THE SPENDING POWER OF CONGRESS — APROPOS THE MATERNITY ACT

THE report that there is to be a concerted effort on the part of certain states [1] to challenge the constitutionality of the Sheppard-Towner Act of November 23, 1921, "for the promotion of the welfare and hygiene of maternity and infancy and for other purposes," [2] revives a constitutional issue which once engrossed the attention of the country but of which little has been heard for a generation or more — the question of the scope of Congress's power of expenditure with respect to funds raised by national taxation. Briefly, the Act just referred to stipulates for the appropriation through a term of years of certain sums of money, to be expended under the direction of the "Children's Bureau" of the Department of Labor, in coöperation with certain state agencies, within — for the most part — states which, through their legislatures, accept the provisions of the Act and duplicate their assigned portion of the national appropriation. So far as the constitutional questions raised by it are concerned, the Act is not dissimilar in character to the still pending Towner-Sterling Education Bill, which in turn is the culmination of a series of measures whereby the national government has, since the year 1900, entered more and more upon a policy of subsidizing education within the states from the national revenues. These measures are treated below in their proper historical setting.

So far as I can gather from an opinion which was rendered by the Attorney-General of Massachusetts last May in response to inquiries from the Senate and House of Representatives of the Commonwealth, the constitutional objections levelled against the Maternity Act are four in number: (1) that it tends to defeat the general purposes of the Constitution to establish a federal government with limited and enumerated powers; (2) that it tends to invade the field of powers reserved to the states by the

[1] Maine and Massachusetts have been mentioned in this relation.

[2] 42 STAT. AT L., c. 135, p. 224.

Tenth Amendment [3]; (3) that it is in excess of the power granted Congress by Article I, Section VIII, Clause 1, of the Constitution [4]; (4) that acceptance of the terms of the Act by a state would be void as amounting to an abdication of the state's sovereignty.[5] The bulk of this paper will be devoted to the third objection; the fourth will be considered briefly at the close of it; the first and second objections may be disposed of in a paragraph.

It is an inaccurate terminology which characterizes the central government as "a federal government." The Constitution establishes a federal system with a *national government* at its center. However, there is no need to quarrel about words; the main point to be made clear is that not even the Supreme Court is entitled to set aside acts of Congress on some vague theory of the purpose or spirit of the Constitution, in the face of its specific terms. Thus, whatever else may be said about the federal system — and everybody no doubt has his notion of it — one feature of it is undeniable, namely, that the national government has been invested by the Constitution with certain powers. Where, therefore, any such investment of power has been effected in plain terms, other affirmations respecting the federal system must be made in deference thereto.[6] And similarly

[3] "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."

[4] Quoted *infra*, p. 550.

[5] Attorney-General Allen opines that it might be difficult for a state which had voluntarily accepted the act to raise the question, whereas a state which had not would not have surrendered any sovereignty. Whether a tax-payer's suit would stand on a better footing is also questionable. See Wilson *v.* Shaw, 204 U. S. 24 (1906). On the other hand, it would seem that the court might permit a state to represent before it the consolidated interest of its citizens as tax-payers. See *e.g.* Georgia *v.* Tenn. Copper Co., 206 U. S. 230 (1907). And once the case was in court it is probable that the state might raise the question of the effect of the act, if accepted by it, on its sovereignty. See Missouri *v.* Holland, 252 U. S. 416 (1920), apparently overruling Georgia *v.* Stanton, 6 Wall. (U. S.) 50 (1867), as to the power of the court to protect a state in its political rights.

[6] The recent decisions of the court in the Child Labor Cases, Hammer *v.* Dagenhart, 247 U. S. 251 (1918); Bailey *v.* Drexel Furniture Co., 42 Sup. Ct. Rep. 449 (1922), invite criticism on this very point. They seem to have been predicated on the theory that the national government may exercise its constitutional powers for relatively few purposes, not specified at present, but to be defined, as cases arise, by the court. Any such notion is untenable for three reasons: first, because it invokes a vague "spirit of the Constitution" to the

as to the Tenth Amendment; its very phraseology makes clear its inapplicability as a test of the scope of the delegated powers of the national government — a fact only reinforced by Article VI, Paragraph 2. In words uttered by Madison early in the history of the Constitution [7]: "Interference with the powers of the states is no constitutional criterion of the power of Congress. If the power is not given, Congress can not exercise it; if given, they may exercise it, although it shall interfere with the laws or even the constitutions of the states."

Let us turn, therefore, to the actual wording of the Constitution. The provision pertinent to our inquiry is Article I, Section VIII, Clause 1, which reads as follows:

"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; but all duties, imposts, and excises shall be uniform throughout the United States."

The phrase which demands special scrutiny is that which authorizes Congress to "provide," in some way or other, "for the general welfare." Our inquiry is therefore twofold: by what *means* precisely may Congress provide for the "general welfare"; and what *is* the "general welfare"? The first question may be dealt with rather briefly; but the second involves an extensive examination into congressional and presidential opinion, for thus far this is not a field in which the court has interposed.

While the Constitution was before the country for ratification certain of its opponents charged that the phrase "to provide for the general welfare" was intended as a sort of legislative joker, which was designed, in conjunction with the "necessary and proper" clause, to vest Congress with power to provide for whatever it might regard as the "general welfare" by any means

overthrow of its clear wording; secondly, because it deprives the national government of that sovereignty which the best authority, *e.g.*, Chief Justice Marshall in Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1 (1824) has always attributed to it within the range of its designated powers; thirdly, because, by the same sign, it claims for the court a right of interposition within the acknowledged field of legislative discretion. *Why* a particular power of government should be exercised has hitherto usually been regarded as a question not of law but of policy, and such it must remain unless we wish to see the Supreme Court erected into a third house of Congress.

[7] 2 ANNALS OF CONGRESS, 1891.

deemed by it to be "necessary and proper."[8] The suggestion was promptly repudiated by advocates of the Constitution,[9] and it is clearly unallowable. In the first place, the phrase stands between two other phrases, both dealing with the taxing power, — an awkward syntax on the assumption under consideration. In the second place, the phrase is coördinate with the phrase "to pay the debts," which means the debts of "the United States" at the end of the clause, and which designates a purpose of money expenditure only. In the third place, the suggested reading, by endowing Congress with practically complete legislative power, makes useless the succeeding enumeration of specific powers. This last at least is a fatal objection, and we must therefore accept Jefferson's contention, in his Opinion on the Bank,[10] that the power to lay taxes to provide for the general welfare of the United States is the power "to lay taxes *for the purpose* of providing for the general welfare. For," as he continues, "the laying of taxes is the *power,* and the general welfare the *purpose,* for which the power is to be exercised. Congress are not to lay taxes *ad libitum,* for any purpose they please; but only to pay the debts, or provide for the welfare of the Union. In like

[8] See 1 STORY, COMMENTARIES, 5 ed., §§ 907, 908, and references. According to Gallatin, speaking in 1798, Gouverneur Morris attempted as a member of the Committee of Style, to throw the words "to provide" etc., "into a distinct paragraph, so as to create not a limitation, but a distinct power." 3 FARRAND, RECORDS OF THE FEDERAL CONVENTION, 379. A similar accusation was brought against J. Q. Adams in 1819, because of the punctuation of the clause in the edition of the Journal of the Convention which was published by the government that year. 6 MEMOIRS, 121–127. For two diverse punctuations of the clause as it came from the Committee on Style, see 2 FARRAND, *op cit.,* 569 and 594. The history of the clause in Convention is related by Madison in his letter of Nov. 27, 1830, to Speaker Stevenson, 2 *op. cit.,* 483 *et seq.;* 9 WRITINGS OF JAMES MADISON, Hunt ed., 411 *et seq.* The accompanying "Memorandum" gives further data on the subject of punctuation. The idea that the "general welfare" clause effects a grant of general powers was reasserted only a few years ago by the editor of the AMERICAN LAW REVIEW. See 30 AM. L. REV. 787–790.

[9] 1 STORY, *op. cit.* § 908, and citations.

[10] 1 STORY, *op. cit.* § 926; 3 WRITINGS, Memorial ed., 147–149. The date of the document is Feb. 15, 1791. Further along in the same paper Jefferson says: "It was intended to lace them [Congress] up strictly within the enumerated powers, and those without which, as means, those powers could not be carried into effect." These words seem to indicate that Jefferson at this date took the Madisonian view of the "general welfare" clause. See also 7 WRITINGS, Ford ed., 492.

manner they are not to do anything they please, to provide for the general welfare; but only to lay taxes for that purpose." The clause is, in short, not an independent grant of power, but a qualification of the taxing power.

