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The General Welfare Clause and the Theory of Public Goods

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INTRODUCTION

The federal government, according to many Americans, should defend the nation, preserve the environment, build highways, promote science, improve health, alleviate poverty, protect civil rights, and fight crime. Because the Constitution establishes a national government of limited powers, Congress requires constitutional authorization to undertake these activities. Proponents of federal power trace much of it to Article I, Section 8, Clause 3, which reads: “The Congress shall have power . . . [t]o regulate commerce . . . among the several states”¹ The Commerce Clause authorizes federal regulation of the channels and instrumentalities of interstate commerce, such as dredging navigable rivers, transporting beef across state lines, and scheduling commercial airplane flights. In addition, Clause 18 gives Congress the power “. . . [t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers.”² The Necessary and Proper Clause, and possibly the Commerce Clause as well, justify federal regulation of activities with significant effects on interstate commerce, such as racial discrimination in hotels.³

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¹ U.S. CONST. Art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .”).

² U.S. CONST. Art. I, § 8, cl. 18 (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

³ It is not clear whether the Commerce Clause by itself supports congressional power to regulate activities having a substantial effect on interstate commerce, or whether the Necessary and Proper Clause provides the

In debates over constitutional authorization, political demands for federal laws can collide with constitutional limits on federal powers. The interpretive community of legislators, judges, and scholars must negotiate these tensions.⁴ When this community agrees by consensus that Congress seeks to regulate a channel or instrumentality of interstate commerce, or that the regulated activity is commercial and substantially affects interstate commerce,⁵ the case is easy. Harder cases involve non-commercial, intrastate activities with arguably attenuated effects on interstate commerce, such as possession of guns in schools, arsons of dwellings, or gender-motivated violent crimes. Advocates of limited federal power, called “federalists,” argue that these activities do not significantly affect interstate commerce and thus that Congress has no constitutional authority to regulate them. Defenders of robust federal authority, called “nationalists,” argue that these activities affect interstate commerce sufficiently for the Commerce Clause to authorize federal regulation, and that Congress should exercise its authority whenever federal regulation provides the most effective solution to a problem.

Lost in this debate is a series of cases that appear unproblematic under current law – at least so far – but are hard as a conceptual matter. These cases concern interstate activities that have no relation to commercial activity. Such cases are problematic intellectually because the

relevant constitutional “hook.” Compare *Gonzales v. Raich*, 121 S. Ct. 2195, 2205 (2005) (“Cases . . . have identified three general categories of regulation in which Congress is authorized to engage under its commerce power. . . . Third, Congress has the power to regulate activities that substantially affect interstate commerce.”), *with id.* at 2216 (Scalia, J., concurring in judgment) (“Congress’s regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.”). It is also not clear, however, that anything turns on this distinction.

⁴ For work clarifying the idea of communities of shared meaning in law, see, for example, Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 186-94 (1986-87).

⁵ We use the terms “commercial activity” and “economic activity” in the non-technical sense used by the Supreme Court, which seems to refer to the production and distribution of goods and services. *But see infra* note 19.

Commerce Clause refers to “commerce . . . among the several states,”⁶ *i.e.*, interstate commerce. It does not refer to a problem that is interstate *or* commercial. Clause 3, in other words, contains the Interstate Commerce Clause, not the Interstate or Commerce Clause.

We propose a novel approach to this theoretical problem. Instead of debating whether the Commerce Clause works overtime, the interpretative community should require the rest of Article I, Section 8 to do a normal day’s work. Unlike the Commerce Clause, which refers to “commerce,” the first clause in Article I, Section 8 refers to more general powers: “The Congress shall have Power [t]o lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States”⁷ The generality of the words “common Defence and general Welfare,” and their location at the beginning of the list, suggest that the enumerated powers *instantiate* the common defense and the general welfare.⁸ By “instantiate” we mean that the enumerated powers are instances of the common defense and the general welfare that clarify the meaning of those terms.

The enumerated powers are more than examples and less than an exhaustive list. Both the abstract concept of the general welfare and the instances of it define the national government’s proper role in our federal system. To understand the abstract concept of the

⁶ U.S. CONST. Art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .”).

⁷ The General Welfare Clause is also known as the Spending Clause or the Taxing and Spending Clause. We use the terms interchangeably.

⁸ Our understanding of the relationship between the General Welfare Clause and the Commerce Clause is similar (but not identical) to the Hamiltonian position that has prevailed since the Supreme Court adopted it in *United States v. Butler*, 297 U.S. 1 (1936). According to the Hamiltonian view, Congress possesses an independent, substantive power to tax and spend in the general welfare. That is, Congress may tax and spend for any purpose so long as it exercises its taxing and spending power to provide for the general welfare of the United States, and so long as it does not violate another constitutional provision. Congress need not limit its taxation and spending to executing the other powers enumerated in Article I of the Constitution. *See infra* Part I.B. While we largely agree with that understanding, we also suggest that the other clauses in Article I, Section 8 instantiate, even if they do not exhaustively define, the constitutionally relevant meaning of the phrase “general Welfare.”

general welfare, we draw from contemporary social science, which probes the distinction “between one welfare and another, between particular and general.”⁹ The phrase “general welfare” includes “public goods” in the technical sense well-developed in economics, both descriptively and mathematically.¹⁰ The enumerated powers mostly include public goods and the powers required to supply them. The modern theory of public goods, consequently, helps to explain why the enumerated powers are instances of providing for the general welfare.

The technical features of a public good preclude private markets from providing an adequate supply of it. When a public good affects several states, the federal government possesses inherently superior political and administrative ability relative to individual states in supplying the good. Similarly, the technical features of a public bad preclude private markets from adequately constraining it. When a public bad affects several states, the federal government possesses inherently superior political and administrative ability relative to individual states in regulating the bad. We will distinguish between national public goods or bads such as military defense, which affect all states, and interstate public goods or bads such as migrating birds, which affect at least two states.

According to the public goods conception, the General Welfare Clause authorizes Congress to spend money on national or interstate public goods, to tax interstate public bads,¹¹ and to condition federal grants to states on their alleviating interstate public bads. The presence

⁹ *Helvering*, 301 U.S. at 640.

¹⁰ As explained at length in Part II, a “pure public good” is characterized by (1) the absence of rivalry over consumption of the good and (2) the impossibility of excluding others from consuming the good. See Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954); Paul A. Samuelson, *Diagrammatic Exposition of a Theory of Public Expenditure*, 37 REV. ECON. & STAT. 350 (1955).

¹¹ It would be implausible to suggest that economic theory’s identification of the distinction between the general and the particular captures all the constitutionally relevant meaning in the phrase “general Welfare.” Consequently, the presence of an interstate externality does not constitute a *necessary* condition for federal regulation, which would be radical in its implications. See *infra* Part V.C for a discussion of potential accounts of the general welfare other than the public goods interpretation.

of an interstate externality provides a sufficient condition for the constitutionality of federal taxation and spending to combat it.¹² The federal government can tax and spend to control environmental spills across states, regardless of the presence or absence of a nexus with commercial activity.¹³

Shifting some of the burden placed upon the Commerce Clause to the General Welfare Clause should refocus debate on issues that really matter to lawmakers and citizens. Consider, for example, personal uses of private property that harm endangered species. To authorize federal intervention under the Commerce Clause, proponents must show either that the endangered species substantially affect interstate commerce, or that the activity harming the species is commercial in nature. In reality, many endangered species have attenuated effects on interstate commerce, and activities harmful to the species include recreational uses of private property. This is unsurprising because Congress did not pass the Endangered Species Act¹⁴ out of concern for interstate commerce. Congress' principal purpose was much closer to "provid[ing] for the . . . general Welfare of the United States . . ."¹⁵ The relationship between endangered species and commerce distracts attention from the question of how preserving endangered species promotes the general welfare of the country. A debate on this point should

¹² See *South Dakota v. Dole*, 483 U.S. 203 (1987). In *Dole*, the Supreme Court held that Congress may condition five percent of federal highway funds on a recipient state's adopting a 21-year-old drinking age, even assuming (but not deciding) that the Twenty-First Amendment would prohibit Congress from imposing a national minimum drinking age directly. *Id.* at 217-18. The Court stressed that the condition imposed by Congress was "clearly stated," *id.* at 208, was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel," *id.*, and was not "so coercive as to pass the point at which pressure turns into compulsion," *id.* at 211. See *infra* Part I.B (discussing *Dole*).

¹³ For purposes of this inquiry, we assume the validity of the settled understanding that the General Welfare Clause authorizes taxing and spending only, not direct federal regulation. In future work we will critically assess the soundness of that understanding.

¹⁴ Endangered Species Act of 1973 (ESA), 16 U. S. C. §§ 1531-1544.

¹⁵ U.S. CONST. Art. 1, § 8, cl. 1.

result in a more straightforward defense of federal authority, aligning better with common-sense reasons for national action that most Americans understand.¹⁶

We hope to revitalize the jurisprudence of the General Welfare Clause by using the theory of public goods and bads. Nationalists may resist this shift in justification where courts have already found Commerce Clause authority for federal action to combat interstate externalities, but practical considerations should give them pause. Before 1995, the Supreme Court allowed federal regulation of activities with any connection to interstate commerce, no matter how attenuated. Following *United States v. Lopez* and *United States v. Morrison*,¹⁷ however, a loose connection makes a law constitutionally vulnerable. The Court apparently will not countenance federal activity under the Commerce Clause just because that activity addresses a national social problem such as the environment, civil rights, or certain kinds of crime. Those decisions apparently require activities regulated under the Commerce Clause to be “economic.” Exclusive reliance on the commerce power invites federal courts to strike down current and

¹⁶ Accordingly, we disagree with commentators who criticize as “circumvention” the prospect of congressional use of the conditional spending power when the Court holds certain federal laws beyond the scope of the commerce power. See, e.g., Lynn A. Baker and Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 460 (2003). Different constitutional “hooks” for congressional legislation – which are identified textually with different words and are animated by distinct purposes – are sensibly interpreted in different ways by the Supreme Court. See generally Neil S. Siegel, *Dole’s Future: A Strategic Analysis*, 16 SUP. CT. ECON. REV. (forthcoming 2007). While the Commerce Clause contains the word “commerce,” the General Welfare Clause contains the words “general welfare.” These are meaningful differences. Accordingly, the Court’s view that commerce-power legislation requires a nexus to economic activity by no means suggests that conditional federal expenditures should also require such a connection to commercial conduct. It should suffice for judicial review of spending-power statutes that the congressional expenditure advances the general welfare in a way identified by the theory of public goods.

¹⁷ *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating, for the first time since the New Deal, a federal statute regulating private conduct — the Gun Free School Zones Act of 1990 — as beyond the commerce power); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress lacked authority under either the Commerce Clause or § 5 of the Fourteenth Amendment to enact a provision of the Violence Against Women Act of 1994 (VAWA) creating a private civil remedy for victims of gender-motivated violence). See *infra* Part I.A (discussing *Lopez* and *Morrison*).

future laws that appear to address “noneconomic”¹⁸ problems. In the years ahead, courts could invalidate laws targeting interstate externalities with no relation to commerce. Reliance on the General Welfare Clause, however, would not require federal regulation to be “economic” or “commercial” in nature.¹⁹

Indeed, the General Welfare Clause may become particularly salient in the coming years, now that the Rehnquist Court has become the Roberts Court and Justice Alito has replaced Justice O’Connor. The newly constituted Court may continue to limit congressional power under the Commerce Clause, either as a matter of constitutional law or by construing federal statutes narrowly to avoid possible conflict with the Constitution.²⁰ For example, the recent outcome in *Rapanos v. United States*²¹ revealed a Court that was one vote shy of substantially

¹⁸ See *Lopez*, 514 U.S. at 561 (stressing that the criminal statute at issue “by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms”); *Morrison*, 529 U.S. at 610 (emphasizing “the role that the economic nature of the regulated activity plays in our Commerce Clause analysis”).

¹⁹ As an aside, we question how long the weight of constitutional interpretation can rest on a definition of “economic” that contradicts the definition used in the field of economics. Perhaps the Supreme Court has in mind the idea that economics concerns things that are “material.” This was the preferred conception of economics in the late 19th and early 20th centuries. That view makes no sense of markets for immaterial goods, such as intellectual property and credit services. More likely, the Court has in mind things that are bought and sold. See *supra* note 5. That conception makes no sense of public goods such as military defense, or externalities such as pollution, which are major topics of economic analysis. The preferred definition of economics since the 1930s has focused on scarcity. On that understanding, economics concerns the use of anything – material or immaterial, marketed or unmarketed – that is scarce. See Robert Cooter & Peter Rappoport, *Were the Ordinalists Wrong About Welfare Economics?*, 22 J. ECON. LIT. 507 (1984), reprinted in Mark Blaug, editor, 37 PIONEERS IN ECONOMICS Vol 37 (Mark Blaug ed., 1992). See also the brief version reprinted in HUMAN WELLBEING AND ECONOMIC GOALS 93-96 (Frank Ackerman *et al.*, eds. 1997).

²⁰ See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (avoiding a Commerce Clause challenge by holding that the Army Corps rule extending the definition of “navigable waters” in § 404(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1344(a), to include intrastate waters used as a habitat by migratory birds exceeded the authority granted to the Corps in the CWA); *Jones v. United States*, 529 U.S. 848 (2000) (avoiding a Commerce Clause challenge by holding that arson of an owner-occupied private residence not used for any commercial purpose falls outside the compass of 18 U.S.C. § 844(i), which makes it a federal crime to damage or destroy, “by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce”); see also *infra* Part I.A.

²¹ 126 S. Ct. 2208 (2006).

restricting federal regulatory authority to protect wetlands under the Clean Water Act.²² A restrictive series of judicial decisions would punch holes in existing federal regulations. Some of the statutes at risk are divisive and others enjoy a bipartisan consensus in Congress. If the political will emerged to plug those holes, proponents would need a politically convincing constitutional warrant for new federal legislation. In those circumstances, Congress would be well advised to invoke the General Welfare Clause as a source of constitutional authority.²³

Part I briefly summarizes relevant Supreme Court decisions interpreting the Commerce Clause and the General Welfare Clause. Part II provides pertinent economic background concerning the economic theory of public goods. Part III develops the public-goods approach to the Constitution's grant of congressional power to tax and spend in the "general Welfare." This Part uses the text, history, and structure of the Constitution, as well as on the Court's case law and contemporary constitutional values, to show that conventional sources of constitutional authority support the public goods approach. Part IV identifies how Congress might appropriately use its taxing and spending powers under the General Welfare Clause to target some activities whose regulation is constitutionally problematic under the Commerce Clause. The Supreme Court's decisions in *Rapanos* and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*²⁴ and various applications of federal environmental law will figure prominently in the discussion. Part V anticipates objections to our argument. A brief Conclusion summarizes our project.

²² See *infra* Part II.A.

²³ Our concern here is with the political efficacy of environmental measures, not with the "pretext" debate in constitutional law about the scope of the commerce power. See *infra* note 184 and accompanying text.

²⁴ See *supra* notes 20-21 and accompanying text.

I. THE COURT’S COMMERCE AND GENERAL WELFARE JURISPRUDENCE

This Part surveys Supreme Court decisions concerning the Commerce Clause and the General Welfare Clause. This background situates the theoretical innovations that follow.

A. *Commerce Clause Decisions*

The Court’s understanding of the scope of Congress’ “power . . . [t]o regulate Commerce . . . among the several States”²⁵ has vacillated throughout American history. Initially, the Court broadly construed the Commerce Clause.²⁶ From the late 1800s until 1937, however, the Court adopted a narrower view and invalidated many statutes as beyond the commerce power’s scope. Sometimes, the Court struck down acts that regulated “manufacturing” and not “commerce.”²⁷ Other times, the Court concluded that the effect on interstate commerce was insufficiently “direct.”²⁸ Then, from 1937 until 1995, the Court reversed course and did not invalidate a single

²⁵ U.S. CONST. Art. 1, § 8, cl. 3.

