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THE GENERAL WELFARE CLAUSE
By C. Perry Patterson*

One of the most controversial provisions of the Constitution is the general welfare clause. The debate over the meaning of this clause began in Washington's first administration between Hamilton and Jefferson in connection with the establishment of the first bank of the United States. It has continued through our history, being the subject of frequent pronouncements by statesmen and of comment by learned publicists. In general the discussion followed partisan lines which were represented by the doctrines of loose and strict construction. The supreme court managed to dodge this issue down to 1936 when it placed its first interpretation on this clause in the case of Butler v. United States.¹

The loose construction theory has generally been designated Hamiltonian and the strict construction theory Jeffersonian, sometimes the Jefferson-Madison theory, because the popular understanding is that Madison in 1830 after he had become a Jeffersonian made an interpretation of the clause in agreement with Jefferson. The truth of this matter is that Madison in 1788 in The Federalist made the same interpretation of the general welfare clause as he made in 1830 before he had changed his politics and before the Constitution had been adopted. Jefferson followed Madison in both time and substance in his interpretation. In order, however, to judge of the constitutionality of these two widely divergent interpretations it is necessary to see how this clause got into the Constitution and for what purpose it was adopted.

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¹(1936) 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A. L. R. 914.
The First Appearance of the Clause

In Article III of the Articles of Confederation is found the following language: "The said states hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare. ..." Here the language could mean nothing more than a general purpose of the league and conferred no power whatever on the league. The article further speaks of "binding themselves to assist each other." In other words, whatever action might be taken would be a matter of the individual states. For the same general purpose the clause is repeated in the Preamble of the Constitution of the United States which has never been considered as conferring powers on the government of the United States. However, the clause was inserted in the Constitution as is later shown before it was placed in the Preamble.

The Clause in the Federal Convention

All of the leading statesmen of the transition period from the Articles of Confederation to the Constitution realized that the chief weakness of the general government under the Articles was its lack of power to lay and collect taxes because governments cannot function without money. Accordingly all of the four proposals for the new Constitution suggested that the power to levy and collect taxes be granted to Congress. On August the 16th, almost three months after the meeting of the Federal Convention, in accordance with the recommendation of the Committee of Detail, the convention adopted without dissent the first power of the Congress: "The Legislature of the United States shall have the power to lay and collect taxes, duties, imports and excises."

This power would undoubtedly have remained in this form but for the solicitation of some delegates about the payment of the revolutionary war debt. On August the 18th, Rutledge and Charles Pinckney of South Carolina and Gerry and King of Massachusetts called attention of the convention to the fact that no specific provision had been made for the payment of the debt of the confederation and Pinckney moved that Congress have power "to secure the

3 These were the Madison, Paterson, Pinckney and Hamilton proposals.
4 Max Farrand, The Records of the Federal Convention, (1911) I, 308. While no state delegation dissented, Mr. Gerry of Massachusetts voted against the resolution.
payment of the public debt."5 This motion was referred to the Committee of Detail.

Then Rutledge moved that a grand committee consisting of one member from each state be appointed to "consider the necessity and expediency of the United States assuming all the state debts. . . . The assumption would be just as the state debts were contracted in the common defense."6 Rutledge stated in support of his motion that, as taxes on imports were to be given up by the states, "It was politic, as by disburdening the people of state debts it would conciliate them to the plan."7 King said, "Besides the considerations of justice and policy which had been mentioned, it might be remarked that the state creditors, an active and formidable party, would otherwise be opposed to a plan which transferred to the Union the best resources of the States without transferring the state debts at the same time. The state creditors had generally been the strongest foes of the impost plan."8

It is necessary to notice that here were two objects of special taxation—the debt of the confederation and the state debts—which it was felt that the regular provision of taxation already adopted would not include. It was not clear that the government under the Constitution would be obligated to pay the debt of the confederation and it was certain that it was under no obligation to pay the state debts and could not do so without special provision. It is also important to notice that if provisions should be made to use the taxing power for these two purposes that when they were accomplished the special power would cease to have any force because there was no suggestion by any member of the convention that the government under the Constitution would not have the power to pay its own debts. It was specifically being given "the power to borrow money on the credit of the United States," or to create debts, and certainly the power to pay such debts would be implied.

On August the 21st, three days after the appointment of the special committee on state debts, it reported through Governor Livingston of New Jersey, recommending the following new power for the Congress: "The Legislature of the United States shall have power to fulfill the engagements which have been entered into

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5Ibid., II, 325, 326.
6Ibid., II, 327. This motion was referred to a grand committee consisting of Langdon, King, Sherman, Livingston, Clymer, Dickinson, McHenry, Mason, Williamson, C. C. Pinckney, and Baldwin. The italics in the quotations are supplied unless the contrary is indicated.
7Ibid., II, 327.
8Ibid., II, 327, 328.
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 defense and the general welfare.”