But the question still remains: What is that " general welfare " which Congress may promote by the power of taxation and expenditure? It is obviously a case where words need to be given only their literal operation to produce the broadest effect, and as we have just seen, the opponents of the Constitution gave them this operation. The same, moreover, is true of Hamilton in *Federalist,* numbers 30 and 34,[11] where, however, the " general welfare " clause is treated as qualifying the fiscal power. Madison, on the other hand, in answering the alarmist arguments of opponents of the Constitution, in *Federalist,* number 41, not only confines Congress's power to promote the general welfare to its fiscal power, but also restricts the " general welfare " which Congress may thus promote to that welfare which it may further promote by its other delegated powers. In other words, the powers of taxation and appropriation are themselves but instrumental, and accordingly enlarge the field within which the national government may act, even when it is merely spending money, not at all.[12]

The difficulty in the way of this view, which, by its author's

[11] Lodge's edition is followed. Hamilton's argument for the most part consists in urging the impossibility of foreseeing all the requirements of the *common defense.* His logic, however, is equally applicable to the *general welfare.*

[12] Besides the FEDERALIST, see Madison, " Report on the Resolutions " (1799–1800), 6 WRITINGS, Hunt ed., 354–356; and the " Veto Message " of Mar. 3, 1817, 1 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 584–585 (hereafter cited as RICHARDSON). It would seem that Madison originally formulated his peculiar view of the " general welfare " clause on rather short notice, for in setting forth the advantages to be expected from the proposed government in FEDERALIST, No. 14, he had earlier written: " Let it be remarked, in the third place, that the intercourse throughout the union will be daily facilitated by new improvements. Roads will everywhere be shortened, and kept in better order; accommodations for travellers will be multiplied and meliorated; an interiour [*sic*] navigation on our eastern side will be opened throughout, or nearly throughout, the whole extent of the Thirteen States. The communication between the Western and Atlantic districts, and between different parts of each, will be rendered more and more easy by numerous canals. . . . " The assumption seems to be that the new government will have an important hand in this work.

own admission, detracts from the literal meaning of words, has never been better pointed out than by Story in his Commentaries:

" If there are no other cases which can concern the common defence and general welfare except those within the scope of the enumerated powers, the discussion is merely nominal and frivolous. If there are such cases, who is at liberty to say, that being for the common defence and general welfare, the Constitution did not intend to embrace them? " [13]

Nor has he greater difficulty in meeting Madison's contention that the literal view of the " general welfare " clause, even if invoked only in " cases which are to be provided for by the expenditure of money, would still leave within the legislative power of Congress all the great and important measures of government, money being the ordinary and necessary means of carrying them into effect."

" The only question," Story rejoins, " is whether a power to lay taxes and appropriate money for . . . the general welfare does include all the other powers of government or even include the other powers (limited as they are) of the national government? " [14]

And he justly opines that a negative answer must be returned to both branches of the inquiry. But Madison also urged in support of his theory the fact that the phrase " common defense and general welfare " was taken from the Articles of Confederation, the idea being that it could not have been the intention of an instrument which so carefully safeguarded the " sovereignty " of the states, to vest Congress with an indefinite power of appropriation. At the same time, however, he admits that even after the adoption of the Articles, " habit and a continued expediency, amounting often to a real or apparent necessity, prolonged the exercise of an undefined authority " in this as well as in other respects.[15] In other words, given simply their literal force, the phraseology of the Articles dealing with the power of expenditure did in fact only ratify the previous practice of Congress.

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[13] 1 STORY, *op. cit.*, § 924.

[14] *Ibid.*, § 923.

[15] See the Letter of Nov. 27, 1830, cited in Note 8, *supra.*

The classic statement of the literal view of the "general welfare" clause occurs in Hamilton's Report on Manufactures,[16] in 1791. The salient part of this document reads as follows:

"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. 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. And there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, *as far as regards an application of money.*

"The only qualification of the generality of the phrase in question which seems to be admissible is this: That the object to which an appropriation of money is to be made must be general, and not local; its operation extending in fact or by possibility, throughout the Union, and not being confined to a particular spot.

"No objection ought to arise to this construction, from a supposition that it would imply a power to do whatever else should appear to Congress conducive to the general welfare. A power to appropriate money with this latitude, which is granted, too, in express terms, would not carry a power to do any other thing not authorized in the Constitution, either expressly or by fair implication."

The practical nub of Hamilton's argument was a system of bounties for selected lines of manufacture; and though it otherwise bore no fruit, it may have furnished one reason why Congress voted, the following February, a subsidy to the cod fisheries — a proposal against which Madison vainly urged his narrow doctrine of the power of expenditure.[17] Nearly five years later, Washington, in his final message to Congress, brought forward a series of recommendations implying the possession by Congress of the broadest discretion in expenditure. The following passages from this document are especially noteworthy:

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[16] 4 WORKS, Lodge ed., 70, 151.

[17] See 1 BENTON, ABRIDGMENT, 350 *et seq.*

" Congress have repeatedly, and not without success, directed their attention to the encouragement of manufactures. The object is of too much consequence not to insure a continuance of their efforts in every way which shall appear eligible. As a general rule, manufactures on public account are inexpedient; but where the state of things in a country leaves little hope that certain branches of manufacture will for a great length of time obtain, when these are of a nature essential to the furnishing and equipping of the public force in time of war, are not establishments for procuring them on public account to the extent of the ordinary demand for the public service recommended by strong considerations of national policy as an exception to the general rule?

" It will not be doubted that with reference either to individual or national welfare agriculture is of primary importance. In proportion as nations advance in population and other circumstances of maturity this truth becomes more apparent, and renders the cultivation of the soil more and more an object of public patronage. Institutions for promoting it grow up, supported by the public purse; and to what object can it be dedicated with greater propriety? . . .

" I have heretofore proposed to the consideration of Congress the expediency of establishing a national university. . . .

" True it is that our country, much to its honor, contains many seminaries of learning highly respectable and useful; but the funds upon which they rest are too narrow to command the ablest professors in the different departments of liberal knowledge for the institution contemplated, though they would be excellent auxiliaries.

" Amongst the motives to such an institution, the assimilation of the principles, opinions, and manners of our countrymen by the common education of a portion of our youth from every quarter well deserves attention. The more homogeneous our citizens can be made in these particulars the greater will be our prospect of permanent union; and a primary object of such a national institution should be the education of our youth in the science of *government*. In a republic what species of knowledge can be equally important and what duty more pressing on its legislature than to patronize a plan for communicating it to those who are to be the future guardians of the liberties of the country? " [18]

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[18] 1 RICHARDSON, 201–202. The fact that the proposed national university would have been established in the District of Columbia does not, of course, alter the Constitutional question so far as Congress's power of expenditure is concerned; since the expenditure would have been, not for local governmental purposes, under Sec. VIII, cl. 17 of Article I, but in furtherance of the " general welfare."

Here are three suggestions — manufactures on public account, encouragement to agriculture, a national university — none of which can be vindicated except by reference to the "general welfare" clause. It is worth noting Madison's complaint that a report of a committee of Congress, in January 1797, supporting the President's recommendations in behalf of agriculture, received not "the slightest mark of disapprobation from the authorities to which it was addressed." [19]

A few months later the Virginia and Kentucky Resolutions were promulgated, the theory of which was essentially that the Constitution, being a compact of sovereign states, reserved to the latter a mediating function between the people and the national government. It followed of course that the national government, before undertaking within the boundaries of the states any new or unaccustomed activity, must secure their consent. Indeed it was insisted that the "necessary and proper" clause implied this requirement, since no matter how *necessary* a measure might be as a means to a constitutional end, *propriety* required that the state or states most immediately concerned should be consulted; [20] and this doctrine was felt to be especially applicable to the construction by the national government of public works within the states, on account of the possibility — exaggerated by Madison, but evidently present — that national expenditures would carry with them jurisdictional consequences. Thus from the outset the question of "internal improvements" — which for the most part was the form assumed by the broader issue of Congress's spending power between the election of Jefferson and the Civil War — became involved with the doctrine of "state consent," and so it continued for nearly two decades.

The opening chapter in the history of internal improvements is the story of the compact, as it may be properly termed, under which Ohio was admitted to the Union in 1802.[21] In return for

[19] 6 WRITINGS, 355–356.

[20] 2 AMERICAN STATE PAPERS (Miscel.), 443.

