



THE AMERICAN TESTAMENT

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Part 9 of 12

. . . to . . . promote the general welfare . . .

The phrase “general welfare” had been present in the third article of the Articles of Confederation, which read: “The said states hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare.” It is in no way clear what the phrase there meant. If it was interpreted as equivalent to “the common good,” “the public good,” “the common weal,” or “general happiness,” it would then be designating the all-embracing comprehensive end of government. With so broad a meaning, it could not logically be placed in the Preamble to the Constitution as one of six purposes that together constitute an articulation of the complex structure of the common good, with which it was identical.

The phrase gained its specific meaning, not from any early elucidation of the Preamble, but rather from discussion during the period of ratification and from later constitutional developments occasioned by the occurrence of the same phrase in the taxing clause of the Constitution. The first paragraph of Article I, Section 8, reads: “The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States.” There then follows an enumeration of specific things that Congress is empowered to do, first, an odd assortment of fiscal and military things, and then an odd assortment of things neither fiscal nor military. Section 8 ends with what came to be called “the sweeping clause”: “The Congress shall have power ... to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”

Power to tax and spend for “the general welfare,” with the additional provision of “power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers” —that sounds like very great power, indeed! Madison, in *Federalist #41*, took note of a fierce attack on the language of the first paragraph of Article I, Section 8, on the ground that it would amount “to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare.” He undertook to ward off such an attack by saying that the first paragraph did not announce a separate power to tax and spend for the general welfare; that it was just an introductory heading for the powers specified in the following paragraphs of Section 8; that

the taxing-and-spending power was limited to those specified powers. With that interpretation, Madison was not merely pleading for ratification. He fervently believed, and continued to believe, along with Jefferson in their later opposition to Hamilton, that the major issue of limited versus unlimited government was at stake in the interpretation placed on the reference to general welfare in the first paragraph of Article I, Section 8.

Madison may have been right about the original intentions behind the phrase “general welfare” in that Section. He was, after all, “the father of the Constitution.” But the matter was not put to rest by his vehement words on the subject in *Federalist #41*.

In December of 1791, Hamilton, the Secretary of the Treasury, presented to Congress his bold and brilliant *Report on Manufactures*. He worked into that document his own constitutional interpretation:

A question has been made concerning the constitutional right of the Government of the United States to apply this species of encouragement, but there is certainly no good foundation for such a question. The National Legislature has express authority “to lay and collect taxes . . . and provide for the . . . general welfare.” . . . These three qualifications excepted, the power to *raise money is plenary and indefinite*. . . . The phrase [general welfare] is as comprehensive as any that could have been used, because it was not fit that the constitutional authority of the Union to appropriate its revenues should have been restricted within narrower limits than the “general welfare,” and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition.

It is, therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects, which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper.

Jefferson spoke of this privately to Washington, urging that Hamilton’s proposition seemed to go “far beyond every one ever yet advanced” toward making the Constitution “a very different thing from what the people thought they had submitted to,” and had indeed forced the people to consider “whether we live under a limited or an unlimited government.” Madison wrote to the Governor of Virginia: “What think you of the [Hamilton’s]

commentary ... on the term ‘general welfare’? The federal government has been hitherto limited to the specified powers, by the Greatest Champions for Latitude in expounding those powers—If not only the means, but the objects are unlimited, the parchment had better be thrown into the fire at once.” On the floor of the House, Madison repeated his view that the words “general welfare” were simply “a sort of caption or general description of the specific powers” that followed, and had “no further meaning” and gave no “further power” than what could be “found in that specification.” “In short, sir,” Madison concluded,

. . . I venture to declare it as my opinion that were the power of Congress to be established in the latitude contended for, it would subvert the very foundation and transmute the very nature of the limited government established by the people of America; and what inferences might be drawn, or what consequences ensue from such a step, it is incumbent on us all well to consider.

Madison was persuasive in the House. Hamilton suffered a major defeat. His important *Report on Manufactures* was pigeonholed.

The argument, however, was far from over. Although one or another sort of welfare legislation did get passed, the constitutional issue was not raised until well into the twentieth century. It was the Great Depression that brought the Supreme Court, in a series of cases during 1936-37, to resolve, in Hamilton’s favor, his dispute with Madison about the range of the power of Congress “to promote the general welfare.”

In the case of *United States v. Butler* (1936), in which, for a side reason, the decision went against the Agricultural Adjustment Act (involving subsidies for reduction of the farm surplus), Mr. Justice Roberts’s opinion for the court reviewed the doctrinal quarrel and explicitly settled it in Hamilton’s favor:

The argument is that Congress may appropriate and authorize the spending of moneys for the “general welfare”; that the phrase should be liberally construed to cover anything conducive to national welfare. . . .

Since the foundation of the nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same

section; that, as the United States is a government of limited and enumerated powers, the grant of the power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. . . . Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general [not local] welfare of the United States.

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 writing 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. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of Section 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

Two immediately ensuing cases in 1937 are also worth noting. They are concerned with the constitutionality of different Titles in the Social Security Act of 1935. In both cases, that act is upheld in the decision. In both cases, the opinion for the Court was delivered by Mr. Justice Cardozo. In both cases, he adverted to the doctrine in *United States v. Butler*, set forth just above.

