Report on Manufactures," see supra, pp. 74. For the congressional committee on agriculture, of 1796, see infra, pp. 100 ff.
from the report on manufactures that according to Hamilton it belongs to the discretion of Congress "to pronounce upon objects which concern the general welfare, and for which, under that description, appropriation is requisite and proper. And there seems to be no room for a doubt,"--continues Madison--"that whatever concerns the general interests of learning, of agriculture, of manufacture, is within the sphere of national councils as far as regards an application of money."

Up to this point, Madison correctly describes Hamilton's doctrine. But in the passage which follows, the doctrine is presented with unwarranted additions, as follows:

Now, whether the phrases in question be construed to authorize every measure relating to the common defence and general welfare, as contended by some (see Variant I, page 9, supra), or every measure only in which there might be an application of money, as suggested by the caution of others, - the effect must substantially be the same, in destroying the import and force of the particular enumeration of powers which follows these general phrases in the Constitution; for it is evident that there is not a single power whatever, which may not have some reference to the common defence or general welfare; nor a power of any magnitude which, in its exercise, does not involve, or admit, an application of money. The government, therefore, which possesses power in either one or other of these extents, is a government without the limitations formed by a particular enumeration of powers. . . .

. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

The true and fair construction of this expression . . . /is, that/ money can not be applied to the general welfare, otherwise than by application of it to some particular measure conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the particular authorities vested in Congress. If it be, the
money requisite for it may be applied to it. If it be not, no such application can be made. . . .

Finally, Madison concludes that an unlimited power for general welfare in the hands of the general government is tantamount to a consolidation of the states into one entity, which is contrary to the intentions of the Founders.

**Agriculture, Internal Improvements, and Institutions of Learning Prior to the Nineteenth Century**

The Constitution does not delegate to the Federal Government any jurisdiction in matters of agriculture, education, nor, according to beliefs expressed in certain phases of the early Nineteenth Century, in the building of roads or canals.

That the Constitution should delegate power in these matters, was at one time urged in the Federal Convention by some of the Delegates, but the proposals did not find their way into the Constitution. Nevertheless the Government, although lacking jurisdiction, showed very early an interest in and concern for these objects. Thus December 10, 1796, the Senate, in response to previous communications by the

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39 August 20, 1787, G. Morris, supported by C. Pinckney, submitted a proposal recommending as follows: "To assist the President . . . there shall be a council of state composed of the following officers: . . . The Secretary of domestic affairs, . . . It shall be his duty to attend to matters of general police, the state of agriculture and manufactures, the opening of roads and navigations, and the facilitating communications throughout the United States. . . ." 5 El. 446.
President of the United States, wrote to him in part as follows: 40

The necessity of accelerating the establishment of certain useful manufactures by the intervention of legislative aid and protection and the encouragement due to agriculture by the creation of boards (composed of intelligent individuals) to patronize this primary pursuit of society are subjects which will readily engage our most serious attention.

A national university may be converted to the most useful purposes. The science of legislation being so essentially dependent on the endowments of the mind, the public interests must receive effectual aid from the general diffusion of knowledge, and the United States will assume a more dignified station among the nations of the earth by the successful cultivation of the higher branches of literature. 41

Soon afterwards the Congress 42

Resolved, that so much of the President's Speech as relates to the encouragement of manufactures, be referred to the committee of Commerce and Manufactures,

and further resolved that

so much of the President's speech as relates to the promotion of agriculture, be referred to a select committee; and

40 James Richardson, Messages and Papers of the Presidents, Vol. 1, p. 205. Hereafter cited as "Rich."

41 Corwin, op. cit., 555, note 18, remarks: "The fact that the proposed national university would have been established in the District of Columbia does not, of course, solve the Constitutional question so far as Congress's power of expenditure is concerned; since the expenditure would have been, not for local governmental purposes, under Sec. VIII, cl. 17, of Article I, but in the furtherance of the 'general welfare'."

42 Annals of Congress 1671.
to the latter committee the following persons were appointed:

    Mr. Swift, Mr. Gregg, and Mr. Brent.

Then on January 11, 1797, which was Wednesday, Mr. Swift of that committee made a report,43

    recommending the institution of a society for that purpose [promotion of agriculture], under the patronage of Government, which might act as a common centre to all other societies, of a similar kind throughout the United States. No public provision is contemplated except for the salary of a Secretary and for stationery; but if the state of the Treasury would make even this unadvisable [sic], it is stated it might be carried into effect without pecuniary aid.44

The report is accompanied by a plan, the principal articles of which are, that the society shall be established at the Seat of the Government; that it shall comprehend the Legislature of the United States, the Judges, the Secretary of State, . . . the Treasury, . . . of War, the Attorney General, and such other persons as should choose to become members . . .; that an annual meeting should be held at the Seat of the Government. . . .

This was then referred to the Committee of the Whole to be discussed on Monday, January 16, but apparently45 it was not discussed that day or ever afterwards, and that was the end of Federal agricultural policies within the Eighteenth Century.

On the other hand, the Committee on Commerce and Manufactures was assigned the task of inquiring -

    whether it would not be expedient, for the better security of navigation, to place a number of buoys within and near the harbor of Boston. . . . .46

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432 Annals of Congress 1835.

44Emphasis supplied.

45Monday, January 16, 1797, is recorded on pp. 1837 ff. of Annals of Congress, Vol. II.

462 Annals of Congress 1837.
The committee found that it would; and the trends of policy thus initiated, grew into a standard type of legislation, namely, the Rivers and Harbors bills, under which money and, in the older days, land, have been appropriated from the beginning of the Republic to the present day in large quantities. These improvements to navigation were the first acts of federal involvement in the type of program which in the early Nineteenth Century became known as "internal improvements," and which for a long time represented the central constitutional issue of the ante-bellum part of the century.

It was along the developmental lines beginning with the above resolution, that the Government eventually found itself the most important agent in projects such as those arising at the Muscle Shoals complex; and the modern Tennessee Valley Authority, a federal agency of a novel type, became the model on which numbers of others were subsequently fashioned.

No move was made in the remaining years of the Eighteenth Century to promote a system, or systems, of public education of an elementary or intermediate type, but the idea of a national university received an extensive discussion in Congress. Nevertheless, it did not materialize at that time.
CHAPTER III

INTO THE NINETEENTH CENTURY

Introductory Observations

The most permanently conspicuous constitutional issue of the early Nineteenth Century, from Jefferson's Administration to the end of Jackson's, is the question of federal involvement in what was and occasionally still is called "internal improvements," a term found in writings of Adam Smith and in Hamilton's. Hamilton probably adopted the phrase from Smith.

The relative significance of the topic of internal improvements as a leading constitutional issue diminished during the Presidency of Van Buren, being overshadowed momentarily by an economic crisis, and permanently, indeed increasingly, with the paramount complexities of abolitionism and its correlative suggestion of secessionism. But, until the Civil War, the tune of internal improvements did not disappear from the (kakophonic) symphony of constitutional argumentation. Only the former theme, now finding itself in conjunction with the more important matter of slavery/abolition and the basic problem of the permanency of the Union, became politically subordinated to the larger issues.
In this period the checks and balances functioned in such a manner that the truncating of the powers of the states was gladly performed by the Supreme Court and the rest of the federal judiciary, even though this branch of government was manned by professed Republicans (and original Anti-federalists) as well as by Federalists from the very beginning.*

The function of curbing the Congress in the name of the reserved rights of the states was acquired by the Presidency with a zeal which struck a fair comparison with the courts' opposite predilection. The towering figure in the field of presidential vetoes was Madison. He established a tradition to which each of the Democratic-Republican Presidents of the ante-bellum era made his contribution in good time, at least in practice if not in theory.

In practice, both Monroe and Jackson suppressed some of the internal improvements, as Madison would have done in their place. In theory, both of them were avowed adherents of the doctrine elaborated by Hamilton in the "Manufactures."

Madison himself had made it clear in the 1799-1800 "Report on the Virginia Resolutions," that he would have no part of the exposition by whose light the Constitution permitted Congress to give out money for the general welfare aside from the enumerated powers. But even he did not have the heart to adhere to his thesis systematically, for he

*Generally, see Hampton L. Carson, The History of the Supreme Court of the United States, with Biographies of all Chief and Associate Justices, Philadelphia, P. W. Ziegler Co., 2 wols., 181 copyright 1891, published 1902.
approved a number of projects in the nature of internal improvements. Others he vetoed.

The tradition of his theory was then carried into practice with a systematic rigor by the Democratic Presidencies following Van Buren, and including Buchanan.

Van Buren during his one term seems to have had no occasion to form an opinion on the welfare clause and internal improvements, for the financial collapse following the policies of his predecessor did not leave either the state or the federal governmental systems with enough fiscal energy to press for more publicly sponsored internal improvements.

Jefferson, the first of the Republican or Democratic Presidents, had actively promoted the idea of internal improvements, envisioned a future in which revenues would overflow debts and expenditures, and took kindly to the idea, which occurred to him in that connection, that the Federal Government might as well redistribute the financial surpluses among the states for the promotion of learning, agriculture, the manufactures, and a system of communications: in a word, internal improvements.

The Congress, by adopting certain resolutions, creating certain committees, and passing numerous laws authorizing internal improvements, manifested its preference, in those instances, for the Hamiltonian outlook. On the other hand, it seems that the negative instances in which similar appropriations were proposed but repudiated, have never been counted. Hence the proposition, usually adopted on the evidence of the
positive cases, affirming Congress's Hamiltonian inclinations, may allow of some qualification.

The whole era is very obviously characterized by polarity, vacillation, and ambivalence. The government as a whole experienced constantly the pulsations of two divergent tendencies, with varying degrees of centralism and decentralism prevailing alternately. The whole field of facts apparently has never been quantified systematically enough to provide conclusive support to precise statements of the tendencies involved. But, impressionistically speaking, the first three decades and a half of the century allowed a greater latitude to the spending and otherwise congressional powers than the subsequent twenty-five years.

In the early 'thirties of the Nineteenth Century, the voice of Mr. Justice Story lent authority to the views advocated forty years before by Hamilton, and this presumably helped to place the Government upon the Hamiltonian foundation. But it seems evident that these effects had to remain latent during the two decades issuing into the Civil War, for the generally known fact of the prevalence, in those times, of a rigidly strict constructionism, is not compatible with the idea.

After the Civil War, it has been observed, the Presidents no longer vetoed internal improvements or other appropriations for the sole reason that the purposes of the appropriations were not reducible to the enumerated powers and therefore must be predicated on the Hamiltonian view of the welfare clause.
There were vetoes of appropriations, especially in Cleveland's administrations. But not for constitutional reasons.

With the Administration of Lincoln, there ended the long tradition of the Presidency to expound the welfare clause. It was never resumed again. But while it lasted, the tradition provided extensive presidential essays concerning the role of the welfare clause in the constitutional scheme.

The Federalist or Whig Presidents did not engage in this custom.

Nothing original was added to the expositions of the welfare clause by the literature of the era of 1800-1860. All basic models or variants of the interpretation were invented or discovered prior to the Nineteenth Century.

All the veto messages contain a statement essentially identical with the idea of Federalist #41. This is the negation of the concept of plenary governmental powers in Congress. Some of the vetoes moreover include a rejection or an affirmation of the Hamiltonian concept of spending for the general welfare. Some distort Hamilton's theory in the manner in which Madison distorted it in the "Report on the Resolutions." Under the distortion, the Variant (II) becomes identified with Variant (I) through Variant (IV). See Table I, supra, page 9.

Some aspects of the above general summary will now be detailed with a closer attention.
Territorial Acquisitions

The Constitution makes no explicit provision authorizing the Government to enlarge the realm by acquiring territory. At the time the Constitution was drafted and adopted, the sovereignty of the United States extended, in addition to the geographical area composed of the several states, to a large territory of a north-westerly location, which was governed by norms enacted by the Continental Congress.¹

¹The status of the territories external to the states was ambivalent under the Articles of Confederation. To understand it, we need to look to an even earlier period of history, that which precedes the Declaration of Independence of 1776. At that time, several of the 13 colonies held titles to lands, or territories, external to their own boundaries. Six of the colonies held such titles on the basis of early grants from the English Crown. One colony had a title based upon a treaty of cession with Indian tribes. The other six colonies had no such possessions. - The colonies themselves were dependencies of British sovereignty; hence the external territories belonging to the various colonies were dependencies of dependencies. Then the colonies proclaimed themselves independent, which implied a change of status for the territorial dependencies also. They were now exempted from British sovereignty, and belonged to the new states. - When a union was formed, the question arose: "Were these territories the property of the individual states who claimed them, or were they the property of all the states collectively?" The Articles of Confederation seemed to favor the former assumption, for according to that document no state might be deprived of territory for the benefit of the United States. John D. Hicks, The Federal Union, 3rd ed., Houghton Mifflin Co., Cambridge, Mass., 1957, p. 159. Eventually, however, the states transferred the territories to Congress, and assented to the governing of them by the Congress. -- Professor Charles K. Burdick observes that territorial cessions made to the United States by the several states in revolutionary days were meant for the general welfare. "Federal Aid Legislation," 3 Selected Essays on Constitutional Law 628, from (1923) 8 Cornell L.Q. 324.
These congressional laws\(^2\) were predicated upon acts of cession\(^3\) emanating directly from the sovereignty of the states and not from the content of the Articles of Confederation, although with respect to territories generally, the power to occupy and govern them at least temporarily must be inferred from the power to conduct defensive operations, which was vested in the Congress by the Articles.\(^4\)

The Constitution gave recognition to the fact that the United States possessed certain given territories outside of the several states,\(^5\) and provided for the possibility of others being created within the realm by further cessions from the states of the Union.\(^6\) These classes of territories, at least, were contemplated by the provision\(^7\) delegating to Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."


\(^3\)See, e.g., "Virginia's cession of western lands to the United States," Commager, \textit{id.}, Document #76.

\(^4\)Art. IX.

\(^5\)Const. VI:3:2.

\(^6\)Const. VI:3:1; Const. I:8:17.

\(^7\)Const. VI:3:2.
Whether this provision might also apply to territories other than the above-mentioned classes, depended on whether or not the United States could acquire any further territories. This question was open to discussion when during the March of 1803 a trend of events developed which made it urgent that the question be determined:

What is the state of things? There has been a cession of the island of New Orleans and of Louisiana to France.

No nation has a right to give to another a dangerous neighbor without her consent.8

Such were the voices of Congress responding to the situation. As is well known, the object of concern was a "right of deposit" enjoyed by the United States by arrangement with the Crown of Spain, enabling the commerce of the western geographical area of the then United States to use the river Mississippi as an outlet into the Mexican Gulf.

It was at first not the intent of the United States to seek the acquisition of any territory, but merely to do all that was necessary to keep the New Orleans junction open to traffic in case the new owner, France, moved to close it. Authorizations and appropriations were accordingly given by Congress to the President of the United States for purposes of military defense of the commercial route and junction.9

82 Abr. 681.

9"An act directing a detachment from the militia of the United States, and for erecting certain arsenals." Approved March 3, 1803, 2 Stat. 241, ch. 32. Sec. 4 provides "for paying and subsisting" the troops, and for defraying other expenses.
But meanwhile negotiations with France suggested the possibility of purchasing the island of New Orleans, and the Congress appropriated two million dollars for the purpose.\textsuperscript{10} The resolutions to appropriate the money, and the appropriation act itself,\textsuperscript{11} do not speak of territorial acquisition, but describe themselves merely as a measure "to defray any expenses which may be incurred in relation to the intercourse between the United States and foreign nations." The two millions were voted in January. Subsequently the offer was made in Paris to United States diplomatic representation that in addition to New Orleans, the whole vast area of Louisiana could be purchased from France.

President Jefferson was of opinion that under the United States Constitution neither he as President, nor the Congress, had authority to acquire territory, at least not by purchase, whatever opinion he might have, if any, about acquisition by conquest. It was nevertheless his firm determination that, for the good of the nation, the acquisition was necessary. He settled the conflict in his mind by assuming that a sub-

\textsuperscript{10}For proceedings in the House of Representatives, see 2 Abr. 721-723.

sequent constitutional amendment would legalize the transaction, and meanwhile he counseled that in Congress the constitutional problem should not be agitated.

In such general circumstances, a treaty, since then known as "the treaty of Paris (of 1803)," was signed between the United States and France on April 30. And it was communicated to both Houses of Congress in October of that year.

Contrary to Jefferson's wishes, the issue of constitutionality was brought into the open and debated keenly on the floor. The political parties had switched their customary attitude and the Federalists found themselves advocating the strict constructionist position. The main reason behind their drive was a fear of having a vast agricultural area added to the body politic. The constitutional reasoning in the debates was not always clearly defined. Thus for example a Senator favored the purchase of New Orleans alone, but

... as to Louisiana, this new, immense, unbounded world, if it should ever be incorporated into this Union, which I have no idea can be done but by altering the Constitution, I believe it will be the greatest curse that could at present befall us; ... 15

Some explicitly asserted that the treaty-making power did not comprise the right to acquire territories, especially not if this implied the incorporation into the national body politic

122 American State Papers 506.
13 Ibid.
142 Abr. 52 ff., 146 ff., 3 Abr. 10 ff.
153 Abr. 10.
whole new population; and that this new entity was to be soon endowed with statehood, as the Treaty of Paris provided in its Article 3, was especially repugnant to the feelings of some of the Federalists in Congress. Only Congress, not the President and two thirds of the Senate alone, could admit states into the Union; and even then this power, they argued, extended only to geographical areas comprised within the territories which the United States already possessed at the time of the adoption of the Constitution.

From the opposite side, it was argued simply that the power to make treaties does authorize the acquisition of new territories, or such authority was inferred both from the treaty-making power, and from the power of conquest.

Mr. Pickering, Senator Timothy Pickering of Massachusetts, had never doubted the right of the United States to acquire new territory, either by purchase or by conquest, and to govern the territory as a dependent province; and in this way might Louisiana have become a territory of the United States, and have received a form of government infinitely preferable to that to which its inhabitants are now subject.

Eventually, the sentiment in Congress was overwhelmingly in favor of the acquisition. The legislative consummation of the transaction took the form of three separate acts of Congress. The first is entitled "An act to enable the President . . . to take possession of the territories ceded by France to the United States. . . ." This statute reappropriated the moneys

163 Abr. 18. 173 Abr. 13.
182 Stat. 245.
originally intended for a military intervention, for the newly authorized purchase.

The second of the three statutes which accomplished the purpose is a comprehensive financial measure. "An act authorizing the creation of a stock, to the amount of $11,250,000, for the purpose of carrying into effect the Treaty of Paris... and making provision for the payment of the same." The method of financing under this act consisted in the issue, "in favour of the French Republic," of "certificates of stock" by the United States Treasury. This "stock" were actually bonds, bearing an interest of six percent per annum, and the whole obligation was funded in the same manner as the rest of the debt of the United States—i.e., the revenue was to be raised by taxation.

The third act (Statutes at Large, Volume II, page ), titled "An act making provision for the payment of claims of citizens of the United States on the Government of France, the payment of which has been assumed by the United States, by virtue of the Treaty of Paris," is a clearance measure which utilizes existing claims of United States citizens on

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19 Supra, note 9, on p. 111.

20 The act authorizing the President to take possession is found at 2 Stat. 245. The original appropriation id., 241. The authorization to take possession was approved Oct. 31, 1803.

21 2 Stat. 247; approved Nov. 10, 1803.

22 Const. I:8:1; and "An act for the redemption of the whole public debt of the United States," of April 1802, ch. 32.
the Government of France, as a counter-balance in partial repayment of the costs of the Louisiana territory. Such, then, was the constitutional, legal, and financial mechanism of the acquisition of the first territory after the establishment of the Constitution.

It is clear from all the proceedings that although the transaction, being a purchase, involved an application of the spending powers, it was nevertheless not predicated upon the power to spend for the general welfare independently from the several specified grants of authority. Such a possibility was never even suggested in the year 1803 during which the purchase was accomplished, and it was not until 1817 that, in retrospect, the Louisiana purchase was sought to be constitutionally justified upon the sole basis of the power of making appropriations.\(^{23}\)

The judicial department was never presented with the opportunity of adjudicating the constitutionality of the Louisiana purchase itself. But in 1819 the United States purchased another territory, this time the peninsular Florida from Spain. Within a decade, a case arose\(^{24}\) in which it became necessary to determine "the relation in which Florida stands to the United States."\(^{25}\) In that connection, the

\(^{23}\) Supra, p. 82.


Court disposed of the question whether the United States could acquire new territory, in the following statement:

The Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties; consequently that Government possesses the power of acquiring territory, either by conquest or by treaty.26

This, then, is the proposition that settles the doubt. No recourse was found necessary to the spending powers.

The Supreme Court under Marshall, rather than regarding the spending power as an instrument fit to open for the Government access to fields of action which were otherwise not committed to its jurisdiction, took the position that congressional taxation, and thus presumably spending, is confined to the specified purposes. This idea is, in the words following, expressed in Gibbons v. Ogden:27

Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense 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 States. . . .28

This position obviously concurs with Madison's view of the welfare clause; and it is affirmed in the same decision at

26 Id., 592 f.


28 Id., at 441. Emphasis added.
another place of which the Chief Justice presented an emphatic rebuttal of the general principle of strict constructionism, in the following manner:29

Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the states are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the Constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined.

The two above quotations in conjunction make it clear that Marshall was of the opinion that the natural reading of the welfare clause would not empower Congress to tax (and spend) for those purposes which are within the exclusive province of the states.

Such being the Supreme Court's position at the time, it is understandable that it did not undertake to place the territorial purchases upon the constitutional basis of the spending power. And it appears in conclusion that Calhoun's bid to view the Louisiana purchase as a precedent to reinforce the Hamiltonian principle of the welfare clause, did not take roots in constitutional doctrine.

29Id., 462 f.
But in another field of legislation, Congress was soon to assert itself in a manner which invoked the larger concept of the spending power. This was in the sphere of internal improvements.

**Internal Improvements:**
Roads and Canals, Rivers, Railroads

The phrase "internal improvement," or "improvements," is a terminus technicus peculiar to American politics of the five or so decades preceding the Civil War. It seems to have acquired common currency in the years following the War of 1812, and from then on it occurs regularly in presidential and congressional documents. It largely vanished from usage during the Civil War, although it continues to live in the parlance of constitutional history, from whence it makes an occasional quaint excursion into the language of a contemporary judicial opinion and finds there a refreshingly startling application to some ultra-modern phenomenon.

The epithet "internal" probably emerges from contradiction to "foreign affairs," thus suggesting certain domestic concerns of the United States; but it also parallels the phrase--very important in the old days--"the internal police of the states," i.e., their internal affairs as contradistinguished from concerns of the national government.

The concept "internal improvement" is, in any event, capable of a myriad of applications to anything and everything that is in any sense internal to the United States or possibly
to the several states. It might refer to the souls of men or their bodies, to arts, sciences, ethics, or to sports, recreation, hygiene, housing, or communion with the universe. One President of the United States, at least, cherished and proposed such an inspired meaning of "internal improvements." It was John Quincy Adams. Thoreau and Emerson would undoubtedly have concurred, if the technicalities of a constitution other than transcendental had interested them.

But in practice the connotation of the phrase was much less out of the ordinary. From the very first, the term "internal improvements" simply meant the building, keeping, and repairing of roads and canals, and improving the navigability of existing streams or other bodies of water. Sometimes "internal improvements" included progress in agriculture, or a growth of "manufactories" or the increased prosperity of fisheries, and of commerce and business generally. Sometimes also education, which usually meant a public and basic or elementary education, was regarded as a part of the meaning ascribed to the idiom "internal improvements." Or the idea of a national university would be from time to time mentioned as a desirable "internal improvement."

The phrase "internal improvement" is unknown to the Constitution of the United States. It is probably nowhere used in any of the several state constitutions. The word "improvement" is frequently used by Adam Smith, as indeed the nature of the doctrines of economics would make us expect it
to be. The Wealth of Nations influenced Alexander Hamilton, and it seems that the latter's essay on manufactures \(^{30}\) predetermined that "internal improvements" would refer above all to a system of public passageways on ground or by water. Under the heading "The facilitating of the transportation of commodities," in the aforementioned essay, Hamilton writes: \(^{31}\)

Improvements favoring this object intimately concern all the domestic interests of a community; but they may, without impropriety, be mentioned as having an important relation to manufactures. There is, perhaps scarcely anything which has been better calculated to assist the manufacturers of Great Britain than the melioration of the public roads of that kingdom, and the great progress which has been of late made in opening canals. Of the former, the United States stand much in need; for the latter, they present uncommon facilities. The symptoms of attention to the improvement of inland navigation which have lately appeared in some quarters, must fill with pleasure every breast warmed with a true zeal for the prosperity of the country. These examples, it is to be hoped, will stimulate the exertions of the government and citizens of every state. There can certainly be no object more worthy of the cares of the local administrations; and it were to be wished that there was no doubt of the power of the National Government to lend its direct aid on a comprehensive plan. \(^{32}\)

This is one of those improvements which could be prosecuted with more efficacy by the whole than by any part or parts of the Union. There are cases in which the general interest will be in danger to be sacrificed to the collision of some supposed local interest. [Italics added]

Hamilton then quotes from Adam Smith, introducing the passage with the note that "These remarks are sufficiently judicious

\(^{30}\) \textit{Works}, Lodge, ed., Vol. 5, pp. 70 ff; and \textit{Supra}, 75 ff.

\(^{31}\) \textit{Id.}, pp. 159 ff.

\(^{32}\) Emphasis added.
and pertinent to deserve a literal quotation:

"Good roads, canals, and navigable rivers, by diminishing the expense of carriage, put the remote parts of a country more nearly upon a level with those of the neighborhood of the town. They are upon that account, the greatest of all improvements. . . ."

This had been foreseen while the Constitution was in the making, and proposals were made to insert among the enumerated powers of Congress also the power "to provide for cutting canals where deemed necessary," and to "grant charters of incorporation where the interest of the United States might require, and the legislative provisions of individual states may be incompetent." The mover of the latter proposition (Madison) meant that the corporations would promote means of communication across the Union.33 But the canal-clause was rejected by the Convention by a large majority.

As for the power "to establish . . . post-roads,"34 the Convention approved it in a 6 to 5 vote.35 From the prevailing mood as the records of the Convention reflect it, it seems that the Delegates had a considerable tendency to regard "internal improvements" as belonging to the "internal police" of the several states. And after the adoption of the Constitution

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335 El. 543 f. Edmund Randolph seconded Madison's proposal to enable Congress to incorporate companies for cutting canals, etc. Rufus King thought the power "unnecessary," perhaps in view of the commerce clause. James Wilson replied: "It is necessary to prevent a state from obstructing the general welfare." But eventually the motion to enable Congress to provide for canals, was defeated 8:3.

34 Const. I:8:2.

35 El. V:434.
the power concerning roads, which had been none-too-willingly given in the first place, was for some time reduced to a mere shadow.

Scores of statutes enacted during the first 15 years of the Constitution\textsuperscript{36} were predicated on the assumption that "to establish a post-road" meant merely to designate along which of existing roads the United States Mail should be carried—but not to build a road. With the word "establish" so stringently interpreted, the postal clause of course could not validate the building of any kind of passageway. And the power to declare and conduct war, and to maintain and operate the armed forces, would not readily justify the building of a road in a time of peace and without a visible relatedness to some specific needs of defense. In a word, there was no road-building clause to be found in the Constitution as in the year 1800 and thereabouts citizens read the document—unless, of course, the action might be placed upon the welfare clause. But such uses of the welfare clause had been valiantly repudiated by the various resolutions of the last decade of the Eighteenth Century, and no man had had a stronger hand in that repudiation than Thomas Jefferson. It would therefore have seemed a theoretical impossibility for him to favor, sponsor, or direct the making of a road conceived as a federal project.

Nevertheless he had done the theoretically impossible

\textsuperscript{36}Statutes at Large, passim.
in the case of the Louisiana purchase, and he did it again in the case of the Cumberland road. In both instances, he satisfied himself that a subsequent constitutional amendment would rectify the presently unlawful action of the Government.\textsuperscript{37}

The Cumberland Road project is a cause célèbre which needs no new narrative to tell its story.\textsuperscript{38} We shall confine ourselves to certain more technical remarks.

As early as 1801, and before the admission of Ohio to statehood, Congress "provided that 1/20th part of the net proceeds arising from the sale of lands in the State of Ohio, should be applied to making roads to that State, under the direction of Congress."\textsuperscript{39}

The appropriation was then made in December 1803\textsuperscript{40} and the President of the United States was authorized to proceed with the steps outlined for him in the congressional instruction.\textsuperscript{41}

The President was to appoint "three commissioners to lay out a road . . . to be four rods in width." The commissioners were directed to "make a report to the President of . . . the expense of making the road passable." The President was

\textsuperscript{37}Jefferson had no firm opinion as to whether the postal clause would validate road construction; he assumed that in proper circumstances, a military road might be built by the Government; but an overall system of internal improvements, he reckoned, could not be undertaken lawfully, unless the Constitution were amended.

\textsuperscript{38}Cf. Corwin, op. cit., 557, and literature there cited.

\textsuperscript{39}Retrospectively summarized in Congress, Nov. 28, 1803: 3 Abr. 83 ff.

\textsuperscript{40}3 Abr. 83, 128, 384.

\textsuperscript{41}3 Abr. 384.
authorized to accept or reject the plan in whole or in part.

If he shall accept it, he is then authorized to obtain the consent of the states through which the road may pass; and having obtained such consent, to make a turnpike. Fifty thousand dollars are appropriated, payable first out of the proceeds of the reservation from the sale of lands in Ohio, and, secondly, out of the Treasury of the United States, the last sum to be chargeable to the preceding fund.42

The building of the road began March 29, 1806.43 It passed through Maryland, Pennsylvania, Virginia, and Ohio, and in each state consent to the project was given by a legislative act, "approving the route and providing for the purchase and condemnation of the land."44

The original Cumberland Road Act, which was approved by President Jefferson, was then variously supplemented in the years 1810, 1811, and 1815, at which times it was repeatedly approved by President Madison.45 The cumulative amount of appropriations under the latter three acts was $210,000, "payable out of any moneys in the Treasury, but reimbursable out of the Ohio fund. . . ."

42James Monroe, "Views of the President of the United States on the Subject of Internal Improvements," 2 Rich. 713 ff.


45Ibid.
Aside from the Cumberland program, a number of other, lesser and more primitive projects were authorized by the Government from time to time--two in 1806, a couple of others in 1807, another two in 1811. "All those roads except Cumberland were formed merely by cutting down the trees and throwing logs across, so as to make causeings over such parts as were otherwise impassable. The execution was of the coarsest kind."

The implication of Mr. Monroe's emphasis on the primitive nature of these projects seems to be that, being improvisations of a sort, cutting through expanses of wilderness, they did not represent a sufficiently definite issue for constitutional deliberations. On the other hand, the Committee on Internal Improvements (1817), headed by Henry St. George Tucker of Virginia, did not regard them as unimportant items in the series of precedents which the Committee offered in support of the proposition that the legislative practice of the 1806-1817 period exhibited an adherence to the larger scope of the spending powers of Congress. And Professor Corwin remarks:

"... The national government opened, between the years 1806 and 1817, some eleven roads in various parts of the country--most of them log roads, to be sure, but good constitutional precedents for all that."

Yet, the soundness of this constitutional precedent tends

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47 Id., 739.  
48 36 Harv. L. Rev. 557.
to wither to the extent that we remind ourselves of the fact that the leading precedent which presides over the whole phalanx of projects, the Cumberland Road, was undertaken subject to the assumption of a forthcoming constitutional amendment.\(^{49}\)

The point is that all the various enactments which form the legal basis of the Cumberland road, were passed in Congress without any constitutional analysis, tentatively. It was never suggested in 1806 that the power to make the road rested on the welfare clause. All the rest of the roads were authorized equally without any doctrinal basis. The idea that the whole complex emanates from the spending power, is a retrospective artifact created in the year 1817, when the roads were already in existence, and when it would have been odd to say that they ought not to be there.

The roads came into existence via facti and for several years had merely a de facto status. Their creation was a bit of a revolution against the Constitution as understood at the time of the events. A doctrine capable of furnishing them with a legitimate constitutional title, was already in existence, having been enunciated by Hamilton in 1791. But after the vehement denunciations of Hamilton's position by Jefferson and Madison in the various Resolutions of the late nineties, it was difficult to revert to the condemned doctrine. A dozen years later, time had provided enough of a cushion to

\(^{49}\text{Id.}, 557, \text{note 22.}\)
accommodate the contradiction.

"In the course of his administration Madison had permitted repeated infractions by Congress of the strict constitutional doctrine which, as we have seen, he had developed at the outset with respect to Congress' spending power; but the far reaching scheme of the Bonus Bill\(^{50}\) seems to have revived his original scruples in all their intensity.\(^{51}\)

The acquiescence of the road-building practice would have continued if Congress had not embarked upon the ambitious scheme of internal improvements by passing the measure called "An act to set apart and pledge certain funds, for . . . constructing roads and canals, and improving navigation of water courses, in order to facilitate, promote, and give security to internal commerce among the several states, and to render more easy and less expensive the means and provisions for the common defense." This was the famous "Bonus Bill."

There was nothing new in the project; it merely systematized the elements of the existing practice into a more comprehensive scheme. But it probably seemed to Madison that this action brought the unconstitutional practice, hitherto relatively inconspicuous, into an exceedingly obvious light. It provoked him into a veto, which he inflicted his last day in office.\(^{52}\)

\(^{50}\textit{Infra},\ 128.\) \(^{51}\textit{Corwin, op. cit.},\ 559.\) 
\(^{52}\textit{Veto message, March 3, 1817: 2 Rich. 569.}\)
The veto message reiterates once again the grounds traversed in Federalist Number 41 and in the "Report on the Virginia Resolutions" (1799-1800):

"The legislative powers vested in Congress are specified and enumerated. . . ."

"The power to regulate commerce among the several states cannot include the power to construct roads and canals, and to improve the navigation of water courses. . . ."

"To refer the power in question to the clause 'to provide for the common defence and general welfare' would be contrary to the established and consistent rules of interpretation. . . ."

"A restriction of the powers 'to provide for the common defence and general welfare' to cases which are to be provided for by the expenditure of money would still leave within the legislative power of Congress all the great and most important measures of government, money being the ordinary and necessary means of carrying them into execution."

"If a general power to construct roads and canals . . . be not possessed by Congress, the assent of the States . . . can not confer the power. . . ."

"I am not unaware of the great importance of roads and canals and the improved navigation . . . but . . . I have no option but to withhold my signature. . . ."

Monroe assumed presidential duties the following day, and in his first inaugural address pledged to continue the
principles of Madison. But the Congress struck back. It appointed a committee to deal with "so much of the President's message as relates to roads, canals, and seminaries of learning," of which Henry St. George Tucker of Virginia became the chairman. It reported on December 15, 1817.

Aside from a wealth of factual material which the committee assembled, and from which we have quoted above, its report enunciated certain propositions of doctrine. Of these, we shall consider only those which concern us most directly.

First of all, the Committee departed from the habitual stance of constitutional interpretators by suggesting that both strict and liberal interpretations of the Constitution may be equally valid, depending on the circumstances of the case. When it does no harm to anyone concerned, and all benefit from it, why should a liberal construction of the powers of the Government be wrong?

But your committee, nevertheless, do not conceive it necessary to call to their aid in affirming the power of Congress to provide for internal improvements the liberal principles of construction which the occasion might justify. They disavow any use of the general phrase in the Constitution to provide for the common defence and general welfare, as applicable to the enumeration of powers, or as extending the powers of Congress beyond the specified powers; and they admit that to support their positions, it must appear that the powers contended for are expressly granted, or that they are both "necessary and proper" for carrying into execution some other express powers.

532 Rich. 4.
55 Id., 454.
On its face, the above statement makes the impression of affirming the Madisonian view, but another portion of the Committee's report contains an emphatic pronouncement which places the above utterance into an entirely different perspective:

There is perhaps no part of the Constitution more unlimited than that which relates to the application of the revenues which are to be raised under its authority. The power is given "to lay and collect taxes to pay the debts and provide for the common defence and general welfare of the United States;" and though it be readily admitted, that, as this clause is only intended to designate the objects for which revenue is to be raised, it cannot be construed to extend the specific powers of Congress, yet it would be difficult to reconcile either the generality of the expression or the course of administration under it, with the idea that Congress has not discretionary powers over its expenditures, limited by their application "to the common defence and general welfare."

Thus, it can be scarcely conceived, that if construed with rigor, the Constitution has conferred the power to purchase a Library, either specially or as a "necessary" incident to legislation. ... (or) the pious services of the Chaplain, the purchase of expensive paintings for ornamenting the Hall of session ... the liberal donation to the sufferers of Venezuela ... or the employment of our revenues in the useful and interesting enterprise to the Pacific.

These and a variety of other appropriations can only be justified upon the principle that the general clause in question has vested in Congress a discretionary power to use for the "general welfare" the funds which they are authorized to raise.

