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Constitutional Guidance for Lawmakers

Enough Is Enough: Why General Welfare Limits Spending

Perhaps no other clause in the Constitution generated as much debate among the Founders as the "Spending Clause"—the first of the 18 powers granted to Congress under Article I, Section 8. Alexander Hamilton and James Madison, the principal authors of The Federalist, *famously disagreed about the meaning of "general Welfare" and the limits to Congress's spending power. For the past 70 years, however, this fruitful debate over the meaning of the Constitution has been replaced by the view that there are no limitations whatsoever on Congress's power to spend and that the "general Welfare" means whatever Congress says it means. Today, no project is deemed too local or too narrow not to fall under the "general Welfare" rubric. It is therefore incumbent upon Members of Congress to consider, once again, the limits of their spending power and recognize, as even Hamilton did, that it is not unlimited. This essay is adapted from* The Heritage Guide to the Constitution *for a new series providing constitutional guidance for lawmakers.*

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."
— Article I, Section 8, Clause 1

Although the Spending Clause is the source of congressional authority to levy taxes, it permits the levying of taxes for two purposes only: to pay the debts of the United States, and to provide for the common defense and general welfare of the United States. Taken together, these purposes have traditionally been held to imply and constitute the "Spending Power."

To many today, those two purposes are so broad as to amount to no limitation at all. The contemporary view is that Congress's power to provide for the "general Welfare" is a power to spend for virtually anything that Congress itself views as helpful. To be sure, some of the Founders, most notably Alexander Hamilton, supported an expansive spending power during the Constitutional Convention; but such proposals, including an explicit attempt to authorize spending by the federal government for internal improvements, were rejected by the Convention. Hamilton continued to press his case by arguing during George Washington's administration for an expansive interpretation of

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the clause (which Washington adopted). In his "Report on Manufactures" (1791), Hamilton contended that the only limits on the tax-and-spend power were the requirements that duties be uniform, that direct taxes be apportioned by population, and that no tax should be laid on articles exported from any state. The power to raise money was otherwise "plenary, and indefinite," he argued, "and the objects to which it may be appropriated are no less comprehensive."

Hamilton's broad reading met with opposition from many of the other Founders. James Madison repeatedly argued that the power to tax and spend did not confer upon Congress the right to do whatever it thought to be in the best interest of the nation, but only to further the ends specifically enumerated elsewhere in the Constitution, a position supported by Thomas Jefferson.

There was also a third, more intermediate, interpretation, recognized later even by Alexander Hamilton. According to this view, the "common Defence and general Welfare" language is not, as Madison contended, a shorthand way of limiting the power to tax and spend in furtherance of the powers elsewhere enumerated in Article I, Section 8; but it does contain its own limitation, namely, that spending under the clause be for the "general" (that is, national) welfare and not for purely local or regional benefit. President James Monroe later adopted this position—albeit with more teeth than Hamilton had been willing to give it—in his 1822 message vetoing a bill to preserve and repair the Cumberland Road. Monroe contended that Congress's power to spend was restricted "to purposes of common defence, and of general, national, not local, or state, benefit."

There are relatively few examples from the early Congresses of debate over the scope of the spending power, but the few that do exist are enlightening. The First Congress refused to make a loan to a glass manufacturer after several Members expressed the view that such an appropriation would be unconstitutional, and the Fourth Congress did not believe it had the power to provide relief to the citizens of Savannah, Georgia, after a devastating fire destroyed the entire city. The debates do not reflect whether Congress thought such appropriations unconstitutional because they did not further other enumerated powers (Madison's position) or because they were of local rather than national benefit (Monroe's position), but they reflect a rejection of the broad interpretation of the spending power originally proffered by Hamilton.

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On the other hand, some appropriations for apparently local projects were approved, but it can be argued that those projects were of general benefit or specifically tied to other enumerated powers, and hence within the authority conferred by Article I, Section 8. At the same time it was denying a request to fund the dredging of the Savannah River, for example, Congress approved an appropriation for a lighthouse at the entrance of the Chesapeake Bay. Both measures were important for navigation, but the lighthouse was of benefit to the coastal trade of the entire nation (and hence to *interstate* commerce), while the dredging operation was primarily of local, *intrastate* benefit to the people of Georgia and hence fell on the "local" rather than the "general" side of the public welfare line.

