

# To Provide for the General Welfare

A History  
of the Federal Spending Power

Theodore Sky



DELAWARE

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that case have employed the same reasoning in justification of Congress, as they now make against the Convention. How difficult is it for error to escape its own condemnation!<sup>14</sup>

It is to be noted that, in the quoted paragraphs, Madison did not specifically dwell on spending, as distinguished from general regulatory activities. To the extent that Madison's argument in "Federalist No. 41" maintained that the General Welfare Clause did not confer upon Congress power to regulate in all areas pertaining to the "general welfare of the United States," independent of the taxing and spending power, it was consistent with the action of the Convention and with the weight of the interpretations that followed ratification during Madison's lifetime, including Story's commentaries. It was generally understood, as Madison argued, that the General Welfare Clause did not confer power to regulate agriculture beyond what would be possible under the interstate and foreign commerce power as a means of "providing for the general welfare." Nor, as Madison urged, was the clause thought to confer power to regulate the course or descents or the forms of conveyances, let alone power to "destroy" freedom of the press or trial by jury. The question that Madison's analysis in No. 41 raised, however, was whether the General Welfare Clause was qualified by the enumerated powers so as to limit *spending* for purposes encompassed within the enumerated powers and thus to preclude federal *spending* for such matters as education, internal improvements, economic subsidies and social services, without a constitutional amendment. It was this question, so ably posed by Madison as a means of defending the Constitution against the Anti-Federalist onslaught, that would confound statesmen during Madison's life and after his death until the Supreme Court quietly put the issue to rest in 1936 in addressing legislation to confront the Great Depression. Madison later claimed that spending was so limited; Hamilton denied that it was.

Madison's observations in No. 41 constituted the only specific interpretation of the General Welfare Clause to appear in the *Federalist Papers*. However, other key players in the Convention, notably, James Wilson and Alexander Hamilton offered defenses of the taxing power that did not invoke or rely upon Madison's narrow reading. Roger Sherman, the author of the original proposal that led to the inclusion of the clause did not opine on the matter in his fairly limited and subdued contributions to the debate. In his speech to the Pennsylvania ratifying

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framers could not have anticipated. This argument regarding the need for flexibility had been advanced by Hamilton previously in the debates on ratification of the Constitution. He invoked it here in this "general welfare" analysis as a central point: the framers had no choice but to preserve an avenue of flexibility to address important national issues that could not be the subject of specific provision in the Constitution. The "general welfare" language was that avenue. It provided the "indefinite" grant of authority to the federal legislature for which Hamilton had been desperately groping since his June 18, 1787 speech before the Philadelphia Convention.<sup>4</sup>

At the same time it should be noted that, in the quoted passage, Hamilton treated the General Welfare Clause as a *limitation* on the taxing power and not as an independent grant of "regulatory" authority as Gouverneur Morris might have contended, at least if his use of the semicolon had prevailed. Hamilton discussed the clause as describing the "objects" to which "money" raised under the taxing power "may be appropriated." The General Welfare Clause, as discussed in the *Report on Manufactures*, circumscribes, however broadly, the power to appropriate and spend.

Having described the breadth of the General Welfare Clause, Hamilton then stated his conclusion about its reach with regard to specific areas of national concern: "It is, therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. *And there seems to be no room for doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce is within the sphere of the national councils, as far as regards an application of money.*"<sup>5</sup>

The General Welfare Clause was thus a constitutional basis not only to support the manufacturing subsidy proposals that Hamilton suggested in the report; it would also support initiatives in education and agriculture—areas that would be of interest to southern lawmakers. After all, Madison had proposed aid to universities in the constitutional convention and Washington had done so in his first inaugural address. The conclusion probably was designed to gain support for the interpretation from those who might object to it, as well as to support administration goals.

Hamilton, perhaps recognizing the broad grant of power that



he was proposing ran counter to Madison's central thesis as to the meaning of the clause, despite the report's effort to include an "education sweetener," added one qualification: the objects of the appropriation should be *general* rather than *local*. Hamilton said: "The only qualification of the generality of the phrase in question which seems to be admissible is this: That the object to which an appropriation of money is to be made be general and not local; its operation extending, in fact or by possibility, throughout the Union and not being confined to a particular spot."<sup>6</sup>

Hamilton declined the opportunity to address directly the arguments that Madison had made in "Federalist No. 41," that the "general welfare" formulation was a mere shorthand or introductory for the enumerated powers that followed. Nor did he attempt fully to refute the central point that would be made in opposition: by broadly construing the "general welfare" language in the federal constitution, that document would give Congress authority to enter a vast array of areas that the framers had not mentioned in the enumerated powers. This, of course, he must have anticipated, would be Madison's concern. Hamilton recognized the problem and tried to deal with it in two somewhat elliptical sentences: "No objection ought to arise to this construction from a supposition that it would imply a power to do whatever else should appear to Congress conducive to the general welfare. A power to appropriate money with this latitude, which is granted, too, in express terms, would not carry a power to do any other thing not authorized in the Constitution, either expressly or by fair implication."<sup>7</sup>

As Hamilton apparently perceived it, the power to appropriate did not extend to the power to regulate directly. Congress could spend to encourage activities thought to be of benefit to the public in a particular area, such as education. That did not mean, in the absence of specific constitutional authority, that Congress had plenary power directly to regulate in that area. The Constitution gave Congress spending authority through the express language of Article I, section 8, clause 1. Otherwise, it confined the legislative power of Congress to regulate through the enumerated powers. This was the closest Hamilton came to directly confronting the implications of Madison's general welfare theory expressed in "Federalist. No. 41." The new central government was, indeed, one of express enumerated powers. However, one of these express powers, the spending power, was as comprehensive as Congress wished in order to provide flexibility to deal

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with unanticipated problems. The equation thus becomes: broad power to spend; limited power to engage in direct regulation through the enumerated powers that appear in the Constitution after the General Welfare Clause. Evidently, Hamilton thought this response sufficient without mentioning "Federalist No. 41" or its author; clearly, it would not do to take on Madison by name, particularly since Hamilton was a coauthor of the set of essays in which Madison's interpretation of the General Welfare Clause had appeared.

Hamilton's theory in the *Report on Manufactures*, of course, did not convince Madison or those who shared his views. It is instructive to note that Hamilton implicitly recognized Madison's position and attempted to deal with it by contending that the power of the purse is different than regulatory power, at least on the surface. However, Hamilton did not try to elaborate on the point or to develop distinctions between the two powers that might have strengthened his central interpretation. He did not, for example, urge that the spending power could be expressed by grants or other instruments which the recipient would be free to reject or that it would generally be exercised through appropriations, measures limited in time in a way that permanent regulatory legislation is not. This is not surprising since the *Report on Manufactures* was not intended to serve as a constitutional treatise. It was a proposal for urgent legislative action which included a legal argument on the basis of which legislators could support the action constitutionally if they decided to take it.

The significance of Hamilton's "general welfare" interpretation in the *Report on Manufactures* is threefold. In the first place, it represents the views of one of the framers of the Constitution, who, while not always present at the deliberations and absent when the General Welfare Clause was proposed, debated, and reported favorably by the Committee on Unfinished Parts, was present when the clause was finally included in the draft of the Committee of Style on which he served. Second, Hamilton was one of the major defenders of the Constitution and authored a majority of the essays that constituted *The Federalist*, a factor which gives some weight to his views on the meaning of the basic charter. Third, the *Report* provides a framework for evaluating the significance of the interpretation in light of the development of government policy in a major area early in the first term of the first president.

The interpretation was not merely an insignificant, speculative legal sidebar in a long, unfocused tract on economic policy. Ham-

Clause. "Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and the State Governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsuceptible of judicial cognizance and decision."

That the general welfare authority was confined to the appropriation of funds did not sway Madison here, as it had not in the past. "A restriction of the power to 'provide for the common defense and general welfare' to cases which are to be provided for by the expenditure of money would still leave within the legislative power of Congress all the great and most important measures of Government, money being the ordinary and necessary means of carrying them into execution." Gaining the assent of States to the projects would not cure the defect. "The only cases in which the consent and cession of particular States can extend the power of Congress are those specified and provided for in the Constitution."

