Notes

A PROHIBITION ON PURELY LOCAL PURPOSES: THE "GENERAL WELFARE" LIMITATION OF CONGRESS'S SPENDING POWER

ELIZABETH L. BROWN†

ABSTRACT

Congress's spending power allows the federal government to spend money to provide for the general welfare of the United States. While this "general welfare" language was initially understood as barring Congress from apportioning money for local purposes, the Supreme Court's interpretation of the spending power has treated this limitation as effectively nonjusticiable. Consequently, the spending power has provided Congress with an attractive carrot to coax states into enacting regulations that Congress could not achieve through its other powers.

This Note challenges the notion that the general welfare limitation of the Spending Clause should be considered nonjusticiable. Instead, it calls for a return to the original understanding that the spending power could not be exercised to promote purely local purposes, an understanding that the Court adopted in its earlier spending cases. Relying on principles of collective action federalism and the "substantial effects" test from United States v. Lopez*, this Note proposes distinguishing between general and local spending by looking at the anticipated effects of the spending beyond the recipient of the funds itself.*

† Duke University School of Law, J.D. expected 2022; University of Mississippi, B.A. 2019. My thanks to Professor Neil Siegel for his feedback and guidance regarding this Note as well as Sadie Kavalier, Jonathan Ellison, Tranae Felicien, Michelle Lou, and the rest of the *Duke Law Journal* team for their edits and suggestions. Thanks also to my parents for their continual support. All errors are my own.

INTRODUCTION

What constitutes spending that "provide[s] for the . . . general Welfare of the United States?"[1] Many would likely be surprised at the notion that appropriations for "public education, roads, rivers, [and] canals" were once considered to fall outside of the scope of the general welfare.[2] Underlying why some viewed roads and canals as beyond Congress's spending power was the notion that they were "purely local objects," and Congress could only appropriate money for national purposes.[3] Any spending that primarily aided a specific geographic area—in other words, local welfare spending—lacked a sufficient national characteristic to be within Congress's powers.[4] While today many matters once considered purely local have national effects, Article I, Section 8 of the United States Constitution still remains. The question is whether it has an enforceable meaning.

In *United States v. Lopez*,[5] Chief Justice William Rehnquist declared that the Supreme Court was "unwilling" to conclude that "there never will be a distinction between what is truly national and what is truly local."[6] However, the Court's jurisprudence regarding congressional spending suggests otherwise.[7] In fact, by permitting Congress to define the limits of "general welfare," the Court allows Congress to appropriate money for purposes that benefit only a select locality instead of the nation. Due to the Court's abdication of its role,

---

1. U.S. CONST. art. I, § 8, cl. 1.

2. *See* Thomas Jefferson, Sixth Annual Message (Dec. 2, 1806), *in* 10 THE WORKS OF THOMAS JEFFERSON 302, 317–18 (Paul Leicester Ford ed., 1905) [hereinafter Jefferson, Sixth Annual Message] (calling for a constitutional amendment to give Congress the power to spend to address the quoted list of matters).

3. S. JOURNAL, 33d Cong., 1st Sess. 365–66 (1854) (statement of President Franklin Pierce).

4. *See infra* Part I (tracing the historical evolution of the Spending Clause).

5. United States v. Lopez, 514 U.S. 549 (1995); *see also* United States v. Morrison, 529 U.S. 598, 617–18 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local.").

6. *Lopez*, 514 U.S. at 567–68.

7. *See* South Dakota v. Dole, 483 U.S. 203, 207 n.2 (1987) (questioning the justiciability of the "general welfare" restriction on congressional spending). In addition to the justiciability question raised by *Dole*, the Court's current taxpayer standing doctrine also contributes to the great deference afforded to Congress for questions of federal spending. David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2563–64 (2005). The issues of taxpayer standing are beyond the scope of this Note, however. The proposed framework for enforcing limits on Congress's spending power applies equally to questions of conditional spending where states have standing to raise constitutional challenges.

Congress has impermissibly invaded the domain of local governments through its spending projects.

The examples of such local welfare spending abound. For instance, the American Recovery and Reinvestment Act included bailing out a failing shopping mall, subsidizing prototype kitchen appliances for Martha's Vineyard residents, and funding the construction of bike trails to a major league baseball stadium.[8] One of the more famous examples of local welfare appropriations was the $223 million earmarked for the Gravina Island Bridge.[9] The bridge, deemed the "Bridge to Nowhere" by its detractors, would have connected Ketchikan, Alaska, with its airport on Gravina Island.[10] At the time, Ketchikan had a population of 8,900 people, and the airport served about 85,000 people annually.[11] Due to public outcry about the wastefulness of the bridge and the remaining $177 million that Alaska would have needed to supplement to complete the project, Alaska ultimately diverted the money to other projects.[12] The bridge was never built.[13]

Concerns with the Court's current Spending Clause jurisprudence extend beyond wasteful spending. The broad discretion awarded to exercises of the spending power creates avenues for Congress to subvert limitations imposed on its other powers. Since the spending power is independent of Congress's other enumerated powers,[14] it is

8. TOM COBURN & JOHN MCCAIN, STIMULUS CHECKUP: A CLOSER LOOK AT 100 PROJECTS FUNDED BY THE AMERICAN RECOVERY AND REINVESTMENT ACT 2, 4, 10, 17 (2009).

9. Steve Quinn, *Alaska's 'Bridge to Nowhere' Plan Finally Scrapped*, REUTERS (Oct. 23, 2015, 8:06 PM), http://reut.rs/1NYLvaK [https://perma.cc/ZD9P-DTD4]; Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, §§ 1114(e)(2), 1702, 119 Stat. 1144, 1174, 1272, 1385 (2005).

10. Ronald Utt, *The Bridge to Nowhere: A National Embarrassment*, HERITAGE FOUND. (Oct. 20, 2005), https://www.heritage.org/budget-and-spending/report/the-bridge-nowhere-national-embarrassment [https://perma.cc/D8XH-SE24].

11. *Id.*; *'Bridge to Nowhere' Timeline*, PROPUBLICA (Sept. 24, 2008, 9:23 AM), https://www.propublica.org/article/bridge-to-nowhere-timeline [https://perma.cc/EX4X-QGHL].

12. *See* Quinn, *supra* note 9 (noting that the "projected costs exceeded $400 million," while Alaska only "secured a $223 million earmark").

13. *See id.* ("A proposed Alaska bridge . . . has officially been scrapped.").

14. The connection between the spending power and the other enumerated powers has been the subject of much debate, dating back to the Founding Era itself. Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1112 (1987). A prominent position, often referred to as the Madisonian approach, viewed the spending power as an "authorization to Congress to spend money, but only in order to carry out powers specifically conferred elsewhere in the Constitution." *Id.*; *see also infra* Part I.A. However, since 1936, the

not inherently problematic that Congress can use its spending power to accomplish a goal that another power could not. The dilemma arises due to the federal government's status as a government of limited powers. If Congress can use federal funds to accomplish almost any regulatory goal, the government of limited powers is one in name only.[15]

The Spending Clause does not dictate this abandonment of limits on congressional power. As the text itself states, Congress can spend to "provide for the . . . general [w]elfare of the United States."[16] While "general welfare of the United States" is a broad category, it is not all-consuming. General does not mean local.[17] Thus, textually, congressional spending that provides only for local welfare does not fall within the power granted in the Spending Clause. But distinguishing between general and local spending is not a simple task.

A workable framework for distinguishing between spending for the local welfare and for the general welfare is increasingly necessary if this limitation is to be operational today. This Note proposes determining whether spending qualifies as for the general welfare by looking at the anticipated effects of the spending beyond the recipient of the funds itself. When the spending targets activities or goods that have substantial effects on individuals, localities, and states beyond the initial grant recipient, the spending can be said to provide for the general welfare of the United States. Otherwise, it is spending for the local welfare and, thus, beyond the power provided to Congress under Article I, Section 8. This framework recognizes that, in an interconnected society, actions in one locality can have broad impacts

---

Court has adopted the view that the spending power is not limited by the other enumerated powers. United States v. Butler, 297 U.S. 1, 65–66 (1936).

15. For example, Congress can impose conditions on a state's receipt of federal funding. These conditions can include requiring the state to enact a regulation that Congress could not directly implement under the Commerce Clause. Consequently, Congress's ability to bribe the states to impose regulations that it cannot enact itself undermines the limitations on the Commerce Clause. *See* Lynn A. Baker & Mitchell N. Berman, *Getting off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459, 499–502 (2003) (detailing how Congress can use the Spending Clause to circumvent limits on other enumerated powers).

