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The General Welfare Clauses of the Constitution

By

D. Barlow Burke*

During wartime the normal lines of demarcation between state and federal governments are bent and stretched to the breaking point. For the all important purpose of winning the war, constitutional limits upon federal powers cease to prevail and the central government may undertake all activities that are required to insure a unified national effort. Past experience has demonstrated that after the war the bent lines recoil and the states are restored to their former rightful status. It is presumed that this salutary precedent will be followed after the close of the present world wide struggle. Consequently, since peace is the normal condition and its return may be anticipated, the scope of this paper will be confined to conditions existing prior to the outbreak of the present national emergency.

The preamble to the Constitution of the United States reads as follows:

"We the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty for ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

The words, "promote the general welfare" comprise what some have called the "forgotten clause" of the Constitution. Certain advocates of enlarged federal powers have asked how there can be doubts as to the power of the central government to establish whatever measures may be deemed desirable for the common good when such a clause as this was written into the Constitution by the framers themselves. Judges have answered this question by saying that the clause is not part of the substantive law, that all of the preamble is merely introductory and is not in a proper sense a part of the Constitution. It merely precedes it, as a declaration of principle, a statement of the objectives to be attained by the new government thereafter outlined. No power to enact any statute is derived there-
from. It conveys no authority upon any of the component parts of the government, nor does it enlarge or affect the federal system described in the articles which follow.1

Perhaps the significance of the foregoing may be appreciated more clearly if viewed from the standpoint of the federal government as a government of delegated powers. If Congress had the power to promote the general welfare by the passage of such general legislation as it chose to enact, deriving this power from the clause of the preamble cited above, its authority would be unlimited, and there would be no line of demarcation between Federal powers and those of the several States. If the central government had power to promote the general welfare it would not need other powers, and the careful enumeration of specific Federal powers in Article I, section 8, would be unnecessary. Thus we cannot look to the preamble or any part of it, as a source of Federal authority or jurisdiction.

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

In the above words is begun section 8 of Article I of the Federal Constitution, a lengthy section containing 18 clauses which confer upon the Federal government its specific and limited powers. Appropriately enough, the power to levy and collect taxes is listed first among the Federal powers. The impotence of the confederate government under the Articles of Confederation had been due largely to its lack of a taxing authority, and the framers of the new government clearly foresaw that no central government worthy of the name could exist without the expressly conferred power to tax. The taxing power is perhaps the most extensive (and therefore most dangerous) power that any democratic government may have. Because it is necessary to protect the people from possible governmental oppression limitations were imposed upon the right to tax, and at once we find stated the purposes for which taxes may be levied. There are three such purposes, i.e., to pay the debts, to provide for the common defense and to promote the general welfare of the nation.

If one reads the taxing clause in a cursory or unanalytical manner, it would seem that it entrusts the Federal government with a wide responsibility affecting the general welfare of the whole people and clothing it with tremendously inclusive power. Further, it will be recalled that this clause is part of an express power in the Constitution itself and is in no sense prefatory as in the Preamble. May the Federal government, therefore, enact any and every law that it deems appropriate for the promotion of the general welfare?

In answering this question, reference may be made to the punctuation of the clause. It will be observed that after the word "excises" there is a comma. If it were a semi-colon, it is no exaggeration to say that the whole complexion of our governmental plan would be different, for with the latter punctuation a new and independent power would have been conferred on the Federal government, a power to legislate in whatever way it saw fit to provide for the general welfare, and thus the line of demarcation between Federal and State powers virtually would have been extinguished. The comma, however, negatives the idea that the promotion of the general welfare is a separate and distinct power of the Federal government. It is a limitation on the taxing power. For what purpose may Congress levy taxes, duties, impost and excises? The answer is, to pay the debts and provide for the common defense and general welfare of the United States. The general welfare clause contains no provision of power, but on the contrary it is a limitation of the taxing power of the United States, and that only.\(^2\)

This view is sustained by Justice Story in the following words: "If the clause (i.e., to pay the debts, etc.) is construed to be an independent and substantive grant of power, it not only renders wholly unimportant and unnecessary the subsequent enumeration of specific powers, but it plainly extends far beyond them and creates a general authority in Congress to pass all laws which they may deem for the common defense and general welfare. Under such circumstances, the Constitution would practically create an unlimited national government."\(^3\)

