The General Welfare Clause and the Unlimited Federal Spending Power

by Jay Starkman


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In this report, Starkman traces the controversial history of the Constitution's Article I, section 8, granting Congress the taxation power, and he explains how the purposes for which funds may be spent have evolved.

This report is an expansion of "Stop Me Before I Spend Again," which Starkman published in *The Wall Street Journal* on September 29, 2022.

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> "A Nation cannot plunder its own treasury without putting its Constitution and its survival in peril."
>
> — Justice Anthony M. Kennedy[1]

Origin of the General Welfare Clause

Congress is in an unchecked spending spree funded with high taxes and deficit spending. This is permitted under the controversial and poorly drafted general welfare clause in the Constitution. For decades, much of today's federal spending was thought unconstitutional. How and when did this change? It was a long process.

Soon after ratification of the Constitution, arguments began between Federalists, who wanted a strong federal government, and Jeffersonians, who wanted to keep the federal government small. Both groups made exceptions to federal spending when it involved expanding access to territories or making land grants.

In the 20th century, flood control and disaster relief demanded portions of the federal budget. President Franklin D. Roosevelt saw big government and big social spending as cures for social ills. He intimidated the Supreme Court with his "court packing" plan and appointed eight liberal justices, whose rulings set the precedent sanctioning most spending with few controls. President Lyndon B. Johnson's "war on poverty"

[1] *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring). Kennedy lamented, yet agreed with the majority, that the line-item veto Congress granted the president to curb spending was unconstitutional.

created a dependent society without curing poverty and started a permanent cycle of deficit spending. Late in the century, Congress lost discipline to control spending and created a dysfunctional budget process.

The Constitution mentions "general welfare" twice, used together with "common defense." First in the preamble:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the *common defence*, promote the *general Welfare*, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[2] [Emphasis added.]

It is mentioned later, in section 8 of Article I, in conjunction with Congress's power to tax:

> The Congress shall have 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; but all Duties, Imposts and Excises shall be uniform throughout the United States. [Emphasis added.]

Then follows a list of enumerated powers. This raises the question whether the first paragraph, which grants the power of taxation, adds a power to provide for an undefined general welfare. In other words, does the Constitution contain a "general welfare" clause as a specific power? We never refer to a separate "common defense" power because that is later separately and specifically enumerated.

Section 8 was adapted from the Articles of Confederation, which also twice used the terms together:

> ARTICLE III. 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. [Emphasis added.]
>
> ARTICLE VIII. 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 Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States. [Emphasis added.]

General welfare was a constant theme over 12 years of planning for a government. It appeared in (1) Benjamin Franklin's proposed Articles of Confederation of 1775; (2) John Dickinson's first draft of the eventually adopted articles; (3) the articles themselves; (4) the Virginia Plan; (5) Roger Sherman's proposal for a government less powerful than that contemplated by the Virginia Plan; (6) proposals to have the federal government pay confederation debts; and (7) the finished Constitution. Legal historians conclude that the general welfare clause was not intended to be an independent grant of power. Rather, it was intended as a limit on federal power, though poorly worded.[3]

Madison's Interpretation

Thirty-six-year-old James Madison, known as the father of the Constitution,[4] denied that general welfare in section 8 conferred an additional enumerated power, writing in Federalist No. 41:

> Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution,

[2]The Supreme Court has ruled that the preamble is merely hortatory. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). In accord, Joseph Story, *Commentaries on the Constitution of the United States*, section 462 (1833): "The preamble never can be resorted to, to enlarge the powers confided to the general government, or any of its departments. It cannot confer any power per se; it can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the constitution. Its true office is to expound the nature, and extent, and application of the powers actually conferred by the constitution, and not substantively to create them."

[3]Robert G. Natelson, "The General Welfare Clause and the Public Trust: An Essay in Original Understanding," 52 *U. Kan. L. Rev.* 1, 29-30 (2003-2004).

[4]The initial plan for the Constitution is attributed to Madison, who provided the basic blueprint for the final document. Known as the Virginia Plan, it proposed a strong central government composed of three branches: legislative, executive, and judicial.

> on the language in which it is defined. It has been urged and echoed, that the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States," amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction. . . . The objection here is the more extraordinary, as it appears that the language used by the convention is a copy from the articles of Confederation.

He continued to explain that all the separate enumerated powers in section 8 are separated by a semicolon, and there is none separating taxation to confer an additional power for general welfare. Madison insisted that a separate power would require very singular language, such as "to raise money for the general welfare," which was never considered. Each enumerated section 8 power is preceded by "To" and ends in a semicolon:

> The Congress shall have Power
>
> To lay and collect Taxes . . . ;
>
> To borrow money . . . ;
>
> To regulate Commerce . . . ;

Wording in the Articles of Confederation was less ambiguous that general welfare meant common defense and war. The power under the taxation clause could not have "exercised an unlimited power of providing for the common defense and general welfare" because it is followed by enumerated powers: "To declare War . . . ; To raise and support Armies . . . ; To provide and maintain a Navy." Madison concluded that there is no enumerated general welfare power.[5]

Why is the power to levy and collect taxes listed first? Because it's the most important. Without this power, any government of any description is helpless. This corrected a major weakness in the articles. Read this way, general welfare is a limitation on the taxing power.

Hamilton's Interpretation

Woodrow Wilson explained Alexander Hamilton's attitude toward the Constitution:

> He had been a member of the convention, had signed the document now sent forth, and meant to devote himself very heartily indeed to advocating its adoption; but he had taken very little part in its formulation, because, as he had frankly told his fellow members, he himself desired something very different, which he knew he could not get. He had very little faith, he said, in federal government, or even in republican government, which it seemed to him impracticable to establish over so extensive a country as the United States. He could wish, he said, that the state governments, as independent political bodies, might be extinguished, or at any rate entirely subordinated; that the general government might be given "complete sovereignty."[6]

Hamilton construed section 8 liberally as a separate and significant grant of power to tax and to spend for any purpose within the general welfare not otherwise prohibited. He interpreted

[5] In correspondence, Madison complained to Edmund Pendleton (another founding father), "If Congress can do whatever in their *discretion* can be *done by money*, and will promote the general welfare, the Government is no longer a limited one possessing enumerated powers, but an indefinite one subject to particular exceptions. It is to be remarked that the phrase out of which this doctrine is elaborated, is copied from the old articles of Confederation, where it was always understood as nothing more than a general caption to the specified powers, and it is a fact that it was preferred in the new instrument for that very reason as less liable than any other to misconstruction" (emphasis in original). "From James Madison to Edmund Pendleton, 21 January 1792," *Founders Online*, National Archives.

[6] Woodrow Wilson, *A History of the American People*, vol. 3, 72-74 (1906).

the Constitution broadly and section 8 differently by reading a separately stated power as to "provide for . . . the general welfare." And he associated it with the power to tax, justifying the power to create the Bank of the United States to hold the tax funds — clearly a "necessary and proper" act in his view. He did not challenge Madison's Federalist 41 interpretation of general welfare or even mention the dispute. Instead, Hamilton's Federalist 23 simply called for an "energetic" federal government.

As Treasury secretary, Hamilton submitted to Congress in December 1790 a proposal for a Bank of the United States as a public-private enterprise. The government would own a minority stake and deposit its tax revenue. The bank bill sailed through Congress in February 1791. President George Washington hesitated to sign because Secretary of State Thomas Jefferson and Attorney General Edmund Randolph[7] opposed it, arguing the doubtful constitutionality of establishing a bank. Jefferson believed that states should charter their own banks and that a national bank unfairly favored wealthy businessmen in urban areas over farmers in the country. So Washington requested written opinions from Jefferson and Randolph, which he gave to Hamilton to respond to their objections.[8]

Seven days later, Hamilton sent a long retort to the president (26 pages in a published book) in which he expanded the definition of enumerated powers, claiming that "there are *implied*, as well as *express* powers" and "there is another class of powers, which may be properly denominated *resulting* powers." (Emphasis in original.) He thereby deflected Randolph's argument that the specified powers were "thus insufficient to uphold the incorporation of a bank."

He disposed of Jefferson's objection that only states can incorporate banks, arguing an extension of the taxing power:

> A Bank relates to the collection of taxes in two ways; *indirectly*, by increasing the quantity of circulating medium and quickening circulation, which facilitates the means of paying — *directly*, by creating a *convenient species* of *medium* in which they are to be paid. To designate or appoint the money or *thing* in which taxes are to be paid, is not only a proper, but a necessary *exercise* of the power of collecting them.[9] [Emphasis in original.]

The differences of opinion centered on interpreting a poorly worded phrase.[10]

Washington devoted a day to reading and reflecting on Hamilton's arguments, after which he chose them over Jefferson's and signed the bank bill on February 25, 1791, creating the ill-fated First Bank of the United States.[11] It was ill-fated because when the bank's charter came up for renewal 20 years later, President Madison's vice president, George Clinton, broke the Senate tie and cast the deciding vote in 1811 against renewing the charter. Hamilton's pet project expired.

Few tax-financed internal improvement projects passed Congress and avoided presidential veto in the early years. Even the Erie Canal, which opened in 1825, had to be built with state taxes because it was considered sectional to New York, despite its benefiting several states.

The Constitutional Convention

The convention records leave a mystery how and why the phrase "general welfare" was included:

> May 29, [1787, start of convention]
> Resolved that the Articles of

[7] As governor, Randolph headed the Virginia delegation to the Constitutional Convention in Philadelphia.

[8] "To Alexander Hamilton From George Washington, 16 February 1791," *Founders Online*, National Archives.

[9] Hamilton, "Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank" (Feb. 23, 1791).

[10] The 1861 Constitution of the Confederate States of America sought to avoid the controversy by omitting common defense and general welfare from its preamble, while strictly prescribing permitted "internal improvements":

> SECTION VIII. The Congress shall have Power
> To lay and collect Taxes, Duties, Imposts and Excises, for revenue necessary to pay the Debts, provide for the common Defence . . . but neither this, nor any other clause contained in this Constitution, shall ever be construed to delegate the power to Congress to appropriate money for any internal improvement intended to facilitate commerce; except for the purpose of furnishing lights, beacons, and buoys, and other aids to navigation upon the coasts, and the improvement of harbors, and the removing of obstructions in river navigation; in all such cases such duties shall be laid on the navigation facilitated thereby, as may be necessary to pay the costs and expenses thereof.

[11] John Ferling, *Jefferson and Hamilton: The Rivalry That Forged a Nation* 220-221 (2013).

> Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, "common defence, security of liberty and general welfare."[12]
>
> Aug 6, [draft of Constitution] VII, Sect. I, The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises; To regulate commerce with foreign nations. . . . [note, no general welfare mentioned][13]
>
> Aug 21, Gov. LIVINGSTON . . . delivered the following report: "The legislature of the United States shall have power to fulfill the engagements which have been entered into by Congress, and to discharge, as well the debts of the United States, as the debts recurred by the several states, during the late war, for the common defence and general welfare."[14]
>
> Aug 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 first clause of article 7, sect 1. "for the payment of said debts, and for the defraying the expenses that shall be incurred for the common defence and general welfare." The proposition, as being unnecessary, was disagreed to.[15]
>
> Sept 4, Mr. BREARLY . . . made a further partial report, as follows: . . . The first clause of article 7, sect. 1, to read as follows: "the legislature shall have 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."[16]

Thirty-year-old Hamilton had his own ideas about the proposed constitution. In preparation for his June 18 speech at the convention, he submitted the Hamilton Plan, which included the following clause:

> The Legislature of the United States shall have power to pass all laws which they shall judge necessary to the common defence and general welfare of the Union.[17]

Hamilton sought to give to Congress unlimited power to pass all laws for general welfare. It was practically voted down six times in the convention, either directly or by voting up a distinct opposing proposition. Failing that, Hamilton's followers have struggled to show that the words "general welfare" in Article I, section 8 of the Constitution really meant what was specifically rejected by the convention six times.[18]

No one knows the origin of the "general welfare" addition after the August 6 draft, which lacked it. Unsuccessful in having this clause inserted into the Constitution, might a devious Hamilton have added the general welfare phrase into the taxation clause?[19] Without any discussion, some time between August 6 and September 4, the phrase "general welfare" was added to the taxation clause, and no one thought it significant to discuss in the primary record.

Madison, Randolph, George Mason, Randolph Baldwin, and Washington attended the entire convention. Mason and Randolph refused to sign the Constitution. The New York delegation, save Hamilton, had walked out in July.

[12]The Virginia Plan was the blueprint for a new government introduced into the Philadelphia Convention on May 29, 1787, by Randolph. It contained Madison's ideas for a strong central government composed of legislative, executive, and judicial branches. Madison proposed this to Washington and Randolph in the weeks preceding the convention, and it was refined by the Virginia delegation in Philadelphia before being introduced. "The Virginia Plan, 29 May 1787," *Founders Online*, National Archives.

[13]Max Farrand, *The Records of The Federal Convention of 1787*, vol. 2, 181 (1911). Farrand notes that nothing more was recorded of the Virginia Plan until July 24, 1787, when a constitution was drafted that contained this exact wording as Article 6. *Id.* at vol. 3, 595-598.

[14]Jonathan Elliot, "The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787," vol. 5 at 451 (1836).

[15]*Id. at* 476; Farrand, *supra* note 13, vol. 2 at 414.

[16]Elliot, *supra* note 14, vol. 5 at 506.

[17]Farrand, *supra* note 13, vol. 3 at 627. Hamilton's speech is at *id.*, vol. 1 at 294-301.

[18]Henry St. George Tucker, "Judge Story's Position on the So-Called General Welfare Clause," 13 *ABA J.* 363 (July 1927). Tucker, a Virginia Democrat, was a member of Congress from 1889 to 1897 and from 1922 until his death in 1932.

[19]Hamilton attended the convention on August 13, just a few days before the draft with general welfare. He was in New York from August 20 to September 2. Farrand, *supra* note 13, vol. 3 at 588.

The arguments raised by Mason at the Virginia ratification convention echoed more serious questions raised at the New York ratification convention. It was uncertain whether New York would support ratification. Two of New York's deputies left Philadelphia in July 1787, mid-convention, because they believed that the convention improperly departed from the goal of merely amending the Articles of Confederation, leaving Hamilton as the sole delegate with many absences. Note the slyness in Article VII, declaring "unanimous consent of the States present . . . hereunto subscribed our Names" with Hamilton as the sole signatory for New York, the only state with just one delegate. Hamilton was unable to sign the Constitution as a deputy because the New York delegation was absent and had not consented. So he could sign only as a witness.[20]

New York City newspapers published essays opposing the Constitution. It fell to Hamilton and John Jay to convince New York to ratify it. As a state in the middle of the proposed republic, New York was essential if the union was to succeed. George Clinton, the governor of New York, was an adversary of the Constitution.[21] Addressing these objections was the primary function of *The Federalist Papers*, whose essays by Madison, Hamilton, and Jay were first published in New York newspapers, all addressed, "To the People of the State of New York." The New York convention was full of doubters, such as John Williams, who asked, "Are not the terms — *common defence and general welfare* — indefinite, undefinable terms? What checks have the state governments against such encroachments?"[22]

New York laid a condition on its ratification, "a draft of a conditional ratification, with a bill of rights prefixed, and amendments subjoined. Debates arose on the motion, and it was carried."[23] It provided:

> Resolved, as the opinion of this committee, that the constitution under consideration ought to be ratified by this convention: *Upon condition nevertheless*, That until a convention shall be called and convened for proposing amendments to the said constitution, [followed by list of conditions; emphasis in original].

