Social Security and The General Welfare

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One of the principal concerns raised by opponents of the Constitution during the ratification process was that the general welfare clause in Article 1, Section 8 would grant the federal government virtually unlimited scope in providing for the general welfare of the states and their citizens. On a first pass, it seems that the critics' concerns were warranted; the word "general" in general welfare is ambiguous and susceptible to a wide range of interpretations.

To still the concerns of the critics, James Madison wrote the following in Federalist 41:

> Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general expressions just cited, the authors of the objection might have had some color for it… But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows and is not even separated by a longer pause than a semicolon? ... For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars.[1]

In referring the critics to the enumerated powers that immediately follow the general welfare clause, he leaves no room for doubt that Congress is not authorized to transgress the bounds of their enumerated powers. The general welfare clause is not a delegation to Congress of "unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare."[2]

The reason for an explicit enumeration of Congressional powers is that Hamilton, Madison, and many other founding fathers appeared more concerned with legislative overreach than Executive or Judicial overreach, given the breadth of powers entrusted to the Legislature. In Federalist 48, Madison states: "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."[3] He goes on to say: "The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."[4]

In Federalist 71, Hamilton remarks: "The tendency of the legislative authority to absorb every other, has been fully displayed and illustrated by examples in some preceding numbers. In governments purely republican, this tendency is almost irresistible. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves…"[5]

In light of this, it is curious that the constitutionality of the Social Security Act is an issue that is virtually never countenanced by members of the political elite in this country, at least not

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[1] James Madison, *The Federalist No. 41*, in *The Federalist Papers*, ed. Clinton Rossiter (New York: Signet Classics, 2003), 259.
[2] Ibid, 258 - 259.
[3] James Madison, *The Federalist No. 48*, in *The Federalist Papers*, ed. Clinton Rossiter (New York: Signet Classics, 2003), 306.
[4] Ibid, 306 – 307.
[5] Alexander Hamilton, *The Federalist No. 71*, in *The Federalist Papers*, ed. Clinton Rossiter (New York: Signet Classics, 2003), 432.

publicly. The scarcity of official opinions regarding this matter may well be explained by two facts: that the constitutionality of Social Security has been upheld by the Supreme Court on more than one occasion, and the vanishingly small probability that the Social Security program will ever be terminated, given how deeply ingrained into our national fabric it has become. The Act encompassed not just the old-age program, but unemployment insurance and, eventually, Medicare and Medicaid. The purpose of this paper is to examine the constitutionality of the old-age program.

In delivering the opinion of the court that upheld the constitutionality of the Act in Helvering v. Davis, the Court leaned heavily on the general welfare clause in their decision. Justice Benjamin Cardozo wrote: "Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times."[6]

Indeed, it is surely the case that the Constitution must be amended over time as exigencies present themselves. Madison acknowledges this in Federalist 43: "That useful alterations will be suggested by experience could not but be foreseen."[7] However, it is surely not the case that simply because "what is critical or urgent changes with times," Congress has leeway to flout its enumerated powers to legislate into existence anything that it deems "critical" for the present times. Madison and the founders anticipated that "what is critical or urgent changes with time," and that these changes would need to be accommodated. However, the *means* granted by the framers of the Constitution for making those accommodations was not wanton acts of congressional legislation, but the provision of *amendments* to the Constitution, which must be ratified by three-fourths of the state legislatures.

In Steward Machine Company v. Davis, a separate case involving Social Security, Justice McReynolds (dissenting) quoted President Franklin Pierce's veto message that he sent to the Senate in regards to the Bill for the Benefit of the Indigent Insane. In proposing this legislation, Congress appealed to the same "general welfare" clause for justification. Pierce responded by pointing out that: "It can not be questioned that if Congress has power to make provision for the indigent insane without the limits of this District, it has the same power to provide for the indigent who are not insane, and thus to transfer to the Federal Government the charge of all the poor in all the States… The whole field of public beneficence is thrown open to the care and culture of the Federal Government."[8]

Madison himself practiced what he preached on this head. Toward the end of his tenure as President, he encouraged his friends in Congress to pave the way for a set of government-sponsored public works projects, which included the building of roads and canals that the country desperately needed at the time. In response to the President's prodding, Congress passed the "Bonus Bill," which was intended to use funds flowing into the Treasury from the Second Bank of the United States to fund these projects. When this bill reached his desk, he vetoed it.