The report never mentioned Alexander Hamilton, but it is clear that the asserted position is identical with the theory which

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56 Id., 458. 57 Id., 458.
Hamilton declared in his report on manufactures in 1791.

The Tucker committee embodied the essence of its conclusions in a resolution, which was proposed to the House of Representatives and to the Senate for adoption.58 The proposed document underwent several modifications, and finally resulted in the adoption of the following proclamation, or resolution, of Congress:

That Congress have power, under the Constitution, to appropriate money for the construction of post roads, military and other roads, and of canals, and for the improvement of water courses.

Clearly, if congressional majorities had felt that there was solid evidence in support of the doctrine that taxes may be laid and revenues appropriated for the general welfare regardless of the enumerated powers, the Congress was free to proclaim the idea in the resolution. Instead, however, a far more modest claim is expressed in the above. Indeed, what is asserted can well be fitted within the Madisonian concept of the spending powers, for none of the purposes mentioned in the above resolution as susceptible to application of money, are definitely beyond the scope of the enumerated powers.

Rather than amounting to a promulgation of Hamilton's doctrine of the welfare clause, the above resolution to Congress remains upon non-committal grounds. It may be con-

58For Senate proceedings, see 4 Abr., 67. Proceedings in the House, id., 120 ff.
ceived as construing the spending powers; but it may also be understood as asserting a more intensive application of the postal powers, the war powers, and the commerce clause.

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The congressional protestations of jurisdiction in the field of internal improvements, although the language conveying the assertions of Congress was not so radically Hamiltonian as it might have been, nevertheless liberalized the hitherto rigid position of President Monroe, who had set out at the beginning of his Presidency with a Madisonian determination. Madison's veto of the Bonus Bill did not become—contrary to what Congress had feared—the credo of his successor, and for more than four years the President abstained from any interference with congressional programs of internal improvements. Monroe had become an adherent of the Hamiltonian view of the spending powers and adopted Hamilton's construction of the welfare clause. But in converting to the broad view of the spending powers he became sensitive to the extreme lest the governing powers of Congress be extended beyond the constitutional enumeration under some illicit application of the welfare clause.

His alertness manifested itself in the brisk and firm veto on May 4, 1822, of an act of Congress seeking to establish a system of tolls for financing the maintenance of the old Cumberland road. This, Monroe remonstrated, would be

59 Cf. Corwin, op. cit., 559 f.
much more than a mere exercise of the spending power: it would lead to an invasion of the respective states with a whole machinery of federal enforcement—quite in violation of Hamilton's doctrine as well as of Madison's principles.

On this occasion, Monroe published, as an appendix to the veto message, an eighty-page essay "Views of the President of the United States on the Subject of Internal Improvements," which is actually a systematic exposition of the essential aspects of the whole Constitution.60

His conversion to Hamilton's views is explained in that paper. Within two years, Chief Justice Marshall in the case of Gibbons v. Ogden, supra, proclaimed Madison's doctrine as the true conception of the spending powers, and so there developed a dualism in the interpretation of the welfare clause. At the same time, however, the Ogden ruling fortified Congress's power over navigation, which seems to have been applied also to navigation through canals and to the construction of canals itself.

In any event, the years 1823 and 1824 witnessed a great expansion of federal programs in the field of canals and the improvement of the navigability of rivers.61 The several states were themselves very active in these fields, and

federal involvement usually took the form of some aid, either by action of the Corps of Army Engineers, or grants of land, or of money.

It was then, in 1824, that the Federal Government did for the first time become interested in the stretch of the Tennessee River known as Muscle Shoals, for the improvement of which it gave the state of Alabama four hundred thousand acres of land. Three quarters of a century later, in 1899, Congress licensed for the first time a private development of the Muscle Shoals site for electric power, but "Nothing came of this grant, nor did anything significant come of two or three other measures passed during the next 15 years (one of which provided occasion for President Theodore Roosevelt's historic veto)."

Federal interest was resumed again in 1916, and led to the creation of the Tennessee Valley Authority in the early Thirties of our century.

Meanwhile under President John Quincy Adams, who subscribed to Hamilton's views of the spending powers, the whole concept of internal improvements received an inspired expansion, so as to include, at least in the vision of the

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63 Martin, op. cit., 351.
64 Martin, Ibid.
mind, cultural projects as well as physical. 66

Andrew Jackson, on the other hand, proved a great hindrance to internal improvements, although verbally he declared himself in favor of Hamilton's doctrine of the spending powers. 67

Returning for a moment to the views of President Monroe, we may note that the manner in which he conceived of the enumerated powers of Congress rendered their dimensions not only narrow but also shallow. For example, the power "To establish post-offices and post-roads," 68 is interpreted by him in such a manner as to become virtually a non-power. 69

What is the just import of these words and the extent of the grant? The word "establish" is the ruling term. . . . The question therefore is, what power is granted by that word?

. . . . . . . . . . . . . . . . . . . . . . . . . . .
The use of the existing road by the stage, mail carrier, or postboy in passing over it as others do is all that would be thought of, the jurisdiction and soil remaining to the State, with a right in the State or those authorized by its legislature to change the road at pleasure.

Eventually he sums up the findings of his analysis—which is far more comprehensive than our above excerpt would seem to suggest, as follows:

From this view of the subject I think we may fairly conclude that the right to adopt and execute a system of internal improvements, or any part of it, has not been granted to Congress under the power to establish post-offices and

67 Cf. Corwin, op. cit., 566 f.
68 Const. I:8:3.
post-roads; that the common roads of the country only were contemplated by that grant and are fully competent to all its purposes. 70

Likewise he repudiates any suggestion that the power of Congress over interstate and foreign commerce (and commerce with Indian tribes) yields the necessary jurisdictional base upon which the National government could validly engage in the construction of roads, canals, or other communications and internal improvements generally.

The goods and vessels employed in the trade are the only subjects of regulation. It can act on none other. A power, then, to impose . . . duties and imposts in regard to foreign nations and to prevent any on the trade between the States was the only power granted. 71

This view is supported by a series of measures, all of a marked character, preceding the adoption of the Constitution. As early as the year 1781 Congress recommended it to the States to vest in the Congress of the United States the power to levy a duty. . . . In 1786 a meeting took place at Annapolis of delegates from several of the states on the subject, and on their report a convention was formed in Philadelphia . . ., to whose deliberations we are indebted for the present Constitution.

In none of these measures was the subject of internal improvement mentioned or even glanced at. 72

On the other hand, as we have already mentioned, Monroe subscribed to the proposition that federal funds may be validly applied as subventions to states for purposes of internal improvements. Monroe's interpretations of the Constitution

70 Rich. 159.
72 Id., 162.
have a marked historical orientation, tending to illuminate the connotation of its provisions from their antecedents in earlier charters. Under the Articles of Confederation the states could be reimbursed from the continental treasury for what they had provided for the general welfare, and the same spirit may be conceived in the idea of giving them in advance an amount of funds for what they are about to do for the general welfare. In any case the initiative is theirs and there is no compulsion imposed on them by the Federal Government.

A reasoning along some such lines probably contributed to Monroe's conversion from Madison's stringent view of the spending power to the larger view advocated by Hamilton. Another reason on Monroe's part was a desire for consistency between theory and practice. Pointing to donations of either money or of land, made by the Federal Government to states for schools and for roads, and pointing further to "gratuitous grants of money for the relief of foreigners in distress — the first in 1794 to the inhabitants of St. Domingo, who sought an asylum on our coast . . . ; the second in 1812 to the people of Caracas, reduced to misery by an earthquake," he concludes:

It will surely be better to admit that the construction given by these examples has been just

73 Ibid., 170 f.
74 Ibid., 171.
75 Ibid., 171 f.
and proper than to deny that construction and still to practice on it - to say one thing and do another.\textsuperscript{76}

Monroe did not seek to extract information about the formation of the welfare clause from the \textit{Journal} of the Federal Convention, although the volume had been public since 1819.

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We have made a fleeting mention of the consistent support given to internal improvements during the single term of Monroe’s presidential successor Adams. The Congress of the middle and latter Twenties of the century was also well disposed toward such programs, and extensive undertakings were initiated especially in the field of canals and the improvements of navigation. But with Jackson’s accession to the presidency both the doctrine and practice of internal improvements began to exhibit fluctuations which continued to the eve of the Civil War.

Joseph Story’s emphatic affirmation of the broader view of the spending powers, which he expressed in 1833, was presumably influential, but other considerations operated restrictively on the scope of federal powers generally.

Beginning with the Thirties, a new type of "internal improvement" was brought into existence by technological advancement, namely, the railroad. The network of rails expanded phenomenally even during the 30 years preceding the

\textsuperscript{76}Id., 172.
Civil War. "Although there were only 23 miles of railroad in 1830, there were more than 30,000 in 1860." It seems that in this development the Federal Government did not have much of a share at that time, and that the question of constitutionality of such possible participation persisted. But on the eve of the Civil War, virtually all political parties asserted in their platforms that the Government itself ought to engage in the construction of railways:

Thus in the Democratic party platform of June 1860 it was stated:

Resolved that one of the necessities of the age, in a military, commercial, and postal point of view, is speedy communication between the Atlantic and Pacific States; and that the Democratic Party pledge such Constitutional Government aid as will insure the construction of a Railroad to the Pacific coast, at the earliest practicable period.

The Breckenridge Democratic Platform provided:

Whereas, One of the greatest necessities of the age, in a political, commercial, postal and military point of view, is a speedy communication between the Pacific and Atlantic coasts. Therefore, be it Resolved, That the National Democratic Party do hereby pledge themselves to use every means in their power to secure the passage of some bills, to the extent of the constitutional authority of Congress, for the construction of a Pacific Railroad from the Mississippi River to the Pacific Ocean, at the earliest practicable moment.

The Republican platform, of May 1860, reads:

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(15) That appropriations by Congress for River and Harbor improvement of a National character, required for the accommodation and security of an existing commerce, are authorized by the Constitution, and justified by the obligations of Government to protect the lives and property of its citizens.

(16) That a Railroad to the Pacific Ocean is imperatively demanded by the interests of the whole country; that the Federal Government ought to render immediate and efficient aid in its construction; and that, as preliminary thereto, a daily Overland mail ought to be immediately established.78

From the language of these documents it would appear that, notwithstanding the views of President Monroe expressed four decades before, constitutional opinion had come to the conclusion, even prior to the Civil War, that federal participation in the construction of internal improvements was a valid exercise of its powers under the postal clause, the commerce clause, and the war clauses.

* * *

In conjunction with the topic of internal improvements, and sometimes as an aspect of the general concept of improvement, public discussion during the nineteenth century related to the subject of agriculture, of education generally, and agricultural education in particular.

To these topics we turn presently.

78The platforms are reprinted in Commager, op. cit., as documents ##193 ff.
Agriculture, Education, and Agricultural Education in the Nineteenth Century

We have already observed that the Constitution has not bestowed upon the Federal Government jurisdiction in matters of education, nor in matters of agriculture. We also have seen that as early as the Nineties of the Eighteenth Century, the Government displayed some interest in promoting agriculture, although nothing tangible came out of those tentative plans at that time.

Consequently there was no substance around which a constitutional controversy could develop.

As for education, the Government approached the object very early in the Nineteenth Century, by indirect means. Its instrument in doing so was Section 3 of Article IV of the Constitution, the first paragraph of which empowers Congress to admit new states into the Union, while the second gives it the authority to make "all needful rules and regulations respecting the territory or other property belonging to the United States," and to "dispose of [them]." This gives Congress a threefold jurisdictional tool.

(1) As long as a geographical area has the political status of "territory," Congress has the power to rule and regulate it in all respects, including matters of education. Then (2), in contemplation of admitting it to the status of a state, the Congress can prescribe conditions under which the admission will be granted. Thus it may require that the prospective state incorporate into its constitution provisions expressing
principles, ideas and policies which Congress wishes to impose upon the state. And finally, (3), the power to give away land ("power to dispose of . . ."), to land grants, enables Congress to motivate the states of the Union, new or old (and, for that matter, to motivate any other party), to adopt a policy or follow a course of action which Congress hopes to effectuate by securing the cooperation of the recipients of the donated land.

There is nothing in the Constitution to suggest that in giving away portions of land belonging to the United States, the Congress must see to it that the donated land is used for purposes included in the scope of the other enumerated powers stated in the Constitution. The Founders probably assumed that once a piece of land or other property is severed from United States ownership, it would have nothing further to do with the Constitution insofar as the Constitution defines the powers of the Federal Government.

But a transfer of land is a contract, and a contract is capable of permanently binding either one or both parties. Hence the transferee of the land could be bound by the United States to use the received land for stated purposes. Thus the Government can make its beneficiaries into the agents of its policies; and again one might ask whether this contractual power of the United States, inherent in Section 3 of Article IV, may be used exclusively for policies whose objects are within the enumerated powers, or freely at large.
The facts of the early federal policies in matters of education are, that beginning with the act admitting Ohio into the Union, it became customary with the Government to require that the prospective state should insert into its prospective constitution a provision requiring the government of the future state to establish a system of free public elementary education. And to enable the new state to fulfil this provision, donations of federal land would be made to each newly admitted state for the purpose.

And later grants of land would be made for higher types of schools, invariably with the requirement that agricultural enlightenment should be a part of the curriculum, although a larger scope of learning was not precluded. In this manner "agricultural colleges" were fostered by the Federal Government, which in due course would broaden their outlook and become "liberal arts colleges."

All of this development bypassed the welfare clause of Article I of the Constitution, insofar as the clause is regarded as a spending provision related to the taxing clause preceding it. For the spending or appropriating of land is not governed, at least not directly, by that clause.

On the other hand, if it is assumed that the Federal Government has no right to promote by indirect means policies exceeding the positively stated purposes for which the Government, on the face of the Constitution, was created, then any federal step in the direction of an object not
enumerated would expose the Government to the objection that its action is an embodiment of the doctrine, long since rejected, discredited, condemned and abjured, that the welfare clause is the source for the Government of an unlimited all-comprehending power to provide for the general welfare.

And precisely on these grounds such agricultural-educational legislation was vetoed by President Pierce after half a century of untrammeled development. Also President Buchanan distinguished himself in these respects.

With Lincoln in the Presidency, however, the gates were opened again for a procession of federal measures pertaining to education, agriculture, and agricultural education.

* * *

To bring to an approximate completion our present topic, i.e., an exposition of the welfare clause, especially in its capacity as a concept in governmental spending, we need yet to consider the category of relief-grants as legislatively practised in the period here under discussion. To that topic we shall turn following an intermediate note inserted for purposes of orientation.

A Note to Define the Relevancy of Present Discussions

The object of our inquiries is still the meaning of the welfare clause of Article I of the Constitution. More precisely, it is our object to ascertain which of the several possible meanings was ascribed to the clause in given times
by given schools of thought. Explicit statements of doctrine are preferable to us if they can be found. Otherwise, implicit indications are taken as second best.

Federal land-grants as such stand in no relationship to the welfare clause insofar as the clause is considered a concept in monetary spending, as both Hamilton and Madison regarded it to be. On the other hand, insofar as it may be—per impossibile—regarded as a plenary enabling clause, to that extent any move of the Government which seems to transcend the closed set of purposes for which the Government is believed to have been formed, may be pointed out as illustrating that the Government claims unlimited jurisdiction under the plenary construction of the clause.

Hence Pierce's and Buchanan's denunciations of the welfare clause in connection with land-grants for agricultural and educational purposes.

The monetary grant, on the other hand, is a topic directly related to the welfare clause. Since land-grants, or rather the practice of making them, has been eventually converted into monetary grants, there is an historical continuity between the two types of grant, but constitutionally they are two entirely different things.

As for the grants for internal improvements, namely, acts for improving the navigability of rivers, acts for constructing roads, acts for constructing canals, acts for constructing railroads and acts for constructing multiple-purpose
hydroelectric projects,—or measures providing for any of these things by whatever indirect and complex means—it is necessary to distinguish several periods of constitutional opinion as to the status of these various objects insofar as they, respectively, existed in the given historical periods.

In the earliest years of the Republic installation of buoys, lighthouses, beacons, piers, etc., as well as the removing of obstacles to navigation, was done without constitutional argument, presumably under the power to regulate interstate commerce. Later, between the year 1800 and the Civil War, the opinion became established, although not absolutely, that neither roads nor canals could be constructed or sponsored by the Federal Government under the commerce clause, but concession was made to the effect that the Government was within its rights in making grants, whether in land or in money, for these purposes.

At that point the welfare clause, in its Hamiltonian costume, was instrumental as the only provision under which the Federal program of internal improvement could be carried on. Then some time before the Civil War the postal clause and the war powers were regarded as constitutional bases capable of sustaining the projects; but not the commerce clause.

After the Civil War, also the Commerce Clause was recognized for these purposes, and it so remained until the late Thirties of the Twentieth Century, at which time the welfare clause reappeared in new armor, judicially endowed with the
authority to enable the Government to pursue its programs of internal improvement not merely by making grants, but by asserting its own eminent domain and perhaps other coercive powers.

In the period from, and including, Reconstruction, until the late stages of the New Deal, the concept of internal improvements is divorced from the welfare clause, for the commerce, postal, and war clauses are found sufficient to provide constitutional coverage for the phenomena.

* * *

Presently we shall conclude our survey of the pre-war Nineteenth Century by a brief examination of appropriations for the purposes of relief or charity.

Relief Legislation During The Ante-Bellum Period

Provisional Statement

There is doubt in the present writer's mind as to the existence—whether for the period of 1800 to 1860/61, or for any other period under the Constitution—of a complete catalog of congressional measures classifiable as appropriations for relief purposes.

The generalization can be found throughout the pertinent literature, observing that grants for relief purposes have

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80 Only relief by actual grant of money or land is included within the above concept. Possible indirect modes of relief are not considered.
been made by Congress time and again during the Nineteenth and apparently also the Twentieth Centuries. But the sources offer only occasional examples, and these seem to be very few.

Moreover, it seems that no research has been done whatever, aiming to assemble instances in which relief measures were proposed in Congress, but failed of passage. Hence the sum total of available findings in this field not only appears to be fragmentary, but even the fragments themselves are one-sidedly selected, in that they invariably represent the positive, never the negative instances.

It is not possible for this writer to undertake, within the time-limitations and within the intended scope of this study, a satisfactory completion of the needed researches on this topic.

He must content himself with pointing out the existing state of research as he has found it, and with a suggestion as to the relevancy of a research of that nature.

A complete information of the indicated type would be interesting in view of the fact that the modernized American federalism which consists in the principle of state-federal cooperation predicated upon the federal grant-in-aid, and of which the Maternity Act of 1921 or the Social Security Act of 1935 are characteristic examples, was originally introduced with the understanding that relief legislation had been a practically immemorial tradition and was sanctioned by the
preponderance of opinion during the generation of the Founding Fathers themselves.

But the evidence which we had the opportunity of considering in an earlier chapter, suggests that such is not the case. If there were instances in which relief was granted, there were others in which it was refused—and, from what we have seen, it seems fairly evident that it was done on constitutional grounds, or that constitutional considerations played a very important part in the decisions.

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Looking to the portions of the Nineteenth Century which preceded the Civil War, we find only two instances of relief appropriations.

In Volume 4 of Elliot's Debates, on page 431, a footnote informs us that "In May 1812, 'an act for the relief of the citizens of Venezuela' was passed, authorizing the President to expend $50,000 to purchase provision for that object. The motion to fill the blank with that amount was moved by Mr. Calhoun, and carried by ayes, 45; noes, 29."

The other, noted by Professor Charles K. Burdick in his article "Federal Aid Legislation,"\textsuperscript{81} is a measure titled "An act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes." February 17, 1815; Statutes at Large, Volume III, page 211.

\textsuperscript{81} Selected Essays on Constitutional Law 628, 633, note 30. The article was originally published in 1923.
Only the title of the statute itself is given at the cited place. There is no text of the law. But there is another entry adjoined to the above, which says: "Act of April 26, 1822, ch. 40. Lands granted to persons having lands in the county of New Madrid, which were injured by earthquakes, on the 10th Nov. 1812. A report of his proceedings shall be made to the land office by the recorder."

That is all we have to show by way of relief legislation for the aforesaid period of history.

For the period including the Civil War and later decades, see below, pages 159 et seg., and 169 et seg.
Even the masters of constitutional thought recognize that an adequate treatment of the period of armed conflict between the states (1860-1865) is difficult to accomplish.

The constitutional aspects of the Civil War are manifold. Because of their number and complexity and their relations with matters not directly constitutional in character, their delineation is most difficult.

Much of the experience of the government in handling Civil War problems had relevance for the years ahead. The assumption by the federal government of powers of unprecedented breadth, even though nominally for the period of the war crisis only, established a precedent and conditioned the minds of the people for the similar exercise of broad powers in later years, whether in war crises or otherwise.¹

The latter of the two above-quoted paragraphs points for us a principle of simplification which qualifies and limits the difficulty mentioned in the former. During an armed conflict to which the United States is a party, the set of constitutional clauses which contain the "war powers" of the nation² become


²Esp. Const. I:8:11,12,13,14,15,16; Con., II:2.

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applicable, and their combination results in a generalized jurisdictional grant the magnitude of which resembles, and supersedes, the plenary version of the welfare clause and other larger jurisdictional grants of the Constitution.

All roads become potentially military roads; canals, rivers, and other navigation, together with the commerce which moves along their lines, acquire strategic significance. The President, as commander-in-chief of the Army and Navy of the United States, and of the militia of the several states when called into the actual service of the United States, acquires the power to take almost any measures, in any field of human activity, which he deems conducive to the accomplishment of purposes inherent in his martial functions. And the Congress has the power "to make all laws . . . necessary and proper for carrying into execution . . . all [the] powers vested in the" commander-in-chief.

In such a state of affairs almost all congressional spending and all coercive measures of the Government may be validated without any recourse to the welfare clause. The problem of the constitutionality of the internal improvements, for example, is submerged under the paramount import of the war powers. Federal eminent domain becomes synonymous with the whole range of unqualified sovereignty to the extent of military occupation of territory and domination over things and people. But when the tide of anomalous conditions recedes, the regular concepts of the Constitution resume their reign.
This does not necessarily mean that the statūs quo ante bellum returns; but whatever new arrangements and habits of thought came into existence during the exceptional era, must either find a validating support in the normal concepts of the Constitution, or be abolished, or continue on an extra-constitutional basis.

It may be, however, that the large events of an upheaval the magnitude of a war or especially a civil war, so transforms the psychological climate of the nation that the same Constitution and its old phrases are now read in a different light. And, in point of fact, the Civil War resulted in several amendments to the Constitution, which enlarged the functions of the Federal Government greatly.

Indeed, underlying the specific provisions of the Civil War amendments there is a metamorphosis of the whole theory of American federalism. It is this, that while before that war the main rationale of the status of the states was predicated on the assumption that they, not the Federal Government, were and must be the primary safeguards of human liberty, the trend of events preceding the war and continuing through and after it, brought the assumption into doubt. And in course of time it came to pass that the Federal Government emerged as the primarily trusted defender of liberties.

It came to pass moreover that additional factors made it inevitable that a mass of public functions, formerly decentralized, should now be processed through some central
clearing-house, with the obvious result of further enhancing
the stature of the Federal Government. The traditional neg-
ative concept of liberties has been encysted by accretions
of claims for positive governmental cares, and the original
natural liberty of an agricultural civilization subsided to
the concept of individual benefits and a roundabout economic
security predicated on a tightly organized industrial and
automated society.

All this, of course, did not come out of the Civil War
in one leap, but formed cumulatively over the century which
followed that war. The point is that regardless of the martial
emergency of the war, impact from other sources undoubtedly
would have imposed modifications on the traditional concepts
of the Constitution. The war accelerated some of these
modifications.

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In spite of everything, the Government during the Civil
War, and after it, still was a government of enumerated
powers, and not one entitled to make all laws necessary for
the general welfare. No amendment was added to furnish it
with powers to regulate agriculture or education, and no of-
official act decided that its spending power could be used for
purposes not embraced within the enumerated fields of juris-
diction. Nor was there any judicial affirmation of the doc-
trine, apparently approved by public opinion in times shortly
preceding the Civil War, that the Government could build
roads or railroads, or that it could in any way sponsor such undertakings.

What, then, was the actual practice of the Government with respect to all the varied types of things which are on the verge of constitutionality and appear now to be within and now without the concept of legitimacy, depending on the shifting winds of doctrine?

The topical areas upon which the questions settle, are much the same after the war (and to some extent during the war), as they were before it. But there are some shifts of emphasis and some other changes. We shall consider them one by one.

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Federal Grant to States in Aid of Emancipation

In a message to Congress of March 6, 1862, President Lincoln recommended the legislative adoption of a resolution which read in part as follows:

That the United States ought to cooperate with any State which may adopt gradual abolishment of slavery, giving to such state pecuniary aid, to be used by such state, in its discretion, to compensate for the inconveniences, public and private, produced by such a change of system.

Such a proposition on part of the General Government sets up no claim of a right by a Federal authority to interfere with slavery within State limits, referring, as it does, the absolute control of the subject in each case to the State and its people immediately interested. It is proposed
This measure as contemplated at that time, as is obvious from its own text in its entirety, was predicated solely on the power of Congress to appropriate for the general welfare, although Lincoln made no reference to that clause. No constitutional amendment was postulated in that connection, although toward the end of the year Lincoln proposed another measure, for which an amendment was to be sought.

From the above proposal it is surely clear that Lincoln may be claimed by the Hamiltonians as their man as far as the concept of the spending power is concerned. Had Lincoln proposed an amendment in that connection, the Madisonians could argue that this was because he did not believe that money could be appropriated from Federal Treasury for a purpose not covered by the enumerated powers. Such intent is perhaps present in a statement by historian James G. Randall, who makes the following observation on the measure which we have just considered above:

A new federalism has now arisen which involves not only a vast extension of national functions, but a species of State and Federal "cooperation" through which the authorities in Washington enter

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3 Commager, op. cit., document #211, pp. 402 f.

the domain of State government in the building of roads, the protection of maternity, and the promotion of agricultural education.

It is curious to note that this was partly fore­shadowed in Lincoln's plan for State emancipation with Federal compensation, and that Lincoln pro­posed for the purpose a constitutional amendment.5 We find, however, no indication that the original plan was meant by Lincoln to involve an amendment.

Eventually, needless to remark, the emancipation was carried out by a constitutional amendment without compensation.

Note on the Confederate Constitution

The Confederate South had such an aversion to the whole idea of federal grant-in-aid of anything, and such a revaluation toward the phrase "general welfare," that in the separate Constitution which it adopted upon secession, under the date of February 8, 1861, the welfare clause was omitted, and it was specially pointed out that no grants could be made by the confederate government. The Confederate Constitution is otherwise almost an exact copy of the Constitution of the United States.

Section 8 of Article I of the Constitution of the Confederate States of America6 reads in part as follows:

The Congress shall have power -
(1) To lay and collect taxes, duties, imposts, and excises, for revenue necessary to pay the debts, provide for the common defence, and carry on the Government of the Confederate States; but no bounties shall be granted from the treasury.

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5Randall, op. cit., 523.
6Commager, op. cit., doc. No. 201.
Reference to general welfare is missing also from the Preamble. There are further precautions derived from experiences which the Confederate States had encountered while members of the United States. Thus Section 8 of the First Article of the Confederate Constitution continues:

The Congress shall have power...

(3) To regulate commerce with foreign nations, and among the several States, and with the Indian tribes; but neither this, nor any other clause contained in the Constitution shall be construed to delegate the power to Congress to appropriate money for any internal improvement intended to facilitate commerce; except for the purpose of furnishing lights, beacons, and buoys, and other aids to navigation upon the coasts, and the improvement of harbors, and the removing of obstructions in river navigation, in all which cases, such duties shall be laid on the navigation facilitated thereby, as may be necessary to pay the costs and expenses thereof.

* * *

Federal Relief Activities During Reconstruction

Without attempting in any way to detail all the varied activities in the nature of affording relief to deprived persons and rehabilitation to areas destroyed by war, we dispose of the issue by simply assuming that the whole complex is constitutionally within the range of the clauses pertaining to the concept of war. Hence the question of interpreting the welfare clause does not arise in this context.

The larger issue of the nature of American federalism certainly unfolds fascinating involutions during the critical
period here under consideration, but the extensive analysis for which occasion is offered by the subject-matter, cannot be fitted into the scope of the present paper. Hence we abstain from it.

Undoubtedly the period accorded opportunity for exercising many a form of federal-state cooperation, parallelism, and also antagonism, which had not been known before. But this may have been of a passing significance only. Whether any permanent forms remained and carried into latter stages of the nineteenth century and into the twentieth, must be left here an unanswered question. Besides, existing literature has undoubtedly explored the problem with great amplitude.

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Looking to other matters than the war and its aftermath, we note that there have remained some open questions—in our statement but also in the historical reality which we are describing, in several topical fields. One of them is the subject of internal improvements, the status of which had remained unsettled before the Civil War. Another is agriculture; another education. And there is further the question of grants for relief and other purposes, and besides the grant-form of spending, there are also other forms of appropriations which, if they are for purposes not directly sanctioned by the Constitution, may be questioned.

Let us first turn to agriculture.
Federal Interest In Agriculture During
and After the Civil War

From the Wednesday of January 11, 1791, when Congressman Swift of the House Committee on Agriculture reported a resolution recommending federal sponsorship of an "Agricultural Society" with all of Congress, the judiciary, and the cabinet, for membership, almost three fourths of a century elapsed during which nothing much was done on part of the Federal Government with respect to agriculture, except for verbal mentions in presidential addresses.

To this there is a minor qualification.

Beginning sometime in the Thirties of the Nineteenth Century, the agricultural interest was represented in the Federal Government by a unit in the rank of a "clerkship" whose function had come into being in the manner thus described by Professor Swisher:

In 1836, the commissioner of patents received from government representatives abroad and from others considerable quantities of seeds and plants, which he distributed to farmers throughout the country. He acted without government authority and with no aid except the use of the franks of congressmen who were his personal friends. He urged, however, that the government should officially take up the work of aiding agriculture in this and other ways. In 1839, Congress made its first appropriation to the extent of one thousand dollars for the purpose of collecting and distributing seeds, prosecuting agricultural investigations, and procuring agricultural statistics. The work was to be done under the commissioner of patents, who at that time was an official of the Department of State. The work expanded steadily and new and larger appropriations were made. When, in 1849, the Patent Office was transferred to the newly established Department of the Interior, the work
was further expanded. By 1862, when an independent department was created for the agricultural interests, some 60,000 dollars a year was being spent on agriculture.7

The bill to establish the Department of Agriculture was approved by President Lincoln on May 15, 1862.8 The following year appropriations for the department amounted to $118,000.

In enacting the statute creating the Department, there was "but little debate" in the House of Representatives, and apparently none on the constitutionality of the measure. In the Senate, some voices urged that the Constitution contained no clause pertaining to agriculture,9 but for some reason it was found difficult to attack the bill as unconstitutional in spite of the lack of a positive constitutional authority.10

The reason undoubtedly is that the department was not meant to exercise any "powers" and hence the limitations whereby the Constitution safeguards the people (or states) against the powers of the Federal Government, might be regarded as inapplicable.

A Madisonian might well object that if an agency is not meant to be Congress's instrument in exercising a power or powers belonging to Congress, then the Congress has no legitimate power to create such an agency. Indeed Madison

7Swisher, op. cit., 376 f.
9Swisher, op. cit., 380.
10Id., 378 f.
raised such an objection in his "Report on the Resolutions," of 1799-1800, where the mere fact that a congressional com-
mittee on agriculture had been created, is deplored as unconstitutional.  

(And it would seem that logic will support the principle).

Concerning the constitutionality of the act creating the Department of Agriculture as a spending measure, it is ob-
served by Professor Swisher that "It was hard to attack the bill on the ground of unconstitutional expenditures, because, whatever the intent as to the future, it provided for no immediate increase of expenditures. Few Senators were willing to agree that the appropriation gradually built up from 1,000 dollars to $60,000 for distribution of seeds to farmers and for related purposes, had been made year after year in violation of the Constitution."  

So the bill was passed over constitutional doubts; and its validity was never questioned in the courts.

The creation, continued existence, and elevation to cabinet status, of the Department Agriculture, became a reason of cavil to "adisonian observers of constitutional developments; but the Hamiltonians point to it proudly as a leading example of the proposition that Congress, at least since Lincoln's day, has adhered to the views of the founder of their school.

11 Supra, p. 97.

12 Swisher, op. cit., 379.
Numbers of other agencies of a similar status followed, including the Children's Bureau, the Women's Bureau, the early Bureau of Education, etc.\textsuperscript{13} Appropriations for these do not (did not) constitute federal grants, but they are still appropriations made for the general welfare, insofar as no acceptable reference to some of the enumerated powers can be shown.

The characteristic mark of entities of this category has been, or used to be, that they were not permitted to exercise any coercive powers. This is in keeping with the Hamiltonian view of the welfare clause.

Simultaneously with the creation of the Department of Agriculture, Congress also established a program of subventions to the states for the purpose of aiding the formation and operation of colleges concerned with the promotion of agricultural knowledge: "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanical arts."\textsuperscript{14} This is the famed Morrill Act. Eventually the land-grant basis of the program was replaced by pecuniary appropriations.

\textsuperscript{13}Textbooks often enumerate a long list of federal and semi-federal (sometimes partly-private) institutions for which federal funds are expended although they cannot be readily referred to any of the enumerated powers. E.g., one writer names the Department of Labor, the Geological Survey, the Bureau of Fisheries, the Bureau of Mines, the Public Health Service, the National Park Service, the Bureau of Criminal Identification, the FTC, the FPC, national museums, world expositions subsidized by the Government, state experiment stations subsidized by it, etc. Lawson, \textit{op. cit.}, 232.

\textsuperscript{14}12 \textit{Stat.} 503. Cf. Swisher, \textit{op. cit.}, 381.
In 1887, a congressional measure known as "The Hatch Act," provided for the establishment, in connection with agricultural colleges, of "experimental stations," the purpose of which was "to promote scientific investigation and experiments respecting the principles and applications of agricultural science," and to diffuse among the people of the United States useful and practical information on the subject of agriculture.

This program was subsidized by funds in the Treasury proceeding from the sale of public lands. With hard cash rather than inert land being the heart of the program's mechanics, there were indications that Congress's willingness to give was accompanied by its determination to control the uses of the gift. There were men in Congress who predicted the coming of federal coercion in the wake of benefaction. Freedom of education, and, as well, the reserved rights of the states, appeared to be threatened. Once more the constitutionality of the whole agricultural involvement on part of the Federal Government was questioned in Congress.

But the new measures eventually passed.

In 1890 a so-called "Second Morrill Act" was passed, adding further monetary support for the colleges, and tightening

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16 Swisher, op. cit., 384, note 27.
17 18 Congressional Record 723 ff.
federal control over the activities of the recipient schools. In opposition, the text of the message accompanying, thirty years before, President Buchanan's veto of February 24, 1859, whereby the original Morrill Bill was returned to Congress, was now read again by congressmen fearing federal imposition.18

Again, however, the proponents of the measure eventually prevailed.

And, observes Professor Swisher, "Although the Supreme Court did not pass directly upon the constitutionality of such appropriations, the long-established custom, coupled with more recent constitutional interpretations in other fields, has resulted in general acceptance of the belief that the making of such expenditures does not violate the Constitution.19

On these foundations is based the widely-shared opinion that the Congress has traditionally vindicated Hamilton's view of the welfare clause.

It is readily seen that for the courts to overturn the proposition, even if a positive demonstration disclosed that the Founders meant otherwise, would be an overwhelming undertaking to face.

Internal Improvements

In the field of internal improvements, to which our attention now turns, federal aid continued to be given, mostly in the form of land-donations, throughout the nineteenth

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19 Ibid., 388.
century. The projects included the old types of communication, viz., roads and canals, and the newly established type, the railroad. In the following, we wish to look particularly on the railroads.

The Railroads

Congressional action in the field of railroads began at a time when it could be justified under the war powers as well as under the commerce clause: "... on or about July 1, 1862, the government of the United States undertook to construct, or to cause to be constructed, a line of railroad from the Missouri River to the Pacific Ocean, and to that end Congress passed an act entitled 'An act to aid in the construction of a railroad from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes'."

It cannot at present be doubted that Congress, under the power to regulate commerce among the several states as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little cared for, as commerce

was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and the locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject.

This... power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of state as well as federal corporations. 21

So we see that at least in 1887, if not earlier, it was settled that the construction and other regulation of railroads, which is a type of "internal improvements," is within federal jurisdiction by virtue of the commerce clause, and, as well, some other enumerated powers of the Constitution.

The same logic obviously applies to ordinary interstate roads and, under the postal clause, also to intrastate roads insofar as they may be declared as partaking of a postal character.

Further, the federal railroad legislation of the nineteenth century frequently pertained also to the telegraph and telephone communications, for the wires usually ran along the rails and the lines were constructed and services operated by the same companies which owned the railroads.

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The twentieth century added more novelties in the field of communications, especially the radio and television, and also interstate pipelines. These came under federal jurisdiction by much the same reasoning as the above. The whole complex is covered primarily by the commerce clause.