Finally, Madison made it clear that his objection was based on the Constitution, not on the policy or *expediency* of using federal funds for internal improvements. This was only consistent with his messages on the subject. "I am not unaware of the great importance of roads and canals, and the improved navigation of water courses," he told Congress, "and that a power in the National Legislature to provide for them might be exercised with signal advantage to the general prosperity." But his fidelity to the constitutional principles that he was espousing precluded him from letting the policy advantages prevail. The following observation, in a sense a valedictory, summarizes the view that Madison had held during his public life and the view that he would continue to maintain during his retirement: "But seeing that such a power is not expressly given by the Constitution and believing that it can not be deduced from any part of it without an inadmissible latitude of construction and a reliance on insufficient precedents; believing also that the permanent success of the Constitution depends on a definite partition of powers between the General and the State Governments, and that no adequate landmarks would be left by the constructive extension of the powers of Congress as proposed in the bill, I have no option but to withhold my signature from it. . . ."

He closed, however, by noting that he "cherish[ed] the hope that [the bill's] beneficial objects may be attained by a resort for

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the necessary powers to the same wisdom and virtue in the nation which established the Constitution in its actual form and providently marked out in the instrument itself a safe and practicable mode of improving it as experience might suggest."<sup>23</sup>

#### BALANCING NATIONAL GROWTH WITH CONSTITUTIONAL CONSTRAINT

Congress may have been less convinced than Madison as to the need for such an amendment, believing that the Constitution already authorized internal improvement legislation. One factor that may have been influential was the availability of an alternative interpretation of the General Welfare Clause. Hamilton had urged that the General Welfare Clause could be read broadly *without an amendment* to support initiatives to promote the general welfare, including federal assistance to aid manufactures and agriculture. Moreover, some internal improvement legislation had been enacted and implemented prior to 1817 without a preceding constitutional amendment. This was the Cumberland Road legislation enacted in 1806 during Jefferson's second term. Congress may have therefore recognized that the internal improvement issue could be addressed without a constitutional amendment. Despite the recommendations of Jefferson and Madison and despite Madison's dramatic veto of the Bonus Bill, as matters unfolded, Congress did not hasten to propose the type of enhancement to the Constitution that Madison called for in his veto message.

In that message, Madison had publicly articulated his definitive view as to the limited reach of the General Welfare Clause. Moreover, he had backed up that view by vetoing a popular measure. His action was not the product of sudden impulse or limited reflection. Despite the surprise that Henry Clay expressed about Madison's action, the views that Madison expressed in the veto message reflected principles that he had advocated firmly during the thirty years that separated his service in the Constitutional Convention and the delivery to his desk of the Bonus Bill. His message was consistent with the position that he had taken in "Federalist No. 41." It also was consistent with the view he had taken in 1791 in opposing Hamilton's interpretation, in the *Report on Manufactures*, that the General Welfare Clause was not limited to spending to implement the enumerated powers. Finally, it was consistent with the position that his friend, political



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had recommended. It seemed clear that Congress was not prepared to heed Monroe's advice in his inaugural address. Indeed, Congress and the president were at an impasse on the subject; despite Clay's opposition to the Bonus Bill veto, the House in 1817 had been unable to muster the necessary two-thirds vote to override the veto and pass the bill. On the other hand, at least a majority voted in opposition to the veto, suggesting that a two-thirds vote to propose an amendment to the Constitution, as Madison and Monroe advocated, would not be available. In light of this impasse, some compromise seemed necessary if internal improvement, so necessary to national growth in an expanding nation, were to advance.<sup>5</sup>

Perhaps prompted by these considerations or stung by Clay's critique, Monroe quietly proceeded to prepare a lengthy memorandum setting forth his legal views on the issue. The president originally intended to share this memorandum with Congress when he delivered his third annual message in late 1819. However, Secretary of State John Quincy Adams and other members of the cabinet dissuaded him from doing so, believing that Monroe's views would receive no better treatment in the Sixteenth Congress than they had from its predecessor. Adams concluded that it was a "moral certainty" that Congress would not act on an amendment. Deferring to his cabinet, Monroe filed the memorandum for possible future use.<sup>6</sup>

The issue arose again in his second term in a way that demanded an executive determination. In May 1822, Congress presented to Monroe for his signature a bill entitled, "An act for the preservation and repair of the Cumberland road." Monroe characterized it as legislation affording Congress "a power to establish turnpikes with gates and tolls, and to enforce the collection of tolls by penalties." He perceived it as legislation that implied Congress's ability to exercise "a power to adopt and execute a complete system of internal improvement." Monroe therefore vetoed it, describing his reasons in a brief message.<sup>7</sup> He began this message by first explaining that—as he understood it—the right to impose duties on persons passing over the road also involved the right to take land from the proprietor and to pass laws for the protection of the road. If that right existed for the Cumberland Road then, by extension, it existed for all roads that Congress might establish. In short, Monroe saw the measure before him as constituting "a complete right of jurisdiction and sovereignty for all the purposes of internal improvement." It did not constitute "merely the right of applying money under the power

Constitution would "practicably create an unlimited government." In concluding that no such reading was intended, Story cited President Monroe's memorandum of May 1822 issued in connection with his internal improvement veto of that year. Both Story and Monroe had reached the same conclusion.<sup>13</sup>

Further, Story reasoned, to give the enumeration of powers a "sensible place" in the Constitution, it was necessary to construe them "as not wholly and necessarily embraced in the general power [to provide for the common defence and general welfare]." Moreover, to give every part of the Constitution meaning, it was necessary to avoid the broader construction of the General Welfare Clause. "For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? . . . [T]he idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can [have] no other effect than to confound and mislead, is an absurdity which no one ought to charge on the enlightened authors of the Constitution. It would be to charge them either with premeditated folly or premeditated fraud." Here, Story appropriately cited Madison's "Federalist No. 41," in which the same conclusion was reached.

The reading that Story selected avoided all these pitfalls. "[C]onstruing the [General Welfare] clause in connection with and as a part of the preceding clause giving the power to lay taxes, it becomes sensible and operative. It becomes a qualification of that clause, and limits the taxing power to objects for the common defence or general welfare. It then contains no grant of any power whatsoever; but it is a mere expression of the ends and purposes to be effected by the preceding power of taxation." Again, Story relied upon the Monroe Memorandum as well as Madison.

At this stage, Story had interpreted Article I, section 8 in what he regarded as a reasonable manner. It contained an independent taxing power qualified by the General Welfare Clause. It also contained a number of separate enumerated powers relating to defense, interstate and foreign commerce, and other Article I, section 8 fields. The taxing power so construed was one of a number of enumerated powers. However, as read by Story, the General Welfare Clause did *not* constitute a regulatory power, independent of the spending power, authorizing Congress to enact whatever measures it wished, with or without appropriation, under an unlimited power to legislate for the general welfare of the United States. The structure of the Constitution as

and Jefferson, an alternative that would justify more internal improvement and other public investment legislation when the political climate warranted. Thus, the friends of internal improvements could continue to build over the decades, as they had done during the administrations of Monroe and Adams, a body of precedent that would be impossible to ignore when the courts finally came to rule on the issue. At that juncture, Story's analysis would reemerge as a compelling starting point for a judicial decision incorporating the Hamiltonian view into the authoritative judicial interpretation of the General Welfare Clause.<sup>22</sup>

In sum, Story provided a constitutional continuum respecting the General Welfare Clause. On one end of the continuum is the proposition that Congress may appropriate tax revenues in order to provide for the general welfare, a general welfare that is not confined to the legislative fields assigned to Congress in the enumerated powers contained in Article I, section 8. At the other end of the continuum is the proposition that Congress may not legislate to provide for the general welfare, independent of federal spending. To use Monroe's example, it may assist states in the construction of roads (subject to reasonably related grant conditions) but may not supersede state jurisdiction over the roads in question. By the same token Congress may not, in the absence of constitutional authority separate from the General Welfare Clause, wholly federalize areas committed to state authority which it is authorized to assist under the spending power.

#### THE GENERAL WELFARE WISDOM OF THE ANTEBELLUM PRESIDENTS

The period before the Civil War was characterized by a continuation of the rift over the scope of the spending power. Democratic presidents who looked to the South for political support—including James K. Polk, John Tyler, Franklin Pierce, and James Buchanan—followed Jacksonian philosophy and vetoed internal-improvement legislation as a means of preventing the restoration of the American System and maintaining perceived constitutional constraints. For these men, Madison's testament was the paramount starting point. In contrast, Whig presidents, especially Zachary Taylor and Millard Fillmore, were proponents of Clay's American System and more tolerant of internal-improvement legislation. Their time on the stage was, however,



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of such short duration that they were unable to install policies that endured.