That eminent authority on the Constitution and the Supreme Court, Charles Warren, sums up Story's interpretation as follows — "the power to levy taxes was granted for the purpose of paying the public debts and providing for the common defense and general welfare; that Congress may lay a tax in order to pay for anything which it can reasonably deem to be for the common defense and general welfare; that so long as the object is one of 'general' as opposed to 'local' welfare, Congress may tax and appropriate money for it; and that Congress is clothed with the power of determining what is the common defense and general welfare."\(^4\)

Furthermore, no less an authority than James Madison wrote on this subject in 1788, at the time when the battle over ratification was being waged along the Atlantic seaboard. He expressed the viewpoint of one who played a vitally important role in the drafting of the Constitution. He wrote: "On the language in which it is defined, it has been urged and echoed that the power 'to lay and collect taxes, duties, impost and excises, to pay the debts, and provide for the common defense and general welfare of the United States,' amounts to an unlimited


\(^3\)Story, "Commentaries on the Constitution" (1833).

commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor . . . than their stooping to such a misconstruction. Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general explanation just cited, the authors . . . might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing a power to legislate in all possible cases. . . . But what color can the objection (i.e., the misconstruction) have when a specification of the objects alluded to by those general terms immediately follows, and is not even separated by a longer pause than a semicolon? Nothing is more natural nor common than first to use a general phrase and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor clarify the general meaning, and can have no other effect than to confound and mislead it, is an absurdity.'''

A recent statement to the same effect was contained in the decision of the Supreme Court which declared unconstitutional the Guffey Coal Act; "The proposition, often advanced and as often discredited, that the power of the Federal Government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court.''

Despite clear and definite statements such as the foregoing, the purposes of the framers and the interpreters of the Constitution continue to be misunderstood. Even such a scholar and eminent historian as Charles A. Beard, discussing proposed amendments to the constitution, wrote recently: "The fathers considered specification versus generality and decided on a combination. They conferred some powers expressly on Congress. They authorized it to make all laws necessary and proper for carrying into effect the powers conferred on Congress and other branches of the government. They went farther than that. They empowered Congress to pay the debts and provide for the common defense and general welfare of the United States. It would be difficult to frame an amendment broader than the general welfare clause. But see how that clause has been neglected, mauled, manhandled and whittled away.''

Professor Beard seems not to recognize that the clause is but an explanation of the purpose of taxation.

Therefore we must assume, first, that the purpose of raising revenue by taxation is to promote in some form the general well-being of the people, and second,

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6The Federalist XLI.
7CARTER v. CARTER COAL COMPANY et al. 298 U. S. 238.
6"What Shall We Do with the Constitution?" in "The Nation," April 1, 1936.
that the Federal government is not at liberty to provide for that well-being by every and any method it may choose capriciously to adopt. The Constitution gives it the power to tax in order to attain that object. We may, then, read the clause as follows: "Congress shall have the power to levy taxes, etc., in order to pay the debts and provide for the common defence and general welfare of the United States." It is within the province of the several states to provide for the welfare of their respective peoples by whatever means they choose to take, subject only to the limited prohibitions imposed by the Constitution, such as those found in Article I, section 10, and in the Fourteenth Amendment. In the realm of the State's general welfare powers there are no such narrow limitations as those which circumscribe the Federal government.

The power to tax implies the power of the government to spend the money raised by taxation. It infers not only the power but the duty of the government to use the funds for the purposes of general welfare, the common defense or the payment of debts. How should this "spending power" be exercised? According to Professor Corwin, Madison, writing in the Federalist No. 41, "confines the 'general welfare' which Congress may promote by taxation and expenditure to that welfare which it may promote by its other delegated powers". Alexander Hamilton, on the other hand, adopted a wider view and visualized the general welfare as including subjects far more comprehensive than the powers of Congress enumerated in Article I, section 8. His liberal view of the general welfare clause is to be found in his famous "Report on Manufactures", published in 1791, as follows:

"The phrase (general welfare) is as comprehensive as any that could have been used, because it was not fit that the constitutional authority of the Union to appropriate its revenues should have been restricted within narrower limits than the 'general welfare' and because this necessarily embraces a vast variety of particulars which are susceptible neither of specification nor of definition. It is therefore of necessity left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufactures and of commerce, are within the sphere of the national councils, as far as regards an application of money."