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As for grants-in-aid for the relief of sufferers, only a few sporadic instances can be found during the latter parts of the nineteenth century—as follows.

Relief Legislation in the Form of Grants of Money or Land During the Post-Bellum Nineteenth Century

Following our guide, we note four instances of relief-grants in the aforementioned period.

1863

Statutes at Large, Volume 12, page 652, chapter 37; an act of February 16, 1863, "for the relief of persons for damages sustained by reason of depredations and injuries by certain bands of Sioux Indiana." After the title, there follows a recital observing that:

The United States became bound by treaty stipulations to pay large sums of money and annuities to certain bands of the Dacota or Sioux Indians. The greater portion of which remains unpaid; during the past year the said bands of Indians made an unprovoked and most savage war upon the

22To these cases we have been led by Professor Ch. K. Burdick's selection of examples. Burdick, op. cit., p. 633, note 30.
United States and destroyed and damaged a large amount of property. Persons whose property was destroyed or damaged by the said Indians or United States troops in said war should be indemnified in whole or in part out of the indebtedness and annuities so forfeited as aforesaid (from the funds reserved for the Indians). Two thirds of unexpended annuities to be paid to commissioners, and apportioned to survivors of massacres. Certain land to be set apart for Indians who aided the whites.

1877
Statutes at Large, Volume 19, page 374, chapter 106.
Here we find the following fragment pertaining to ravages by grasshoppers:

Relief of persons suffering from ravages of grasshoppers limited to September 1, 1875. For payment of amounts certified to be due by the accounting-officers of the Treasury Department for expenses of relief of persons suffering from the ravages of grasshoppers incurred prior to September 1, 1871, and prior years, $288.40.

It would seem that these fragments are somewhat in the nature of supplementary enactments dependent on preceding legislation, to which, unfortunately, no reference is made.

1882
Statutes at Large, Vol. 22, page 379; March 21, 1822.
No. 12. Joint resolution making a further appropriation to relieve the sufferers by the overflow of the Mississippi River and its tributaries. . . . That a further sum of 150,000 dollars . . . is hereby appropriated . . . for the purpose of furnishing food to such persons as have been rendered destitute by the recent floods. . . . No. 16. Joint
resolution authorizing the Secretary of War to use rations for the relief of destitute persons in the district overflowed by the Mississippi River. April 1, 1882. Subsistence stores for sufferers from overflow. . . . $100,000 is hereby appropriated, of which sum so much as is necessary shall be used by the Secretary of War in the purchase and distribution of subsistence stores to aid in the relief of destitute persons in the district overflowed by the Mississippi and its tributaries; and he is authorized to cooperate with the authorities of the several states of which such district is a part in making distribution of the same.

* * *

Trends of Doctrine After the Civil War

Although Judge Story and others made a number of distinct contributions both to constitutional interpretation or doctrine and to constitutional history, a complete account of the genesis of the great document could only be undertaken after the publication, in 1840, of Madison's Notes. A dozen years later, in 1852, it was observed that "a special history of the origin and establishment of the Constitution . . . had not yet found a place in . . . American national literature."23 A work was then conceived, and consummated in 1865, in which the requirement of completeness was fulfilled.

to a remarkable degree, and which possesses other dis-
tinguished qualities. Although its author, G. T. Curtis,
disclaims all intention to offer a system of constitutional
interpretations, nevertheless in relating the events of the
Federal Convention he implicitly deals with meanings of future
constitutional provisions, and this is indeed of interest
to us in the present study.

Curtis may have been the first student of the Constitution
to traverse the grounds treaded before him by Story in
analyzing the records of the Convention generally, and tracing
the formation of the welfare clause in particular. If so,
he was also the first to do the work with the benefit of
Madison's Notes, denied to Story.

Curtis immediately identified the points where Story
had apparently misunderstood the motives of the Convention
in certain given matters, although Curtis's dissertation is
in no way an argument with Story. Nor is it, on the book's
internal evidence, a polemic generally or an argument addressed
to the Hamilton-Madison controversy over the welfare clause.
If anything, Curtis in 1865 appears to be a sincere admirer
of the Union, glad that it survived and proud of its govern-
ment and governmental system, which he ponders with a patriot's
delight as well as with the objectivity of a competent
historian. His findings, however, conflicting as they do
with Story's on salient points of the formation of the wel-
fare clause, are in their results favorable to the Madisonian
outlook and support the accounts given of the Convention's proceedings and motives by Madison. This is especially true about Curtis's account of the events of August 16, 1787, and the subsequent trend of developments, which he expounds on pages 318 et seq. of his second volume.

Volens nolens, he is thus placed by his findings into the company of Madison and the later Madisonians, notably the Tuckers of Virginia and Charles Warren. (See Chapter VI, below.)

And by 1886, if not earlier, Mr. Curtis was a conscious, articulate, publicly active proponent of Madisonian views of congressional spending powers. With great vigor, he attacked the new and growing ramifications of congressional spending policies, presumably on the occasion of repeated increases in appropriations for the Department of Agriculture. (see page 187, below.) Forty years later, his precise and strong expressions were cherished by opponents of the Maternity Act.

Another significant work on constitutional law which was published during the early years of the Reconstruction Era, John Norton Pomeroy's An Introduction to the Constitutional Law of the United States,24 followed Hamilton and Story in the interpretation of the welfare clause, without efforts to inquire into the proceedings of the Federal Convention for the genesis of the controversial clause.

Toward the end of the century at least two significant expositions of the Constitution appeared. Of these, John Innis Clark Hare's *American Constitutional Law* of 1889 has been claimed both by the Hamiltonians and the Madisons as adhering to their respective views. On the other hand, John Randolph Tucker's *The Constitution of the United States, A Critical Discussion of Its Genesis, Development and Interpretation*, published in 1899, resolutely defended the Madisonian position, both on logical and historical grounds. J. R. Tucker was the first commentator directly to take issue with Story on the interpretation of the proceedings of the Federal Convention. Tucker's analysis of the records of the Convention and of Mr. Justice Story's interpretation of those records, is thorough and extensive, although afflicted with some inaccuracies; and his rejection of Story's position is firm and complete.

Tucker's biographer remarks that this work, which is briefly known as *Tucker on the Constitution*, is "universally used in Virginia and in many of the Southern States" as the standard text of constitutional law.

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26 Corwin, op. cit., 575.

27 St. George Tucker II, in the House of Representatives, in the year 1926. See infra, p. 286.


It may be observed, then, that the Madisonian view of the welfare clause has established itself in the South of the United States, while preference for the Hamiltonian position tends to be the position of the Northern or North-Eastern school of thought.

In terms of political parties, the Nineteenth Century Democratic view of the Constitution tends to be synonymous with Madison's strict constructionism, both before and after the Civil War. The post-bellum Republican outlook was essentially Hamiltonian, although, as is well known, the eclectic nature of a political platform renders any sweeping generalization precarious, and complicated specifications would be necessary in order to describe the historical reality faithfully.

We shall see in the next chapter that in the Twentieth Century the tenet of strict constructionism passed from the Democratic to the Republican party, and that a renewed effort to establish the Madisonian view of the Constitution generally and of the welfare clause in particular, was made in Congress during the Twenties, i.e., during the Republican decade.

But the principal proponent of this effort was a Southern Democrat, namely, Henry St. George Tucker, son of John Randolph Tucker and the editor of the latter's aforementioned work on the Constitution.30

30Cf. Supra, 163 ff; infra, 289 ff.
Surveying, then, the trends of constitutional doctrine manifested in the three decades or so around the turn of the century, we can only say that various forms and shades of both strict and broad constructionism were being asserted side by side. Not only did both Madison and Hamilton have their respective adherents, but some legal writers went so far as to begin to assert the doctrine which a century before had been abjured by all interpreters of the Constitution, namely, the proposition that under the welfare clause the Congress could lawfully exercise a plenary legislative jurisdiction. It was stated in the following words:

Our view, then, is that those governmental powers, the exercise of which may be necessary to promote the general welfare of the people of the United States, and which, from their nature, cannot be effectively exercised by the States, for that reason vest in Congress, except where they are prohibited, expressly or implicitly, by some portion of the Constitution. These views may be heretical; certainly they are not the views of a strict constructionist. Nor do we regard it as a sound argument in opposition to them that they embrace views which were never contemplated in the formation of the Federal Union. Those who formed that union could not think of everything that might arise in the expansive and illimitable future. Great and far-seeing as they were, their horizon was narrow when compared with ours. They knew nothing of the steamboat, the steamship, the steam railway, the electric telegraph on land, the

31 An editorial note which may be regarded as representing this opinion, appeared in 1896 in the American Law Review, Vol. 30, pp. 787 ff. Captioned "Constitutionality of the Agricultural Department," the item consists of a letter to the editors, in which the sender rejoices at the "strict constructionism" of the editors' views, and encouraged, proposes a full scale enquiry into the constitutionality of the Department of Agriculture. - The editors reply that they favor not a strict, but the broadest possible scope of the congressional powers; that agriculture should be included within that scope, is, however, beyond anything they are willing to endure.
electric cable under the sea, of men talking to each other hundreds of miles apart over a wire; and the possibilities of the X-ray surpass anything dreamed of by the most optimistic imagination of that day. They did not profess to establish a minute scheme of government for those who should live in their places a hundred or a thousand years hence;32

This language is bold but carries but a small stick, because the reasoning behind its courage has too many defects. First, even though the Founders had not predicted the X-ray (to which the writer of the note seems to ascribe a remarkable constitutional significance) or the steam engine, they were not lacking the knowledge that all things change. Fulton was experimenting with a steam-boat during the summer in which the Constitution was being drafted, and other signs of the incipient industrial revolution were in evidence. Technological change was not beyond the Founders' imagination. And they anticipated social changes as well. Why else would they have made the Constitution amendable? And what other action under the Constitution is more natural as new conditions conflict with old provisions, than to amend the provisions?

Secondly, the welfare clause cannot be given the plenary import for the reasons explained by Randolph and others in 1788 and reduced to writing by Madison in Federalist No. 41. It is not a question of piety, but of logic.

32Id., pp. 789 f.
Thirdly, supposing for the sake of argument that the plenary meaning is ascribed to the clause, and that Congress does have the power to make all laws necessary for the general welfare, where, in the name of the Constitution, is the reason to curtail this postulated plenary power by the qualification referring to the ability or inability of the several states to deal effectively with the object of the legislation?

If Congress can, on basis of the welfare clause, legislate for the general welfare, it can do so whether or not the states could effectively deal with a given situation. For the Constitution contains no qualification resembling that suggested by the writer of the editorial note.

Nevertheless, the Note reads some such qualification into the Constitution, and on that basis contends that the Department of Agriculture is unconstitutional: 33

But even under our liberal theory of interpretation, we doubt whether any warrant can be found in the instrument for the creation of a department of Agriculture. This subject could solely be dealt with, and is dealt with, by the respective States, for their own inhabitants and their purposes. . . . To support such Congressional action requires even a larger interpretation of the welfare clause than we have been disposed to give it. But if such an interpretation could fairly be found in the instrument, we are in favor of finding it.

It is not clear whether the above contention that Congress does not, under the welfare clause, have authority to concern itself with agriculture, is postulated because agriculture is within "local welfare" and not "general welfare," or be-

33Id., 790.
cause, although relevant for the general welfare, it is nevertheless an object with which the states can deal; or whether the fact that the states can deal with it, defines the object as "local" in contradistinction to "general."

In another part of the Note we find another expression of the doctrine, as follows:

We are in favor of giving reasonable scope and effect to this general welfare clause. This general grant of power, by the very language of the grant, authorizes Congress to lay taxes for the purpose of providing for the general welfare of the United States. It therefore authorizes Congress to provide for the general welfare of the United States.

This glaringly false inference is an obvious disregard both of logic and of the whole preceding history of the argument developed around the welfare clause.—The statement continues as follows:

What is to be regarded as the general welfare of the United States, and consequently within the jurisdiction of Congress, is to be determined upon a construction of the partition of powers between the general government and the State governments, as provided for in the whole instrument.

But where in the "whole instrument" are we to look for the criterion of the "partition" of the powers? From the very beginning of the Constitution, it has been thought that the powers enumerated were delegated to the National Government, and all the rest remained with the states. That was the formula of the "partition." But if the Government now has the power to provide for the general welfare, the enumeration no longer can be the criterion. Where else, then, in the
Constitution, is there a clue to the meaning or scope of the term "general welfare"?

On the other hand, if the enumeration still determines the dividing line, and the scope of "general welfare" is defined by it, then the extent of "general welfare" is tantamount to the sum-total of the objects covered by the enumeration.

The latter position would seem to be the purest possible expression of the view of James Madison (Variant III, page 9, supra). But the statement on the preceding page, "... It therefore authorizes Congress to provide for the general welfare ...", undoubtedly contemplates the consolidationist meaning (Variant I, idem).

The last portion of the statement, finally, invokes a criterion reminiscent of Resolution 6 of the Virginia Plan of 1787, i.e., Randolph's original proposal of jurisdictional division. The portion of the Note which implicitly refers to the Randolph criterion, reads as follows:

Upon this theory [the theory described in the two excerpts quoted just above] of interpretation, it is undeniably logical that all matters pertaining to the general welfare of the people of the United States which, from their very nature, are beyond the power of regulation by the legislation of the States, are remitted to Congress.

This eclectic syncretism of doctrines fits well into the fin du siecle in which it originates. But the tendency toward ambivalence in theory did not come to an end with the century. The trend entered into the Twentieth Century and has produced several types of interpretative constructs,
having in common the effort both to sustain the idea of enumerated powers, and the idea that Congress can do anything which is for the general welfare of the United States or the people of the United States.

The above Note of 1896, while obviously inspired by the Randolph Resolution 6, not only abstains from any reliance upon the authority of the Founders, but rather it openly claims the right to disregard the intentions of the Founders. Its blunt sincerity in this respect stands alone, or almost alone, for few if any of subsequent interpreters of the Constitution have directly proposed the notion that the authentic views of the Founders may be disregarded, and that the Constitution may be interpreted free from its genesis and its larger history. Most writers and authorities try to preserve the belief that the Constitution as currently practiced, is the same as originally intended, or at least not in sharp contradiction to the original intentions.

We have already noted that while a radical centralism, illustrated by the Note of 1896, was developing during the last years of the nineteenth century, there was, on the other hand, a resurgence of the Madisonian strict constructionism, and that especially the South of the United States identified with it. The greatest work of the times in that category was Tucker on the Constitution, of 1899.
The doctrine, then, was far from settled on the approach of the Twentieth Century, and the gap between the extremes of the competing theories was at least as wide as ever, and probably wider.
CHAPTER V

THE TWENTIETH CENTURY

A. Prior to the New Deal

In the Twentieth Century, the spending powers came to be directed toward purposes of a benevolent or "social" nature in a more systematic manner than the sporadic emergency grants which had become customary in the previous century.

In the first place, there was created in 1912 the Children's Bureau in the Department of Labor.\(^1\) The Department of Labor itself, established also in that year, is assumed to be a congressional instrumentality necessary and proper for the regulation of interstate commerce, and thus it is validated by the commerce clause of the Constitution. But the Children's Bureau has been always cited as an example of the kind of federal agency which can not be justified by any of the enumerated powers, and must be therefore assumed to be validated by the right of Congress to spend funds for the general welfare under the welfare clause alone.

Originally, the Bureau was not an outlet for making any grants of money, and the funds appropriated to it were ex-

\(^1\)37 Stat. 79. In 1918, a "Women's Bureau" was created, with analogous objectives. 41 Stat. 987.
clusively for its own operation, which consisted in gathering, collating, and disseminating information concerning maternal and infant welfare. It was in that respect analogous to the Department of Agriculture, which, too, had in common with the Bureau the fact that it did not rest on any of the enumerated powers.

These agencies (and some others, of a similar status) did not cost too much money, and did not arouse an opposition which would seek to challenge their constitutionality in courts. But within a decade there was enacted a far more substantial measure than a provision for gathering information. It was the "Maternity Act" of 1921, providing "for the appropriation through a term of years of certain sums of money, to be expended under the direction of the 'Children's Bureau' of the Department of Labor, in cooperation with certain state agencies, within . . . states which through their legislatures, accept the provisions of the Act and duplicate their assigned portion of the national appropriation."\(^2\) The purpose of the disbursements was the "promotion of the welfare and hygiene of maternity and infancy."\(^3\)

The Maternity Act was approved by President Harding, but then challenged in the courts as beyond the powers of Congress, as usurping the powers of the states, and for other reasons. On this occasion, a number of articles appeared

\(^2\)Corwin, op. cit., 548.

throughout legal periodicals, including Edward S. Corwin's excellent survey of the history of congressional spending powers, and the history of the construction of the welfare clause. This is the article "The Spending Power of Congress, Apropos the Maternity Act," to which we have referred--and will refer--frequently in the present study.

Interestingly and perhaps significantly, there is one phase of the history of the welfare clause which Corwin has wholly ignored--the formation of the clause by the Federal Convention. Basing himself mainly on so much of Story's argument as rests on supposed self-evidence, logic, grammar, and a general principle of statesmanship, but refusing to follow Story into the deeps of the Federal Convention's records, Corwin reaches a conclusion concurring with Story and his precursors Hamilton, Monroe, Calhoun and Clay, and others: Congress may spend for the general welfare, regardless of the enumeration of specific powers. The Maternity Act is constitutional. And,

not even the Supreme Court is entitled to set aside acts of Congress on some vague theory of the purpose or spirit of the Constitution, in the face of its specific terms.\(^4\)

The following year the complaints against the Maternity Act were dismissed by the Supreme Court on procedural grounds\(^5\) and thus, without adjudicating the main constitutional issue, the Act was allowed to stand. But it seems moreover that

\(^{4}\text{Id., 549.}\)

\(^{5}\text{Massachusetts v. Mellon, 262 U.S. 447 (1923).}\)
the petitioners seeking voidance of the statute did not even urge the courts to proclaim the Madisonian notion that federal spending is limited to enumerated purposes. As described by the Supreme Court, the contention was "that these appropriations are for purposes not national, but local to the states." This would seem implicitly to affirm the Hamiltonian version, the complaint being merely that the Maternity Act, aiming allegedly at local welfare and not general welfare, violates Hamilton's formula; and not that Hamilton's doctrine is wrong and Madison's right.

The Madisonian tradition, however, was far from extinct in the Twenties of our century, and the torch of strict constructionism was raised valiantly, if vainly, by Henry St. George Tucker, a Representative in Congress from Virginia, the grandson of the Tucker who a hundred years before headed the congressional committee which recommended federal sponsorship of internal improvements and tended to favor a liberal interpretation of the spending powers.7

On March 3, 1926, Tucker attacked the Maternity Act appropriations as unconstitutional, condemning at the same time the whole line of precedents claimed to bespeak the verity of Hamilton's view of the welfare clause, as being themselves unconstitutional.8 Mr. Tucker unfolded, before

6Id.
7Supra, pp. 163 f.; and infra, pp. 235 f.
867 (Pt 5) Cong. Rec. 4931 ff.
an avidly interested and amused House of Representatives, an extensive analysis of the records of the Federal Convention, spending on it all of his allotted time plus several additional amounts of time yielded to him most willingly by others. Congressman Tucker crossed weapons with Joseph Story's *Commentaries*, fighting him on the battleground of logic, grammar, and the general history of the Union, as well as the special genesis of the welfare clause as revealed by the records of the Federal Convention.  

He moreover inserted into the Congressional Record an interesting statement similar in tenor, made in 1886 in an address given by George Ticknor Curtis before the Georgetown University School of Law.  

From the speech of Mr. Curtis:

Looking into the body of the *Constitution*, we come upon the first clause of the eighth section of article I of the Constitution, which contains the grant of the taxing power. Here the words "general welfare" are used again having first been used in the Preamble; and, strange to say, there are persons who suppose that this clause contains a grant of authority to tax in order to promote the personal welfare of every man, woman and child in the United States.

I shall merely counsel you to analyze the clause and see how strange this notion is. The clause grants to Congress a power to tax the people for three special purposes: First, to pay the debts...
of the United States; second, to provide for the common defense of the United States; third, to provide for the general welfare of the United States.

In every one of these special purposes for which the taxing power is to be exercised "the United States" means the political corporation known as the United States and not the individual inhabitants of the country. The debts that are to be paid are the debts of the Government; the common defense that is to be provided for is the defense of the Government in all those matters it has duties of defense to discharge for the whole country; the general welfare that is to be provided for is the well being of the Government in all those matters of which its efficiency concerns the whole Union. In the very next clause, which contains the grant of power to borrow money on the credit of the United States, the "United States" is used in the same sense, meaning the Government known as the United States. It is on the credit of the Government, not on the credit of individuals or States, that Congress is authorized to borrow money.

Now, look at the stupendous communism that is wrapped up in the taxing power on the supposition that it includes the power to tax for the promotion of the welfare of individuals. There is no limit to the taxing power excepting that duties, imposts and excises must be uniform. . . . All the property in the country may be taxed without limit for the legitimate objects of taxation. If one of those legitimate objects is the welfare of individuals or masses or classes or the whole people, the two Houses of Congress and any President acting together can divide up all the property in the country upon the plea that a general division will promote the general welfare. By this process this Government could devour itself, and there would be nothing left for it to subsist upon.

* * *

In 1929, Professor Charles Warren published the results of analyses of the records of the Federal Convention,12 which

had led him to the conclusion that

the phrase "to provide for the general welfare"
is merely a general description of the amount of
welfare which was to be accomplished by carrying
out those enumerated and limited powers vested
in Congress - and no others.13

In 1926, meanwhile, a four-hundred page volume in close
print, appearing in Washington D.C. as a privately printed
publication, heralded an unorthodox thesis in the following
style:

I undertake to show - wrote its author Francis
James Lawson - that the welfare clause is, what
it purports on its face to be, a general grant of
unlimited power to be utilized by Congress in its
own discretion for the common defense and general
welfare of the United States. . . . I boldly chal­
lenge an ancient constitutional dogma, which rests
upon the dicta of early cases and was never acted
upon until in comparatively recent times; - and
then only as a predecided principle of juris­
prudence, to the support of which no judicial
reasoning has ever been adduced. I assert the
efficacy of the General Welfare Clause of the
Constitution and dispute the force of those de­
cisions by which it has been read out of the funda­
mental law. I allege the existence in the
General Government of all the general police powers
possessed by the states, concurrent with the
states, dormant until exercised, and, when ex­
ercised, to that extent displacing any state leg­
islation inconsistent therewith.14

Lawson delved into the labyrinthine detail of the Federal
Convention's proceedings in a feverish effort to extract from
them proof that the Constitution was meant to create a
unitary and not federal structure of government, and that

13Id., p. 475.

14James Francis Lawson, The General Welfare Clause,
the welfare clause was the key to the whole idea.\textsuperscript{15}

When it was done no publisher would print it, but Lawson merited himself a footnote in the works of a distinguished authority.\textsuperscript{16}

If nobody except Professor Corwin paid attention to Lawson, the Depression which broke out three years after Lawson's publication could not be ignored so well as Lawson could, and it did for the expansion of federal jurisdiction very nearly as much as Lawson had wished to do for it. For as far as constellations of constitutional clauses are concerned, the welfare clause presided over the whole firmament of the New Deal. And eventually it gathered almost all the power with which Lawson would endow it.

\textbf{B. The New Deal}

Franklin Delano Roosevelt expressed himself on the Constitution a number of times, in varying degrees of directness and definiteness. But, like Washington and other presidential predecessors, he generally refrained from detailed analyses. There are no specific statements by him construing the spending powers of Congress or interpreting the welfare clause.

\textsuperscript{15}For examination of Lawson's historical inquest, \textit{infra}, Part II, pp. 268 ff.

As Governor of the state of New York, he made, while the Depression was still young, a radio address the emphasis of which was upon the states rights. He pointed out that the Federal Government possessed only the powers enumerated by the Constitution. But a few years later, as President of the United States, he contended that

While it is not written in the Constitution, nevertheless, it is the inherent duty of the Federal Government to keep its citizens from starvation.

His First Inaugural Address demonstrated his determination to extend the powers of the Federal Government generally and of the Presidency in particular, as far as was necessary to deal with the anomalous condition into which the country had been thrown by the disorganization of its economic forces.

Our greatest primary task is to put people to work. It can be accomplished in part by direct recruiting by the Government itself, treating the task as we would treat the emergency of a war, but at the same time, through this employment, accomplishing greatly needed projects to stimulate and reorganize the use of our national resources.

Hand in hand with this we must ... recognize the overbalance of population in our industrial centers and, by engaging on a national scale in a redistribution, endeavor to provide a better

18 Id., p. 572.
20 March 4, 1933. 77 Cong. Rec. 5-6.
use of the land for those best fitted for the land. The task can be helped by definite ef-
forts to raise the values of agricultural prod-
ucts and with this the power to purchase the output of our cities. It can be helped by pre-
venting . . . the tragedy of the growing loss through foreclosure of our small homes and our farms. It can be helped . . . by the unifying of relief activities which today are often scattered, uneconomical, and unequal. . . . By national planning for and supervision of all forms of transportation and of communications and other utilities which have a definitely public character.

I shall presently urge upon a new Congress in special session detailed measures for their ful-
fillment, and I shall seek the immediate assistance of the several states.

"With this pledge taken," Mr. Roosevelt continued in his first Inauguration Address, "I assume unhesitatingly the leadership of this great army of our people dedicated to a disciplined attack upon our common problems." And with respect to constitutional principles, he observed:

It is to be hoped that the normal balance of executive and legislative authority may be whol-
ly adequate to meet the unprecedented task before us. But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure.

I am prepared under my constitutional duty to recommend the measures that a stricken nation in the midst of a stricken world may require. These measures, or such other measures as the Congress may build out of its experience and wisdom, I shall seek, within my constitutional authority, to bring to speedy adoption.

But in the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still criti-
cal, I shall not evade the clear course of duty that will then confront me. I shall ask Congress for the one remaining instrument to meet the crisis -
broad executive power to wage a war against the emergency, as great as the power that would be given me if we were in fact invaded by a foreign foe.

The people of the United States have not failed. In their need they have registered a mandate that they want a direct, vigorous action. They have asked for discipline and direction under leadership. They have made me the present instrument of their wishes. In the spirit of the gift I take it.

Within five days of the Inauguration, a new Congress, the Seventy-Third, met in its first session on March 9.21

Responding to special messages from the President, the Congress gave its first attention to measures pertaining to banking and currency, including a reorganization of the Federal Reserve System.22 But bills dealing with a great many other aspects of the national emergency (and with other matters) were introduced even the same day. Some of the urgent proposals described themselves in terms invoking a reference to "the general welfare," as for example House Resolution 4, entitled as23

A bill to provide further for the national security and defense, insure domestic tranquility, and promote the general welfare by limiting the production, conserving the supply and controlling and facilitating the distribution of agricultural products, and for other purposes.

This was the origin of the legislation which was to develop

21 77 Cong. Rec. 41.
22 Id., pp. 45 ff.
23 Id., p. 85.
into the Agricultural Adjustment Act, the statute which eventually confronted the Supreme Court of the United States with the occasion to formulate for the first time in the history of the Constitution a judicial opinion of the meaning of the welfare clause.

The present study does not propose to attempt a general description of the New Deal, a topic which has been more than amply discussed in existing literature. Table II, below, page 195, may serve for a quick synopsis of the topical range covered by the main features of the whole program. The principal headings are for the most part the same as may be followed throughout presidential addresses and messages from George Washington's First Inaugural to date, and the same concerns may be identified in legislative debates from the First Congress to the present day. Only the methods of approach have intensified and the jurisdictional assertions of the Federal Government have become bolder.

In general outline, the New Deal resembles Hamilton's report on manufactures of 1791. Genuinely novel are only the elements subsumable under the heading of "social security," although even these, consisting essentially in "bounties" of one kind or another to satisfy this or that class of needs, are conceptually within the Hamiltonian projections. The

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TABLE II

THE NEW DEAL: TOPICAL SYNOPSIS

Commerce
Banking
Currency

Industry
Industry in general
Transportation, particularly
Railroads
Other selected industries
Mining

Internal improvements
Flood control
Irrigation
Electrification
Recreation
Housing
Urban development

Employment
Education
Agriculture
Social Security
fundamental difference only is that while the Federal bene­
ficence contemplated by the aforementioned essay of 1791
looked to certain national functions rather than to people
as such, the neo-Hamiltonian outlook of 1933 et seq. recog­
nizes the subjective well-being of persons as an integral
part of the objective functions themselves. And it goes a
step beyond that, culminating in a recognition of the idea
that the well-being of the persons who compose the nation
is an end in itself, even regardless of their instrumental
value as agents of this or that nationally important ob­
jective function, such as commerce, industry, agriculture,
transportation, or defense.

It may be noted in the sense of the observation just
made above, that aspects of the general industrial act of
1933, known briefly as the "NIRA,"26 and provisions of cer­
tain special industrial acts, like that which pertained to
mining27 and that which related to railroad transportation,28
were in fact "social security" measures insofar as they pro­
vided for pensions and other personal benefits to the miners
and the railroad workers. But the declared rationale of
these provisions was predicated upon the proposition that
the welfare of the workman is an indispensable instrumentality

Swisher, op. cit., 891 ff.

27 Bituminous Coal Conservation Acts; Carter v. Carter,

in the dispatch of the business at which he works; and this relationship was offered in justification of the provision being made for the welfare of the working person.

The general social security statute,\footnote{29 Stat. 620. Swisher, \textit{Id.}, 913 ff.} which originated about two years later than the foregoing railroad law and mining law, transcends the aforementioned subservience of person to function, and, extending almost universally to all citizenry rather than to special classes defined by relatedness to certain types of work, provides them with systematic allotments of monetary grants and other benefits because they are people and not because they are instrumentalities of commerce, production, or defense.

In the course of debates leading to the enactment of the Social Security Act of 1935, during the First Session of the 74th Congress, the House of Representatives heard an exposition of the Constitution with respect to the question of validity of the contemplated measure, or measures, known as the Wagner-Lewis-Doughton insurance proposals (House Resolutions 4120 and 7260). It was on April 17, 1935, and the question of constitutionality was in a state of confusion.

Observed Representative Ernest Lundeen, Republican of Minnesota:

Concerning the constitutionality of the \textit{above measures}, I am surprised that able lawyers on this floor have not taken up this question in more detail. One of my colleagues here stated to me the other day that someone maintained to
him that H.R. 7260 is "absolutely probably constitutional," and that well illustrates the state of mind of Members. . . .30

To ameliorate the situation a learned member of the New York Bar was subsequently invited to enlighten the House of Representatives, to wit, Mr. Leo Linder, who disposed of some of the more disagreeable historical difficulties by counting Madison as a Hamiltonian as far as the construction of the spending powers was concerned:

Such distinguished constitutional authorities as Washington, Madison, Monroe, Hamilton, Calhoun, and Justice Story, have definitely repudiated the conception of an appropriating power limited by the other powers.31

The Madisonian view was mentioned, but without referring it to Madison, and was discounted as follows:

The argument is . . . wholly unsound, for it ignores the fact that one of the enumerated powers set forth in the Constitution is the power to "lay and collect taxes . . . for . . . the general welfare of the United States."

The basic position for the constitutionality of the bill was stated as follows:

The affirmative argument establishing the constitutionality of the bill is really very simple. This bill provides for the appropriation of Federal moneys out of the Treasury of the United States for the payment of compensation to the unemployed, the sick, the disabled, and the aged. It is thus simply an exercise of the appropriating power; that is, the power of Congress to spend money. The bill does, indeed, do more than provide for appropriations; it provides for the setting up of administrative machinery. But

3079 (Pt. 6) Cong. Rec. 5863.

31Ibid.
the appropriating power of Congress necessarily carries with it the incidental power to provide administrative machinery for disbursing the moneys appropriated and for insuring their proper application to the purposes sought to be achieved by Congress. [Reference to W. W. Willoughby on the Constitution, Ch. 3, par. 62, p. 105.]

Mr. Linder mainly relied on Joseph Story, but he moreover found support for his position in Roger Tawney's judicial opinion. And Linder also adduced a list of legislative precedents as evidence that Congress had always freely exercised the spending powers, even apart from the enumerated topics. Further, Hare and Pomeroy were quoted to the essential effect that Congress is the only interpreter of the welfare clause.

In the debate which followed Mr. Linder's analysis, it was remarked (uncertain by whom) that

The Congress which passed the Reconstruction Finance Corporation Act, the Home Owners' Loan Corporation Act, and the bulk of the national emergency legislation clearly conceived that it was for the "general welfare" that individuals, corporations, and banks should be given money out of the Treasury of the United States.

And the voice, unidentified in the Congressional Record, continued:

The ultimate object of our Government is the general welfare of our people. Among the people of a nation are the unfortunates, the poor, the sick, the aged,

32 George Holmes v. Silas H. Jennison, Governor of Vermont, 14 Pet. 540, 570, 571 (1840). The present writer is unable to share Mr. Linder's opinion that the case has bearing upon the topic at hand.

3379 Cong. Rec. 5864.
34 Id., 5870.
and other persons in a dependent position; each generation has and will have them. . . . Under such circumstances some agency must step in and assume the burden of correcting such abuses in the interest of the general welfare; and in the past, as we see again in the pending bill, this agency is government itself.35

And it was added by Representative Andrew Jackson May, Democrat from Kentucky:

I think the clearest expression we have ever had of the function of government was stated in the Declaration of Independence by Thomas Jefferson, when he said that the object of government was the protection of life, liberty, and the pursuit of happiness. I think that is what this legislation is designed to do, if it is perfected.36

These various expressions illustrate trends in Congress of constitutional interpretation favorable to the wide scope of the legislative program of the New Deal period.

Contrary to the theory that the "welfare of the United States" referred to the Government of the union and not directly its people, an increasingly wider reception was now being given to the proposition that the people, rather than institutions and impersonal functions, were the substance of the entity designated as "The United States," and that the welfare of the people was the essential aspect of the "welfare of the United States."

The justifying rationale of federal social legislation was changing its philosophical foundation.

35 Id., 5871.
It may be noted that elements of social security may be predicated either upon the proposition that the nation needs the persons to whom the benefits are extended, or, on the other hand, on the proposition that the persons need the nation. The ultimate maxim of the system of ethics elaborated by Immanuel Kant is that a human person ought to be treated not merely as a means to an end but as an end in himself. That principle also proclaims itself quite clearly in the style of the Declaration of Independence. The same philosophy sought to express itself, it would seem, in the legislative declaration, made in the Clayton Act of 1914, that human labor is not a commodity. It might have been more accurate to say that the human selfhood is not a commodity, for unless labor be a commodity, it could not be paid for, which is probably the last thing that the Act would have wished to accomplish. In any event, a progression toward a Kantian ethics from a Benthamite utilitarianism may be discerned in the legislative and presidential thought of the Twentieth Century. The Social Security Act of 1935 represents the first wide plateau of achievement in this ascendancy.

The constitutional concomitant of the development was the rediscovery of the welfare clause as a more comfortable basis of social legislation, after it had been found impossible logically, and perhaps also ethically awkward, to

37 38 Stat. 730. Section 6 provides, in part: "That the labor of a human being is not a commodity or article of commerce."
cultivate elements of human welfare as appendages to commerce, or possibly to other "enumerated powers."

The grant of pensions to railroaders was attempted under the aegis of the commerce clause. The judiciary voided it as not having a direct relation to commerce. The directness of the relationship to interstate commerce was also relevant in the judicial determination of the constitutionality of portions of the industrial omnibus known as the National Industrial Recovery Act, and of the Farm Bankruptcy Act, otherwise known as the Frazier-Lemke Bill; although in the case of the latter act, the primary reliance in defending its constitutionality was had upon the power of Congress over the subject of bankruptcies. At any rate, both acts were voided at least in part, by the Supreme Court, and both were voided on the same day, May 27, 1935.

Of the NIRA, there survived provisions authorizing federal financing of various public works and internal improvements. (See infra, pp. 239 ff.)

The Agricultural Adjustment Act of 1933 looks both to the welfare of agriculture as a nationally important function,

38 Const. I:8:3.


42 48 Stat. 31.
and to the personal welfare of the farmer. While it does not provide pensions or medical benefits or unemployment compensation, it provides compensatory grants—"bounties"—in the nature of governmentally guaranteed quasi-profits, thus securing incomes deemed sufficient for the farmer to provide himself with the various necessities of a fairly decent existence.

From the standpoint of our present study, the main interest of the Agricultural Adjustment Act of 1933 lies in the fact that it was the first measure in American constitutional history whose adjudication impelled the Supreme Court of the United States to elaborate upon the meaning of the general-welfare clause of Article I of the Constitution, which provision had been almost entirely ignored by the judiciary.

The high court pronounced its opinion in this matter early in the year 1936, in the case of United States v. Butler; we shall soon take up a discussion of that important event in a little more detail. Meanwhile we find it desirable both because of chronology and of logic to dispose of certain preliminaries.

Some two years prior to being interpreted by the Supreme Court, the welfare clause had already been analyzed and applied in a number of cases reaching various lower Federal courts. And the first case which occasioned a judicial dis-

\[43\text{Infra, p. } 208\]
cussion of the welfare clause was not concerned with the Agricultural Adjustment Act, but with the National Industrial Recovery Act, which is briefly known as "NIRA."

