FORUM: "OVERTAKEN BY A GREAT CALAMITY:" DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE

The Sympathetic State

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I. A Surprising Confidence

In 1962, Francis Perkins, Franklin Roosevelt's secretary of labor, recalled the "Roots of Social Security" for an audience of Social Security Administration staff members. The Committee on Economic Security, which had broad agreement on most issues, "broke out into a row because the legal problems were so terrible." According to Perkins, the legal committee had deadlocked in the summer of 1934 over the crucial question of the constitutional basis for federal authority over unemployment and old age insurance. Then, as Perkins told the crowd, she paid a social call on Justice Harlan Fiske Stone's wife. The justice himself sat down to tea and asked how she was getting on. She seized the opportunity and laid before him the problem that was occupying the Committee:

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> Well, you know, we are having big troubles, Mr. Justice, because we don't know in this draft of the Economic Security Act, which we are working on—we are not quite sure, you know, what will be a wise method of establishing this law. It is a very difficult constitutional problem you know. We are guided by this, that, and the other case. [Justice Stone] looked around to see if anyone was listening. Then he put his hand up like this, confidentially, and he said, "The taxing power, my dear, the taxing power. You can do anything under the taxing power."[1]

Perkins returned to work from her encounter with the justice and firmly, though somewhat mysteriously, informed the committee that the Act should be justified as an exercise of congressional power under the taxing and spending clause.[2] According to Perkins and her chief legal advisor Tom Eliot, the entire Act was structured around Stone's admonishment.[3]

Today, if Perkins' tale is remembered at all, it is as a confession of an overly cozy, if not flat-out improper, relation between the Supreme Court and the Roosevelt Administration that in the end saved the infant welfare state from the Four Horsemen. But we can glean a more interesting insight if we look past the tantalizing image of the whispering Justice Stone and listen to his advice: What was this power under which the federal government could "do anything," and why was he so confident, in the summer of 1934, that the Supreme Court would ratify a scheme for which its advocates strained to find any constitutional basis?

Justice Stone's assurances of broad federal power should strike us as odd, coming as they did three years before 1937's "switch in time."[4] It is an article of faith in contemporary legal historiography that prior to that time federal intervention in the economy was proscribed by a narrow interpretation of congressional power under the Constitution, especially during the late nineteenth and early twentieth centuries. In particular, it is commonly believed that the development of a U.S. welfare state had been

1. Frances Perkins, "The Roots of Social Security" (address delivered at Social Security Administration headquarters, Baltimore, Md., October 23, 1962).

2. Ibid. Perkins claimed that she never told Eliot or any of the other lawyers on the committee how she—a non-lawyer—came to this conclusion: "as far as they knew, I went out into the wilderness and had a vision." Ibid. In another version of the story in Perkins's 1946 memoir, she admits that she told Roosevelt but swore him to silence "as to the source of my sudden superior legal knowledge." Frances Perkins, *The Roosevelt I Knew* (New York: Random House, 1946), 286.

3. Perkins, "The Roots of Social Security"; Thomas Hopkinson Eliot, "The Legal Background of the Social Security Act" (address delivered at a general staff meeting at Social Security Administration Headquarters, Baltimore, Md., February 3, 1961) ("Suffice it to say that with very little discussion at the Technical Board level, practically none at the Advisory Council Level, the research staff brought in the basis of what we have today, a contributory old-age insurance system based on the taxing and spending power, a la Justice Stone").

4. *West Coast Hotel v. Parrish,* 300 U.S. 379 (1937).

stunted by a strict "Madisonian" view of the power of Congress—under the very clause cited by Stone—to appropriate funds only in the service of a specific enumerated power rather than in the "general welfare."[5] In this view, apart from a few specifically defined categories such as Civil War pensions,[6] welfare spending was outside the scope of federal authority and fell to states, local governments, and charities. Even worse, the taxing power had been the focus of particular anxiety during the *Lochner* era and had been treated by conservative commentators to a legendarily narrow interpretation in the form of the "public purpose doctrine."[7] To us, then, it may well appear that Justice Stone was pointing Perkins toward not a safe haven but a locked door.

Unfortunately for the conventional account, Justice Stone turned out to be right. The Court ultimately approved both unemployment compensation and old age benefits on the precise basis he had urged upon Perkins—the latter by a 7-2 vote.[8] Yet at the time of their conversation, Justice Stone

5. U.S. Constitution, art. I, sec. 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 defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States").

6. Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge: Belknap Press of the Harvard University Press, 1992).

7. This doctrine was popularized by Thomas Cooley's authoritative *Treatise on the Law of Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union,* 6th ed. (Boston: Little, Brown, 1890) and *Treatise on the Law of Taxation, Including the Law of Local Assessments,* 2d ed. (Chicago: Callaghan and Company, 1886). Cooley argued that there was an implicit constitutional limit on the power of state and municipal governments to impose taxes such that all expenditures of such funds must be for a "public purpose." A number of state supreme courts relied on the doctrine in striking down various state tax assessments during the late nineteenth century. Examples include *Lowell v. Boston,*111 Mass. 454 (1873), and *State v. Osawkee Township,* 14 Kan. 418 (1875). The Supreme Court initially found that the power of state and local governments to tax is limited by "implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." *Loan Ass'n v. Topeka,* 87 U.S. 655, 663 (1874). Thus, "there can be no lawful tax which is not laid for a *public purpose.*" Ibid., 664. The doctrine reached its apex toward the end of the century when the Court recognized the public purpose doctrine as a requirement of substantive due process under the Fourteenth Amendment. *Fallbrook Irrigation District v. Bradley,* 164 U.S. 112, 159 (1896). However, as discussed below, the Court never applied this doctrine against Congress despite repeated requests that it do so. At least one lower court did, however. See, e.g., *United States ex rel. Miles Planting and Mfg. Co. v. Carlisle,* 5 App. D.C 138 (C.A.D.C. 1895) (relying on *Loan Ass'n v. Topeka* and *Lowell v. Boston* in holding that the sugar bounty provisions of the McKinley Tariff Act were unconstitutional because Congress could expend the tax revenues only for a "public purpose").

8. In *Steward Machine Co. v. Davis,* 301 U.S. 548 (1937), the Court upheld the unemployment compensation provisions of the Social Security Act, and in *Helvering v. Davis,* 301 U.S. 619 (1937), it upheld the old age benefit provisions of the Social Security Act.

knew that the Court had not considered the scope of congressional power to tax and appropriate funds in over a decade, since the challenge to the Maternity Act in 1923.[9] Even then, the Court had refused to decide the issue, choosing instead to resolve the case on the basis of standing. In fact, in 1934 there was no judicial precedent on which Justice Stone could have been relying. Yet we can be sure, given the stakes, that this was not a shot in the dark. Justice Stone had some basis for his belief, even if history has by now obscured it by treating the Court's subsequent action as a radical departure from past practice.

This article searches out the source of Justice Stone's surprising confidence. In fact, he was giving voice to a history that, while perhaps unknown today—and even a bit remote to then twenty-seven-year-old Tom Eliot[10]—was extremely familiar to the lawyers and politicians of Justice Stone's generation and before. As we shall see, the justice was by no means alone in his belief that Congress could "do anything" under its power to tax and appropriate. Some of those who also held this view are unsurprising: Justice Brandeis, Harry Hopkins, progressive constitutional law scholar Edward Corwin, and Senator Robert M. LaFollette, Jr. Some are more unexpected, figures not typically associated with taking an expansive view of federal power, such as Henry Clay, constitutional historian Charles Warren, nineteenth-century constitutional law treatise authors John Innes Clark Hare and John Norton Pomeroy, and Chief Justice Charles Evans Hughes. Others are truly shocking, including some of the men most closely associated with *Lochner*-era laissez-faire constitutionalism—men such as Supreme Court Justices Rufus Peckham and Samuel Miller; Michigan Supreme Court Justice Thomas M. Cooley, whose *Treatise on Constitutional Limitations* had famously elaborated the public purpose doctrine; the well-known Supreme Court advocate Joseph Hodges Choate; William Howard Taft; as well as earlier generations of "strict constructionists," including Jefferson, Madison, Calhoun, and Breckinridge.

These men and their contemporaries based their conviction in large part on an expansive tradition of congressional expenditures for the relief of

9. *Massachusetts v. Mellon,* 262 U.S. 447 (1923).

10. To Eliot and the other government lawyers charged with finding a constitutional basis for social security, Perkins's "wilderness vision" seemed the best strategy, though Eliot was nervous about whether the Court would ultimately agree. Eliot recalled in 1980 that the older and more experienced lawyers on the CES staff, including U.C. law professor Barbara Nachtrieb Armstrong, and Assistant Attorney General Alexander Holtzoff did not share his anxiety and were very confident about the justification of the Social Security Act as a "tax and spend statute." Thomas Eliot, *Recollections of the New Deal: When the People Mattered* (Boston: Northeastern University Press, 1992), 96–97, 112.

people "overtaken by a great calamity."[11] As I have elsewhere shown, from the earliest days of the Republic, Congress had appropriated funds from the Treasury on hundreds of occasions for the relief of fires, floods, earthquakes, Indian depredations, and other disasters.[12] As this article demonstrates, these appropriations escalated dramatically in both size and number from the late nineteenth century until the New Deal—the very period we now associate most closely with the dominance of laissez-faire ideology and a lack of federal redistribution.

From Justice Stone's perspective, there were two important facts about the history of disaster relief that recommended it to the proponents of Social Security: First, it was a well-known, extensive precedent for a popular form of direct federal relief based on Congress's authority to tax and spend in the "general welfare." Over the course of a century's practice, Congress had explicitly and liberally interpreted this clause of the Constitution (then called the "general welfare clause")[13] to include the power to grant relief for sudden catastrophes. If the Depression could be cast as such an event, these precedents would be applicable. In fact, extending this precedent beyond its traditional scope was not a new idea. The very durability of disaster relief as a precedent had long made it a tempting ally for those seeking federal aid for other purposes, beginning with congressional debates over the Freedmen's Bureau in 1866. The history of disaster relief appeared in this role not only in Congress, but also in briefs and arguments to the Supreme Court, in political speeches, and in newspaper editorials.[14]

11. *Cong. Rec.,* 53d Cong., 3d Sess., 1895, 27, pt. 4:2882 (Populist Senator William Allen of Nebraska, arguing for drought relief, and citing precedents of flood relief and other prior acts of Congress).

12. See Michele Landis, "'Let Me Next Time Be Tried By Fire': Disaster Relief and the Origins of the American Welfare State 1789–1874," *Northwestern University Law Review* 92 (1998): 967–1034; Michele Landis, "Fate, Responsibility, and Natural Disaster Relief: Narrating the American Welfare State," *Law and Society Review* 33 (1999): 257–318; Michele Landis Dauber, *Helping Ourselves: Disaster Relief and the Origins of the American Welfare State,* Ph.D. diss., Northwestern University, 2003.

13. See, e.g., Brief for the United States at 129, *United States v. Realty Co.,* 163 U.S. 427 (1896) (No. 870) (denying that charitable appropriations had been properly made under the "General-Welfare Clause"); Brief for the United States at 8, *Field v. Clark,* 143 U.S. 649 (1892) (No.1,050). This brief by then-Solicitor General William Howard Taft argued that is the sugar bounty was "within the power of Congress under the general welfare clause of the Constitution."

14. The history of disaster relief also figured in the law review articles of the 1920s and '30s as a precedent that justified an expansive reading of the taxing and spending power. For instance, in his 1935 law review article McGuire discussed the citation of disaster relief appropriations in the Sugar Bounty cases and concluded that the Court had relinquished judicial review over appropriations decisions by Congress. O. R. McGuire, "The New Deal and the Public Money," *Georgetown Law Journal* 23 (1935): 155, 190. Similarly, in an

Second, and more important for Stone and Perkins, the constitutionality of appropriations that Congress deemed to be for the general welfare was not subject to judicial review. Instead, everyone agreed—even if some did so reluctantly—that Congress and not the Court had the last word on whether or not a given appropriation comported with the general welfare. The remedy for any error by Congress was to be found in the executive veto or at the ballot box, *not* through appeal to a court. Indeed, as Charles Warren ruefully admitted in 1932 (quoting Edward Corwin, who did not share Warren's outrage about it), "We must conclude that into the dread field of money expenditure the Court may not thrust its sickle; that so far as this power goes the General Welfare is what Congress finds it to be."[15] The appeal of such a precedent to New Deal supporters like Justice Stone is obvious. Unless the conservative members of the Supreme Court—whom Tom Eliot would later call the "battalion of death"[16]—intended to abandon this long tradition of deferring to Congress on such questions (as Eliot fretted that they might) a properly structured Social Security Act might survive.

The fact that disaster relief served as a precedent for the expansion of the welfare state in the 1930s belies the argument, associated most closely with Theda Skocpol, that the lateness and weakness of the American welfare state are due in large measure to the lack of a precedent for social spending, apart from flawed programs such as Civil War pensions. Skocpol argues, for example, that pensions for Civil War veterans constituted a kind of proto-welfare state for the general populace, and that the extension of pensions from veterans to the general elderly population failed to occur because of elite claims that the pension program was plagued with corruption.[17] In fact, I argue, it was not the negative precedent of Civil War pensions that shaped the subsequent welfare state but the positive precedent of disaster

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article published the same year, Cathcart discussed the Sugar Bounty and *Butler* decisions and concluded that Congressional power to spend out of the general revenues, including for the "relief of human suffering" is essentially unlimited. Arthur Cathcart, "The Supreme Court and the New Deal," *Southern California Law Review* 9 (1935): 328–30.

15. Charles Warren, *Congress as Santa Claus* (Charlottesville, Va.: Michie Company, 1932), 142 (quoting Edward Corwin, "The Spending Power of Congress—Apropos the Maternity Act," *Harvard Law Review* 36 [1922]: 580). Corwin's article had argued that the Court had no power to strike down the Sheppard-Towner Maternity Act because history demonstrated that Congress had always had plenary and unreviewable power over appropriations. Warren admitted that Corwin was right as to the history but urged that the Court should find a way to review Congress's relief appropriations or else "as to such legislation the powers of Congress are not limited by the Constitution in fact (however much they may be in theory)" (3).

16. Eliot, *Recollections of the New Deal,* at 95.

17. Skocpol, *Protecting Soldiers and Mothers.*

relief. Rather than explaining why Civil War pensions did not evolve into broader social welfare programs (a task that assumes that many people at the time saw such a potential connection, an assumption for which Skocpol offers scant evidence),[18] this article investigates why New Dealers worked so energetically to recruit disaster relief as a precedent for their expansion of the welfare state.

In Section II, I sketch the history of disaster relief appropriations for victims of fires, floods, wars, storms, cyclones, famines, droughts, and plagues during the late nineteenth and early twentieth centuries. These appropriations continued and even accelerated a pattern of relief provision begun in the early years of the Republic. In Section III, I show how members of Congress and others attempted to extend the precedent of federal disaster relief beyond its traditional ambit to argue for broader measures such as the Freedmen's Bureau, aid to the unemployed during the Depression of 1893, and assistance to cotton farmers in 1914. Finally, in Section IV, I touch on the ways in which the precedent of disaster relief figured importantly in several Supreme Court cases in which particular grants, for example those providing bounties for domestic sugar producers and federally backed farm loans, were challenged. In those cases, lawyers defending the appropriations argued that Congress's long practice of granting funds for disaster relief demonstrated that Congress, not the courts, had the power to determine whether spending was in the general welfare, as it was "a question purely of legislative expediency and discretion."[19] It was to this argument that Justice Stone referred Frances Perkins, and it became a key legal underpinning of the New Deal.

18. Although Skocpol's book contains numerous examples of elite opinion that Civil War pensions were a hotbed of graft and corruption (e.g., *Protecting Soldiers and Mothers,* 272–78), there is little evidence to suggest that any serious reformer or political actor expected that Civil War pensions would serve as a positive precedent for noncontributory old age pensions. The best evidence she musters on this crucial point appears to be the suggestion from Isaac Rubinow in 1913 that the inevitable death of the Civil War pensioners would at least in theory leave space in the federal budget for "the establishment of a national old-age pension scheme without even any material fiscal disturbance." This is, however, some distance from her assertion that Rubinow and others had "expect[ed] a smooth transition from Civil War pensions to more general benefits for elderly Americans" (*Protecting Soldiers and Mothers,* 157 n.101). This lack of evidence is surprising given that Skocpol's project leans heavily on the notion that Rubinow and others had indeed had this belief (and that it was a sensible one to have); it is after all their mistaken view of the precedential capacity of the Civil War pension system that she purports to explain, primarily with reference to Mugwump attacks on widespread fraud in the program.

19. Brief for the Appellees at 24, *United States v. Realty Co.,* 163 U.S. 427 (1896) (No. 870) (Brief of Joseph Choate).

II. "Just as Well as Generous": Direct Federal Relief in the Lochner Era

> The cry of paternalism should not deter us from the discharge of a plain duty of government in case of great emergencies. It is not paternalism to protect the people against the sufferings of earthquakes and great fires. It is not paternalism to provide in so far as possible against the baneful fruits of war. . . . Paternalism is fostered often by the failure of government to exercise with wisdom and discretion just and sane powers of government.
>
> Senator William Borah, 1914

The history of disaster relief in the period from the Civil War through the early twentieth century is one of remarkable constancy, despite the political and ideological currents that might have been expected to derail the practice, such as the distaste for "paternalism" that Senator Borah, in the quotation above, attempted to counter on behalf of the South's cotton farmers in 1914.[20] In order to appreciate this consistency, it is helpful to review briefly the history of disaster relief from its first appearance shortly after the founding of the Republic.

Disaster Relief before the Civil War

Federal relief for disaster "sufferers" began in 1790, as a series of private bills for the relief of individuals.[21] This practice gave way by 1822 to general relief bills benefiting a defined class of claimants. By the time of a devastating fire in Alexandria, Virginia, in 1827, Congress had already granted twenty-seven separate claims for relief, encompassing thousands of claimants and millions of dollars, for relief following events such as the Whiskey Rebellion, the slave insurrection on St. Domingo (Haiti), and various fires, floods, and storms. Beginning in 1794, these funds were most often administered through temporary federal relief bureaucracies established within the executive, often the War Department. Federal relief agents evaluated applications and distributed benefits according to statutory eligibility criteria.[22]

These early appropriations quickly hardened into a set of legislative precedents that were repeatedly invoked both for and against proposed relief

20. Senator William Borah (D-Idaho), *Cong. Rec.,* 63d Cong, 1st sess., 1914, 51, pt. 16:16777.

21. Landis, "'Tried by Fire;'" Landis, "Fate, Responsibility, and 'Natural' Disaster Relief."

22. On the development of disaster relief bureaucracies in the early Republic, see Michele Landis Dauber, "The War of 1812, September 11, and the Politics of Compensation," *DePaul Law Review* 53 (2003): 289–354.

measures. In this respect, Congress often acted less like a legislature than a court, with members arguing that the government was constrained by its prior decisions. Concerns among members of Congress about the equitable application of these precedents contributed to the construction of narratives that distinguished among events and petitioners—certain events were compensated while others were ignored. Successful appeals told of events in a particular form that I have called the "disaster narrative": stories of sudden, unforeseeable losses for which the claimant was morally blameless. Need alone, no matter how severe, was insufficient to justify government aid. Ultimately, whether or not an event would be considered a "disaster" deserving of federal intervention turned upon the ability of the claimants to argue that they, like those who previously received aid, were innocent victims of fate rather than irresponsible protagonists in their own misery.

Concerns about the constitutionality of disaster appropriations did not seriously impinge upon the congressional practice of granting aid during the antebellum period. Although there were some early disagreements, most notably following the Savannah and Alexandria fires, the permissibility of federal relief for acts of "Providence" was only rarely and half-heartedly revisited by Congress after 1827. By the mid-nineteenth century, the constitutional status of disaster relief was so uncontroversial that appropriations were most often made without debate by unanimous joint resolution.

The pace of disaster relief declined somewhat in the twenty years immediately preceding the Civil War, which saw relatively few appropriations.[23] According to some commentators,[24] this falling off was due to fears within the dominant Democratic Party that extension of federal power would incite secessionist sentiments and split the party.[25] This fear briefly overcame both the logrolling logic of federal appropriations—after all, trading votes was premised on the political order persisting long enough to collect favors in return—and the moral logic of blameless victimization. That reticence

23. During this period, the Congress approved such things as aid to the Irish famine victims, *Resolution of March 3, 1847* (9 Stat. 207, No. 10); *Congressional Globe,* 29th Cong., 2d sess., 1847, 16, pt. 1:505, and $200,000 in direct relief to victims of the Sioux Indian depredations in Minnesota. *Act of February 16, 1863* (12 Stat. 652, ch. 37); *Congressional Globe,* 37th Cong., 3d sess., 1863, 34, pt. 1:179, 192, 440–45, 509–18.

24. Sidney Fine, *Laissez-Faire and the General Welfare State* (Ann Arbor: University of Michigan Press, 1956): 21; Corwin, "The Spending Power of Congress," 548; Warren, *Congress as Santa Claus,* 142.

25. Corwin argues that the narrow interpretation of the taxing power was dominant only during the period 1845–1860 "when state's rights principles were dominant with all sections and parties." Corwin, "The Spending Power of Congress," 579. Warren similarly notes that though relief was granted for the Irish potato famine in 1847, President Pierce vetoed the Dorothea Dix bill providing federal aid for indigent insane asylums in 1854, and President Buchanan vetoed the Homestead Act in 1860. Warren, *Congress as Santa Claus.*

lasted until 1865, when the massive Freedmen's Bureau relief effort threw the door to federal aid wide open again.

Disaster Relief in the Late Nineteenth and Early Twentieth Centuries

Even with the complications introduced by the Civil War and its aftermath, the practice surrounding disaster relief grants in the late nineteenth and early twentieth centuries was strikingly similar to that of the first half of the nineteenth century—concerned with precedent, couched in a language of moral blame and obligation, and largely uninhibited by constitutional objections. Even new questions, such as the entitlement of African-Americans to relief funds, were assimilated into the moral logic of fate and fault. Indeed, the most significant change was not the political or moral bases of relief, but a dramatic increase in both the frequency of appropriation and the amount granted in particular cases.

Between 1860 and 1930, there were more than ninety separate relief measures for various fires, floods, droughts, and famines[26] compared with approximately half as many similar grants from 1790–1860.[27] Some of these were quite large, such as the millions expended by the Freedmen's Bureau for southern relief following the Civil War, or the similar sums for victims of repeated Mississippi River floods.[28] Others were relatively small,

26. *Cong. Rec.,* 71st Cong., 1st sess., 1931, 74, pt. 1:3241–43; Senate Committee on Manufactures, *Federal Aid for Unemployment Relief: Hearings on S. 5125,* 73d Cong., 1st sess., 2–3 February 1933; Brief for the United States at app. C. 61–62, *United States v. Butler,* 297 U.S. 1 (1936) (No. 401); Brief for Respondent Harold I. Ickes as Federal Emergency Administrator of Public Works at 164 & n.80, App. D, 68–69, *Duke Power Co. v. Greenwood County,* 299 U.S. 259 (1936) (No. 32).