²⁶ *See* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193 (1824) (“Commerce undoubtedly is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”); *id.* (“The word ‘among’ means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.”); *id.* at 196-97 (“This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce . . . among the several States, is vested in Congress as absolutely as it would be in a single government.”).

²⁷ *See, e.g.*, *United States v. E.C. Knight Co.*, 156 U.S. 1, 12-13 (1895) (holding that the Sherman Antitrust Act could not be used to thwart a monopoly in the sugar refining industry because the commerce power did not authorize Congress to regulate manufacturing, which was antecedent to commerce); *Carter v. Carter Coal Co.*, 298 U.S. 238, 303-04 (1936) (invalidating the Bituminous Coal Conservation Act of 1935 because federal regulation of wages and hours concerned production, not commerce).

²⁸ *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) (invalidating the Live Poultry Code for New York City, which prevented chicken sellers from requiring buyers to purchase sick chickens and which included wages, hours, and child-labor provisions, based on an “indirect” relationship to interstate commerce).

federal law on Commerce Clause grounds.²⁹ Before 1995, the conventional wisdom held that Congress could regulate whatever it wanted under the Commerce Clause.

United States v. Lopez changed the landscape. The Justices considered whether Congress exceeded its commerce power in enacting the Gun Free School Zones Act of 1990 (“GFSZA”),³⁰ which criminalized firearm possession within 1,000 feet of a school.³¹ Writing for Justices O’Connor, Scalia, Kennedy, Thomas, and himself, Chief Justice Rehnquist concluded that GFSZA was unconstitutional because a firearm’s presence near a school did not substantially affect interstate commerce.³² He wrote that GFSZA “is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms. [It] is not an essential part of a larger regulation of economic activity, in

²⁹ In 1937, Justice Owen Roberts changed his view of the scope of the commerce power and became the fifth vote to uphold laws of the kind previously invalidated by the Court. *See West Coast Hotel v. Parish*, 300 U.S. 379 (1937) (upholding a state minimum wage law for women); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding federal regulation of labor relations in the steel industry). His “switch in time that saved nine” came to characterize this era of Commerce Clause jurisprudence. *See United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act of 1938, which prohibited the shipment in interstate commerce of goods made by employees paid less than the mandated minimum wage); *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding the Agricultural Adjustment Act’s wheat-production quota as applied to a wheat farmer who exceeded his quota but used the excess wheat exclusively for home consumption and livestock feeding); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding Title II of the Civil Rights Act of 1964, which prohibited racial discrimination by places of public accommodation); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding Title II’s application to a small, family-owned restaurant).

³⁰ 18 U.S.C. § 922(q)(2)(a); § 921(a)(25).

³¹ 18 U.S.C. § 922(q)(2)(a) (making it a crime “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone”); § 921(a)(25) (defining a “school zone” as: (A) “in, or on the grounds of, a public, parochial, or private school”; or (B) “within a distance of 1,000 feet from the grounds of a public, parochial, or private school”).

³² He first flagged three types of activity that Congress may regulate using its commerce power:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

514 U.S. at 558-59 (citations omitted). *Lopez*, *Morrison*, and *Raich* required a substantial-effects inquiry.

which the regulatory scheme could be undercut unless the intrastate activity were regulated.”³³

He then observed that the law “contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”³⁴ He also noted the absence of legislative findings on the interstate commercial effects of firearm possession in school zones.³⁵

Finally, the Court considered the government’s reasons for why Congress could have rationally concluded that firearms near schools substantially affect interstate commerce:

The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation’s economic well-being.³⁶

The Court emphatically rejected those rationales because it could not “perceive [in them] any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”³⁷

The Court proved five years later that *Lopez* was not merely symbolic. *United States v. Morrison*³⁸ concerned the constitutionality of the civil damages provision of the federal Violence

³³ *Lopez*, 514 U.S. at 561.

³⁴ *Id.*

³⁵ *Id.* at 562-63.

³⁶ *Id.* at 563-64 (citations omitted).

³⁷ *Id.* at 564. Justice Kennedy (whose views are now likely decisive) wrote that “here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus.” *Id.* at 580 (Kennedy, J., concurring). While noting that “[i]n a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence,” he stressed that “we have not yet said the commerce power may reach so far.” *Id.*

Against Women Act (“VAWA”), which authorized victims of gender-motivated violence to sue their assailants for money damages in federal court.³⁹ The question presented was whether the damages remedy fell within the scope of Congress’ authority under either the Commerce Clause or Section Five of the Fourteenth Amendment. Splitting 5-4 like in *Lopez*, the Court invalidated the damages remedy as beyond Congress’ power under either provision. The Chief Justice concluded for the Court that Congress was regulating noneconomic activity traditionally regulated by the states:

Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.⁴⁰

The Chief Justice further wrote that, like GFSZA in *Lopez*, VAWA “contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’ power to regulate interstate commerce.”⁴¹

The Court rejected the idea that violence against women substantially affects interstate commerce, despite a voluminous legislative history documenting Congress’ judgment to that effect.⁴² According to the Chief Justice, “Congress’ findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as

³⁸ 529 U.S. 598 (2000).

³⁹ 42 U.S.C. § 13981.

⁴⁰ *Id.* at 613.

⁴¹ *Id.*

⁴² 529 U.S. at 614 (“In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families.”).

unworkable if we are to maintain the Constitution’s enumeration of powers.”⁴³ Specifically, that reasoning “seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States’ police power) to every attenuated effect upon interstate commerce.

The Chief Justice warned that the government’s reasoning, if accepted, would allow Congress to regulate any violent crime “as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.”⁴⁴ Such reasoning could “be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.”⁴⁵ Thus, the Court denied “that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”⁴⁶ ⁴⁷ *Morrison* goes further than *Lopez* in restricting federal power by disabling Congress from regulating noneconomic activity based on its aggregative impact on interstate commerce.⁴⁸

⁴³ *Id.* at 615.

⁴⁴ *Id.*

⁴⁵ *Id.* at 615-16.

⁴⁶ *Id.* at 617-18.

⁴⁷ *Id.*

⁴⁸ The Court later clarified that an activity need not always be economic in nature to be regulable under the Commerce Clause. In *Gonzales v. Raich*, 125 S. Ct. 2195 (2006), the Court held 6-3 that the Commerce Clause allows Congress to prohibit local cultivation and use of marijuana in compliance with state law authorizing such use. California had created a medical exception to its marijuana laws, but no such exception exists in the Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq.* Writing for the Court, Justice Stevens relied upon *Wickard v. Filburn*, *see supra* note 29, which he said “establishes that Congress can regulate purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.” 125 S. Ct. at 2206. He saw “striking” similarities between *Raich* and *Wickard*: Congress could have rationally concluded that leaving home-consumed wheat or marijuana outside the federal regulatory scheme would affect interstate price and market conditions. *Id.* at 2206-07.

Lopez and *Morrison* are the only cases in which the Rehnquist Court invalidated federal laws on Commerce Clause grounds. In other instances, however, the Court limited congressional power by construing statutes narrowly. A narrow construction avoided “constitutional doubts” regarding whether Congress had exceeded its commerce power. The first such decision came in *United States v. Jones*,⁴⁹ which raised two questions. The first question was whether arson of a private residence violates the federal law criminalizing arson or attempted arson of “any building” that is “used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.”⁵⁰ If the Court answered affirmatively, the second question was whether the law is constitutional in light of *Lopez*. The federal government argued that the dwelling was “used” in activities affecting interstate commerce because the homeowner secured a mortgage from an Oklahoma lender, bought casualty insurance from a Wisconsin insurer, and used natural gas from sources outside Indiana.⁵¹ The Court unanimously disagreed and construed the statute not to apply to arson of a private residence. Justice Ginsburg wrote for the Court that the statute’s “used in” requirement “is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce.”⁵²

Justice Ginsburg further stated that the Court’s reading “is in harmony with the guiding principle that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”⁵³ Specifically, she wrote that in light of *Lopez*, “it is appropriate to

⁴⁹ 529 U.S. 848 (2000).

⁵⁰ 18 U.S.C. 844(i).

⁵¹ 529 U.S. at 855.

⁵² *Id.*

⁵³ *Id.* at 857 (internal quotation marks omitted).

avoid the constitutional question that would arise were we to read [the law] to render the traditionally local criminal conduct in which petitioner Jones engaged a matter for federal enforcement.”⁵⁴ Construing the statute narrowly, the Court did not have to address the constitutional question. Interpreting laws narrowly to avoid constitutional doubts is well established, but the Rehnquist Court broke new ground by taking this approach to Commerce Clause challenges.

The Court also engaged in constitutional avoidance in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*.⁵⁵ A consortium of Chicago suburbs had sought to purchase an abandoned gravel pit as a disposal site for non-hazardous solid wastes. Migratory birds used water within the pit as habitat. Section 404(a) of the federal Clean Water Act (“CWA”)⁵⁶ regulates the discharge of dredged or fill material into “navigable waters,” which the Act defines as “the waters of the United States, including the territorial seas.”⁵⁷ The Army Corps of Engineers (“Corps”) had promulgated rules regarding the CWA’s applicability. One of them, the “Migratory Bird Rule,”⁵⁸ required compliance with the CWA in use of the pit.

⁵⁴ *Id.* at 858 (internal quotation marks omitted).

⁵⁵ 531 U.S. 159 (2001).

⁵⁶ Federal Water Pollution Control Act (“FWPCA”) Amendments of 1972, 86 Stat. 817, *as amended*, 33 U.S.C. §§ 1251-1376, commonly known as the Clean Water Act (“CWA”).

⁵⁷ § 1362(7).

⁵⁸ 51 Fed. Reg. 41217 (1986) (stating that § 404(a) extends to intrastate waters “[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties,” “[w]hich are or would be used as habitat by other migratory birds which cross state lines, “[w]hich are or would be used as habitat for endangered species; or “[u]sed to irrigate crops sold in interstate commerce”). *See also* 531 U.S. at 164 (quoting the Migratory Bird Rule). The Migratory Bird Rule clarified a federal regulation issued by the Corps to define a key statutory term in the CWA. *See* 33 C.F.R. § 328.3(a)(3) (1999) (defining “waters of the United States” to include “waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . .”).

The Justices divided along the same lines as in *Lopez* and *Morrison*, deciding 5-4 that the CWA did not apply to intrastate waters used as habitat by migratory birds. The United States had defended the constitutionality of the Migratory Bird Rule and the associated regulation on the ground that “protection of migratory birds is a national interest of very nearly the first magnitude,” and “millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds.”⁵⁹ Chief Justice Rehnquist underscored for the Court the “significant constitutional questions” raised by such arguments:

[W]e would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner’s land because it contains water areas used as habitat by migratory birds, respondents now . . . focus upon the fact that the regulated activity is petitioner’s municipal landfill, which is “plainly of a commercial nature.” But this is a far cry, indeed, from the “navigable waters” and “waters of the United States” to which the statute by its terms extends.

These are significant constitutional questions . . . , and yet we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the “Migratory Bird Rule” would result in a significant impingement of the States’ traditional and primary power over land and water use. . . . We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents’ interpretation⁶⁰

Such use of the avoidance canon, particularly in the present political environment, illustrates the significant impact of the Court’s restrictive commerce-power jurisprudence.⁶¹

⁵⁹ 531 U.S. at 173 (internal quotation marks omitted).

⁶⁰ 531 U.S. at 173-74 (citations omitted).

⁶¹ As one of our colleagues has noted:

Environmental legislation has become politically divisive. At a time when political institutions are themselves closely divided, the prospects are not bright for enacting contentious legislation sure to produce well-organized losers, which such wetlands legislation certainly would be. . . . As a practical political matter, *SWANCC* removes the federal government from this area as surely as a holding of unconstitutionality would. . . . [T]he shadow that *SWANCC*’s clear statement interpretive rule casts is much more ominous than the shadow *Lopez* and *Morrison* together have cast over the theoretical reach of federal authority under the Commerce Clause.

In stark contrast to Chief Justice Rehnquist, Justice Stevens wrote in dissent that the migratory bird rule does not blur the “distinction between what is truly national and what is truly local.” Justice Holmes cogently observed in *Missouri v. Holland* that the protection of migratory birds is a textbook example of a *national* problem. . . . The destruction of aquatic migratory bird habitat, like so many other environmental problems, is an action in which the benefits (*e.g.*, a new landfill) are disproportionately local, while many of the costs (*e.g.*, fewer migratory birds) are widely dispersed and often borne by citizens living in other States. In such situations, described by economists as involving “externalities,” federal regulation is both appropriate and necessary.⁶²

Parts III and IV show that Justice Stevens’ comments on “externalities” arising from migrating birds precisely fit the public goods conception of the general welfare.

In a recent fight over federal protection of wetlands endangered by economic development, a plurality of four Justices narrowly construed the phrase “navigable waters” in the CWA.⁶³ The Court in *Rapanos v. United States*⁶⁴ faced the question whether wetlands adjacent to non-navigable tributaries of traditional navigable waters were part of “the waters of the United States” within the meaning of the CWA.⁶⁵ Justice Scalia, writing for himself and Chief Justice Roberts, Justice Thomas, and Justice Alito, concluded that the term “navigable waters” in the CWA includes “only relatively permanent, standing or flowing bodies of water,” not “intermittent or ephemeral” flows.⁶⁶ The plurality further concluded that “*only* those wetlands

Christopher H. Schroeder, *Environmental Law, Congress, and the Court’s New Federalism Doctrine*, 78 IND. L.J. 413, 455, 457 (2003).

⁶² *Id.* at 195 (Stevens, J., dissenting) (some citations omitted). See also *infra* Part III.D (discussing *Missouri v. Holland*, 252 U.S. 416 (1920), and other cases where the Court understood the constitutional relevance of interstate collective action problems).

⁶³ The Act defines the term “navigable waters” as “the waters of the United States, including the territorial seas.” § 1362(7). See *supra* notes 56-57 and accompanying text.

⁶⁴ 126 S. Ct. 2208 (2006).

⁶⁵ If the Court answered affirmatively, the second question presented was whether applying the Act to such wetlands was beyond the scope of the commerce power.

⁶⁶ *Id.* at 2220-22. According to the plurality, the statutory term

with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and covered by the Act.”⁶⁷

In concluding that federal regulation of wetlands not meeting these twin requirements was beyond the scope of the CWA, the plurality emphasized federalism concerns:

Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power. The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land--an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board. We ordinarily expect a “clear and manifest” statement from Congress to authorize an unprecedented intrusion into traditional state authority. The phrase “the waters of the United States” hardly qualifies.⁶⁸

The plurality further stated that it was practicing constitutional avoidance:

Likewise, just as we noted in *SWANCC*, the Corps’ interpretation stretches the outer limits of Congress’s commerce power and raises difficult questions about the ultimate scope of that power. Even if the term “the waters of the United States” were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.⁶⁹

Justice Kennedy concurred in the judgment because he agreed with the plurality that the cases should be remanded for further proceedings. By stark contrast with Justice Scalia,

“the waters” refers . . . to water ‘[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,’ or ‘the flowing or moving masses, as of waves or floods, making up such streams or bodies.’ Webster’s New International Dictionary 2882 (2d ed.1954) On this definition, “the waters of the United States” include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in “streams,” “oceans,” “rivers,” “lakes,” and “bodies” of water “forming geographical features.” *Ibid.* All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.

Id. at 2220-21 (footnotes omitted). Every other Justice rejected a requirement of relative permanency.

⁶⁷ *Id.* at 2226.

⁶⁸ *Id.* at 2224 (plurality) (citations omitted).

