Tucker's questions

> "That a government should have this great means to execute powers of other governments reaches the point of absurdity. Why should a government be given means to execute a power which is denied to it and confided to another? Why give it the power to help another to do what is denied to it? If Congress cannot be trusted with the grant of a power, why give unlimited discretion to Congress to raise money to enable one not entrusted with the power by Congress to perform it? Can such folly be attributed to the framers of the Constitution?" (*Constitution of the United States,* p. 480),

The same rule applies to private corporations. A corporation authorized to engage in the cotton manufacturing business can not raise and employ its funds in a mining enterprise, which business it was not allowed to conduct, on the plea that it is permitted to raise funds for its general welfare and that success in the mining business would promote its general welfare and that of its members.

(f) Power to appropriate is an implied power auxiliary to the vested powers.

The Hamiltonians neglect, in their discussion, the fact that this clause is a clause authorizing the levying of taxes; that is the object sought. The words "to pay the debts and provide for the common defence and general welfare of the United States" are only a restriction, as Story himself points out, a statement of the purposes for which taxes may be raised. The Hamiltonians, however, when they come to interpret the clause, read it as granting the power to tax and the further right to appropriate the proceeds for these purposes. But the clause does not say so. Nowhere in the Constitution is any ex-

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press power to appropriate provided for. It is an implied right which accompanies each power granted so far as necessary as a means of executing the power. Here we have a power to tax. There is an implied right to appropriate money for the expense of collecting the tax. There is no implied right given by a taxing section to appropriate money for any other purpose. In other words, the only right to appropriate given by the Constitution is implied,—the right to appropriate as a means of carrying out a power. But since the only power given by this section is the power to tax, there is no implied right to apply money to agriculture, but only to the collection of taxes. Had such a right been intended, it would have been granted as an express power—the power to appropriate for these purposes. It seems clear that the "general welfare" as here used was not intended to include matters beyond the scope of the enumerated powers, so that it was not necessary to grant the power to appropriate for the "general welfare" since that right, to the extent intended, was covered by the implied right to appropriate for the purpose of carrying out the granted powers.

(g) Only explicit language would justify accepting Hamiltonian view.

It would take very clear and explicit language to convince one that language in a constitution giving the authority to tax authorizes a sovereignty to tax for purposes which, by the terms of the same instrument, are confided to another sovereignty. In other words the language would have to be so explicit as to permit of no other interpretation.

But here we have no such clear, explicit language. On the contrary, we submit that the language clearly shows that no such right was intended. The language surely is

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not sufficiently clear and explicit to require the meaning contended for. If it were, this dispute as to its meaning would not have arisen.

(h) Opinion of Chief Justice Marshall.

This view is supported in clear language by Chief Justice Marshall. In *Gibbons* v. *Ogden,* 9 Wheat. 199, he said that—

> "Congress is not empowered to tax for those purposes which are within the exclusive province of the States."

In this case Marshall holds that though the State and the United States can tax the same subject, they are exercising different powers because each taxes for the objects confided to it and neither one can tax for the powers confided to the other. If this is so, it is clear that the United States can not tax for the purpose of accomplishing an object over which the States have exclusive jurisdiction, as in the case of agriculture.

3. IT IS INCONCEIVABLE THAT THE CONVENTION SHOULD HAVE GIVEN THE FEDERAL GOVERNMENT POWER TO RAISE MONEY TO PROVIDE FOR MATTERS WITH RESPECT TO WHICH THE STATES RETAINED THE POWER TO TAX AND OVER WHICH THEY INSISTED ON KEEPING CONTROL.

As we have shown, the Constitution, especially in matters of taxation, was intended to confer only such power on the central government as was essential to enable it to perform its functions. Power to raise money to be applied to purposes which the States had the acknowledged authority to provide for and the exclusive power to control was certainly not essential.

It must be remembered that at the time of the adoption of the Constitution people had little confidence in the central government; they feared its power and

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doubted if it would not be controlled by a hostile majority from other States. The population of each State was comparatively small. The citizens of each State could trust their friends and neighbors to care for their local interests; they could not trust a body, a majority of which was composed of citizens of other States. They were reluctant to give such a body any power. For what conceivable reason would they wish to give it the power to tax them in order to provide for local matters over which they insisted on retaining control and for which they retained the right to raise money by taxation?

4. THE HAMILTONIAN INTERPRETATION WOULD DEFEAT THE PUBLIC POLICIES WHICH THE STATES HAVE THE RIGHT AND DUTY TO DECLARE AND ENFORCE.

(a) Regulation through spending an invasion of State power.

Of course, if the right to appropriate money for matters concerned with the internal affairs of the State could be used, as it is used in the present case, to restrain and drastically interfere with and control an important local matter, it would be wholly repugnant to the fundamental principle of the Constitution, as we shall show in our discussion of the Hamiltonian view of the welfare clause.

But even if the right to appropriate money for intrastate objects is held not to authorize such a plan to restrain or regulate local matters, it would nevertheless affect the carrying out of the public policy of the States.

(b) Enlargement of federal taxing purposes a burden on State taxing power.

The resources subject to taxation are not unlimited. All taxes whether raised by the United States or by the States must be paid by the people of the United States. Even if larger taxes can be raised, it is not always politic to do so; nor can it necessarily be done without impos-

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ing oppressive burdens. If the United States raises money to apply to local purposes, there is that much less that the States can raise wisely or without too much hardship. Unless, therefore, the United States applies the money to the purposes to which the States wish it to be applied, they are necessarily thwarted to this extent in carrying out the purposes they wish to accomplish.

(c) Burden on State taxing power impairs State's ability to provide for welfare of its citizens.

Thus, Massachusetts might wish to devote money to encouraging manufactures, while the United States might apply it to education or vice versa. Since the amount of money available is limited, if it is applied to education, manufacturing, which at the time seemed more important to Massachusetts, would suffer. Thus, the policy of the State would necessarily be affected and thwarted.

Indeed, the United States could apply the money to undo some policy which the State had promoted, since, by declining to apply the proceeds to a project which the State had fostered and applying it to some contrary policy, what the State had accomplished would be undone.

(d) Enlargement of federal taxing purposes opens door to sectional discrimination.

In any event, the United States would not be likely to agree with each State on what was the wisest policy for the expenditure of the money in that State. It would be apt to apply general policies while the States would apply local policies suited to their own needs. If the United States were always to agree with each State, as to the wisest application of tax money in that State to local purposes, why should it wish or need the right to appropriate the money for the purpose, since the State it-

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self could so raise and apply the money? The only reason would seem to be that with this power money could be raised largely in certain States or in a certain section to be spent for the welfare of other States or sections. But, if there is one thing clear in the history of the formulation and adoption of the Constitution, it is that those who formulated and those who adopted it had no such intention, and had they dreamed that the Constitution provided that taxes raised in one section of the country could be applied largely in another section of the country for local matters outside the powers granted the United States, the Constitution would have failed of adoption.

5. IF THE GENERAL WELFARE CLAUSE HAD BEEN DESIGNED TO ENLARGE THE TAXING POWER, A SIMILAR CLAUSE WOULD HAVE BEEN APPENDED TO THE BORROWING POWER.

Immediately following the clause in Article I, Section 8, permitting Congress to levy taxes, is the power "to borrow money on the credit of the United States". Under the Hamiltonian view, it is the provision that taxes may be levied "to provide for the general welfare of the United States" which gives Congress the power to raise money by taxation for purposes outside the sphere of federal control. But the borrowing power does not contain the words "to provide for the general welfare." Therefore, if the Hamiltonians are correct in their contention that the phrase "to provide for the general welfare of the United States" enlarges the purposes for which taxes may be levied, it would seem to follow that Congress did not have the right to borrow money for such enlarged purposes. If so, the result would follow that taxes could be levied for these enlarged purposes but money could not be borrowed for them. Such a result would be irrational.

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It seems clear that if the Convention had intended to confer a sweeping power of expending money outside of the sphere of federal control, they would not have confined it to the taxing power. The delegates would have inserted a separate power, namely, the power to appropriate money whether derived from loans, or taxes to carry into execution the powers vested in the government of the United States, and, in other respects to promote the general interests of the people of the United States.

They would have made it clear that Congress could go outside the sphere of federal power in spending money, in the first place, and, in the second place, they would not have inserted the provision simply as an annex to the taxing clause but would have made it apply to revenue from all sources.

6. THE HAMILTONIAN INTERPRETATION WOULD DEFEAT THE EXPRESS RESTRICTIONS ON TAXATION IMPOSED IN THE CONSTITUTION.

The power to tax was a power which the people of the States were most reluctant to confer on Congress. They did so only because it had been proved that the United States under the Articles of Confederation was impotent without this power.

They restricted the power in every way they could to prevent its being used by a majority of States to oppress a minority and still give the requisite ability to raise money.

Charles C. Pinckney, Member of the Convention, said in the South Carolina House of Representatives, in January 1788,

> "We had many things to hope for from the National Government and the chief thing we had to fear from such a Government was the Risque of un-

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> equal or heavy taxation. . . ." (Max Farrand, *Records of the Federal Convention, Vol.* III, 83, *North Carolina State Records,* XX, pp. 777, 779.)

Thus, due to the fear that the northern and middle States, whose exports were comparatively small compared with the southern agricultural States, might levy excessive taxes upon exports of tobacco, rice and indigo, and thus oppress the southern States, it was provided that Congress should have no authority to tax exports. To provide so far as possible against imposing taxes which would be disproportionately burdensome to one section, it was provided that no direct taxes could be levied except on the basis of representation and that all duties, imposts, and excises must be uniform.

But these purposes would be defeated if the United States could levy taxes which were uniform or based on representation and apply the proceeds to local affairs as it saw fit. Even if the subject matter to which the money was applied was of a general character, it would obviously be possible to apply it so as to benefit some of the States disproportionately. Benefits applied to manufacturing would not have aided the South. Benefits applied to tobacco or rice would not have aided the North.

Had it been believed that any such power was granted, the Constitution would not have been adopted. In any event, it is clear that restrictions to prevent abuse similar to those imposed on taxation would have been imposed on the expenditure.

This objection to interpreting the clause as the Hamiltonians demand, is so cogently stated by Williamson, a member of the committee which drafted and reported the welfare clause in the Constitutional Convention, and a member of the first two Congresses, at the debate on the Codfisheries Bill in 1792, that we quote it at substantial

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length. The Codfisheries Bill proposed what its supporters contended was only a drawback of duties. Williamson contended that the drawback would exceed the duties and would therefore be a bounty. He said:

> "Is it within the powers of this Congress to grant bounties? I think not; and on this single position I would rest the argument.
>
> "In the constitution of this Government there are two or three remarkable provisions, which seem to be in point. It is provided, that direct taxes shall be apportioned among the several States according to their respective numbers. It is also provided, that all duties, imposts, and excises, shall be uniform throughout the United States; and it is provided, that no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another. The clear and obvious intention of the articles mentioned was, that Congress might not have the power of imposing unequal burdens; that it might not be in their power to gratify one part of the Union by oppressing another. It appeared possible, and not very improbable that the time might come, when, by greater cohesion, by more unanimity, by more address, the Representatives of one part of the Union might attempt to impose unequal taxes, or to relieve their constituents at the expense of other people. To prevent the possibility of such a combination, the articles that I have mentioned were inserted in the Constitution. . . .
>
> "But we have been told, that Congress may give bounties for useful purposes; that is to say, they may give bounties for all imaginable purposes; because the same majority that votes the bounty will not fail to call the purpose a good one. Establish the doctrine of bounties, and let us see what may follow. Uniform taxes are laid to raise money, and that

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money is distributed—not uniformly; the whole of it may be given to the people in one end of the Union. Could we say in such a case that the tax had been uniform? I think not. There is certainly a majority in this House who think that the nation would be stronger and more independent, if all our labor was performed by free men. This object might be promoted by a bounty. Let a poll-tax be laid, according to the Constitution, of one dollar per poll: in this case sixty cents must be paid for each slave; and the number of slaves being 680,186, their tax would amount to $334,911. To encourage the labor of citizens, let Congress then give an annual bounty of one dollar to every free man who is a mechanic, or who labors in the field. We might be told that the bounty was small, and the object was good; but the measure would be most oppressive, for it would be a clear tax of rather more than three hundred thousand dollars on the Southern States.

"Perhaps the case I have put is too strong—Congress can never do a thing that is so palpably unjust—but this, sir, is the very mark at which the theory of bounties seems to point. The certain operation of that measure is the oppression of the Southern States, by superior numbers in the Northern interest. This was to be feared at the formation of this Government, and you find many articles in the Constitution besides those I have quoted, which were certainly intended to guard us against the dangerous bias of interest, and the power of numbers. Wherefore was it provided that no duty should be laid on exports? Was it not to defend the great staples of the Southern States—tobacco, rice, and indigo—from the operation of unequal regulations of commerce, or unequal indirect taxes, as another article had defended us from unequal direct taxes?

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"I do not hazard much in saying, that the present Constitution had never been adopted without those preliminary guards in it. Establish the general doctrine of bounties, and all the provisions I have mentioned become useless. They vanish into air, and like the baseless fabric of a vision, leave not a trace behind. The common defence and general welfare, in the hands of a good politician, may supercede every part of our Constitution, and leave us in the hands of time and chance.

". . . Establish the doctrine of bounties, set aside that part of the Constitution which requires equal taxes and demands similar distributions, destroy this barrier, and it is not a few fishermen that will enter, claiming ten or twelve thousand dollars, but all manner of persons—people of every trade and occupation—may enter at the breach, until they have eaten up the bread of our children." (*Annals of Congress,* Second Congress, pp. 378, 379, 380, 381.)

7. THE WORDS "OF THE UNITED STATES" EMPHASIZE DISTINCTION BETWEEN OBJECTS OF FEDERAL AND OBJECTS OF STATE WELFARE-CONTROL; THE "SURPLUSAGE" CONTENTION IS UNFOUNDED.

The Government in its brief quotes the argument of Mr. Justice Story to the effect that the phrase would be robbed of any meaning unless given the effect contended for and also quotes Chief Justice Taney to the effect that no words in the Constitution can be rejected as superfluous.

Whatever the effect of the rejection of a single word, it is clear that certain provisions and phrases could be rejected without changing the meaning of the Constitution. They are recited for clarity and emphasis.

Thus, the Tenth Amendment did not change the Constitution or detract from the powers granted Congress. (See *supra* p. 57.) The last clause of Article I, Sec-

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tion 8, permitting Congress to make laws necessary and proper for carrying into execution the powers vested by the Constitution in the United States, is intended for clarity and to prevent any contention to the contrary. The same construction would have been given the Constitution without it. (See Hamilton in *Federalist,* No. XXXIII.)

In the taxing clause, also, there are these words adding emphasis and clarity. Had Congress in the original draft of the Constitution merely been given power to tax, it would have been implied that the power was limited to taxing in aid of and in order to accomplish the powers granted to the United States. It was clear that without the words "to pay the debts and to provide for the common defence", Congress would have had power in such case to tax for these purposes. They add nothing but clarity. So, in the case of the additional words "for the general welfare of the United States", they show clearly that the taxes were to be levied for the general welfare of the United States as distinguished from the general welfare of the States.

The important change effected from the Articles of Confederation was from the right to make requisitions on States, which could not be enforced, to the power to lay taxes on individuals, which could be enforced,—as a means of raising revenue. There was no change as to amount which—theoretically at least—might be raised. In each case it was unlimited within the sphere of federal purposes. The words "common defence" and "general welfare," in both instruments, designated the collective federal purposes. The phrase "of the United States" renders emphatic the limitation to such federal purposes.

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We submit that Mr. Justice Story's contention discloses the weakness of his case. It is a labored, unconvincing argument.