27. Landis, "'Tried By Fire.'"

28. Examples of appropriations for Mississippi River flood relief include the following Acts of Congress: Act of April 23, 1874 (18 Stat. 34 ch. 125) (indefinite amount); Act of May 13, 1874 (18 Stat. 45, ch. 170) ($190,000); Joint Resolution of February 25, 1882 (22 Stat. 378, No. 6) ($100,000); Joint Resolution of March 10, 1882 (22 Stat. 378, No. 8) (indefinite amount); Joint Resolution of March 11, 1882 (22 Stat. 378, No. 9) (same); Joint Resolution of March 21, 1882 (22 Stat. 379, No. 12) ($150,000); Joint Resolution of April 1, 1882 (22 Stat. 379, No. 16) ($100,000); Act of April 11, 1882 (22 Stat. 44 ch. 77) ($20,000); Act of March 27, 1884 (26 Stat. 269) ($125,000); Act of March 31, 1890 (26 Stat. 33, ch. 58) ($25,000); Joint Resolution of April 21, 1890 (26 Stat. 671, No. 16) ($150,000); Joint Resolution of April 7, 1897 (30 Stat. 219, No. 9) ($200,000); Joint Resolution of May 9, 1912 (37 Stat. 663, No. 19) ($1,239,179.65); Act of August 26, 1912 (37 Stat. 601) ($4,500); Act of March 4, 1913 (37 Stat. 919); Act of October 22, 1913 (38 Stat. 215–16) ($785,388.79); Joint Resolution of February 15, 1916 (39 Stat. 11, ch. 28) (indefinite amount); Joint Resolution of August 3, 1916 (39 Stat. 434, ch. 267) ($540,000); Act of March 23, 1928 (45 Stat. 359) ($1,500,000 for emergency work relief on levees); Act of February 28, 1929 (45 Stat. 1381) ($3,654,000) (emergency flood relief and restoration of roads and bridges).

for example $10,000 for emergency food and transportation following a flood of the Rio Grande River in 1897.[29] During the same period, only a handful of proposals were rejected by Congress and only two were vetoed by the executive: President Johnson vetoed the first Freedmen's Bureau extension bill in February 1866[30] (a subsequent effort passed a few months later over his veto),[31] and an appropriation for Texas drought relief was vetoed by President Grover Cleveland in 1887.[32] This tradition of federal aid was well-known to the public, and there was extensive press coverage of congressional debates,[33] as well as numerous editorials in favor of the practice such as the 1897 demand by the *New York Daily Tribune* for "the prompt benefaction of the Federal Government" following a Mississippi River flood.[34]

Precedent. The use of precedent as a powerful argument both for and against the enactment of particular measures persisted in the post–Civil War period, now strengthened by the addition of numerous new cases. The Texas drought relief bill vetoed in 1887, just mentioned, is a case in point. Texas Senator Richard Coke, the sponsor of the bill, argued that although his wealthy state did not need the aid, and would make its own provisions for the drought sufferers, it was entitled to receive the federal largess because

> money is expended here every year for the relief of people in different parts of the United States. Money was expended for the relief of the people of the great State of Ohio when they suffered from floods. There is not a session of Congress that money for the relief of people somewhere in the United States is not expended. We ask no departure from any precedents established by the Government . . . we are not asking for anything except for that which has always been freely granted to others having no greater rights or equities than ourselves.[35]

29. Joint Resolution of June 9, 1897 (30 Stat. 221, No. 14).

30. *Congressional Globe,* 39th Cong., 1st sess., 1866, 37, pt. 1:916.

31. *Congressional Globe,* 39th Cong., 1st sess., 1866, 37, pt. 5:3913 (House), 3842 (Senate).

32. *Cong. Rec.,* 49th Cong., 2d sess., 1887, 18, pt. 2:1875.

33. See, e.g., "Congress Affords Relief: Joint Resolution Passed Appropriating $200,000 for Mississippi and Red River Flood Sufferers," *New York Times,* April 8, 1897, at 3; "Congress to the Rescue: Appeal from the President in Behalf of the Flood Sufferers," *New York Daily Tribune,* April 8, 1897, at 1; "Relief for El Paso Sufferers," *New York Daily Tribune,* June 1, 1897, at 5; "Aid for the Mississippi Valley Sufferers," *New York Times,* March 16, 1882, at 1.

34. "Relief for the Flood Stricken," *New York Daily Tribune,* April 8, 1897, at 5.

35. *Cong. Rec.,* 49th Cong., 2d sess., 1887, 18, pt. 2:1269. Coke had been removed from the Texas Supreme Court in 1867 as "an impediment to Reconstruction." *Congressional Biography* 2002, available at http://bioguide.congress.gov/ (last visited January 7, 2004).

Coke vigorously denied Senator Hawley's accusation that Texas was "passing the hat."[36] Instead, according to Coke "[w]e ask no charity from Congress, we ask no aid from the National Government. We only ask to be treated as the people of other States are treated. Justice, not charity, is what we ask."[37]

Coke's fellow Democrat Eli Saulsbury of Delaware disagreed about the force of the precedents in arguing against relief for the drought-stricken Texans. In his view, the entire practice was unlawful and the long line of precedents was "the very strongest argument which could be made against this appropriation of money. We see what we are coming to. Year after year, applications come up here from some section of the country for donations of money out of the public Treasury. We ought at once to put our foot down upon such proceedings."[38] Republican Henry Teller, a former interior secretary during the Arthur administration, approved the prior precedents in cases of "great misfortune" but argued that this case would set a dangerous precedent because the drought only affected a small corner of a large, rich state, and there was no sudden emergency. "If you furnish seed to them," he warned, "you will be called upon to furnish them to hundreds of others."[39]

Most senators conceded the importance of the precedents but echoed Teller's skepticism about the existence of a disaster sufficient to trigger their operation. Prior grants had been for such things as floods affecting utterly destitute freedmen who were unlikely to be aided by southern

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He was subsequently elected governor of Texas, and then as a Democrat to the Senate. In addition to this somewhat checkered past, he had earned his colleagues' resentment by repeatedly opposing the Blair Education Bill as unconstitutional, proclaimed that he did not believe disaster relief was constitutional either, but given that it was a settled practice he "proposed to claim the benefits of it for my State." *Cong. Rec.,* 49th Cong., 2d sess., 1887, 18, pt. 2:1268. Although Coke resisted Senator Hoar's baiting demand that "Texas should furnish constitutional law to us, who need it, especially when we are obliged to vote upon this bill," other senators stepped into the breach, such as Senator Edmunds, who offered that it was "perfectly constitutional for Congress to give away as much money for such a purpose as it sees fit; whether it is wise or not is another thing" (1268).

36. Ibid.

37. Ibid.

38. Ibid., 1269.

39. Ibid. A similar objection was made ten years later when the New York Tribune reported that a bill for relief following a flood in El Paso "provoked a good many mutterings of dissent among members on both sides of the House." One California Congressman complained that El Paso was a thriving city in a rich state that ought to provide for its own sufferers without asking Congress for aid. Nevertheless, the precedent of repeated aid for Mississippi River flood victims was invoked and there were only 11 votes against the bill. "Relief for El Paso Sufferers," *New York Daily Tribune,* June 1, 1897, at 5.

legislatures, or for other sudden catastrophes in which the victims were unable to help themselves. By contrast, Senator Edmunds pointed out that the Texas drought was not a sudden emergency but had happened several months before. People would receive aid from the state legislature and would be able to obtain seeds from their neighbors.[40] Other senators said that they were troubled by the fact that the bill's own sponsor denied the need for the funds. Though the bill passed, it may be that the weakness of the claim contributed to Cleveland's decision to veto it, given its poor prospects for passing over his objection.[41]

The importance of legislative precedents in congressional relief determinations highlights the fact that members of Congress were nearly always lawyers, often quite highly skilled ones. As lawyers (rather than merely party members or politicians)[42] they tended to characterize situations as cases, reason analogically, and argue in favor of adherence to precedents under a theory of "equal justice" for similarly situated persons. They were particularly unlikely to ignore or dismiss as irrelevant arguments about the way Congress had treated similar claims in the past, even though they were in theory entitled to do so. As Senator Henderson pointed out in con-

40. *Cong. Rec.,* 49th Cong., 2d sess., 1887, 18, pt. 2:1268.

41. With a few notable exceptions including Cleveland's veto of Texas drought relief (echoed by Hoover's initial resistance to drought relief in 1930) support for disaster relief did not divide neatly along party lines with Republicans in favor and Democrats opposed. As the discussion of (Democratic) Senator Coke's advocacy for the Texas drought relief bill (and the southern Democratic demands in 1914 for relieving the cotton belt) indicates, federal disaster relief policy generally enjoyed broad popular support from both parties. Efforts to extend the precedent to such things as aid to education or unemployment relief sometimes provoked Democratic resistance but patterns of support and opposition more closely tracked geography than party politics. So, for example, southern Democrats from the eastern seaboard tended to support the Blair bill, while those from Texas did not; Democrats from states along the Ohio and Mississippi supported frequent flood relief appropriations, and those from dry regions proposed drought aid.

42. The fact that legislators have generally been lawyers may add another dimension to theories that emphasize the bureaucratic competencies (usually, the lack thereof) of state actors in explaining the trajectory of American state development. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities 1877–1920* (Cambridge: Cambridge University Press, 1982); Elisabeth S. Clemens, *The People's Lobby: Organizational Innovation and the Rise of Interest Group Politics in the United States, 1890–1925* (Chicago: University of Chicago Press, 1997); Theda Skocpol and John Ikenberry, "The Political Formation of the American Welfare State in Historical and Comparative Perspective," in *Comparative Social Research: The Welfare State*, vol. 6, ed. R. F. Thomasson (Greenwich, Conn.: JAI Press, 1983), 87–147; Skocpol, *Protecting Soldiers and Mothers.* Such theories have generally focused on the patronage, logrolling, and vote-seeking aspects of legislative behavior (the "party" aspects of state development) while neglecting the rather obvious fact that the members of Congress (and not only judges) were nearly always themselves lawyers with legal training and experience.

nection with the 1866 Portland fire relief bill, "it will not do to say to any lawyer that he must not rely on precedents. I apprehend that we all rely on them to a great extent."[43] Eventually, claimants (including advocates for unemployment relief during the 1930s) were able to persuasively contend that these precedents were so numerous and consistent that they created an entitlement to federal relief for certain sorts of losses—those beyond the claimants' fault.

Fate and Responsibility. As the Texas drought relief debate illustrates, the disaster narrative remained a crucial part of the process of claiming federal relief after the Civil War. Claimants were repeatedly described as deserving because they were needy through no fault of their own. Conversely, opponents argued that claimants had no one to blame but themselves for their problems and were thus not entitled to relief. In a typical example, Representative Daniel Garrett of Texas argued in favor of the $20 million Russian famine relief bill because "if I must decide as to whether or not I shall vote yea or nea in the matter of saving starving mothers and children by the thousands and tens of thousands in stricken Russia and Armenia who are not in any way responsible either for their own sad condition or that of their government, I shall vote for the perishing women and children and take the consequences."[44] In opposition, Senator Shields argued that "if Russia is in trouble . . . it grows out of the people's own fault and out of their own idleness."[45]

Sifting the responsibility of the needy was the chief way of distinguishing a "disaster" deserving of relief from other sorts of needs. Thus, Senator McPherson responded to Populist Senators "Silver" Dick Stewart and William Peffer, who sought aid for the unemployed in the depression of 1893, by distinguishing them from the unemployed of the South Carolina Sea Islands, whose factories were destroyed by a cyclone and were "not responsible or to blame for what has overtaken them."[46] Indeed, ensuring that those who had caused their own problems were excluded from receiving government assistance was described by a number of congressmen as an essential feature of public, as opposed to private, charity.[47] On

43. *Congressional Globe,* 39th Cong., 1st sess., 1866, 39, pt. 5:3919.

44. *Cong. Rec.,* 67th Cong., 2d sess., 1921, 62, pt. 1:472.

45. Ibid., 579.

46. *Cong. Rec.,* 53d Cong., 1st sess., 1893, 25, pt. 3:3077.

47. The distinction made here between the moral imperatives for public and private relief may have been overstated, at least in the context of major disaster. As Karen Sawislak's excellent account of relief distribution by charitable organizations following the Chicago Fire in 1872 shows, private aid workers were extremely focused on distinguishing between "those who are helpless from their own misfortune and those whose misery arises from their own default." Karen Sawislak, *Smoldering City: Chicagoans and the Great Fire, 1871–1874*

this basis, Ohio Republican William Lawrence (who was something of a constitutional scholar and had declined an appointment to federal court in Florida in order to serve in the Union Army) objected to the extension of Freedmen's Bureau relief efforts to include former rebels whose betrayal of the Union had, in his view, caused the current widespread famine. Perhaps in the context of private philanthropy such distinctions would not be proper, he acknowledged, but "as the custodians of the public Treasury . . . we should be just as well as generous."[48]

The Constitution. As before the Civil War, the constitutionality of disaster relief rarely arose in congressional debates. The lack of controversy was often mentioned as evidence that the question had long been settled, as when Representative Blount reminded the House during debate of an 1884 Ohio River flood relief bill that "without one word of criticism in reference to the Constitution, without any expression save that of a great humanity" half a million dollars had been voted in relief following the yellow fever epidemics on the Gulf Coast.[49] Although some members continued to express constitutional doubts, they were generally quite half-hearted, and resoundingly rejected.[50]

(Chicago: University of Chicago Press, 1995), 90. However, Sawislak notes that there were at least some charity workers following the Chicago Fire who, like Rep. Lawrence, thought that wretchedness and poverty demanded a charitable response regardless of individual fault—a view that was rarely, if ever, expressed in the context of federal relief (117). It is difficult to determine whether long-standing practices surrounding the distribution of government aid based on moral blamelessness influenced private disaster relief givers, or the reverse, or whether both practices were perhaps influenced by other social factors.

48. *Congressional Globe,* 39th Cong., 2d sess., 1867, 38, pt. 1:260. Similarly, Illinois Representative Adams argued that as a matter of public policy "no appropriation should be made out of the national Treasury except to relieve distress occasioned by an unforeseen catastrophe, and then only so far as it is necessary to go for that purpose . . . we ought not to provide for injuries that are likely to accrue from the annual floods . . . since that is a catastrophe which cannot be called unforeseen." *Cong. Rec.,* 48th Cong., 1st sess., 1884, 15, pt. 3:2296.

49. *Cong. Rec.,* 48th Cong., 1st sess., 1884, 15, pt. 3:1038.

50. The sole clear reference to the public purpose doctrine I found during this period was ironically made by Kansas Populist William Peffer. Peffer was an accomplished lawyer, but was viewed in the Senate as a left-wing crackpot. The Populists opposed the Sea Islands cyclone relief bill because it "calls to the attention of the Senate the suffering and distress in one quarter" while ignoring the larger problem of widespread unemployment and distress due to the abandonment of the silver standard, which was, to the Populists, a far more serious "legislative cyclone." Peffer argued that the government should establish a system of public works but "to donate money to persons . . . out of the public treasury is altogether another thing." According to Peffer, the money in the Treasury "is not ours and we have no legal authority to use it for any purpose that is not a public purpose." *Cong. Rec.,* 53d Cong., 1st sess., 1893, 25, pt. 3:3077. Peffer's speech on this subject was, like all his other speeches, ignored.

When congressmen bothered to respond to constitutional objections at all they argued that past Congresses had repeatedly given a liberal interpretation to the power to tax and appropriate in the general welfare.[51] Occasionally hoary standards like Madison's vote in favor of the St. Domingo relief bill[52] or the approving discussion of disaster relief in Story's *Commentaries*[53] were recounted. More often, proponents recited a long string of precedents to establish the lawfulness of the practice. In a typical example, during House debate over a Mississippi River flood relief bill in 1884, Louisiana Democrat Carleton Hunt offered—even though there had been no constitutional challenge—that "this appropriation is plainly warranted by the terms of the Constitution." The former dean of the Louisiana (now Tulane) Law School then read the General Welfare Clause and expounded at some length upon the meaning of the power, quoted Story, and concluded that Congress could spend in the furtherance

51. During the earlier period (1790–1830) there had been no broad agreement on the basis for the constitutionality of disaster relief. In the few cases in which the Constitution was debated, many possibilities were suggested (i.e., War Power, Necessary and Proper Clause, the Power to Tax and Spend, the general welfare provision in the Preamble, the pursuit of happiness in the Declaration of Independence, the Commerce Power, etc.) though there was no clear consensus for any of them. By the time of the later period that is the subject of this article, it was agreed that appropriations for disaster relief were within Congress's power to tax and spend in the general welfare. The justification of the Freedmen's Bureau Relief Act of 1867 under this clause doubtless contributed to its citation in subsequent cases.

52. As a member of Congress in 1794, Madison had supported a $15,000 grant of relief to the white refugees fleeing St. Domingo following the slave insurrection. *Annals of Cong.,* 3d Cong., 1st sess., 1794, pt. 1:171–72. As president, he signed numerous relief bills appropriating millions of dollars in property indemnifications, cash assistance, and food and clothing distribution, including relief following the Caracas earthquake of 1812, the New Madrid, Missouri (territory) earthquake of 1815, and the massive relief program following the War of 1812. See Landis, "'Tried By Fire,'" 977 nn. 53–54; Landis, "The War of 1812."

53. Story had a recurring role in disaster relief debates because he had written a defense of a broad interpretation of the General Welfare Clause and had there used disaster relief as an example of a necessary function of government that could no longer be fulfilled if the narrow interpretation were to prevail. Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray & Co., 1833), §§ 985–991. Story's view was frequently offered in Congress and the courts as an authoritative interpretation of the General Welfare Clause. See, e.g., *Cong. Rec.,* 48th Cong., 1st sess., 1884, 15, pt. 3:2295; Brief for the United States at 71, *Field v. Clark,* 143 U.S. 649 (1892) (No. 1,050); Brief for the Appellants at 35, *United States v. Realty Co.,* 163 U.S. 427 (1896) (No. 870) (Brief of Joseph Choate); Brief for the United States at 152–54, *United States v. Butler,* 297 U.S. 1 (1936) (No. 401). One of the more interesting of these citations came during House debate over the Russian famine relief bill. Several Representatives referred to an oral argument before the Supreme Court by then-private attorney Charles Evans Hughes. Hughes had argued in *Smith v. Kansas City Title & Trust* that the federal farm loan program was a valid exercise of Congress's power to spend in the general welfare, cited the precedent of disaster relief, and quoted Story. *Cong. Rec.,* 67th Cong., 2d sess., 1921, 62, pt. 1:457, 472.

of the general welfare, not just for enumerated powers.[54] His colleague Ezekiel Ellis, also a lawyer, stood to cite the 1812 Caracas earthquake and 1847 Irish Potato Famine relief bills, and to inform the House that such figures as Nathaniel Macon ("the stringent and severe Democrat, the strict constructionist"), Calhoun, Breckenridge, and others had voted for them, and that Madison himself had signed the Caracas resolution.[55] Representative Barbour Lewis took the floor to state impatiently that he had "no disposition whatever to discuss the constitutional phases of this question. It is sufficient to state in this connection that in the history of this government a great many precedents have been established whereby such an appropriation . . . can be and in my judgment ought to be justified in the mind of every member of this House."[56] Similarly, Senator John Henderson (R-MO) argued in favor of the Portland fire relief bill of 1866 that "if I can find that past Congresses have exercised the power and that the present Congress has exercised a similar power, I shall not hesitate when these poor people are calling. . . . the interpretations of the Constitution made by past Congresses add much force to the arguments that may be made in favor of the proposition before us."[57] As Texan John Reagan put it during an 1884 Mississippi River flood relief debate, "we have a long line of precedents which have met the approbation of the most illustrious minds of the past and we know that if we shall do what we are now asked to do we do not violate the Constitution. . . ."[58]

Members agreed that Congress could spend for disaster relief because it was in the general welfare. In addition, they frequently pointed out that determining the general welfare was Congress's exclusive province. As Illinois Republican Joseph Cannon argued in supporting relief following a flood on the Rio Grande in 1897: "In matters of this kind, involving the appropriation of money, Congress has unlimited power. Gentlemen on one

54. *Cong. Rec.,* 48th Cong., 1st sess., 1884, 15, pt. 3:2295. The debates over the permissibilty of disaster relief and the scope of the general welfare clause provide a marvelous example of what a number of scholars have described as "the Constitution outside the courts." This is particularly so given the highly explicit and repeated iteration of the dominant view that there was no judicial review of Congress's interpretation of the Clause. See Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999); Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge: Harvard University Press, 1999); Keith Whittington, "Extrajudicial Constitutional Interpretation: Three Objections and Responses," *North Carolina Law Review* 80 (2002):773–851.

55. *Cong. Rec.,* 48th Cong., 1st sess., 1884, 15, pt. 3:2296–97.

56. Ibid., 2295.

57. *Congressional Globe,* 39th Cong., 1st sess., 1866, 37, pt. 5:3919.