⁶⁹ *Id.*

however, Justice Kennedy concluded that the Corps had the authority under both the statute and the Commerce Clause to regulate wetlands that are adjacent to non-navigable tributaries of traditional navigable waters so long as the wetlands “possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”⁷⁰ In his controlling opinion, Kennedy did not specify precisely what the “significant nexus” test requires. He did emphasize, however, that the Corps must establish substantial ecological connections between the wetlands and traditionally navigable waters, regardless of the existence of hydrologic connections. In practice this requirement should allow robust federal protection of wetlands.⁷¹

Justice Kennedy wrote that his interpretation of the CWA “does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption.”⁷² While conceding that his “significant nexus requirement may not align perfectly with the traditional extent of federal authority,” he wrote that “in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty.”⁷³

⁷⁰ *Id.* at 2236 (Kennedy, J., concurring in judgment) (quoting *SWANCC*, 531 U.S. at 167, 172).

⁷¹ *Id.* at 2247-52. Justice Kennedy wrote:

With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters--functions such as pollutant trapping, flood control, and runoff storage. 33 CFR § 320.4(b)(2). Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.” When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term “navigable waters.”

Id. at 2248. Kennedy also sent an important signal in writing that “the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps’ assertion of jurisdiction is valid.” *Id.* at 2250.

⁷² *Id.* at 2249.

⁷³ *Id.* Justice Scalia called Justice Kennedy’s “significant nexus” test “perfectly opaque.” *Id.* at 2234 n.15 (plurality).

In a dissent joined by Justices Souter, Ginsburg, and Breyer, Justice Stevens wrote that the Court should defer to the Corps' reasonable judgment that federal regulation was necessary:

The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps' resulting decision to treat these wetlands as encompassed within the term "waters of the United States" is a quintessential example of the Executive's reasonable interpretation of a statutory provision.⁷⁴

Justice Stevens rejected the plurality's resort to *SWANCC*-type constitutional avoidance because "[t]he wetlands in these cases are not 'isolated' but instead are adjacent to tributaries of traditionally navigable waters and play important roles in the watershed, such as keeping water out of the tributaries or absorbing water from the tributaries."⁷⁵ Similarly, Justice Breyer underscored the breadth of congressional power to regulate the nation's "various" and "intricately interconnected" waters.⁷⁶

B. *General Welfare Clause Decisions*

Part IV shows that Congress could justify federal power over a range of environmental problems more directly and securely by relying less on the Commerce Clause and refocusing on the meaning of the General Welfare Clause. Having discussed some recent commerce power cases, we turn to the historical and contemporary debate over the constitutional meaning of the General Welfare Clause.

James Madison and Alexander Hamilton famously debated the purposes for which Congress may tax and spend. Hamilton believed that Congress may tax and spend for any

⁷⁴ *Id.* at 2252 (Stevens, J., dissenting).

⁷⁵ *Id.* at 2261-62 (Stevens, J., dissenting).

⁷⁶ *Id.* at 2266 (Breyer, J., dissenting).

purpose that provides for the general welfare of the United States and does not violate another constitutional provision. The specific powers enumerated in Article I, Section 8, according to Hamilton, do not exhaust the authority to provide for the general welfare through taxation and spending, which is a substantive power in its own right.⁷⁷ In contrast, Madison believed that Congress must limit its taxation and spending to executing the specific powers enumerated in Article I, Section 8.⁷⁸

In *United States v. Butler*,⁷⁹ the Supreme Court settled this debate by endorsing Hamilton's view as "the correct one."⁸⁰ Decisions subsequent to *Butler* reaffirmed the breadth of Congress' power under the General Welfare Clause regarding both the clause's relationship to the rest of Article I, Section 8, and the meaning of "general Welfare" itself. In *Steward Machine Co. v. Davis*, the Court rejected a constitutional challenge to the federal unemployment compensation system created by the Social Security Act ("SSA").⁸¹ And in *Helvering v. Davis*, the Court sustained the constitutionality of the SSA's old-age pension program, which is funded exclusively by federal taxes.⁸² Writing for the Court, Justice Cardozo first reaffirmed the

⁷⁷ See ALEXANDER HAMILTON, 1791 REPORT ON THE SUBJECT OF MANUFACTURES (1791), reprinted in 10 PAPERS OF ALEXANDER HAMILTON 230, 302-04 (Harold C. Syrett ed., 1966). See also *Butler*, 297 U.S. at 65-66 (discussing Hamilton's position).

⁷⁸ THE FEDERALIST NO. 41 (Madison) (arguing that the General Welfare Clause conferred authority to tax and spend only for purposes indicated by the enumerated powers that followed in Article, I, Section 8). See also *Butler*, 297 U.S. at 65 (discussing Madison's restrictive view of the General Welfare Clause and Hamilton's expansive view).

⁷⁹ 297 U.S. 1 (1936).

⁸⁰ *Butler*, 297 U.S. at 66. The *Butler* Court noted that "Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position." *Id.* (citing chapter XIV of JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833)).

⁸¹ 301 U.S. 548 (1937).

⁸² 301 U.S. 619 (1937).

Hamiltonian position and then turned to the Constitution’s distinction between general welfare and local welfare:

Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. . . . Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation.⁸³

Later decisions have reaffirmed that deferential posture. “In considering whether a particular expenditure is intended to serve general public purposes,” the Court stated in *South Dakota v. Dole* that “courts should defer substantially to the judgment of Congress.”⁸⁴ Indeed, the Court noted that “[t]he 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.”⁸⁵

The *Dole* Court, after noting the formal general-welfare requirement, held 7-2 that Congress may condition five percent of federal highway funds on a recipient state’s adopting a 21-year-old drinking age.⁸⁶ Chief Justice Rehnquist wrote for the Court that the condition imposed by Congress was “clearly stated” and “directly related to one of the main purposes for which highway funds are expended—safe interstate travel,”⁸⁷ and was not “so coercive as to pass

⁸³ *Id.* at 640-41 (citations omitted).

⁸⁴ 483 U.S. 203, 207 (1987) (citing *Helvering*, 301 U.S. at 640, 645).

⁸⁵ 483 U.S. at 207 n.2 (citing *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976) (*per curiam*)).

⁸⁶ *Id.* at 217-18. The Court assumed, but did not decide, that the Twenty-First Amendment would prohibit Congress from imposing a national minimum drinking age directly.

⁸⁷ *Id.* at 208.

the point at which pressure turns into compulsion.”⁸⁸ *Dole* confers upon Congress broad ability to accomplish indirectly through incentives what it cannot impose directly through regulations.⁸⁹

Turning from conditional expenditures to the federal government’s power to tax, the Court historically distinguished between revenue-raising taxes, which primarily finance the government, and regulatory taxes, which primarily discourage an activity. The Court permitted revenue taxes as a necessary means for the federal government to promote the general welfare, and the Court forbade regulatory taxes by the federal government to discourage activities.⁹⁰ Because all taxes inevitably raise revenues, the distinction between revenue-raising taxes and regulatory taxes concerns the primary purpose of the tax. The intricacies no longer concern us because the modern Court views the General Welfare Clause as allowing both kinds of taxes.⁹¹

Having surveyed the current jurisprudence of the Commerce Clause and the General Welfare Clause, we turn now to the economic theory of public goods. Part III uses public goods theory to show that the enumerated powers are instances of the general welfare that mostly concern public goods. It follows that the General Welfare Clause authorizes federal expenditures on interstate public goods and federal taxes on interstate public goods.

⁸⁸ *Id.* at 211.

⁸⁹ *See, e.g.,* *New York v. United States*, 505 U.S. 144, 166-67 (1992) (“Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. . . . [U]nder Congress’ spending power, ‘Congress may attach conditions on the receipt of federal funds.’ *South Dakota v. Dole*, 483 U.S., at 206 . . .”).

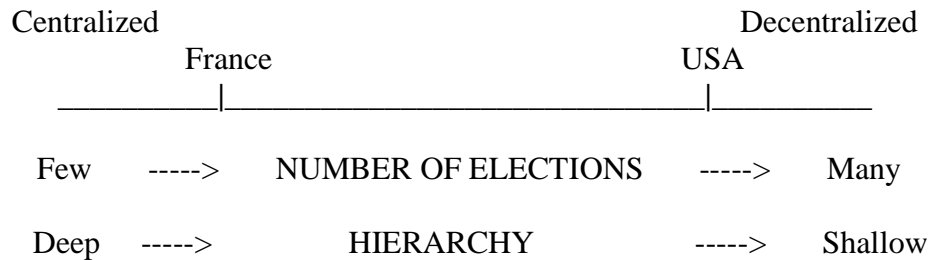
⁹⁰ *See, e.g.,* *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922) (invalidating the federal Child Labor Tax Act, Pub. L. No. 65-254, 40 Stat. 1138 (1919), because “a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed” and “[i]ts prohibitory and regulatory effect and purpose are palpable”).

⁹¹ *See, e.g.,* *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937) (“Every tax is in some measure regulatory. . . . But [it] is not any less a tax because it has a regulatory effect.”); *United States v. Kahriger*, 345 U.S. 22, 31 (1953) (stating that regulatory taxes are constitutional because “[u]nless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power”). For an analysis of the distinction between taxes or financial incentives on the one hand and regulations on the other, *see infra* Part V.D.

II. THE ECONOMIC THEORY OF PUBLIC GOODS

In democratic societies, the citizens elect officials to form governments, and governments administer the country through hierarchies. Democracies can be unitary like France and Japan, or federal like the United States and Australia. In unitary states, the citizens elect the central government and it appoints officials to administer each of the country's districts. Elections are relatively few and hierarchical administration is relatively deep. Conversely, in federal states, the citizens elect the central government and the provincial or state governments. Compared to unitary states, elections in federal states are relatively numerous and the hierarchy is relatively shallow. Figure 1 depicts these facts as a continuum from centralized to decentralized.⁹²

Figure 1: Unitary versus Federal States



A federal system like the United States lies to the right on this continuum.

In a federal system, the central government should have the powers that it can exercise better than the state governments, and the state governments should have the powers that they can exercise better than the central government. Thinking along these lines, de Tocqueville remarked that the United States “federal system was created with the intention of combining the different advantages which result from the magnitude and the littleness of nations.”⁹³ The

⁹² Choosing a location on this point is a simple formulation of the problem of choosing the optimal number of governments. See ROBERT COOTER, *THE STRATEGIC CONSTITUTION* (2000) (Chapter 5).

⁹³ (Tocqueville 1945) at page 168, quoted in (Oates 1990). PROVIDE FULL CITES

economic theory of public goods offers a simple solution to the problem of identifying the best level of government to supply a good. The solution depends on the technical character of the goods in question. We will explain the technical character of several types of public goods.

A. *National Public Goods*

By definition, *pure* public goods are *nonrivalrous*, meaning that one person's enjoyment does not detract from another's. For example, military expenditures can provide security from invasion, and the security enjoyed by one citizen does not detract from the security enjoyed by another citizen. When pollution abatement improves air quality, one person who breathes air does not detract from another person breathing it. In contrast, private goods are rivalrous. The bite that I take out of a hamburger leaves one less bite for someone else, and the land where I build my house becomes unavailable for building by others.

Besides being nonrivalrous, *pure* public goods are *non-excludable*, which means that excluding individuals from enjoying their benefits is infeasible or uneconomical. For example, all residents of the United States during the Cold War enjoyed the benefits of deterring a Soviet missile attack, and no one could be excluded from enjoying these benefits. American residents enjoyed security whether or not they paid the taxes used to provide it. When abatement improves air quality, no one in the locality can be excluded from breathing. Although toll booths can exclude people who do not pay from driving on roads, collecting tolls on most local streets is uneconomical.⁹⁴ In contrast, the owner of a hamburger can usually exclude others from eating it, and the owner of land can exclude others from entering it.

⁹⁴ Using these two defining characteristics of public goods, Paul Samuelson provided a remarkably simple and powerful mathematical formulation of efficiency in demand and supply. *See supra* note 10.

When exclusion is infeasible or uneconomical, individuals have an incentive to free ride by not paying for the goods. Free riding prevents suppliers from earning a profit, which precludes an adequate private supply of the good.⁹⁵ A free market will undersupply national defense, clean air, and other public goods.⁹⁶ The state can prevent free riding by collecting taxes to finance public goods. Unlike purchases, taxes are involuntary, so that people who try to free ride break the law.

Dirty air, which is the negative equivalent of clean air, is a “public bad.” Whereas goods are produced intentionally, most bads are incidental byproducts of producing goods. Manufacturers and motorists enjoy the good and dump the bad into the public domain. Because bads are outside free markets, they are also called “externalities.” The proposition that a free market will undersupply public goods is equivalent to the proposition that a free market will oversupply public bads. The state can reduce the supply of public bads by regulating or taxing them.

By definition, a *national* public good is non-rivalrous and non-excludable at the national level. Because everyone in the nation benefits, the national government represents all of the beneficiaries, and each state government represents only some of them. Full representation gives the national government better information and motivation to supply the optimal amount of the good. Stopping free-riding requires a national tax, which a national government can assess.

These facts imply a prescription: *When a public good is purely national, or nearly so, the central government should provide for it.* In other words, the central government should raise

⁹⁵ Technical characteristics of goods can cause markets to fail (Arrow and Hahn 1971). Market failure provides the conventional economic justification for state supply and regulation of goods. Economic theory has analyzed the forms of market failure and proposed remedies for them. (Breyer 1982; Schultze 1977). PROVIDE FULL CITES

⁹⁶ Finding counter examples is difficult. Buchanan hypothesized that in some circumstances a private market will result in too many people getting vaccinated, but it seems false in fact that private markets oversupply public health. INSERT CITE

revenues and use them to supply the public good, either directly by government production or indirectly by purchasing the good from a supplier. The equivalent is true of national public bads:

When a public bad is purely national, or nearly so, the central government should control it.

Instead of being national, however, many public goods and bads are mostly local. Like Central Park in New York City, some public goods have a location, so that people who live nearby use it more than others. Pollution may collect in a specific air-quality basin and harm its residents more than other people. Public goods with a location are often afflicted by congestion. As a park becomes crowded, one person's enjoyment of it detracts from another person's enjoyment. As a road becomes congested, one more driver slows down the other drivers.

Supplying efficient quantities of public goods with specific locations requires information about their use. A state or local government usually possesses more information about state or local parks, roads, and air than does the central government. In addition, state and local residents can effectively monitor state and local officials, expressing approval or disapproval at the polls. Accordingly, state and local officials have better incentives than central officials for supplying state and local public goods. Moreover, a state or local public good can be financed by a state or local tax, which falls primarily on the beneficiaries and misses non-beneficiaries. These facts imply a second prescription in the conventional theory of public goods: *When a public good or bad has a state or local location, state or local government should provide or control it.*

To illustrate, assume that a city neighborhood needs a small park for local residents. In siting and scaling the park, local residents possess better information than non-residents. Local residents also have stronger incentives than non-residents to monitor the officials responsible for creating and maintaining local parks. These facts favor assigning power over city parks to local governments. In contrast, assume that people from all over a nation could benefit

from establishing a large park in the mountains. Responsibility for this park should fall upon officials who have a national perspective.

The difference between national and state or local public goods implies a simple proposition that we call the *internalization prescription* for jurisdiction: *Assign power over public goods and bads to the smallest unit of government that internalizes the effects of its exercise.* To combine “. . . the different advantages which result from the magnitude and the littleness of nations,” the federal government should supply national public goods, and the states and localities should supply state and local public goods.

Water and air pose circulate in regions formed by natural contours such as rivers and mountains that correspond imperfectly to state and local political boundaries. Pollution, consequently, spills over from one government jurisdiction to another. Spillovers create an incentive for each government to free ride on pollution abatement by others.

To avoid free riding by localities, the government with primary responsibility for abatement should encompass the natural region affected by pollution. Sometimes special governments can be created to fit the boundaries of a natural region. The internalization principle implies that the jurisdiction of a special government ideally extends as far as the effects of the public goods that it supplies or the public bads that it controls. A special district might provide clean water to several counties, or a special district might impose liability on local governments that pollute in an air basin.