16. U.S. CONST. art. I, § 8, cl. 1.

17. *See* Alexander Hamilton, Opinion as to the Constitutionality of the Bank of the United States (Feb. 23, 1791), *in* 3 THE WORKS OF ALEXANDER HAMILTON 445, 484–85 (Henry Cabot Lodge ed., 1904) [hereinafter Hamilton, Opinion on National Bank] (noting that "general welfare" did not include "merely or purely local" purposes).

beyond its borders.[18] Accordingly, drawing the line between local and general welfare requires more than looking directly at the recipient of the funding. To account for these considerations, the proposed framework employs principles from collective action reasoning[19] and the "substantial effects" test from *Lopez*.[20]

To that end, this Note proceeds as follows. Part I discusses historical understandings of Congress's spending power, beginning with the debate between Alexander Hamilton and James Madison over its limits and the views of several early presidents. It then examines the Court's interpretation of the Spending Clause. Part II presents a new conception of the "general welfare" limitation. It briefly outlines some principles of collective action reasoning, showing how certain activities internal to a state or locality may have broader impacts that the states do not account for or are unable to address. It then defines the general welfare limitation and applies it to several examples of congressional spending. Part III addresses additional reasons for this limitation, noting why judicial intervention is necessary and why the Court's existing jurisprudence is insufficient to maintain the federal government's status as a government with limited powers, even with added scrutiny of the coercive nature of some conditional spending applied in *National Federation of Independent Business v. Sebelius* (*NFIB*).[21]

I. THE DISAPPEARING "GENERAL WELFARE" LIMITATION

While multiple interpretations of the scope of Congress's power to provide for the general welfare have existed since the Founding Era, the prominent early views lacked a belief that the first clause of Article I, Section 8 gave Congress unlimited discretion in its spending determinations. This Part discusses these original interpretations of the

18. *See, e.g.*, Michele Starnini, Marián Boguñá & M. Ángeles Serrano, *The Interconnected Wealth of Nations: Shock Propagation on Global Trade-Investment Multiplex Networks*, SCI. REPS., Sept. 11, 2019, at 1, 1–2 (discussing how economic crises in one country can cause international impacts); Todd Sandler, *Overcoming Global and Regional Collective Action Impediments*, 1 GLOB. POL'Y 40, 40 (2010) (discussing the rise of positive and negative "cross-border flows").

19. *See* CLINT PEINHARDT & TODD SANDLER, TRANSNATIONAL COOPERATION: AN ISSUE-BASED APPROACH 16–18 (2015) (discussing collective action problems).

20. *See* United States v. Lopez, 514 U.S. 549, 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

21. Nat'l Fed. of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 585 (2012).

Spending Clause and the development of the Court's current abandonment of restrictions on general welfare. It begins with the debate between Hamilton and Madison about the clause's relationship to the other Section 8 powers. Then, it discusses the views of several early presidents on the extent to which Congress could appropriate money under the clause for improvement programs within states. Finally, it addresses the Supreme Court's treatment of the Spending Clause from *United States v. Butler*[22] to *South Dakota v. Dole*[23] and how current jurisprudence has departed from the early understandings of the clause.

Under these initial interpretations of the Spending Clause, a key limit on Congress's power could be found in the phrase "general welfare" itself: by stating spending should be for the general welfare, the clause denied Congress the ability to solely spend for *local* welfare.[24] Despite this historical understanding, the Supreme Court has suggested that Congress is owed such great deference on the question that a general welfare limitation may be nonjusticiable.[25]

A. The Hamilton-Madison Debate over the Spending Clause

The initial dispute over the breadth of congressional power under the Spending Clause centered around whether the clause even provided an independent grant of power and if so, how broad that grant extended. Hamilton, advocating for a broad understanding of the clause, contended that it "embraces a vast variety of particulars, which are susceptible neither of specification nor of definition" but those particulars included only "[*g*]*eneral* and not *local*" appropriations.[26] Madison instead saw the clause as limited to spending for the other

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

23. South Dakota v. Dole, 483 U.S. 203 (1987).

24. *See, e.g.*, 39 ANNALS OF CONG. 1841 (1822) (statement of President James Monroe) (stating that Congress cannot "apply money in aid of the State administrations, for purposes strictly local, in which the nation at large has no interest, although the State should desire it"); S. JOURNAL, 33d Cong., 1st Sess. 364–69 (1854) (statement of President Franklin Pierce) (discussing how proposed spending toward a "purely local object" was not within any of the classes of appropriations for which the Constitution authorizes Congress to legislate); Hamilton, Opinion on National Bank, *supra* note 17 ("Congress . . . cannot rightfully apply the money they raise to any purpose merely or purely local.").

25. *Dole*, 483 U.S. at 207 n.2.

26. Alexander Hamilton, Report on Manufactures (1791), *in* 2 THE FOUNDERS' CONSTITUTION 446, 446–47 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter Hamilton, Report on Manufactures].

enumerated powers.[27] While Hamilton's viewpoint ultimately won out in the courts and has come to be the dominant view,[28] the shared understanding of limits on the spending power suggests that the current acquiescence to Congress's appropriation whims is misguided.

Hamilton's approach to the clause has been categorized as having two forms: a "strong" and "weak" version.[29] In its strongest form, the clause extends far beyond spending by providing "an independent power . . . to enact any law in furtherance of the general welfare of the United States."[30] Hamilton had indicated his support for this broad grant of power at the Constitutional Convention but adopted a more limited approach to the clause after ratification.[31] The weak Hamiltonian view understood the Spending Clause as "a grant of power to spend for the general welfare."[32] As Hamilton articulated in his 1791 *Report on Manufactures*, the clause gives Congress discretion "to pronounce, upon the objects, which concern the general [w]elfare, and for which under that description, an appropriation of money is requisite and proper."[33] This discretion was not unlimited under the weak Hamiltonian position.[34] Only "[*g*]*eneral* and not *local*"

27. James Madison, Speech in the House of Representatives on the Bank Bill (Feb. 2, 1791), *in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 26, at 446, 446.

28. United States v. Butler, 297 U.S. 1, 65–66 (1936); Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 86–87 (1999).

29. Renz, *supra* note 28, at 87.

30. *Id.* at 103.

31. *See* 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 584, 588 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co., 2d ed. 1901) [hereinafter ELLIOT'S DEBATES] (noting Hamilton's proposed grant of the "power to pass all laws which [Congress] shall judge necessary to the common defence and general welfare of the Union" to the federal legislature); Hamilton, Report on Manufactures, *supra* note 26, at 447 (discussing that the spending power was "qualifi[ed]" by the requirement that "the object to which an appropriation of money is to be made be *General* and not *local*; its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot"); Rosenthal, *supra* note 14 (noting Hamilton as a proponent of the view that the spending power is "a grant of power to spend . . . but only for general, as distinguished from local or particularistic, purposes").

32. Renz, *supra* note 28, at 124.

33. Hamilton, Report on Manufactures, *supra* note 26, at 447.

34. *See* Hamilton, Opinion on National Bank, *supra* note 17 (noting that spending money for a "merely or purely local" purpose was an "exception" to Congress's discretion).

appropriations would be permitted.[35] Appropriations whose operations were "confined to a particular spot" would not qualify.[36]

Madison viewed the spending power as limited solely to spending involving the other enumerated powers.[37] He understood the clause primarily as "explain[ed] and qualif[ied]" by the other clauses in Article I, Section 8 and not as an expansion of Congress's enumerated powers.[38] For Madison, the constitutionality of congressional spending focused on an inquiry into whether the "particular measure" to which the money would be spent was "within the enumerated authorities vested in Congress."[39] Madison's interpretation has clear faults. It arguably nullifies the general welfare portion of the clause of any meaning.[40] The Necessary and Proper Clause would cover most, if not all, of the purposes Madison articulated for the spending power.[41] As Justice Joseph Story put it, Madison's argument suggests that the clause providing the spending power "ought not to be in the Constitution."[42]

Consequently, Hamilton's weak position eventually emerged as the leading view when the Supreme Court announced its adoption of it in *United States v. Butler*.[43] Notably, though, both positions in the early spending power debate understood the clause as restricted. Even Hamilton's interpretation suggested that Congress's discretion over spending should not apply when spending on local matters.[44]

B. Early Presidential Views on the Spending Clause

Original understandings of the impermissibility of localized congressional spending are further evident from the practice of several

---

35. Hamilton, Report on Manufactures, *supra* note 26, at 447.

36. *Id.*

37. Renz, *supra* note 28, at 108–09.

38. THE FEDERALIST NO. 41, at 47 (James Madison) (J. & A. McLean 1788); 4 ELLIOT'S DEBATES, *supra* note 31, at 567.

39. 4 ELLIOT'S DEBATES, *supra* note 31, at 552.

40. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 919 (Thomas M. Cooley ed., 4th ed. 1873).

41. Renz, *supra* note 28, at 121.

42. STORY, *supra* note 40.

43. *See* United States v. Butler, 297 U.S. 1, 66 (1936) ("[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution. But the adoption of the broader construction leaves the power to spend subject to limitations.").