Madison in 1830 wrote a long explanation of the wording "regarded by some as conveying to Congress a substantive and indefinite power." He gave a day-by-day explanation on the drafting, attempting to explain the mystery of how the phrase "general welfare" was inserted:

> In the course of the proceedings between the 30th of May & the 6th of Augst. the terms Common defence & General welfare as well as other equivalent terms must have been dropped: for they do not appear in the Draft of a Constitution, reported on that day, by a Committee appointed to prepare one in detail. . . . On the 21st. of Augst. this last Committee reported a clause in the words following "The Legislature of the U. States *shall have power* to fulfil the engagements, *which have been* entered into by Congress, and to discharge as well the debts of the U. States, as the debts incurred by the *several* States, *during the late war*, for the *common defence* and *general welfare*;" . . . On the 22d. of Augst. . . . [added] "for payment of the debts and necessary expences," with a proviso qualifying the duration of Revenue laws.[24]

John Quincy Adams in 1832 wrote a lengthy retort to Madison's 1830 letter:

> The power granted is of taxation, ample in extent, and varied in all its forms, with an exception afterwards of taxes upon exports — the common defence and general welfare are the purposes for which Congress are required to provide in the exercise of the granted power of taxation; so is the payment of the debt. That is no

[20] Gregory E. Maggs, "A Concise Guide to *The Federalist Papers* as a Source of the Original Meaning of the United States Constitution," 87 *B.U. L. Rev.* 801, n.19 (2007).

[21] Clinton is believed to have composed several anti-Federalist letters under the nom de plume Cato.

[22] *Debates and Proceedings of the Constitutional Convention of the State of New York*, at 96 (June 17, 1788).

[23] *Id.* at 142.

[24] "James Madison to Andrew Stevenson, 27 November 1830," *Founders Online*, National Archives; Farrand, *supra* note 13, vol. 3 at 483-494.

> grant of power. It is one of the purposes for which the power of taxation is granted — to provide for the common defence and general welfare, is another.[25]

Justice Joseph Story

Supreme Court Associate Justice Joseph Story served from 1812 until his death in 1845. Only age 32 when nominated by Madison, he remains the youngest person ever nominated to the Supreme Court. In addition to riding circuit, Story taught at Harvard and wrote prolifically, including his 1833 magisterial, three-volume *Commentaries* treatise.[26] Revised editions were published after his death, in 1845, 1851, 1858, 1873, and 1891, and continue to be published to this very day. Each new edition has added more footnotes and commentaries, so today it is difficult to determine what source materials Story himself accessed.[27] *Commentaries* is still cited by the Supreme Court.[28]

Chapter 14, "Powers of Congress," examines Article I, section 8 of the Constitution.[29] Story was a Federalist whose rulings leaned against state rights and lauded Hamilton.[30] A hundred years later, his opinion would be cited as summarily superior to all other evidence in interpreting the term "general welfare" as the basis for upholding New Deal legislation and all the accompanying spending that followed. His opinions do not deserve such simple deference.

Story delivered the opinion in *Hunter's Lessee*,[31] conferring on the Supreme Court the power to overrule the decisions of state and federal tribunals on questions of constitutional law. His son William, in publishing his father's letters, wrote:

> The [Jeffersonian] Republicans were strict constructionists of the Constitution, narrowing down the powers of the Federal Government to the express and exact terms of that instrument, while the Federalists claimed a broader and more liberal exposition in favor of the United States. The opposition between these parties was the struggle of State sovereignty against Federal sovereignty. . . . In the case of *Martin v. Hunter's Lessees*, he first judicially stated his constitutional views, claiming an enlarged and liberal construction in favor of the Federal Government; and as those doctrines were at all points opposed to those of Mr. Jefferson and the Republicans.[32]

Historian Henry Steele Commager said they were all nationalists. According to him, the Jeffersonians "thought of nationalism in terms not of the state but of people" who saw "constitutions, laws and governments merely as instruments — not as ends in themselves. The Marshall-Story nationalism was, by contrast,

[25] *John Quincy Adams and Speaker Andrew Stevenson of Virginia: An Episode of the Twenty-Second Congress (1832)*, 538 (1906), Internet Archive.

[26] Story, *supra* note 2.

[27] In his original preface, Story says that he relied mainly on *The Federalist* and "the extraordinary Judgments of Mr. Chief Justice Marshall upon constitutional law." The preface to the 1873 edition admits adding "new amendments . . . in the body of the work, and additional chapters are given for that purpose." In the 2008 Lanang Institute edition of *Commentaries*, paragraph numbers are mismatched (and there are two section 1044s), and it includes extensive new footnotes, commentaries, and correspondence. Other sources, Story admits, were "loose and scattered" pamphlets and "irregular fragments" of discussions from "obscure private and public documents."

[28] *See, e.g.*, *Trump v. Mazars USA LLP*, 140 S. Ct. 2019, 2038 (2020) (Thomas, J., dissenting).

[29] Story, *supra* note 2, at section 904. "Do the words, 'to lay and collect taxes, duties, imposts, and excises,' constitute a distinct, substantial power; and the words, 'to pay debts and provide for the common defense, and general welfare of the United States,' constitute another distinct and substantial power? Or are the latter words connected with the former, so as to constitute a qualification upon them? This has been a topic of political controversy; and has furnished abundant materials for popular declamation and alarm. If the former be the true interpretation, then it is obvious, that under color of the generality of the words to 'provide for the common defense and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers; if the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of a national character, 'for the common defense and the general welfare.'"

[30] "In Mr. Hamilton's celebrated 'Argument on the Constitutionality of the Bank of the United States,' in Feb. 1791, there is an admirable exposition of the whole of this branch of the subject." *Id.* at ch. 25, n.23.

[31] *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

[32] *Life and Letters of Joseph Story*, vol. 1, 276-277 (1851). A modern reviewer expressed a more caustic assessment: "The *Commentaries* were a massive attempt to prove that the doctrines — nationalism, expansive construction of federal power, and judicial supremacy — for which Story stood and which Jefferson had opposed were in fact the logical conclusions of a truly republican faith." H. Jefferson Powell, "Joseph Story's Commentaries on the Constitution: A Belated Review," 94 *Yale L.J.* 1285, 1301 (Apr. 1985).

narrow and legalistic." He noted that Jefferson advised Madison against appointing Story to the high court.[33]

Commentaries attacks notions of state sovereignty, and Story's 1842 fugitive slave opinion in *Prigg*[34] was a tour de force against states' rights and the precursor to *Dred Scott:*

> The legislation of Congress, if constitutional, must supersede all state legislation upon the same subject, and, by necessary implication, prohibit it. For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere. . . . Where Congress have exclusive power over a subject, it is not competent for state legislation to add to the provisions of Congress on that subject.[35]

Chief Justice Roger B. Taney in his deplorable *Dred Scott* opinion cited *Prigg* as "the great and leading case" supporting his decision.[36]

Commager called *Prigg* "nationalism with a vengeance."[37]

Story promoted the maxim that Christianity was part of the common law.[38] He injected this personal belief in ruling that religion played a vital role in public education, and wrote an 1844 Supreme Court opinion upholding the use of the Bible and the teaching of Christian moral principles in a city-run school.[39]

In all of Supreme Court history, no justice has written with such bias on matters of personal religious belief, specifically Christianity's impact "upon public and political law." Story's *Commentaries* suggests the intended primacy of Christianity reflected in the First Amendment's freedom of religion: "The real object of the amendment was, not to countenance, much less to advance Mohammedanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects."[40]

It is not surprising that Story, as a practicing Unitarian, concluded that "every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it."[41] Unitarians, at least in the early 1800s, stressed that words have meaning.[42] Story influenced this dictum into an 1840 opinion by Taney:

[33]Henry Steele Commager, "The Nationalism of Joseph Story" (lectures given at Boston University on March 31, April 2, and April 4, 1941); *Gaspar G. Bacon Lectures on the Constitution of the United States 1940-1950*, 34-35 (1953). Upon the death of Chief Justice John Marshall in 1835, many expected Story to be appointed chief justice. However, Story regarded many of President Jackson's proclamations as exceeding the limits of constitutional authority, and Jackson looked upon all persons with opposing political views as enemies.

[34]*Prigg v. Pennsylvania*, 41 U.S. 539 (1842). *Prigg* presented the grave question whether the national government's enforcement of the Fugitive Slave Act of 1793 was exclusive or concurrent with state governments. Some Northern states sought to place obstacles in the way of applying the act and to provide protection to free Black people. Pennsylvania passed such a law in 1826. Violations were punishable by a $500 to $1,000 fine and seven to 21 years imprisonment at hard labor. Edward Prigg, the agent of a slave owner in Maryland, discovered a fugitive slave in Pennsylvania. The magistrate before whom he took her refused to issue a proper certificate. So Prigg kidnapped her and took her back to to the slave owner in Maryland. He was promptly indicted for violation of the Pennsylvania act, and, by mutual consent of the Pennsylvania and Maryland courts, the case was brought to the Supreme Court for adjudication.

[35]*Id.* at 617-618. While concurring in judgment, Justice Smith Thompson dissented in part: "I cannot concur in that part of the opinion of the Court which asserts that the power of legislation by Congress is exclusive." Justice Peter V. Daniel concurred in judgment, while arguing that state legislation that is "strictly ancillary would not be unconstitutional or improper" (citing Marshall, "The mere grant of a power to Congress did not imply a prohibition on the States to the exercise of the same power"). Justice John McLean, concurring in judgment, complained, "The slave is found in a State where every man, black or white, is presumed to be free. . . . But [a state has jurisdiction over] removing him out of the State by force and without proof of right."

[36]*Dred Scott v. Sandford*, 60 U.S. 393, 534 (1856).

[37]Commager, *supra* note 33, at 42-44.

[38]A.H. Wintersteen, "Christianity and the Common Law," 38 *Am. L. Register* 273 (May 1890); Stuart Banner, "When Christianity Was Part of the Common Law," 16 *L. & Hist. Rev.* 27 (Spring 1998).

[39]*Vidal v. Girard's Executors*, 43 U.S. 127 (1844).

[40]Story, *supra* note 2, at sections 1865-1873. This passage is quoted in Brief for Amicus Curiae Foundation for Moral Law in Support of Petitioners at 4-5, *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022) (No. 20-1800). By 1833, this was already an antiquated idea. New York in 1777 was the first state to abolish from its constitution most religious preferences, excepting Catholics. South Carolina changed its constitution in 1790, giving equal freedom to Protestants, Catholics, and Jews. The Anglican Church was the only legal religion in colonial Virginia, where Jews could not legally perform marriages or have Christian servants, and Catholics and non-Christians could not testify in court — laws that were fully rescinded by 1802. Religious qualifications for office were eliminated in Pennsylvania in 1790, in Delaware in 1792, in Georgia in 1798, in Massachusetts in 1821, and in Maryland in 1826. Maryland passed the "Jew Bill" (its formal legislative title) in 1825. Until 1876, only Protestants could be elected to the New Hampshire state legislature. Joseph Heckelman, *The First Jews in the New World* 76-80 (2004).

[41]Story, *supra* note 2, at section 451.

[42]For example, two Unitarian publications of the period both stress the significance of words: Andrews Norton, "A Discourse on the Latest Form of Infidelity" (July 19, 1839); and George Ripley "'The Latest Form of Infidelity' Examined: A Letter to Mr. Andrews Norton" (1839).

> In expounding the Constitution of the United States, every word must have its due force and appropriate meaning, for it is evident from the whole instrument that no word was unnecessarily used or needlessly added. The many discussions which have taken place upon the construction of the Constitution have proved the correctness of this proposition and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning.[43]

It is not surprising that Story's hubris and bias favoring Federalists would have him express his personal preference for Hamilton's interpretation of general welfare, which appears was never debated at the Constitutional Convention — especially not in the context of an enumerated power. He simply accepted Hamilton's interpretation of general welfare based on "textualism," that the Constitution should be interpreted by considering only the words used in the document, despite the ambiguity in the section 8 taxing power. He sought to prove that the words in the U.S. Constitution should be interpreted as they were understood when they were written — "originalism," according to his interpretation.[44]

Over 150 years later, Justice Antonin Scalia cautioned that in favoring originalism, "a court should apply the text's plain meaning without reference to legislative history, so long as the text's plain meaning was unambiguous." Regarding rulings over disagreements between Hamilton and Jefferson, Scalia explained:

> Those [judges] writing before 1840 did not have Madison's extensive notes; and before 1845, *Elliot's Debates*, which included debates in the ratifying convention.[45] And only in 1911 did [Yale history professor Max] Farrand undertake a comprehensive compilation of all the records pertaining to the adoption of the Constitution.[46]

Commentaries cites the example of Robert Morris's Bank of North America, which received a national charter under the Articles of Confederation, as "proof" for Story's interpretation of general welfare. That was an argument long refuted by Madison.[47]

"It is remarkable," wrote Story, "that Mr. George Mason, one of the most decided opponents of the Constitution in the Virginia convention, held the opinion that the clause, to provide for the common defence and general welfare, was a substantive power."[48] He was citing, out of context, Mason speaking on June 14, 1788, at the Virginia ratification convention:

> That Congress should have power to provide for the general welfare of the Union, I grant. But I wish a clause in the Constitution, with respect to all powers which are not granted, that they are retained by the states. Otherwise, the power of providing for the general welfare may be perverted to its destruction.[49]

[43] *Holmes v. Jennison*, 39 U.S. 540, 570-571 (1840). This dictum was repeated in Justice Sandra Day O'Connor's dissent in *Kelo v. City of New London*, 545 U.S. 469 (2005).

[44] Textualists believe that laws — especially the Constitution — say what they mean and mean what they say, and that judges should focus on the text. A corollary of textualism is originalism, the principle that a legal text means what it was understood to mean when it was enacted. Kevin A. Ring, *Scalia's Court: A Legacy of Landmark Opinions and Dissents*, ch. 1 (2016). Today originalism is generally associated with conservative politics, though the relation between history and interpretation depends on whether one is alluding to original intent, original meaning, or original understanding.

[45] Story had the 1830 edition of *Elliot's Debates*, which is cited in *Commentaries*.

[46] Thomas A. Schweitzer, "Justice Scalia, Originalism and Textualism," 33 *Touro L. Rev.* 749 (2017); Scalia, *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived* 186-187 (2017).

[47] "The case of the Bank established by the former Congress, had been cited as a precedent. This was known, he said, to have been the child of necessity. It never could be justified by the regular powers of the articles of confederation. Congress betrayed a consciousness of this in recommending to the States to incorporate the Bank also. They did not attempt to protect the Bank Notes by penalties against counterfeiters. These were reserved wholly to the authority of the States." *James Madison Papers*, vol. 13 at 375-376 (Feb. 2, 1791).

[48] Story, *supra* note 2, at ch. 14 ("Taxes"), n.1.

[49] Elliot, *supra* note 14, vol. 3 at 442.

Mason was actually objecting to the lack of the Ninth and 10th amendments, which would be ratified three years later in 1791.[50]

Story ignored Sen. Abraham Baldwin of Georgia, who attended the Constitutional Convention on June 11, 1787, "and probably regularly thereafter."[51] In 1802, 13 years after adoption of the Constitution, Baldwin asserted that "a strict construction" had come to prevail. General welfare had been suggested:

> as authorizing the building of manufacturing towns, a national university, and to carry on any pecuniary enterprises, with the public money; deliberate practice seems for many years to have settled the construction that those words should not be considered as a distinct grant of power, but a limitation of the power granted in the former part of the article, to lay and collect taxes, etc.[52]

Story dismissed Madison's argument that the term "general welfare" was a flourish adopted from the Articles of Confederation and never remotely considered as granting an enumerated power:

> Mr. Madison seems to labor under a mistake, viz. in supposing, that the proposition of the 25th of August, to add to the power to lay taxes, as previously amended on the 23d of August, the words, "for the payment of the debt and for defraying the expenses, that shall be incurred for the common defense and general welfare," was rejected on account of the generality of the phraseology. The known opinions of some of the states, which voted in the negative (Connecticut alone voted in the affirmative) shows, that it could not have been rejected on this account. It is most probable, that it was rejected, because it contained a restriction upon the power to tax; for this power appears at first to have passed without opposition in its general form.[53]

Given that *The Federalist Papers* continues to be cited as persuasive (even binding) authority by scholars and judges[54] — and that Hamilton had not published an opposing opinion therein — how could Story conclude "most probable" against Madison's informed view? Federalist 41 is not easily misinterpreted. Story may have considered it "not so much as an authoritative explanation of the framers' specific intent regarding particular constitutional provisions, but more as a learned commentary on the general meaning of the Constitution."[55]

Story also ignored the many anti-Federalists, like "Deliberator," who fretted (before adoption of the First Amendment) that "Congress may, if they shall think it for the 'general welfare,' establish an uniformity in religion throughout the United States."[56] Story relied on the fact that the states ratified the Constitution. He ignored that they ratified with the condition or understanding that a bill of rights would follow.