58. *Cong. Rec.,* 48th Cong., 1st sess., 1884, 15, pt. 2:1037.

side or the other may say that measures of this kind violate the Constitution; yet when we make an appropriation we are the judges of the propriety of the appropriation, and there is no power to withhold the money when it is appropriated."[59]

Though Cannon's assertion that under the Constitution it was for Congress alone to "judge . . . the propriety of the appropriation" may sound to modern readers as so far afield that it must have been unusual, in fact, it was a widely shared and oft-repeated interpretation of congressional power to tax and spend. In another example, Speaker Joseph Kiefer reminded the House in 1884 that, "The General Government has throughout its history selected extraordinary cases for granting relief. Where we shall stop, where the boundary line is, must always rest within the discretion of Congress."[60]

In the view of most members of Congress who spoke on the subject, if those judgments were subject to any review it was only by the electorate, and not the courts. The sole sign of any congressional anxiety regarding judicial review of disaster relief appropriations was the bare suggestion at the end of the debate over the 1921 Russian famine relief bill that the recent advent of the (now-constitutionally permissible) income tax might cause citizens "to appear in the Supreme Court to enjoin the disbursement of this money on the ground that Congress has exceeded its constitutional power."[61] Members often stated that even if the measure were unconstitutional (which they did not concede), they would gladly vote their sympathies and then throw themselves on the mercy of the "American people [who] from one end of the land to the other will say that Congress did the proper and right thing."[62] In this vein, Republican Samuel Randall of Massachusetts declared that he supported opening the relief operations of the Freedmen's Bureau to "suffering and starving" whites, particularly women and children, regardless of any prior disloyalty. "I shall not be ashamed to look [my constituents] in the face and say that in voting this appropriation I did it from the impulses of humanity and I venture that with one voice they will say to me 'well done good and faithful servant.'"[63]

The notion that the people were the ultimate judge of the legitimacy of appropriations decisions[64] led congressmen to present evidence of popular

59. *Cong. Rec.,* 55th Cong., 1st sess., 1897, 30, pt. 2:1470.
60. *Cong. Rec.,* 48th Cong., 1st sess., 1884, 15, pt. 3:2294.
61. *Cong. Rec.,* 67th Cong., 2d sess., 1921, 62, pt. 1:471.
62. Ibid., 566.
63. *Congressional Globe,* 40th Cong., 1st sess., 1867, 39, pt. 1:90.
64. The evidence presented here is consistent with what Kramer has called "popular constitutionalism," the notion that "the people themselves—working through or responding to their agents in the government . . . were responsible for seeing that the Constitution was

opinion in speeches to support or attack particular measures. In one particularly vivid example, Nebraska Populist William Allen read editorials from the *Omaha Bee* harshly critical of the Senate's decision a few days earlier to refuse $300,000 in drought relief to his parched state in the winter of 1895–96: "The rejection of the amendment to the agricultural appropriation bill . . . means that Nebraska need expect no Federal aid in caring for her drought sufferers. Senator Allen's proposition was perfectly legitimate and its adoption by Congress would have elicited only approval from the great mass of the people from whom the Federal Government really derives its revenue. There have been numerous precedents in its favor."[65] The amendment was resubmitted and promptly passed 31-17.[66]

The Sympathetic State. Relief proponents facing the rare legislator who was determined to make a constitutional objection often responded that the claim of the innocent victim on government aid was so compelling that it trumped such pedestrian concerns.[67] This drove some to articulate a theory of the state based upon compassion and charity. As a frustrated Lyman Trumbull declared in heated debate over the 1866 extension of the Freedmen's Bureau, "If you want to know where the constitutional power to do this is, and where the law is, I answer it is in that common humanity that belongs to every man fit to bear the name, and it is in that power that belongs to us as a Christian nation."[68] Other Republicans similarly found a kind of extra-constitutional governmental authority in the very necessity of the circumstances, the law of civilized nations, principles of sovereignty, and the ideals of Christian charity. A constitution that would

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properly interpreted and implemented." Larry Kramer, "The Supreme Court 2000 Term Forward: We the Court," *Harvard Law Review* 115 (2001): 11–12, 16. According to Kramer, judicial review in the early Republic was unaccompanied by any notion of judicial supremacy, and it was not until the period 1875–1905 that the Supreme Court became aggressive about asserting its dominion over constitutional interpretation. At least with respect to congressional spending in the general welfare, however, it appears that popular constitutionalism persisted much later than Kramer suggests. Indeed, the struggle he recounts over the Court's expanding reach during this period never materialized in the context of the General Welfare Clause, and as shown below the Court repeatedly ducked opportunities to reach the question and assert itself. Moreover, the writings of constitutional authorities during this period, including Thomas Cooley and many of the other key villains of the *Lochner* era, agreed that the Court had no power to review Congress's determinations on this question.

65. *Cong. Rec.,* 53d Cong., 3d sess., 1895, 27, pt. 4:2882.

66. Ibid., 2883.

67. As the examples given in this section indicate, such objections were raised only in unusual cases in which proponents sought to apply the precedent of disaster relief to an innovative context, such as the Freedmen's Bureau and the Blair Bill.

68. *Congressional Globe,* 39th Cong., 1st sess., 1866, 37, pt. 1:939.

bar such desperately needed relief, according to Iowa Republican Josiah Grinnell "is not worthy to be our great charter."[69]

Moreover, legislators frequently contended that the exigencies of the current catastrophe swamped their *own* constitutional objections.[70] For example, in an 1884 House debate over a proposal for $300,000 in aid after an Ohio River freshet, Republicans who were angry over Democratic opposition to the Blair Education Bill taunted Democrats seeking the flood relief by demanding that they articulate a constitutional basis for the measure. Instead, Ohio Democrat John Follett tartly replied, to laughter and applause from the Republicans, that "necessity knows neither law nor constitution and never did in this country."[71] His colleague Adoniram Warner told the packed chamber that "mingled with the appeals that come to us for help are the cries of children and the petitions for women homeless, shelterless, hungry, and in this presence I cannot stop to argue literal construction of the Constitution. I will take the side of mercy and risk it on that."[72] Isaac Jordan, also of Ohio, was even more blunt: "I do not know whether this bill is constitutional or not. We have no time to enter into a discussion of this question. While we would stand here debating it the floods would not abate and the people would perish."[73]

Nevertheless, Colorado Republican James Belford was gleeful at hoisting the Democrats on their own petard. Amid Democratic cries of "Vote! Vote!," the former Colorado Supreme Court Justice joined in mocking the Democrats to laughter and applause from the Republican side:

> Talk about Constitution! Talk about laws! Humanity is greater than any constitution which was ever formulated by any people. It is humanity for which constitutions are enacted and laws are made. And Paul put it right when he said the greatest of all the virtues is charity, either in the individual or the nation. Talk about state rights in a matter in the cloudy presence of a constantly

69. Ibid., 651.

70. Similar views were frequently expressed in a myriad of cases, including the 1921 appropriation of $20 million for Russian famine relief, when Senator Smoot responded to constitutional objections by saying that even if the relief was unconstitutional, if it would "keep millions from death" he would support it. *Cong. Rec.,* 67th Cong., 2d sess., 1921, 62, pt. 1:566. In another example, Representative McPherson supported the unsuccessful plea for $50,000 in work relief for the Sea Islands cyclone victims. He responded to constitutional objections, saying, "whether the bill is constitutional or unconstitutional, it is something that appeals to our humanity. Certainly if the appropriation proposed is not a constitutional appropriation of money, it is one which the Congress of the United States has gone outside of the Constitution more than 20 times since I have been a member of this body and I am willing to do it again." *Cong. Rec.,* 53d Cong., 1st sess., 1893, 25, pt. 2:3077.

71. *Cong. Rec.,* 48th Cong., 1st sess., 1884, 15, pt. 2:1033.

72. Ibid., 1039.

73. Ibid., 1038.

> accumulating calamity! Suppose my friend from Connecticut had lived in the days of Noah . . . I suppose he would have referred that drowning crowd to the city council of Nineveh . . . Now in the name of Heaven—not in the name of the Constitution, but in the name of that sweet broad rainbow-robed charity which would make us better and brighter and more generous men—let us make this appropriation. [Applause.][74]

In response, Texas Democrat John Reagan lamely attempted to distinguish disaster relief for the innocent victims "who may be dying now for the want of it," from legislation, like the Freedmen's Bureau and the Blair Bill, that "trenches upon the powers and rights of the states and upon the liberties and securities of the people."[75] In the former case, the Democrats were in agreement that a higher law of mercy was applicable even if "it might be difficult to point to a precise warrant in the Constitution" for relief.[76] Despite the Republican needling of the Democratic proponents of states' rights, in truth the Republicans agreed with Democratic relief proponents that disaster appropriations were clearly in the general welfare,[77] and the bill passed overwhelmingly.[78]

III. Innovations

Every successful claim enhanced the appeal of disaster relief as a precedent for those seeking federal funds, whether for disasters or for other purposes. But of course the indeterminacy of this distinction was precisely what made it tempting to seek to breach it. The nineteenth and early twentieth centuries saw a series of efforts to draw the circle of disaster more broadly than in the past, in order to fit within it various calamities for which federal relief was desired, if not seen as automatically warranted. The first such effort involved the Freedmen's Bureau, initially justified under the War Power and then, after the cessation of hostilities, as a response to the disaster that had befallen black, and even some white, southerners. The last began with Wisconsin Senator Robert M. LaFollette Jr.'s response to drought conditions in the winter of 1930 and served as the vanguard of the effort to cast mass unemployment as a disaster on a national scale in the 1930s.[79]

74. Ibid., 1036.
75. Ibid., 1037.
76. Ibid.
77. Ibid., 1034.
78. The vote was 234–12. Ibid., 1040.
79. Landis, "Fate, Responsibility, and 'Natural' Disaster Relief."

The Freedmen's Bureau

> No approximately correct history of civilization can ever be written which does not throw out in bold relief, as one of the great landmarks of political and social progress, the organization and administration of the Freedmen's Bureau.[80]
>
> W. E. B. DuBois, 1901

On February 5, 1866, another Thomas Eliot stood on the floor of the House and responded to arguments that the bill extending the life of the Freedmen's Bureau was unconstitutional. Massachusetts Representative Thomas Dawes Eliot (a distant relation to Perkins's deputy, Thomas Hopkinson Eliot) was the chairman of the Committee on Freedmen's Affairs and was charged with shepherding the bill through the House. He sarcastically replied to critics that "[t]his would be a marvelous misfortune if true, and would prove that our Constitution, ordained to promote the general welfare and secure the blessings of liberty, had not within itself the power to do its work."[81]

Over in the Senate, former Treasury Secretary William Fessenden sounded a similar theme, asserting that "we have the power to appropriate money; and though we do not find a specific power to appropriate money for this particular purpose; it is yet an object of government, a thing that the government and country must provide for and there is no other way of doing it."[82] Fessenden and Eliot both argued that Congress was not restricted to spending in the service of enumerated powers; it was clearly in the general welfare to relieve the widespread starvation and social dislocation that followed in the war's train: "Will you make no appropriations for the benefit of these people; not only the colored people who have thus been thrown upon the world but the refugees who have been driven by the war from their states, out of their possessions and reduced to poverty and misery?" Fessenden demanded. "All the world would cry shame upon us if we did not."[83] Plainly, to Eliot and Fessenden, the provision of the Constitution empowering Congress to appropriate for the general welfare was intended to permit it to meet just such an unforeseen crisis.[84]

The Freedmen's Bureau was the mechanism by which they proposed to do it. Inaugurated in March 1865, it was located administratively within the War Department and charged with control of all freedmen and abandoned lands in the rebel states during the war and for a period of one year

80. W. E. B. DuBois, "The Freedmen's Bureau," *Atlantic Monthly* 87 (1901): 354, 357.
81. *Congressional Globe,* 39th Cong., 1st sess., 1866, 37, pt. 1:656.
82. Ibid., 365–66.
83. Ibid., 365.
84. Ibid.

afterward. It was originally intended to address the problem of "contraband"—runaway or abandoned slaves who crossed Union lines by the hundreds of thousands and swarmed behind the Union troop movements in search of food, work, and safety—by providing relief and by leasing abandoned farm lands to the former slaves.[85] After the war's end it took on a number of ambitious projects, some more successful than others, including land reform, implementing a system of free labor, constructing social institutions such as courts, hospitals, and schools for blacks, punishing violations of the freedmen's civil rights, and providing relief.[86]

It would be impossible to overstate the scale of the destitution in the South following the war, when, in DuBois' words, "all the Southern land was awakening as from some wild dream to poverty and social revolution."[87] Relief was thus the most important first task of the Bureau: "to subsist the many thousands of unemployed while work was being found for them."[88] The Freedmen's Bureau Act had specifically provided that the commissioner (General Oliver O. Howard was appointed shortly after the Act's passage) may "direct such issues of provisions, clothing, and fuel, as he may deem needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children, under such rules and regulations as he may direct."[89]

In order to carry out the enormous job of relieving the millions of impoverished southerners, to say nothing of the other operations of the Bureau, Howard created an elaborate bureaucratic structure, with headquarters in the nation's capital.[90] Under this system, there was a quartermaster general in Washington, and most states had a disbursing officer, quartermaster general, and chief of commissary. Each state was divided into districts, headed by a sub-assistant commissioner, and the districts were often divided into sub-districts with an officer and an agent. Howard published extensive regulations

85. Robert Bremner, *The Public Good: Philanthropy and Welfare in the Civil War Era* (New York: Alfred A. Knopf, 1980), 98.

86. George Bentley, *History of the Freedmen's Bureau* (Philadelphia: University of Pennsylvania Press, 1955); Paul Skeels Pierce, *The Freedmen's Bureau: A Chapter in the History of Reconstruction* (New York: Haskell House Publishers, [1904] 1971); Eric Foner, *Reconstruction: America's Unfinished Revolution* (New York: Harper & Row, 1988).

87. DuBois, "The Freedmen's Bureau," 359.

88. Bentley, *History of the Freedmen's Bureau,* 76; Mary Farmer, "'Because They Are Women': Gender and the Virginia Freedmen's Bureau's 'War on Dependency,'" in *The Freedmen's Bureau and Reconstruction: Reconsiderations,* ed. Paul Cimbala and Randall Miller (New York: Fordham University Press, 1988), 165.

89. 13 Stat. 507 (1865).

90. There were four divisions: land, records, financial affairs, and medical. Howard initially appointed nine assistant commissioners (with three more a few months later), to govern Bureau operations in the states where the Bureau operated.

in numerous "Circulars" and also issued an operations manual governing the actions of all agents.[91] By midsummer 1865, Howard had obtained commissary stores for "rations" and promulgated regulations governing eligibility screening and distribution.[92] In most states, Bureau agents issued monthly ration "tickets" to recipients who met prescribed eligibility requirements.[93] In August 1865, the Bureau was issuing 148,000 rations every day; at the end of the year, it was still supplying 50,000 people per day.[94]

The Bureau's relief operations were quickly attacked from all sides. Clinton Fisk, assistant commissioner for Kentucky and Tennessee complained that rebels were "swindling" the Bureau by pretending to be loyal refugees, while the southern press excoriated it as a "bureau of charity" for giving free food, clothing, and other benefits to the black laborers who, they alleged, would not work if they could obtain government relief.[95] Howard himself was ambivalent toward relief. Though he expressed sympathy for the conditions of the people, he also worried about "pauperizing" the freedmen, and ordered that rations be cut on a number of occasions in order to induce the freedmen to accept labor contracts at low prices.[96] In August 1865, Howard halted government relief to all whites who were not, strictly speaking, refugees.[97] A month later he directed agents to "carefully

91. Victoria Marcus Olds, "The Freedmen's Bureau as a Social Agency" (Ph.D. diss., Columbia University, 1966), 117.

92. Under regulations issued by Howard, a ration was defined as a week's worth of groceries for an adult (children received a half ration) made up of specific amounts of certain foods, including pork or beef, flour, bread, cornmeal, hominy, vinegar, soap, sugar, salt, and, pepper. *Circular No. 8, Records of the Freedmen's Bureau,* reprinted in House Exec. Doc., 39th Cong., 1st sess., 1866, no. 11, p. 47.

93. Howard's regulations required "rigorous screening" of applicants for rations. Bureau agents were to "arrive at a correct conclusion of how many are actually in a starving condition, and if possible, how many have died from want of food." Agents were to visit the homes of applicants, and examine their circumstances carefully for signs of either fraud or pauperism. Olds, "The Freedmen's Bureau as a Social Agency," 197. Screening procedures varied somewhat from state to state.

94. Bentley, *History of the Freedmen's Bureau,* 76; Bremner, *The Public Good,* 117. One observer noted that "the streets in front of commissary offices were sometimes blocked with vehicles bringing men many miles" to obtain rations. Pierce, *The Freedmen's Bureau,* 94.

95. Bentley, *History of the Freedmen's Bureau,* 77.

96. Ibid.; Farmer, "'Because They Are Women,'" 167. In October, 1865, Fisk ceased issuing rations in order to "force[] the idle to work or starve." Bentley, *History of the Freedmen's Bureau,* 77. An agent in Greenville, S.C. simply refused to distribute rations and refused to requisition them even when his superior instructed him to do so. He claimed that he was "refusing to feed the suffering lest I should encourage the lazy." Olds, "The Freedmen's Bureau as a Social Agency," 199. According to Pierce, Howard ordered relief programs terminated when freedmen refused to harvest the cotton crop in 1866. Pierce, *The Freedmen's Bureau,* 95.

97. Farmer, "'Because They Are Women,'" 166.

investigate the matter of issues of Rations to Refugees and Freedmen and order their discontinuance whenever in their judgment such issues can be dispensed with."[98] After October 1865, Howard decreed that relief was to be strictly limited to cases of extreme suffering.[99]

This retrenchment proved impossible to maintain in the face of widespread starvation in the winter of 1865–66. Many Bureau agents continued to distribute rations even after Howard's orders to stop, particularly following a string of floods and storms in the spring of 1866.[100] Though aid was reduced, as Pierce notes, "in many states it was deemed impracticable and inhumane to give the order full force."[101] In the first fifteen months of its operation, the Bureau distributed approximately 13 million rations, two-thirds of which went to freedmen.[102] Howard estimated the cost of the food, clothing, and medical supplies distributed by the Bureau during this period at over $2 million.[103] In addition, the Bureau provided free transportation (either to find work or to return home) to nearly 10,000 people during the same period.[104]

As noted above, Congress had provided in the original legislation that the Bureau would operate during the war and "for one year thereafter."[105]

98. Ibid.; see also Olds, "The Freedmen's Bureau as a Social Agency," 200.

99. Bremner, *The Public Good,* 116; Pierce, *The Freedmen's Bureau,* 95–96.

100. Farmer, "'Because They Are Women,'" 169–70; Bremner, *The Public Good,* 120; Pierce, *The Freedmen's Bureau,* 96; Bentley, *History of the Freedmen's Bureau,* 139. Bureau agents in Louisiana and Alabama distributed thousands of rations following flooding and drought. Alabama's assistant commissioner told Howard that it was "a matter of life and death." Arkansas' assistant commissioner considered complying with Howard's order and concluded that to do so would cause starvation. Bentley, *History of the Freedmen's Bureau,* 139.

101. Pierce, *The Freedmen's Bureau,* 96.

102. Foner, *Reconstruction,* 152; Pierce, *The Freedmen's Bureau,* 98–99. There was variation between states in distribution patterns. During the first year of operation, the Alabama Bureau distributed more than twice as many rations to whites as to blacks. Alabama's eligibility requirements called for local justices of the peace to draw up lists of the persons desperately in need and required those people to swear an oath that they would suffer if they did not receive aid. Howard eventually discontinued the practice of using local political establishments to determine eligibility because he thought it led to patronage and unfairly excluded freedmen in favor of whites. Olds, "The Freedmen's Bureau as a Social Agency," 203; Bentley, *History of the Freedmen's Bureau,* 143.

103. Pierce, *The Freedmen's Bureau,* 99 n 4.

104. Ibid., 102. The transportation aid was intended to move freedmen from the cities (where they had congregated) back to the plantations (which were in need of labor), and thus off the relief rolls. One strategy used by the Bureau was to refuse to issue ration tickets to any able-bodied freedmen who refused to be transported to areas where there was a demand for their labor. Farmer, "'Because They Are Women,'" 171.

105. There was some controversy over determining precisely when the clock had begun to run on the Bureau's life. The last confederate troops officially surrendered in May 1865.

The Bureau's relief programs were intended to be temporary, emergency measures,[106] remaining in operation only until the state governments were reestablished, solvent, and able to assume the care of the poor, now including poor freedmen. Howard was particularly keen to turn poor relief over to local authorities; however, this proved impossible.[107] Bureau agents reported that there would be widespread famine without federal intervention.[108] Northern Freedmen's Aid societies demanded that Congress extend the life of the Bureau, and Howard sent a request to Congress for an appropriation of $11 million for the coming year.[109]

The task of extending the life and resources of the Bureau fell to the moderate Republican faction led by Lyman Trumbull and William Fessenden in the Senate, and John Bingham in the House. The Radicals, led by Thaddeus Stephens in the House and Charles Sumner in the Senate, had lost control of the thirty-ninth Congress when they forced the issue of black suffrage. According to Eric Foner,[110] the moderates did not share the radical vision of the Civil War as a "golden opportunity" for consolidating and extending the power of the national government or ensuring the political equality of the freedmen. Instead, they sought to carry out Reconstruction, while preserving insofar as possible traditional principles of federalism.[111] Still, the Bureau extension bill they proposed was far-reaching. Trumbull, the chair of the Judiciary Committee and a lawyer who had drafted both the Thirteenth Amendment and the Confiscation Act wrote the bill with Howard.[112] It would have extended the life of the Bureau indefinitely and

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However, the Union was engaged in scattered clean-up operations for several more months. By the spring of 1866, however, it was clear that the Bureau's days would be numbered if Congress did not authorize an extension.

106. Farmer, "'Because They Are Women,'" 166.

107. Bremner, *The Public Good,* 120. Howard did not think that local governments would assume responsibility for indigent relief until the federal government withdrew from the field. Foner, *Reconstruction,* 152. However, the South had lacked a poor relief infrastructure even before the Civil War; poor whites had tended to migrate to the North in search of work rather than compete with slave labor, which depressed wage rates. Then the war destabilized and bankrupted the southern governments leaving them unable to take responsibility for the poor. Olds, "The Freedmen's Bureau as a Social Agency," 23.

108. Olds, "The Freedmen's Bureau as a Social Agency," 202.

109. Bentley, *History of the Freedmen's Bureau,* 115. Howard's funding request had set off howls of protest in the southern press. The Bureau had no appropriation during the first year because it was supposed to sustain itself through the sale and lease of confiscated and abandoned lands. Johnson's policy of restoring property to prior owners under a general amnesty stripped the Bureau of this means of support and made an appropriation necessary.

110. Foner, *Reconstruction,* 242–43.

111. Ibid., 242.

112. Bentley, *History of the Freedmen's Bureau,* 115.

expanded its jurisdiction to the entire nation, dramatically increasing both the size of the bureaucracy and the scope of its operations.[113]

Thus, the moderate Republican proponents of extending the mandate of the Freedmen's Bureau found themselves in a potentially delicate political situation in January 1866, despite their strength in the Reconstruction Congress. While the war was ongoing, and even in its immediate aftermath, providing aid and protection to former slaves could be justified in strategic as well as humanitarian terms: feeding and clothing blacks lent moral weight to the North's complaint against the South, mollified a potentially explosive force, and provided an incentive to slaves still working in the South to withhold their labor from the Confederate economic machine. Even the Bureau's highly bureaucratized and centralized relief operations, which fed and clothed millions of American citizens—functions that Howard conceded were "abnormal to our system of government"[114]—were easily shoehorned into Congress's War Power, which was portrayed as nearly infinite.

But now the war was over. Democrats were asking hard questions about the constitutional basis for an institution like the Bureau in peacetime. The attack was led in the Senate by Democrat Thomas Hendricks of Indiana, who would later become vice president under Grover Cleveland. He demanded that Trumbull tell the Senate "[w]here is the power of the General Government to do this thing? I have understood heretofore that it has never been disputed that the duty to provide for the poor, the insane, the blind and all who are dependent on society rests upon the States and that the power does not belong to the General Government. What has occurred then in this war, that has changed the relation of the people to the General Government?"[115] Reverdy Johnson of Maryland and Garrett Davis of Kentucky joined Hendricks's objections. Davis, who had been elected as a Unionist to fill the seat vacated when J. C. Breckinridge was expelled for supporting the rebellion, insisted that the support of paupers was a state, not federal, responsibility and assailed the Bureau as "wholly heretical and not having a figment of authority in the Constitution."[116]

113. It also would have granted permanent title to the freedmen who had been given leases to land in the South Carolina Sea Islands by Sherman during the war, set aside vast tracts of public lands for allotment to the freedmen, and established military jurisdiction and military courts to try violations of the freedmen's civil rights under the Black Codes.

114. Foner, *Reconstruction,* 152.

115. *Congressional Globe,* 39th Cong., 1st sess., 1866, 37, pt. 1:315. Some Republicans like Edgar Cowan thought that "[i]f it was only to operate for the relief of the refugees, of course, I suppose there could be no valid objection to it," but resisted the far more controversial provisions—for example, those establishing military courts and setting aside land for freedmen's homesteads—that he contended trenched on the police power of the states. *Cong. Rec.,* 39th Cong., 1st sess., 1866, 37, pt. 1:334.

