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Limited Government and the Welfare Clause

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LIMITED GOVERNMENT AND THE WELFARE CLAUSE

By

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The construction of the U. S. Constitution has at all times, since the genesis of the Republic, been represented by two opposing fields of thought. Jefferson, an individualist, an advocate of states' rights, a disciple of John Locke[1] and an avowed opponent of centralization of governmental power advocated at all times a rigid construction. On the other hand, Hamilton, a vigorous advocate of strong centralized government, advocated consequently a loose construction and construction by interpolation. Each had his own adherents and followers, but so profund were the differences on this basic premise that there resulted, as the aftermath of this struggle, two parties—the Jeffersonian or the Democratic-Republican Party, and the Federalist Party.

Briefly stated, the judicial philosophy of nationalism or strong centralized government came to the front. In 1803, acting under the authority given it in Article III, Sections 1 and 2 of the Federal Constitution, in the case of *Marbury v. Madison*[2] the principle of judicial review was established, thus placing the court "over the Constitution."[3]

The doctrine was extended in *Martin v. Hunters Lessee*[4] in which the court held that final decisions of the state supreme courts on federal questions were subject to review by the United States Supreme Court.

In *McCulloch v. Maryland*[5] in a decision of monumental importance, the court read into the constitution the doctrine of implied powers, and the continued adoption of this judicial synthesis in *Gibbons v. Ogden*[6] so transcended the commerce clause as to open the door to construction which now encompasses the entire agricultural and industrial life of the states.[7]

Coming now to the controversial "General Welfare Clause," we note that it is to be found as a part of Article I, Section 8, Subdivision I of the United States Constitution, which reads as follows:

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1 The Declaration of Independence was mostly the work of Thomas Jefferson, although Adams and Franklin suggested minor alterations. The salient features were borrowed from the philosophy and theory of government as expressed in John Locke's second treatise: JOHN LOCKE, TWO TREATISES ON GOVERNMENT (1694).

2 1 Cranch 137 (1803).

3 EDWIN S. CORWIN, COURT OVER CONSTITUTION (1938).

4 1 Wheat. 304 (1816).

5 4 Wheat. 316 (1819).

6 9 Wheat. 31 (1824).

7 Wickard v. Fillburn, 317 U.S. 111 (1942); Mulford v. Smith, 309 U.S. 38 (1939); United States v. Darby, 312 U.S. 100 (1941); Kirschbaum v. Walling, 316 U.S. 517 (1942).

> "SECTION 8. The Congress shall have the power 1. To lay and collect taxes, duties, imposts and excises, to pay the debts and *provide for the common defense and general welfare of the United States;* but all duties, imposts, and excises shall be uniform throughout the United States." (Emphasis added.)

This clause has agitated and proved to be one of the most provocative clauses of our Constitution, its proper interpretation being one of the basic issues between Jefferson and Madison and the Democratic-Republican Party and Hamilton and the Federalist Party, the crucial point again striking at the fundamental premise of limited government through the question of "loose" or "strict" construction of the Constitution. These two constructions may be stated as follows:

(1) The Jefferson or Madison interpretation, which was that the power "to lay and collect taxes . . ., to pay the debts and provide for the common defense and general welfare of the United States; . . ." must be confined as descriptive of and limited by the succeeding specific enumeration of powers to be found in the succeeding subdivisions of Section 8.

(2) The construction of Mr. Justice Story, which is that from the terms of the grant (*supra*), Congress has a substantive power to tax and appropriate, limited only by the requirements that it shall be exercised to provide for the common defense and general welfare of the United States, and is not confined to, or limited by the subsequently enumerated specific grants of power to Congress.

Throughout the years, however, the "General Welfare Clause" has withstood the challenge of judicial interpretation, or at least has not been the subject of judicial consideration. However, in 1936 in the case of *United States v. Butler,*[8] the court did announce its conclusions on this clause. To say that the holding of the Supreme Court approving the interpretation of Mr. Justice Story has "softened by a quasi"[9] the doctrines of limited government is to temper the seriousness of the court challenge with restraint.