The general welfare concern was supposedly addressed in the Ninth and 10th amendments, which reserved powers not enumerated as "retained by the people" and "reserved to the States." The 10th Amendment was soon

[50] James Mason in *id.* at 441-442 (the portion that Story quoted out of context is italicized):

> Mr. Chairman, gentlemen say there is no new power given by this clause. Is there any thing in this Constitution which secures to the states the powers which are said to be retained? Will powers remain to the states which are not expressly guarded and reserved?. . . . Shall the support of our rights depend on the bounty of men whose interest it may be to oppress us? *That Congress should have power to provide for the general welfare of the Union, I grant. . . . Otherwise, the power of providing for the general welfare may be perverted to its destruction.* . . . We wish this amendment to be introduced to remove our apprehensions. There was a clause in the Confederation reserving to the states respectively every power, jurisdiction, and right, not expressly delegated to the United States. This clause has never been complained of, but approved by all. Why not, then, have a similar clause in the Constitution. . . . Unless there be some such clear and finite expression, this clause now under consideration will go to any thing our rulers may think proper. Unless there be some express declaration that every thing not given is retained, it will be carried to any power Congress may please.

[51] Farrand, *supra* note 13, vol. 3 at 587.

[52] *Annals of Cong.* 105 (1802).

[53] Story, *supra* note 2, at ch. 14, n.41.

[54] *The Federalist Papers* were cited in slightly over 70 Supreme Court cases before the New Deal and over 250 more from 1930 to 2005. Charles Pierson, "*The Federalist* in the Supreme Court," 33 *Yale L.J.* 728, 734-735 (1923-1924); James G. Wilson, "The Most Sacred Text: The Supreme Court's Use of *The Federalist Papers*," 1985 *BYU L. Rev.* 65, 66 (1985); Matthew J. Festa, "Dueling Federalists: Supreme Court Decisions With Multiple Opinions Citing *The Federalist*, 1986-2007," 31 *Seattle U. L. Rev.* 75, 90 (2007).

[55] Festa, *supra* note 54, at 84.

[56] Bill Bailey, ed., *The Anti-Federalist Papers*, 167 (2012).

depreciated by Chief Justice John Marshall in a landmark decision:

> There is no phrase in the [Constitution] which, like the Articles of Confederation, excludes incidental or implied powers and which requires that everything granted shall be expressly and minutely described. Even the 10th Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people," thus leaving the question whether the particular power which may become the subject of contest has been delegated to the one Government, or prohibited to the other, to depend on a fair construction of the whole instrument.[57]

In its day, *Commentaries* was both praised as an "incomparable monument of sound and healthy and incontestable constitutional principles" and condemned as a "regrettable collection of mere dogmas lacking support in history or principle." John C. Calhoun was harsher still: "I regard Story's *Commentaries* as essentially false and dangerous."[58]

For the next 100 years, Story's opinion on general welfare remained dormant. His interpretation was ignored in the actions of prior and subsequent presidents Jefferson, Madison, James Monroe, Andrew Jackson, Franklin Pierce, James Buchanan, and Grover Cleveland.

Internal Improvements as General Welfare

Before the Civil War, general welfare expenditures were small and few, often as the result of presidential opposition and vetoes. There was no legal challenge because only the few persons directly concerned and benefiting had standing, and they weren't suing. In any case, before the New Deal, general welfare was limited to "internal improvements," usually tied to defense or territorial expansion.

The Cumberland Road, the country's first major improved highway, was 620 miles leading from the Potomac River to the Ohio River. Though constitutionally controversial, President Jefferson signed the legislation in 1806, with construction lasting from 1811 to 1834. But even Jefferson later cautioned, "Congress has not unlimited powers to provide for the general welfare, but only those specifically enumerated."[59]

On his last day in office, President Madison, while acknowledging the need for roads and canals, vetoed the Bonus Bill of 1817 because there was no express congressional power for that spending.[60] The Bonus Bill was to provide funding for internal improvements of roads and canals, using dividends expected from the new Second Bank of the United States. This placed the Cumberland Road project in jeopardy.

Madison's successor, Monroe, vetoed a similar bill in 1818. And he later vetoed a bill that would erect toll gates on the Cumberland Road to pay for repairs because that involved the power of eminent domain, and the road belonged to the states.[61] "My idea is that Congress have an unlimited power to raise money, and that in its appropriation they have a discretionary power, restricted only by the duty to appropriate it to purposes of common defense and of general, not local, national, not State, benefit," he declared.[62]

Jackson vetoed the Maysville Road Act of 1830 to provide aid for a road project connecting two towns in his home state of Kentucky, arguing that it was of "purely local character" and that funding would be a "subversion of the federal system." In his veto message, Jackson cited Jefferson's broad view of the spending power that justified the $15 million Louisiana Purchase and the $2.5 million

[57] *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819). Articles of Confederation: "Article II. 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" (emphasis added). The 10th Amendment failed to state "expressly." It provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

[58] H. Jefferson Powell, *supra* note 32.

[59] "Thomas Jefferson, Letter to Albert Gallatin, [before 6 June 1817]," *Founders Online*, National Archives.

[60] Madison, "Veto Message on the Internal Improvements Bill" (Mar. 3, 1870).

[61] "1822 James Monroe — The Constitution and Federal Highways," State of the Union History (July 31, 2017).

[62] Monroe, "Views of the President of the United States on the Subject of Internal Improvements" (May 4, 1822).

thus far spent on the Cumberland Road, which distinguished and justified rejecting the Maysville Road appropriation.[63] Jackson also killed the Second Bank of the United States by withdrawing all federal funds.

In 1854 Pierce vetoed the Bill for the Benefit of the Indigent Insane, which would have given 10 million acres of land to the states for sale so the proceeds would support asylums. His veto message concluded that nothing in the Constitution authorized Congress to pass this kind of legislation, that enactment would open a floodgate of federal welfare legislation, and that care of indigent people with mental illnesses was the responsibility of the states.[64]

A bill to establish colleges of agriculture and mechanical arts through grants of land to the states barely passed Congress in 1859, after long, bitter, and prescient debate. Sen. Clement Clay Jr. observed:

> This bill treats the states as agents instead of principals, as the creatures, instead of the creators of the Federal Government; proposes to give them their own property, and direct them how to use it. . . . It thus transposes the relations of the Federal and State governments.[65]

His colleague, Sen. Henry Rice, concurred:

> If these projects are constitutional, what limit is there to the power of Congress over any subject? . . . If we give lands to States for colleges . . . how long will it be before they will ask aid for every object, and come to rely entirely upon the General Government even for expenses of their own, until they become so dependent on the national Treasury that they will have but a shadow of sovereignty left, and be mere suppliants at the doors of Congress?[66]

The bill was vetoed by President Buchanan who cautioned, "Should the time ever arrive when the State governments shall look to the Federal Treasury for the means of supporting themselves and maintaining their systems of education and internal policy, the character of both Governments will be greatly deteriorated." The bill was reintroduced in 1862, expanded to include military strategy, and with the absence of opposing southern state members of Congress, passed overwhelmingly and was signed by President Abraham Lincoln. Land grant legislation continued to be enacted, which led to the establishment of a group of historically Black colleges and universities.[67] This marked the beginning of subsidies with constantly increasing federal government supervisory powers.

Every state today has a college founded with a Morrill land grant. Texas A&M (agriculture and mechanical),[68] Cornell, Rutgers, Clemson, and most state universities were founded this way.

Land grants were used to promote education and, particularly after 1840, to promote railroads, given strong doubts prevalent at the time that tax revenue could not be used for this purpose. The transcontinental railroad included a race between the Union Pacific and the Central Pacific. Congress divided land into blocks, granting 20 miles of public land on each side of odd-numbered blocks of track to the railroads, with right of way on even-numbered blocks. This was justified for defense, during the Indian wars and the Civil War, furnishing a cheap and expeditious mode for the transportation of troops and supplies while binding together the widely separated parts of the country.[69]

[63]Jackson, "Veto Message Regarding Funding of Infrastructure Development" (May 27, 1830).

[64]"I take the received and just construction of that article, as if written to lay and collect taxes, duties, imposts, and excises in order to pay the debts and in order to provide for the common defense and general welfare. It is not a substantive general power to provide for the welfare of the United States, but is a limitation on the grant of power to raise money by taxes, duties, and imposts. If it were otherwise, all the rest of the Constitution, consisting of carefully enumerated and cautiously guarded grants of specific powers, would have been useless, if not delusive." Pierce, "Veto Message" (May 3, 1854).

[65]Clay, *Cong. Globe*, 35th Cong., 2nd Sess., at 852 (Feb. 7, 1859).

[66]Rice, *id.* at 717.

[67]Buchanan, "Veto Message Regarding Land-Grant Colleges" (Feb. 24, 1859); "The U.S. Land-Grant University System: An Overview," Congressional Research Service (Aug. 29, 2019).

[68]"Why Is the Morrill Act Still Important to Texas A&M?" Texas A&M University (July 1, 2018).

[69]*Leo Sheep Co. v. United States*, 440 U.S. 668 (1979). Initially, Congress wanted to allocate 10 miles on each side of the track. When promoters still couldn't find enough investors, the distance was doubled to 20 miles. The railroads could sell the land for capital, and the faster competitor accrued the most land.

Without the railroad, travelers to California faced a variety of unappealing choices: an arduous four-month overland trek from the East, risking yellow fever on a 35-day voyage via the Isthmus of Panama, or a more than four-month voyage around Cape Horn.

The first federal money grant was in 1879, when Congress appropriated the annual sum of $10,000 for books and educational materials for blind people. That was the beginning of cash grants, and not without objection. Sen. Roscoe Conkling of New York challenged it: "Under what provision of the Constitution or under which one of the powers possessed by Congress this appropriation, with these regulations, is to be made"?[70] President Rutherford B. Hayes signed the bill into law.

Condemnation of land for the creation of national parks was based partly on the general welfare clause, but only in relation to the power of taxation.[71]

Many other relatively small (by today's standards) appropriations followed. Highway construction proved too costly for states as automobiles and trucks became ubiquitous, requiring federal support.[72] Subsidies for maintaining the state National Guard became more generous in 1903, with strings attached for the first time. Subsidies for forest fire prevention followed in 1911, then prevention of venereal diseases in 1918, and maternity and infant hygiene in 1921.[73]

Disaster Relief

In his veto of an 1887 appropriation of $10,000 for distributing seeds in drought-stricken counties of Texas, President Cleveland wrote, "I can find no warrant for such an appropriation in the Constitution, and I do not believe that the power and duty of the General Government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit."[74]

Theodore Roosevelt in 1905 only sent his surgeon general to deal with a yellow fever outbreak in New Orleans, then ravaging parts of the South.[75] There is no record of President Wilson or his White House ever mentioning the 1918 Spanish flu pandemic.[76]

There were 23 floods in Johnstown, Pennsylvania, between 1808 and 1937. The 1889 Johnstown flood is considered among the three worst American natural disasters (the 1900 hurricane in Galveston, Texas, and San Francisco's 1906 earthquake were the other two), resulting in over 2,000 deaths and some $25 million in property damage. Over $4 million in cash aid came from public charities and nationwide fundraising. Clara Barton brought 50 volunteers, a large quantity of supplies, and $39,000 from her nascent American Red Cross.[77] There was no federal aid.

The 1900 Galveston hurricane killed about 8,000 people and caused $17 million in property damage in the region. Again, relief came from public charities and nationwide fundraising, and the Red Cross arrived with 78-year-old Barton. There was no federal aid.

The San Francisco earthquake of 1906 lasted less than a minute, ignited several fires that burned for three days, and destroyed 490 city

[70] 8 *Cong. Rec.* 1753 (Feb. 22, 1879).

[71] Congress "has the great power of taxation, to be exercised for the common defense and general welfare." *United States v. Gettysburg Electric Railway Co.*, 160 U.S. 668 (1896) (granting power to condemn land for Gettysburg National Park).

[72] At the turn of the century, U.S. roads were among the worst in the world. Fewer than 9 percent were surfaced, usually by a layer of gravel. The rest were dust, which turned into mud after rain and into frozen ruts in winter. It became a hot political issue, even before the arrival of the car. The Good Roads Movement was founded in 1880, primarily for cyclists. It became the National League for Good Roads at a meeting in Chicago in 1892. Brian Appleyard, *The Car: The Rise and Fall of the Machine That Made the Modern World* 33 (2022).

[73] Austin F. Macdonald, "Federal Subsidies to the States: A Study in American Administration," at 44, 71, 81, and 89 (1923) (PhD thesis, University of Pennsylvania), Internet Archives; *Ervien v. United States*, 251 U.S. 41 (1919) (upholding the right of the federal government to enforce strings attached).

[74] Cleveland, "Veto of Texas Seed Bill" (Feb. 16, 1887).

[75] "Mr. Roosevelt Acts Quickly: Orders Surgeon General to Do Everything in His Power," *The New York Times*, Aug. 5, 1905.

[76] John T. Woolley, "Presidents and Contagious Disease," American Presidency Project, UC Santa Barbara (Apr. 4, 2020) ("President Trump's lengthy daily news conferences on the novel coronavirus are an unprecedented leadership strategy for the nation facing a crisis. In no prior national crisis of any sort, have Presidents placed themselves so visibly at the center of all crisis decision-making.").

[77] Joseph P. Kozlovac, "Adventures in Flood Control: The Johnstown, Pennsylvania Story," Northwest River Forecast Center, National Oceanic and Atmospheric Administration (Apr. 19, 1995); "Report of the Secretary of the Flood Relief Commission" (1890).

blocks, leveling 80 percent of the city. It left many hundreds dead, 300,000 homeless, and $400 million in property damage. San Francisco was different. Soldiers were pressed into service to assist with fire control, patrol streets, and guard buildings. Military supplies were requisitioned from up to 1,000 miles away. Congress enacted emergency appropriations to pay for food, water, tents, blankets, and medical supplies in the following weeks. Funds were appropriated to reconstruct many of the public buildings. The city also received some $474,000 of aid from foreign countries.[78]

Why was San Francisco different from all that preceded that warranted federal aid? First, it would be costly to restore and repair the U.S. Post Office building, the U.S. Mint at San Francisco, the U.S. Customs Warehouse, the U.S. subtreasury building, and the post offices in Oakland and San Jose.[79] Second, Congress made its reasons known that this city was a national matter, as it prepared to, and did, commit millions of dollars toward the city's restoration:

> San Francisco has been and is the leading port of the Pacific coast intimately related with every part of the United States in the transaction of interstate commerce and with . . . foreign countries in the conduct of foreign commerce; and Whereas it is of the highest importance not only to the Pacific coast and intermountain region, but to the entire United States that the city should be immediately restored with a view to the promotion of inter state and foreign commerce, and the cooperation of the nation is of the highest importance in such restoration. . . . [Congress] under its power relating to the general welfare and the regulation of commerce between the States and with foreign countries should come to the aid of San Francisco either by a direct loan or by a guaranty of credit or by cooperation with the entire American people in a broad financial project which shall involve the restoration of San Francisco upon comprehensive and enduring plans.[80]

Progressives now began pushing for state or even federal control of water power and electricity.