This was the first time the phrase “for the common defense and general welfare” was used in the convention in connection with any specific provision of the Constitution. The report was debated on August the 22nd, Madison taking the position that the power should be granted “to prevent misconstruction” and Gerry thinking it “essential that some explicit provision should be made... so that no pretext might remain for getting rid of the public engagements.” The feeling against a possible repudiation of the debt of the Congress became so strong that Gouverneur Morris moved to substitute the following motion: “The Legislature shall discharge the debts and fulfill the engagements of the United States.” This motion was adopted unanimously. On August the 23rd the convention prefixed this clause to the taxing power previously adopted, making the revised provision read as follows: “The Legislature shall fulfill the engagements and discharge the debts of the United States and shall have the power to lay and collect taxes, duties, imposts and excises.”

The troublesome problem of the debts of the confederation kept recurring. Mason of Virginia contended that “the use of the word shall will beget speculation and increase the pestilent practice of stockgrabbing,” and said that there was “a great distinction between original creditors and those who purchased fraudulently of the ignorant and distressed.” Butler of South Carolina objected to shall because it “would compel payment as well to the bloodsuckers who had speculated on the distresses of others, as to those who had fought and bled for their country.” Finally on motion by Randolph of Virginia the word shall was eliminated and the clause covering the debts of the confederation was changed to: “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 change left the Congress under the Constitution free to deal with these debts as it saw fit. It was not compulsory to pay them in full. It could discriminate between original purchases and those who had bought

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9Ibid., II, 352.
10Ibid., II, 377.
11Ibid., II, 382.
12Ibid., II, 392.
13Ibid., II, 414.
bonds at sacrificial prices. The advantage that the creditors had won was that under the Constitution the Congress by virtue of its taxing power would be able to pay these debts at whatever figure it might decide.

It was still felt, however, that the taxing clause needed adjustment to make clear that the Congress could levy a tax for the purpose of paying the old debts. In fact, the Committee of Detail had on August the 22nd, suggested the phrase "for payment of the debts and necessary expenses of the United States." Accordingly on August 25th, Sherman of Connecticut said that he "thought it necessary to connect with the clause for laying taxes, duties, etc., an express provision for the object of the old debts," and moved to add to the power "to levy and collect taxes, duties, imposts, and excises" the words "for the payment of said debts and for the defraying of expenses that shall be incurred for the common defense and general welfare." This motion was defeated, indicating that the convention thought that Congress would have the power to pay the old debts as well as current expenses without any change in the taxing clause.

It seems that this action might have ended the matter but for the question of the assumption of the state debts which had been suggested in Governor Livingston's report on August 21. This matter had been separated from the question of the debts of the Confederation and no action had been taken on it. On August the 31st the question of the assumption of the state debts was referred to a committee of eleven headed by Judge Brearley of New Jersey. This committee in its report on September 4 ignored the matter of state debts, but suggested the same change in the taxing clause which Sherman had proposed on August 25, and which the convention had defeated, still feeling that it would require an express power to enable Congress to pay the old debts and to provide for the common defense, and the general welfare. Accordingly, it moved that the taxing clause should read: "The Legislature 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." This change was approved by the convention without dissent. It is clear that the phrase "to pay the debts" referred exclusively to the debts of the Confederation because the Congress, of course, would have power to pay the debts which it

14 Ibid., II, 414.
15 Ibid., II, 497.
contracted. It was also clear that this change did not increase the taxing power but only enlarged the purpose for which taxes could be used, namely the old debts. The power to pay these debts was made an express power rather than leaving the power to be doubtfully implied.

Why were the additional words “and provide for the common defense and general welfare of the United States,” added? Here it is necessary to recall that the Committee of Eleven to which was referred the matter of state debts made the following report on August 21 through Governor Livingston. “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 defense and general welfare.” This phrase, it is seen, is only descriptive of the debts for which taxes could be levied—debts both those of the old Congress and of the states that had been incurred “for the common defense and general welfare.” It not only did not grant any power whatever but limited the use of taxes to the achievement of such welfare as is provided in the subsequent powers which the Committee of Detail on August 6 suggested should embrace those matters of common defense and general welfare over which the government of the United States should have control and about which it should have the power of legislation. “In other words,” as Charles Warren, the greatest of our constitutional historians says, “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.” In other words, it conferred no power whatsoever on the Congress, which was exactly the Madison and Jefferson contention as will later be shown.

Interpretation by Madison

For almost a half century down to his death in 1836, Madison was the only member of the convention, or American statesman for that matter, who knew what the members of the convention said in the debates on the general welfare clause. Charles A. Beard recently stated that Madison’s “belated interpretation of the general welfare clause” as not conferring any power whatsoever upon the

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16Ibid., II, 356.
18Madison’s Journal was not published until 1840.
Congress was not made until "after he became a partisan," implying that he changed his mind after he became a Jeffersonian or that he had said nothing before and merely agreed with Jefferson for partisan reasons. This statement does not square with the record.