Special districts are more important than visible. For example, few residents of California know that their state contains more than 5,000 special governments such as water districts, school districts, park districts, and transportation districts. The legal framework makes forming special districts within California relatively easy. In contrast, the legal framework for

creating special governments that cross state lines is harder to use. In practice, special districts have limited success in supplying interstate public goods and controlling interstate bads. When a natural region for public goods or bads extends over several states, the federal government may be the only practical authority to solve the problem. To understand why, the next section explains the political foundation of the internalization principle.

B. *The Federal Coase Theorem*

The *internalization prescription* seems antiseptic, but its foundation is the dirt of politics. We will analyze the politics of federalism abstractly. Interstate public goods or bads create an incentive for different governments to cooperate with each other. By cooperating, they can create a surplus. The obstacle to cooperation is the need to agree on distributing its benefits and burdens of cooperation. “Transaction costs” refer to the time and effort required to bargain to an agreement. A famous proposition in law and economics, which helped Ronald Coase win the Nobel Prize, asserts that individuals bargain successfully when unimpeded by transaction costs.

Applied to intergovernmental relations, this proposition implies that when transaction costs are low, bargaining among governments will correct any oversupply or undersupply of public goods or bads.⁹⁷ For example, when state governments can bargain easily with one other, they will cooperate in supplying the optimal amount of national defense and pollution abatement. These considerations lead to a proposition that we call the “Federal Coase Theorem”: *Assuming zero transaction costs of bargaining, the supply of public goods and bads is efficient regardless of the allocation of powers to different levels of government.*

⁹⁷ Here is the equivalent proposition for the private sector: *With zero transaction costs of bargaining, the supply of private goods is efficient regardless of the number of markets.* The choice between markets and hierarchies matters to efficiency only because of transaction costs.

The point of the Federal Coase Theorem is *not* that the allocation of powers to governments at different levels makes no difference to the efficient supply of public goods. Rather, the point is that obstacles to bargaining among the states give the federal government an advantage in supplying interstate public goods. To see why, consider one way that centralization changes the transaction costs of political bargaining. When states bargain to form a compact, each of them is free to join or not to join it. As with international treaties, making state compacts requires unanimity among members. In contrast, Congress does not require unanimity among the states to pass a federal law. Instead of unanimity, Congress requires a majority of members in the House and Senate.

In general, unanimity and majority rule define two poles of intergovernmental relations. We want to analyze the difference between them while avoiding a complicated discussion of the division of powers. So, imagine a federal government unlike the United States that operates purely on the principle of majority rule among the states, as would be the case if the United States Senate were the only chamber of Congress and the President had no veto power. In this imaginary federal system, states can act by federal legislation that requires a majority, or by compacts that require unanimity among the participants. A comparison of majority rule through a legislature and unanimity rule through compacts will elucidate some differences between federal versus state lawmaking.

Under unanimity rule, the probability of paralysis increases with the number of members. The logic of holdouts explains the main cause. As a coalition grows, each member that joins demands a fraction of the resulting increase in the surplus from cooperation. If the last member to join increases the coalition's value more than when each previous member joined, then the last member to join can demand the best terms. Everyone who recognizes this fact has an incentive

to hold out and to join the coalition last. If everyone holds out, however, the coalition never forms. Increasing returns to the scale of cooperation among states thus creates a problem of holdouts for state compacts.

To illustrate, assume that five local governments have jurisdiction over segments of a lake's shore. The five governments want to use the lake for recreational swimming, which requires all of them to stop polluting. The governments negotiate to distribute abatement costs. An agreement among any four governments is worthless without participation by the fifth government. If any four governments reach a tentative agreement, the fifth government can refuse to cooperate unless the others pay most of its abatement costs. Any government, however, could be the fifth government to join. Recognizing this fact, all five governments may hold out, which paralyzes abatement efforts and the lake remains polluted.

Because of the holdout problem, the transaction costs of bargaining under unanimity rule increase rapidly with the number of bargainers. Unanimity rule paralyzes groups with more than a few members. State compacts are thus unpromising as solutions to interstate pollution.

Having explained why unanimity rule paralyzes large organizations, now we will explain why majority rule animates them. Majority rule creates competition to become the decisive member in a majority coalition. To illustrate, in an assembly of 101 persons, a coalition of 51 members constitutes a majority. To form a majority coalition, a minority coalition of 50 members must attract one additional member. Instead of holding out and risking exclusion, many of the 50 outsiders may join the majority coalition and share in the advantages of power.⁹⁸

To illustrate by the example of the polluted lake, assume that five local governments form a council with the power to impose a pollution abatement program on its members by

⁹⁸ This logic explains why majority coalitions seldom incorporate more members than effective control requires. Riker developed this argument through the concept of the minimum winning coalition. INSERT CITES

majority vote. A coalition of three local governments can impose an abatement plan on the other two, including making the two governments outside the coalition pay a disproportionate share of abatement costs. A minority coalition with two members must attract an additional member to create a majority coalition. All three players outside this coalition may want to join in order to avoid being excluded from power. Competition to become the decisive member of the majority coalition often prevents holdouts in large organizations.

As an organization grows, it may switch from unanimity to majority rule in order to avoid paralysis.⁹⁹ The switch ameliorates the problem of holdouts, but it creates a new one: exploitation. Under unanimity rule, anyone who stands to lose from collective action can veto it. The veto blocks collective acts from making anyone worse off. The switch to majority rule removes the veto power. Under majority rule, the central government may provide national public goods, which benefit everyone, and also impose the costs of these programs disproportionately on the minority.¹⁰⁰ In the extreme case, majority rule does more harm than good to the minority.

Return to the example of bargaining over a regional plan to abate pollution. Instead of a lake, however, assume a polluted river that flows through several states. As the stream flows, pollution accumulates, so the downstream states suffer worse pollution than the upstream states. When negotiating a compact that requires unanimity, the upstream states have more bargaining

⁹⁹ For example, as more countries join the European Union, the Council of Ministers increasingly follows majority rule rather than its original unanimity rule. INSERT CITE. For the same reason, switching from unanimity to majority rule may make an organization more willing to accept new members. For example, the shift towards majority rule makes the Council of Ministers more willing to accept new countries into the European Union. INSERT CITE. A successful federal system with unanimity rule must have few members, whereas a successful federal system with majority rule can have many members. In general, a shift from unanimity rule to majority rule increases the optimal number of governments in a federal system.

¹⁰⁰ This is one reason why Buchanan and Tullock stressed the advantages of a unanimity rule in their classic book that revived contractarianism (Buchanan and Tullock 1962 (1967)). See also Persson and Tabellini 1994. PROVIDE FULL CITES

power than the downstream states, so they may extract an agreement that benefits them more than the downstream states. Or perhaps the upstream states will hold out, and no agreement will be reached. In general, the states with the least need for a compact have the most power when negotiating its terms. Furthermore, as more members are needed to make the compact viable, the probability falls of reaching any agreement.

Now consider a change from unanimity rule to majority rule. Assume that downstream states, which outnumber upstream states, form a majority coalition. Under these assumptions, the downstream states can impose unfavorable terms on the upstream states, so the policy imposed by the majority may require the upstream states to pay a disproportionate share of abatement costs. In general, a change from unanimity to majority rule transfers bargaining power from the parties who need collective action least to the parties inside the national coalition. The federal supply of public goods creates opportunities for the governing coalition to exploit the states excluded from power.

Our contrast between unanimity rule and majority rule exposes the politics underlying the internalization prescription. Spillovers across state lines create an incentive for each state to free ride on the efforts of others, which results in too few interstate public goods and too many bads. Forming a special government among the affected states could solve the problem in principle, but, in fact, states seldom give up their jurisdiction over particular activities to special governments. Instead, states more often compact to cooperate with one other. Compacts usually require unanimity for important acts, which imposes high transactions costs on collective action. If the compact encompasses many states, holdouts will paralyze it. Shifting power from state compacts to Congress animates regulatory activity. The central government operating on majority rule can find solutions that elude states cooperating through unanimity rule.

This is the political logic at the foundation of the internalization prescription. A more complete discussion of political logic would consider instability under majority rule,¹⁰¹ contrast lobbying at the national and state levels,¹⁰² and focus on the difference between states and citizens.¹⁰³ Political logic cannot completely explain the allocation of powers in governments. A more complete explanation of the internalization principle goes beyond political logic and reaches to history. In spite of these limitations, Part III will show that the internalization prescription provides a remarkably good explanation of the powers in Article 1, Section 8.

III. PUBLIC GOODS AS GENERAL WELFARE

According to the internalization prescription, a constitution should *assign power over public goods to the smallest unit of government that internalizes the effects of its exercise*. The federal government is the smallest unit of government that internalizes the effects of interstate public goods and bads. The internalization prescription thus implies that Congress should have constitutional authority to legislate over interstate goods and bads. When state compacts fail, Congress should exercise this authority. When state compacts succeed, Congress should not exercise this authority.

¹⁰¹ In technical terms, majority rule games of distribution with symmetrical players have an empty core. To illustrate, consider the example of a counsel of five local governments that can impose a pollution abatement program on its members by majority vote. Assume that a coalition of three local governments makes a plan requiring the other two local governments to pay most of the abatement costs. Each of the three local governments in the majority coalition can credibly threaten to quit if it does not receive a disproportionate share of the coalition's value. These considerations may destabilize any potential coalition. INSERT CITE

¹⁰² The relevant economic theory concerns "rent-seeking." For an introduction to this voluminous literature, see... INSERT CITE

¹⁰³ In economic jargon, the representation of citizens by elected officials is an "agency problem." The agency problem is to design electoral competition so that the self-interest of political officials prompts them to do what is best for their constituents. See... INSERT CITE

The internalization prescription has a firm basis in constitutional law.¹⁰⁴ Specifically, we show that (A) the enumerated powers listed in Article 1, Section 8 closely follow the internalization prescription; (B) the Constitution’s structure suggests that the federal government is authorized to target interstate public goods and bads; (C) Supreme Court doctrine identifies interstate collective action problems as a sound basis for federal legislative jurisdiction, including under the General Welfare Clause; (D) historical evidence indicates that the Constitution’s Framers acted to empower the federal government to address interstate collective action problems; and (E) arguments from contemporary constitutional values support that submission as well. A reasonable conclusion is that empowering Congress to “provide for the common Defence and general Welfare of the United States” authorizes federal taxing and spending on interstate public goods and bads.

A. *Public Goods are in the Constitution*

We begin by showing that many powers enumerated in Article I, Section 8 concern interstate public goods or bads. This demonstration will lead to a public-goods conception of the General Welfare. For easy reference, we number each clause in Article I, Section 8 below:

Figure 2: The Eighteen Clauses in Article 1, Section 8

The Congress shall have power

1. 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;
2. To borrow money on the credit of the United States;
3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;
5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

¹⁰⁴ See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-22 (1991).

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;
7. To establish post offices and post roads;
8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;
9. To constitute tribunals inferior to the Supreme Court;
10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;
11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
13. To provide and maintain a navy;
14. To make rules for the government and regulation of the land and naval forces;
15. To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;
16. To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;
17. To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;--And
18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

The General Welfare Clause comes first in Article I, Section 8. Public goods theory explains why the federal government can defend the nation far better than the individual states. Instead of a federal military, we could imagine the states entering compacts to defend the nation by coordinating their militias. The transaction costs of coordination preclude adequate security through state compacts. The need for centralization is obvious for purely national public goods, and military defense is the closest example. Clauses 10 through 16 concern specific powers for defending the nation. These powers are instances of how to provide for the common defense.

Without a patent, an inventor has difficulty preventing someone else from copying her invention. Without copyright, an author has difficulty preventing someone else from reprinting her book. If the creator cannot prevent unauthorized use, the creator cannot sell her creation, so the incentive to create is weak. The problem of exclusion for inventions and novels resembles the problem of excluding someone from the benefits of national defense. In this respect, creativity resembles public goods. To overcome the problem of non-excludability, intellectual property law gives creators temporary ownership of their creations, and uses the state's machinery of enforcement to prevent unauthorized use.¹⁰⁵ Clause 8 gives Congress power over intellectual property, as is required to solve this national problem.

The post office is a network, and networks often have increasing returns to scale.¹⁰⁶ Specifically, the more pick-up and delivery points, the more valuable the service is for each user. Increasing returns to scale of an industry were one of the first forms of positive externalities that economists identified.¹⁰⁷ With increasing returns to scale in an industry, each producer's activity benefits the other producers. Merging different producers into one organization lowers the transaction costs of coordinating their activities. When returns continue to increase up to the national level, a natural monopoly exists on the national level. The federal government is an appropriate supplier when technology creates a natural monopoly at the national level. Clause 7, which authorizes the federal government to operate a post office, is an application of public goods theory to a network. Similarly, the federal government is an appropriate supplier of an interstate highway system and was an appropriate regulator of railways in the 19th century.

¹⁰⁵ INSERT CITE

¹⁰⁶ INSERT CITE

¹⁰⁷ CITE Marshall

We have explained that the theory of national public goods provides a rationale for powers 7, 8, and 10-16. The first part of Table 1 summarizes this claim.

Figure 3: Economic Analysis of Enumerated Powers

Public goods	1. provide for common defense and general welfare
	7. establish post office
	8. make intellectual property law
	10. suppress piracy
	11. declare war
	12. raise armies,
	13. maintain navy
	14. make military law
	15. call militia
	16. govern militia
National market	
	3. regulate commerce
	4. establish naturalization and bankruptcy law
	5. issue money, fix weights and measures
	6. punish counterfeiting
Federal administration	
	2. issue bonds
	3. govern District of Columbia & federal buildings in states
	9. create lower federal courts
	18. make laws necessary & proper to execute these powers

Public goods theory, however, does not explain why the federal government should have powers 2-6, 9, and 18. Two additional concepts will complete the rationale.

Like contemporary Europe, 18th century America faced the problem of creating a unified market. The federal government has decisive advantages over state governments in creating a free national market for goods, capital, and labor. Clauses 3 through 6 give the federal government powers to do so. Using the Dormant Commerce Clause, which the Supreme Court has held is implicit in Clause 3, courts have prevented state interference with the interstate movement of resources.¹⁰⁸ (Several other constitutional provisions also prevent state

¹⁰⁸ The Supreme Court has closely policed state regulations discriminating against interstate commerce:

governments from impeding the movement of goods, capital, and labor.¹⁰⁹) Regarding Clause 4, uniform naturalization law increases labor mobility, and uniform bankruptcy law increases capital mobility. And Clauses 5 and 6 are important because creating and preserving a common currency can lower transaction costs for interstate exchanges, as does setting national standards for weights and measures.

Adam Smith's *Wealth of Nations* was published in 1776, the year the Declaration of Independence was crafted. If the drafters of the Constitution in 1787 needed any further convincing of the advantages of free markets among the states, experience with trade barriers under the Articles of Confederation provided it.¹¹⁰ The Constitution gave Congress the necessary powers to create a national market, and Congress used them. To unify product markets, the federal government abolished internal tariffs and the Supreme Court used the dormant Commerce Clause to prevent states from erecting regulatory barriers to the interstate movement of goods. The United States unified its labor and capital markets by developing a core of federal laws, such as federal deposit insurance, the separation of commercial and

Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' This rule is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States. States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. This mandate 'reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'

The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests. Rivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented.

Granholm v. Heald, 544 U.S. 460, 472 (2005) (citations omitted)).

¹⁰⁹ See U.S. CONST. Art. I, § 10.

¹¹⁰ INSERT CITE

investment banking, securities laws, minimum wages, and the social security system. These laws create sufficient uniformity to sustain a national market in capital and labor, just like the removal of internal tariffs created a national market in goods. For more than 150 years, the United States was the world's largest zone of unrestricted resource mobility,¹¹¹ and this fact goes far towards explaining the country's remarkable economic performance.

Supplying public goods and creating a national market require powers of administration. Powers 2, 9, and 18 secure these needed powers for the federal government.