In analyzing the question as to which construction is correct, it is necessary to inquire into the circumstances surrounding its adoption, the opinions of those who participated in its early analysis, consideration and debate, and also the opinions of contemporaries who later discussed constructions of the clause.[10]

In the course of its proceedings the Federal Convention adopted on August 16, after recommendation of the Committee of Detail, the following clause:

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[8] 297 U.S. 1 (1936). The Supreme Court in this case states (p. 66) that Mr. Justice Story in his commentaries espouses the Hamiltonian position. However, an analysis of the conclusions of Story and Hamilton would indicate that Hamilton advocated a much looser construction than did Mr. Justice Story.

[9] The expression of Mr. Justice Holmes, dissenting in Springer v. Government of the Philippine Islands, 277 U.S. 189 (1928).

[10] In this connection the discussion of the background at the Federal Constitution by James Madison in a letter to Andrew Stevenson (Nov. 1830) is most instructive and enlightening. See WRITINGS OF JAMES MADISON, Vol. LV, p. 122 (1865).

"The legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises."[11]

However, after this adoption by the Convention great solicitation and debate developed in the Convention about the power of Congress to pay (a) the debts of the Revolutionary War, and (b) the necessity and propriety of the United States assuming and paying all of the debts of the states. In connection with the payment of the debts of the states it was forcibly argued in the Convention that inasmuch as Congress was to appropriate the taxes on imports, and inasmuch as that was one of the chief sources of income to the states, the Federal Congress should thereupon assume payment of the state obligations. Consequently two motions were made (1) that Congress have the power "to secure the payment of the public debt"[12] and (2) that a special committee be appointed, one member from each state to "consider the necessity and expediency of the United States assuming all the state debts."[13]

Obviously, it was contended in the Convention that there was no obligation on the Federal Government to pay the debts of the states and it was debatable whether or not under the taxing power as proposed, there was a right of the Federal Government to pay the debts of the Confederation heretofore incurred.

On August 19 the special committee was appointed, and on August 21 the committee recommended to the Federal Convention the adoption of the following power:

"The legislature of the United States shall have power to fulfill the engagements which have been entered into by Congress, and to discharge as well the debts of the United States as the debts incurred by the several states during the late war, *for the common defense and the general welfare.*"[14] (Emphasis added).

Thus it is to be seen that there is proposed for ratification to the Federal Convention power of Congress to:

(1) Fulfill the engagements which have been entered into by Congress;

(2) To discharge as well the debts of the U. S.;

(3) To discharge the debts incurred by the several states during the late war;

(4) Said debts incurred for the common defense and general welfare.

It is therefore apparent that the phrase "for the common defense and general welfare" appears at this point for the first time before the Convention and had definite and sole reference to the payment of the obligations of the Confederacy heretofore incurred during the Revolutionary War, and the obliga-

11 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION, Vol. I, p. 308 (1911) (hereinafter cited as FARRAND).
12 II FARRAND 325, 326.
13 II FARRAND 327.
14 II FARRAND 352.

tions of the states incurred for the common defense and general welfare during the late war.

The debates in the Convention thereafter reflect that the members were concerned that Congress might still repudiate the old debts by failure to pay the same and consequently the following substitute motion was made and carried in lieu of the recommendation of the special committee:

> "The legislature *shall* discharge the debts and fulfill the engagements of the United States." (Emphasis added).

Upon adoption of this motion the Convention thereafter, on August 23, placed this new clause prior to the taxing power adopted on August 16 and so adopted the following:

> "The legislature *shall* fulfill the engagements and discharge the debts of the United States and shall have the power to lay and collect taxes, duties, imposts and excises."[15]

The records of the Convention show that thereafter debate still continued and was critical relative to the mandatory use of the word "shall," it being strenuously contended that compulsory obligation on Congress to pay all of the old debts of the Confederacy would result in the unjust enrichment of those who had purchased bonds and obligations at a few cents on the dollar. And, consequently on motion given, made and carried the word "shall" was stricken and the clause was this time adopted as follows:

> "All debts contracted and engagements entered into, by or under the authority of Congress shall be valid against the United States under this Constitution as under the confederation."[16]

Thus the payment of the debts of the confederation was left under the discretion of Congress.