Perhaps reflecting his resistive temperament, President Calvin Coolidge favored the pocket veto — a way for the president to reject a bill without a veto message and without giving Congress a chance to override a veto. Cleveland, whom Coolidge admired, had used this veto in his day, as had Theodore Roosevelt. Coolidge raised its use to an art form. *The New York Times* referred to it as "disapproval by inaction." He vetoed 50 bills during his administration, 30 of them by pocket veto.[81]

The great Mississippi River flood of 1927 wiped out many areas of the South as the river grew to 70 miles wide. Twenty-seven thousand square miles (about equal to the combined size of Massachusetts, Connecticut, New Hampshire, and Vermont) were inundated with as much as 30 feet of water. Hundreds drowned.[82]

Yet Coolidge pointedly chose not to visit the devastated areas — sending Commerce Secretary Herbert Hoover in his place — out of concern that a presidential visit might encourage the idea of federal spending on disaster relief, for which there were already advocates in Congress. The War Department sent tents, cots, and blankets. Other relief would have to come from the Red Cross and private donations. This was basic federalism — that relief had to be provided by the states.[83]

The task was overwhelming, and Hoover handled the flood deftly. His stock rose as he amazed all with his successful leadership in marshaling relief and securing state cooperation and private relief.

[78] "Foreign Assistance to San Francisco During the 1906 Earthquake and Fire," Museum of the City of San Francisco.

[79] 41 *Cong. Rec.* 6178-6179 (May 1, 1906).

[80] 40 *Cong. Rec.* 6244 (May 2, 1906) (concurrent resolution).

[81] Article I, section 7 was upheld in *Pocket Veto Case*, 279 U.S. 655 (1929) (partially overturned in *Wright v. United States*, 302 U.S. 583 (1938)). Opportunities for a pocket veto are rare; it requires an unsigned bill by the president after a final adjournment *sine die*. Richard S. Beth and Jessica Tollestrup, "Sessions, Adjournments, and Recesses of Congress," CRS, R42977 (Feb. 27 2013).

[82] Stephen Ambrose, "The Great Mississippi Flood of 1927," *National Geographic*, May 1, 2001.

[83] Amity Shlaes, *Coolidge* 358-359 (2013).

Eventually, Coolidge negotiated a 1928 landmark relief for the 1927 flood area, appropriating $325 million and making federal authorities solely responsible for controlling flood waters from Cape Giarardeau, Missouri, to the Gulf of Mexico.[84] This was the first major cash outlay for federal aid to disasters that previously was considered a state responsibility alone and overturned the expectation that Washington could leave regional crises to state and local governments.

As Coolidge had feared, providing specific relief resulted in demands for more relief.

In 1930 the Senate approved loans to farmers and fruit growers in storm- and flood-stricken areas of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia. A House amendment increased to $7 million the $6 million that the Senate had approved for drought-stricken sections of Illinois, Indiana, Minnesota, Montana, New Mexico, North Dakota, and Ohio. Missouri and Oklahoma successfully petitioned to add their states to what came to be called "Santa Clause legislation." New York City Mayor Fiorello La Guardia protested, "I am not going to stand idly by, seeing farm relief measures enacted here, while the unemployed in my city of New York starve."[85]

Three years later, Congress approved $14 million for construction to improve navigation and control flooding in the Missouri River Valley above Kansas City. *The New York Times* wrote, "The Missouri River Valley above Kansas City has had its faith in Santa Claus renewed."[86]

Dam Building

Since at least the 1820s, the U.S. Army Corps of Engineers has been involved in dam construction, beginning with the Ohio River to improve navigation and flood control. Involvement increased dramatically with the establishment of the U.S. Bureau of Reclamation in 1902 for water storage and delivery. Hydropower production became an important secondary function for the bureau.

The Colorado River flooded regularly. Taming it for irrigation became a goal, and $150,000 was raised to dig a canal to bring water to California's Imperial Valley. Before that, without a drop of water, property could be purchased in 320-acre tracts at just $1.25 an acre under the Desert Land Act. Then came water in 1901.[87] Canal silting and flooding soon made the project unsuccessful, until the Bureau of Reclamation was called in, which by 1922 turned attention to the Boulder Canyon area, because of its granite rock foundation, as the location for a Colorado River dam.

In January 1922 Secretary of Commerce Hoover initiated talks among the seven states that fell within the river's basin.[88] When the Supreme Court handed down a decision in June 1922 undermining the water claims of the upstream states,[89] they became anxious to reach an agreement. Allocation of Colorado River water rights led to the creation of an interstate compact, with the approval of Congress.[90] This would effectively take river policy out of the federal government's hands and return it to the states. The resulting Colorado River Compact was signed on November 24, 1922.[91]

In his 1927 State of the Union address, Coolidge proposed the construction of Hoover Dam,[92] primarily as a method of flood control,

[84]"Coolidge Signs Bill to Control Flood Disasters," *Cornell Daily Sun*, May 16, 1928; David Greenberg, "Help! Call the White House! How the 1927 Mississippi Flood Created Big Government," *Slate*, Sept. 5, 2006.

[85]"$7,000,000 Farm Aid Is Voted by House," *The New York Times*, Feb. 25, 1930.

[86]Roland M. Jones, "Flood Fund Cheers Missouri Valley," *The New York Times*, Sept. 3, 1933.

[87]Joseph E. Stevens, *Hoover Dam: An American Adventure* 11-20 (1988).

[88]California, Nevada, Arizona, Utah, New Mexico, Colorado, and Wyoming. "Boulder Canyon Project Act (1928)," National Archives.

[89]*Wyoming v. Colorado*, 259 U.S. 419 (1922) (argued Dec. 6, 7, and 8, 1916; reargued Jan. 9, 10, and 11, 1918; reargued Jan. 9 and 10, 1922; and decided June 5, 1922). A prior decision, *Kansas v. Colorado*, 206 U.S. 46 (1907), held that the division of waters of an interstate stream should be made on a case-by-case basis.

[90]"Sharing Colorado River Water: History, Public Policy and the Colorado River Compact," 10 *ARROYO* 1 (Aug. 1997). State compacts are authorized with congressional consent under Article I, section 10, clause 3, but they had never been concluded among more than two states. The history of state compacts is explained at "Compacts Clause," Cornell Law School Legal Information Institute.

[91]"Hoover Dam: Herbert Hoover and the Colorado River," Bureau of Reclamation (updated July 13, 2022).

[92]Coolidge, "Fifth Annual Message to the Congress of the United States," (Dec. 6, 1927). It was referred to as Hoover Dam after President Hoover for his contributions in bills passed by Congress during its construction, but it was named Boulder Dam by the Roosevelt administration. The Hoover Dam name was restored by Congress in 1947.

irrigation, and hydroelectric power generation. (In the same address, he also proposed construction of the St. Lawrence Seaway to facilitate exporting products to Europe.) In his final State of the Union address, Coolidge distinguished support for Hoover Dam and opposition to government involvement in Muscle Shoals, Alabama, a troubled dam on the Tennessee River.

Congress hoped the sale of this water-generated power would help make up for the $165 million cost of the dam in a law it passed in December 1928.[93] It also permitted the compact to go into effect when at least six of the seven states approved it. This occurred June 25, 1929.[94] Though the dam straddles the Arizona-Nevada border, Arizona did not join the compact until 1944.[95]

Work began in 1931, and Interior Secretary Ray Lyman Wilbur named it Hoover Dam. It was the largest contract ever put out to bid by the government. Although the Hoover administration remained generally opposed to federally financed relief projects, it was quite willing to promote and encourage the job opportunities that attended construction of Hoover Dam because it was "work relief" during the Depression.[96] Besides, it was based on a multistate compact that left distribution of water resources and hydroelectric power to the states.

That was not the case, however, for the government operation of the hydroelectric dam and vast nitrate plant at Muscle Shoals (about 70 miles west of Huntsville, Alabama), begun toward the end of World War I on the Tennessee River. It was built to supply large amounts of electricity for two factories to make nitrates needed for manufacturing gun powder. That would allow production of nitrate domestically, instead of importing it from Chile. But the war ended before the dam and both factories were completed, and producing nitrates by hydroelectric power was obsolete by 1927.[97]

Presidents Coolidge and Hoover opposed Muscle Shoals because it would have put the government in competition with private business, not just in the distribution of power but also in the manufacture and distribution of fertilizers.[98] Coolidge wanted to put it into private hands.[99] Private enterprise now manufactured ample synthetic nitrogen, so the War Department no longer needed Muscle Shoals.[100]

FDR enthusiastically embraced Muscle Shoals. One of his first acts created the Tennessee Valley Authority (TVA) on May 18, 1933, with power to acquire, construct, and operate dams in the Tennessee Valley; manufacture nitrate and fertilizer; generate and sell electric power; inaugurate flood control; withdraw marginal lands from cultivation; develop the river for navigation; and in general, "advance the economic and social well-being of the people living in the said river basin." It was also given "power in the name of the United States of America to exercise the right of eminent domain."[101]

[93] "The Boulder Canyon Project Act (1928)," National Archives.

[94] "Hoover Proclaims Boulder Dam Pact," *The New York Times*, June 26, 1929.

[95] "Colorado River Compact," Water Education Foundation (2023).

[96] David P. Billington, Donald C. Jackson, and Martin V. Melosi, *The History of Large Federal Dams: Planning, Design, and Construction* 171-174 (2005).

[97] Coolidge, *supra* note 92. The United States had by then developed a chemical process for producing synthetic nitrates.

[98] Hoover, *Memoirs: The Great Depression, 1929-1941* 325 (1952).

[99] In 1922 Henry Ford offered to purchase the two factories and dam that cost more than $82 million to build for $5 million for a 100-year lease. The properties were worth $8 million as scrap alone, and he expected the government to fund a further $68 million for renovations to the derelict dams and factories that he would repay at 4 percent interest. Ford's bid died in the Senate from strong opposition by Sen. George Norris, who preferred that the government operate the dam. Today the Tennessee Valley Authority's Clinch River dam is called the Norris Dam. Robert Lacey, *Ford: The Men and the Machine* 210-218 (1986); Silas Bent, "Ford's White House Bee Buzzing Far and Wide; Campaign Taking Form," *The New York Times*, Jan. 7, 1923; "Supporters Feared Ford Would Switch," *The New York Times*, Dec. 21, 1923; Robert L. Duffus, "Ford's Muscle Shoals Case Under Fire," *The New York Times*, Apr. 20, 1924.

[100] 74 *Cong. Rec.* 7046-7048 (Mar. 3, 1931); Shlaes, *Forgotten Man: A New History of the Great Depression* 115-116 (2007).

[101] Tennessee Valley Authority Act section 4(h).

Following Supreme Court decisions upholding the TVA, the Tennessee Electric Power Co. found itself unable to compete and sold out to the TVA.[102]

The TVA expanded far beyond Muscle Shoals. Today it remains a government corporation serving most of Tennessee and parts of Alabama, Georgia, Kentucky, Mississippi, North Carolina, and Virginia. Its facilities include 29 hydroelectric dams, a pumped-storage plant, 17 gas plants, five coal plants, one diesel plant, three nuclear plants, 14 solar sites, and one wind site.[103] It is criticized as an unaccountable federal monopoly with power of eminent domain, exempt from over 130 federal laws, including workplace safety, civil liability lawsuits, and income tax, and it engages in unfair practices to keep out competition.[104]

The Federal Reserve Bank

The Panic of 1907 had 70-year-old J.P. Morgan press wealthy Wall Street bankers to commit their own funds as a lender of last resort to save the nation from a severe financial crisis. Morgan assigned J.P. Morgan partner Henry Davison and Banker's Trust Secretary Benjamin Strong the task of deciding which banks should be saved. In the aftermath, the nation realized how vulnerable it was without a central bank because it could not rely on a future Morgan to ride to the rescue. So financial and political leaders set out to establish the third American central bank.

A small secret gathering convened in November 1910 on secluded Jekyll Island, Georgia, to forge a plan for a new central U.S. bank. It included Senate Finance Committee Chair Nelson Aldrich[105] and Strong.[106] The plan called for a single central bank with 15 branch banks across the country, each branch having a board of directors elected by member banks. Democrats made repudiating the Aldrich plan a part of their 1912 presidential platform.

Following Wilson's election as president, the shelved Aldrich plan, revived as a Democratic plan by Rep. Carter Glass and Sen. Robert Owen, became the Federal Reserve Act of 1913.[107] It established 12 regional Federal Reserve banks and a Board of Governors, consisting of the secretary of the Treasury, the comptroller of the currency, and five representatives from the Federal Reserve appointed by the president and confirmed by the Senate. The act required that at least two of the five have experience in banking or finance.[108]

Member banks had access to discounted loans at their reserve banks. The Federal Reserve was also to serve as lender of last resort.

Strong, who at age 41 had just been named president of Bankers Trust Co. in 1914, was pressured by his peers as the only man who could lead the new central bank. He soon resigned to become the first governor of the Federal Reserve Bank of New York. Strong's broad banking experience, close working relationships and friendship with the major European central bankers,[109] direct involvement in the 1907 Panic rescue and the 1910 Jekyll Island plan, and his temperament and authoritarian management style — together with the clout of the largest Federal Reserve district — made him the de facto leader of the Fed. It was a great personal sacrifice. The job paid $30,000, far less than what he might

[102] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (5-4 decision in which Justices Louis D. Brandeis, Harlan Fiske Stone, Benjamin N. Cardozo, and Owen J. Roberts dissented, saying that shareholders of Alabama Power had the right to their original suit against the TVA contract with Commonwealth and Southern); *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939). (The Court held 8 to 1 that the TVA had the right to sell surplus electricity and operate in the marketplace. The TVA had been permitted in the name of making a southern river navigable. The Court did not address whether the TVA was constitutional.) Shlaes, *supra* note 100, at 208 and 271.

[103] TVA, "Our Power System" (2023).

[104] Jim Powell, *FDR's Folly: How Roosevelt and His New Deal Prolonged the Great Depression* 257-260 (2003); Richard Munson, "Federal Power Dinosaurs," 14 *Issues in Sci. & Tech.* (Fall 1997).

[105] Aldrich was one of the most corrupt politicians ever in Congress. That's how he became one of the wealthiest and the poster child for advocates of the 17th Amendment calling for direct election of senators. His plan was therefore suspect and rejected, until Democrats reworked it. *See* Lincoln Steffens, "Rhode Island: A State for Sale," 24 *McClure's Magazine* 337 (Feb. 1904); David Graham Phillips, "The Treason of the Senate: Aldrich, the Head of It All," *Cosmopolitan*, Mar. 1906; Jerome L. Sternstein, "Corruption in the Gilded Age Senate: Nelson W. Aldrich and the Sugar Trust," 6 *Capitol Studies* 14 (Spring 1978).

[106] Michael A. Whitehouse, "Paul Warburg's Crusade to Establish a Central Bank in the United States," Reserve Bank of Minneapolis (May 1989).

[107] "The Federal Reserve Act of 1913 — A Legislative History," Law Librarians' Society of Washington, D.C. (updated Aug. 2009).

[108] Federal Reserve Act of 1913, P.L. 63-43.

[109] England's Montagu Norman, Germany's Hjalmar Schacht, and France's Émile Moreau.

have earned at Bankers Trust and less than what he needed to live on. His Park Avenue apartment annual rent was $15,000. His wife divorced him in 1916.

