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The General Welfare Clauses in the Constitution of the United States

Cover Page Footnote

Class of 1938, Fordham University, School of Law

THE GENERAL WELFARE CLAUSES IN THE CONSTITUTION OF THE UNITED STATES¹

HERMAN J. HERBERT JR.†

"The General Welfare Clause is dead—long live the General Welfare Clause!"—HENRY A. WALLACE,² 1936.

" . . . a power as broad as the boundless seas and infinite as the firmament, embracing the whole field of human desires and human cupidity"—HENRY ST. GEORGE TUCKER,³ 1927.

"The common defence and general welfare, in the hands of a good politician, may supersede every part of our constitution, and leave us in the hands of time and chance."—HUGH WILLIAMSON,⁴ 1792.

I. GENERAL WELFARE—THE CONCEPT

In endeavoring to discover the basic political principle responsible for the abundance of socio-economic legislation emanating from Washington during the years of the Roosevelt administration, one is struck by the similarity of current public pronouncements. He listens to a "fireside chat" by the President of the United States and hears that "the powers given to Congress to carry out . . . the general welfare . . . can best be described by saying that they were all the powers needed to meet each and every problem which had a national character and which could not be met by purely local action."⁵ Cabinet officers write of the "theory that the country as a whole, including industry, commerce, and finance ought to be developed and used for the greatest good for the greatest number";⁶ that "the outstanding need seems to be for a democratic mechanism which can direct action in behalf of the general welfare."⁷ A political author expresses vehemently his desire for "the final creation of a general government . . . with powers equal to the utmost necessity of the general welfare."⁸

Legal and political scholars of every age have agreed that the primary obligation of the state is a broad mandate to provide generally for the peace and prosperity of its citizens. In the Aristotelean ideology, the state exists not

† Class of 1938, Fordham University, School of Law.

1. Class of 1911 Prize Essay.

The Class of 1911, on the occasion of its Silver Jubilee, established a prize consisting of the yearly income of the sum of \$1500, to be awarded annually for the best essay submitted by a student in the senior class of the Law School on a legal subject to be designated annually by the Dean. In the event that in any year no essay submitted is deemed worthy of the award, the income of the fund for that year will be devoted to the purchase of books for the law library.

2. WALLACE, *WHOSE CONSTITUTION* (1936) 35.

3. Tucker, *Judge Story's Position on the So-called General Welfare Clause* (1927) 13 A. B. A. J. 363, 367.

4. Debate in the House on the Codfisheries' Bill, Feb. 3, 1792. 4 ELLIOT'S DEBATES (1836) 436. Hereafter cited: ELLIOT.

5. Franklin D. Roosevelt, quoted in (1937) 23 A. B. A. J. 351.

6. ICKES, *THE NEW DEMOCRACY* (1935) 96.

7. WALLACE, *op. cit. supra*, note 2, at 267.

8. BRANT, *STORM OVER THE CONSTITUTION* (1936) 116, 119.

merely for the prevention of evil or for the sake of economic gain through alliances for trade, but for the promotion of "a perfect and self-sufficing life, *i.e.* a happy and honorable life" to be effected through noble actions, which are the *raison d'être* of the state.⁹ Plato, advocating a collectivist society, sets up four great virtues for the state—wisdom, courage, temperance, and justice—and contends that "everyone having his own" is the great object of government.¹⁰

Justinian, introducing the Institutes to the Roman people, echoes the Platonic philosophy, but dwells on the necessity of law to achieve the desired end. The three fundamental objects of law are: to injure no one; to live morally (*honeste*); and to render every man his own. But the end of the state is the same. Therefore the end of the state is to be secured through law.¹¹ The end of law, like the end of the state, is therefore moral as well as coercive.

Perhaps the doctrine of the "*communum bonum*" of St. Thomas Aquinas best epitomizes the great and general end of all government. "Whatever is for an end," says the great logician, "should be proportionate to that end. Now, the end of law is the common good (*communum bonum*); because, that law should be framed, not for any private benefit, but for the common good of all the citizens. Hence human laws should be proportionate to the common good. Now the common good comprises many things. Wherefore law should take account of many things, as to persons, as to matters, and as to times. Because the community of the state is composed of many persons; and its good is procured by many actions; nor is it established to endure for a short time, but to last for all time, by the citizens succeeding one another."¹²

With the advent of the Christian theology, the concept of a close inter-relationship between human and divine law came into being. Carried through the teachings of Augustine and Thomas Aquinas, it is seen in the early period of modern history in the argument of Cataneo, Roger Coke, and Follett.¹³ Coke, rebelling against the school of Hobbes and Rousseau, writes that all law is to be traced to God and the Natural Law.

"The *ratio finalis*, or the end for which God hath ordained kings, is for the protection of them whom God hath committed to their charge and government; not only by all just and due means to protect them from the outward violence and oppression of their outward enemies, but also in peace inwardly and by all means to suppress all faction and sedition of ambitious men, who would disturb it. . . . The end of all government is, either to preserve the governed inwardly in peace, or to defend them from outward violence of others."¹⁴

To Cataneo, the happiness of mankind, insofar as humanly attainable, is the chief and universal object of laws.

9. ARISTOTLE, POLITICS, III, 9. BARKER, POLITICAL THOUGHT OF PLATO AND ARISTOTLE (1906) 282.

10. PLATO, REPUBLIC, IV, 427-435 (Jowett's translation).

11. JUSTINIAN, INSTITUTES, I, 1, § 3, translated by CUMIN CIVIL LAW (1865). And see *Introduction* to AIRD, CIVIL LAW OF FRANCE (1864). For thoughts analogous to that of Justinian, see ST. AUGUSTINE, CONFESSIONS, iii, 8, and CICERO, DE REPUBLICA, I, 25.

12. SUMMA THEOLOGICA, Part II, XCVI, Art. I. Cf. ST. AUGUSTINE, DE CIV. DEI, xxii.

13. See Follett's pamphlet, *Elements of the Science of Good Government* (1833) for an extended discussion of the moral aspect of political science.

14. JUSTICE VINDICATED FROM THE FALSE FOCUS PUT ON IT (1660) Book II, 42.

"Long before there was any possibility for men to fear each other, or to quarrel about possessions, a natural propensity, and a familiar acquaintance, inclined them to a reciprocal union, a thousand indispensable wants, which no man by himself, however laborious or ingenious, could have provided for, must have linked them together, and a thousand pleasures, to which we are naturally addicted, must have been the cement of society, without which we cannot attain to any felicity."¹⁵

Men have created civil society, therefore,

"that they may be less wretched in unavoidable evils and more happy in their enjoyments . . . legislators may sometimes be wide of the mark, but they always take the like aim; their intentions cannot be absolutely opposite. . . ."¹⁶

Blackstone emphasises the necessity of the state for man's protection;

" . . . and this is what we mean by the original compact of society . . . namely, that the whole should protect all the parts, and that every part should pay obedience to the whole, or, in other words, that the community should guard the rights of each individual member."¹⁷

Leo XIII, expounding the Christian theory of the formation of the state, strikes, perhaps, the mean of all the teachers that precede him:

"When different families . . . unite under the inspiration of nature, in order to constitute themselves members of a larger family circle called civil society, their object is not only to find therein the means of providing for their material welfare, but, above all, to draw thence the boon of moral improvement."¹⁸

II. THE ORIGIN OF THE CLAUSES

The Declaration of Independence, setting forth the fundamental objections of the American colonies to English rule, included the statement that the British King

"had refused his assent to laws, the most wholesome and necessary for the public good"

and, in recognition of this primary obligation of the state, the Continental Congress incorporated into the Articles of Confederation two sections containing the words "general welfare";

"Art. III. The said states hereby severally enter into a firm league of friendship . . . for their mutual and general welfare, binding themselves to assist each other, against . . . attacks made upon them. . . ."

"Art. VIII. All charges of war, and all other expenses which shall be in-

15. *ESSAYS ON THE NATURAL ORIGIN OF POLITICAL GOVERNMENTS* (1753) 8.

16. *THE SOURCE, THE STRENGTH AND THE TRUE SPIRIT OF LAWS* (1753) 154.

17. 1 *BL. COMM.* 47.

18. Leo XIII, Encyclical, *Au Milieu des Sollicitudes* (1892). In comparison, it is to be noted that the materialistic collectivist has his conception of the "general welfare". "In a higher plane of communist society, society may inscribe upon its banners; each one according to his abilities, to each according to his needs." MARX, *I CAPITAL* (4th ed. 1907) 567.

curred for the common defense and general welfare . . . shall be defrayed out of a common treasury. . . ."

Expressive of like principles are two portions of the Constitution of the United States:

"Preamble. We, the people of the United States, in order to form a more perfect union . . . provide for the common defense, promote the general welfare . . . do ordain and establish this Constitution. . . ."

"Art. I, Sec. 8, Clause 1. The Congress 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. . . ."¹⁹

One notes a great similarity between Art. III of the Articles of Confederation and the Preamble of the Constitution, and between Art. VIII of the Articles and Art. I, Sec. 8, Clause 1 of the Constitution. Both the former are statements of purpose; as it were, editorial comments; both the latter are taxing clauses. While these likenesses add some weight to a contrary viewpoint, it is misleading to state broadly that the phrase "general welfare" was copied from the Articles into the Constitution.²⁰ Under the Articles, the phrase had a limited meaning, for the reason that the Revolutionary War was the principal "general welfare" of which the federal government took cognizance; and the debts arising out of the war were the chief financial burden.²¹ At the time the Constitution was written, on the other hand, the War was some years in the past; this, and the fact that the delegates at the Federal Convention were desirous of forming a union with greater coercive authority,²² goes far to disprove any contention that the similarity of terminology is to denote similarity in the extent of power conferred.

It may be true that the phrase in the Preamble was so copied, for the phrase was not included in the Preamble until the closing days of the Federal Convention.²³ Since there is no recorded discussion of the Preamble at that time,

19. It is interesting to note that many Constitutions, adopted since 1789 contain the words "general welfare" or their equivalent. See the Constitution of the SWISS CONFEDERATION (1874) Art. II; CONSTITUTION OF THE ARGENTINE NATION (1893) Preamble; BRITISH NORTH AMERICA ACT (Canada, 1867). Under the CONSTITUTION OF BRAZIL, Art. 44, the President is required to take an oath that he will "maintain and execute the federal constitution with perfect loyalty, promote the general welfare of the republic, observe its laws, and uphold its union, integrity, and independence."

