



The Fake James Madison

Conservatives' Selective Reading of the Founding Fathers Threatens Social Security and Medicare

Ian Millhiser | May 2011

Introduction

The House Republican plan to phase out Medicare is crashing and burning. Rep.-elect Kathy Hochul (D-NY) just won an impossible election victory by campaigning to keep Medicare alive. The Senate just soundly rejected the House GOP's plan. Even former Speaker of the House Newt Gingrich, who once shut down the government in a failed attempt to force President Bill Clinton to support draconian Medicare cuts, blasted this Medicare-killing plan as “radical right-wing social engineering.”

Yet even as this concerted assault on Medicare hemorrhages support from elected officials, conservatives have a backdoor plan to get the courts to kill Medicare for them. Numerous lawmakers embrace a discredited theory of the Constitution that would not only end Medicare outright but also cause countless other cherished programs to be declared unconstitutional. Under this theory, Pell Grants, federal student loans, food stamps, federal disaster relief, Medicaid, income assistance for the poor, and even Social Security must all be eliminated as offensive to the Constitution.¹

In essence, supporters of this constitutional theory would so completely rewrite America's social contract that they make Rep. Paul Ryan (R-WI), the author of the House GOP plan, look like Martin Luther King Jr. This issue brief explores the legal and historical gymnastics required to accept the conservative position that programs like Medicare and Social Security violate the Constitution.

The general welfare

Although Congress's authority is limited to an itemized list of powers contained in the text of the Constitution itself, these powers are quite sweeping. They include the authority to regulate the national economy, build a national postal system, create comprehensive immigration and intellectual property regulation, maintain a military, and raise and spend money.

This last power, the authority to raise and spend money, is among Congress's broadest powers. Under the Constitution, national leaders are free to spend money in any way they choose so long as they do so to "provide for the common defense and general welfare of the United States."² For this reason, laws such as Medicare and Social Security are obviously constitutional because they both raise and spend money to the benefit of all Americans upon their retirement.

Many members of Congress, however, do not believe the Constitution's words mean what they say they mean. Consider the words of Sen. Rand Paul (R-KY), who recently explained the origin of the increasingly common belief that Congress's constitutional spending power is so small that it can be drowned in a bathtub:

*If you read [James] Madison, Madison will tell you what he thought of the Welfare Clause. He said, "Yeah, there is a General Welfare Clause, but if we meant that you can do anything, why would we have listed the enumerated powers?" Really, the Welfare Clause is bound by the enumerated powers that we gave the federal government.*³

In essence, Paul and many of his fellow conservatives believe Congress's power to collect taxes and "provide for the common defense and general welfare of the United States" really only enables Congress to build post offices or fund wars or take other actions expressly authorized by some other part of the Constitution. According to this view, the spending power is not—as it is almost universally understood⁴—itself an independent enumerated power authorizing Congress to spend money.

Paul's understanding of the Spending Clause is not simply the idiosyncratic view of an outlier senator. Indeed, there is strong reason to believe his view is shared by the majority of his caucus. In the lead-up to the 2010 midterm elections, congressional Republicans released a "Pledge to America," which broadly outlined their plans for governing if they were to prevail that November.⁵ In it, the lawmakers claimed that "lack of respect for the clear constitutional limits and authorities has allowed Congress to create ineffective and costly programs that add to the massive deficit year after year."⁶

This language suggests that many conservatives agree with Sen. Paul that Congress is somehow exceeding its constitutional authority to spend money. But there is no support for this view in constitutional text or in Supreme Court precedent.

In its very first decision to consider the issue—its 1936 decision in *United States v. Butler*—the Supreme Court unanimously affirmed that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution," as Sen. Paul would claim.⁷ Similarly, while the text of the Constitution establishes that "the exercise of the spending power must be in pursuit of 'the general welfare,'" neither Sen. Paul nor the Pledge cites examples of laws that fail to meet this criterion.⁸

Selectively reading Madison

While conservatives' narrow understanding of the spending power finds no support in the text of the Constitution or in the Supreme Court's decisions, Sen. Paul is correct that it does have one very famous supporter. In an 1831 missive, former President James Madison claimed that the best way to read the Spending Clause is to ignore its literal meaning and impose an extra-textual limit on Congressional power:

With respect to the words "general welfare," I have always regarded them as qualified by the detail of powers connected with them. To take them in a literal and unlimited sense would be a metamorphosis of the Constitution into a character which there is a host of proofs was not contemplated by its creators.⁹

Sen. Paul suggests that Madison's extra-textual limit is both authoritative and binding—even if it means that programs ranging from Social Security to Medicare to Pell Grants must all cease to exist. But it is a mistake to assume that Madison's preferred construction of the Spending Clause must restrict modern-day congressional action.