Madison repeatedly explained the meaning of this clause, in 1788, 1791, 1799, 1817, and in 1830, and these explanations are in agreement. Madison was the first American to explain the meaning of the clause because it was one of the objections made against the adoption of the Constitution. In the *Federalist* No. XLI published in 1788 he said: "Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution, on the language in which it is defined. It has been urged and echoed, that the power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, then their stooping to such a misconstruction.

"Had no other enumeration or definition of the powers of Congress been found in the Constitution, than the general expressions 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 form of conveyances, must be very singularly expressed by the terms 'to raise money for the general welfare.'

"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? If the different parts of the same instrument ought to be so expounded as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more
natural 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 on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing, had its origin with the latter.

"The objection here is the more extraordinary, as it appears that the language used by the convention is a copy from the articles of confederation. The objects of the Union among the States as described in article third, are 'their common defense, security of their liberties, and mutual and general welfare.' The terms of article eighth are still more identical: 'All charges of war and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress, shall be defrayed out of a common treasury,' etc. A similar language again occurs in article ninth. Construe either of these articles by the rules which would justify the construction put on the new Constitution, and they vest in the existing Congress a power to legislate in all cases whatsoever. But what would have been thought of that assembly, if, attaching themselves to these general expressions, and disregarding the specifications which ascertain and limit their import, they had exercised an unlimited power of providing for the common defense and general welfare? I appeal to the objectors themselves, whether they would in that case have employed the same reasoning in justification of Congress as they now make use of against the convention. How difficult it is for error to escape its own condemnation."20

It will be noticed that the critics of the Constitution in 1788, hoping to defeat its ratification, charged that the general welfare clause gave to the national government an "unlimited commission" to legislate for the general welfare. Madison speaks of the "distress" of these critics and of "their stooping to such misconstruction." "But what color can the objections have," he says, "when a specification of the objects alluded to by these general terms immediately follow, and is not even separated by a longer pause than a semicolon." In other words Madison says that the matters covered by "the common defense and general welfare clauses" are to be found in the "specification of powers that immediately follows—the

enumerated powers. According to Madison these clauses are only *descriptive* of the powers that follow and add absolutely nothing to the powers of Congress. This means that whatever power Congress has to tax "for the common defense and the general welfare" must be found in the enumerated powers. "For what purpose," he says, "could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general powers?" This is exactly what the minutes of the convention show to have been the purpose of these clauses as has been previously shown. It is exactly what Charles Warren says was their purpose.

This explanation of these clauses by Madison was in 1788 before the rise of political parties under the Washington administration and before they became involved in Hamilton's financial policies. Jefferson was not even in the country. It is true that Madison later changed his politics, but he never changed his views on the Constitution. The fact is he had to change his politics to keep from changing his constitutional principles.

Three years later in 1791 when the establishment of the Bank of the United States was being debated by Congress, Madison, then a member of the House of Representatives, laid down the rules which should govern the interpretation of the Constitution as follows:

"An interpretation that destroys the very characteristics of government cannot be just."

"Where a meaning is clear, the consequences, whatever they may be, are to be admitted; where doubtful, it is fairly triable by its consequences."

"In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide."

"Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties."

"In admitting or rejecting a constructive authority, not only the degree of its incidentality to an express authority is to be regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction."

"Reviewing the Constitution," he said, "with an eye to these positions, it was not possible to discover in it the power to incorporate a bank. The only clauses under which such a power could be pretended, are either:
1. The power to lay and collect taxes to pay the debts, and provide for the common defense and general welfare.”

"In discussing this power," he said, "no argument could be drawn from the terms 'common defense, and general welfare.' The power as to these general purposes was limited to acts laying taxes for them; and the general purposes themselves were limited and explained by the particular enumeration subjoined. To understand these terms in any sense, that would justify the power in question, would give to Congress an unlimited power; would render negatory the enumeration of particular powers; would supersede all the powers reserved to the state governments. These terms are copied from the Articles of Confederation; had it ever been pretended, that they were to be understood otherwise than here explained?"

It is clear from this quotation that Madison is repeating almost verbatim the explanation of the general welfare clause made in the Federalist. The sum total of his explanation is that it was purely descriptive of the enumerated powers that followed. It was a case of laying down a general thesis and later supporting it with details defining its scope.

In 1799 Madison again reaffirmed his original interpretation in the Federalist. Speaking of the use of the words "for common defense and general welfare" in the Articles of Confederation and in the Constitution, it was never supposed, he said, "that the meaning was changed" and that "it will scarcely be said that in the former they were ever understood to be either a general grant of power, or to authorize the requisition or application of money of the old Congress to the common defense and general welfare, except in the cases afterwards enumerated, which explained and limited their meaning: and if such was the limited meaning attached to these phrases in the very instrument revised and remodeled by the present Constitution, it can never be supposed that when copied into the Constitution a different meaning ought to be attached to them."

"In both," he said, "the Congress is authorized to provide money for the common defense and general welfare. In both, is subjoined to this authority an enumeration of the cases to which their powers shall extend. Money cannot be applied to the general..."