[21] The early history of internal improvements is sufficiently sketched for our purposes in Monroe's "Views of the President of the United States," etc., of May 4, 1822, 2 RICHARDSON, 144 *et seq.* Special studies of important phases of the subject are the following: J. S. YOUNG, A POLITICAL AND CONSTITUTIONAL STUDY OF THE CUMBERLAND ROAD; DAVID WALTER BROWN, THE COMMERCIAL POWER OF CONGRESS, App. I; and LINDSAY ROGERS, THE POSTAL POWER OF CONGRESS, 61–96. See also Notes 83 and 84, *infra.*

a grant of lands to each township for free schools and a pledge on the part of the national government to use five per cent of the money raised from the sale of lands within the state for the construction of roads between Ohio and the seaboard states, Ohio was required not to tax the public lands which should be sold within its borders for a term of five years after sale. The following year by an amendatory act Congress provided further that three per cent of the net proceeds from land sales in Ohio should be turned over "to such persons as might be authorized by the legislature of the state, to be applied to the laying out, opening, and making of roads within the state." Three years later the famous Cumberland road, which was to run from a point in Maryland to Ohio, was authorized by Congress. The act specified various features of the construction and stipulated that the consent of the states affected should be obtained. All these acts received Jefferson's approval; as also, presumably, did Gallatin's ambitious project, put forth in 1808, which called for a great canal from North to South along the Atlantic coast and a vast system of interior communications between the Atlantic on the one hand and the Great Lakes and Western rivers on the other. The scheme proved abortive; but notwithstanding, the national government opened, between the years 1806 and 1817, some eleven roads in various parts of the country — most of them log roads, to be sure, but good constitutional precedents for all that.[22]

Meantime, in December 1816, there had been introduced into Congress a measure which called for the segregation of the bonus from the recently chartered National Bank and of the government's share of the Bank's dividends as a permanent fund pledged to internal improvements. This was the celebrated Bonus Bill, and its sponsor was John C. Calhoun, who at this stage was one of the most thoroughgoing nationalists in the country. Undertaking the defense of the measure in the House,[23] Calhoun recited two objections of a constitutional nature: "First, that they were to cut a road or canal through a state

[22] For most of the above data, see 2 RICHARDSON, 169–171; on Gallatin's scheme, see 4 HENRY ADAMS, HISTORY OF U. S., 364–365. For many features of Gallatin's plan, however, Jefferson thought a constitutional amendment necessary. See 1 RICHARDSON, 456.

[23] 5 BENTON, ABRIDGMENT, 706–707.

without its consent; and next that the public moneys can only be appropriated to effect the particular powers enumerated in the Constitution." The first objection, he answered, did not apply, and at any rate was hardly worth discussing, " since the good sense of the states might be relied on. They will," he continued, " in all cases readily yield their consent." Indeed the thing to be feared was " in a different direction; in a too great solicitude to obtain an undue share to be expended within their respective limits." As to the second point, he cited both the tax clause and the postal clause. Granting the objection, did not the power to establish post roads comprehend more than the power merely to designate them? But his principal reliance was on the other clause.

" He was no advocate for refined arguments on the Constitution. The instrument was not intended as a thesis for a logician to exercise his ingenuity on. It ought to be construed with plain good sense. . . . If the framers had intended to limit the use of money to the powers afterwards enumerated and defined, nothing could be more easy than to have expressed it plainly."

Furthermore,

" the habitual and uniform practice of the government coincided with his opinion. Our laws are full of instances of money appropriated without any reference to the enumerated powers. We granted, by a unanimous vote, or nearly so, fifty thousand dollars to the distressed inhabitants of Caraccas and a very large sum, at two different times, to the Saint Domingo refugees. If we are restricted in the use of our money to the enumerated powers, on what principle, said he, can the purchase of Louisiana be justified? To pass over many other instances, the identical power which is now the subject of discussion, has, in several instances, been exercised. To look no further back, at the last session a considerable sum was granted to complete the Cumberland road. In reply to this uniform course of legislation, Mr. C. expected it would be said, that our constitution was founded on positive and written principles, and not on precedents. He did not deny the position; but he introduced these instances to prove the uniform sense of Congress, and the country (for they had not been objected to), as to our powers; and surely, said he, they furnish better evidence of the true interpretation of the constitution, than the most refined and subtle arguments."

In the course of his administration Madison had permitted repeated infractions by Congress of the strict constitutional doctrine which, as we have seen, he had developed at the outset with respect to Congress's spending power; but the far-reaching scheme of the Bonus Bill seems to have revived his original scruples in all their intensity. His veto of the bill was accompanied by a message in which he traversed the principal constitutional arguments in behalf of the measure.[24] Alluding to the commerce clause, which had been brought forward in the course of the debate for the first time as furnishing a constitutional warrant for internal improvements by the national government, he denied that it could "include a power to construct roads and canals, to improve the navigability of water courses in order to facilitate, promote, and secure . . . commerce"; the power granted by the clause, he contended, was merely "remedial." The "general welfare" clause he construed as he had a generation before in the *Federalist;* and he met the doctrine of state consent as follows:

> "If a general power to construct roads and canals and to improve the navigability of water courses, with the train of powers incident thereto, be not possessed by Congress, the assent of the states in the mode provided in the bill can not confer the power. The only cases in which the consent and cession of particular states can extend the power of Congress are those specified and provided for in the Constitution."

On this point at least the message is unanswerable; for while a state may undoubtedly covenant as to how it will exercise its own powers, it can not, generally speaking, surrender powers to the national government except through participation in the process of constitutional amendment. In point of fact, from this time forward the doctrine of state consent practically disappears from presidential discussions, though in other quarters it lingered on till it received its *coup de grâce* from the Civil War.

The Bonus Bill was vetoed March 3, 1817; the day following Monroe became President. In his first message to Congress the

[24] 1 RICHARDSON, 584–585. See ROGERS, POSTAL POWER, 82–88, and 91, footnote. *Cf.* Kohl *v.* U. S., 91 U. S. 367 (1875), where the doctrine is decisively rejected.

new executive took pains to give notice that he shared the constitutional views of his predecessor with respect to internal improvements, and would govern himself accordingly, unless the difficulty were met by constitutional amendment, a course which he urged.[25] But others remained unconvinced. The passage in the message just alluded to was referred to a special committee of the House, which was headed by Tucker of Virginia; and on December 15th, this committee reported.[26] It rejected the presidential version of the Constitution on all points, and even appeared to scout the doctrine of state consent. Whether by virtue of the postal clause, or the commerce clause, or by virtue of its military powers, the national government, it was asserted, had the right to construct and improve roads and cut canals, " at least with the consent of the states " affected. Passing then to the " general welfare " clause, the report continued: " It would be difficult to reconcile either the generality of the expression or the course of administration under it with the idea that Congress has not a discretionary power over its expenditures, limited only by their application to the common defense and the general welfare." As instances of past expenditures outside the range of the enumerated powers of Congress, the report mentioned the purchase of a library by the national government, of paintings, of the services of a chaplain, " liberal donations to the wretched sufferers of Venezuela," the despatch of Lewis and Clarke's expedition to the Pacific, the granting of bounties for the encouragement of the fisheries, and " the virtual bounties " which a protective tariff affords manufactures. Nor was it to be apprehended that this power would be abused " while the vigor of representative responsibility remains unimpaired. It is on this principle," the report continues, " that the framers of the Constitution mainly relied for the protection of the public purse. It was a safe reliance. It was manifest that there was no other subject on which representative responsibility would be so great." Furthermore, it was a case in which legislative discretion was absolutely necessary, " since no human foresight could discern, nor human industry enumerate the infi-

[25] 2 RICHARDSON, 18.

[26] 2 AMERICAN STATE PAPERS (Miscel.), 443; 31 ANNALS, 15th Congress, 1st Sess., 451 *et seq.*

nite variety of purposes to which the public money might advantageously and legitimately be applied. The attempt would have been to *legislate,* not frame a constitution; to foresee and provide specifically for the wants of future generations, not to frame a rule of conduct for the legislative body." At one point, however, the report does — inferentially at least — concede something to Madison's apprehensions. For it insists throughout that the states always "retain their jurisdictional rights," whatever operations the national government might undertake within their limits, and whether with or without state consent. Unfortunately, the basis on which this confident assertion was rested by the committee is not disclosed.[27]

Of the two most notable documents bearing on the question of Congress's spending power, the report just cited is one; the other being the elaborate paper, *Views of the President of the United States on the Subject of Internal Improvements,* which Monroe transmitted to the House of Representatives on May 4, 1822, in connection with his veto of a bill "For the Preservation and Repair of the Cumberland Road." [28] The distinctive feature of this bill was a provision for turnpikes with gates and tolls; and because of this fact the presidential essay — it runs to approximately 30,000 words — is shaped throughout to meet the issue which the Tucker report deliberately scouted, that of jurisdiction.