20. Warren states simply that the words "were operating from Articles of Federation, in which they were words of mere general import." WARREN, MAKING THE CONSTITUTION (1929) 475n. The argument is based upon the view expressed by Madison in his letter to Andrew Stevenson in which Madison, like Warren, states that the clauses were copies from the Articles of Federation and are subject to the same narrow construction. 3 FARRAND, RECORDS OF THE FEDERAL CONVENTION (1937) 483. Hereafter cited: FARRAND. There is no reason for the bald assertion. Even if the argument is granted, however, it is to be noted that Madison admitted that the "general welfare" clause of the Articles was one of "undefined authority." 4 MADISON, LETTERS AND WRITINGS (1922) 126.

21. WARREN, MAKING OF THE CONSTITUTION (1929) 466-469.

22. In this respect, both the Virginia and Patterson (New Jersey) Plans agreed. 1 FARRAND, 242.

23. The Preamble was not presented until the report of the Committee on Style was

it may be presumed that the phrase was copied from Art. III of the Articles, Art. III being the "preamble" of that instrument.

The present Art. I, Sec. 8, Clause 1 of the Constitution, however, was debated vigorously during the Convention. Though taxes could be levied by the Congress under the Articles, there was no means of enforcing collection.²⁴ A "firm league of friendship" existed, and nothing more.²⁵ The need for taxation on a national plane was clearly felt; the clause suffered many revisions as a result.²⁶ In view of the controversy involved in the modern interpretation of the clause, it is to be noted that the most "radical" propositions were these:

given on September 12th. The Convention closed on the 17th. 2 FARRAND, 265, 650. There is no reported discussion of the Preamble by the Committee on Detail—a strong indication of the fact that the preamble was intended to convey no substantive power whatever. In a proposed draft of the Constitution as presented to the Convention on August 6, the following is the Preamble: "We, the people of the states of New Hampshire, Massachusetts, Rhode Island . . . do ordain, declare, and establish the following Constitution for the government of ourselves and our posterity." *Ibid.* 152. In this form, the Preamble was passed unanimously on August 7. *Ibid.* 196. On September 10, the draft of the entire instrument was passed to the Committee on Style. The Committee revised the whole draft, and presented the Preamble in its present form. *Ibid.* 565.

24. OGG AND RAY, INTRODUCTION TO AMERICAN GOVERNMENT (1932) 29.

25. ARTICLES OF CONFEDERATION, Art. III.

26. The clause in the Patterson Plan, note 27, *infra*, was the first presented. 1 FARRAND, 242. Wilson of Pennsylvania a few days later presented a clause reading: "The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises. . . ." 2 FARRAND, 167. Discussion of the latter clause concerned only the limits of the power to tax and the possibility of taxing imports; there was no mention of the spending power of Congress. 2 FARRAND, 305-308. (However, the words "general welfare" were not as yet included). To the Wilson Clause the words "for the payment of the debts and necessary expenses of the United States" were later added. *Ibid.* 366. Subsequent revisions changed the clause to read, first: "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, and imposts, and excises" (*ibid.* 382); second: "all debts contracted and engagements entered into, by or under the authority of the Congress shall be as valid against the United States under this Constitution as under the Confederation" (*ibid.* 414); and third: its present form (*ibid.* 493). Another clause was reported by a committee which had decided favorably toward the assuming by the federal government of the state war debts. It read: "The legislature of the United States shall have full 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." (*ibid.* 352.) Sherman's clause, *supra*, was defeated as "unnecessary" (*ibid.* 414). It is noteworthy that none of the discussion on any of these clauses directly concerned the spending power. (*ibid.* 305-308, 412-414).

An interesting argument over the original construction of the clause will be found in an address by Congressman David J. Lewis of Maryland before the House of Representatives in 1935, in the CONGRESSIONAL RECORD, 74th Cong. 1st Sess. Vol. 79, Part 10, pp. 10399-10411. Congressman Lewis argues that when the clause was read to the Constitutional Convention on September 12, from the desk copy of General Washington, the clause contained a semicolon after the words "to pay the debts of the United States", and that the printed convention copies of the clause likewise contained the semicolon. He attributes the change in punctuation to a mistake of the copyist who prepared copies of the finished

"Resolved, that . . . Congress be authorized to pass acts for raising a revenue . . . to be applied to such federal purposes as they shall deem proper and expedient."²⁷

"(Congress shall have the power to tax) for the payment of said (war) debts and for defraying the expenses that shall be incurred for the common defense and general welfare."²⁸

The first was part of the Patterson Plan.²⁹ The author of the second was Roger Sherman, of Massachusetts, who was the author also of the present clause.³⁰ It would seem that both would have conveyed a broad power to spend and nothing more. Since there was no debate over the clause when it was presented in its present form,³¹ however, there is no means of judging the extent of power conferred by it originally.

III. THE SCOPE OF THE CLAUSES

It is immediately evident, in view of the federal nature of the American union, that the concept of general welfare, in the United States, will have to be "split" into that welfare for which the states on the one hand, and the federal government on the other, can provide. Federal and state governments operate concurrently throughout the nation. For some purposes the states are sovereign, for others subordinate;³² they retain, under the Constitution, all powers not granted to the national government.³³ Our object is to ascertain the limits of the powers of Congress, under the clauses of the Constitution quoted above, to legislate for general welfare of the people of the United States.

Constitution for publication. It is true that if a semicolon were put in place of the comma in the clause as it is read at present, the resulting disjunction would make it possible to separate the "general welfare of the United States" from the power to lay and collect taxes; and the present attempted expansion of Congressional power might be sustained constitutionally. We submit, however, that the argument has never been fully sustained; in any event, its force is extremely weakened by the fact that the clause has contained the comma, and its grammatical construction has remained unchallenged, for a century and a half.

27. 1 FARRAND, 243.

28. 2 FARRAND, 414.

29. It is noteworthy, in view of the argument that the clauses were copies from the Articles, that a broad power to spend should have been urged by the smaller states, which were championed by the Patterson Plan. They feared they would be "deprived of an equality of suffrage . . . and thereby be thrown under the domination of the large states." 1 FARRAND, 242 (Madison's footnote). The fact that the Patterson resolution was broad in its application is some proof that there was a desire even in the Convention that the power to spend should be used widely.

30. BRANT, *STORM OVER THE CONSTITUTION* (1936) 137.

31. 2 FARRAND, 499.

32. Marshall, C. J., in *Cohens v. Virginia*, 6 Wheat. 264, 412 (1821).

33. U. S. CONST., Amend. X: "The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

A. THE PREAMBLE

Sir Edward Coke states cautiously that the "rehearsall or preamble" of a statute is a "good mean" to find out its meaning, and as it were "a key to open the understanding thereof."³⁴ The Preamble of the Constitution appropriately sets forth the general ideals toward which the Constitution tends, and refrains from establishing any specific rule of law. It is extremely unlikely that the present tendency to expand the power of Congress and the executive will alter this accepted interpretation.³⁵ Judge Story stated the true scope of the preamble as follows:

"The Preamble can never be resorted to, to enlarge the powers confided to the general government or any of its departments. It cannot confer any power per se. It can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power when otherwise withdrawn from the Constitution. Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them."³⁶

Story's viewpoint has been universally upheld by later judicial decisions and constitutional authorities³⁷ and seldom questioned except in the political authorship of the present day.

B. THE CLAUSE IN ART. I, SEC. 8.

It would be fortunate if as clear a limitation could be set upon the grant of power given to Congress by the clause in Art. I, Sec. 8. It would seem that

34. COKE, *FIRST PART OF THE INSTITUTES, OR A COMMENTARY UPON LITTLETON* (1812) II, § 103. And see HARGRAVE AND BUTLER, *NOTES TO LORD COKE'S FIRST INSTITUTE* (1812) Book II, note 42.

35. Note the developments in such books as ICKES, *THE NEW DEMOCRACY* (1935); WALLACE, *WHOSE CONSTITUTION* (1936); and BRANT, *STORM OVER THE CONSTITUTION* (1936).

36. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (5th ed. 1891) § 462.

37. *Jacobson v. Massachusetts*, 197 U. S. 11, 22 (1905):

"Although the Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States or any of its departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those granted. Although, therefore, one of the declared objects of the constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be expected to that end by the United States unless, apart from the Preamble it can be found in some express delegation of power or in some power to be properly implied therefrom." And *cf.* *United States v. Boyer*, 85 Fed. 425, 430 (W. D. Mo. 1898); COOLEY, *CONSTITUTIONAL LIMITATIONS* (8th ed. 1927) 11; WILLOUGHBY, *ON THE CONSTITUTION* (2d ed. 1929) § 41. In the early years of government under the Constitution, there was expressed the doctrine that the Congress possessed a general grant of power to legislate for the general welfare. The fear of such a doctrine can be found in Madison's Report on the Virginia Resolutions, 4 ELLIOT (1800) 576; in Jefferson's Opinion on the Bank, 3 WRITINGS (Memorial ed. 1899) 147-149, 179; and in the argument of Burwell in the House during the debate on the renewal of the charter of the United States Bank (Jan. 16, 1811) 4 ELLIOT (1800) 473.

from the beginning the words "to provide for the general welfare" were subject to two widely divergent political views.³⁸ The Federalist, desiring a strong central authority, considered that Congress had the power to tax and spend for anything within the general welfare and was limited only to the extent that the tax and expenditure serve a public purpose.³⁹ The Republican, interested in the retention by the states of as great a sphere of authority as possible, imposed a narrow interpretation, allowing the Congress to tax and spend only for purposes within the enumerated powers following the clause.⁴⁰

1. *Statutory Application of the General Welfare Clause—Ante 1933*

Despite the argument over the scope of the clause, there can be seen in the enactment of statutes by the Congress an ever-expanding field of federal appropriations. The limits of that field are not yet known with any degree of definiteness.⁴¹

In an early message to Congress, Washington urged that

"the safety and interest of a free people require that Congress should promote such manufactures as tend to render them independent of others,"⁴²

38. A letter of Jefferson is illuminating: "Our tenet ever was, and, indeed, it is almost the only landmark that divides the Federalists from the Republicans, that Congress has no unlimited powers to provide for the general welfare, but is restrained to those specifically enumerated; and that, as it was never meant they should provide for the 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." Jefferson to Gallatin, June 16, 1817, quoted in WARREN, *MAKING OF THE CONSTITUTION* (1929) 478.

The political significance of the clauses was argued strenuously in the state conventions which followed the Philadelphia meeting. See argument in McGuire, *The New Deal and the Public Money* (1936) 23 *Geo. L. J.* 155, 171-179, and in brief for the United States in *United States v. Butler*, 297 U. S. 1 (1935), quoted in (1936) 22 *A. B. A. J.* 115 *et seq.*

39. Hamilton is the chief exponent of the Federalist theory: "It is therefore of necessity left to the discretion of the national legislature to pronounce upon the objects which concern the national welfare, and for which, under that description, an appropriation of money is requisite and proper. And . . . 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." *Report on Manufactures*, 1791, 4 *ELLIOT*, 578.