116. Ibid., 370.

Trumbull, Eliot, and other Bureau supporters began to cast about for a constitutional provision that could sustain their bill. Suggestions of the continued use of the War Power were unavailing (Senator Guthrie exclaimed that the war had been over for nine months!), and they turned to Congress's power to provide for the general welfare through appropriations.[117] Trumbull claimed that "whenever in the history of this Government there has been thrown upon it a helpless population that must starve and die but for its care," aid had been provided. He and his allies cited as precedents relief appropriations for Indians, land grants for schools, and the distribution of seeds through the Bureau of Agriculture. While they did not refer directly to the history of disaster relief in this particular debate (they would do so extensively during the next Bureau appropriation debate a few months later), they repeatedly described the freedmen as the deserving, innocent victims of both slavery and emancipation (which had "thrown" them upon the world in a helpless condition) who were clearly not to blame for their miserable condition and claimed for the federal government both moral duty and the constitutional power to respond to such a vast humanitarian crisis.

The extension bill passed on February 9, 1866; President Johnson vetoed it the next day.[118] In his veto message, Johnson echoed congressional Democrats' concerns about the Bureau's constitutionality in peacetime. He wrote that "a system for the support of indigent persons in the United States was never contemplated by the authors of the constitution, nor can any good reason be advanced why, as a permanent establishment, it should be founded for one class or color of our people more than another."[119] Johnson had initially supported the Bureau as a temporary wartime necessity; however, he styled himself as a strict constructionist and had voted against disaster relief while in the Senate.[120] The override vote narrowly failed. However, a slightly diminished version of the bill passed over a second veto

117. Ibid., 321, 365–66, 369, 630, 651, 656.

118. According to Bentley, opposition to the bill was stiff before it passed. It was denounced by Lincoln's former attorney general Edward Bates as a "bill of enormities" that was the "consummation of lawless radicalism and lawless contempt for the constitution." Bentley, *History of the Freedmen's Bureau,* 118. Nevertheless, Foner contends that the moderates were shocked at the veto; Johnson was expected to sign the bill and all his allies had voted for it. Foner, *Reconstruction,* 247. It was this veto, along with the veto of the Civil Rights Act, that marked the battle lines between Congress and Johnson and ultimately led to his impeachment.

119. Ibid., 916.

120. Johnson had voted against the 1847 Irish famine relief bill. Foner, *Reconstruction,* 178, 216–18.

on July 16, 1866.[121] At that time, Congress also passed a separate measure appropriating nearly $7 million, over half of which was for relief.

The rhetoric of blameless victimization by forces beyond the control of the purported victims was never more potent than in the thicket of racial antagonism surrounding the Freedmen's Bureau. From the very beginning, proponents of federal relief for the newly emancipated slaves were careful to cast them as the innocent victims of what Representative Cole called "this crime scarcely second in magnitude to the crucifixion."[122] Republicans described the freedmen as "orphan children" who were "sober and industrious."[123] "It is not their crime or their fault that they are so miserable," argued Connecticut Representative Hubbard, in favor of the 1866 extension bill. "From the beginning to the present time they have been robbed of their wages, to say nothing of the scourgings they have received."[124] Bureau advocates were quick to assign blame for the continued poverty of the South's black population to such factors as the war, southern white hostility, and the degraded conditions of slavery—illiteracy, dependency, irreverence—that Republicans asserted had left them ill prepared to care for themselves.

Bureau opponents adopted the opposite stance, relying on racial imagery to describe the black population as the victim only of its own inherent vices. During the debate over the 1866 effort to extend the life of the Bureau by two years, Senator Saulsbury avowed that white people were being unfairly taxed "to support in idleness a class who are too lazy or too worthless to support themselves."[125] Kentucky Senator Davis objected that the relief efforts of the Bureau would "establish a great system of lazzaroni . . . of poorhouses for the support of lazy Negroes all over the Southern states."[126] Fears that "lazy and worthless men will gather around the Freedmen's Bureau to be fed and clothed"[127] dominated the House debate over relief. Indeed, these concerns were so deeply felt in Congress that before it passed the 1866 extension bill over Johnson's veto, an amendment was adopted providing that "no person shall be deemed destitute, suffering, or dependent on the government for support within the meaning of the Act who, being

121. The revised bill extended the life of the Bureau for two years rather than indefinitely, permitted the extension of jurisdiction only into former slave states, including those that had remained loyal (Maryland and Kentucky) rather than to every state, and tightened the eligibility criteria for relief.

122. *Congressional Globe,* 38th Cong., 1st sess., 1864, 35, pt. 1:742.

123. Ibid., 773.

124. *Congressional Globe,* 39th Cong., 1st sess., 1866, 37, pt. 1:630.

125. Ibid., 345.

126. Ibid., 396.

127. Ibid., 638.

able to find employment could, by proper industry, or exertion avoid such destitution, suffering, or dependence."[128]

These issues were magnified in 1867, when Congress debated extending the eligibility for Bureau relief to all white southerners regardless of prior disloyalty. Radicals vigorously resisted this move to expand the mission of the Bureau but a coalition of moderates, who contended that they were motivated by humanitarian concerns, and Democrats joined together to pass it. There was widespread crop failure throughout the South, and reports of famine were filtering into Congress.[129] In the face of accounts coming from Howard and others that "they have seen lying upon the roadside men, women and children in a state of starvation, dying for want of food"[130] there was little support for denying aid. As in other cases, constitutional doubts were ostentatiously cast aside in the name of suffering humanity[131] and legislative precedents were listed, including prior Bureau relief appropriations, Irish famine relief, and various measures for the relief of an 1867 fire in Portland, Maine.[132]

A strong current of support for what I have here termed the "Sympathetic State" ran through the debates. For instance, Vermonter Frederick Woodbridge argued that the Constitution was of no relevance because relief was justified under the laws of sovereignty, which "authorizes a government to do what its own preservation demands. . . . it would be so dark a stain upon the honor of our country and so huge a blot upon the civilization of the age by placing it upon the record of this House that the Congress of the United States refused to give bread to nearly sixty thousand starving people who

128. Ibid., 655. The anxiety that federal relief would disrupt the southern labor market was sometimes repeated in connection with Mississippi flood relief, as when the *New York Times* inveighed in 1882 against the "demoralizing" effects of ration distribution on black labor. Still, the Times approved the relief so long as it was issued "only to those willing to work." "The Floods in the South: No Change in the Situation—The Demoralizing Effects of Free Rations," *New York Times,* March 16, 1882, at 3.

129. *Cong. Rec.,* 40th Cong., 2d sess., 1867, 39, pt. 1:40, 42, 45.

130. Ibid., 40.

131. Ibid., 89, 90, 208. What is most striking about both the congressional debates and the press coverage of them is the lack of any serious constitutional controversy; these appropriations were taken by everyone to be well within the scope of Congress's authority. Indeed, a year later, when the Bureau requested a further appropriation, the *New York Times* editorial noted that "were the question simply one of relief it would be only necessary to determine the precise nature and extent of the emergency and the best means of rendering whatever relief might be required. These points . . . will have to be settled when Congress enters upon the question practically." In this case, however, the *Times* worried that any further relief threatened "to make pets of the freedmen" and would pauperize them, so it advocated work relief instead. Editorial, "Southern Relief Question—Considerations for Congress," *New York Times,* 6 January 1868, 1.

132. *Cong. Rec.,* 40th Cong., 2d sess., 1867, 39, pt. 1:46–47, 85, 89, 211.

live under the same government with us."[133] After the bill passed, the *New York Times* (which had covered the controversy extensively) agreed with this vision of the role of government and editorialized that "[h]umanity has triumphed over partisan hate, and our Government is spared the disgrace of rejecting the appeal for relief which comes from the Southern people."[134]

Race figured in this contest in ways that we might now find surprising, with opponents alleging that the southern *whites* were inferior, lazy, and unwilling to work for their own support, as contrasted with images of the hardworking slave robbed of his rightful wages. For example, Representative Logan ridiculed the idea that the national government should provide relief funds to white former slave-owners, saying "[t]here is a class of people in the South that never did make bread, and never will, who will always be starving if we allow them to become pensioners. If they had used ordinary industry and energy, they would not today be in want of assistance to save them from starvation."[135] Representative Schneck proposed an amendment to pay for the relief by taxing the rich of the south, saying:

> [W]henever work is to be done, wherever honest labor is to be put forth by men for their own support, no people are more apt to call upon Hercules instead of putting their own shoulder to the wheel than these same southern rebels. While they had their Negroes to work for them we did not hear this cry for assistance, but this means of support being taken away none are more ready than they to make Negroes of the Northern mudsills[136] who are expected to work and pay taxes for the support of those who despise them.[137]

General Benjamin "Beast" Butler, who was hated by southerners for his treatment of the civilian population while military governor of occupied New Orleans during the war, asked whether the workers of the North should be "taxed to support in lazy whiskey drinking idleness the self-styled aristocracy of the South?"[138] Nevertheless, proponents repeatedly emphasized

133. Ibid., 208.

134. Editorial, "Relief for the South," *New York Times,* 23 March 1867, 1.

135. *Cong. Rec.,* 40th Cong., 2d sess., 1867, 39, pt. 1:88.

136. A "mudsill" was literally the lowest log in the wall of a cabin—the log that lay in the mud and supported the rest of the building. During the Civil War, the term came into use as a derogatory name for the lowest class of laborers. It was adopted as a term for low-level enlisted soldiers of the North. Oxford English Dictionary Online 2003, http://dictionary.oed.com (last visited January 7, 2004).

137. *Cong. Rec.,* 40th Cong., 2d sess., 1867, 39, pt. 1:259.

138. Ibid., 237.

that the war was not the fault of the innocent white women and "unoffending little children"[139] and that they, at least, deserved relief.

The debates over the 1867 southern relief bill illustrate the complex racial politics of the Freedmen's Bureau as a precedent in two different ways. First, the extension of federal relief to blacks for the twin "disasters" of slavery and emancipation drove Democratic congressmen to demand the same sort of largess for their white constituents who were in their view at least as deserving as the "colored lazzaroni." The bloody shirt of the Freedmen's Bureau would thus be waved during many future debates over federal relief.[140] Second, the Bureau created a precedent for the assumption of federal responsibility for indigent blacks that the southern states, unwilling to provide any subsistence benefits to former slaves, came to rely upon. Following numerous floods, storms, cyclones, and other events, southern Democrats repeatedly requested federal relief for the "helpless colored people" who had lost out. Though they sometimes acknowledged that their state should provide for the victims, they were obviously eager to avoid such a result and relied instead upon northern sympathies for the freedmen to provide funds from the national treasury.[141]

It remains tempting to regard the Bureau as a singular event, a creature of a time when the animus of the Civil War reordered, albeit temporarily, the racial hierarchy of American society.[142] Few historians of the American

139. Ibid., 90.

140. For instance, during House debate over the 1884 Ohio River flood relief bill, a number of democratic congressmen argued that Republicans could not object to relieving "the poor and suffering whites on the Ohio" given their history of supporting relief for blacks through the Bureau and otherwise. Cong. Rec., 48th Cong., 1st sess., 1884, 15, pt. 2:1037.

141. Following a Mississippi River flood in 1884, northern Republican senators accused southern states of refusing to provide flood relief to blacks and demanding federal relief instead. The southerners responded by taunting the Republicans about the Bureau expenditures and Republican commitment to the "wards of the nation." Cong. Rec., 48th Cong., 1st sess., 1884 15, pt. 4:4659; Cong. Rec., 53d Cong., 1st sess., 1893, 25, pt. 2:3038. Senator Butler of South Carolina asked relief for 30,000 black victims of a cyclone because the state would likely not do so and "there is bound to be very great suffering among those people."

142. Before we conclude that whites have enjoyed no particular advantage over racial minorities in obtaining disaster relief, we should recall that support for aiding blacks but not whites was very limited. Indeed, as described above, by 1867 the original relief mandate of the Bureau had been transformed from an agency devoted to the specific benefit of the freedmen into a distribution channel for general relief to the South. As detailed in my previous work, successful appeals for disaster relief must describe the claimants as blameless victims of the vicissitudes of fate. Yet blacks and other racial minorities have more often than not been denied, for reasons having nothing to do with disaster relief per se, the role of moral innocent. Because the status of minorities is rooted in particular circumstances of race and politics, rather than in the relatively fixed logic of blame, the ability of members of disfavored racial groups to lay claim to resources varies over time. Thus, it was easier for congressional advocates for the freedmen to describe slavery as a disaster deserving

welfare state have taken up W. E. B. DuBois' invitation to "throw out in bold relief" the role of the Freedmen's Bureau in American political development. An unpublished dissertation from 1966[143] noted that the Bureau was clearly the first federal public assistance agency, yet scholars of the welfare state had ignored it. This neglect has remained uncorrected in the thirty-five years since that observation, despite a veritable frenzy of effort aimed at ferreting out the nineteenth-century precursors of the welfare state and important "constitutional moments" in state development.

However, many people with practical aims, including those designing and defending the New Deal, saw the Bureau as a key element in a history of social provision that would validate other relief efforts, both modest and massive. In addition to the lowly status of its "victims"—if the federal government could aid blacks, surely it could relieve whites in dire circumstances—the Bureau showed that the precedent of disaster relief was sufficiently flexible to authorize quite radical departures from traditional principles of federalism, given a big enough "disaster." And since the disaster to which the Freedmen's Bureau responded was, at root, one of massive unemployment in the wake of the collapse of the South's economy, the Bureau was of particular interest to later advocates like LaFollette, Perkins, and Eliot, who needed authorizing precedents for the relief of unemployment.

The Blair Education Bill

The Freedmen's Bureau quickly became assimilated into the line of precedent as an outpost that could be used both to validate less far-reaching measures and to tilt the balance in favor of other expansive proposals. An example of the former came even before passage of the Bureau extension bill, when Bureau opponents in the Senate proposed $50,000 in fire relief for the residents of Portland, Maine.[144] In support of the aid bill, propo-

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of relief in 1865 than at perhaps any time since then, and that ease was short-lived. What seems enduring is the fact that racial minorities in the American state have, with the brief exception of the immediate aftermath of the Civil War, always have a less certain possibility of success at characterizing themselves as blameless victims than do whites, even when facing otherwise identical exigencies. Moreover, members of minority groups often see their claims challenged, like those of the former Rebels in 1867, as a consequence of the simple binary structure of the disaster narrative itself, in which there are only two roles—victim and disaster. If minority claimants are displaced from the role of victim by the logic of the racial hierarchy, they are available to fill the only remaining narrative role, that of "disaster." See Landis, "Tried by Fire," 1025–27.

143. Olds, "The Freedmen's Bureau as a Social Agency."

144. *Congressional Globe,* 39th Cong., 1st sess., 1866, 37, pt. 5:3916–18.

nents marshaled a stream of precedents capped now by the enormous relief expenditures of the Bureau. This incorporation of the Freedmen's Bureau into the line of "ordinary" disaster relief solidified its role in the stream of federal relief precedents. It was then available to serve as a precedent in support of other efforts at innovation and extension, including some that were less successful than the Bureau itself.

The first such proposal was the Blair Education Bill, which was unsuccessfully introduced in Congress for a dozen years from 1880 to 1892 (it passed the Senate three times but was repeatedly blocked in House committees). The Blair Bill sought to provide federal funding for common, or public, schools in order to counter the widespread illiteracy, particularly among southern blacks and poor whites, captured in the 1880 census.[145] As passed by the Senate in 1884 (and unchanged in subsequent years) it would have provided $10 million in aid to local schools in the first year, which would be gradually reduced over a period of seven years, for a total appropriation of some $77 million.[146]

Although it has long been ignored by historians,[147] Blair's proposal was probably the single most hotly debated political issue in the 1880s. It had deep support around the country, including in the South, among labor, farmers, and in the business community. Petitions in support of the bill poured in to Congress,[148] and newspapers all over the country editorialized for and against it. According to Gordon Lee[149] southern papers supported the bill and "Senators who opposed the bill on the grounds of unconsti-

145. Gordon Lee, *The Struggle for Federal Aid, First Phase: A History of the Attempts to Obtain Federal Aid for the Common School 1870–1890* (New York: Bureau of Publications Teachers College, Columbia University, 1949); Allen Going, "The South and the Blair Education Bill," *Mississippi Valley Historical Review* 44 (1957): 267; Bremner, *The Public Good.*

146. Lee, *The Struggle for Federal Aid, First Phase,* 88.

147. Going, "The South and the Blair Education Bill."

148. Hundreds of petitions in support of the Blair Bill were sent to the House Education Committee in an effort to get the provision out of committee for a vote. The petitions were pre-printed forms that readers tore from the pages of magazines such as *The Continent,* which printed one such document in 1888. Readers then filled them with signatures and sent them to Congress, such as one from "97 citizens of (Holyoke) Massachusetts, Among these are 39 voters." The form language of the petition contends that widespread illiteracy "endangers the general welfare" and asks for "an appropriation from the Treasury of the United States for temporary aid" to the schools. Petition, Citizens of Holyoke, Massachussets to Representative F. Rockwell, undated, 1888, NARA, RG 233, HR 50A-H7.1, box 129. Many emanated from the south, such as an 1884 memorial from the citizens of North Carolina, printed and distributed by the State Department of Public Instruction. Memorial of Citizens of North Carolina to the Congress of the United States for National Aid to Popular Education, March 14, 1884, HR48A-H8.1, box 140.

149. *The Struggle for Federal Aid, First Phase,* 132.

tutionality were bitterly castigated" in editorials. One Virginia newspaper editor threatened to turn the Democrats out of office for opposing the bill, while the *Nation* and the New York papers, both Democrat and Republican, opposed the bill because it would erode local responsibility for education. The debate "brought the federal aid question squarely to the forefront of much of American editorial thought."[150] Blair argued to the Senate during the 1886 debates that "the measure has been generally and thoroughly discussed throughout the whole country and probably public sentiment is more largely in favor of this bill than was even known to be the case with any other of like importance in the history of American legislation."[151]

The Blair Bill's supporters repeatedly called on the history of disaster relief for two purposes: to show that Congress had the authority to spend federal funds for purposes it deemed necessary and to argue that illiteracy qualified as the kind of "disaster" to which Congress had already responded, notably in the case of the Freedmen's Bureau. For example, in the 1886 Senate debate, Howell Jackson of Tennessee defended the bill as "warranted by the express language of the Constitution, . . . approved by the unquestioned weight of high authority, . . . and sanctioned by the contemporaneous and continued practice of the government," referring to spending for disaster relief under the General Welfare Clause.[152] Similar arguments were made in each of the four debates over the bill in 1884, 1886, 1888, and 1890.

The fact that disaster grants were for temporary emergency relief prodded Blair and other supporters of the education bill to cast illiteracy and its amelioration as a similar emergency demanding similar measures. This shift was both rhetorical—for instance, Blair in 1884 called illiteracy a "volcano"—and practical.[153] The limited time frame of Blair's proposal itself reflected this need; proposals made in the 1870s calling for a permanent federal educational fund were defeated because they were widely seen as unconstitutional and unprecedented. Seeking to take advantage of the authorizing precedent of disaster relief, however, Blair and his allies advocated for direct appropriations out of the general revenue to meet the temporary emergency of illiteracy.[154] This strategy was largely success-

150. Ibid., 128.

151. Ibid., 147.

152. *Cong. Rec.,* 49th Cong., 1st sess., 1886, 17, pt. 2:1768.

153. Lee, *The Struggle for Federal Aid, First Phase,* 147.

154. Ibid., 88, 147–48. It is interesting to note that supporters of the Blair Bill did not call upon the massive federal expenditures for Civil War pensions as an authorizing precedent for direct federal charitable aid, despite the fact that the Blair Bill was considered by the Senate later in the same session in 1890 that passed the Dependent Pension Act. If Skocpol's argument is correct that Civil War dependent pensions were understood by contemporaries as the

ful with the press, which echoed the "disaster" arguments, as when the Charleston *News and Courier* argued that if the Constitution permitted aid for the Chicago fire and Mississippi River flooding, then it surely permitted aid to the South in its "critical emergency."[155]

The Blair Bill also saw the first use of an instrument of persuasion that had not previously appeared in congressional debates: a table of prior instances of disaster relief by the federal government (Fig. 1).[156] Representative John Daniel of Virginia, speaking in support of the Blair Bill in 1890, asserted that Congress had unlimited authority to spend in the general welfare, citing "the opinions of those who were the contemporaneous expounders of the instrument," such as Monroe, Calhoun, and Webster.[157] He then went on to present as evidence of congressional practice a "list of no less than twenty-five or thirty measures, cases where relief has been granted by Congress to sufferers by fire, floods, earthquakes, and in the extermination of diseases."[158] His list included the Caracas and New Madrid earthquakes, the 1847 Irish famine relief, the Portland fire, the 1867 Freedmen's Bureau extension, the Chicago fire, and two dozen other cases. He asked rhetorically, "What difference is there—constitutionally speaking—in the passage of this bill and in the passage of such bills as those which are here referred to? They are all, or nearly all, based on the constitutional prerogative to provide for the general welfare."[159]

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first national-level social spending program, we should expect Congressional supporters of the Blair Bill to cite as precedent the Civil War pensions that they had just passed. Certainly there had not been time for Civil War pensions to acquire the taint of corruption to which Skocpol assigns their subsequent failure to appear as precedent for various social welfare programs, including those of the New Deal. But although the Blair Bill ran into difficulty and ultimately failed passage, none of its supporters apparently thought that citing the successful expansion of Civil War pensions would be of any help to their cause. The reason that the two efforts were seen as unrelated is suggested in the debate over the Dependent Pension Act in which supporters and opponents of the bill repeatedly emphasized that the pensions were a debt the government was contractually obligated to pay rather than a charitable gratuity. *Cong. Rec.,* 51st Cong., 1st sess., 1890, 21, pt. 7:6381. These appropriations were seen as within Congress's enumerated power to pay the debts (and perhaps to provide for the common defense). They were thus of no help to the Blair Bill's advocates, who instead cited cases of federal charitable donations under the General Welfare Clause; the largest class of such cases was federal disaster relief. This suggests that even in 1890, Civil War pensions were simply not seen as a relevant precedent or an entering wedge for expanded social provision by the advocates of that expansion.

155. Going, "The South and the Blair Education Bill," 281 n.1.

156. *Cong. Rec.,* 51st Cong., 1st sess., 1890, 21, pt. 3:2295.

157. Ibid., 2293.

158. Ibid., 2295.

159. Ibid.

Cases where relief has been granted by Congress to sufferers by fires, floods, earthquakes, diseases, etc.