21The other powers listed which are irrelevant to this discussion are: “2. The power to borrow money on the credit of the United States, and 3. The power to pass all laws necessary and proper to carry into execution those powers.”


23Writings (Hunt Ed.) VI, 354, 355.
welfare, otherwise than by an 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, a question arises whether the particular be within the enumerated 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.”²⁴

It is noticed that Madison repeats in substance his previous interpretations of the general welfare, holding that it was only a general description of the subsequent enumeration of powers practically all of which relate to the common defense and general welfare and that when money is appropriated for these purposes the constitutionality of the act must be found in a “particular” power, otherwise the entire subsequent enumeration of powers which was the object of the greatest solicitude of the convention, which determines the chief characteristic of the government—that of a limited government—and without which the Constitution would have been impossible, becomes meaningless.

In 1817 as President of the United States in a veto message of a bill providing for internal improvements he said: “To refer the power in question to the clause ‘to provide for the common defense and general welfare’ would be contrary to the established and consistent rules of interpretation, as rendering the special and careful enumeration of powers which follow the clause nugatory and improper. Such a view of the Constitution would have the effect of giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them, the terms ‘common defense and general welfare’ embracing every object and act within the purview of a legislative trust. It would have the effect of subjecting both the Congress and laws of the several states in all cases not specifically exempted to be superseded by laws of Congress, it being expressly declared ‘that the Constitution of the United States and laws made in pursuance thereof shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.’ Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and the State Governments, inasmuch as questions relating to the general

²⁴Ibid., VI, 357.
welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision.”

Here again the same interpretation is restated with additional emphasis, that to grant the Hamiltonian construction would be tantamount to nullifying all of the enumerated powers, to the establishment of Congressional supremacy, and, therefore, to the elimination of judicial review as an enforcing agency of the “boundary between the powers of the General and State governments.” He warned the American people against the far-reaching effect of the doctrine of implication, calling attention to a fundamental distinction that has not been sufficiently recognized “between a power necessary and proper for the Government or Union, and a power necessary and proper for executing the enumerated powers. In the latter case, the powers included in each of the enumerated powers were not expressed, but to be drawn from the nature of each. In the former, the powers composing the Government were expressly enumerated. This constituted the peculiar nature of the Government. No power, therefore, not enumerated could be inferred from the general nature of the Government. Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the Constitution.”

“The doctrine of implication is always a tender one. The danger of it has been felt in other governments. The delicacy was felt in the adoption of our own; the danger may also be felt if we do not keep close to our chartered authorities.”

Speaking of the arguments to sustain the bank bill, he said: “If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.” The prophesy in these statements has just about been fulfilled. Judicial review has just about abolished itself as a check upon the Congress by “remote and multiplied implications.”

In 1830, only six years before his death, Madison in a famous letter to Andrew Stevenson, November 27, said: “It is to be emphatically remarked that, in the multitude of motions, propositions, and amendments, there is not a single one having reference to the terms ‘common defense and general welfare,’ unless we were so to

25James D. Richardson, Messages and Papers of the Presidents; (1903) I, 584, 585.
27Benton, op. cit., I, 276.
understand the proposition containing them made on August 25th, which was disagreed to by all the states except one. The obvious conclusion to which we are brought 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, requiring no critical attention . . .

"... That the terms in question 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 well-known advocates in the convention for a jealous and cautious definition of federal powers, should have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions and endless definitions elaborated by them." Madison also called attention to the fact that the ratifying conventions proposed 126 amendments to the Constitution and in no instance was the general welfare clause mentioned; yet all of these amendments sought to place further limitations on Congress. Again, he says: "A like demonstration, that these terms were not understood in any sense that could invest Congress with powers not otherwise bestowed by the Constitutional charter, may be found in what passed in the first session of the first Congress, when the subject of amendments was taken up, with the conciliatory view of freeing the Constitution from the objections which had been made to the extent of its powers or the unguarded terms employed in describing them. Not only were the terms 'common defense and general welfare' unnoticed in the outset; but the Journals of Congress show that, in the progress of the discussions, not a single proposition was made in either branch of the Legislature which referred to the phrase as admitting a constructive enlargement of the granted powers, and requiring an amendment guarding against it. Such a forbearance and silence on such an occasion, and among so many members who belonged to the part of the nation which called for explanatory and restrictive amendments, and who had been elected

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29It has frequently been stated by historians, legal writers, and statesmen that the phrase "for the common defense and general welfare" was copied from the Preamble. Just the opposite was true. They were borrowed from the Articles of Confederation, September 3; incorporated in the taxing clause September 4; and placed in the Preamble September 12. See Charles Warren, The Making of the Constitution, page 475, footnote 1. See also Madison's Journal on these dates.
30Writings (Hunt Ed.) IX, 420. Italics supplied.
31Ibid., IX, 422.
as known advocates for them, cannot be accounted for without supposing that the terms 'common defense and general welfare' were not at that time deemed susceptible of any such construction as has been applied to them."