Although he had been one of the Maysville Road's major architects during the Jackson administration, as president, Martin Van Buren did not play a major role in extending it as a precedent. His administration was preoccupied with the financial panic of 1837 and with a continuing effort to persuade Congress to adopt its subtreasury proposals—a mechanism for the receipt and disbursement of federal funds that is essential to the administration of federal spending programs.<sup>23</sup>

Van Buren was defeated by William Henry Harrison in the election of 1840. Harrison, a Whig, survived only a month after his inaugural address, which was a long disquisition on the constitutional role of the executive. It fell to John Tyler to carry out the policies of the administration. Tyler, a Democrat, followed Jacksonian principles with regard to internal improvements. Tyler had supported Jackson's Maysville Road veto. His annual messages encouraged river and harbor improvements on the Great Lakes or the Mississippi that Tyler believed would enhance trade and therefore would be justified as national in scope. However, in 1844, he vetoed a river and harbor measure because it contained appropriations for local projects that he believed could not be justified.<sup>24</sup>

#### Polk's Vetoes

Tyler's successor, James Knox Polk, was explicitly Jacksonian in his actions on the internal improvements issue and, if anything, less compromising than his mentor from his native state. Polk vetoed several internal improvement bills and carefully explained his views in the accompanying messages. In his final state of the union message, he also gave the nation an unyielding brief in opposition to Clay's American System, in which federally financed internal improvements were portrayed as an unmitigated evil.

Polk's second internal-improvement veto, which took place toward the end of 1847, was accompanied by a statement of his views on internal improvements and, more broadly, on the spending power. The measure in question appropriated over 500 thousand dollars for the improvement of rivers and harbors lying within the individual states. Polk stated his objection at the outset. The bill would set a precedent for further appropriations for the improvement of rivers and harbors. Without an immediate



resort to taxation, it would be difficult to maintain the credit of the United States at a time when the nation was engaged in a war with Mexico.<sup>25</sup>

Polk then undertook to review the history of the internal-improvement movement, as he saw it. He attributed the policy of "embarking the Federal Government in a general system of internal improvement" to the Adams administration twenty years earlier. Applications for projects had then reached the sum of \$200 million. Polk's predecessor, Andrew Jackson, had confronted the crisis by vetoing the Maysville Road bill. This, to Polk, had checked the policy of placing the cost of local improvements on the federal government and had led to the reduction of the debt. Polk maintained that he could not distinguish the legislation involved in Jackson's vetoes from that before him.<sup>26</sup>

Polk's alternative for financing internal improvements was to propose that Congress permit the states to lay tonnage duties in order to finance them. As an alternative, he proposed adopting a constitutional amendment. Despite his commitment, he was no more successful than the Virginia presidents he had cited in convincing Congress to forward such an amendment to the states.<sup>27</sup>

In his farewell message, Polk warned the people of the perils of the American System. As he described it, the system involved three elements: (1) a national bank; (2) a high protective tariff; and (3) "a comprehensive scheme of internal improvements." What Polk termed "a comprehensive scheme of internal improvements" was a "convenient and necessary adjunct" of the high protective tariff. It was "capable of indefinite enlargement and sufficient to swallow up as many millions annually as could be exacted from the foreign commerce of the country." Internal improvements for Polk were thus, not a means of opening up the country and expanding trade, but a pretext for higher taxes in the form of protective duties.<sup>28</sup>

*Zachary Taylor, Millard Fillmore, and the Brief Revival of Internal Improvements*

The Whig Party acquired the habit of nominating for president military heroes who died early in their terms. They were succeeded by vice presidents who were not reelected and have been little remembered. Such was the case with Zachary Taylor, elected as the twelfth president in 1848 under the Whig banner. He died on July 9, 1850, having served little more than a year after his March 1849 inauguration, and was succeeded by his vice

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president, Millard Fillmore of New York. Taylor had little oppor-  
tunity to demonstrate his fidelity to the American System and  
other Whig principles, including those pertaining to internal im-  
provements. However, support for internal improvements had  
been an issue in Taylor's 1848 campaign against Lewis Cass, the  
Democratic candidate. Abraham Lincoln and other Whig sup-  
porters expressed their belief that Taylor favored internal im-  
provements by voicing their preference for him.<sup>29</sup>

While Taylor's death cut short his opportunity to pursue internal-  
improvement initiatives, his successor, Millard Fillmore, ampli-  
fied the internal-improvement themes that Taylor had sounded.  
As J. D. Richardson observed, "[Fillmore's] political career  
began and ended with the birth and extinction of the Whig  
party." He had served in Congress during the Jackson and Van  
Buren years and in 1848 had been nominated by the Whigs for  
vice president. Fillmore's philosophical leanings were entirely  
consistent with the resumption and extension of the internal-  
improvement movement, as he made abundantly clear in his first  
annual message at the end of 1850.

Fillmore began by laying out the constitutional markers. "I en-  
tertain no doubt," he said, "of the authority of Congress to make  
appropriations for leading objects in that class of public works  
comprising what are usually called works of internal improve-  
ment. This authority I suppose to be derived chiefly from the  
power of regulating commerce with the foreign nations and  
among the States and the power of laying and collecting im-  
posts." Presumably, the latter reference was to the spending  
power under the General Welfare Clause.<sup>30</sup>

Like Adams in 1825, Fillmore was using the precedent of past  
legislative support for the infrastructure as a basis for asserting  
that federal appropriations for this class of public works were  
constitutional. He cited previous federally funded projects such  
as lighthouses, buoys, and beacons.<sup>31</sup> By removing the states'  
power to collect imposts, Fillmore argued, the Constitution made  
it necessary for Congress to aid the states by subsidizing inter-  
nal improvements. As Fillmore so cogently put it: "By the adop-  
tion of the Constitution the several States voluntarily parted with  
the power of collecting duties or imposts in their own ports, and  
it is not to be expected that they should raise money by internal  
taxation, direct or indirect, for the benefit of that commerce the  
revenues derived from which do not either in whole or in part go  
into their own treasuries."<sup>32</sup>

The practice of supporting internal improvements, in the tradi-

tion if not with the zeal of John Quincy Adams, had been resumed. Fillmore's place in the sun was, however, fleeting, and the resumption expired with his presidency. As the Whig president who served longest (almost three years), Fillmore's actions on behalf of internal improvements and the federal spending power may be taken to reflect the Whig persuasion in its most well developed form as expressed by a sitting Whig president. But Fillmore's lack of stature, his status as a nonelected president, the brevity of his tenure, and the absence of any comprehensive constitutional analysis or decision law did not permit great weight to be given to his views. As a reward for his steady, if less than passionate, advocacy of Whig views on the subject, the Whig party declined to renominate him in 1852, turning instead to yet another military hero, General Winfield Scott, who was in turn defeated by the Democrat Franklin Pierce.<sup>33</sup>

*Franklin Pierce and James Buchanan: Strict Construction in the Shadow of Secession*

In 1854, Pierce vetoed two legislative measures. His explanation for so doing made clear his understanding of the limits of the spending power, as well as his understanding of the scope of that power under the broad, alternative construction of the Constitution. The first bill, vetoed in May 1854, would have granted public lands to the states on the basis of an apportionment formula. Each state was to place the proceeds from the sale of these lands in an interest-earning fund, and the interest was to be dedicated to maintaining the indigent insane within the state. States without public lands would be issued scrip for the same purpose. In essence, the measure constituted a state administered, formula driven, categorical federal-aid program to assist states in better serving a specific, needy population.<sup>34</sup>

Pierce saw this initiative as flatly unconstitutional and profoundly dangerous. The breadth of the proposition alarmed him. If Congress could make provision for the indigent insane in the states, he correctly forecast, it would also have the power to provide for the noninsane indigent and "thus to transfer to the Federal Government the charge of all the poor in all the States." He turned to the General Welfare Clause and rejected it as a source of that power. He took it as settled construction that Article I, section 8, clause 1 was "not a substantive general power to provide for the welfare of the United States, but it is a limitation on the grant of power to raise money by taxes, duties, and imposts."