Hamilton's views have been enacted into law on many occasions. Thousands of dollars have been appropriated by Congress for the survey and construction of roads and canals by the federal government. Money raised by federal taxation has been spent for the study of plant and animal diseases and to support the many other scientific activities of the Department of Agriculture. Likewise, various acts of Congress have appropriated money for the promotion of education, notably the Morrill Act of 1862 and the Act of 1890, providing for federal

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8Corwin, "The Twilight of the Supreme Court, p. 154."
aid to state agricultural and mechanical arts colleges. By the terms of the latter act, the sum of $25,000 annually was to be donated to each state for the endowment of such colleges. In 1921, Congress passed the Shepherd-Towner Maternity Act, "for the promotion of the welfare and hygiene of maternity and infancy. In the Maternity Act Cases, the Supreme Court refused to support the contention that the Maternity Act was in excess of federal power as granted in Article I, section 8, clause 1.

Certainly these examples of general welfare legislation support Hamilton's view of a broad spending power based on taxation and they bear witness that Congress has put into practice the Hamiltonian thesis on many occasions.

How far may the taxing power be used to attain economic and social ends? The importance of this question is apparent in the light of present day tax proposals. In answering the question, the Courts must consider each proposed tax on its own merits, especially as to the type of economic or social purpose sought to be attained. Obviously, if the end sought is the benefit of a few privileged persons at the expense of many, there is not that wide diffusion of benefit that is implied in the term "general welfare". Though not expressly stated in the Constitution, it is firmly established by repeated judicial decisions that taxation must be for a public purpose. Furthermore, it is the function of the Courts to determine whether the taxing statute is for a public object. The processing taxes levied upon manufacturers in order to accomplish the plans of the Agricultural Adjustment Administration had difficulty on this score. Obviously, the purpose of these taxes was to help the farmers better their condition by means of crop and livestock reduction. It was the government's plan to pay the farmers for reducing their crop and livestock yields, and the money to pay them was taken from the manufacturers of agricultural products. Against these taxes was raised the argument that such is not a public purpose, and that in reality the money so paid is a subsidy to a group, admittedly large, of favored individuals. In the ruling which invalidated the A.A.A. Justice Roberts challenged the taxes in the following words (though the decision was based principally on other grounds):

"It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, signifies an exacting for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another."
As to taxation with a moral end in view, the Supreme Court has said: "Congress may under the broad authority of the taxing power tax intoxicating liquors, notwithstanding their production is prohibited and punished, we have no question." The fact that the statute in this respect had a moral end in view, as well as the raising of revenue, presents no valid constitutional objection to its enactment.

One of the most interesting cases dealing with the regulatory power of Congress under its taxing power is that of McCray vs. United States. By an act of May 9, 1902, Congress imposed a tax of ten cents per pound on oleomargarine artificially colored so as to resemble butter and a tax of only one-fourth of one cent per pound on oleomargarine not so colored. The United States sued McCray, an oleomargarine dealer, to recover a penalty of $50. Judgment was for the government. McCray alleged that the artificial coloration used was not injurious to health and that without it oleomargarine was not soluble. He claimed that a tax of ten cents per pound would destroy the oleomargarine industry and charged that the statute was unconstitutional, on the ground that the purpose of the tax was not to raise revenue but to suppress the manufacture of the taxed article.

The Court, however, overruled the contention of the defendant. Where the taxing statute appears, on the surface, to be a revenue raising measure, the Court will not inquire into the motive of the legislators who enacted it. "The decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted," wrote Justice White.

The Federal taxing power has in other instances been used as a means of suppressing the thing taxed. For example, by the act of August 9, 1912, Congress ended the manufacture of white phosphorus matches, dangerous to workmen, by placing a tax of two cents per hundred matches. Also, the manufacture of opium for smoking purposes was stopped by imposing a tax of $3.00 per pound by the act of January 17, 1914.