The NIRA, needless to remark, is a very heterogeneous legislative creation. Among other things, it consists of a system of appropriations from the Federal treasury to be allocated as grants or loans to states and municipalities with a view of stimulating all manner of construction, building, and improvement, for such multiple purposes as providing employment, establishing publicly owned public utilities, especially electric plants, building recreational facilities, and other projects. In conjunction with parallel legislation, these projects included a variety of intergovernmental arrangements and a network of governmentally sponsored semi-private financial institutions whose function it was to stimulate the building of new housing facilities. There were also federal provisions for the erection of planned model communities, et cetera.

Inasmuch as the greater part of all these activities was outside of the jurisdictional domain given to the Federal Government by the traditional enumeration of constitutional powers, unless the already-strained scope of the commerce clause could be stretched by trained constructions to cover also these novel and manifold topics, the Federal involvement in the new fields had to be formulated as a mere use of the spending power, in the hope that the Supreme Court would eventually adopt the Hamiltonian doctrine of the welfare clause.
The Congress kept tactfully trying to suggest the idea to the courts by frequently mentioning "general welfare" in the preambles with which it had become fashionable to introduce the acts Congress was passing. And it seems, from the facts which we shall presently consider, that at least some of the courts were ready enough to give the welfare clause a fair chance to prove its potential as an important factor in the new scheme of things; but apparently the Government, i.e., the various district attorneys appearing on behalf of the public agencies who encountered opposition in their pursuit of the NIRA policies, placed no great confidence in the possibilities of the welfare clause, and preferred to rely on the familiar commerce clause. Only after this strategy had suffered a defeat, did the defenders of the legislation turn to the welfare clause as a tool of last resort. Surprisingly, it worked and the provisions in question were sustained.

Let us now take a look at the first encounter of the NIRA with the challenge of states rights.

Apparently the first case where the NIRA was judicially tested was *Missouri Public Service Commission v. The City of Concordia (Mo.)*, decided in 1934. The controversy was about the power of the Federal Government to sponsor and finance the erection of a municipal electric plant. The Federal district court said that it could not, because the

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production of electricity, like any other production, was local commerce and not interstate. Then about a month and a half later, the same court, presided to by another judge, encountered much the same kind of case in Missouri Utilities Co. v. City of California (Mo.). And here, whether upon the behest of counsel or upon its own motion, the court tried the validity of the Federal sponsorship of the local construction of electric plants not under the criterion of interstate commerce, but as a manifestation of the power of Congress to collect and spend taxes for the general welfare of the United States.

Reasoned and decided by District Judge Otis, this case represents not only the first comprehensive analysis of the welfare clause and its history by any court of law, but among judicial statements at least, this is one of the most excellent.

Thus finally in the fall of 1934, the welfare clause achieved official recognition as a constitutional provision capable of sustaining a certain type of statute which no other part of the Constitution would uphold.

The authority of Joseph Story's expositions of the welfare clause, of 1833, played an important role in the formation of Judge Otis's opinion in the above case. The views of Alexander Hamilton, first expressed in 1791, thus finally bore their first judicial fruit in 1934. But so far this

was only an isolated event in one of the many Federal district courts.

The era which followed was a period of a great variety, casuistry, and uncertainty throughout the Federal judiciary concerning the meaning of the welfare clause. The question of whether Hamilton or Madison was right on the score of the welfare clause was complicated by the difficulty of many a judge to form a clear opinion as to what each of those men meant. With respect to the New Deal measures, or some of them, certainly with respect to the two pivotal components of the whole New Deal system, namely the NIRA and the AAA, the legal situation was unpredictable.

We have already noted that in one case the NIRA was voided because the welfare clause was not used at all. In another the welfare clause was applied, was interpreted in the Hamiltonian manner, and the disputed activity was upheld as within the general welfare. In a third case, a district court subscribed to Madison's doctrine and voided the measure in question. The cases decided during the year 1935 appear to be rather uniformly stabilized on the proposition that Hamilton, not Madison, was the example to follow, but this common understanding did not secure a uniform approval of the statutes under adjudication.

A district court subscribing to Hamilton's views voided

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the AAA on the ground that it concerned local and not general welfare. Another district court understood Hamilton's position as postulating the extreme centralist maxim that under the welfare clause Congress could not only appropriate but freely legislate for the general welfare.

Early in 1936 the Supreme Court rendered the very important decision to which we have already alluded (above, p. 203), namely the opinion in the case of United States v. Butler, concerning the Agricultural Adjustment Act. To a great extent the opinion in the case reflects, rather than disposes of, the confusions which at that time were so much in evidence throughout the courts dealing with the welfare clause. A massive body of literature has arisen in the wake of the Butler case, and a good deal of criticism has been heard. But whatever its defects—and they are serious—the Butler opinion did in any event settle, at least nominally, the perennial squabble of the two or more schools of thought by awarding its judicial choice of preference to the doctrine of Hamilton. On this point the Court was unanimous, although

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49297 U.S. 1 (1936).

it is doubtful that the Justices were agreed as to what it was that they were unanimous about.

**The Butler Case**

(a) Its Juristic Aspect  
Part (1) Substantive Points

A landmark of constitutional history though it is, the opinion in the *Butler Case* cannot rest its glory on the quality of its reasoning. Far from being regarded as a masterpiece of judicial logic, it is rather recognized by common consent among students of the Constitution as one of the most mystifying essays ever written about it. The primary difficulties are found on the substantive side of the opinion, rather than in matters of procedure. The procedural aspect presents some novel and interesting points, but is not affected, as the substantive aspect is, with inherent inconsistencies.

The Court's reasoning in the merits of the case opens with a prelude announcing the presence of a momentous issue: the perennial dilemma of two equally respected schools of interpretation of a constitutional clause is now to be resolved. The Court describes what Madison and Hamilton, respectively, thought of the meaning of the welfare clause. It takes notice that each of the two great men had a dignified following. But the Court will not--it declares--revive the

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52 *Id.*, 183.
controversy. On all the evidence, it appears to the Court that Hamilton's version, as espoused by Mr. Justice Story, is the correct reading of the welfare clause. "While, therefore, the power to tax is not unlimited," observes the Supreme Court, "its confines are set in the clause which confers it, and not in those of Section 8 of Article I of the Constitution which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." (Evans, Cases, page 184.)

It would seem logical at this point to expect that the Court will determine whether the grants to farmers proposed by the Agricultural Act of 1933 (supra, page 202) are or are not within the definition of "general welfare." But in a move that comes as a surprise to most minds examining the opinion, the Court's reasoning now takes a sharp turn away from its own adopted basis of argument:

We are not now required to ascertain the scope of the phrase "general welfare of the United States" or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. (Idem, page 185.)
Now since according to the quotation which precedes the one immediately above, the Court recognizes that Congress does have the power to authorize expenditures of public moneys for public purposes regardless of the enumerated powers, it follows that the Court's opposition to the AAA cannot be the result of the fact that agriculture is not enumerated in the Constitution among the several other topics over which the federal government has direct control. The reason, then, must be in something else. But what? As we try to find out, words like "coercion," "compulsion," and "purchase of compliance," and "economic pressure," stand out from the sequel of the Court's opinion.53 The Congress seeks to "control," "regulate," "enforce regulations," in a sphere (agriculture) not directly committed to its care by the Constitution.

For a moment, then, we presume that the appropriation for agriculture would be constitutional, under the terms of the Supreme Court, if the grants were not conditional grants, i.e., if the benefits offered by the AAA were not conditioned on the farmers' restraint in cultivating and marketing certain commodities according to federal specifications. As the AAA had arranged it, a farmer would be eligible for benefits if he voluntarily entered into a contract with the federal government to abstain from sending to market amounts of certain commodities in excess of what the federal government determined was desirable. The farmer-government contract was, obviously,

53Evans, Cases, pp. 185-188.
the form in which the conditionality of the federal grant of subsidy to farmers expressed itself. But the Court now surprises us a second time, in that it declares:

We are not here concerned with a conditional appropriation of money [but with the fact that the statute requires] a contractual obligation to submit to a regulation which otherwise could not be enforced. 54

Well, what else is a conditional grant than payment in return for a certain promise? And unless such a promise is exacted as a condition of the payment, how will the Government know for what its money will be used, and that it will be for the general welfare? Why does the Court tell us that it is not concerned with the conditionality nature of the federal grant, if in fact it obviously is concerned with it? What other feature of the AAA constitutes conceivably a "coercion," unless it is the conditionality of the grants?

But now a third and final surprise comes as the Supreme Court enunciates that the statute would be void even if all element of coercion or compulsion were absolutely absent, and the whole arrangement were genuinely voluntary:

But if the plan were one for purely voluntary cooperation it would stand no better so far as federal power is concerned. At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states. (Idem, page 187.)

Then how can Congress appropriate public funds for public purposes outside of the enumerated powers, if even a purely

54 Id., 187.
voluntary acceptance of the purpose for which the funds are
given, is "at best a scheme for purchasing obedience to fed­
eral regulation of a subject reserved to the states?" This
is a point-blank contradiction in the Court's own terms,
from which only two ways of escape suggest themselves with
whatever faint claim to credibility they can muster at least
on the face of it. First, appropriations which are not grants
either to the states or to the people of the states, might
pass the Court's criterion, because if no grant is made, there
can be no conditions implicit in it. Thus the Government
could appropriate it to its own agencies for purposes not enum­
erated in the Constitution, as it did for example in the case
of the original Department of Agriculture. Second, federal
grants to states or individuals might be constitutional if no
purpose were stated at all, because if nothing is said there
can be no condition implied in that nothingness, and the
recipient of a grant thus discussed could not comply with a
federal intent try as he might, and howsoever voluntary and
spontaneous his good will to comply might be. But then, of
course, the Federal Government would be scattering its funds
with no control whatever over what the money will do, and
whether or not its uses will have anything to do with the
general welfare. Such "bounties" might well be regarded as
unconstitutional by definition, there being no definite link
to connect them with the concept of the general welfare. And
besides, a type of blind bounties such as these are totally
strange to the whole idea for which Hamilton devised his doctrine of the welfare clause.

In a word, the case of United States v. Butler is a Kafkaesque creation.

(b) The political aspect of the case

What Mr. Justice Owen Roberts really wanted to accomplish with the meandering technique of the Butler opinion is and probably will remain a speculative matter. Intentions are invisible. Only the results are palpable.

His decision gave an immediate victory to the conservative element in the nation and the conservative wing of the Supreme Court. But it made a gift of lasting value to the progressives. Yet for the great gift to bear any fruit at all it was first necessary that the badly distorted Hamiltonian doctrine should be returned to its true meaning. This was done a year later by another Justice of the Supreme Court, Benjamin Cardozo. Justice Roberts did not dissent when the Cardozo opinion upheld the Social Security Act. If Roberts had sided with the conservatives in the 1937 adjudication of the Social Security Act, it would have resulted in a defeat of that legislation. But he went along with the progressives. Then why did he, the year before, act to defeat the AAA? Why did he formulate an opinion which was perfectly well usable as a tool for taming Hamilton's doctrine to serve Madisonian purposes? Surely the logic of his Butler opinion does not

55 See infra, pp. 226 ff, for the two cases whose opinions were written by Mr. Justice Cardozo.
provide us with reasons sufficient unto themselves. We suppose, therefore, that the motives were extra-juristic.

As for Mr. Justice Roberts himself, he seems to have enjoyed the position of a "floater" siding now with this and now with that school of thought on the Court. In acting out the role of a neutral middle-man, he perhaps averted many a crisis that might have been precipitated if the one or the other wing of the Court had been forced into a permanently defensive position. The situation surrounding the Butler case is an instance in point.

Was the Supreme Court at that time to promulgate the doctrine of James Madison, and declare in accordance with it not only that the Agricultural Adjustment Act was void, but also that the Department of Agriculture itself had been unconstitutional from its very origin? --and that the Maternity Program of 1921 was void as well? Were the conservative members of the Court prepared to say that President Lincoln did not know what the Constitution meant when he signed the Department of Agriculture into existence, and when he approved the Morrill aid to education? If he was wrong on that, why should it be believed that he was right on other constitutional issues, such as the right of secession? If the Supreme Court must choose between James Madison and Abraham Lincoln, which way will it go?

It went the Lincoln way, because Lincoln for the main practical purposes is modern, while Madison is antiquated.
Lincoln held then Hamilton's view of the spending powers of Congress. Examples of his actions show it. But even forgetting both Lincoln and Madison, there were the living and active interests of agriculture and of the social-minded groups supporting the maternity program and other things. The Court could not turn the clock back in the face of such powerful trends.

Hence the Madisonian concept of the welfare clause and of the spending powers of Congress was not usable in 1936. Madison was definitely out where the welfare clause was concerned. The Court had to turn to Hamilton. On the other hand, a straight application of the Hamiltonian doctrine to the Agricultural Adjustment Act would have obviously resulted in upholding it, much to the distress of the conservative side of the Court. Driven into a corner as a minority in a tightly divided Court, the conservatives might then have taken up a fight. They may have been forced into a vigorous action seeking not only to get rid of the Agricultural Adjustment Act, but more importantly to challenge the proposition that Hamilton was right as against Madison in his explications of the welfare clause.

The whole Hamiltonian school, when it comes to the welfare clause, has an extremely well founded idiosyncrasy against the records of the Federal Convention. For nothing is so fatal to its tenets than the obvious import of those records. Any of the conservative judges could have discredited the Hamiltonian school by presenting, in a dissenting opinion, an exposition
of the genesis of the welfare clause. It was therefore wise not to provoke the conservatives to the point of enticing in them a desire for such a major enterprise.

The conservatives then acquiesced in the proposition that Hamilton was right, especially if what he presumably meant by the welfare clause was of such a nature as to defeat the Agricultural Adjustment Act and, with reliance had upon the words of Mr. Justice Roberts interpreting the situation, if what Hamilton presumably meant would now serve to defeat any other system of federal grants in aid. Taking Mr. Justice Roberts's interpretations of Hamilton as a basis, it must have appeared perfectly clear that while Congress had the power to spend money for purposes not enumerated, yet all these unenumerated purposes were in the domain reserved to the states by the Tenth Amendment, and any federal spending intended to accomplish something in that reserved domain was, by Mr. Justice Roberts's light, unconstitutional as violating the Tenth Amendment.

That was a Coolidge type of Hamiltonianism, and the conservative members of the judiciary had no quarrel with it. A Madison in Hamilton's clothing was perhaps precisely what they felt was needed.

But in a year or so the Butler opinion turned out to have been a Trojan horse harboring a real Hamilton under a deceptively tame pseudo-Hamiltonian nominalism. The sweeping motion of Justice Cardozo's blazing spirit cast aside the Madisonian residue of the Butler case, and a new era of constitutional interpretation was here.
(c) The juristic aspect of the Butler case
Part (ii) Curiosities of procedure

If the Agricultural Adjustment Act was to be killed it was necessary to remove the procedural obstacles established in the early Twenties of the Twentieth Century in the Maternity Cases,\footnote{supra, 184 ff.} and to enable attackers of the AAA to come into court and argue in the merits. In other words, the courts had to grant the petitioners standing in court, and they, the courts, further had to affirm their own jurisdiction in determining the meaning of the welfare clause, even if this possibly included adjudications of the polarity of general versus local welfare.

A new formation of concepts was added by these developments to American constitutional jurisprudence. A set of cases developed in which the crux of the argument is the question whether or not a spending act of Congress is within the general welfare clause, yet these cases continue the maxim, originating in 1923, that congressional spending measures cannot be judicially challenged. They were found unchallengeable in 1923 partly because the courts abstained from jurisdiction, partly because the courts denied to challengers the standing to sue, and partly for a reason in which the above two reasons are combined into one.

Instrumental in the handling of the Butler case in 1936 was the tradition, about as old as the Republic itself, that a tax can be challenged, even if an appropriation of moneys

\footnote{supra, 184 ff.}
derived from taxation can not be challenged. In older cases
taxes were challenged as not being uniform throughout the
United States, or as being income taxes imposed without
apportionment based on census; but not because the intended
use of the revenue-obtained funds was not for the general
welfare. It is usually impossible to challenge a tax on the
ground that its proceeds are not going to be spent for the gen­
eral welfare, because the collections go into the United States
Treasury where they mix with the general mass of funds. Not
only is it unknowable at the time a tax is being collected to
what purpose the money is going to be assigned, but when a sum
of money is assigned to a purpose and appropriated (which must
be done by an act of Congress), it is not known or knowable
from what tax or taxes the money had come.

The funds proceeding from a given tax would have to be
earmarked for a given purpose, in order that the validity of
the tax might be subject to evaluation against the criterion of
whether or not the spending of the funds is intended for the
general welfare. This was the case under the Agricultural
Adjustment Act, which directly provided for marking the funds,
but it was so also, in essence, in the case of the Social
Security Act (enacted in 1935 and adjudicated in Supreme Court
in 1937), which did not earmark funds but which juxtaposed two
types of tax and two types of appropriations for social benefits
in a manner so obvious as to make any earmarking needless.

In all these cases challengers of the acts did find the
doors to the Supreme Court open, because they did not primarily
challenge congressional spending acts, but taxing acts; but once in court, they assigned as the reason (or as one of the reasons) of the alleged invalidity of the congressional acts the proposition that the purpose on which the taxes were meant to be spent was not the general welfare.

In the case of the Agricultural Adjustment Act, the opinion of the Supreme Court (United States v. Butler, supra), reads in a manner which tends to suggest that perhaps in an earlier draft of its reasoning the Court contemplated to void the AAA on the ground that agriculture, being a kind of production, had to do with local welfare and not general welfare. But then the Court probably backed out of the prospect of having to decide each time Congress makes an appropriation, whether the alleged welfare for which the money is intended, is general or local. The issue of general/local was dropped in the Butler case, and the AAA was voided on the alleged presence in the scheme of "coercion."

In subsequent cases, the determination of what is "local welfare" and what "general welfare" was directly pronounced to be an unjustifiable or political issue, at least unless Congress's judgment in such a matter is clearly wrong. Even so, Mr. Justice Cardozo did in fact go into some lengths to demonstrate that relief of unemployment was for the general welfare, although by the light of his own dictum in that case he did not have to do it. Mr. Justice Roberts a year before Cardozo first opened a full scope of judicial review to determining whether

57Cf. United States v. E. C. Knight, 156 U.S. 1 (1895), for the proposition that production is a 'local activity.'
a given tax was for the general welfare, then dropped the issue as beside the point, but meanwhile he managed to declare that the mere fact that a given evil existed everywhere throughout the country, did not mean that to remedy it was a matter of general welfare. This *oliter dictum* seems to have been overruled by the Cardozo decisions of 1937.  

Another other things Mr. Justice Roberts offers the contention that the judicial application of the Constitution is a purely cognitive act, into which no volitive element enters from the courts. If an act is properly challenged in the courts, the judges merely lay the Constitution and the challenged statute side by side, and see whether the latter squares with the former.

Were it not rather transparent that the Court finds itself, with the *Butler* case, on the defensive and that the recitals about the nature of judicial review are among its means of defending itself and perhaps, in a sense, apologizing for a reasoning so weak in the face of an occasion so very significant, it would be hard for any student of judicial review to suppress in him the wish that those observations should have remained unsaid in that case. For among all the decisions ever made by the Supreme Court, *Butler* belongs to the few which demonstrate the extra-juristic, volitive, and political aspect of judicial review with an exceptionally indubitable clarity.

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58 See Evans, *Cases*, p. 188 for Roberts's opinion that an aggregate of local conditions does not make the situation general; and *id.*, pp. 199 and 207, for Cardozo's views on the same topic.
(d) The Historical Aspect of the Case

The basis upon which the Supreme Court promulgated the Hamiltonian version of the welfare clause to be its true meaning, was built as follows:

Since the foundation of the nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers.

Hamilton, on the other hand, maintained the clause conferred a power separate and distinct from those later enumerated, is not restricted in meaning to the grant of them, and Congress consequently has the substantive power to tax and appropriate, limited only by the requirement that it shall be exercised for the general welfare of the United States.

Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Joseph Story, in his Commentaries, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of Congress.

It results that the power of Congress to authorize expenditure of public moneys for public purposes
is not limited by the direct grants of legislative power found in the Constitution. . . .60

The Court then emphasizes the notion, asserted and reasserted by Hamilton and his early adherents Monroe and Story, that the power of taxation and appropriations, while broader than the enumerated powers, is not unlimited, and that what is not within the term "general welfare," esp. "local welfare," cannot be the object of federal fiscal measures.

* * *

In a little while we shall be dealing with cases which modified aspects of the Butler decision. For a moment we return to the year 1936.

* * *

For the rest of the year 1936 the Court continued to hold a tight rein over the expansive tendency of progressive legislation. As though fearing lest the mention of Hamilton's name in the Butler case encourage the belief that consolidationism was on its way and the doctrine of enumerated powers was losing ground, the Court made once again a determined attack upon the proposition—whose origins and development we had the occasion to observe in our study of the period of constitutional ratification and of the first half of the nineteenth century—that Congress had constitutional power to regulate everything which concerned the whole

60Id., 194.
nation which could not be managed by the separate states.

Invalidating the Bituminous Coal Act, which sought to regulate various aspects of the mining industry, including certain labor relations, the Supreme Court said:

The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court.61

Then, referring to the genesis of the Constitution, the Court observed:

In the Framers Convention, the proposal to confer a general power akin to that just discussed was included in Mr. Randolph's resolutions, the sixth of which, among other things, declared that the National Legislature ought to enjoy the legislative powers vested in Congress by the Confederation, and "moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislations [sic]." The Convention, however, declined to confer upon Congress power in such general terms; instead of which it carefully limited the powers which it thought wise to entrust 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.

This memento was undoubtedly intended not only for Congress and the President, but also for the community of writers of

scholarly texts on the Constitution, among whom moods favoring and proposing various forms of unusually broad constructionism of federal governmental powers were prevailing to the almost complete exclusion of any opposition.

In 1937, "a developing recession . . . had to be checked by renewed spending, which resulted in more internal improvements," but the constitutionality of these expenditures continued to be clouded by doubt. For even though it had been settled in the Butler case that federal money might be spent for general welfare even apart from the enumerated topics, the example of the same case was a disconcerting suggestion that it could never be known in advance what the Supreme Court would regard as a welfare of a general nature, and what merely local. For in these matters as in others, it is usually difficult to achieve something general except through component particulars.

President Roosevelt no longer repeated his erstwhile confident and bold declaration that whether it is in the Constitution or not, the Federal Government would keep its people out of misery. Now he contented himself, in his Fifth Annual Message, of January 1937, with the modest observation that the Constitution should be more widely studied; and that if it were, it would be found that it does provide the powers which the Government needs to meet the exigencies of the difficult times.  

63 Id., 425 f.
By that time, the President's attention had begun to turn increasingly to the international scene, and he lost interest in much of the welfare program originally intended by the NIRA legislation. But as a redeeming grace for the cause of the New Deal, the occurrence of vacancies on the Supreme Court enabled the President to reconstitute the high bench in a manner favorable to the spirit of his policies, and an era considerably more free from judicial restraints ensued. The results were immediately obvious in two cases, decided in 1937, in which the welfare clause was construed again, this time to sustain the statute which was being challenged. Thus we arrive at the cases in which the Hamiltonian doctrine, inaugurated in 1936, finally became fruitfully operative.

The Steward Machine Case, and the Helvering Case

(1) Steward Machine Co. v. Davis

An act of August 14, 1935 titled "The Social Security Act," had authorized and appropriated in its Title III "grants to states for unemployment compensation administration," for the purpose of assisting the states in the administration of their unemployment compensation laws. The amounts to

64 Id., 429.
65 49 Stat. 620.
be appropriated were 4 million dollars a year to begin with, and therefore 49 million each year.

The same statute through its Title IX imposed a tax, called excise, upon certain classes of employers, and the presumption was that the tax was to pay the aforementioned grants to states, although the proceeds of the tax were not to be earmarked in any way as they flowed into the Treasury of the United States, "like internal-revenue collections generally."

In essence, the statute was an act of initiative on part of the Federal government, to stimulate the states to set up their own schemes of unemployment compensation.

When the act was put into operation, a corporate employer in Alabama, the Steward Machine Company, paid the tax ($46,14), under protest, then filed for refund with the Commissioner for Internal Revenue, H.G. Davis, and sued to recover, alleging constitutional invalidity of the statute under which the tax was imposed.

Apart from finding fault with the tax itself, as allegedly lacking the uniformity required of excises; as violating due process by taking property; and for other reasons, Stewart seems to have impugned the tax further by attacking its purpose, viz., appropriations for grants to states to induce them to adopt certain policies in a field which is the states' own business, and none of the Federal Government's concern.
To deny that the Government could act on the topic of unemployment, acting though it did by appropriations and not legislative coercion, Steward appears to have contended that relief of unemployment is not a matter of general welfare, because the Court answered:

During the years of 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. . . . The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if people were not to starve.

It is too late today for the argument to be heard with tolerance, that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the general welfare. . . . 67

Contentions of coercion were also raised, well in line with similar tracts of the Butler case. But the spirit of the Supreme Court had changed, and the majority view was no longer represented by Justice Roberts, but by the progressive Justice Cardozo, who disposed of the allegations of undue compulsion with ease.

Coercion, he argued, consists of a restriction of choice. To amplify a given choice is not a coercion, but on the contrary an enlargement of freedom. In this he was supported by the conservative Mr. Justice Sutherland, who had authored the opinion in the Maternity cases of 14 years before. Sutherland did not believe, however, that the states

67 Evans, Cases, p. 199.
could, even by their consent, abdicate sovereignty so as to make room for a federal leadership in matters committed by the Constitution to the states, and not delegated to the Federal Government.

So the old argument about the Consent Theory of Madison's days was revived for a moment, but its vitality did not have much momentum. Another conservative, Mr. Justice Reynolds, observed gloomily: "Forever, so far as we can see, the States are expected to function under federal direction concerning an internal matter." Other two Justices, Butler and Van Devanter, joined with Reynolds and Sutherland. But the Social Security Act was upheld in a 5 to 4 decision.

(2) Helvering v. Davis

In the same Social Security Act of 1935 which we have just considered, the mechanism of grants-in-aid to states for the administration of unemployment compensation (with the tax on certain employers, which financed it), there was embodied another scheme of social legislation. Title II of the Act provided for "Federal Old-Age Benefits." Title VIII imposed two types of tax, one being an income-tax on employees and the other an excise tax on employers. The benefits provided for by the Act were principally monthly payments to persons 65 years of age or older, the amounts not to exceed $85 per month.

A firm domiciled in Boston, Massachusetts, named The Edison Electric Illuminating Company, being an employer within
Title VIII, above, and subject to the tax on employers under that title, was sought to be restrained from making the payments of the tax by one of its shareholders, George P. Davis. There was some doubt as to whether Mr. Davis, upon whom no obligation fell to pay either of the taxes, was directly enough affected to challenge the validity of those taxes, or one of them.

In the District Court it was found that Davis was not competent to question the tax on employees. He was found competent, however, to question the tax imposed upon the firm of which he was a shareholder. Upon trying in the merits the constitutionality of the latter tax, the court found it valid, and dismissed Davis's petition for injunction.

The Circuit Court of Appeals to which the case was then transmitted concluded differently. Considering the tax in context with its presumed purpose, viz., the funding of the pension payments provided for by Title II, the appellate court reasoned that old age pensions were not a topic for the Federal Government to deal with; hence it was within the reserved rights of the states; which reserved powers (it may be added) may be neither usurped nor surrendered. - Title II was hence held void as repugnant of the Tenth Amendment, and Title VIII, imposing the two types of tax, was voided in its entirety as auxiliary to an intrinsically unconstitutional purpose.

The premise upon which the avoidance of the old-age benefits was predicated in the court of appeals, dragging along
to annihilation also Title VIII, of the Social Security Act, was then unavoidably a "sitting duck" for the Supreme Court, which needed to say hardly more than this:


The Court admitted that there was a possible doubt as to the historical justification of the choice made in the Butler case in favor of Hamilton's theory, and observed:

> There have been great statesmen in our history who have stood for other views. We will not resurrect the contest. It is now settled by decision.

It continued:

> Yet difficulties are left when the power is conceded [admitted to exist]. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event.

> There is a middle ground or certainly a prenumbra in which discretion is at large.

> The discretion, however, is not confided to the courts. [Italics added.]

> The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.

> This is now familiar law.69

Really, this assertion of unreviewability of the contra-disposition of general and local welfare was quite a new law

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then, just created in Helvering v. Davis. The Butler opinion certainly did not suggest it. And as a matter of fact, we find Mr. Justice Cardozo working quite diligently in the Steward case\textsuperscript{70} to demonstrate that the relief of unemployment may be a matter of the "general welfare of the United States."

Thus again, there is a dual line upon which the courts may proceed in the matter. Following Cardozo's example, they may inquire whether a given relief is actually for the general welfare. Or follow his \textit{dictum}, they may disclaim jurisdiction.

After the three exceptional cases beginning with Butler and ending with Helvering, judicial practice reverted the habit of the Melon cases, \textit{supra}, denying petitioners standing in court to question appropriations.\textsuperscript{71}

\* \* \*

The six intense years known as the New Deal then came to an end in the fall of 1938, in the wake of congressional elections which gave expression to the fact that the New Deal coalition was no longer the primary operating force.\textsuperscript{72}

\textbf{Some Observations Concerning the New Deal}

Before following constitutional history into its most recent era, in which another dimension was added

\textsuperscript{70}\textit{Supra}, p. 228\textsuperscript{3}.


to the power of the welfare clause, let us briefly pause to
survey what the New Deal itself has added to the developments
which interest us.

First of all we note the negative fact that no signifi-
cant effort was made to ascertain the authentic intentions
of the Founders' Convention with respect to the welfare clause.
The Supreme Court but perfunctorily noted the traditional
existence of two schools of interpretation; it did not examine
the records of the Convention; and then it proceeded, with­
out disposing of contrary arguments, to enunciate its con­
cluding choice on favor of the Hamiltonian view of the
spending powers.

Another observation of a negative nature is that the
Madisonian school fell, it seems, into a dormant state during
the New Deal. After Warren's exposition in 1929 of the
Federal Convention's proceedings and his declaration of con­
clusions as to the authentic sense of the welfare clause,
nothing further was said on that score. Not only were the
times profoundly averse to any doctrine tending to paralyze
the newly acquired powers of the Federal Government, for the
beneficial exercise of which powers a great need was felt
among very large segments of the Nation; but moreover there
was nothing more left to say. No impartial observer, we are
convinced, could have resisted the conclusiveness of the
evidence speaking through the records of the Federal Convention,
especially after the researches done in the twenties had made
the truths even more obvious than they had been before. Faced with the realization that the Madisonian school was doubtless right but, as it appeared, hopelessly unworkable in the given circumstances, even the most earnest observers apparently concluded that rehashing the particular historical verity was academic to the point of pointlessness.

No dissent was registered even by the conservative wing of the Supreme Court as the credo strenuously held by the Father of the Constitution to his dying day (1836), was ultimately rejected precisely a hundred years after his demise, in order to give recognition as the law of the land to the artful but practical doctrine of the brilliant but irreverent Mr. Hamilton.

All this may be noteworthy but it is not surprising, i.e., the above developments were not unexpected at the time of their occurrence, and they are not strange to understand now. What may strike some of us as strange is the paucity of Supreme Court cases dealing with the welfare clause even after the important recognition of the clause as a well-nigh universal spending authorization, and as the most far-reaching potential tool of Federal leadership in policies exceeding the traditional boundaries of Federal jurisdiction.

The three lonely cases decided by the Supreme Court in 1936 and 1937 on the basis of the welfare clause constitute a statistic of strange contrast with the innumerable cases construing the commerce clause. But the disparity of the
respective quantities of adjudications is not beyond explanation. The differential cause is to be sought, at least to a considerable degree, in the fact that by the time of the New Deal, the judiciary had found it possible for very nearly 150 years to uphold the distinction between interstate and intrastate commerce, while on the other hand the dichotomy of general welfare versus local welfare was found judicially unmanageable almost immediately after the welfare clause became an operating provision. The courts gave up all interest in reviewing both spending and taxing acts under criteria of "generality" and "locality," and became satisfied that the judgment as to which is which, was for Congress itself to make.

Although factor tending to keep adjudications based on the welfare clause at a minimum is the aforementioned judicial tradition, originating in 1923 if not earlier, to deny standing to sue to all who cannot show that some specially direct detriment to their legal rights is inherent in the congressional spending act which is the target of their petition for judicial review.

A twofold barrier thus works to keep potential cases out of court. Prospective plaintiffs are unable to qualify for access to courts, and they would have no justifiable issue if they did get there. Not, at any rate, if their cavil were predicated on the contention that the challenged appropriation act fails to serve the general welfare. Neither the welfareness, nor the generality, are reviewable. It may
be that the courts hold back because of their sense of self-restraint, modesty, and a reverence for the separation of powers. But it is also sufficiently obvious that even if these considerations were discounted, there would still remain a forbidding obstacle to judicial review in the inherently difficult, if not impossible, task of articulating the standards under which "welfare" can be rationally distinguished from "ilfare," and "general welfare" from "local welfare." - Admittedly, it is not past the Supreme Court to apply standards which it refuses to define. Although unable to formulate a rule of conduct sufficiently definite to enable publishers to know when they are and when they are not committing acts of obscenity, the Supreme Court has nevertheless upheld convictions based upon undefinable statutory terms. For that matter, the Court has persistently refused to define "commerce," but the absence of a definition has not prevented it from identifying in every case arising under the commerce clause, the phenomenon in point as being or not being in interstate commerce. It would therefore seem that the same reliance upon erudite intuition would enable the Court to do by the welfare clause as it has done by the commerce clause. Some reflection will show, however, that the rules of thumb applicable in sorting intrastate from interstate commerce, are ill-suited to perform a like function as between local and general welfare.

It is not proposed to demonstrate the methodological
difficulty and the epistemological difference. It can be done. But perhaps this is not the proper occasion.

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We proceed to note now an interesting relationship which seems like a bit of a paradox. The cases treating of the welfare clause (during the New Deal period) are only three (there has been one more Supreme Court case since), and the statute upheld during the New Deal under the welfare clause is one in number. (There has been one more act of Congress upheld by the Supreme Court under the welfare clause since.)

Such a paucity of judicial events and such a scarcity of laws judicially upheld in connection with and by virtue of a clause might tend to impress the mind to the effect that the clause is relatively unimportant, because, judging by the scanty statistics, it appears to be a rather obscure and inactive provision of the Constitution. One is reminded of the clause (Article IV, Section 4) promising that "the United States shall guaranty to every state in this Union a republican form of government," which clause has never been adjudicated or acted upon.

But the analogy ends before these words, "acted upon," For the frequency with which the welfare clause is acted upon legislatively is probably in an inverse ratio to the frequency with which it is acted upon judicially. The paucity of judicial decisions construing the welfare clause, is a result of the fact that the type of enactment which, if
attacked, would be defended by reference to the welfare clause, is very unlikely to be attacked in the first place. The likelihood of a suit is negligible because the hope of succeeding is evanescent. In short, federal spending measures are privileged in comparison with the other types of congressional and otherwise governmental acts. They are almost invulnerable.

With its chronic shortage of jurisdictional powers, a shortage potentially more severe each time a new demand is made upon the Government to set things aright in topical areas for which the Constitution has not blessed it with a clearly stated authority, the Congress finds the freedom of its spending powers the nearest thing to a general enabling mandate. In such contemporary topical areas as Public Health and Welfare (United States Code, Title 42), or Education (idem, Title 20), or the most recently created Federal administration of Housing and Urban Development, we may find an amazing multitude and variety of governmental, intergovernmental, and semi-private arrangements, comprised of all manner of functions and entities. It is probably to be inferred that the constitutionality of most or all of the phenomena grouped and organized under the aforementioned headings, is postulated on the basis of the topically unrestricted spending power, i.e., upon the Hamiltonian interpretation and application of the welfare clause.
The significance of the welfare clause, then, as developed during the New Deal, is that it provides the basis of constitutional validity for vast complexes of systematized services, operations, and programs conducted by or with the National Government in areas of human activity which without the welfare clause and its Hamiltonian interpretation would be beyond the Government's jurisdiction.

C. Beyond the New Deal

For the last decade and a half the doctrine of the welfare clause has made no headway, although the power to spend for general welfare, established in 1936 and subsequent years, has continued to be the basis of prolific congressional action. Before the development came to rest in a stagnation which lasts to the present day, the doctrine made a forward thrust which transcends anything bequeathed by the Butler case, the Steward case, and the Helvering case of the 1936-1937 period.73

In a point-blank contradiction to the emphatic insistence of the Supreme Court, in the above precedents, upon the inadmissibility of any form of coercion under the welfare clause, the federal District Court for the Western District of New York made new law in 193974 by proclaiming that the power of Congress "to tax in aid of the general welfare presupposes the power to condemn lands to carry out the projects if they

73 Supra, pp. 226.

74 In Re United States, 28 F. Supp. 758 (1939).
are in the interests of the general welfare."  

Speaking the language of late-nineteenth century cases upholding federal eminent domain under powers specifically enumerated, the 1939 district court case recites that

The Federal Government is not dependent upon the caprice of individuals or the will of state legislatures in the acquisition of such lands as may be required for the full and effective exercise of its powers.