Statutes at Large.		Date of approval.	Sufferers, etc.	Amount appropriated.
Vol.	Page.			
2	730	May 18, 1812	Sufferers by earthquake in Venezuela	$50,000.00
3	211	Feb. 17, 1815	Sufferers by earthquake in New Madrid, Mo.	Indefinite.
5	6	Mar. 19, 1836	Sufferers by fire at New York City	Do.
5	131	Feb. 1, 1836	Sufferers by Indian depredations in Florida.	Do.
6	46	Feb. 19, 1803	Sufferers by fire at Portsmouth N. H.	Do.
6	53	Mar. 19, 1804	Sufferers by fire at Norfolk, Va	Do.
6	356	Jan. 24, 1827	Sufferers by fire at Alexandria, Va	20,000.00
9	207	Mar. 3, 1847	Transportation of supplies to sufferers in Ireland.	Indefinite.
12	652	Feb. 16, 1863	Sufferers by Indian depredations in Minnesota.	200,000.00
13	416	July 4, 1864	Sufferers by accident at arsenal, District of Columbia.	2,000.00
14	364	July 4, 1866	Sufferers by fire at Portland, Me	Indefinite.
14	567	Feb. 22, 1867	Transportation of supplies South	Do.
15	24	Mar. 29, 1867	do	Do.
15	28	Mar. 30, 1867	Sufferers in South	Do.
15	28	Mar. 30, 1867	Seeds for destitute in South	50,000.00
15	246	Jan. 31, 1868	Destitute in South	Indefinite.
16	596	Feb. 10, 1871	Transportation of supplies to France and Germany.	Do.
17	51	Apr. 5, 1872	Sufferers by fire at Chicago, Ill	Do.
17	646	Mar. 12, 1872	Postmaster's losses at fire in Chicago, Ill.	Do.
18	34	Apr. 23, 1874	Sufferers by overflow of Mississippi River.	Indefinite.
18	45	Mar. 13, 1874	do	190,000.00
18	303	Jan. 25, 1875	Seeds to sufferers by grasshoppers	30,000.00
18	314	Feb. 10, 1875	Sufferers by grasshoppers	150,000.00
19	374	Mar. 3, 1877	do	285.40
21	27	June 14, 1878	do	663.00
21	1	Apr. 18, 1879	Refrigerating ship—yellow fever	200,000.00
21	66	Mar. 5, 1880	Contributions to colored emigrants free duty.	Indefinite.
21	303	Feb. 25, 1880	Transportation of supplies to Ireland	Do.
21	306	May 4, 1880	Sufferers by cyclone at Macon, Miss	Do.
22	44	Apr. 11, 1882	Seeds to sufferers Mississippi River overflow.	20,000.00
22	378	Feb. 23, 1882	Sufferers Mississippi River overflow	100,000.00
22	378	Mar. 10, 1882	do	Indefinite.
22	378	Mar. 11, 1882	do	Do.
22	379	Mar. 21, 1882	do	150,000.00
22	379	Apr. 1, 1882	do	100,000.00
23	267	Feb. 12, 1884	Sufferers by Ohio River overflow	300,000.00
23	268	Feb. 15, 1884	do	200,000.00
23	269	Mar. 27, 1884	Sufferers by Mississippi River overflow, unexpended balance of appropriation for Ohio overflow.	125,000.00
23	273	June 7, 1884	Sufferers by overflow of Mississippi River.	Unexpended balance.
25	630	Sept. 26, 1888	Sufferers by yellow fever.	200,000.00
25	631	Oct. 12, 1888	do	100,000.00

What difference is there—constitutionally speaking—in the passage of this bill and in the passage of such bills as those which are here referred to? They are all, or nearly all, based on the constitutional prerogative to provide for the general welfare.

Figure 1. Table of relief granted by Congress (1890)

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This table, which subsequently appeared in various forms in many other contexts, represented a hardening of the appeal to precedent in the face of what proponents surely saw would be strong resistance. The work of gathering cases, having them printed in tabular form, and distributing them to legislators went well beyond the casual citing of prior authority in the midst of debate. It is thus no accident that this tactic appeared during the 1890 Senate debate, when the bill was losing southern support (indeed, it was defeated in the Senate in 1890 after passing on three prior occasions),[160] since it is a sign that stronger measures would be needed for success when the gap between prior precedents and present case was wide. Viewed in this way, the table is a sensitive indicator of conflict over the applicability of precedent, and it appeared in each subsequent innovative effort—particularly in New Deal debates and legal briefs.

Unemployment and Farm Relief

The Blair Bill was followed by other, also unsuccessful, efforts to use the history of disaster relief in support of innovative relief legislation. In each of these cases, the table of prior cases (now maintained and updated by the Senate document room staff)[161] was placed into the *Congressional Record* and served as the basis for numerous speeches and newspaper editorials. The Depression of 1893 saw such an effort, led by Kansas Populist William Peffer, who asked the Senate why the federal purse could not be loosened to relieve the suffering of unemployed workers if it could be opened to fire sufferers and freedmen.[162] Peffer's interest in the history of disaster relief was first piqued during the debate over relief for the Sea Islands hurricane victims in November 1893. In that case, the cyclone had destroyed the factories that had provided the only source of employment for the isolated black community.[163] Peffer opposed the cyclone relief because "there are a great many other people who are in circumstances as destitute as these," who were equally deserving of relief, and said that if the Senate considered the appeal from South Carolina, he would bring one on behalf of the unemployed workers throughout the country who were suffering through winter in the midst of a severe depression. A month later he did so, proposing a national system of unemployment relief (funded by placing millions of dollars of silver currency into circulation).[164]

160. Lee, *The Struggle for Federal Aid, First Phase*, 162; John Ezell, "Jefferson Davis and the Blair Bill," *Journal of Mississippi History* 31 (1969): 121.

161. *Cong. Rec*., 53d Cong., 1st sess., 1893, 25, pt. 1:388.

162. Ibid., 387–88, pt. 2:3039.

163. Ibid., pt. 2:3038.

164. Ibid., pt. 1:385–86.

During the November debate over the South Carolina relief bill, Peffer had contended that the entire enterprise of relief was unconstitutional. Now, however, he saw things quite differently. The Congress *did* have the power to vote relief, either implied in the Constitution, or inherent in the nature of governance.

> There are great occasions, Mr. President, when nations, communities, and individuals may call to their aid powers which, under ordinary circumstances, are not known to exist. It is too late now, Mr. President, in the history of this grand people to say that we dare not do anything of this kind. Upon an examination of the record it will be found that there are many instances where the Congress of the United States has gone to the relief of suffering people in different parts of the country.[165]

Peffer then recited a slew of disaster precedents beginning with the Portsmouth fire in 1803 and including the New Madrid earthquake, the New York fire of 1836, the Alexandria fire, the Minnesota Indian depredations, the Portland fire, and the 1867 Freedmen's Bureau Act. He referred the Senate to the "paper from which I am reading, in its tabulated form," which was printed in the *Record* with the text of his speech. As in the case of the Blair Bill, we may take the presence of the table and the detailed argumentation by Peffer as a sign that in 1893 it was a stretch to contend that idle workers were destitute "through no fault of their own"[166] in the same way as victims of floods, fires, hurricanes, and earthquakes. Nothing came of Peffer's 1893 effort to mobilize the precedent of disaster relief in support of his proposal for federal unemployment relief, though doubtless he would have been gratified to see the success his ideas eventually enjoyed during the New Deal; as Clanton[167] notes, Peffer was only "one great depression and four decades ahead of [his] time."

However, the bare fact that Peffer made the connection between disaster relief and unemployment relief indicates that attitudes about the causes of industrial unemployment were in transition. During the extremely severe depression of 1873 (until the 1930s known as the "Great Depression") there was only one fleeting mention of New York's "suffering and starving poor" during discussion of an 1874 appropriation for southern flood victims,[168] and the suggestion that the two groups were comparable was swiftly rejected. Prior to 1893, the general view was that the unemployed were at fault for their own circumstances, either because of laziness or due

165. Ibid., 388.

166. *Cong. Rec.,* 53d Cong., 1st sess., 1893, 25, pt. 1:386.

167. Gene Clanton, *Congressional Populism and the Crisis of the 1890s* (Lawrence: University Press of Kansas, 1998), 62.

168. *Cong. Rec.,* 53d Cong., 1st sess., 1874, 2, pt. 4:3151.

to an unreasonable refusal to accept the market wage[169] or unwillingness to move to the "vast interior" where there were employment opportunities.[170] The values of the middle class made it hard for them to accept that there were involuntarily unemployed people. In Alexander Keyssar's view, "no one doubted that business panics occasionally threw some men and women out of work, but it was widely believed that these were transient episodes, affecting a small number of workers, who found new jobs in short order. If a worker was idled repeatedly or for a prolonged period of time, it was almost certainly his own choice or his own fault."[171]

This began to change in 1893, when, Keyssar says, there was "something of a breakthrough in middle-class thinking about the problem of involuntary idleness" due to the severity of the downturn.[172] Whereas in the depressions of 1857 and 1873, cities would purchase transportation to send their unemployed to the "empty west,"[173] and the government's free land policies called into question the willingness of the unemployed to make their own way in the world,[174] by 1893 those possibilities had melted away, exposing the realities of the modern business cycle.[175] At this point, Keyssar notes, the word "unemployment" began to appear in common usage. It then became plausible to describe mass idleness as a national catastrophe rather than a personal failing.[176]

169. Herbert Gutman, "The Failure of the Movement by the Unemployed for Public Works in 1873," *Political Science Quarterly* 80 (1965): 254; Benjamin Klebaner, "Poor Relief and Public Works During the Depression of 1857," *Historian* 22 (1960): 264.

170. Carl N. Degler, "The West as a Solution to Urban Unemployment," in *New York History,* ed. Mary Cunningham (Cooperstown: State Historical Association, 1955), 63–84.

171. Alexander Keyssar, *Out of Work: The First Century of Unemployment in Massachusetts* (Cambridge: Cambridge University Press, 1986), 251; see also Samuel Rezneck, "Distress, Relief, and Discontent in the U.S. during the Depression of 1873–78," *Journal of Economic History* 58 (1950): 498.

172. Keyssar, *Out of Work,* 251.

173. Degler "West as a Solution," 64.

174. Gutman, "The Failure of the Movement by the Unemployed for Public Works in 1873," 271; Klebaner, "Poor Relief and Public Works During the Depression of 1857," 266.

175. Calvin Woodard, "Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State," *Yale Law Journal* 72 (1962): 320; Hannah Feder, *Unemployment Relief in Periods of Depression* (New York: Arno Press, [1936] 1971). It may be that Frederick Jackson Turner's "closing of the frontier" in 1890, as well as the restrictive anti-tramp laws passed in the wake of the widespread vagrancy during the 1873 depression contributed to this transformation by placing boundaries around the range of possibilities for workers in search of employment.

176. Although the notion of involuntary idleness began to gain currency as a result of the depression of 1893, the unemployed worker's moral culpability was by no means settled. For example, a Labor Department economist concluded in an 1898 study that European style

As with the Panic of 1893, the collapse of world cotton markets in 1914 produced a widespread depression in the cotton-growing South, and led to numerous impassioned appeals from southern legislators for disaster relief.[177] One of these was an amendment to President Wilson's war tax bill proposed by Senator Hoke Smith of Georgia. This would have allowed the government to issue bonds and compelled the federal government to buy up enough southern cotton to support the price at a profitable level.[178] The proposal was attacked as both unconstitutional and paternalistic, charges that provoked supporters to recite a litany of prior appropriations for disaster relief. Senator Frank White, an Alabama Democrat and lawyer, contended that the constitutionality of the measure was clear, although he acknowledged that as a matter of policy it was "not in accord with the principles heretofore declared and maintained by the leaders of the party to which I belong, but those principles have been departed from and are no longer insisted upon by that party. They are history; they are not living vital principles today." Rather, White said, the question under the precedents was whether or not there was a "real emergency" affecting a sufficiently extensive section of the country: "The precedent has already been made and repeated by all political parties . . . this Government has been engaged in this kind of business since 1810, when it appropriated money to take care of sufferers by an earthquake in Venezuela, and has continued ever since." Smith then placed into the *Record* a *different* table of prior disaster relief appropriations, this one prepared by the Treasury Department on October 16, 1914, listing not only domestic flood and fire relief but also numerous foreign aid appropriations for famines and plagues.[179]

Other senators chimed in with their own lists of disaster precedents. A letter to the editor of a North Carolina newspaper arguing that the $2 million (sic)[180] Congress appropriated for relief of the Salem fire earlier that

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unemployment insurance should not be adopted in the United States because "[t]hough lack of employment is often unavoidable on the part of the workingman, the latter's will and energy play such an important part that any attempt to distinguish voluntary from unavoidable idleness is futile." William F. Willoughby, *Workingmen's Insurance* (New York: Thomas Y. Crowell & Co., 1898), 375. In an effort to counter views like Willoughby's the American Federation of Labor, in its 1897 request for federal relief for the unemployed, emphasized mechanization, increasing division of labor, immigration, and other "changing conditions, unknown in our forefathers' times" that had thrown millions out of work. "Labor Leaders' Demands: Memorial to the President, Cabinet, and Congress from the American Federation," *New York Times,* April 23, 1897, at 1.

177. *Cong. Rec.,* 63d Cong., 2d sess., 1914, 51, pt. 16:16635, 16766–81.

178. Ibid., 16766.

179. Ibid., 16786.

180. The appropriation for relief of the Salem fire was $200,000, not $2 million. *Cong. Rec.,* 63d Cong., 2d sess., 1914, 51, pt. 16:16787.

year entitled the southern farmers to the same treatment was read into the record.[181] Senator Ellison Smith of South Carolina reminded aid opponents "you did not balk at sending your millions to suffering San Francisco."[182] William Borah of Idaho noted, "we have spent millions of dollars to take care of the situation after great fires in some of our cities; after the earthquake at San Francisco, and we have sent large sums of money to sufferers in foreign lands by reason of earthquakes and other disasters." The history proved, in Borah's view, that "there is no difficulty about the powers of our Government. . . . This whole question depends upon the proposition of whether the disaster and the unfortunate condition of the South has reached the proportions of a national catastrophe." Borah reminded the Senate that the Supreme Court had determined that "the great object of government is the common good and that the Constitution as to the tax levying power has left a wide discretion to the wisdom of Congress" in dealing with such emergencies.[183]

As in other debates, senators emphasized the extent to which the farmers were innocent of any wrongdoing[184] and voiced support for a more sympathetic and less formalistic state, either through a "liberal construction of the Constitution" that would allow the national government to address the problems of expanding industries and changed economic conditions,[185] or, if necessary, by pragmatically abandoning the Constitution for a more humane organizing principle, as Ellison Smith argued:

> It is a sad commentary upon the Congress of the United States to say that . . . the Nation may not relieve itself in the hour of distress because of constitutional limitations. . . . This it seems to me should be a lesson to some of the great constitutional lawyers on this floor. Just as sure as we, the lawmakers and the Congress of the United States convince the people of America that they were made for the Constitution and not the Constitution for them that no matter what disaster might come for which relief could be given in order to preserve the letter of the constitution the people must suffer, there will either be a different Constitution or a different Congress to interpret it.[186]

House debate on a similar measure that would have provided loans directly to the affected cotton farmers followed the same basic script, including the citation of prior disaster relief precedents, the assertion that the farmer was suffering "through no fault of his own,"[187] and the suggestion

181. Ibid., 16635.
182. Ibid., 16771.
183. Ibid., 16777.
184. Ibid., 16773–74.
185. Ibid., 16788.
186. Ibid., 16771.
187. Ibid., 16867.

that there was a law of humanity higher than the Constitution that should guide the Congress in cases of innocent suffering. Kenneth McKellar of Tennessee, who would later reiterate these arguments during the New Deal, put it succinctly: "What is government for unless it is to protect its citizens in time of disaster or misfortune?"[188] Despite the outcry from southern congressmen and their allies, northerners were unwilling in 1914 to extend the disaster relief precedent to authorize a system of agricultural price supports for one particular regional crop suffering from market failure (rather than from the boll weevil or some other "natural" crisis). As in the case of unemployment relief, however, these first hesitant efforts to cast economic difficulties as disasters deserving of federal aid were later successful (in this case, very shortly thereafter, with the passage of the Federal Farm Loan Act of 1916).[189]

The failure of these efforts at expansion and innovation had multiple causes, but important among them was the difficulty in representing widespread suffering that was not due to calamitous natural events as a "disaster." William Peffer, arguing for unemployment relief in 1893, used newspaper articles from around the country to create the sense that unemployment was a problem of national scale and dimension rather than "limited to one town, to one city, to even one State." His investigation showed that the problem "spreads out over the entire country, that one-third of the industrial population of the whole people are unemployed."[190] Proponents made reference to far-flung deprivation and cited specific examples, but were often reduced to ruing the fact that their listeners and readers could not see the need with their own eyes, as Ellison Smith told the Senate about the cotton farmers in 1914 that "[t]hose living outside the cotton growing states cannot have any adequate conception"[191] of the scope of the catastrophe. Likewise, South Carolina Representative David Finley complained that if only Congress could somehow be convinced of the extent of southern deprivation, it would grant the requested relief.[192] However, it would not be until the 1930s, when modern techniques of aggregation and representation such as statistical depiction, documentary photography, press wire services, radio, and film were brought to bear, that the problem of narrating events like market failures and unemployment as singular calamities would be effectively addressed.[193]

188. Ibid., 16868.

189. 39 Stat. 360.

190. *Cong. Rec.,* 53d Cong., 1st sess., 1893, 25, pt. 1:386.

191. *Cong. Rec.,* 63d Cong., 2d sess., 1914, 51, pt. 16:16769.

192. Ibid., 16872.

193. Landis, "Fate, Responsibility, and 'Natural' Disaster Relief." Although there were important pioneering efforts at documenting the plight of the poor through the use of photography and journalistic exposes, most famously Jacob Riis's *How the Other Half Lives*

IV. Disaster Relief in the Supreme Court

Legislators were not the only advocates who called on the history of disaster relief to defend federal expenditures as lawful and appropriate. Elite trial lawyers also deployed the long history of congressional action in relieving disaster to defend appropriations against charges that they exceeded Congress's power under the Constitution. Against such claims, these lawyers argued that Congress had the sole authority to determine the appropriateness of expenditures for the general welfare, and that the Supreme Court's writ did not run to reviewing Congress's judgment. These arguments were not confined to the fringes of constitutional practice—they were made by such prominent advocates as William Howard Taft, Joseph Hodges Choate, and Charles Evans Hughes. Even more striking, men very closely associated with laissez-faire constitutionalism, such as Justices Peckham, Cooley, and Miller, also subscribed to the notion that Congress alone could determine the general welfare and that there was no "public purpose" doctrine that limited federal, as opposed to state and local, taxation. This section briefly touches on some of the cases in which these arguments were raised and the way that the advocates and the Court addressed them.

During the late nineteenth and early twentieth centuries, the power of Congress to spend in the general welfare was raised in several cases before the Supreme Court. Two of these cases, *Field v. Clark*[194] and *United States v. Realty Company*,[195] involved the constitutionality of a provision of the McKinley Tariff Act that offered to pay a bounty to domestic sugar producers. In the first case, the Marshall Field Company challenged duties assessed against it by arguing that the entire tariff act was invalid because the government lacked the constitutional power to pay a bounty. Field's lawyers urged the Court to extend to the federal government its 1874 decision in *Loan Association v. Topeka,* holding that state and municipal taxation must be for a public purpose. In their view, the notion of the general welfare could not be broader than that of the public purpose.[196] After

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(New York: Charles Scribner's Sons, 1890), the first quarter of the twentieth century saw the extensive development of bureaucratic and representational technologies, including such things as portable and more easily operated cameras, the widespread use of motion pictures, wire service technologies for the speedy distribution of images and text, press networks, movie houses, and film distribution channels. The Roosevelt administration enthusiastically recruited these developments and launched a thoroughgoing propaganda mobilization which was aimed in large measure at the construction of the depression as a national disaster.

194. 143 U.S. 649 (1892).

195. 163 U.S. 427 (1896).

196. Brief for the Appellants at 56, *Field v. Clark,* 143 U.S. 649 (1892) (No. 1050) (Brief of Edwin Smith).

all, they argued, the federal government had less power than the states so that any limit on the states must also apply to Congress. Thus, because the bounty was for a private rather than a public benefit, they contended that the entire tariff act was unconstitutional.[197]

The task of defending the power of Congress to spend in the general welfare fell to then-Solicitor General William Howard Taft. Taft vigorously refuted the argument that the public purpose cases had any application to Congress. Those cases "are all of them cases of municipal taxes which must be for municipal purposes . . . that is a very different object for taxation than the encouragement by the National Government of a widespread industry in many quarters . . . for national purposes."[198] Citing Cooley's view that the "general welfare" was broader than the municipal public purpose limitation due to the need for broad taxation and expenditure powers, Taft argued that it was for Congress, not the Court, to determine what was in the general welfare. As support for this proposition, he turned—like Trumbull, Peffer, Blair, and later, LaFollette, Hiss, and Roosevelt—to the history of disaster relief:

> The difference between what constitutes a "public purpose" for a municipality and for the Government of the United States is illustrated by reference to those acts of Congress in which direct bounties as acts of charity have been conferred by the United States upon classes of people in this country and in foreign countries. We have taken, from the speech of Senator Daniel upon the constitutionality of the Blair Education Bill a table prepared by him evidently with much care and accuracy, showing the various acts of Congress by which sums of money were appropriated from the U.S. Treasury to assist private individuals in distress.[199]

The table was reproduced in full on page seventy of the government's brief. To the cases cited in the table, Taft added some discussion of the San Domingo refugee bill and Story's *Commentaries.* He concluded that if the public purpose doctrine applied against Congress, "then every one of the acts referred to in the foregoing table would be unconstitutional and void, and yet as we see they cover a period of a century, nearly the whole life of our present constitutional government." He added as a rhetorical flourish that "in a note to be found in Elliot's Debates it is stated that the act for the relief of the citizens of Venezuela 'the motion to fill in the blank' left for the amount was moved by 'the strictest constructionist of the Constitution

197. Brief for the Appellants at 19–32, *Field v. Clark,* 143 U.S. 649 (1892) (No. 1050) (Brief of Charles Curie).

198. Brief for the United States at 67–69, *Field v. Clark,* 143 U.S. 649 (1892) (No. 1050).

199. Ibid., 69–70.

the country has ever seen, Mr. Calhoun.'" Taft concluded by urging the Court to agree with "Judge Cooley's statement that a much wider latitude with reference to expenditures is to be allowed the Congress of a nation than the legislature of a State or the council of a city."[200] The appellants in their reply brief responded to the disaster relief precedents, disputing both their validity and applicability.[201]

In a unanimous opinion written by Justice Harlan, the Court acknowledged that "it would be difficult to suggest a question of larger importance, or one the decision of which would be more far-reaching" than the power of Congress to spend in the general welfare. Nevertheless, the Court sidestepped this important question by holding that the tariff and bounty provisions were separable so it was not required to reach the constitutional issue. Even if the bounty were impermissible, the Court ruled that Field would still owe the duties on his merchandise and left for another day the question of the scope of the General Welfare Clause.[202]

The second Sugar Bounty case presented the same question under different circumstances. In the intervening five years, Republican President Benjamin Harrison had been replaced by Democrat Grover Cleveland, who (it may be recalled from the Texas drought relief veto) was hostile to disaster relief and other federal spending. During the 1893 Depression, Congress, under pressure from Cleveland, repealed the bounties and payments ceased in August 1894. Some sugar producers who were in the midst of the growing season at that time felt cheated and sued for the payment of the bounties, arguing that they had relied upon the promise in taking on debt and entering the field of sugar production. After the appeal went in the government's favor, the Cleveland Administration stopped paying the claims, taking the position that the law had been unconstitutional in the first place (in effect taking the position of the appellants in *Field v. Clark*).