In 1919, the Supreme Court handed down one of its most famous decisions on this subject, in the case of United States vs. Doremus. By the terms of the Harrison Narcotic Drug Act, Congress, under the guise of an excise law, undertook to regulate the sale of narcotic drugs in the United States. The act imposed a special tax on the manufacture, importation, sale or gift of narcotic drugs, and aimed, by the fixing of penalties, to confine the sale of such drugs to registered

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16 U. S. v. YUGANOVICH, 256 U. S. 462.
17 195 U. S. 27.
18 1737 Stat. at L. 81.
19 1914 Stat. at L. 209.
dealers and to physicians and to persons coming to dealers with legitimate prescriptions from physicians. The tax was nominal in amount (though the amount has since been increased) being one dollar per year for every person dealing in any way in narcotics. Dr. Doremus, a physician registered under the act and who had paid the required tax, was indicted for violating the act in dispensing to one Amaris a certain quantity of heroin, not in the course of regular professional practice and without the written orders required on a form issued by the Commissioner of Internal Revenue.

Citing the case of In Re Kollock, the Supreme Court stated that the law may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. In his opinion Justice Day asked: "Have the provisions in question any relation to the raising of revenue? That Congress may levy an excise tax upon such dealers and others who are named in section one of the act cannot be successfully disputed. The provision of section two, to which we have referred, aim to confine sales to registered dealers, and to those dispensing the drug as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic above board and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law. This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Amaris, being as the indictment charges, an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax. Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue. We cannot agree with the contention that the provisions of section two, controlling the disposition of these drugs in the ways described, can have nothing to do with facilitating the collection of revenue. . . ."

Thus the Court held that the regulative features of the Harrison Act facilitated the collection of the tax, making it more difficult to evade payment. The judges refused to consider these regulative aspects as the chief purpose of Congress in enacting the legislation, thus setting up the rule that the presence of some regulatory provisions in a tax law will not make the law unconstitutional.

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1965 U. S. 326.
20249 U. S. 86.
The decision in the Doremus case marks a broad extension of Federal power. The effect of the decision, however, was somewhat reduced by the case of Linder vs. U. S. in which it was held that the Harrison Act must be strictly construed so as not to extend its operation beyond the proper limits of a revenue measure. Said Justice McReynolds: “Congress cannot, under the pretext of executing delegated power, pass laws not intrusted to the Federal government. And we accept as established doctrine that any provision of an Act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced.”

Furthermore, the Court has since ruled that the power of Congress to tax for the general welfare of the people is not an unlimited power, even though the purpose of the contemplated tax is a public one. A noted example of such Court imposed limitation occurred in the Child Labor Tax Case, decided in 1922. By the terms of the Child Labor Tax Law of February 1919 Congress imposed an excise tax equivalent to 10 per cent of the annual net profits upon any person employing child labor in violation of the provisions of the statute regulating such employment. The Drexel Furniture Company of North Carolina, was required to pay, and paid under protest, to Bailey, United States Internal Revenue Collector, the sum of $6,312.79 for having employed and permitted to work in its factory a boy under fourteen years of age, thus incurring the tax of ten per cent on its net profits for the year.

The Company attacked the law in the ground that it was a regulation of the employment of child labor in the States, an exclusively State function under the Federal Constitution and within the reservation of the tenth amendment.

In sustaining the Company's objections to the constitutionality of the law, the Court distinguished between a tax and a penalty. In the words of Chief Justice Taft: “Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous . . . But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us. . . . Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the tenth amendment, would be to

21268 U. S. 5.
2240 Stat. at L. 1138.
enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."2

This case may be interpreted as a danger signal raised by the Supreme Court, a gesture which signified that Congress had already gone far enough in trespassing upon the rights of the States to regulate manufacturing and other forms of production.

Also significant in this connection are two further opinions, one by Justice Sutherland and the other by Justice Roberts. In U. S. vs. La Franca, the former said: "A tax is an enforced contribution to provide for the support of the government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction can be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such."24

Justice Robert's view was expressed in a later decision, U. S. vs. Constantine.

A provision of the Revenue Act of 1926 imposed in addition to the $25. excise tax laid on retail liquor dealers by R. S. 3244, as amended, a "special excise tax" of $1,000, on such dealers when they carry on the business contrary to local state or municipal law, and provided fine and imprisonment for failure to pay, held an exaction which is really a penalty cannot be converted into a tax by so naming it.