40. The Republican view is epitomized in Madison's opinion: "It will scarcely be said that (in the Articles) these phrases were ever understood to be either a general grant of power or to authorize the requisition or application of money by the old Congress to the common defense and general welfare, except in the cases afterward enumerated, which explained and limited their meaning, and if such were the limited meaning attached to these phrases in the very instrument revised and remodelled by the present Constitution, it can never be supposed that when copied into the Constitution, a different meaning ought to be attached to them." (1799) *Report to the Virginia Legislature on the Virginia Resolutions*, 4 *ELLIOT* 577.

41. Even during the Federal Convention it was sought to give Congress the power to create a university, to encourage the advancement of useful knowledge and discoveries, and to establish seminaries—all outside the present enumerated powers. 2 *FARRAND*, 32.

42. Jan. 11, 1790, quoted in 4 *ELLIOT* 332.

and added that the advancement of agriculture and commerce needed no recommendation. The Congress agreed that

"agriculture, commerce, and manufactures, forming the basis of the wealth and strength of our confederated republic, must be the frequent subject of our deliberations."⁴³

On behalf of commerce there was passed during Washington's administration the Codfisheries Bill,⁴⁴ providing for the payment of subsidies to those in certain types of industry, in accordance with the desire expressed by Hamilton in his Report on Manufactures, given to the Congress in 1791.⁴⁵

(a). Internal Improvements

In 1802, under the agreement whereby Ohio was admitted to the Union,⁴⁶ the Congress passed its first measure in aid of internal improvements within the states. In return for a grant of land to each township, to be utilized for free schools, and a pledge on the part of the federal government to use five per cent of the money received from a sale of the public lands within the state for the construction of roads between Ohio and the seaboard states, Ohio was required not to tax the public lands which should be sold for a period of five years after the sale. During the next year Congress provided that three per cent of the net proceeds from land sales in all the states should be turned over "to such persons as might be authorized by the legislature of the state to be applied to the laying out, opening, and making of roads within the states."⁴⁷

Although Jefferson supported the Republican view of the spending power,⁴⁸ he permitted and in fact urged an exception in the case of the Louisiana Purchase.⁴⁹ A reaffirmation of the doctrine that the federal monies could be spent in aid of internal improvements is seen in the passage of the measure for the establishment of the Cumberland Road,⁵⁰ the subject of many subsequent appropriations and much severe debate.⁵¹

43. 4 ELLIOT 332.

44. 1 ANN. 2ND CONG. 387 (1792).

45. 4 ELLIOT 578; Works (Lodge's Ed.) 151.

46. 2 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS (1911) 169-171. Hereafter cited: RICHARDSON.

The author has depended greatly upon Professor Corwin's excellent treatise for his development of the statutory enactments under the General Welfare Clause. Corwin, *The Spending Power of Congress—Apropos the Maternity Act* (1923) 36 HARV. L. REV. 548.

47. 2 RICHARDSON, 169-171.

48. Cf. note 49 *supra*. While Jefferson early in his administration believed that Congress should protect agriculture, manufacturing, commerce, and navigation by means within "the limits of our constitutional powers" (1 RICHARDSON, 318) and advocated the establishment of a marine hospital in New Orleans for the treatment of American seamen (*ibid.* 324), he later urged that amendments were necessary to authorize expenditures for roads, canals, river developments, and education (*ibid.* 444). One question posed by him in 1806, however, is of merely academic importance at the present time: "To what objects shall surpluses be appropriated . . . after the entire discharge of the public debt . . . ?"

4 ELLIOT 334.

49. However, the purchase was severely contested in the House. 4 ELLIOT 462-463.

50. 2 RICHARDSON 169-171.

51. YOUNG, A POLITICAL AND CONSTITUTIONAL STUDY OF THE CUMBERLAND ROAD, *passim*.

In 1817, a bill to set aside the bonus and dividends accruing to the United States on the shares held by the government in the National Bank as a fund for internal improvements was debated on the floor of the House.⁵² John Calhoun, advocating passage of the act, mentions other examples of appropriations outside the enumerated powers:

"We granted by unanimous vote, or nearly so, \$50,000 to the distressed inhabitants of Caraccas, and a very large sum, at different times, to the St. Domingo refugees . . . at the last session, a considerable sum was granted to complete the Cumberland Road. . . . I have introduced these instances to prove the uniform sense of Congress, and the country, as to our powers; and surely they furnish better evidence of the true interpretation of the Constitution than the most refined and subtle arguments."⁵³

The Bonus Bill went to Committee, and the committee, reporting, mentioned the pledge of funds for a library, for paintings, and for the services of a chaplain; "liberal donations to the wretched sufferers of Venezuela"; the despatch of the Lewis and Clark expedition to the Pacific; and the payment of bounties under the Codfisheries Bill.⁵⁴ The Bonus Bill was passed over Madison's veto.⁵⁵

In opposition to the "uniform sense of Congress" stressed by Calhoun are two presidential messages, one sent to Congress by Madison with his veto of the Bonus Bill,⁵⁶ the other by Monroe with the veto of a bill for the preservation and repair of the Cumberland Road.⁵⁷ Specifying his objection, Madison again sought to limit the "general welfare clause" of Art. I by the enumerated powers and stated his fear that a broader view would give to Congress a

"general power of legislation, . . . the terms 'common defence and general welfare' embracing every object and act within the purview of the legislative trust."

The objection failed to convince the Congress, in all probability for the reason that Calhoun and others had not sought to extend the power of Congress under the clause beyond the field of appropriation.

Monroe, on the other hand, was constrained to admit that Congress had an unlimited power to raise money and a wide discretion in spending it, the only limitation being that it must be applied for "general, not local . . . benefit." The power went no further, however; for though Congress might appropriate *ad libitum*, it could not gain by virtue of the appropriation any jurisdictional rights over the improvement for which the grant was made. Congress could grant money for the construction of a road, but it must be left to the state to condemn the land, to build the road, and to undertake the

52. 31 ANN. 15TH CONG. (1st Sess.) 451 *et seq.*

53. 2 WORKS OF CALHOUN (Cralle ed. 1912) 194.

54. 31 ANN. 15TH CONG. (1st Sess.) 451 *et seq.*

55. 2 WORKS OF CALHOUN (Cralle ed. 1912) 186. The vote was 86 to 84, a probable indication of an almost equal division of the Congress as to the scope of the clause.

56. Feb. 27, 1817; 4 ELLIOT, 488.

57. 1822-4 ELLIOT, 550, also at 32 ANN. 15TH CONG. (2nd Sess.) 1380 *et seq.* The Message is Monroe's famous "Views of the President of the United States on the Subject of Internal Improvements."

protection of it when completed. More concretely stated, the theory urged was that the "necessary and proper" clause of Art. I, Sec. 8⁵⁸ was not to be used in conjunction with the "general welfare clause". Judicial decision has destroyed Monroe's contention, at least insofar as condemnation is concerned.⁶⁰

At the present time, the development of roads, canals, railroads, and other internal improvements may be sustained under the war, postal, or commerce powers.⁶⁰ It is submitted, however, that the fact does not alter the force of the instant argument. The significance and scope of the "general welfare clause" during the early years of constitutional history is to be determined largely by the belief of the Congress as expressed in legislation enacted under the clause,⁶¹ since there had not as yet been any pertinent judicial interpretation.

(b). Education and Agriculture

The enactment of statutes in aid of internal improvements was conducive to the desire to appropriate money to other fields not included within the enumerated powers. Aid to both education and agriculture had been urged by the early presidents.⁶²

It is to be noted that the United States until comparatively recent times was to a far greater extent an agricultural, rather than an industrial, nation.⁶³ Early appropriations show the interest of the Congress in improving the knowledge of the farmer. In 1838 money was voted for the collection of agricultural statistics; in 1850, for the chemical analysis of vegetable substances. In

58. U. S. CONST. Art. I, Sec. 8, clause 18: "The Congress shall have the Power . . . to make all laws which shall be necessary and proper to carry into execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States. . . ."

59. *United States v. Gettysburg Elec. Ry. Co.*, 160 U. S. 668 (1896); *United States v. Certain Lands in the City of Louisville, Kentucky*, 78 F. (2d) 684 (C. C. A. 6th, 1935); both cases holding that if the land is to be used for a public purpose, the United States may condemn.

60. See 2 RICHARDSON, 760 for opinion of Monroe. Development of railroads through federal aid was condoned in *California v. Central Pacific R.R. Co.*, 127 U. S. 1 (1888), the court stating that the Congress has "plenary power" over the whole subject of land transportation. Irrigation statutes were sustained in *Kansas v. Colorado*, 206 U. S. 46 (1907), and flood control in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288 (1935); (1936) 5 FORDHAM L. REV. 114.

61. See Corwin, note 46, *supra*, at 565.

62. Recommendations of Washington (*supra* p. 000) and Jefferson (*supra* note 48) have been noted. Jefferson was of the opinion that an amendment was necessary if Congress wished to found a university (1 RICHARDSON 444). Madison, in his first message to Congress advocated the establishment by the Congress in the District of Columbia of a seminary of learning local in its legal character but universal in beneficial effects. (1 RICHARDSON 470). In his seventh message the project was suggested again (*ibid.* 552, 553). In the interest of developing scientific knowledge, John Quincy Adams urged the establishment of an astronomical laboratory, the present naval observatory, and the subsidizing of scientific expeditions. (2 *ibid.* 785).

63. The present Secretary of Agriculture has presented some interesting statistics in his recent volume, *WHOSE CONSTITUTION* (1936).