44. Hamilton, Opinion on National Bank, *supra* note 17.

early presidents who used their veto power to check what they viewed as congressional expenditures outside of the spending power. From Thomas Jefferson to James Buchanan, nearly every president took the position that Congress could not spend federal funds for internal improvements like roads and canals, since such expenditures were viewed as targeting local, rather than national, objects.[45]

Jefferson's election in 1800 marked a triumph for Madison's interpretation in the executive branch.[46] As president, Jefferson called for a constitutional amendment to provide Congress with the ability to appropriate money for "public education, roads, rivers, canals, and such other objects of public improvement" because such spending was not included in Congress's enumerated powers.[47] Madison himself vetoed a congressional bill aimed at funding internal improvements.[48] Though James Monroe departed from the Madisonian approach,[49] he adopted the distinction of national versus local spending as the limitation.[50] He remarked that Congress cannot "apply money in aid of the State administrations, for purposes strictly local, in which the nation at large has no interest, although the State should desire it."[51] Under his view, not all internal improvements were barred: Congress could appropriate money to fund certain roads that promoted national interests in transportation for commerce and national security.[52]

This distinction between national and local spending appropriations transcended party lines. Democratic-Republican, Whig, and Democratic presidents understood the spending power as

45. *See* Lynn A. Baker, *Constitutional Ambiguities and Originalism*, 103 NW. U. L. REV. 495, 513 (2009) [hereinafter Baker, *Constitutional Ambiguities and Originalism*] ("[N]umerous Congresses from 1800 to 1860 enacted legislation providing for internal improvements . . . . [A]lmost every President during that period vetoed such legislation as unconstitutional."). The exceptions to this were James Monroe, in the later part of his presidency, and John Quincy Adams. *Id.* at 513 n.77; David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 29 (1994).

46. *See* Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), *in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 26, at 452, 452 (noting that the belief that Congress's spending power is "restrained to those [powers] specifically enumerated" was a "landmark" division between the Federalists and the Democratic-Republicans).

47. Jefferson, Sixth Annual Message, *supra* note 2.

48. 30 ANNALS OF CONG. 211–13 (1817) (statement of President James Madison).

49. *See* 39 ANNALS OF CONG. 1838 (1822) (statement of President James Monroe) (rejecting the view that Congress has "no right to expend money, except in the performance of acts authorized by the other specific grants [of the Constitution]").

50. *Id.* at 1841.

51. *Id.*

52. *Id.*

excluding local appropriations despite their parties' differing views of national power generally.[53] Jefferson, Madison, and Monroe were all Democratic-Republicans.[54] President John Tyler, a Whig,[55] vetoed a bill that "blend[ed] appropriations for numerous objects but few of which agree[d] in their general features" even though his party generally supported congressionally funded internal improvements.[56] Presidents Franklin Pierce and James Buchanan, both Democrats,[57] vetoed bills involving land grants to the states based on their view of the congressional spending power.[58] Pierce noted that the Constitution did not give the federal government power over "purely local objects."[59] From his perspective, allowing Congress to fund those local projects would transform the states into mere lobbyists for the "bounty of the federal government."[60] Buchanan likewise argued that such non-

53. *See, e.g.*, *supra* note 46 and accompanying text; Adam Silver, *Consensus and Conflict: A Content Analysis of American Party Platforms, 1840–1896*, 42 SOC. SCI. HIST. 441, 442–43 (2018) (noting that the Democratic-Republican and Democratic parties viewed the national government's role as limited while the Whigs "adopted more positive government, prostatist positions").

54. *Thomas Jefferson*, UNIV. OF VA.: MILLER CTR., https://millercenter.org/president/jefferson [https://perma.cc/WWG3-MYKV]; *James Madison*, UNIV. OF VA.: MILLER CTR., https://millercenter.org/president/madison [https://perma.cc/3VP9-WGXR]; *James Monroe*, UNIV. OF VA.: MILLER CTR., https://millercenter.org/president/monroe [https://perma.cc/J86B-QBAA].

55. *John Tyler*, UNIV. OF VA.: MILLER CTR., https://millercenter.org/president/tyler [https://perma.cc/SV97-FM4E].

56. Letter from John Tyler, President of the United States, to the House of Representatives (June 11, 1844), *in* 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2183, 2184–85 (James D. Richardson ed., 1897) [hereinafter Tyler Letter]; Silver, *supra* note 53, at 443. Tyler distinguished between permissible appropriations (improvements aimed at "the security from the storms of our extended Atlantic seaboard of the vessels of all the country") and impermissible ones (improvements addressing "mere local influences"). Tyler Letter, *supra*, at 2184–85.

57. *Franklin Pierce*, UNIV. OF VA.: MILLER CTR., https://millercenter.org/president/pierce [https://perma.cc/462S-VR7U]; *James Buchanan*, UNIV. OF VA.: MILLER CTR., https://millercenter.org/president/buchanan [https://perma.cc/35PK-6E4B].

58. S. JOURNAL, 33d Cong., 1st Sess. 361, 367 (1854) (vetoing a land grant to states for asylums); Letter from James Buchanan, President of the United States, to the House of Representatives (Feb. 24, 1859), *in* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 56, at 3074, 3074, 3076, 3078 [hereinafter Buchanan Letter] (vetoing a land grant to states for colleges). Both Pierce and Buchanan saw no distinction between Congress's purchase of land for the states and a direct monetary grant to the states; thus, their determinations that Congress could not appropriate money to the states for the proposed benefits barred a land grant for the same purpose. S. JOURNAL, 33d Cong., 1st Sess. 367 (1854) (statement of President Franklin Pierce); Buchanan Letter, *supra*, at 3079.

59. S. JOURNAL, 33d Cong., 1st Sess. 365 (1854) (statement of President Franklin Pierce).

60. *Id.* at 365–66.

national spending would encourage legislators to focus on funding local projects only benefitting their constituents rather than the nation.[61] Thus, the spending power's exercise for local projects could undermine its efficacy for promoting the *general* welfare.

Together, these early views on the congressional spending power point to an original understanding that the spending power was limited by more than Congress's discretion. It was understood that, at minimum, Congress could not spend for "any purpose merely or purely local."[62] Reading the language of the clause solely as a grant of power requires ignoring or discounting this history. The existence of this limitation is of limited value without a method of enforcement, either as a self-imposed restraint by Congress or as administered by the courts. Both the historical examples discussed above and the current political incentives demonstrate the improbability that Congress will effectively apply this limitation itself. Thus, the Court's doctrine on the spending power plays a key role in the continued existence of the general welfare limitation on congressional spending.

C. Butler, Helvering, Dole, *and the Court's Reluctance to Police Spending*

Despite the historical understandings about the local limit on Congress's discretionary spending for the United States' general welfare, the Supreme Court has retreated from enforcing any strict restraints on this discretion. This Section tracks that development over time. It begins with *United States v. Butler*, where the Court first embraced the Hamiltonian interpretation and the distinction between general and local.[63] Then it moves on to *Helvering v. Davis*[64] and *Steward Machine Co. v. Davis*,[65] in which the Court upheld congressional spending programs by noting their connection to improving the national welfare. This Section concludes by discussing *South Dakota v. Dole* and the Court's turn toward viewing a general welfare limitation as nonjusticiable.

---

61. Buchanan Letter, *supra* note 58, at 3076.

62. Hamilton, Opinion on National Bank, *supra* note 17.

63. United States v. Butler, 297 U.S. 1, 65–67 (1936) ("[T]he purpose must be 'general, and not local.'" (quoting Hamilton, Report on Manufactures, *supra* note 26, at 447)).

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

65. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

In *United States v. Butler*, the "first key case on the scope of the Spending Clause,"[66] the Court addressed the debate between Madison and Hamilton over the proper interpretation of the spending power.[67] Following the guidance of Justice Story in his *Commentaries on the Constitution*, the Court adopted Hamilton's interpretation as the correct understanding for the clause and determined that Congress's spending power extended beyond its other enumerated powers.[68] The Court also approved of Hamilton's limitation on the scope of congressional spending, stating that Congress could not appropriate federal funds only for local welfare.[69] The Court in *Butler* did not provide guidelines for the scope of general welfare, as it invalidated the implicated congressional act on other grounds.[70] But the Court made clear that it had the authority to invalidate spending for local purposes despite the broad discretion afforded to Congress in determining what provides for the general welfare.[71]

The following year, in *Helvering v. Davis*, the Court showed its reluctance to enforce limitations on the concept of general welfare but maintained a distinction "between one welfare and another, between particular and general."[72] *Helvering* involved a challenge to the Social Security Act's pension and lump sum payments to persons over age sixty-five.[73] The Court pointed to the national nature of the financial insecurity of older people in the United States and the potential problems that would arise in relying on the individual states to all establish their own programs.[74] The Court noted that incongruence between the states raised spillover concerns: any state that enacted an old age pension program could attract the elderly to move into the state which could overburden that state's resources.[75] Thus, since Congress was addressing a national problem, its spending promoted the general

66. Samuel R. Bagenstos & Ilya Somin, *Common Interpretation: The Spending Clause*, CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/755 [https://perma.cc/3KK6-YX8Y].

67. *Butler*, 297 U.S. at 65–66.

68. *Id.* at 66.

69. *Id.* at 66–67.

70. *Id.* at 68.

71. *Id.* at 67.

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

73. *Id.* at 634–36.

74. *Id.* at 644.

