ARTICLES

The Basis of the Spending Power

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TABLE OF CONTENTS

I. Introduction 215
II. The Bearing of Basis 216
A. Some Consequences of Misattribution 216
B. The Insufficiency of the Orthodox "Basis" 220
III. The Usage of the "General Welfare" Phrase 224
A. "General Welfare" as a Preambulatory Phrase . . . 224
B. The "General Welfare" Phrase and the Principle of Enumerated Powers 228
C. The "General Welfare" Phrase and Spending 235
IV. The "Property Clause" Basis for Spending 243
A. The Detail Committee's "Well Managing" Clause 243
B. Gouverneur Morris' "Property Clause" 248
C. Confirming Gestures 251
D. Ownership Powers and Governance Powers 256
V. Conclusion 258

I. INTRODUCTION

No power of the federal government in the United States today entails more elaborate impacts on society than the power of Congress to spend; yet none has received so little critical analysis from legal scholars.

On those few occasions when commentators have troubled even to discuss the constitutional basis for federal spending (as distinguished from its many ramifications), without modern exception they have

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pointed to a subordinate phrase in the opening clause of the Constitution's Article I, Section 8. That clause gives Congress "Power To lay and collect Taxes," and the subordinate phrase explains that such taxes are "to pay the Debts and provide for the common Defence and general Welfare of the United States."[1]

This Article undertakes to demonstrate, however, that 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. First, spending "for carrying into Execution" any enumerated power is authorized by the familiar Necessary and Proper Clause.[2] Second, Article IV gives Congress "Power to dispose of . . . Property belonging to the United States," one species of such property being money in the Treasury.[3] This "Property Clause" is ample to authorize all federal spending,[4] whether or not it is also authorized by the Necessary and Proper Clause.

II. THE BEARING OF BASIS

A. *Some Consequences of Misattribution*

Whether the spending power derives from one clause or another is not an idle or merely academic question. There are consequences of major importance. For example, the Supreme Court has held that one's taxpayer status can give standing to challenge only such federal acts as assert "authority conferred by the taxing and spending clause of Article I, Sec. 8"; specifically, the Court has held that taxpayer status *cannot* give standing to challenge disposal "under the Property

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1. U.S. CONST. art. I, § 8, cl. 1. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." *Id.*

2. "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." U.S. CONST. art. I, § 8, cl. 18. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ," *id.* art. I, § 9, cl. 7, and such appropriation "laws"—insofar as they exhibit the requisite telic connection—qualify no less than regulatory statutes as "necessary and proper for carrying into Execution" an enumerated power.

For elaboration of the telic requisite of the Necessary and Proper Clause, see DAVID E. ENGDAHL, CONSTITUTIONAL FEDERALISM IN A NUTSHELL ch. 3 (2d ed. 1987).

3. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. CONST. art. IV, § 3, cl. 2.

4. Moreover, the Property Clause authorizes not only spending, but also every other form of disposal (including discard and destruction), as well as arrangements for the custody, safekeeping, investment, and management of federal funds.

Clause, Art. IV, Sec. 3, cl. 2."[5] If, however, the power to spend is actually conferred by the Property Clause, and not by the taxing clause, the case law on taxpayer standing must be reconsidered, at least.

The Supreme Court, discussing spending with reference to the "general Welfare" phrase of the taxing clause, has said a "line must . . . be drawn between one welfare and another, between particular and general."[6] Where the line "shall be placed cannot be known through a formula in advance of the event," it elaborated; "[t]here is a middle ground or certainly a penumbra in which discretion is at large."[7] This means that for each federal spending measure, one by one and perhaps provision by provision, it must be determined whether the spending goal is "general" enough for the measure to be sustained.[8] If, on the other hand, the spending power actually derives from the property clause, this occasion for cavil disappears, for the latter authorizes disposal whether or not any so-called "general Welfare" objective is served.

Attributing the spending power to the taxing clause occasions a more serious problem than the need to find some "general Welfare" objective; for it easily induces the mistaken conclusion that *promotion of the general welfare*, rather than merely the act of spending itself, is within Congress' constitutional power. Thus, one can be easily misled into believing that Congress may impose *regulations* to effectuate any end toward which it has chosen to spend, regardless how extraneous it is to the constitutionally enumerated powers.[9]

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5. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 480 (1982).

6. Helvering v. Davis, 301 U.S. 619, 640 (1937).

7. *Id.*

8. The significance of this issue has been diminished—but not eliminated—by the rule that this discretion for the most part "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." *Id.*

9. As the Supreme Court said in 1936, "the phrase 'to provide for the general welfare' qualifies the power 'to lay and collect taxes.' The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted." United States v. Butler, 297 U.S. 1, 64 (1936).

In more recent dicta, however, the Supreme Court has declared that Congress' spending power under the Taxing Clause "is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause." Buckley v. Valeo, 424 U.S. 1, 90 (1976). Steps "necessary and proper" to carry out *the spending process itself* would not enlarge federal power materially; but the *Buckley* dictum instead seems to contemplate laws helping to effectuate the *ends at which federal spending is aimed*. On this mistaken view, Congress' power would indeed be "quite expansive," for Congress may *spend* toward virtually *any* end, even though it is beyond the enumerated powers, and therefore on this view of the *Buckley* dictum, it could *regulate* to promote

Most of the current legal controversies over federal spending involve whether and to what extent federal policies mandated as funding conditions are enforceable against recipients or against non-recipient program beneficiaries, and whether or to what extent such federal policies are capable of preempting contrary state law. These questions are too multifaceted and complex to examine exhaustively here,[10] but their analysis is substantially determined by whence the spending power derives. The powers conferred in Article I of the Constitution (where the Taxing Clause is found) all are described as "legislative Powers"[11]—that is, powers of *governance*, or governmental jurisdiction. The Article IV Property Clause, in contrast, confers powers characteristic of *ownership*, and no governmental jurisdiction at all.[12] If spending is a prerogative attributable to ownership, rather than a governance power, funding conditions are enforceable as contracts *but not as statutes*. Supremacy Clause consequences therefore cannot ensue, so that state policies contrary to extraneous policy aims of federal spending are not properly subject to preemption.

To which clause the spending power is attributed has ramifications even for the most fundamental legal issue regarding that power: whether Congress may spend for purposes beyond its enumerated powers at all. Every law student learns that James Madison thought it could not,[13] while Alexander Hamilton argued it could.[14] So long

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any end whatsoever!

This view implicit in *Buckley*, of course, contradicts the passage quoted above from *Butler*, and completely abrogates the principle of enumerated powers. The *Buckley* dictum thus illustrates how easily the habit of associating spending with the so-called "General Welfare Clause" can lead good minds into manifest error. Attributing the spending power to the Property Clause, on the other hand, can help one avoid this error.

10. I discuss them at length in another article: David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994). There was not sufficient space in that long article, on the other hand, to examine the constitutional basis of the spending power, as is done here.

11. U.S. CONST. art. I, § 1.

12. *See infra* note 209 and text accompanying notes 209-12.

13. In 1817 Madison vetoed the "Bonus Bill" on this ground. Veto Message, March 3, 1817, *in* 1 J.D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 584 (1896). The Act incorporating the Second Bank of the United States (which Madison had signed in 1816) required the Bank to pay a "bonus" of 1.5 million dollars to the United States; the "Bonus Bill," presented to Madison as his second term drew to its close, designated that sum, plus periodic dividends the Bank was to pay, a permanent fund to finance various internal improvements. Madison vetoed the bill because he could not find internal improvements within the enumerated powers. *Id.*

14. *E.g.*, Alexander Hamilton's Final Version of the Report on the Subject of Manufactures, Dec. 5, 1791, *in* 10 THE PAPERS OF ALEXANDER HAMILTON 230, 303-04 (Harold C. Syrett ed., 1966). The great Justice and legal commentator of the next generation, Joseph Story, agreed. *See, e.g.*, 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 718 n.1, 727-28 (5th ed. 1891).

as one conceives of the spending power as derived from the Taxing Clause, the contest between Madison's view and Hamilton's remains a draw.[15] If one looked elsewhere but found no basis except the Necessary and Proper Clause, appropriation laws could be valid only insofar as they were calculated "for carrying into Execution" some enumerated power, and thus Madison's view must prevail. If, however, one recognizes the spending power as based on the Property Clause—which does not restrict dispositions of federal property to those effectuating enumerated powers—Hamilton's view is vindicated. Attention can then shift toward understanding the Hamiltonian thesis more accurately and applying it more consistently than the courts have done since 1937.[16]

This short list does not exhaust the implications of grounding spending power doctrine on one clause rather than another of the Constitution. I have dealt more elaborately with these and some other implications in another place.[17]

Constitutional law is not simply a branch of common law evolving by accretion and adaptation of precedent. Under a *written* Constitution, at least until habitual neglect reduces it to metaphor, argument tends to return sooner or later, and again and again, to the text. Professor Powell has aptly identified "The Revolutionary Role of the Text."[18] Even propositions repeated for generations often lose their credibility when impeached by careful study of the organic instrument. This force of the text is not metaphysical, or mystical, or even emotional, but rather dialectical and logical: At least where it is somewhat more than epigraphic, when the text is carefully parsed it

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15. In a monument of illogic, the Supreme Court in 1936 nominally endorsed Hamilton's view while actually applying Madison's instead, using a "dual federalist" misreading of the Tenth Amendment to foreclose spending objectives that no other enumerated power sustained. *See* United States v. Butler, 297 U.S. 1, 65 (1936). A year later, upholding provisions of the Social Security Act in Steward Mach. Co. v. Davis, 301 U.S. 548 (1937), and Helvering v. Davis, 301 U.S. 619 (1937), the Supreme Court attempted to "distinguish" the 1936 case but failed to purge its basic conceptual error. Since that time, misconceptions of Hamilton's thesis have served as cover for extensions of federal control beyond anything Hamilton could have conceived, and contrary to the view he actually maintained. Now, in the 1990's, Justice O'Connor has led a majority of the Justices to the brink of repeating that 1936 mistake: She began her revival of the *Butler* error in her dissenting opinion in South Dakota v. Dole, 483 U.S. 203, 212-18 (1987) (O'Connor, J., dissenting); and the other majority Justices failed to dissociate themselves from it when she pressed it further in her opinion for the Court in New York v. United States, 112 S. Ct. 2408, 2423 (1992).

16. *See generally* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994).

17. *Id.*

18. H. Jefferson Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427, 1433 (1986).

can render some arguments untenable, others more or less credible, and (occasionally) some all but ineluctable.

Other provisions might limit its use, but *the language conferring* a power controls its inherent scope.[19] It therefore is appropriate, and might have far-reaching consequences, to reconsider the constitutional basis of the federal spending power.

B. The Insufficiency of the Orthodox "Basis"

Orthodox doctrine attributes Congress' spending power to the subordinate phrase, "to pay the Debts and provide for the common Defence and general Welfare of the United States," in the clause empowering Congress to lay and collect taxes. It is possible to promote the "general Welfare" in some ways by the very act of *imposing* a tax, as by taxing deleterious products or practices to make them economically unattractive. However, tax imposition by itself can do nothing to pay debts or to provide for defense. Orthodox doctrine therefore relies on a process of inference that Justice Owen J. Roberts in 1936 articulated this way:

> The Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation . . . can never accomplish the objects for which they were collected unless the power to appropriate is as broad as the power to tax. [Therefore t]he necessary implication from the terms of the grant is that the public funds may be appropriated "to provide for the general welfare of the United States."[20]

It seems odd that this rationale—generations old even when Justice Roberts articulated it—has gone unchallenged for so long.

In the first place, since the only reason for seeking a basis in the written Constitution is the principle of enumerated powers, it is anomalous to rely on precisely such inference as that principle generally precludes. The relevant language in the Taxing Clause is merely allusive: At least in form, it certainly is not a grant of power. The Constitution contains several similar instances of power being alluded to in one provision, but actually granted by another. For

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19. The words "to coin money," for example, are not apt to authorize the minting of commemorative medallions or the printing of paper currency (although *another* grant of power authorizes the latter, *see* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870)). Similarly, the power "to regulate Commerce . . . among the several States"—its scope ascertained by analysis of those textual terms, *see* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)—does not authorize regulation of local business practices (although the Necessary and Proper Clause separately defines a different power capable of supporting many such regulations).