200. Ibid., 70.

201. Reply Brief for the Appellants, *Field v. Clark,* 143 U.S. 649 (1892) (No. 1050).

202. *Field v. Clark,* 143 U.S. at 695–96. In addition to Harlan, who was somewhat more liberal than most of his colleagues, other members of the unanimous *Field* Court included conservatives Chief Justice Melvin Fuller, David Brewer, Stephen Field, and Henry Billings Brown. Fuller wrote the Court's opinions in *United States v. E. C. Knight,* 156 U.S. 1 (1895) (holding that the Sherman Anti-Trust Act did not apply to sugar producers) and *Pollack v. Farmer' Loan & Trust Co.,* 158 U.S. 601 (1895) (striking down the federal income tax). Brewer, as a justice of the Kansas Supreme Court, had held that drought relief violated the public purpose doctrine. See *State ex. Rel. Griffith v. Osawkee Township,* 14 Kan. 418 (1875). Field dissented from the Court's decisions in both the *Slaughterhouse Cases* and in *Munn v. Illinois,* because he disagreed that the federal constitution allowed even a limited amount of economic regulation. Finally, Henry Billings Brown is best known to history as the author of the Court's opinion in *Plessy v. Ferguson;* he also wrote a concurrence in *Lochner.*

At that point, Congress appropriated money to pay those individuals who were in the midst of the production process when the original bounty had been repealed,[203] but the Cleveland Administration still refused to pay on the grounds that the entire law was invalid and unconstitutional due to the bounty provisions.

The briefs in *Realty Company* essentially rehearsed the arguments from *Field* but with the government changing sides. In the new case, the government argued that the law was invalid because Congress lacked the authority to spend in the general welfare and urged the Court to adopt a narrowing construction of the General Welfare Clause in order to stop the growing "socialistic wave."[204] Meanwhile, the sugar men argued that Congress had broad, unreviewable discretion to spend as it saw fit.

The sugar producers were represented by Joseph Hodges Choate, who was widely considered to be the best lawyer of his time and who that same year had argued (and won) the *Pollack* case striking down the federal income tax.[205] Choate's brief opened by entirely denying the power of judicial review over congressional appropriations, which he described as a "purely legislative question . . . which the courts have no means of determining, and that therefore the decision of Congress is final and binding upon all branches of the Government including the Courts." Although Choate conceded that Congress could spend only for the general welfare, he argued that "Congress is necessarily the sole and final arbiter of that question—its fiat is law—its stamp to that effect makes the use national, the purpose national."[206] Otherwise, according to Choate, the courts would become embroiled in second-guessing thousands of appropriation decisions and "a hopeless confusion of the judicial and legislative departments of the Government must ensue."[207]

203. As with the Blair Bill, numerous petitions (many of them pre-printed forms) were sent to the House and Senate Appropriations Committees by "business men" from all parts of the country contending that the bounty should be paid for 1894 either on grounds of fairness or because, as a group of petitioners from Tennessee argued, goods (in this case, mules) had been sold on credit to sugar producers who were now unable to pay for them. Letter, J. W. Howard et al. to Representative N. Cox, Jan. 23, 1895, NARA, RG 233, 53A-H3.4, box 133.

204. Brief for the United States at 187–88, *United States v. Realty Co.,* 163 U.S. 427 (1896) (No. 870).

205. *Pollack v. Farmer's Loan and Trust Co.,* 157 U.S. 429 (1895); Sidney Fine, *Laissez-Faire and the General Welfare State* (Ann Arbor: University of Michigan Press, 1956), 133; Morton Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 26.

206. Brief for the Appellants at 7–9, *United States v. Realty Co.,* 163 U.S. 427 (1896) (No. 870) (Brief of Joseph Choate).

207. Ibid., 16.

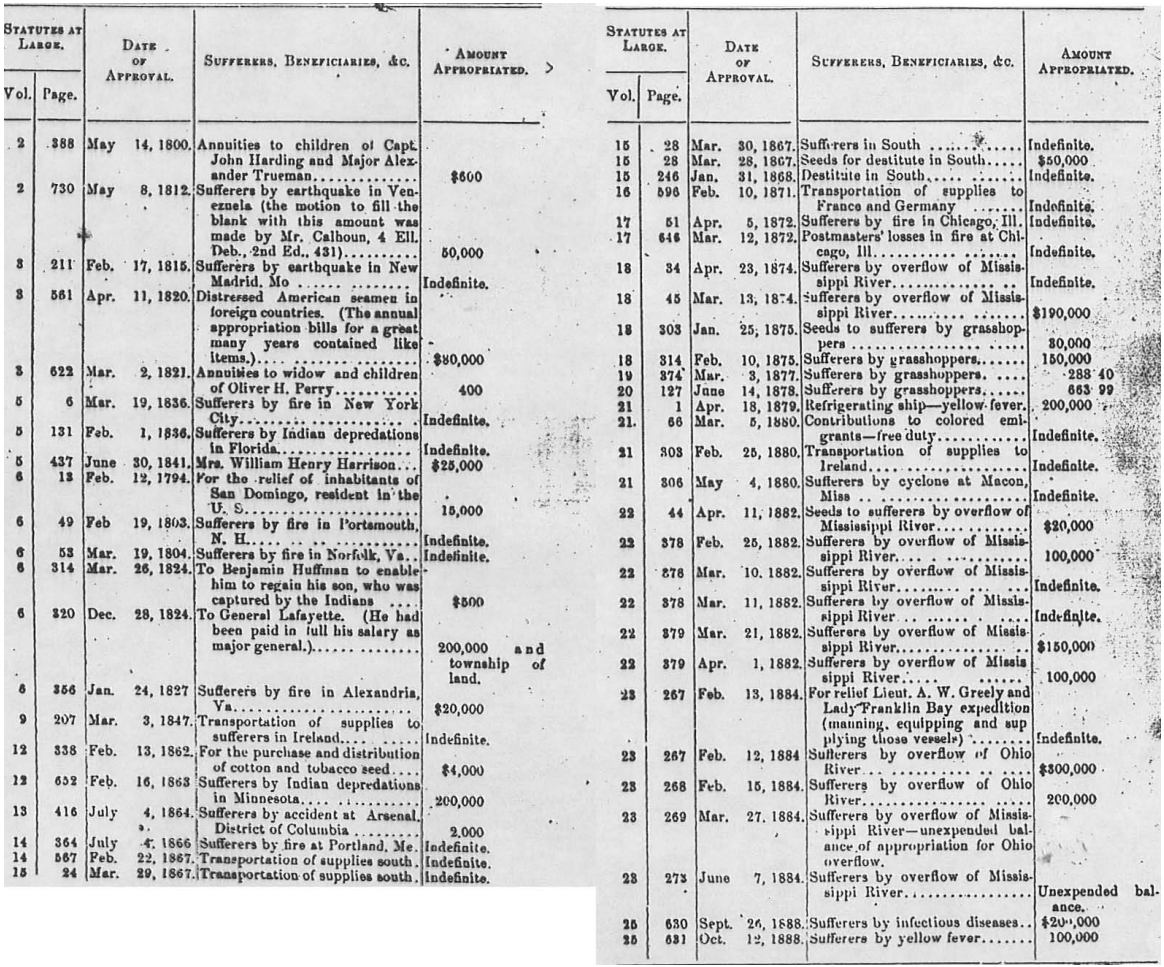
Choate then went on to argue that the history of disaster relief appropriations (illustrated by inclusion of a two-page table, Fig. 2) demonstrated that the General Welfare Clause had been given an expansive interpretation and that the court had no power to "review and veto" Congress's judgments. The argument was amplified by a discussion of several disaster relief cases such as the Alexandria fire, the St. Domingo refugee bill, the 1867 Freedmen's Bureau extension, as well as by the views of various constitutional scholars and treatise authors, such as J. I. Clark Hare, Thomas Cooley, John Pomeroy, and the eminent historian Hermann Von Holst, all of whom agreed that "it must be accepted as settled law that Congress is the sole and final judge as to the use to which the public money of the United States shall be put."[208] According to Hare, as quoted by Choate in his brief to the Court, the remedy for any error by Congress in this regard was at the polls, not the courts.[209]

Even if, however, judicial review of congressional determinations of the general welfare were appropriate, Choate argued that the sugar bounty was within the scope of that clause considering "the established practice of more than a century—concurred in by every Congress and approved by the people," referring to the history of disaster relief appropriations. The government's sole argument, according to Choate, was that the public purpose doctrine limiting municipal and state taxation should apply to the federal government. But "we respectfully submit that those cases have no real bearing upon the broad national question here involved and that what is for the general welfare or general benefit of a vast nation of seventy millions of people, covering half the continent, is not to be measured by what is for the public use of a school district or a town or a city or even one of the forty-five states of the Union."[210] He concluded his brief by pointing out that Judge Cooley had long recognized that the determinations of Congress regarding the public interest were entitled to deference, and that even Justice Miller, in *Loan Association v. Topeka,* had acknowledged that the determination of whether a particular use was public depended upon the type and size of government, and its course and usage in terms

208. Ibid., 42. Choate was a nephew of Massachusetts congressman Rufus Choate. He attended college and law school at Harvard, then litigated some of the most important cases of the late nineteenth century. At least nominally Republican, Choate became a member of New York City's Committee of Seventy, which broke up the Tweed Ring, and he assisted in the prosecutions of Tammany officials.

209. Ibid., 34. Hare concludes that the constitutionality of appropriations is "legislative, not judicial, and the errors of Congress cannot be corrected by the courts." John Innes Clark Hare, *American Constitutional Law,* vol. 1 (Boston: Little Brown, 1889), 249.

210. Ibid., 90.



Statutes at Large. Vol.	Page.	Date of Approval.	Sufferers, Beneficiaries, &c.	Amount Appropriated.
2	388	May 14, 1800.	Annuities to children of Capt. John Harding and Major Alexander Trueman	$600
2	730	May 8, 1812.	Sufferers by earthquake in Venezuela (the motion to fill the blank with this amount was made by Mr. Calhoun, 4 Ell. Deb., 2nd Ed., 431)	50,000
3	211	Feb. 17, 1815.	Sufferers by earthquake in New Madrid, Mo	Indefinite.
3	561	Apr. 11, 1820.	Distressed American seamen in foreign countries. (The annual appropriation bills for a great many years contained like items.)	$80,000
3	622	Mar. 2, 1821.	Annuities to widow and children of Oliver H. Perry	400
5	6	Mar. 19, 1836.	Sufferers by fire in New York City	Indefinite.
5	131	Feb. 1, 1836.	Sufferers by Indian depredations in Florida	Indefinite.
5	437	June 30, 1841.	Mrs. William Henry Harrison	$25,000
6	12	Feb. 12, 1794.	For the relief of inhabitants of San Domingo, resident in the U. S.	15,000
6	49	Feb 19, 1803.	Sufferers by fire in Portsmouth, N. H.	Indefinite.
6	53	Mar. 19, 1804.	Sufferers by fire in Norfolk, Va.	Indefinite.
6	314	Mar. 26, 1824.	To Benjamin Huffman to enable him to regain his son, who was captured by the Indians	$500
6	320	Dec. 28, 1824.	To General Lafayette. (He had been paid in full his salary as major general.)	200,000 and township of land.
6	356	Jan. 24, 1827	Sufferers by fire in Alexandria, Va	$20,000
9	207	Mar. 3, 1847.	Transportation of supplies to sufferers in Ireland	Indefinite.
12	338	Feb. 13, 1862.	For the purchase and distribution of cotton and tobacco seed	$4,000
12	632	Feb. 16, 1863	Sufferers by Indian depredations in Minnesota	200,000
13	416	July 4, 1864.	Sufferers by accident at Arsenal, District of Columbia	2,000
14	364	July 4, 1866	Sufferers by fire at Portland, Me.	Indefinite.
14	567	Feb. 22, 1867.	Transportation of supplies south.	Indefinite.
15	24	Mar. 29, 1867.	Transportation of supplies south.	Indefinite.
15	28	Mar. 30, 1867.	Sufferers in South	Indefinite.
15	28	Mar. 28, 1867.	Seeds for destitute in South	$50,000
15	246	Jan. 31, 1868.	Destitute in South	Indefinite.
16	596	Feb. 10, 1871.	Transportation of supplies to France and Germany	Indefinite.
17	51	Apr. 5, 1872.	Sufferers by fire in Chicago, Ill.	Indefinite.
17	646	Mar. 12, 1872.	Postmasters' losses in fire at Chicago, Ill.	Indefinite.
18	34	Apr. 23, 1874.	Sufferers by overflow of Mississippi River	Indefinite.
18	45	Mar. 13, 1874.	Sufferers by overflow of Mississippi River	$190,000
18	303	Jan. 25, 1875.	Seeds to sufferers by grasshoppers	30,000
18	314	Feb. 10, 1875.	Sufferers by grasshoppers.	150,000
19	374	Mar. 3, 1877.	Sufferers by grasshoppers.	288 40
20	127	June 14, 1878.	Sufferers by grasshoppers.	663 99
21	1	Apr. 18, 1879.	Refrigerating ship—yellow fever.	200,000
21	66	Mar. 5, 1880.	Contributions to colored emigrants—free duty	Indefinite.
21	303	Feb. 25, 1880.	Transportation of supplies to Ireland	Indefinite.
21	306	May 4, 1880.	Sufferers by cyclone at Macon, Miss	Indefinite.
22	44	Apr. 11, 1882.	Seeds to sufferers by overflow of Mississippi River	$20,000
22	378	Feb. 25, 1882.	Sufferers by overflow of Mississippi River	100,000
22	378	Mar. 10, 1882.	Sufferers by overflow of Mississippi River	Indefinite.
22	378	Mar. 11, 1882.	Sufferers by overflow of Mississippi River	Indefinite.
22	379	Mar. 21, 1882.	Sufferers by overflow of Mississippi River	$150,000
22	379	Apr. 1, 1882.	Sufferers by overflow of Mississippi River	100,000
23	267	Feb. 13, 1884.	For relief Lieut. A. W. Greely and Lady Franklin Bay expedition (manning, equipping and supplying those vessels)	Indefinite.
23	267	Feb. 12, 1884	Sufferers by overflow of Ohio River	$300,000
23	268	Feb. 15, 1884.	Sufferers by overflow of Ohio River	200,000
23	269	Mar. 27, 1884.	Sufferers by overflow of Mississippi River—unexpended balance of appropriation for Ohio overflow.	
23	273	June 7, 1884.	Sufferers by overflow of Mississippi River	Unexpended balance.
25	630	Sept. 26, 1888.	Sufferers by infectious diseases	$200,000
25	631	Oct. 12, 1888.	Sufferers by yellow fever	100,000

Figure 2. Table of disaster relief appropriations (1896)

of the "objects for which taxes have been customarily and by long course of legislation levied."[211]

As in *Field,* the Court's opinion was unanimous. This time, however, the decision was authored not by the relatively liberal John Marshall Harlan[212] but by Rufus Peckham, who would later pen several of the most reviled opinions of the *Lochner* era, including *Lochner* itself.[213] Although the Court again declined to directly decide the scope of the General Welfare Clause (deciding instead that the Act of 1895 reinstating the bounty for certain claimants created a "debt" that Congress was constitutionally empowered to pay), it referred explicitly to the disaster relief table in its opinion, noting that "payments in the nature of a gratuity yet having some feature of moral obligation to support them have been made by the government by virtue of acts of Congress, through its power over appropriation of the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity. A long list of acts directing payments of the above general character is appended to the brief of one of the counsel for the defendants in error." The Court took the table "as evidence of what has been the practice of Congress since the adoption of the Constitution."[214] Moreover, Peckham wrote, the question whether or not a particular case was within that "class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and ground upon principles of right and justice . . . must in its nature be one for Congress to decide for itself."[215] Commentators such as Edward Corwin[216] correctly interpreted this statement, written by a reactionary jurist for a deeply conservative Court, as a signal that the Supreme Court was unlikely ever to intrude into the field

211. Ibid., 91; *Loan Ass'n v. Topeka,* 87 U.S. 655, 665 (1874).

212. Harlan's reputation as a liberal is largely based on his famous dissents including those in *Plessy* and *Lochner.* However, he was not entirely hostile to the doctrine of economic substantive due process. For example, Harlan wrote the Court's opinion in *Adair v. United States* invalidating a federal law prohibiting interstate carriers from terminating workers for union membership. 208 U.S. 161 (1908).

213. Peckam was also the author of *Allgeyer v. Louisiana,* 165 U.S. 578 (1897), which struck down a Louisiana statute barring foreign insurance companies without local agents from doing business in the state as an infringement on the substantive due process rights of Louisiana citizens wishing to purchase insurance from such companies. Joining Peckham's opinion in *Realty Co.* were Chief Justice Fuller, and Justices Gray, Peckham, Brown, Shiras, Brewer, and Harlan. (Justice Edward White, a sugar man from Louisiana, recused himself).

214. *United States v. Realty Co.,* 163 U.S. 427, 441 (1896).

215. Ibid., 444.

216. Corwin, "The Spending Power of Congress."

of congressional spending so long as it was even arguably in the general welfare.[217]

The significance of the points raised by the losers in the Sugar Bounty cases should not be missed. As noted by the appellants in *Field* and the government in *Realty Company,* the deference Congress received was denied to municipal and state determinations. Even municipal disaster relief legislation, narrowly conceived, was often struck down by state supreme courts, which interpreted their own constitutions to bar disaster relief as impermissible "class legislation" that transferred money from the population to private interests ("from A to B" in Judge Cooley's famous formulation) through the mechanism of taxation in violation of the public purpose doctrine.[218] In *State ex. Rel. Griffith v. Osawkee Township,*[219] then-Kansas Supreme Court Justice David Brewer (who later would vote with the majority to uphold federal spending in both *Field* and *Realty Co.*) wrote for the court that state legislation allowing municipalities to issue bonds to

217. The question of the scope of congressional authority under the General Welfare Clause arose in two more cases prior to the New Deal that merit brief mention. The first, *Smith v. Kansas City Title & Trust Company,* 255 U.S. 180 (1921), was a challenge to the Federal Farm Loan Act of 1916 by an investor who contended that Congress had no authority to create Federal Land Banks for the purpose of holding farm mortgages. In that case, the lawyer representing the Federal Land Bank of Wichita, Kansas was none other than Charles Evans Hughes. Between losing the presidential election to Woodrow Wilson in 1916 and his appointment as Secretary of State by Calvin Coolidge in 1921, Hughes practiced law in New York. In his oral argument to the Court, Hughes echoed Taft and Choate on the broad and unreviewable scope of the spending power, arguing that "[t]he Farm Loan Act deals with pecuniary aid alone, that is, it is concerned only with the application of money." Argument of Mr. Hughes for the Appellee, *Smith,* 255 U.S. at 192. As such, Hughes argued that it was for Congress to determine how best to spend the funds so appropriated and "its decision of that question is not open to judicial review." Argument of Mr. Hughes for the Appellee, *Smith,* 255 U.S. at 193. Then, after the advent of the national income tax raised the specter of millions of taxpayer suits (a concern first raised in the debate the Russian famine relief in 1920) to enjoin appropriations by Congress, the Court held in *Massachusetts v. Mellon,* 262 U.S. 447, 487 (1923), that taxpayers lacked standing to challenge particular spending decisions, in that case, for maternal and child health. The briefs in *Mellon* had, like those in the other cases discussed in this section, recounted the history of disaster relief as an authorizing precedent for the Maternity Act. Taft, who had argued those same precedents to the Court thirty years before, in *Field,* was by then chief justice. Despite intense public pressure on the Court to intervene, the Court again refused to reach the issue. See Robert Post, "Federalism in the Taft Court Era: Can it be Revived?" *Duke Law Journal* 51 (2002): 1545–47.

218. Clyde Jacobs, *Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon upon American Constitutional Law* (Berkeley: University of California Press, 1954).

219. 14 Kan. 418 (1875).

relieve drought-stricken farmers violated the constitution because such relief was not a "public purpose."[220] Similarly, in *Lowell v. Boston*,[221] the Massachusetts high court held that relief for the Boston fire was unconstitutional because it was not for a public purpose. These constraints were well-understood in Congress and were reported in the press.[222] The problem of courts barring local disaster relief was so widespread that as late as 1932 a Note in the *Yale Law Journal* urged the explicit amendment of state constitutions to permit state and local disaster relief. This fact highlights the importance of the evidence presented in this article for the constitutional history of the nineteenth century: in the field of disaster relief, Congress not only had the power to intervene in the workings of the economy, but its power to do so *vastly exceeded* that of state and local governments. This, of course, is precisely opposite to the dominant historical account of the period from the Civil War through the Progressive Era as one characterized by a weak national government and state-level innovation.

V. Conclusion

The evidence presented here reveals a broadly popular and well-elaborated system of federal transfer payments that gathered steam throughout the late nineteenth and early twentieth centuries and that served as the basis for a number of abortive efforts to launch a more thoroughgoing welfare state. Improbably, this contradicts every other scholarly account of the period. The traditional story, of course, is that there was no federal relief or redistribution at all during this period due to the overwhelming dominance of the twin evils of laissez-faire economic theory and laissez-faire constitutionalism. Revisionist histories of the period have chipped away at this account in several respects. As noted above, Skocpol argues that Civil War veterans' pensions represented Congress's earliest and only real foray into the field of social welfare spending during this period, and that experience was so negative that it served only to inhibit the development of other programs.[223] Other scholarship[224] has focused on the development

220. See also Fine, *Laissez-Faire and the General Welfare State,* 136.

221. 111 Mass. 454 (1873).

222. "Congress to the Rescue:Appeal From the President in Behalf of the Flood Sufferers," *New York Daily Tribune,* April 8, 1897, at 1. This front-page story reported that the southern states could not be faulted for asking Congress for relief because they were barred by their constitutions from rendering aid.

223. Skocpol, *Protecting Soldiers and Mothers.* In contrast with Civil War Pensions, disaster relief was untainted by political party associations, was generally supported by both parties and by both the executive and the legislative branches, and had been provided to every area of the country and every class and both black and white recipients rather than

of various state-level benefits, and on the growth of the federal bureaucracy as a prerequisite to the later emergence of the New Deal state.[225] However, no accounts have hinted at anything like widespread direct federal relief before the New Deal. This lacuna makes the New Deal seem even more wondrous an innovation, springing as it did from the apparently barren soil of the weak, laissez-faire federal state.[226]

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merely to the favored North or to blacks in the South. The pattern of party domination of distribution for supporters and voters that Skocpol documents for Civil War pensions was not replicated in the case of disaster relief despite the fact that it was a quintessentially "distributive" program. Richard L. McCormick, "The Party Period and Public Policy: An Exploratory Hypothesis," *Journal of American History* 66 (1979): 279; Theodore J. Lowi, "American Business, Public Policy, and Political Theory," *World Politics* 16 (1964): 677. Moreover, perhaps owing to its temporary emergency nature, disaster relief failed to spark fears of a large standing bureaucracy based on spoils. Thus, disaster relief was a national distributive program that provided an alternative precedent for expansion of the subsequent national welfare state. Indeed, to the extent that Progressives fretted about the evils of Civil War pensions, disaster relief likely looked all the more attractive as an authorizing precedent for an expanded system of public social provision.