Only the spending power was involved here. The project for which the United States sought to expropriate certain lands from the state of New York, was a multi-functional reclamation development purporting to have all or most of the purposes usually attributed to projects of that type (forestation, reforestation, prevention of soil erosion, flood control, establishment of game sanctuaries, possibly recreational facilities, but not, in this case, irrigation); and in addition, relief of unemployment, for the petition to condemn the land and vest its title or titles in the United States relied for authority upon certain sections of the NIRA which had survived the voidance in preceding years of other sections.

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75 Id., pp. 759, 764.
76 Mr. Justice Field, dissenting, in Kohl v. U.S., 91 U.S. 367, 378 (1875); and same, for majority court, in Fort Leavenworth v. Lowe, 114 U.S. 525 (1885).
77 Ibid.
78 48 Stat. 200, June 16, 1933; Title 2, Sec. 202 of Act; 40 USCA sec. 402 f.
There was no reference to navigation or otherwise to interstate commerce. The district court said:

Projects looking to flood control, reforestation, prevention of soil erosion, and establishment of game refuges, affect the general welfare and are in the "public interest," authorizing condemnation of lands despite objections by the state wherein the lands are situated.80

At another point of the opinion, the court observed that

The authority of the Federal Government to acquire land within a state to enable it to perform its proper functions . . . is inherent in the sovereignty of the Federal Government81

The court appeared to realize that the Supreme Court cases construing the welfare clause offered no authority for asserting eminent domain, but it was determined to contribute an innovation by arming the spending power with an escort of coercive powers capable of reaching wherever the spending power reached.82

The incompatibility of this opinion with the clear language of precedent and with the philosophy embodied in the precedents, is too obvious to need elaboration. The state of New York defended itself against what it alleged to be, and what was, a usurpation of its powers in violation of the Tenth Amendment, but, having lost the case, did not appeal. There the story ended for the time being. If it had appealed, an important aspect of constitutional development would have

80 In Re U.S., p. 759.
81 Id., p. 761.
82 Id., p. 764, 767.
undoubtedly travelled in a different direction from that which it in fact took since that time. For in view of its then recent decisions, with Justices Roberts and Cardozo still in attendance, the Supreme Court would have had no choice but to overrule the unwarranted extension of the potency of the welfare clause.

A decade later, the United States Court of Claims and the Supreme Court of the United States decided a case in a manner which indirectly affirms the admissibility of federal eminent domain under the welfare clause. 83

In a context which we shall consider later, the Supreme Court declared, by Mr. Justice Jackson, as follows:

The custom of invoking the navigation power in authorizing improvements appears to have had its origin when the power of the Central Government to make internal improvements was contested and in doubt. It was not until 1936 that this Court in United States v. Butler ... declared for the first time, and without dissent on this point, that, in conferring power upon Congress to tax "to pay the Debts and provide for the common Defence and the general welfare of the United States," the Constitution delegates a power separate and distinct from those later enumerated, and one not restricted by them, and that Congress has a substantive power to tax and appropriate for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished from some merely local purpose. If any doubts of this power remained, it was laid to rest the following year in Helvering v. Davis, ... Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement, is now as clear and ample as its power.

to accomplish the same results indirectly through resort to strained interpretation of the power over navigation.\textsuperscript{84}

If this statement does not explicitly approve federal condemnation proceedings based on no other authority than the welfare clause, it comes as near to it as can be done without saying so.—The substance of the case was as follows:

Seasonal high water on the river San Joaquin in California operated as a natural irrigation system for certain riparian grasslands where the Gerlach Company and several others owned tracts of land, using them apparently as grazing grounds. Without the periodical overflow of the river the lands were arid and barren. The building across the river of a dam, known as the Friant Dam, first projected by the state of California (1933) and then taken over by the Federal Government (1935), as part of a vastly comprehensive system of gigantic edifices for an overall redistribution of freshwater resources throughout the state and region, was about to put an end to the beneficial inundations conferred upon the riparian owners by the natural movements of the river.

The owners petitioned for compensation. For reasons not clear from the text of the case itself, the compensability of their claims was predicated on the proposition that the dam with its attached system for irrigation (the claimants would not have benefited from the artificial system, which did not include their properties), was a reclamation project

\textsuperscript{84} \textit{Id.}, p. 738.
and not primarily a project looking to an improvement of navigation. But on the face of it at least, and by virtue of its involved history, the character of the project was ambivalent, and susceptible to either classification. The fortunes of the claimants depended on how the courts would view the nature of the project. The Government contended that the main purpose of it was navigation. The petitioners said reclamation and irrigation was the main, and probably the only, purpose.

That was the only point directly before the courts in the case. The constitutionality of the project itself was not questioned.

For some reason which, again, is not clear on the face of the case, the compensation, if awarded, must take the form of payment or payments in "condemnation proceedings," i.e., "proceedings in eminent domain," and not at all proceedings in damages, or simply a voluntary purchase of rights. Why this had to be so, and why neither damages nor condemnation awards, nor a price of purchase, of whatever rights and values were involved, could have been possible if the project had been of navigational purpose, is a matter for depth-analysis. But it was agreed on all hands that such was the case.

To conclude, the courts adjudged that the Friant Dam was a reclamation-irrigation project; that it had little or nothing to do with navigation, or with interstate commerce otherwise; that ("accordingly") compensation was to be awarded
to the complaining owners; for which purpose it was then assumed that certain rights had been "taken under eminent domain," and that the Fifth Amendment was applicable.

As the situation was defined, the courts found themselves under the necessity to introject the concept of "eminent domain" into the case, if claimants were at all to recover. But by giving this remedy, the courts inescapably admitted, within the premises of the case, from whatever sources derived, that federal eminent domain could constitutionally be exercised under the welfare clause.85

A Note on the Nature of the Spending Power

A sharp logical difference must be drawn between two aspects of the spending power created by the Hamiltonian conception of the welfare clause. In its first aspect it is a function peculiar to American federalism, i.e., it is a unique feature of the Constitution of the United States. It functions as a replacement or substitute for the direct legislative powers which the Federal Government needs but does not have. A government of fragmentary powers but whole responsibilities, the Federal Government has sprouted an unexpected organ to make itself whole.

In this respect the spending power is a quasi-jurisdictional auxiliary, and not primarily a concept of economics.

85 It would be tempting here to delve into the history of eminent domain under the Constitution. But the space-time continuum which imprisons us bids us bid farewell to that temptation.
In its second aspect the spending power is intrinsically a tool of Keynesian economics or its equivalents. Here it functions not as a fiction of jurisprudence but as a controlling force acting upon massive realities of a vast momentum.

During the New Deal the two aspects of the spending power became intertwined and both acquired extraordinary vigor. The one enabled a tighter political centralism of the federation, the other made it possible for the new centralism to deploy itself as the primary national engine of economic recovery. Such, in any event, is the hypothesis.

Turning now, in conclusion, to the constitutional role of the spending power, we must note that Hamilton's idea is predicated on the postulate that the Federal Government can wear two hats. Under the hat of sovereignty, it can command, coerce, issue charters of incorporation, be immune from suit, assert eminent domain, and otherwise do, have, and be, everything a sovereign power is, has, and does. But this hat it may only wear in those specially enumerated fields of action.

In the remainder of the field of human concerns, which is illimitable, the Government may not wear a governmental hat at all. Its sovereignty is not transferable to those regions. There it wears a civil, private hat. It can do what private entities do. It can show interest in things. It can do research and give advice. It can make contracts. It can
buy and sell. It can make gifts. It can participate in exhibitions. It can speak.

It can spend money on virtually anything, but its legal competency and its economic ability to buy is no substitute for anyone's willingness to sell. Its legal and economic ability to make benefactions is no substitute for anyone's willingness to become the recipient of benefactions. In short, although Congress has the power to spend money for the purpose of buying Mr. G. a barrel of pork from Mr. H., it neither has the power to seize that pork from Mr. H. under federal eminent domain if H. will not sell, nor to force the pork into Mr. G.'s mouth by civil or criminal process or by an act of the Army Corps of Engineers if G. will not eat it. The spending power does not imply that much. If it did, the Government would be one of general and not of enumerated powers.

The attempt to apply the clause, found in the last lines of Section 8 of Article I of the Constitution, which authorizes Congress "to make all laws which shall be necessary and proper for the carrying into execution of the foregoing powers," to the spending power implied in the first lines of that Section, namely (according to Hamilton) to spend for the general welfare, so as to result in the proposition that the Government may legislate upon everything for which it spends, reduces the otherwise possibly tenable Hamiltonian version of the welfare clause to such an absurdity as to demonstrate that Madison was right. The welfare clause represents no power at all but is only a word of introduction.
Conclusion of Part I

We have now reached the end of a survey which took us across nearly eighteen decades from the autumn of 1787 to the fall of 1966. The study enabled us to become acquainted with the several meanings which have been read at the various stages of history into the welfare clause of Article I of the Constitution, and we have seen what roles the clause played at different times and in the various situations.

It had been our deliberate purpose from the outset, to see the Constitution at every moment of time with the vision of the contemporary generation which in that given moment was interpreting it. For the most part, the interpretation of the Constitution took its own course, without the benefit of the written records of the proceedings of the Convention which had composed the text of the Constitution. To this there were some exceptions. Those are taken into consideration in the sequel hereof, in Part II. But the main purpose of Part II, which follows, is to resolve, if solution is possible, the problem held in suspension throughout Part I: namely, to find out what the Convention meant by the welfare clause.

Part II is made up of three chapters, of which the last two represent an analysis of the proceedings of the Federal Convention. The chapter preceding them gives a brief survey of the literature dealing with the Federal Convention, and also, for completeness, with certain commentaries on the
Constitution which deal with the welfare clause although they may not discuss the Federal Convention.

Those chapters of our Part II which analyze the Convention, are not only expository but also argumentative. The argument, indeed, is an intrinsic ingredient of the exposition. The function of argument is to select one from among several alternative conclusions in each problematic situation. But as we proceed to affirm a proposition, we implicitly reject others, which brings us into opposition to writers who assert them, and into conjunction or concurrence with writers who believe as we do. For the progress of the argument, it is necessary that our reader should be briefly acquainted with each of the contending commentators in advance, for in the course of the discussion of the Convention we cannot in the same breath discuss, in addition, the several writers at length.

The preliminary chapter of Part II helps dispose of this difficulty. And it is also, incidentally, a major bibliographical note on the subject matter of the welfare clause.
PART II
CHAPTER VI

THE INTERPRETERS OF THE RECORDS OF
THE FEDERAL CONVENTION

There are only a few thorough analyses and expositions
of the transactions of the Federal Convention of 1787, gen­
erally, and only a few analyses of the genesis of the welfare
clause particularly; and those expositions which exist, some­
times differ in the conclusions at which they arrive.

Some expositors, like Elliot or Farrand, remain objec­
tive in the sense of abstaining from the advocacy of any
conclusion in controversial areas (see infra, p. 301). Oth­
ers interpret the proceedings precisely with a view of
determining the probable truth about the intentions of the
Founders, and eventually become advocates of this or that view,
according to their findings. Among these there is again a
class of interpreters in respect of whom it is difficult to
resist the impression that in them the resolve to arrive at
a preconceived conclusion governs the whole of their cognitive
process, and that their mind is so firmly made up to begin
with that nothing in the available evidence will move them
to abandon it.

In any event there would appear to be apaucity of in­
stances in which a researcher has arrived at a conclusion
which runs counter to his socio-political outlook. It would appear that the sense of civic responsibility among political scientists has been mostly so intense as to preclude them from heralding discoveries that might be injurious to opinions which support each given thinker's concept of the nation's general welfare.

In these respects the present writer confesses himself to be a black sheep, in that in him the cognitive effort is wholly divorced from his political preferences.

We now set out to examine several existing interpretations of the events surrounding the genesis of the welfare clause in the Federal Convention. This is done not only for completeness but mainly for the purpose of directing our attention to the salient points of the subject matter, so that in reading the subsequent chapters, which expound the transactions of the Convention, we may be duly alert to the significance of the various aspects and phases of the trend of events.

Most of the interpreters of the genesis of the welfare clause belong either to the school of thought known as the Hamiltonians, or to the Madisonian camp. Some represent a position sui generis.

In order fully to understand the present chapter, and the following Chapters VII and VIII, we need to realize that the transactions of the Federal Convention fall into two distinct divisions, each definable in terms of time and also
in terms of the nature of the work done in it. The first period extends from the late days of May 1787 to July 26. The second extends from August 6 to the end of the Convention's sessions in mid-September of that year.¹

During the first period, the Convention debated and assembled ideas as the raw materials of which the text of a constitution would eventually be shaped. The text itself, or rather its first draft, was prepared from these raw materials between July 27 and August 5 by a committee, called Committee of Detail, while the Convention was in recess. During the second period, which commenced on August 6, the Convention worked on the text submitted by the committee, making various modifications, until it reached its final form on September 15, to be signed on the 17th, which was Monday. After signing, the Convention dissolved.

Our present study is ultimately concerned with the jurisdiction of Congress as intended by the Convention. The meaning of the welfare clause, which forms the title of our paper, can only be determined as a result of dealing with the conceptually larger issue, the intended jurisdiction of Congress, as ascertainable from the whole proceedings of the Convention, and from the whole Constitution.

¹The Convention was supposed to convene Monday, May 14, but too few delegates had arrived by then for anything to be done, and it was not until May 25 that attendance was sufficient to begin even the preliminaries of the official agenda. That was Friday. On Saturday there was no session, and on Monday 28 preliminary agenda was concluded, except for a few points, which carried over to Tuesday. That done, the main business began with Randolph introducing the Virginia Plan, on May 29.
In the whole mass of materials there are, however, certain leading clues which help us to direct attention to the relevant points. In the first period of the Convention, which is discussed in Chapter VII, below, we look mainly to Resolution 6 of the Virginia Plan, which was the statement, in rough terms, of the scope of the powers suggested, tentatively, to be given to the future Congress. But also Resolutions 1, and, as amended, Resolutions 1, 2, and 3, are important. Aside from explicit references to these resolutions, the Convention debated the nature of the Union, and, in that connection, the powers of the future government, throughout.

The reader who desires to form an independent opinion as to the intentions of the Convention concerning the nature of the Union in terms of the jurisdiction of the Congress, will need to consider at least 20 selected pages of Elliot's Volume V. To facilitate this, we have prepared the following table of references to pages and topics:

121 The Whole Virginia Plan, incl. Res. 6.
132 Amending Res. 1, 2, 3.
133 Objections raised to term "national." Randolph's assurances.
137 Objection to weakening the states repeated.
138 Randolph repeats assurances.
139 Parts of Res. 6 adopted. Objections to other parts raised. Randolph disclaims consolidationist intentions. Madison doubts that enumeration of powers is possible. Res. 6 adopted almost whole, except clause authorizing force.
Resolution 6 of the Virginia Plan has played an important role in the method of interpretation used by the broad constructionist schools. Some look to its original shape of May 29, some to its final shape of July 17, but in any event they point out that it contained a general power, and that the Committee of Detail therefore should have included a general jurisdictional power of Congress into the text of the Constitution.
With the text proposed by the Committee of Detail we deal in Chapter VIII, below. In the process, we find that the following provisions, elements of debate, and other facts, are relevant to our topic:

The fact that in the proposed text, the powers of Congress are enumerated one by one.

The power to tax is stated as first among them, but with no reference to debts, defense, or welfare.

But eventually the taxing clause is conjoined to the words "to pay the debts, and provide for the common defence and general welfare," etc.

Consequently we need to follow from their origin all proposals, made during the second period of the Convention's work (August 6 et seq.), which refer to the concept of public debt; and all instances in which the term "general welfare" was used. For out of these elements the final version of the welfare clause was compounded.

No table of pages and topics need here be given for the second part of the Convention's proceedings, as the steps of development are made sufficiently clear, with references, in Chapter VIII, below.

The specific contexts in which the above selected aspects of the Convention's proceedings acquire significance at the hands of the various interpreters of the Convention, will become obvious from the examination of the several schools which follows.
Hamilton departed from the Convention after June 29, and subsequently was present, it is believed, only on August 13, and September 6, 8, 10, and 17.² The records of the Convention were not published during his life. Hence he neither could have been a systematic expositor of the proceedings as recorded, nor did he have a direct personal memory of events subsequent to the day of his departure. It follows that when he construed the welfare clause on later occasions (whether in the Federalist Papers—where his references to the clause remain vague—or in his "Report on Manufactures" of 1791, which is the leading statement of the construction later adopted by Monroe, Andrew Jackson, Henry St. George Tucker (1780-1848), Joseph Story and others), his interpretation was based on the Constitution itself, without any pretensions of authenticity in the sense of presenting the actual intentions of the Founders. He urged what was logically possible and practically desirable from the point of view of the policies he proposed as Secretary of the Treasury. But his interpretation is without relevancy as construing or evidencing the proceedings of the Convention.

Other Hamiltonians Among the Founders

Among the members of early Congresses who on one occasion or another showed disposition to favor appropriations for purposes not covered by the powers enumerated in the Constitution, there was a number of former members of the Convention. For example, Oliver Ellsworth of Connecticut, Elbridge Gerry of Massachusetts, or James Wilson of Pennsylvania.

Their votes and statements in Congress tell us what they thought of the welfare clause then, especially in 1791 and after, but none has made any attempt to recall what the Convention itself had meant by the clause, except for the commonly shared repudiation of the idea that it was a plenary authorization.

Most important to us appears the conduct, in 1791, of Roger Sherman of Connecticut, because we believe that he had been, in 1787, instrumental in writing the welfare clause into the Constitution. In 1791, he was tempted to apply the welfare clause in a manner which later became known as "Hamiltonian," but he immediately yielded to Madison's objection, thus apparently conceding that the broader interpretation had not been meant in 1787, either by himself or by others, to be the intended sense of the clause.

3 Supra, 667; infra, 3843 ff.
The first systematic interpretation of the proceedings of the Convention was undertaken by Judge Story, and utilized in his Commentaries, which were first published in 1833. By his light, the Constitution shows two faces. On the one hand, it is emphatically a constitution of enumerated powers. On the other hand, the Government under it has all the powers necessary to provide for the general interests of the Union, in other words, for the general welfare of the United States. Upon a closer view, this appears to mean that its coercive powers are enumerated and specified, but its power to appropriate, without coercion, is general. It, too, he stresses, is enumerated.

The spending power is general, because (1) the Constitution nowhere requires that it should be limited to the purposes stated in the other entries of the enumeration; (2) the words "general welfare" are as broad as they could be, and (3) the enumeration designed by the Committee of Detail arose under instructions given by the Convention, to enable the Congress "to legislate in all cases for the general interest of the Union."

4 Edition herein used is the Fifth, Boston, Little, Brown, and Co., 1891, in two volumes. Pertinent Sections, 906 ff. Genesis of welfare clause is examined in Sections 928 ff.

5 Compare Section 909 with 930, in fine, which echoes the Bedford version of Resolution 6 of the Virginia Plan. Text of Bedford amendment, infra, p. 320.
Story's reconstruction of the pertinent aspects of the proceedings of the Convention involves the following:

The contention that the original authority to tax, contained in the provision "The national legislature shall have the power to lay and collect taxes, duties, imposts and excises" (August 6), is left in this bare form, would have implied an unlimited scope of spending powers.

The scope of spending powers would have been unlimited (1) because no limitation was then expressed; (2) because the fact that the purposes of the Government were enumerated in subsequent statements, does not restrict the fiscal power to them, for the same reason that the grants of power following the taxing-spending clause are not restricted by reference to each other; and (3) because under Resolution 6, of the proceedings prior to the text of the Constitution, the general government was to have general powers.

Why, then, was the welfare clause added? Because, after all, some limitation on the spending power was required. The role, in the whole matter, of the public debts, was secondary.

Such, in essence, is the outline of Story's interpretation of the welfare clause from its genesis. As will be seen from the sequel, Story entirely missed the manner in which the welfare clause was formed during the second period of the Convention.

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6Story's argument is further examined infra, 290, 295, 297, 334.
Later Hamiltonians

It seems that for a hundred years after Story, the Hamiltonian school of constitutional interpretation made no further effort to expound the records of the Federal Convention. Texts were written in the nineteenth century proclaiming the doctrine advocated before by Hamilton and Story, but the writers did not repeat the descent to the roots which Story had undertaken.

In the Twentieth Century the great proponent of broad constructionism, Edward S. Corwin, in his valiant defense of the Maternity Act, preferred to rely on traditions formed after the promulgation of the Constitution, rather than delving into the scrolls of the Federal Convention itself. He abstained completely from referring to the Convention.

A dozen years after Corwin, interest revived in some aspects of the proceedings of the Convention, but a complete review of Story's findings was not undertaken by his followers then or since.

The broad constructionist school, rather than agitating the question of the birth-credentials of their favorite interpretation of the welfare clause, chose to take a stand on the larger basis of the general idea proclaimed in the old Resolution 6 of the Virginia Plan, which we have already encountered above.

Supra, p. 123.
Robert E. Cushman and J.A.C. Grant

"When Randolph proposed the Virginia plan at the third session of the Federal Convention, it contained the only sound and workable principle by which the powers of nation and states could be divided," wrote Professor Cushman in 1934, referring to Resolution 6 of the plan.

Concurring, Professor J.A.C. Grant wrote two years later: "When Randolph proposed the Virginia plan at the third session of the Constitutional Convention, it contained what has been correctly characterized as 'the only sound and workable principle by which the powers of nation and states could be divided'."

The two articles run in a unique unison for some length. Reciting the resolution of the Virginia plan which says that "the national government ought to be empowered . . . to legislate in all cases to which the separate states are incompetent," etc., the authors concede that "This was the statement of a principle and not the description of a method; it declared the object for which national powers were to be conferred rather than the precise mechanism by which the delegation was to be made."

Nevertheless they maintain - in words of Professor Cushman closely paralleled by those of Professor Grant - that

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In the ensuing debates it appears that this broad statement correctly expresses the basic intention of the convention, although it was fairly promptly suggested that the object so described might better be achieved through the enumeration of specific powers. . . . 10

Cushman and Grant then conclude that "The delegated powers of Congress, therefore, were not conferred in a miserly spirit nor with a niggardly hand. They were given to serve the broad purpose of Randolph's original resolution." 11

At the same time Cushman realizes that "The delegated powers of Congress do not include a broad and undefined authority to legislate for the national welfare. There is, in short, no independent national police power as such. If Congress is to deal directly and effectively with the problems of national import which may be deemed to inhere in the field of marriage and divorce control, or in the punishment of those who participate in lynchings, it must secure the authority to do so by constitutional amendment. The emergence of a national problem does not automatically generate national power to solve it." 12 But Professor Cushman continues immediately:

But if we define the national police power to be the use by the federal government of its clearly delegated powers for the broad purposes of national social and economic welfare, we are then considering a power not only necessary and desirable in dealing with the nation's problems,


12 Cushman, op. cit., 544.
but also lying within the scope of the purposes for which powers were delegated to Congress by the statesmen who built our constitutional system.

"For this is merely to say"—continues Cushman—"that the power to tax, to regulate commerce, or to set up postal regulations, powers given to Congress in order that it might "legislate for the general interests of the Union, and also in those cases to which the states are separately incompetent, or in which the harmony of the United States may be interrupted," may be used by Congress for the broad national purposes for which they were thus conferred. By such national police power Congress may deal, with varying degrees of effectiveness, with any truly national problem which emerges within the range and sweep of the plenary powers enumerated in Article I, Section 8 of the Constitution.

Now, aside from whatever other points of a possible doubt may be raised in connection with the above expression of Professor Cushman, it is to be noted first of all that the theory which he proffers, and which has been adhered to by others besides him, regards the Sixth Resolution of the Virginia Plan of 1787 as an essential component of the interpretative devices which he uses, almost as if the Resolution were itself a part of the Constitution. Within that much of his argument, one would feel that he advocates a view of the Constitution in the light of which Congress would have the plenary authority to provide legislatively for all matters of national concern.

But in the next step of the exposition this is disclaimed, and emphatic reference is made to the enumerated powers. But what is Professor Cushman's position? Do, or do not, these
enumerations restrict the plenary impact which the cited Resolution of the Randolph document would or might have without them?

Now it seems that he holds that they do not, in that he appears to maintain that whatever is a "truly" national problem, is legislatively reachable through this or that one of the enumerated powers. Now again it seems that he negates this assertion, in that he says, generally, that not every national problem can be reached by Congress, and, specially, that for example marriage, divorce, or lynchings, are instances of the things which the Congress can not reach through the enumerated channels of authority.

Moreover he adorns the enumerated powers of Article I, Section 8, of the Constitution, with the epithet "plenary," which would seem like a bit of a contradiction in terms, although not more so than the rest of the reasoning.

* * *

With the genesis of the words "provide for the . . . general welfare" Professor Cushman does not deal in this article, nor, it seems, in any other of his writings. Nor does Professor Grant inquire into that point. They both refer to the proceedings of the Federal Convention only for the sake of Resolution 6 of the Virginia Plan.

But that both authors favor the Hamiltonian concept of the welfare clause is clear from the fact that they advocate the widest possible expansion of the compass of all the
powers delegated to Congress, including the taxing power and the spending power which is implied in it.\textsuperscript{13}

\textbf{Advocates of a Consolidated System}

When the text of the Constitution first came into the open, the welfare clause aroused fears in some quarters that the Constitution meant to vest Congress with the plenary power to legislate generally for the welfare of the nation, regardless of the fact that side by side with the provision referring to general welfare there was a specific enumeration of powers.\textsuperscript{14}

These fears were subsequently dispelled by the Founders and other interpretors, as based upon a misunderstanding of the Constitution; and any possible attempt that might in the future be made, under the Constitution if the Constitution is adopted, to claim that Congress has the right to exercise plenary powers, was condemned once and forever. And as a matter of fact, it continued to be condemned once-and-forever time and again ever afterwards, and the condemned doctrine enjoyed a sinister reputation which it would have been a most highly inadvisable act for any public man to declare himself and advocate of; and hence no person ever did so, at least before the Civil War.

\textsuperscript{13}See esp. Cushman, \textit{op. cit.}, pp. 548, and Grant, \textit{op. cit.}, pp. 675 ff.

\textsuperscript{14}Richard Henry Lee to Edmund Randolph, letter dated Oct. 16, 1787; 1 El. 503.
The only exception we have been able to find was Congressman John Lawrence in 1791, and his opinion was tactfully ignored by his colleagues in the House.

In late nineteenth century a law journal writer came up with an advocacy of the condemned idea, but he pointed out with definiteness that his construction of the Constitution did not profess to expound the intentions of the Founders: rather, his point was that the Founders' views had become obsolete, and that the Constitution should be applied in such ways as would best suit modern reality.

From this point of view must be distinguished the thesis, inaugurated in 1926 by Francis James Lawson, that the Founders themselves had intended a political system governed in all national respects by one national government, and that no powers were reserved to the states except such as Congress might not care to exercise itself. The same idea, by a somewhat different argument, was heralded again in 1953 by William Winslow Crosskey.

Lawson submerged himself most deeply in the materials of the Federal Convention, tracing with minute attention the development of all views pertaining to the proposed jurisdiction

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15 Supra, p.65.
17 Supra, 189 , note 14, and infra, p. 268.
of the future Congress, and he dwelt in that connection upon every occurrence, in the Convention's proceedings, of the phrase "general welfare" wherever he could find it.

His basic idea is that the whole meaning of the Sixth Resolution of the Virginia Plan was transposed into the welfare clause of Article I of the final Constitution.

Crosskey, on the other hand, touched but sparingly the records of the Convention, has made no use or even a mention of the Sixth Resolution, and has shown, in his cited work, no interest in the formation of the welfare clause. Although his work is historically oriented, the Federal Convention itself is the one spot in history which seems to hold no interest for him. Otherwise, he has included formidable masses of literature contemporary with, and preceding, the making of the Constitution.

James Francis Lawson

In the chapter "Proceedings in Convention," Lawson has counted that the Federal Convention affirmed Resolution 6 of the Virginia Plan not less than five times. Taking this fact as his major premise, he maintains that "the instruction of the Committee of Detail, which transformed the language of Resolution 6 into a enumerative statement of powers is not to make an enumeration, but to

\[19\text{Lawson, op. cit., pp. 144 ff., esp. pp. 167, 168.}\]
\[20\text{Id., 169 f.}\]
work out details which shall conform to the resolutions. The powers to be given, however subdivided, are equal to "the legislative rights vested in Congress by the Confederation, and moreover to legislate in all cases for the general interest of the Union, and also in those to which the states are severally incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation". This constitutes— says Mr. Lawson— "the sixth formal vote of the Convention approving the broadest meaning in the welfare clause."

Unfortunately, there was no welfare clause at that time anywhere among the Resolutions, and when the Committee of Detail produced a draft of the Constitution, with powers enumerated, there was no phrase mentioning "welfare" or "general welfare" either, and, as we shall see in following chapters, the Convention never missed it. Not until a need for some such phrase developed from circumstances totally unrelated to anything that may in any way be deduced from Resolution 6. What these circumstances were, will be seen from the following chapters.

Again, on page 170, Lawson asserts that the sum total of the enumerated powers was intended to be equal to the concept of the plenary power which he believes was comprised in Resolution 6:

21Needless to say, in the words cited by Lawson we recognize the Resolution 6 of the Virginia Plan in one of its variations.
The Committee on Detail reported, on August 6, a printed plan containing the first outline of the enumerated powers. The general power contained in the resolutions submitted to the Committee was omitted. In its stead were the particulars designed to equal it.

But a moment later Lawson seems to doubt that the enumeration was truly tantamount to the general concept, and on page 177 in fine, he appears to accuse the Committee of Detail of a deliberate cutting of the powers which the Convention presumably wanted it to embody into the draft. On page 188 Lawson praises the Committee on Unfinished Portions for its alleged effort to restore the powers to their originally intended wholeness by making certain changes in punctuation. 22

These alleged changes in punctuation have been the subject of extensive debates among historians of the Federal Convention. 23 The essence of the matter is that somewhere along the line as the draft of the Constitution passed through several committees, there suddenly appeared a semi-colon and perhaps a paragraphal indentation which would make the first portions of what now is Section 8 of Article I of the Constitution, look somewhat like this:

22Matters pertaining to the various committees will be better understood from subsequent chapters hereof, which among other information contain a synoptic table showing the chronology of the creation and duration of the committees. For the immediate purpose of our present narrative, let it be merely mentioned that the draft of the Constitution went from the Committee of Detail through intermittent actions of the whole Convention to the Committee on Unfinished Portions and then to the Committee on Style, which put it into its final shape.

The legislature shall have power to lay and collect taxes, duties, imposts, and excises; To pay the Debts, and provide for the Common Defence and General Welfare of the United States.

The particular Founding Father, or perhaps Framer, to whom rumors attribute an effort to provide a semi-colon where otherwise there is a comma now and presumably was before the punctuational intermezzo, is Gouverneur Morris. He sat on several committees of the Convention, including Unfinished Business and Style. It is usually supposed that the semi-colon incident occurred (if it did occur at all) in the Committee on Style. Mr. Lawson, for some reason, considers that it was probably done in the Committee on Unfinished Portions. But that would not seem to make much difference. The salient point is that Mr. Lawson applauds Morris's achievement, hypothetical or actual, as a move intended to make whole and good the import of Resolution 6 of the Virginia Plan, which the enumeration designed by the Committee of Detail diminished, according to what Lawson explains on page 178 of his work:

The Convention had never receded from the principle expressed in #6 of the Virginia Resolutions. Why should now Morris give it up? What authority was there for this committee to abandon to the mercy of the state legislation any case involving "the general interest and welfare of the Union," after the Convention had ordered all such cases included?

The alleged manipulation of the aforementioned comma so as to convert it into a semi-colon had been called "a trick" in 1798 in Congress, and Lawson takes an issue with that valuation:
Obedience to its instructions is not a trick upon the Convention. It is tricked by the emasculation of the idea it ordered incorporated, by the obliteration of the language it actually inserted, and by the insertion of the limitations which it rejected.

Mr. Lawson's argumentation is of a generally Protean character. In the pass we have just examined, he believes that the enumeration of powers shortchanged the Convention. The powers, he argues here in effect, were whole and plenary when they went into the Committee of Detail. But when they came out, they were fragmentary, enumerated. What else is there for an honest patriot like Morris to do, than secretly to retouch the text of the proposed Constitution, so as to make the draft good again?

But elsewhere in his work Mr. Lawson thinks, on the contrary, that the enumeration took nothing away from the large jurisdictional idea comprised in the Sixth Resolution. Looking back from page 178 to page 169, we find the author asserting that the enumeration did not diminish, but only subdivided, the plenary powers. He even concedes that the enumeration was, indeed, desired by the Convention:

Rutledge, Randolph, Ghorum, Ellsworth, and Wilson were chosen to make the first draft of the Constitution. This is the first official act of the Convention looking to the enumeration of powers.\(^{24}\)

The idea that the enumeration of powers merely subdivides a totality, would seem to parallel aspects of the doctrine

\(^{24}\)Emphasis added. The five persons named in the above are the Committee of Detail. "Ghorum" is Lawson's form for "Gorham."
proclaimed by some of the modern interpreters who adhere, on the one hand, to the principle that the powers of the Government are enumerated, while on the other hand asserting that nothing truly national is beyond the reach of the Government.

But Mr. Lawson has a still different theory of the enumerated powers: In fashioning the enumeration, the Convention or its committees did not in any way contemplate that a restrictive effect should be imposed by the enumeration upon the plenary grant proposed in Resolution 6. The maxim *enumeratio unius est exclusio alterius*,\(^2^5\) is altogether inapplicable to the Constitution, because it conflicts with the obvious import on the welfare clause. The real reasons for which an enumeration was inserted into the Constitution are, contends Mr. Lawson, entirely somewhere else.

In the first place,\(^2^6\) while Congress has, under the welfare clause, the right or power to govern any object of national significance, some matters are so important that the Constitution makes it Congress's duty to care for them: and those are enumerated. Or rather, some of the items enumerated are enumerated for this aforesaid reason. But there are other reasons. Thus, secondly, "By the enumeration, the Convention was enabled to place qualifications upon certain particular grants, which could not be easily stated upon the general grant. The particulars are limited in the manner

\(^{2^5}\)Lawson cites the maxim on pp. 86, 88, of his work.

specified; but this is not to limit the general power to the particulars, so specified in order that they may be limited or made certain."27

Thirdly, "The enumeration might easily arise out of an abundant caution, to leave no doubt of any of the particulars; since the want of some of those had reduced the country to a state of helplessness and anarchy."28

Finally, the best of all: "The Convention, by this enumeration, was quite willing to divert the attention of the country from the extent of the main grant. Many of the giants of the political life of that day were not above a political subterfuge to carry a point. Adroitness was in no sense a discreditable characteristic."29

So that disposes of the principle of enumeration. But the concept of the reserved rights of the states is predicated precisely upon the notion that the central government is limited to the enumerated powers. If the central government can govern also outside of the enumerated areas, then nothing, it would seem, is "reserved to the states or to the people," and one might well be curious to learn what, in that case, it is that the Tenth Amendment guarantees.30

28Id., 90.  
29Id., 92.  
30The 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." Article X of amendments to the Constitution.
This enigma is dissolved by Mr. Lawson as follows:

What is the reserved power of the people, then, other than their right in the recurring elections to change their representatives and their laws. . . . [31]

And what is reserved to the states?

It reserves to the states the power to act upon matters which Congress does not judge to be of general concern and of which it does not actually take jurisdiction. [32]

And if Congress should act upon all aspects of the human existence?

Such statutes need not displace the states, but, if the local authorities cared, could be administered through cumulative laws and municipal police. . . . To extend the power of Congress to include the general welfare would not destroy the cities, counties, or states. It would simplify our institutions, making them workable. . . . [33]

Professor Crosskey

Features of great similarity conjoin to Mr. Lawson's theory the work of Professor William Winslow Crosskey, published in 1953. [34] Both authors are unorthodox in as well the method and the conclusion. Both have in common the failure to convince either historians or legal thinkers of the soundness of their offerings. Lawson was neither published


Crosskey was both published and reviewed, but the reviews have remained uniformly negative. Both authors have comprised an uncommon amount of learning, but both have relied heavily upon taking liberties with elementary rules of descriptive objectivity. Citing out of context is frequent in both, and Professor Crosskey occasionally serves the reader the point-blank reverse of patently obvious meanings of documents. Both compound from historical elements, selectively arranged, a past which never was.