What then were Madison’s arguments? (1) That the general welfare clause was copied from the Articles of Confederation where it conferred no power because the old Congress could neither tax nor legislate, and, therefore, was merely the assertion of a general purpose. (2) That its meaning was found in the powers subjoined to the Articles as well as in the Constitution. (3) That the natural and logical method of presenting an issue is to state a general thesis and support it with details. (4) That this is the method used in the Constitution is shown by Congress being given the power to declare war, but, without trusting the means to implication, it is specifically given the power to raise and maintain armies and navies and to provide rules and regulations for their government—that it is given the power to coin money and regulate the value thereof and to punish counterfeiters as the means of enforcing its power, et cetera. (5) That the clause never attracted the attention of the state rights critics in the convention that framed the Constitution, or in the ratifying conventions, or in the Congress that proposed the Bill of Rights or in the legislatures which ratified it. (6) That it is inconceivable that a clause which would create congressional supremacy could escape the notice of as many able critics as these various bodies contained when many of them had been elected for the specific purpose of guarding the rights of the states. (7) That it was generally understood that the general government was a limited one, that this is its chief characteristic, and that to admit the construction that is sought would create an unlimited government. (8) That this construction would destroy the line between the general and the state governments and, therefore, destroy the chief function of the Federal Courts, and that this alone was enough to prove its unconstitutionality. (9) That if this construction was admitted, the Constitution might as well be “thrown into the fire,” because constitutional supremacy would be succeeded by congressional supremacy and ultimately by a unitary state. To Madison’s logical mind it was unthinkable that one principle of the Constitution could destroy another and itself at the same time. He never thought that judicial review which was included to preserve the supremacy of the Constitution and, therefore, its lines dividing authority would finally be the agent of its destruction. Is Constitu-

\[32\]Ibid., IX, 422, 423.
tional government impossible? If not what is the device for its maintenance?

**Jefferson's Interpretation**

It has already been shown that Madison placed his interpretation on the general welfare clause before the Constitution was adopted and before there was any conference between him and Jefferson about it, Jefferson being in Paris at the time, and that Madison never changed his original construction of this clause. It follows, therefore, that Jefferson never changed Madison's mind on this matter. Did Madison determine Jefferson's construction of the clause? It is not possible to give a categorical answer to this question but it is very unlikely that either influenced the other in this matter, the two statesmen being what they were. It came as a shock to both of them that any one could contend that this clause conferred a separate and substantive power on the Congress which alone would have made it an unlimited government. It cannot be doubted in the least that Jefferson, if he had had the least suspicion that the clause was unsusceptible of such a construction, would have proposed to make an amendment limiting its meaning when the Bill of Rights was being considered.

Because some writers regard Madison's construction of the clause as a strict construction, and because Jefferson is regarded as the father of the doctrine of strict construction, they conclude that Jefferson determined Madison's point of view. In this case the sequence of events made this impossible. However, it does not seem to occur to these commentators that a true and accurate construction of the Constitution is not a strict construction. Because one insists on a proper construction of the Constitution he is not *ipso facto* a strict constructionist or even a Jeffersonian. This is just the kind of philosophy that has made it an indication of senility or moronity even to raise the question of constitutionality about any of the acts of government in this country and has substituted the demands of the ballot box for constitutional government.

In Jefferson's opinion to President Washington on the constitutionality of the Bank of the United States in 1791 he said: "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 powers to do whatever would be for the good of the United States; and as they would be 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 strictly within the enumerated powers, and those without which, as means, these powers could not be carried into effect.33

In 1792, referring to the general welfare clause, he said: "I suppose the meaning of this clause to be, that Congress may collect taxes for the purpose of providing for the general welfare, in those cases wherein the Constitution empowers them to act for the general welfare. To suppose that it was meant to give them a distinct substantive power, to do any act which might tend to the general welfare, is to render all the enumerations useless, and to make their powers unlimited."34

In the Kentucky Resolutions of 1798, Jefferson said: "Words meant by the instrument (the Constitution) to be subsidiary only to the execution of limited powers, ought not to be so construed as themselves to give unlimited powers, nor as a part to be taken as to destroy the whole residue of that instrument."35 Here a very solid distinction is made between a power which is purely incidental to the execution of a granted power and a power of government which is not granted but which is derived from even an incidental power which is itself derived by implication. In other words, when incidental powers which are derived from granted powers as a means for their execution are themselves made into substantive powers of government by construction, violence is done to the Constitution

33 Writings (Ford Ed.) V, 286. Italics supplied.
34 Ibid., VI, 141. Italics supplied.
and to the principle of a limited government. Granted powers are conferred upon the government not by the people but by judicial construction.