First of all, even the most prominent supporters of "originalism"—the belief that the Constitution must be read exactly as it was understood at the time it was written—reject the view that an individual framer's intentions can change constitutional meaning. As the nation's leading originalist, Supreme Court Justice Antonin Scalia, explains, "I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words."¹⁰

Indeed, Madison himself would have been dismayed by the claim that an established understanding of the Constitution must bend to his own singular views. Like Scalia, Madison rejected the notion that the framers' personal desires can defeat the words they actually committed to text. As he explained to future President Martin Van Buren, "I am aware that the document must speak for itself, and that that intention cannot be substituted for [the intention derived through] the established rules of interpretation."¹¹

Secondly, Madison embraced a way of interpreting the Constitution reminiscent of the evolving theories of constitutional interpretation that are so widely decried by modern conservatives. Although Rep. Madison opposed on constitutional grounds the creation of the First Bank of the United States in 1791, President Madison signed into law an act creating the Second Bank in 1816. He "recognized that Congress, the President, the Supreme Court, and (most important, by failing to use their amending power) the American people had for two decades accepted" the First Bank, and he viewed this acceptance as "a construction put on the Constitution by the nation, which, having made it, had the supreme right to declare its meaning."¹²

The Constitution is not a scavenger hunt

Even if we must, as Sen. Paul suggests, be bound by the Founding Fathers' subjective intentions, Madison's understanding of the Constitution hardly reflects the consensus view among those who created it. The truth is that Madison's voice was merely one of many competing voices among the founding generation—and his vision of the Constitution was eventually rejected by no less a figure than George Washington himself.

Madison's chief antagonist in early debates about constitutional meaning was Alexander Hamilton. As the nation's first secretary of the treasury, Hamilton offered an interpretation of the Spending Clause that closely resembles the modern understanding:

These three qualifications excepted, the power to raise money is plenary, and indefinite; and the objects to which it may be appropriated are no less comprehensive, than the payment of the public debts and the providing for the common defence and "general Welfare." The terms "general Welfare" were doubtless intended to signify more than was expressed or imported in those which Preceded; otherwise numerous exigencies incident to the affairs of a Nation would have been left without a provision. The phrase is as comprehensive as any that could have been used; because it was not fit that the constitutional authority of the Union, to appropriate its revenues shou'd 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.¹³

Hamilton's understanding of the spending power was one part of a broader, more expansive vision of congressional power that also included a robust interpretation of Congress's power under the Constitution's Necessary and Proper Clause.¹⁴ This broader understanding of Congress's role prevailed over Madison's very limited one during the earliest days of the Republic. Hamilton was the chief advocate who convinced President George Washington to sign the First Bank bill over Madison's objections.¹⁵

The point here is not that constitutional interpretations should be played like the card game "War," where conservatives play the Madison card and everyone else plays the Washington card, and whoever plays the higher card wins. Rather, the point is simply that conservatives are wrong to treat the Founding Fathers' statements as if they were a menu that lawmakers can search through and order the kind of Constitution they want. The Constitution is not a scavenger hunt.

Moreover, it is hardly necessary to dismiss Madison's tremendous contributions to the Constitution itself in order to recognize why America should not relitigate a 230-year-old argument about America's power to spend money on programs like Medicare.¹⁶ Hamilton was undoubtedly correct that his own reading of the Spending Clause is more consistent with the Constitution's text than the reading offered by Madison—Madison himself concedes as much—but Madison was also correct to warn that the nation rejects a longstanding and widely accepted constitutional interpretation at its peril.