On the simple question of the right of Congress to raise and spend money Monroe owns himself to have undergone a change of views.

"It was impossible to have created a power within the Government or any other power distinct from Congress and the Executive which should control the movement of the Government in this respect and not destroy it. Had it been declared by a clause in the Constitution that the expenditures under this grant should be restricted to the construction which might be given of the other grants, such restraint, though the most innocent, could not have failed to have had injurious

[27] At the close of the debate, the House voted a resolution asserting the power of Congress "to appropriate money for the construction of postroads, military and other roads, and of canals and for the improvement of water courses." Other resolutions implying certain powers of jurisdiction were defeated by small majorities. 32 ANNALS, 15th Congress, 1st Sess., 1380 *et seq.*

[28] 2 RICHARDSON, 142–143; 144–183.

effect on the vital principles of the Government and often on its most important measures." [29]

It follows that, while "Each of the other grants is limited by the nature of the grant itself," this is limited "by the nature of the Government only." Nor can there be any doubt that "Good roads and canals will promote many very important national purposes." [30] Also, there was the plain verdict of the practice of the government from the beginning: "A practical construction, thus supported, shows that it has reason on its side and is called for by the interests of the Union. Hence, too, the presumption that it will be persevered in." [31] And,

"wherein consists the danger of a liberal construction to the right of Congress to raise and appropriate the public money? . . . Is not the responsibility of the representative to his constituents in every branch of the General Government equally strong, and as sensibly felt as in the State governments, and is not the security against abuse as effective in the one as in the other government?" In short, "My idea is that Congress has 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." [32]

But the power of appropriation is one thing, jurisdiction quite another, and the former, Monroe argues throughout, does not infer the latter. In his own words:

"The right of appropriation is nothing more than a right to apply the public money to this or that purpose. It has no incidental power, nor does it draw after it any consequence of that kind. All that Congress could do under it in the case of internal improvements would be to appropriate the money necessary to make them. For every act requiring legislative sanction or support the State authority must be relied on. The condemnation of the land, if the proprietors should refuse to sell it, the establishment of turnpikes and tolls, and the protection of the work when finished must be done by the State. To these purposes the powers of the General Government are believed to be utterly incompetent." [33]

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[29] *Ibid.*, 166.
[30] *Ibid.*, 167.
[31] *Ibid.*, 172.
[32] *Ibid.*, 173.
[33] *Ibid.*, 168.

Indeed in his veto, Monroe had put the same idea somewhat more positively:

"A power to establish turnpikes with gates and tolls and to enforce the collection of tolls by penalties, implies a power to adopt and execute a complete system of internal improvement. A right to impose duties to be paid by all persons passing a certain road, and on horses and carriages, as is done by this bill, involves the right to take the land from the proprietor on a valuation and to pass laws for the protection of the road from injuries, and if it exist as to one road it exists as to any other, and to as many roads as Congress may think proper to establish. A right to legislate for one of these purposes is a right to legislate for the others. It is a complete right of jurisdiction and sovereignty for all the purposes of internal improvement, and not merely the right of applying money under the power vested in Congress to make appropriations, under which power, with the consent of the States through which this road passes, the work was originally commenced, and has been so far executed. I am of opinion that Congress do not possess this power; that the States individually can not grant it, for although they may assent to the appropriation of money within their limits for such purposes, they can grant no power of jurisdiction or sovereignty by special compacts with the United States. This power can be granted only by an amendment to the Constitution and in the mode prescribed by it." [34]

Later Monroe illustrates his position by suggesting an analogy between the national government and a corporation. "There is not a corporation in the Union," he says, "which does not exercise great discretion in the application of the money raised by it to the purposes of its institution. It would be strange if the Government of the United States, which was instituted for such important purposes and endowed with such extensive powers, should not be allowed at least equal discretion and authority." [35] But on the other hand, it is inferred, there would be also the same subordination to the law of the state. Yet this is all on the assumption that the expenditure does not take place within the field of jurisdiction which falls to the national government by virtue of its enumerated powers; for within that field, Monroe acknowledges, national power is, by Article VI, Paragraph 2 of the Constitution, paramount over state power.

[34] *Ibid.*, 142–143. [35] *Ibid.*, 168–169.

We are thus brought to the final turn of Monroe's argument. This consists in a careful examination of those clauses of the Constitution which, when read in conjunction with the "necessary and proper" clause, confer jurisdictional powers upon the national government within the limits of the states, for the purpose of demonstrating that none of these authorizes the national government to embark upon a system of internal improvements. Thus the power of Congress "to establish post offices and post roads" is, he argues, simply the power to designate such offices and roads. "The idea of a right to lay off the roads of the United States on a general scale of improvement, to take the soil from the proprietor by force, to establish turnpikes and tolls, and to punish" despoilers of the national property would never occur to an intelligent citizen.[36] Nor was the power "to declare war" a better foundation for such pretensions. "If it had been intended that the right to declare war should include all the powers necessary to maintain war," why the specific grant of power to raise and support armies and the navy, etc.?[37] Lastly, as to the commerce clause, the claims set up under this appeared to Monroe to have the least weight of all, the delegation of power effected by this clause having been dictated mainly by the "injuries resulting from the regulation of trade by the States respectively."[38]

Monroe's argument reduces itself to the following propositions: First, Congress's power to appropriate money is an independent power, unlimited in extent so long as the purpose of its exercise is national in character; but it carries with it no rights of jurisdiction within the states, nor may the states confer such rights by their individual action. Secondly, Congress may therefore contribute money *ad libitum* toward the construction and maintenance within the states of internal improvements planned on a national scale, but all jurisdictional rights in relation to the works thus brought into existence would remain with the states. Thirdly, none of the clauses of the Constitution which confer jurisdictional rights upon the national government authorize the construction by it of public works within

[36] *Ibid.*, 157.
[37] *Ibid.*, 159.
[38] *Ibid.*, 161.

the states, even when read in conjunction with the "necessary and proper" clause.[39]

Supplemented by "Repeated, liberal, and candid discussions in the Legislature," the *Views* "conciliated the sentiments and approximated the opinions of enlightened minds upon the question of constitutional power"[40] for fully two decades. On March 3, 1823, the first Rivers and Harbors Bill became law; in April of the following year $30,000 was appropriated for the survey of such roads and canals as the President should deem to be of national importance; by the Act of March 3, 1825, was authorized a subscription of $300,000 to the stock of the Delaware and Chesapeake Canal; at the same session $200,000, together with a grant of 24,000 acres of land, was voted General Lafayette, then the country's guest. In his inaugural the younger Adams sought to fire the imagination of Congress by citing "the magnificence and splendor" of the public works "of the ancient republics." In his first message[41] he announced that surveys had been completed "for ascertaining the practicability of a canal from the Chesapeake Bay to the Ohio River," for a road from Washington to New Orleans, and for the union of the "waters of Lake Memphremagog with Connecticut River"; also, that surveys for roads in the territories of Florida, Arkansas and Michigan and from Missouri to Mexico, as well as for the continuance of the Cumberland Road, were under way or had been completed. Even so, "the great object of the institution of civil government," "the improvement of those who are parties to the social compact," was not to be accomplished exclusively by roads and canals; "moral, political, and intellectual improvements are duties assigned by the Author of Our Existence to social no less than to individual man," wherefore "governments are invested with power," the exercise of which for "the progressive improvement of the governed" "is a duty as sacred and indispensable as the usurpation of powers

[39] Congress, however, did not altogether agree with Monroe on the question of jurisdiction. See ROGERS, POSTAL POWER, 84. In support of Monroe's position is Cleveland, P. & A. R. Co. *v.* Franklin Canal Co., Federal Cases, No. 2890 (Circ. Ct., W. D. Pa., 1853).

[40] The quoted words are from J. Q. Adams' Inaugural, 2 RICHARDSON, 298–299.

[41] *Ibid.*, 299 *et seq.*

not granted is criminal and odious." Specifically, Adams, recurring to Washington's suggestion, urged a national university; national patronage of voyages of discovery, the erection of an astronomical observatory. "There are," he noted, "one hundred and thirty of these light-houses of the skies" scattered through Europe, "while throughout the American hemisphere there is not one." He also pressed the execution of the resolution of December 24, 1799, providing for a monument in the city of Washington to the Father of his Country. Nor did he doubt that the various powers of Congress were adequate to these objects; and if they were, not to utilize them "would be treachery to the most sacred of trusts." "The spirit of improvement," he concluded, "is abroad upon the earth."