1852, for the first time, the purchase and distribution of seeds was provided for; and a few years later Congress published information concerning the consumption of cotton.⁶⁴ Noteworthy is the fact that these early appropriations were made at a time when an unlimited spending power was in disfavor—the “State’s Rights” period of 1830-1860. In 1862, with no discoverable objection on constitutional grounds, the Department of Agriculture was established,⁶⁵ and in the same year was voted a sum for the study of plant and animal diseases.⁶⁶

From these few statutes there has developed the huge organization centered today in the Department of Agriculture. Continued expansion of the field of agricultural research has been accompanied by consistent increases in the number of services rendered to the farmer by the national government and paid for out of the federal monies.⁶⁷ Until recent years, the desire of Congress to aid the farmer influenced all grants in aid of education. In 1862, under the Morrill Act, land was given to establish colleges,

“where the leading object shall be, without excluding other scientific or classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts. . . .”⁶⁸

Again, a presidential veto was of no avail, for Congress overrode the argument of Buchanan when he urged that there was no real distinction between the land and the money controlled by Congress, and that since money could not be appropriated outside the enumerated powers, the use of the land was likewise prohibited.⁶⁹

The Morrill Act was amplified in 1890, and a direct grant of money received from a sale of the public lands, in contra-distinction to the land itself, was given to each state and territory establishing colleges in accordance with the requirements made under the earlier statute.⁷⁰ In 1900 the final step was taken, and the appropriation was allowed from general funds.⁷¹ In all cases,

64. See Corwin, note 46, *supra*, at 565.

65. REV. STAT., § 520, 5 U. S. C. A. § 511 (1862).

66. For above and other details, see WANLASS, U. S. DEPT. AGRICULTURE, 38 JOHN HOPKINS STUDIES, *passim*.

67. Among recent statutes may be found the following: 44 STAT. 1065, 7 U. S. C. A. § 146 (1927), (\$10,000,000 for the eradication of the European corn-borer); 50 STAT. 57, 7 U. S. C. A. § 148 (1937), Control of insect pests and plant diseases; 46 STAT. 1469, 7 U. S. C. A. § 426a (1931), (\$1,000,000 each year for experimentation in the eradication of wolves, coyotes, bobcats, etc.); 45 STAT. 593, 7 U. S. C. A. § 415 b, d (1937) (diffusion of knowledge relative to the standardization, grading, etc. of wool); 44 STAT. 840, 7 U. S. C. A. § 421a (1926), 44 STAT. 981, 7 U. S. C. A. 422a (1928) (establishment of dairying and livestock experiment stations in North Dakota and Tennessee); 43 STAT. 243, 7 U. S. C. A. § 404 (1924) (“such sums as may be necessary” for the Bureau of Dairying); 42 STAT. 1519, 7 U. S. C. A. § 64 (1923) (Cotton Standards Act—regulation of cotton standards and production).

68. 12 STAT. 503, 7 U. S. C. A. § 301 (1862).

69. 5 RICHARDSON, 548.

70. 26 STAT. 417, 7 U. S. C. A. § 322 (1890). Donations amounting eventually to \$25,000 per year were to be made to each state and territory, for the more complete maintenance of schools already established, or to be established, under the Morrill Act.

71. 31 STAT. 179, 25 U. S. C. A. § 421 (1900). If the appropriation resulting from

the money is given only where there are taught in the colleges affected subjects relating to agriculture and the industrial arts.

The Smith-Lever Act of 1914⁷² and the Smith-Hughes Act⁷³ of 1917 have still further extended the power to appropriate in the field of education. Under the former, agricultural extension work is being promoted throughout the states; under the latter, the federal government cooperates with the states in the payment of salaries and training of teachers in agricultural and industrial subjects and home economics.

Recent provision for federal aid has seen a severance of education from agriculture. The presently-existing National Youth Administration⁷⁴ aids students in colleges and high schools by grants of money to be placed toward tuition or support, in return for some type of labor performed in conjunction with the work of the school. Grants are made to every type of student, and the study of the subjects formerly required is no longer prerequisite. Very recently there has been requested from the federal government the sum of nearly one billion dollars for aid to the public school systems of the various states, in which it is said "glaring inequalities" exist.⁷⁵ What action the Congress will take remains to be seen. It would seem that there is no constitutional objection to the granting of money for the purpose desired.

(c). Miscellaneous Appropriations

A full treatment of the multitudinous application of federal monies under the head of general welfare is impossible here. It would be well, however, to cite some of the fields within which the Congress has seen fit to spend.

Since 1879, funds have been voted for participation in, or aid of, commemorative expositions.⁷⁶ Assistance in times of disaster has been given to Americans at home,⁷⁷ and to Americans⁷⁸ and others abroad.⁷⁹ Money has

the sale of lands did not suffice, the deficit could be met out of funds not otherwise appropriated. An act of 1907, 34 STAT. 1281, 7 U. S. C. A. § 322, increased this supplementary appropriation to \$50,000 yearly for each state and territory.

72. 38 STAT. 372, 7 U. S. C. A. § 341 (1914).

73. 39 STAT. 929, 20 U. S. C. A. § 11 (1917).

74. Created by Exec. Order of the President on June 26, 1935, pursuant to Emergency Relief Appropriation Act of 1935, 49 STAT. 115, 15 U. S. C. A. § 728 note.

75. *New York Times*, Feb. 24, 1938, at p. 2, col. 3. The report shows that grants to states under present laws will total more than \$53,000,000 for the fiscal year 1938. The President's advisory Committee on Education states that "federal aid is the only way in which the difficulties in this widespread and complex situation can be adequately corrected." The report asks for the expenditure of some \$855,000,000 in aid of elementary and secondary schools, improved preparation of teachers, construction of school buildings to facilitate district reorganization, administration of state departments of education, educational services for adults, and library service for rural areas.

76. 17 STAT. 203 (1812); 19 STAT. 3 (1876); 25 STAT. 621 (1888); 27 STAT. 389 (1892); 31 STAT. 1444 (1901); 38 STAT. 77 (1913); 40 STAT. 210 (1921).

77. 3 STAT. 211 (1815); 12 STAT. 652 (1862); 19 STAT. 374 (1877); 22 STAT. 379 (1882); 40 STAT. 917 (1918).

78. 24 STAT. 384 (1887).

79. 24 STAT. 108 (1886); 42 STAT. 351 (1921) (\$20,000,000 for grain for those starving in Russia).

been granted to aid polar expeditions⁸⁰ and for observation of eclipses of the sun.⁸¹

Vocational rehabilitation, as provided for in the present Social Security Act,⁸² had its forerunner in an act of 1879 which set aside \$250,000 as "a perpetual fund for the purpose of aiding the education of the blind, through the American Printing House for the Blind at Louisville, Kentucky."⁸³ The desire to aid disabled soldiers after the World War prompted an enactment of 1920 in which the Congress granted to the states on a share-and-share-alike basis a million dollars yearly for the vocational rehabilitation of persons in industry.⁸⁴

Nor is the Social Security Act completely novel in its provision for aid to maternal welfare. The Sheppard-Towner Act of 1921⁸⁵ created a nation-wide organization "for the promotion of the welfare and hygiene of maternity and infancy" and appropriated sums to be spent by state agencies in states which accepted the terms of the Act and duplicated their assigned portions of the national appropriation.

IV. THE NEW DEAL APPLIES THE GENERAL WELFARE CLAUSES

A momentary pause is necessary. Were one writing of the scope of the General Welfare Clauses before 1933, his work would have ended with a mention of the multifarious activities carried on by such governmental agencies as the Public Health Service,⁸⁶ Bureau of Education,⁸⁷ Bureau of Fisheries,⁸⁸ Bureau of Labor Statistics,⁸⁹ Children's⁹⁰ and Women's⁹¹ Bureaus, Commission of Fine Arts,⁹² and others.⁹³ He would mention that the limited scope of the clause in the Preamble had remained unchanged, that Story's interpretation still governed;⁹⁴ and that on the contrary the scope of the clause in Art. I, Sec. 8 had been widened consistently. He could have then appended *Finis* to his work.

The short span of four or five years has changed all that. As of 1938, one

80. 22 STAT. 384 (1882).

81. 12 STAT. 117 (1860).

82. 49 STAT. 620, 42 U. S. C. A. Chap. 7, Title X (1935).

83. 20 STAT. 468, 20 U. S. C. A. 101 (1879).

84. 41 STAT. 715, 29 U. S. C. A. § 31 (1920).

85. 42 STAT. 224 (1921).

86. 37 STAT. 309, 42 U. S. C. A. § 1 (1912).

87. REV. STAT. § 516, 20 U. S. C. A. § 1 (1967).

88. 32 STAT. 826, 5 U. S. C. A. § 597 (1903); created also the National Bureau of Standards, Coast and Geodetic Surveys, Patent Office, and Census Office.

89. 37 STAT. 737, 29 U. S. C. A. § 1 *et seq.* (1888).

90. 37 STAT. 79, 42 U. S. C. A. 191, (1912).

91. 41 STAT. 987, 29 U. S. C. A. § 11 (1920)

92. 36 STAT. 371, 40 U. S. C. A. §§ 104, 106 (1910).

93. To the statutes already cited should be added, 43 STAT. (Service in the interests of conserving natural resources); 50 STAT. 319, 16 U. S. C. A. § 584 (1937), (creating and continuing the Civilian Conservation Corps). The whole field of activities on behalf of conservation is within the General Welfare Clause.

94. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (5th ed. 1891) § 462. Jacobson v. Massachusetts, 197 U. S. 11, 22 (1905), quoted note 37, *supra*; United States v. Boyer, 85 Fed. 425, 430 (D. C. Mo. 1898).

is but partially finished with any discussion of the clauses here considered, for wide as the concept of general welfare within the scope of the federal government had become in 1933, a staggering extension of the concept has occurred in the enactment of statutes since the arrival of the Roosevelt administration.⁹⁵ Caught in the throes of a national economic disaster, the administration has sought, under the shibboleth of giving a "New Deal", to make vast reforms in the economic and social life of the nation. To alleviate unemployment and to create an impetus for the return of better business conditions, a vast program of relief through direct loans and grants to individuals, corporations, and municipalities was set up under the National Industrial Recovery Act⁹⁶ and companion measures.⁹⁷ The government undertook to aid in the refunding of mortgages on homes,⁹⁸ and offered to farmers complete facilities for extending long, short, and intermediate term credit for practically every agricultural purpose.⁹⁹ The construction of public works was undertaken in an unprece-

95. The Executive was granted far-reaching powers in the creation of boards through the Reorganization Bill of 1933. 47 STAT. 446, 5 U. S. C. A. § 126. Such power was he given over the spending of the public monies that for the first time in the history of the federal courts complainants have urged that Congress has unlawfully delegated the power to spend. See *Franklin Township v. Tugwell*, 85 F. (2d) 208, 219 (App. D. C. 1936).

96. 48 STAT. 195, 7 U. S. C. A. § 607; 15 U. S. C. A. §§ 609b, 701-712, 23 U. S. C. A. § 9b, 26 U. S. C. A. §§ 55, 901, 903, 940, 40 U. S. C. A. §§ 401-414 (1933).

97. Title II, National Industrial Recovery Act, 48 STAT. 200, 40 U. S. C. A. § 401 (1933) is modified by the Emergency Relief Appropriation Acts of 1935, 1936, and 1937, 49 STAT. 115, 49 STAT. 1608, 50 STAT. 352, 15 U. S. C. A. § 728 note. See *Stewart Machine Co. v. Davis*, 301 U. S. 548, 587 (1937), for a concise statement of the amount spent under these acts up until the time of the case. Loans to corporations and municipalities were made also through the Reconstruction Finance Corporation, created under 48 STAT. 318, 15 U. S. C. A. § 601 (1936).