Public goods, the national market, and effective administration promote the general welfare of the United States. Economic theory provides a clear rationale for allocating the enumerated powers over public goods and national markets to the federal government. The rationale is based on an analysis of the politics of inter-governmental cooperation. The enumerated powers 1, 7, 8, and 10-16 encompass the interstate public goods that were important in the 18th century. Justice Cardozo wrote for the Court that the concept of general welfare is “not static” and “[n]eeds that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation.”¹¹² The advantages enjoyed by the federal government in protecting the states against military invasion resembles the advantage that it now enjoys in protecting against interstate pollution. As technology and institutions change, Congress should promote the general welfare where it enjoys a decisive advantage over the states.

¹¹¹ The European Union has eclipsed the United States as the world's largest zone of unrestricted mobility, and like the United States, Europe experienced unprecedented, sustained economic growth. INSERT CITE

¹¹² *Helvering v. Davis*, 301 U.S. 619, 641 (1937).

B. Constitutional Structure

Interpretation of the Constitution can proceed by “inferring rules from the relationships that the Constitution mandates among the structures it sets up.”¹¹³ Interpreting the General Welfare Clause from constitutional structure is relatively straightforward. Because the Constitution separates powers between the federal and state governments, the Rehnquist Court observed that “[t]he Constitution requires a distinction between what is truly national and what is truly local.”¹¹⁴ Regarding the General Welfare Clause in particular, the relevant constitutional question is whether a particular instance of taxing or spending is “general” or “local.”

For the reasons we offered in Part II, national public goods and interstate externalities are not “truly local.” Our analysis of Article 1, Section 8 suggests that the Constitution allocates powers between federal and state governments according to relative competence.¹¹⁵ A more complete analysis of constitutional powers would buttress this conclusion.¹¹⁶ A structural analysis implies that the legislature most capable of addressing interstate externalities, which is Congress, must have the constitutional authority to do so.

¹¹³ BOBBITT, *supra* note 104, at 12.

¹¹⁴ *United States v. Morrison*, 529 U.S. 598, 617-18 (2000).

¹¹⁵ One might respond that the national-local distinction should not be understood functionally but formally based on some other conception such as respect for state sovereign dignity, which is indifferent to questions of relative governmental competence or welfare consequences. *See, e.g.*, Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 397 (2005) (“[T]he Court has invalidated federal actions that impede upon, or affront the ‘dignity’ of, states *qua* states.”); Elizabeth Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L. REV. 1503, 1559 (2000) (suggesting that the Court’s decisions in *New York* and *Printz* may be animated by concern that commandeering expresses disrespect for states). This perspective is at odds with an understanding of constitutional law informed by social science.

¹¹⁶ *See, e.g.*, ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* (2000).

C. *Supreme Court Doctrine*

Several times during the 20th Century, the Supreme Court concluded that collective action problems among states helped to justify federal legislation. In *Missouri v. Holland*,¹¹⁷ the state sued to stop a federal game warden from enforcing the Migratory Bird Treaty Act of 1918 and associated regulations, arguing that the law violated the Tenth Amendment.¹¹⁸ Writing for the Court, Justice Holmes rejected the appeal to state sovereignty:

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act.¹¹⁹

As we have seen,¹²⁰ Justice Stevens would later appeal to Justice Holmes' reasoning in his *SWANCC* dissent, arguing that "federal regulation is both appropriate and necessary" in the face of interstate externalities.¹²¹

Birds have non-market value that spills across jurisdictions as they migrate. Protecting birds thus combines an externality problem and a problem of collective action. We refer to jurisdictional spillovers of non-market value as "interstate externalities." A related class of cases concerns economic competition among the states that is deemed unfair from the national perspective. A state's unfair practice gives it a competitive advantage in interstate markets

¹¹⁷ 252 U.S. 416 (1920).

¹¹⁸ *Id.* at 430-431.

¹¹⁹ *Id.* at 435.

¹²⁰ *See supra* note 62 and accompanying text.

¹²¹ 531 U.S. at 195 (Stevens, J., dissenting).

against other states. Instead of non-market value spilling across jurisdictions, unfair practices in one jurisdiction undermine fair practices in a competing jurisdiction.

Two years before *Holland*, the Court decided such a case. The federal law at issue in *Hammer v. Dagenhart*¹²² was “intended to prevent interstate commerce in the products of child labor.”¹²³ The question was whether the federal government had the power to prohibit a state from exporting goods made with child labor to another state. The Court held the law unconstitutional, reasoning that “the necessary effect” of “a prohibition against the movement in interstate commerce” of commodities produced by child labor is “to regulate the hours of labor of children in factories and mines within the states, a purely state authority.”¹²⁴

The Court in this case considered and rejected an argument for federal power based on a collective action problem among the states. Specifically, the Court asked whether competition from states without regulation of child labor might undermine the efforts of a state wanting to regulate child labor:

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of childmade goods because of the effect of the circulation of such goods in other states where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the state of production. In other words, that the unfair competition, thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in those states where the local laws do not meet what Congress deems to be the more just standard of other states.¹²⁵

The Court denied that the logic of collective action could overcome the states’ police power:

There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may co-

¹²² 247 U.S. 251 (1918).

¹²³ *Id.* at 268.

¹²⁴ *Id.* at 276.

¹²⁵ *Id.* at 273.

operate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions.¹²⁶

Justice Holmes dissented, arguing that the Commerce Clause authorized the federal law. He wrote that “[t]he public policy of the United States is shaped with a view to the benefit of the nation as a whole,” and that “[t]he national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.”¹²⁷ Justice Holmes thus connected unfair competition and collection action problems to the general welfare of the United States.

Although Justice Holmes lost the battle, he won the war two decades later. In *United States v. Darby*, the Court overruled *Hammer v. Dagenhart* in sustaining the imposition of federal minimum-wage and maximum-hour regulations on manufacturers of goods shipped in interstate commerce. After noting “the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved,” the *Darby* Court held that “[t]he reasoning and conclusion of the Court’s opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.”¹²⁸

Significantly, the *Darby* Court embraced the collective-action logic rejected in *Hammer*:

[T]he evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the

¹²⁶ *Id.* at 273-74.

¹²⁷ *Id.* at 281 (Holmes, J., dissenting).

¹²⁸ 312 U.S. 100, 115-16 (1941) (citations omitted).

impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as “unfair,” as the Clayton Act, 38 Stat. 730, has condemned other “unfair methods of competition” made effective through interstate commerce.¹²⁹

The Court later used a similar argument from collective action to justify federal regulation of environmentally destructive practices. In *Hodel v. Virginia Surface Mining and Reclamation Association*,¹³⁰ the Court deemed significant “a congressional finding that nationwide ‘surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders.’”¹³¹ The Court emphasized that “the prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause.”¹³²

The *Hodel* Court did not stress an interstate externality like migrating birds, nor did it stress unfair interstate competition. Instead, the Court stressed that market competition between the states can promote environmentally destructive practices within a state.

Turning from the Commerce Clause to the General Welfare Clause, the Court in *Steward Machine Company v. Davis* rejected a constitutional attack on the unemployment compensation

¹²⁹ *Id.* at 122. See also *id.* at 115 (“The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows.”).

¹³⁰ 452 U.S. 264, 281 (1981).

¹³¹ *Id.* at 281-82 (quoting 30 U.S.C. § 1201(g) (1976 ed., Supp. III)).

¹³² *Id.* at 282.

system established by the Social Security Act (“SSA”).¹³³ Writing for the Court, Justice Cardozo stressed the collective action problem:

But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. Two consequences ensued. One was that the freedom of a state to contribute its fair share to the solution of a national problem was paralyzed by fear. The other was that in so far as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the government of the nation.¹³⁴

As evidence for a collective action problem, Justice Cardozo noted that Massachusetts had enacted a bill that would remain inoperative unless the federal bill became law or eleven of a list of 21 states “impose[d] on their employers burdens substantially equivalent.”¹³⁵

On the same day that *Steward Machine Company* came down, the Court in *Helvering v. Davis* sustained the constitutionality of the SSA’s old-age pension program, which had been funded exclusively by federal taxes.¹³⁶ Writing for the Court, Justice Cardozo perceived a rational basis for Congress’ concern about leaving the problem to the states:

Apart from the failure of resources, states and local governments are at times reluctant to increase so heavily the burden of taxation to be borne by their residents for fear of placing themselves in a position of economic disadvantage as compared with neighbors or competitors. We have seen this in our study of the problem of unemployment compensation. *Steward Machine Co. v. Davis*, supra. A system of old age pensions has special dangers of its own, if put in force in one state and rejected in another. The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. Only a power that is national can serve the interests of all.¹³⁷

¹³³ 301 U.S. 548 (1937).

¹³⁴ *Id.* at 588 (citations and footnote omitted).

¹³⁵ *Id.* at 588 n.9.

¹³⁶ 301 U.S. 619 (1937).

¹³⁷ 301 U.S. at 644 (footnote omitted).

This paragraph identifies a collective action problem much like child labor – interstate competition discourages states from protecting workers who need compulsory pension systems.

To summarize, Supreme Court decisions interpreting the Commerce Clause and the General Welfare Clause upheld federal legislation in significant part because the statutes aimed to solve collective action problems among the states. In some cases the Court explicitly tied the congressional action to the requirement that federal taxation or spending advance the “general Welfare of the United States.”¹³⁸ Interstate externalities caused some of these collective action problems, and unfair or environmentally destructive competition caused others.

D. Historical Evidence

Hamiltonians and Jeffersonians vigorously debated the meaning and significance of the General Welfare Clause during the Constitution’s first fifteen years.¹³⁹ Their disagreement suggests original *meanings* of the General Welfare Clause, not a single, definitive understanding.¹⁴⁰ Indeed, modern scholars who have investigated the original meaning of the “general Welfare” language have come to very different conclusions. One scholar recently argued that the original meaning precludes federal spending “for the special welfare of particular

¹³⁸ U.S. CONST. Art. I, § 8, cl. 1.

¹³⁹ *See, e.g., supra* Part I.B (referencing the Hamilton-Madison dispute).

¹⁴⁰ *Cf.* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 6 (1996) (“Both the framing of the Constitution in 1787 and its ratification by the states involved processes of collective decision-making whose outcomes necessarily reflected a bewildering array of intentions and expectations, hopes and fears, genuine compromises and agreements to disagree. The discussions at both stages of this process consisted largely of highly problematic predictions of the consequences of particular decisions. In this context, it is not immediately apparent how the historian goes about divining the true intentions or understandings of the roughly two thousand actors who served in the various conventions that framed and ratified the Constitution, much less the larger electorate that they claimed to represent. . . . [T]he notion that the Constitution had some fixed and well-known meaning at the moment of its adoption dissolves into a mirage.”).

regions or states.”¹⁴¹ Others have maintained, based on their understanding of the original understanding, that the General Welfare Clause does not authorize any federal spending.¹⁴² Still another commentator has discerned in the original meaning of the clause not just a failure to authorize federal spending, but also a significant restriction on federal authority – namely, “a standard of impartiality borrowed from the law of trusts.”¹⁴³

We offer no view concerning the original meaning or meanings of the words “general Welfare” because we are not legal historians. In any case, the public-goods conception of the General Welfare Clause is not an originalist theory. Instead, we rest our legal interpretation on the authority of constitutional text, structure, doctrine, and ethos explored above and below.¹⁴⁴

We note, however, an historical basis for our general approach in the central purpose of the Framers in drafting Article I, Section 8:

Federal power over genuinely interstate and international affairs lay at the heart of the plan approved by the Philadelphia delegates. According to the Convention’s general instructions to the midsummer Committee of Detail, which took upon

¹⁴¹ See John Eastman, *Restoring the “General” to the General Welfare Clause*, 4 CHAP. L. REV. 63, 65 (2001) (“Congress, I contend, has only the power to spend for the ‘general’ welfare and not for the special welfare of particular regions or states, even if the spending was undertaken in all regions or all states and therefore might be said to enhance ‘general’ welfare in the aggregate.”). This frankly stunning view of the modern scope of federal power would have disabled the federal government from directing federal dollars to the states affected by Hurricane Katrina.

¹⁴² See Jeffrey T. Renz, *What Spending Clause? (Or The President’s Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 142, 144 (1995) (“The [General Welfare Clause] is not . . . a grant of power to spend. . . . The General Welfare Clause is an intentionally redundant limit on the tax power.”); David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE UNIV. L. R. 215, 216 (1995) (“Congress’ power to spend does not derive from that so-called ‘General Welfare’ Clause, but instead derives from two overlapping but independent provisions found elsewhere in the Constitution. . . . Th[e] ‘Property Clause’ is ample to authorize all federal spending, whether or not it is also authorized by the Necessary and Proper Clause.” (footnotes omitted)).

¹⁴³ See Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 KAN. L. REV. 1, 4 (2003) (“Examination of history . . . shows that the General Welfare Clause is more than a mere ‘non-grant’ of spending power. It was intended to be a sweeping *denial* of power--specifically, it was intended to impose on Congress a standard of impartiality borrowed from the law of trusts, thereby limiting the legislature’s capacity to ‘play favorites’ with federal tax money.”).

¹⁴⁴ See *supra* Parts III.A-C and *infra* Part III.E.

itself the task of translating these instructions into the specific enumerations of Article I, Congress was to enjoy authority to “legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.”¹⁴⁵

Given the state of economic analysis at the time of the Founding, the Framers would have been hard pressed to express more cogently their apprehension of interstate collective action problems.

Collective action problems disrupted the country during the 1780s under the Articles of Confederation.¹⁴⁶ One such problem was the national government’s inability to tax individuals.¹⁴⁷ The General Welfare Clause solved this problem by abandoning the requisition scheme of the Articles and empowering Congress to tax individuals directly.¹⁴⁸ Accordingly, to the extent that history is deemed relevant to contemporary constitutional meaning, it would seem sensible to understand Congress’ power to tax and spend in the general welfare as incorporating the authority to act in the face of interstate public goods and bads.

To be clear, we offer this evidence as merely suggestive, not as dispositive of the historical inquiry. We do not address the distinction between the intent of the Framers and the

¹⁴⁵ AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 108 (2005) (quoting 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 131-32 (Max Farrand ed. 1966)). This language came from the Virginia Plan, see RAKOVE, *supra* note 140, at 60, 177-78, so named because it was drafted by the Virginia delegation before the Convention was ready to proceed. Incorporating most of James Madison’s pre-Convention assessment of what ailed America, the Virginia Plan formed the basis of the Convention’s first two weeks of debate. *Id.* at 59.

¹⁴⁶ *See, e.g.*, RAKOVE, *supra* note 140, at 24-28, 47-48, 167-68, 188-89, 102-08 (discussing various failures of the Articles of Confederation).

¹⁴⁷ *See, e.g.*, AMAR, *supra* note 145, at 46 (“Along with other federal organs, the navy could be directly financed by new federal imposts, duties, and other taxes imposed on individuals from every region—individuals who would be directly represented in the Congress that would set general tax rates and approve the overall defense budget. This new and readily enforceable revenue system would cure the collective-action problems that had doomed the Articles’ requisition regime, which lacked strong mechanisms to sanction shirking states. (State self-interest alone had failed to guarantee adequate financial support; continental defense was a classic shared good whose benefits radiated beyond the contributing states.)”).

¹⁴⁸ *See* U.S. CONST. Art. I, § 8, cl. 1.

intent of the Ratifiers, nor do we parse the differences between original intent and original meaning.¹⁴⁹ We also do not trace how the intent of the Framers to address separate state incompetence shaped the understanding of the specific clauses in Article I, Section 8 that emerged from the Constitutional Convention. Something may have eventually been changed in translation, as the General Welfare Clause came to be understood to authorize taxing and spending only, not “legislat[ion] in all Cases.”¹⁵⁰

There is an additional reason for us not to make aggressive originalist claims: The Articles of Confederation itself employed “general welfare” language in allocating power over taxing and spending.¹⁵¹ What solved the interstate collective-action problem that existed during the Critical Period was (obviously) not the use of the same language in the same context in the Constitution, but the fact that the Constitution empowers Congress to bypass the states and tax individuals directly.