"While foreign nations less blessed with that freedom which is power than ourselves are advancing with gigantic strides in the career of public improvement, were we to slumber in indolence or fold up our arms and proclaim to the world that we are palsied by the will of our constituents, would it not be to cast away the bounties of Providence and doom ourselves to perpetual inferiority?" [42]

Adams's vision outran the inclination of the country, perhaps its resources; certainly it made small appeal to the narrow imagination of the frontiersman who came after him. Nevertheless, it does not appear that Jackson rejected the broad doctrine which had been developed by Monroe as to Congress's power in the appropriation of money; on the contrary we find him attempting to foist this doctrine on Madison as well, whose veto of the Bonus Bill he interprets quite erroneously as "a concession that the right of appropriation is not limited by the power to carry into effect the measures for which money is asked." [43] On the other hand, he is very explicit that no rights of jurisdiction accompany such appropriations; and furthermore they must be for "general not local, national not state" purposes. His emphasis on this latter point, both in his celebrated veto of the Maysville Road Bill on May 27, 1830,[44] and in later communications constitutes in fact Jackson's distinctive contribu-

[42] *Ibid.*, 316.

[43] See Madison's own words on the point, 9 WRITINGS, Hunt ed., 375–376.

[44] 2 RICHARDSON, *et seq.* Other vetoes will be found *ibid.*, 493, 508, 638.

tion to the question of Congress's spending power. Moreover, a series of vetoes which he based partly on this ground and partly on the ground that there ought to be no expenditures without attendant jurisdiction, by bringing to an abrupt close all general schemes of improvement by the national government, marks an epoch in the history of the subject. Pointing out in his message of December 1, 1834, that at the time of the veto of the Maysville Road Bill there had been reported to Congress bills calling for the appropriation of $106,000,000 for internal improvements, while memorials before Congress called for projects which would have involved an expenditure of another hundred million, Jackson thus congratulated himself and the country upon his decisive stand on that occasion:

"So far, at least, as it regards this branch of the subject, my best hopes have been realized. Nearly four years have elapsed, and several sessions of Congress have intervened, and no attempt within my recollection has been made to induce Congress to exercise this power. The applications for the construction of roads and canals which were formerly multiplied upon your files are no longer presented, and we have good reason to infer that the current of public sentiment has become so decided against the pretension as effectually to discourage its reassertion. So thinking, I derive the greatest satisfaction from the conviction that thus much at least has been secured upon this important and embarrassing subject." [45]

From 1830 until the Civil War the constitutional issue centers for the most part about rivers and harbors bills, the first one of which was, as noted above, signed by Monroe in 1823. The line of precedents for such measures, however, reaches back to the beginning of the government, specifically to the Act of August 7, 1789, for the establishment and support of lighthouses, buoys, and other aids to navigation.[46] The narrow constructionist was thus presented with the problem either of distinguishing rivers and harbors bills from such measures, or if he admitted the validity of the former, of distinguishing them from internal improvements generally. Jackson, in an effort to apply his principle that appropriations must be for general not local purposes, wished to confine grants for rivers and

[45] 3 *ibid.*, 120–121. [46] 5 ibid., 263.

harbors " to places below the ports of entry or delivery established by law," [47] a test which resulted in the creation of many new ports of entry. Tyler fell back on the more general doctrine; [48] but Polk, confronted in 1846 with a bill which made provision for $1,378,450, to be applied " to more than forty distinct and separate objects of improvement," sought to erect Jackson's rule of thumb into one of constitutional obligation.[49] He also urged that such works should be accomplished by the states, which should then recoup themselves from tonnage dues [50]; and in general, it may be said, he sought to revive the doctrines of Madison's veto. Taylor and Fillmore, on the other hand, being disciples of Clay, instigated rivers and harbors appropriations;[51] while Pierce reverted once more to the Madisonian position, but with a significant difference. While he denied that Congress could make such appropriations by virtue of the " general welfare," the commerce, or postal clauses, he held them to be warrantable at times as measures of national defense and for facilitating the collection of the revenues; but the acquisition of jurisdiction should usually accompany appropriations, which it could do as to " needful buildings " in accordance with Article I, Section VIII, Clause 17; for the rest, however, the national government must content itself with the jurisdiction conferred upon it by the " admiralty and maritime " clause of Article III.[52]

Thus as we approach the Civil War, we discover it to be the tendency of presidential doctrine to return to the grounds of Madison's veto of 1817, enlarged nevertheless by an invocation of the war power. Nor did the project of a railway to the Pacific, suggested by the outcome of the Mexican War, at first

[47] 3 *ibid.*, 122.

[48] 4 *ibid.*, 330.

[49] *Ibid.*, 460 *et seq.*

[50] *Ibid.*, 616–617.

[51] 5 *ibid.*, 20 and 90.

[52] *Ibid.*, 218 *et seq.* and 259 *et seq.* Buchanan recurred to Madison's and Polk's views, *ibid.*, 601 *et seq.* Later vetoes of rivers and harbors bills have not raised the general constitutional question, but have invoked the distinction between national and local improvements. See 7 RICHARDSON, 382; 8 *ibid.*, 120; 9 *ibid.*, 677. The last reference is to Mr. Cleveland's veto of May 29, 1896, of a bill carrying an appropriation of eighty millions. The measure was passed over the veto.

alter the status of the question.[53] Both Pierce and Buchanan recommended the enterprise by reference to military necessity,[54] an argument which the outbreak of the Civil War rendered conclusive. It was not until nearly a quarter of a century later that the Supreme Court had occasion to pass upon the acts of 1862 and 1864, which called the Union Pacific and Central Pacific lines into being, but when it did so, it invoked in their behalf not merely the war power but the commerce and postal powers as well.[55]

Nevertheless, it would be a mistake to suppose that Congress's broader power of appropriation, in however bad repute theoretically, was in fact defunct, even during that period when the doctrine of strict construction was most prevalent. In 1817 a committee of Congress had reported in favor of the establishment of a bureau of agriculture, but the suggestion had, like Washington's similar proposal, fallen by the wayside. Twenty-one years later an appropriation for the "collection of agricultural statistics and other . . . agricultural purposes" was voted, and fourteen years after that the purchase and distribution of seeds, which had in fact begun as early as 1836, was specifically provided for. Meantime, in 1850, an appropriation of one thousand dollars was made for the chemical analysis of vegetable substances, and eight years after that $3500 was voted for the publication of information concerning the consumption of cotton. The Department of Agriculture itself was established in 1862, and the year following $80,000 was voted to its use, for the study of plant and animal diseases and insect pests, the culture of tobacco, silk, and cotton, irrigation, the adulteration of foods, and the like.[56] The multifarious activities of this department today, involving the annual expenditure of nearly one hundred millions, are a matter of common knowledge. Yet this expansion

[53] For the beginnings of the movement for a Pacific railway, see LEWIS H. HANEY, A CONGRESSIONAL HISTORY OF RAILWAYS IN THE UNITED STATES TO 1850, cc. XXI–XXIII.

[54] 5 RICHARDSON, 220, 457, 526, 572, 650. Taylor and Fillmore had both recommended the enterprise earlier, but with little reference to the constitutional question. *Ibid.*, 20 and 86.

[55] The leading case is California *v.* Central Pacific Ry. Co., 127 U. S. 1 (1887).

[56] For the above and other details, see WILLIAM L. WANLASS, UNITED STATES DEPARTMENT OF AGRICULTURE (38 Johns Hopkins Univ. Studies), *passim.*

seems to have stirred little if any protest on constitutional grounds, a remark which applies equally to the parallel development of the census, to the establishment of the geological and geodetic surveys, to the creation of the Fisheries Bureau, the Bureau of Mines, and the Labor Bureau (now the Department of Labor), and to the participation of the government in the business of irrigation, game preservation, etc., etc.

The entrance of the national government into the field of education, on the other hand, presents a somewhat different story, and an instructive one for our purposes. This began, as we have seen, with the provision in the act under which Ohio was admitted to the Union — a provision harking back, in turn, to the Ordinance of 1787 [57] — whereby, in return for a grant of lands to each township in the state for public schools, and other concessions, the state pledged itself to withhold its hand in the matter of taxation for a term of years as regarded land sold by the national government to settlers. Later similar compacts were entered into with other states as they were admitted into the Union. Building upon these beginnings, and animated especially by its increasing interest in agricultural development, Congress in February 1859 passed a bill the purpose of which was stated to be "the endowment, support, and maintenance of at least one college [in each State] where the leading object shall be, without excluding other scientific or classical studies, to teach such branches of learning as are related to agriculture and the mechanic arts, as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life." [58] The bill assigned to each state twenty thousand acres of land for each Senator and Representative in the existing Congress and an additional twenty thousand acres for each additional Representative to which it might become entitled under the census of 1860. In return each state was required "to provide within five years at least not less than one college, or the grant to said state" was to cease forthwith, and the state was to pay over to the United

[57] And back of that to the Ordinance of 1784, of which Jefferson was the principal author.