98. Home Owner's Loan Act, 48 STAT. 128, 12 U. S. C. A. §§ 1461, 1463A, 1463B (1933) under which the Home Owners' Loan Corporation was created; 48 STAT. 1246, 12 U. S. C. A. § 1702 (1933) created the Federal Housing Administration. Reference should also be made to the low-cost housing and slum clearance provisions of the National Industrial Recovery Act, 49 STAT. 2026, 40 U. S. C. A. § 421 (1936). That such statutes are derived in their inception from the general welfare clause of Article I, Sec. 8 may be seen in a report of the Attorney-General to the President, rendering opinion as to the constitutionality of the Home Owners' Loan Act, *supra*. "Home ownership in the United States is declining; home ownership, as a national objective, would be permanently injured if the thousands of foreclosures taking place should continue . . . funds should be available to (homeowners) at low cost and in liberal amounts; if funds were provided for needed home repairs and improvements this would provide work for thousands of the unemployed . . . granting loans to assist owners in retaining title to their homes is certainly more closely connected with the general welfare than appropriating funds for the benefit of a particular group in the community." Opinion of August 22, 1933, 37 OR. ATT. GEN. (1933).

99. Farm Credit Administration, created by EXEC. ORD. § 6084 (1933), pursuant to Reorganization Bill of 1933, 47 STAT. 446, 5 U. S. C. A. § 126. In aid of the farmer also are the Rural Resettlement program, 49 STAT. 2035, 40 U. S. C. A. § 431 (1936), under which it is sought to take farmers from unproductive or exhausted soil and transfer them to more fruitful land under federal aid and supervision; and the Bankhead-Jones Farm

dented degree.¹⁰⁰

Under the Agricultural Adjustment Act of 1933,¹⁰¹ in order to raise farm income through curtailment of production, a system of benefit payments to farmers was instituted, whereby the farmer contracted with the federal government to keep within certain limits the amount of his land under cultivation. The Act was financed through the levying of processing taxes upon processors of agricultural commodities, the proceeds of the taxes being paid to the farmers under the direction of the Secretary of Agriculture.

Of great import was the enactment of the Social Security Act,¹⁰² providing for payment of old-age pensions on a permanent basis, for direct grants in aid of maternal welfare and vocational rehabilitation, and for a system of unemployment insurance which was to go into effect if a state enacted its own law in conformity with the requirements set up in the Social Security Act. Specific taxes were levied throughout the country to finance the Act, all employers being required to pay the old-age benefit tax, and those employing eight or more being required to pay the unemployment insurance levy.

The extent to which the federal government sought to enter the field of private life and enterprise in the name of general welfare may be seen in the "Declaration of Policy" of the National Industrial Recovery Act:

"A national emergency productive of widespread unemployment and disorganization of industry, which burdens foreign and interstate commerce, affects the public welfare, and undermines the standard of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof, and to provide for the general welfare by promoting the organization of industry, . . . etc."¹⁰³

It is to be noted that, without any great distortion of the language of the statute, its policy can be carried far beyond interstate commerce alone and

Tenant Act of 1937, 50 STAT. 522, 7 U. S. C. A. §§ 1000-12 under which rural rehabilitation activities become a permanent activity of the Department of Agriculture which grants loans on mortgages, rehabilitates distressed farm families, and engages in the promotion of land conservation and utilization. For a complete discussion of the latter statute and the whole field of farm tenancy, see (1937) 4 LAW AND CONTEMPORARY PROBLEMS 423-572.

100. Under Title II, N.I.R.A., 48 STAT. 200, 40 U. S. C. A. § 401 (1933) and the Emergency Relief Appropriation Acts, 49 STAT. 115, 49 STAT. 1603, 50 STAT. 352, 15 U. S. C. A. § 728 note, and see also 50 STAT. 319, 16 U. S. C. A. § 584 (1937), continuing the Civilian Conservation Corps and 50 STAT. 320, 16 U. S. C. A. 715e (1937), granting money to the Secretary of Agriculture for the creation of buildings, dikes, dams, canals, and such other works as may be necessary in the interest of conservation of natural resources.

101. 48 STAT. 31, 7 U. S. C. A. §§ 601 *et seq.* (1933).

102. 49 STAT. 620, 42 U. S. C. A. Chap. 7 (1935).

103. Cited note 96, *supra*. Provisions of Title I of N.I.R.A. relating to codes of fair competition, 48 STAT. 19, 15 U. S. C. A. § 701, *et seq.* (1933), were declared unconstitutional in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935); held, the Act under this Title constituted an unlawful delegation of power by the Congress to the President and an attempt to gain control of intrastate commerce, in contravention to the Tenth Amendment.

applied to all business, labor, and industry; the clause "and to provide for the general welfare" is clearly disjoined from any of the clauses referring to interstate and foreign commerce.¹⁰⁴

In urging the enactment of such measures as this, the Administration has demonstrated a belief not seriously urged since the very early period of government under the Constitution. The belief is that the federal government possesses an independent power to provide for the general welfare, by any type of legislation whatever, when the matter is national in scope. Both the President¹⁰⁵ and the Secretary of Agriculture¹⁰⁶ have sought to justify the contention by bringing forward a supposed desire on the part of those who wrote the Constitution to create a form of government which would be sufficient for any national emergency that would arise in the future. By the device of omission, the clause of Art. I is changed to read "The Congress shall have the power to lay and collect taxes *and . . . to provide for the general welfare.*"¹⁰⁷ At the same time, new scope is sought to be given to the Preamble.¹⁰⁸

Even with the words "duties, imposts, and excises to pay the debts and to" omitted, the clause of Art. I should be made to read "The Congress shall have the power to lay and collect taxes . . . to provide for the common defence and general welfare." Even when the clause, with its proper connotation, is read in its most liberal sense, as Story¹⁰⁹ and Hamilton¹¹⁰ have stated, the general welfare may be served by the Congress only in pursuance of the power to tax and spend. The legal advisors to the Administration have indicated, moreover, that the opinion of the President and the Secretary of Agriculture is not shared by every governmental organ. The brief for the United States in the "A.A.A. Case" is in direct disagreement:

104. The writer is aware that his statement is subject to criticism, and that, in a case where two interpretations of a statute are possible, that should be upheld which will sustain the constitutionality of the statute. However, his opinion of the intention of draftsmen of the N.I.R.A. is sustained by the actual practices of the National Recovery Administration, and by the opinion in the Schechter case, holding portions of the N.I.R.A. unconstitutional. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 528 (1935).

105. "Having in mind that in succeeding generations many other problems then undreamed of would become national problems, (the framers) gave to Congress the ample broad powers 'to levy taxes . . . and provide for the common defence and general welfare of the United States.'" Franklin D. Roosevelt, quoted by Somer, *Bill for "Reforming" the Supreme Court* (1937) 23 A. B. A. J. 351. In contrast, see the words of John W. Davis quoted by McGuire, *The New Deal and The Public Money* (1935) 23 Geo. L. J. 155, at 173: "No line or syllable of the Constitution gives to the Federal government a roving commission over the whole field of social betterment."

106. "Changes might come with the years, problems might arise which would drastically alter the pattern of what constituted 'the general welfare'. Yet the instrument of the people in their new union provided that such problems might be dealt with. The Constitution envisioned a true nation, to be controlled by the people, and with powers to deal nationally with national problems." WALLACE, *WHOSE CONSTITUTION* (1936) 35.

107. See quotation in note 105, *supra*.

108. See note 106, *supra*. Secretary Wallace's entire volume is based upon a broad interpretation of the Preamble.

109. STORY, *COMMENTARIES* (1891) §§ 907, 908.

110. Report on Manufacturers (1791), quoted in 4 ELLIOT 578.

"Three different theories exist as to the proper interpretation to be given to the General Welfare Clause; First, it is said that the clause should be construed as granting Congress power to promote the general welfare independently of the taxing power. This view has been universally rejected. . . . That the Hamiltonian theory is the correct theory is, we submit, clearly shown by the plain language of the Constitution."¹¹¹

V. THE GENERAL WELFARE CLAUSES IN THE COURTS

New Deal legislation has brought the General Welfare Clauses into a new judicial prominence. As a result of the present attempt to expand the scope of the clauses, Supreme Court decisions during the last three years have for the first time given some indication of the extent to which they may be applied legitimately by the Congress. The important decisions within the purview of this work are those involving the constitutionality of the National Industrial Recovery Act,¹¹² the Agricultural Adjustment Act of 1933,¹¹³ the Social Security Act,¹¹⁴ and the Emergency Relief Appropriation Act of 1935.¹¹⁵

Each of the decisions has restated the fundamental principle that the Congress possesses no universal power to legislate in every situation that concerns the general welfare of the United States.¹¹⁶ It may be stated with finality that

111. Brief for the United States in *United States v. Butler*, 297 U. S. 1, 136 (1935).

112. Title I, 48 STAT. 195, 15 U. S. C. A. § 701 *et seq.* (1933), held unconstitutional in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

Title II, 48 STAT. 200, 40 U. S. C. A. § 401 *et seq.* (1933), considered in *Alabama Power Co. v. Ickes*, 301 U. S. 681 (1938), sustaining federal grants to municipalities for the construction of municipal power plants, and lower court cases prior thereto: *Consumers' Power Co. v. City of Allegan, Mich.*, 71 F. (2d) 477 (C. C. A. 6th, 1934); *Alabama Power Co. v. Ickes*, 91 F. (2d) 303 (App. D. C. 1937); *Arkansas-Missouri Power Co. v. City of Kennett, Mo.*, 78 F. (2d) 911 (C. C. A. 8th, 1935); *Missouri Utilities Co. v. City of California, Mo.*, 8 F. Supp. 454 (W. D. Mo. 1934). *Contra*: Holding grants unconstitutional: *Missouri Public Service Co. v. City of Condordia*, 8 F. Supp. 1 (W. D. Mo. 1934); *Washington Water Power Co. v. City of Coeur d'Alene, Idaho*, 9 F. Supp. 263 (N. D. Idaho, 1934); *Duke Power Co. v. Greenwood County, S. Car.*, 10 F. Supp. 8 (W. D. S. C. 1935); *Illinois Power and Light Corp. v. City of Centralia, Ill.*, 11 F. Supp. 874 (E. D. Ill. 1935).

Title II was considered also in *United States v. Certain Lands in the City of Louisville, Kentucky*, 78 F. (2d) 684 (C. C. A. 6th, 1935), held, since housing is not a public matter within the national general welfare, the federal government has no power to condemn land for a housing project; and in *Franklin Township v. Tugwell*, 85 F. (2d) 208 (App. D. C. 1936), in which the Resettlement Administrator was restrained from building a model community on the same ground as *United States v. Certain Lands*, *supra*, and also because there was an unlawful delegation of the power to spend.

113. 48 STAT. 31, 7 U. S. C. A. §§ 601 *et seq.* Taxing and benefit payment provision held unconstitutional in *United States v. Butler*, 297 U. S. 1 (1936).