Strong was a great legendary Fed leader. The Fed was envisioned to use the power of setting the discount rate and bank reserve requirements to control the currency. Realizing that discount rate manipulations took a long time to manifest, Strong introduced open market operations (purchases and sales of government securities as a means of managing the quantity of money in the U.S. economy), which had an immediate effect on the money supply. He pressed for the direct sale of Liberty bonds to the public to finance World War I. Unfortunately, he died of tuberculosis in October 1928 at age 55. He was succeeded by his protégé, George Harrison, who lacked Strong's personality and stature and thus could not fill Strong's shoes.

Between 1927 and 1929, the Fed faced a dilemma. It could raise interest rates to curb Wall Street speculation or keep rates low to prop up European exchange rates, which was necessary to keep the world economy humming. It half-heartedly tried to do both and achieved neither. With the Great Depression, the Fed did the opposite of countercyclical action by applying the brakes and tightening in the face of a downturn, instead of pumping money into the economy. (Hoover didn't help by raising taxes with the Revenue Act of 1932.) As banks failed, the Fed failed to act as lender of last resort. The Fed compounded the harm of Roosevelt's 1936 tax increases (including the beginning of Social Security withholding) by doubling the reserve requirement, which contracted the money supply. This plunged the economy back into relatively deep depression.[110]

Some believe that had Strong lived, the Great Depression might have been avoided. Yale economist Irving Fisher told the House Committee on Banking and Currency in 1934 that Strong's "policies died with him. I have always believed, if he had lived, we would have had a different situation."[111]

Responsible historians say the Great Depression was inevitable, given high speculation; unsustainable debt; a tax policy that grew income inequality; and economic policies that failed to benefit many industries, reduce unemployment, or help middle- and lower-income households. The triggers were Federal Reserve inaction and adherence to the gold standard. Tariffs didn't help, but they weren't the trigger.

In most countries, the Depression ended in the early 1930s. That it lasted in the United States until the beginning of World War II must be blamed on New Deal policies. Frequent tax increases (1932, 1934, 1935, and 1936), business practice restrictions, promotion of labor unions, fixing of farm prices, and adoption by most states of income and sales taxes drained disposable income and suppressed economic activity that might have ended the Depression earlier. The United States suffered thousands of bank failures, unlike Canada, which had none despite as severe a depression.[112]

The Federal Reserve Act was amended in 1927,[113] 1933,[114] and 1935.[115] More frequent amendments followed. A 1977 amendment required the Fed "to promote effectively the goals

[110] Patricia Waiwood, "Recession of 1937-38," Federal Reserve History (Nov. 22, 2013).

[111] Liaquat Ahamed, *Lords of Finance: The Bankers Who Broke the World* 503-504 (2009); Alexander Tabarrok, "Separation of Commercial and Investment Banking: The Morgans vs. the Rockefellers," 1 *Q. J. Austrian Econ.* 1, 13 n.38 (Spring 1998).

[112] Jim Powell, *supra* note 104, at 32.

[113] As with the First and Second banks of the United States, the 1913 act provided a charter for just 20 years. It was made permanent in 1927.

[114] The 1933 Glass-Steagall Act is best remembered for separating commercial banking from investment banking and instituting federal deposit insurance. It also took open market operations away from the New York Fed and gave control to a Federal Open Market Committee of the seven-member Board of Governors of the Federal Reserve System. The committee was required to meet at least four times a year (in practice, it usually meets eight times), and it has the power to direct all open market operations of the Federal Reserve banks.

[115] The 1935 Banking Act stripped the regional reserve banks of much power and vested major decisions with seven governors and a rotating group of five regional branch presidents, all limited to a single four-year term. The secretary of the Treasury and comptroller of the currency were removed from the board, giving it theoretical independence from the administration. All major decisions were now centralized with monetary officials in Washington, including the Federal Open Market Committee, supplanting New York for control of money. Ahamed, *supra* note 111, at 475; Shlaes, *supra* note 100, at 211-212.

of maximum employment, stable prices, and moderate long-term interest rates" and required the chair to appear before Congress at semiannual hearings to report on the conduct of monetary policy, on economic development, and on the prospects for the future.[116]

The Federal Reserve system is a government-sponsored entity that has never been subjected to the appropriations process.[117] On questionable legal authority, President Joe Biden issued Executive Order 14067 ordering development of a digital currency and assigning the task to a bureaucratic consortium of no less than 28 government agencies.[118]

Rise of the New Deal

Hoover ascended to the presidency through great qualities rarely found in men. He made his fortune as a geologist and mining engineer in Australia and China, later becoming a mining consultant and financier. He was a superlative organizer, earning an international reputation when he helped arrange travel to the United States for 120,000 Americans stranded in Europe at the start of World War I. He administered the distribution of food to millions of war victims under German occupation, especially famine-stricken Belgium, risking ire from Wilson for providing aid behind enemy lines. His relief efforts continued after the war, including food for starving Germans and Russians. His work is acknowledged with saving millions of lives.

Serving as secretary of commerce from 1921 to 1929, Hoover brought vibrancy to a previously sleepy post. He achieved national prominence with his success in handling the Great Mississippi Flood of 1927 and as federal chair of the 1922 Colorado River Compact, which led to building the Hoover Dam. These successes made Hoover the 1928 Republican nominee for president on the first ballot, and he decisively defeated Democratic candidate Al Smith.[119]

Yet Hoover became a tragic hero when he failed at his greatest challenge. The Great Depression overwhelmed aid agencies and private charities, such as Hoover had relied on for his success with Belgian starvation relief and Mississippi flood relief. He authorized the President's Emergency Relief Organization to help coordinate local, private relief efforts and in 1932 created the Reconstruction Finance Corp. to bail out banks and businesses, and the Federal Home Loan Bank Act to support savings and loan banks, which restricted savings and loans to making mortgage loans within 50 miles of their home office. He did little else, though. His belief in laissez-faire principles would not allow him to accept that only the federal government could deal with the grave situation. The country despaired that Hoover didn't know what to do or how to do it — if anybody on Earth did, he would know. With Republicans in control of the House and Senate, Hoover's prestige and influence should have given him the platform to succeed in fighting the Depression.

Instead, he called for a steady course and demagogued the threat Democrats posed to the bewildered unemployed, starving, homeless masses, bankrupt farmers, and small businesses as he told a Madison Square Garden rally:

> They are proposing changes and so-called new deals which would destroy the very foundations of our American system of life. . . . The glitter of promise, and the discouragement of temporary hardships. . . . The destruction of government credit would mean one-third of the electorate with Government jobs

[116] Federal Reserve Reform Act of 1977, P.L. 95-188.

[117] Roy T. Meyers, "The Budgetary Status of the Federal Reserve System," Congressional Budget Office (Feb. 1985); "Introduction to the Federal Budget Process," at 8, CRS, R46240 (Jan. 10, 2023); *cf. Community Financial Services Association v. Consumer Financial Protection Bureau*, 51 F.4th 616 (5th Cir. 2022) (holding the self-financing of the Consumer Financial Protection Bureau unconstitutional and differentiating the Federal Reserve, which "at least remains tethered to the Treasury by the requirement that it remit funds above a statutory limit" under 12 U.S.C. section 289(a)(3)(B)).

[118] Executive Order 14067 (Mar. 9, 2022); Aaron Klein, "How Biden's Executive Order on Cryptocurrency May Impact the Fate of Digital Currency and Assets," Brookings Institution (Mar. 17, 2022).

[119] Hoover has one of the most interesting presidential libraries, filled with so many great accomplishments of this remarkable man besides his presidential years. It is located in West Branch, Iowa, just off I-80.

earnest to maintain this bureaucracy and to control the political destinies of the country.[120]

FDR was a great orator, blessed with a magnificent tenor voice, and fortunate to run in an era when radio had been brought into half of U.S. households, making possible a new type of campaign. Fifty percent of the population now lived in cities. The frontier was no longer open for settlers seeking a new life of self-sufficiency. Roosevelt's solution was massive federal aid and control. He could inspire an audience, as in his often-quoted inaugural address: "The only thing we have to fear is fear itself."[121]

Economist John Maynard Keynes suggested government intervention as the means to end a depression, and FDR was a disciple. "Let us experiment with boldness on such lines, even though some of the schemes may turn out to be failures, which is very likely," wrote Keynes.[122]

And experiment FDR did. The first New Deal projects in May 1933 — the National Industrial Recovery Act (NIRA) and the Agricultural Adjustment Act (AAA) — were, according to Keynes, merely price- and wage-fixing measures that turned into failed experiments.

More experiments followed: the Securities Act (1933), the Securities and Exchange Act (1934), the Federal Housing Authority Act (1934), the Public Utility Holding Company Act (1935), the Rural Electrification Act (1935), the Fair Labor Standards Act (1938), and dozens more. Federal deposit insurance was opposed by FDR but championed by Vice President John Nance Garner, who had been House speaker and arguably the most powerful vice president ever.[123]

The largest New Deal agency, the Works Progress Administration, was created by executive order on May 6, 1935.[124] It started 100,000 projects and gave jobs to millions.[125]

Roosevelt faced a conservative and hostile Supreme Court. It consisted of the conservative Four Horsemen (Justices James McReynolds, Pierce Butler, Willis Van Devanter, and George Sutherland), the liberal Three Musketeers (Justices Louis D. Brandeis, Harlan Fiske Stone, and Benjamin N. Cardozo), and two justices in the center (Chief Justice Charles Evans Hughes and Justice Owen Roberts).

Thousands of lawsuits were filed challenging New Deal acts.[126] There was concern that the Supreme Court would overturn all New Deal legislation, throwing out the TVA acts, the securities acts, the Railroad Retirement Act, the Social Security Act, the Guffey Coal Act, the National Labor Relations Act, the Federal Housing Act (enacted in 1934 to decrease home foreclosures), the Home Owners Loan Corp. (created in 1933 to reduce bank foreclosures by helping owners refinance their loans), the Federal Deposit Insurance Corporation,[127] the Public Utility Act of 1935, the Frazier-Lemke Farm Mortgage Act, the National Banking Act of 1935, the Bankhead Cotton Control Act, and the Reconstruction Finance Corp.

[120] "Text of the President's Address Before Throng of 22,000 at Madison Square Garden," *The New York Times*, Nov. 1, 1932. Today, government employment is between 2.2 million and 9.6 million, depending on how one counts, which is hardly Hoover's one-third of the electorate. Carol Wilson, "Federal Workforce Statistics Sources: OPM and OMB," CRS, R43590 (June 24, 2021) (Table 3, "Total Federal Employment," at 6, shows up to 4.3 million.); Joe Davidson, "How Big Is the Federal Workforce? Much Bigger Than You Think," *The Washington Post*, Oct. 3, 2017 (adds 3.7 million contractors and 1.6 million grant employees).

[121] Did that shibboleth really give hope to the starving, unemployed, homeless person waiting in a bread line who feared imminent starvation? The phrase may have been adapted from Thoreau's 1851 journal entry concerning atheism ("Nothing is so much to be feared as fear"), which may have originated with the ancient Roman Stoic philosopher Seneca ("You will then comprehend that they contain nothing fearful except the actual fear." Seneca, *Letters From a Stoic* — Letter XXIV: On Despising Death.). Nearly all his speeches were largely written for him by others. His best phrases, like "the forgotten man" and "the new deal," were borrowed from other men. Allan Nevins, "The Place of Franklin D. Roosevelt in History," *American Heritage*, June 1966.

[122] Nicholas Wapshott, *Samuelson Friedman* 64 (2021).

[123] Banking Act of 1933 (the Glass-Steagall Act); Bascom Timmons, *Garner of Texas: A Personal History* (1948).

[124] Executive Order 614 ("pursuant to the authority vested in me under the Emergency Relief Appropriation Act of 1935").

[125] Shlaes, *supra* note 100, at 150.

[126] Hal H. Smith, "Thousands of Suits Hit New Deal Acts," *The New York Times*, Jan. 2, 1936.

[127] "The full consequences of federal deposit insurance didn't become apparent until the 1980s, when bailing out savings and loan associations cost $519 billion." Jim Powell, *supra* note 104, at 57.

In the spring of 1935, Roberts joined the Four Horsemen invalidating the Railroad Retirement Act[128] and thereafter voted consistently with conservatives. The Supreme Court unanimously demolished NIRA,[129] by a 6-3 vote declared the AAA unconstitutional,[130] rebuked the Securities and Exchange Commission,[131] struck down the Guffey Coal Act,[132] overturned the Municipal Bankruptcy Act,[133] and invalidated the New York minimum wage law by a 5-4 vote.[134] The minimum wage decision outraged even former President Hoover, who called for an amendment to restore to the states "the power they thought they already had."[135]

The Court unanimously invalidated parts of NIRA as it declared:

> Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power.[136]

The failure of NIRA was no real loss, as Keynes noted in 1933: "I cannot detect any material aid to recovery in the NIRA."[137]

The AAA paid farmers who reduced their crop size, from taxes imposed on the processors of farm products. A cotton mill challenged the processor tax in *Butler*.[138] Citing the 10th Amendment, the Supreme Court ruled the AAA unconstitutional because it constituted a "plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government."[139]

Applying "general welfare" was one of the government arguments for upholding the AAA. The *Butler* Court ruled, "We are not now required to ascertain the scope of the phrase 'general welfare of the United States.'" At the same time, the Court adopted Story's interpretation that general welfare is a separate enumerated power. It thus laid the legal framework for eventually upholding the Social Security Act:

> The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that if it were adopted "it is obvious that under color of the generality of the words, to 'provide for the common defence and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers." The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the

[128] *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935) (The Court held 5 to 4 that the Railroad Retirement Act of 1934, establishing a compulsory retirement and old-age pensions for railroad workers engaged in interstate commerce, violated the due process and commerce clauses.). *See* Russell W. Galloway Jr., "The Court That Challenged the New Deal (1930-1936)," 24 *Santa Clara L. Rev.* 65, 86 (Winter 1984).

[129] *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding that the minimum wage and maximum hour provisions of NIRA violated the delegation doctrine and the commerce clause). *Panama Refining Co. v. Ryan*, 295 U.S. 388, 433 (1935) (In an 8-1 decision, the Court held that an executive order under the authority of NIRA limiting transport of petroleum in interstate commerce was an unconstitutional delegation of lawmaking authority, subject to a $1,000 fine and/or a six-month prison sentence.). On the same day, the Court dealt a personal blow to the president in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), a unanimous decision that the president cannot remove executive officials of a quasi-legislative or quasi-judicial administrative body created by Congress purely for political reasons and without the consent of Congress.

[130] *United States v. Butler*, 297 U.S. 1 (1936) (a 6-3 decision). The AAA processing tax raised at least $500 million in 1935 tax receipts. Shlaes, *supra* note 100, at 269. A few years later, the act would be upheld in modified form (*Mulford v. Smith*, 307 U.S. 38 (1939), and *Wickard v. Filburn*, 317 U.S. 111 (1942)), and today it would likely be considered within Congress's commerce power (*Katzenbach v. McClung*, 379 U.S. 294 (1964)).

[131] *Jones v. Securities and Exchange Commission*, 298 U.S. 1 (1936).

[132] *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding that the Guffey Coal Act violated the commerce clause and infringed on contractual liberty in contravention of the due process clause of the Fifth Amendment).

[133] *Ashton v. Cameron County Water Improvement District No. 1*, 298 U.S. 513 (1936).

[134] *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (holding that a state minimum wage law violated liberty of contract).

[135] The Associated Press, "Hoover Advocates Women's Wage Law," *The New York Times*, June 7, 1936.

[136] *Schechter*, 295 U.S. at 528.

[137] "From Keynes to Roosevelt: Our Recovery Plan Assayed," *The New York Times*, Dec. 31, 1933 (open letter from Keynes to President Roosevelt).