224. Harry Scheiber, "Government and Economy: Studies of the 'Commonwealth Policy' in Nineteenth Century America," *Journal of Interdisciplinary History* 3 (1972): 135–51; Oscar Handlin and Mary Handlin, *Commonwealth: A Study of the Role of Government in the American Economy, 1774–1861* (Cambridge: Harvard University Press, 1947).

225. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge: Cambridge University Press, 1982).

226. The account that Congress was not permitted by the Constitution to engage in national welfare spending before 1937 was perhaps a product of the vision of the New Deal lawyer-hero promoted by participants-cum-historians such as Rex Tugwell, Arthur Schlesinger, and to a somewhat lesser extent, William Leuchtenberg. Rexford Tugwell, *The Democratic Roosevelt* (Garden City, N.J.: Doubleday, 1957); Arthur M. Schlesinger, *The Coming of the New Deal* (Boston: Houghton Mifflin, 1959); William Leuchtenberg, *Franklin D. Roosevelt and the New Deal* (New York: Harper & Row, 1963). These authors have emphasized both the legal acumen and political skills of the New Dealers in forcing the Court to back down. A narrative account of the long-established and undisputed power of Congress to spend however it pleased to advance the general welfare (and the Court's century and a half of acquiescence in that practice) would, after all, produce a far less dramatic narrative of liberal triumph. Moreover, such a history of the General Welfare Clause would only have served to call attention to the administration's poor draftsmanship of the Agricultural Adjustment Act, which, because it linked the processing tax directly to the benefit payments to growers, was vulnerable in a way that the Social Security Act (which paid benefits out of the general revenues) was not. Meanwhile, conservative opponents of the Roosevelt Administration were not interested in highlighting the legitimacy of the New Deal in the light of history and precedent. It is reasonable to conclude that while this history of the spending power was clearly well known and important prior to 1937, there was no one remaining after 1937 who saw much benefit in recalling it, and it faded into obscurity Thus, the notion that the Constitution constrained federal social spending prior to the New Deal may be another of what Barry Cushman has called a "constitutional bedtime story with a happy ending for New Deal liberals." Barry Cushman, "Rethinking the New Deal Court," *Virginia Law Review* 80 (1994): 261.

At the center of the vision of a sharply constrained national government is the Supreme Court, which is remembered as having been a sturdy bulwark against federal intervention into the economy during this period. This image of the Court as what William Novak[227] aptly calls "the great bogeyman of liberal reform" has been subject to repeated critique.[228] As Stephen Siegel[229] notes, for the past twenty years there has been a "growing scholarly realization that the *Lochner* era was far more receptive to economic regulation than the traditional account acknowledges." Even the revisionists conclude, however, that the Court was hostile to "class legislation"[230] and paternalism.[231] Yet disaster relief was repeatedly assailed as both, without drawing the Court into the role of forbidding it, despite its multiple opportunities to do so in the Sugar Bounty cases and other litigation throughout this period. As the evidence in this article makes clear, the role of the Court in prohibiting federal redistribution has been dramatically overstated, if not outright invented. In questions of the general welfare, the Congress made it clear that it expected the Court to defer to its judgment, and the Court did so, at least by abstention.

We are by now accustomed to thinking of the late nineteenth century as a period of state contraction and, conversely, the New Deal period as one of expansive creativity. The evidence presented in this article challenges that understanding. Instead, it shows that by the time of the New Deal, lawyers and politicians had long since developed a legal and political strategy for expanding the reach of the welfare state. The argument that economic catastrophes were no different than natural disasters, and thus entitled to relief had been so routinely deployed in the years since the Civil

227. William Novak, "The Legal Origins of the Modern American State" (Chicago: American Bar Foundation Working Paper #9925, 2002): 4.

228. For summaries, see Novak, "Legal Origins"; Manuel Cachan, "Justice Stephen Field and 'Free Soil, Free Labor Constitutionalism': Reconsidering Revisionism, *Law and History Review* 20 (2002): 8–18.

229. Stephen A. Siegel, "The Revision Thickens," *Law and History Review* 20 (2002): 635.

230. Alan Jones, "Thomas M. Cooley and Laissez-Faire Constitutionalism: A Reconsideration," *Journal of American History* 53 (1967): 751–71; Charles McCurdy, "Justice Field and the Jurisprudence of Government-Business Reliations: Some Parameters of Laissez-Faire Constitutionalism," *Journal of American History* 61 (1975): 970–1005; Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993); Michael Les Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law and History Review* 3 (1985): 293–31; Barbara Fried, *The Progressive Assault on Laissez-Faire: Robert Hale and the First Law and Economics Movement* (Cambridge: Harvard University Press, 1998), 31.

231. Aviam Soifer, "The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921," *Law and History Review* 5 (1987): 249.

CONGRESSIONAL APPROPRIATION ACTS JUSTIFIABLE ONLY BY VIRTUE OF A BROAD CONSTRUCTION OF THE "GENERAL WELFARE" CLAUSE OF THE UNITED STATES CONSTITUTION

1. APPROPRIATIONS FOR RELIEF OF DISTRESS DUE TO CATASTROPHIES

Earthquakes.—Venezuela, 1812 (c. 79, 2 Stat. 730); New Madrid, Missouri, 1815 (c. 45, 3 Stat. 211); Italy (c. 7, 35 Stat. 584); and Japan, 1925, (c. 297, 43 Stat. 963–964).

Indian Depredations.—Florida, 1836 (Public Resolution No. 1, 5 Stat. 131), and Minnesota, 1863 (c. 37, 12 Stat. 652).

Fires.—New York City, 1836 (c. 42, 5 Stat. 6); Alexandria, Virginia, 1827 (c. 3, 6 Stat. 356); Portland, Maine, 1866 (Public Resolution No. 69, 14 Stat. 364); San Francisco, 1906 (Public Resolutions Nos. 16 and 19, 34 Stat. 827, 828); and Salem, Massachusetts, 1914 (c. 223, 38 Stat. 609, 681).

Wars or Famines.—Ireland in 1880 (Public Resolution No. 16, 21 Stat. 303); the Southern States in 1867 (Public Resolution No. 28, 15 Stat. 28); American citizens in Cuba in 1897 (Public Resolution No. 11, 30 Stat. 220); India in 1897 (Public Resolutions Nos. 8 and 12, 30 Stat. 219, 220); Alaskan natives of the St. Paul and St. George Islands in 1897 (c. 2, 30 Stat. 11, 29; c. 2, 30 Stat. 226; c. 546, 30 Stat. 597, 616); French West Indies in 1902 (c. 787, 32 Stat. 198); Europe in 1919 (c. 38, 40 Stat. 1161); and Russia in 1921 (c. 15, 42 Stat. 351).

Tornadoes or Cyclones.—Mississippi in 1880 and 1913 (Public Resolution No. 30, 21 Stat. 306; and the Southern States generally in 1908 (Public Resolution No. 20, 35 Stat. 572).

Yellow Fever.—1879 (c. 1, 21 Stat. 1); 1888 (Public Resolutions Nos. 44, 48, 25 Stat. 630, 631).

Grasshopper Scourges.—1875 (c. 25, 18 Stat. 303; c. 40, 18 Stat. 314); 1877 (c. 106, 19 Stat. 363, 374); and 1878 (c. 191, 20 Stat. 115, 127).

Floods.—Mississippi River, 1874 (c. 125, 18 Stat. 34; c. 170, 18 Stat. 45; c. 455, 18 Stat. 230); 1882 (c. 77, 22 Stat. 44; Joint Resolutions Nos. 6, 9, 12, 16, 22 Stat. 378, 379); 1884 (Public Resolutions Nos. 18, 32, 23 Stat. 269, 273); 1890 (c. 58, 26 Stat. 33; Joint Resolution No. 16, 6 Stat. 671); 1897 (Public Resolutions Nos. 3, 9; 30 Stat. 216, 219); 1912 (Public Resolution No. 19; 37 Stat. 633); and 1913 (c. 32, 38 Stat. 208, 211, 215, 216). The Southern States generally in 1916 (c. 267, 39 Stat. 434) and in 1928 (c. 11, 45 Stat. 53; c. 572, 45 Stat. 539, 543). The Ohio River in 1884 (Public Resolutions Nos. 9, 12; 23 Stat. 267, 268). The Rio Grande River in 1897 (Public Resolution No. 14; 30 Stat. 221).

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Figure 3. List of appropriations under the "General Welfare" clause

War that it would have been surprising had it not been made in defense of the New Deal. Indeed, during the 1930s the Roosevelt administration and its allies repeatedly presented Congress, the courts, and the polity with this argument, often bolstered by an updated version of the table of disaster relief precedents that first appeared in the 1880 debate over the Blair bill (Fig. 3).[232] In this light, it appears that the most innovative part of the New Deal was not its legal and constitutional claims,[233] but the way that its advocates narrated the Depression as a "disaster"[234] that supported, and even mandated, federal aid.

232. Lists of disaster relief precedents were often recited during Congressional debates, in Supreme Court briefs, and in political speeches in support of New Deal programs such as the AAA, the CWA, and the Social Security Act; the table itself was frequently reproduced in various forms. See, e.g., Senate Committee on Maunfactures, *Federal Aid for Unemployment Relief: Hearings on S. 5125,* 73d Cong., 1st sess., 2–3 February 1933. Assistant Solicitor General Alger Hiss included the table in the Government's 1935 brief defending the Agricultural Adjustment Administration (AAA), and argued that the extensive history of disaster relief "should of itself settle the construction" of the general welfare clause and hence the validity of the New Deal farm relief program. Brief for the United States, at 153, *United States v. Butler,* 297 U.S. 1 (1936) (No. 401). Hiss did not merely lift the table from the Choate brief; he assigned a lawyer, A. L. Jacobs, from the Justice Department's Tax Division to research the history of appropriations under the General Welfare Clause. The result was a twenty-two-page memorandum, discussing a number of possible precedents which might be cited for the AAA, including a three-page "tabulation of [disaster relief] cases in which the appropriation cannot be justified except as a measure in behalf of the general welfare," and such things as codfish bounties and federal grants to the states. Interestingly, one of Jacobs's other suggestions was veterans' pensions. While Hiss made much of disaster relief in the brief, and cited several other forms of government spending such as the Children's Bureau, there is no mention of veteran's pensions as a precedent for New Deal welfare spending in his 280 page brief or 100 page appendix. Memorandum, A. J. Jacobs to Sewall Key, Aug. 22, 1935, NARA, RG 60, Correspondence File 5–36–346. Interestingly, the history of disaster relief, accompanied by an eight-page version of the table, was featured in Edith Abbott's monumental 1940 work on American social welfare history. Abbott, who was Dean of the School of Social Service Administration at the University of Chicago, describes disaster relief as the first phase of federal social provision, albeit one that was somewhat haphazard. Edith Abbott, *Public Assistance: American Principles and Policies* (Chicago: University of Chicago Press, 1940), 2:645–48, 691–99.

233. Cushman, following Peter Irons, makes a similar point with respect to the Commerce Clause, arguing that the NLRB lawyers responsible for drafting and defending the Wagner Act were careful to avoid the argument that validating the NLRA required the Court to make a revolutionary change. Instead, they described the Act as entirely consistent with existing precedent. Barry Cushman, "A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones and Laughlin," *Fordham Law Review* 61(1992):105, 144–56; Peter Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1982).

234. Landis, "Fate, Responsibility, and 'Natural' Disaster Relief," 284–312.

FORUM: COMMENT

Disaster Relief, "Do Anything" Spending Powers, and the New Deal

HOWARD GILLMAN

Less than two years after Justice Harlan Fiske Stone reportedly advised Franklin Roosevelt's secretary of labor that "You can do anything under the taxing power,"[1] the U.S. Supreme Court ruled in *U.S. v. Butler* that Congress had no authority to create a system whereby farmers would receive subsidies for limiting production, with the funds coming from a tax on basic commodities.[2] While Stone, along with Brandeis and Cardozo, voted to uphold this feature of the Agricultural Adjustment Act, a majority led by Justice Owen J. Roberts declared that this particular scheme of taxing and spending interfered with the reserve powers of the states to control local manufacturing and agriculture. Roberts cited the great nationalist Joseph Story for the proposition that "the Constitution was, from its very origin, contemplated to be a frame of a national government, of special and enumerated powers, and not of general and unlimited powers. . . . A power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them."[3] The AAA

1. See Michele Landis Dauber, "The Sympathetic State," *Law and History Review* 23 (2005): 388. Alpheus Thomas Mason, in *Harlan Fiske Stone: Pillar of the Law* (New York: Viking Press, 1956), 408, reports that Stone said, "The taxing power of the Federal Government, my dear, is sufficient for everything you want and need."

2. *U.S. v. Butler,* 297 U.S. 1 (1936).

3. Citing Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray, 1833), sections 909, 922.

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was "a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states. . . . If the Act before us is a proper exercise of the federal taxing power, evidently the regulation of all industry throughout the United States may be accomplished by similar exercise of the same power."

Stone's dissent, written mostly on New Year's Day 1936, was so vehement in defense of Congress's taxing and spending power that its tone offended Justice Roberts.[4] Still, it was a dissent. Thus, in early 1936, six justices did not agree that Congress could do anything under the taxing power. In fact, their position echoed the views of a nearly unanimous Court some fourteen years earlier, in *Bailey v. Drexel Furniture Co.,* which struck down the Child Labor Tax Law passed in the wake of *Hammer v. Dagenhart.*[5]

We need to be careful, therefore, when Michele Landis Dauber tells us that Stone's "do anything" view of Congress's (ostensibly unreviewable) taxing and spending power was shared by such nominally conservative justices as Hughes (who was in the *Butler* majority) and Taft (who authored the opinion in *Bailey*). Dauber is undoubtedly correct that "Stone turned out to be right" in the sense that the post–"switch in time" Supreme Court eventually upheld unemployment compensation and old age benefits under a broad theory of Congress's power to tax and spend.[6] But her choice to tell her story without attention to these contrary decisions leaves a misleading impression, both about the nature of the jurisprudential consensus and about the extent to which the constitutional issues associated with disaster relief can be said to offer a significant foundation for the New Deal revolution in American politics.

Dauber makes an important contribution to our understanding of constitutional history by bringing to light these periodic debates over the legitimacy of federal disaster relief. It is possible that she slightly overstates the degree of constitutional consensus about the practice in the early republic,[7]

4. See Mason, *Harlan Fiske Stone,* 408.

5. *Bailey v. Drexel Furniture Co.,* 259 U.S. 20 (1922), with Justice Clarke as the lone dissenter. Chief Justice Taft wrote: "Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control and one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

6. See *Steward Machine Co. v. Davis,* 301 U.S. 548 (1937) and *Helvering v. Davis,* 301 U.S. 619 (1937).

7. David P. Currie, in "The Constitution in the Supreme Court: The New Deal, 1931–1940," *University of Chicago Law Review* 54 (1987): 504, at n.136, reports that "the refusal of

and it might have been useful to contrast the constitutional debates over spending for disaster relief with related (yet more contentious) debates implicating the scope of Congress's power to tax and spend—such as federal support for a national university or for internal improvements.[8] Still, there is no reason to doubt her claim that the antebellum Congress extended relief without much concern about the constitutionality of the practice. Her discussion of the references to this tradition during the political struggle over the Freedmen's Bureau illuminates an interesting and underappreciated feature of that historic debate. She is also right to point out how specific instances of disaster relief were often cited (albeit unsuccessfully) as precedents by others seeking to expand the scope of federal disaster assistance to include funds to address unemployment and education.[9]

However, Dauber's most dramatic claim is that this is a story about how "disaster relief served as a precedent for the expansion of the welfare state in the 1930s." We are told that references to disaster relief "figured importantly in several Supreme Court cases" involving federal grants and that arguments developed in these cases helped establish the claim that congressional spending was "a question purely of legislative expediency and discretion" and thus "became a key legal underpinning of the New Deal." It is, essentially, an argument about state building as a form of reasoning by analogy: disaster relief led to the Freedmen's Bureau, which led to arguments about federal assistance for schools and for the unemployed,

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an early Congress to provide disaster relief for a single community after debate had raised serious constitutional doubts tends to support Hamilton's insistence that 'the object to which an appropriation of money is . . . made [must] be *General* and not *local;* its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot."

8. For more on the debates over a national university and internal improvement, see Edward Corwin, "The Spending Power of Congress—Apropos the Maternity Act," *Harvard Law Review* 36 (1922): 548–82. Dauber claims that Corwin argued "that the Court had no power to strike down the Sheppard-Towner Maternity Act because history demonstrated that Congress had always had plenary and unreviewable power over appropriations," but that characterization probably overstates Corwin's position. Corwin was well aware that there were long-standing arguments over whether Congress was using its powers of appropriation only to promote legitimate "national" ends and not to act in ways that challenged traditional spheres of state authority.

9. It is a bit surprising that Dauber does not cite Susan Sterett's discussion of constitutional debates over "social spending" at the turn of that century; see "Serving the State: Constitutionalism and Social Spending, 1860s–1920s," *Law and Social Inquiry* 22 (1997): 311. It is true that Sterett was looking mostly at constitutional debates governing the scope of state powers rather than federal authority, but her topic is relevant to the question of constitutional precedents for the emergent welfare state, and it would have been helpful for Dauber to explain how her discussion relates to this earlier work.

which led to some Supreme Court cases addressing the scope of Congress's taxing and spending power; and before we know it the New Deal response to the Great Depression can be seen as fitting neatly into this long-standing tradition of federal relief to the victims of disasters.

While I find much of value and interest in Dauber's account of the rise of "the sympathetic state" it seems to me that the larger claims about the importance of these precedents for the New Deal are not demonstrated by her evidence. Let me set aside the observation that a number of the links in this apparent chain of causation—including the Blair Education Bill and the late nineteenth-century efforts to offer federal aid for the unemployed—were actually examples of federal officials rejecting the proffered analogies (and thus provide at least as much precedential support to those who would resist an expanded welfare state). Nor will I question whether the posturing of members of Congress during debates about disaster relief represents meaningful examples of "the Constitution outside the courts"—except to say that, in my judgment, the case for serious deliberation requires better evidence than the fact that many representatives were lawyers and that they occasionally cited favorable past actions of Congress in support of self-serving proposals.[10] Many current members of the House and Senate are lawyers but very few people today would assume that this must make them care about consistency in taking positions or especially receptive to the power of reasoning by analogy. Some might assume that this professional training merely makes them glib and capable of arguing any side of an issue, depending on what position best served their political agenda.

More central to Dauber's story is the claim that the tradition of disaster relief shaped the development of Supreme Court precedent in a way that was eventually useful to New Dealers seeking legal underpinnings for their political innovations. She acknowledges that the arguments about disaster relief got nowhere in *Field v. Clark,* where the Court simply sidestepped the question of the scope of Congress's authority to appropriate in the

10. Dauber provides plenty of evidence to support a (predictable and unsurprising) portrait of these representatives as self-serving and grandstanding politicians rather than lawyers who took seriously the principled application of precedent. Among the quotes peppered in her account: "If you want to know where the constitutional power to do this is, and where the law is, I answer it is in that common humanity that belongs to every man"; "necessity knows neither law nor constitution"; "I cannot stop to argue literal construction of the Constitution"; "I do not know whether this bill is constitutional or not"; "humanity is greater than any constitution"; "now in the name of Heaven—not in the name of the Constitution, but in the name of that sweet rainbow-robed charity which would make us better and brighter and more generous men—let us make this appropriation"; etc. Needless to say, if members of Congress could have established these statements as legitimate precedents they would not have needed courts to broadly interpret the scope of Congress's spending powers.

General Welfare.[11] If there was a real case law payoff to the practice of disaster relief it would have to be in *U.S. v. Realty Company,* where even the conservative justices acknowledged some tradition of congressional grants that took the form of a "gratuity" or "pure charity." However, it would be misleading to characterize the central thrust of this opinion as embracing a proto-Stoneian "do anything" theory of the spending power. Instead, the overwhelming preoccupation of the justices in that opinion was to emphasize that the federal government had a moral obligation to pay off what amounted to a "debt" to certain industries. Like Marshall in *Fletcher v. Peck,*[12] these conservative protectors of vested rights were willing to bracket the legitimacy of the original obligation in order to make a larger point about how it was salutary for the Congress to respond to the equities involved and authorize payouts to these corporations.[13] In other words, these justices agreed to the payment because they believed it was "a moral and honorable claim upon the public treasury."

Importantly, however, Peckham underscored that the justices were specifically *not* concluding that Congress alone could decide the legitimacy of these sorts of payoffs. "It is unnecessary to hold here that Congress has power to appropriate the public money in the treasury to any purpose whatever which it may choose to say is in payment of a debt or for purposes of the general welfare. A decision of that question may be postponed until it arises."[14] Not surprisingly, this case is not cited later by the Supreme Court as authority for any sweeping statement about the unlimited or unreview-

11. Dauber believes it is important that, during this litigation, Solicitor General William Howard Taft advocated in favor of a broader reading of Congress's authority to spend for the General Welfare. It is undoubtedly true that many conservatives understood, along with Cooley, that the scope of the federal government's spending power was broader than the authority of states, whose spending was limited by the familiar "public purpose" feature of police powers jurisprudence. But (a) this does not establish that there was a consensus among progressive and conservative thinkers about the actual scope of Congress's authority and (b) Taft's advocacy as solicitor general provides no real evidence of his personal views on this question.

12. *Fletcher v. Peck,* 10 U.S. 87 (1810). The difference between that case and *Realty* was that Marshall was recognizing an enforceable vested legal right whereas Peckham was merely recognizing the legitimacy of paying off an essentially "moral" debt.

13. Justice Peckham wrote at one point: "We are of the opinion that the parties, situated as were the plaintiffs in these actions, acquired claims upon the government of an equitable, moral or honorary nature. Could Congress legally recognize and pay them although the act of 1890 as to its bounty provisions might be unconstitutional? It is true that in general an unconstitutional act of Congress is the same as if there were no act. That is regarding its purely legal aspect. . . . [These claims] were nevertheless of so meritorious and equitable a nature as to authorize the nation through its Congress to appropriate money to pay them." *U.S. v. Realty Co.,* 163 U.S. 427, 439 (1896).