It can here be noticed that the report of the special committee under date of August 21, recommending in part the payment of the debts incurred by the several states during the late war for the common defense and general welfare, was entirely superseded by the substitute motion made and adopted on August 22 which eliminated any reference to state debts. Inasmuch as this question of the payment of the state debts had been eliminated in the subsequent motion adopted by the Federal Convention, the matter still evolved discussion of the delegates and precipitated the reference of the question of state debts again on August 31 to a committee of eleven. On September 4 the committee returned its findings to the Federal Convention. However, the question of the affirmance and payment of the state debts for which the committee was created was still ignored and, instead, the committee being of the opinion that an express power was necessary to enable Congress to pay the old debts, it moved that the taxing provision heretofore formally adopted be amended so as to provide as follows:

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15 II FARRAND 328; also, WRITINGS OF JAMES MADISON, Vol. LV, p. 124.
16 II FARRAND 414.

> "The legislature shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."[17]

This new proposal by the committee of eleven was then unanimously approved by the Federal Convention and embodies the taxing power as it is presently provided for in the United States Constitution.

In discussing, therefore, the perturbant clause "and provide for the common defense and general welfare of the United States" it is necessary to remember at all times that the clause was first submitted by the special committee on August 21 as a clause of limitation, i.e., that Congress was to (a) discharge the debts of the United States and (b) the debts incurred by the several states during the late war, "for the common defense and general welfare." It can be therefore concluded that the clause originally saw its initiation into the Constitution as descriptive of Revolutionary War debts to be paid. It is the contention of this writer that the correct constructions are the conclusions reached by Jefferson and Madison that the phrase is a limitation of the right to tax and spend but the general purposes themselves, i.e., to provide for the common defense and the general welfare were limited and explained by the subsequent enumerated powers. In other words, Congress has a power to tax . . . . and spend and provide for the common defense and general welfare of the United States but as is specified in the enumerated powers thereinafter set forth and fixed in Congress.

In drawing further conclusions on the correct construction of this clause, the principles, restatements and conclusions of Jefferson, Madison, Hamilton and Story are of great value.

I *Jefferson's Contention*

Undoubtedly it is correct to say that Jefferson was the most conspicuous apostle of democracy in America and most antiphonal in his constitutional belief. His original contention on the construction of this clause appears in 1791 in his communication to President Washington on the question of the constitutionality of the Bank of the United States. Discussing the welfare clause in this communication he advised President Washington that the clause "to pay the debts and provide for the welfare of the Union" was descriptive of the power to tax and was not to be construed as giving a distinct and independent power to do any act which Congress might think would be for the good of the Union. He further stated that otherwise construed "it would reduce the whole instrument to a single phrase, that of instituting a Congress with powers to do whatever would be for the good of the United States; and as they would be the sole judges of the good or evil it would also be a power to do whatever

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[17] II FARRAND 497.

evil they pleased." It was his conclusion to Washington that "it was intended to lace them up strictly within the enumerated powers, ..."[18]

He adhered to the same conclusions again in 1792. In later years his conclusions were in no wise changed. In a communication to Spencor Roane in 1815 he discusses the dangers of powers by implication, and in discussing the clause "common defense and general welfare" he again concludes that it was absurd to reason that the Convention would delegate specified powers to Congress and at the same time specify unlimited powers. He states this proposition as follows:

> ". . . . they could not be awkward in language as to mean, as we say, 'all and some'. And should this construction prevail, all limits to the Federal Government are done away with. This opinion, formed on the first use of the question, I have never seen any reason to change, whether in or out of power; but on the contrary, find it strengthened and confirmed by five and twenty years of additional reflection and experience . . . ."[20]