20. United States v. Butler, 297 U.S. 1, 65 (1936).

example, Congress' power to constitute inferior courts is *alluded to* in Article III[21] but *conferred by* a clause in Article I.[22] A clause in one section of Article I *alludes to* Congress' powers to tax and to regulate commerce, and prohibits using those powers to create preferences among ports;[23] but those powers are *conferred by* clauses appearing in a different section of that Article.[24] The so-called "Exceptions" Clause in Article III[25] *alludes to* the power Congress has regarding Supreme Court appellate jurisdiction, but no such power is *conferred* except by the Necessary and Proper Clause.[26] In all of these instances, to treat the clause that merely alludes to the power as instead creating the power and prescribing its inherent scope offends the principle of enumerated powers; and in some instances, the mistake has profound ramifications.[27]

The clause commonly mischaracterized as the General Welfare Clause has *never* been called the Common Defence Clause, although its relevant language, to "provide for the common Defence and general Welfare of the United States", makes parallel reference to both. Surely this is because, while the Taxing Clause *alludes to* spending for defense, the power to spend for defense obviously *derives from* other language, drafted in suitable power-granting form, located elsewhere in

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21. "[S]uch inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

22. "The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court . . . ." U.S. CONST. art. I, § 8, cl. 9.

23. "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another . . . ." U.S. CONST. art. I, § 9, cl. 6.

24. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . ; To regulate Commerce with foreign Nations, and among the several States . . . ." U.S. CONST. art. I, § 8, cls. 1, 3. *See also id.* art. I, § 9, cls. 4, 5.

25. "[T]he supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2.

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

27. The Necessary and Proper Clause empowers Congress to adjust Supreme Court appellate jurisdiction in ways adapted to effectuating the "judicial Power," which Article III of the Constitution provides "shall extend to all Cases. . .arising under this Constitution . . . ." However, the habit of misattributing Congress' power to adjust jurisdiction to the Exceptions Clause (which lacks the means-to-end constraint found in the Necessary and Proper Clause) has induced the mistaken opinion that laws "excepting" from Supreme Court attention various categories of such cases (e.g., abortion and school prayer) would be constitutional, *even if no other* federal forum for them remained. *See generally* David E. Engdahl, Federal Courts and Congress' Power: Premises False and True (March, 1995) (unpublished manuscript, on file with *Seattle University Law Review*).

the Constitution.[28] If the reference to "common Defence" spending simply alludes to power conferred elsewhere, however, certainly it is anomalous to consider the same language the *source* of whatever power Congress might have to spend for the "general Welfare," or even "to pay the Debts"!

Another reason to doubt this traditional attribution is that it fails to provide any authority at all to spend money acquired otherwise than by taxation.[29] The federal treasury receives money from many other sources, including penalties, fines, user fees, leases, surplus property sales, gifts, bequests, and returns on investments. The spending allusion in the Taxing Clause cannot credibly be twisted so far as to authorize the spending of funds received from such sources. If such funds are to be spent, some other authority for spending them must be found.

Moreover, the funds accumulated from such miscellaneous sources are negligible in comparison to those generated by the exercise of Congress' power "[t]o borrow [m]oney on the credit of the United States . . . ."[30] This Borrowing Clause makes no reference to spending at all, and the spending allusion in the Taxing Clause does not even colorably reach borrowed sums; yet borrowed money now funds an enormous fraction of every federal budget. If Congress' spending power really were based on the allusion to spending contained in the Taxing Clause, spending on credit would be unconstitutional. At the same time, since the only practical reasons to borrow are to invest, to refund debt, or otherwise to spend, the borrowing power itself would be superfluous and vain.

In addition, between receipt and disbursement something has to be done with the federal government's money. There is a separate requirement of regular accounting for receipts and expenditures,[31] but nothing in the Taxing Clause confers even custodial authority over federal funds, much less authority to safeguard or invest such funds

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28. This power-granting language includes the language authorizing Congress to "support" armies (subject to a restriction against appropriations for longer than two years), U.S. CONST. art. I, § 8, cl. 12; that authorizing Congress to "maintain" a navy (subject to no such restriction), *id.* art. I, § 8, cl. 13; and the language authorizing Congress to make appropriations laws for carrying the various powers regarding war and military activities into execution, *id.* art. I, § 8, cl. 18.

29. The possibility of at least some revenue other than from federal taxes was plainly contemplated in framing the Constitution. It provides that any *state* imposts or duties on imports or exports beyond amounts absolutely necessary to fund state inspection laws "shall be for the Use of the Treasury of the United States." U.S. CONST. art. I, § 10, cl. 2.

30. U.S. CONST. art. I, § 8, cl. 2.

31. U.S. CONST. art. I, § 9, cl. 7.

before they are withdrawn "in Consequence of Appropriations made by Law."[32]

Unlike the Taxing Clause, the Property Clause provides ample textual basis for the management and spending of all federal monies, from whatever source derived. Nor is this merely fortuitous: The purpose of this Article is to show that ensuring ample power to manage and spend federal money was one of the several purposes for which the Property Clause was deliberately designed.

I am not one who insists "the Framers' intent" should control construction of the Constitution. However, in more than a quarter-century of constitutional scholarship, I have found constant confirmation of the observation I made in my youth, that

> [d]iscovering the framers' forgotten intent can destroy the illusion of necessity in an unsatisfactory but long established construction and create the opportunity for a policy choice between alternative constructions. And probably in constitutional law as in other fields of law historical research in an effort to grasp a forgotten understanding can uncover the source of vexatious conceptual errors which the legal mind has hitherto been unable to escape.[33]

The value of such inquiry, moreover, has been repeatedly confirmed by the judiciary.[34]

The following pages therefore meticulously examine the records of the Constitutional Convention, and other materials from the

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32. U.S. CONST. art. I, § 9, cl. 7.

33. David E. Engdahl, *Book Review*, 21 J. LEGAL EDUC. 119, 120-22 (1968) (reviewing THE RECONSTRUCTION AMENDMENTS' DEBATES (Alfred Avins ed., 1967)).

34. *See, e.g.*, Butz v. Economu, 438 U.S. 478, 491 n.15 (1978) (citing David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972), with arcane sources first unearthed by that article pervading the opinion); Nevada v. Hall, 440 U.S. 410, 415 n.6 (1979) (citing David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972)); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 258-59 n.11 (1985) (Brennan, Marshall, Blackmun, & Stevens, JJ., dissenting) (citing David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972)); United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 465 n.16 (citing David E. Engdahl, *Characterization of Interstate Arrangements: When is a Compact Not a Compact?*, 64 MICH. L. REV. 63 (1965), with arcane sources first unearthed by that article pervading the opinion); *id.* at 482 n.3 (White & Blackmun, JJ., dissenting) (citing David E. Engdahl, *Characterization of Interstate Arrangements: When is a Compact Not a Compact?*, 64 MICH. L. REV. 63 (1965)); Illinois v. Michigan, 409 U.S. 36, 36 n.* (1972) (citing David E. Engdahl, *Characterization of Interstate Arrangements: When is a Compact Not a Compact?*, 64 MICH. L. REV. 63 (1965)); Cuyler v. Adams, 449 U.S. 433, 452, 453 (1981) (Rehnquist, Burger, & Steward, JJ., dissenting) (citing David E. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987 (1965)); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 587 (1985) (O'Connor, Powell, & Rehnquist, JJ., dissenting) (citing David E. Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMMENTARY 93 (1985)).

founding period, to show how the Framers of the Constitution attended to the necessity for a sufficient textual authorization of spending. Heretofore overlooked details are brought to light by this sometimes tedious explication, and the reader who endures will emerge with considerable confidence about the basis of the spending power. The experience should also confirm that even after generations of scholars have culled them, these historical materials can still yield new insights to those who afford them patient and reflective examination.

III. THE USAGE OF THE "GENERAL WELFARE" PHRASE

A. *"General Welfare" As a Preambulatory Phrase*

At the Constitutional Convention in 1787, the phrase "general welfare" was used in the first Resolution prepared by the Virginians and introduced by their Governor Randolph on May 29. That First Randolph Resolution was preambulatory in character, and the "general welfare" phrase was enclosed in quotation marks. The Resolution said: "Resolved, that the articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely . . . 'common defence, security of liberty and general welfare.'"[35] The quoted phrases (or close approximations thereto) had actually been used in the Articles of Confederation to state the objectives of that first instrument of union.[36]

The next day, on Randolph's own motion, his First Resolution was replaced by three separate propositions, only one of which made reference to "defence, . . . liberty and general welfare."[37] That one proposition was passed over without being put to a vote,[38] and then lay neglected until near the end of the Convention when the Committee on Style and Arrangement used its language to enliven the drab

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35. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 20 (Madison), 30 (Journal), 33 (Madison) (Max Farrand ed., 1911) [hereinafter FARRAND, RECORDS].

36. *See* ARTICLES OF CONFEDERATION art. 3. The Articles of Confederation were recommended by the Continental Congress in 1777. The last State to approve them was Maryland, in 1781.

37. The three substitute propositions were:

> 1. that a Union of the States merely federal will not accomplish the objects proposed by the articles of Confederation, namely common defence, security of liberty, & genl. welfare.
>
> 2. that no treaty or treaties among the whole or part of the States, as individual sovereignties, would be sufficient.
>
> 3. that a *national* Government ought to be established consisting of a *supreme* Legislative, Executive & Judiciary.

1 FARRAND, RECORDS, *supra* note 35, at 33 (Madison); *see* 1 *id.* at 30-31 (Journal).

38. *See* 1 *id.* at 30-32 (Journal), 33-38 (Madison), 38-44 (Yates & McHenry).

preamble[39] approved by the delegates earlier. The improved preamble declares that among the purposes of the Constitution are: "to establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty . . . ."[40] As this preamble recites, the Constitution was calculated to render "more perfect" the Union already established by the Articles to promote those same objectives, identified in the Articles as "common defence," "security of . . . Liberties," and "mutual and general welfare."[41] A study of the "general welfare" phrase, therefore, should begin with its use in the Articles of Confederation.

Benjamin Franklin proposed his "Articles of Confederation and perpetual Union" to the Continental Congress a year before independence was even claimed.[42] At that time, Franklin envisioned "The United Colonies of North America" remaining under British rule, but joining together in "Confederation and perpetual Union."[43] According to his Article II, the colonies should unite "for their common Defence . . . for the Security of their Liberties and Propertys, the Safety of their Persons and Families, and their mutual and general Welfare."[44]

Franklin's confederation proposal was not immediately pursued. However, in June, 1776, when the Continental Congress at last resolved upon independence and appointed a committee to draft an appropriate "declaration," it authorized another committee "to prepare and digest the form of a confederation to be entered into between these colonies."[45] On July 12, that committee reported a draft in the

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39. "We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity." *See* 2 FARRAND, RECORDS, *supra* note 35, at 565 (Farrand's compilation of the Proceedings of Convention Referred to the Committee of Style and Arrangement).

40. 2 FARRAND, RECORDS, *supra* note 35, at 590 (Report of the Committee of Style).

41. ARTICLES OF CONFEDERATION art. 3.

42. Franklin's document was dated May 10, 1775, and apparently received some consideration on July 21 that year. It is printed in 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 195-199 (Worthington C. Ford ed., 1905) (edited from original records in the Library of Congress) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS].

43. Preamble and Article I, *in* 2 *id.* at 195.

44. Article II, *in* 2 *id.* at 195.

45. 5 *id.* at 431 (1906). John Adams reports a similar resolution having been proposed in mid-February. John Adams, *Notes of Debates in the Continental Congress*, *in* 5 *id.* at 1069, 1072. The committee consisted of "a member from each colony," and was appointed on June 12, 1776. 5 *id.* at 432-33.

handwriting of John Dickinson, which incorporated much of Franklin's proposal but enlarged and made fundamental changes to it.[46]

The Dickinson draft was printed,[47] and then revised in the Committee of the Whole.[48] The revised draft was reported on August 20.[49] Further action was long delayed by delegate absences and the exigencies of war: Although the August 20 draft received some attention during the following spring and summer, it was not given priority until October, 1777. The Articles were at last finished and submitted to the States on November 15, 1777.[50]

As preambulatory generalities, Franklin's statements regarding the objectives of union proved acceptable. The specifics of his plan, however, contemplated much greater consolidation than many found tolerable once the spirit of independence was aflame. The prevailing sentiment is exemplified by the response to Franklin's proposal that congressional seats be apportioned among the colonies according to their voting populations, with each delegate having one vote.[51] Emphasizing the separate identities, prerogatives, and primacy of the individual states, the Dickinson draft rejected that scheme in favor of one vote for each state regardless of its population or the size of its delegation[52] (the rule being followed in the Continental Congress itself).

During debate on August 1, 1776, Franklin moved to amend the Dickinson plan by inserting apportionment and voting provisions like those his own draft had proposed.[53] In support of Franklin's motion, John Adams of Massachusetts urged that

> [T]he individuality of the colonies is a mere sound . . . the confederacy is to make us one individual only; it is to form us, like

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46. *See* 5 *id.* at 546-54.