14. Ibid., 440.

able scope of Congress's spending power. It plays no discernible role in any of the New Deal-era debates about the legitimacy of innovative spending plans. In the canon of constitutional law it merely stood for the proposition that Congress could spend "in recognition of a moral obligation to those who had put in their crop the previous year upon the faith of the bounty law then in existence. It was not so much a gift by the Government as a reward paid in consideration of expenses incurred by the planters upon the faith of the Government's promise to pay a bounty to the manufacturers and producers of sugar."[15]

If there was a serious precedent for the claim that the judiciary would have a very small role to play in reviewing congressional spending decisions, it would be in a more well-known case that receives just passing attention in Dauber's footnotes, *Massachusetts v. Mellon,* aka, *Frothingham v. Mellon* (1923).[16] We know that the case stands for the proposition that individual taxpayers have no standing to challenge the constitutionality of congressional spending. Thus, as a practical matter, if Congress passes a spending bill that imposes no special tax burdens or regulatory schemes (unlike the situation in *Bailey v. Drexel Furniture,* and later, *U.S. v. Butler*), then it is unlikely that any person will have standing to insist that courts evaluate whether the spending falls within Congress's constitutional authority. In that limited sense *Frothingham* implied that Congress's spending power is unreviewable under certain circumstances—not because of a broad consensus about the broad scope of Congress's powers to spend in the General Welfare, but because of Article III limits relating to standing. Moreover, the justices were also unanimous in support of the proposition that courts have no authority to adjudicate the state's "naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing

15. *Allen v. Smith,* 173 U.S. 389, 402 (1899). Dauber (392, n. 15) cites Corwin's 1922 article on the spending power as evidence that this earlier case really did stand for a broad reading of the spending power (Corwin, "The Spending Power of Congress"). However, Corwin's passing reference to the case in his footnote 77 is hardly a careful analysis. Moreover, Corwin also wrote that "he would be a bold man who would assert dogmatically that legitimate occasion might never arise for judicial interposition within this field" (576). Even if we acknowledge that Corwin was advocating for a broader interpretation (see especially p. 580) it would be important to keep in mind his reputation as a propagandist (in the best sense) of progressive constitutionalism. Among other things, during the New Deal battles, Corwin was an active public spokesperson for a theory of the "living Constitution" that was central to Roosevelt's vision. See Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building," *Studies in American Political Development* 11 (Fall 1997): 191–247.

16. *Frothingham v. Mellon,* 262 U.S. 447 (1923), mentioned in Dauber's notes 9 and 217.

is to be done without their consent." This "question, as it is thus presented, is political and not judicial in character"—again, not under a theory of Congress's spending power but because Article III requires that the judicial power be invoked only in response to some discernible injury (which was not apparent in a case involving a statute that "imposes no obligation but simply extends an option which the State is free to accept or reject"). In other words, "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." Consequently, the case "must be disposed of for want of jurisdiction *without considering the merits of the constitutional questions*" (emphasis added). It is a precedent of sorts, but not for the spending theory that is the subject of Dauber's discussion.

If the expansion of the welfare state under the New Deal was really just a matter of the federal government offering extremely large handouts to the needy in response to a discrete disaster, then Dauber's tradition of the "sympathetic state" would have been relevant to the constitutional debates, and we might have lots of examples where these earlier precedents were central to contemporaneous discussions. Similarly, if the New Deal was essentially about no-strings-attached grants, then *Frothingham* would have been a useful precedent for the proposition that courts should stay out of the discussion.[17] The problem is that the New Deal was not merely about the expansion of federal spending; it was a complete reconfiguration of structures of governance in the United States, including an unprecedented expansion of federal regulatory authority in areas that traditionally had been the province of state governments. There was no "broadly popular and well-elaborated" agreement within the legal community about the legitimacy of these reconfigurations, and there were certainly no precedents for judicial deference—quite the contrary. There is much of interest in the story of disaster relief, but to imply that nineteenth-century federal disaster relief laid important groundwork for the New Deal is, in my judgment, to misunderstand the nature of the political developments occurring in the 1930s.

Admittedly, it is extremely difficult to establish that any given precedent (such as federal disaster relief) actually mattered for deliberations that take

17. Even then, we should never assume that justices feel obligated to follow precedents with which they disagree; in fact, the evidence is pretty overwhelming that justices feel no such obligation, especially when an inherited precedent would require them to decide a case in a way that was inconsistent with their broader ideological commitments. See Harold J. Spaeth and Jeffrey A. Segal, *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court* (Cambridge: Cambridge University Press, 2001).

place in dramatically different historical-political contexts. We know that precedents are often referred to for instrumental or strategic reasons rather than for principled ones. Moreover, it is almost always possible for opponents to insulate themselves from the force of a precedent by pointing to relevant differences between cases. Ultimately, of course, one can always claim that the precedent is incorrect and therefore undeserving of one's allegiance. When making a causal claim for the importance of a precedent it would be best if one could show that decision makers who might otherwise be expected to oppose a particular proposal (e.g., conservatives who are hostile to the New Deal) nevertheless accept the proposal explicitly because of the force of the precedent. However, that sort of evidence does not seem to exist in this case. Dauber mentions that many conservative judges and scholars seemed to accept some notion of expanded federal powers over spending (as I have argued, there is some disagreement over exactly what their position might have been on that issue). But she provides no evidence that any conservative justice who might have been expected to oppose the New Deal nevertheless voted in favor of spending programs because he was convinced that the tradition of disaster relief was legitimate, well-established, and (unfortunately) applicable to the New Deal. We learn in a footnote that "lists of disaster relief precedents were often recited during Congressional debates, in Supreme Court briefs, and in political speeches in support of New Deal programs such as the AAA," but, as Justice Stone discovered, this did not stop his more conservative brethren from striking down the AAA as beyond Congress's legitimate powers.

Dauber is undoubtedly correct that it is a mistake to assume that the pre–New Deal national government was constituted by a non-redistributive laissez-faire ethic and was aggressively supervised by an activist conservative Court that challenged any deviations from the minimalist state. As she notes, many others have offered useful correctives to this story, and the tradition of disaster relief is an important contribution to this revisionist effort. However, we should be careful not to substitute one set of overstated claims with another. There are a lot of things that made the New Deal possible. Dauber helps us remember that good New Deal lawyers used every idea at their disposal to make their case—sometimes citing useful precedents and sometimes arguing for the irrelevance of precedents in light of dramatic changes in the social and economic life of the country. It is possible to appreciate and acknowledge the role that disaster relief played in some lawyers' briefs and in some congressional testimony without necessarily accepting the larger claim that this tradition was a "key legal underpinning" for the expansion of the welfare state.

FORUM: RESPONSE

Judicial Review and the Power of the Purse

MICHELE LANDIS DAUBER

Howard Gillman is unconvinced by my argument that New Deal lawyers turned to the history of federal disaster relief in support of key spending measures, such as the Social Security Act. Likewise, he is unpersuaded by Justice Stone's suggestion to Frances Perkins that she could "do anything under the taxing power." I understand why Stone's comment grates on Gillman's modern ear; it grated on mine too. What is Stone talking about, and how could his comment be squared with our understanding of the pre–New Deal period as one of sharp limits to federal power imposed by the courts? Gillman's conviction that, in this era, the Supreme Court exercised substantial veto power over federal spending leads him to some critical misreadings of key cases and misstatements of fact. I appreciate the opportunity to respond to his comments and, in particular, to include some details regarding Supreme Court developments for which there was no space in the article itself.

Gillman's criticisms center on two issues. First, he claims that, prior to the New Deal, the Supreme Court exercised judicial review over congressional spending decisions under the General Welfare Clause. Gillman cites two cases, *United States v. Butler,* and the Child Labor Tax Case, in which he asserts that the Court struck down federal statutes on this basis. Thus, Justice Stone's suggestion was, in Gillman's view, wishful thinking. Second, Gillman argues that the history of congressional appropriations for disaster relief was not cited, not relied upon, and ultimately not relevant to New Deal–era debates over the constitutionality of federal spending programs. Both of these claims are belied by the evidence.

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Judicial Review of Congressional Spending

I turn first to the question of the extent of judicial review of Congress's spending power. Essentially, Gillman argues that there was no "serious precedent for the claim that the judiciary would have a very small role in reviewing congressional spending decisions" until at least the "switch in time," when it upheld unemployment compensation and old age benefits in *Steward Machine Co. v. Davis* and *Helvering v. Davis.* However, the reality is very nearly the opposite: beginning with *Realty Company,* decided in 1896, the Supreme Court on several occasions before 1937 indicated that Congressional spending was, for all practical purposes, unreviewable. In fact, the Court has never invalidated a congressional appropriation because it exceeded the scope of the General Welfare Clause.

Realty Company is a nearly perfect test of the power of the idea that Congressional spending decisions deserved extreme deference. The case presented a prime opportunity for the Court to strike down class-based legislation, to which the Court had a well-defined aversion during this period, according to Gillman himself.[1] The case was brought by sugar producers (in the parlance of the time, the "Sugar Men") seeking payment of nearly $5.3 million in bounties—cash gifts to sugar interests—legislated by Congress in connection with the reduction of the tariff on imported sugar, but withheld by the Treasury because of doubts about the constitutionality of the various acts mandating the payments.

Despite the obvious class nature of the bounties, the Court unanimously refused the government's invitation to hold that these payments were outside the scope of Congress's authority under the General Welfare Clause.[2] Instead, as Gillman notes, the Court stated that the question of whether Congress had *completely* unreviewable authority to spend as it saw fit could be "postponed until it arises." But the Court did so in the course of defining a basis for congressional spending that was, for all practical

1. In *The Constitution Besieged,* Gillman argues that during the *Lochner* era, the Court was motivated by hostility to "class" legislation that "promoted only the narrow interests of particular groups or classes rather than the general welfare." In his view, the prior political commitments of justices led them to "strike down legislation that (from their perspective) was designed to advance the special or partial interests of particular groups or classes." See Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993), 7 and 10.

2. That the Court refused to declare the bounties as unconstitutional class legislation favoring the sugar men is even more surprising because the Court had to reverse a lower court that had struck down the bounty on this precise basis. *United States ex. Rel. the Miles Planting and Mfg. Co. v. Carlisle,* 5 App. D.C. 138 (C.A.D.C. 1895). The government likely shared this surprise, as it clearly expected to prevail. After all, it had boldly refused to carry out a statute that had been passed by Congress and signed by the president.

purposes, the same thing. The Court found that Congress could pay a debt grounded in "general principles of right and justice—when, in other words it is based upon considerations of a moral or merely honorary nature . . . although the debt could obtain no recognition in a court of law." And how to determine whether such "debts" exist? In the Court's view, "[t]heir recognition depends solely upon congress, and whether it will recognize claims thus founded must be left to the discretion of that body," a discretion that "can rarely, if ever, be the subject of review by the judicial branch of the government."

Given the expansive nature of the Court's opinion in *Realty Company,* it should be no surprise that Gillman's claims that it was "not cited later by the Supreme Court as authority for any sweeping statement about the unlimited or unreviewable scope of Congress's spending power" and that it "play[ed] no discernible role in any of the New Deal–era debates about the legitimacy of innovative spending plans" are simply false.[3] In fact, *Realty Company* was repeatedly cited for just such sweeping propositions, despite Gillman's claim about the narrowness of its significance.

Legal defenders of the New Deal saw *Realty Company* as a key resource in their argument for judicial deference to Congress's spending power and repeatedly cited it in their briefs to the Court. *Realty Company* was cited numerous times on this point in the government's brief in *U.S. v. Butler,* a legal tour de force by Assistant Solicitor General Alger Hiss, most relevantly for the principle that "Congressional application of the term 'general welfare' cannot be . . . subject to judicial review." According to the government's brief, if courts could not scrutinize congressional appropriations for moral or honorary "debt," "a term so familiar to our courts," then surely more exotic notions like the "general welfare" were beyond the competence of any court to decide. *Realty Co.* was similarly cited in the government's briefs in key New Deal cases, including *Steward Machine Co. v. Davis* and *Helvering v. Davis.*

New Deal lawyers continued to rely on *Realty Co.* for a simple reason: it proved to be a powerful precedent. For example, the Court's unanimous opinion in *Cincinnati Soap Co. v. United States*[4] in May 1937, authored by Justice George Sutherland (one of the conservative "four horsemen" and author of the despised 1923 opinion in *Adkins v. Children's Hospital* striking down the women's minimum wage law), cites *Realty Company* for the principle that congressional appropriations for "high moral obli-

3. Even the Westlaw headnotes for *Realty Company* summarize the opinion as holding that Congressional appropriations "can rarely, if ever, be the subject of review by the judicial branch."

4. 301 U.S. 308 (1937).

gations" are virtually always "a matter of policy and discretion not open to judicial review" (at 317). Justice Sutherland's opinion explicitly relied upon the history of disaster relief for "earthquakes, fires, and other events," saying that "legislation of this character has been so long continued and its validity so long unquestioned that . . . a legislative practice such as we have here . . . marked by the movement of a steady stream for a century and a half of time goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice" (at 315).

Three weeks later, the Supreme Court upheld federal old age pensions in *Helvering v. Davis,* relying on *Realty Company* and *Cincinnati Soap* for the proposition that Congress has a "wide range of discretion" to spend in the general welfare, "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."[5] By this point, any distinctions among "debt," "high moral obligation" and "general welfare" had been submerged and *Realty Company* now stood, with *Cincinnati Soap,* for the simple proposition that Congress could spend as it saw fit so long as its determinations were not utterly arbitrary. [6]

It is worth noting here, given Gillman's insistence on the importance of finding "any conservative justice who might have been expected to oppose the New Deal [who] nevertheless voted in favor of spending programs because he was convinced that the tradition of disaster relief was legitimate" that Justice Sutherland, the author of *Cincinnati Soap,* voted

5. *Helvering v. Davis,* 301 U.S. 619, at 640–41. The strength of the precedent was not limited to cases of federal power. Two months earlier, the Alabama Supreme Court had relied on *Realty Co.* in upholding the state's unemployment compensation scheme as an appropriate use of the *state's* police power. That "some individuals may receive more immediate benefits than others" was not fatal to the plan because under *Realty Co*. such payments were permissible if part of a general plan serving a public purpose or discharging a public duty. *Beeland Wholesale Co. v Kaufman,* 174 So. 516, 524 (Ala. 1937).

6. The difficulty of distinguishing between a "debt" arising from a "moral obligation" and "general welfare" was frequently noted from the very beginning of the litigation over the Roosevelt administration's programs. For example, a district court relied upon *Realty Co.* for its conclusion that building municipal power plants was within the general welfare. The court concluded that the distinction between "debt" and "general welfare" was incoherent because "the only constitutional power to pay such a debt as the promise to give a bounty to sugar producers and manufacturers is in clause 1 of section 8, and the Court said that there was the source of the power. . . . By what sort of reasoning can it be argued that the same language which authorizes Congress to appropriate money to pay a debt not incurred in the discharge of any power elsewhere vested in Congress does not also authorize some object essential to the general welfare not within the scope of any power elsewhere vested in Congress." *Missouri Utilities Co. v. City of California,* 8 F. Supp. 454 (W.D. Mo. 1934). The government's brief in *Butler* made the same point. Brief for the United States, at 179, *United States v. Butler,* 297 U.S. 1 (1936) (No. 401).

with the majority in *Helvering* rather than join the dissent by his fellow-horsemen McReynolds and Butler.

But what of *Butler?* In Gillman's view, *Butler* demonstrates that Stone was simply wrong: shortly after his clandestine tea with Perkins, the Court struck down the AAA as outside Congress's authority under the General Welfare Clause. Here, Gillman misreads *Butler.* The government had indeed rested its case for the AAA on the capacious and generally unreviewable power of Congress to appropriate for the general welfare. However, the majority discussed the issue just long enough to reject the processors' claim that Congress could spend only for enumerated powers rather than in the general welfare, a field over which Congress had "a wide range of discretion." The Court then explicitly sidestepped the question of whether spending in aid of agriculture was within the general welfare, despite the fact that the opinion terms this issue the "great and controlling question in the case." Instead, the Court resorted to a tortured argument that the Act was an improper attempt to regulate agriculture, a subject reserved to the states according to the 10th Amendment. Rather than undertake the first-ever judicial review of Congress's exercise of the spending power, the Court turned to another basis for invalidating the law. That the Court chose the alternative route is evidence for the power of the *Realty Company* precedent, and in fact *Butler* was subsequently cited, in the New Deal cases discussed above, for the proposition that Congress was entitled to nearly unlimited deference in spending under the General Welfare Clause.[7]

This is still the law. The plain fact is that the Supreme Court has never—before, during, or after the New Deal—struck down a federal law because Congress had exceeded its constitutional authority to spend. Instead, the Court has repeatedly restated *Realty Co.*'s principle of deference to Congress on the question of the general welfare. As Chief Justice Rehnquist

7. The Child Labor Tax Case offers even less support for Gillman's argument. There, the Court never even reached the question of the scope of Congress's power to tax for the general welfare, concluding quickly that the tax on businesses employing child labor was not a tax but was a penalty designed to regulate a matter reserved to the states. Another case discussed by Gillman, *Frothingham v. Mellon,* did raise the subject of the scope of the General Welfare Clause, but as in *Butler* the Court declined to exercise judicial review, disposing of the case on the basis of standing. In any event, Gillman's suggestion that *Frothingham* somehow provides the only "serious precedent for the claim that the judiciary would have a very small role to play in reviewing congressional spending decisions" is belied by the fact that the Court did not similarly dispose of *Butler, Helvering,* and *Steward Machine* on the basis of standing, despite the fact that the government raised it. See, e.g., Brief for the United States, at 40–45, *Helvering v. Davis,* 301 U.S. 619 (1937) (No. 910); Brief for the United States, at 122–35, *United States v. Butler,* 297 U.S. 1 (1936) (No. 401). Hiss was less sanguine than Gillman about the efficacy of *Frothingham,* as he devoted the bulk of his brief to deference and the scope of the General Welfare Clause.

noted in *South Dakota v. Dole,* "the level of deference to the congressional decision is such that the Court has . . . recently questioned whether 'general welfare' is a judicially enforceable restriction at all."[8]

Disaster Relief in the New Deal

Gillman believes that I overstate the importance of federal disaster relief by calling it a "key legal underpinning" for the expansion of the welfare state during the New Deal. I am less committed to the precise wording (one person's "key" could be another's "somewhat important") than I am to showing how disaster relief was deployed as a precedent in New Deal legal and political contests. As I have detailed at greater length elsewhere and in my forthcoming book,[9] New Deal lawyers, politicians, and other advocates frequently invoked the history of disaster relief to argue that the Depression was itself a disaster that deserved, even mandated, federal relief.

To give just one example from the political arena, Roosevelt's relief captain Harry Hopkins argued in a radio speech in early 1937 that "we should consider Government spending in the light of this country's history, to see whether or not it is something new and revolutionary and frightful, or whether it is entirely traditional and has been going on for a long time." As examples of "traditional" spending, Hopkins mentioned "direct subsidies" to the sugar industry, and then said

> And as for the spending of Federal money to relieve the distress of individuals, there are more than 100 acts or resolutions of Congress dating back to 1803, which provide special subsidies or concessions to help groups of citizens recover from disaster or other circumstances beyond their own control. These policies were not mere official generosity. They were intended to promote the general welfare in accordance with the Constitution.[10]

This use of disaster relief as a precedent for federal spending began even before the New Deal. It was mentioned in similar speeches by Senator Robert M. La Follette, Jr. and others in Congress during the winter

8. Likewise, the Ninth Circuit noted in upholding the conditional expenditure of federal highway funds contingent on the states adopting a uniform speed limit, courts have almost uniformly shied away from meddling in the congressional power of the purse. *Nevada v. Skinner,* 884 F.2d 445 (9th Cir. 1989).

9. The book, also titled *The Sympathetic State,* will treat the use of the disaster precedent in the legal and political defense of the New Deal in close detail. See also works cited in Michele Landis Dauber, "The Sympathetic State," *Law and History Review* 23 (2005): 391, n. 12.

10. Radio Address, 1937, Harry L. Hopkins Papers, box 12, Speeches and Articles, Franklin and Eleanor Roosevelt Library, Hyde Park NY.

of 1930. This effort was, I have argued, continuous with earlier efforts, many of which I mention in my article, to bolster spending proposals by analogizing them to disaster relief.

Of course, as Gillman points out, the history of those efforts to call on disaster relief in Congress to support innovative spending measures was not uniformly successful. Why then would New Deal lawyers repeatedly list congressional appropriations for disaster relief in their legal defense of New Deal spending programs? The most likely reason is that in the judicial context these precedents by and large worked, as when Justice Sutherland explicitly credited the government lawyers with educating the Court on the history of disaster relief as a precedent for federal spending in *Cincinnati Soap*. Alger Hiss and his team of lawyers in *Butler* were likely led to include the list of disaster relief appropriations through reading the Supreme Court's opinion in *Realty Company,* in which the Court cited the list as it appeared in Joseph Choate's brief for the Sugar Men. The disaster precedents reappeared in other New Deal cases, including those cited above, because they had helped in *Butler* and in *Realty Company* to support the proposition that Congress's long practice of enacting class legislation in support of disaster relief was constitutional, and hence that Congress could legitimately spend for purposes not included in its enumerated powers. The lawyers also looked to disaster relief as a kind of hedge in case the Court decided to exercise judicial review over spending: to the extent that a new spending measure could be analogized to the 150–year tradition of disaster relief, it could be brought within the constitutional scope of the general welfare.[11]

11. The disaster precedent actually extended out of the federal spending context into the interpretation of the state police power. For example, the Supreme Court held in *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398 (1934) that Minnesota's Mortgage Moratorium Law did not unconstitutionally interfere with contractual obligations because "if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood, or earthquake, that power cannot be said to be nonexistent when the urgent public need demanding such relief is produced by other and economic causes" (439–40). The Alabama Supreme Court explicitly relied on disaster relief and *Blaisdell* in holding that the state's unemployment compensation statute was within the state's police power to enact because the suffering caused by large scale economic difficulties, like that caused by "fire, flood, or earthquakes" was "a proper subject of governmental action in the interest of the general welfare." *Beeland Wholesale Co. v. Kaufman,* 174 So. 516, 524–25 (Ala. 1937). Gillman finds fault with the fact that I chose not to discuss *Public Pensions* by Susan Sterett. Sterett's book, while quite good in some respects, is flawed for its failure to distinguish between federal and state spending doctrines and practices, as well as its incorrect theory of the legal defense of the Social Security Act. Sterett asserts that the New Deal spending programs were justified as payment for "service" by workers to the state, however, as *Beeland* shows, this is inaccurate. Instead, *Beeland,* which was the most important test case of state unemployment compensation statutes, relied for its conclusion

Gillman's difficulty with disaster relief as a precedent for the New Deal welfare state is rooted, it appears, in his more general understanding of the New Deal as a revolutionary break with the past, a "complete reconfiguration of structures of governance." He therefore asserts that lawyers defending the New Deal moved freely between citations of useful precedents and arguments for the "irrelevance of precedents in light of dramatic changes in the social and economic life of the country." But arguing that the New Deal was wholly innovative was a luxury not available to the lawyers defending the Social Security Act in the Supreme Court, where the most damning description would have been "unprecedented." We need not settle the question of the essential continuity or discontinuity of the New Deal in order to see that, for its legal defenders, the ability to demonstrate continuity with constitutionally permissible practices was prized above all else. Disaster relief provided one such potential safe haven, to such an extent that I think it reasonable to term it a "key" legal underpinning for the New Deal welfare state.

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that unemployment relief was a valid public purpose on the fact that "starvation, or the tendency to it, due to economic depression, is as alarming and dangerous to the state and its people as that condition due to flood, drouth, or earthquake." *Beeland Wholesale Co. v. Kaufman,* 525.