[58] 5 RICHARDSON, 543.

States any amounts it had received from lands previously sold. Other conditions were also specified, and the consent of the state must be communicated to the national government within two years.

The bill was upset by a presidential veto. Speaking to the constitutional issue, Buchanan wrote: "I presume the general proposition is undeniable that Congress does not possess the power to appropriate money in the Treasury, raised by taxes out of the people of the United States, for the purpose of educating the people of the respective States." [59] Any other view would mean "an actual consolidation of the federal and state governments so far as the great taxing and money power is concerned, and constitute a government of partnership between the two in the Treasury of the United States, equally ruinous to both." But, he continued, this bill is justified as an exercise by Congress of its power "to dispose . . . of the territory and other property of the United States"; the argument was unacceptable:

"It would be a strange anomaly, indeed, to have created two funds — the one by taxation, confined to the execution of the enumerated powers delegated to Congress, and the other from the public lands, applicable to all subjects, foreign and domestic, which Congress might designate; that this fund should be 'disposed of,' not to pay the debts of the United States, not 'to raise and support armies,' not 'to provide and maintain a navy,' nor to accomplish any one of the other great objects enumerated in the Constitution, but he diverted from them to pay the debts of the States, to educate their people, and to carry into effect any other measure of their domestic policy. This would be to confer upon Congress a vast and irresponsible authority, utterly at war with the well-known jealousy of Federal power which prevailed at the formation of the Constitution. The natural intendment would be that as the Constitution confined Congress to well-defined specific powers, the funds placed at their command, whether in land or money, should be appropriated to the performance of the duties corresponding with these powers. If not, a Government has been created with all its other powers carefully limited, but without any limitation in respect to the public lands." [60]

Nor was this all; for some of "these lands were paid for out of the Treasury from money raised by taxation. Now if Congress

[59] *Ibid.*, 547. [60] *Ibid.*, 548.

had no power to appropriate the money with which these lands were purchased, is it not clear that the power over the lands is equally limited? . . .

" If this were not the case, then by the purchase of a new territory from a foreign government out of the public Treasury, Congress could enlarge their own powers and appropriate the proceeds of the sales of the land thus purchased, at their own discretion, to other and far different objects from what they could have applied the purchase money which had been raised by taxation." [61]

Three years later the Morrill Act, embodying substantially the provisions which Buchanan had vetoed, but increasing the donation of lands for each representative in Congress from twenty to thirty thousand acres, became law.[62] An amendment in 1866 extended its benefits to newly admitted states, and today there is probably not a state in the Union which has not long since accepted it. The Bureau of Education was created in the Department of the Interior in 1867 — in part, no doubt, as an outcome of the Freedmen's Bureau. In 1870 we find President Grant urging an appropriation of proceeds from the sale of public lands to educational purposes, a recommendation which was renewed by his immediate successors,[63] and led finally to the enactment of the Act of 1890. By this statute donations amounting eventually to $25,000 per annum were to be made to each state and territory " for the more complete endowment and maintenance of colleges for the benefit of agriculture and the mechanic arts," already established or to be established in accordance with the Morrill Act. The grant was made subject to certain conditions designed to secure equitable participation by colored students in its benefits and to the legislative assent of the several states and territories.[64]

Thus was the transition effected from donations of land to donations of money, though the latter were still confined to proceeds from land sales. Meantime, in his message of 1882, President Arthur, asserting that " the census returns disclose an alarming state of illiteracy in certain portions of the country,

[61] *Ibid.*, 549.
[62] Act of July 2, 1862, c. 130, 12 STAT. AT L. 503.
[63] 7 RICHARDSON, 152, 203, 606, 626; 8 *ibid.*, 58.
[64] Act of August 30, 1890, 26 STAT. AT L. 417.

where the provision for schools is grossly inadequate," had urged national aid on a much broader scale;[65] and in 1883 Senator Blair, chairman of the Senate Committee on Education, had introduced a bill providing for the distribution of some $77,000,000 among the states on the basis of illiteracy. The bill received strong suppport from Southern members and passed the Senate three times. Its final failure was due in part to the constitutional objection, but in greater measure to other considerations.[66] Not until 1900, did Congress make an appropriation from the general funds in aid of education within the states. By an act passed that year it was provided that whenever the receipts from the sale of public lands should be insufficient to meet the demands of the Act of 1890, the deficit should be met out of "any funds in the national Treasury not otherwise appropriated."[67] Seven years later appropriations to supplement the grants which are forthcoming under the Act of 1890 were authorized to the eventual amount of $50,000 per annum for each state and territory.[68]

And thus we are brought to the recent series of measures, which culminates in the Sheppard-Towner Act and the Towner-Sterling Bill. The first of these is the Smith-Lever Act of 1914,[69] which calls for the appropriation of increasing sums, to amount finally to more than four and one-half millions annually, for the promotion of agricultural extension work in the states and territories. The share of each state is determined by its proportion of the rural population of the country, and is conditioned on its appropriation each year of an equal sum for the same purpose. The next member of this series is the Smith-Hughes Act of 1917,[70] which authorizes on like terms appropriations to amount finally to seven millions per annum, which are to be turned over to the several states in varying proportions for the purpose of coöperating with them in the paying of salaries and the training of teachers of agricultural and industrial sub-

[65] 8 RICHARDSON, 143, 184, 253.

[66] D. R. DEWEY, NATIONAL PROBLEMS (24 THE AMERICAN NATION, N. Y., 1907), 89–90.

[67] Act of May 17, 1900, c. 479, 31 STAT. AT L. 179.

[68] Act of March 4, 1907, c. 2907, 34 STAT. AT L. 1281.

[69] Act of May 8, 1914, c. 79, 38 STAT. AT L. 372.

[70] Act of February 23, 1917, c. 114, 39 STAT. AT L. 929.

jects and of home economics. A little later, the government began rehabilitation work with disabled soldiers, and this activity no doubt is what suggested the Act of 1920, appropriating after 1921 one million dollars annually for coöperating with the states, on the now familiar fifty-fifty basis, in the vocational rehabilitation of persons disabled in industry.[71]

Meantime, in October 1918, the project originally known as the Smith-Towner Bill, but subsequently rechristened the Towner-Sterling Bill, had made its appearance. Besides providing for a national Department of Education, the measure would authorize an annual appropriation of approximately 100 million dollars, to be distributed among the states and territories in varying proportions, for the purpose of combating illiteracy, promoting Americanization, encouraging physical education, assisting the preparation of public school teachers, and most important of all, developing education in the public elementary and secondary schools. Fifty millions would be devoted to this last purpose alone; but in order to qualify for its share of this part of the appropriation, a state would be required to have a legal school term of twenty-four weeks each year, a compulsory school attendance law for children between the ages of seven and fourteen, and a law requiring that the English language should be the basic language of instruction in the common branches in all schools, both public and private. Furthermore, in order to qualify for any part of the appropriation, a state would be required to accept the terms of the act by legislative enactment and to match such sums as it received with like sums allocated to the same purposes.[72]

All these measures, actual or prospective, obviously rest on the

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[71] Act of June 2, 1920, c. 219, 41 STAT. AT L. 715. Mention should also be made in this connection of the Acts of March 3, 1879, c. 186, 20 STAT. AT L. 468; and June 25, 1906, c. 3536, 34 STAT. AT L. 460. The former appropriated $250,000 "out of money in the United States Treasury not otherwise appropriated," as a perpetual fund for the purpose of aiding the education of the blind, through the American Printing House for the Blind, which is located at Louisville, Ky. The latter commutes the income from this fund with an annual appropriation of $10,000. See also the Act of July 1, 1898, c. 546, 30 STAT. AT L. 624, for an appropriation to Howard University with conditions attached.

[72] For a copy of the bill and a survey of the discussion regarding it, both in Congress and out, see THE REFERENCE SHELF (H. W. Wilson Co., 958 University Ave., N. Y. City), No. 5. The constitutional issue seems to have occupied small

literal reading of the "general welfare" clause; whether some of them raise other questions we shall consider in a moment. But first let us turn for an instant to another class of evidence bearing on our principal topic — the views of writers.