8. THE PURPOSES SOUGHT TO BE ACCOMPLISHED BY THE CONSTITUTION DID NOT REQUIRE, FOR THEIR ACCOMPLISHMENT THAT THE FEDERAL GOVERNMENT BE GIVEN POWER TO APPLY MONEY IN A FIELD NOT CONTROLLED BY IT, BUT RESERVED TO THE STATES.

In the period from the formulation of the Articles of Confederation until the adoption of the Constitution, there is contained in the letters of the leading statesmen, in the debates in the Convention itself, in the debates in the state conventions at which the Constitution was adopted and in the *Federalist,* a minute and complete discussion of the defects of the Confederation, the purposes to be accomplished by the new Constitution, and a statement of the powers granted by it and the objections thereto.

The student will not find a single reference by any responsible person to the necessity or desirability of giving Congress the power to tax for purposes beyond the scope of the matters which it was given power to control. Yet, this is a vast and important power, and one which surely would have been pointed out and discussed, had there been any intention of granting it.

The *Federalist* written principally by Hamilton and Madison discusses at length the purposes sought to be accomplished by the new Constitution, analyzes all of its provisions of any importance, and gives the reason for their necessity, and answers the objections made thereto. Yet, there is not a suggestion that the right now contended for was a desired objective or that it was provided for. The opposite is clearly implied.

"The opinion of the Federalist," said Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, 418,

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> "has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed."

In *Federalist* No. XVI, Hamilton discusses the necessity for giving the federal government the right to act directly in enforcing its powers rather than through the state governments. In No. XVII, he meets the objection that this power will tend to render the central government too powerful and to enable it to absorb the power of the States. He first says that the regulation of the domestic affairs of the government would not be attempted. He adds,

> "The administration of private justice between the citizens of the same state, *the supervision of agriculture and of other concerns of a similar nature,* —all these things, in short, which are proper to be provided for by local legislation—can never be desirable cares of a general jurisdiction." (Italics ours.)

Clearly, the implication is that supervision over agriculture and other similar local matters not only is not a proper function of the federal government but that it would not be a desirable care of the federal government, or one with which it would desire to concern itself.

Again in No. XXXIV Hamilton specifically designates "the encouragement of agriculture and manufactures" as among "the objects of state expenditures." If this is so, why provide the federal government with power to tax the citizens for the purpose of applying money to these matters?

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In considering the defects of the Confederation and the requirements of a stronger government, it is not suggested that the power to apply money to the local affairs of the States is desirable or necessary.

In discussing the power of taxation, Hamilton says in No. XXXI,

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

It is clear that non-federal purposes were not committed to the care of the United States. It is also clear that the application of money would, necessarily, to some extent, affect and hamper the carrying out by the States of their public policies, as we have shown above. Thus, if Hamilton's statement is correct, the Federal Government should have power to tax and apply the money to the objects committed to its care, and the State governments power to tax and apply the money to the objects reserved for their care; and further, the Federal Government should not have the right to tax and apply the proceeds to objects reserved to the care of the States, or the States, power to tax for Federal purposes. If the Federal Government could tax for State purposes, the exercise of the power would necessarily interfere with the exclusive power of the States to deal with their own affairs, and in consequence the States would not (to quote Hamilton's words) be "free from any other control" but a regard for the public good.

No. XLI, written by Madison, deals with the question of whether any of the powers transferred to the Federal Government are unnecessary or improper or

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whether the total grant is dangerous to the jurisdiction left in the States.

In this connection, Madison discusses the welfare clause. He first states,

> "It has been urged and echoed, that the power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defence or general welfare."

He then adds,

> "No stronger proof could be given of the distress under which the writers labor for objections than their stooping to such a misconstruction."

He then goes on to show that nothing is more natural nor common than first to use a general phrase and then to explain or qualify it by recital of particulars and that it is clear that the particulars here explain and limit the general clause. He further points out that the words were taken from the Articles of Confederation and that in those Articles they clearly were not intended to give the Congress under the Confederation unlimited powers.

It is to be noted that Madison does not mention what is now known as the Hamiltonian view. The reason, as we explain below, is that no such view had at the time been suggested by any responsible person. The objection presented was broader than the mere application of money. The claim had been made that Congress could "exercise every power." Naturally this included the application of money, but the objection was that Congress could legislate as well as apply money to matters not included within the specifically enumerated powers. Consequently the question considered by Madison in the

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Federalist was whether the general welfare clause gave an unlimited power of *legislation.* Madison's line of reasoning is applicable to the narrower claim. Had it occurred to anyone that the right to appropriate as to such matters, but not the right to legislate with respect to them was granted, Madison would surely have referred to it.

In No. XV. Hamilton says,

> "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist." (Pages 90, 91).

In No. XV. and No. XXI. the lack of sanction to the laws of the subsisting Confederation is emphasized. In No. XXII. the necessity of national power to regulate commerce among the States is emphasized, and in No. XXIII. Hamilton sets forth the *principal purposes* to be answered by Union in the following words:

> ". . . . . the preservation of the public peace, as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries." (Page 144).

It is perfectly clear that the idea of giving the Federal Government power to spend money for purposes not confided to the Federal Government was utterly foreign to the purposes of the founders, and was entirely unnecessary as a means of curing the evils of the Confederation and attaining the great objects for which the Constitution was framed.

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9. THE WORDS "COMMON DEFENCE" AND "GENERAL WELFARE" WERE TAKEN FROM THE ARTICLES OF CONFEDERATION, WHERE THEY HAD THE LIMITED MEANING FOR WHICH WE CONTEND.

The words "common defence" and "general welfare" were taken from the Articles of Confederation and should naturally be given the meaning which they had in that instrument.

In the Articles of Confederation the words did not mean objects which the States had the right and ability to control and over which the United States exercised no authority.

What "common defence" did mean in the Articles of Confederation was defense in a war, and since only Congress could declare war or peace it necessarily meant defense in a war in which the United States was engaged. What "general welfare" meant, was the welfare of the States which was common to all of the States, and was to be promoted by the use of the powers given to the Confederacy.

The Articles of Confederation had nothing to do with individuals in the States. It was a "league of friendship," (Article III) a "Confederacy," (Article I). The Articles were called "Articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay" etc. It was executed by the several delegates "on the part and behalf of separate and individual states."

That these States were at that time recognized as being independent and sovereign States is well recognized in our Constitutional Jurisprudence. ". . . . all laws made by the several States, after the Declaration of Independence, were the laws of a sovereign and independent government." This was the utterance of a strong Federalist, Mr. Justice Chase in *Ware* v. *Hylton,* 3 Dallas, 199, 225.

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"By the Revolution, the duties as well as the powers of government, devolved upon the people of New Hampshire." (Chief Justice Marshall, in *Dartmouth College Case,* 1819, 4 Wheat. 518, 651).

> "When this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the federal government." (Mr. Justice M'Lean, in *Wheeler* v. *Smith,* 1849, 9 How. 55, 78.)

Various States passed laws for the encouragement by tariff or otherwise, of manufactures and new agricultural enterprises, and the tariff policy of the several States evoked sharp conflicts with their neighbors and was one of the causes which led to the calling of the Federal Convention.

Here we have the picture of thirteen States each independent of the others, and each legislating for the welfare of its own inhabitants, unrestricted by its neighbors and often times in antagonism to them.

The Articles of Confederation left the great bulk of these matters to the several States. The exclusive powers were given to the United States, in Congress assembled, by Article IX. of determining on peace and war, except in certain instances, of sending and receiving ambassadors, entering into treaties and alliances, with certain qualifications, of establishing rules in prize cases, of granting letters of marque and reprisal in times of peace, appointing courts for the trial of piracies and felonies committed on the high seas and cases of captures; they were given authority to determine disputes between two or more States concerning boundary, jurisdiction, or other causes; they were given the sole and exclusive right and power of regulating the alloy and

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value of coin struck by their own authority, or by that of the respective States, fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits were not infringed; establishing and regulating post-offices; appointing all officers of the land forces, in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces; making the rules and regulations of the land and naval forces and directing their operations. They were given authority to borrow money or emit bills of credit on the credit of the United States; to build and equip a Navy; to agree upon the number of land forces and to make requisitions from each State for its quota. *These in general were the matters which Congress could deal with, and they were the matters which had to do with the* "COMMON *defence*" *of all of the States and their* "GENERAL *welfare*" *considered as a Confederation.*

The words "common defence" and the words "general welfare" are used in Article III and Article VIII of the Articles of Confederation. Article III provides:

> "The said States hereby severally enter into a firm league of friendship with each other, for their **common defence,** the security of their liberties, and their mutual and **general welfare,** binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever."

Article VIII provides:

> "All charges of war, and all other expenses that shall be incurred **for the common defence or general welfare,** and allowed by the United States in Con-

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> gress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint. . . ."

Article II provides:

> "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

Can it be reasonably contended that under Article VIII Congress had authority to spend money for any other purpose except those concerning which it had been expressly given power to deal by the Articles of Confederation? We think not.

Madison in the debate of the Codfisheries Bill, (1792) said,

> "It is to be recollected, that the terms 'common defence and general welfare', as here used, are not novel terms, first introduced into this Constitution. They are terms familiar in their construction, and well known to the people of America. They are repeatedly found in the old Articles of Confederation, where, although they are susceptible of as great latitude as can be given them by the context here, it was never supposed or pretended that they conveyed any such power as is now assigned to them. On the contrary, it was always considered as clear and certain, that the old Congress was limited to the enumerated powers, and that the enumeration limited and explained the general terms. I ask the gentle-

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men themselves, whether it ever was supposed or suspected that the old Congress could give away the moneys of the State in bounties, to encourage agriculture, or for any other purpose they pleased? If such a power had been possessed by that body, it would have been much less impotent, or have borne a very different character from that universally ascribed to it." (*Annals of Congress,* Second Congress, p. 387.)

It is obvious that the United States, under the Articles of Confederation, did not seek to raise money for purposes which they did not attempt to control. Their original, primary purpose was to carry through the Revolution successfully. At all times they had insufficient money to pay their troops and pay for military supplies, and the debts which they had contracted for the purposes of the Revolution. In the four years after the Revolution ended, they were unable to raise money to pay their debts contracted for war purposes. The furthest possible thing from their minds was to raise money for matters which they did not attempt to control. They were unable to raise sufficient for the purposes they did attempt to control. The possibility or desirability of raising money to apply to State purposes was remote from anyone's mind. The sole question was whether they could raise enough money for their own purposes, and they failed in this.

THE CONTENTION OF THE GOVERNMENT — THAT THE GENERAL WELFARE CLAUSE WAS NOT GIVEN A RESTRICTED MEANING IN THE ARTICLES OF CONFEDERATION—IS NOT SUSTAINED BY THE EVIDENCE ADDUCED.

The contention of the Government, that under the Articles of Confederation, the Congress had power to requisition money from the States without restriction

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as to the purpose for which it was to be used, (Government's Brief, page 142), is unsupported by evidence.

Remarks of Sherman.

Sherman said that the Congress of the Confederation had the right to say how much the people should pay and to what purposes it should be applied. (Government's Brief, p. 142.) All he meant was what purposes within the scope of their powers—in the same sense that it may be stated that the Board of Directors of a corporation has the right to say for what purposes the money of the corporation may be applied. The subject he was discussing was the proposal that the powers of legislation be vested in a congress of one branch, as under the Confederation. When the issue raised in the instant case was presented to Sherman in the first Congress, he showed plainly that he favored the Madisonian interpretation. (*Infra,* pp. 118-119.)

Madison's remark relied on by the Government.

The Government quotes Madison as saying that the practice under the Articles of Confederation was one of "undefined authority." Its implication is that Madison meant a practice of undefined authority with respect to the spending of money. But Madison was not talking about the *spending of money,* but the *exercise of power to legislate,* when he used those words, which are taken from the body of his letter to Stevenson. It is the supplement that deals with the Hamiltonian theory.

Nicholas' Speech in Virginia Convention.

The Government contends that Nicholas' speech in the Virginia Convention shows that he believed the welfare clause gave an unlimited right to appropriate money.

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What Nicholas meant was that there was an unlimited right to raise money for the general welfare.

Nicholas' argument does not attempt to deal with the question of what subject matters were included under the general heading "common defence and general welfare." What would Nicholas have said if he had been asked whether Congress, under the Confederation had, or under the Constitution, was to have, an unlimited power to raise money to free the slaves in the several States? He would have said— "Slavery is a local matter, Congress cannot control it directly or by the use of money. The powers of the Confederation did not extend to slavery— it was not part of the common defence or general welfare and the same is true under the Constitution."

10. DEBATES IN FEDERAL CONVENTION SUPPORT MADISON'S INTERPRETATION.

(a) Hamiltonian Doctrine Not Considered.

In the early meetings of the Convention the discussion was confined to the principles of the Virginia resolutions. There is not in all this discussion any mention of any such right as Hamilton subsequently contended for.

Proposals were made to give the Federal Government more power than was ultimately granted it by the Constitution as adopted. Hamilton went farther than others and proposed that the Congress should have power, subject to Executive veto to "pass all laws whatsoever", and all state laws contrary thereto were to be void, which of course was not accepted (*Debates in the Federal Convention of 1787* by James Madison, Hunt & Scott ed., pp. 118, 119.)

There was, however, in the course of the Convention, no suggestion whatsoever of giving the Federal Gov-

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ernment power to appropriate money for objects outside the field of federal power, which constitutes the Hamiltonian doctrine.

(b) Account of Proceedings.

On July 24th although the Convention had not quite finished its discussion of general principles, a committee of five was "appointed to report a Constitution conformably to the resolutions passed by the Convention." The committee reported its draft of the Constitution on August 6. (*The Debates in the Federal Convention of 1787* by James Madison; Hunt & Scott, editors, p. 337.) In this draft the taxing clause was contained in Article VII, Section 1, as follows:

> "The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises; . . . . " (*Idem.*, p. 340).

Under the provisions of this clause Congress clearly would have been limited to taxing for the fulfilment of the powers entrusted to it, as it would have been clearly implied that the power to tax was in aid of and for the purpose of enabling the United States to accomplish the purposes for which it was formed and the powers confided to it.

In the discussion preceding the adoption of this provision, on August 16, Mr. Carroll expressed doubts as to the propriety of a mere majority of Congress being a quorum, on account of the difference of interest among the States (*Idem.*, p. 410). Mr. Mason urged that the provision in Section 4 of Article VI of the draft of Constitution, forbidding a tax on exports, be made a part of the taxing clause which authorized the levying of taxes. He proposed an amendment of the taxing power

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to this effect. *Ibid.* Considerable discussion ensued as to whether exports ought to be taxable by Congress. It was finally decided that consideration of the clause prohibiting taxes on exports be postponed until the clause should be reached in the place in which it stood in the report. Section 1 was then agreed to, Mr. Gerry alone voting no (*Idem.*, p. 412).

The Discussion related to the payment of the existing debts of the Confederation and of the States.

On August 18 the question of the payment of the debts of the Confederation and of the debts of the States incurred in the Revolution was brought up for consideration.

Both the securities of the Confederation and of the States were selling for a small portion of their par value. The Articles of Confederation provided, as shown above, that "all charges of war and other expenses incurred for the common defence or general welfare and allowed by the United States in Congress assembled should be defrayed out of a common treasury to be supplied by the several states."

The Confederation, therefore, had the right and duty to care for the State debts incurred for these purposes but as the States refused to pay their allotments, no settlement with the States could be made by the Confederation. As the debts of the States were not proportionately equal, some of the States would have necessarily supplied funds to pay the debts of others.

A substantial part of the public debts of the States and the United States was held by speculators or others who had bought them at a big discount. ". . . unmerited misfortune and patriotic distresses," said John Jay,

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"became articles of speculation and commerce." (Paul Leicester Ford, *Pamphlets on the Constitution,* p. 71.)

Public opinion as to how to deal with this situation was divided. Some were for repudiation. Some were for payment on a basis which would give holders the amounts only they had paid for the securities. Some were for full payment but for dividing the proceeds among the original holders who had given full value and the purchasers who had bought at a discount. Others, of course, strenuously advocated full payment to the holders at face value.