47. 5 *id.* at 555.

48. Bits of the deliberations on certain days are known from John Adams' *Notes of Debates in the Continental Congress, see* 5 *id.* at 1076-1083 (1906), and from Thomas Jefferson's *Notes of Debates in the Continental Congress, see* 5 *id.* at 1085, 1098-1106.

49. 5 *id.* at 672, 689 (1906). The Dickinson Draft and the August 20 Draft are printed in parallel columns in 5 *id.* at 674-89.

50. 9 *id.* at 906-25 (1907).

51. *See* arts. VII and VIII, *in* 2 *id.* at 197 (1905).

52. *See* arts. XVI and XVII, *in* 5 *id.* at 680-81, col. 1 (1906).

53. John Adams, *Notes of Debates in the Continental Congress, in* 6 *id.* at 1080-82 (1906). One delegate moved that votes be proportional to what each state paid; another said, "[t]he vote should be taken two ways; call the Colonies, and call the individuals, and have a majority of both." 6 *id.* A third argued that "the smaller states should be secured in all questions concerning life or liberty, and the greater ones in all respecting property. [H]e therefore proposed that in votes relating to money, the voice of each colony should be proportioned to the number of it's [sic] inhabitants." Thomas Jefferson, *Notes of Debates in the Continental Congress, in* 6 *id.* at 1102.

> separate parcels of metal, into one common mass. [W]e shall no longer retain our separate individuality, but become a single individual as to all questions submitted to the confederacy. [T]herefore all those reasons which prove the justice and expediency of equal representation in other assemblies, hold good here.[54]

Pennsylvania's young Dr. Benjamin Rush added that "[w]e have been too free with the word independence; we are dependent on each other, not totally independent States."[55] And James Wilson of Pennsylvania said: "[A]s to those matters which are referred to Congress, we are not so many states; we are one large state. [W]e lay aside our individuality whenever we come here . . . ."[56]

However, Franklin's August 1 motion was disapproved,[57] and a determination to proceed as affiliated but independent and predominantly autonomous states prevailed. The most outspoken opponent[58] of Franklin's motion was Rev. John Witherspoon, President of the College of New Jersey (later Princeton), who argued "that nothing relating to individuals could ever come before Congress; nothing but what would respect colonies. [H]e distinguished between an incorporating and a federal union."[59] The sentiment against consolidation was very strong in 1776 and 1777, and the Articles therefore grew more protective of state prerogative with each successive draft. This

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54. 6 *id.* at 1104.

55. John Adams, *Notes of Debates in the Continental Congress*, in 6 *id.* at 1081.

> We are now a new nation. [Voting by States] will promote factions in Congress and in the States; it will prevent the growth of freedom in America. If we vote by numbers, liberty will be always safe . . . . Montesquieu pronounces the confederation of Lycia, the best that ever was made; the cities had different weights in the scale . . . .

6 *id.* By Thomas Jefferson's account, Dr. Rush said: "[W]ere it possible to collect the whole body of the people together, they would determine the questions submitted to them, by their majority." "[W]hy should not the same majority decide, when voting here by their representatives?" Thomas Jefferson, *Notes of Debates in the Continental Congress*, in 6 *id.* at 1105.

56. 6 *id.* at 1105.

> [I]t has been said that Congress is a representation of states, not of individuals. I say that the objects of it's [sic] care are all the individuals of the states. [I]t is strange that annexing the name of "State" to ten thousand men, should give them an equal right with forty thousand. [T]his must be the effect of magic, not of reason.

6 *id.*

57. At least three different alternatives to one vote per state were proposed a year later, on October 7, 1777, but each was defeated. The proposition that "each State shall have one vote" was then approved, with even Pennsylvania's (different) delegation voting for it. 9 *id.* at 778-82 (1907).

58. Connecticut, New York, and North and South Carolina were said not to be strongly inclined either way. *See* John Adams, *Notes of Debates in the Continental Congress*, in 6 *id.* at 1082 (1906) (remarks of S. Hopkins).

59. Thomas Jefferson, *Notes of Debates in the Continental Congress*, in 6 *id.* at 1103.

is most manifest in its provisions regarding the central governance power, to which we now turn.

B. The "General Welfare" Phrase and the Principle of Enumerated Powers

Franklin had used the "general welfare" phrase not only for the preambulatory purpose of his Article II, but also to define the lawmaking authority of the central Congress he proposed. His Article V said that Congress should "make such general Ordinances as tho[ught] necessary to the General Welfare, [which] particular Assemblies cannot be competent to."[60] He elaborated this generality by specifying "those that may relate to our general Commerce; or general Currency; to the Establishment of Posts; and the Regulation of our common Forces."[61] However, Franklin seems to have conceived this short list as illustrative rather than definitive.

In contrast, the Dickinson draft omitted Franklin's "general welfare" phrase, and listed with particularity several matters as to which "[t]he United States assembled shall have the sole and exclusive Right and Power."[62] Much of the time the Continental Congress devoted to the Articles was spent chiseling this list of centralized lawmaking powers.[63]

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60. Art. V, *in* 2 *id.* at 196 (1905).

61. Art. V, *in* 2 *id.* at 196. Apparently his original wording was, "Ordinances . . . necessary to the General Welfare . . . *such as* may relate to" those particulars. That was then changed to "Ordinances . . . necessary to the General Welfare . . . *viz. those that* may relate to" those particulars. Art. V, *in* 2 *id.* at 196 (emphasis added).

62. Art. XVIII, *in* 5 *id.* at 681-85, col. 1 (1906).

Dickinson's draft also added after the particularizing list a clause declaring that "the United States assembled shall never . . . interfere in the internal Police of any Colony, any further than such Police may be affected by the Articles of this Confederation." 5 *id.* at 685, col. 1. The Committee of the Whole deleted this clause, *see* art. XIV, *in* 5 *id.* at 685, col. 2, but no explanation for this deletion survives. Perhaps at first it was thought redundant once the changes in Article III, discussed in the text, had been made. Further reflection would indicate, however, that language merely reserving such power as "shall not interfere with" central governance is considerably less protective against centralization than the provision in the Dickinson draft that "the United States . . . shall never . . . interfere in the internal Police" of states except as the Articles authorize. This is probably why the clause about powers "not . . . expressly delegated" was later added.

63. This constituted Article XIV of the August 20, 1776 draft of the Committee of the Whole, which became Article IX of the finished Articles of Confederation.

One alteration made in the list of particulars by the Committee of the Whole seems much more than mere refinement. The Dickinson list would have given the Congress "Authority for the . . . Welfare of the United Colonies and every of them." 5 *id.* at 683, col. 1. But this was displaced by language authorizing the Congress to create a council and such committees and officers "as may be necessary for managing the general affairs of the United States . . . ." 5 *id.* at col. 2.

The reaction against Franklin's idea of broad central legislative authority manifested also in the evolution of a different provision. In addition to extending the power of the Congress under his Article V as far as "the General Welfare," Franklin had contemplated that individual colonies, should they so choose, might surrender authority even over internal affairs. His Article III provided that "each Colony shall enjoy and retain as much as it may think fit of its own present Laws, Customs, Rights, Privileges, and peculiar Jurisdictions within its own Limits . . . ."[64] In contrast, to preclude states from yielding more than the Articles would require, the Dickinson draft qualified this by adding a declaration that each state "reserves to itself the sole and exclusive Regulation and Government of its internal police, in all matters that shall not interfere with the Articles of this Confederation."[65] Then the Committee of the Whole deleted Franklin's original language, so that by August 20, 1776, Article III consisted of the Dickinson draft's reservation clause alone.[66] When this was considered again in April of the following year, it was replaced with a reservation clause even less tolerant of consolidation, which declared: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[67]

When the Constitutional Convention assembled a decade later, however, the more substantial apprehensions were not over consolidation but over disintegration. In the words Edmund Randolph used to elaborate the first Resolution he and his fellow Virginians proposed, most Americans had come to believe that "a *national* Government ought to be established" because "a Union of the States merely federal

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64. 2 *id.* at 196 (1905).

65. Art. III, *in* 5 *id.* at 675, col. 1 (1906).

66. 5 *id.* at col. 2.

67. 9 *id.* at 908, col. 2 (1907). This change came at the urging of North Carolina's Thomas Burke, who said the delegates were slow at first to understand its significance but then debated it for two days. Letter of Thomas Burke to Richard Caswell (April 29, 1777), *in* 6 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 671, 672 (Paul H. Smith ed., 1980). The provision also was re-prioritized from Article III to Article II.

Two other similar caveats were also added. First the Congress' authority to enter into treaties was subjected to the proviso that "no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever . . . ." Motion approved October 23, 1777, *in* 9 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 833, 834 (1907); *see also* art. IX, *in* 9 *id.* at 915, col. 2. Second, Congress' authority to regulate trade with the Indians and otherwise to manage Indian affairs was subjected to the proviso that "the legislative right of any State, within its own limits be not infringed or violated." Motion approved October 28, 1777, *in* 9 *id.* at 845; *see also* Art. IX, *in* 9 *id.* at 919, col. 2.

will not accomplish the objects proposed by the articles of Confederation . . . ."[68]

The proposal that "a *national* government" replace the "merely federal" scheme of the Articles of Confederation precipitated new debate over the apportionment of membership and votes in the Congress.[69] Only after some weeks was that disagreement compromised by acceptance of a different rule for each of two distinct houses. In contrast, so firm was the conviction that the Congress, however constituted, must have more authority than the Articles of Confederation allowed that it took scarcely any time at all to reach agreement on the appropriate scope of national legislative power.

The Sixth Randolph Resolution proposed would have authorized the central legislature "to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation . . . ."[70] According to Madison's notes, the portion of this Resolution which merely carried forward the powers conferred by the Articles was promptly given "a silent affirmative nem. con"[71] on May 31.[72] About the more general phrases, however, substantial misgivings might well have been expected.

The references to matters in which "the separate States are incompetent" and those in which separate legislation might interrupt "harmony" were equivalent in their generality, and comparable in apparent meaning, to the terms "Ordinances . . . necessary to the General Welfare, [which] particular Assemblies cannot be competent to," used by Franklin a decade before.[73] At that time, every subsequent draft beginning with Dickinson's had rejected such generality in favor of jealous particularity, and even devised additional language to emphasize and preserve state prerogatives. The mood in 1787, however, was very different. Eventually a principle of enumeration would prevail, but one far less miserly and far less restrictive than the Articles had imposed.

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68. 1 FARRAND, RECORDS, *supra* note 35, at 33 (Madison); *see 1 id.* at 30-31 (Journal).

69. *See* 1 FARRAND, RECORDS, *supra* note 35, at 33-38 (Madison).

70. 1 *id.* at 21 (Madison).

71. Nemine Contradicente: no one contradicting. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1287 (2d ed. 1987).

72. 1 *id.* at 53 (Madison).

73. *See supra* text accompanying note 60.

Three South Carolina delegates[74] at first objected to the phrase, "to which the separate States are incompetent." They thought it too vague and invasive of state prerogative, and said they must have "an exact enumeration" before they could vote.[75] But Randolph, declaring that he, too, opposed inroads on state jurisdiction, "disclaimed any intention to give indefinite powers to the national Legislature."[76] Madison—who of course had participated in drafting the Virginia proposals—added that "he had brought with him into the Convention a strong bias in favor of an enemeration [sic] and definition of the powers necessary to be exercised by the national Legislature; but had also brought doubts concerning its practicability."[77] Apparently the assurances of Madison and Randolph persuaded the South Carolinians because when the "incompetent" phrase was put to a vote it was approved without dissent; no state but Connecticut even divided.[78] The equally nebulous "harmony" phrase was also approved, with no record of discussion or dissent.[79]

The Sixth Resolution was not specifically discussed further until July 17, when Roger Sherman (whose unhappiness with its wording had caused Connecticut's earlier division) moved to substitute different language. Sherman's objection was not to the use of generalities instead of "exact enemeration [sic];" however he moved that the legislature be authorized

> [t]o make laws . . . in all cases which may concern the common interests of the Union: but not to interfere with the government of the individual States in any matters of internal police which respect

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74. John Rutledge, Pierce Butler, and Charles Pinckney. Probably not by mere coincidence, South Carolina's delegates also had been the first to support Thomas Burke's 1777 amendment to Article II of the Confederation. *See* Letter of Thomas Burke to Richard Caswell (April 29, 1777), *in* 6 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 671, 672 (Paul H. Smith ed., 1980).

75. 1 FARRAND, RECORDS, *supra* note 35, at 53 (Madison).