And what appears to be the last public utterance upon the subject is contained in a letter to Albert Gallatin in 1817, in which arguing the question of the veto by President Madison of an act of Congress providing for internal improvements, Jefferson after concluding that the act was not within the expressed powers of Congress, and discussing this tenet as the division line between the Democratic Republicans and the Federalists, concludes as follows:

> ". . . . Congress had not unlimited powers to provide for the general welfare, but were restrained to those specifically enumerated; and that as it was never mean they should provide for that welfare but by the exercise of the enumerated powers, so it could not have been meant they should raise money for purposes which the enumeration did not place under their action; consequently the specification of powers is a limitation of the purposes for which they may raise money . . . ."[21]

II *Madison's Contention*

Probably only second to Jefferson was James Madison in his advocacy of the constitutional doctrines of strict construction and the original doctrines of the Democratic-Republican Party. In analyzing his views on the Welfare Clause, it must be borne in mind that Madison took a leading part in the debates of the Convention and was scholarly in his keeping full, careful and complete notes,[22] and the records of the Convention show that he spoke more frequently than any other delegate, with the exception of James Wilson and Grovenor Morris, and an analysis of his debates with the ultimate draft of the Constitution show that his influence and conclusions largely shaped the final document.

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18 WRITING, Vol. V, p. 286 (Ford edition).
19 WRITING, Vol. VI, p. 141 (Ford edition).
20 WRITINGS, 14, 350 (Library edition).
21 WORKS, Vol. X, 91 (Ford edition).
22 These notes were published by order of Congress. Three volumes—Washington—1843.

He strenuously and continuously contended that the Constitution should not be interpreted by interpolation and thusly be made the means of introducing radical innovations.

Madison on at least five public occasions expressed his views on the Welfare Clause, his last expression being in 1830 in his letter to Andrew Stevenson.[23] In all of his expositions his conclusions were basically the same but possibly more pronounced with the passing of time. In the Federalist,[24] in contending for the ratification of the Constitution against the attacks being based by its opponents on the power to lay and collect taxes, and in defense of the proposition that the Welfare Clause contains a delegation of unlimited powers to Congress, he stated as follows:

> "But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows and is not even separated by a longer pause than a semicolon? . . . . for what purpose could the enumeration of particular powers be inserted if these and all others were meant to be included in the preceding general power? . . . ."

In 1791 while a member of the House of Representatives, and in debating the question of the establishment of the Bank of the United States, he advises the House that an interpretation that destroys the very characteristics of government cannot be just, and if it were, such a power could only be deducted from the power to lay and collect taxes and provide for the common defense and general welfare, and concludes in part:

> ". . . the power as to these general purposes (common defense and general welfare) was limited to acts laying taxes for them; and the general purposes themselves were limited and explained by the particular enumeration subjoined. To understand these terms in any sense, that would justify the power in question, would give to Congress an unlimited power; . . . . would supersede all the powers reserved to the state governments. . . ."[25]

His same conclusions were again reaffirmed in 1817, this time as President of the United States in a message to the Congress vetoing a bill for certain internal improvements. However, in this veto message he raises for the first time the most significant question and conclusion, which is that to permit Congress to have an unlimited power to tax "for the common defense and general welfare" would be to nullify the doctrine of judicial review of the acts of Congress on constitutional grounds because as he states:

> ". . . such a view . . . . would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the general and the state governments, inasmuch as questions relating to the general

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[23] *Id.* at 121.
[24] No. XLI (1788).
[25] ANNALS OF CONGRESS, at 1946, 1st Congress, 2d Session (1791).

welfare being questions of policy and expedience, are unsusceptible of judicial cognizance and decision."[26]

And, in 1830 in his letter to Stevenson,[27] in a complete summation of all of his prior utterances, and in answer to the contention of the proponents of unlimited power as to why the terms "common defense and general welfare" if not meant to convey the comprehensive power which, taken literally, they express, were not qualified and explained by some reference to the particular powers subjoined, queries, that if the terms were meant to embrace not only all the powers particularly expressed, but also the indefinite power which has been claimed under them, why was not such intention so declared and why was so much critical labor employed in enumerating the particular powers if the general clause was to be all comprehensive?