Millions of Americans depend upon programs such as Social Security, Medicare, and federal student loans, and America has grown into the wealthiest and most prosperous nation ever to exist in the years since these programs were enacted. Throughout this golden age, not one Supreme Court justice has questioned what Justice Scalia recently told a gathering of members of Congress: “It’s up to Congress how you want to appropriate, basically.”¹⁷

Conclusion

Few things are certain in American politics, but after this week one thing is crystal clear—the American people cherish Medicare and they want no truck with an agenda that would destroy it. Sadly, far too many conservative lawmakers refuse to listen to their constituents on this basic and obvious point—to the extent of inventing a theory of constitutional interpretation that would achieve their goal of ending Medicare far sooner than the House Republicans’ ill-considered budget.

Conservatives will tell you that killing Medicare is the only way to read the Constitution consistently with the framers’ intent. Don’t believe them. The truth is that the only way to reach this conclusion is to hunt through the framers’ statements, cherry pick statements that conservatives like, and ignore the very text of the Constitution itself in the process.

Ian Millhiser is a Policy Analyst and Blogger for American Progress, where his work focuses on the Constitution and the judiciary.

Endnotes

- 1 Ian Millhiser, “Coburn Channels Failed Tenth Candidates Who Claim Department of Education Is Unconstitutional,” Think Progress, December 7, 2010, available at <http://thinkprogress.org/2010/12/07/coburn-education-dpmt/>; Ian Millhiser, “Mike Lee Suggests FEMA, Federal Poverty And Food Safety Programs Are All Unconstitutional,” Think Progress, January 19, 2011, available at <http://thinkprogress.org/2011/01/19/mike-lees-katrina/>.
- 2 U.S. Const. art. I, § 8.
- 3 “We The Interns clip 2 - Senators Rand Paul and Mike Lee Discuss Their Legislative Ambitions,” available at http://www.youtube.com/watch?v=d7L_76oaw&feature=relmfu.
- 4 See, for example: *United States v. Butler*, 297 U.S. 1 (1936), 66 (holding that the Taxing and Spending Power’s “confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress”).
- 5 Republican Majority in Congress, “A Pledge to America” (2010), available at <http://pledge.gop.gov/resources/library/documents/pledge/a-pledge-to-america.pdf>.
- 6 *Ibid.*, p. 33.
- 7 *Butler*, 66; *Ibid.*, 87 (Stone, J., dissenting) (explaining that the spending power stands “on a parity with the other powers specifically granted”).
- 8 *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), available at <http://supreme.justia.com/us/483/203/case.html>. Indeed, the question of what kind of government spending fails to advance the “general welfare” is sufficiently indeterminate that the Supreme Court views itself as largely incompetent to make such determinations. See: *South Dakota v. Dole*. (“In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.”).
- 9 Letter from James Madison to James Robertson, April 20, 1831, available at http://en.wikisource.org/wiki/James_Madison_letter_to_James_Robertson; *Butler*, 65 (citing Madison’s belief that the Spending Clause “amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section”).
- 10 Antonin Scalia, Address at the Catholic University of America, October 18, 1996, available at <http://web.archive.org/web/19980119172058/www.courtstv.com/library/rights/scalia.html>.

- 11 H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard Law Review* 98 (5) (1985): 885–948 (quoting letter from James Madison to Martin Van Buren on July 5, 1830).
- 12 *Ibid.*, 940 (quoting letter from James Madison to Marquis de LaFayette in November 1826).
- 13 Alexander Hamilton, "Report on Manufactures to the House of Representatives," December 5, 1791, available at http://press-pubs.uchicago.edu/founders/documents/a1_8_1s21.html.
- 14 "Hamilton's Opinion as to the Constitutionality of the Bank of the United States, 1791," available at <http://www.constitution.org/mon/ah-bank.htm> (arguing that the power to charter a national bank fits within Congress's necessary and proper power).
- 15 *Ibid.*
- 16 Compare letter from James Madison to James Robertson with Hamilton, "Report on Manufactures."
- 17 Ian Millhiser, "Scalia Slaps Down GOP's Tenterism," *Think Progress*, January 25, 2011, available at <http://thinkprogress.org/2011/01/25/scalia-tenterism/>.