76. 1 *id.*

77. 1 *id.* Madison told the delegates that they should do whatever "should be found essential to such a form of Govt. as would provide for the safety, liberty and happiness of the Community. This being the end of all our deliberations, all the necessary means for attaining it must, however reluctantly, be submitted to." 1 *id.*

78. 1 *id.* at 53-54 (Madison). The negative vote splitting Connecticut was that of Roger Sherman. *See* 1 *id.* at 54 (Madison). He thought the proposition "too indefinitely expressed," yet thought "it would be hard to define all the powers by detail." 1 *id.* at 59-60 (Pierce). He later would offer a substitute proposal of his own. *See infra* text accompanying note 79.

79. 1 *id.* at 54 (Madison).

> the government of such States only, and wherein the general welfare of the United States is not concerned.[80]

Sherman's motion was the first at the Convention to use the actual phrase "general welfare" in more than a merely preambulatory role. Sherman used "general welfare" (and the equally general phrase "common interests of the Union") here comparably to the use of it in Franklin's Article V defining the Congress' lawmaking power, rather than Franklin's preambulatory Article II.[81] In Franklin's Article V, Franklin had instanced the generality with his examples of "Commerce; . . . Currency; . . . Posts; and . . . common Forces."[82] In a like manner, "Mr. Sherman, in explanation of his ideas read an enumeration of powers . . . ."[83] However, apparently still convinced (as he had observed more than six weeks before) that "it would be hard to define all the powers by detail,"[84] Sherman opted for Franklin's general phrase instead of using enumeration to circumscribe the federal government's concerns.

Sherman's motion failed,[85] but an ensuing one by Gunning Bedford of Delaware was approved.[86] Bedford's motion added a phrase to the Sixth Randolph Resolution authorizing Congress "to legislate in all cases for the general interests of the Union."[87] We do not know whether Sherman's use of the compendious "general welfare" and "common interests" phrases had evoked any statements of concern; but Bedford's reference to "general interests" prompted Randolph himself to exclaim: "This is a formidable idea indeed. It involves the

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80. 2 *id.* at 21 (Journal). Madison's record of the language of this motion, 2 *id.* at 25 (Madison), is considerably less clear.

Sherman had affirmed earlier "that the Confederation had not given sufficient power to Congs. and that additional powers were necessary." 1 *id.* at 34 (Madison). He believed "also that the General and particular jurisdictions ought in no case to be concurrent." 1 *id.* at 34-35 (Madison). This is probably why this motion copied the Articles in trying to delimit national by state power. Sherman's phrase, however, resembled Dickinson's "never interfere" clause more closely than it did the Articles' ultimate Article II, retaining "sovereignty" to the States.

81. *See supra* text accompanying note 60.

82. Art. V, *in* 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 196; *see also supra* text accompanying note 61.

83. 2 FARRAND, RECORDS, *supra* note 35, at 26 (Madison). Sherman's explanatory list has not survived.

84. 1 *id.* at 59-60 (Pierce). Sherman had made this observation on May 31st when the Sixth Resolution was first discussed. *See* 1 *id.* at 59-60 (Pierce).

85. 2 *id.* at 21 (Journal), 26 (Madison).

86. 2 *id.* at 21 (Journal), 27 (Madison).

87. 2 *id.* at 21 (Journal), 26 (Madison).

power of violating all the laws and constitutions of the States, and of intermeddling with their police."[88]

Notwithstanding Randolph's objection, Bedford's motion was approved.[89] Consequently, while the phrase "general welfare" was not included in the resolution defining the legislative power, Bedford's "general interests" was, as it was approved and referred to the Committee of Detail late in July.[90]

However, the exchange over Bedford's motion apparently rekindled interest in the idea of enumerating rather than generalizing Congress' powers. Randolph himself was a member of the Committee of Detail, and in an early draft for the Committee, he tried his hand at the task of enumeration.[91] His list underwent revision, but the Detail Committee did use the enumeration technique in its August 6 Report.[92] This shift by the Committee from generalization to enumeration excited no objection from the other delegates, whose only responses through the remainder of the Convention were some efforts to ensure an enumeration sufficient to cover all that the generalizations had been thought to comprehend.

Enumeration had quite a different significance in 1787 than in 1777, however. The Constitution's enumeration was not accompanied by adamant assertions of state priority and prerogative comparable to those characterizing the Articles of Confederation.[93] In the Constitution, enumeration was undertaken not to repudiate the generalities of the Sixth Randolph Resolution (which earlier had been repeatedly approved), but rather to articulate them in greater detail. Under the Constitution, consequently, Congress' powers are not delimited by those of the states.

On the other hand, unlike Franklin's specification of "Commerce," "Currency," "Post," and "common Forces,"[94] and the enumeration Sherman had used to explain his motion of July 17,[95] enumeration in the Constitution was *not merely to illustrate* what might be comprehended by the generalities. Possibilities within the displaced

88. 2 *id.* at 26 (Madison).
89. 2 *id.* at 21 (Journal), 27 (Madison).
90. *See* 2 *id.* at 131 (Committee of Detail, I).
91. *See* 2 *id.* at 142-44 (Committee of Detail, IV).
92. *See* 2 *id.* at 181-82 (Madison).
93. *See supra* text accompanying notes 63-67.
94. *See supra* text accompanying note 61.
95. *See supra* text accompanying note 83.

general phrases, but not fairly within the enumeration that displaced them, *did not* remain constitutionally permissible.[96]

To suppose otherwise would vitiate the principle of enumeration. Since the constitutional enumeration details what the displaced generalities were thought to comprehend, those generalities certainly should inform the construction and application of the enumerating clauses; but every assertion of federal power must be sufficiently grounded in the document's text. The decision to enumerate rather than rest on generalities means that, as to domestic affairs,[97] all suggestions of general, implicit, or inherent federal power must fail.

The significance of this shift from generalization to enumeration can be illustrated with the taxing power. Power to tax was one power denied by the Articles of Confederation, which all agreed the new central government must have. Nonetheless, even while specifying that federal courts should have jurisdiction to enforce federal revenue laws,[98] the original Randolph Resolutions did not specify any taxing power for Congress. Similarly, although the resolutions referred to the Committee of Detail contained several references to national taxes[99] they articulated no taxing power.

This, however, was not anomalous so long as Congress' power was described in ample generalities—as it was both in the Sixth Randolph Resolution and in its derivative referred to the Committee of Detail. Only with the shift to enumeration did it become imperative that any taxing power, in order to exist, be articulated more specifically. Accordingly, when it opted for enumeration, the Committee of Detail inserted a new clause saying "[t]he Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises."[100]

By the same token, of course, the shift from generalization to enumeration caused federal spending competence to depend upon inclusion in the Constitution's text of sufficient authorizing language.

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96. Their mistaken view that they *did* was maintained in Robert Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335 (1934).

97. The same cannot be said of power for international affairs, where the principle of enumerated powers does not apply. *See* DAVID E. ENGDAHL, CONSTITUTIONAL FEDERALISM IN A NUTSHELL §§ 9.01-9.03 (2d ed. 1987); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION ch. 1 (1972).

98. *See* 1 FARRAND, RECORDS, *supra* note 35, at 22 (Madison).

99. The referred resolutions provided that representation be proportioned to direct taxes; required that direct taxes be apportioned according to a census; and required that bills for raising money originate in the "first Branch of the Legislature." Resolutions referred to Committee of Detail, 2 FARRAND, RECORDS, *supra* note 35, at 131 (Committee of Detail, I).

100. 2 *id.* at 181 (Madison).

Power to spend could no more be left to inference than could power to tax, to regulate commerce, or to maintain an army or navy.

C. The "General Welfare" Phrase and Spending

Under the Articles of Confederation the central government, even though it had no power to tax, had ample authority to spend any funds it collected as requisitions from the States or otherwise. In fact, in sharp contrast to its niggled and hobbled law-making power, the Congress' spending power under the Articles was virtually unrestricted.

Article VI of Franklin's 1775 proposal provided that not only all "Charges of Wars," but also "all other general Expences to be incurr'd for the common Welfare, shall be defray'd out of a common Treasury . . . ."[101]

This "common welfare" phrase is materially indistinguishable from the "general welfare" phrase used in Franklin's Article V to define the Congress' *law-making* power.[102] In order to cabin that *law-making* power, the draftsmen of the Articles of Confederation had repudiated this generality and employed narrow particularization instead. In remarkable contrast, however, *they never even attempted to confine spending* more narrowly than Franklin's generalization had proposed.

Instead, Franklin's language authorizing spending for the common or general welfare was carried forward without substantial change to Article XI of the Dickinson draft,[103] and thence to Article IX of the August 20 draft, which said: "All charges of wars and all other expences that shall be incurred for the common defence, or general welfare, and allowed by the United States Assembled, shall be defrayed out of a common treasury . . . ."[104] Article IX, which also dealt with how the cost of supplying the common treasury should be allocated among the several states, was discussed more frequently and more extensively in the Continental Congress than any other provision of the Articles of Confederation except the one dealing with the law-making power.[105] Yet no qualification or modification of the "general

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101. 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 196.

102. *See supra* text accompanying note 60.

103. Article XI of the Dickinson Draft provided: "All Charges of Wars and all other Expences that shall be incurred for the common Defence, or general Welfare, and allowed by the United States assembled, shall be defrayed out of a common Treasury . . . ." 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 677-678, col. 1 (1906).

104. 5 *id.* at col. 2.

105. Article IX was discussed almost every day for a week from October 7 through 14, 1777. *See* 9 *id.* at 781, 785, 788, 793, 797, 800, 801 (1907).

welfare" phrase *in the context of spending* appears to have been suggested at any time.[106] As finally adopted, the spending provision read: "All charges of war and all other expences, that shall be incurred for the common defence or general welfare, and allowed by the United States, in Congress assembled, shall be defrayed out of a common treasury . . . ."[107]

The Journals of the Continental Congress contain some examples of expenditures characterizable as for the "general welfare" although not undertaken to implement law-making powers. Indeed, until the Articles of Confederation became effective, the Continental Congress had no law-making power at all, yet it spent a great deal of money—and not just for cannonballs, powder, and other materiel of war. In January 1877, for example, Congress authorized one thousand dollars for gifts to some needy, but friendly and peaceable Indians in Pennsylvania.[108] One might suppose that this charity, extended while England was seeking to exploit any occasion for disaffection among native populations, would also have strategic ramifications. However, doubtless it reflected the same humanitarian considerations that had induced Franklin in his 1775 draft not only to provide against "Injustice in the Trade with" the Indians, but also to authorize officials "at our general Expence by occasional small Supplies, to relieve their personal Wants and Distresses."[109] At the time of that donation, before the Articles were in force, *all governance* power reposed in the separate states; the occasion therefore demonstrates that power to govern and power to spend money were not considered as commensurate at all. Thus, it should not seem surprising that central government spending could be deemed for the "general welfare" even though not effectuating any central governance power.

The Randolph Resolutions, unlike the Articles of Confederation, included no explicit authorization to spend at all.[110] Again, however, that was because the Virginians had employed generalization instead of enumeration: One generalization in the Sixth Randolph Resolution

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106. The only changes made were styling changes by the committee appointed to "revise and arrange" the approved articles, 9 *id.* at 900, 902, or "small amendments made in the diction, without altering the sense . . . ," 9 *id.* at 907, before the final version was approved on November 15.

107. Art. VIII, *in* 9 *id.* at 913, col. 2. A clause in Article IX provided that "[t]he united states in congress assembled shall never . . . ascertain the sums and expences necessary for the defence and welfare of the united states, or any of them, . . . unless nine states assent to the same . . . ." 9 *id.* at 921-922.

108. 7 *id.* at 62-63 (1907).

109. Art. XI, *in* 2 *id.* at 198 (1905).

110. *See* 1 FARRAND, RECORDS, *supra* note 35, at 20-22 (Madison).

was that the legislature should "enjoy the Legislative Rights vested in Congress by the Confederation,"[111] and among these was the power conferred by Article VIII to defray "all . . . expences . . . incurred for the . . . general welfare."[112] When the Committee of Detail opted for enumeration, of course, such incorporation by reference could no longer be employed; and, accordingly, a draft for the Detail Committee in James Wilson's handwriting proposed authorizing federal revenues "to be applied to such [federal] Purposes as [Congress] shall deem proper and expedient . . . ."[113]

Wilson's proposal, however, was not approved by the Committee. Instead—ironically—while it enumerated more substantial powers of *governance* than the Articles of Confederation had allowed, the August 6 Report of the Committee of Detail subjected the *spending* competence of the central government to unprecedented constraint. The only language in the Committee's Report authorizing any spending at all was the same language the Committee had devised for dealing with the myriad details of organizing the government and effectuating its various *enumerated* powers.