Why would Madison torpedo a piece of legislation that was the offspring of his own admonition? The reason, according to Madison in his veto message, is that "the legislative

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[6] *Helvering v. Davis*, 301 U.S. 619, 641 (1937).
[7] James Madison, *The Federalist No. 43*, in *The Federalist Papers*, ed. Clinton Rossiter (New York: Signet Classics, 2003), 275.
[8] *Steward Machine Co. v. Davis*, 301 U.S. 548, 601 - 602 (1937).

powers vested in Congress are specified and enumerated in the eighth section of the first article of the constitution; and it does not appear that the powers proposed to be exercised by the bill is among the enumerated powers; or that it falls by any just interpretation, within the power to make laws necessary and proper for carrying into execution those or other powers vested by the constitution in the government of the United States."[9] He explained that enabling Congress to subsidize these internal improvements projects (that would greatly benefit Americans) "would have the effect of giving to Congress, a general power of legislation, instead of the defined and limited one hitherto understood to belong to them; the terms 'common defence and general welfare' embracing every object and act within the purview of a legislative trust."[10]

Madison's successor to the chief magistracy, James Monroe, echoed this same sentiment in his Annual Message to Congress on December 2nd, 1817. He began by acknowledging the utility of public roads and canals: "When we consider the vast extent of territory within the United States, the great amount and value of its productions, the connection of its parts, and other circumstances on which their prosperity and happiness depend, we can not fail to entertain a high sense of the advantage to be derived from the facility which may be afforded in the intercourse between them by means of good roads and canals."[11] He then proceeded to share his opinion on the matter of whether or not Congress has the right to appropriate funds for the construction of these public works: "Congress do not possess the right. It is not contained in any of the specified powers granted to Congress, nor can I consider it incidental to or a necessary means, viewed on the most liberal scale, for carrying into effect any of the powers which are specifically granted."

If the general welfare clause is to be interpreted without regard to the "particulars" enumerated immediately afterward, for the purpose of bringing the Constitution up to date with the "critical or urgent" matters of the times, then anything that can be justified as a contribution to the "general welfare" can be legislated into reality by Congress, making the enumeration of powers utterly superfluous. It is inconceivable that the founders intended to vest such potential for despotism in the legislature, the very branch of government whose habit of arrogating powers to itself was not only known to them, but feared to such a degree that they repeatedly warned about it and built bulwarks against it in the Constitution. Hence, the general welfare clause is properly interpreted as *qualified*.

An honest and candid reflection on these matters requires the acknowledgment that Hamilton had a broad conception of federal power. In Hamilton's *Report on Manufactures*, he recommended the foundation of regulatory agencies for manufactured goods, as well as the governmental subsidization of key industries that were still in their infancy. Among his justifications given for such broad federal authority, he cited the general welfare clause:

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, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare" … the power to raise money is plenary and indefinite, and the objects to which it may be appropriated, are no less comprehensive than the payment of the public debts, and the providing for the common defence and general welfare. The terms "general welfare" were doubtless intended to signify more than

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[9] James Madison, March 3, 1817: *Veto Message on the Internal Improvements Bill*, Miller Center, University of Virginia.
[10] Ibid.
[11] James Monroe, *First Annual Message*, December 2, 1817, Miller Center (University of Virginia online).

was expressed or imported in those which preceded; otherwise, numerous exigencies incident to the affairs of a nation would have been left without a provision. The phrase is as comprehensive as any that could have been used; because it was not fit that the constitutional authority of the Union, to appropriate its revenues should have been restricted within narrower limits than the "general welfare" and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition.[12]

Harking back to Madison's Federalist 41, what could possibly have been the point of the ensuing enumeration of powers that are delegated to Congress following the general welfare clause, "if these and all others were meant to be included in the preceding general power"? If Hamilton's reasoning is correct here, that the "general welfare" clause was intended to embrace "a vast variety of particulars, which are susceptible neither of specification nor of definition," then we should imagine the meticulous toiling of the framers over the enumeration of powers allotted to Congress in Article 1, Section 8 as nothing more than a mere sampling of the endless powers entrusted to Congress – a superfluous and ridiculous exercise.