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The government could lay taxes in order to provide for the general welfare. To construe it otherwise would, as Jefferson and Madison had argued, eradicate the enumerated powers, invade states' rights, and dry up local spending for charitable purposes.<sup>35</sup>

In his analysis of the General Welfare Clause as not conferring a power to provide for the general welfare, separate and apart from the power to apply tax revenues, Pierce was consistent with the views of Monroe and Story on the precise point. However, the president did not address the proposition clearly announced by Monroe and Story, and strongly supported by Adams, that the spending power contained in the General Welfare Clause conferred the power to appropriate for the general welfare, unconfined by the enumerated powers. That jump was apparently too great for Pierce's political convictions. Those convictions were rooted in Democratic tradition and deference to its strict construction doctrines.

Pierce declined to apply the analysis that Monroe and Story had formulated, an analysis that might have permitted him to sign the indigent-insane measure before him. For the same reasons, he declined to place any stock in Article IV, section 3 of the Constitution which affords Congress the power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." If the bill exceeded the power of Congress under the spending power, it exceeded it under the power to dispose of lands. As a constitutional matter, for Pierce, it was "wholly immaterial whether the appropriation be in money or in land." He applied the same strict constructionist philosophy to federal assistance measures, whether in the form of direct appropriations under Article I or dispositions of public lands under Article IV.<sup>36</sup>

Pierce's successor, James Buchanan, was forced to report, in his final annual message, that the state of the union was disunion. He had begun his administration by identifying himself as a "strict constructionist" of the Constitution. He concluded that a state had no right under that Constitution to secede. His strict stance precluded him, however, from finding in the Constitution a power that would authorize him to use force to stop a state from seceding. He urged compromise and constitutional conventions, steps that did nothing to stem the slide toward national dismemberment.

Using Polk's 1847 veto message as a starting point, Buchanan vetoed a number of internal improvement measures that he be-



lieved to be lacking in constitutional authority. He vetoed as well a bill that would have donated land to the states in exchange for their promise to devote the proceeds of the sale of the land to establish agricultural colleges. This bill was a precursor of the Morrill Act of 1862.<sup>37</sup>

The land-grant college bill in question donated 20,000 acres of land for each Senator or Representative in Congress. Over 6 million acres with a valuation of over \$6 million would be distributed. States with public lands would receive their quota in the form of land grants. The remaining states would receive land scrip which they might sell on the market. In both cases, proceeds had to be used by the grantee states for the endowment, support and maintenance of at least one college where the primary purpose would be the teaching of agriculture and mechanic arts "in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life." Each state was obliged to provide for at least one college within a five year period or the grant would cease and proceeds of the sales revert to the United States.

Buchanan pitched his veto on both questions of expediency and constitutionality but made clear that his constitutional concerns were controlling. He began this part of his message by avowing that it was "undeniable that Congress does not possess the power to appropriate money in the Treasury of the United States for the purpose of educating the people of the respective States." He could not find the power in the Necessary and Proper Clause. He did not discuss the spending power and the General Welfare Clause extensively. When he did turn to that provision, he complained that admitting a constitutional power under that language in favor of the bill in question would involve taxation for state, as well as federal, purposes. "This," he observed, "would be an actual consolidation of the Federal and State governments so far as the great taxing and money power is concerned, and constitute a sort of partnership between the two in the Treasury of the United States, equally ruinous to both." Evidently, for Buchanan, encouragement for education did not come within the purview of the phrase, "the general Welfare of the United States." Or, if it did, the General Welfare Clause was an insufficient prop because the spending could not be justified as within the ambit of a discrete enumerated power.<sup>38</sup>

That the bill in question related to the disposition of the public lands, rather than a direct appropriation, did not persuade Buchanan of its constitutionality. The Constitution provided Con-

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Congress does not possess the Treasury of the United States. The people of the respective states in the Necessary and Proper Clause, the power and the General Welfare Clause did turn to that provision, the constitutional power under that provision would involve taxation for this," he observed, "would be the power of the federal and State governments. The power is concerned, and the two in the Treasury to both." Evidently, for Buchanan did not come within the General Welfare of the United States. The General Welfare Clause was an insufficiently justified as within the power.<sup>38</sup>

the disposition of the public lands, did not persuade Buchanan. The Constitution provided Con-

gress with "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The defenders of the bill had pointed to this language as justifying their contention that Congress could make a gift of the public lands for the purpose of education. Buchanan, like Pierce, saw this as exceeding the enumerated powers. The framers would not have carefully limited these powers, while leaving Congress the power to use funds from the disposition of lands to carry out any domestic policy. Lands could be disposed of only to carry out duties corresponding to the enumerated powers. In short, dispositions of land must, for constitutional purpose, be subjected to the same test as the appropriation of funds.<sup>39</sup>

Nor could the term "dispose of" be used to convey the power to "give away." Because the lands were purchased with the proceeds of federal taxes, Congress was confined, in applying the lands or money derived from their sale, to the purposes for which money could be appropriated. Buchanan said: "The inference is irresistible that this land partakes of the very same character with the money paid for it, and can be devoted to no objects different from those to which the money could have been devoted." In short, Buchanan, like Pierce, treated the issue as a question about the constitutionality of an appropriation of federal funds. In answering that question, Buchanan declined to apply the General Welfare Clause as justifying the appropriation. For him, assisting higher education in the states was not tantamount to providing for the general welfare of the United States.<sup>40</sup>

The reasoning behind Buchanan's veto of the 1859 homestead bill was similar to that behind the land-grant college bill. The homestead bill gave every adult citizen who was the head of a family, and every adult of foreign birth residing in the United States who declared the intention of becoming a citizen, the privilege of obtaining 160 acres of federal land so long as the settler resided upon it continuously for five years. At the end of the five-year period, the settler would receive a land patent in exchange for the payment of twenty-five cents per acre, or one-fifth of the government price. The bill also provided for a cession of certain public lands to the states. In vetoing the bill, Buchanan invoked constitutional considerations similar to those raised earlier when he vetoed the land-grant college legislation.<sup>41</sup>

The internal improvement vetoes of Polk, Pierce, and Buchanan represent the high-water mark of resistance to a broad, Hamiltonian construction of the General Welfare Clause. They

represent the efforts of antebellum Democratic presidents to hold the line against what they saw as constitutional derogation. But their policies were not equal to the times or to the crises that they posed, any more than were the temporizing efforts to address the all-consuming sin of slavery. To those crises, Lincoln brought a different set of starting points than his immediate predecessors, points that he had developed and formulated throughout his political career and ones to which he would give significant effect, if without explicit rhetoric, during his presidency despite his consuming preoccupation with the Civil War.

sons in the United States who had been emancipated. The interpretation of the constitutional concept contained in that clause had itself been freed from prior constraints that had held it in check. In time that clause would become an increasingly powerful instrument for giving effect to the "new birth of freedom" of which Lincoln spoke at Gettysburg and which he helped institute by promoting the Thirteenth Amendment. It remains so to this day. Lincoln's most important contribution to the growth of the spending power may be connected to his role in ending slavery and in thus confronting the nation with the challenge of dispensing social justice to an oppressed minority. Whatever it might have meant prior to Lincoln's time, it was inevitable that the General Welfare Clause would be seized upon as a prime instrument for responding to that challenge. The nexus between civil rights and spending power actions at the federal level has been a close one ever since.<sup>17</sup>

#### LINCOLN, EDUCATION, AND THE SPENDING POWER: THE MORRILL ACT

Despite Abraham Lincoln's recognition of the importance of education in a reconstructed state, the reader of his annual messages during the period of his presidency finds little reference to education and to the role of the federal government in promoting it. In fact, there are fewer references to that subject in Lincoln's presidential papers than in the annual messages of Washington, Jefferson, Madison, Monroe, and John Quincy Adams. Lincoln, as we have seen, had taken a positive approach to a national role in financing internal improvements, particularly through financing canals and railroads, in assisting agriculture, and in authorizing homestead grants, all expressions of the spending power. During his earlier political life he had argued eloquently and persuasively for a broad reading of that power. Yet, it does not appear that he gave the same emphasis to education, as an object of an energetic application of the federal spending power, in his public statements, notwithstanding his apparent recognition of the important role of education in postwar reconstruction.