It is incomprehensible, he argues, to believe that delegates to the Federal Convention there for the purpose of protecting the sovereignty of the states and creating a general government of limited powers would intentionally place in the Federal Constitution a phrase susceptible of being omnipotent in its grant of power and creating a nullity of the specified delegation of powers. He describes his intention thusly:

". . . . it exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant and cautious definition of federal powers should have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions and definitions elaborated by them."

And, thereafter in pointing out that such a construction would in effect create two separate constitutions, he concludes:

"Consider for a moment the inmeasurable difference between the Constitution limited in its powers to the enumerated objects, and expounded as it would be by the import claimed for the phraseology in question. The difference is equivalent to two constitutions, of characters essentially contrasted with each other—the one possessing powers confined to certain specified cases, the other extending to all cases whatsoever; for what is the case that would not be embraced by a general power to raise money, of power to provide for the general welfare, and a power to pass all laws necessary and proper to carry these powers into execution; all such provisions and laws superseding, at the same time, all local laws and constitutions at variance with them? Can less be said with the evidence before us, furnished by the journal of the Convention itself, that that is impossible that such a constitution as the latter would have been recommended to the states by all the members of that body whose names were suscribed to the instrument."[28]

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26 MESSAGES AND PAPERS OF THE PRESIDENTS (Richardson), Vol. II, p. 569, Public Bureau of National Literature, New York (1917).
27 MESSAGES AND PAPERS, *op. cit.* supra note 26, Vol. LV, p. 121.
28 MESSAGES AND PAPERS, *op. cit.* supra note 26, at 28.

III *Hamilton's Contention*

Hamilton's writings in advocacy of loose construction of the Constitution have always been strikingly imperialistic in basis, and he never ceased to avow on all occasions his aristocratic—monarchistic partialities. Initially it was he and James Wilson[29] who so vehemently and strenuously attacked the adoption of the Federal Bill of Rights as a false philosophy, unnecessary and improper and detrimental to the people's rights. From these principles his writings all reason deductively and his philosophy of government would not see or would not conceive the righteousness of or propriety of the two great conquests of the colonial period—local self-government and the doctrine of sovereignty in the people. In construction of the Welfare Clause he was ardent in his contention that the power of Congress to lay and collect taxes "for the common defense and general welfare" was plenary and indefinite and fully comprehended the payment of the public debts and providing for the common defense and general welfare. He felt that the power to appropriate its revenues should not be restricted by the subsequent enumeration of powers subjoined to the clause, and that the "general welfare" should be the guiding hand in the ultimate right of Congress to tax and appropriate. With the exception that there should be an apportionment for direct taxes, uniformity for indirect taxes and prohibition of taxes on exports, his contention is stated as follows:

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

The objects which concerned the "general welfare" and for which under that description an appropriation of money is requisite and proper should be "left to the discretion of the national legislature." His conclusions were so broad that he felt that appropriations for money under this clause could be made (with the exceptions heretofore stated) without restriction as long as they were general objects and not local objects, concluding in this respect as follows: ". . . . the object to which an appropriation of money is to be made be general, and not local; its operation extending in fact or by possibility throughout the Union, and not being confined to a particular spot."[30]

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29 ELLIOTT'S DEBATES ON THE CONSTITUTION, Vol. II, p. 434.
30 WORKS, Vol. III, p. 371 (Lodge edition).

IV *Story's Contention*

Story while a Democratic Republican by party affiliation labored throughout his life in all of his undertakings for a centralized government and for the absorption and vitiation of the powers of the states. In 1816 in a memorandum of notes made for delivery of a speech to be made by a friend in Congress, he said: ". . . . I hold it to be a maxim . . . . that the government of the United States is intrinsically too weak, and the powers of the state governments too strong; that the danger always is much greater of anarchy in the parts than of tyranny in the head."[31] To perpetuate these ends he advocated the constitutional doctrines of liberal construction, implied powers, and the general welfare which predominate his judicial decisions and his legal commentaries. While the leading place in this work on the bench belonged to his colleague, John Marshall, Story had a very large share in that remarkable series of decisions and opinions dating from 1816 to 1830.