Justice Roberts said: "The condition of the imposition is the commission of a crime. This, together with the amount of the tax, is again significant of penal and prohibitory interest rather than the gathering of revenue . . . We conclude that the indicia which the section exhibits of an interest to prohibit and to punish violations of state law as such are too strong to be disregarded, remove all semblance of a revenue act and stamp the sum it exacts as a penalty. In this view the statute is a clear invasion of the police power, inherent in the states, reserved from the grant of powers to the federal government by the Constitution."25

Quite similar to the invalid child labor tax was the tax levied upon miners of bituminous coal by the Guffey Coal Act. This law sets up for the harassed soft coal industry a miniature National Recovery Administration, and imposes a heavy tax upon those coal operators who refuse to comply with its provisions. The terms of the law assess the tax against all producers, but provide that 90 per cent of the amount should be returned to those who participate in the code

24282 U. S. 568.
25296 U. S. 287.
structure created for the industry. When the law came before the Supreme Court, the penalizing nature of the tax was readily recognized. The Court said: "The so-called excise tax of 15 per centum on the sale price of coal at the mine, or, in the case of captive coal the fair market value, with its drawback allowance of 13\(\frac{1}{2}\) per cent, is clearly not a tax but a penalty . . . It is very clear that the "excise tax" is not imposed for revenue, but exacted as a penalty to compel compliance with the regulatory provisions of the Act. The whole purpose of the exaction is to coerce what is called an agreement, which, of course, it is not, for it lacks the essential element of consent. One who does a thing in order to avoid a monetary penalty does not agree; he yields to compulsion precisely the same as though he did so to avoid a term in jail."^26

In the case of Alton Railroad Company vs. The Railroad Retirement Board the District Court of the United States for the District of Columbia ruled against a federal tax law designed to revive a project previously declared unconstitutional by the Supreme Court. On August 29, 1935, the President had approved two acts of Congress, one "to establish a retirement system for employees of carriers subject to the Interstate Commerce Act" and the other "to levy an excise tax upon carriers and an income tax upon their employees". In the course of its opinion, the District Court said: "It is true, as claimed by defendants, that the Tax Act is apparently based on the power of Congress to levy taxes to promote the general welfare and for the common defense, and also upon the power to regulate commerce." But "it was clearly the intention of Congress that the pension system created by the Retirement Act should be supported by the taxes levied upon the carriers and their employees . . . When the act to establish a railroad retirement system, approved on the same day as the taxing act is considered in connection with it, the reasons for the peculiar provisions of the taxing act are apparent. The two taken together so dovetail into one another as to create a complete system, substantially the same as that created by the Railroad Retirement Act of 1934, held unconstitutional by the Supreme Court in the case of Railroad Retirement Board vs. Alton Railroad Company, 295 U. S. 330."^27 In other words, the 1935 laws, including the taxing statute, were passed to accomplish the purpose covered by the 1934 Retirement Act which had been voided by the Supreme Court.

Widespread as has been the use of the taxing power to promote the general welfare, an even greater reliance for the attainment of this end has been placed upon the commerce powers of Congress.

Flexibility, the extent of which was scarcely anticipated by the authors of the Constitution, has made this interstate commerce power the basis of a Federal police power of real magnitude. In order to promote the health, safety, morals

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26298 U. S. 238.
27In Equity No. 60, 397. U. S. District Court for the District of Columbia.
and commonweal of its citizens, the Federal Government has passed innumerable laws predicated upon the right of Congress to regulate interstate and foreign commerce. Fraudulent and unhealthy foods and drugs may not be shipped from one State to another. In order to discourage gambling, Congress has forbidden the interstate shipment of lottery tickets recognizing, of course, that no Federal law could constitutionally suppress a lottery of other gambling device within a State. Likewise, though no Federal law could directly prohibit the practice of prostitution, Congress has sought to suppress commercialized vice organized on a National scale by the Mann Act, making it a crime for any person to induce a woman to go from State to State for an immoral purpose. More recently, the Federal Government has legislated to prevent stolen automobiles from being moved across State lines. The menace of kidnapping motivated the passage of the so-called Lindbergh law, a Federal statute designed to give the Federal authorities jurisdiction over any kidnapper who transported his victim from State to State.

An extended discussion upon this topic, however, is not within the scope of this paper; since the power of Congress to regulate interstate and foreign commerce is a power separate and distinct from the taxing power and thus it is not, strictly speaking, any part of or related to the general welfare clause. The latter remains as a limitation upon the taxing power of the Federal government.