Congress approved various appropriations to fund a road across the Cumberland Gap, but it rejected as unconstitutional a larger appropriation for internal improvements of which the Cumberland Gap road project was a part. Congress accepted the view that it had no power under the Constitution to open roads and canals in any state; its power to fund the Cumberland Road was the result of the compact with Ohio "for which the nation receive[d] an equivalent," namely, Ohio's promise not to tax for five years any lands sold by the federal government in Ohio. Moreover, as

George Washington had repeatedly urged while President, the opening of a road across the Cumberland Gap was strategically necessary to keep the western territories allied with the coastal states (rather than with the foreign powers that controlled the Mississippi river region at the time), something critically important to the security of the entire nation and not just the people of Ohio. The Cumberland Gap road was an example of a local project that directly benefited the nation. Appropriations for other local projects such as public education and local roads and canals, the "general" benefit of which was less direct, were viewed as unconstitutional, and a proposal in Jefferson's 1806 State of the Union Address to amend the Constitution to permit funding for such internal improvements was never adopted.

In sum, although Alexander Hamilton and other leaders of the Federalist Party argued for an expansive reading of the spending power, their reading was, on the whole, rejected both by Congress and, after the election of 1800, by the executive. Indeed, the differing views on the scope of federal power was a principal ground on which the 1800 presidential-election contest between Jefferson and incumbent Federalist President John Adams was waged. As Jefferson would note in an 1817 letter to Albert Gallatin, the different interpretations of the Spending Clause put forward by Hamilton, on the one hand, and Madison and Jefferson, on the other, were "almost the only landmark which now divides the federalists from the republicans." Jefferson won that election, and, save for a brief interlude during the one-term presidency of John Quincy Adams, the more restrictive interpretation of spending power was adopted by every President until the Civil War.

President Madison vetoed as unconstitutional an internal improvements bill that was passed by Congress at the very end of his presidency. President James Monroe also rejected the expansive Hamiltonian view of the Spending Clause (albeit on slightly different grounds than Madison had), vetoing various attempts at internal improvement bills during most of his two terms. But in the last year of his presidency, James Monroe, finding the line between "general" welfare and local welfare a hard one to define, signed a few bills to fund surveys for some local internal improvement projects. He thus opened a gate through which flowed a flood of spending on local projects during the administration of President John Quincy Adams. But Adams's resurrection of the Hamiltonian position became the focus of the next presidential election, contributing to Adams's defeat at the hands of Andrew Jackson, who promptly put to rest "this dangerous doctrine" by vetoing a $200 million appropriation for the purchase of stock in the Maysville and Lexington Turnpike Company and for the direct construction of other "ordinary" roads and canals by the government itself. So strong was his veto message that for four years Congress did not even try to pass another such bill, and when in 1834 it passed an act to improve the navigation of the Wabash River, Jackson again responded forcefully, rejecting as a "fallacy" the contention that the Spending Clause conferred upon Congress the power to do whatever seemed "to conduce to the public good."

In 1847 and 1857, Presidents James K. Polk and James Buchanan, respectively, vetoed subsequent congressional efforts to fund internal improvements. Polk vetoed a bill strikingly similar to much of the pork-barrel legislation to which we have grown accustomed in modern times. It provided $6,000 for projects in the Wisconsin territory—constitutionally permissible because of Congress's broader powers over federal territories—but it also included $500,000 for a myriad of projects in the existing states. Polk contended that to interpret the Spending Clause to permit such appropriations would allow "combinations of individual and local interests [that would be] strong enough to control legislation, absorb the revenues of the country, and plunge the government into a hopeless indebtedness."

Similarly, in his message vetoing the college land grant bill, President Buchanan took it as a given that the funds raised by Congress from taxation were "confined to the execution of the enumerated powers delegated to Congress." The idea that the resources

of the federal government—either taxes or the public lands—could be diverted to carry into effect any measure of state domestic policy that Congress saw fit to support "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."