In construing the power "to pay the debts and provide for the common defense and general welfare of the United States," Story concedes that the Constitution was to frame a national government of special and enumerated powers and not of general and unlimited powers.[32] He states that if this clause is construed to be an independent and substitutive 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 or general welfare. And, consequently, he stresses the Constitution would practically create an unlimited national government.

His construction, however, is that this clause should be construed with and as a part of the preceding clause giving the power to lay taxes. In this respect it becomes "sensibly and operative." It becomes "a qualification" of that clause and limits the taxing power to objects for the common defense or general welfare. It then contains "no grant of any power whatsoever; but it is a mere expression of the ends and purposes to be effected by the preceding power of taxation."[33] In other words, it is Story's construction that the power "to lay and collect taxes . . . . to pay the debts and provide for the common defense and general welfare of the United States" is without limitation as long as the power to tax is limited to objects for the common defense or general welfare. It is his contention that if so construed it then contains no grant of any power.

In discussing the question as to whether this clause should be treated as a prelude to the succeeding specifically enumerated powers, Story states:

> ". . . . but there is a fundamental objection to the interpretation thus attempted to be maintained, which is, that it robs the clause of all

31 W. W. STORY, LIFE AND LETTERS OF JOSEPH STORY, Vol. I, p. 295 (1851).
32 STORY, COMMENTARIES ON THE CONSTITUTION, Vol. I, § 909 (1891).
33 STORY, *op. cit. supra* note 32, § 911.

> efficacy and meaning. No person has a right to assume that any part of the Constitution is useless, or is without a meaning; and a fortiori no person has a right to rob any part of a meaning, natural and appropriate to the language in the connection in which it stands. Now, the words have such a natural and appropriate meaning as a qualification of the preceding clause to lay taxes. Why then should such a meaning to be rejected?"[34]

And further on he contends "the power then is under such circumstances, necessarily a qualified power. If it is so, how then does it affect or in the slightest degree trench upon the other enumerated powers?"[35]

The Attack On Limited Government

In analyzing the judicial inroads into constitutional government that are and have taken place, it must be borne in mind at all times that the government of the United States is based upon the fundamental precepts that all sovereignty resides in the people, and that the Federal Government was conceived and exists only by reason of a limited delegation of powers,[36] and that the power to create necessarily involves the power to retract. Unfortunately, this cardinal tenet which should serve as a beacon light to all guardians of constitutional government is often in texts upon the subject, public discussions and judicial decisions, glossed over, or laid to one side in the interests of expediency, emergency or public clamor.[37] To these advocates all is fusion and "with every breath of the American people, there is born a new constitution."

In the *Butler* case, the court after most painstakingly stating the elementary premise of American constitutional government that the Federal Government is a government of limited and delegated powers and has only such powers as are expressly conferred upon it and as may reasonably be implied from those granted,[38] thereafter proceeds after a brief discussion[39] to adopt what it terms the construction of Mr. Justice Story, concluding that "it results that the pow-

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[34] STORY, *op. cit. supra* note 32, § 912.
[35] STORY, *op. cit. supra* note 32, § 922.
[36] Joseph L. Call, *Statement to Subcommittee of the Committee on the Judiciary,* United States Senate, holding hearings on proposed S.J. Resolution 1 proposing an amendment to the Constitution of the United States relating to the legal effect of treaties and other international agreements; United States Government Printing Office, Washington, (1955), p. 406. This statement contains a brief but comprehensive analysis of these principles.
[37] In United States v. California, 332 U.S. 19 (1947), the Supreme Court quieted title of the United States against the State of California in fee simple for possession of all rights and powers over the lands and minerals and other things of value underlying the Pacific Ocean and lying seaward of the ordinary low watermark for three nautical miles. In doing so, the court stated, ". . . the Federal Government *rather* than the state has *paramount rights* in and power over that belt, and incident to which is full domination over the resources of the soil under that water, *including oil.*" (Emphasis added.) The decision thusly creates a new power in the Federal Government, not one delegated from the people nor implied from a delegated power. The term "paramount rights" is only a tautology of "sovereignty" and the effect of the decision is to read sovereignty and omnipotent power into the Federal Government at the expense of sovereignty in the people.
[38] United States v. Butler, 279 U.S. 63, 66, 67, 68, 69, 77 (1936).
[39] *Id.* at 65.