In 1815 in a letter to Spencor Roane he said: "I hope our courts will never countenance the sweeping pretensions which have been set up under the words 'common defense and general welfare.' These words only express the motives which induced the convention to give to the ordinary legislature certain specified powers which they enumerate, and which they thought might be trusted to the ordinary legislature, and not to give them the unspecified also; or why any specification? They could not be so awkward in language as to mean, as we say, 'all and some.' And should this construction prevail, all limits to the Federal Government are done away. This opinion, formed on the first use of the question, I have never seen reason to change, whether in or out of power; but, on the contrary, find it strengthened and confirmed by five and twenty years of additional reflection and experience; and any countenance given to it by any regular organ of the government, I should consider more ominous than anything which has yet happened." 36

In 1817 in a letter to Albert Gallatin, speaking of an act for internal improvements which had been vetoed by President Madison, Jefferson said: "The act was founded, on the principle that that phrase in the constitution which authorizes 'to lay taxes, to pay the debts and provide for the general welfare,' was an extension of the powers specifically enumerated to whatever would promote the general welfare; and this, you know was the federal doctrine, whereas, our tenet ever was, and indeed, it is almost the only land-mark which now divides the federalists from the republicans, that Congress had not unlimited powers to provide for the general welfare, but were restrained to those specifically enumerated; and that as it was never meant they should provide for that welfare but by the exercise of the enumerated powers, so it could not have been meant they should raise money for purposes which the enumeration did not place under their action; consequently, that the specification of powers is a limitation of the purposes for which they may raise money. ... This phrase ... by a mere grammatical quibble, has countenanced the General Government in a claim of universal power. For in the phrase, 'to lay taxes, to pay the debts and provide for the general welfare,' it is a mere question of syntax, whether the two last infinitives are governed by the first or are distinct and

36Writings (Library Ed.) XIV, 350, 351.
coordinate powers: a question unequivocally decided by the exact definition of powers immediately following."

What then by means of summary were Jefferson's arguments? (1) That Congress is limited to levying taxes for the general welfare. (2) That the general welfare involved is that which is included in the enumerated powers which control the purposes for which taxes can be levied. (3) That if this is not true, the general welfare clause creates an unlimited government and makes useless the enumerated powers. Why grant "all" and "some"? (4) The established rule of construction is to give to the equivocal parts of a document a meaning that harmonizes with the rest of it. (5) That it is generally true that no government has a right to do anything that is not for the general welfare and particularly is this true of a general government in a federal system where local matters are under the control of independent governments. (6) Hence, it is true that all the powers of the general government relate to "the common defense and general welfare," and, therefore, constitute the objects for which taxes can be levied. The war powers are for "the common defense," and the powers to regulate commerce, to coin money and regulate its value, to make uniform rules for the regulation of bankruptcy, to make treaties, and to maintain the supremacy of the Constitution and laws of the United States throughout the land are for "the general welfare." (7) Even its forbidden powers kept it from giving preferences to sections in violation of "the general welfare."

Hamilton's Interpretation

The constitutionality of Hamilton's commercial policies was questioned by Madison and Jefferson. Hamilton contended that the power of Congress to lay and collect taxes "for the common defense and general welfare" was limited only by (1) uniformity for indirect taxes; (2) apportionment for direct taxes and (3) the prohibition of taxes on exports. "These three qualifications excepted," he said, "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 defense 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

Works (Ford Ed.) X, 91.
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," he said, "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."

"The only qualification of the generality of the phrase in question, which seems to be admissible, is this," he said: "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."

The scope of "the general welfare," according to Hamilton includes "a vast variety of particulars, which are susceptible neither of specification nor of definition," and are "of necessity left to the discretion" of Congress, subject only to the limitation that the object "be general, and not local." Within this field which cannot be defined the power of Congress to raise and appropriate revenues "is plenary and indefinite." Here, according to Hamilton, is a distinct and separate grant of an indefinite power subject only to the discretion of Congress as long as the objects of its solicitude are not "confined to a particular spot." It is clear that this is a grant of congressional supremacy adequate for the purposes of a general government, free from the limitation of judicial review and eliminating the necessity for the subsequent enumeration of powers.

Monroe's Interpretation

Monroe in his first annual message to Congress December 2, 1817, speaking of the importance of good roads and canals, said: "A difference of opinion has existed from the first formation of our Constitution to the present time among our most enlightened and virtuous citizens respecting the right of Congress to establish such a system of improvement. Taking into view the trust with which I am now honored, it would be improper after what has passed that this discussion should be revived with an uncertainty of my opinion respecting the right. Disregarding early impressions...

I have bestowed on the subject all the deliberation which its great importance and a just sense of my duty required, the result is a settled conviction in my part that Congress does not possess the right. It is not contained in any of the specified powers granted to Congress, nor can I consider it incidental to or a necessary means, viewed on the most liberal scale, for carrying into effect any of the powers which are specifically granted.929

The result was that Monroe asked the Congress to submit an amendment to the states, giving it the power to raise and to spend money for internal improvements and stating that "In cases of doubtful construction, especially of such vital 'interests,' it comports with the nature and origin of our institutions, and will contribute much to preserve them, to apply to our constituents for an explicit grant of power." The amendment was introduced in the Congress, but was defeated, by those who were opposed to such an extension of federal power and by others who felt that Congress already had the power.40 Monroe finally reached the conclusion that Congress could appropriate money for internal improvements but could not engage in their actual construction without encroaching upon the police power of the states.