That said, this project is consistent with the Framers’ design as a general matter – that is, empowering Congress to address impediments to collective action among the states – regardless of whether our interpretation captures the Constitution’s original meaning (assuming there is

¹⁴⁹ See, e.g., RAKOVE, *supra* note 140, at 7-11 (discussing these distinctions).

¹⁵⁰ FARRAND, *supra* note 145, at 131.

¹⁵¹ The relevant language allowed Congress to apportion taxes, but left tax collection to the states:

All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.

Articles of Confederation, Art. VIII.

such a thing) at the specific level of “general Welfare.” As support for our central analytical claim about the constitutional meaning of that language, we rely on a combination of economic analysis, various methods of constitutional interpretation, and general historical purposes.

Professor Amar uses historical evidence to criticize the modern Supreme Court’s “move[ment] toward reading the [Commerce Clause] paragraph as applicable only to economic interactions,” arguing that “[w]ithout a broad reading of ‘Commerce’ in this Clause, it is not entirely clear whence the federal government would derive its needed power to deal with noneconomic international incidents—or for that matter to address the entire range of vexing nonmercantile interactions and altercations that might arise among states.”¹⁵² We submit that there is an independent way: a public-goods conception of the General Welfare Clause confers broad authority upon Congress to address noneconomic, interstate externalities.

E. Contemporary Constitutional Values

Arguments from contemporary constitutional values support this conclusion as well. At the opposite end of the interpretive spectrum from originalism lies the view that the Constitution’s meaning changes over time.¹⁵³ The conception of constitutional authority underlying this view has been called the authority of *ethos*, which refers to an evolving expression of collective identity, one encompassing a consensus on contemporary American

¹⁵² AMAR, *supra* note 145, at 107-08.

¹⁵³ Compare, e.g., *Roper v. Simmons*, 543 U.S. 551, 587 (2005) (Stevens, J., concurring) (“that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text”), with *Roper*, 543 U.S. at 608 (Scalia, J., dissenting) (“The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to ‘the evolving standards of decency’ of our national society.” (internal citations omitted)).

values.¹⁵⁴ This conception of constitutional authority strongly supports the public-goods understanding of the General Welfare Clause. Most Americans, both within and outside the legal community, view interstate problems as within the appropriate purview of federal regulation. Reasonable people may disagree about whether a problem is genuinely interstate or actually intrastate, but once an interstate scope is established, the argument for federal control becomes compelling to most members of the interpretive community.

Current Commerce Clause jurisprudence supports our submission. Even as the Rehnquist Court restricted the commerce power and the lower courts have become more conservative over time,¹⁵⁵ it remains largely uncontroversial that pollution and endangered species fall within the commerce power as long as they cross state lines.¹⁵⁶ Yet it is a nice theoretical question why the mere interstate movement of those phenomena by itself – that is, without the establishment of any nexus to commercial activity – renders them regulable under the *commerce* power. The

¹⁵⁴ See generally Robert C. Post, *Theories of Constitutional Interpretation*, in CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 23-50 (1995). While Bobbitt usefully categorizes the different kinds of constitutional argumentation, see *supra* notes 104, Post distinguishes them based on the conceptions of constitutional authority that they presuppose. A conception of constitutional authority provides a justification for the practice of judicial review in a presumptively majoritarian society. For example, historical interpretation relies upon the authority of the Constitution as consent, and doctrinal interpretation invokes the status of the Constitution as law. See generally POST, *supra*.

¹⁵⁵ See *supra* Part I.A; see, e.g., Deborah Sontag, *The Power of the Fourth*, NEW YORK TIMES MAGAZINE, March 9, 2003, §6, at 40 (“[President Bush] appears poised to transform the federal judiciary -- which includes 179 appeals judges at full strength -- back into an overwhelmingly conservative bench. In 12 years between them, Ronald Reagan and George H.W. Bush established a Republican majority on every appeals court. Clinton, facing stiff resistance from an opposition Senate for six of his eight years, pushed that back somewhat so that Bush inherited a Republican majority on 8 of the 13 appellate courts, with 3 more poised to swing Republican through his appointments. And those appointments, because they are for life, could reverberate for generations.”).

¹⁵⁶ See Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 724 (2002) (“While the Court’s Commerce Clause jurisprudence is ultimately more concerned with the impacts of activities upon interstate commerce than the activities’ location, most judges and commentators have assumed that whether a species is located in only one state or crosses state boundaries is an important factor.” (footnotes omitted)). But see John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 185 n.49 (1998) (“Why the fact that a bird or animal crosses state lines of its own violation and without being itself an object of interstate commerce is sufficient for Commerce Clause purposes remains unexplained.”).

answer, we suggest, is that most Americans (including judges of diverse ideologies) conceive interstate externalities and other collective action problems as fitting at the federal level.

Implicitly, the collective sense of the American people has been that federal action to alleviate interstate collective action problems is federal action properly aimed at promoting the general welfare of the United States.

F. Summary

Our submission that the General Welfare Clause empowers Congress to address interstate externalities and other interstate collective action problems through taxation and spending finds substantial support not only in economic theory, but also in the various approaches to constitutional interpretation. We have grounded our understanding of the General Welfare Clause in the text of Article I, Section 8, the Constitution's federalist structure, Supreme Court doctrine, and contemporary constitutional values. Moreover, while we have made no claims about the original meaning of "general Welfare," we have shown more generally that the Framers sought to enable Congress to internalize interstate externalities. Now we illustrate the promise of a turn to the General Welfare Clause by considering legal applications in the field of environmental law.¹⁵⁷

IV. DOCTRINAL APPLICATIONS

This Part analyzes Congress' power under the public-goods conception of the general welfare to target environmental problems whose regulation currently is, or arguably should be, constitutionally problematic under the Commerce Clause. The discussion focuses on various

¹⁵⁷ Because we have not mastered the details of complex federal environmental statutes and regulatory regimes, our hope is that environmental lawyers will examine the extent to which our approach would have purchase in the areas of environmental law in which they specialize.

applications of federal environmental law, including the Supreme Court’s decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC) and *Rapanos v. United States*.¹⁵⁸ While the environmental harm often spills across state borders, its cause may or may not be “economic” or “commercial” as the Supreme Court has conceived those terms.¹⁵⁹ Environmental law both illustrates the viability of the general-welfare approach to federal legislation and stands to benefit from it.

The argument proceeds in four parts. First, we identify some important environmental-law applications that may be constitutionally vulnerable in light of *Lopez*, *Morrison*, *SWANCC*, and *Rapanos*, and we explore lurking theoretical problems with applications of federal environmental law that are not constitutionally suspect under current law. Second, we analyze the extent to which the public-goods approach allows Congress to address these potential problems under the General Welfare Clause. Third, we illustrate the taxation and expenditure techniques through which Congress might protect the environment under the public-goods approach. Finally, we clarify the limits of that approach, detailing why Congress must rely on some other conception of the general welfare if it wants to tax and spend to address other types of environmental harms and the problems at issue in *Lopez*, *Morrison*, and *Jones*.

A. Problems

An enormous literature identifies applications of federal environmental law that may be constitutionally vulnerable after *Lopez*, *Morrison*, *SWANCC*, and now *Rapanos*.¹⁶⁰ Prominent

¹⁵⁸ See *supra* notes 20-21.

¹⁵⁹ See *supra* Part I.A (discussing *Lopez*, *Morrison*, and *Raich*).

¹⁶⁰ See, e.g., Schroeder, *supra* note 61, at 422-23 (discussing problematic applications and citing the literature).

concerns include (1) the Clean Water Act's protection of isolated, intrastate wetlands¹⁶¹ and other wetlands that lack "a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made";¹⁶² (2) the Endangered Species Act's protection of isolated, intrastate habitats for species that lack commercial value,¹⁶³ (3) the Clean Air Act's regulation of wholly intrastate ambient air quality standards,¹⁶⁴ (4) the Safe Drinking Water Act's purity requirements for the arsenic content of local drinking water supply systems,¹⁶⁵ and (5) the Superfund statute's regulation of on-site disposal of hazardous waste.¹⁶⁶

While each vulnerability warrants detailed constitutional analysis, some general similarities suffice for our purposes:

Many federal environmental statutes exhibit characteristics that raise federalism warning flags under the Court's revamped approach: (1) they are often defended by invoking Congress's authority to regulate intrastate activity that affects interstate commerce; (2) they regulate highly localized private conduct, such as the modification of critical habitat by single land owners on small pieces of property, conduct that has no discernible impact on any national market; (3) they

¹⁶¹ See *supra* note 56 (citing the Clean Water Act ("CWA")). The Court in *SWANCC* and *Rapanos* stated that constitutional concerns informed its decision. See *supra* Part I.A.

¹⁶² *Rapanos*, 126 S. Ct. at 2236 (Kennedy, J., concurring in judgment) (quoting *SWANCC*, 531 U.S. at 167, 172).

¹⁶³ See *supra* note 14 and accompanying text (citing and discussing the Endangered Species Act ("ESA")). For decisions entertaining Commerce Clause challenges to various applications of the ESA, see *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003) (commercial development of private property that could harm six species of subterranean invertebrates found only within two Texas counties), *reh'g and reh'g en banc denied*, 362 F.3d 286 (5th Cir. 2004); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) (housing development construction that could jeopardize the continued existence of the arroyo southwestern toad, which is located only in California), *reh'g and reh'g en banc denied*, 334 F.3d 1158 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (taking of red wolves on private land); *Nat'l Ass'n of Homebuilders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (public hospital and power plant construction that could harm the Delhi Sands Flower-Loving Fly, which is located only in California).

¹⁶⁴ 42 U.S.C. §§ 7401-7671q.

¹⁶⁵ *Nebraska v. E.P.A.*, 331 F.3d 995 (D.C. Cir. 2003) (rejecting a facial Commerce Clause challenge to the Safe Drinking Water Act regulation setting the maximum contaminant level for arsenic in drinking water).

¹⁶⁶ *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997) (rejecting a Commerce Clause challenge to federal regulation of the on-site disposal of hazardous waste under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675).

impinge on the authority states would otherwise have to regulate land use, a traditional area of state concern.¹⁶⁷

All of those themes are evident in Part I.A's discussion of *Lopez*, *Morrison*, *SWANCC*, *Raich*, and *Rapanos*. Each theme is significant, but most important, we submit, is the Court's division of regulated activities into "economic" and "noneconomic" categories. That distinction does essentially all of the work in the recent Commerce Clause cases. The Court understands the conceptual difficulties involved in distinguishing intrastate activities that substantially affect interstate commerce in the aggregate from those that do not. The Court, therefore, has not tried.¹⁶⁸ Instead, it has allowed aggregation based on substantial effects when the regulated class of activity is "economic" (as the Court understands that term), but not otherwise.¹⁶⁹ The economic/noneconomic distinction explains not only the outcomes in the above cases, but also why the *Lopez* Court reaffirmed *Hodel*, which used the "affects" inquiry to allow federal regulation impinging on local authority over a traditional subject of state concern. The regulated activity in that case – surface mining – was commercial in nature.¹⁷⁰

The economic/noneconomic distinction affects the constitutionality of the vulnerable legal applications discussed above because those applications may have an economic nexus in some situations but not others. For example, an endangered species may be harmed by a

¹⁶⁷ Schroeder, *supra* note 61, at 414.

¹⁶⁸ In *Lopez*, for example, the Court did not actually refute the government's arguments that firearm possession in schools substantially affects interstate commerce in the aggregate. Instead, the Court "pause[d] to consider the implications of the Government's arguments," which were essentially that if Congress can regulate gun possession in schools, then Congress can regulate anything. 514 U.S. at 564-65. The Court did not provide a test for distinguishing substantial from insubstantial effects on interstate commerce.

¹⁶⁹ See *supra* Part I.A (discussing *Lopez*, *Morrison*, and *Raich*). As discussed *supra* in note 48, the *Raich* Court clarified that the regulated activity need not be economic if Congress rationally concludes that the failure to regulate the class of activity would undermine federal regulation of the interstate market in the commodity produced by the activity. Accordingly, the class of activity must be economic even if particular instances within the class need not always be economic.

¹⁷⁰ See *supra* notes 130-132 (discussing *Hodel*).

commercial developer or by the recreational use of private land. Both kinds of activity, however, are subject to regulation under the Endangered Species Act. Likewise, safe drinking water problems can be caused by industrial pollution or natural sources such as arsenic. Yet both types of conduct are subject to regulation under the Safe Drinking Water Act. The same is true of the regulatory schemes established by the Clean Water Act and the Clean Air Act; those statutes regulate anyone who generates certain kinds of pollution, not just commercial entities.

The commercial/noncommercial distinction, therefore, is key in evaluating environmental applications in the vulnerable category. Interestingly, however, the constitutionality of other instances of environmental regulation goes unquestioned under current law even when a commercial nexus is lacking. Examples include the mere movement of a pollutant through the air or water across state lines, or the mere positioning of a protected environmental feature (such as an endangered species) across a state boundary. We are aware of no decisional law that casts doubt on the power of Congress to regulate such phenomena under the Commerce Clause. We are aware of decisional law that appears reflexively to endorse the exercise of such authority.¹⁷¹

As a descriptive matter, one can reconcile legal applications that are currently vulnerable and those that are not: the regulated activity must be “economic” when it is *intrastate* and it is alleged substantially to affect interstate commerce, but need not have any commercial nexus when it moves *interstate*. The Court is relatively demanding on the “commerce” side of the “interstate commerce” requirement when the “interstate” aspect is not clearly met.¹⁷² But courts are willing to look past an attenuated (or even nonexistent) “commerce” nexus when the

¹⁷¹ See William Funk, *The Court the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 ENVTL. L. REP. 10741, 10761-62, 10765 (2001) (compiling case citations and quotations).

¹⁷² We use the term “interstate” commerce as a synonym for the language in clause 3 authorizing Congress to regulate commerce “among the several States.” U.S. CONST. Art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . .”).

“interstate” dimension is satisfied.¹⁷³ The federal judiciary has construed the Interstate Commerce Clause in Article I, Section 8 as if it were the Interstate *Or* Commerce Clause.

The commerce power, however, contains both requirements. It is not clear why Clause 3 allows Congress to regulate the interstate movement of naturally occurring arsenic in water or some other pollutant simply by virtue of the interstate status of the movement, particularly if the medium for the movement is an underground aquifer or a small nonnavigable stream lacking a significant nexus to waters that are navigable in fact. Nor is it apparent why Congress can regulate activities just because they threaten the existence of a species that moves across state boundaries – that is, regardless of whether those activities move through or impact the channels or instrumentalities of interstate commerce or substantially affect interstate commerce.¹⁷⁴

B. Solutions

The key feature of a congressional turn to the General Welfare Clause is that this clause includes the word “Welfare,” not “commerce.” Accordingly, the economic or noneconomic nature of an environmental problem is irrelevant to the constitutionality of federal taxation or expenditures aimed at addressing it. Consider the presently uncontroversial cases described above. Any sort of air pollution, water pollution, or endangered species that moves between or among states can be targeted by Congress under the General Welfare Clause because such

¹⁷³ See *supra* note 156 and accompanying text.