To answer Hamilton's argument in the *Report* for a broad conception of Congressional authority, it is best that we refer to Hamilton himself in Federalist 83:

The plan of the convention declares that the power of Congress, or, in other words, of the *national legislature*, shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd as well as useless if a general authority was intended.[13]

But this is precisely Madison's appraisal of the Article 1, Section 8, which is inconsistent with Hamilton's interpretation in the *Report*. On the one hand, in the *Report*, he declares that the powers of Congress are so "vast" that they're are "susceptible neither of specification nor of definition," then on the other hand, in Federalist 83, he says that the powers of Congress "extend to certain enumerated cases." So, which one is it? That Hamilton, in Federalist 71, warned of the despotic tendencies of the Legislature to "absorb every other" authority, we ought to find his reading of Article 1, Section 8 in Federalist 83 more credulous. That he so confidently expressed that the Constitution allotted to Congress only enumerated powers, which precluded a general authority, when attempting to persuade New York to ratify, and then, out of the other side of his mouth, to have claimed that the Constitution actually vests the Legislature with powers that are "susceptible neither of specification nor definition" when it suited his ends later on, undermines the confidence one could place in his interpretation regarding the general welfare clause in his *Report*.

Madison and Jefferson both rightly recoiled to Hamilton's *Report* in disgust. Madison, in reflecting on what this meant for the Constitution, said: "If not only the means, but the objects are unlimited, the parchment had better be thrown into the fire at once."[14] Hamilton's usage of the general welfare clause in this instance, if exploited as precedent going forward, would grant Congress authority to pursue unlimited *ends* as it saw fit. Jefferson perceived the designs behind Hamilton's *Report* as a means to unlimited ends in that it would have "permitted Congress to take everything under their management which *they* should deem for the public welfare."[15]

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[12] Alexander Hamilton, *Report on Manufactures*, 1791, Constitution.org, 17.
[13] Alexander Hamilton, *The Federalist No. 83*, in *The Federalist Papers*, ed. Clinton Rossiter (New York: Signet Classics, 2003), 496.
[14] Dumas Malone, *Thomas Jefferson and His Time*, vol. 2, p. 430.
[15] Jefferson, *Anas of Thomas Jefferson*, p. 55.

In Jefferson's response to Hamilton's plans for the Bank of the United States, he made clear that legislation must meet the litmus test of the necessary and proper clause. "A measure" must be "more than just *convenient* in executing powers granted to the federal government: it had to be truly *necessary* – that is, indispensable."[16] Jefferson believed that "to take a single step beyond the boundaries thus specifically drawn … is to take possession of a boundless field of power, no longer susceptible of any definition."[17]

When Chief Justice John Marshall's Court handed down its landmark decision in *McCulloch v. Maryland*, a veritable firestorm erupted in Virgina in response. Marshall's court subscribed to Daniel Webster's reasoning that the necessary and proper clause entailed that Congress must deem a law "Best and most useful," not "absolutely indispensable," in passing legislation for the general welfare.