[138] *Butler*, 297 U.S. 1.

[139] *Id.* at 67-68. The enactment of a new AAA remedied the problems highlighted by the Court and allowed agricultural support programs to continue, while adding a provision for crop insurance. *Wickard v. Filburn*, 317 U.S. 111 (1942).

> nation's debts and making provision for the general welfare.
>
> Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section. . . . In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated. . . .
>
> Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one.
>
> And [Story] makes it clear that the powers of taxation and appropriation extend only to matters of national, as distinguished from local, welfare.[140]

While stating it would not review those discourses in detail, here was a conservative court expressing dictum supporting Hamilton based on the 1891 fifth edition of Story's treatise, which included additions and revisions not originally authored by Story in 1833. This dictum would form the foundation for later rulings upholding all social spending programs as general welfare.

The government brief in *Butler* cited Story's interpretation that every word in the Constitution has meaning. The brief concluded with a new theory:

> It is only reasonable to suppose, therefore, that since the burden of taxation was to be borne by all the States, it was decided that the power of distributing the benefits of taxation should be limited to purposes serving the general good of all the States, and should not permit promotion of localized welfare of one or more of the larger States. This, we submit, is the logical explanation of the reasons for the adoption of the provision that taxes might be laid for that which would promote the general welfare.[141]

Thousands of pages have been written debating the meaning of general welfare. Yet the Supreme Court devoted just 10 paragraphs to discuss and conclude in favor of Hamilton and the Federalists, discounting 150 years of interpretation and practice by Jeffersonians and pre-FDR Democrat and Republican presidents while ignoring Federalist 41. Soon the Court would expand *Butler*, while leaving a pregnant statement on which it might revisit its ruling:

> The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, *unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment*.[142] [Emphasis added.]

The Court-Packing Threat

By 1936 FDR was frustrated with the Supreme Court overturning his New Deal legislation and that after four years, he was the only full-term president without one opportunity to appoint a Supreme Court justice, even though this was the most elderly Court in history, with an average age of 71. The elderly conservative judges refused to

[140] *Butler*, 297 U.S. at 64-67.

[141] "The General Welfare Clause: The Hamiltonian and Madisonian Views," 22 *ABA J.* 115, 117 (Feb. 1936).

[142] *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

retire. McReynolds insisted, "I'll never resign as long as that crippled [expletive] is in the White House."[143] FDR decided to alter the composition of the Court, or persuade the Court to change its views.

The origin of court-packing was Roosevelt's recollection of British Prime Minister Herbert Asquith, who threatened to create several hundred new liberal peer sympathizers, enough to outvote the existing House of Lords, in order to pass legislation that the Lords refused to pass. The threat worked. The Parliament Act of 1911, which restricted veto power by the House of Lords and provided home rule for Ireland, passed. This deft political maneuver is considered the zenith of Asquith's prime ministerial career.[144]

Fearing it might strengthen turnout for Republicans, Roosevelt did not make the Court a campaign issue in 1936. He waited until after his landslide victory.[145] Then he proposed a bill that when any judge of the United States reached the age of 70 and did not resign or retire, the president could, with Senate confirmation, appoint an additional judge to the court on which the older judge served. Six justices were over age 70. It would allow Roosevelt to appoint six more, resulting in 5-4 decisions against the New Deal presumably becoming 10-5 decisions favoring the administration.[146]

Ironically, in 1913, when McReynolds was serving as Wilson's attorney general, he proposed that when a pension-eligible judge failed to retire at age 70, the president may appoint another judge, who would have precedence over the older one.[147]

The 18-member Senate Judiciary Committee issued a 49-page scathing report in 1937, signed by 10 members, including seven Democrats. It concluded, "It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free, representatives of the free people of America."[148]

There were proposals to amend the Constitution to make explicit grants of additional power to Congress, to require at least a 7-2 vote by the Supreme Court to invalidate legislation,[149] or to mandate that no judge may hold office beyond their 70th birthday.[150]

Justices Hughes and Roberts apparently were intimidated, and they gave up defending constitutional liberties. They abandoned the principle of enumerated powers — that the only legitimate powers of the federal government are those spelled out in the Constitution and that all other powers are reserved for the states or individuals. They began upholding laws that asserted federal powers not mentioned anywhere in the Constitution.[151]

The conservative justices eventually retired — Van Devanter in 1937, Sutherland in 1938, and McReynolds in 1941. Butler died in 1939. Roosevelt was able to name eight justices during his terms in office, replacing all except Roberts, who retired in July 1945. Roosevelt's legacy was the most liberal Supreme Court in our history.

Court-packing plans recently resurfaced amid strong opposition, from both the left and the right. Justice Ruth Bader Ginsburg denounced it. "I think it was a bad idea when President Franklin Roosevelt tried to pack the court," she told National Public Radio. "It's one side saying, 'When we're in power, we're going to enlarge the number of judges, so we would have more people who would vote the way we want them to.'"[152]

While the 294-page December 2021 Biden court-packing report mentions the 49-page 1937 Senate report, it ignored the scathing 1937 conclusion and avoided its own conclusion,

[143] William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 121 (1995) (citing Drew Pearson and Robert S. Allen, *Nine Old Men at the Crossroads* 2 (1936)).

[144] *Id.* at 95.

[145] Roosevelt carried every state but Maine and Vermont.

[146] Robert Bork, *The Tempting of America* 54 (1990).

[147] Leuchtenburg, *supra* note 143, at 120 (citing "Report of the Attorney General for the Fiscal Year Ending June 30, 1913," at 5 (1913)).

[148] S. Rep. No. 75-711, at 23 (1937).

[149] *Id.* at 91. Sen. George Norris of Nebraska told colleagues, "Nowhere in that great document is there a syllable, a word, or a sentence giving to any court the right to declare an act of Congress unconstitutional." Leuchtenburg, *supra* note 143, at 103. Roosevelt would cite *Madison's Journal* and *Elliot's Debates* as authority that the framers of the Constitution had voted on four separate occasions against giving judges the power to pass upon the constitutionality of acts of Congress. *Id.* at 122.

[150] *Id.* at 118.

[151] Jim Powell, *supra* note 104, at 210-211.

[152] Nina Totenberg, "Justice Ginsburg: 'I Am Very Much Alive,'" NPR Morning Edition (July 24, 2019).

rendering that new report dishonest and incomplete.[153]

Robert Bork explained why proposals to weaken the Supreme Court fail:

> The Court has done many excellent things in our history, and few people are willing to see its power broken. The difficulty with all proposals to respond to the Court when it behaves unconstitutionally is that they would create a power to destroy the Court's essential work as well. . . . That depends upon the passions of the moment, but it is obvious that unpopular proper rulings may as easily be overturned as improper ones.[154]

The Constitution has survived well over 200 years despite being so difficult to amend. Much of the credit accrues to the Supreme Court, which is the de facto amendment maker. It's a grave responsibility that requires its decisions be respected. Recent protesters led by Senate Majority Leader Charles E. Schumer, D-N.Y., outside the Supreme Court and a threatening crowd outside the home of Justice Brett Kavanaugh are an ominous sign.

Social Security and the Supreme Court

Labor Secretary Frances Perkins had plans for unemployment insurance and pensions for older adults in draft bill form. At a tea at Stone's house, Perkins sat beside him, and he gave her a tip. She had confided her fears that any great social insurance system would be rejected by his Court. Not so, he said, and whispered back the solution: "The taxing power of the federal government my dear; the taxing power is sufficient for everything you want and need." If the Social Security Act was formulated as a tax rather than government insurance, it could get through.[155]

That practically guaranteed Stone's vote well before a case ever came to trial.

The Social Security Act of 1935 passed with strong bipartisan support.[156] It was instantly popular with the public because it gave them a third leg to a retirement stool, in addition to savings and a private pension. Millions who had no hope of ever stopping work might now plan for retirement.

The act included a provision for unemployment insurance, which was upheld by the Supreme Court in 1937 in a 5-4 decision.[157] Citing *Butler*, the Court ruled, "In a crisis so extreme, the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare."[158]

The dissenters believed that entire scheme of the act was an ominous meddling by the federal government in the affairs of the states. There was the threshold question whether unemployment benefits were allowed under the Constitution, and it was an improper abdication of state sovereignty in the federal administrative powers that the 90 percent credit for federal tax, to the extent that the state enacted a corresponding unemployment act, was an unlawful coercion of state action. McReynolds quoted the veto message of Pierce in 1854, which maintained the thesis that the relief of indigent people with mental illnesses is a sacred and exclusive prerogative of the states. Pierce then said that the general welfare clause

> is not a substantive general power to provide for the welfare of the United States, but is a limitation on the grant of power to raise money by taxes, duties, and imports. . . . If it were otherwise, all the rest of the Constitution, consisting of carefully enumerated and cautiously guarded grants of specific powers, would have been useless, if not delusive.[159]

The following day, the Supreme Court upheld the old-age provisions, again citing *Butler*. "Congress may spend money in aid of the

[153] Presidential Commission on the Supreme Court of the United States, "Final Report" (Dec. 8, 2021).

[154] Bork, *supra* note 146, at 55.

[155] Shlaes, *supra* note 100, at 229. This quote is repeated in several books, none citing an original source. Just because workers paid Social Security taxes while working did not mean they were entitled to receive a pension later. It was not a contract like an insurance policy. *Fleming v. Nestor*, 363 U.S. 603 (1960).

[156] House: 372 yeas (including 81 out of 117 Republicans), 33 nays, 2 present, and 25 not voting. Senate: 77 yeas (including 16 out of 25 Republicans), 6 nays, and 12 not voting.

[157] *Steward*, 301 U.S. 548.

[158] *Id.* at 586-587.

[159] *Id.* at 605 (McReynolds, J., dissenting (citing Pierce)).

'general welfare' . . . The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison."[160]

In 150 years of American history, these were the first Supreme Court cases upholding spending under the general welfare clause of the Constitution. A portentous viewpoint is that the Supreme Court dared not overrule the unemployment and Social Security acts, passed overwhelmingly by Congress, which was considering Roosevelt's court-packing plan as those rulings were issued.

The Social Security Board released a pamphlet stating, "You and your employer will each pay three cents on each dollar you earn, up to $3,000 per year. . . . [That amount] is the most you will ever have to pay."[161] The 1936 Republican campaign platform predicted fiscal gimmickry:

> The so-called reserve fund estimated at $47,000,000,000 for old age insurance is no reserve at all, because the fund will contain nothing but the government's promise to pay, while the taxes collected in the guise of premiums will be wasted by the government in reckless and extravagant political schemes.[162]

Upon passage of the Social Security Act in 1935, it was projected that payments would reach $4 billion in 1980.[163] Actual 1980 Social Security spending was $118 billion.[164] Social Security was kept solvent by raising the taxable wage base and increasing the tax rate by 3 percentage points per decade, until it reached 12.4 percent in 1990.

Reeling from criticism at overturning the New York minimum wage act in 1936, the justices reversed themselves in a virtually indistinguishable case by upholding an identical Washington minimum wage act in 1937 and overturning its 1923 precedent holding such laws unconstitutional.[165] Then, in rapid succession, the Court upheld unionization and collective bargaining work laws: the Railway Labor Act[166] and the National Labor Relations Act.[167]

Lasting Effect of New Deal on Spending

The 1935-1937 New Deal general welfare cases — *Schechter*, *Butler*, *Steward*, and *Davis* — led to four propositions[168]:

1. A proposed expenditure for the general welfare is not subject to legal attack except in a justifiable controversy at the instance of a party who can show a direct and therefore actionable injury.
2. The powers to tax and to spend for the general welfare are independent and not limited to the other enumerated fields of federal authority.
3. Taxes cannot be levied nor funds expended for the primary purpose of purchasing in compliance with a policy of regulation.
4. There is no invasion of the reserved 10th Amendment powers of the states by a system of taxing and spending under which the states are induced to collaborate with the nation in relieving a social need that is national in scope.

There remain unresolved general welfare questions:

1. What criteria establish a public rather than private purpose and a local rather than general purpose?
2. To what extent does the doctrine of unlawful delegation of legislative power apply to appropriations for the general welfare?

[160] *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

[161] Shlaes, *supra* note 100, at 282 (citing Social Security pamphlet ISC9).

[162] "Text of Platform Adopted by Republican Convention," *The New York Times*, June 12, 1936.

[163] Vincent D. Nicholson, "Recent Decisions on the Power to Spend for the General Welfare," 12 *Temple L. Q.* 435, 436 n.5 (July 1938).

[164] "Budget of the United States Government, Outlays by Agency: 1962-2026," Table 4.1.

[165] *Coast Hotel Co. v. Parrish*, 200 U.S. 379 (1937), *rev'g Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), *rev'g Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

[166] *Virginian Railway Co. v. Federation*, 300 U.S. 515 (1937).

[167] *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Many provisions of the National Labor Relations Act were contained in NIRA, which was enacted in 1933 but found unconstitutional in 1935. Benjamin Collins, "Right to Work Laws: Legislative Background and Empirical Research," CRS, R42575 (Jan. 6, 2014).

[168] Kenneth Sears, "Summaries of Articles in Current Legal Periodicals," 24 *ABA J.* 938 (Nov. 1938).

3. What conditions may lawfully be attached to a loan or a grant?
4. May the federal government own and operate facilities for the promotion of the general welfare, and may it exercise sovereign powers such as the right of eminent domain for that purpose?

Historian Amity Shlaes concluded, "It's inescapable that many of the powers ceded to the New Dealers were rated permissible by the public or the courts only because of the emergency of the Great Depression."[169]

The New Deal succeeded in transforming the economy. Roosevelt offered hope and change — big changes — though unsuccessful at recovery. Its legacy "converted a nation of aggressive individualists into a social-minded nation accepting the principles of a welfare state."[170] Scalia explained:

> We are all socialists. . . . No one, even in the most conservative quarters of American society, now denies that there should be a so-called "safety net" provided by the government for our citizens. The only real argument is over how many services that safety net should provide, and how poor one must be in order to qualify. . . . Until the triumph of the New Deal, there were many who thought [section 8] prohibited the expenditure of funds for any private assistance. . . . But that fight, as I have said, is over. We now believe that any expenditure for any citizen is an expenditure for the general welfare — whether to the poor, such as food-stamp recipients; or to the middle class or even fairly well-to-do, such as the victims of a tornado in Florida; or even to the downright rich, such as shareholders of Chrysler Corporation. All of these are now regarded as entirely proper objects of the state's beneficence.[171]

The Great Society

Paul Samuelson was a Keynesian whose economics textbook was first published in 1948. It became ubiquitous for most introductory college courses. That textbook and liberal instructors indoctrinated generations of college students that Keynesianism should be the mainstream approach to macroeconomics the world over.

"Grants in aid" gained popularity among Democrats in projects for hospitals and highways. In 1949 Congress proposed $300 million in annual aid to education under a complex formula varying from $5 to $29 per pupil, depending on a state's economic status. Former President Hoover condemned it as risking poking the "camel's head of Federal control" into the tent of American education. He complained, "We may as well face the fact that the 'grants-in-aid' system has become a prime instrument in centralizing the government of the people in Washington." General Dwight D. Eisenhower agreed that it would "become another vehicle for the believers in paternalism [and] additional national centralization of power."[172]

Returning to the common defense aspect of general welfare, our interstates, which proliferated during the Cold War, were formally known as the Dwight D. Eisenhower National System of Interstate and Defense Highways. Mile-long stretches can double as emergency landing strips for military aircraft, and many Army bases are located nearby. The Highway Revenue Act of 1956 recognized that road building was unaffordable to state governments. So it paid 90 percent to be matched by 10 percent from the states, financed by a fuel tax. Originally, the interstate highways were to be completed in 1972 at a cost of $26 billion. They were not completed until 1990 and cost $275 billion.[173]

[169] Shlaes, *supra* note 100, at 101.