The Convention showed a division of opinion.

On August 18 Mr. Gerry

> "remarked that some provision ought to be made in favor of public Securities, and something inserted concerning letters of marque, which he thought not included in the power of war. He proposed that these subjects should also go to a Committee." (*Idem.* p. 421.)

Gerry's motion was later on the same day, committed, *nem. con.,* to the Committee of Detail (*Idem.,* p. 422).

Mr. Rutlidge moved

> "that a Grand Committee be appointed to consider the necessity and expediency of the U. States assuming all the State debts. A regular settlement between the Union & the several States would never take place. The assumption would be just as the State debts were contracted in the common defence. It was necessary, as the taxes on imports the only sure source of revenue were to be given up to the Union. It was politic, as by disburdening the people of the State debts it would conciliate them to the plan." (*Ibid.*)

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Mr. Sherman

> "thought it would be better to authorize the Legislature to assume the State debts, than to say positively it should be done. He considered the measure as just and that it would have a good effect to say something about the Matter."

Mr. King

> "thought the matter of more consequence than Mr. Elseworth seemed to do; and that it was well worthy of commitment. Besides the considerations of justice which had been mentioned, it might be remarked that the State Creditors an active and formidable party would otherwise be opposed to a plan which transferred to the Union the best resources of the States without transferring the State debts at the same time. The State Creditors had generally been the strongest foes to the impost-plan. The State debts were probably of greater amount than the federal. He would not say that it was practicable to consolidate the debts, but he thought it would be prudent to have the subject considered by a Committee."

It was voted that the committee be appointed to consider the assumption in accordance with Mr. Rutlidge's motion. (*Idem.*, p. 422.)

A Committee of eleven, one from each state, was thereupon appointed to consider the matter. (*Idem.*, p. 423.)

On August 21, Livingston for the Committee of Eleven proposed the following:

> "The Legislature of the U.S. shall have power to fulfil the engagements which have been entered into by Congress, and to discharge as well the debts of the U. S. as the debts incurred by the several States during the late war, for the common defence and general welfare."

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This is the first introduction of the words "common defence and general welfare" in connection with the taxing power. It is most important to note the sense in which the words are used. By Article VIII of the Articles of Confederation the United States was to pay the expenses and debts of the States "incurred for the common defence or general welfare."

In the August 21 resolution we have the words used merely to define the debts of the United States, that is, its own direct debts, and the States' expenses it had agreed to pay, viz., those incurred by the States for the common defense or general welfare.
It was agreed nem. con. that the report should lie on the table. (*Idem.*, p. 436.)

On August 22 a discussion of this proposed provision occurred.

> "Mr. Ellsworth argued that the provision was unnecessary. The U. S. heretofore entered into Engagements by Congs. who were their agents. They will hereafter be bound to fulfil them by their new agents."
>
> "Mr. Randolph thought such a provision necessary: for though the U.S. will be bound the new Govt. will have no authority in the case unless it be given to them."
>
> "Mr. Madison thought it necessary to give the authority in order to prevent misconstruction. . . ."
>
> "Mr. Gerry thought it essential that some explicit provision should be made on this subject so that no pretext might be made for getting rid of the public engagements."
>
> "Mr. Govr. Morris moved by way of amendment to substitute,

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> "'The Legislature *shall* discharge the debts & fulfil the engagements of the U. States.'
>
> "This amendment was agreed to all the states being in the affirmative." (*Idem.*, pp. 450-451.)

On the same day, August 22, the Committee of Detail, of which Rutlidge was Chairman, reported on several matters. Among them was Gerry's proposal to provide for public securities. The Committee reported that, in their opinion, the following addition should be made to the report [*i.e.*, the draft of the Constitution] now before the Convention, namely,—

> "At the end of the first clause of the first section of the seventh article add, 'for the payment of the debts and necessary expenses of the United States, provided that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans, shall continue in force for more than —— years.'" (*Idem.*, p. 448.)

The consideration of the report was postponed (*Idem.*, p. 450), and was not acted on until August 31, when it was referred to the Committee on Unfinished Portions (*Idem.*, p. 502).

In the period between August 22 and August 31, further action was taken on the proposal of the Committee of Eleven, as amended on Govr. Morris' motion.

On August 23 the clause as so amended was agreed to, but—

> "Mr. Butler expressed his dissatisfaction lest it should compel payment as well to the Bloodsuckers who speculated on the distresses of others, as to those who had fought & bled for their country. He gave notice that he should move for a reconsideration." (*Idem.*, p. 457.)

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On August 24 he again moved that the provision be reconsidered the next day. "He dwelt on the division of opinion concerning the domestic debts, and the different pretensions of classes of holders." (*Idem.*, p. 460.)

On August 25 the clause was reconsidered. It was objected by Col. Mason that the term "shall" will beget speculations; that there was a great distinction between original creditors and those who purchased fraudulently of the ignorant and distressed. . . . (*Idem.*, p. 465.)

After further debate—

Mr. Randolph "moved to postpone the clause in favor of the following

'All debts contracted & engagements entered into, by or under the authority of Cong. shall be as valid agst. the U. States under this Constitution as under the Confederation.' " (*Idem.*, p. 466.)

After further debate the Randolph motion was adopted, only Pennsylvania voting in the negative. (*Idem.*, p. 467.)

The provision was ultimately incorporated in the Constitution, as the first clause of Article VI. (*Idem*, p. 553.)

Immediately after the vote on Randolph's motion was taken on August 25—

> "Mr. Sherman thought it necessary to connect with the clause for laying taxes duties &c an express provision for the object of the old debts, &c—and moved to add to the 1st clause of 1st. sect. art VII 'for the payment of said debts and for the defraying of expenses that shall be incurred for the common defence and general welfare.'
>
> "The proposition, as being unnecessary, was disagreed to, Connecticut alone, being in the affirmative." (*Ibid.*)

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On August 31 it was agreed to "refer such parts of the Constitution as have been postponed and such parts of reports as have not been acted upon to a committee consisting of one member from each state appointed by ballot." This was the so-called "Committee on Unfinished Portions," previously referred to.

To this Committee, accordingly, was submitted the report of the Committee of Detail on Gerry's motion to provide for the public securities which had remained unacted on since August 22.

On September 4 this committee reported the taxation and welfare clause substantially as it now stands*† and *it was agreed to nem. con., without debate,* and there was no further discussion of it in the records.

(c) Conclusions to be Drawn.

The above record is of the greatest importance for the following reasons:

First. It shows that under the provision in the original draft of the Constitution there was only an authority to tax which would clearly have limited taxation to provid-

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*NOTE: The wording was—

"The Legislature shall have power to lay and collect taxes, duties, imposts & excises, to pay the debts and provide for the common defence & general welfare, of the U.S." (*Idem.*, p. 507.)

†NOTE: The uniformity clause was added in convention on September 14 (*Idem.*, p. 563). "Legislature" was changed to "Congress" in the report of the Committee on Stile (*Idem.*, p. 548). This report of the Committee on Stile shows a semi-colon (;) (instead of a comma (,)) after "excises," which had not appeared in the clause as adopted on September 4 and did not in the Constitution as adopted by the Convention (*Idem.*, p. 630). *Cf.* Remarks of Albert Gallatin, June 19, 1798, in Congress (*Annals of Congress, 5th Congress,* Vol. 2, p. 1976). Madison referred to the semi-colon as in the Committee's on Stile's report as "an erratum of the pen or of the press." (Letter to Stevenson, November 17, 1830, Farrand, *Records of the Federal Convention,* Vol. III, pp. 483, 492.) *Cf.* also, Henry St. George Tucker, in *American Bar Association Journal,* Vol. 13, pp. 363, 465, 468.

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ing funds for the accomplishment of the powers granted Congress.

Second. It shows that the welfare clause was adopted without any debate or objection or without any intimation that it granted the enormous powers now contended for, in spite of the fact that Madison and also Williamson, who a few years later so strongly denounced the right as defeating the intention and restrictions imposed in the Constitution (*supra,* pp. 89-91), were present when it was adopted.

It shows a tacit and unquestioning assumption on the part of the delegates that Federal money was to be spent for Federal objects and for those alone. The unanimity of the Committee that reported the general welfare clause and the entire absence of any request by any delegate for an explanation of the meaning of the words, or of any objection or protest, are wholly persuasive. The words had a definite and well understood meaning in the Articles of Confederation; no one even dreamed that they would afterwards be twisted into the interpretation which Hamilton subsequently sought to place upon them. There was not even a suspicion that such a construction could be placed upon the words; if there had been, can it be for one moment supposed that the Southern delegates would have remained silent? Can it be supposed that Madison, Williamson, Butler and Baldwin—all of whom were on the Committee on Unfinished Portions, and all of whom subsequently disagreed with Hamilton's interpretation—would have concurred in the report of the Committee which added the welfare clause to the taxing clause? Hamilton's subsequent interpretation was ingenious; but it was so far from the real thought in the minds of the delegates at the time the

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Constitution was being debated, that it did not even occur to them. The fact that there was not even a question made about it shows how utterly foreign Hamilton's interpretation was to what was in the minds of the delegates.

The debates of the Convention between August 6th and September 4th are replete with evidence of the economic division of interests between the States, of the zeal and energy with which the delegates from each State undertook to espouse the cause of their respective constituents. The debate over the number of representatives; (*Debates in the Federal Convention of 1787* . . . by James Madison, Hunt & Scott, Editors, page 358 *et seq.*); on entrusting the Senate with the power of originating money bills; (*Idem.,* page 388, 395); upon the militia; (*Idem.,* page 425, 452, 453); concerning the right of Congress to tax exports; (*Idem.,* page 439 et. seq.); concerning the prohibition of the slave trade; (*Idem.,* page 442 et seq.); the debate over the compromise involving the restriction of the slave trade and the elimination of the two-thirds requirement for the passage of Navigation Acts; (*Idem.,* page 483 et seq.);—all these demonstrate the conflict of interests which at times threatened to be irreconcilable. The power of Federal taxation was subjected to the closest scrutiny, and restrictions upon the taxing power were the result of a studied design to prevent inequality in taxation. *Hylton* v. *United States,* 3 Dallas, 171, 177; *Pollock* v. *Farmer's Loan & Trust Co.,* 157 U. S. 429, 563, 564, 587, 588; *Knowlton* v. *Moore,* 178 U. S. 41, 95, 96. Butler of South Carolina considered the interests of the Southern and of the Eastern States "to be as different as the interests of Russia and Turkey." (*Idem.,* pp. 484, 485.) Pinkney of South Carolina mentioned five

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distinct commercial interests, and alleged that "these different interests would be a source of oppressive regulations if no check to a bare majority should be provided." (*Idem.*, page 483.) A power over exports, said Gerry of Massachusetts, "will enable the Genl. Govt. to oppress the States as much as Ireland is oppressed by Great Britain." (*Idem.*, page 440), and the same power Butler declared to be "unjust and alarming to the Staple-States." (*Idem.*, page 439.) Is it not significant that while so many provisions evoked storms of dissension and debate, the general welfare clause created not even a ripple of comment or inquiry?

Third. The reason for the adoption of the clause is clearly shown.

Those desiring that the Constitution should provide that the old debts "*shall* be paid" were defeated on Aug. 25, it being thought by the majority wiser merely to provide that the old obligations should be obligations of the new government without providing that the new government must necessarily care for them, or in what form, thus leaving this disputed question as to the manner in which these obligations should be cared for to later determination.

Sherman on August 25, immediately after the vote striking out the mandatory clause requiring the payment of the old debts insisted that it be shown in the taxing clause, that taxes could be levied for the payment of such debts, presumably so that no one would seek to avoid the responsibility of payment by contending that the authority to raise the money by taxation to pay them was not explicitly granted. He asked in order that there should be no doubt in the matter that the taxing clause

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contained in Article VII, Section 1, be amended to read as follows:

> "The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises for the payment of said debts and for the defraying of expenses that shall be incurred for the common defence and general welfare."

His sole purpose was to make clear that Congress could levy taxes to pay the old debts which, by the separate action which had immediately before been adopted by the Convention, it was provided should be valid against the new government. The purpose of suggesting the addition of the phrase relating to defraying of expenses, etc., after "said debts" was to prevent a limitation of the taxing power to payment of debts and in suggesting it Sherman had not the slightest notion that he was adding the grant of vast power to the United States now contended for. Sherman was subsequently a member of the Committee on Unfinished Portions which reported the general welfare clause in the form adopted, and presumably brought up in the Committee the substance of his motion of August 25 which had been defeated and secured the consent of the Committee to report it with certain verbal alterations. The recommendation of the Committee of Eleven—"for the payment of the debts and necessary expenses of the United States,"—Sherman's motion,—"for the payment of said debts and for the defraying of the expenses that shall be incurred for the Common defence and general welfare,"—and the provision reported by the Committee on Unfinished Portions—"to pay the debts and provide for the Common defence and general welfare, of the U. S.,"—all meant practically the same thing. The

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real concern, as the debates show, was with respect to payment of the old debts.

Fourth. The reason for the addition of the words "for the common defence and general welfare" is self-evident. Had the provision read that Congress might "lay and collect taxes, etc. for the payment of the debts", the question would have immediately arisen as to whether Congress could lay taxes for any other purpose. It was obviously essential to add some other phrase showing that it could also levy taxes to carry out its other powers.

Under the Articles of Confederation, Congress was given the power to collect from the States all expenses incurred "for the common defence or general welfare". These words, as Madison has said, had been understood as only authorizing Congress under the Articles of Confederation to raise money for the purposes which it undertook to control. To use Madison's own words,

> "The similarity in the use of these phrases, in the two great federal charters, might well be considered as rendering their meaning less liable to be misconstrued in the latter; because it will scarcely be said, that in the former, they were ever understood to be 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 cases afterward enumerated, which explained and limited their meaning; and if such was 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 this Constitution, a different meaning ought to be attached to them." (*Report on the Virginia Resolutions,* Elliot's *Debates,* 2nd ed., Vol. IV, p. 551.)

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While the Convention had voted that it was unnecessary to adopt Sherman's suggestion since the power to raise money to pay the old debts, which had been expressly stated to be obligations of the new government, was necessarily implied, it seems obvious that the words, as Sherman suggested, would add some emphasis, just as the Tenth Amendment later added emphasis, to the reservation of powers to the States. Since those who strongly urged that the payment of the debts be made mandatory had been defeated, it seemed a slight concession to insert the suggestion made by Sherman which was in line with Gerry's previous motion of August 11 that provision be made for the public securities, and the recommendation of the committee of eleven. While the mandatory provision had been defeated the Committee on Unfinished Portions took this opportunity to adopt Sherman's suggestion and make this slight concession.

(d) Evidence of Sherman's Speech on the Proposed Glass Manufactory Loan.

That Sherman had not the slightest idea of introducing into the Constitution a provision which should empower Congress to apply money for purposes concerning which they were not authorized to legislate, is confirmed by his attitude on the proposal that the Secretary of the Treasury of the United States be authorized to make a loan of not exceeding $8000. to one Amelung to aid him in maintaining his "American Glass Manufactory" which was considered by the First Congress under the Constitution, of which Sherman was a member.

On June 3rd, 1790 the proposal was debated and defeated.

> "Mr. Smith, of South Carolina, and Mr. Sherman, objected to the report of the committee. They doubted the Constitutionality of the power of Con-

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gress to loan money to their constituents; they objected to it on account of the precedent it would establish, and supposed that the encouragement and assistance would be applied for with more propriety to the State Government." (*Annals of Congress; 1st Congress;* Vol. 2, page 1630.)

And later in the debate

"Mr. Sherman read that part of the Constitution which he conceived was contrary to the proposition in the report." (*Idem.,* p. 1631.)