That language contemplated power for the national legislature "to make all laws that 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."[114] While ample to authorize spending to execute the various enumerated powers, this clause would not authorize any spending for purposes *extraneous* to that enumeration. Thus, the Detail Committee's Report contemplated a spending

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111. *See supra* text accompanying note 70.

112. ARTICLES OF CONFEDERATION art. VIII.

113. 2 FARRAND, RECORDS, *supra* note 35, at 157 (Committee of Detail, VIII). This latter was copied from the "New Jersey Plan" introduced by Patterson on June 15. *See* 1 *id.* at 242-43 (Madison).

An earlier Detail Committee draft in the handwriting of Edmund Randolph had proposed authorizing the use of tax revenues "for the past and future debts and necessities of the union." 2 *id.* at 142 (Committee of Detail, IV).

114. 2 *id.* at 182 (Madison). The Convention approved this "necessary and proper" clause on August 20. 2 *id.* at 345 (Madison).

The Committee's Report also provided that money could be drawn from the treasury only pursuant to appropriations originating as House bills, Report of Committee of Detail, Art. IV, § 5, *in* 2 *id.* at 178 (Madison); *see also* Resolutions submitted to Committee of Detail, *in* 2 *id.* at 131 (Committee of Detail, I); and that bills upon final approval would become "laws," Report of Committee of Detail, Art. VI, § 13, *in* 2 *id.* at 181 (Madison). For convention actions pursuant to these suggestions, see 2 *id.* at 509 (Madison). *See also* U.S. CONST. art. I, § 7, cl. 1; *id.* art. I, § 9, cl. 7.

competence substantially curtailed from the essentially unrestricted spending power existing under the Articles of Confederation.

Had the completed Constitution contained no provision for spending other than this, Madison's thesis that the spending power is limited to effectuating other enumerated powers would have been sound. The fact is, however, that the delegates judged the Detail Committee's Report deficient in this regard. Before they were finished, they would have added to the evolving text another authorization for spending that renders Madison's thesis untenable.

No other language relevant to spending was considered until August 18, when James Madison and Charles Pinckney and others submitted lists of additional powers for Congress deemed within the generalizations of Randolph's Sixth Resolution, but not enumerated in the August 6 Report of the Committee of Detail.[115] These lists, which were referred to the same Detail Committee for consideration,[116] included several particulars that would involve spending. One of them was power "[t]o secure the payment of the public debt."[117]

Later the same day, on a motion by John Rutledge, the delegates appointed a "grand committee" consisting of one delegate from each state to "consider the necessity and expediency" of the United States assuming all the state debts.[118] Consequently, at the same time the debts issue was on referral to the Committee of Detail, it was under consideration by this "grand committee," too. The "grand committee" reported on August 21,[119] and the Detail Committee submitted its supplemental report on August 22.[120] Discussion of the latter was "postponed that each member Might furnish himself with a copy,"[121] and the "grand committee's" proposal was considered first.

That "grand committee" proposal used the "general welfare" phrase, but it used that phrase in a peculiar and narrow way. It said:

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115. 2 FARRAND, RECORDS, *supra* note 35, at 321-22 (Journal), 324-26 (Madison). On the same date, the delegates approved a floor amendment adding the words "and support" to the clause authorizing the legislature to "raise Armies." 2 *id.* at 329 (Madison). No discussion of that amendment is reported, and it was agreed to "nem. con." 2 *id.*

116. 2 *id.* at 321 (Journal), 325 (Madison).

117. 2 *id.* at 322 (Journal), 326 (Madison).

118. *See* 2 *id.* at 322 (Journal), 327 (Madison). Some other matters debated that day referred to this committee, too. Similar "grand committees" (or "committees of eleven") were formed on some other occasions.

119. 2 *id.* at 355-56 (Madison).

120. 2 *id.* at 366-67 (Madison).

121. 2 *id.* at 376 (Madison).

> The Legislature of the United-States shall have power to fulfil the engagements which have been entered into by Congress, and to discharge as well the debts of the United States, as the debts incurred by the several States during the late war, for the common defence and general welfare.[122]

By this context and grammar, both the "general welfare" phrase and its companion phrase, "common defence," were confined in meaning to the common cause of the revolution, in which most of the debts then existing had been incurred.

This proposal of the grand committee was not adopted, however. Instead, the delegates on August 22 approved a substitute proposal of Gouverneur Morris which declared simply: "The Legislature shall fulfil the engagements and discharge the debts of the United States."[123] The "general welfare" phrase thus disappeared.

On August 23, this language was conjoined to the Taxing Clause so as to provide: "The Legislature shall fulfil the engagements and discharge the debts of the United-States, and shall have the power to lay and collect taxes, duties, imposts, and excises."[124] This conjunction, however, was undone two days later because of objections to Morris' word "shall." It was argued that "shall fulfil" would foreclose such options as buying up paper at discount, thus arguably enhancing the security of public creditors and entailing somewhat greater public expense.[125] Edmund Randolph therefore moved to "postpone"[126] that language in favor of a clause providing simply that "all debts contracted and engagements entered into, by or under the authority of Congress shall be as valid against the United States under this constitution as under the confederation."[127] This clause was approved on August 25,[128] and it survives in the finished Constitution.[129]

It is important to notice that this clause approved on August 25—unlike the grand committee's proposal and even Morris' substi-

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122. 2 *id.* at 352 (Journal).

123. 2 *id.* at 368 (Journal); *see also* 2 *id.* at 377 (Madison).

124. 2 *id.* at 382 (Journal); *see also* 2 *id.* at 392 (Madison).

125. 2 *id.* at 413 (Madison).

126. Neither the Journal nor Madison's notes explicitly declare that approval of this motion to "postpone" deleted Morris' language from the Taxing Clause. It must have been regarded as having that effect, however, because otherwise the objectionable word "shall" would have remained.

127. 2 *id.* at 408 (Journal); *see also* 2 *id.* at 414 (Madison).

128. 2 *id.* at 408 (Journal).

129. *See* U.S. CONST. art. VI, § 1.

tute—*confers no authority to pay* such debts.[130] The need for some adequate grant of relevant power could hardly have been overlooked at the time, however. The submission of lists of additional powers on August 18 shows that the delegates by then understood the principle of enumeration quite well. Randolph himself, discussing on August 22 the grand committee's proposal (which *did* confer payment power), had remarked that he "thought such a provision necessary; for though the U. States will be bound, the new Govt. will have no authority in the case unless it be given to them."[131]

The delegates did, indeed, perceive the necessity of an enumerating grant of power sufficient to embrace payment of the debts; and they did answer that necessity, as data examined elsewhere show.[132] They also, a few days later, added the "general welfare" phrase in the form ultimately approved as the Taxing Clause of Article I, Section 10; but this addition had nothing to do with the perceived need for enumerating a power to spend.

According to Madison's notes, on August 25, after Randolph's language affirming the validity of prior debts had been approved, Roger Sherman said that he

> thought it necessary to connect with the clause for laying taxes duties &c an express provision for the object of the old debts &c—and moved to add to the 1st. clause of 1st. sect—of art VII [the taxing clause of the Detail Committee's August 6 Report] "for the payment of said debts and for the defraying the expences that shall be incurred for the common defence and general welfare."[133]

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130. Spending to pay debts incurred *earlier*, during the Revolution and Confederation periods, could not be considered spending "for carrying into Execution the . . . Powers vested by" the *new* Constitution particularly if the national government should assume the *states'* debts, as was proposed. To authorize payment of those debts, therefore, language different from that of the Necessary and Proper Clause was required.

131. 2 FARRAND, RECORDS, *supra* note 35, at 377 (Madison). Randolph's early draft in the Committee of Detail had authorized debt payment by express language distinct from his latitudinous "necessities of the union" phrase. *See* 2 *id.* at 142 (Committee of Detail, IV). We do not know whether that debt payment language was omitted by the Committee inadvertently or over Randolph's dissent. One other member of the Committee of Detail, Oliver Ellsworth, seems to have been somewhat oblivious on this point. *See* 2 *id.* at 377 (Madison). Madison "thought it necessary to give the authority in order to prevent misconstruction." 2 *id.*

132. *See, e.g.*, *supra* text accompanying notes 109 et seq.

133. 2 FARRAND, RECORDS, *supra* note 35, at 414 (Madison). The wording of Sherman's motion resembled (and probably was influenced by) the wording of the August 21 grand committee proposal, but there were differences. In the August 21 proposal (which was not adopted), the phrase "common defence and general welfare" was limited by grammar and context to refer only to the recently concluded ordeal of revolution. In Sherman's formulation there was no such restricting connection. In fact, Sherman's explicitly contemplated "expences that shall be incurred" in the future. Also, the phrase "common defence and general welfare" in the August

Similar language had been contained in the Committee of Detail's supplemental report submitted August 22, but vote on the report was postponed to enable each delegate to "furnish himself with a copy."[134] The report called for adding to the Taxing Clause the phrase "for payment of the debts and necessary expenses of the United States . . . ."[135]

Rather than approve either of these formulations, however, the delegates on September 4 adopted a third version, which blended these two.[136] The third version changed the Taxing Clause to read: "The Legislature shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States."[137] In this manner, the "general welfare" phrase reappeared. It emerged in the course of addressing the debts question, but here, unlike in the August 21 "grand committee" proposal, the relationship between the "general welfare" phrase and debt payment is one of conjunction, not apposition. This formulation survives almost verbatim in the finished Constitution.[138]

There is no contextual or grammatical reason for construing the "general welfare" phrase in this clause as any less general or comprehensive in meaning than the same phrase in the utterly permissive Spending Clause in the Articles of Confederation,[139] or in the Constitution's improved preamble reported eight days later by the Committee on Style and Arrangement.[140] Certainly nothing suggests such a peculiarly narrow meaning of the phrase as was manifest in the

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21 proposal was merely descriptive of the debts, or of the cause in which they had been incurred; but in Sherman's, "to pay the debts" and to "provide for the common defence and general welfare" were treated as distinct and separate applications of funds.

134. *See supra* text accompanying note 121.

135. 2 FARRAND, RECORDS, *supra* note 35, at 366 (Journal). This was substantially equivalent to the language originally proposed by Randolph during that Committee's earlier deliberations, but was omitted from its principal, August 6 Report. *See supra* note 113.

136. 2 FARRAND, RECORDS, *supra* note 35, at 495 (Journal), 499 (Madison). This blended formulation apparently was adopted with no discussion at all. It had been proposed by yet another "grand committee," appointed on August 31. *See* 2 *id.* at 473 (Journal), 481 (Madison). The charge to this committee was to report on "such parts of the Constitution as have been postponed, and such parts of reports as have not been acted on . . . ." 2 *id.* However, the committee canvassed for other lacunae as well. Roger Sherman was a member of this "grand committee," as he had been of the earlier one.

137. 2 FARRAND, RECORDS, *supra* note 35, at 493 (Journal); *see also* 2 *id.* at 497 (Madison).

138. U.S. CONST. art. I, § 8, cl. 1.

139. The "general welfare" phrase in this September 4 provision contrasts markedly with the same phrase used in the disapproved August 21 proposal. In the September 4 provision, taxing to pay debts (including old debts from the Revolution) and taxing to provide for the general welfare (and common defence) are referred to in separate, parallel phrases.

140. *See supra* text accompanying notes 39-41.

discarded August 21 "grand committee" proposal. Neither is there any textual basis for cabining this "general welfare" phrase, as Madison later would urge, within the scope of otherwise enumerated powers. Power to spend for effectuating those enumerated powers was already separately supplied by the Necessary and Proper Clause.

However, when proposed and approved, this merely allusive subordinate phrase in the Taxing Clause was not even conceived as granting any power at all! Had that been its purpose, grammatically more appropriate models of power-granting language, which could have been copied instead, were immediately at hand.[141] Moreover, although the delegates surely understood that adequate power-granting language was needed to authorize any spending not sustainable under the Necessary and Proper Clause (such as the payment of prior debts), Madison reports that Sherman's August 25 motion was disapproved by every State but his own *"as being unnecessary . . . ."*[142] Had its purpose been to grant that requisite power, Sherman's motion (and the blended language later approved in its stead) could hardly have been thought "unnecessary"!

Several other provisions had been added to the nearly finished Constitution during the several days preceding September 4. As the next Section explains, among them was a provision ample to authorize federal spending whether or not to effectuate other enumerated powers. Had he been concerned over *power* to pay debts, Sherman's August 25 motion would have been unnecessary and inapt because it contained no power-granting language. Sherman's stated purpose, however, was only "to connect with" the Taxing Clause some reference to "the object of the old debts . . . ,"[143] as if to forestall arguable objections against putting general revenues to such use. For this, the language of mere allusion he proposed was quite appropriate. Moreover, his provision could fairly be characterized as "unnecessary," even though it also was uncontroversial and inconsequential enough to be accepted without discussion in the modified form later suggested by the second grand committee on September 4.[144]

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141. For example, the August 21 "grand committee" report had proposed that the legislature "shall have power to . . . discharge" debts and to fulfill engagements. Even the language of Gouverneur Morris' August 22 motion—"the Legislature shall fulfil the engagements and discharge the debts"—was more apt as a grant of power.