75. *See id.* ("A system of old age pensions . . . is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose.").

welfare.[76] In conducting its analysis, the Court noted the evolving nature of the "general welfare," stating that "[n]eeds that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation."[77] The Court therefore determined that establishing the distinction between local and general belonged primarily to Congress, subject only to rational basis review.[78]

Steward Machine Co. v. Davis, which involved Congress's authorization of grants to the states to use for unemployment compensation, also addressed the use of the spending power to further national welfare.[79] The Court discussed the massive unemployment problem the country faced nationwide during the Great Depression and the need for federal action to avoid mass starvation.[80] Further, while some states had established their own unemployment assistance programs, others held out in order to remain economically advantageous for businesses, shifting the burden of supporting the unemployed to the nation.[81] Thus, Congress's decision to permit grants to the states to aid with their administration of unemployment compensation promoted the general welfare by encouraging all states to aid the jobless in a time of national crisis.[82]

In *South Dakota v. Dole*, the Court delineated the limitations on Congress's conditional spending power.[83] The Court noted that the spending power can be exercised only "in pursuit of 'the general welfare,'" but then questioned the justiciability of the general welfare limitation.[84] In a footnote, the Court cited *Buckley v. Valeo*[85] to support this uncertainty over the general welfare limitation.[86] In *Buckley*, in response to the appellants' argument that Congress's spending was contrary to the general welfare, the Court stated that general welfare

76. *Id.* at 645.

77. *Id.* at 641.

78. *Id.* at 640–41.

79. Steward Mach. Co. v. Davis, 301 U.S. 548, 577, 586–87 (1937).

80. *Id.* at 586.

81. *Id.* at 587–88.

82. *Id.* at 586–87.

83. South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

84. *See id.* at 207 & n.2 (noting the question of "whether 'general welfare' is a judicially enforceable restriction at all").

85. Buckley v. Valeo, 424 U.S. 1 (1976).

86. *Dole*, 483 U.S. at 207 n.2.

should be understood as a grant of power rather than as a limitation.[87] The *Buckley* appellants' argument centered on the word "welfare" and not the word "general" in general welfare: they did not attack Congress's spending on a contention that it was for local rather than general welfare, but that it was poor policy and destructive to welfare.[88] The Court rightly rejected this position on the grounds that Congress defines what spending promotes welfare.[89] This nonjusticiability of the question of whether spending provides for welfare is separate from the question of whether spending is for local or general purposes. While the footnote in *Dole* signaling a potential rejection of the general welfare limitation fails to distinguish between these two questions, the Court's brief analysis of whether the conditional spending at issue in the case promoted the general welfare did mention the interstate nature of the problem Congress sought to address.[90] Thus, the Court sent mixed messages in *Dole* of its understanding of the general welfare limitation, but clearly indicated its unwillingness to treat it like a veritable limitation.

The suggestion in *Dole* that general welfare is nonjusticiable was not an inevitable, or even a necessary, outcome as the Court's previous cases and the historical understandings of the spending power demonstrate. The Court itself acknowledged in its spending cases that Congress's spending power "extend[s] only to matters of national, as distinguished from local welfare."[91] The difficulty arises in trying to make that distinction. Yet, the Court need not throw up its hands and declare the task impossible. Instead, it should return to the principles articulated in cases like *Helvering* and *Steward Machine Co.* for understanding why congressional spending that may look localized instead presents a need for national action: the individual states and localities face problems that they are unable to effectively solve themselves.

---

87. *Buckley*, 424 U.S. at 90–91; Brief of the Appellants at 145, 151, Buckley v. Valeo, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 441595, at *145, *151.

88. *See* Brief of the Appellants, *supra* note 87, at 145 (arguing that "[d]irect government subsidies to candidates and parties are contrary to the 'general welfare'" by listing various harms that such subsidies cause, such as "reduc[ing] the amount of influence that citizens have over their representatives").

89. *Buckley*, 424 U.S. at 90–91.

90. *Dole*, 483 U.S. at 207 n.2, 208.

91. United States v. Butler, 297 U.S. 1, 67 (1936).

II. COLLECTIVE ACTION AND "GENERAL WELFARE"

The Court's reluctance to impose limits on the spending power leaves Congress with the ability to skirt constraints on its other powers so long as it is willing to use federal funds to entice states or localities to do its bidding. However, as Hamilton duly noted, Congress "cannot rightfully apply the money [it] raise[s] to any purpose merely or purely local."[92] Given Congress's use of spending for regulatory aims and the interconnected nature of modern U.S. society, determining what purposes are "purely local" may require more than looking at the recipient of the federal dollars.[93] Federal spending may be aimed at one locality to address a broader national problem that exists due to externalities caused by the actions of the locality. In certain cases, Congress may be the only governmental body positioned to recognize and adequately respond to those externalities.[94]

Therefore, a framework to identify congressional spending that provides for the general welfare of the United States should distinguish between spending that is truly local and that which appears local but serves a broader purpose. This Part proposes such a framework, using the principles of collective action reasoning to demonstrate why certain internal activities may impact national welfare. Section A explains the basics of collective action federalism which suggests that individual states may be ill-equipped to resolve certain issues and that the federal government should intervene in such situations. Section B presents a framework for distinguishing between local and general welfare using this collective action basis. The proposed framework is then applied in Section C to different existing and proposed spending programs: the highway spending in *Dole*, the Lake Jackson Ecopassage, and the Gun-Free School Zones Act reimagined as a conditional spending program.

92. Hamilton, Opinion on National Bank, *supra* note 17, at 485.

93. *See, e.g.*, Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 339–43 (2012) (discussing how spending to promote counterterrorism efforts in individual localities is necessary to avoid "'domestic safe havens' for terrorists" that could cause "national-level" harms).

94. *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 138 (2010) ("[W]hen a negative externality is purely national, or nearly so, the central government should control it.").

A. An Overview of Collective Action Federalism

In a federal system, one of the key questions is of allocation: determining which matters will be addressed by the national government and which are left to the more local levels of government. In drawing the line, some have focused on the abilities of the different levels of government to recognize and resolve problems. Collective action reasoning suggests that some problems cannot be solved by individual actors and require coordination.[95] In some of these cases, a more local, smaller government entity likewise may be unable to recognize and resolve the issue while the larger government entity could.[96]

The connection between resolving collective action problems and the powers given to Congress in the Constitution has been previously recognized.[97] In a 2010 article, Professors Robert Cooter and Neil Siegel proposed a theory of "collective action federalism" that framed the Article I, Section 8 powers as "a coherent set" that "mostly address two kinds of spillovers: interstate externalities and national markets."[98] Under their model, Section 8 "authoriz[es] Congress to tax, spend, and regulate when two or more states face collective action problems. Conversely, governmental activities that do not pose collective action problems for the states are 'internal to a state' or 'local.'"[99] Where these collective action problems exist, states are less effective than the national government at resolving the issues.[100] Thus, as a guiding principle for federalism, they argue that looking toward the existence of collective action problems ensures that both the national and local governments have "the power to do what each does best."[101] The federal government addresses problems that the states alone cannot, while leaving the states to handle their own internal matters.

---

95. PEINHARDT & SANDLER, *supra* note 19, at 45–46.

96. Cooter & Siegel, *supra* note 94, at 137–38.

97. *See generally id.* (discussing the connection between Article I, Section 8 and collective action problems).

98. *Id.* at 118–19.

99. *Id.* at 119.

100. *See id.* at 118 ("[M]uch of what the federal government does best is to solve collective action problems that the states cannot solve on their own.").

101. *Id.*

The basic problem for states in addressing these collective action problems is their inability to fully account for various externalities.[102] The issue of river pollution demonstrates this problem. Imagine that, to encourage companies to create jobs in their states, Arkansas and Mississippi permit factories to dump chemicals and other waste in the Mississippi River without restrictions.[103] Louisiana, which is downstream, cannot fully clean up its section of the river so long as those upstream companies continue their actions. If Mississippi alone sought to take action by regulating dumping, it would face a similar problem to Louisiana and risk the loss of businesses to Arkansas where they could continue dumping. Thus, Mississippi may hold out until Arkansas also acts, not knowing that Arkansas may make the same calculus, leading to unabated pollution.[104] The value of cleaning up the river may be enough to encourage Mississippi to act regardless, but the state may not choose the socially-optimal amount of regulation.[105] Mississippi could underregulate in this context for two reasons: first, its regulations would be ineffective in completely solving the problem, and second, some of the benefits of the regulations or costs of not regulating would be felt outside of its borders (for example, in Louisiana).[106] In other words, Mississippi would not internalize some of the effects of the pollution since they are not felt within the state's borders. To solve this issue of river pollution, the states would either need to work together, requiring numerous decisionmakers and legislative bodies to reach an agreement, or look to the national government for help.

Under the "internalization principle," which calls for power to be placed with "the smallest unit of government that internalizes the

---

102. Abigail R. Moncrieff, *Cost-Benefit Federalism: Reconciling Collective Action Federalism and Libertarian Federalism in the Obamacare Litigation and Beyond*, 38 AM. J.L. & MED. 288, 292 (2012).

103. Waste dumping in the Mississippi River is no mere hypothetical. *See, e.g.*, Blythe Bernhard, *Mississippi River Is Awash in Toxins, Report Finds*, ST. LOUIS POST-DISPATCH (Mar. 23, 2012), https://www.stltoday.com/news/local/metro/mississippi-river-is-awash-in-toxins-report-finds/article_6305c4a5-7db6-5ed6-a53b-22e79d96f18e.html [https://perma.cc/4ZNL-2G69] (reporting that "[m]ore than 12.7 million pounds of toxic chemicals . . . were dumped into the Mississippi River in 2010").