11. HAMILTON'S DOCTRINE WAS NOT AN ISSUE IN THE CAMPAIGN FOR RATIFICATION OF THE CONSTITUTION.

The ingenious theory of Constitutional interpretation, that while the Federal Government was one of enumerated powers, and those powers could not be exceeded, yet nevertheless Congress might apply money in furtherance of objects over which it had no power of regulation and control, was still unborn during the struggle over the ratification of the proposed Constitution. The occasion had not yet arisen which was to cause it to germinate in Hamilton's resourceful brain. The battle over ratification was fought along a broad front, and with considerable bitterness, as was natural, considering the sharp cleavage of economic and social forces. The contest was exceedingly close. Consolidation, and tyranny, it was predicted, would result if the Constitution were adopted. "Centinal" claimed that they had entirely annihilated the old Confederation and the particular governments of the several States, and instead had established—

". . . . one general government that is to pervade the union; constituted on the most *unequal* principles, destitute of accountability to its constituents, and as despotic in its nature, as the Venetian Aris-

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tocracy. . . ." (McMaster & Stone, *Pennsylvania and the Federal Constitution,* page 595.)

It would be absurd to accept this interpretation of the Constitution, or the other extravagant claims which were made with respect to the probable effect and operation of various clauses, including the taxing clause. Prejudice distorted the purpose of the Constitution and read a sinister intention in every clause.

It is rather to the temperate and scholarly exposition of the *Federalist* that we should look for the meaning intended to be attached to the Constitution by its framers, and from this we have seen, that Madison interpreted the general welfare clause (and in this interpretation Hamilton, as his collaborator, *at that time presumably agreed*) as being explained and qualified by the subsequent enumeration.

It is true that Madison was not considering the Hamiltonian doctrine—there was then no Hamiltonian doctrine to consider—but Madison's exposition is clearly applicable to the Hamiltonian doctrine and was subsequently applied by Madison to the Hamiltonian doctrine. The power of taxation was a focus of opposition, but the particular interpretation subsequently attached to the general welfare clause by Hamilton was not discussed. It is true, that instances may be found in which the opponents of ratification claimed that under the general welfare clause Congress might legislate as to any matters it saw fit and of course make expenditures therefor. But no one made the distinction that Congress would have the right to appropriate money for purpose with respect to which it was forbidden to legislate, which was later advanced by Hamilton.

The real issues of the campaign, with respect to taxation, were whether Congress ought to have the taxing

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power at all, or whether the power granted was too extensive as respects the methods and objects of taxation; whether it would operate unjustly as between States (*Cf.,* Oliver Ellsworth in Connecticut. Government's brief, appendix, pages 34, 35), whether it would divest the States of the power to tax for their own welfare.

The position of the advocates of ratification was that the power of taxation was necessary because the futility of the requisition system had been shown by the experience under the Confederation. In the second place a power to lay a tariff duty alone, to which it was suggested it be limited, was not sufficient because, while it might suffice in times of peace, in the event of a foreign war, cutting off commerce, revenue would fail and the Government credit with it, and the Government would be unable to provide for the national defense. Direct taxes and excises must be at the command of government; the power of taxation should be commensurate with the objects of the Government. Any limitation, therefore, as to the character of property on which taxes might be levied, or upon the amount which might be raised, would be likely to lead to repetition of the futility of the Confederation. "Every power," said Hamilton, "ought to be in proportion to its object. . . ." (*Federalist,* No. XXX.) As there was no way of telling how much money would be needed to defend the country in case of war, it was folly to place a limitation upon the power of the Government to raise money for this purpose. But there is no suggestion by the advocates of ratification that the Federal Government should have power to raise money to apply to matters which the Federal Government was not constituted to control; on the contrary, the implication is that if the power is to be proportioned to the objects, it does

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not exist where there are no objects to which to attach itself.

It was freely admitted by the advocates of ratification that Congress had power to tax for the general welfare. And why not? General welfare under the Confederation meant the attainment of those general objects which the Confederation was organized to accomplish; it did not include matters which were "expressly reserved" to the States. By putting ourselves in the position of a citizen of a State whose principal interests were safeguarded by the State, and who in respect to a few matters, relating principally to national defense, looked to the Congress of the Confederation for protection, we plainly see that the term "general welfare" had a limited meaning, bounded by the powers of the Confederation. Of course if the new government were to be given greater powers, then general welfare would have a wider application.

Those who explained that the Federal Government should have an unlimited power to raise money, meant an unlimited power to raise money for the objects of the Federal Government. We submit that, carefully examined, there is not in the quotations collected by the Government a single statement made therein to the adoption of the Constitution which expresses the doctrine subsequently formulated by Hamilton.

Among the numerous amendments proposed to the Constitution, none related to the general welfare clause. Madison's explanation, and similar expositions, presumably set at rest fears that it conferred an unlimited power to legislate. Had the suggestion been seriously made, or taken seriously, that the Federal Government could tax not only for its own purposes, but for State purposes as well—could do all that money could do to enlarge and extend its sphere of influence,—some

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action would have been taken toward amendment. It remained for Hamilton, a few years later, to evolve this novel doctrine, and by his prestige and influence, to give it an air of respectability.

12. AN ADDITIONAL REASON FOR ACCEPTING MADISON'S VIEW IS HIS PREEMINENT QUALIFICATIONS.

Madison was better qualified than any other member of the Constitutional Convention to give a correct interpretation of the intent of the members of the Convention as to the meaning of the Constitution.

He was the first to propose that the States meet to consider commercial relations which resulted in the Annapolis Convention of 1786 and the call for the Constitutional Convention. He was a student and had devoted himself to the study of principles and systems of government. He had a large responsibility for the Virginia Plan which formed the basis for the Constitution. He took a leading part in the debates in the Convention. He was the only person to take full notes of the debates.

Moreover he was not at the time prejudiced against a strong central government. He considered that "the individual independence of the States was irreconcilable with their aggregate sovereignty, but that the unification of the whole into one single republic would be as inexpedient as it was unattainable." (Letter to Washington, April 16, 1787. Madison's *Works*, published by order of Congress, Vol. I, p. 287.) He believed that a practical compromise was the system of dual sovereignties which was adopted, but he considered that it was "absolutely necessary to a perfect system" that the United States have the right to negative the laws passed by the States (*Debates in the Federal Convention of 1787* . . . by James Madison, Hunt & Scott ed., p. 75).

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Throughout a distinguished career devoted to the public service, Madison was steadfastly of the opinion that the general welfare clause did not give Congress power to legislate, or to appropriate money, for purposes outside of the scope of the subsequently enumerated powers. His opinion in the 41st number of the *Federalist* related to the objection that Congress might assume to exercise an unlimited power of legislation, but the reasoning is equally applicable to the narrower claim. His speech on the Bank Bill in 1791, (*Annals of Congress,* First Congress, pages 1896-1897) also related to the claim of power. But after Hamilton had announced the new doctrine in December of 1792, Madison denounced it in a letter written to Edmund Pendleton in the following month, (*Letters and writings of James Madison,* published by order of Congress, Volume I, page 545), and within a fortnight in the debate on the Codfisheries Bill, elaborated his views in opposition. (*Annals of Congress,* Second Congress, pages 386-388.) He again indicated the same point of view in the Third Congress in the debate over the Bill for the Relief of Refugees from San Domingo. (*Annals of Congress,* Third Congress, pages 170, 171.) The Virginia Resolutions, which are attributed to Madison, deplored the tendency to enlarge the powers of the general government by forced construction, so as to destroy the meaning and effect of the particular enumeration, which necessarily explains and limits the general phrases, and so as to consolidate the States by degrees into one sovereignty. (*Federalist.* Ford's Edition, page 685.)

In the following year Madison's report on the Virginia Resolution in the Virginia House of Delegates, dealt at length with the general welfare clause and with

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the alternative alleged powers sought to be derived from it by forced construction. (*Elliot's Debates;* Second Edition, Volume IV, page 551 et seq.)

When the matter came before him as Chief Executive he acted upon his opinion by vetoing the Bank Bonus Bill. (Richardson. *Messages and Papers of the Presidents,* Volume I, page 584.)

After Monroe became President, Henry St. George Tucker sent to Madison a copy of the report on roads and canals, upon which the Government relies in its brief. (Page 150.) In reply Madison said,

> "I must pray you, my dear sir, to be assured that, although I cannot concur in the latitude of construction taken in the Report, or in the principle that the consent of States, even of a single one, can enlarge the jurisdiction of the General Government, or in the force and extent allowed to precedents and analogies introduced into the Report, I do not permit this difference of opinion to diminish my esteem for the talents, or my confidence in the motives, of its author."
>
> (*Letters and Other Writings of James Madison.* Published by order of Congress. Volume III, page 54.)

In a letter to President Monroe about the same time, (December 27th, 1817) he says,

> "Serious danger seems to be threatened to the genuine sense of the Constitution, not only by an unwarrantable latitude of construction, but by the use made of precedents which cannot be supposed to have had in the view of their Authors the bearing contended for, and even where they may have crept through inadvertence into acts of Congress, and been signed by the Executive at a midnight hour, in the midst of a group scarcely admitting perusal,

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and under a weariness of mind as little admitting a vigilant attention.

"Another, and perhaps a greater danger, is to be apprehended from the influences which the usefulness and popularity of measures may have on questions of their constitutionality. It is difficult to conceive that any thing short of that influence could have overcome the constitutional and other objections to the Bill on roads and canals which passed the two Houses at the last session." (*Idem.*, page 56.)

And finally in his celebrated letter to Andrew Stevenson, (*Letters and Other Writings of James Madison,* published by order of Congress, Volume IV, page 121 *et seq.*) Madison reiterated his opposition to both the broader and the narrower view.

13. HAMILTON'S INTERPRETATION WAS ORIGINATED BY HIM FROM MOTIVES OF EXPEDIENCY, AFTER THE CONSTITUTION WAS ADOPTED.

A candid student of the period is inevitably led to the conclusion that the interpretation advocated by Hamilton was inspired by political expediency or an attempt to make the central government stronger than the Convention which formulated it or the people who adopted it were willing to concede.

Hamilton himself apparently attended only the early and final meetings of the Convention and was not present when this clause was debated and adopted. He had little sympathy with the limitations placed upon the powers of the central government. At the last meeting in fact he said,

"No man's ideas were more remote from the plan than his own were known to be; but is it possible to deliberate between anarchy and Convulsion on one

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side, and the chance of good to be expected from the plan on the other?'' (*Debates in the Federal Convention of 1787* . . . by James Madison, Hunt & Scott ed., p. 581.)

Gouv. Morris wrote:

''General Hamilton had little share in forming the Constitution. He disliked it, believing all Republican government to be radically defective.'' (Jared Sparks' *Life of Gouv. Morris,* III, 260-265; Farrand, *Records,* III, 418-419.)

On becoming Secretary of the Treasury he immediately sought in every way to draw to the government as much power as possible and the support of the moneyed classes. He was an executive and the opinions he advanced as to the meaning of the Constitution were not judicial but those of an executive seeking to accomplish his purposes.

When he published his famous Report on Manufactures in 1791 he believed that by suggesting bounties to aid manufacture he could draw manufacturers to the support of the central government as he had drawn the moneyed classes by his insistence on the payment of the old Federal and State debts.*

Madison later, accounting for the breach between himself and Hamilton, said it was due to Hamilton making perfectly plain

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*NOTE: Professor Channing says,

''Not being able to secure a 'strong government' through the Federal Convention, Hamilton was gradually building up such an organization by a liberal interpretation of the Constitution and by executive action.'' (*History of U. S., IV,* p. 162.)

''It was undoubtedly Hamilton's purpose to draw men of wealth and property to the support of the government by means of his financial measures.'' (Woodrow Wilson, *History of the Am. People,* Vol. III, p. 110.)

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> "his purpose and endeavor to *administration* the Government into a thing entirely different from that which he and I both knew perfectly had been understood and was intended by the Convention who framed it and by the people adopting it." (Edward Channing, *History of the U. S.* (*Letter, Trist to Van Buren*), IV, 162.)

Both Madison and Jefferson regarded Hamilton's doctrine not only as wrong, but also as *new*. Shortly after the Report appeared, Madison in his letter to Edmund Pendleton on January 21, 1792 said that the Report—

> ". . . broaches a new constitutional doctrine of vast consequence, ... I consider it myself as subverting the fundamental and characteristic principle of the Government; as contrary to the true and fair, as well as the received construction, and as bidding defiance to the sense in which the Constitution is known to have been proposed, advocated, and adopted. . . ." (*Letters and Other Writings of James Madison,* published by order of Congress, Vol. I, pp. 545, 546.)

Shortly afterwards Jefferson in a conference with the President said,

> "That it was a fact, as certainly known as that he and I were there conversing, that particular members of the Legislature . . . had from time to time aided in making such legislative constructions of the Constitution as made a very different thing from what the people thought they had submitted to; that they had now brought forward a proposition far beyond every one ever yet advanced, and to which the eyes of many were turned, as the decision was to let us know whether we lived under a limited or unlimited government. He asked me to what pur-

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poses I alluded? I answered, to that in the report on manufacture, which, under color of giving *bounties* for the encouragement of particular manufactures meant to establish the doctrine that the power given by the Constitution of the United States to collect taxes to provide for the general welfare of the United States permitted Congress to take everything under their management which *they* should deem for the public welfare, and which is susceptible of the application of money; consequently, that the subsequent enumeration of their power was in the discretion to which resort must be had and did not at all constitute the limits of their authority; that this was a very different question from that of the bank which was thought an incident to an enumerated power." Jefferson's *Works,* IV 457.)

The interpretation of the general welfare clause which Hamilton suggested for the first time after the adoption of the Constitution and while he was Secretary of the Treasury was at least strongly colored by his desire to enforce his views of what the Constitution should have been and is entitled to little weight.

We submit that the following statement in Madison's letter of November 27, 1830 to Speaker Stevenson was fully justified.

"That the terms in question were not suspected in the Convention which formed the Constitution of any such meaning as has been constructively applied to them may be pronounced with entire confidence." (Max Farrand, *Records of the Federal Convention,* Vol. III, pp. 483, 492.)

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14. THE GOVERNMENT'S CONTENTION, THAT HAMILTON'S DOCTRINE WAS ADOPTED BY EARLY CONGRESSES, IS NOT SUPPORTED BY THE HISTORICAL EVIDENCE.

The Government contends that the Hamiltonian construction was adopted by the weight of contemporaneous opinion and by the early Congresses, and that "the practice of the earlier Congresses . . . has been uniformly followed by Congress and the Executive branch of the Government."

(a) Story's statement as illustrating a common misconception.

This statement by the Government we submit is wholly erroneous. It is a common misconception, based in large part on the statement by Mr. Justice Story, in his *Commentaries on the Constitution,* published in 1833, which was for long the standard and practically the only text book on the Constitution. We quote this passage in full, because it states specifically the precedents which it contends justify the conclusion, and we shall show below that, probably due to the fact that the debates in Congress were not published at the time these *Commentaries* were written, Story misconceived the importance and bearing of the so-called precedents.

Mr. Justice Story says (Vol. I, pp. 727-728)

> "In regard to the practice of the government, it has been entirely in conformity to the principles here laid down. Appropriations have never been limited by Congress to cases falling within the specific powers enumerated in the Constitution, whether those powers be construed in their broad or their narrow sense. And in an especial manner appropriations have been made to aid internal improvements of various sorts, in our roads, our navigation, our streams, and other objects of a national character and importance. In some cases, not silently, but upon discussion, Congress has gone the length of

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making appropriations to aid destitute foreigners and cities laboring under severe calamities; in the relief of the St. Domingo refugees, in 1794, and the citizens of Venezuela, who suffered from an earthquake in 1812. An illustration equally forcible of a domestic character, is in the bounty given in the cod-fisheries, which was strenuously resisted on constitutional grounds in 1792, but which still maintains its place in the statute-book of the United States.''