[170] Nevins, *supra* note 121.

[171] Scalia, *supra* note 46, at 324. Georgia Power Co. will receive hundreds of millions of dollars on its recently completed Plant Vogtle nuclear plant under IRC section 45J, specifically written to benefit only this corporation.

[172] "Hoover Condemns School Aid to All," *The New York Times*, June 27, 1949.

[173] Susan Croce Kelly and Quinta Scott, *Route 66, the Highway and Its People* 181 (1988). The legendary 2,400-mile Route 66 ran from Grant Park in Chicago to the Santa Monica Pier in California. It was built under the Federal Road Act of 1916 (with a 50-50 federal-state match) and the Federal Highway Act of 1921 calling for interconnected interstate highways. Paving started in 1926 and wasn't completed until 1938. It was mostly a 16-foot-wide, two-lane road with a high, largely head-on, fatal accident rate because there were no seat belts. (Today's interstate lanes are 11 to 12 feet wide.) Justification for federal aid required that rural roads be intended to carry the mail, and the legislation made no mention of urban streets.

President Lyndon Johnson ended responsible spending with his Great Society and Medicare while prosecuting a war in Vietnam. This led to today's sectional grants and distortions in medical pricing.

Johnson declared, "Our aim is not only to relieve the symptom of poverty, but to cure it and, above all, to prevent it."[174] Upon signing the Economic Opportunity Act of 1964, Johnson promised it would reduce the costs of "crime, welfare, of health and of police protection. . . . The days of the dole in our country are numbered."[175] Instead, his public housing programs destroyed cohesive neighborhoods as welfare discouraged marriage and contributed to juvenile delinquency. He succeeded in creating permanent devastating deficits.

Johnson's Great Society "war on poverty" welfare entitlements did not eradicate poverty. It did not even succeed in managing it. Rather, it seems to have established a permanent sense of downtroddenness and hopelessness. Johnson and his legacy squandered trillions of dollars in a baleful failure.

Budget officials predicted that Medicare, passed in 1965, would cost less than $400 million in fiscal 1967. Instead, it cost $1.1 billion.[176]

At the time the Great Society programs were getting started, future Fed Chair Alan Greenspan explained, "The welfare statists were quick to recognize that if they wished to retain power, the amount of taxation had to be limited and they had to resort to programs of massive deficit spending, i.e., they had to borrow money by issuing government bonds, to finance welfare expenditures on a large scale."[177] Future Fed Chair Arthur Burns called much of the anti-poverty campaign "pure waste."[178]

The Budget Process

Budgeting is intricately involved with taxation and spending. Taxation and appropriations were once handled by the taxation committees. A separate House Committee on Appropriations was created in 1865. The Senate Committee on Appropriations was created in 1867. Budgets were submitted to Congress by the president or individual executive branch agencies.

Some agencies would spend at a rapid rate money that had been appropriated for an entire year. When the funds neared exhaustion, the agency informed Congress that if additional appropriations were not provided, the required services would have to be stopped. Although Congress complained about "coercive deficiencies," additional funds were usually granted when it was threatened with a shutdown of some executive function deemed vital to the nation.[179]

Controlling national debt is an essential prerequisite task for Congress to assert its powers of the purse, taxation, and initiating war. Before World War I, Congress often directly authorized borrowing for specified purposes, detailing the types of financial instruments Treasury could use, specifying or limiting interest rates and maturities, and detailing when bonds could be redeemed.

In deciding on financing for World War I in 1917, Congress debated how all prior wars were financed — including taxation, interest costs, the effect of debt on inflation, and how those debts were eventually repaid.[180] The Second Liberty Bond Act of 1917 set an aggregate issue ceiling on Treasury bonds at $9.5 billion, the first debt ceiling

[174] Johnson, "Annual Message to the Congress on the State of the Union," Jan. 8, 1964.

[175] Johnson, "Remarks Upon Signing the Economic Opportunity Act" (Aug. 20, 1964). Johnson was not the first in predicting the end of poverty. Relying on continuing prosperity the nation had achieved since 1922, Hoover told the Republican National Committee in his 1928 acceptance speech, "Given a chance to go forward with the policies of the last eight years, we shall soon, with the help of God, be in sight of the day when poverty will be banished from this nation."

[176] Shlaes, *Great Society: A New History* 279 (2019).

[177] Greenspan, "Gold and Economic Freedom," reprinted in Ayn Rand, *Capitalism: The Unknown Ideal* 93-95 (1966), from Rand's newsletter, "The Objectivist."

[178] James R. Sikes, "Economist Warns of Spending Peril," *The New York Times*, Mar. 5, 1967.

[179] "U.S. Senate Committee on Appropriations, United States Senate, 1867-2008," at 10 (2008).

[180] 55 *Cong. Rec.* — Senate 7338-7387 (Sept. 1917).

law in which all separately legislated debt obligations were combined. It was not until 1939 that Congress set a fixed $45 billion comprehensive debt ceiling.[181]

The Budget and Accounting Act of 1921 (Budget Act)[182] was landmark legislation that provided a means for Presidents Harding and Coolidge to control the budget and the nation's debt, and at the same time give the people the ability to hold someone responsible. It required the president to provide estimates of expenditures and appropriations necessary for support of the government, among other new duties, which became the starting point for an annual budget appropriations bill. The Budget Act also created the Bureau of the Budget (today the Office of Management and Budget) and the General Accounting Office (today the Government Accountability Office), independent of the executive branch.

The Budget Act was amended by the Accounting and Auditing Act of 1950. It made the GAO responsible for establishing accounting standards for federal agencies to follow.

Then Congress and the executive branch gradually lost budget discipline and passed numerous laws to camouflage incompetence or entirely defeat discipline.

Johnson was burdened with huge deficits from his guns-and-butter strategy of continuing the Vietnam War while pursuing Great Society welfare. In early 1968, he sought to hide the magnitude of the deficit by combining surpluses in Social Security and all other trust funds with the federal deficit into a "unified budget" — which still projected an $8 billion deficit that year.

The 1921 Budget Act was gutted by the Congressional Budget and Impoundment Control Act of 1974 (P.L. 93-344), when it became collateral damage in the anti-executive fervor following Watergate. Congress was frustrated by presidents who used the Budget Act to exert greater control over federal spending, especially President Richard Nixon's impoundment of congressionally appropriated funds. The 1974 act tilted budget authority back to Congress and centralized power in the budget committees while weakening the taxwriting committees. It created the House and Senate budget committees and the Congressional Budget Office and required the annual adoption by Congress of a concurrent resolution on the budget. The president would still submit a proposed budget in January or February, but Congress now had its own ability to create a budget with its own priorities.

Under the 1974 act, the president could propose impoundments, and those funds could be withheld for 45 days, allowing Congress to consider the merits. If Congress did not approve, the funds proposed for rescission had to be released on the 46th day.[183] The budget committee in 1980 changed the budgeting process by mandating that the taxwriting committees increase revenue for one year by $4 billion, which was carried out. This was the first time that the reconciliation process was successfully implemented. It contributed to fiscally responsible tax policy because the budget resolution indicated the amount of tax that had to be raised.[184]

The inability to control deficit spending led to passage of the Balanced Budget and Emergency Deficit Control Act of 1985 (P.L. 99-177). The central feature was a series of declining deficit targets, expected to lead to a balanced budget by fiscal 1991. The deficit targets were enforced by sequestration, a process involving largely across-the-board spending cuts triggered automatically if a deficit target was not met.[185] In 1985 the Senate passed the Byrd rule, intended to protect the reconciliation process by excluding from budget bills extraneous matter that didn't aid deficit reduction efforts while preserving the deliberative character of the Senate. It excluded

[181] H.J. Cooke and M. Katzen, "The Public Debt Limit," 9 *J. Fin.* 298 (Sept. 1954).

[182] General Accounting Office, "The Budget and Accounting Act, 1921, as Amended" (1966).

[183] GAO, "Impoundment Control Act Use and Impact of Rescission Procedures," GAO-10-320T (Dec. 16, 2009). In a 1987 interview, former House Ways and Means Chair Wilbur Mills called these changes a mistake because they stopped the president from withholding money in order to balance the budget. Oral history transcript, Wilbur Mills, interview 2 (II), at 15 (Mar. 25, 1987), by Michael L. Gillette, LBJ Library.

[184] Charles McLure, "The Budget Process and Tax Simplification/Complication," American Institute of CPAs/American Bar Association Conference on Tax Simplification, Washington, D.C., (Jan. 11, 1990).

[185] Robert Keith, "The Statutory Pay-As-You-Go Act of 2010: Summary and Legislative History," CRS, R41157 (June 8, 2010).

from expedited procedures legislative matters not central to deficit reduction.[186]

Five years later, still unsuccessful at controlling spending, Congress passed the Budget Enforcement Act of 1990 (P.L. 101-508). This established a "pay as you go" process and limited discretionary spending, which superseded the deficit targets but retained sequestration as the means of enforcement. The 1990 act divided the budget into mandatory direct spending and discretionary spending. Direct spending is principally entitlement programs, such as Social Security, Medicare, federal employee retirement, unemployment compensation, and some programs of a mandatory nature that are not entitlements. Discretionary spending consists of annual appropriations under the jurisdiction of the House and Senate appropriations committees, mostly the routine operations of federal departments and agencies.

Unable to control itself, Congress passed the Line Item Veto Act of 1996 (P.L. 104-130). The Supreme Court quickly ruled it unconstitutional because it gave the president unilateral authority to change the text of duly enacted statutes, thus violating the Constitution's presentment clause.[187]

Pay-go didn't go well, either. Discretionary spending limits were extended twice.[188] Pay-go was terminated in 2002.[189] The remaining provisions of the 1985 budget act expired on September 30, 2006.

President Barack Obama proposed, and Congress enacted in 2010, a new statutory pay-go proposal, attached to a debt ceiling increase.[190] The White House explained pay-go: "Congress can only spend a dollar if it saves a dollar elsewhere. Mandatory spending increases and tax cuts must be paid for; they're not free, and borrowing to finance them is not a sustainable long-term policy."[191]

Violation of pay-go discretionary spending limits would result in sequestration to eliminate the deficit. Debt service costs explicitly are excluded from the definition of budget effects under pay-go, among other exceptions, and there are five-year and 10-year cost estimate restrictions. Proposals to establish a bipartisan task force on responsible fiscal action were defeated and excluded from the final bill. With Congress unable to control its profligate tendencies, pay-go has been subject to frequent modifications to allow unchecked deficit spending to continue.[192]

Although a 10-year window is now the standard, the number of years covered by budget resolutions has varied. In the 1970s, one-year resolutions were the norm. In the 1980s, the budget window lengthened to three years. Beginning in the 1990s, budget resolutions most frequently covered five years. Today 10-year budget resolutions are the norm and manipulated to avoid fiscal responsibility.[193] The Inflation Reduction Act of 2022 was "balanced" with deficit spending for the first five years, mitigated by projected net revenue in years 6 through 10.[194]

[186] Consolidated Omnibus Budget Reconciliation Act of 1985 (P.L. 99-272); Bill Heniff Jr., "The Budget Reconciliation Process: The Senate's 'Byrd Rule,'" CRS, RL30862 (updated Sept. 28, 2022).

[187] *Clinton v. City of New York*, 524 U.S. 417 (1998) (6-3 decision that the act violated Art. I, section 7, cl. 2 of the Constitution). In 1991 attorney general research for President George H.W. Bush concluded, "Throughout all British history, and early Colonial and American experience," there is no support that "inherent line-item veto authority could be squared with the Constitution." William P. Barr, *One Damn Thing After Another* 54 (2022). For a contrary view, see Roy E. Brownell II, "The Unnecessary Demise of the Line Item Veto Act: The Clinton Administration's Costly Failure to Seek Acknowledgment of 'National Security Rescission,'" 47 *Am. Univ. L. Rev.* 1273 (June 1998).

[188] The Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66) and the Budget Enforcement Act of 1997 (P.L. 105-33).

[189] Reduction of Preexisting PAYGO Balances (P.L. 107-312).

[190] Statutory Pay-As-You-Go Act of 2010 (P.L. 111-139).

[191] White House release, "Statement From the President on House Passage of PAYGO" (Feb. 4, 2010).

[192] Budget Control Act of 2011 (P.L. 112-25), American Taxpayer Relief Act of 2012 (P.L. 112-240), the Bipartisan Budget Act of 2013 (P.L. 113-67), the Bipartisan Budget Act of 2015 (P.L. 114-74), the Bipartisan Budget Act of 2018 (P.L. 115-123), and the Bipartisan Budget Act of 2019 (P.L. 116-37).

[193] The budget window is the number of years to which the spending and revenue decisions in a budget resolution apply. Law requires that the budget resolution cover at least five years — the upcoming year plus the next four years. Peter G. Peterson Foundation, "What Is the Budget Window?" (July 20, 2017).

[194] CBO, "Estimated Budgetary Effects of H.R. 5376" (Nov. 18, 2021). H.R. 5376, the Build Back Better Act of 2021, was passed in 2022, euphemistically misnamed the Inflation Reduction Act of 2022. CBO, "Estimated Budgetary Effects of Public Law 117-169" (Sept. 7, 2022). The budget costs have since been revised upward, and even those revisions are criticized for understating the true projected costs. *See* Martin A. Sullivan, "JCT Report Explains $200 Billion Revision to Green Energy Revenue Estimates," *Tax Notes Federal*, May 29, 2023, p. 1455; and George K. Yin, "The Real Culprit in the Misrepresented Costs of the Ways and Means Legislation," *Tax Notes Federal*, June 19, 2023, p. 2039. These "five-year/10-year budgets" are reminiscent of Melvin Douglas's pick-up line upon meeting Greta Garbo (playing a Russian envoy): "A Russian! I love Russians! Comrade, I've been fascinated by your five-year plan for the last 15 years." *Ninotchka* (1939).

Through 1980, major tax legislation followed the appropriate legislative process. Bills were first introduced in the House, hearings and testimony were solicited, draft legislation was circulated for comment, and meaningful debate occurred on the House floor, all before adoption. The process was then repeated in the Senate, followed by a conference to resolve differences between the House and Senate bills. After 1980, it became common for both houses of Congress to consider simultaneously two materially different substantive tax revision measures, often without hearings or reports, with meetings conducted in secret. Negotiators would reach agreement as a conceptual matter with drafting done later, and usually passed on the floor of both houses without permitting amendments or serious debate.[195]

This tactic was first used in passing the 1982 Tax Equity and Fiscal Responsibility Act. It originated in the House as a 21-page minor tax reduction proposal. The Senate deleted everything except the bill number, H.R. 4961. Then, 679 pages of Senate tax increases were substituted. H.R. 4961 went to a joint House-Senate conference to work out the "differences." The Conference Committee made major new additions to the Senate bill. The bill then went back to the House and Senate for a vote. In an unusual move, House Ways and Means Committee Chair Dan Rostenkowski bypassed his own committee and put the conference bill to a vote of the full House the same day that this massive bill reached members' desks, allowing no time for anyone to read it. Just four hours were allotted for debate: two hours for Democrats and two hours for Republicans. Then they voted.[196]

In 1972 the Joint Committee on Taxation was dominant both in terms of size and influence, with 19 professional members (excluding the lawyers responsible for refund cases), and its chief of staff was the most influential tax staff member on Capitol Hill. The Ways and Means Committee had just three people on its tax staff, and the Finance Committee had just two. Wilbur Mills was the all-powerful chair of both Ways and Means (with no subcommittees) and the Committee on Committees (which determined who sat on other committees). In those days, if the chairs of the Ways and Means and Finance committees and their staff at the JCT concurred with a Treasury proposal, it was virtually an accomplished fact. Today, the JCT is largely a research and assistance arm. Tax proposals are drafted in secret by partisan House and Senate tax staff carrying out party objectives. There are rarely hearings on tax proposals or House and Senate committee reports.[197]

The Clinton administration's claim to four years of balanced budgets is a myth. Once Social Security is removed from the budget presentation, it was in deficit for three of those four years. The fourth year appears to have shown a surplus, resulting from alternative minimum tax on stock option gains just before the dot-com bubble burst. (Grantees tried holding shares with borrowed funds until the shares qualified for long-term capital gains, but they were sold under margin calls. That resulted in an inability to pay a tax year 2000 AMT on the difference between the fair market value and the grant price, payable in April 2001.) The tax debts of those taxpayers had to be compromised or forgiven after the value of their dot-com shares fell below the AMT they owed, because they had no means of paying it. Quantifying that revenue loss might make the fourth Clinton surplus year a deficit too.