142. 2 FARRAND, RECORDS, *supra* note 35, at 414 (Madison) (emphasis added); *see also* 2 *id.* at 408 (Journal).

143. 2 *id.* at 414 (Madison).

144. 2 *id.* at 497 (Madison).

The conclusion to which all this leads is that the "general Welfare" phrase in the Taxing Clause of the Constitution *alludes to* the vast generality of purposes to which tax revenues, as well as other federal receipts, might be put, but does nothing to *empower* Congress to spend. The power to spend, except pursuant to the Necessary and Proper Clause, must depend upon other constitutional language. Identifying that language is the task to which we now turn.

IV. THE "PROPERTY CLAUSE" BASIS FOR SPENDING

A. *The Detail Committee's "Well Managing" Clause*

As noted in the preceding Section, on August 18, 1787, Madison and Pinckney submitted lists of additional powers for Congress, which were referred to the Committee of Detail.[145] That Committee's August 22 supplemental report contained, and the Convention approved, provisions obviously responsive to several of these suggestions. These include, for example, the clauses empowering Congress to provide for patents and copyrights[146] and to grant letters of marque and reprisal;[147] the language authorizing Congress to regulate Indian affairs even within the boundaries of States;[148] and the clause empowering Congress to govern the national capital district not just within the scope of otherwise enumerated powers, but "in all Cases whatsoever."[149]

That August 22 supplemental report also contained, and the Convention approved, provisions responsive to other Madison or Pinckney suggestions, but much less obviously so. For example, Pinckney had proposed that Congress be authorized "[t]o establish seminaries for the promotion of literature and the arts & sciences," and Madison had proposed that Congress be authorized "[t]o establish an University."[150] The Committee of Detail reported no language *obviously* responsive to these proposals. Because the document three weeks later still contained no language specifically responsive to them,

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145. *See supra* text accompanying note 115.

146. U.S. CONST. art. I, § 8, cl. 8.

147. U.S. CONST. art. I, § 8, cl. 11.

148. U.S. CONST. art. I, § 8, cl. 3.

149. U.S. CONST. art. I, § 8, cl. 17.

150. 2 FARRAND, RECORDS, *supra* note 35, at 325 (Madison); *see also* 2 *id.* at 321-22 (Journal). Establishing a university or seminaries would require expenditures of money, to be sure; but it also could require much more, including land acquisition, planning and construction of buildings, design of curriculum, operational management, and selection and employment of staff.

on September 14 Madison and Pinkney again moved that power "to establish an University" be added.[151]

So far as surviving records show, no delegate opposed this proposal on its merits either the first or the second time it was made. On the second occasion, however, Gouverneur Morris pointed out that, since the first, the delegates had authorized Congress to "exercise exclusive Legislation in all Cases whatsoever" in the national capital district. "[I]n all Cases whatsoever" meant that the competence of Congress within that district would not be confined to the otherwise enumerated powers; consequently, *within the capital district*, Congress would be as competent as any state to establish and operate a university. Apparently, most delegates were convinced by Morris' assertion that "this will reach the object,"[152] and the motion explicitly to authorize establishment of a university was voted down.[153]

This university example illustrates the technique of consolidating several particular points under somewhat more general terms. There are several other examples of this technique among Congress' enumerated powers.[154]

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151. 2 *id.* at 616 (Madison), 620 (McHenry).

152. 2 *id.* at 616 (Madison); *see also* 2 *id.* at 620 (McHenry).

153. 2 *id.* at 616 (Madison).

154. One other example is the suggestion attributed to Pinckney, 2 *id.* at 326 (Madison), of power "[t]o regulate Stages on the post roads," 2 *id.* at 322 (Journal). The suggestion might actually have been Gerry's. *See* 2 *id.* at 328 (Madison). This was never specifically addressed by committee report or convention action; presumably it was thought subsumed by the Commerce Clause, by the Postal Clause, or by the Necessary and Proper Clause.

Another example is the much-controverted power to charter corporations. On August 18, Madison had proposed power "[t]o grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent." 2 *id.* at 325 (Madison). Pinckney more simply had proposed power "to grant charters of incorporation." 2 *id.* at 325 (Madison). Two days later the Convention approved the Necessary and Proper Clause which had been proposed by the Committee of Detail. 2 *id.* at 345 (Madison). The delegates' recognition that this felicitous clause would authorize a multitude of possible means to the ends it specified was evidenced by their rejection as superfluous of Madison's own floor suggestion that authority specifically to create offices be added. 2 *id.* at 337 (Journal), 345 (Madison). Few delegates could have anticipated so miserly a construction of this clause as Jefferson (and Madison) would later propound. After all, before the decision to enumerate had been made, these same delegates had repeatedly approved national legislative power in terms far less guarded than these.

The "necessary and proper" language was perfectly apt for authorizing (among very many other things) the creation of corporations *as means to effectuate* the other enumerated powers. The August 18 proposals regarding incorporation had not been so restricted, however: Pinckney's was carte blanche, and Madison's contemplated the chartering of corporations any time "the Public good" might require "and the authority of a single State may be incompetent." 2 *id.* at 325 (Madison). Apparently most delegates considered it sufficient to give Congress power to incorporate *for effectuating other federal powers*; it seems very *un*likely that, when they approved the Necessary and Proper Clause just two days after the utility of corporations had been

Also on the Madison and Pinckney lists were proposals that Congress be authorized to spend money for various purposes not within any enumerated power.[155] One of these proposals, that Congress have the power "to secure the payment of the public debt," has already been discussed.[156] In addition, Pinckney proposed empowering Congress "[t]o establish . . . rewards . . . for the promotion of agriculture, commerce, trades and manufactures," and Madison proposed empowering Congress "to encourage by premiums . . . the advancement of useful knowledge and discoveries."[157] The apparent premise of these suggestions was that financial inducement, by sponsorship or reward, of activities or accomplishments beyond Congress' competence to govern, might well promote the public good; or, in other words, might "provide for the . . . general welfare," although neither Madison nor Pinckney used that particular phrase.

The Committee of Detail did not report (nor did the Convention approve) any language *obviously* responsive to these suggestions of extraneous spending. However, one cannot therefore conclude that

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commended, many of the delegates could have overlooked this obvious application of its terms. This application was certainly obvious to the very first Congress (which included several erstwhile Convention delegates), which enacted the bill to incorporate the Bank of the United States.

To reinforce his later thesis that power to incorporate was rejected by the Convention, Madison would cite a discussion that occurred more than three weeks later, on September 14. Dr. Franklin suggested amending the Postal Clause "to provide for cutting canals." 2 *id.* at 615 (Madison). Madison took this occasion to urge, once again, a power to create corporations unrestricted to effectuating enumerated powers. 2 *id.* at 615 (Madison). He specifically ventured that federal corporations could undertake various internal improvements. Madison's suggestion was not even put to a vote and Franklin's was rejected.

Even from the scanty comments Madison reports in his notes, however, one cannot infer doubts that the Necessary and Proper Clause would support chartering corporations *to effectuate enumerated powers* (as distinguished, for example, from undertaking internal improvements). Some comments were made in that September 14 discussion about incorporating a bank; but those comments were responsive to the *unlimited* incorporating power Madison had proposed, not to the possibility of incorporation in order to effectuate enumerated powers. No one at that time even considered whether or how incorporating a bank might help deliver pay to scattered troops, supply currency to facilitate tax payments, or ensure a source of credit for the government's operating needs. When those questions were later considered, the sufficiency of the Necessary and Proper Clause was plain.

The principle of enumerated powers does not demand any particular level of generality or specificity. Greater specificity provides increased verbal and grammatical opportunities for forensic reasoning and argument. However, covering several matters collectively with more general terms of enumeration is sometimes the more practical expedient.

155. To this extent, in other words, Madison himself proposed language that would have authorized at least some such extraneous spending that later would denounce as unconstitutional. *See supra* note 13 and accompanying text.

156. *See supra* text accompanying notes 115 et. seq.

157. 2 FARRAND, RECORDS *supra* note 35, at 321-22 (Journal), 325 (Madison).

they were rejected.[158] The Convention records do not otherwise evidence a practice of killing proposals in committee; and—as the university example shows—they do demonstrate a practice of subsuming several specifics under somewhat more general terms. It therefore must be acknowledged as at least possible that the Committee of Detail, rather than rejecting the proposals that Congress be authorized to spend for debts, premiums, and rewards, actually subsumed these specifics under language broad enough to cover them all.

In fact, the Detail Committee's supplemental report of August 22 contains language appropriate to do exactly that. The Committee proposed authorizing the national legislature

> to provide, as may become necessary, from time to time, for the well managing and securing the common property and general interests and welfare of the United States in such manner as shall not interfere with the Governments of individual States in matters which respect only their internal Police, or for which their individual authorities may be competent.[159]

This provision, which for convenience of reference I call the Well Managing Clause, answered several needs. Most obviously, the clause was responsive to yet another item on Madison's August 18 list: Vast expanses of land had been ceded to the nation by several of the original States, to be governed under the Northwest Ordinance the Continental Congress had enacted just five weeks before.[160] With reference to this vast domain, Madison had included on his August 18 list a power in the national legislature "[t]o dispose of the unappropriated lands of the U. States," and "[t]o institute temporary Governments for New States arising therein."[161]

Certainly the "unappropriated lands" in that Northwest Territory comprised part of the "common property . . . of the United States" contemplated by the Well Managing Clause. This could not have been the whole of it, however.[162] The caveat regarding states'

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158. Reflection on the lack of any language *obviously* responding to his suggestions might possibly have reinforced Madison's later conviction that the Constitution does not countenance extraneous spending.

159. 2 FARRAND, RECORDS, *supra* note 35, at 367 (Journal).

160. *See* An Ordinance for the Government of the Territory of the Unites States Northwest of the River Ohio, July 13, 1787, *in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 957-64 (Francis N. Thorpe ed., 1906).

161. 2 FARRAND, RECORDS, *supra* note 35, at 324 (Madison).

162. Similarly, "disposal" is one option in dealing with property one owns, but "managing" comprehends much more, and the Committee used the broader term.

"internal Police" and matters "for which their individual authorities may be competent" shows that the clause was designed also to deal with something more: Because States were not deemed extraterritorially competent,[163] this caveat could only have contemplated property *within* States, and the Northwest Territory lay beyond every State's borders.

This Well Managing Clause therefore seems also responsive to yet another of Madison's suggestions, that Congress have power "to . . . hold . . . landed property" for military installations "and other necessary buildings,"[164] because most such facilities presumably would be located within the boundaries of States. However, the Well Managing Clause was equally apt to cover a great deal more: The phrase "general interests and welfare" would have been mere surplusage had it contemplated nothing more than the other phrase, "common property."

The independent significance of the "general interests and welfare" phrase is not at all difficult to discern. "General interests and welfare" is simply a variation of "common interests" and "general welfare," and the usage and import of the latter two phrases has been elaborated in preceding Sections. Such contemporaneous usage by the same people in the same Convention suggests that these phrases in this context could not have been understood as limited in any significant way.

Roger Sherman had used both phrases in his July 17 attempt to articulate the scope of federal power before the principle of enumerated powers had prevailed.[165] It was precisely because Sherman recognized the phrases as, by themselves, all-encompassing that he had added limiting terms equivalent to those contained in the "well managing" clause's caveat.[166] Similarly, "General welfare" had also been used in the Spending Clause of the Articles of Confederation,

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163. The proposition that state competence is territorially limited was integral to constitutional jurisprudence from the outset and was too fundamental to need any textual predicate. After the ratification of the Fourteenth Amendment, however, it came to be associated with the Due Process Clause. *See* Pennoyer v. Neff, 95 U.S. 714 (1878).

164. 2 FARRAND, RECORDS, *supra* note 35, at 321 (Journal), 325 (Madison).

165. *See supra* text accompanying note 80.