In respect to opinion and discussion by Congress and the executive branch of the Government after the adoption of the Constitution, the statement by Story and others that the Hamiltonian view was adopted generally as the proper interpretation of the Constitution and was so acted upon is without foundation. In fact, the reverse is true. There has always been opposition to this doctrine; there is not a clear-cut case of legislation in Congress adopting this view until long after Congress ceased to contain any person who had participated in public affairs at the time of the adoption of the Constitution or who was a member of the Constitutional Convention. In fact, there is not a clear-cut case which can be relied upon as showing any general acceptance of the doctrine until after the Civil War, and even then there was strong opposition.

(b) General principles applicable to evaluating legislative precedents.

In considering legislative precedents, three points are to be borne in mind.

(1) Where the construction of the Constitution is plain, no contemporary or other extraneous opinions or action by Congress or the executive branch is material. We believe the wording of the general welfare clause is sufficiently clear so that consideration of such outside opinion and practice is not permissible.

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(2) In cases of doubtful construction, *contemporary* opinion is valuable because it expresses the views of those acquainted with the purposes of the framers of the Constitution. Especially is the action of the first few Congresses important, since they not only were composed of men living contemporaneously with the adoption of the Constitution, but also among the members were men who had been also members of the Constitutional Convention and who may be assumed to have understood its intention. Such contemporaneous opinion is of real value only when it is accepted by both opponents and proponents of legislation; that is when it meets with common assent. In such cases, especially where the view also receives judicial approval, it has persuasive if not conclusive force.

Thus, in *Martin* v. *Hunter's Lessec,* 1 Wheat. 304, 351-352, Mr. Chief Justice Marshall said,

> "It is an historical fact, that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions. It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the first congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system."

He then states that the Supreme Court has many times sustained this jurisdiction and adds,

> "This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state

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> courts, and these judicial decisions of the supreme court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts."

In *Cohens* v. *Virginia,* 6 Wheat. 264, 420, Mr. Chief Justice Marshall in speaking of the validity of the Judiciary Act said that it was adopted by a Congress containing many members of the Convention which framed the Constitution and "not a single individual, so far as is known, supposed that part of the act . . . to be unauthorized by the constitution."

In the present case, as we shall show, not only was there not common consent as to the correctness of the Hamiltonian view but there was the most violent opposition voiced in Congress, and there is not a single act in the early Congresses which constitutes a precedent. In fact the action of Congress, we submit, proves that the Hamiltonian view was opposed in all the early Congresses and not adopted by any.

As to later action by Congress, it carries little weight. It does not indicate the view of the framers of the Constitution. Unless adopted without dissent and unless there has been opportunity to test it in the courts, it has no persuasive force. Otherwise, Congress by its own action could amend the Constitution.

Abraham Lincoln said that it was a great truth, greatly uttered when John C. Calhoun stated in the Senate that "to legislate upon precedents is but to make the error of yesterday the law of today." (Charles Warren; *Congress as Santa Claus,* p. 12. Carl Sandburg; *Abraham Lincoln, The Prairie Years,* p. 489.)

Where no suit can be brought to test the constitutionality of legislation, it can carry no or little weight as a precedent. Since a citizen can not litigate the legality of

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an appropriation by Congress out of the general treasury, as was held in *Massachusetts* v. *Mellon,* 262 U. S. 447, and as such appropriations heretofore have generally been made from the general treasury and no taxes have been levied, as in the present case, for the express purpose of so disbursing them, the question heretofore could not be raised unless raised by the Government itself in denying its own right to act under such laws. In *United States* v. *Realty Company,* 163 U. S. 427, the question was sought to be raised in this manner but the court held that the payment was for a "debt" and therefore it was unnecessary to determine the question. There has been no other opportunity to present it to this court.

The precedents are for the most part quite recent,—practically all of them since the Civil War, and most of them only in the last thirty years. There has always been opposition. These precedents, as stated, carry no weight.

See *Myers* v. *United States,* 272 U. S. 52, 171.

See also *Fairbank* v. *United States, supra,* in which the court set aside a construction of the Constitution which had been adopted by Congress first from 1799 to 1801 and again from 1862 to 1872, and finally by a statute of 1898.

(c) Reasons for this common misconception as to the precedents.

Before taking up the alleged precedents themselves, we wish to consider briefly what caused this common misconception in respect to the practices of Congress. It was due to a number of causes.

The first and principal reason was the fact that there was in the early Congresses no common understanding as to the powers granted Congress. The broad scope of these powers, the right of the United States to use any and all means appropriate to carry them out, and the doctrine of implied powers had not been settled or agreed

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upon. The decisions of Marshall, and later decisions, which determined and defined the scope of the implied powers and laid down the principle that a real nation was established with full power to do what was necessary to provide for foreign and interstate commerce, navigation, and the other matters committed to its charge, all lay in the future.

The result was that there was great confusion and dispute as to what might be done under the express powers granted Congress. It was easy, therefore, to contend that Congress had made appropriations for matters in excess of its powers when in reality such was not the case. Thus, it was seriously contended as late as 1817 that Congress had adopted the Hamiltonian Doctrine by appropriating money for the payment of the salary of the Senate chaplain, for the purchase of books for the library at Congress and paintings for the Capitol. (See *infra*, pp. 152-3.) As the Constitution did not expressly give the right to do these things, it was contended that Congress had no power to do them unless authorized by the welfare clause.

Another cause of confusion lay in the failure to discriminate between the right to dispose of public lands, or the proceeds thereof, and the purposes for which taxes could be raised.

In Section 3, of Article IV, of the Constitution, it is provided:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting territory or other property belonging to the United States;"

It is now settled that Congress has the right to dispose of public lands by gift or otherwise for such purposes as it sees fit, and while it holds them, of course, to take such

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steps as are necessary for their use and protection. The donation or appropriation of land or the proceeds thereof was confused with the right to levy taxes and dispose of the proceeds, and it was contended that if appropriations or gifts of public land could be made for certain purposes, beyond the scope of the enumerated powers, it must follow that taxes could be levied for the same purposes.

The situation at the time must also be borne in mind. Virginia and other states had, from 1780 to 1785, before the adoption of the Constitution, ceded to the United States the vast region comprising the Northwest Territory, and later Georgia and North Carolina ceded the Southwest Territory extending to the Mississippi River. The Louisiana Purchase added another immense area to the United States. The United States not only controlled this territory, but actually owned most of the land.

It was essential that roads, canals, and other developments be carried out in this territory and also in the newly admitted States shortly organized within it, and also that provision should be made so that public land might be given or sold to settlers, private individuals, and to some extent to the States.

This was essential for military and police protection of the territory and the public lands, to enable the United States to sell and dispose of the lands, and enable the new States to obtain citizens and to provide a means of interstate commerce and communication between them and the eastern, seaboard States, and also to enable the United States to establish post roads and mail service as it was authorized by the Constitution to do.

Furthermore, in the eastern States, roads were essential for intercourse between the States, for carrying mails, and for military protection. We are apt to forget that there were most inadequate facilities of this char-

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acter, even in the older States, and yet these facilities were essential for carrying out the express purposes which everyone admitted were conferred on the United States. In fact, as pointed out in the Congressional debates, it was often with difficulty that a Congressman could get to Washington from his own State, due to the inadequacy of the roads.

It was clear that unless the United States had power, as it was later determined it had, to control these matters, it might not be able to defend its territories adequately and practical means might be lacking for travel between the States. The new government might, in such case, fail from impotency, as did the Confederation. It was instinctively believed that the United States was intended to have power to provide for these matters in some way. Could it step in and construct the necessary roads, canals, etc. for Interstate Commerce and for military purposes and for the development of its own vast public lands? It was strenuously denied that it could do so, since it was contended this would deprive the States of their rightful jurisdiction. Others held that the United States could construct such roads or canals within the States, but only with the consent of the States. It was contended by others that the consent of the States could not confer authority on the United States.

Under these circumstances, advocacy of the Hamiltonian interpretation of the welfare clause was resorted to by those who felt the improvements must be made and that it was intended by the framers of the Constitution that it should have such power.

"We believe that the United States has been granted power to construct such roads and canals," they said, "but if it has no such power, will you not agree that Congress has the right to apply money to their construction? This doctrine is supported by Hamilton. It does

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not involve taking any jurisdiction away from the States since they will control the roads and canals after their construction."

It was urged that the framers of the Constitution did not intend to leave the United States utterly impotent in respect to these improvements, as they were necessary for the carrying out of the powers expressly conferred upon it. It was argued that the right to apply money for their construction, since such construction was necessary to enable the United States to carry out the powers expressly granted, was clearly intended.

Another influence at work was the fact that the business chaos which had existed when the Constitution was adopted had disappeared, the tariff adopted for the protection of manufacturers as well as for revenue was producing a surplus in the Treasury which could be applied to these necessary "internal improvements" (the name by which roads, canals, etc., although intended for interstate communication or military purposes, were called as distinguished from improvements relating to foreign commerce), and Jefferson suggested the adoption of a constitutional amendment to permit of the surplus being applied to such purposes. The manufacturers feared that if this surplus could not be so applied, duties would be reduced, and they therefore joined in seeking a method of diverting it to such purposes.

In spite of these strong grounds for adoption of the Hamiltonian view, the remarkable thing which strikes the reader of the debates in Congress and the Acts passed by it, is the resistance on the ground of its unconstitutionality to undertaking such improvements, although now recognized as clearly within the powers of Congress, and the persistent refusal to accept the Hamiltonian doctrine. Gradually the States themselves provided these facilities, so that it became less necessary

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for Congress to do so, and gradually it became agreed that Congress had power itself to construct interstate roads, canals, etc. It also became agreed that Congress could use public lands and their proceeds for purposes other than the enumerated powers. There was a persistent refusal to use tax money for matters over which it was admitted the States and not the United States, had jurisdiction, which, with minor exceptions, persisted until within the last thirty years.

Another cause of misunderstanding was the fact that the debates in the early Congresses were not printed until some time after Story wrote his *Commentaries,* nor were Madison's *Notes on the Debates of the Constitutional Convention* available until 1840. Had these records been available, it is more than likely that Storey and others would have expressed a different view as to the practice of the early Congresses.

(d) No early precedents adopted Hamilton's doctrine.

We shall now briefly discuss the early acts relied on by Story, and relied on by the Government in the present case, to show that Congress while still composed of members who participated in public affairs at the time of the Constitutional Convention and while still containing members of that Convention adopted the Hamiltonian view.*

THE CODFISHERIES ACT, 1792.

The first Act referred to by Story and by many after him as sustaining the Hamiltonian doctrine was the Codfisheries Act of 1792. This Act, on examination, is on the whole a precedent for the Madisonian view rather than the Hamiltonian view. An import duty on salt of six cents a bushel had been laid by the Tariff Act of

*Note. There were very few members of the Constitutional Convention in Congress after 1800. (See Charles A. Beard, *Economic Origins of Jeffersonian Democracy,* pp. 34-73.)

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1789 (*Annals of Congress,* 1st Congress, Volume II, p. 2129). Section 4 of that Act had provided for a payment in lieu of drawback of the duties on salt where the salt, on which the duty had been paid, was used in curing fish which was subsequently exported. This payment amounted to five cents per quintal of dried fish. (*Idem.,* p. 2131.)

The Codfisheries Bill of 1792 in its original form provided that in lieu of this drawback payment, a "bounty" should be paid to the owners of fishing vessels, to be divided with the fishermen. On motion the word "bounty" was struck out and "allowance" substituted, (*Annals of Congress,* 2nd Congress, p. 401), and in this form the measure passed.

Those who proposed the bill stated that no bounty was intended, Gerry alleging (*Annals of Congress,* 2nd Congress, p. 376) that all that was asked was the payment of an amount equal to the duty which had been paid on the salt which was used in curing the fish.

Madison himself, on the ground that it did not provide a bounty but merely a repayment of duties, voted for the bill. As the question of the right of the United States to grant bounties was raised, however, he did deliver a long and carefully reasoned speech on the subject maintaining that the Constitution did not permit the payment of bounties, and stating fully his interpretation of the welfare clause and stating that if the Hamiltonian view were to be adopted,

> "I venture to declare it as my opinion, that were the power of Congress to be established in the latitude contended for, it would subvert the very foundation, and transmute the very nature of the limited Government established by the people of America; . . ." (*Idem.,* pp. 386-389.)

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Williamson of North Carolina, a member of the Constitutional Convention, present when the welfare clause was adopted by the Convention, felt that the drawback might exceed the duty and thus amount to a bounty and therefore voted against the bill, and delivered a strong speech showing why the Hamiltonian interpretation was clearly not intended by the Constitutional Convention. We have quoted from this speech above (*supra,* pp. 89-91, *Annals of Congress,* 2nd Congress, p. 378).

It is clear that the bill was understood to be concerned with a matter relating to duties on imports over which the United States has control and, that it was not enacted by Congress, on the ground that it was justified by the Hamiltonian doctrine and that it affords no support to that doctrine.

THE SAN DOMINGO REFUGEES RELIEF ACT, 1794.

In the Third Congress (1794) the San Domingo Bill relied on by Story and the government and generally relied on to support the Hamiltonian theory was enacted. Some 2,000 French refugees from the Insurrection in San Domingo fled to this country and were destitute. An appropriation of $15,000 was proposed for their relief. It was vigorously opposed by Madison, by Giles, and by Nicholas as beyond the power of Congress. As a result it was amended on motion of the speaker so as to provide that "a regular account of the money so spent be kept; and that the President of the United States be requested to obtain a credit therefor in the accounts between the French Republic and the United States." In other words, a gift of the money for these purposes was not made, because of constitutional objections to the Hamiltonian theory; it was voted that it should be regarded as an advance or a loan to the French Government. It may be noted that it would

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in any event be undoubtedly justified as in aid of foreign relations.

THE WHISKEY REBELLION SUFFERERS RELIEF ACT, 1795.

The Act of February 27, 1795 (1 Stat. 423) relied on by the Government merely provides damages for those who had suffered in the so-called "Whiskey Rebellion" by reason of assisting United States officers in enforcing the excise law. Obviously the United States has a right and moral duty to recompense citizens for assisting in the enforcement of its laws and probably for failure on its part to protect against damages from such resistance. Madison spoke in debate on the Bill; he did not favor it on practical grounds, but he did not suggest that it was objectionable because it supported the Hamiltonian doctrine. It was not enacted, nor was its passage urged or suggested on the basis of that doctrine.

WASHINGTON'S RECOMMENDATIONS RELATIVE TO AGRICULTURE AND A NATIONAL UNIVERSITY.

Washington in his First Message to Congress said that "the advancement of agriculture, commerce, and manufactures by all proper means, will not, I trust, need recommendation; . . ." The words "by all proper means" must be assumed to have been used advisedly. What means Washington deemed proper, we do not know except as interpreted by his speech of December 7th, 1796, referred to hereafter. It is not improbable in view of the assumption by the First Congress that import duties might be imposed with a protective object, that Washington had in mind protective duties for agriculture. As a matter of fact a protective duty was placed upon hemp by the First Congress.

The Government relies on Washington's speech to the Senate and House of Representatives on December 7,

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1796 (*Annals of Congress,* 4th Congress, 2nd Session, pp. 1594-1595) which referred to agriculture as of primary importance to individual and national welfare. He said that institutions for promoting it grew up supported by the public purse—undoubtedly referring to the agricultural associations which had been incorporated under the laws of several States and which had been the objects of State bounty as well as private assistance. It is difficult to stretch Washington's words to imply a recognition of Federal bounties to agriculture, and Congress did not so interpret them.

Under date of January 11, 1797, the *Annals of Congress* show that Mr. Swift, for the committee to whom was referred that part of the President's speech relative to promotion of agriculture, made a report recommending the institution of a society for that purpose. This society was to receive no support from the Government except, it was suggested, that possibly the salary of a secretary and the expense of stationery might be provided. The following resolve was recommended,

> "Resolved, That a society for the promotion of agriculture ought to be established at the seat of Government of the United States."