114. 49 STAT. 620, 42 U. S. C. A. Chap. 7 (1935) upheld in *Stewart Machine Co. v. Davis*, 301 U. S. 548 (1937) and *Helvering v. Davis*, 301 U. S. 619 (1937).

115. 49 STAT. 115, 15 U. S. C. A. § 728 note. The act modified Title II of N.I.R.A., 48 STAT. 200, 40 U. S. C. A. 401 (1933), and is involved in the same cases. See note 112, *supra*.

116. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 528 (1935);

the clause in the Preamble contains no substantive grant whatever, despite the wishful thinking of those who in recent years have sought to extend the power of Congress to so many new fields of human activity.¹¹⁷

A. THE RIGHT TO SUE

The paucity of cases involving the "general welfare" clause of Art. I, Sec. 8 is largely attributable to the cases of *Frothingham v. Mellon*¹¹⁸ and *Massachusetts v. Mellon*,¹¹⁹ which denied the right of the state as *parens patriae*¹²⁰ and of the individual taxpayer¹²¹ to sue to restrain the Secretary of the Treasury from making expenditures under the Federal Maternity Act (Sheppard-Towner Act) of 1921.¹²² Holding that the interest of the individual taxpayer was indeterminate and minute, the Court denied the requisite *locus standi* to maintain the suit.¹²³

A more potent factor even than the inability to show direct damage has been the statement of the courts that the wisdom of federal expenditure is a political question and not subject to judicial review.¹²⁴ It has repeatedly been held that the soundness of policy involved in such legislation is not to be decided by the Court, but by the Congress. Nor is it to be considered whether good or harm will result. If the taxpayer wishes to attack such expenditures, he may do so only through the ballot-box.¹²⁵

Until 1935, the right to seek relief against an appropriation measure had been granted only in cases where a specific tax had been levied in order to regulate¹²⁶ and where it was alleged that the government sought to condemn land under an unconstitutional expenditure.¹²⁷ Since 1935,¹²⁸ the courts have granted

United States v. Butler, 297 U. S. 1, 64 (1936); Carter v. Carter Coal Co., 298 U. S. 238, 291 (1936). The latter case declared unconstitutional the Bituminous Coal Conservation Act of 1935, 49 STAT. 991 (1935), which sought to regulate prices and production of bituminous coal by the setting up of a code of fair competition analogous to those set up under the N.I.R.A. See also *Helvering v. Davis*, 301 U. S. 619, 640-642 (1937).

117. A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 528 (1935); and Carter v. Carter Coal Co., 298 U. S. 238, 291 (1936); *Jacobson v. Massachusetts*, 197 U. S. 11, 22 (1905); *United States v. Boyer*, 85 Fed. 425, 432 (W. D. Mo. 1898); WILLOUGHBY ON THE CONSTITUTION (2d ed. 1929) § 61.

118. 262 U. S. 447 (1923).

119. *Ibid.*

120. *Massachusetts v. Mellon*, 262 U. S. 447 (1923).

121. *Frothingham v. Mellon*, 262 U. S. 447 (1923).

122. 42 STAT. 224 (1921).

123. See 262 U. S. 447, 485 (1923).

124. See *Wilson v. Shaw*, 204 U. S. 24, 32 (1907); *Green v. Frazier*, 253 U. S. 233, 240 (1919); *Massachusetts v. Mellon*, 262 U. S. 447, 482 (1923); *Arizona v. California*, 283 U. S. 423, 455 (1931).

125. See *Massachusetts v. Mellon*, 262 U. S. 447, 482, 488 (1923); *Green v. Frazier*, 253 U. S. 233, 240 (1919); *United States v. Realty Co.*, 163 U. S. 427, 444 (1896); *United States v. Carlisle*, 5 App. Case (D. C.) 143 (1895).

126. *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U. S. 20 (1921); *Head Money Cases*, 112 U. S. 580 (1884); *United States v. Butler*, 297 U. S. 1 (1935); *Sonzinsky v. United States*, 300 U. S. 506 (1937).

127. *United States v. Gettysburg Elec. Ry. Co.*, 160 U. S. 668 (1896); and see *United States v. Certain Lands in City of Louisville, Kentucky*, 78 F. (2d) 684 (C. C. A. 6th, 1935).

128. It is submitted that courts have extended their jurisdiction since 1933 because

complainants the right to sue where there was alleged a direct interference with business¹²⁹ or threatened irreparable injury;¹³⁰ where unlawful delegation of power to the Executive was alleged;¹³¹ and where a political subdivision urged that it would be deprived of a substantial portion of its tax revenues.¹³²

B. THE PRESENT SCOPE OF THE CLAUSE

Although the scope of the clause was not considered directly until the decision in *United States v. Butler*,¹³³ in 1935, the courts generally, if by indirection, upheld the Hamiltonian view of the federal spending power. The historical expansion of the field of appropriation has been sustained in cases which either approve specific expenditures or do not question their validity. Thus, the payment of sugar bounties under a statute then repealed was sustained in an early case as a "debt" of the United States.¹³⁴ Tacit acceptance of federal funds for aid in a centennial exposition is seen in another decision.¹³⁵ The same is true of payments under the Morrill Act¹³⁶ and the Federal Maternity Act;¹³⁷ for the Panama Canal;¹³⁸ for national battle monuments;¹³⁹

the government has attempted to enter more directly into the field of private economic competition. Thus the government attempted to control agricultural production under the Agricultural Adjustment Act, 48 STAT. 31, 7 U. S. C. A. § 601 *et seq.* (1933) and, to pay farmers for voluntary submission, sought to tax processors directly; under the National Industrial Recovery Act, Title I, 48 STAT. 195, 15 U. S. C. A. § 701 (1933), it attempted to have all private business submit to the setting of prices and wage standards; and by means of grants to municipalities under N.I.R.A. Title II, 48 STAT. 200, 40 U. S. C. A. § 728 note (1933), it has endangered the business of privately owned power plants. Since these modes of interference are more direct than taxation alone, suits are necessarily more frequent.

129. *City of Campbell, Missouri v. Arkansas-Missouri Power Co.*, 55 F. (2d) 560 (1932); but compare *Alabama Power Co. v. Ickes*, 301 U. S. 681 (1938).

130. *Adkins v. Children's Hospital*, 261 U. S. 525 (1922). But compare *Alabama Power Co. v. Ickes*, 301 U. S. 681 (1938).

131. *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936); *Franklin Township v. Tugwell*, 85 F. (2d) 208 (App. D. C. 1936). In the latter case the court decided that Sec. 1 of the Emergency Relief Appropriation Act of 1935, 48 STAT. 115, 40 U. S. C. A. § 728 note, allowing the President to expend for "housing, \$450,000,000" was unconstitutional because (1) the word "housing" was indefinite; (2) Congress had laid down no standard to guide the Executive in spending and (3) Congress had required no findings to be made by the President before the money could be spent; held, this constituted an unlawful delegation of legislative power to the President.

132. *Franklin Township v. Tugwell*, 85 F. (2d) 208 (App. D. C. 1936).

133. 297 U. S. 1 (1936).

134. *United States v. Realty Co.*, 163 U. S. 427 (1896); see *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824); see also *Field v. Clark*, 143 U. S. 649 (1892).

135. *Eyster v. Centennial Board of Finance*, 94 U. S. 500 (1876).

136. *Cornell University v. Fiske*, 136 U. S. 152 (1890); *Wyoming v. Irvine*, 205 U. S. 278 (1907).

137. *Massachusetts v. Mellon*, 262 U. S. 447 (1923).

138. *Wilson v. Shaw*, 204 U. S. 24 (1907).

139. *United States v. Gettysburg Railway Co.*, 160 U. S. 668 (1896).

and for spoliation claims where American shipping had been damaged or destroyed by the French.¹⁴⁰

Only one requirement is made in any of these cases. The tax and expenditure must be for a public purpose.¹⁴¹ Broad discretion is left to the Congress by decisions which state that what is a public purpose must be governed mainly by the course and usage of the government and the objects for which have been by the history of legislation levied.¹⁴²

(1). *The Case of United States v. Butler*

Despite the consistent approbation of federal expenditures the Supreme Court refrained from examining the "general welfare" clause of Art. I directly until the decision in the case of *United States v. Butler*,¹⁴³ which held unconstitutional the taxing and benefit provisions of the Agricultural Adjustment Act.¹⁴⁴ While the Court expressly refrained from setting express boundaries on the power to legislate under the clause,¹⁴⁵ it did hold that any payment to farmers coercive in its nature was outside the lawful powers of Congress.¹⁴⁶

In order that the case might be heard, the question first to be settled was whether a justiciable issue was presented, in view of the decision in *Massachusetts v. Mellon*.¹⁴⁷ Deciding that the taxing and benefit payment provisions of the Act were part of a single "unauthorized plan",¹⁴⁸ the Court allowed the suit, stating that the sections of the Act were not capable of being severed and considered separately.¹⁴⁹ "The tax plays an indispensable part in the plan

140. French Spoliation Claims, 162 U. S. 439 (1896). See also *Indiana v. United States*, 148 U. S. 148 (1893); *United States v. River Rouge Co.*, 269 U. S. 411 (1926); *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288 (1935); (1936) 5 FORDHAM L. REV. 114 (1936), for other examples of approval of expenditures valid under the General Welfare Clause.

141. "Taxes are burdens or charges imposed by the Legislature upon persons or property to raise money for a public purpose. . . ." 2 COOLEY, CONSTITUTIONAL LIMITATIONS (1927).

142. *Loan Association v. Topéka*, 20 Wall. 655, 664 (1874). Like statements will be found in *United States v. Gettysburg Elec. Railway Co.*, 160 U. S. 668, 680 (1896); *Massachusetts v. Mellon*, 262 U. S. 447 (1923); and *Wilson v. Shaw*, 204 U. S. 24, 31 (1906).

143. 297 U. S. 1 (1936).

144. 48 STAT. 31, 7 U. S. C. A. § 601 *et seq.*

145. 297 U. S. 1, 68 (1936).

146. 297 U. S. 1, 71 (1936).

147. 262 U. S. 447 (1923); see discussion at p. 000, *supra*.

148. 297 U. S. 1, 58 (1936).

149. *Ibid.* The court has appended the following notes: "U. S. DEPARTMENT OF AGRICULTURE, *Achieving A Balanced Agriculture*, p. 38: 'Farmers should not forget that all the processing tax money ends up in their own pockets. Even in those cases where they pay part of the tax, they get it all back. Every dollar collected in processing taxes goes to the farmer in benefit payments.'

"U. S. DEPARTMENT OF AGRICULTURE, *The Processing Tax*, p. 1: 'Proceeds of processing taxes are passed to farmers as benefit payments'."