Both assert that it was the Founders' intention to create a Constitution with a Congress empowered to legislate in all matters which in Congress's opinion concern the national interest. Both dispose of the fact that congressional powers are enumerated, by adducing secondary reasons for the enumeration. Both brush aside the Tenth Amendment in a facile manner, picturing it, to put it plainly, as a dummy for eighteenth century's credulous and unenlightened foes of a great idea, the idea of a consolidated nation. Both appear to be inspired by an inner statesmanship of their own, an ardent desire to liberate the full potential of legislative supremacy, or national supremacy, for the greatest good of the modern American society. They write with a high political motivation. Much like some of the Utopian Socialists of yester-year, who believed that if only some Prince adopted their system, things would anon be righted, each of our two authors addresses himself to the Supreme Court with the solemn
exhortation that it abandon the curse of an old heresy and admit that this Government was never meant to be limited to the enumerated powers.

Crosskey, like Lawson, reads the words "provide for the general welfare," in Article I of the Constitution, as a separate grammatical formation, and rejects what he calls "the purposive view of the clause," i.e., that the welfare clause designates one of the purposes of taxation.

A basic difference between the two authors is in the substructure supporting the concept of the clause's separateness from its natural context. Lawson derives it from Resolution 6 of the Virginia Plan. Of that Crosskey chooses to know nothing. When Crosskey's attention falls upon the welfare clause, the notion of an unlimited National government has been already established in his argument on the basis of a philologically complicated revaluation of the commerce clause (combined with some other elements of the Constitution). In accord with findings he thus made quite apart from any examination of the actual development of the welfare clause, he then remarks:

It thus can be seen, in general, that, when the Common Defence and General Welfare Clause is taken as a direct grant of substantive power to Congress, there is a striking fitness and appropriateness about the Constitution in all its parts. Nothing, under this substantive view, appears to be unnecessary; the draftsmanship is skillful and completely consistent; every part of the document has meaning and seems to subserve some purpose easily understood. . . .
On the other hand, Crosskey proceeds to point out, under the "purposive view" the clause becomes either superfluous or "plainly inappropriate to the extent that it encroaches upon any of the five 'objects' that the Preamble states. . . ."

The actual formation of the welfare clause during the second phase of the Federal Convention's workings, and the role played by the "old debts" in the making of additions to the original taxing clause, is terra incognita to Crosskey. Where the main evidence is concentrated, many seekers have thus failed to take a good look. Story did not have the Notes on Debates. Lawson read them with an uneven eye. And some, like either Crosskey or Corwin, appear to have taken counsel from Aristotle's wise saw that some things it is better not to know than know.

It is thus only in a negative sense that Crosskey is herein considered among interpreters of the Federal Convention, to distinguish him above all from Lawson, who did deal with the genesis of the clause, albeit not in a manner that to us would satisfy criteria of objectivity.

The Madisonians

The "Randolph Plan" which was offered to the Federal Convention, and adopted by it as its principal working outline, was undoubtedly a "Madison Plan" at least as much as it was "Randolph," it being generally agreed that Madison was the dominant master-mind of the Virginia Delegation in the Federal Convention. To a great extent, Randolph was an agent
of ideas common to the Virginia group, whose concepts in turn were mostly inspired by Madison.

In any event, it is a fact that throughout the first half of the Convention's duration and proceedings Madison held on to the idea expressed in Resolution 6, resisting systematically all efforts made by others, especially those of South Carolina, and also Sherman of Connecticut, to dissolve the generalized expression of the Resolution into several enumerated specifications. He wished it were possible to do it, Madison said. But he did not believe it could be done. And the more he thought about it, he said, the more obvious did the impossibility become in his mind. It was impossible, he maintained, to enumerate in advance what a government is to do.

Randolph, on the other hand, was very uncertain and, one might say, apologetic as well as apprehensive concerning this dilemma between an abstract definition and concrete enumeration. Every time Resolution 6 was attacked, he promised or half-promised that something would be done about it, but he did not know what. Madison, on the other hand, promised nothing.

Then suddenly, after certain traumatic events, the powers proposed to be given to the future Congress appeared in the draft of the Constitution in the form of an enumeration, and the blanket Resolution 6, or its language, was gone. And from then on, as long as he lived, Madison was one of the
foremost guardians of the principle of enumeration and of an ever so strict adherence to the limits thus staked out.

In giving an account of existing interpretations of the transactions of the Federal Convention, we surely cannot omit Madison, who not only was a life-long student of the notes of the debates of that assembly, but it was by his own hand that these debates were noted. He had himself recorded them, and he kept them while he lived. In addition, his own memory supplied a subsidiary record of the proceedings, as did, of course, the living memories of all the other participants, insofar as they were actually present.

Of all these sources of testimony, only those are known to us which, at one time or another, during or after the Convention, were somehow, directly or indirectly, reduced to writing. And those which were so reduced, were all gathered and collated by Professor Max Farrand in 1911 and 1913, insofar as their existence was known at that time. And an examination of various more recent works in the field leads the present writer to believe that nothing of significance for our present topic of discussion has been found since Max Farrand's work.

This leaves us with Madison's Notes on Debates as our principal source, but in addition there are Madison's expressions made after the Convention. These include whatever corrections and additions he made upon, and to, the original recordings of the debates. They include, also, various
other papers written by Madison, public or private: today they all are public.

Within the confines of our subject-matter, there appears to be no instance of a supersession of an original recording in the Debates by a subsequent correction materially changing the import of the original record. Only two points deserve a mention in this connection. One is Madison's comment on the margin, asserting that the authentic version of the welfare clause is the one which has a comma, and not a semicolon, in the middle. The other matter concerns the so-called Pinckney Draft, namely, a document which was at first inserted into the Notes by Madison under the date of May 29, and which at that time was believed by Madison to be Charles Pinckney's blueprint for a Constitution. Later Madison discovered that the paper had come to him from some other source, but he was neither able to ascertain who had authored it, or what happened to the Pinckney draft, or what was the content of the latter.

The Pinckney draft passed through the hands of the Committee of Detail, and after that it vanished. The main point of interest--at least in connection with our enquiries--is whether the Pinckney draft was the source of the idea of enumerated powers, i.e., whether the Committee of Detail followed Pinckney in writing that principle into the Constitution.

35El. V:560, note.
For our present purposes, however, this is not essentially important. Our concern rather is with the question of what did the committee and the Convention mean by the enumeration, for assertions such as Mr. Lawson's or Crosskey's have been able to cast some doubt on that point.

In short, there appears to be nothing within the purview of our subject-matter that would tend to diminish Madison's credibility as a witness of the events in the Convention, whether he speaks through the Notes of Debates or his later papers.

In any event our primary attention centers on the question whether or not the enumeration of powers was intended as a limitation. If it was, then the welfare clause cannot have the meaning asserted by Lawson and Crosskey. Secondly, we desire to know whether the Convention made any suggestion from which it could be inferred that the intended meaning of the welfare clause was what Alexander Hamilton would have it mean.

In the present chapter we consider Madison as an interpreter, among other interpreters, of the proceedings of the Convention. In the chapters which follow we are the interpreters of the Convention's proceedings as recorded by Madison.

James Madison

In Federalist Papers, in Virginia Resolutions, in Remarks on the Resolutions, and in some of his presidential
vetoes, Madison interpreted the welfare clause without referring to its genesis in the Convention. But finally in 1830 he expressed himself on this latter point.

The statement is found in the document "Letter to Mr. Madison by Mr. Stevenson," dated 27 November 1830, "examining the origin and progress of the clause of the Constitution 'to pay the debts, and provide for the common defence, etc."

The essence of the whole exposition, which is long and involved, may be found in a paragraph which runs as follows:

That the terms in question to provide for ... the general welfare of the United States were not suspected, in the Convention which formed the Constitution, of any such meaning as has been constructively applied to them, may be pronounced with entire confidence; for 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 and phrases in a sense rendering fruitless and restrictions elaborated by them.

Other parts of the letter take us to the days of the Federal Convention when the problems of the public debts were debated, and the question was raised whether a special clause must be inserted to enable, or oblige, the Government of the United States to pay them.

This question had two branches, one pertaining to the already existing debts of the Confederation, the other to

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36 Reprinted in 4 El. 612; in Story, Commentaries, note to sec. 930. Both sources give only extracts.

37 4 El. 613.

38 See infra, pp. 329.
those which were about to arise under the borrowing clause
of the new Constitution. Madison had returned, in the
Convention, an affirmative answer to the former part of the
inquiry, but seems to have made no specific effort to answer
the latter; but retrospectively, in 1830, he maintained that
for the new debts there was no need for a repayment provision,
for such power is naturally implied in the borrowing power.
And he regrets in his letter to Stevenson that any reference
to debts was subjoined to the original taxing clause (of
August 6), because if not for that addition, the reference
to common defense and general welfare would not have been
added either.

The obvious conclusion . . . is that these terms,
copied from the Articles of Confederation, were
regarded in the new, as in the old instrument,
merely as general terms, explained and limited by
the subjoined specifications, and therefore re­
quiring no critical attention or studied precaution.

If it be asked why the terms "common defence and
general welfare," if not meant to convey the compre­
hensive power which, taken literally, they express,
were not qualified and explained by some reference
to the particular power/s/subjoined, the answer is
at hand - that, although it might easily have been
done, and experience shows it might be well if it
had been done, yet the omission is accounted for
by an inattention to the phraseology, occasioned,
doubtless, by the identity with the harmless

39 The Congress shall have power . . . To borrow money
on the credit of the United States; . . . Com.I:8:2.

40 This whole complex will be more easily understood from
the sequel hereof, both in this chapter and the following
two chapters.

41 4 El. 613.
character attached to it from the instrument from which it was borrowed.\textsuperscript{42}

So the question asked by Madison's opponents is answered easily, he argues. But can they answer him, if he asks them why was so much labor expended by the Convention on the careful enumeration of powers, if at the same time an all-embracing authority was meant to be conveyed, including all those enumerated, and ever other power besides? Thus -

But may it not be asked, with infinitely more propriety, and without the possibility of a satisfactory answer, why, if the terms were meant to embrace not only all the powers particularly expressed, but the indefinite power which has been claimed under them, the intention was not so declared; why, on that supposition,\textsuperscript{43} so much critical labor was employed in enumerating the particular powers, and in defining and limiting their extent?\textsuperscript{44}

Consider, for a moment, the immeasurable difference between the Constitution, limited in its powers to the enumerated objects, and expanded as it would be by the import claimed for the phraseology in question. The difference is equivalent to two constitutions, of characters essentially contrasted with each other; and one possessing powers confined to certain specific cases, the other extended to all cases whatsoever. For what is the case that would not be embraced by a general power to raise money, a power to provide for the general welfare, and a power to pass all laws necessary and proper carry these powers into execution - all such provisions and laws superseding, at the same time, all laws and constitutions at variance with them? Can less be said, with the evidence before us

\textsuperscript{42}\textit{Id.}, 612.

\textsuperscript{43}The supposition that the welfare clause conveys plenary powers.

\textsuperscript{44}\textit{Id.}, 612.
furnished by the Journal of the Convention itself, than that it is impossible that such a constitution as the latter would have been recommended to the states by all the members of that body whose names were subscribed to that instrument?

And it may be added that, in all probability, the Continental Congress would not have endorsed such a constitution either.

Furthermore, Madison notes that the ratification conventions, too, must be considered.

Passing from this view of the sense in which the terms "common defence and general welfare" were used by the framers of the Constitution, let us look for that in which they must have been understood by the conventions, or rather by the people, who, through their conventions, accepted and ratified it. And here the evidence is, if possible, still more irresistible, that the terms could not have been regarded as giving a scope to federal legislation infinitely more objectionable than any of the specified powers which produced such strenuous opposition, and calls for amendments which might be safeguards against the dangers apprehended from them.

Without looking at the recorded debates of the ratification conventions, Madison says, it is sufficient to consider the demand for restrictive amendments:

Here are a majority of the states proposing amendments, in one instance thirty-three by a single state, all of them intended to circumscribe the power granted by them to the general government, by explanations, restrictions, or prohibitions, without

45Characteristically, Madison is not referring to his own notes, but to the official Journal.

46This is not Madison's remark, but the present writer's.

47Id., 614.

48Ibid.
including a single proposition from a single state referring to the terms "common defence and general welfare;" which, if understood to convey the asserted power, could not have failed to be the power most strenuously aimed at, because evidently more alarming in its range than all the powers objected to put together. And that the terms should have passed altogether unnoticed by the many eyes which saw danger in terms and phrases employed in some of the most minute and limited of the enumerated powers, must be regarded as a demonstration that it was taken for granted that the terms were harmless, because explained and limited, as in the "Articles of Confederation," by the enumerated powers which followed them.

The sequel of his letter shows that he is aware that the welfare clause caused a great furor initially. He refers to the Letter by Lee to Randolph, of October 16, 1787; but Madison's point is that later, when the amendments were being formulated, the welfare clause was no longer a target, for its harmlessness had been demonstrated.

That, of course, is not wholly accurate. It would seem more nearly true to say that the public was sufficiently satisfied that the Constitutional Convention had not meant any harm by the clause, but fears that in the future the erstwhile unintended connotation might yet be engrafted upon the clause, persisted. For that very reason the Tenth Amendment (which originally was the Twelfth) was insisted upon. Surely the Tenth Amendment is aimed against the feared potentials of the welfare clause. Madison's Number 41 Federalist itself testifies to these facts.

49El. I:503 f.
We have so far, in rendering Madison's position, permitted ourselves to indulge in a measure of additional latitude, for not all of the above material can be characterized as directly being in the nature of an interpretation of the transactions of the Federal Convention. But indirectly there is relevancy even in the extraneous elements, in that one assumes that what the Founders, fresh back from the workshop where the Constitution had been hammered out, told the people the Constitution meant, that was also its real meaning, i.e., the meaning which its authors themselves believed it to have.

And in that sense the ex post facto dicta mirror the res gestae themselves, and the events of the ratification conventions constitute an interpretation of the Constitutional Convention, as well as, in a sense, a continuation of it.

All this taken together, the evidence would seem sufficient to annihilate whatever claim to credibility might be aspired to by the trend, represented by Lawson or Crosskey, which contends that the Founders themselves structured the Constitution as a consolidationist instrument. And with this central proposition there fall also its subimplications, notably the contention that the welfare clause is a plenary grant, and that the enumeration of powers was meant only for emphasis or such like subordinate purposes.

On the other hand, nothing tangible seems to be at hand, from Madison's contribution as witness to the federal
Convention, that would bear directly on the validity of the version of the welfare clause which was proposed by Hamilton. That is to say, there is nothing directly negating the proposition that the taxing and spending powers relate to the broad concept of general welfare, rather than being constricted by the enumeration.

What Madison thought about the proposition, we know. Whether his opinion was identical with that of the Convention, may be made the object of a doubt.

We leave this question open and maintain judgment in suspension while we turn to other representatives of the Madisonian school.

John Randolph Tucker

It seems that for almost three quarters of a century after the Federal Convention had been the object of analysis by Story for the Hamiltonians and Madison for the Madisonian school, no attempt was made by anyone to renew the explorations aimed at the recovery of authentic concepts from the records of the Convention.

Finally in 1899 a comprehensive work on the genesis, development and interpretation of the Constitution was published posthumously, authored by John Randolph Tucker (b. 1812, d. 1883) and edited by his son Henry St. George Tucker (1853-1932), grandson of the Henry St. George Tucker (1780-1848) who in 1817 presided over the congressional committee
which studied the problem of internal improvements.\textsuperscript{50}

Examining the genesis of the welfare clause, J.R. Tucker surveys, in Section 227 of his work (pages 487 to 489) the set of jurisdictional resolutions of the Federal Convention which were examined before him by Story. The most important among them are the several successive versions of Resolution 6 of the Virginia Plan, the last of which, proposed by Gunning Bedford, aimed to enable the future Congress to "legislate in all cases for the general interests of the Union."

Story contends in Section 930 of the Commentaries that the latter idea was subsequently embodied in the welfare clause of Article I of the Constitution, as well as in the Preamble of the Constitution. John Randolph Tucker disagrees most emphatically with the notion that the welfare clause of Article I was meant to incorporate the blanket jurisdictional authorization of the Bedford version of the sixth resolution of the Virginia Plan.\textsuperscript{51}

\textsuperscript{50} The 1817 committee on internal improvements, \textit{supra}, 130. Activities of the youngest of the three Tuckers, as congressman and professor of law during 1920's contending for Madisonian principles in expounding the welfare clause, \textit{supra}, 174. For biographical data, see 85th Congress, 2d session, \textit{Biographical Directory of the American Congress, 1774-1961}, U.S. Gov't Printing Office, 1961; p. 1731.

\textsuperscript{51} The development of Resolution 6 of the Virginia Plan is followed closely in Chapter VII, \textit{infra}. Story's interpretation of the welfare clause, including elements of his historical analysis, is partly dealt with \textit{supra}, pp. 259, partly \textit{infra}, Chapter VIII, and partly in the immediate sequel of the present page. The compendium by J.R. Tucker, edited by his son Henry, has the full title \textit{The Constitution of the United States, A Critical Discussion of its Genesis, Development, and Interpretation}, Chicago, Callaghan and Co., 2 vols, 1899. It is known as \textit{Tucker on the Constitution}. 

Having surveyed the portions of the debates of the Convention which pertain to the formation of the welfare clause, Tucker observes in Section 228 of his book:

This is all that appears upon the records as detailed by Mr. Madison of the proceedings of the convention. The whole record gives no ground for the conclusion stated by Judge Story, that it conformed to the spirit of that resolution of the convention which authorizes Congress "to legislate in all cases for the general interests of the Union."

The "it" refers to the "course of action" alleged by Story in Section 930 of his Commentaries, which course of action consisted in adopting the welfare clause of Article I of the Constitution, for two purposes (according to Story): first, to reduce to a limited concept the purposes of taxation which otherwise (in Story's opinion) would have been unlimited and second, to keep the scope of those purposes broad enough to accommodate "all constitutional objects and powers."

Rejecting Story's interpretation, Tucker further contends:

So far is this from being true, that the resolution that Congress should legislate in all cases for the general interests of the Union, though formally offered, was never finally adopted by the Convention.

This contention calls for some clarification. The proposal to enable Congress to legislate "in all cases for the general interests of the Union" was indeed adopted, on July 17, by a vote of 6 to 4, as recorded on page 320 of Volume 5 of Elliot's Debates, edition of 1937. All other editions of Madison's Notes agree on that point. The proposal was made
by Mr. Bedford of Delaware, as we shall note in a larger context in Chapter VII, below, and it was meant (and adopted) as an amendment to Resolution 6 of the Virginia Plan. Prior to the Bedford amendment, the language of the Resolution was Randolph's.

It seems, however, that the Tuckers believed that the provision referred to by Story, was a part of the plan proposed by Hamilton, for their argument continues as follows:

So far from it, the proposition of Mr. Hamilton, already referred to, and which was substantially that stated by Judge Story, was never even voted upon, but was merely suggested by him [apparently Hamilton] and never regularly proposed.

Above, however, as we have seen, Tucker (or rather, the Tuckers), had stated that the proposition had been "formally offered," which is in fact true about the motion by Bedford by July 17, while Hamilton's plan, outlined for the Convention orally on June 18, did not have the status of a formal motion. 52 The Tuckers are also mistaken in citing in this connection Article VII of Hamilton's plan, for Hamilton placed his proposal of congressional jurisdiction into Article I of his plan. 53 The phrase "general interests of the Union" is not found in Hamilton's plan.

52 El. V:198 ff.
53 "The supreme legislative power of the United States of America to be vested in two different bodies of men . . . who, together, shall form the legislature . . . with power to pass all laws whatsoever, subject to the negative here-after mentioned." (The veto power was given to the executive, in Art. IV.) Art. VIII proposed judicial jurisdiction in "all matters of general concern." El. V:205.
We need not dwell further on the various inaccuracies in the paraphernalia of the substantive point, which is, to repeat, that the provision aiming to enable Congress to legislate "In all cases for the general interest," was in fact adopted by the Convention into the body of ideas from which subsequently a text of the future constitution was to be fashioned. The crucial question rather is this, did the subsequently adopted enumeration exhaust "all cases" concerning the "general interest," or only some of them?

If not all, why was any enumeration attempted at all? And what indication is there, in the finished Constitution, that the legislative jurisdiction was to extend to matters of general interest outside of the enumerated topics of general interest?

The broad constructionists point to the general-welfare clause in this connection. It becomes therefore necessary to examine the steps—and the reasons behind the steps—whereby the welfare clause was written into the text of the Constitution itself, in the period following August 6, when the draft of the text was before the Convention.

This phase of the developments has not been adequately analyzed by the Tuckers in the work of 1899. Skipping this unfulfilled need, they proceed to a summary as follows:

The record of the Federal Convention, if it proves anything, proves only . . . that the words "to pay the debts," as one of the objects of . . . taxation, were associated with the words "to provide for the common defence and general welfare," used in the Articles of Confederation, under which those
debts had been contracted, as indicating that the constitutional limitations under both instruments of the objects defined in the words "common defence and general welfare" were those which were indicated by the granted and enumerated powers delegated to Congress.

"Reduced to plainer English, the above seems to mean this: Under the Articles of Confederation, the Continental Congress was vested with certain enumerated functions or powers, which constituted the meaning of the terms "common defence and general welfare." For these purposes, and not others, the continental funds could be expended, and debts could be contracted for the same purposes. And the situation is the same under the new Constitution (although the list of enumerated objects is now somewhat longer, and the ability of Congress to assert itself in its proper fields of action is more intense).

The above conclusion is confirmed by our findings (Chapter VIII, infra), but regrettably no issue was taken by J.R. Tucker with Story on the development of the welfare clause in the period of the Convention following August 6. Thus Story's interpretation, which was based upon incomplete records, remained unrefuted by the 1899 work, although the latter work expressed, as we have just seen, a rejection of Story's position.

That is all we have found to say on Tucker's analysis of the genesis of the welfare clause. But aside from his (somewhat fragmentary) treatment of the making of the welfare clause, he has a great deal to say about it on the basis of
logical considerations, and from other points of view. Thus in Section 230 he protests, doubtless apropos the position of Judge Story:

To speak of the government as a government of granted powers, and yet to hold that its greatest power, that of unlimited taxation, can be applied to the execution of powers not granted nor enumerated in the Constitution, but to such objects as Congress may deem to be for the common defence and general welfare, would make it substantially a government of unlimited powers.

Much like Madison before him, J.R. Tucker is unable to believe that the Government, if permitted to offer funds for pursuits which are not comprised within the powers enumeratively granted to the Government, would abstain from efforts to take jurisdictional control of the objects for which the funds were appropriated. Thus in Section 234, he attacks federal grants to states for education as constitutionally wrong, and observes:

It is too obvious to escape observation that the appropriation of money must be followed, as was proposed, with some supervision over its expenditure, and as to the system of education to be pursued. Indeed it is clear that Congress ought not to appropriate money for a useless system of education; and if Congress intervenes as to the system, because of the appropriation of money for the purpose, it would be claiming to some degree the right to exercise the denied power - denied to Congress and reserved exclusively to the States. (Page 497)

For the same reasons he rejects, in Section 232, the notion of federal "bounties on product," although there is no commonly known instance of any such payments since the cod fisheries bonus of the late eighteenth century. But he may have in mind the various services and grants of seed, etc.
to farmers by the Department of Agriculture, and it is undoubtedly against the sizable funds appropriated to the Department of Agriculture that he militates in Section 229:

We have been thus full in respect of this celebrated theory of Mr. Hamilton, that while Congress cannot claim unlimited discretion in the exercise of powers which it may choose to consider for the common defence and general welfare, yet it may do so as to the objects of the appropriation, because this theory has of late years assumed dangerous prominence in the administration of the Federal government. The government is induced to enlarge its taxation, in order to accomplish the objects which, by loose construction, are embraced in these celebrated words.

In Section 230, Tucker observes with respect to the intentions of the Federal Convention and of the ratification conventions:

The theory of construction which we are combating involves the historical conclusion that the States, which were jealously guarding their reserved powers by expressly enumerating the powers delegated to the Federal government, agreed under this power of taxation, in the face of its liability to abuse by exercise for objects and purposes which were ungranted, that Congress might nevertheless, at its discretion, assume and execute them through the power of appropriation. It is absurd to suppose that such was the purpose of the States which framed the Constitution. It is not surprising that the ingenious and inventive intellect of Mr. Hamilton, who had been defeated in the convention in all his efforts to grant unlimited powers to Congress, should have been led to adopt an interpretation of this clause, . . . which in effect would accomplish the object in which he was foiled in the convention. He favored a strong government with large powers, believing it to be essential to the success of the system; and naturally, with his bold and ardent temperament, sought to establish a policy which the terms of the Constitution did not authorize, by a strained, and, as we have shown, an improper interpretation of this taxation clause.

Such, then, in essence, were the arguments proffered in 1899 in the work *Tucker on the Constitution*, edited by Henry St.
George Tucker (1853-1932) from materials assembled by his father John Randolph Tucker, who had died 16 years before the publication of this book. Less than quarter of a century after this publication, the son, Henry St. George, resumed the fight against the Story-Hamilton view of the welfare clause.

Henry St. George Tucker (1853-1932)

The doctrinal conflict had lain dormant for some two decades when the militancy of the opposing schools of thought was aroused by the passage, in 1921, of the Maternity Act. Among the first writers to respond on behalf of the Madisonian school was Henry St. George Tucker, who in 1922 published in Volume 8 of the Virginia Law Review an article entitled "The General Welfare." Substantial portions of the article are a direct reprint of the book of 1899, which we have just examined. Other parts of the article contain lucid and pertinent discussion of the development of the welfare clause after the adoption of the Constitution. But there is in it nothing, in addition to the above book, that would seek to encounter Judge Story's exposition of the events in the Federal Convention.

On March 3, 1926, Henry Tucker attacked, in Congress, an appropriation bill which was about to be passed supplementary

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54 Supra, 1881

to the Maternity Act. The debate which developed was extensive and fascinating, and Tucker undertook to demonstrate in considerable detail that although the Convention at one time had before it proposals seeking to give a general jurisdiction to Congress, this was superseded by subsequent enumeration of powers.

On June 2, 3, and 4, 1927, Tucker delivered lectures to the Bar Association of Georgia, which were reprinted in the July and August issues of the *American Bar Association Journal*, under the title of "Judge Story's Position on the So-Called General Welfare Clause."

Although in some particulars more complete than the statements of 1899 and 1926, these 1927 expositions made by Mr. Henry Tucker of the genesis of the welfare clause still would appear to fall short of the great scholastic precision with which the history of the formation of the clause was subsequently analyzed by Professor Charles Warren in 1929. It is therefore proposed to proceed directly to the work of Warren, although not without regret that the intended scope of our work does not permit us to give Henry Tucker the attention which his scholarship deserves.

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57 (1927) XIII:363 ff. and 465 ff.

58 Warren acknowledges his debt to Henry Tucker in notes on pages 474, 478, of the work cited in the note herein below.
"In the consideration of the validity of Judge Story's interpretation," writes Professor Warren in his work *The Making of the Constitution*, it must be always borne in mind that Story's *Commentaries* was published prior to the publication of Madison's *Notes of Debates*, and without any knowledge of the discussions in the Convention other than the records of the motions and votes contained in the Journal."

This *apologia* for Story refers to the fact that Story has misunderstood or ignored the reason which had led the Convention to incorporate the words "to provide for the ... general welfare" into the Constitution.

Story, and other broad constructionists after him, have seen a connection between Resolution 6 of the Virginia Plan, and the general-welfare clause, because Resolution 6 had proposed general powers, and it appeared possible to contend that the welfare clause was inserted to restore the idea, after its generality had been reduced by adopting an enumeration of powers. To maintain this view it is, however, necessary to ignore the real reason, obvious from the *Notes of Debates*, which occasioned the adoption of the welfare clause into Article I of the Constitution.

Madison pointed out that reason clearly enough in the Letter to Stevenson of 1830, but a larger elaboration in context with a review of the proceedings of the Convention

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was made only by Warren, on pages 464 to 479 of his cited book. In an even greater detail it is carried out in our Chapter VIII, below. 60

The reason, as we shall see in Chapter VIII, below, was that to the power "To lay and collect taxes, duties, imposts, and excises," as it stood in the original proposed text of a constitution of August 6, there was then sought to be added a clause securing a part of the tax funds for the payment of the debts. 61 As Warren rightly observes, 62

Had the Convention simply voted that Congress should have "power to lay and collect taxes, duties, imposts, and excises, to pay the debts of the United States," and had it stopped there, such a provision might have been construed as giving Congress the power to levy and collect taxes to pay the old debts and only for that purpose. Some words evidently had to be added that would make clear the power of Congress to levy taxes for all the National purposes set forth in the grants of power subsequently specified in this section.

In other words, the phrase "to provide for the general welfare is merely a general description of the amount of welfare which was to be accomplished by carrying out those enumerated and limited powers vested in Congress--and no others.

60 The subject matter seemed to us to call for reorganization for the additional reason that Warren groups the whole development of the welfare clause under the heading "Thursday, August 16, 1787; In Convention; The Taxing Power and the General Welfare Clause," although the formation of the clause by gradual steps is stretched out to, and including, September 4. Hence Warren has found himself forced to gather the events of all the intervening days under "August 16," merely because they had to do with taxation, which he chose, in his caption, to link to August 16. But that is confusing.


62 Id., 474 f.
CHAPTER VII

EVENTS IN THE FEDERAL CONVENTION

By a common understanding among the Delegates in the Federal Convention rather than by a resolution arrived at in a formal procedure, it came to pass that the initiative in leading the Convention in the first steps of its actual business of preparing an improved scheme of government was accorded to, and assumed by, the delegation from Virginia, which accordingly proceeded to outline the nature and purpose

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2 El. V: 126.

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of the impending agenda. Its outline, known ever since as "The Virginia Resolutions," or "The Virginia Plan," was adopted by the Convention as the basis upon which the subsequent negotiations proceeded.\(^3\) It is also known as "The Randolph Plan," because the privilege of presenting the proposals to the Convention fell to Edmund Randolph of Virginia.

The "Resolutions" themselves had 15 articles,\(^4\) but were preceded by an introductory statement divided into four major points.\(^5\)

In the first of these introductory points Randolph described "the properties which such a government," namely, an adequate government for the confederation or federation, ought to have. He specified them as follows:

1. The character of such a government ought to secure, first, against foreign invasion; secondly, against dissensions between members of the Union, or seditions in particular states; thirdly, to procure to the several states various blessings, of which an isolated situation was incapable; fourthly, it should be able to defend itself against encroachments apparently by the state governments; and fifthly, to be paramount to the state constitutions.

As a result of considerations expressed in the introductory statements, the fifteen resolutions were then proposed. The first three of those were as follows: "1. Resolved, that the

\(^3\)El. V:126 ff.

\(^4\)El. V:127 f.

\(^5\)El. V:126 f.
Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, 'common defence, security of liberty, and general welfare'.

2. Resolved, therefore, that the rights of suffrage in the national legislature ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.

3. Resolved, that the national legislature ought to consist of two branches.

Articles 7 and 9 proposed the establishment of a "national executive" and "national judiciary." Article 8 provided for a "council of revision," to be composed of the executive (which in Randolph's conception would have been plural) and of "a convenient number of the national judiciary, ... with authority to examine every act of the national legislature, before it shall operate, and every act of a particular legislature before a negative thereon shall be final. . . ."

Very important was Article 6 of the Resolution, which provided, in part, as follows:

"That the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation, and moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union, or any treaty subsisting under the authority of the Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof.

The following day, which was May 30, Resolution #1 was suspended upon Randolph's own motion, occasioned by a sug-
gestion from Gouverneur Morris of New York; and in its stead, three other resolutions were proposed:

1. That a union of states merely federal will not accomplish the objects proposed by the Articles of Confederation, namely, common defence, security of liberty, and general welfare.

2. That no treaty or treaties among the whole or part of the states, as individual sovereignties, will be sufficient.

3. That a national government, ought to be established, consisting of a supreme legislative, executive, and judiciary.

Of these above three, the last was eventually voted upon first, and it was adopted the same day, by a 6-1 vote, while one state was divided. The Resolution #6, stating the cases in which the national legislature ought to legislate, was taken into consideration the following day, May 31. "On the question of transferring all the legislative powers of the existing Congress to this assembly [the newly proposed "national legislature"], there was a unanimous affirmative, without debate." Then, "On the proposition for giving legislative power in all cases to which the state legislatures were individually incompetent," there was some rather significant discussion, to be considered shortly. In the end, the idea of giving Congress power to legislate in all cases to which individual states are incompetent, was adopted in a vote of 9-0, while Connecticut was divided between Ellsworth, who

\[6\text{El. V:134. The divided state was New York. Hamilton, yes; Yates, no.}\]

\[7\text{El., V:139.}\]
favored this power, and Sherman, who did not favor it. 8

Next, the records tell us, 9

The other clauses of Resolution #67, giving
powers necessary to preserve harmony among the
states, to negative all state laws contravening,
in the opinion of the national legislature, the
Articles of Union, down to the last clause (the
words "or any treaties subsisting under the
authority of the Union," being added after the
words "contravening, etc., the articles of the
Union," on motion of Dr. Franklin), were agreed
to without debate or dissent.

But "the last clause of the sixth resolution, authorizing an
exertion of the force of the whole against a delinquent state,"
was postponed, in order that a better method might be found
for securing the unity of the Union. 10

Friends of the idea of a strong National Government, be-
ginning with Mr. Justice Joseph Story in 1833, have repeatedly
invoked the fact that the Resolution 3 (page 304, above), and
the Resolution 6 (pages 305, 306 above), were adopted,
as evidence that the Federal Convention intended to create
a national government authorized to act upon all matters which
in its opinion concerned the Union as a whole. In other words, that the Convention had in
mind a government empowered "to provide for the general wel-
fare of the United States," by one method or another, regardless
of whatever indications to the contrary may seem to be

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8El. V:139.
9Ibid.
10El., V:140.
contained in the various specifics of the finished Constitution. 11

That position discounts the fact that the then existing "powers" of the Continental Congress under the Articles of Confederation were actually non-powers, because the Congress could not enforce them; that the method proposed by Randolph for enforcement, was repudiated simultaneously as his proposed general grant of power was adopted; and that even the power "to negative all laws passed by the several states contrary, in the opinion of the national legislature, the Articles of Union," was subsequently revoked,12 although, as we have seen, it was at first adopted.13

Finally, the argument of the centralist schools of thought tends to disregard certain understandings made in the Convention prior to the vote taken upon the propositions which we have just discussed. These understandings will be apparent from the following consideration:

As soon as Randolph introduced the proposition "That a national government ought to be established, consisting of a supreme legislative, executive, and judiciary,"14 it underwent a discussion, less however, on its general merits than

11 For the argument of the centralist schools of thought, see supra, ¶ 266.
12 El. V:322.
13 Supra, 305.
14 Supra, 304.
on the force and extent of the particular terms 'national and supreme'.

The discussion went along as follows: "Mr. Charles Pinckney wished to know of Mr. Randolph whether he meant to abolish the state governments altogether. Mr. Randolph replied, that he meant by these general propositions merely to introduce the particular ones which explained the outlines of the system he had in view.

Mr. Butler said, he had not made up his mind on the subject, and was open to the light which discussion might throw on it...

General Pinckney expressed a doubt whether the act of Congress recommending the Convention, or the commissions of the deputies to it, would authorize a discussion of a system founded on different principles from the Federal Constitution (i.e., the principles of the Articles of Confederation).

Mr. Gerry seemed to entertain the same doubt.

Mr. Gouverneur Morris explained the distinction between a federal and a national supreme government; the former being a mere compact resting upon the good faith of the parties, the latter having a complete and compulsive operation. He contended, that in all communities there must be one supreme power, and one only.

Mr. Mason observed, not only that the present Confederation was deficient in not providing for coercion and punishment against delinquent states, but argued very cogently that punishment could not, in the nature of things, be executed on the states collectively, and therefore that such a government

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15 El. V:132.
16 El. V:132 f.
17 Id., 133.
18 Ibid.
19 Ibid.
20 Ibid.
21 Ibid.
was necessary as could directly operate on individuals, and would punish those only whose guilt required it.

Mr. Sherman admitted that the Confederation had not given sufficient power to Congress, and that additional powers were necessary; particularly that of raising money, which, he said, would involve many other powers. He admitted, also, that the general and particular jurisdictions ought in no case to be concurrent. He seemed, however, not to be disposed to make too great inroads on the existing system; intimating, as one reason, that it would be wrong to lose every amendment /i.e., reform of the Confederation/ by inserting such radical features as would not be agreed to by the states.

The day following—May 31—additional protests were made against allegedly excessive amounts of power being proposed for the national government:

Mr. Butler apprehended, that the taking so many powers out of the hands of the states as was proposed tended to destroy all that balance and security of interests among the states which it was necessary to preserve and called on Mr. Randolph, the mover of the propositions, to explain the extent of his ideas, and particularly the number of members he meant to assign to this second branch /i.e., the upper house of the national legislature/.

Mr. Randolph observed, that he had, at the time of offering his propositions, stated his ideas, as far as the nature of general propositions required; that details made no part of the plan, and could not perhaps with propriety have been introduced. . . . He observed, that the general object was to provide a cure for the evils under which the United States labored; that, in tracing these evils to their origin, every man had found it in the turbulence and follies, of democracy; that some check therefore was to be sought for against this tendency of our governments; and that a good Senate seemed most likely to answer the purpose.