Congress took no action for the creation of such a society.

In Madison's report on the Virginia resolutions (James Madison, *Report on Virginia Resolutions,* Elliot's *Debates,* 2nd ed., Vol. IV, p. 551), the latitude of power in the national councils assumed by the committee's report is deprecated, so that the failure of Congress to act upon the recommendation of the Committee presumably must be referred in part at least to opposition on constitutional grounds in Congress.

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The President also referred in his address to the establishment of a national university in the District of Columbia. The plan was to give a certain amount of land for the erection of the building, but the university was to be supported entirely independently of Congress. (*Idem.*, pp. 1698-1702.) This did not involve the use of tax money. The House as a Committee of the whole voted against the project "by a great majority" (*Idem.*, p. 1704) and the proposal was eventually postponed (*Idem.*, p. 1711) and not revived in that Congress.

SAVANNAH FIRE SUFFERERS RELIEF BILL DEFEATED, 1797.

In the same Congress that declined to establish a society for the promotion of agriculture (1797), a bill was introduced to give relief to those who had "suffered by the late fire in Savannah, Georgia." The extent of the calamity was pictured as extreme. (*Idem.*, p. 1712.) Relief was denied by a vote of 55 to 24. (*Idem.*, p. 1727.) Strong constitutional objections were made.

Mr. Claiborne said,

> " . . . It was a sharp conflict between humanity to that suffering country and the Constitution." (p. 1720).

Mr. Nicholas said,

> " . . . The General Government had no power but what was given to it, but the State Governments had all power for the good of their several States. If the general welfare was to be extended (as it had been insinuated it ought) to objects of charity, it was undefined indeed." (p. 1723).

VIRGINIA RESOLUTIONS (1798) AND MADISON'S REPORT (1800) THEREON CONTROVERTED HAMILTON'S DOCTRINE.

In 1798 the famous Virginia Resolution by the Virginia Assembly and in 1800 Madison's report upon those reso-

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lutions directly controverted the Hamiltonian Doctrine. Elliot's *Debates,* 2d. Ed., Vol. I, pp. 528, 550-553.)

TWO ACTS (1803, 1804) TO RELIEVE FIRE SUFFERERS RELATED TO BONDS FOR DUTIES.

Two Acts were passed, one in 1803 (6 Stat. 49) and one in 1804 (6 Stat. 53), both relied upon by the Government, for the relief of sufferers from fires. An examination of these Acts shows that they merely provided that such sufferers who had given bonds for duties might take up those bonds and give new bonds with sureties payable at a later date. This was clearly an exercise by Congress of control over collections of taxes and not a recognition of the Hamiltonian doctrine.

ACT FOR RELIEF OF EARTHQUAKE SUFFERERS IN MISSOURI TERRITORY.

The Act for the relief of sufferers by earthquake in New Madrid, Missouri (3 Stat. 211) relied on by the Government was in aid of persons in a territory, and authorized merely a grant of public lands and not tax moneys.

VENEZUELA EARTHQUAKE SUFFERERS RELIEF ACT, 1812.

The Act of 1812 (2 Stat. 730) to aid sufferers from earthquake in Caracas, Venezuela, relied on by both Story and the Government was passed almost without debate and without a discussion of the Constitutional question involved. At the time the foreign relations of the country were in a very strained condition, and we were about to engage in war with England. Venezuela, on July 14, 1811, had declared its independence from Spain and was attempting to defend its independence by force as we had done just previously, and its status was a matter of great concern to the United

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States. It would seem that the grant was justified on the ground of promoting foreign relations. In any event, it was a minor appropriation made without comment or debate. Had it been recognized as establishing the Hamiltonian principle, it is clear, that it would have excited debate, and entirely clear, that Madison, then President, would have vetoed it. Stevenson, of Virginia, at a later date (January 19, 1827) said with respect to the Venezuela Act and also the Act in aid of the San Domingo refugees (*Congressional Debates,* Vol. III, pp. 757-8):

> "Might not those cases have been defended under the power of the General Government for great external objects? The war and treaty making power, and foreign relations, belongs exclusively to this Government, and, in their exercise, can never conflict with any of the reserved powers of the States. . . . May not those who passed these acts have considered the right to do so as belonging to these great classes of powers? May they not have believed that the observation of benevolence and goodwill towards nations was the policy and duty dictated by the laws of nations, and that, in the exercise of the treaty making power, it was in the power of this Government to conciliate, by acts of kindness and benevolence, those nations with whom they might be disposed to treat?"

CONCLUSION AS TO SO-CALLED RELIEF LEGISLATION.

In short, an examination of the records clearly justifies the conclusion of Mr. Warren:

> "These three statutes—the Codfisheries Act in 1792, the San Domingo Act in 1794, and the Venezuela Act in 1812—the first, based on the Commerce Clause; the second, on the Debt Paying Clause; and the third, merely on a desire to foster our foreign relations—constitute the sole instances of Congres-

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> sional donation of Government tax revenues, between the year 1789 and the year 1867—a period of seventy-eight years." (Charles Warren. *Congress as Santa Claus,* pp. 20, 21.)

That they were not recognized as based on an acceptance of the Hamiltonian doctrine is shown by the debate in 1827 on the bill for the appropriation for sufferers by fire at Alexandria in the District of Columbia. This Bill was enacted but the opinion was expressed that its constitutionality "rested solely on the fact that the city to be relieved was within the District over which Congress had exclusive jurisdiction. Without the limits of that district, he would not view such a relief as constitutional:" (See speech, Burges, *Congressional Debates,* Vol. III, p. 752).

Opposition was made on the ground that it involved a mere donation of money.

Mr. Rives said,

> "According to the broadest construction which had ever been put on this clause (the welfare clause), it justified no appropriation of the public money but for some purpose connected with the common defence and general welfare of the Union. For his part, said Mr. R., he had always thought that these general terms were limited and defined by the subsequent enumeration of specific powers granted to Congress, and that we could not legitimately vote away the public money but in execution of some of the powers so granted." (*Congressional Debates,* Vol. III, p. 758.)

ROADS AND CANALS.

We have shown the situation confronting the country with respect to the necessity for roads and canals to

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develop the vast western territory, to provide military protection, and to provide for intercourse between the States newly created in the West with the Eastern seaboard States.

In 1802, in the Act authorizing the admission of Ohio as a State, it was provided that one twentieth part of the net proceeds of the lands in Ohio sold by Congress should be applied to laying out and making public roads leading from the navigable waters emptying into the Atlantic, to the Ohio, to the said State and through the same, such roads to be laid out under the authority of Congress with the consent of the several States through which the road should pass. (2 Sts. 173, 175). This was on condition that the State exempt from taxation for five years, all public lands in the State sold by Congress. (*Ibid.*) On March 29, 1806, an act was passed providing for the survey and construction of the Cumberland road from Cumberland, Maryland to Ohio. Thirty thousand dollars was appropriated, to be paid out of the fund created from the sale of public lands in Ohio. Thereafter other sums were appropriated, payable out of the fund either immediately or ultimately. (1811, $50,000, 2 Sts. 661; 1812, $30,000, 2 Sts. 730; 1815, $100,000, 3 Sts. 206; 1825, $150,000, 4 Sts. 128.) It was not until 1827 (4 Sts. 228) that money was appropriated for the Cumberland road without providing either that it should be paid, or repaid, out of the five per cent fund. Provision was made for surveying or laying out certain other roads, largely interstate or situated in the territories or on the public domain. Small appropriations in some cases were made out of the general funds for expenses.

JEFFERSON'S MESSAGE TO CONGRESS, 1800.

Jefferson in his annual message of December 2, 1806 referring to the growing surplus in the treasury, re-

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marked that it would be inadvisable to reduce duties since they were laid largely on luxuries and expressed the wisdom of applying the surplus to "public education, roads, rivers, canals, and such other objects of public improvement as it may be thought proper to add to the constitutional enumeration of Federal powers". (James D. Richardson, *Messages and Papers of the Presidents*, Vol. I, p. 409.) He recommended an amendment to the Constitution to permit such application "because the objects now recommended are not among those enumerated in the Constitution", (*Idem.*, p. 410).

MADISON'S MESSAGE TO CONGRESS, 1815.

In his message to Congress of December 5, 1815, Madison spoke of the great importance of "establishing throughout our country the roads and canals", which he referred to as "facilities for intercommunication in bringing and binding more closely together the various parts of our extended confederacy." He added that "any defect of constitutional authority which may be encountered can be supplied in a mode which the Constitution has providently pointed out." (*Idem.*, pp. 567-568).

MADISON'S VETO MESSAGE, 1817.

On March 3, 1817, Madison vetoed a bill which set apart the bonus and dividend payments from the National Bank (not tax moneys) "for constructing roads and canals, and improving the navigation of water courses, in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defense," (*Idem.*, p. 584). He held that the power to regulate commerce did not include the "power to construct roads and canals, and to im-

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prove the navigation of water courses." (*Idem.*, p. 584.) He held further that the welfare clause does not grant power to appropriate for such purposes.*

MONROE'S MESSAGE TO CONGRESS, 1817.

President Monroe, in his first message to Congress, December 2, 1817, (*Idem.* II, pp. 11, 18), referring to the vast territory of the United States, said,

> ". . . we can not fail to entertain a high sense of the advantage to be derived from the facility which may be offered in the intercourse between them by means of good roads and canals. . . . A difference of opinion has existed from the first formation of our Constitution to the present time among our most enlightened and virtuous citizens respecting the right of Congress to establish such a system of improvement. . . . Disregarding early impressions, I have bestowed on the subject all the deliberation which its great importance and a just sense of my duty re-

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*NOTE. President Jackson subsequently misinterpreted Madison's veto message. (Elliot's *Debates*, Second Edition, Volume IV, pages 526, 527.) It ought to have been apparent that Madison did not believe Congress had power to appropriate money for internal improvements, because the Bill which was vetoed was one which simply appropriated money. (*Annals of Congress*, 14th Congress, Second session, pages 1061-1062.) Madison's letter to Tucker and his letter to President Monroe, both written during the same year (*Letters and Other Writings of James Madison;* published by order of Congress, Volume III, pages 54, 56) make Madison's position perfectly clear, if it was ever really in doubt. That the meaning attributed to the Message by Jackson was not the one placed upon it by Congress, is shown by the fact that in the December following the veto, Barbour of Virginia, introduced a proposal for a Constitutional Amendment to the effect that "Congress shall have power to pass laws *appropriating money* for constructing roads and canals, improving the navigation of water courses." (Italics supplied.) (*Annals of Congress*, 15th Congress, First session, Volume I, pages 21, 22.) When Jackson's Message was sent to Madison by Van Buren, Madison wrote Van Buren as follows:

> ". . . In returning his thanks for this polite attention, he regrets the necessity of observing that the Message has not rightly conceived the intention of J. M. in his veto in 1817, on the bill relating to internal improvements. It was an object of the veto to deny to

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quired, and the result is a settled conviction in my mind that Congress do not possess the right. It is not contained in any of the specified powers granted to Congress, nor can I consider it incidental to or a necessary means, viewed on the most liberal scale, for carrying into effect any of the powers which are specifically granted. In communicating this result I can not resist the obligation which I feel to suggest to Congress the propriety of recommending to the States the adoption of an amendment to the Constitution which shall give to Congress the right in question.''

COMMITTEE'S REPORT AND DEBATES ON MONROE'S MESSAGE, 1817.

This part of the President's message was referred to a committee, of which Mr. Henry St. George Tucker of Virginia was chairman, which made a lengthy report which was the subject of several days' debate in the House. (*Annals of Congress,* 15th Congress, 1st Sess., Vol. I, pp. 1114-1250, and see, 1283-1312; Vol. II, 1313-1400.) Every possible view was expressed as to the

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Congress as well the appropriating power as the executing and jurisdictional branches of it. And it is believed that this was the general understanding at the time, and has continued to be so, according to the references occasionally made to the document. Whether the language employed duly conveyed the meaning of which J. M. retains the consciousness, is a question on which he does not presume to judge for others.'' (*Letters and Other Writings of James Madison;* published by order of Congress, Volume IV, page 88.)

What Madison undoubtedly meant was that the Federal Government could accomplish almost as much by the appropriation of money as it could by the exercise of legislative power, and consequently to concede Congress the appropriating power with the breadth claimed, would be to frustrate the intention of the framers, to create a government of limited powers. Other statements of Madison show that that is what he thought, *eg.* The speech on the Codfisheries Bill. (*Annals of Congress,* Second Congress, pages 386, 388, 389), Letter to Stevenson, and supplement to that letter (*Letters and Other Writings of James Madison;* published by order of Congress, Volume IV, pages 126, 128, 134, 135, 137, 138).

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powers granted Congress in this respect. A reading of the debates gives a clear idea of the confusion of mind and the different points of view existing at this time on the powers of Congress in respect to interstate commerce, military defense and navigation.

The committee's report defends the right of the United States to construct roads and canals necessary for interstate communication and military purposes, at least with the assent of the States in which they are situated. Congress, the report says, is expressly authorized "to make all laws necessary and proper for carrying into effect" its powers. The report contends that the right to construct such roads and canals is "necessary" to carry out the powers expressly granted. The only question is whether such construction by the United States is "proper" in view of the fact that it would be "an interference with the jurisdiction of the States over its own soil" which might not be "proper" without the assent of the States. In the opinion of the committee, with the assent of the States involved the objection as to its being proper would be removed.

The report then adds that if this construction is not possible, Congress, in its opinion, can apply funds for these purposes under the welfare clause, and that previous action of Congress justifies such application. (*Annals of Congress,* 15th Congress, 1st Sess., Vol. I, p. 458.)

> "A few of the very great variety of instances, in which the revenues of the United States have been applied to objects not falling within the specified powers of Congress, or those which may be regarded as incidental to them, will best illustrate this remark.
>
> "Thus, it can scarcely be conceived, that, if construed with rigor, the Constitution has conferred the power to purchase a Library, either specifically or as

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> a 'necessary' incident to legislation. Still less, perhaps, can the pious services of a Chaplain, or the purchase of expensive paintings for ornamenting the Hall of session, or various other expenditures of similar character be considered as 'necessary' incidents to the power of making laws. Yet, to these and to similar objects have the funds of the United States been freely applied, at every successive session of Congress, without a question as to the constitutionality of the application."

In the debates it was vigorously asserted that Congress had the power without the assent of the States to construct such facilities as roads and canals in order to carry out its powers to regulate commerce, to transport the mails, and provide the necessary facilities for military defense. The evils resulting from lack of communication were pointed out. The United States would be unable to transport its troops or defend its territory without such roads, and the expense which would be incurred in a few campaigns for lack of these facilities would reimburse the entire cost. (*Idem.*, pp. 1126-1128.)

It was vigorously contended that if Congress did not have the power to construct the roads it had no power to appropriate money for such construction.

Mr. Smyth of Virginia said (*Idem.*, p. 1146),

> " . . . It is properly admitted by the select committee, that the clause grants no power but to raise money. The common defence and general welfare are to be provided for, by expending the money raised in the execution of the other powers expressly granted."
>
> "If Congress have greater latitude in making appropriations than in passing other laws, it is not given to them by the Constitution."