Courts have sanctioned conditions to spending if it (1) promotes the general welfare, (2) is unambiguous, (3) relates to a federal interest or program, (4) is not itself unconstitutional, and (5) is not coercive — hence national unemployment

[195] Harold R. Handler, "Budget Reconciliation and the Tax Law: Legislative History or Legislative Hysteria?" *Tax Notes*, Dec. 21, 1987, p. 1259.

[196] Jay Starkman, *The Sex of a Hippopotamus: A Unique History of Taxes and Accounting* 298-299 (2008).

[197] Ronald A. Pearlman, "The Tax Legislative Process: 1972-1992," *Tax Notes*, Nov. 12, 1992, p. 939; Yin, "How Codification of the Tax Statutes and the Emergence of the Staff of the Joint Committee on Taxation Helped Change the Nature of the Legislative Process," 71 *Tax L. Rev.* 723, 769-778 (Summer 2018) (tracing the rise and decline of JTC influence).

insurance,[198] a national speed limit,[199] a national drinking age,[200] and Medicaid expansion.[201]

The 2021 Infrastructure Investment and Jobs Act (P.L. 117-58) will pay for half the $6.3 billion cost of adding 1.5 miles and three additional stations to New York City's Second Avenue subway — a purely local project costing seven times the average of building a subway anywhere else in the world.[202]

Never has a legislated social spending program been overturned by the Supreme Court. Lack of standing by those not directly affected is the major obstacle in challenging general welfare spending.

A trilogy of cases challenged the Patient Protection and Affordable Care Act of 2010 (P.L. 111-148). In 2012 the Supreme Court held that the penalty for not complying with the mandate to have health insurance was really a tax, and Congress has the power to tax.[203] When states failed to establish a health insurance "exchange," the federal government was authorized to establish a federal exchange, making individuals residing in those states potentially subject to the penalty tax.[204] Following repeal of the penalty in 2017, another challenge was repelled as the Supreme Court ruled that 18 states and two individuals lacked standing to challenge the mandate, thus avoiding a ruling on whether the Affordable Care Act, without a tax, was still constitutional.[205]

Without so much as an executive order, President Joe Biden ordered forgiving up to $20,000 in student loans per individual.[206] The cost was estimated to be at least $500 billion. Most commentators said this action was unconstitutional,[207] and the Supreme Court agreed in a 6-3 decision along partisan lines.[208] While the majority ruled that the plaintiff state attorneys general "likely had standing," the three dissenters disagreed that the six states "have no personal stake in the Secretary's loan forgiveness plan." Anticipating this ruling, a defiant Biden announced an alternative plan, which may be harder for anyone to have standing to challenge, on the same day the Supreme Court ruled against his forgiveness plan.[209]

The fears of Mason, "Deliberator," and others that the federal government under the Constitution would be able to do as it pleased have been realized under loose interpretations of the general welfare clause and lack of standing for those who might contest welfare spending.

Timeline of Chronic Deficits

France's ancien régime bankrupted with regularity, in 1602, 1643, 1648, 1721, and 1789, thus relieving itself of paying interest and principal. France incurred a 1 billion livre debt from aiding the American Revolution, including the critical final Battle of Yorktown. That debt became an unsustainable burden. So King Louis XVI raised taxes again after 1786. This became one of the triggers for the 1789 French Revolution.

[198] *Steward*, 301 U.S. 548 (holding that a 90 percent credit provision is inducement, not coercion, for states to adopt unemployment compensation legislation and furthers general welfare).

[199] *Nevada v. Skinner*, 884 F.2d 445, 450-451 (9th Cir. 1989) (holding that a threatened loss of 95 percent of highway funds upon failure to comply with a national speed limit was not coercion). "We have been unable to uncover any instance in which a court has invalidated a funding condition" (citing *Oklahoma v. Schweiker*, 655 F.2d 401, 406 (D.C. Cir. 1981)).

[200] *South Dakota v. Dole*, 483 U.S. 203, 211-212 (1987) (holding that with no new money offered to the states, the threat of losing 5 percent of highway funds upon failure to raise the minimum drinking age was "relatively mild encouragement," not impermissible coercion).

[201] *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (upholding Medicaid expansion but severing as unconstitutional coercion threatening states with the loss of their existing Medicaid funding if they declined to comply with the expansion).

[202] Infrastructure Investment and Jobs Act section 21201. *See* Ana Ley, "Will East Harlem Ever Get Its Long-Delayed Subway?" *The New York Times*, Jan. 31, 2022; and Brian M. Rosenthal, "The Most Expensive Mile of Subway Track on Earth," *The New York Times*, Dec. 28, 2017. Other subway systems received lesser grants. *See, e.g.*, "MARTA Gets $25M for Five Points Station Overhaul," *Atlanta Intown Paper*, Sept. 11, 2022. The IRA is 1,039 pages, with $1.2 trillion in funding for roads and bridges, broadband, drinking water resources, airports, electric vehicles, and more, with pork spending in each of the 50 states. For details, see Department of Transportation, "USDOT Releases State by State Fact Sheets Highlighting Benefits of the Bipartisan Infrastructure Law" (Nov. 18, 2021). An additional $200 million of local transit grants were buried in the 1,068-page Consolidated Appropriations Act of 2022 (P.L. 117-103), listed at Federal Transit Administration, Table 20, "FY2022 Transit Infrastructure Grants-Community Project Funding/Congressionally Directed Spending."

[203] *NFIB*, 567 U.S. 519.

[204] *King v. Burwell*, 576 U.S. 473 (2015).

[205] *California v. Texas*, 141 S. Ct. 2104 (2021).

[206] White House fact sheet, "President Biden Announces Student Loan Relief for Borrowers Who Need It Most" (Aug. 24, 2022).

[207] Preston Cooper, "No, Biden Can't Forgive Student Loans by Executive Order," *Forbes*, Aug. 30, 2022.

[208] *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

[209] White House fact sheet, "President Biden Announces New Actions to Provide Debt Relief and Support for Student Loan Borrowers" (June 30, 2023).

While the North financed the Civil War with taxes and debt (repaid by 1872), the South printed about $1.5 billion of paper money, which became worthless after the war. Poor fiscal policy was one of the greatest single weaknesses of the Confederacy, contributing significantly to its defeat.

The United States has been debt free for only two years in its entire history. As House Speaker "Champ" Clark of Missouri related in discussion leading to the first debt ceiling law in 1917:

> Since this Government was founded there have been but two years when we did not have a national debt. As a matter of fact, during those two years we did have a national debt of $7,000, because they never could find the people who held the bonds. We started in with a national debt, which was created by the Revolutionary War. It was increased by Hamilton's assumption act, which assumed the revolutionary debts of the various States. . . . These two years were in John Tyler's administration. Mr. Speaker Cannon said truly that a surplus was accumulated in Andrew Jackson's administration. That is the truth, but at the same time a national debt was running. Certain bonds had not matured and were outstanding, and you can not send out for a man who has a national bond that is due five years from now and say to him that he has to take the money for the bond at this time. You can not do that. While they had a surplus, they also had a national debt. . . . The lowest that I could ever find it got to was $7,000, in Tyler's day. The surplus was accumulated in Jackson's day.[210]

When World War I began in 1914, it was widely assumed that the war couldn't last much longer than six months because the belligerents would run out of money. Taxation at confiscatory rates was not feasible, so when loan sources dried up, the nations at war resorted to printing money. This contributed to the British pound losing its status as the world's reserve currency after the war.

Commenting on the raging inflation wrought by European money printing, Keynes wrote, "Lenin was certainly right. There is no subtler, no surer means of overturning the existing basis of society than to debauch the currency."[211] (Unlike later monetarist economist Milton Friedman, who argued that money printing resulted in inflation, Keynes believed that inflation won't necessarily result, or result quickly.[212])

The ancient Greeks understood that general welfare meant common defense. Themistocles persuaded fellow Athenians to build a defensive fleet of 371 powerful trireme warships (three tiers of rowers) with heavy battering rams at the prow. These expensive hardened ships won the 480 BCE naval Battle of Salamis against the much larger Persian fleet. Had Athenians not built those ships that stopped Persia's westward expansion, Greek democracy might have died in its infancy.

The U.S. naval fleet has shrunk from 594 ships at the end of the Reagan era to under 300 today. Some 37 percent of the submarine fleet is either in maintenance or awaiting repairs.[213] The GAO reported that the Navy lacks adequate capabilities for battle damage repair in the event of a great power conflict with China or Russia.[214] The sad truth is, we lack today the fiscal and infrastructure capacity to fight a major war.

Over the decades, Social Security made costly expansions: Child, spouse, and survivor benefits were added in 1939. Added in 1956, open-ended and lax disability benefits. Beginning in 1961, workers were allowed to retire at age 62 (which deprived the economy of productive workers and made the ratio of workers to retirees worse). Costliest of all was the 1972 indexing of earnings.[215] Medicare was enacted in 1965 and

[210] 55 *Cong. Rec.* — House 6684 (Sept. 6, 1917).

[211] Keynes, *The Economic Consequences of the Peace* 236 (1920).

[212] Keynes, "The Theory of Prices" in *The General Theory of Employment, Interest, and Money*, ch. 21(V) (1936).

[213] "The U.S. Submarine Fleet Is Underwater," *The Wall Street Journal*, July 29, 2023; Letters, *The Wall Street Journal*, Aug. 11, 2023.

[214] GAO, "Navy Ships: Timely Actions Needed to Improve Planning and Develop Capabilities for Battle Damage Repair," GAO-21-246 (June 2021).

[215] David A. Stockman, *The Triumph of Politics: Why the Reagan Revolution Failed* 183 (1986); CRS, "Social Security: Major Decisions in the House and Senate Since 1935," RL30920 (June 22, 2023).

expanded to cover more people and services over the following decades, adding prescription drug coverage in 2003.[216] These programs are headed for insolvency.

Since 2009, "all revenues were committed before the new Congress walked in the door. Effectively all discretionary spending had to be paid for with borrowing, and no new reform could be adopted without rescinding some past promise made to the public for low taxes and high spending."[217] We can't tax enough in a free enterprise economy to cure this deficit, and we can't continue such high-deficit spending.

Permanent massive deficit spending has been embraced by both Democratic and Republican congresses and administrations. The annual president's budget proposal is dead on arrival. America's fiscal machinery is broken, and neither Congress nor the president has any real interest in fixing it, regardless of which party is in office. There is no leadership or interest in addressing the unsustainable spending or the national debt.

Standard & Poor's and Fitch have downgraded U.S. debt, joining the stack of evidence of how profoundly different and risky the nation's fiscal situation is now, which deserves attention. Though rarely discussed, everyone knows it can never be repaid. Lack of standing has always limited the Supreme Court from addressing this grave issue. However, the justices may be able to define "clearly wrong," in revisiting "general welfare," a possibility it left open in its 1937 *Davis* ruling.[218] That could save the nation's fisc by forcing restrictions on the scope of general welfare spending.

Debt ceiling debate and negotiations are the best time to review total spending and where national debt is headed, as a more responsible Congress did in 1917 when setting the first debt ceiling for that very purpose. Instead of debate in this year's political wrangling, Congress *suspended* the debt ceiling until January 1, 2025, a first step toward completely repealing the debt ceiling,[219] and with it, the last vestige of fiscal responsibility. Interest on $32 trillion of federal debt today consumes 15.5 percent of all federal revenue.[220] We now spend $3 for every $2 in tax revenue. We are headed for a $40 trillion national debt in 2027, and if interest remains at 4 percent, that would consume over 30 percent of revenue.

The Supreme Court has granted Congress the power to do whatever in its discretion can be done by money in the name of general welfare. Hamilton's promise in Federalist 78 that "courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments" has failed. As Madison predicted, it has resulted in a government no longer limited by enumerated powers, but an indefinite one subject to particular exceptions.[221]

How ironic that Hamilton, our greatest Treasury secretary, who set the country on a sound financial footing, made an interpretation of general welfare that could be this nation's undoing. The progressives of the early 20th century were tightwads, unlike today's spendthrift progressives who espouse the bizarre modern monetary theory,[222] believing that inflation will not be triggered by printing money to solve problems. Modern monetary theory is alluring because if rapidly rising national debt will never be repaid, why pay it down at all?

Authorities are unanimous that general welfare does not sanction spending on purely local projects, like funding the New York subway. Hamilton said so in his "Report on

[216] S. Srakocic, "Medicare: How Did It Begin and How Has It Changed?" *Healthline*, Feb. 23, 2021; Mary West, "What to Know About the History and Future of Medicare," *Medical News Today*, Jan. 28, 2021.

[217] C. Eugene Steuerle, "Tax Reform: Lessons From History," *Tax Notes*, Oct. 17, 2011, p. 323.

[218] *Davis*, 301 U.S. 619.

[219] Fiscal Responsibility Act of 2023 (P.L. 118-5), section 401.

[220] Editorial Board, "A Peacetime Fiscal Blowout," *The Wall Street Journal*, Aug. 9, 2023.

[221] *See* "From James Madison to Edmund Pendleton, 21 January 1792," *supra* note 5.

[222] Matthew C. Klein, "Everything You Need to Know About Modern Monetary Theory," *Barron's*, June 7, 2019.

Manufactures."[223] Story said so in *Commentaries*.[224] The Supreme Court agreed[225] and left open revisiting general welfare spending when "clearly wrong."[226] Even the New Deal administration wrote that localized welfare was excluded.[227]

Does no one have standing to challenge local project funding causing him or her a direct and therefore actionable injury? If Congress is serious about controlling its profligate ways, it could start by legislating broader standing so that the limits of general welfare can be tested in court, or the courts could expand who qualifies for standing as it did in the recent student loan forgiveness case.

Politicians fear legislating any reduction of benefits entrenched in New Deal and Great Society programs. Our economic stability, prosperity, and eventually our freedom will suffer if we cannot control those expenditures and manage our debt. The future of the republic is at stake. We cannot fail to act. ■

[223] "The only qualification of the generality of the Phrase in question [general welfare], which seems to be admissible, is this — That the object, to which an appropriation of money is to be made, be *General*, and not local; its operation extending, in fact, or by possibility, throughout the Union, and not being confined to a particular spot." Hamilton, "Report on Manufactures," *Founders Online*, National Archives (Dec. 5, 1791).

[224] "If the defense proposed by a tax be not the common defense 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." Story, *supra* note 2, at section 919.

[225] *Butler*, 297 U.S. at 67.

[226] "Congress may spend money in aid of the 'general welfare.' . . . The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Davis*, 301 U.S. at 640.

[227] "The power of distributing the benefits of taxation should be limited to purposes serving the general good of all the States, and should not permit promotion of localized welfare of one or more of the larger States." Government brief in *Butler*, reproduced in "Hamiltonian and Madisonian Views," *supra* note 141, at 117.