er of Congress to authorize expenditure of public moneys for public purposes *is not limited by the direct grants of legislative power found in the Constitution.*"[40] (Emphasis added.) The court further proceeds to reason that the adoption however of such a construction has some limitations, stating that (quoting Story) "the power to lay taxes for the common defense and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them."[41]

The conclusion of the court that the power to lay taxes for the common defense and general welfare of the United States is not in common sense a general power is a false syllogism, because "the common defense and general welfare of the United States" is an all-conclusive and comprehensive term. The question of what is for the general welfare or a national purpose is purely a question of policy, the sole judge of which is Congress. And, the judiciary cannot constitutionally prescribe to the Legislative Department limitations upon the exercise of what it now acknowledges to be an express power of Congress. The responsibility for the exercise of the "general welfare," whether oppressive or not, is not a question for the review of the courts, and the only constitutional check on an abuse of congressional discretion is (a) the procedure set forth in the Constitution and/or (b) the accountability of the legislators to the electors.

Madison argued that the adoption of the Story construction construing Congress unlimited power to tax "for the common defense and general welfare" would be to nullify the entire doctrine of judicial review of the acts of Congress on constitutional grounds, because such questions "relating to the general welfare being questions of policy and experience, are unsusceptible of judicial cognizance and decision."[42]

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[40] *Id.* at 66.

[41] *Id.* at 66. The fallacy of the court is the adoption of the Story construction despite the repetitious affirmations of limited powers. Nevertheless, this is the adoption of an unlimited power in Congress. Charles Warren has stated that the approval of Justice Story's construction "has in fact resulted in vesting Congress with a power practically unlimited in its scope." CHARLES WARREN, THE MAKING OF THE CONSTITUTION, p. 447 (1938). It was but very few months after the decision in United States v. Butler that this doctrine was enlarged in the case of Helvering v. Davis, 301 U.S. 619 (1937), and in this case the court concludes that the discretion, (speaking of the discretion of Congress to exercise the powers of the general welfare) however, is not confined to the courts. The discretion belongs to Congress, unless the choice is clearly wrong a display of arbitrary power, not an exercise of judgment. Furthermore, the court concludes in this case ". . . nor is the concept of the general welfare static . . . . what is critical or urgent changes with the times." "Old age pensions and social benefits, therefore, fall within the penumbra of 'solidarity interests' and are legitimate means to 'save men and women from the rigors of the poorhouse' as well as from the haunting fear that such a lot awaits them when the journey's end is near." Both the doctrines in the *Butler* case and the *Helvering* case in the adoption of the Story construction of the taxing power are in themselves a direct repudiation of the doctrines of limited government. John Taylor, in discussing this type of construction, concludes that this "is another instance in which unlimited power is attempted to be inferred from a power acknowledged to be limited. Thus the wisdom of concession and the ingenuity of retraction are so constantly blended, as finally to invest a government acknowledged to be limited, with an unlimited power over the very restrictions imposed upon itself."

[42] MESSAGES AND PAPERS, *op. cit. supra* note 26 at 569.

Justice Stone in the dissenting opinion of the *Butler* case, in discussing the right of the court to declare acts of Congress unconstitutional, clearly advances the proposition that "for the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government." Clearly this decision for all practical purposes destroys the power of judicial review over congressional acts by vitiating the constitutional limitations set forth in Article I, Sec. 8. Under such conclusions the maintenance and preservation of constitutional government must henceforth be placed upon the discretion and good judgment of the members of Congress, and the rights of the people are in turn relegated to their good judgment in exercising their right of ballot.