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In a long carefully reasoned speech, he said (*Idem.*, pp. 1161-1162),

> " . . . His idea as to the correct construction of that instrument, was this:—That the common defence and general welfare, were the ends proposed to be attained—the enumerated powers which followed, were the means of attaining them; and that money was the instrument, as far as it was necessary, by which those powers were to be executed. In support of this construction, he would refer the Committee to the forty-first number of the Federalist, in which the question is strongly asked, 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 powers? There could be but one answer to this question—that the specification was intended to operate as a limitation of the general words which preceded it. If, then, the proposition were correct, that we must look to the enumeration of particulars, for the extent of our powers, we must look to the same source, for the extent of our right of appropriation. For why, sir, was the right of raising money, by taxes, given us? He would answer, that money was, to the body politic, what blood was to the natural body. It gave to it its life and vigor, and enabled it to perform its functions. The power of raising it, then, was given to us, as he had already remarked, as the instrument by which we were enabled to execute our other powers. What were they? Those which were enumerated, and the necessary incidents which they involved. . . . Unless, then, the application of money shall be construed to extend to the objects of the specified powers, and the necessary incidents only, the Constitution will be chargeable with the palpable inconsistency of intending to impose limitations upon us, and at the same time furnishing us, by means of

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> the tax-laying power, with an instrument, by which we may, at pleasure, thrown off those very limitations."

It was finally resolved by very close votes (*Idem.*, p. 1249), (1) that Congress has power to appropriate money for the construction of post roads, military and other roads, and of canals and for the improvement of water courses; (2) that Congress has power to construct post roads and military roads; (3) that Congress has power to construct roads and canals necessary for commerce between the States; (4) that Congress has power to construct canals for military purposes. The resolution "that it is expedient that the sum to be paid to the United States under the 20th section of the Act to incorporate the subscribers to the Bank of the United States, and the dividends which shall arise from their shares in its capital stock, shall be constituted as a fund for the construction of roads and canals," was decided in the negative, ayes 72, noes 73.

MONROE'S VETO OF CUMBERLAND ROAD BILL, 1822.

President Monroe on May 4, 1822 vetoed a bill for the Cumberland Road because it provided that the United States should have the power to establish and collect tolls and generally have jurisdiction over the road. He held that the powers granted the United States did not include the power to have jurisdiction over property situated in the States even though constructed for interstate purposes, post roads, military roads, or otherwise. He transmitted with his veto a statement of his views in which he advocated the Hamiltonian view, namely, that money could be appropriated for these purposes so that the United States would be able to see that these facilities were provided, but that Congress could exercise no jurisdiction over their construction or over the roads after

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they were constructed. (James D. Richardson, *Messages and Papers of the Presidents,* Vol. II, p. 142.)

We have not space to continue a detailed examination of action by Congress or the attitude of the Executive. It may be interesting, however, to refer briefly to a few later presidential messages and vetoes.

PRESIDENT JACKSON'S VIEWS.

President Jackson held that Congress could not control or take jurisdiction over such improvements "if jurisdiction of the territory, which they may occupy be claimed as necessary to their preservation and use; . . . Although frequently and strenuously attempted, the power to this extent has never been exercised by the Government in a single instance. It does not, in my opinion, possess it, and no bill therefore which admits it can receive my official sanction." (James D. Richardson, *Messages and Papers of the Presidents,* Vol. II, pp. 484-485.)

While Jackson apparently believed that the Madisonian doctrine was correct, he felt that precedents for appropriations for these purposes had established the practice and right, but he was opposed to such appropriations in general as a matter of policy.

PRESIDENT POLK'S VETO MESSAGE, 1847.

President Polk in his veto message of December 15, 1847 (*Messages and Papers of Presidents,* Vol. IV, pp. 610, 618-620) referring to the Hamiltonian doctrine, said,

> "The power of appropriating money from the Treasury for such improvements was not claimed or exercised for more than thirty years after the organization of the Government in 1789, when a more latitudinous construction was indicated, though it was not broadly asserted and exercised until 1825."

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Refuting President Monroe's advocacy of the Hamiltonian doctrine, he said,

> "But it is impossible to conceive on what principle the power of appropriating public money when in the Treasury can be construed to extend to objects for which the Constitution does not authorize Congress to levy taxes or imposts to raise money."

PRESIDENT PIERCE'S VETO MESSAGE, 1854.

President Pierce in a veto message of May 3, 1854, of a bill providing for a grant of public lands to the several States for the benefit of indigent insane persons, definitely adopts the Madisonian view although the expenditure of tax money was not involved. (James D. Richardson, *Messages and Papers of the Presidents,* Vol. V, pp. 247, 250-252.)

PRESIDENT BUCHANAN'S VETO MESSAGE, 1860.

President Buchanan also supported the Madisonian view in his veto message of February 1, 1860, (James D. Richardson, *Messages and Papers of the Presidents,* Vol. V, pp. 599, 601) in which he supported the opinion expressed by President Polk in his veto message above referred to of December 15, 1847.

CONCLUSION AS TO PRECEDENTS PRIOR TO CIVIL WAR.

It is clear from the above that not only was there no general agreement in the early Congresses with the Hamiltonian interpretation, but that on the contrary there was violent opposition to the Hamiltonian view. The Savannah relief bill of 1797 was opposed because of opposition to this doctrine, and was defeated apparently on constitutional grounds, and there is not a clear-cut case in any of the early Congresses in which it was adopted. Even when it was sought to be adopted it was usually attempted to be applied to the appropria-

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tion of money for matters relating to interstate roads or canals, or roads necessary for military defense, or to develop the public lands; in other words, to matters jurisdiction of which it is now admitted was confided to Congress. The thought really was that these improvements were essential as a means of enabling the powers granted to the United States to be carried out. The objection to having the United States construct the improvements itself was, that it might interfere with the jurisdiction of the States, but it was felt that if money only were appropriated and no control taken, no interference with the jurisdiction of the States could result, so that this objection was removed.

We submit that the advocacy of the Hamiltonian doctrine by those who succeeded Hamilton was another form of stating that the United States had an implied power to appropriate money towards such purposes as interstate communication, military defense, postroads, etc.

We confidently assert that if the broad nature of the powers, which it was later held had been actually conferred by the Constitution upon Congress, had been thoroughly understood, the Hamiltonian doctrine, which was seized upon and advocated principally as a means of aiding in carrying out these powers, would have rapidly been forgotten.

PRECEDENTS AFTER CIVIL WAR.

We have no space to deal with later precedents. A more extended statement is made by Charles Warren, in *Congress as Santa Claus.* They may be divided into the following classifications.

(1) After 1867 donations for the relief of sufferers from disaster, both local and foreign, have occasionally been voted by Congress.

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(2) In 1862 a Statute was enacted granting public lands to the States for the establishment of Agricultural Colleges, on conditions laid down by the Government; (Act of July 2nd, 1862, 12 Stat. 503). This Bill had previously been vetoed by President Buchanan; (February 24th, 1859).

Grants of land before this had usually been made for a consideration or they provided some compensation in return, such as an exemption of taxation of other public lands for a period of time, or in the form of some benefit to the remaining Government lands.

This legislation only appropriated land which the Government had power to dispose of or give away as it pleased, and constitutes no precedent for the use of moneys raised by taxation.

Beginning in 1887 distributions were made to the States for agricultural experiment stations, but until 1907 these purported to be appropriated from public land funds and not taxes. (See Charles Warren, *Congress as Santa Claus,* pp. 92-93.)

(3) In the last thirty years there have been several grants made to the States from general funds for special purposes to be administered by the States in accordance with plans laid down by Congress. It was usually provided that the State should contribute to the plan itself. Such is the Shepard-Towner Maternity Bill. These grants are for purposes not concerned with the enumerated powers.

(4) The Agricultural Department was established in 1862; other departments or bureaus have followed. Many of these departments or bureaus are in large part or wholly concerned with matters over which Congress has jurisdiction, such as the Interstate Commerce Commission, Federal Trade Commission, etc. A number like

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the Agricultural Department, Labor Department, Public Health Service, etc., are principally concerned, as the Government Brief shows, with collecting statistics, research and diffusing information and advice. The Government has power to collect statistics and to make investigations. Such information may be regarded as necessary in order that proper legislation may be passed, as a thorough knowledge of all business and economic conditions is necessary to wise legislation. It would seem for similar reasons that appropriations for research, are permissible within the Madisonian theory of the welfare clause. When such information has been obtained, the Madisonian theory would not forbid Congress to make it public and useful.

While it is not material in this case, it would seem, therefore, that the Madisonian interpretation does not prohibit the maintenance of these departments and expenditures for most if not all of the purposes for which they were created.

(5) Finally, in the last few years a number of Acts like the present have been passed, definitely appropriating money for purposes outside the powers granted Congress, and sometimes, as in the present case, for the purpose of exercising control of a matter confided by the Constitution to the jurisdiction of the States.

An examination of the legislation from the adoption of the Constitution shows not only a refusal to recognize the Hamiltonian doctrine until after the Civil War, but also that, except for sporadic gifts for relief and a few instances of gifts to the States to carry out certain policies which are not of extreme importance, there has been since that time up to recently comparatively little legislation and that principally within the last thirty years, which has violated the Madisonian doctrine that taxes

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can be levied only to pay the debts of the United States, and to provide for the common defense and for such matters of general welfare, as are embraced within the powers conferred upon the United States.

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XIII.

THE HAMILTONIAN INTERPRETATION OF THE GENERAL WELFARE CLAUSE DOES NOT AUTHORIZE THE PRESENT LEGISLATION.

Under the Hamiltonian interpretation of the welfare clause Congress has power to tax and apply the proceeds for the purposes comprised within the powers granted Congress and also for other purposes.

But this interpretation does not give Congress the right to tax and apply the proceeds for any purpose it pleases. It has still only a restricted right to tax for the "general welfare of the United States." To hold that "the general welfare of the United States" is broader than the powers granted the United States does not make it all-inclusive. Its scope and limitations must still be defined.

The Constitution expressly denies to the United States any power to control agriculture and confides this authority to the States. We submit that if the United States has the right to apply tax moneys to agriculture, it clearly has not the right to do so for the express purpose and in such manner as to result in the regulation of agriculture, which right was expressly denied it by the Constitution. Otherwise, this vague phrase authorizing the United States to tax to provide for the general welfare would give Congress power to defeat the express intent and provisions of the Constitution.

1. UNDER THE HAMILTONIAN INTERPRETATION OF THE GENERAL WELFARE CLAUSE A RIGHT TO TAX FOR LIMITED PURPOSES ONLY IS GRANTED.

Even were no limitations provided in the Constitution as to the objects for which taxes could be levied, the right to tax would still be subject to certain limitations.

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Taxes could only be levied for public purposes. The right to tax like all other powers granted the Federal Government could not be exercised in violation of the due process clause of the Fifth Amendment.

But in this case the right to tax is expressly limited, even under the Hamiltonian view, to levying taxes to be applied for the general welfare of the United States. This phrase, even under the Hamiltonian view, as we shall show below, has distinct limitations.

Mr. Justice Story, one of the strongest advocates of the Hamiltonian theory, says in his *Commentaries on the Constitution* (5th Edition, p. 663), that the true meaning

> ". . . will be best illustrated by supplying the words which are necessarily to be understood in this interpretation. They will then stand thus: 'The Congress shall have power to lay and collect taxes, duties, imposts and excises, *in order* to pay the debts, and to provide for the common defence and general welfare of the United States;' that is, for the purpose of paying the public debt, and providing for the common defence and general welfare of the United States. In this sense, Congress has not an unlimited power of taxation; but it is limited to specific objects,—the payment of the public debts, and providing for the common defence and general welfare. A tax, therefore, laid by Congress for neither of these objects, would be unconstitutional, as an excess of its legislative authority."

Again he says (pp. 672-3):

> "A power to lay taxes for any purposes whatsoever is a general power; a power to lay taxes for certain specified purposes is a limited power. A power to lay taxes for the common defence and general welfare of the United States is not in common

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> sense a general power. It is limited to those objects. It cannot constitutionally transcend them. If the defence proposed by a tax be not the common defence of the United States, if the welfare be not general, but special, or local, as contradistinguished from national, it is not within the scope of the Constitution. If the tax be not proposed for the common defence, or general welfare, but for other objects, wholly extraneous . . . . it would be wholly indefensible upon constitutional principles. The power, then, is, under such circumstances, necessarily a qualified power."

Hamilton himself in his famous Report on Manufactures recognized that the purpose must be

> ". . . general and not local; its operation extending in fact or by possibility throughout the Union, and not being confined to a particular spot." (Hamilton's *Works,* Lodge ed., Vol. III, p. 372.)

Monroe, an adherent of the Hamiltonian view, in his veto of the Cumberland Road Bill on May 4, 1822, (Richardson's *Messages and Papers of the Presidents,* Vol. II, pp. 142, 167) said:

> "If, then, the right to raise and appropriate the public money is not restricted to the expenditures under the other specific grants according to a strict construction of their forms, respectively, is there then no limitation to it? Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not."

He continues to say that the purposes must be of general, not local interest, and not a State "benefit."

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2. NATURE OF THE POWER TO TAX AND TO APPROPRIATE FOR THE GENERAL WELFARE OF THE UNITED STATES.

Under the Hamiltonian view the taxing power provides for two things: first, the power to tax for certain purposes; second, the right to appropriate or apply the money so raised for those objects for which they may be levied. The former is a legislative power, strictly speaking; the latter not, since it gives no control over any subject matter but merely a right to apply money to the subject matter.

That the right to appropriate is not a power in the legislative sense is the essential doctrine of the Hamiltonians. Otherwise, as they admit, their view could not be sustained. If the right to appropriate money for an object gave the right to regulate or control that object or the subject matter thereof, then if Congress can, as they contend, appropriate money for substantially any purpose beyond the scope of the granted powers, such as agriculture, manufacturing, etc., all that Congress would need to do to enlarge the granted powers would be to appropriate money for some other object and then proceed to legislate in respect to the subject matter thereof and so control it. But this would make the United States a government of practically unlimited powers which the Hamiltonians admit it is not. Therefore it is essential to their doctrine that the power to appropriate be strictly limited to an application of money, and that it give no right whatsoever to legislate with respect to or regulate the subject matter for which the money is appropriated.

Thus Hamilton in his *Report on Manufactures* said, (Hamilton's *Works,* Lodge ed., Vol. III, p. 372)

> "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,

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> are within the sphere of the national councils, *as far as regards an application of money.*" . . . "*A power to appropriate money* with this latitude, which is granted, too, in express terms, would not carry a power *to do any other thing not authorized in the Constitution,* either expressly or by a fair implication." (Italics ours.)

Jefferson in his opinion on the Bank of the United States (February 15, 1791, 4 Jefferson's *Works,* 524, 525) said:

> "'To lay taxes to provide for the general welfare of the United States'; that is to say, 'to lay taxes *for the purpose* of providing for the general welfare'. For the laying of taxes is the *power,* and the general welfare the *purpose* for which the power is to be exercised. Congress are not to lay taxes *ad libitum, for any purpose they please;* but only *to pay the debts, or provide for the general welfare of the Union.* In like manner they are not *to do anything they please* to provide for the general welfare, but only *to lay taxes* for that purpose."

Mr. Justice Story strongly supports this view (see *Commentaries on the Constitution,* Vol. I, pp. 717-727).

3. THE POWER TO TAX AND TO APPROPRIATE MONEY FOR THE GENERAL WELFARE GIVES NO AUTHORITY TO LEGISLATE WITH RESPECT TO OR TO CONTROL AGRICULTURE.

The general welfare clause, then, under the Hamiltonian view contains two powers: first, the power to tax for certain purposes; second, the right to appropriate the money so raised for these purposes.

The first power—the power to tax—gives Congress no power to authorize any such regulation of agriculture as is provided for in the present legislation. Such a control of agriculture has no relation whatsoever to the

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power to tax. Under that power Congress can designate the object to be taxed, the amount of the tax, and make provision to insure the collection of the tax, and that there be no evasion.

Linder v. *United States,* 268 U. S. 5.
Nigro v. *United States,* 276 U. S. 332.

In *Linder* v. *United States,* which concerned an act providing for taxation of sales of narcotics, the Court said (p. 18):

> "Obviously, direct control of medical practice in the States is beyond the power of the Federal Government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure."

A restriction of the production of cotton has no relation to the enforcement of a tax on the processing of cotton. The restriction on growing cotton does not in any conceivable way assist in the collection of the tax.