The legislation that Lincoln signed into law during his administration represents a marked departure from this pattern. That departure took the form of Lincoln's approval of the Morrill Land Grant College Act. The Morrill Act provided for the donation of public lands to states and territories to assist them in establish-

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ing and maintaining colleges that would offer education in agriculture and the mechanic arts. Lincoln signed it into law on July 2, 1862, without, as far as research reveals, any fanfare, in the form of a signing statement or accompanying address.<sup>18</sup> Nor did Lincoln mention the legislation in his December 1862 annual message, or in later messages. The president's silence on the issue attracted the attention of Phillip Paludan in his account of the Lincoln presidency. "Interestingly enough, the president apparently paid little attention to this bill. He did not mention it in his annual message to Congress in 1863, which did refer to the homestead and banking bills." Paludan attributes this to the "ambiguity about formal education in a man who had had little of it himself."<sup>19</sup>

The Morrill Act in effect constituted a simple but classic program of federal assistance to the states involving cooperative federalism. The federal government provided financial assistance in the form of land grants. The statute provided an apportionment formula for allocating the assistance (the land or land scrip) among the states. The law directed the state to use the funds in question (the proceeds of the land or scrip sales) for a general purpose set forth in the law, to endow, support, and maintain institutions of higher education. The law specified the role of the instrumentality of the participating state that would carry out duties under the act, here the state legislature. Participation by the state was voluntary. The state would have to signify its assent by legislation before the law's provisions came into play for that state. The law specified the conditions upon which the grants were made. The law also described the consequences of failure to comply with the conditions, here, return of the grant funds. An agency or department of the federal government was named as the administering agency: the Department of the Interior. The state was required to submit an annual report to the administering department, presumably as a means of facilitating evaluation and fostering accountability. In sum, Congress had passed, and Lincoln signed into law, a federal education program statute. By providing a framework for such assistance, the statute in effect provided for a national system of aid to land grant colleges, without any semblance of national jurisdiction over the institutions themselves. Thus, through authorizing legislation, the concept of appropriation to the states under the General Welfare Clause was gradually being transformed into a workable instrument without the need for a constitutional amendment.<sup>20</sup>

*Lincoln's role and its significance*

What is significant is not what Lincoln said about this legislation. He signed the land grant college bill without an accompanying statement, at least without one that has been passed down to posterity. His subsequent annual messages are silent about it. What is significant is that he signed the bill. His predecessor, Buchanan, had vetoed similar legislation. In explaining his veto, Buchanan had complained that the legislation represented an expression of the spending power beyond the authority of Congress under the Constitution. Buchanan had also feared that the measure would draw the federal government into a wide range of domestic matters not, in his view, appropriate for its attention.

Buchanan's predecessor, Pierce, had vetoed legislation that would have granted public lands to states to enable them to serve indigent persons who were mentally ill. Pierce's veto had urged constitutional and policy concerns similar to those voiced by Buchanan when he vetoed the land grant college bill. Pierce had expressed his own apprehension that if the bill before him were enacted, it would set a precedent for undue expansion of the role of the federal government. Both Pierce and Buchanan regarded the bills they vetoed as efforts to exercise the constitutional spending power in ways that exceeded that power, rather than proper expressions of the congressional power over the public lands. They had insisted that a disposition of the public lands must meet the same test as an appropriation of funds under the General Welfare Clause.<sup>21</sup>

Lincoln and his advisors were doubtless aware of these precedents. Lincoln had predicted that Pierce would veto this type of legislation in the period prior to the latter's election in 1852. In reversing the Buchanan land grant college veto policy, President Lincoln took a very different course than that of his northern Democratic predecessors. That course implicitly recognized an appropriate role for the federal government in assisting activities at the state level that fell within the ambit of the general welfare. In signing the Morrill bill, Lincoln moved the Executive Branch in a new direction regarding such legislation and paved the way for future enactments providing federal aid to education or other endeavors that came within the broadly encompassing general welfare ambit.

In making the Morrill Act a public law, for all that the record shows, Lincoln declined to raise the objections, legal or policy, that his predecessors had raised. He even declined to give them

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credence by discussing and rejecting them. In the three-year span that separated Buchanan's veto from Lincoln's signature, a great change in the constitutional landscape had taken place, a change that both the Executive and Legislative branches understood and that required no explication. In this respect, Lincoln's approval of the Morrill Act marks a new approach toward spending-power legislation, one that reflected the earlier stance of John Quincy Adams but that at the same time had moved beyond it.

One can, of course, argue that Lincoln's approval of the measure was pro forma and reflective of the traditional Whig view that presidents should not employ the veto to frustrate congressional action. In other words, in signing the Morrill Act, Lincoln was arguably following the course that William Henry Harrison or Zachary Taylor would have followed regarding domestic legislation to come before them had they survived to serve out their terms. Lincoln's signature on the Morrill Act is, on this basis, nothing more than a Whig president's deferential nod to the Legislative Branch rather than a thoughtful expression of support for the law and policy inherent in the legislation.

On the other hand, Lincoln's signature on the bill arguably represents more than Whigish deference. While Lincoln did generally practice Whig restraint in his dealings with Congress on legislation, his action in approving the college bill is wholly consistent with the constitutional and policy positions that he had taken before he reached the White House, the platform on which he ran in order to get there, and the other domestic policies that he supported during the time he occupied that office. His failure to articulate his support for this higher education legislation more likely reflects his preoccupation with the war than his indifference to the policy of federal support for higher education.

As a state legislator, Lincoln had advocated a governmental role in internal improvements. As a congressman during the Polk administration, he had eloquently opposed that president's veto of federal internal improvement legislation, a veto pitched on much the same grounds that moved Buchanan in his comparable veto of the 1859 version of the Morrill Act. Lincoln had supported both the constitutionality and expediency of the legislation that Polk vetoed. In his speech criticizing the Polk veto Lincoln had expressed not only the standard Whig position of deference to the legislative branch but his own conclusions on the constitutionality of internal-improvement legislation under the General Welfare Clause. On that occasion he had counseled

his congressional colleagues that their constitutional consciences should not be "pricked" unduly if they supported such legislation.

Moreover, the Morrill Act was consistent with legislation that Lincoln actively promoted during his presidency and discussed in his annual messages, including grants of public lands for railroads, federal assistance for internal improvements such as canals and waterways, and the homestead legislation discussed above. Representative Justin Smith Morrill of Vermont, who proposed and managed the college bill, argued during the debates on the legislation that it would enhance national prosperity by increasing agricultural production and efficiency. Morrill tied his legislation to the Homestead Act; if land was being given freely, farmers would have to learn how to use it. All of the legislation—for the railroad, for internal improvements, and for education—shared a common theme: their constitutional support ultimately depended upon a broad, Hamiltonian reading of the General Welfare Clause.

In providing expanded higher-education opportunities for the industrial classes, Lincoln was implementing a theme that he had sounded throughout his administration: the role of government in supporting equal opportunity. At the time he signed the legislation, Lincoln was calling upon the "industrial classes" to bear the burdens of the war he was waging to preserve the Constitution. It would have been completely incongruous for him to have invoked that same Constitution as a reason for denying them opportunities for education, especially since he had earlier referred to them as a "national resource."

As Paludan correctly observes, "Lincoln clearly believed . . . that one of the contrasts between free labor and slave labor was that free laborers were thinking people whose labor was improved by their inventiveness and whose thought was sharpened and enlivened by their labor. The Morrill Land Grant Act exemplified that image." Paludan's point appropriately identifies the Morrill Act's ties to free labor expressed in Lincoln's first annual message. Lincoln's 1859 speech in Milwaukee reinforces this conclusion. There Lincoln had pointed out the contribution of education to the successful pursuit of agriculture. The 1862 education act was thus integrated into and interlocking with other components of the Lincoln administration's domestic program and Lincoln's overall political and economic philosophy.

One may speculate that, in signing the bill, Lincoln saw no need for calling attention to a move that was consistent with both



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his own prior positions, with the platform of his own party and with other bills that he had signed. While he did not, except in rare occasions, intervene in the legislative process, his overall support for his party's program and his general encouragement of the Congress to implement it presumably embraced the Morrill Act as well as other progressive legislation during the first two years of his administration.

To be sure, in defending the constitutionality of his legislative proposal in 1858, Morrill had relied upon the power of Congress under the Constitution to dispose of public lands rather than General Welfare Clause. He had supported this argument by ample reference to public land grants under various administrations for purposes such as agriculture and education. In his remarks in 1862 prior to the congressional debates on the legislation, he did not return to the constitutional issue. Thus, there is no specific indication that the General Welfare Clause was specifically before the Congress during the debate.