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22 Roger Sherman of Connecticut, Ibid. 23 El. V:137 f. 24 The discussions, here and throughout, oscillated between the topic of jurisdiction, and the topic of composition or structure, of the future national government, as important consequences follow from each of these topics for the other. El. V:138, 139.
On the proposition for giving legislative power
in all cases to which the state legislatures were
individually incompetent,—Mr. Pinckney and Mr.
Rutledge objected to the vagueness of the term
"incompetent," and said they Rutledge and Ch.
Pinckney, but the sentiment appears to have been
common to the whole delegation of South Carolina/ could not well decide how to vote until they
should see an exact enumeration of powers compre­
hended by this definition.

Mr. Butler repeated his fears that we were
running into an extreme, in taking away the powers
of the states, and called on Mr. Randolph for the
extent of his meaning.

Mr. Randolph disclaimed any intention to give
indefinite powers to the national legislature, de­
claring that he was entirely opposed to such an
inroad upon the state jurisdictions, and that he did
not think any considerations whatever could ever
change his determination. His opinion was fixed
on this point.

Mr. Madison said, that he had brought with him
into the Convention a strong bias in favor of an
enumeration of the powers necessary to be exercised
by the national legislature, but had also brought
doubts concerning its practicability. His wishes
remained unaltered; but his doubts had become
stronger. What his opinion might ultimately be, he
could not yet tell. But he should shrink from
nothing which should be found essential to such a
form of government as would provide for the safety,
liberty, and happiness of the community. This
being the end of all our deliberations, all the
necessary means for attaining it must, however
reluctantly, be submitted also. 25

It was upon this declaration by Madison, that nine of the ten
states then present voted to give Congress powers in the cat­
egory of instances to which the individual states were in­
competent, etc. However, enforcement provisions were denied,
as we have already noted; and sometime later also the grant
of power for the future federal government to veto state laws,
was revoked. 26

25El. V:139. 26Id., 322.
Further discussion of the powers of the future central government was preempted by the increasingly troublesome problem of the formula under which the respective influences of the several states would be apportioned. From the beginning of the Convention until July 16, which is to say, for more than one and a half months, the Virginia delegation acted on the assumption, expressed in the second of the resolutions offered by Randolph on May 31 in substitution of his original Resolution #1,\(^\text{27}\) that "the rights of suffrage in the national legislature" would be "proportioned" in a manner related to the magnitude of the respective states.

While neither of the two principal personalities—aside from George Washington—of the Virginia delegation, namely, Randolph and Madison, were clear about the manner in which the jurisdiction of the future government was to be expressed, and while Randolph appeared to be more positively committed to the idea of some definite limitations upon the federal powers than Madison was, nevertheless, the delegation as a whole was obviously on the forward side in regard to jurisdictional innovations.

But South Carolina consistently pressed for an enumeration of powers.\(^\text{28}\) It had introduced a plan of its own, by Charles Pinckney, the same day—May 30—on which Randolph began to unfold the resolutions of Virginia. It is believed

\(^{27}\text{Supra, pp. 302, 303.}\)

\(^{28}\text{Supra, pp. 307, 309.}\)
that the Pinckney plan was based upon the idea of enumerated powers. 29 Unlike the plan of William Paterson, 30 which was rejected as a general basis of proceedings, decision over the Pinckney plan was kept pending for an extremely long period of time, until the whole matter took an interesting turn, to be described shortly below.

The trend of events suggests the hypothesis that the Convention had for some time looked favorably upon the idea of expressing the scope of the future federal powers enumeratively, before this sentiment had opportunity to manifest itself in action. The reason why it did not manifest itself at an earlier time than in fact it did, would appear to be the influence which Madison had over the Virginia delegation, and the Virginia delegation over the Convention. Madison, as we have seen, was firm in his diffidence as to the method of enumeration from the beginning of the Convention until a certain event, the event to which we have alluded a moment ago, and which we shall describe presently.

It was the adoption of the principle known as the Connecticut compromise. It was a synthesis of the principle of equality among the states in the national legislature, and of the principle of proportioned representation therein. The Compromise adopted equal representation for the upper branch


30 The plan which was originally attributed to Charles Pinckney, is reprinted in 5 El. 129 ff.
of the legislature, and of proportionality in the lower. But since the lower house, in which the large states were accorded preponderance over the small, was not to be able to pass laws without the concurrence of the upper house, where all states were equal, the large states felt short-changed by the arrangement, which had passed in the Convention in the morning on July 16 in a 5-4 vote, with Massachusetts divided. The states favoring the compromise were the small ones: Connecticut, New Jersey, Delaware, Maryland, and North Carolina. Against it were the larger states, except Massachusetts; the state of Georgia, although small in population, was large in territorial size, and it voted against the compromise, presumably because it anticipated that soon it would count as a large state. The states opposed to the compromise were, then, Pennsylvania, Virginia, South Carolina, and Georgia.

The effect of the compromise was disappointing, even alarming, to the large states, which, as it appears, had been expecting to be unopposable leaders of the future federation. Apart from the substance of the Compromise vote, it was a very tangible illustration that a large state, and even a combination of large states, could be outvoted in the national councils.

Upon Edmund Randolph, the impact of the event was traumatic. But it seems that even the philosophically constant Madison felt a cooling off of his fervent dedication to the

31El. V:316.
principle of a sovereign national government, and that this was the intermezzo during which the foundation of his future strict-constructionism was formed. Mason of the Virginia delegation, not long before as dedicated a nationalist as Madison, appears to have suffered an alienation from the erstwhile goals of the Virginia delegation, similar to the change of mood in his leading colleagues. In the end, Mason and Randolph refused to sign the finished draft of the Constitution. Of the Virginians, only Madison, Blair, and Washington signed.

The small states, or, in any event, their spokesman the New Jerseyite Paterson, displayed a dissatisfied demeanor for another little while, but it may be judged from the small states' fast ratification\textsuperscript{32} that they knew the Connecticut Compromise for the good bargain it was for them.

Be that as it may, the Compromise at long last settled an abiding dilemma whose presence had been an obstacle to the discussing and resolving of other fundamental issues,\textsuperscript{33} among which was the jurisdiction, the powers, of the future federal government. Thus on June 27, "Mr. Rutledge had moved\textsuperscript{34}...

\textsuperscript{32}For the ratifications, see \textit{Supra}, Ch. I.

\textsuperscript{33}E.g., on June 25, Mr. Butler, observing that we were put to difficulties at every step by the uncertainty whether an equality or a ratio of representation would prevail finally in the second branch, moved to postpone the fourth resolution . . . . \textit{El. V:240}. - The "4th resolution" concerned the election of the lower house. \textit{Id.}, p. 127. But the impediment noted by Butler stood in the way of other agenda as well.

\textsuperscript{34}\textit{El. V:248}. 
to postpone the sixth resolution, defining the powers of Congress, in order to take up the seventh and eight, which involved the most fundamental points, the rules of suffrage in the two branches; which was agreed to, *nem. con.*

So it came to pass, that a little while after the adoption, July 16, of the Compromise, "The sixth resolution in the report from the committee of the whole House from the Virginia Plan had meanwhile been adopted and recommended by the Committee of the Whole, so that the Virginia Resolutions became Resolutions of the Committee of the Whole*, which had been postponed, in order to resume the seventh and eighth, was now resumed." 35

And again, as before, there was a unanimous assent to that part of the resolution which stated "That the national legislature ought to possess the legislative rights vested in Congress by the Confederation." But there was no easy passage this time for the subsequent clause, reading "... and moreover to legislate in all cases in which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." These parts being read for a question,

Mr. Butler calls for some explanation of the extent of this power; particularly the word "incompetent." The vagueness of the terms rendered it impossible for any precise judgment to be formed.

Mr. Gorham. The vagueness of the terms constitutes the propriety of them. We are now establishing general principles, to be extended hereafter into details, which will be precise and explicit.

35 El. V:319 (July 17).
Mr. Rutledge urged the objection started by Mr. Butler; and moved that the clause should be committed, to the end that a specification of powers comprised in the general terms might be reported.

On the question of commitment, the votes were equally divided. Connecticut, Maryland, Virginia, South Carolina, Georgia, aye, 5; Massachusetts, New Jersey, Pennsylvania, Delaware, North Carolina, no, 5. So it was lost.

Assuming that the vote for commitment was a vote for the idea "that a specification of powers comprised in the general terms might be reported," it follows that the above moment constitutes the dies a quo for the Virginia delegation's adherence to the principle of enumerated powers.

Madison and Randolph, at any rate, became strict constructionists on that eventful Monday, the 16th of July 1787. It is clear from a positive statement which Randolph made immediately after the vote on the commitment of the jurisdictional paragraph had been taken, that he had divested himself from any idea of large national powers the moment the Connecticut Compromise prevailed earlier that day:

The vote of this morning (involving an equality of suffrage in the second branch) had embarrassed the business extremely. All the powers given in the report from the committee of the whole were founded on the supposition that a proportional representation was to prevail in both branches of the legislature.

Randolph then expressed a wish for the Convention to adjourn, which was understood by some as proposing an immediate dis-

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36 El. V:317.
solution of the Convention. Paterson, fearing that this might be a maneuver to force the Convention to retract the Compromise and deprive the small states of the equality in the upper house which they had just achieved, announced his cheerful concurrence with Randolph's proposal to end the Convention altogether. Charles Cotesworth Pinckney of South Carolina spoke out immediately to save the Convention, and Randolph declared that he had only meant an adjournment until the next day. Then Paterson, superciliously, "seconded the adjournment till tomorrow, as an opportunity seemed to be wished by the larger states to deliberate further on conciliatory expedients."

But the motion to adjourn "till tomorrow" did not pass, the vote being 5-5. Then Jacob Broome of Delaware, Gerry of Massachusetts, and Rutledge of South Carolina renewed arguments against an adjournment sine die. Finally, the Convention adjourned for the day, in a vote of 7-2, one state divided.

It seems that in the turbulence of the 16th of July the leadership slipped from the hands of Virginia. Randolph, it seems, no longer cared much afterwards, and eventually did not even sign the Constitution.

But now the Convention was within striking distance of accomplishment. The compiling of principles upon which a constitution might be formulated, had been almost done. From

37 William Paterson, spelled "Patterson" in Elliot.

38 Georgia. El. V:318 f.
July 17 only nine or ten more days were to be spent on the preliminary activity of assembling and debating the substance which was to be fashioned into the language of the Constitution. On July 26, the Convention was already to transmit to a committee 23 resolutions, into which the original 15 of the Randolph Plan had grown, as instructions under which the text of a new Constitution should be fashioned.

It had been understood from the beginning, that the motions or resolutions currently debated and voted upon by the Convention were intended merely as the raw materials or ideas for a constitution, not as being themselves the phrases of the future text of such constitution. It was probably assumed, although it is nowhere stated in the records explicitly, that the textual formulation would be performed by a committee.

The first mention of such a unit was made on Monday, July 23, a week after the Connecticut Compromise. It was proposed by Elbridge Gerry "that the proceedings of the Convention for the establishment of a national government (except the part relating to the executive) be referred to a committee to prepare and report a constitution conformable thereto."40

This was agreed upon unanimously. The proposed size of the committee then underwent some fluctuation, until it settled upon the number five.41 The membership of the com-

39 This is a retrospective observation, not to imply that the convention imposed a deadline upon itself.

40 El., V:357.

41 El. V:357 f.
mittee was appointed the following day, which was Tuesday.\textsuperscript{42}

After the appointments, the Convention referred to the committee the 23 Resolutions under which, or from which, the text of the Constitution was to be drawn, and also the plans of Charles Pinckney and of William Patterson,\textsuperscript{43} apparently to be drawn upon in the discretion of the committee. The name "committee of detail" occurs in the records for the first time on Thursday, July 26.\textsuperscript{44} Then the Convention adjourned for ten days.\textsuperscript{45}

Before we turn to the next major division of our subject matter, namely, a study of the text of a future constitution proposed by the Committee of Detail, we must for a moment return to events of July 17, the day following the Connecticut Compromise. In fact we need to glance back even farther into the past, and recall that on June 27, which was Wednesday, the Convention had agreed "to postpone the sixth resolution, defining the powers of Congress, in order to take up the seventh and eighth, which involved the most fundamental points, the rules of suffrage in the two branches \textit{i.e.}, the formulae of representation in the two houses of Congress.\textsuperscript{46}

\begin{footnotes}
\item[42] El. V:363; and see Table III, \textit{infra}, p. 384.
\item[43] El. V:363.
\item[44] El. V:370.
\item[46] El. V:248.
\end{footnotes}
When on June 27 the consideration of the jurisdictional provision was postponed, the status of the provision had been defined by two previous actions of the Convention, namely:

(1) the adoption, on May 31,\(^47\) of the whole body of the provision (Resolution 6 of the plan submitted by Randolph on May 29\(^48\)), except the last sentence, which authorized the future Congress "to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof." On this last sentence the Convention was undecided on May 31, and it was postponed.\(^49\)

The time to consider it came again on June 27, but still the Convention felt unready to make a decision, mainly for the reason (as would appear from all the circumstances) that it was not yet known how the power-relationships within the future Congress would be structured, i.e., what the system of representation would be.

But now on July 17, this was already known. It had been decided the day before. At long last a final disposition of Resolution 6 had to be made. It was not only that the last sentence of the resolution, the sentence providing for enforcement, had to be dealt with. There existed moreover a commitment arising from the repeated assurances, given time and again throughout the sessions of the Convention, that the

\(^{47}\text{El. V:139.}\)

\(^{48}\text{El. V:127 f.}\)

\(^{49}\text{El. V:140.}\)
indeterminate expressions of Resolution 6 were merely guidelines for future specifications, and not final formulations of jurisdictional grants. So the specifications were yet to be made, and the Convention came around to the business on July 17.

July 17, Sherman set out to propose an enumeration of powers, but G. Morris would not let him finish, keeping him from continuation by commenting upon the powers which Sherman had been able to mention before the interruption prevented him from mentioning others.

Then Mr. Gunning Bedford, of Delaware, hitherto a steadfast if not especially prominent adversary of almost all innovations that would modify the Articles of Confederation in favor of a more energetic general government, proposed what must have been a surprise motion to the rest of the Delegates, considering that it was coming from Mr. Bedford. - The record in these parts reads as follows:

Mr. Bedford moved that the second member of the sixth resolution be so altered as to read, "and moreover to legislate in all cases for the general interests of the Union, and also in those to which the states were severally incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." Mr. Gouverneur Morris seconds the motion.

Mr. Randolph. This is a formidable idea, indeed. It involves the power of violating all the laws and constitutions of the states, and of intermeddling with their police. The last member of the sentence is also superfluous, being included in the first.

Mr. Bedford. It is not more extensive or formidable than the clause as it stands - no state being separately competent to legislate for the general interests of the Union. [All italics original.]

On the question of agreeing to Mr. Bedford's motion, it passed in the affirmative.

Why the amendment to Mr. Bedford should ever have been proposed or passed, is very unobvious. It does nothing to furnish the promised specifications or concretizations of the abstract terms. It does nothing to resolve the problem of enforcement, which the Convention kept undecided ever since it first recognized its existence on May 31, and which continued to remain unresolved throughout the debates of July 17, the last occasion on which Resolution 6 was debated before the transmittal of the final instructions to the Committee of Detail.

If anything, the Bedford version was more sweeping than Randolph's had been. Randolph thought so. Bedford replied, defensively, that it was not. But if it neither restricted nor enlarged the import of the version which it replaced, what did it do? - The only difference seems to be that the Bedford provision came from the smallest state of the Union, while Randolph's had come from the biggest. And the only tangible effect of replacing the one with the other, seems to be that it made Mr. Randolph even more angry than he had been already.

Then discussion turned to the next part of Resolution 6, in which it was provided that "the national legislature ought
to be empowered . . . to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union, or any treaty subsisting under the authority of the Union. . . ."

This federal veto over state power infringing upon the future constitution was, however, rejected. Then came the moment to resume the most highly troublesome topic of calling forth the force of the Union against any state violating the charter of the Union, but before the theme was unfolded again, a proposal was made which in substance offered an alternative to the military method of securing the Union. Proposed by Luther Martin of Maryland, the provision is of identical essence with the now familiar "supremacy clause" of Article VI, Section 2, of the Constitution. It aims to place the security of the Union upon the conscience of the judges, rather than upon the weapons of soldiers.

The Convention apparently took it as an answer to the problem of the enforcement of federal measures, adopted it unanimously, and the last sentence of Resolution 6, which speaks of using the military might against disobedient states, was never mentioned again.

All done and told, Resolution 6 was in the following shape when the Convention transmitted the whole document

\[52\] El. V:127 f., 321.

\[53\] El. V:322.
containing it and the rest of agreed ideas, to the Committee of Detail:

6. Resolved, That the national legislature ought to possess the legislative rights vested in Congress by the Confederation; and moreover, to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.

Beyond dispute, the above language authorizes the Congress "to legislate in all cases for the general interests of the Union." Beyond dispute, also, is the fact that the above provision is not a part of the Constitution, but of a document which was instrumental during certain preliminary stages of the drafting process which eventually resulted in the text of the Constitution.

Later stages of the developments produced a different method of formulating the powers of the Congress, viz., the enumeration of several distinct grants of jurisdiction. The Constitution, as finally adopted, states the powers of Congress by way of an enumeration.

An earnest mind contemplating all these facts faces a dilemma. Did the enumeration of powers supersede and thus annul the preceding blanket authority "to legislate in all cases for the general interest of the Union," or are we to

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54 Bedford's original motion used the phrase "severally incompetent," but during the ensuing explanation he used the word "separately," which then found its way into the written form of the resolution.
assume that the enumerated powers must be so construed as to enable the Congress "to legislate in all cases for the general interest of the Union?"

The Convention did not ask the Committee of Detail to break up the abstract term into an enumeration, but when the enumeration was offered, the Convention accepted it.
While the Convention was vacationing, the text of the future Constitution was being fashioned in the Committee of Detail. In the absence of a record of its proceedings, only inference remains as the basis for dealing with such doubts as may be raised about the meaning which the Committee intended in writing or arranging the provisions. And doubts have been raised: not immediately, in the Convention itself, as on August 6 it received the report of the Committee and commenced to discuss it paragraph after paragraph not during those discussions; but at various later times. They were raised after the draft of the Constitution had reached the public and the ratification conventions, and during later periods of history, including very recent ones, after the Constitution had been established and become an operating instrument of government.

The Committee of Detail adopted the language of some of the Resolutions almost verbatim into the text of the Constitution, but not so the broad jurisdictional authorization of the Resolution 6, against which there had been such urgent reservations made throughout the previous proceedings. Although the Convention did not instruct the Committee to replace
the blanket mandate of that resolution with a specified list of powers, the Committee resolved the broad definition into a catalog of enumerated powers.

Was this transmutation contrary to the sense of the Convention? And what was the sense of the Convention with respect to the scope of jurisdiction of the future national government? Was the Committee to express in constitutional language the idea of the Resolution 6, enabling the national government to determine for itself from case to case what was of national significance, and to include every such object within its own jurisdiction? Or was the Committee to consider that the repeatedly given promises that the blanket grant would be appropriately qualified, specified, and limited, constituted a binding understanding apart from which the Resolution 6 could not be validly carried into the Constitution?

In various stages of later history, commentators have appeared among the advocates of centralism who asserted, variously, that the Resolution 6, especially in conjunction with the original Resolution 1 of the Randolph Plan,¹ and in conjunction with the subsequently substituted Resolutions 1 and 3,² indicated the sense of the Convention, to confer plenary powers upon the future national government. The Committee of Detail, say these writers, enfeebled the intent of the Convention, but the lost substance was restored again

¹Supra, p. 304.
²Supra, p. 304.
by the Convention. And, they contend, it was the precise purpose of the welfare clause (which, as we shall see, was embodied into the Constitution at a rather late stage), to be the instrument of that restoration of a lost meaning.

This is essentially the argument of Francis Lawson.\(^3\) The enumeration, he contends, appearing in the Constitution without the welfare clause, may have been intended by the Committee of Detail as a move to restrict the national government to the enumerated powers only. But the welfare clause was subsequently supplied, and in its presence the enumeration serves certain secondary purposes only, such as exemplification or emphasis.\(^4\) In accordance with this persuasion, Mr. Lawson disposes of the Tenth Amendment by reading it to mean that whichever powers the national government does not care to assume, are reserved to the several states or the people, so as to make it clear that they no longer belong to some third party, such as the King of England.\(^5\)

The idea that the general import of the Resolution 6 of the Randolph Resolutions, supra, and the definition of the


\(^5\)Id., ch. "The Tenth Amendment," pp. 217 ff., esp. 226: "It reserves to the states the power to act upon matters which Congress does not judge to be of general concern and of which it does not actually take jurisdiction." And on page 227: "What is the reserved power of the people, then, other than their right, in the recurring elections, to change their representatives and their laws."
purpose of the Union as consisting in the securing of the common defense and the general welfare of the United States (see page 30, above), could not have simply disappeared; and that in some form, they must have remained in the Constitution, is shared also by less radical representatives of the centralist trend of thought, notably by Mr. Justice Story, and some more recent commentators.

In the thought of the school which follows Story, the argument resolves itself into the contention that while in the exercise of substantive legislative powers the national government is restricted to the enumerated fields, such restriction does not apply to its fiscal powers, whose scope is coextensive with the concept of the general welfare.

The above are the two most distinct types of the centralist, or, in other words, the "broad-constructionist" trend of thought. Opposed to either of them is the "strict-constructionist" or decentralist thought, represented most notably by James Madison. According to him, the welfare clause adds nothing either to substantive or to fiscal powers of Congress, and merely serves as a preamble to the powers whose enumeration follows.

The evidence herein assembled demonstrates with a clarity which leaves little room for speculation, that the purpose

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7See "variant (III), supra, p. 9.
8Ibid.
of inserting the welfare clause into the draft of the Constitution was not what either Mr. Lawson or Mr. Justice Story have said it was. The events in the Convention pertinent to the point in question ran as follows:

The debate of the draft began August 6, but it took several days for the Convention—which debated the document paragraph by paragraph—to reach Article VII, containing the enumeration of powers proposed to be vested in the future Congress. When finally the seventh article was read and examined, it turned out that no provision had been made for the repayment of the existing revolutionary debts. Pressures accordingly developed for having inserted into the Constitution appropriate provisions which would secure a threefold objective, namely,

That the future government be given constitutional authority to pay such debts;

That the government be constitutionally placed under obligation to pay them; and

That there be a constitutionally guaranteed source of revenue from which the debts would be paid.

The primary concern at that stage was the debts already existing. To deal with the problem a grand committee was created on August 18, which on the 21st of the month proposed

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9See Table III, infra, p. 38434/
a clause in the language following: 10

The legislature of the United States shall have power to fulfill the engagements which have been entered into by Congress, and to discharge, as well the debts of the United States, as the debts incurred by the several states, during the late war, for the common defence and general welfare.

The above, it may be noted, provides nothing concerning debts to arise in the future under the borrowing power. It is a mere cooption into the new Constitution of the principle of Article 8 of the Confederation. The absence of a prospective operation may have been a strike against this provision, but, worse still, the provision authorizes congressional assumption of state debts, a measure which was beginning to emerge as anathema in the minds of many persons disposed to regard the future federal government as a threat to the independence of the states. Hence the provision was "tabled," which at that time meant a bona fide postponement.

Meanwhile on August 22 another committee, viz., the Committee of Detail, which had formulated the original draft, came forward with a proposal of its own, which read as follows:

"The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises, for payment of the debts and necessary expenses of the United States.

This formulation differs from the one above (A) in several respects. It does not suggest the assumption of state debts

10 This and subsequent quotations are from Elliot, Volume V, pages as noted in text to the right of each quotation. The letters to the left will serve to identify each provision for purposes of a summary found in later stages of this chapter.
by the federal government. It is not limited to debts already contracted. And it makes taxation instrumental as the source of revenue from which the debts will be payable. It may be noted also, that the portion of the sentence which begins with the words "for payment of the debts," is an equivalent precursor of the later expression "to pay the debts," while the words "necessary expenses of the United States" preceded the later expression "common defence and general welfare of the United States."

On August 22, then, the Convention had two provisions of similar import on its agenda, namely, (B) and (A). The proposal (A) was taken up first. At the same moment, however, another alternative developed, namely, the opinion

That no enabling provision authorizing the payment of existing debts was necessary at all. P.463

Some held with Ellsworth that it was not, because

The United States heretofore entered into engagements by Congress, who were their agents. They will hereafter be bound to fulfill them by their new agents. P.463

Others believed with Randolph that

Though the United States will be bound, the new government will have no authority in the case, unless it be given them. P.463

Madison concurred that a provision was needed, for the reason that the continuity of the new with the old government might be questioned, and attempts to repudiate the debts of the Confederation might be made on those grounds. However, while asserting the need for a provision covering the already
contracted debts of the Confederation, Madison did not favor, but rather opposed, the adoption of a provision pertaining to debts which were about to be contracted by the future government under its borrowing powers. He regarded the power of repayment as implied in the power to borrow. And as late as 1830 he, an old man at that time, butterly regretted that the provision was ever adopted, because during its adoption it had become the vehicle upon which the welfare clause got into the Constitution, soon to become a source of mischief with which he and others had to contend all their lives.11

Neither of the two provisions before the Convention on August 22 made the payment of the debts mandatory, and this was felt as a defect by some. Accordingly, G. Morris moved that in the provision designated herein above as (A), the words "The legislature . . . shall have power to fulfill the engagements" be replaced with the mandatory

(D) The legislature shall fulfill. . . . P. 464

This amendment was voted upon first, and adopted unanimously.

Then an oversight occurred. The Convention, forgetting that the locus designated in the draft as Article VII, Section 1, paragraph 1, was occupied by the clause enabling the future Congress lay and collect taxes, etc., assigned this place to the freshly adopted amendment (D). The taxing power was thus eliminated from the Constitution. The provision (A), amended by (D), was now holding the position VII:1:1. This went un-

11Madison to Stevenson, El. IV:612.
noticed for quite some time, while the provision about debt continued to be belabored further.

Thus on Saturday August 25 Randolph and Butler moved for a reconsideration of the debt provision, proposing a new formulation, as follows:

All debts contracted, and engagements entered into, by or under the authority of Congress, shall be as valid against the United States under this Constitution, as under the Confederation.

This move was undoubtedly motivated by the intention to get rid of the authorization of the assumption by Congress of the debts of the states. The motion (E) carried, uncertain whether to replace (A) as amended by (D), or to be added to it. As we know, it eventually worked out in such a way that (E) became a provision in its own right in the new Constitution, viz., Article VI:1; while (A/D) was replaced with (B), somewhat modified so as to uphold the last words of (A). We shall see presently the steps which led to those results.

Neither the provision (A), which now was amended by (D), nor the provision (E), which was now adopted either to stand aside from (A/D) or to replace it, take care that taxation be constitutionally made the source of revenue from which public debts should be paid. Indeed, as we have noted, the taxing power was temporarily dislodged from the draft altogether.

Sherman was one of the men who were continually concerned about the soundness of constitutional arrangements for the repayment of public debts, and he apparently regretted the rejection of the version (B), which had the virtue of bringing
the idea of debt into conjunction with the idea of taxation. Like others, he seems to have overlooked that the taxing clause itself had been inadvertently removed from the Constitution. Assuming that the power to tax was still there as Article VII, Section 1, he now proposed the following:

(F) To add to the first clause of Article 7, section 1, "For the payment of said debts and for the defraying the expenses that shall be incurred for the common defence and general welfare."

This was proposed the same day as (E), namely, August 25. But the Convention voted (F) down. The reason of the rejection of this Sherman proposal occupied a great deal of attention of Mr. Justice Story, who took issue on this score with Madison. This controversy goes to the heart of our problem, namely, the intended meaning of the welfare clause. Therefore we must give it a close examination.

Madison himself noted in his record of the debates simply that (F) was rejected by the Convention "as unnecessary." Story, however, first imputes to Madison the speculation that the Convention rejected the provision because of "the generality of the phraseology"—an opinion nowhere asserted by Madison himself. To this allegedly Madisonian opinion Story then opposes his own view, which is as follows:

(X) It is most probable that it was rejected, because it contained a restriction upon the power

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13Story, op. cit., p. 683, note.
to tax; for this power appears at first to have passed without opposition in the general form.\textsuperscript{14}

He refers to the same point at another place,\textsuperscript{15} in these words:

So that the whole clause \texttt{[the taxing clause]} stood \texttt{[after the rejection of (F)]} without any further amendment, giving the power of taxation in the same unlimited terms as it was reported in the original draft of the Constitution.

According to (X), above, it would seem, then, that this is how the Convention wanted the taxing power to be: unrestricted, unlimited. Astonishingly, however, Story immediately continues:

This unlimited extent of the power of taxation seems to have been unsatisfactory; and at a later day a committee reported that the clause respecting taxation should read as follows:

The legislature shall have the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States:

and this passed \texttt{[continues Story]} in the affirmative without any division.

Aside from the contradiction between (X) and (Y), which shows that Story's reconstruction of the attitude of the Convention vacillates without explanation, it must be objected to him that he imposes a gratuitous assumption as to the scope of the purposes of taxation intended by the original draft of August 6. He takes it for granted that as it originally stood, the taxing clause empowered the Congress to lay and collect

\textsuperscript{14}Ibid.

\textsuperscript{15}Id., p. 680.
taxes for any purposes whatsoever, regardless of the fact that the idea of the draft was to create a legislature of limited and enumerated purposes and powers. On that assumption, he reasons that the welfare clause could not possibly have had any other purpose but to operate as a limitation upon the presumably plenary power of taxation, and he shows us the Convention now as rejecting the alleged limitation, now as adopting it.

But on all the evidence, some of which was presumably unavailable to Story and some of which he chose to disregard or overrule, the story presented by Mr. Justice Story is an artifact constructed around an assumption for which there is no support either in logic or in history. The rejection of Sherman's proposal (F), and the adoption, on a later occasion, of the language (G), had nothing to do with any intention to manipulate the topical scope of the taxing and spending powers. The motion (F) was brushed aside as unnecessary, and not as contrary to the (alleged) intention of the Convention to keep the (allegedly) general scope of the taxing powers undiminished. Nothing indicates, and everything opposes, the notion that a general taxing power was intended in the first place. Hence it could not have been the role of the welfare clause to restrain or restrict it. The rejection of the proposal (F) occurred because the Convention thought it unnecessary to point out that the public debt could be paid from revenues obtained by taxation. It was too obvious that it could. And as for
the other desiderata of the creditor interest, they had been taken care of by the existing provisions. That the taxing power had been inadvertently displaced, remained, as we have already observed, unnoticed at the time.

The discovery of discrepancies led, within a week of the events on August 25, to the formation of the Committee on Unfinished Portions. Thanks to the recommendations of this unit, the Randolph amendment (E) was removed from the place which originally belonged to the taxing provision (VII:1:1 of the draft of August 6), and shifted to another part of the draft. This vacated the position for the taxing clause, which was restored and combined with a debt clause in a fashion similar to the version (B). In the debts clause itself, the words "for payment of the debts and necessary expenses of the United States" were rephrased so as to read "to pay the debts and provide for the common defence and general welfare of the United States." The latter part of the new language satisfies the form proposed earlier as (F), which we have seen was at first rejected. The same language (reference to common defense and general welfare) had been used also in (A).

The eventual result of the action of the Unfinished Portions Committee, approved by the Convention, was the following clause:

\[(H)\] The legislature shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States (September 4).
The considerations which led to the various shifts of language and to the miscellaneous regroupings and rearrangements of clauses can be easily identified from the records of the proceedings. It is a simple matter to explain why the version \((H)\) was adopted although the similar provision \((F)\) had been rejected "as 'unnecessary'" shortly before. But simple though it is, a commentary seeking to exhaust all the trivialities of the process of drafting could run into pages and more pages of what even a very benevolent reader would undoubtedly characterize as a tract of boredom. Clear it is, in any event, that the dilemma between the broad and the narrow concept of the taxing power, in the sense in which it later became habitual to distinguish between the Hamiltonian and the Madisonian view of the taxing clause, was not before the Convention at any stage of its proceedings. Hence it could not have been the function of the words referring to common defense and general welfare, either to extend or to contract the scope of that power.

As a reconstruction of an historical reality, then, the theory of Mr. Justice Story must be rejected.

The fact that Story did not have access to Madison's notes of the debates of the Convention does not wholly explain the divergence of his position from historical fact as revealed by the evidence available to us. Story did have, and used, the official journal, which recorded the text of the motions and their sequence. In addition, he had the
benefit of Madison's letter to Stevenson, in which the
genesis of the welfare clause is again outlined in no uncer-
tain terms. But Story chose to doubt Madison even though
the latter's words were those of a direct reporter of events,
rather than mere opinions of a distant interpreter. Instead
of taking Madison's letter as evidence, Story quarrelled with
it as if its content were hypotheses on equal footing with
Story's own. With that attitude, he would have had to feel
free to question the notes of the debates as well, if they
had been at his disposal.

It is our conclusion that Story's position emanates
primarily from his purpose and not his research. The light
in which he reads the history, springs from his commitment
to the future. His theory is eminently practical, but
authentic it is not.

A few more words are now necessary to complete the ac-
count of the fashioning of the welfare clause in the
Convention. The remarks to be added pertain to the trans-
formation of the version (H), above, into the final language
and arrangement of the welfare clause in the Constitution.
The formulation which was eventually adopted, and which has
remained the same to the present day, is this:

Article I. Section 8. The Congress shall have
Power To lay and collect Taxes, Duties, Imposts
and Excises, to pay the debts and provide for the
common Defence and general Welfare of the United
States; but all Duties, Imposts and Excises shall
be uniform throughout the United States;
The transition from (H) to ( ) was effected partly in the Committee on Style and Arrangement, partly in Convention. The rearrangement of articles and section of the Constitution was done in the Committee, which also substituted "Congress" for "legislature." The requirement of uniformity of taxation was added by the Convention itself. Also inserted by the Convention there was, for a while, a clause giving Congress the power to appoint a treasurer; but it was dropped and never entered into the final draft. It had been located where now the requirement of uniformity is (see (G), above).

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Such, then, are the main facts of the formation of the welfare clause of Paragraph 1, Section 8, Article I, of the Constitution. And now, before proceeding to the general reviews and summaries with which our study will close, a few special notes amplifying the above accounts are in order.

A Note Concerning Punctuation and Capitalization

Rumors have it that an attempt was made in the Committee on Style to inject a semi-colon after the word "Excises," with a view of creating the impression that the subsequent clause authorizing the payment of debts, and the following clause referring to provisions for defense and welfare, were each meant to be vestments of independent powers— independent of each other and, more importantly, each of the taxing clause which precedes them. The result presumably hoped for by this alleged trick of punctuation would have been a language
seemingly authorizing the Congress to exercise legislative powers for any and all purposes comprised within the notion of the general welfare of the United States.

But this attempt, if made, was in any event marred even before the report of the Committee was returned to the Convention. The solemnized parchment-transcript of the Constitution bears no trace of any semi-colon at the particular point of the text.

It may be noted in passing that in the course of the formation of the provision there were fluctuations in the matter of a comma after the word "Imposts." Some of the intermediate versions have a comma there, preceding the "and." The parchment-text does not show a comma in that place. It would make no difference if it did.

Except for Congressman Henry St. George Tucker, delivering an oral dissertation on the welfare clause in the House of Representatives in 1926,16 none of those who have heretofore argued whether or not the words "to provide for the common Defence and general Welfare of the United States" are an independent sentence constituting a plenary mandate, have given any consideration to the selective capitalization of letters in the original of the Constitution.

But the evidence inherent in such consideration is pretty conclusive all by itself, regardless of all manner of other argument and analysis.

16Supra, p. 297.
As an examination of the original text of Section 8 of Article I of the Constitution clearly reveals, each independent unit of the text, constituting a grant of power, begins with a capital T in the infinitival "To" with which the statement begins. Thus a capital letter begins the expression "To lay and collect Taxes," but a small letter introduces the phrase "to pay the Debts." What follows then is an infinitive of the verb "provide," but it has no "to" in front of it; it borrows it, so to speak, from the preceding reference to the payment of the debts. This verb "To provide" then controls two objects, "the common Defence" and "the general Welfare of the United States." The connective "for" relates the "provide" to both objects.

After "United States" in the above is a semi-colon (not identical with the controversial semi-colon mentioned supra, on page 340), then follows the memento "But all Duties, Imposts, and Excises, shall be uniform throughout the United States;" and the whole unit is closed by a colon, which stands for a period and ends a sub-paragraph.

Then, on a new line appears "To borrow money on the Credit of the United States:" which is followed by a list of entries, each beginning with a capitalized "To."