104. *See* PEINHARDT & SANDLER, *supra* note 19, at 20–25 (discussing how countries are incentivized to take no action to reduce pollution where other countries also take no action to avoid imposing costs on themselves without a reciprocated benefit).

105. Moncrieff, *supra* note 102, at 293–94.

106. *Id.*

effects of its exercise,"[107] this Mississippi River pollution example would necessitate federal action. While the most immediate costs and benefits of action flow beyond each of the three states' borders, they can be internalized by the nation.[108] The nation cannot simply pass on the costs of inaction to others. Further, rather than relying on the individual state governments to each ratify a proposal, the national government would unite the various stakeholders in one body to address the issue with a majority vote.[109] These same principles can apply to the provision of national public goods.[110]

Alternatively, if instead of a polluted river, the example pertained to a lake located within one state, that state would face fewer difficulties in trying to clean up the water by itself. The dilemma regarding a business moving to another state due to policy differences would remain, but the state's voters and policymakers could inform themselves of the issue and decide whether the value of a nonpolluted lake outweighs those costs.[111] In such cases, the primary effects of the policy choice would stay within the state. Federal expenditures in such a situation where the effects are internalized within a state would involve extensive contributions from nonbeneficiaries, whereas requiring the state itself to fund the project would place the burden on those who will primarily benefit from it.[112] Conversely, federal expenditures in cases with interstate spillovers would spread the costs among beneficiaries rather than placing the burden on one state and allowing the other affected states to free ride.[113]

Thus, collective action federalism provides an answer to the power allocation question of federalism by pointing toward the effects of the

---

107. Cooter & Siegel, *supra* note 94, at 137 (emphasis omitted).

108. Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS. 29, 46 (2012) (noting that "internalizing an interstate pollution externality requires collective action among the affected states, which justifies federal intervention" (emphasis omitted)).

109. Cooter & Siegel, *supra* note 94, at 141.

110. *Id.* at 137 (discussing the internalization principle in the context of federal spending for national parks). Public goods, such as clean air, are those that multiple people can benefit from without reducing their benefits to any individual person or without imposing an additional cost, and that cannot feasibly be denied to people. PEINHARDT & SANDLER, *supra* note 19, at 17.

111. *See* Cooter & Siegel, *supra* note 94, at 137–38 (discussing how "people affected by a policy have more reason to inform themselves about it and to influence it").

112. *See id.* (noting how "a local public good can be financed by a local tax, which primarily hits the beneficiaries and misses nonbeneficiaries").

113. *Id.*

problem.[114] Where the problem presents costs and benefits that cross state lines, collective action problems can arise that suggest the federal government should step in.[115] If instead the consequences of a policy choice will predominantly impact the residents of that state with limited external effects, those in the state should be free to make that choice without intervention from nonbeneficiaries and should not pass on the costs of funding those local policies to those nonbeneficiaries.[116]

B. A New Conception of "General Welfare"

These principles can provide an interpretative basis for general welfare in the Spending Clause: whenever Congress is spending to fund an interstate public good or to address an interstate negative externality, its action "provide[s] for the . . . general [w]elfare of the United States."[117] In such cases, congressional action addresses public benefits and costs that would otherwise be overlooked, underaddressed, or unaddressed by a failure of individual state action. However, when Congress spends to address purely local or intrastate activities that lack significant impacts on other states, Congress's actions are addressing the welfare of a locality or state, rather than that of the United States. In applying this collective action understanding of general welfare as a limitation on congressional power, those cases of intrastate welfare are beyond Congress's constitutional spending power. In those situations, if Congress cannot rely on another enumerated power to justify its spending, it has intruded into the domain reserved to the states under the Tenth Amendment.[118]

This Note proposes using a similar framework to the substantial effects test outlined in *Lopez* to determine what spending qualifies as general welfare.[119] Under this framework, Congress's spending will be presumed to provide for the general welfare of the United States when the funding targets activities or goods that have a substantial effect beyond the individuals, localities, and states where the money immediately goes. In such cases, though an actual collective action

114. *See id.* at 144 (discussing how collective action federalism supports "assign[ing] power to the smallest unit of government that internalizes the effects of its exercise" (emphasis omitted)).

115. *Id.* at 137–38, 159.

116. *Id.* at 138.

117. U.S. CONST. art. I, § 8, cl. 1.

118. *See id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

119. *See* United States v. Lopez, 514 U.S. 549, 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

problem may not exist, the broad impact of the spending suggests that Congress is addressing costs or benefits that are not adequately addressed otherwise. Alternatively, if the effects of that spending only have a limited impact on the United States or if the impact is too attenuated, the costs and benefits associated with that good or activity are likely already internalized within the recipient state or locality. A state or locality's inaction does not alter the analysis. A refusal to use spending or regulation to address that good or activity, despite Congress's determination of its benefit, does not transform spending with a localized impact into one with national effects. Additionally, in cases of conditional spending, both the spending and the condition would need to satisfy the general welfare limitation to be a permissible use of congressional spending power.

While this reading of the general welfare limitation is not the only way to distinguish between local and general spending, there are a few reasons why this formulation is valuable if a general welfare limitation is to be enforced. First, the historical articulations of the limitation discuss the ability of states to address certain measures or the limited nature of the benefits beyond state boundaries.[120] In his message to Congress regarding his veto of internal improvements, Monroe noted that "the [s]tates individually[] would be fully adequate" to address the proposed improvements.[121] Likewise, Pierce stated that the spending he vetoed targeted programs that the states had already established on their own.[122] Second, the key cases where the Court developed its spending doctrine relied on the ineffectiveness of state action in explaining why congressional spending was promoting the general welfare.[123] For example, assistance for the elderly through old age pensions was justified congressional spending in *Helvering* due to the inability of the "laws of the separate states [to] deal with it effectively."[124] Additionally, this framework also addresses the need for a nonstatic notion of general welfare.[125] When incentives, interactions, and information change, activities with effects once

120. S. JOURNAL, 33d Cong., 1st Sess. 365–66 (1854) (statement of President Franklin Pierce); 39 ANNALS OF CONG. 1859 (1822) (statement of President James Monroe).

121. 39 ANNALS OF CONG. 1859 (1822) (statement of President James Monroe).

122. S. JOURNAL, 33d Cong., 1st Sess. 365–66 (1854) (statement of President Franklin Pierce).

123. Helvering v. Davis, 301 U.S. 619, 640–41, 644 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548, 586–89 (1937).

124. *Helvering*, 301 U.S. at 644.

125. *See id.* at 641 ("Nor is the concept of general welfare static.").

circumscribed to a particular region may have broader effects. Lastly, it acknowledges that matters appearing local may implicate the general welfare of the United States.

An initial challenge of using the existence of interstate public goods or spillovers is determining how broadly to view these categories. In a highly interconnected society, mere policy differences between states can cause spillover effects. To the extent that foot voting occurs, policy decisions in one area can attract or repel residents.[126] For proponents of federalism, the diversity of policy decisions among the states is one of its primary benefits.[127] An interpretation of national power that could conceivably be manipulated to allow Congress to eliminate many, if not all, of these differences would be self-defeating and, thus, undesirable.

However, requiring Congress to demonstrate the existence of a collective action problem that states are unable to solve before it can use its spending power also presents problems. For one, it would constrain Congress's ability to act proactively. A too strenuous requirement would likely require Congress to make formal findings in order to spend.[128] Further, imposing any real limit on the capacity of Congress to spend for localized welfare could have significant repercussions. There are over a thousand spending grants to state and local governments within the Catalog of Federal Domestic Assistance.[129] Questioning the constitutional legitimacy of some of these programs may lead to an elimination of programs that states,

126. *See* Ilya Somin, *Foot Voting, Federalism, and Political Freedom*, *in* FEDERALISM AND SUBSIDIARITY, NOMOS LV, at 83, 90–91 (James E. Fleming & Jacob T. Levy eds., 2014) (discussing the ability of a foot voter to select between different state or local policies).

127. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)) (describing the ability of localities to differ from each other as an "important advantage[]" of federalism); Somin, *supra* note 126, at 83 (describing foot voting as "a tool for enhancing political freedom").

128. *Cf.* United States v. Lopez, 514 U.S. 549, 562–63 (1995) ("Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.").

129. ROBERT JAY DILGER & MICHAEL H. CECIRE, CONG. RSCH. SERV., R40638, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 9–10 (2019). The Catalog of Federal Domestic Assistance contains listings of federal financial assistance programs available to state and local governments, organizations, and individuals. U.S. GEN. SERVS. ADMIN., 2019 CATALOG OF FEDERAL DOMESTIC ASSISTANCE I–II (2019).

localities, and individuals have relied on and may open a Pandora's box of judicial activism.