The first case, *Steward Machine Co. v. Davis (1937)*, involved Title III of the Social Security Act, which authorized appropriations from the general revenue funds for the purpose of assisting the states in the administration of their *unemployment compensation* laws. Cardozo wrote:

During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights.

Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. *CF. United States v. Butler*; and *Helvering v. Davis* decided herewith.

In a companion case to *Steward*, the case of *Helvering v. Davis* (1937), the Court sustained the old age pensions provisions of the Social Security Act (Titles II and VIII), which imposed taxes on employers and employees and authorized appropriations to pay old age pensions to eligible previous employees in an exclusively federal program. Cardozo wrote:

The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. . . . Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co.*, has set the doubt at rest.

But the ill is all one or at least not greatly different whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.

Within seven years, the idea of "the general welfare" implicit in such cases received an exuberant expansion. President Roosevelt's State of the Union message on January 11, 1944, first

dealt with measures needed to continue the prosecution of the war with vigor. He closed with a vision of how the peace should be prosecuted:

It is our duty now to begin to lay the plans and determine the strategy for the winning of a lasting peace and the establishing of an American standard of living higher than ever before known. We cannot be content, no matter how high that general standard of living may be, if some fraction of our people—whether it be one-third or one-fifth or one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure.

This republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights—among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty. As our nation has grown in size and stature, however—as our industrial economy expanded—these political rights proved inadequate to assure us equality in the pursuit of happiness.

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. “Necessitous men are not freemen.” People who are hungry and out of a job are the stuff of which dictatorships are made. In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.

Among these are:

The right to a useful and remunerative job in the industries or shops or farms or mines of the nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old

age, sickness, accident, and unemployment;

The right to a good education.

All of these rights spell security. And after this war is won, we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being. America's own rightful place in the world depends in large part upon how fully these and similar rights have been carried into practice for our citizens. For unless there is security here at home there cannot be lasting peace in the world. . . .

I ask the Congress to explore the means for implementing this economic bill of rights—for it is definitely the responsibility of the Congress so to do.

That 1944 State of the Union message was delivered at some considerable temporal distance from the Declaration of Independence, from the Preamble's statement of the promotion of the general welfare as one of the objectives of government, and from the dispute between Founding Fathers about the power of Congress to promote the general welfare.

However, it is clear that Roosevelt's impassioned proclamation draws its inspiration, its terms of discourse, indeed its very diction, from Jefferson's Declaration of Independence. It is likewise clear that Roosevelt's boldness about what "it is definitely the responsibility of the Congress so to do" derives from the Depression Court's decisions that Hamilton was right about the plenary power that Congress has, under the Constitution, to promote the general welfare.

Roosevelt did not use the term "general welfare." He mentioned "new goals of human happiness and well-being." He

clearly subsumed “the welfare power,” to call it that by analogy to “the war power,” under the Declaration of Independence’s assertion that an overriding objective of government was to secure—that is, make secure—the natural right to the pursuit of happiness.

He called his second bill of rights a bill of economic rights. The term “economic” is used very broadly. It is worth remembering that Hamilton’s interpretation of the Constitution, in his *Report on Manufactures*, did not occur in a context of an emergency concern for the desperate plight of unfortunate citizens suffering from a depression. Hamilton wanted Congress to promote the general welfare by assistance to the growth of businesses. All governmental actions in aid of “the economy,” to fight inflation or recession, would be as much exercises of the welfare power as measures of assistance to the seriously indigent, the debilitated old, the helplessly sick or disabled, and those whom we have the habit of speaking of as “on welfare.” Roosevelt’s very broad use of the term “economic” includes such things as the right to a decent home, the right to adequate medical care, the right to sufficient schooling, as well as the rights of every farmer and every businessman. Used thus broadly, the term encompasses all the external conditions which can be judged indispensable to leading a decent human life.

Roosevelt explicitly declared that the promotion of the general economic welfare and the implementation of specifically economic rights were necessary if “true individual freedom” is to thrive. More than that, such measures are indispensable if the pursuit of happiness by every human being is to be more than an ineffectual right. The participation by every human being in the general economic welfare and the recognition of his basic economic rights provide him with the enabling means or facilitating conditions without which he must inevitably be impeded if not totally frustrated in his effort to pursue happiness—to make a good life for himself.

A government cannot guarantee to all the attainment of happiness; it cannot even provide them with all the conditions that they need for a modicum of success in the effort to live humanly well, such as moral virtue and the gifts of good fortune; but the one thing it can do, and do effectively, is to provide human beings with the external conditions they need in order to lead decent human lives—economic goods or benefits of all sorts in addition to civil peace, political liberty, and a just social order.

The whole of Roosevelt’s State of the Union Address in 1944 charges Congress with the task of doing distributive justice. To assure to all “equality in the pursuit of happiness” is a work of justice. All human beings, equally in possession of the inherent human right to pursue happiness, can rightfully expect from the political society of which they are members and from the government of which they are together constituents, proportionately

equitable support in their exercise of that right. Justice requires government to promote the general welfare, understood as an equitable participation by all in the economic or other external goods which are judged indispensable to the pursuit of happiness. All human beings should have an equal opportunity to fare well in that pursuit.



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