**Story's Interpretation**

Story agreed in part with the Madison-Jefferson construction. "Do the words," he asked, "'to lay and collect taxes, duties, imposts, and excises,' constitute a distinct, substantial power; and the words, 'to pay debts and provide for the common defense and general welfare of the United States,' constitute another distinct and substantial power? Or are the latter words connected with the former, so as to constitute a qualification upon them? If the former be the true interpretation," he said, "then it is obvious, that under color of the generality of the words 'to provide for the common defense and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specified powers: if the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of a national character, 'for the common defense and the general welfare.' "41

It will be noticed that Story's interpretation is a middle ground.

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929Richardson, op. cit., II, 18.
40Homer C. Hackett, Constitutional History of the United States (1939) I, 350-352.
He agrees with Madison who appointed him to the Supreme Court that the welfare clause does not make a separate grant of substantive power to the Congress but restricts the taxing power to objects that must meet the requirements of the general welfare. He differs from Hamilton in this respect, but he differs from Madison in that he thinks that Congress can name the objects which are included in "the common defense and the general welfare" while Madison contended that these objects had to be found in the enumerated powers of Congress.

It is obvious that there is a tremendous difference in the scope of the authority of Congress according to these interpretations. The Story interpretation though not as broad as that of Hamilton or of James Wilson creates an almost unlimited subject matter for legislation by the Congress provided it is connected with taxation. After all, are not all the functions of government based on taxation?

"Judge Story's construction," says Charles Warren, "has, in fact, resulted in vesting Congress with a power practically unlimited in its scope. The construction, moreover, produces an anomalous result, viz., that though Congress has no power to create, construct, or administer a specific instrumentality unless the power be granted in the Constitution, it may, nevertheless, appropriate money raised by taxation to maintain such an instrumentality if it deems the same to be for the general welfare. In other words, that while Congress may have no constitutional power to create a university in every state, it may have the power to appropriate money to run them, if, in its opinion for the general welfare." 42

It is unfortunate that Hamilton and Story did not have access to the Madison Journal which was not published until 1840. It is true that Hamilton was a member of the Federal Convention, but he never spent much time at the convention due to the radical difference between his views and those of his colleagues, Lansing and Yates, which divided the delegation and lost the state its vote. In fact, they all left the convention. Story never saw the minutes of the convention, which are an indispensable source from which to approach the study of any part of the Constitution. Story was a real student, and it is almost certain that if he had had access to this great source he would have reached the same conclusion as that reached by Charles Warren.

The result of recent historical research by Charles Warren and critical examination of the minutes of the Federal Convention and

of the records of the state ratifying conventions is that: (1) The phrase "to pay the debts" was inserted in the Constitution for the sole and express purpose of enabling the Congress to pay the debts of the confederation which a provision of the Constitution had brought forward and made as binding on the new Congress as on the old Congress. There was no suggestion from any source that the Congress under the Constitution would be unable to pay its own debts because it was given the specific power to borrow money on the credit of the United States, from which the power to pay such debts would logically follow. (2) The phrase "for the common defense and general welfare" was copied from the Articles of Confederation where it had been purely descriptive of the powers of the old Congress and where it conferred no power whatever. This was exactly the contention of Madison and Jefferson. Madison knew from his records that this was what the convention intended. Since it has been shown in this paper that Madison made this interpretation in No. XLI of The Federalist in 1788 before the Constitution was ratified and before Jefferson returned from France, it follows that Jefferson either reached the same conclusion independently or borrowed his interpretation from Madison.

Story was wrong in two particulars according to Madison, Jefferson, Warren, and the minutes of the Federal Convention: (1) That to pay the debts referred to the debts contracted under the Constitution and (2) That Congress could determine the meaning of the phrase "for the common defense and general welfare" instead of its meaning being found in the subsequent enumerated powers. It must be remembered that Madison and Jefferson did not contend that Congress could not tax "for the common defense and general welfare." This would, according to them, prevent Congress from exercising any of its powers. Their contention was that all the powers of Congress are "for common defense and general welfare," but that its powers are enumerated and that the enumeration defines the scope of the welfare clause otherwise the government is unlimited except by its own discretion. As Jefferson said why grant "all" power by the welfare clause and then grant only "some" powers by enumeration?

It is interesting to reflect on what Justice Story thought about Hamilton's interpretation of the general welfare clause and then on what the Supreme Court has done to Justice Story's interpretation. "If the clause, 'to pay the debts and provide for the common defense and the general welfare of the United States,' is construed to be an independent and substantive grant of power," he said, "it
not only renders wholly unimportant and unnecessary the subsequent enumeration of specific powers; but it plainly extends far beyond them, and creates a general authority in Congress to pass all laws, which they may deem for the common defense and general welfare. Under such circumstances, the Constitution would practically create an unlimited national government." He agreed with Madison and Jefferson in this contention. He further agreed that "The enumerated powers would tend to embarrassment and confusion; since they would only give rise to doubts, as to the true extent of the general power, or of the enumerated powers."