The proposal uses the flexible standard of a substantial effects test to address these concerns. While a *Lopez*-like restriction in the context of the Spending Clause is subject to many of the critiques of *Lopez* itself,[130] this Note proposes such a restriction because it draws from a test that the Court has already approved of, and courts can competently address questions of degree. First, given the reliance interests involved in existing federal spending programs, it is more feasible to enforce a restriction that would add some teeth to federalism constraints without toppling the existing system. The line drawing involved in the substantial effects test allows a court to consider the specific facts involved in each program rather than requiring analysis under a hardline rule.[131] The indeterminacy of the rule's application in a given situation is no more problematic than First Amendment and substantive due process cases.[132] Such uncertainty issues may call for deference in particularly close cases, but other situations involving lengthy causal chains to demonstrate substantial national effects would receive no deference.[133] The substantial effects test is imperfect, and drawing lines between national and local objects has historically presented difficulties,[134] but so long as "[t]he Constitution requires a distinction between what is truly national and what is truly local,"[135] courts cannot abandon policing the distinction due to legal uncertainty. Despite its shortcomings, the Court has settled on the substantial effects test as a method for drawing that line in

130. *See, e.g.*, Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1253–56 (2002) (noting the reticence of the lower courts to invalidate congressional statutes after *Lopez*); Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of* United States v. Lopez *and* United States v. Morrison, 68 TENN. L. REV. 605, 605 (2001) (stating that the *Lopez* test is "too imprecise to provide any sort of basis for a credible and predictable limitation on congressional power").

131. *See* United States v. Morrison, 529 U.S. 598, 610–16 (2000) (discussing and applying various considerations in determining whether the act in question satisfied the substantial effects test).

132. Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 804–06 (1995).

133. *See id.* at 804 (noting that difficult line-drawing does not require total deference since "[s]ome assertions of the federal commerce power are truly beyond the pale").

134. *See* Dral & Phillips, *supra* note 130, at 625–26 (discussing a prior "federal-local distinction" test).

135. *Morrison*, 529 U.S. at 617–18.

another context. Extending it to the Spending Clause would reinvigorate the boundary between local and general welfare.

C. Applying the "General Welfare" Limitation

Given the case-specific nature of an interstate effects analysis, demonstrating its application in practice requires a few examples to show how the framework could be used to determine the legitimacy of congressional spending. This Section applies the general welfare limitation proposed above to the highway funding at issue in *Dole*, the Lake Jackson Ecopassage, and the Gun-Free School Zones Act at issue in *Lopez* reimagined as a condition on spending.

1. *Federal Highway Funding in* Dole. To first demonstrate the impacts of adopting the general welfare limitation, this Subsection addresses the spending at issue in *Dole*. In *Dole*, Congress conditioned a portion of federal highway funds on a state raising its minimum drinking age to twenty-one.[136] Applying the general welfare limitation more rigorously to that spending would not change the result of the case. Interstate highways are a quintessential public good because they are nonrival and nonexcludable.[137] Further, a primary benefit of the interstate highway system is its aid of transportation between the major cities across the nation by easing the movement of goods across state lines.[138] Thus, the involved spending funded a good with substantial benefits beyond the individual state where the road would be built.

The condition placed on the funding also sought to address interstate effects caused by non-uniform drinking ages.[139] The "lack of uniformity in the States' drinking ages created 'an incentive to drink and drive' because 'young persons commut[ed] to border States where the drinking age [was] lower.'"[140] A state's attempt to reduce the alcohol-related fatalities of its young drivers by raising its drinking age

136. South Dakota v. Dole, 483 U.S. 203, 205 (1987).

137. *See* PEINHARDT & SANDLER, *supra* note 19, at 17 (explaining that pure public goods are nonrival because one individual's consumption of a good does not detract others' opportunities to consume, and that pure public goods are nonexcludable because the good's benefits are available to both payers and nonpayers alike).

138. STAFF OF H.R. COMM. ON PUBLIC WORKS, 91ST CONG., BENEFITS OF INTERSTATE HIGHWAYS 5, 7–9 (Comm. Print 1970).

139. *Dole*, 483 U.S. at 209.

140. *Id.* (alteration in original) (quoting PRESIDENTIAL COMM'N ON DRUNK DRIVING, FINAL REPORT 11 (1983)).

was undercut by its neighbors maintaining a lower drinking age. Eighteen- to twenty-one-year-olds would typically drive across state lines to drink and then return to the roads of their home state, thereby perpetuating the problem of young, intoxicated drivers that the state had attempted to solve.[141] These "blood borders" made up half of the total borders between states.[142] Consequently, the states on their own were unlikely to address this problem. Congress used conditional spending to entice the states to solve this national, cross-border problem. Therefore, the spending properly falls within the general welfare limitation.

2. *The Lake Jackson Ecopassage*. The Lake Jackson Ecopassage was built between 2009 and 2010 with $3.4 million in federal stimulus money from the American Recovery and Reinvestment Act.[143] The Ecopassage is a wall and culvert system underneath a portion of U.S. Highway 27 that reduces the number of wildlife casualties that occur on the road.[144] Prior to the Ecopassage's construction, the stretch of the highway "had the highest documented road mortality (for animals) of any in the world."[145] The Ecopassage may also reduce human fatalities on the road given the danger of hitting an alligator or "cinder block" sized turtles while traveling along a roadway.[146] Despite these benefits, the one-mile Ecopassage[147] does not have substantial effects beyond the locality where it was built. The principal benefit of the Ecopassage is its reduction of animal deaths on the part of the road crossing Lake Jackson.

---

141. *See Measures To Combat Drunk Driving: Hearing Before the Subcomm. on Surface Transp. of the S. Comm. on Com., Sci., and Transp.*, 98th Cong. 6 (1984) (statement of Sen. Frank R. Lautenberg, Member, S. Comm. on Com., Sci., and Transp.) (discussing the problem of "border slaughter").

142. *Id.* at 36 (statement of Douglas M. Fergusson, Vice President for Highway Traffic Safety, Nat'l Safety Council).

143. Joe Follick, *Turtle Lives Hinge on Eco-Passage*, LEDGER (June 27, 2009, 9:36 PM), https://www.theledger.com/article/LK/20090627/news/608076240/LL [https://perma.cc/56Y9-HAET]; TOM COBURN, 100 STIMULUS PROJECTS: A SECOND OPINION 1, 11 (2009).

144. *Lake Jackson Ecopassage*, ATLAS OBSCURA, https://www.atlasobscura.com/places/lake-jackson-ecopassage [https://perma.cc/8JE2-A9MA].

145. *Id.*

146. Michael Markarian, *Florida Turtle Tunnel Protects Motorists Too*, HUFFPOST, https://www.huffpost.com/entry/florida-turtle-tunnel-pro_b_218084 [https://perma.cc/K3N6-EJPN] (last updated Dec. 6, 2017).

147. *Id.*

Although this local benefit is clear, determining how the Ecopassage impacts the welfare of those beyond the locality is more difficult. People who value the preservation of ecosystems may consider themselves benefitted by the Ecopassage, even if they never visited the project themselves, but the connection to the general United States requires drawing a lengthy chain of events over an extended period of time. The Ecopassage is located on a United States highway near the Florida-Georgia border.[148] However, appropriations for a one-mile stretch of roadway[149] lack the broad impact of generalized highway funding, especially since the federal government built alternative highways that reduce interstate travel on the road.[150] Only those who drive through that mile-long segment during a time in which an animal would have otherwise crossed the road are directly impacted. Those drivers are likely to be locals. While their safety on public roadways is important, it is not of national concern. The goal of protecting the environment is likewise laudable, but in cases like the Ecopassage, the proper authority to address this issue is the local government because the need for the project was sufficiently internalized. The local county commission had recognized the problem and sought to address it.[151] A private donor had bought and donated the additional land the state needed to complete the project.[152] Even the Ecopassage's supporters acknowledge that it was "a community-based project."[153] In light of the local nature of the project, the appropriation to fund the Ecopassage would be impermissible under the general welfare limitation.

Congressional funding of the Ecopassage also raises the issue of aggregation. Congress did not fund it to save Lake Jackson's turtles but to create jobs as part of the stimulus package of the American Recovery and Reinvestment Act.[154] The cumulative spending of the

148. *Lake Jackson Ecopassage*, *supra* note 144.

149. Markarian, *supra* note 146.

150. *See U.S. 27*, AA ROADS, https://www.aaroads.com/guides/us-027-fl [https://perma.cc/DUF7-97P2] (last updated May 3, 2015) (noting that U.S. 27 has been "[s]upplanted by Interstate 75").

151. Markarian, *supra* note 146.

152. *Id.*

153. *Id.*

154. *See* COBURN, *supra* note 143 (discussing the Ecopassage as one of the projects included as part of the American Recovery and Reinvestment Act's attempt to "jumpstart the economy"); COUNCIL OF ECON. ADVISERS, EXEC. OFF. OF THE PRESIDENT, ESTIMATES OF JOB CREATION FROM THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009, at 2 (2009) (noting that

numerous projects had national effects. But that does not transform a local project into one with national effects. Permitting Congress to piece together hundreds of localized spending projects with no shared character besides their cumulative ability to impact the broader United States obliterates the notion of a limitation. While aggregation has been used in the context of the Commerce Clause,[155] the aggregation involved in these types of spending programs differs since the programs are not all necessary pieces for an effective regulatory regime,[156] but rather funding divvied up by politicians to benefit the individual localities they represent. Aggregation would be proper in cases of broad spending programs that involve a specific shared characteristic, but where that characteristic is itself a broad concept like impacting the national economy, such aggregation should not save otherwise unconstitutional appropriations.