Of all the numerous commentators on the Constitution before the Civil War, about the only one whose work has not long since found its way to the scrap-heap is Joseph Story. His great work, the official prestige of its author, his nearness to Marshall, his wide scholarship, and modern point of view have rescued him from the common fate; and as we have seen, Story rejects absolutely the Madisonian version of the "general welfare" clause. Of commentators since the Civil War, Tucker comes to the defense of the Madisonian doctrine, but supplements it — as he is compelled both by practice and judicial precedent to do — by a greatly enlarged view of Congress's powers under the commerce and postal clauses, and of the war power.[73] Hare and Pomeroy, on the contrary, follow Monroe and Story. Both assert, moreover, that while in theory national expenditures must be for national purposes, the decision as to what purposes are national lies with Congress alone; [74] a propo-

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part in the discussion. A further precedent for the coöperative features of the Sheppard-Towner Act and the Towner-Sterling Bill is furnished by the Federal Highways Act of July 11, 1916, c. 241, 39 STAT. AT L. 355, which is supplemented and extended by the Acts of February 28, 1919, c. 69, 40 STAT. AT L. 1189, and November 9, 1921, c. 119, 42 STAT. AT L. 212. Though justified under the Postal Clause, the administration of these measures is assigned to the Department of Agriculture. As amended, the act authorized an appropriation of $75,000,000 for the fiscal year of 1921. Constructions under the act are to be done in each state under the highway department thereof, subject to the inspection and approval of the Secretary of Agriculture. Before a state can qualify for its share of the national appropriation, it must, through its legislature, accept the terms of the act, a compliance which, it is recognized, will sometimes involve constitutional amendment or a popular referendum, or both. No project may be entered upon which has not first received the approval of the Secretary of Agriculture, and of the funds required half must come from the state. A state may furthermore have its share of the national appropriation cut off if it does not provide for the proper maintenance of existing constructions. Only durable types of surface and materials may be adopted; all roads constructed under the act shall be free from tolls, etc.

[73] J. R. TUCKER, THE CONSTITUTION OF THE UNITED STATES, H. St. G. Tucker ed., 478 *et seq.*

[74] 1 HARE, AMERICAN CONSTITUTIONAL LAW, 241; POMEROY, CONSTITUTIONAL LAW, 10 ed., 228–229.

sition which more recent writers,[75] by their silence on the general issue, tend to confirm, since this silence reflects the silence of the court.

Nevertheless, he would be a bold man who would assert dogmatically that legitimate occasion might never arise for judicial interposition within this field. For the court to attempt to draw the line between general welfare on the one hand and local welfare on the other would no doubt land it into grave difficulties.[76] It would next be asked to say whether the Boston Navy Yard was for the "common defense" — an embarrassing question. Indeed, the old-time distinction between "public" and "private" purpose — a distinction which has never been applied against the national Congress[77] — is none too clear

[75] The reference is to the standard works of Willoughby, McClain, Cooley, and Hall. However, Professor Burdick's THE LAW OF THE AMERICAN CONSTITUTION, which has just appeared, deals specifically with the question and takes the literal view of the "general welfare" clause, which is stated in words borrowed from Monroe's "Views."

[76] In Chief Justice Marshall's opinion in Gibbons *v.* Ogden, 9 Wheat. 1, 199 (1824), occurs the following sentence: "Congress is not empowered to tax for those purposes which are within the exclusive province of the States." These words have sometimes been cited in support of the idea that the Supreme Court might properly disallow an appropriation of Congress, in a case of which the court had jurisdiction, on the ground that such appropriation represented an invasion by Congress of the field of state power. This seems, however, a rather hasty deduction. Quite aside from the fact that the words quoted were uttered *obiter*, it is apparent that they make no contribution toward a determination of what purposes are "within the exclusive province of the States." Elsewhere in the same opinion Marshall takes account of the occasional overlapping of national and state powers in the following words: "It is obvious that the government of the Union, in the exercise of its express powers . . . may use means that may also be employed by a State in the exercise of its acknowledged powers." Thus, to apply this proposition to the present case, the national government, being vested with the express power of providing by money for "the general welfare," may do so by means employed by the states in the promotion of their local welfare — for instance, the appropriation of money for education within the states. The only question to be determined is whether education within the states is a matter of national, that is, "general" welfare; and this question, which was answered affirmatively even at the outset of the government, has certainly been settled by the course of legislation since 1862. Story quotes the *dictum* with approval. 1 COMMENTARIES, 5 ed., § 927. And that his evaluation of it is correct seems to be proved by Marshall's own approval of Monroe's "Views." See letter from former to latter, of June 13, 1822, in OSTER, POLITICAL AND ECONOMIC DOCTRINES OF JOHN MARSHALL, 179.

[77] The broad language employed in United States *v.* Realty Co., 163 U. S. 427 (1896), suggests, moreover, that it never will be. See also Field *v.* Clark, 143 U. S. 649 (1891); and Allen *v.* Smith, 173 U. S. 389 (1899).

nowadays.[78] On the other hand, some of the terms of the Towner-Sterling Bill — as for instance, that a state, in order to share the benefits of the measure, must have certain statutes on its books — suggest the theoretical possibility at least of conditions which would cut off a state from its fair share of an appropriation, ostensibly for the general welfare, on entirely arbitrary grounds. Thus, suppose an appropriation for the support of education in those states only which at the following election should choose Republican governors: Would the court, assuming it to have obtained jurisdiction of a case raising the point, be obliged to presume such an appropriation to be for the "general welfare" of the United States? But Congress's power to stipulate conditions to its bounty which do not on their face contradict the notion of a national purpose but which are clearly relevant to the main object of an appropriation must, save for the political check, be nearly unlimited. Certainly, the mere fact that an appropriation holds out an inducement to states to do something which, perhaps, they would not otherwise do, is not enough to condemn it.

We turn now for a moment to the cases — not for the light which they shed on the main issue, for that is very little, but for what they have to say on the collateral subject of jurisdiction. As we have already noted, the Supreme Court in the *Pacific Railroad Cases*[79] attributed the right of the national government to construct interstate highways to the war power and to the powers of Congress under the commerce and postal clauses. But these cases also teach, that as auxiliary to the power to construct highways, Congress may vest a corporate agent with the power of eminent domain within the states and that the national franchises of such corporations may be exempt from state taxation.[80] This question therefore arises: Would the same jurisdictional rights and immunities be claimable in connection with an appropriation warranted only under the "general welfare" clause? *United States* v. *The Gettysburg Railway Co.*,[81] in which the court, invoking this clause, unanimously sustained an exercise of the power of eminent domain in the laying out of a national

[78] See *e.g.* Green *v.* Frazier, 253 U. S. 233 (1920).

[79] 127 U. S. 1 (1887).

[80] See also Luxton *v.* North River Bridge Co., 153 U. S. 525 (1894).

[81] 160 U. S. 668 (1896).

park, seems to return an affirmative answer. The principle suggested by the decision is that Congress may take all measures which are "necessary and proper" to assure the application of an expenditure to its designated purpose. And of like implication is *Van Brocklin* v. *Tennessee*,[82] in which was asserted the immunity from taxation by a state of land acquired therein by the national government in the exercise of the latter's right "to lay and collect taxes to . . . provide for the common defense and general welfare of the United States." On the other hand, that general jurisdictional rights do not attend the right of appropriation — Madison's apprehensions to the contrary notwithstanding — seems clear. Thus suppose Congress should vote money for a school: it could under the cases just cited authorize the seizure by eminent domain of land for the building, and as national property, both land and building could be exempted from local taxation; but if attendance at the school were to be compelled it would have to be by the state, not by the national government.[83]

And so much for the argument against the Maternity Act that it exceeds Congress's power of expenditure. The question really boils down to this: What weight should be given to the

[82] 117 U. S. 151 (1885).

[83] In his brief on reargument in Smith *v.* Kansas City Title and Trust Co., 255 U. S. 180 (1921), in which the question of the validity of the Federal Farm Loan Act of July 17, 1916, c. 245, 39 STAT. AT L. 360, was involved, Mr. Hughes based his case for the validity of the act on the following propositions (p. 21):

"I. Congress has power to use the public money, and to provide for the borrowing of money, to aid in agricultural development throughout the country in accordance with the systematic and general plan to promote the cultivation of the soil, involving the application of money through loans or otherwise, and that Congress, having this power, could exercise it by the adoption of appropriate means to that end and the creation of instrumentalities for that purpose;

"II. Congress has the power to judge for itself what fiscal agencies the government needs and that its decision of that question is not open to judicial review; that Congress may create in its discretion, as it has created in this instance, moneyed institutions equipped to serve as fiscal agents of the government and to provide a market, as stated in the Act, for United States bonds."