¹⁷⁴ Accord Funk, *supra* note 171, at 10766 (“[W]hen one seeks the authority for plenary congressional authority over interstate waters per se or to regulate interstate pollution simply by reason of its being interstate, one seeks in vain. . . . Congress’ power to legislate must be grounded in its enumerated powers and does not extend to . . . interstate waters . . . except as any such legislation is otherwise based on the enumerated powers.”). As *SWANCC* and *Rapanos* now stand in the U.S. Reports, it is fair to ask whether the Justices who favored a narrow construction of the CWA can honestly distinguish the facts of those cases from hypothetical situations in which the ecological and hydrological facts are exactly the same but the abandoned gravel pit or wetland at issue just happens to straddle the boundary between two states. What is it about the fact of straddling a state line that renders those environmental features regulable under the Commerce Clause when under the facts actually litigated it would raise a substantial constitutional question if the CWA were construed as authorizing regulation?

pollutants (or species) are interstate public bads (or goods) by definition. For example, the touchstone of federal authority for five Justices in *Rapanos* was interstate navigable waters. But lots of water that flows across state boundaries is nonnavigable, and some of this water presumably lacks a significant nexus to interstate navigable waters (whatever “significant nexus” turns out to mean). Were federal authority triggered by an interstate externality, however, as it would be under the public-goods approach to the General Welfare Clause, the simple movement of an environmental stressor across a state line would justify federal taxation and spending regardless of whether there was a significant nexus to interstate navigable waters.

To consider another example, the extinction of an endangered species harms the future well-being of people in all states where the species might otherwise be preserved. When activity in state A renders the species extinct in states A, B, and C, the external effect of the activity in state A is clear. Moreover, whether the activity threatening the endangered species habitat is the construction of a housing development or the recreational use of land by local residents makes no difference for purposes of the general welfare. The same can be said of interstate drinking water that has been contaminated by naturally occurring arsenic instead of an industrial polluter. In either case, federal action can internalize this externality. The federal government, therefore, potentially enjoys a decisive advantage over the states in addressing the problem of preserving species or combating pollutants that move interstate.

Where the environmental problem is interstate but unrelated to commerce, therefore, the public-goods approach to the General Welfare Clause holds great promise. Although no court has yet questioned the constitutionality of such applications under the Commerce Clause, what is presently uncontroversial may not always remain that way.¹⁷⁵ The Rehnquist Court’s Commerce

¹⁷⁵ Cf. Funk, *supra* note 171, at 10771 (“The larger question raised by a stricter scrutiny of the Commerce Clause basis for environmental legislation, as suggested by *SWANCC*, is the extent to which the Court will

Clause jurisprudence, which caused a sea change in constitutional law beginning in 1995, corroborates this assertion.¹⁷⁶

In the absence of federal action, states may find themselves competing for laxity (“race to the bottom”) or severity (“race to the top”).¹⁷⁷ A race to laxity occurs when states gain a competitive advantage from weaker standards. We have already discussed Supreme Court cases where nationalists argued that only federal power could prevent a race to the bottom. A race to severity occurs when the state with the highest standards can impose it on national businesses. When California sets automobile emission standards, supplying the same car to all states may be cheaper for manufacturers than modifying cars for sale in California.¹⁷⁸ Congress must decide whether to impose higher standards when the states race to laxity, and it must decide whether to impose lower standards if the states race to severity. It is often a complex empirical question whether a race exists and, if so, in which direction it tends. Reasonable minds often disagree regarding these issues.¹⁷⁹ Arguments are appropriately directed to Congress, which is best situated to make the quintessentially legislative judgment of whether a race exists that requires

reconsider, or consider for the first time, assumptions that have underlain environmental legislation and its judicial review for one-quarter century. . . . As yet, there has been no express indication that the Court is willing to knock the pins from under most of the nation’s environmental laws. It is only by inference from the stricter application of the Commerce Clause generally and the concerns voiced by the Court in *SWANCC* in particular that one might conclude that such a threat exists.”).

¹⁷⁶ See *supra* part I.A.

¹⁷⁷ See, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “to the Bottom”?*, 48 HASTINGS L.J. 271 (1997); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996); Joshua D. Sarnoff, *The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL’Y F. 225 (1997); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE J. ON REG. 67 (1996); Richard L. Revesz, *The Race to the Bottom and Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997).

¹⁷⁸ INSERT CITE

¹⁷⁹ See *supra* note 177. For a review of the literature, see Adler, *supra* note 115, at 466-70.

federal attention.¹⁸⁰ Congress should not regulate if states are better situated to handle the problem through competition or compacts.¹⁸¹ As for judicial review, when Congress rationally concludes that a race of one kind or another exists among the states and supports its determination with legislative findings that dispel the suspicion of mere rent seeking, the constitutional inquiry regarding whether Congress is acting in pursuit of the general welfare should end.¹⁸²

The public-goods approach to the General Welfare Clause reveals that the interpretive community correctly conceives the interstate movement of water, pollution, or species as justifying federal regulation, but it sometimes does so for the wrong reasons. These problems primarily concern the impact of interstate externalities or other collective action problems on the general welfare of the country, not interstate commerce. The closest thing Congress has to a freestanding warrant to address interstate problems by virtue of their interstate status is the General Welfare Clause, not the Commerce Clause.¹⁸³

In addition, the general-welfare approach focuses the interpretive community's attention on the real issue at hand, which is the environmental impact of the regulated activity on the general welfare, not the effect on interstate commerce. Debate over the extent of a nexus between a regulated activity and commerce in the environmental context distracts attention from

¹⁸⁰ The existence of a race to the top among the states regarding an issue does not compel the conclusion that the issue is best left to the states instead of the federal government. Like a race to the bottom, a race to the top may be sub-optimal from the perspective of the general welfare of the country.

¹⁸¹ U.S. CONST. Art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . .”).

¹⁸² *Cf.* Funk, *supra* note 171, at 10767 (“However this academic argument turns out, it seems unlikely that the Court would in the face of express congressional findings reject a determination that a ‘race to the bottom’ existed. This is precisely the type of legislative judgment that does not seem amenable to proof one way or the other.”). Funk makes a predictive point; ours is normative.

¹⁸³ *Cf.* Funk, *supra* note 171, at 10766 (arguing that “there appears to be no authority for Congress to legislate to resolve interstate problems generally”).

the central constitutional question of what is truly national (or interstate) and what is truly local (or intrastate). So do arguments about whether Congress “really” wanted to regulate interstate commerce or whether its commerce justification is pretextual.¹⁸⁴

The General Welfare Clause leads directly to the issue of the appropriate vertical division of constitutional authority in our federalist system. Unsurprisingly, therefore, the public-goods understanding of the general welfare would reach some, but not all, of the currently vulnerable applications of federal environmental law described above. If clean air or clean water is a state or local public good – which it is when a pollution problem remains entirely intrastate – the public-goods conception of the general welfare would not reach it. Nor would our approach reach on-site hazardous waste disposal that does not seep across state borders.

Endangered species and wetlands, however, are potentially a different matter. Regarding the Endangered Species Act’s protection of allegedly isolated, intrastate habitats for specific species that lack any known commercial value, the key issue is whether the habitat is really isolated and intrastate. If the species exists only in one state, has no reasonable prospect of existing in more than one state even with habitat preservation, and has lived only in that same state in the past, then the public-goods approach to the general welfare would not support federal regulation. If, however, human conduct in one state does, will, or did affect the existence of the species in another state, the public-goods understanding of general welfare is implicated and Congress can tax and spend to preserve the species. A problem does not become less interstate because the absence of federal regulation has resulted in the extinction of the species everywhere

¹⁸⁴ Our point is not that Congress can regulate interstate commerce only for certain purposes and not others, so that allegations of pretext have potential force. Compare, e.g., William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769 (arguing for the need to invigorate pretext doctrine in Commerce Clause cases), with, e.g., Schroeder, *supra* note 61, at 443-45 (critically analyzing Van Alstyne’s view). Rather, our concern is with the distracting quality of the debate itself in many environmental-law settings.

but one state. Moreover, the species' lack of economic value is irrelevant to the general-welfare approach. Nor does it matter whether the activity harming the species is commercial.

Regarding the Clean Water Act's protection of allegedly isolated, intrastate wetlands, again the critical question is the claimed isolation and intrastate nature of the protected environmental feature. Commerce, including navigability, has nothing to do with the constitutional inquiry. To be sure, some wetlands may be so isolated as to be beyond the public-goods conception of the general welfare.¹⁸⁵ In general, however, environmental systems such as water are intertwined in ways (*e.g.*, surface hydrological connections or ecological connections) that often affect the welfare of people in more than one state.¹⁸⁶ In that circumstance, the public-goods approach justifies federal taxation and expenditures in pursuit of the general welfare.

C. *Techniques*

Now we illustrate how Congress can use its taxing and spending powers to protect the environment under the public-goods approach. The methods are familiar: taxation, spending, and conditional spending. Examples currently exist in the environmental-law context.¹⁸⁷

¹⁸⁵ *SWANCC* does not provide a good example of such isolation. The waters at issue in that case were isolated and intrastate in terms of their physical location, but they were not isolated or intrastate in other ways – specifically, their use as habitat by migratory birds that move interstate. *See supra* Part I.A; Part III.C.

¹⁸⁶ *See, e.g.*, EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 308 (1992) (discussing the interconnectedness of species within ecosystems); Steven M. Johnson, *United States v. Lopez: A Misstep, But Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. ENVTL. L.J. 33, 81 (1996) (“It is a fundamental principle of ecology that ecosystems are composed of interdependent parts that play vital roles in preserving the ecosystem.”). *Cf., e.g.*, *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 807 (7th Cir. 2005) (“Nothing in the Constitution forbids interpreting the Clean Water Act to cover any wetlands that are connected to navigable waters. Whether the wetlands are 100 miles from a navigable waterway or 6 feet, if water from the wetlands enters a stream that flows into the navigable waterway, the wetlands are ‘waters of the United States’ within the meaning of the Act.”); *United States v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004) (“Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves.”).

¹⁸⁷ *See generally* Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147 (2001).

Congress has not often used its tax power to advance environmental protection. The most prominent example is Superfund, under which the federal government can fund a cleanup of hazardous substances through a tax on petrochemical companies, utilities, and crude oil importers, as well as reimbursement from responsible parties.¹⁸⁸ Because past distinctions between revenue and regulatory taxes no longer control in constitutional law,¹⁸⁹ Congress enjoys ample authority to tax interstate externalities as a means of advancing the general welfare of the country.

In addition to taxation, Congress can spend money in pursuit of the general welfare. For example, Congress appropriates billions of dollars in grants under various Clean Water Act programs.¹⁹⁰ The federal government could make widespread use of federal funds to finance state environmental-protection efforts directed at interstate externalities.

Under *South Dakota v. Dole*, moreover, Congress can condition federal dollars on state compliance with requirements that the federal government has no constitutional power to impose directly.¹⁹¹ Congress has not made extensive use of this indirect regulatory lever in the service of environmental protection. The most prominent example is the 1990 amendments to the Clean Air Act, which withdraw federal highway funds from states that have not achieved the national Ambient Air Quality Standards (“NAAQS”).¹⁹² If Congress were to make greater use of its conditional spending power, it could address interstate environmental problems that are arguably

¹⁸⁸ See generally 26 U.S.C. § 9611.

¹⁸⁹ See *supra* notes 90-91 and accompanying text.

¹⁹⁰ Binder, *supra* note 187, at 161 (providing examples from fiscal year 2000, including a Drinking Water State Revolving Fund and a Clean Water State Revolving Fund, each providing roughly \$1.2 billion).

¹⁹¹ See *supra* Part I.B.

¹⁹² 42 U.S.C. § 7509(b)(1)(A); 42 U.S.C. § 7410(m). The NAAQS specify the level of air quality required to protect the public health and welfare. We do not discuss here whether this particular use of the conditional spending power raises constitutional concerns under *Dole*'s “relatedness” requirement. See *supra* note 12.

beyond the scope of the commerce power – *i.e.*, in situations where the interstate problem has little relation to commerce. Congress could also offer states sufficient financial incentives to obtain their agreement to enact a federal regulatory program, to enforce federal environmental law, or to waive their sovereign immunity to private environmental lawsuits in federal court.¹⁹³ Under the Court’s current Tenth and Eleventh Amendment jurisprudence, Congress may not directly impose any of these obligations on the states.¹⁹⁴

D. Distinctions

The public-goods approach to the “general Welfare” is viable in important environmental-law settings because so many environmental harms are interstate externalities by nature. The key analytical point animating the public-goods approach is not that an environmental problem in one state ultimately has interstate effects. Rather, the thrust is that the interstate “publicness” of the problem gives the federal government a decisive regulatory advantage over the states.

The facts of *Lopez*, *Morrison*, and *Jones* illustrate this distinction between interstate effects and interstate externalities. Take *Morrison*, for example. It is difficult to deny that

¹⁹³ See generally Neil S. Siegel, *Commandeering and its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. (forthcoming 2006) (comparing, among other things, commandeering and conditional federal spending in terms of their relative impact on federalism values); Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 104-05 (2001) (arguing that Congress should enjoy robust power to require that states waive their sovereign immunity from suit as a condition of receiving federal funds).

¹⁹⁴ See *New York v. United States*, 505 U.S. 144 (1992) (holding that the “take title” provision of the Low Level Radioactive Waste Policy Amendments Act of 1985, which required states either to regulate radioactive waste according to Congress’ requirements or else to take title to the waste, constitutes unconstitutional compulsion and commandeering of the governmental capacity of state governments); *Printz v. United States*, 521 U. S. 898 (1997) (relying on a Tenth Amendment anti-commandeering rationale in holding unconstitutional certain interim provisions of the Brady Handgun Violence Prevention Act, which required state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks); *Seminole Tribe of Fla v. Fla*, 517 U.S. 44 (1996) (holding that Congress may not use the commerce power to abrogate the states’ sovereign immunity from private lawsuits for money damages in federal court).

intrastate violence against women generates significant interstate commercial consequences in the aggregate.¹⁹⁵ But that claim is different from the assertion that the absence of federal regulation by itself increases gender-motivated violence sufficiently to produce an interstate impact. The interstate-externality argument can succeed in the context of violence against women (or firearms possession in schools or arson) only on a showing that the public-bad effect renders the federal government best situated to address the problem. It is not clear that such an argument can be sustained. States appear *able* effectively to combat gender-motivated violence, guns in schools, and arson regardless of whether other states address or ignore these problems. Whether all states are *willing* to do so to a sufficient extent from the national perspective is a distinct question.

To be clear, we do not opine on the soundness of the Court's decisions in *Lopez*, *Morrison*, and *Jones*. The statutes in those cases were challenged as beyond the scope of the commerce power; we discuss the problems targeted by those statutes only to clarify the public-goods conception of the general welfare. Nor do we submit that Congress is disabled from taxing and spending to address violence against women, guns in schools, arson, or local environmental problems such as isolated, intrastate wetlands. Rather, we conclude that such taxation and expenditures do not fall within the public-goods conception and therefore require support from some other account of the general welfare. We discuss some possibilities below.¹⁹⁶

¹⁹⁵ The *Morrison* Court did not disagree with the factual accuracy of the federal government's empirical claims about the interstate commercial impact of violence against women. Rather, the Court changed the subject in the same way that it did in *Lopez*. See *supra* note 168.

¹⁹⁶ See *infra* Part V.C.

V. ANTICIPATING OBJECTIONS

This Part anticipates various objections to our argument. Critics might assert that (A) Congress should redraft vulnerable federal environmental laws under the commerce power, not the General Welfare Clause; (B) our interpretation fails because we do not exclude conceptions of the general welfare other than the public-goods approach; and (C) our interpretation fails because we do not include other understandings of the general welfare.