Madison thought that this tautology and conflict was enough to prove that the Hamilton interpretation was unconstitutional, because it was impossible to eliminate the enumerated powers. Justice Story strengthened this argument, saying: "One of the most common maxims of interpretation is . . . that, as an exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated."

Justice Story thought he was placing a very restrictive interpretation on the power in question when he limited it merely to taxation. In other words, Congress could only tax for the general welfare: it could not legislate in general for the general welfare. He overlooked the fact that only legislation raising and appropriating money would likely do much for the general welfare and that as a matter of fact practically all legislation involves the expenditure of money.

For more than 150 years the Supreme Court was able to escape placing an interpretation on the general welfare clause. In 1936 it adopted Story's interpretation, but incorrectly stated that "Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position." It has been shown previously by a quotation from Hamilton that he insisted that the welfare clauses made a distinct and substantive grant of power to Congress while Story maintained that it was only a purpose clause and restrictive of the taxing power. One wonders if the court did not know the difference and also which one it meant to adopt. In two later cases Justice Cardozo elaborated the court's philosophy as to the general welfare clause; both opinions dealt with social security. In the first, only a passing remark was made to the effect: "It is too late today for the argument to be

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43 Story, op. cit., II, 369.
44 Ibid., II, 369, 370.
heard with tolerance that in a crisis so extreme the use of money of
the nation to relieve the unemployed and their dependents is a use
for any purpose narrower than the promotion of the general wel-
fare."47 This remark was made in concluding a discussion in which
an attempt was being made to draw a line between duress and in-
ducement as if it would make any difference as to the constitution-
ality of what was being done whether by duress or inducement; of
the states. It seems that the court conceded that if the states were
being coerced, the scheme of things was unconstitutional but if only
inducement was, being used the same scheme of things would be
constitutional. Can Congress by mere legislation, if the states
consent by inducement, change the Constitution? Of course, Con-
gress nationalized the administration of the participation of the
states in the scheme of things. It is very doubtful whether either
Hamilton or Story ever imagined that the welfare clause could
control state taxation and abolish state administration of its own
taxes.48 The significant thing about the remark is not only its lack
of relation to the point under consideration, but the flat announce-
ment that it was "too late" to listen to argument on constitutionality
"in a crisis so extreme." In other words, what is necessary is con-
stitutional.

In the second decision by Justice Cardozo congressional su-
premacy as predicted by Madison, Jefferson, Monroe, and Story
was practically announced. "The line must still be drawn," said the
court, "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 cer-
tainly a penumbra in which discretion is at large. The discretion,
however, is not confided to the courts. 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."49
"When such a contention comes here we naturally require a show-
ing that by no reasonable possibility can the challenged legislation
fall within the wide range of discretion permitted the Congress."50

This is but an involved way of saying that Congress is prac-

47Steward Machine Co. v. Davis, (1937) 301 U. S. 548, 57 S. Ct. 883,
81 L. Ed. 1279, 109 A. L. R. 1293.
48See dissenting opinion of Justice Sutherland in the Steward Machine
Co. v. Davis Case, in which Justices Van Devanter, McReynolds and Butler
concurred.
49Helvering v. Davis, (1937) 301 U. S. 619, 57 S. Ct., 904, 81 L. Ed. 1307,
109 A. L. R. 1319.
50United States v. Butler, (1936) 297 U. S. 1, 56 S. Ct., 312, 80 L. Ed.
477, 102 A. L. R. 914.
tically unlimited in legislating for the general welfare. A line must be drawn between particular and general welfare, but by what body? By the Congress, not by the courts. Can the courts question the constitutionality of the line? Not unless the line is clearly wrong and is outside of "the wide range of discretion permitted the Congress." Even when the wide discretion of Congress is questioned it must be shown that "by no reasonable possibility" could the Congress be right. What is the place left to judicial review? This line must be one of those invisible radiations of which Justice Holmes so frequently spoke.

Thus has come to pass what James Madison said in 1817: "Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and State Governments, in as much as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision." So it has happened that by judicial interpretation we have practically abolished the lines of federalism fixed in the Constitution by the enumerated powers and achieved the original Virginia proposal that Congress should have the power "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." While the Virginia proposal gave Congress the power to regulate all such state legislation, this remains almost the only function of judicial review if the states continue to struggle. Justice Holmes once said: "I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the union would be imperiled if we could not make that declaration as to the laws of the several states." Maybe he was correct. It remains to be seen. For decades political scientists have contended that the English character offered a greater protection than a fundamental law. Current events seem to cast some doubt on this contention. It can be said now that the future of constitutional government in this country is primarily in the hands of the Congress subject only to the ballot box.

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51 Richardson, op. cit., I, 585.
52 Farrand, op. cit., I, 21.
53 Speeches, (1913) 98.