There is language in *Field v. Clark*, 143 U. S. 649, 695 (1892) which might be construed to uphold the distinction made by the court in the *Butler* case. In that case the Court refused to consider an appropriation contained in the Tariff Act because the appropriating

of regulation . . . it is the heart of the law." Thus the case is distinguished from *Massachusetts v. Mellon*.¹⁵⁰

It is submitted that this holding reduces the power of judicial review, in cases involving federal spending, to a mere matter of form. Let the tax be levied by one statute, and the proceeds thereof be placed in the federal treasury, to be withdrawn under a separate appropriation statute, and it would seem that the doctrine of *Massachusetts v. Mellon* will continue to apply, since no taxpayer has it within his power to prove that the money paid by him was withdrawn from the treasury and expended under the statute alleged to be unconstitutional.¹⁵¹ This contention is borne out in the most recent case involving the endeavor of a taxpayer to upset a federal expenditure, despite the fact that the taxpayer-corporation could prove a great threatened financial damage through the enforcement of the statute attacked.¹⁵²

Mr. Justice Roberts, writing the prevailing opinion, upheld the Hamiltonian view of the General Welfare clause, conceding that the power to tax and spend for the general welfare was a separate substantive grant, distinct and free from limitation by the subsequent clauses in Art. I, Sec. 8. Adopting the terminology of Story and Monroe, Mr. Justice Roberts places but one restriction on the Clause—that expenditures authorized under it by the Congress be for national, not local, purposes. The opinion states simply:

provision was separable. The inference might be that if it were inseparable the appropriation could be reviewed. The majority opinion in the *Butler* case discounted the contention that the tax should be tested as if unrelated to the appropriation, as a "novel suggestion." 297 U. S. 1, 58 (1936).

150. 297 U. S. 1, 59 (1936). The case is put on a parity with the *Head Money Cases*, 112 U. S. 580 (1884). The statute involved in the latter case imposed a tax upon every alien who entered the United States. The proceeds were put into the general treasury and were used to pay the expenses of regulating immigration. In the *Butler* case, the money was not used directly for regulating agricultural production, but was spent in the form of benefits to farmers who contracted, it seems, voluntarily with the federal government. It is submitted, therefore, that there is not a complete analogy between the two cases.

151. By amendments of August 24, 1935, and February 29, 1936, (49 STAT. 775, 49 STAT. 1151, 7 U. S. C. A. §§ 609b, 612b), the specific appropriation of tax proceeds was deleted, and "a sum equal to the proceeds" was made available to the Secretary of Agriculture; held, taxes levied under the Act as amended were valid. *Larabee Flour Mills v. Mee*, 12 F. Supp. 395 (W. D. Mo. 1935). And see *Cincinnati Soap Co. v. United States*, 301 U. S. 308 (1937), upholding a statute which imposed a tax on the processing of coconut oil and provided that all proceeds received from the processing of Philippine products be held as a separate fund and paid into the treasury of the Philippine Islands; the court indulges in a "presumption" that "the funds will be appropriated for public purposes and not for private purposes".

152. *Alabama Power Co. v. Ickes*, 301 U. S. 681 (1933). Petitioner had no right to sue to restrain the loan of money under the Emergency Relief Appropriation Act of 1935 (48 STAT. 115, 40 U. S. C. A. § 728 note), to municipalities for the building of municipal power plants, since the municipality had the right to borrow. The court states flatly that the Congress has the right to grant and loan the money, despite pecuniary damage to petitioner.

"The Congress is expressly empowered to lay taxes to provide for the general welfare."¹⁵³

Mr. Justice Stone, dissenting and contending that the Agricultural Adjustment Act was constitutional, agrees wholeheartedly with this portion of the prevailing opinion.¹⁵⁴ Thus Hamilton, Story, and Monroe are sustained in their interpretation of the powers of the Federal Government in the field of expenditures of the nation's monies.

The Court split sharply, and spared no words, however, over the consequences of the enforcement of the Agricultural Adjustment Act. In a paragraph startling in its categorical enunciation of a new principle of Constitutional Law, the majority took what appears to be a sudden shift to the narrow Madisonian view of the General Welfare Clause. Said the Court:

"We are not now required to ascertain the scope of the phrase 'general welfare of the United States' or to decide whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle imbedded 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. The tax, the appropriation of the funds raised, and the direction for their disbursement are . . . but means to an unconstitutional end."¹⁵⁵

Yet, if the Hamiltonian view be adopted, the end is constitutional if the expenditure is within the general welfare. Phrased interrogatively, the question was this: "Does a severely depressed state in agriculture create a situation affecting the general welfare of the United States?" In the last analysis, the answer is a matter of opinion, as the vehement opposition of the minority indicates.¹⁵⁶

It is to be noted, too, that the states have in many instances been required to fulfill certain conditions in order to obtain federal monetary grants,¹⁵⁷ the

153. 297 U. S. 1, 66 (1936).

154. 297 U. S. 1, 79 (1936). And see *Reconstruction Finance Corp. v. Central Republic Trust Co.*, 17 F. Supp. 263 (N. D. Ill. 1936) upholding the R. F. C. in giving aid through loans of federal monies to distressed commercial and agricultural institutions and railroads.

155. See 297 U. S. 1, 68 (1936).

156. See *id.*, at 79.

157. See opinion of Mr. Justice Stone in *United States v. Butler*, 297 U. S. 1, 80 *et seq.* (1936). Thus, payments under the Sheppard-Towner Maternity Act, 42 STAT. 224 (1921), sustained in *Mass. v. Mellon*, 262 U. S. 447 (1923) and the Morrill Act, 12 STAT. 503 7 U. S. C. A. § 301 (1862), upheld in *Cornell University v. Fiske*, 136 U. S. 152 (1890) and *Wyoming v. Irvine*, 206 U. S. 278 (1907), were conditioned in that the states had to enact certain statutes or set up administrative machinery or adapt college curricula to the demands of the Congress.

Moreover, the states by compact with the federal government [*Arizona v. California*, 283 U. S. 423 (1930); *Stearns v. Minnesota*, 179 U. S. 223 (1900); *Ward v. Race Horse*, 163 U. S. 504 (1891)] or with each other [*Howard v. Ingersoll*, 13 How. 380 (1851); *Alabama v. Georgia*, 23 How. 505 (1859); *Central R. R. N. J. v. Jersey City*, 209 U. S. 473 (1908); *Mass. v. N. Y.*, 271 U. S. 65 (1925)] may contract to give up certain of their reserve powers.

money to be spent in activities within the reserved powers of the states. In all instances, the states have willingly accepted performance. This limitation upon the federal power to spend poses one of the great problems yet to be answered by judicial decision. Apparently, under the *Butler* case, the validity of Congressional appropriations is no longer fully a political question, but has become to some extent subject to judicial limitation.

Yet another fact was held to invalidate the legislation involved in the *Butler* case. It coerced farmers into complying with federal agricultural regulations.¹⁵⁸ Though the relation by which the benefits were given was contractual, the Court held that the regulation was not in fact voluntary because the price of non-compliance was loss of benefits.¹⁵⁹ Again the dissenters expressed serious objection, holding that threat of loss, not hope of gain, was the essence of economic coercion.¹⁶⁰ Even admitting there was an element of coercion, they argued, it is to be admitted that Congress can regulate intrastate activities as an incident of the legitimate exercise of the commerce power and the power to levy duties on imports.¹⁶¹ If, then, the power to spend is a delegated power of equal dignity with the others in the control of the Congress, is not the same degree of intrastate regulation incidental?¹⁶²

And if the states, by contract, can delegate a measure of their power to each other or to the federal government, may not individuals likewise submit upon an analogous contractual basis, fulfilling certain conditions in return for grants of money? Questions like the foregoing arise from the diametrically opposed opinions in the *Butler* case. Both opinions agree, however, that if the contract were entirely voluntary, the money could be spent.¹⁶³ They differ as to the fact of coercion under the Agricultural Adjustment Act.

(2). *The Social Security Act Cases*

The Supreme Court has recently held constitutional certain provisions of the Social Security Act¹⁶⁴ analogous to the invalidated sections of the Agricultural Adjustment Act. Title II¹⁶⁵ of the Social Security Act provides for the payment of old-age benefits to numerous classes of workers who shall obtain the age of sixty-five. Title VIII¹⁶⁶ imposes a tax on employers and employes, but

158. See 297 U. S. 1, 71 (1936).

159. *Ibid.*

160. See *id.*, at 81.

161. See *id.*, at 84, citing *Minnesota Rate Cases*, 230 U. S. 352 (1912); *Shreveport Rate Case*, 234 U. S. 342 (1913); *Univ. of Illinois v. United States*, 289 U. S. 48 (1932).

162. In the *Butler* case, *supra*, at 85, Stone, J., said: "The only conclusion to be drawn is that results become lawful when they are incidents of those powers but unlawful when incident to the similarly granted power to tax and spend."

163. See 297 U. S. 1, 71, 81 (1936).

164. 49 STAT. 620, 42 U. S. C. A. Chap. 7 (1935).

Title II, 49 STAT. 622, 42 U. S. C. A. §§ 401 *et seq.* (1935) and Title VIII, 49 STAT. 636, 42 U. S. C. A. §§ 1001 *et seq.* (1935) were upheld in *Helvering v. Davis*, 301 U. S. 619 (1937); Title III, 49 STAT. 626, 42 U. S. C. A. § 501 (1935) and Title IX, 49 STAT. 639, 42 U. S. C. A. §§ 1101 *et seq.* (1935) were upheld in *Stewart Machine Co. v. Davis*, 301 U. S. 548 (1937).

165. 49 STAT. 622, 42 U. S. C. A. §§ 401 *et seq.* (1935).

166. 49 STAT. 636, 42 U. S. C. A. §§ 1001 *et seq.* (1935).

the proceeds, unlike those collected under the Agricultural Adjustment Act, are placed in the general treasury,¹⁶⁷ to be transferred at some future time to an "Old-Age Reserve Account" and to be withdrawn as needed to make the required payments.¹⁶⁸ Suit was brought by a stockholder against a corporation to restrain the payment of the tax and the deducting of the employe's contribution from wages.¹⁶⁹

While the Court could in all probability have declined to hear the case,¹⁷⁰ the fact that the government had not challenged the remedy and had in fact urged that the validity of the statute be determined constrained the Court to decide the controversy by deciding the constitutionality of the Act.¹⁷¹

In sustaining the challenged provisions under the General Welfare Clause, the Court made a statement that will undoubtedly be the basis for future decisions.

"Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times."¹⁷²

Holding with older cases that the wisdom of the Act was not for judicial consideration,¹⁷³ the majority measured the validity of the statute by a pragmatic standard and decided that the states of themselves could not deal effectively with the problem of security for the aged.¹⁷⁴

In a companion decision,¹⁷⁵ the Court sustained the constitutionality of Titles III¹⁷⁶ and IX¹⁷⁷ of the same Act. Title III grants to states who comply with the Social Security Act in the enactment of unemployment compensation laws within the state, certain monies for "Unemployment Compensation Administration"; Title IX imposes a tax on employers of eight or more, the proceeds, like those under Title II, being placed in the general treasury and withdrawn at a future time. The employer is allowed a credit of 90%, however, if his state has enacted an unemployment insurance law, and he is paying a state tax under it. The tax is imposed throughout the country, but the money is

167. 49 STAT. 637, 42 U. S. C. A. § 1007 (1935).

168. 49 STAT. 622, 42 U. S. C. A. § 401 (1935).

169. *Helvering v. Davis*, 301 U. S. 619 (1937).

170. Mr. Justice Cardozo, writing the majority opinion in the *Helvering* case, expressed his personal opinion that petitioner had no standing in court. The action was equitable in nature, an injunction being sought; in his opinion, the legal remedy was sufficient. 301 U. S. 619, 640 (1937). It would seem that the Court could have refused to hear the case on the authority of *Massachusetts v. Mellon*, *supra*, p. 000. The contested statute in the *Helvering* case was analogous to that considered in *Massachusetts v. Mellon* in that the revenue derived through taxation under the statute was placed in the general treasury, and not in a specific fund. Thus petitioner could not trace the money paid over by it to the government into any expenditure considered unconstitutional.

171. 301 U. S. 619, 640 (1937).

172. See *id.*, at 641.

173. See *id.*, at 644.

174. See *id.*, at 641-643.

175. *Steward Machine Co. v. Davis*, 301 U. S. 548 (1937).

176. 49 STAT. 626, 42 U. S. C. A. § 501 (1935).

177. 49 STAT. 639, 42 U. S. C. A. § 1101 (1935).

granted to the state only upon the state's enactment of a state law.¹⁷⁸

Brushing aside arguments that the reserved powers of the states had been invaded and that the measure were coercive upon the states, the Court stated that

"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 promotion of the general welfare."¹⁷⁹

citing *United States v. Butler*. The provisions requiring the states to pass certain laws in order to obtain grants are held a mere inducement to the states to enact unemployment insurance legislation, and not a coercive measure invading the administrative powers of the states.

"To hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties."¹⁸⁰

Rather it is to be emphasized that the state has full freedom in the type of legislation it wishes to enact; in the method of disbursement of the moneys received; and in the retention or abolition of the statute itself.¹⁸¹ This right of choice is held to be such an exercise of the free will of the state as to destroy any contention that the challenged portions of the Act were coercive.¹⁸²

It would seem that the Social Security Act cases have, for the most part, overruled the spirit of the decision in the *Butler* case. In the last analysis, the only distinction upon which the contradictory results of the cases can be based is that the proceeds of the tax exacted in the *Butler* case did not reach the federal treasury, while those of the Social Security Act cases did. In all the cases, it would seem, the tax imposed was legitimate;¹⁸³ in all, the purpose to which the money was to be put was the alleviation of a national evil; in all, conditions were imposed upon the recipients of the grants.

VI. CONCLUSION

The numerous dissenting opinions in the new cases involving the power to spend;¹⁸⁴ the diametrically opposed conclusions reached upon identical sets of

178. 49 STAT. 503, 42 U. S. C. A. § 503 (1935).

179. See 301 U. S. 548, 586 (1937).

180. See *id.*, at 589.

181. See *id.*, at 593-596.

182. See *id.*, at 596. Dissenting opinions argued strongly that the Act deprived the states of their proper administrative functions and powers in a field where they alone have jurisdiction. The remainder of the Social Security Act, relating to direct grants to the states for vocational rehabilitation, aid to dependent children, and maternal and child welfare [42 U. S. C. A. Chap. 7, Titles IV, 49 STAT. 627, V, 49 STAT. 629, X, 49 STAT. 645, XI, 49 STAT. 647 (1935)], is not likely to be challenged, under *Massachusetts v. Mellon*, because there is no specific tax imposed to pay the expenses involved in these activities.

183. Although the validity of the tax in the *Butler* case was not decided, such an excise would seem constitutional in view of the later case of *Cincinnati Soap Co. v. United States*, 301 U. S. 308 (1937), upholding a processing tax on coconut oil. See discussion note 150, *supra*.

184. As to whether housing is a public purpose within the general welfare: *United*

facts in the lower federal courts;¹⁸⁵ the bitter argument over the significance of the "general welfare" clause in its present application¹⁸⁶—all these lead to the conclusion that there is now revealed a new field of constitutional law, as yet hardly charted. Fundamental questions, involving basic concepts in the federal form of government, are brought forward for the first time in the cases decided under one portion of the Constitution hardly considered by the courts until very recent times.

First: To what extent will the courts replace the ballot-box as the determinant of the validity of Congressional expenditure?

Second: To what extent will the courts take jurisdiction to decide the constitutionality of appropriation statutes?

Third: What further socio-economic legislation will be a valid exercise of the power to spend for the general welfare?¹⁸⁷

Fourth: To what further extent can the federal government further control the activities of states and individuals within the states through the making of contracts imposing conditions in return for grants of money?¹⁸⁸

States v. Certain Lands in the City of Louisville, Ky., 78 F. (2d) 684 (C. C. A. 6th, 1935); as to whether resettlement is within the general welfare: Franklin Township v. Tugwell, 85 F. (2d) 208 (App. D. C. 1936). The Butler case and the Social Security Act cases are other excellent examples.

185. The numerous decisions in the lower courts over loans and grants to municipalities for the construction of municipal power plants are an apt illustration. See cases in note 112, *supra*.

186. Contrast the frank expressions of Stone, J., in the Butler case; of McReynolds and Sutherland, J. J., in *Helvering v. Davis*; of Allen, J., in *United States v. Certain Lands in the City of Louisville, Ky.*, 78 F. (2d) 684 (C. C. A. 6th, 1935) and of Stephens, J., in *Franklin Township v. Tugwell*, 85 F. (2d) 208 (App. D. C. 1936), with the prevailing opinion in each case.

187. Most recent is the enactment by Congress of the Agricultural Adjustment Act of 1938, Pub. Act, 640 75th Cong. 3d Sess. (1938). § 347 of the Act provides for referenda of farmers who are growers of each commodity covered by the Act, and provides that the provisions of the Act shall not go into effect unless two-thirds of the farmers affected signify their approval. Benefits are paid in return for crop curtailment as under the Agricultural Adjustment Act of 1933. Penalties are imposed for non-compliance with farm marketing quotas under § 347.

The new Act is a systematic endeavor to control production of basic agricultural commodities; in many respects a copy of the act held unconstitutional in the Butler case. Since there is no provision for the levying of any tax for the payment of benefits, however, it is difficult at the present time to discover any means whereby the constitutionality of the measure can be determined.

188. Note the statement of Madison, 2 ANNALS OF CONGRESS, (1791), quoted by Corwin, *The Spending Power of Congress—Apropos the Maternity Act* (1923) 36 HARV. L. REV. 548, 550: "Interference with the powers of the states is no constitutional criterion of the powers of Congress. If the power is not given, Congress cannot exercise it; if given, they may exercise it, although it shall interfere with the laws or even the constitutions of the states."

In 1934, Justice Sutherland was the author of the broad statement that taxes might be sustained "although imposed with the collateral intent of effecting other ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment." *Magnano v. Hamilton*, 292 U. S. 40, 45 (1934).

The answers are in the future. What new legislation the Congress may enact in the name of general welfare no one may guess. One may venture into the field of conjecture, however, to state that as Congress seeks to expand its sphere of domination, the courts will move to let down their self-made barrier of "political question" and will take it upon themselves to decide the validity of Congressional "general welfare" legislation in a correspondingly wider field. It is submitted that the true worth of the courts as a check upon ill-advised legislation is thus demonstrated. The stabilizing influence of judicial decision will be necessary before a valid limitation upon the terms "general welfare of the United States" can be determined.

INNKEEPER'S RIGHT TO EXCLUDE OR EJECT GUESTS.—The duty of innkeepers to accommodate and serve all applicants, while unrecognized by the Roman Law,¹ has for centuries been affirmed and enforced in England² and America.³ Though expressed as a universal obligation it is not without its limitations. To better understand the situations wherein the proprietor of a hotel may refuse the hospitality of his house or eject a patron who has been admitted, they will be viewed in the perspective of our tenuous knowledge regarding the genesis of this singular duty. No precise statement of the reasons which evoked this law is found in the early cases themselves and a departure from the decisions leaves the investigator groping in the mists of antiquity.

Origin of Public Service Duty

Monopoly has been pointed to as the parent of this public service duty. It is argued that necessity for a service brought upon those dispensing it a duty to serve the public, and that the division of business into public and private was based on economic grounds.⁴ This argument is attacked on the ground that the cases establishing the obligation make no allusion to monopoly.⁵ In fact, historical evidence shows that while common surgeons, barbers, and victuallers were under the obligation of indiscriminate service, there were numerous practitioners in these trades.⁶ Moreover, not the innkeeper, but the *common innkeeper*, was regarded as a public servant.⁷

1. 3 SCOTT, *THE CIVIL LAW* (1932) 134; RADIN, *ROMAN LAW* (1927) § 94.

2. Anonymous, Keilwey 50, pl. 4, 72 Eng. Reprints 203 (K. B. 1450); Gordon v. Silber 25 Q. B. D. 491 (1890); 3 BL. COMM. *164.

3. Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209 (1837); State v. Steele, 105 N. C. 766, 11 S. E. 478 (1890); see L. E. Lines Music Co. v. Holt, 332 Mo. 749, 754, 60 S. W. (2d) 32, 34 (1933).

Some states have incorporated the common law rule of indiscriminate service into their statutes. GA. CODE (1933) § 52-103; ILL. REV. STAT. (Smith-Hurd, 1935) c. 38, § 125; CONSTITUTION AND STATUTES OF LOUISIANA (1920) § 457; ME. REV. STAT. (1930) c. 36, § 5; NEB. COMP. STAT. (1929) § 23-101; N. Y. CIVIL RIGHTS LAW (1935) § 40; OHIO GEN. CODE (Page, 1926) § 12940.

4. 1 WYMAN, *PUBLIC SERVICE CORPORATIONS* (1911) § 1; Arterburton, *The Origin and First Test of Public Callings* (1927) 75 U. OF PA. L. REV. 411.

5. Adler, *Business Jurisprudence* (1914) 28 HARV. L. REV. 135, 156 n. 76.

6. See *id.*, at 155, n. 76. It is here pointed out that in the town of Beverley barbers and surgeons were numerous enough to impose taxes on others entering it.

7. Adler, *supra*, note 5, at 156, n. 76. The necessity of alleging that the inn was "com-