A. *Redrafting under the Commerce Clause*

One might question the necessity of turning to the General Welfare Clause given scholarly arguments that Congress can redraft problematic environmental legislation under the Commerce Clause. For example, Christopher Schroeder has argued that if the Court restricts substantial-effects doctrine further by finding an attenuated nexus to interstate commerce even when the regulated activity is “economic,” a distinct rationale “provides independent justification for extensive federal environmental authority” – namely, “Congress’ authority to sit astride the flow of interstate commerce and to impose conditions on the goods that can be in that flow.”¹⁹⁷ Schroeder details the advantages of “commerce-as-subject doctrine” over “commerce-as-objective authority”:

One of the virtues of commerce-as-subject doctrine is precisely that it is not vulnerable to nexus-based challenges or to the cynicism that attenuated causal chains create about the bona fides of legislative action. If Congress acts to prohibit a class of goods from flowing in interstate commerce, it is doing exactly what this authority permits it to do. The connection with interstate commerce is built directly into the internal logic of the regulation and could not be a tighter fit. Compared to “affects” doctrine justification, commerce-as-subject justifications also exhibit greater candor. . . . Congress’s determination that the primary behaviors of violence against women, or guns near schools, or environmental degradation, are undesirable can be announced forthrightly. “We have chosen to

¹⁹⁷ Schroeder, *supra* note 61, at 414.

deprive these behaviors of the benefits of the interstate commerce system” accurately expresses a real motivation for the regulation.¹⁹⁸

This approach is doctrinally sound, Schroeder submits, because Congress has the “power to approve use of the channels of commerce, conditional on compliance with certain requirements as to how goods have been produced and as to how they are subsequently used” or disposed of after use.¹⁹⁹

We agree that aggressive use of the commerce power to protect the environment remains doctrinally available under current law. Schroeder identifies an important commerce-power basis for federal protection of the environment that the Court has not as yet disturbed. Because most environmental problems are caused by economic activity, moreover, the Court has not yet seriously undermined Congress’ ability to preserve the environment by regulating activities that substantially affect interstate commerce.

We do not suggest that the general-welfare approach is superior to redrafting under the Commerce Clause because the two approaches are appropriately directed at different kinds of problems. The general welfare approach can be used to combat interstate externalities with no relation to commerce. Commerce-as-subject authority can be used to combat intrastate economic activities that are deemed to have an attenuated nexus to interstate commerce.²⁰⁰ Should the national political environment change in the years ahead, it would make sense for Congress to consider both the General Welfare Clause and the Commerce Clause as potential sources of constitutional authority for different kinds of environmental legislation. The

¹⁹⁸ *Id.* at 448-49.

¹⁹⁹ *Id.* at 449.

²⁰⁰ Framed precisely, the commerce power is an instance of promoting the general welfare. Congress should use the Commerce Clause to exercise federal authority over activities that fall under the commerce power. When an activity causes interstate externalities but does not fall under the Commerce Clause or another specifically enumerated power, the General Welfare Clause provides constitutional authorization for federal action.

advisability of using one clause or the other (or both) would depend on the nature of the problem. Commerce-as-subject authority could be particularly useful where the effects of pollution are entirely intrastate, but the origins are interstate in the sense that they can be directly traced to the interstate economy. For example, an industrial plant that generates local pollution may operate on a large scale only because it has access to an interstate market.

We do, however, note a significant advantage that the general-welfare approach has over commerce-as-subject authority. While neither is “vulnerable to nexus-based challenges or to the cynicism that attenuated causal chains create about the bona fides of legislative action,”²⁰¹ the general-welfare approach is even less vulnerable to charges of pretext. At a basic motivational level, Congress passes environmental laws to promote the health and welfare of the country, not to “deprive [certain] behaviors of the benefits of the interstate commerce system.”²⁰² In the Clean Water Act, for example, Congress’ objectives were, among other things, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,”²⁰³ and to attain “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.”²⁰⁴ While we do not submit that pretext arguments are relevant to constitutional analysis of the commerce power,²⁰⁵ we do maintain that basing environmental laws on the General Welfare Clause where possible aligns better with common-sense reasons for action at the national level, reasons that most citizens comprehend.

²⁰¹ *Id.* at 449.

²⁰² *Id.*

²⁰³ 33 U.S.C. § 1251(a).

²⁰⁴ 33 U.S.C. § 1251(a)(2). *See* Funk, *supra* note 171, at 10770 (“The legislative history of the CWA does provide evidence of the concerns that Congress wished to address, and these concerns are not unlike those described in the findings of the other statutes. In short, pollution of the water harms the health and welfare of the nation.”).

²⁰⁵ *See supra* note 184 and accompanying text.

Because Congress may be more likely to realize environmental objectives when constitutional justifications and animating concerns line up, the general-welfare approach may have more practical appeal.²⁰⁶

B. Failing to Exclude Anything

We defend the proposition that the General Welfare Clause, at a minimum, authorizes Congress to spend money on interstate public goods, to condition federal funding to states on their alleviation of interstate public bads, and to tax interstate public bads that affect several states. We therefore provide a sufficient condition for federal taxation or spending in pursuit of the general welfare. Advocates of limited federal power might suggest that we do not offer a genuine interpretation of the General Welfare Clause because we decline to impose any necessary conditions for federal action. Just as current general-welfare jurisprudence fails to impose general-welfare-based limits on the taxing or spending power, so we fail to exclude anything as beyond the embrace of that constitutional language.

For good reason, we have avoided suggesting that the presence of an interstate externality or other collective action problem constitutes a *necessary* condition for federal action. Such an interpretation of the General Welfare Clause would be staggering in its implications. For example, the Constitution would disable the federal government from providing financial relief in the wake of a devastating natural disaster, and progressive wealth redistribution and social

²⁰⁶ We also note that the commerce-as-subject argument could have breathtaking implications. The Court would likely push back if Congress were to legislative aggressively using this basis of constitutional authority. For example, it is unlikely that the Court would uphold as within the scope of the commerce power a federal law prohibiting the movement in interstate commerce of goods produced by companies that hire workers who have not completed a federal K-12 education curriculum. The public goods approach to the general welfare would not reach this far and thus would not be likely to trigger a judicial backlash.

security programs would be unconstitutional.²⁰⁷ Such a radical departure from constitutional tradition would require a stronger defense than we could muster even if we were inclined to try.

Economic theory cannot provide the needed justification. As a legal matter, it is implausible to suggest that the distinction in economics between the general and the particular captures all of the richness, nuance, and constitutionally relevant meaning of the phrase “general Welfare.” It is one thing to suggest, as we do, that economics can inform and improve constitutional interpretation. It is quite another to assert that the principles of economics exhaust the appropriate practice of constitutional adjudication. We resist the imperialistic urge.

We avoid jaw-dropping claims of limited federal power for a more mundane reason. We need not endorse them to defend our arguments that (1) interstate externalities and interstate commerce are not the same thing, but that (2) Congress enjoys ample authority to target the former because the General Welfare Clause authorizes such action. We are concerned to press those points; we do not offer a comprehensive theory of the “general Welfare of the United States.”

C. Failing to Include More: Alternative Conceptions of the General Welfare

The next criticism comes from the opposite direction: By failing to include conceptions of the general welfare beyond the public-goods approach, we are encouraging just the sort of radical restriction of federal taxing and spending authority that we identify above.

The jurisprudential status quo seems to allow Congress to engage in any sort of taxation or spending as far as the general-welfare requirement is concerned,²⁰⁸ and the public-goods conception limits this freedom of action.

²⁰⁷ *See infra* Part V.C.

Rather than engage our argument, this criticism expresses a fear about how others might use it. One can reasonably say something about a legal subject without saying everything, particularly when one disclaims providing a comprehensive theoretical account. Moreover, one can begin to think rigorously about constitutional language without compelling the conclusion that the Constitution confers powers far less robust than the interpretive community has understood it to authorize. Our point is not that exercises of the taxing or spending power falling outside the public-goods conception are unconstitutional, but that they require justification based on some alternative conception of the general welfare.

As explained, the constitutional conception of providing for the general welfare in Article I, Section 8 encompasses promoting national markets and providing for public goods, including defense (national public good), interstate pollution abatement (interstate public bad), and the postal services (national economies of scale). Do the enumerated powers implicate other conceptions of the general welfare? We will briefly describe some supplementary conceptions.

Like many governments in the world, the federal government undertakes redistribution of income in the name of poverty relief, social welfare, and substantive equality. Unlike private insurance, federal health and retirement benefits redistribute income among classes of people, with some classes receiving more benefits than they pay in taxes, and others paying more in taxes than they receive in benefits. Are these federal programs constitutionally justified? Without coordination in retirement and other benefits, workers pay a heavy price for moving from one jurisdiction to another. Building a national market in labor necessarily involves some federal reconciliation of retirement and benefit programs for workers in different states. Perhaps the federal government's power to enact minimum wage laws, to create the social security program, and to operate welfare programs is partly justifiable in this way. A justification based

²⁰⁸ See *supra* Part I.B.

on the mandate to build a national market, however, seems insufficient for the redistributive ambitions of these programs. Sufficient justification requires a redistributive conception of the general welfare.

Such a conception can be drawn from the economic distinction between welfare and wealth. If some people gain more welfare from wealth than others, redistributing wealth from the latter to the former increases total welfare. Egalitarian economists have persistently argued that poor people gain more welfare from additional income than rich people, because the poor use additional wealth to satisfy more urgent needs that the rich have already satisfied. The poor have relatively urgent unmet needs for food, clothing, shelter, and medicine. An older generation of economists referred to these basic needs of all people as “material.”²⁰⁹ Redistribution to satisfy material needs is less controversial than redistribution for other purposes. Thus most people agree that the poor need bread more than the rich need cake, but fewer people agree that the poor need rock concerts more than the rich need opera.

Following this line of thought, the nation’s total welfare increases by transferring money away from relatively rich people who gain little welfare from it, to relatively poor people who gain much welfare from it. The nation’s general welfare, according to this egalitarian conception, is the nation’s total welfare. Federal redistributive policies may find their best constitutional justification as attempts to regulate, tax, and spend for the purpose of increasing the nation’s total welfare. In this way, egalitarian economists historically defended progressive federal taxation and redistributive policies of the Department of Health, Education, and Welfare.

As in politics, egalitarianism has a long tradition in economics, and so does opposition to it. Incorporating egalitarian ends into economic theory is a matter of philosophical persuasion

²⁰⁹ See Cooter & Rappoport, *supra* note 19 (discussing the “material welfare school” in economics).

more than scientific compulsion. From the same facts about the world, some people conclude in favor of egalitarianism and some conclude against it. So we must expect that an egalitarian conception of the general welfare will be more controversial than the public goods conception.

Besides egalitarianism, another controversial conception of welfare involves paternalism.²¹⁰ In the 6th century BC, Aesop wrote the fable of the prudent ant that stored food in the summer and ate it in the winter, while the imprudent grasshopper ate his fill in the summer and starved in the winter. Some classical economists proposed state laws and programs to protect people from such imprudence.²¹¹ In recent years, behavioral economists and psychologists have rehabilitated paternalism by giving it a more scientific basis. Specifically, empirical research has shown that many people are inconsistent in their preferences about future consumption.²¹² The welfare state protects people from the worst consequences of their own imprudence, and the federal government has an advantage in providing some forms of protection. We mention this idea without developing it.

Besides redistribution and paternalism, the economic tradition addresses other controversial causes of welfare. A small group of economists has struggled for decades with the concept of a “merit good.” This idea goes back to John Stuart Mill’s argument that the quality of

²¹⁰ See, e.g., Colin Camerer *et al.*, *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PENN. L. REV. 1211 (2003); Jeffrey J. Rachlinski, *The Uneasy Psychological Case for Paternalism*. Berkeley Workshop in Law, Economics, and Psychology (Apr. 22, 2002).

²¹¹ For example, Pigou argued that state investments in the health and education of workers would yield high social rates of return because many workers are not prudent enough to provide these services for themselves. See ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (1920).

²¹² G. Ainslie & J. Monterosso, *Will as Intertemporal Bargaining: Implications for Rationality, Preferences and Rational Choice: New Perspectives and Legal Implications*, Law School, University of Pennsylvania (2002). To illustrate time-inconsistent preferences, give a child a choice between receiving 1 chocolate bar after 6 days or 2 chocolate bars after 7 days, and he chooses the latter. Ask him again as each day passes and he remains resolute until the 6th day, when he switches and takes the 1 chocolate. The switch illustrates inconsistent preferences over time associated with “hyperbolic discounting.” He initially chooses the 2 bars. Asked again on the 6th day between having 1 that day or 2 the next day, many children switch.

some pleasures is higher than others.²¹³ Thus the pleasure from listening to opera might count more in the social calculus than an equal amount of pleasure from listening to rock music. Merit goods might play a role in arguing that the National Endowment for the Humanities and the National Endowment for the Arts promote the general welfare. We will not, however, attempt to tie a merit goods conception to the general welfare.

Modern philosophers often distinguish welfare, which is aggregative, from rights, which are typically deemed individual. Anti-utilitarian philosophers argue against sacrificing an individual's rights for the sake of advancing the general welfare.²¹⁴ Utilitarian philosophers, in contrast, seek to derive individual rights from promotion of the general welfare. Law and economics discusses rights extensively. For example, law and economics scholars argue that constitutional guarantees of property rights channel transactions into voluntary exchange; freedom of speech encourages the transmission of ideas and competition among them; civil rights destroy racial cartels; and voting rights change political outcomes.²¹⁵ The relationship between rights and welfare surfaces in legal debates over the extent to which constitutional rights should constrain the pursuit of the general welfare, and whether promoting the general welfare encompasses protecting the rights of the individual.²¹⁶ As with merit goods, we will not discuss rights-based conceptions of the general welfare.

²¹³ See JOHN STUART MILL, UTILITARIANISM (1861); Cooter & Rappoport, *supra* note 19.

²¹⁴ See, e.g., J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR & AGAINST (1973); JOHN RAWLS, A THEORY OF JUSTICE (1971).

²¹⁵ See, e.g., COOTER, *supra* note 92.

²¹⁶ For example, Title VI and Title IX, which prohibit racial and gender discrimination, respectively, by entities that receive federal funds, rest on congressional power to spend in pursuit of the general welfare.

CONCLUSION

The enumerated powers are instances of “the common Defence and general Welfare of the United States”²¹⁷ that clarify the meaning of those terms. Both the abstract concept of the general welfare and the instantiations of it define the national government’s proper role in our federal system. To understand the abstract concept of the general welfare, we draw from contemporary social science. The “general Welfare” includes “public goods” and “public bads” in the technical sense developed in economics. We hope this insight will revitalize the jurisprudence of the General Welfare Clause. The theory of public goods explains why many of the enumerated powers are instances of the general welfare. Majority rule can solve many public goods problems that unanimity rule cannot solve. For this reason, the federal government possesses inherently superior political and administrative ability relative to individual states when a public good or bad affects several states.

The Commerce Clause, according to the Supreme Court, authorizes federal regulation of the channels and instrumentalities of interstate commerce and economic activities that substantially affect interstate commerce. The Commerce Clause is a specific instance of promoting the general welfare. Congress may use the commerce power to exercise federal authority over activities that fall under this clause.

The Commerce Clause, however, likely does not authorize federal power over non-economic activities that affect the welfare of people in more than one state. When an activity causes interstate externalities but does not fall under the Commerce Clause or another specifically enumerated power, the General Welfare Clause provides constitutional authorization for the exercise of federal power. The presence of an interstate externality problem provides a

²¹⁷ U.S. CONST. Art. I, § 8, cl. 1.

sufficient condition for the constitutionality of federal taxation and spending to combat it. Interstate problems concerning welfare but not commerce illustrate the potential power and importance of the public-goods approach to the General Welfare Clause, particularly in the area of federal environmental law.

The General Welfare Clause may become particularly salient in the coming years. The newly constituted Court may continue to limit congressional power under the Commerce Clause, either as a matter of constitutional law or by construing federal statutes narrowly to avoid possible conflict with the Constitution. Exclusive reliance on the commerce power invites federal courts to strike down current and future laws that appear to address “noneconomic” problems, including problems that are clearly interstate in scope.

Besides providing a better foundation for some federal powers, shifting some of the burden placed on the Commerce Clause to the General Welfare Clause should refocus debate on issues that really matter to lawmakers and citizens. For example, the relationship between endangered species and commerce distracts attention from the question of how preserving endangered species promotes the general welfare of the country. A debate on this point should result in a more straightforward defense of federal authority, aligning better with common-sense reasons for national action that most Americans understand.