3. *The Gun-Free School Zones Act*. After the Supreme Court overturned the Gun-Free School Zones Act in *Lopez*, President Bill Clinton suggested reinstating the restriction indirectly "by linking [f]ederal funds to enactment of school-zone gun bans."[157] Specifically, he suggested conditioning existing money for "safe schools" on a state's enactment of the ban.[158] This proposal demonstrates how the existing conditional spending framework creates opportunities for undermining the existing limitations of the Commerce Clause. In some cases, the general welfare limitation would restrict that avenue.

Federal funding of K–12 schools primarily produces a local benefit. Students are educated within their communities, and the federal money directed to a school district will be spent for the benefit of the district's students. This money does not substantially impact those beyond the locality receiving the funds. Of course, some may disagree. For example, Justice Stephen Breyer's dissent in *Lopez*

---

the stimulus spending aimed to "save and create jobs, as well as to cushion the economic downturn and make crucial public investments").

155. *See* Gonzales v. Raich, 545 U.S. 1, 20–22 (2005) (applying the aggregating approach to conclude that growing medical marijuana for personal use affects interstate commerce).

156. *Cf. id.* at 22 (upholding Commerce Clause regulation of intrastate activities since their exclusion "would leave a gaping hole in the CSA").

157. Todd S. Purdum, *Clinton Seeks Way To Retain Gun Ban in School Zones*, N.Y. TIMES (Apr. 30, 1995), https://www.nytimes.com/1995/04/30/us/clinton-seeks-way-to-retain-gun-ban-in-school-zones.html [https://perma.cc/CQ9S-JLCG].

158. The President's Radio Address, 1 PUB. PAPERS 611 (Apr. 29, 1995).

argues that there are national benefits to a strong educational system.[159] Still, the localized nature of effects of the spending are further prominent when the spending is directed at school safety as the individuals potentially impacted by an "unsafe" school are those attending or working at the school.

The condition itself suffers from the same problem. Even accepting the existence of some effects beyond the recipient locality, the primary effects of gun possession in a school zone are sufficiently internalized such that the states and localities have acted as they saw necessary.[160] The problem for the conditional spending under the general welfare analysis for the *Lopez* regulation is not the attenuated connection to commercial markets,[161] but the attenuation of the connection beyond the locality in general. While the Court in *Lopez* took issue with the tenuous link between possession of a gun in a school zone and economic activity,[162] a court applying the general welfare limitation would not look to impacts on interstate commerce, but the extent to which a direct link can be drawn from the activity addressed by the spending condition to the welfare of the nation. With a greater number of steps necessary to connect the proposed condition in *Lopez* and welfare beyond just the state choosing to regulate in order to receive funds, the tie to general welfare is less viable. Accordingly, the general welfare limitation would bar a congressional refashioning of the regulation at issue in *Lopez* as a condition on federal spending.

This Section has sought to provide a method for distinguishing between general and local welfare that draws on preexisting interpretative frameworks, collective action federalism, and the substantial effects test from *Lopez*. By looking toward the effects of a particular problem, the proposal draws the line between local and general based on the ability of the local or national government to provide a solution to the problem, thus grounding the test in the

159. *See* United States v. Lopez, 514 U.S. 549, 620–22 (1995) (Breyer, J., dissenting) (noting that "guns in schools significantly undermine the quality of education" and that poor education impacts the ability of American workers to compete internationally).

160. *See id.* at 581–82 (Kennedy, J., concurring) (discussing the various measures of different states and localities to address guns in schools).

161. *See id.* at 560 (majority opinion) (noting how "the possession of a gun in a school zone does not" implicate "economic activity").

162. *See id.* ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.").

question of power allocation in a federal system. The test provides courts a means to reinvigorate the general welfare limitation while retaining flexibility to recognize the interconnectedness of modern society.

III. THE NEED FOR THE "GENERAL WELFARE" LIMITATION

An immediate challenge facing the proposed general welfare limitation is its call for judicial intervention into issues of federalism. A common argument against such intervention rests on the idea that the states are sufficiently protected by political safeguards.[163] When Congress's actions seem to promote the interests of the states by funding their local projects or the implementation of a regulatory scheme, this argument that the states do not need judicial protection appears even stronger.[164] Further, Congress's decision to use a conditional spending grant, rather than directly regulating when possible, can promote federalism by allowing the states to participate in what would otherwise be homogenous national programs.[165] The Court's intervention in imposing a general welfare limitation would strip states of money they want and have come to expect. So, why enforce this limitation?

This Part seeks to answer that question. At its core, the limitation seeks to ensure that the division between the spheres of government is not a mere historical relic in the spending context. Local governments that are closer to a particular need should be expected to spend as necessary to respond to that need. Injecting federal funds in these contexts can overestimate the utility of a particular good.[166] Further, imposing limitations on congressional power to protect state power in other contexts only can mean so much while the spending power remains an open avenue to bypass those restrictions.

---

163. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition of the National Government*, 54 COLUM. L. REV. 543, 558–59 (1954).

164. *See* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 38–39 (2011) (discussing the role of state actors in promoting conditional spending grants).

165. *See* Samuel R. Bagenstos, *Viva Conditional Federal Spending!*, 37 HARV. J.L. & PUB. POL'Y 93, 97–98 (2014) (arguing that conditional spending is a form of cooperative federalism that involves state participation, with complete nationalization as the alternative).

166. *See generally* Alison F. DelRossi & Robert P. Inman, *Changing the Price of Pork: The Impact of Local Cost Sharing on Legislators' Demands for Distributive Public Goods*, 71 J. PUB. ECON. 247 (1999) (noting how Congress's willingness to pay for certain goods for a locality can be significantly greater than the individual locality's willingness).

This Part proceeds in two sections. It first discusses how political safeguards in the spending power context are not independently effective to police limits on congressional power. Despite arguments that the spending power has "a built-in inner political check,"[167] political incentives for congresspeople encourage seeking spending for one's locality. In the conditional spending context, states are pressured to comply with Congress's demands since they can lack an alternative funding basis. Then, the final section notes how the Court's existing limitations on conditional spending focus more on the way in which Congress enacts the spending. As a result, these other limitations serve only as procedural bars rather than addressing the problem of Congress invading the domain of the states.

A. The Ineffectiveness of Political Safeguards

Due to the desirability of passing the expense for local projects to the national government, states often are incentivized to acquiesce to federal intervention. For state officials, refusing offered money is difficult as they risk the bad optics of tax revenue partially funded by their residents flowing to other states only instead of benefitting their residents.[168] With federal money available, local interest groups are empowered to "forc[e] reluctant executive and legislative officials to accept the federal program."[169] While states do not always accept offered federal money, as demonstrated by the states that have refused the Medicaid expansion funding,[170] their decision to turn down the funds is "severely constrained" due to a "lack of equivalent, alternative sources of revenue."[171] A state's ability to tax is limited by the amount taken by the federal government: whatever money the federal government takes through taxation is unavailable to states.[172] Following the imposition of the caps on state and local tax deductions

167. Ronald D. Rotunda, *The Implications of the New Commerce Clause Jurisprudence: An Evolutionary or Revolutionary Court?*, 55 ARK. L. REV. 795, 821 (2002).

168. *See* Follick, *supra* note 143 (quoting Florida's Department of Transportation Assistant Secretary as stating that it "[didn't] make any sense" for the state to refuse funding for the Lake Jackson Ecopassage because the money would otherwise go to a different state).

169. Paul L. Posner & Stephen M. Sorrett, *A Crisis in the Fiscal Commons: The Impact of Federal Expenditures on State and Local Governments*, 10 PUB. CONT. L.J. 341, 353 (1978).

170. *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAMILY FOUND. (Sept. 8, 2021), https://www.kff.org/734275c [https://perma.cc/H7HG-FU9U].

171. Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1936 (1995).

172. *Id.* at 1936–37.

in the 2017 Tax Cuts and Jobs Act, one of the protections of a state's tax base from federal taxation was reduced, potentially increasing the pressure on the states to accept federal funding.[173]

In the case of conditional funding, there are often two groups of states: those that already comply with or want to implement the condition, and those that are otherwise unwilling to comply without financial persuasion.[174] Since congresspeople are unlikely to impose a condition with which their constituents would disapprove, such conditions will likely only be implemented when the first group of states, those that approve of the condition, are in the majority.[175] For the legislators themselves, "a vote in favor of the conditional grant is nearly always a vote to impose a burden solely on other states": comply or subsidize another state.[176] These conditions effectively act as a method for the procondition states to bully the other states into compliance.