However, the relationship to the General Welfare Clause issue could not so easily be avoided. In vetoing the legislation in 1858, President Buchanan had raised a reasonable question. If appropriations could not be made for educational purposes under the spending power, how could public lands be donated for that purpose? The purpose for appropriations or dispositions of tax revenues and public lands must be on the same footing. Otherwise, the general welfare limitation on the spending power could be avoided by using land proceeds for purposes that exceeded the limitations on the spending power.

The answer to Buchanan's question was that both tax revenues and land grants could be used for educational purposes because the General Welfare Clause limitation was not confined to areas or fields embraced within the enumerated powers. Therefore both the spending and land powers were available for such purposes. While the 1862 debates in Congress regarding the Morrill Act did not specifically focus on this point, that answer was implicit in congressional passage of that legislation on the basis of broad educational considerations. Indeed, while the senators who debated the Morrill Act were reminded of Buchanan's veto, none of those who supported the legislation defended their votes on the ground that the public lands power was broader than the spending power.

Moreover, the Morrill Act soon became a convenient precedent for direct appropriation of funds under the spending power. If land grants could be made for the support of institutions of

higher education, proponents of federal aid to education argued, appropriations of tax revenues could also be made available for college aid, as well as for elementary and secondary schools. Republican presidents who followed Lincoln, most notably, Rutherford B. Hayes, made this relationship specific. It was reinforced by the enactment of the Second Morrill Act in 1890 which provided appropriations from land sale revenues for the use of college aid under the 1862 legislation. Later, when the Supreme Court came to consider the scope of the spending power, the Second Morrill Act was cited by the government as a precedent for the Court's approval of the Hamiltonian reading of the clause.

In signing the 1862 Morrill Act, Lincoln was taking an important step down the road to a broader view of the constitutional authority of Congress to enact progressive spending power legislation in aid of education and other general welfare missions, a more progressive step than his prewar Democratic predecessors had been willing to countenance.

Lincoln transmitted to Congress territorial legislation for New Mexico that enabled it to receive the benefits of the Morrill Act. The report of his Interior Department, attached to one annual message, described the progress that had been made in securing the adherence of other states to the act. It has its counterparts in subsequent legislation of assistance to higher education under the Higher Education Act of 1965, through aid to developing institutions, aid for international activities, and aid for construction of academic facilities. The 1862 act can be seen as paving the way for the massively significant participation of the federal government in student financial aid under Title IV of the Higher Education Act, a development that has had an enormous, positive impact in increasing the numbers of college graduates in the United States. Moreover, its enactment and interpretation were to figure in the Supreme Court's analysis, when it finally came to adjudicate the scope of the spending power in 1936 in *United States v. Butler*. The great dissent by Justice, later Chief Justice, Harlan Fiske Stone in that case relied in part on the precedent established by the Morrill Act and the implications that could be drawn from it. Lincoln himself had correctly predicted that such an adjudication would come to pass in his 1848 speech.<sup>22</sup>

Lincoln's signature on the Morrill Act, despite the absence of an explanation when he affixed it, is a profoundly important bridging event. The Morrill Act constituted major federal legislation giving effect to the pleas of Washington, Jefferson, Madison, and John Quincy Adams that Congress make provision for "seminar-

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ies of learning." It implemented in part Lincoln's stated commit- ment to the role of government in elevating the human condition, a theme that he had sounded in his July 1861 message to Congress in response to the secession of the states that had joined the Confederacy. That commitment in turn aligns Lincoln, in the context of this study, with John Quincy Adams, who had briefly been Lincoln's colleague in the Thirtieth Congress, and who, as president, had advocated a concept of internal improvement that went beyond roads and canals. The Morrill Act was one of the most significant manifestations of that concept in the first "four-score and seven years" of the nation's history.<sup>23</sup>

#### LINCOLN'S GENERAL WELFARE LEGACY: A BRIDGE TO THE TWENTIETH CENTURY

Lincoln's contribution to the evolution of the spending power must be regarded as salient. In some measure, that contribution takes the form of the policies that he advocated in his annual messages and elsewhere, such as assistance for internal improvements in transportation and communications, for agricultural benefits, and for homesteading assistance. It also takes the form of the body of progressive legislation that he signed providing for assistance to railroads, aid to land-grant colleges, homestead legislation, and the establishment of the Department of Agriculture. That legislation contributed to the emergence of a set of legislative precedents reflecting spending for general welfare purposes that would not have been possible had the thinking of Polk, Pierce, and Buchanan continued to prevail. The juxtaposition of a Republican president with Whig leanings on internal improvements and a Republican Congress with whom he cooperated reversed the constitutional pattern that had been characterized by prewar Democratic presidents extending Jacksonian philosophy. The Lincoln-congressional combination, through the legislation it produced, effected a sea change in the scope of the exercise of the spending power that can be seen as a significant aspect of Lincoln's "new birth of freedom."

In a larger sense, however, Lincoln's greatest contribution to this evolution lies in the forces that he set in motion: emancipation, enfranchisement, reconstruction, recognition of the important role of the central government in securing equal opportunity, and finally in his successful labor to preserve the Union and transform it from a house divided into a single nation. Lincoln's

administration thus represents a transformation in the development of the concept of providing "for the general welfare" under the Constitution that he labored so valiantly to preserve. Engaged in the throes of a great civil war, he lacked the time, and possibly the inclination, to engage in comprehensive constitutional analysis of the course he implicitly pursued under the General Welfare Clause, as had Madison, Monroe and Jackson. However, that clause was the only reliable constitutional authority for the pursuit of that course. Accordingly, the constitutional implications of the "Lincoln persuasion" in the use of the spending power are clearly consistent with the more analytical approach of Hamilton, Monroe, John Quincy Adams, and Joseph Story and, ultimately, with the position taken by the Supreme Court in *United States v. Butler* adopting the Hamilton-Story interpretation. Lincoln's contribution to that evolution and to the events that followed it is undeniable.

Finally, Lincoln's general welfare legacy embraces the extension of the benefits of the General Welfare Clause to all Americans, including African Americans. Emancipation and the accompanying civil-rights amendments meant freedom. Freedom included the right to travel at will on the roads, canals, and railroads that had been financed in whole or in part with federal assistance, not as a fugitive but as a citizen. Equal protection of the laws became a guaranty ensconced in the Fourteenth Amendment that itself grew out of the experience over which Lincoln presided. Equal protection extended to laws enacted pursuant to the spending power. It meant in theory, for example, protection against discrimination in the enjoyment of the benefits of education legislation enacted under the authority of the spending power. Freedom and equal protection ultimately meant the right of all Americans to share, in accordance with statutory formulas, in the tangible benefits of the massive social insurance and income maintenance programs that were enacted generations later on the strength of the General Welfare Clause.

It might require a century for court determinations and subsequent legislation to vindicate those rights through such decisions as *Brown v. Board of Education* and such enactments as Title VI of the Civil Rights Act of 1964. Indeed, those rights are not fully vindicated to this day. The steps taken during the tenure of Abraham Lincoln, however, were the initial ones. The opening of the Constitution, that included a more broadly applied General Welfare Clause, to these new citizens constitutes one of the most significant elements of Lincoln's role. The implicit recognition of



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education as falling within the purview of the "general welfare of the United States" and therefore a just target of assistance constitutes another. The juxtaposition of an adequate and vigorous spending power under Article I, section 8 and Fourteenth Amendment jurisprudence in securing social justice has been essential to a successful transition from antebellum America in the decades since the Lincoln presidency.

## VI

# Reconstruction, Realignment, Revolution, Resolution

## Reconstruction, T. R., and Wilson's Realignment

THE REPUBLICAN PRESIDENTS WHO FOLLOWED IN THE WAKE OF THE Civil War were not reluctant to propose the bold use of the spending power to accomplish commercial aims, make internal improvements, and, most importantly, reinforce the goals of the newly adopted Fourteenth and Fifteenth Amendments through supplementary federal funding for public elementary and secondary education. At the same time, they found it necessary to caution against extravagant spending for public works and to veto, on occasion, particularly egregious internal-improvement measures. The era from 1869 to 1885, roughly from the beginning of the Grant Administration to the end of the Arthur Administration, was characterized by a concern that had confronted Thomas Jefferson: how best to use a growing surplus. The election of Grover Cleveland, the first Democrat to hold the White House since James Buchanan, did not mark a return to the latter's limited view of the spending power. However, while accepting the scope of that power, Cleveland sought to constrain its extravagant use and declined to propose broad expansion of its exercise. Benjamin Harrison, sandwiched between Cleveland's two terms, took up the stance of his Republican predecessors in favor of federal aid to education. The last of the nineteenth century Republican presidents, William McKinley, did not bring substantial change to their spending-power philosophy.