166. The caveat in Sherman's motion provided: "but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned." 2 FARRAND, RECORDS, *supra* note 35, at 21 (Journal). The caveat in the Detail Committee's Well Managing Clause provided: "in such manner as shall not interfere with the Governments of individual States in matters which respect only their internal Police, or for which their individual authorities may be competent." 2 *id.* at 367 (Journal).

where the phrase's whole significance lay in the contrast it made between the unrestricted *spending* discretion and the severely limited *governing* power the Articles allowed to the central authority.[167]

The Well Managing Clause certainly contemplated far more than spending. The Well Managing Clause contemplated *every* kind of action "to provide . . . for the well managing and securing" of federal property and the "general interests and welfare."[168] While the clause would have authorized more, it certainly would have authorized spending as well. The phrase "general interests and welfare" was quite apt to cover, among other things, the public interest in productivity and economic improvement; "discoveries" and "agriculture, commerce, trades and manufactures" were matters regarding which Madison and Pinckney had suggested that Congress be empowered to pay "premiums" or "rewards."[169] The grant of power by that clause "to provide . . . for the well-managing and securing the . . . general interests and welfare" certainly would have authorized Congress to promote trade, agriculture, industry, and invention by the application of largesse.

However, this Well Managing Clause never even got to the floor for discussion. The clause was obviated by approval of a different motion that covered essentially the same ground.[170] Nevertheless, the clause shows that the Committee of Detail took account of Madison and Pinckney's suggestions that Congress be authorized to spend for purposes extraneous to enumerated powers. While the clause would have conferred power to manage unappropriated federal lands and to manage military installations and other needful buildings, the Well Managing Clause would also have authorized spending for any publicly useful, though unenumerated, end.

Recognizing this feature of the Well Managing Clause is important to an accurate understanding of the provision that was adopted in its place.

B. Gouverneur Morris' "Property Clause"

The language that obviated the Well Managing Clause was moved by Gouverneur Morris[171] and agreed to on August 30.[172] Morris'

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167. *See supra* text accompanying notes 99-107.

168. Indeed, the Well Managing Clause would have vitiated the principle of enumerated powers. No doubt that is why the clause copied Sherman's caveat as well, trying to forestall the aggregation of power that the enumerated powers principle itself (were it not vitiated) would have prevented.

169. 2 FARRAND, RECORDS, *supra* note 35, at 325 (Madison).

170. *See supra* text accompanying notes 169 et seq.

171. 2 FARRAND, RECORDS, *supra* note 35, at 458-59 (Journal), 466 (Madison).

motion provided that: "The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U. States . . . ."[173] This provision survives in the finished Constitution as the Property Clause of Article IV.[174]

What precipitated Morris' motion was a tangential issue that arose during discussion of the formation and admission of new states. The tangential issue concerned the competing claims of several states and the United States to lands westward to the Mississippi from the Appalachians or the Ohio River.

The issue of those claims was addressed by Daniel Carroll of Maryland in a motion which Carroll himself withdrew after considerable discussion and replaced with another.[175] Morris promptly moved to postpone Carroll's motion to take up his own substitute, and the postponement was agreed to "nem. con." Morris' substitute then was approved on its merits, with Maryland alone dissenting.[176]

The second clause of Morris' August 30 motion did, indeed, address the issue of those claims.[177] However, its first clause, set forth above, demands some additional explanation because it was not germane to anything else the delegates debated that day.

The matter on the floor when the western lands question arose was Article XVII of the Detail Committee's August 6 Report. Article XVII dealt with the admission of new states. Apparently Morris believed the issue of western lands claims should be addressed instead in the context of territory not yet at the threshold of statehood. The Well Managing Clause in the Detail Committee's supplemental report of August 22 would have provided appropriate context; but although delegates by that time had copies of it in their hands,[178] that report had not yet been brought to the floor.

Consequently, to dispose of the land claims issue without cluttering the state admission provision Morris had to put forward something equivalent to the Well Managing Clause and add a

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172. 2 *id.* at 459 (Journal), 466 (Madison).

173. 2 *id.* at 458 (Journal), 466 (Madison).

174. *See* U.S. CONST. art. IV, § 3, cl. 2.

175. 2 FARRAND, RECORDS, *supra* note 35 at 458 (Journal), 465-66 (Madison).

176. 2 *id.* at 458-59 (Journal), 466 (Madison).

177. "[A]nd nothing in this Constitution contained shall be so construed as to prejudice any claims either of the United States or of any particular State." 2 *id.* at 458-59 (Journal), 466 (Madison).

178. As the Journal notes, consideration of the Report had been postponed on August 22 specifically "in order that the Members may furnish themselves with copies of the report." 2 *id.* at 368 (Journal).

"competing claims" provision, all in one motion. With the Detail Committee's supplemental report in hand, each delegate could immediately ascertain that the first clause of Morris' motion was equivalent in import to that report's Well Managing Clause. Consequently, that Morris' motion was approved without any reported discussion of its first clause is not surprising, even though that clause was not germane to anything then under discussion.

Because Morris' motion and the Well Managing Clause covered substantially the same ground, Morris' motion mooted the Well Managing Clause. Apparently for that reason, the Well Managing Clause never did surface for Convention deliberation. A "grand committee" appointed the next day was charged to report on "such parts of the Constitution as have been postponed, and such parts of reports as have not been acted on . . . ."[179] The report of that committee, of which Morris himself was a member,[180] did identify a number of provisions still awaiting action; and those propositions occupied the delegates for the next several days. The Well Managing Clause, however, was not one of those identified as still pending. Apparently the clause was regarded as *having been* acted upon, even though it never was brought to the floor except as transmuted into Morris' August 30 motion.

Morris' skill with language is well known, and is demonstrated by the concise language he chose on this occasion. Morris' motion reached not only "territory" but "other property" as well. To be sure, "other property" includes other *real* property; but that less inclusive term Morris significantly eschewed. As assistant superintendent of finance for the American Confederation, and protégé of financier Robert Morris, Gouverneur Morris certainly understood that the phrase "other property" comprehends *personal* property no less than real, and understood that personal property includes money, as well as financial assets of all kinds.

An unqualified power to "dispose of" federal money (in the words of Morris' motion) provides ample authority for such "premiums" or "rewards" as Madison and Pinckney had proposed. Indeed, it authorizes *any* "disposal" (i.e., spending) that might promote, in the words of the Well Managing Clause, the "general interests and welfare of the United States" whether or not any particular expenditure might

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179. 2 *id.* at 473 (Journal), 481 (Madison).

180. The delegates appointed to this committee were Gilman of New Hampshire, King of Massachusetts, Sherman of Connecticut, Brearley of New Jersey, Gouverneur Morris of Pennsylvania, Dickinson of Delaware, Carroll of Maryland, Madison of Virginia, Williamson of North Carolina, Butler of South Carolina, and Baldwin of Georgia. 2 *id.*

also be authorized by the Necessary and Proper Clause as "carrying into Execution" another enumerated power.

On the other hand, unlike the Well Managing Clause, Morris' language does *not* contemplate a generalized power *"to provide . . . for . . .* the . . . general interests and welfare of the United States." Instead, Morris' language only authorizes the control and disposition of federal property, including the tender of federal funds. In other words, Morris' language does not disturb the allocation of *governance* authority otherwise accomplished under the principle of enumerated powers. Morris was therefore able to dispense with the wordy caveat[181] that had hedged the Detail Committee's Well Managing Clause.

Five days after Morris 'Property Clause was approved, the delegates, as earlier detailed, added the allusion in the Taxing Clause observing that tax revenues might be used "to pay the Debts and provide for the . . . general Welfare of the United States."[182] Making that statement a *mere allusion* comported with the principle of enumerated powers, because the requisite *grant of power to spend* already had been separately provided by the approval of Morris' motion five days earlier.

C. Confirming Gestures

Occasionally, of course, some participants at the Constitutional Convention misunderstood what was being done (a fact that should surprise no one experienced in group deliberations). Evidence of some misunderstanding exists with regard to federal spending, but there is stronger evidence that the import of the Property Clause for spending was understood.

Max Farrand described Maryland delegate Dr. James McHenry as "[a] man of only moderate ability."[183] McHenry made himself memorable, however, by keeping some scanty notes. In his notes for September 4, even though McHenry quoted the "general welfare" phrase, he remarked:

"Upon looking over the constitution it does not appear that the national legislature can *erect light houses* or *clean out or preserve the*

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181. The Committee had proposed power to manage the general interests and welfare only "in such manner as shall not interfere with the Governments of individual States in matters which respect only their internal Police, or for which their individual authorities may be competent." *See supra* note 166 and accompanying text.

182. *See supra* text accompanying notes 134-40.

183. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 36 (1913) [hereinafter FARRAND, THE FRAMING OF THE CONSTITUTION].

navigation of harbours . . . . This to be further considered. A motion to be made on the light house etc, to-morrow."[184]

No such motion was in fact made,[185] and two days later McHenry still thought the shortfall remained. In his notes for September 6 he wrote: "Spoke to Gov Morris Fitzimmons and Mr Goram to insert a power in the confederation enabling the legislature to erect piers for protection of shipping in winter and to preserve the navigation of harbors—Mr Gohram [sic] against. The other two gentlemen for it . . . ."[186]

McHenry's notes then declare: "Mr Gov: thinks it may be done under the words of the I clause I sect 7 art. amended—and provide for the common defence and general welfare."[187] From this proposition, which he attributed to Gouverneur Morris, McHenry extrapolated *ad horrendum*: "If this comprehends such a power, it goes to authorise the legisl. to grant exclusive privileges to trading companies etc."[188]

McHenry's wild reaction, however, suggests he might have mistaken Morris' point. To grant exclusive trading privileges is vastly different than simply to spend. The latter is merely a disposition of ownership, while the former would be an assertion of prescriptive power. Thus, McHenry seems to have understood Morris as proffering the General Welfare Clause not merely as an allusion to spending, but as a sweeping grant of *governing* competence to provide for the general good.

McHenry's misunderstanding might have contributed to the myth that Morris had tried to bestow generalized central governance authority by trick. In a 1798 speech in the House of Representatives, Albert Gallatin asserted, claiming nothing but hearsay in support, that Morris, as a member of the Committee on Style and Arrangement, had "attempted to throw [the General Welfare phrase] into a distinct paragraph, so as to create . . . a distinct power."[189] But, Gallatin asserted, the trick was discovered by Roger Sherman, "and the words

184. 2 FARRAND, RECORDS, *supra* note 35, at 504 (McHenry) (emphasis in original).

185. If he somehow knew of it in advance, McHenry might have been referring to what we call the Enclave Clause, which refers to "needful buildings." The committee appointed on August 31 had already drafted that provision, and would propose it the next day. *See* 2 *id.* at 505 (Journal), 509 (Madison). If so, however, this illustrates McHenry's imprecise bent of mind; that clause only addresses jurisdiction, not acquisition or construction.

186. 2 *id.* at 529 (McHenry).

187. 2 *id.*

188. 2 *id.* at 529-30 (McHenry).

189. 3 *id.* at 379.

restored as they now stand."[190] Some modern scholars have repeated this charge with relish.[191] However, it seems quite unfounded.

Alterations in punctuation were made, but nothing to change the import of the General Welfare Clause seems to have ever been attempted.[192] Madison, as well as Sherman, had served with Morris

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190. 3 *id.*

191. *See, e.g.*, Aviam Soifer, *Truisms That Never Will be True: The Tenth Amendment and the Spending Power*, 57 U. COLO. L. REV. 793, 811 (1986); FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 264-65 (1985). McDonald embellishes the story by conjoining McHenry's account of his September 6th conversation with Morris.

192. Gouverneur Morris was one of the five persons appointed to the Style Committee, *see* 2 FARRAND, RECORDS, *supra* note 35, at 547 (Journal), 553 (Madison), 554 (McHenry); and he might well have served as its principal scrivener. *See* FARRAND, THE FRAMING OF THE CONSTITUTION *supra* note 183, at 181-82. But because the other members were Madison, Hamilton, the very able Rufus King of Massachusetts, and Connecticut's highly respected William Samuel Johnson, this was a group not easily duped by one member, no matter how clever he might be.

When the "general welfare" provision was approved on September 4th, the punctuation between "excises" and "to pay" was a comma. That provision was located in the first clause of section 1 of Article VII of the Resolutions as they then stood. *See* 2 FARRAND, RECORDS *supra* note 35, at 493 (Journal). See also Farrand's convenient compilation of the approved provisions at 2 *id.* at 565, 569 (Committee of Style). There were also commas after "taxes," "duties," and "imposts." *See* 2 *id.* at 493 (Journal). Farrand, presumably not as a "trick," omits the latter in his compilation. *See* 2 *id.* at 569 (Committee of Style).