Thus, while there were clearly voices urging for an expansive spending power before the Civil War, the interpretation held by Jefferson, Madison, and Monroe is the one that prevailed for most of the first seventy years after adoption of the Constitution.

While the Court has recently restored some limits to other powers delegated to Congress (such as the Commerce Clause), it has not yet done so with the Spending Power. This does not prevent Congress from adopting on its own a view of its power to spend that is more in accord with those of the Founders.

Modern-day jurisprudence on the Spending Clause begins with the 1936 New Deal-era case of *United States v. Butler*. In that case, both parties relied upon the Hamiltonian position, despite the history recounted above. Both the majority and dissenting opinions of the Court facially accepted the correctness of Hamilton's position even though the majority ruled that the particular tax and regulatory program at issue in the case was unconstitutional because its purpose was to regulate and control agricultural production, "a matter beyond the powers delegated to the federal government"—a holding much more in line with Madison's interpretation of the spending power than Hamilton's.

Moreover, the Hamiltonian position purportedly adopted by the Court was not the expansive view that Congress could do whatever it deemed to be in the public interest, but the much more limited view that the limits on spending were contained in the Spending Clause itself and not in the remainder of Article I, Section 8. "While, therefore, the power to tax is not unlimited," Justice Owen J. Roberts wrote, "its confines are set in the clause which confers it, and not in those of Section 8 which bestow and define the legislative powers of the Congress." In other words, the only limitation on Congress's power to tax and spend was that the spending be for the "general Welfare"—the position actually advocated by James Monroe. What really makes *Butler* a departure from the early interpretation of the clause, then, was that it gave virtually unlimited discretion to Congress to determine what was in the "general welfare"—a holding that, practically speaking, is much more in line with the expansive Hamiltonian position than the positions advocated either by Monroe or by Madison and Jefferson.

Since *Butler*, the courts have essentially treated whatever limitation the clause might impose as essentially a nonjusticiable political question. In the 1987 case of *South Dakota v. Dole*, for example, the Supreme Court noted that "the level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all." Instead, the courts have focused not on the constitutionality of spending programs themselves, but on whether various conditions imposed on the receipt of federal funds—conditions designed to achieve ends concededly not within Congress's enumerated powers—were constitutionally permissible. In *South Dakota v. Dole*, the Court adopted a four-prong test against which it assesses the constitutionality of spending conditions: (1) the spending power must be in pursuit of the "general Welfare," a requirement that the Court left to Congress's judgment to satisfy because, in its view, "the concept of welfare or the opposite is shaped by Congress"; (2) whether the conditions imposed were unambiguous; (3) whether they were related to the particular national projects or programs being funded (thus far, the Court has not invalidated a spending restriction on the grounds that it is too unrelated to the programs being funded); and (4) whether there are other constitutional provisions that provide an independent bar to the conditional grant of federal funds. For example, Congress could

not impose as a condition that a state receiving federal funds for its welfare programs require welfare recipients to waive their Fourth Amendment rights.

Of these four requirements, the "relatedness" and the independent constitutional bar prongs are the only ones that at present have any prospect of actually imposing a real limit on spending. Yet in the facts of *South Dakota v. Dole* itself, the Court concluded that conditioning receipt of federal highway funds on a state's adoption of a twenty-one-year-old drinking age was sufficiently related to the funding program. Eighteen-year-old residents of states with a twenty-one-year-old drinking age would drive to border states where the drinking age was eighteen and procure their liquor, the argument went. When driving back, the drivers had an increased risk of drunk driving on the highways paved by federal funds, and that was a sufficient connection for the Court.

Both Justices William J. Brennan, Jr., and Sandra Day O'Connor dissented. Justice O'Connor noted in her *South Dakota v. Dole* dissent: "If the spending power is to be limited only by Congress' notion of the general welfare, the reality...is that the Spending Clause gives 'power to the Congress...to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.' This...was not the Framers' plan and it is not the meaning of the Spending Clause."

While the Court has recently restored some limits to other powers delegated to Congress (such as the Commerce Clause), it has not yet done so with the Spending Power. This does not prevent Congress from adopting on its own a view of its power to spend that is more in accord with those of the Founders.

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