Any right of the United States, then, to restrict the growing of cotton must be derived from the right to "appropriate" the money raised by the tax for the benefit of agriculture.

But the right to appropriate money for the benefit of agriculture gives no right to regulate agriculture. Control over agriculture is not a necessary or a direct result of the right to appropriate money or an indirect result of the exercise of such right.

Assuming that Congress has the right to appropriate money for the benefit of agriculture, we are confronted with the scope of that right. As we have shown above, the Hamiltonians themselves are the first to admit that the right to appropriate confers no power to control or legislate with respect to the subject matter, since if it

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did their entire theory would collapse as it would involve giving the United States unlimited powers.

It is clear, then, that if Congress has the right to appropriate money for purposes beyond the scope of its granted powers, this right gives it no right or power directly to regulate by prohibitions or legislate with respect to such matters. We therefore submit that it gives the United States no right to use the power to appropriate for the direct purpose of putting into effect a scheme or plan for the regulation of agriculture or any other local matter the regulation of which was clearly intended by the Constitution to be subject to the exclusive jurisdiction of the States. Otherwise the clause would enable Congress through the right of appropriation to control matters which the Constitution and the Tenth Amendment forbid it to control.

Thus, Monroe, who adopted the Hamiltonian view, said, of the restricted nature of this right of appropriation:

> "But the use or application of the money after it is raised is a power altogether of a different character. It imposes no burden on the people, nor can it act on them in a sense to take power from the States, or in any sense in which power can be controverted, or become a question between the two governments."

The right to appropriate money for an object gives Congress the right to designate the object and to authorize a disbursing officer to pay over such money to the designated recipient. It does not give Congress power to use the appropriation for the purpose of controlling the subject matter to which the money is to be applied.

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The use of the appropriation to bring about such control is not necessary to the exercise of the right to appropriate nor a direct or indirect consequence of the exercise of such right.

In the present case the scheme of control or restraint is not an incidental result of the appropriation. On the contrary, the appropriation is incidental to the scheme of restraint. **The restraint is not imposed to enable Congress to make the appropriation. On the contrary, the appropriation is made to enable Congress to carry out the scheme of restraint.**

The Hamiltonians admit that Congress is not authorized by the Constitution to control matters outside the enumerated powers; they only contend that Congress can appropriate money for such other purposes. If, however, Congress can use this power to appropriate in respect to these other matters for the direct purpose of controlling them, then it is clear that the intent of the framers of the Constitution to limit the powers granted to the United States will be defeated by the exercise of the right to appropriate. There are few schemes or regulations in respect to such other matters which Congress, backed by the unlimited power of taxation, could not accomplish by these means. The basic principle of the Constitution would be destroyed. It is clear that the right to appropriate money can give no power so inconsistent with the Constitution.

4. THE PURPOSE OF THE LEGISLATION MUST BE JUDICIALLY INQUIRED INTO.

The Government contends that if we are correct in our contention that Congress is not authorized to tax for the purpose of controlling agriculture, the court can not take cognizance of this purpose, since the motives of Congress can not be inquired into. Therefore the fact that

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these taxes are levied for the purpose of regulating agriculture is not a matter which can be inquired into judicially. It seeks to differentiate the *Child Labor Tax case,* 259 U. S. 20, and *Hill* v. *Wallace,* 259 U. S. 44, on the ground that in these cases it appeared on the face of the legislation that the purported tax was not intended as a tax but as a penalty, a prohibition of certain conduct, and that therefore there was no legislation intended to raise revenue and no proper exercise of the power to tax, while in this case we have a real revenue measure intended to raise money, and therefore the purposes for which it is raised can not be inquired into. It quotes in support of this contention *McCray* v. *United States,* 195 U. S. 27, and *United States* v. *Doremus,* 249 U. S. 86, and similar cases.

The fallacy of the argument is that it leaves out of consideration the fact that the power to tax is a restricted power. Congress can only levy taxes for specific purposes, as we have shown above. The express purpose for which the present taxes are levied is set forth in the act. The question is therefore necessarily raised as to whether this purpose is one for which Congress is permitted under its restricted taxing power to levy taxes.

In the McCray case and the other cases relied on by the Government, the apparent and purported purpose of the tax—to enable the United States to obtain revenue for general treasury purposes—was a proper one. The act on its face was a valid exercise of the power of taxation. The question therefore was whether the court could look beyond the face of the legislation and the fact that it purported to exercise a valid power in order to determine whether the real motive in the minds of the legislators was to raise revenue, as appeared on the face of the act, or was to accomplish some other ulterior purpose. The court held that Congress had authority to

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impose a tax on oleomargarine; that the effect on sales of oleomargarine was an indirect result of an exercise of power conferred on Congress and whether the accomplishment of the indirect effect was the motive in the minds of the legislators could not be inquired into.

In the *Child Labor Tax* case and *Hill* v. *Wallace* the court held that although the legislation purported to levy a tax for general revenue purposes, the unlawful and ulterior purpose appeared on the face of the act and did not have to be sought in the minds of the legislators and that therefore it could be taken into consideration.

In the present case not only does the purpose appear on the face of the act, but, furthermore, since a tax can be levied only for certain limited purposes and since the purpose here is stated, it necessarily must be inquired into in order to determine if the tax is within the purposes for which Congress is expressly authorized to tax.

5. LIMITATIONS ON THE PURPOSES COMPRISED WITHIN THE PHRASE "GENERAL WELFARE OF THE UNITED STATES".

We have shown above that the words "general welfare of the United States" restrict the power to tax to purposes comprised within this phrase.

What are the limitations? It is not necessary for the purposes of this case to determine them exactly. It was said with reference to the limitations on the power to control interstate commerce in *Schechter* v. *United States* (*supra* p. 546), "the precise line can be drawn only as individual cases arise, but the distinction is clear in principle." It is not necessary here to draw a line applicable to every individual case. What is needed is to lay down general principles. Their application to the present case will clearly appear.

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The following limitations we submit must be recognized:

(a) Hamilton himself and all the Hamiltonians admit that the purposes must be general, not local (see *supra* p. 164).

(b) The "general welfare of the United States" can not be the general welfare solely of some other country or solely of people other than citizens of the United States. Their welfare would not be the welfare of the United States. Thus, Mr. Justice Story says in his *Commentaries* (Vol. I, pp. 672-3):

> "If the tax be not proposed for the common defence or general welfare, but for other objects wholly extraneous (as, for instance, for propagating Mahometanism among the Turks, or giving aids and subsidies to a foreign nation, to build palaces for its kings, or erect monuments to its heroes), it would be wholly indefensible upon constitutional principles."

(c) The tax must be for a public as distinguished from a private purpose; otherwise, it would violate the due process clause of the Fifth Amendment.

(d) It can not be for an illegal purpose which includes a purpose which is in violation of or repugnant to the Constitution.

This latter limitation clearly invalidates the present legislation.

However broadly we may interpret the phrase "general welfare of the United States," we cannot interpret it as permitting the levying of taxes for an illegal purpose or one which violates the Constitution. Such purposes can not be held to be for the welfare of the United States.

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However absolute the right to appropriate, it is subject to this necessary qualification. As Mr. Justice Holmes said in *Fidelity and Deposit Co.* v. *Tafoya,* 270 U. S. 426, 434:

> "But it has been held a great many times that the most absolute seeming rights are qualified and in some instances become wrongs. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result."

To put an extreme example, it is clear that a tax could not be legally levied for the purpose of paying the proceeds to such persons as murdered their next door neighbors.

In *Doyle* v. *Continental Insurance Co.,* 94 U. S. 535, where the question of whether the right of a State to exclude a foreign corporation could be exercised merely because the corporation had resorted to the federal court, Mr. Justice Bradley (in a dissenting opinion now the law) said:

> "The argument used, that the greater always includes the less, and, therefore, if the State may exclude the appellees without any cause, it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say, that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property."

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6. AN APPROPRIATION MADE FOR THE DIRECT PURPOSE OF RESTRICTING OR INTERFERING WITH OR REGULATING AGRICULTURE IS REPUGNANT TO THE CONSTITUTION, VIOLATES THE TENTH AMENDMENT AND IS ILLEGAL.

(a) *This legislation effectuates a direct control over or intermeddling with agriculture.*

We have shown that it is a basic principle of the Constitution that the States should retain exclusive control of their local affairs and that agriculture is fundamentally and essentially local and subject exclusively to State control.

It was said in the *License Tax Cases,* 5 Wall. 462, 471:

> "No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers granted to the legislators."

Congress has no authority to interfere or intermeddle with such local affairs. Mr. Justice Holmes in his dissenting opinion in the first child labor case (*Hammer* v. *Dagenhart, supra*) said (p. 277):

> "The objection urged against the power is that the States have exclusive control over their methods of production and that Congress cannot meddle with them, and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it."

In his opinion Congress in that case was only exercising a power over interstate commerce expressly conferred upon it, and therefore the effect on the local affairs of the States he held was an indirect consequence of legitimate action.

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In the present case there can be no question but that the "intermeddling" is direct. We have not here a case where Congress is exercising a power like the power to regulate interstate commerce and the intermeddling with local affairs is an indirect or incidental result thereof. Here we have legislation designed and intended for the sole purpose of intermeddling and controlling. The tax is authorized for the sole purpose of providing funds to carry out the scheme of intermeddling and controlling. The appropriation is authorized solely to enable the scheme to be carried out and the Secretary of Agriculture is authorized to disburse the funds only to those agreeing to or who do carry out the scheme.

The right to tax, as we have shown above, gives no power to legislate for such a scheme. The sole question is whether the right to appropriate money for the "general welfare of the United States" gives a power thus directly to intermeddle with and control local affairs.

The right to control agriculture was denied the United States by the Constitution and confided to the States. To hold that the right to apply money towards agricultural purposes gives it the right to apply money in such manner as to effect control of agriculture would be to hold that the Constitution is wholly inconsistent, since it gives Congress power to control a matter which admittedly it denies it the right to control. Such an interpretation cannot be supported.

(b) *The so-called voluntary character of the control.*

The Government as we understand it does not contend that it has the right under the welfare clause by direct legislation to intermeddle with agriculture or to restrict production. Its contention is that it can under its authority to appropriate money accomplish its scheme of control by inducing the farmers to comply therewith, or

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by imposing conditions on the recipients of its appropriations requiring conformity therewith. This method it styles voluntary, and contends that it turns what would be illegal if accomplished by direct control into a legal scheme which is for the general welfare of the United States.

We deny that the plan is in any legal or true sense voluntary; it is a scheme induced by coercion. But even if it were voluntary and the Secretary of Agriculture could obtain the agreements of sufficient persons to carry out the scheme without making any payments to them to induce them to agree, or without any coercion, the scheme, if authorized by the United States, would still be unlawful.

A combination to restrain interstate or intrastate commerce is not lawful because the parties enter into it willingly and without inducement or coercion. Practically all combinations or plans to restrain commerce are voluntary.

A State could not authorize its Secretary of Agriculture to create and enter into a combination to restrict competition or fix prices of agricultural commodities in interstate commerce. The fact that the other parties to the plan enter the combination voluntarily would not be a defense. The State could not authorize such a combination, even though voluntary, because it would be an interference with interstate commerce, control of which by the Constitution is confided exclusively to the hands of Congress. The question of whether the agreement to carry out the plan was or was not voluntary would be immaterial.

Equally, the United States cannot authorize and create a combination to control the production of agricultural products within a State, even though the individuals entering the combination do so voluntarily, because this

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is an interference with a local matter the control of which under the Constitution is confided to the states.

Such an interference with local affairs by the United States is permissible only where it is expressly authorized by the Constitution or is a direct or incidental result of the legitimate exercise of a power granted the United States by the Constitution.

(c) *Compliance with this scheme is not voluntary.*

As shown above it is immaterial whether or not compliance with the scheme of control is voluntary or coerced. It may be well to point out, however, that in the present case compliance with the scheme cannot be called voluntary in any legal or practical sense.

The cotton grower is offered his choice of not complying, in which case he will not receive the benefits to be paid by the United States, or of accepting and restricting his production and receiving the benefits. The amount of benefit offered is intended to be sufficient to make it necessary or at least advisable for him to accept as a practical matter. This is one of the principal purposes of the legislation as shown above (*supra* p.). If the cotton grower does not accept, he will receive less for his crops; others receiving the benefits may be able to undersell him, and the consequences may be serious, including not only a loss of profits, but possible bankruptcy and the loss of his farm. This is coercion.

In *Frost Trucking Co.* v. *R. R. Com.,* 271 U. S. 583, which case we consider more fully below (*infra* pp. 194-197), the question was whether the State having the right to permit or prohibit the use of the highways could issue a permit to use to a trucking company conditioned on its acting as a public carrier. The court denied this right and said:

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> "If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden" (p. 593).

In *Union Pacific R. R. Co.* v. *Public Service Com.*, 248 U. S. 67, the Union Pacific Railroad applied for a certificate of authorization of an issue of bonds secured by a mortgage on its entire line. Only a small portion of its property was in Missouri. A fee of $10,962.25 was charged for the certificate by the Missouri commission, which was a statutory fee fixed by a percentage on the total issue contemplated. It was held that this was an unlawful interference with interstate commerce. The commission contended that the railroad company was under no obligation to get the certificate, and, having applied for it, was estopped to decline to pay the fee. Mr. Justice Holmes held that whether the certificate was necessary or not, it was a commercial necessity in order to enable the railroad properly to sell its bonds. He said (p. 70):

> "Of course it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made accord-

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ing to interest does not exclude duress. It is the characteristic of duress properly so called."

(d) *What constitutes an illegal interference with local matters?*

As in the case of interstate commerce the precise line between what constitutes illegal interference with the State's jurisdiction and what does not, can most wisely be decided as individual cases arise for decision. Only the general principles need here be laid down and their application to the present case.

(1) Appropriations for purposes over which the State has no control can hardly be called an interference with the State's authority.

On fundamental principles and under the due process of law clause of the Fourteenth Amendment no person can be arbitrarily or unreasonably interfered with in the exercise of his fundamental rights to life, liberty, property.

These rights include the right to devote money to scientific research and investigation, the right to apply money to the promotion of education in accordance at least with methods which do not violate accepted public policy, the right to give property away to relieve suffering or merely to benefit the recipient. None of these acts if performed by an individual could be restrained or controlled by the State. Such control would be arbitrary and would violate the due process clause. They can hardly, therefore, be held an interference with the State's rights or an illegal intermeddling with local affairs, since the State has no jurisdiction over them, and no right to control them.

It may be that other action which has always been recognized as conferring a public benefit and to be en-

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couraged as promoting well recognized public policy ought also to be included as not interfering with the State's authority, even though subject to some theoretical control by the State, until the State takes affirmative action and determines otherwise, just as certain matters largely of local concern which affect interstate commerce have been held subject to local legislation until Congress legislated. It is not necessary to decide this in the present case.

(2) Payments made directly to a State, accepted by it and used by it for some plan which it adopts and carries out, may be unconstitutional for some other reason, but would not be unconstitutional on the ground that they are an interference with the State's authority over local matters.

On the other hand, attempts by the United States to directly control matters itself, which are definitely subject to control by the States, and ordinarily are so controlled, are clearly an interference with the State's authority. Especially is this so when the States have by their constitutions, laws or public policy, held that the attempted action is illegal, criminal or against public policy. Since it is not only the exclusive right but the duty of the State to promote the public welfare relating to its internal affairs, and to regulate and control them so far as it deems this advisable, the United States has neither the duty nor authority to attempt directly to control such matters.

7. PREVIOUS LEGISLATION BY CONGRESS AFFORDS NO PRECEDENT FOR THE PRESENT LEGISLATION.

The Government lays great stress on the established practice of Congress. We have shown above that the precedents which support the Hamiltonian doctrine are comparatively recent, and are of no weight in determining

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