Aside from the semantic question of how the word "necessary" is more synonymous with "best and most useful" than "absolutely indispensable," contemporaries, such as Judge of the Virginia Supreme Court of Appeals, Spencer Roane, saw this reasoning as the "expunge[ment]" of "those words from the Constitution… [by] reading them in a sense entirely arbitrary with the reader."[18] Roane went further by stating: "That man must be a deplorable idiot who does not see that there is no earthly difference between an unlimited grant of power, and a grant limited in its terms, but accompanied with unlimited means of carrying it into execution."[19]

James Madison speculated that the logic of the court's broad interpretation of the necessary and proper clause would give license to Congress to flout the authorities granted to the Judiciary to check the Legislature:

> Is there a Legislative power, in fact, not expressly prohibited by the Constitution, which might not, according to the doctrine of the Court, be exercised as a means of carrying into effect some specified power? Does not the Court also relinquish, by their doctrine, all control on the Legislative exercise of unconstitutional powers? According to that doctrine, the expediency and constitutionality of means for carrying into effect a specified power, are convertible terms; and Congress are admitted to be the judges of the expediency. The Court certainly can not be so; a question, the moment it assumes the character of mere expediency or policy, being evidently beyond the reach of Judicial cognizance.[20]

The dangers that Jefferson, Madison, Monroe, and Pierce apprehended in such broad constructions of the Constitution are well encapsulated in Justice Cardozo's delivery of the court opinion. If the basis for upholding the constitutionality of the Social Security Act, per the Supreme Court's decision in 1937, is that "Congress may spend money in aid of the 'general welfare'," [21] then surely the construction of a network of roads and canals, or the earmarking of 10 million acres of federal land for the indigent insane, is also constitutional. One could conceive of arguments that justify the construction of canals and roads on the grounds that they provide for the common defense, the provision of which is justified under the necessary and proper

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[16] Ron Chernow*, Alexander Hamilton.* New York: Penguin Books, (2005), 352.
[17] Ibid.
[18] Kevin Gutzman, *The Jeffersonians: The Visionary Presidencies of Jefferson, Madison, and Monroe*. New York: St Martin's Press, (2022), 431.
[19] Ibid, 430 – 431.
[20] *JM to Spencer Roane*, September 2, 1819, PJMRS, 1:500-03
[21] *Helvering v. Davis*, 301 U.S. 619, 619 (1937).

clause. However, several presidents, three of whom were founding fathers, and one of whom who has been dubbed the "Father of the Constitution," saw through this sophistry.

Congress, through a unilateral act of legislation, doesn't have any semblance of authority to pass such legislation, since it is not delegated to them in the finite, enumerated powers laid out in the Constitution. If the Constitution didn't provide our Legislature the authority to build roads and canals in the late 18th and early 19th centuries, then neither did it afford the Legislature the power to create a national pension scheme in the 20th century.

One may respond to this by saying: "the Constitution isn't frozen in 1787, it's designed to serve as a framework for governance with enduring relevance." But that is precisely the purpose of *amendments*, which was the provision given by the framers to the people for the purpose of securing the enduring relevance of the Constitution. It is not the business of Congress to keep the Constitution "up to date."

So, what's the difference between the cases of roads, canals, land set aside for the indigent insane, and the case of pensions? There is no clear difference in principle. If Congress, without an amendment to the Constitution, can simply legislate into existence a national pension scheme in a way that "does not contravene the limitations of the Tenth Amendment,"[22] then the logic of the majority opinions of the Supreme Court in Steward Machine Company v. Davis and Helvering v. Davis certainly enable Congress to pass legislation that gives us these other items as well.

It is unfortunate how the constitutionality of Social Security continues to go unquestioned and unchecked, even by legal scholars. Once one becomes acquainted with the intentions of the framers of the Constitution, it isn't difficult to apprehend the fact that they would find the Social Security Act unconstitutional, and therefore the entire program as it stands today. The powers of Congress are "few and defined."[23] To raise taxes for the funding of a national pension program is not an element of the few and defined powers of Congress, nor has an amendment been made to the Constitution that would give them this power. Therefore, the congressional legislation that brought our Social Security program into existence is unconstitutional. Anyone who cherishes our Constitution and is opposed to the notion that it is a living document, malleable to every wind of doctrine that sweeps through our society at any given time, ought to at least question the constitutionality of the program. Otherwise, the document can be violated at will and becomes a constitution in name only; a worthless document that "had better be thrown into the fire at once."

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

[23] James Madison, *The Federalist No. 45*, in *The Federalist Papers*, ed. Clinton Rossiter (New York: Signet Classics, 2003), 289.