The twentieth century opened with a far more energetic presidency, that of Theodore Roosevelt. Increasingly committed to progressive reform, Roosevelt's primary focus was on regulating business. However, Roosevelt also sought appropriations to support his bold conservation and reclamation initiatives. Moreover, he promoted key reinforcement for the vigorous exercise of the spending power through his support for the income tax amendment, a reform largely effected by the administration of

Roosevelt's successor, William Howard Taft. The election of 1912 brought to the White House Woodrow Wilson, who regarded the government as an instrument of progressive reform and who represented a clear break with nineteenth century Democratic presidential tradition in favor of a restrained exercise of federal authority to promote internal improvements and social welfare policies. Wilson saw the Constitution as a living document, to be interpreted creatively in order to secure fair play and achieve social justice in contemporary America. His stance on the spending power must be taken as consistent with that framework.

#### RECONSTRUCTION, THE SPENDING POWER, AND FEDERAL AID TO EDUCATION

##### *Grant*

Their support for federal aid to education reveals something of the constitutional leanings of the Republican Reconstruction presidents who succeeded Andrew Johnson. The first of these, Ulysses S. Grant, saw such assistance as a corollary to the constitutional revolution represented by the Fourteenth and Fifteenth Amendments. In notifying the Congress of the adoption of the latter amendment in 1870, Grant observed that it "completes the greatest civil change and constitutes the most important event that has occurred since the nation came into life."<sup>1</sup> Because Grant recognized that public education was essential to making the amendment effective, he urged Congress "to take all the means within their constitutional powers to promote and encourage popular education throughout the country, and upon the people everywhere to see to it that all who possess and exercise political rights shall have the opportunity to acquire the knowledge which will make their share in the Government a blessing and not a danger." In so doing, he also invoked the memory of Washington's plea for aid to "seminaries of learning"—offered at a time when the population of the country numbered only a few million—while also underlining the importance of educating the more than 40 million citizens of post-Civil War America. Grant knew that only through aid to education could the benefits implicit in the Fifteenth Amendment be secured. Congress, however, declined to heed the president's recommendation, thereby demonstrating the difficulty of obtaining legislative approval for



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educational reform proposals during the late nineteenth century.<sup>2</sup>

## Hayes

Following a bitterly contested election, Grant's successor, Rutherford B. Hayes, took up the same theme with renewed vigor and, perhaps, greater personal commitment, albeit with no greater legislative success. The Hayes inaugural address proclaimed that "[u]niversal suffrage should rest upon universal education." To achieve this end, the new president recommended that "liberal and permanent provisions should be made for the support of free schools by the State governments, and, if need be, supplemented by legitimate aid from [the] national authority." In his first annual message, in December of 1877, Hayes strongly reinforced the same proposal, emphasizing his deep belief in the soundness of the policy: "The wisdom of legislation upon the part of Congress, in aid of the States, for the education of the whole people in those branches of study which are taught in the common schools of the country is no longer a question." He appended his own view as to the constitutional propriety of such a measure, grounding it on the basis of "general welfare" considerations in the framework of Lincoln's land grant college precedent: "The intelligent judgment of the country goes still further, regarding it as also both constitutional and expedient for the General Government to extend to technical and higher education such aid as is deemed essential to the general welfare and to our due prominence among the enlightened and cultured nations of the world."

Noting that one-seventh of the voting population of the country was illiterate, Hayes extended the land grant college precedent to the elementary and secondary level. He pledged his approval for "any appropriate measures which may be enacted by Congress for the purpose of supplementing with national aid the local systems of education in those States [in which slavery formerly existed] and in all the States. . . ." Like Grant before him, Hayes expressed support for a national university. That Hayes was personally invested in his federal aid to education proposals, reiterated in subsequent annual messages, is amply reflected in his diary.<sup>3</sup>

While his rhetoric did not produce actual legislation, it is clear that Hayes had adopted the conclusion, implicit in Lincoln's approval of the Morrill Act, that under the Constitution, Congress

could aid education at elementary, secondary, and postsecondary levels. The needs of Reconstruction gave force to that conclusion; the adoption of the civil rights amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments) to the Constitution lent urgency to the cause.

The inaugural and annual message pleas of President Hayes for federal aid to education were matched by the policies that he pursued during his presidency and the causes he supported during his retirement. As chief executive, Hayes presided over a Department of Interior (headed by Carl Schurz) that included a small body of civil servants organized as a Bureau of Education and dedicated to collecting information and statistics about education, an early forerunner of the present Center on Education Statistics within the present United States Department of Education. The head of that bureau, John Eaton, was an advocate of federal aid for states developing school systems. Hayes, along with Eaton, lent his support to proposed legislation introduced in 1881 that would have distributed federal funds to states on the basis of relative illiteracy. The bill passed the Senate but was blocked in the House.<sup>4</sup>

Hayes's support was apparently a product of his firm conviction that in education lay the foundation for the preservation of the constitutional rights of African Americans and for their full participation in political life and public administration. "Appropriately for a man who favored civil-service reform, Hayes believed that the meritorious should govern, but he also believed that through public education everyone should have access to public office." In keeping with this philosophy, Hayes continued to press for federal aid legislation after he retired.<sup>5</sup>

In his presidential speaking tours and, most notably, in his valedictory message of December 1880, Hayes reinforced his proeducation stance and his enduring commitment to making federal school aid, as Morton Keller puts it, "an active issue in the postwar years." If anything, it had grown stronger. Early in the message, while affirming the duty of the executive to prosecute "unsparingly" those engaged in the denial of constitutional rights, Hayes proclaimed the role of education (including federal aid therefor) as a primary means of advancing civil rights. He also set forth a reasoned argument for federal participation in improving education. He remained convinced that state resources were inadequate to the task, particularly when the education of the African American population had been ignored during the period of slavery. "Firmly convinced that the subject

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Bureau of Education and statistics about education. The Center on Education in the Department of Education, was an advocate of systems. Hayes, along with legislation introduced in the states on the one hand and the Senate but was

uct of his firm conviction for the preservation of the rights of all citizens and for their full administration. "Appropriately reform, Hayes believed, but he also believed that everyone should have access to education. By 1877, Hayes continued to be retired."<sup>5</sup>

most notably, in his view, he reinforced his position in making federal education a major issue in the post-war period. Early in the Reconstruction period, he was determined to prosecute the violation of constitutional rights (including federal education and civil rights). He believed that federal participation in education was essential, particularly when the education had been ignored. He was convinced that the subject

of popular education deserves the earnest attention of the people of the whole country, with a view to wise and comprehensive action by the Government of the United States, I respectfully recommend that Congress, by suitable legislation and with proper safeguards, supplement the local educational funds in the several States where the grave duties and responsibilities of citizenship have been devolved on uneducated people by devoting to the purpose grants of the public lands and, if necessary, by appropriations from the Treasury of the United States."<sup>6</sup>

While the presidency of Rutherford B. Hayes is identified with the removal of federal troops from the South, a step which led to the massive deprivation of civil rights in that region, Hayes's regard for the importance of education in the struggle for civil rights is a counterweight. He devoted his private energies to that same cause, serving on the boards of several foundations and pursuing educational progress for disadvantaged populations. He linked his presidency with that of John Quincy Adams, whose election was also sharply contested and who shared with Hayes an affinity for promoting the bold exercise of the general welfare authority in the interest of education and other initiatives to improve the human condition. Ari Hoogenboom, Hayes's presidential biographer, observes, "Hayes admired Washington's integrity and Lincoln's commitment to equality of opportunity, but he identified with John Quincy Adams in his struggles with Congress, his patronage policies, and his desire to use national policy to foster education."<sup>7</sup>