The draft Constitution reported from the Committee on September 12 was read aloud and then ordered printed. 2 *id.* at 582 (Journal); *see also* 2 *id.* at 585 (Madison). As printed, the punctuation between "excises" and "to pay" was a semicolon, instead. 2 *id.* at 590, 594 (Committee of Style). However, whether this was due to direction from the Committee, or Morris, one of its five members, or, instead, was due to accident or printer's error, no one actually knows. No one ever objected to the semicolon displacing the comma. The comma following "imposts" had been deleted too; but this deviation was too obviously inconsequential to ever have been inflated by allegations of "trick."

As restyled and rearranged by the Committee, the clause in question no longer was the first in its section. The Committee had placed the clause second, putting the provision for appointing a treasurer by joint ballot before it. 2 *id.* at 590, 594 (Committee of Style); *cf.* 2 *id.* at 565, 570 (Committee of Style). The treasurer provision was deleted, and the tax uniformity clause was added on September 14. 2 *id.* at 614 (Madison); the skeletal account of the Journal for this day is found at 2 *id.* at 611 (Journal). These changes necessitated resetting some type; and when the instrument was next printed, the semicolon was a comma again. (The capitalization of some words was also changed, but the omitted comma after "imposts" was not replaced.)

Whether behind these changes lay typographical error, an artless styling touch, or a sneaky ploy of craft, cannot be known with certainty; but the last seems by far the least likely. Correcting the punctuation would prove useful even if the possibility of misunderstanding were inadvertent; and it seems rather unlikely that Sherman (and everyone else) would have remained silent at the time had they suspected a trick.

Madison's account of the September 4th motion, by the way, omits *all* of the commas *except* the one between "excises" and "to pay." Usage was rather irregular in those days, as Convention records show, and we simply do not know to whom or how many of those voting on September 4 the exact choice and location of punctuation marks might have seemed material.

on the "grand committee" which proposed adding the "general welfare" phrase to the Taxing Clause;[193] and Madison said of the alteration to which Gallatin attributed such ominous import that it "must have been an erratum of the pen or of the press . . . ."[194] It seems scarcely conceivable that Morris could have pretended that this clause, with or without punctuation changes, should support such a proposition as McHenry's notes suggest.

More likely, Morris told McHenry simply that Congress could spend money for lighthouses, for piers, and to dredge harbors, and mentioned the "general welfare" language to confirm that the other delegates contemplated very broad discretion in spending.[195] In any event McHenry, finding Morris' suggestion abhorrent, continued to think that no clause yet approved would authorize the government to even pay for lights and harbor improvements. Farrand appends to McHenry's notes for September 15 "a loose scrap of paper," containing three paragraphs, found among the McHenry manuscripts.[196] One paragraph consists of language apparently never moved, specifying power for Congress "to erect piers buoys or marks and to deepen or clean harbours for facilitating or improving navigation."[197] The other two paragraphs are drafts of a motion McHenry made that day to authorize states to lay tonnage duties to finance the same kinds of improvements.[198] Still thinking the federal government would be powerless to fund such improvements, McHenry apparently wanted at least to ensure that the states would be able to do so.

No one spoke in favor of dangerous shoals, unmarked channels, or clogged harbors; surely everyone agreed such improvements as McHenry envisioned would be good. Most delegates probably also recognized, as McHenry plainly did not, that the provisions already approved did amply authorize federal funding of such improvements, and that it was pointless to encourage burdensome state tonnage duties

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Gallatin's aspersion on Morris was dubious at best and deserves no further credit among fair-minded scholars.

193. *See* 2 FARRAND, RECORDS, *supra* note 35, at 473 (Journal), 481 (Madison).

194. Memorandum of James Madison associated with his letter to Andrew Stevenson (Nov. 27, 1830), *in* 9 GAILLARD HUNT, THE WRITINGS OF JAMES MADISON 413-14 n.2; *reprinted in* 3 FARRAND, RECORDS, *supra* note 35, at 491, 492.

195. He could also have pointed out that such spending would subserve the commerce power; but that was a power about which McHenry and the other Maryland delegates had particular apprehensions. *See* FARRAND, THE FRAMING OF THE CONSTITUTION, *supra* note 183, at 152-53.

196. *See* 2 FARRAND, RECORDS, *supra* note 35, at 634 n.17 (McHenry).

197. 2 *id.* at 634 (McHenry).

198. *See* 2 *id.*

to fund the same improvements. The delegates therefore struck from McHenry's proposal all references to markers, lights, and harbor improvements, and transformed his proposal from an authorization of state tonnage duties to a prohibition of state tonnage duties without congressional consent.[199]

Meanwhile, Benjamin Franklin had moved on September 14 to add to the Postal Clause, "a power to provide for cutting canals where deemed necessary."[200] This clause originally had authorized Congress only to "establish post offices"; the phrase "and post roads" had been added to it in mid-August.[201] Franklin's motion reflected no doubt that power *merely to fund* canals would otherwise have existed. The power Franklin proposed was "to provide for cutting canals," and "cutting" them comprehends acquiring the property rights, undertaking the design, and accomplishing the construction. Arguably the power to cut canals would also entail incidents of operation, maintenance, and protection. James Wilson, who seconded Franklin's motion, noted during the brief debate that such power might even entail the production of revenue through tolls. The distinction between power merely to pay for canals, and power "to provide for cutting canals" is the same distinction President James Monroe would make thirty-five years later between *spending* for internal improvements and *undertaking construction of* the Cumberland Road.[202]

Franklin's motion was defeated,[203] and probably it would have been even if Madison had not complicated matters by expanding the motion to authorize the creation of corporations for any purpose "where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent."[204] Some delegates were opposed because they thought canals, unlike post roads, would be primarily of local benefit.[205] Probably more important,

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199. 2 *id.* at 625-26 (Madison); *see* U.S. CONST. art. I, § 10, cl. 3.

200. 2 FARRAND, RECORDS, *supra* note 35, at 615 (Madison).

201. *See* 2 *id.* at 303 (Journal), 308 (Madison).

202. James Madison, To the House of Representatives: Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822), *in* 2 JAMES D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 165 (1896) (paper accompanying message vetoing the Cumberland Road Bill).

203. 2 FARRAND, RECORDS, *supra* note 35, at 611 (Journal), 616 (Madison). The Journal lists the motion as one "To grant letters of incorporation for Canals &ca." 2 *id.* at 611 (Journal). Madison's more elaborate account suggests this was the form into which it was modified following Madison's own intrusion of the corporations issue, Franklin's motion itself having said nothing at all about incorporation.

204. 2 *id.* at 615 (Madison).

205. Sherman of Connecticut objected: "The expence in such cases will fall on the U[nited] States, and the benefit accrue to the places where the canals may be cut." 2 *id.* at 615 (Madison).

however, just as with respect to lighthouses and harbors, the delegates must have understood the difference between *undertaking* ventures and merely *paying for* them. Anyone cognizant of this distinction could have opposed Franklin's motion for the same reason as McHenry's, while simultaneously supporting federal *funding* of canals, channel markers, and lighthouses, as well as premiums and awards to foster agriculture, industry, and trade.[206] Power to *spend*, even for extraneous ends—the power *alluded to* by the "general welfare" phrase added to the Taxing Clause—was already conferred by the property disposal language proposed by Gouverneur Morris and approved.

Transmitting a copy of the proposed Constitution to their Governor five days after it had been signed, Roger Sherman and his fellow Connecticut delegate, Oliver Ellsworth, observed that "[t]he objects, for which congress may apply monies, are the same mentioned in the eighth article of the confederation, viz. for the common defence and general welfare, and for the payment of the debts incurred for those purposes."[207] This statement does not link the spending power to any particular clause of the Constitution, but it does specifically equate Congress' spending power to the unbounded spending discretion the Confederation Congress enjoyed under Article VIII of the Articles of Confederation—*not* to the modest governance powers allowed the Confederation Congress under Article IX, or even to the more substantial governance powers delegated by the Constitution. Article VIII of the Articles of Confederation had authorized *spending* with no more restrictions than Franklin's original, consolidative confederation draft of 1775 had proposed—i.e., with no limitation on legislative discretion at all.[208] Thus the power to *spend* under the Constitution, Sherman and Ellsworth were telling their Governor, is not cabined by the enumeration of *governing* powers.

D. Ownership Powers and Governance Powers

The Article IV Property Clause is most familiar, of course, in its application to landed property, whether located within "territories," within federal enclaves,[209] or within states; but it has been recognized

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206. *See supra* text accompanying notes 142-43.

207. Letter of Roger Sherman and Oliver Ellsworth to the Governor of Connecticut (Sept. 26, 1787), *in* 3 FARRAND, RECORDS, *supra* note 35, at 99.

208. *See supra* text accompanying notes 101-07.

209. Enclaves are geographic areas over which states have ceded governance jurisdiction to the United States. In such places the Enclaves Clause, U.S. CONST. art. I, § 8, cl. 17, as distinguished from the Article IV Property Clause, empowers Congress to exercise *legislative jurisdiction* "in all Cases whatsoever" (i.e., not limited to the scope of otherwise enumerated

as applying to personal property as well.[210] Its application to federal money and the disposal (e.g., spending) thereof has heretofore escaped general notice only because Congress' spending power has been misattributed to the allusive phrase in the Taxing Clause.

The power conferred by the Article IV Property Clause, however, is *not a governance power*: It is simply an owner's prerogative to manage and dispose. In territories outside the bounds of any state, Congress does have comprehensive governance power—*legislative jurisdiction* unrestricted by the principle of enumerated powers; but this does not result from the Property Clause. Indeed, it does not result from anything in the Constitution at all; it results from the principles of international law, and the absence of any other sovereignty there. Disposal of that *governance power*, moreover, is not affected by the Property Clause. Governance power can be lost by defeat in war, or disposed of by treaty made by the President and Senate. Action by the Congress, such as the Property Clause contemplates, is neither necessary nor sufficient for management or disposal of governance power, but it is both necessary and sufficient for management or disposal of federal property.

Whenever a nation acquires territory, by purchase, conquest, or otherwise, quite apart from governance jurisdiction the Nation also acquires *ownership* of the land, except to the extent that titles established under prior regimes are recognized and preserved. Because so few private titles had been previously established in the vast wilderness acquired first by cessions from the original States and afterwards by the Louisiana Purchase and the Guadelupe-Hidalgo and Gadsden Treaties, the United States became the *owner as well as sole government* in those territories. The management and disposal of this *ownership* interest in the territories, as well as the management and disposal of ownership interests in "other Property *belonging to* the United States" (emphasis added), was what the Property Cause addressed.

Recognizing this distinction between ownership and governance, one can reconcile untrammelled federal discretion in spending with the

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powers). Any *ownership interests* of the United States within enclaves, however, are controlled by the Article IV Property Clause. The difference is obvious: For example, the United States *owns* only certain parcels within the District of Columbia (an enclave), but it has *general legislative jurisdiction* over the whole.

210. Modern cases have held the Property Clause applicable, for example, to tangible personalty such as audio tapes of White House conversations. *See, e.g.*, Nixon v. Sampson, 389 F. Supp. 107, 137 n.80 (D.D.C. 1975). It seems equally applicable to intangible interests such as federally-owned patent rights. *See* Nuclear Data, Inc. v. Atomic Energy Comm'n, 364 F. Supp. 423, 425 (N.D. Ill. 1973).

restricted central governing authority contemplated by the principle of enumerated powers. The fact that *contract* obligations might ensue from the acceptance of conditions that accompany federal largesse does not mean that subsidy entails *governance* control.

V. CONCLUSION

If the spending power derives from the Property Clause, it should be possible to inform spending power analysis by a study of the classic cases about state and federal authority over federal lands;[211] and the reciprocal also is true.[212] There are numerous other practical ramifications as well. Elaborating them is beyond the reach of this Article.[213] The starting point for clear thinking about the spending power, however, is finding its basis in Article IV, apart from the Taxing Clause, distinguishing it from the "legislative Powers" enumerated in Article I.

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211. *See generally* David E. Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976), *reprinted in* 14 PUB. LAND & RESOURCES L. DIG. 269 (1977). United States v. San Francisco, 310 U.S. 16 (1940), for example, is as enlightening concerning Congress' spending power as it is concerning Congress' power over non-monetary federal property.

212. In 1976, in what might be excused as dicta beyond the necessities of decision, the Supreme Court overlooked the distinction between ownership and governance and spoke of the Property Clause as if it were a grant of legislative jurisdiction. *See* Kleppe v. New Mexico, 426 U.S. 529 (1976). The *Kleppe* error, which profoundly unsettled established constitutional doctrine, is elaborately analyzed in David E. Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 349-58 (1976), *reprinted in* 14 PUB. LAND & RESOURCES L. DIG. 269, 335-44 (1977). It is likely that if the issue is revisited with candor, and with the assistance of counsel who grasp the principles involved, the *Kleppe* error will be corrected.

213. A beginning has been undertaken in David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994).