The whole arrangement clearly shows that in the first paragraph of Section 8, Article I, only the first "To" begins a unit of meaning. The other infinitives are subordinated.
A Note Concerning Roger Sherman's Role
In Writing The Welfare Clause

The term "general welfare" was first mentioned in the Convention by Edmund Randolph, reading from his notes the first parts of the Virginia Plan. He was recommending, in the Plan's Resolution 1, which he recited on Tuesday, May 29, "... that the Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects of their institution; namely, 'common defence, security of liberty, and general welfare'."17

The "objects of the institution of the Articles of Confederation," i.e., their purposes, had been stated in the Articles themselves. Article 3 read as follows:

The said states hereby severally enter into a firm league of friendship with each other for their common defence, the security of their liberties, and their mutual and general welfare; . . . .18

Article 8 provided in part as follows:

All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, . . . .19

The text of the Articles had been drafted by a committee of 12 members of the Continental Congress, which was first appointed in late spring of 1776, and reported in mid-November

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17El. V:127.
18El. I:79.
19Id., 81.
1777. Its membership was composed thus:

Josiah Bartlett (New Hampshire); Samuel Adams (Mass.); Stephen Hopkins (R.I.); Roger Sherman (Conn.); Robert R. Livingston (N.Y.); John Dickinson (Del.); Thomas M'Kean (Del); Thomas Stone (Maryland); Thomas Nelson (Va.); Joseph Hewes (N.C.); Edward Rutledge (S.C.); and Button Gwinnett (Ga.).

Of these 12 committeemen of the Continental Congress who drafted the Articles of Confederation, three became subsequently delegates to the Federal Convention which wrote the Constitution a dozen years later. They were Dickinson, Livingston, and Sherman.

The proceedings of the committee which drafted the Articles of Confederation are unavailable. It cannot be known who suggested the phraseology containing the term "welfare." It was not a frequently used word in the American political literature of the times. Indeed, it does not seem to appear anywhere in American state papers of the Revolutionary period, or in those of any earlier period. The political writer whose philosophy had the deepest influence upon the doctrines of the American Revolution, John Locke, does not seem to have ever used the word "welfare" in his political writings. It may be that the term "welfare" as a term of political and legal parlance was suggested by translations of the works of the Swiss jurist Emerich de Vattel (1714-1767), who uses the term *le bien public*, and who was influential in America since

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20 El., I:67, and cf. id., 63.
the middle of the eighteenth century. 21

Whichever source the term may have come from, it was used to express one of the purposes of the Union under the Articles of Confederation: "the mutual and general welfare" of the states. That was in 1776.

Then in 1787, the reformers who convened in Philadelphia in the spring of 1787, declared that the Articles ought to be improved so as to actually accomplish the purposes of the Union for whose accomplishment they (the Articles) had been drafted. This was stated, as we have noted, in the Resolution 1 which was read May 29. Then on May 30 a stronger version was substituted as an amendment of Resolution 1, namely:

That a union of the states merely federal will not accomplish the objects proposed by the Articles of Confederation—namely, common defence, security of liberty, and general welfare. 22

After these expressions the word "welfare" was not mentioned again until July 17, the day following the Connecticut Compromise. On that day there occurred one of the numerous debates arising from the Convention's inability to resolve the dilemma as to which to do first: outline the structure of the future government, and then determine the powers it should have, or the other way around. It was decided to settle the jurisdiction first. The main participants in the

21Holmes v. Jennison, 14 Pet. 540 (1840), quotes Vattel at p. 572, as defining a "treaty" as "a compact made with a view to the public welfare. . . ."

22El. V:132.
debate were Gouverneur Morris and Roger Sherman. The Resolution 6 of the Virginia Plan, which had been postponed, was resumed, and Sherman observed, that it would be difficult to draw the line between the powers of the general legislature and those to be left with the states; that he did not like the definition contained in Resolution 6; and proposed, in its place, to insert "individual legislation," inclusive, to assert "to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the government of the individual states in any matters of internal police which respect the government of such states only, and wherein the general welfare of the United States is not concerned.

James Wilson seconded this amendment, "as better expressing the general principle." Gouverneur Morris opposed it: "The internal police, as it would be called by the states, ought to be infringed in many cases, ..." Then "Mr. Sherman, in explanation of his idea, read an enumeration of powers, including the power of levying taxes on trade, but not the power of direct taxation. Mr. Gouverneur Morris remarked

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23El. V:319 f.

24El. V:248, 317, 319. The Resolution 6 read at that time: "That the national legislature ought to possess the legislative rights vested in Congress by the Confederation, and moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the U.S. may be interrupted by the exercise of individual legislation."

25Italics added. Be it noted that the above proposal by Sherman is not to be found among the several versions of provisions dealt with supra., on pp. 330, because the latter set belongs to the period, following August 6, when the text of a constitution itself was debated. The proposal made by Sherman on July 17 belongs to the preliminary agenda during which materials for a future text were being prepared.
the omission . . . . Mr. Sherman acknowledged that his enumeration did not include direct taxation. Some provision, he supposed, must be made for supplying the deficiency . . . but he had not formed any." "On the question on Mr. Sherman's motion, it passed in the negative. Connecticut, Maryland, ay, 2 /all the rest, no, 87/.

The above emphasized quotation of July 17 represents the first use of the words "general welfare" since Randolph had used them on May 29 and 30 in his Resolution 1 and its amendment. The July 17 formulation moreover represents the first use of the phrase "general welfare" as a part of a jurisdictional definition, whereas Randolph had used those terms to co-define the purposes of the Union, following Article 3 of the Confederation. It is important to note that the proponent of the provision was Sherman.

The phrase "general welfare" was again included in the proposal (A), above on page , which originated in a committee dealing with the problem of public debts. The committee reported on August 21. Sherman was among its members. On August 22 version (B), above on page was reported by a committee in which Sherman was not a member. The language used did not contain the phrase "general welfare." It had the words "for payment of the debts and necessary expenses" instead. On August 25, Sherman proposed version (F), above on page 334 . It refers to "common defence and general welfare." It was voted down. A week later, September 2, the
following occurred according to Madison's Notes:

On motion of Mr. Sherman, it was agreed to refer such parts of the Constitution as have been postponed, and such parts of reports as have not been acted on, to a committee of a member from each state; the committee, appointed by ballot, being.

... Here the 11 members are enumerated by names_726

The membership included Sherman and Madison. Chairmanship went to David Brearly of New Jersey. Pierce Butler, one of South Carolina's most energetic fighters for the idea of a limited government with specified powers, was also included. Rufus King (Mass.) and Gouverneur Morris (Pa.) were there too. The rest included Nicholas Gilman of New Hampshire, Hugh Williamson of North Carolina, John Dickinson of Delaware, Daniel Carroll of Maryland, and Abraham Baldwin of Georgia.

The composition of the unit is of interest for purposes of inference concerning the intended meaning of the proposals which it produced. The committee reported September 4 version (H), above page 337, which is of an identical essence with the welfare clause of the Constitution. (Article I, Section 8, paragraph 1.)

Thus it is evident upon a summation of the above observations that, with the exception of certain initial resolutions read to the Convention in late May by Randolph of Virginia, virtually every proposal containing the words "general welfare," originated either in Sherman himself, or in a committee of which he was a member. Conversely, no

26El. V:503.
committee of which Sherman was not a member, produced language containing the phrase, nor was the phrase used by any individual delegate in the Convention, except Sherman (and Randolph in the original Resolutions.).

It would appear that the above correlations constitute a fairly well substantiated reason to believe that Roger Sherman of Connecticut was the principal mover of the welfare clause, and that its insertion into the Constitution is to be ascribed to his efforts.

Sherman's interest in economics generally, and in matters of taxation and the public debts specially, tend to reinforce the above conclusion, although, of course, the latter considerations import much less probative value than those above, because, obviously, interest in economics and in the practicalities of redeeming the Revolutionary debt was not peculiar to Sherman.

If Sherman is the author of the welfare clause, any indication of the idea he had of its meaning would be of special interest to us. Regrettably, his literary estate, all parts of which have been examined—at least briefly—by the present writer insofar as he has been able to learn about their existence, do not offer anything in the nature of a major statement to the point. The only interesting and relevant element is the episode, noted above on pages 65, 66, which occurred, after the adoption of the Constitution, in Congress between Sherman and Madison, during the debate of the National Bank bill in February 1791.
The episode had three stages of development. In the first, Sherman asserted, in the little note handed to Madison (above, pages 365), "that Congress have power to provide by law for raising, depositing and applying money for the purposes enumerated in the Constitution and generally of regulating the finances." In the second stage, Madison negated, by signs penned on the piece of paper, the words "and generally regulating the finances." In the third, Sherman conceded to Madison and gave up the contention asserting the general fiscal power.

We presume that Sherman did not yield to Madison (who was much younger) out of courtesy or excess of benevolence, but because Madison's resistance reminded him of understandings which were in the minds of the draftsmen of the Constitution, including Sherman and Madison themselves, at the time of writing the welfare clause, at the end of the tax clause, into the Constitution. Had anyone at that time, September 1787, in the Committee on Unfinished Portions or in Convention, postulated the broad meaning for the welfare clause, Sherman would have been able, in February 1791, to invoke against Madison the memory of such an understanding. But evidently he (Sherman) recognized, during the episode of 1791, that he had no foot to stand upon, because neither he himself, nor any other Delegate, had contemplated the larger meaning of the clause at the time of the original adoption of the provision either into the report of the committee or, by a vote of the Convention, into the Constitution.
If Sherman was himself the mover of the clause, as we think he was, into the committee report whence it passed, by unanimous vote, into the Constitution, then evidently it is important for us to have his view of the sense of the clause. It is especially important to know what the meaning was when proposed. And common sense in fairness suggests that the meaning as proposed was the same as eventually acquiesced in by Sherman after the exchange with Madison in 1791. For the reminiscence of the original intentions prevailed on the later occasion, although it would have been more convenient for Sherman's immediate political purposes to have a different, larger interpretation put upon the clause.

If Sherman was not the individual author of the welfare clause, even then his concession that Madison was right is very relevant. Both men were on the Unfinished Portions Committee, both were present at, and participated in, the Convention's vote adopting the recommendations of the Committee. Both remembered a few years later with what sense in mind had the Convention adopted the clause. Both agreed, on the later occasion (1791), after some exchange of views, that the position maintained by Madison was the correct one. Why should they have agreed so, if it were not true? For political reasons? But Sherman's political preference at that time (1791) pointed in the opposite direction. Hence if he agreed with Madison, the reason for the agreement must have been in something else.
It was in the recognition of the fact that in 1787 Sherman himself had no notion of the generalized concept of the spending powers under the welfare clause which (evidence) suggests he himself proposed.

Concluding by summarizing, we assert two points as a result of the above discourse concerning Sherman. One, Sherman was the man who carried the phrase "general welfare" into the Constitution. Two, at the time of proposing the language of the provision, he did not anticipate its larger potential.

But we may add that he had discovered the larger interpretation of the clause before Hamilton did. Had he persisted, the particular use of the clause might today be known as the Shermanesque version, rather than Hamiltonian doctrine. As it is, history may observe merely, that Sherman was apparently a rather honest and truthful man. (Nor do we suggest that Hamilton was otherwise. He was free to advocate an arbitrary interpretation, because he was blessed with a complete ignorance of what happened in the Convention during the time in which the welfare clause was made.)

* * *

A Note Concerning The Welfare Clause of the Preamble

The Preamble of the Constitution, as noted on page of the "Introduction," supra, has never been officially recognized as a source of legal powers, hence the present study
is not directly concerned with it. On the other hand, the fact that the phrase "general welfare" appears in it, brings the Preamble within the purview of our attention by virtue of the same considerations which have induced us to be interested in every document of early American statesmanship in which the language "general welfare," or "welfare" in any connection, or equivalent expressions, might be found.

If the phrase "general welfare" had been adopted into the Preamble before the welfare clause of Article I of the Constitution was formed, and if, therefore, we were led to suppose that its use in the Preamble was original and in Article I derivative, a thorough analysis would have been indicated of the formation of the Preamble, in the hope that the enquiry might shed some light upon the concept of "general welfare" as thereafter used in Article I. Especially if an ample discussion had surrounded the introduction of the clause into the Preamble, valuable insights might perhaps have been hoped for from the enquiry.

But it did not happen that way. The first draft of the Constitution, from Committee of Detail on August 6, offered a sort of skeleton-preamble which stated no purposes of the Union at all. Its language was:

We the people of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare,
and establish, the following Constitution for
the government of ourselves and our posterity: 27

This is identical with the preamble of the draft of Charles
Pinckney, submitted to Convention on May 29, 1787.28

The Preamble as it now "walks before the Constitution"
was designed by the Committee of Style and Arrangement, and
emerged from it in the printed report distributed by chair­
man Dr. William Samuel Johnson (Conn.) on September 12.29
The Convention took notice of it, but no questions were raised
about the new Preamble, and no part of it was debated. Other
portions of the text of the Constitution as reported on
September 12 underwent quite a number of alterations before
finally the Constitution, with the amendments made on and
after September 12, was approved by the Convention;30 the
Preamble remained unchanged. It is so to the present day.

The Preamble as adopted, recited the purposes for which
the Constitution of the United States of America was to be
ordained and established. Among them was "to provide for
the common Defence," and "promote the general Welfare." These


28 El. V:129. The uncertainties surrounding the paper
which has been preserved as the Pinckney draft, tend to annul
the inference that the Committee of Detail adopted the preamble
of August 6 from the Pinckney draft of May 29.

29 El. V:535 f. Warren, op. cit., 393 f. For text of the
Preamble proposed September 12, see p.xvi, supra.

30 The approval of the Constitution took the form of a
vote, which occurred on September 15. All the states voted
for the Constitution. El. V:553 in fine. Some individual
delegates voted "no."
expressions may have been taken from Article I, Section 8, Paragraph 1, of the Constitution, but at least indirectly they emanated from the sources whence Article I, Section 8, Paragraph 1, itself derived its elements. These sources comprised (1) first of all Article 3 of the Confederation, reciting common defense, security and liberty, and the mutual and general welfare of the states, as the purpose for which the charter was adopted. Secondly (2), constitutions of the several states, too, had their preambles, some of which recited a good portion of the then flourishing Natural Rights philosophy, a fashion in which the Declaration of Independence had led the way. Governments are instituted among men, heralds the Declaration, in order to secure certain inalienable rights, such as life, liberty, and the pursuit of happiness. Such is the purpose of governments, then, and some of the constitutions of the states spelled it out in their respective preambles. Others omitted the philosophical content and merely stated that the people of the given state "ordain and declare," or the like, "the following constitution." This simple pattern was followed in the (presumed) draft of Charles Pinckney, of May 29, and again in the text reported by the Committee of Detail on August 6.

The omission of whatever general discourse on the nature and purpose of government might have been inserted into the preamble by the committee of Detail, was perhaps the result of Randolph's contention, in the committee, that such matters
did not belong into the preamble of a constitution of the Union. Said he:

A Preamble seems proper, not for the purpose of designating the ends of government and human politics. This display of theory, however proper in the first formation of State Governments, is unfit here; since we are not working on the natural rights of men nor yet gathered into society, but upon those rights modified by society and interwoven with what we call the rights of the States. . . .

But the object of our Preamble ought to be briefly, to declare that the present Federal government is insufficient to the general happiness, that the conviction of this fact gave birth to this Convention, and that the only effectual mode which they [the states in Convention assembled, or their Delegates], can devise for curing this insufficiency is the establishment of supreme Legislative, Executive and Judiciary. Let it be next declared that the following are the Constitution and fundamentals of Government for the United States.31

In other words, the substance of the above reiterates, in part, the introductory disquisitions with which Randolph addressed the Convention on May 29 before he read his Resolutions. In part, the above echoes the words with which Randolph ended his presentation, the same day (May 29) after presenting the Resolutions: "He concluded with an exhortation, not to suffer the present opportunity of establishing general peace, harmony, happiness, and liberty, in the United States, to pass away unimproved."32 And in part the above resembles some of the Resolutions themselves, especially #1

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31Warren, op. cit., 392 f.
32El. V:128.
of May 29, as amended by #1 of May 30, and ##2 and 3 of May 30.33

The Committee of Detail eventually came up with a preamble which omits both the Natural Law doctrine (or other formulation of principles and purposes of human government), and the historical allegations of the causes of calling the Convention, and the causes of adopting the Constitution. Nor does it advertise the supremacy of the three branches of the federal (or national) government.

As the source of authority in whose name the constitution was to be declared according to the draft of August 6, the preamble named the people of the several states, state-by-state, as we have seen above (p.353).

The Convention did not concern itself with the preamble of August 6 any more than at a later time it showed an interest in the preamble of September 12. The latter version abolished the enumeration of the several states, replacing it with the expression "We, the People of the United States." It adopted a statement of purposes, not in the usual Natural Law terms, which refer to individual human rights, but rather in terms of values attributable to a public order itself, and especially a federated public order; to form a more perfect Union; establish justice; ensure domestic tranquility; provide for the common defense; promote the general welfare; secure the blessings of liberty "to ourselves and our posterity."

33El. V:127, 132.
All of these terms are familiar from the Articles of Confederation and from the initial discourses of the Convention, except perhaps the references to establishing justice and ensuring domestic tranquility. These additions and possible other variations ascertainable in the Preamble to the Constitution in contrast to corresponding elements in the Articles of Confederation, may well bespeak the changed nature of the Union. But precisely how the Union was changed, can be only determined from the Constitution proper, by interpreting the terms of the main document itself. The apportionment of governmental powers is detailed in the Constitution, not the Preamble. But, it may be objected, cannot the Preamble, in turn, be a guide in the constitutional interpretation itself? Is it there for nothing, or is its purpose merely to evoke a mood of solemnity in those preparing to read the Constitution? Would, then, a piece of music, a fanfare played out on a trumpet, perform a like function as well, or better? Or is it rather that the Preamble's concepts point to certain large ideas of ethics; bind in conscience; exhort the possessors of power to mind how they should be using it. But if so, would it then clearly be wrong to suggest that the powers given in the Constitution must be adequate to the purposes expressed in the Preamble? And if it is not wrong, does it not follow that the content of the Preamble defines the uses of the powers given by the Constitution? If it does, what is there that the Congress
would not have the jurisdiction to do, using this or that enumerated power as the tool to do it? And what difference does it make to which of the headings of enumerated powers an action is referred, since the conclusion, implicit in the premise, must be in any event that the taking of jurisdiction is constitutional, provided that the action is said to aim at perfecting the Union, doing justice, securing tranquility, or providing for general welfare? On the other hand, if this is what the Constitution with the Preamble means, what are the powers enumerated for?

Thus honest and intelligent men have argued in circles time and again for nearly two centuries.

Nor can a purely logical exegesis, with its "analytical judgments," i.e., inferences drawn from concepts alone, ever stop the endless motion of thought, back and forth, between ultimate absurdities. Dwell long enough upon a theory, and it becomes possible. But where everything is possible, affirmations and negations of the same things appear at once, and everything becomes impossible. Rationality dissolves, and chaos enters.

The historical realities surrounding the idea of the Constitution are, however, nowhere near so metaphysical. The Founders in the Convention were not even mildly interested in how the Constitution would be introduced, whether by the preamble of August 6, or that of September 12, or none at all. They argued carefully about the individual powers being
enumerated in the Constitution. They entirely ignored the procession of ideals in the preamble, as they had mostly ignored the introductory generalities preceding this or that concrete agenda in the earlier stages of the Convention.

They ignored the large abstractions, not because they were nihilists, but because the ultimate axioms were self-evident, and it made no difference how they were expressed, if at all.

The Preamble was not meant to expand the Constitution: neither is it itself a grant of power, nor does it enlarge the grants specified in the Constitution by holding out huge purposes to which the stated powers should be stretched. If anything, it binds the users of the stated powers to certain noble goals in using the powers. But it does not seek to encourage the men in authority to add new powers to those given, albeit the better to serve the noble ideals.

The Preamble, in short, is not of a legal nature. Even as a restraining provision, it is unenforceable in courts. Should Congress use any of its given powers unjustly, the legislative action could not be enjoined as violating the Preamble's words "to establish justice." For enforceable criteria of justice we must look to the Due Process clauses of the Constitution, or to the prohibition against congressional favoring of some ports over others, or the clause forbidding uneven duties, imposts, and excises, and other parts of the Constitution itself.
The Preamble informs us that the Constitution is ordained to establish justice, and the Constitution does establish it. The Preamble itself does not establish justice. The Preamble tells us the Constitution is ordained to ensure domestic tranquility, and the Constitution ensures it, for example, by prohibiting any state to lay imposts or duties upon any imports or exports, unless by Congress's permission. The Constitution further ensures domestic tranquility by making the federal force available to states which may ask for help to put down a rebellion. It ensures tranquility by taking things conducive to interstate quarrel out of the hands of the states, such as regulation of commerce among them. It ensures tranquility by taking religion out of the hands of any governmental unit in the country. It reinforces tranquility at home by offering the federal force to guarantee each state a republican form of government. And so on.

On the whole, the Constitution allocates some powers here and some powers there; it withholds various powers from this one and that one. It insists on a certain manner of exercising governmental powers. These patterns of jurisdictional dispersal themselves are calculated to aid justice, tranquility, defense, welfare, and liberty. The Preamble, in saying so, merely describes a fact and introduces the Constitution for what it is. In this respect the Preamble is not even a norm: not legal, not ethical. It does not admonish or bind. It merely describes.
On the other hand, with respect to each existing governmental power, state as well as federal, the Preamble conveys the exhortation that it be used wisely, i.e., for justice, tranquility, and the general well-being. In this respect, the Preamble is a set of axioms of political ethics. Thus it is not useless, even though it has no legal import.

The welfare clause of the Preamble differs somewhat from the welfare clause of Article I of the Constitution. The Preamble informs us that the Constitution, as a whole, "promotes" the general welfare, by all the powers and prohibitions stated in the Constitution. The welfare clause of Article I refers only to the power to tax and spend, i.e., fiscally to "provide" for the general welfare.

The "general welfare" of the Preamble is not merely the welfare of the "United States," but rather, it seems, of "ourselves and our posterity." The Preamble speaks about people. So does the Constitution in a few places. But the enumerated powers are directed at certain objective functions: the postal system, commerce, defense. The "welfare of the United States" was probably meant to consist of the proper functioning of these institutions. The United States taxes were meant to be spent on the institutionalized functions of the United States.

The welfare of individual people was, in the Founders' day, either of no public concern at all, or it was the con-
cern of local governments or of the states. The immediate human welfare was an object reserved to the several states, "or to the people," by the 10th Amendment. The Constitution "promoted" the general welfare of "ourselves" and "our posterity," by reserving a basic volume of powers to the states, or "to the people."

The "general welfare" of the Preamble seems to mean "welfare generally," the well-being of all those concerned: people, local institutions, states, and the federal functions. The Constitution promotes it, to repeat, as much by leaving some powers with the states, as by placing others into federal hands. By contrast, the "general welfare of the United States," in Article I, is the well-functioning of the federal government, just as "the debts of the United States" are the debts of the federal government.

The fiscal functions of the United States were undoubtedly intended, by the Founders, to subserve merely the federal governmental institutions. The states were left with their own taxing and spending powers, and with other powers, to make their contribution to "welfare-in-general," by promoting the local welfare.

The Constitution apparently did not foresee mutual grants of money either by states to the federal government, or to the states by the federal government.

* * *
In Conclusion of Part II of the Essay, and of the Whole Essay

We have now concluded our study of the Second Part of the essay, which has acquainted us with the formative process where the constitutional provisions which interest us have arisen. Information of their genesis has given us a fair insight into their intended meaning.

We recall that the Federal Convention worked in two successive stages. In the first stage gross ideas were formulated and registered as "resolutions." In the second a committee worked on details, reduced them to a language fit to be the text of a future constitution, and then the Convention spent the remaining part of its sessions working on the text itself.

During the epoch when the raw materials were formed, the Convention adopted time and again the principle that the future Congress should have powers concerning the common interests, leaving to the states what was of a locally domestic concern. This undeniable fact has been keenly exploited by some commentators to argue that a general legislative authorization was intended to be given to Congress throughout the deliberations of the Convention.

These commentators forget, omit, or deemphasize the other, equally undeniable fact, that, also throughout, exceptions were taken and objections raised to any such indefinite grant of jurisdiction, and that assuring explanations were
repeatedly made stating that the current formulations were preliminary outlines of principle subject to later articulation and specification.

When for the last time the broadly defined jurisdic­tional principle was voted in, about 10 days before the materials were transmitted to a committee to work on details, there was nothing among the materials from which any kind of "teeth" could be constructed by the committee. Nor was any­thing in that nature added during the remaining ten or nine days. No resolution instructing the committee to formulate any sanctions of enforcement of the federal powers was among the materials which went to the committee.

Hence by the same token that the nationalists argue from the record of the first epoch of the Convention for a general grant of powers, their antipodes the resurrectionists of the Articles of Confederation could argue that no inde­pendent ability was intended for Congress to enforce whatever measure of powers were given to it, and that the states were meant to remain the only executive departments of the fed­eral government.

In the second epoch of the Convention, the Committee of Detail came forth with a list of enumerated powers. The Convention had not given any instruction requesting such enumeration, but from immediate responses of the Convention to the enumeration it is obvious that the principle was both understood and approved. Neither illustration nor emphasis
was the purpose of the enumeration, but something much more fundamental. The enumeration embodied in itself the demarcation line between the powers of the central government on one hand, and the powers left to the states on the other. It was the heart of the federal dualism. It was the fulfilment of the promises stipulating that the erstwhile roughly stated principle of jurisdictional sharing would be specified in detail.

Inherent in this polarization of powers was the assumption that to the extent of the enumerated topics of action, the new Government would have a complete authority and a system of enforcement sufficient unto itself. Also implied was the notion that in those fields it would act directly upon individuals. This is nowhere stated in the Constitution. Rather, it is understood from statements in the Constitution describing the executive power. The so-called "supremacy clause" (Article VI, section 2) in itself, as proposed toward the end of the preliminary stage of the Convention's proceedings, was meant to be the very antithesis of what it finally came to mean. Authored by Maryland's Mr. Martin, it was intended to make the state judiciaries the only available system of enforcement of congressional will. In any event it was intended to preclude the existence of a federal force capable of asserting itself against the states or their inhabitants without the states' consent.

No power to raise armies was proposed to be given to Congress in the preliminary resolutions. Nor was the
"national executive" to possess the status of the commander-in-chief of any armed forces.

Although the future Congress, particularly, its lower house, was to have the "power" to "originate" "all bills for raising revenue," so did the Continental Congress before have the "power" to assign quotas to the states. But could the new Congress collect the levies it laid? All this remained unsolved by the Convention.

Only the Committee of Detail, finally and for the first time, came up with a draft by whose provisions Congress was to have the power to lay and collect taxes and to raise armies, and the executive was to be the commander-in-chief of such armies. Then it was obvious, though not perhaps to everyone at once, that the enumerated assignments would be really enforceable by the federal government's own power.

Commentators like Mr. Lawson, who say among the many things on which they insist, that the Committee of Detail had no right to restrict the powers of the future congress to an enumeration, might as well contend, too, that the same committee had no right to build into the Constitution the self-generating apparatus of federal enforcement of which we have just spoken.

To that we would reply that had the Committee of Detail adhered in a pedestrian fashion solely to the resolutions handed to it as instructions, then a congress endowed with a general "power" might conceivably have arisen; but this
"power" would in fact have been the same sort of non-power which the Continental Congress had had.

The Committee of Detail formulated a real governmental power. But its formulations were found acceptable only because the power was to be strictly confined within a few topical areas. A truly self-enforcing power of a general scope would not have been acceptable.

The power to collect taxes was an ingredient inserted into the text of the future constitution by the Committee of Detail on its own motion. It was at first stated in a simple clause authorizing Congress "To lay and collect taxes, duties, imposts and excises." There are commentators whose unconquerable soul keeps hammering at this fact with the visionary view of striking a spark to be blown into a flaming proof that even at that stage, with a reference to "general welfare" nowhere in sight, the taxing and spending power was meant to extend anywhere and to anything in the free discretion of the future congress.

But such a postulate finds itself under the onerous weight of the task to overthrow the self-evident a priori axiom that in all human institutions the financial concomitant is subordinated to the purposes of the given institution. In all the federal plans in British North-America which preceded the Constitution, way back to the New England Consociation of mid-seventeenth century, there was always a common treasury for the common cause. And the common cause was al-
ways limited to certain selected purposes. There was
nothing before the eyes of the Founders of the Constitution
by way of a model for a political hybrid mutation endowed
with fiscal powers infinitely transcending the stated purposes
of the institution. Had the Founders been introducing a new
concept in constitutional sophistication, they would have
undoubtedly hinted in that direction, so as to make it clear
at least to one another. But there is no indication of any
such intent.

Those of course whom the benefit of the recordings of
the Founders' debates was denied, as Mr. Justice Story,
would have no way of knowing whether or not such an innovation
was planned by the Founders, and they may or might feel more
free than we can, to persist in postulating the fantastic
notion.

So to postulate is beneficial to them for another reason.
Innocent of all knowledge of the Debates, they have no way
of knowing how the phrase "to provide ... for the general
welfare" ever got into the taxing clause. This gap of infor-
mation provides them with the additional freedom of supposing
that the engrafting of the welfare clause on the tax clause
must assuredly have originated in the desire to reduce the
absolutely unlimited taxing power to a practically limitless
one.

Thus one unreality helps them to explain another.
What an anticlimax would it be for them to face the plain notion that the Founders, conceiving to add the words "for the paying the debts" or "to pay the debts" to the taxing power, had to add another two or three words lest it should seem that paying old debts was the only purpose of the new taxation.

Judge Story, like Hamilton before him, was fortunate not to see the evidence that would have unsettled his conclusions contrived in freedom from information. And modern Hamiltonians have planted themselves upon Story, taking heed not to run into the Debates of the Convention by chance.

* * *
FINAL OPINION

Upon the taking into account of all the factual and inferential evidence contained in the foregoing parts of the present enquiry, this writer had formed a belief as set forth in the following opinion, to wit:

The Convention which formed the Constitution of the United States in 1787 in Philadelphia, and which wrote into the Constitution the clause providing that "The Congress shall have the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the ... general welfare of the United States," etc., intended by this clause to authorize no other collection and appropriation of taxes than so much as was needed for the operation of the Government of the United States in those spheres of action which are committed to its care by the several positively formulated mandates written into the Constitution itself. It was not intended by the Founders assembled in the Convention, that the authority to obtain money by taxation and to spend it for public purposes, should extend to objects not comprised within the statements in the text of the Constitution which indicate the types of purposes for which the Government was formed.

Therefore, insofar as the authentic intent of the Founders may be the postulated criterion of the meaning of the Constitution and thus of the constitutionality of the acts of the Government of the United States, especially its
legislative branch, it follows that the now time-honored practice of appropriating moneys obtained by taxation to purposes not comprised within the above-defined sphere has been unconstitutional from its inception to the present day.

It is not a part of this "Opinion," or of the present study, to dispose of the findings which it has been this enquiry's purpose to make and establish. The scope of the study is confined to the ascertainment of the proposition in point, and does not extend to the problems arising from the conflict of the established governmental practice with the disclosed intentions of the Founders of the Constitution.

The argument upon which the primary conclusion set forth above in this "Opinion is rested, may be stated substantially as follows:

On universal and self-evident principles, it is true for any human institution that the scope of its financial operations is governed by the definition of the purposes for which the institution is established. Thus assuming that a corporation is created for the purposes A, B, and C, for the accomplishment of which it is endowed with powers a, b, and c, and moreover with a financial power f which consists in acquiring money from a given source and applying it, then the purposes for which such moneys can be legitimately applied are, logically, A, B, and C, and not moreover a purpose F, in addition to and in excess of the purposes A, B, and C.
So long as it is true, by definition, that only A, B, and C, are the purposes of a given institution, and powers a, b, and c are the instrumentalities subserving these purposes, to that extent a financial power f is subservient to the powers a, b, and c, and to nothing else. It is an instrumentality of the purposes which preside over the existence and functioning of the institution.

Insofar as the Government of the United States was envisioned by the Founders as an institution of several selected functions rather than an institution endowed with the one limitlessly comprehensive function of doing everything which needs to be done in the nation or for the nation, it follows that the financial operations of the Government must be restricted to the extent of the select areas of activity.

On the other hand, if the Government was envisioned to take care of everything which needs to be done, then of course the scope of its financial operations would be coextensive with that unlimited purpose.

The history of the formation of the Union generally, and of the Constitution in particular, reveals that the idea of a consolidated governmental system under one central supremacy extending to all objects which it might decide to govern, was repugnant to overwhelming majorities of Delegates in the Convention, and even more repugnant to the Nation. Although during the stages of the Convention which preceded the formulating of the text of the Constitution itself, several pro-
visional resolutions and instructions were adopted which, in various forms, express the idea that the future central government ought to have the authority to act upon all matters of national significance, nevertheless it was understood throughout that this general idea would be elaborated into concrete specifications stating what types of objects constitute the content of the concept of national relevancy.

There was a school of thought in the Convention which maintained that such a specification was an impossible task to accomplish; but this school of thought subsided, making room for the school which believed that the main types of objects of national significance could be listed one by one, provided that other categories of jurisdiction could be added by constitutional amendment as needed from time to time.

This philosophy came to be embedded into the fabric of the Constitution, making the central government a government vested not with a whole but only a fragmentary jurisdictional mandate, in accordance with the notion that only a fragment of all the concerns of the human life were of such a nature as to call for regulation by the central government.

Consequently, the fiscal powers of this Government were meant to extend to the several selected purposes and not to other matters.

The jurisdictional structure cast by the Constitution is predicated upon the hypothesis that the class "national purposes" is exhausted by the actual enumeration of the
purposes in the Constitution, and that there is no residue left for the accommodation of which the Constitution must be twisted into grotesque shapes.

Hence the contention:

If there are no other cases which concern the common defence and general welfare, except those within the scope of the enumerated powers, the discussion is merely nominal and frivolous. If there are such cases, who is at liberty to say that, being for the common defence and general welfare, the Constitution did not intend to embrace them?

--is a sophistry, rather than an admirable argument. It is a sophistry because it illicitly negates the hypothesis upon which the Constitution is predicated, and substitutes tacitly a premise which was repudiated by the Convention which made the Constitution, and the ratifying conventions.

Under the theory which guided the making of the Constitution, it is postulated definitionally that there are no "other cases which concern the common defence and general welfare except those within the scope of the enumerated powers," and the discussion surrounding this point arises from the necessity to fight off those who assert the existence of national concerns beyond the stated fields of national jurisdiction, and in so doing negate the basic axioms of the Constitution. What is frivolous is this violation of the axioms, not the effort to counter the violation.

The argument of Judge Story virtually asserts that the Constitution ought to have been formulated on the basis of a
different philosophy from that on which it was in fact formulated. But in that case he is interpreting a constitution which does not exist, and not the one which exists.

It may be, and probably is true, that the philosophy underlying the Constitution in respect of the jurisdictional endowment of the Government was not sufficiently realistic to begin with, in that no government can be bound to a list of enumerated powers; or at least, perhaps, the list of the powers should have been longer. But that would call for a correction of the Constitution by legitimate means, rather than for the reading into the Constitution of meanings which were not meant by the Founders to be in it.

It is, then, our opinion that neither the logic nor the history upon which Story's position is based, can be upheld; and since the scholars who follow Story, who in turn agrees with Hamilton, have never revised their doctrine in relevant respects, and are satisfied to leave his version as it has been for 130 years, unconfronted with evidence published after Story's writing, there is presently no valid reason why the theory should not, under criteria of historical veracity, be dismissed as false.

An altogether different problem arises from the question whether historical authenticity must be the only criterion of the validity of a given constitutional interpretation. Perhaps it is not necessarily so. Perhaps there are considerations capable of providing sufficient reasons for over-
ruling known intentions of the Founders and substituting interpretations which satisfy other, more important criteria. Perhaps the words of a constitution ought to live their own lives, unfettered by the chains of their origin. Constitutional jurisprudence is not the only field in which problems of this type arise. In dealing with literature, we do not necessarily restrict our search for meaning to questions like "what did the poet mean," but we feel free to value a poem according to what it means to us. Confronted with a work of art, even as when confronted with a work of nature, we conceive of its essence. We may wonder what it meant to him who made it, and the discovery of the original sense, if it can be discovered, becomes a part of its meaning-for-us. But the possessorship of the encountered thing is now vested in our own mind. In the ultimate analysis, the present owns the past.

Upon some such theory, the interpretation of the Constitution, as well as interpretations of other things, can free itself from the authority of original intentions. Once free of the criterion of authenticity, the theory of interpretation can postulate some other criterion, for instance that of practicality.

Alexander Hamilton himself never claimed that his proposed uses of the welfare clause had sanction in ascertained intentions of the Federal Convention. His claim was that certain federal programs would do a great deal of good to the nation, and that the welfare clause was capable of an inter-
pretation that would furnish the necessary constitutional title for those programs.

Subsequent history has demonstrated that under the standards of operational practicality, Hamilton's position can pride itself with a splendid title of validity. But it has also demonstrated that it has no valid claim to authenticity. It is a cleverly conceived artifact.

* * *
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### Committees of the Federal Convention

**Dot before name means chairmanship**

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