#### *Garfield, Arthur, and Harrison*

Hayes's successor, James A. Garfield, elevated the subject of education to an important place by mentioning it in his inaugural address. He first traced the history of the nation, insisting that "the most important political change" since the adoption of the Constitution was the end of slavery and subsequent enfranchisement of millions of African Americans. Garfield, like his predecessors, warned of the dangers of illiteracy and recognized the nation's obligation to remove it: "All the constitutional power of the nation and of the States . . . should be surrendered to meet this danger by the savory influence of public education." Garfield did not survive to pursue this vision.<sup>8</sup>

Chester Arthur, who assumed the presidency following Garfield's death, dutifully took up the slain president's education agenda, but with less enthusiasm. In his first annual message, in

December 1881, Arthur recommended a program of supplementary federal aid to education, "as can be constitutionally afforded by the National Government," supporting this recommendation on the basis of the need to increase the literacy of those eligible to vote, particularly the "many who had just emerged from a condition of slavery." Arthur reiterated this recommendation in subsequent annual messages but without the passion of his predecessor, Hayes, who, from retirement, complained that Arthur harbored constitutional doubts on the subject. On that score Hayes observed that there was "no ground for hesitation." Apart from constitutional considerations, practical considerations contrary to Hayes's enthusiastic support ran counter to adopting a federal aid program. They included what Keller describes as "localism, diverse interests and hostility to active central government," as well as opposition from Democrats and educational organizations.<sup>9</sup>

Arthur's particular General Welfare cause lay in rivers and harbors legislation. He opposed extravagant bills but otherwise supported such needed projects as strengthening levees on the Mississippi, noting that "the constitutionality of a law making appropriations in aid of these objects can not be questioned."<sup>10</sup> Although he vetoed legislation emerging from this proposal that he deemed local and not general, it appears that Arthur, like his other elected Republican predecessors who succeeded Lincoln, took a broad, non-Madisonian view of the General Welfare Clause.

The point was made explicit by President Benjamin Harrison, who succeeded to the presidency in 1889 after the expiration of Grover Cleveland's initial term. Harrison revealed his thinking on the issue in his first annual message in December of that year, observing: "National aid to education has heretofore taken the form of land grants, and in that form the constitutional power of Congress to promote the education of the people is not seriously questioned. *I do not think it can be successfully questioned when the form is changed to that of a direct grant of money from the public Treasury.*"<sup>11</sup> Harrison had in mind not only the precedent of the 1862 Morrill Land Grant College Act, but also grants of public land in new states for the purpose of establishing primary and secondary schools.

Harrison posited his recommendation on the same rationale as that of his predecessors—the Fifteenth Amendment. "The sudden emancipation of the slaves of the South, the bestowal of the suffrage which soon followed, and the impairment of the ability



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of the States where those new citizens were chiefly found to adequately provide educational facilities presented not only exceptional but unexampled conditions." Harrison suggested supplementary, time-limited aid directed at this problem that would not "supplant local taxation for school purposes." Anticipating the juxtaposition of spending power and civil liberties legislation in the 1960s, Harrison accompanied these exhortations with strong pleas for civil-rights legislation to protect the right to vote. During his administration, Congress afforded the president an opportunity to extend the federal role in higher education and to apply the philosophy that he had promoted in his earlier annual message. Harrison signed into law the Second Morrill Act, which provided for federal appropriations for land grant colleges, making plain the conviction of both the Executive and the Legislative branches that authority was available for allocating federal appropriations to education, an area not specified in the enumerated powers.<sup>12</sup>

In sum, the Reconstruction Republican presidents, with respect to both education and traditional internal improvements, were prepared, implicitly or explicitly, to read Article I, section 8, clause 1 broadly and support remedial federal legislation based on the spending power, while asserting the role of the president to use the veto power to prevent extravagance and waste in the exercise of the General Welfare authority. Thus, by the end of the Civil War, the Executive Branch, when in Republican hands, had abandoned the posture of the antebellum Democratic presidents who had opposed such general welfare legislation on constitutional grounds. The battle over the scope of the clause that characterized early nineteenth century national politics faded in the late nineteenth century. In part, the Republican stance was consistent with its Reconstruction policy in favor of high protective tariffs that favored home industry but at the same time led to substantial Treasury surpluses that could be used for limited general-welfare spending programs such as those proposed for education. The policy had its roots in Henry Clay's American System, which Lincoln had admired so greatly.

### THE CLEVELAND PERSPECTIVE

Grover Cleveland, the first Democrat to enter the White House since Buchanan, manifested a substantially different perspective. His objective was to root out waste and extravagance in gov-

ernment spending. Standing between Buchanan and Wilson in the pantheon of Democratic presidents, Cleveland is, in some respects, a throwback to the pre-Civil War Jacksonians. He championed lower tariffs and diminished revenues as a response to the growing surplus. He carried out a personal campaign for pension reform. His volume of vetoes on that and other measures greatly surpassed that of his predecessors.

Not surprisingly, neither in his first term, following Arthur, nor in his second, following Harrison, did Cleveland renew his predecessors' recommendations regarding federal supplementary aid to education. This may have been due to his own policy preferences and his belief in frugal, nonpaternalistic government rather than a conviction that such aid was unconstitutional. (It may have also reflected his own conservative perspective, as well as the conservative leanings of his party with its strong southern base.) No suggestion has been found that Cleveland regarded traditional aid to internal improvements as squarely unconstitutional, as Madison had, although Cleveland did veto a revenue-sharing bill as contrary to the basic charter. He took a similar position in vigorously opposing the distribution of seeds by the Department of Agriculture, whose sole role he saw as a provider of research and information. In his second inaugural address, in March 1893, Cleveland solemnly warned his fellow citizens against government paternalism and the "prevalence of a popular disposition to expect from the operation of the Government especial and direct individual advantages."<sup>13</sup>

Cleveland's first-term energies were directed at high tariffs and excessive surpluses. His third annual message in December of 1887, blessedly short and lacking the usual summaries of departmental reports, was deliberately devoted to a disquisition on the evils of Treasury surpluses. "The public Treasury," he declaimed, "which should only exist as a conduit conveying the people's tribute to its legitimate objects of expenditure, becomes a hoarding place for money needlessly withdrawn from trade and the people's use, thus crippling our national energies, suspending our country's development, preventing investment in productive enterprise, threatening financial disturbance and inviting schemes of public plunder." In his final message, he also criticized the excessive use of the general welfare authority as a basis for unwarranted appropriations.<sup>14</sup> His solution to the evils he described was substantial tariff reduction.

Defeated by Harrison in the election of 1888, despite winning the popular vote, but returned again to the White House in 1892

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on the basis of a platform calling for lower tariffs, Cleveland sought to put his beliefs in place through tariff-reform legislation. His second term was marred by the financial depression of 1893 and controversy over silver purchase legislation.<sup>15</sup> Thus beset with financial and economic issues, and philosophically disinclined to support government spending programs, Cleveland did not advocate substantial spending for general welfare purposes during the balance of his second administration. The financial crisis did lead to decreased revenues and a deficit in the last two years of Cleveland's term.

During the succeeding administration, that of William McKinley, the country returned to favoring high tariffs and reciprocity. Confidence in business grew and economic growth resumed. McKinley proposed no major government programs posited on the general-welfare authority. He did not revive the aid to education proposals of his Republican predecessors. The country was instead focused on an expression of national energy different from that characterized by internal improvement in the Monroe or John Quincy Adams sense of the concept—expansion beyond its borders and the acquisition of new territories, a trend that Cleveland had resisted. Hawaii was annexed by treaty and became a territory. The successful conclusion of the Spanish-American War brought with it American responsibility for Puerto Rico and the Philippine Islands.<sup>16</sup>

#### THEODORE ROOSEVELT—ENERGY IN THE EXERCISE OF FEDERAL POWER

With the assassination of President McKinley in 1901, there entered the White House a president devoted to the application of energy and activism in both domestic and international arenas. While accretions to the exercise of the spending power were not the major priority of the Theodore Roosevelt years in office, his presidency is characterized by increasing resort to that source of power where needed to advance his initiatives. During his two terms, he advocated federal aid for water conservation, forest preservation, land reclamation through irrigation projects, workmen's compensation, and enhanced appropriations for the Bureau of Education in the Department of the Interior, along with traditional federal spending for rivers and harbors improvements. There is little doubt that he held the constitutional view that such expenditures were within the purview of the Constitu-