Some of the data relied upon by Mr. Hughes in support of the first proposition are quoted in the note following. In support of the second proposition, he relied principally upon McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316 (1819), which he interpreted as permitting Congress to create corporate agencies for the purpose of applying funds appropriated by it to their designated uses, and to exempt such agencies from state taxation. The curiously narrow and illogical opinion of Mr. Justice Day for the court, sustaining the act, avoided these issues.

Madisonian doctrine that the national government's field of expenditure is precisely co-extensive with the field of its other powers? The logical difficulties in the way of this proposition were pointed out by Story and his arguments need not be repeated. The historical difficulties are not less formidable. The only period when the doctrine was at all generally accepted was that between 1845 and 1860, when state's rights principles were dominant with all sections and parties. Of the earlier Presidents every one who put himself officially on record, Madison alone excepted, avowed the literal view of the "general welfare" clause, qualified to be sure after 1800, first by the doctrine of state consent and later by a general *caveat* against jurisdictional rights following in the wake of appropriations. But neither of these qualifications touches the Maternity Act in any way, nor does the logic of later decisions support them. And the verdict to be drawn from the practice of Congress is substantially the same. The validity of "internal improvements" was finally rested on views of the war, commercial, and postal powers which had not occurred to early champions of national expenditures for this purpose, or were repudiated by them; and probably rivers and harbors appropriations may be similarly justified. Not so, however, of the ever-mounting sums which have been voted through more than eighty years for the encouragement of agriculture, and through more than sixty years — though only more recently from the general funds — for education within the states. Certain it is that any attempt to apply the Madisonian test to national expenditures today would call for a radical revision in the customary annual budget of the government and for a revolution in national administration.[84] Yet with

[84] At the risk of some repetition, I venture to quote in this connection the following passage from Mr. Hughes's brief (p. 35): "Nothing could better illustrate the accepted principle than the appropriations to aid in agricultural development. Since the year 1839 there has been a constant disbursement of public moneys in the promotion and fostering of agriculture, in disseminating information, distributing seeds, and in aiding agricultural schools. For upwards of sixty years — since the Act of 1857 (11 Stat. 226) — Congress has made provision for the distribution of cuttings and seeds. It was in that year also that provision was made for investigation as to the consumption of cotton (*id.*).

"The Department of Agriculture was established in 1862 (12 Stat. 387). The Act provided as to this department: 'the general designs and duties of which shall be to acquire and diffuse among the people of the United States useful in-

the Madisonian doctrine counted out, what other test is there with which, in any reasonably probable case, the court could confront a congressional appropriation without palpably invading the field of legislative discretion? We must conclude that into the "dread field" of money expenditure the court may not "thrust its sickle"; that so far as this power goes, the "general welfare" is what Congress finds it to be.

But even if the Maternity Act is not to be attacked with much prospect of success from the side of national power, still the question of its validity from the side of state power remains; it may, however, be disposed of very briefly. On the one hand, the states may not surrender indefinite powers, nor any valuable

formation on subjects connected with agriculture in the most general and comprehensive sense of that word, and to procure, propagate, and distribute among the people new and valuable seeds and plants.'

"The far-sighted policy of the Morrill Lands Grant Act of 1862 (12 Stat. 503) made possible through donations of public land the establishment of institutions for instruction in agriculture throughout the country. Funds have been provided to maintain bureaus of agricultural statistics, for the introduction and protection of insectivorous birds for laboratories to engage in experimentation in agricultural chemistry (12 Stat. 69). The great pests, or enemies of crops, have been the subject of constant consideration, and frequent appropriations have been made to aid in their elimination (21 Stat. 259; 40 Stat. 374).

"In 1884, the Bureau of Animal Industry was established to disseminate information as to domestic animals and their diseases (23 Stat. 277). In 1890, the weather bureau was put in charge of the Department of Agriculture (26 Stat. 653), to make readily available comprehensive information as to matters of special interest to those engaged in the cultivation of the soil.

"The Irrigation Survey was established in 1889 under the direction of the Secretary of the Interior (25 Stat. 960), and in 1913, the Bureau of Mines (37 Stat. 681).

"The scope of the activities of the Department of Agriculture now embraces those of the Weather Bureau; the Bureau of Animal Industry (including inspection and quarantine work, the eradication of scabies in sheep and cattle, tuberculin and mallein testing, experiments in animal feeding and breeding, including cooperation with State agricultural experiment stations, scientific investigations of hog cholera and other diseases of animals); the Bureau of Plant Industry (including investigations of diseases of plants, of orchard and other fruits, of forest and ornamental trees and shrubs, of soil bacteriology and plant-nutrition, of soil fertility, of plants yielding drugs, poisons and oils, of cereals and cereal disease, of sugar beets, and generally of crop production, and the purchase and distribution of valuable seeds, bulbs, shrubs, vines, cuttings and plants); the Forest Service (including various investigations in forestry); the Bureau of Chemistry (embracing various chemical and physical tests and biological investigations of food products); the Bureau of Soils (including investigations of soil types and chemical properties, of productivity. . . . etc.); the Bureau of Entomology (including investigations of insects affecting fruits, orchards, vineyards and crops); the

power indefinitely;[85] on the other hand, they may enter into compacts respecting the exercise of their powers with each other — Congress consenting — and with the national government; nor is there any apparent reason why compacts of the latter sort should not have as broad scope as those of the former.[86] The arrangement proposed by the Maternity Act is subject to discontinuance by either party at any time, and curtails the freedom of action of states entering into it no more seriously than the compact of 1802 between Ohio and the national government, which was followed by a series of similar compacts with other states, did that of those states.[87] The kind of coöperation between the national and state governments which is provided for by the Sheppard-Towner Act and its antecedents

Bureau of Biological Survey (including the investigation of the food habits of birds and mammals in relation to agriculture); the Division of Publications; the Bureau of Crop Estimates (covering all important data relating to agriculture); the States Relations Service (including farmers' coöperative demonstration work in connection with State organizations, and for the study of methods to combat the cottonboll weevil); the Office of Public Roads and Rural Engineering (including investigations as to farm irrigation and drainage and construction of farm buildings); the Office of Markets and Rural Organization (including investigations of marketing methods, studies of coöperation among farmers in rural credits and other forms of coöperation in rural communities); and the Federal Horticultural Board (see 39 Stat. 446–476; 1134–1166; 40 Stat. 973–1008).

"The federal appropriations in 1917, in support of agriculture amounted to upwards of $29,000,000, and in 1918 to upwards of $45,000,000.

"There can be no question as to the continuous practical construction of the powers of Congress to raise and appropriate money to the effect that this power is not limited to the objects enumerated in the subsequent provisions, but extends what may properly be deemed to be embraced within the general welfare as expressly provided in the clause which confers the taxing power itself.

"As Mr. Chief Justice Marshall said in McCulloch *v.* Maryland, 4 Wheat. 316, 401: 'An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.'"

[85] See Home Telephone and Telegraph Co. *v.* Los Angeles, 211 U. S. 265 (1908).

[86] According to an article in the NEW YORK TIMES of January 21, last, "Congress soon will be asked to confirm a treaty between seven Western States, with the nation as an eighth partner, which is expected to clear the way for the greatest irrigation and power project ever undertaken in this country." To the Compact of 1921 between New York and New Jersey, creating the Port Authority of the port of New York, the national government is also virtually a party. The compact involves a very extensive delegation of powers by the two states.

[87] In Stearns *v.* Minnesota, 179 U. S. 223 (1900), a compact of this character is sustained.

is entirely wholesome, entirely in harmony with early ideas of the federal system,[88] and instead of deadening state policy, directly stimulates it. The scruples raised against such co-operation in the name of state autonomy tend rather to withdraw from the states what must often prove a most advantageous mode of exercising that autonomy. Reversing the scriptural text, they would save the ghost of state sovereignty by suspending its ineffectual body at the end of a chain of fine-spun legalism.

In a word, the powers which the national government is exercising in the Maternity Act are powers which indubitably belong to it, and the powers which the states accepting the act are called upon to exercise indubitably belong to them; that the two governments should elect to exercise their respective powers for a common purpose of legitimate interest to both is certainly no constitutional objection in any sound theory of our federal system.

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[88] Note, for example, the language of Hamilton in FEDERALIST, No. 27: "The legislatures, courts, and magistrates of the respective members, will be incorporated into the operatives of the national government *as far as its just and constitutional authority extends;* and will be rendered auxiliary to the enforcement of its laws."