Regarding localized spending, federal funding of a local project allows legislators to benefit their constituents at the expense of the nation. With most legislators naturally inclined to seek such funding, any representative who chooses to abstain from pursuing special funding for their constituents chooses to impose all of the cost of funding other localized projects without returning any benefit.[177] Further, localized spending projects arise often to coax politicians to support other legislation through coalition-building and logrolling, where legislators agree to support each other's pet projects to get support for their own.[178] Permitting localized spending can promote a "race to the bottom" of legislators attempting to form bargains with

173. *See* GRANT A. DRIESSEN & JOSEPH S. HUGHES, CONG. RSCH. SERV., R46246, THE SALT CAP: OVERVIEW AND ANALYSIS 3 (2020) (noting that the elimination of the State and Local Tax ("SALT") deduction could require state and local governments to "match any reduction in SALT revenue resulting from the cap with a reduction in spending on services provided or increases in other revenue sources"); Brian Galle, *Does Federal Spending Coerce States: Evidence from State Budgets*, 108 NW. U. L. REV. 989, 992 (2014) (arguing that deductions of state taxes from federal taxable income protects the state's tax base because taxation at two levels could reduce the state's tax base but the SALT deduction "effectively offers states a matching grant to impose their own taxes").

174. Baker, *supra* note 171, at 1935–36.

175. *Id.* at 1940–41.

176. *Id.* at 1946.

177. Baker, *Constitutional Ambiguities and Originalism*, *supra* note 45, at 523.

178. Diana Evans, *Policy and Pork: The Use of Pork Barrel Projects To Build Policy Coalitions in the House of Representatives*, 38 AM. J. POL. SCI. 894, 894–95 (1994).

each other to maximize the benefit to their localities and the cost on those represented by the non-coalition members.[179] Further, congressional spending in a legislator's district can increase their reelection chances.[180] In such cases, it is a lack of spending that may impose a political cost; thus, the incentive to spend is augmented.

While in the country's early history this tendency could be rebuffed by a presidential veto,[181] presidents today face political backlash from those who would have benefitted from such localized spending and are unlikely to accept the cost of vetoing such legislation.[182] Often these local spending projects are packaged with necessary and massive spending bills such that most presidents hesitant to support the objectionable spending would not ultimately veto those bills.[183] Consequently, the political branches are incentivized to allow this localized spending and are unlikely to police themselves.

B. The Insufficiency of the Coercion Limitation

While the Court's invalidation of a condition on federal spending in *NFIB* recognized the coercive problem presented by such spending,[184] this renewed limitation on Congress's spending power is unlikely to reel in congressional spending. Chief Justice John Roberts's analysis in *NFIB* rested on three specific aspects of the Affordable Care Act ("ACA"): it involved a significant portion of a state's annual budget, it placed a new condition on an established program, and it

179. Baker, *Constitutional Ambiguities and Originalism*, *supra* note 45, at 523.

180. *See* Steven D. Levitt & James M. Snyder, Jr., *The Impact of Federal Spending on House Election Outcomes*, 105 J. POL. ECON. 30, 50–51 (1997) (estimating that "an additional $100 per capita" spent in an incumbent's district "earns the incumbent approximately 2 percent more of the vote").

181. *See* discussion *supra* Part I.B.

182. Baker, *Constitutional Ambiguities and Originalism*, *supra* note 45, at 524.

183. *See, e.g.*, Burgess Everett, Sarah Ferris, Marianne Levine & Melanie Zanona, *Trump Backs Down, Signs Stimulus Package*, POLITICO (Dec. 27, 2020, 9:28 PM), https://politi.co/3nWYTkk [https://perma.cc/Y7MT-BCYG] (noting that despite having "railed against" a spending bill, former President Donald Trump "decided to sign the bill and not leave office amid a maelstrom of expired benefits and a government shutdown"). Even if the president did veto those bills, Congress could override that veto. *See* Philip Ewing, *Congress Overturns Trump Veto on Defense Bill After Political Detour*, NPR (Jan. 1, 2021, 2:35 PM), https://www.npr.org/2021/01/01/952450018/congress-overturns-trump-veto-on-defense-bill-after-political-detour [https://perma.cc/G62X-335G] (noting that the Senate voted eighty-one to thirteen to override Trump's veto of the 2021 National Defense Authorization Act).

184. *See* Nat'l Fed. of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 581–84 (2012) (characterizing the spending at issue as "a gun to the head").

used the states' commitment to that program to coerce them into adopting a "new" program.[185]

First, the spending at issue in *NFIB* was massive, with states facing a "threatened loss of over 10 percent of a [s]tate's overall budget."[186] Second, the ACA enacted a post-acceptance condition on an "entrenched" program.[187] A state which failed to comply with the condition of Medicaid expansion would lose its entire existing Medicaid funding even after it had developed significant statutory and administrative schemes for the initial Medicaid program.[188] Third, in the ACA, Congress instituted "a condition that did not merely change the existing program but leveraged states' desire to remain in *that* program to get them to participate in a *separate* program."[189] As the Chief Justice stated, Congress did not merely expand the existing Medicaid categories, but transformed it into part of a broader national health insurance scheme.[190] The newly eligible persons under the Medicaid expansion condition are treated differently than those in the preexisting categories.[191] This change to Medicaid was so significant that states could not have foreseen it when they accepted the funding originally.[192] Altogether, these circumstances presented states with no real choice but to accept and were thus coercive.[193]

This framework for finding coercive spending is unlikely to address the concerns of expansive congressional spending and the *Lopez* loophole except in the most egregious cases. The coercion limitation of *NFIB* does not meaningfully restrict Congress's ability to spend. The Chief Justice's opinion establishes that, despite the concerns regarding the states' lack of alternative funding,[194] sizeable grants alone are insufficient to be coercive based on the ultimate decision to maintain the expansion as a separate funding program

185. *Id.* at 580–85; *see also* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 864–65 (2013) (arguing that *NFIB* "is best read as adopting a principle that will find coercion only where all three of these conditions are present at the same time").

186. *NFIB*, 567 U.S. at 582.

187. Bagenstos, *supra* note 185, at 873.

188. *NFIB*, 567 U.S. at 581.

189. Bagenstos, *supra* note 185, at 873.

190. *NFIB*, 567 U.S. at 583.

191. *Id.* at 584.

192. *Id.*

193. *Id.* at 588.

194. These also are discussed in Part III.A of this Note.

untied to the pre-expansion funds.[195] If the post-*NFIB* limitation on coercive spending is roping existing large federal grants into new and unforeseeable programs, the limitation is more procedural than substantive. The Chief Justice's problem with the conditional spending was the way Congress implemented it, rather than the spending in the first place.[196] Thus, post-*NFIB*, Congress's ability to avoid the Commerce Clause limitations through conditional spending remains intact, with the slight restriction that it cannot tie large portions of the states' budgets to compliance.

This coercion limitation, even if applied more strenuously than *NFIB* suggests, is unable to address the political race to the bottom of localized spending enabled by the current complete deference to Congress's understanding of general welfare. Enforcing the other limitations presented in *Dole* could provide an alternative method of addressing some of the concerns of conditional spending.[197] Justice Sandra Day O'Connor articulated a stronger application of the germaneness requirement in *Dole* which would limit Congress's conditional spending power by placing requirements on how the money would be spent, thereby constraining the scope of regulatory power under the Spending Clause.[198] However, it is unclear how much this principle would limit Congress's spending in actuality.[199] Further, it is ultimately an indirect way to address the underlying problem with Congress's spending in these contexts—that Congress has invaded the local domain reserved to the states.[200]

---

195. *See NFIB*, 567 U.S. at 587 ("The Court today limits the financial pressure the Secretary [of Health and Human Services] may apply to induce States to accept the terms of the Medicaid expansion."); Bagenstos, *supra* note 185, at 877 ("Even as limited by the Court's judgment, the Medicaid expansion offers states large amounts of federal money that have been obtained as general federal taxes from the residents of states.").

196. *See NFIB*, 567 U.S. at 583–84 n.14, 585 (noting that, while impractical, Congress could have repealed Medicaid and reimplemented it with the new conditions without raising a coercion problem and that "[n]othing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use").

197. Baker & Berman, *supra* note 15, at 522–23.

198. South Dakota v. Dole, 483 U.S. 203, 215–16 (1987) (O'Connor, J., dissenting).

199. Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 369–71 (2008); Baker, *supra* note 171, at 1961–62.

200. *See Dole*, 483 U.S. at 217 (O'Connor, J., dissenting) (discussing the ability of the unrestrained spending power to allow Congress "to invade the states' jurisdiction" (quoting United States v. Butler, 297 U.S. 1, 78 (1936))).

The general welfare limitation proposed here instead places the distinction between federal and local at the forefront of the analysis, ensuring that the purpose for the restriction on Congress's power is not lost in the phrasing of a particular doctrinal test. Since the Constitution places "purely local" objects beyond Congress's grasp,[201] maintaining the power allocation it sets forth requires determining what is purely local. By focusing on whether the spending has a substantial impact outside of the targeted locality, the proposed test looks to the competencies of the national and local governments—in other words, the power allocation question of federalism.

CONCLUSION

The Court's current Spending Clause doctrine has drifted far from the original understanding of Congress's spending power as restricted to general, rather than local, purposes. This Note has proposed a possible method for reinforcing the distinction between general and local by looking to the effects of a proposed spending program beyond the locality where the funds initially go. While self-restraint by Congress in exercising its power only for general purposes would be preferred, political incentives suggest that this is unlikely. Instead, the courts must ensure that the distinction between national and local in the spending context is not a mere relic of the Founding Era.

201. Hamilton, Opinion on National Bank, *supra* note 17.