

AMERICAN FEDERALISM AND THE DIFFUSION OF POWER: HISTORICAL AND CONTEMPORARY PERSPECTIVES*

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For an historian whose ear is attuned to Madisonian rhetoric and logic, there are many strains in the current-day debate on federalism that are difficult to hear as anything but cacaphony. On a day in January 1978, for example, the President of the United States delivered a half-trillion dollar federal budget proposal to Congress. Apart from that remarkable magnitude of proposed spending, it was noteworthy that for military and political intelligence activities alone the budget (openly and covertly) appeared to contain appropriations greater than for the judicial and legislative branches combined. The very newspaper¹ that carried the Budget, with its stress on increased "grants-in-aid" to state and local government, also offered two stories with apparently contradictory ultimate meanings.

The first article told how the Secretary of Housing and Urban Development was pleased to announce the allocation by Executive fiat of funds for revival of a mortgage-subsidy program for a specified number of unidentified (presumably-as-yet unchosen) middle-income potential householders — the amount of funds to exceed the proposed cut in school-lunch funds in the 1979 Budget.

In the second article, the Sohio Corporation and the air pollution-control officials of the Los Angeles regional Air Quality Management District discussed with the press some of the complexities of their agree-

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1. L. A. Times, Jan. 23, 1978, and other major California newspapers, Jan. 23-24, 1978.

ment that (a) Sohio might build a marine petroleum-terminal at Long Beach to link with a proposed pipeline to Texas, to handle Alaskan crude, thus (i) making the White House happy because such an arrangement would remove the Panama Canal-passage of Alaskan oil as a political issue in the forthcoming debate on the canal treaty, (ii) bringing new investment and jobs to the Los Angeles area, and (iii) violating the 1970 federal Clean Air Act, which designated Los Angeles basin as a "non-attainment" area (federal jargon for dirty air), which didn't matter since the act was enforced at neither the federal nor the state level according to the Air Resources Board chairperson; IF (b) Sohio agreed to remove two pounds of pollutants from the Los Angeles basin's air for every pound that it contributed with its new terminal facilities and attendant operations. This raised complications, both as to how to measure the pollution contributed by Sohio (which, for example, wished ship-funnel emissions measured only while the ship was in Long Beach harbor, whereas local officials wished to measure the ship's emissions while it was in an area marked by a point 50 miles off Point Conception), and as to what form Sohio's clean-up contribution might take. The latter complication seemed susceptible of solution when the Southern California Edison Company, a power company operating as a public utility under state regulation and also under new constraints of federal rules requiring use of fuel that would render Los Angeles basin air even *more* "non-attaining" than before, negotiated to have Sohio contribute the necessary (or desirable) pollution-control devices for a large Edison plant. But, alas, this in turn raised the issues of whether the Internal Revenue Service would treat the investment as a gift to Edison, whether Edison or Sohio would bear the obligation of paying taxes on assessed value of the property, and, withal, whether the entire agreement was discriminatory and unconstitutional because it did not place equal burdens on other polluters long operating in the basin region and antedating Sohio's putative venture. (State Air Resources Board Chairperson Quinn declared the issue moot, however, contending that success with the pollution-control device at the Edison plant would ineluctably lead to regulations requiring identical devices at similar plants elsewhere in the basin and in other industries, thus magically equalizing the burdens!)

Our first story suggests a federal government massive in its power and resources (as confirmed by the Budget), capable of startling shifts of policy gears and the bestowal of lavish sums on favored citizens. Our second story suggests bewildering complexity at best, and a strong measure of

autonomy and control over the realities of policy in any case, in the hands of state and local government.

To add to the confusion and complete the picture, we might cite a third item, this one a paid advertisement by the State of Louisiana, advertising itself as the "Right-to-Profit State." The reason, of course, is this state's right-to-work laws, tax exemptions for new business investments, bond-aid by municipalities for flight industry, *etc.*² — all reminiscent of Mr. Justice Brandeis' warnings about "competition in laxity,"³ a term used to describe the time-honored rivalry among the states to reach the lowest common denominator (or exceed it) — to reduce regulation to its minimum and set up every permissible inducement to give in-state industries the advantage over out-of-state industries in costs of production. Delaware's corporation legislation is the classic instance,⁴ of course; Nevada's venerable divorce laws were another,⁵ finally copied so widely as to force reliance instead upon more lax marriage laws (now also becoming rapidly obsolete, whether copied or not).⁶ The stridency with which state development authorities and business bureaus advertise their advantages over sister states — and the "raiding parties" seeking candidates for flight that have been complained of by rival state development authorities⁷ — serve to remind us that even in a world of complexity (Sohio) or centralism (HUD) there is a vital residual legacy of states' rights and autonomy — in sum, real power in the constituent units of the federal Union.

For a scholar who, whether or not encumbered by Madisonian presumptions and reflexes, wishes to understand all of this, the editor's kind invitation to submit an historical essay for this symposium does not help. For the invitation speaks of casting historical light upon the problem of the "increased autonomy that the federal government has granted to the states" — a concept wholly alien, I submit, to the mind of the Framers in 1787 and one to which even Woodrow Wilson would have had trouble relating.

2. N. Y. Times, Jan. 8, 1978, § 12 (Nat'l Econ. Survey), at 36, col. 1.

3. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L. J. 663 *passim* (1974).

4. *Id.*

5. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 357-58 (1973).

6. N. BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* (1962).

7. *Dow's Pullout Haunts California*, BUS. WEEK, Feb. 7, 1977, at 38. See also Broder, *Canniness of the Long Distance Runner*, 241 THE ATLANTIC 35, 37 (1978).

All of this is by way of saying, simply, that much has changed — not only since 1787, or 1913, but even in the last generation, in the structure of the American federal system. I think that power has become progressively more centralized over time. Distinguished commentators agree. Professor Abraham, for example, says that this is “a patently obvious fact,”⁸ and Professor Fellman, too, finds it obvious that “the irresistible tendency has been in the direction of a steady growth of national power, both in an absolute sense and relatively, with respect to the original design of state power.”⁹ This does not deny that we have something much less than a unitary governmental system. The states exist as constitutional entities, and, as has already been illustrated in our Sohio saga, they still enjoy real power in important areas of policy.

What will follow in the body of this article is a survey and brief analysis of the historic process of centralization. But it must be admitted at once that, at least in the discipline of political science, there are some important commentators who would find the entire inquiry misguided. For they contend that it is misleading to speak of distinct “federal” or “state” powers and functions. In fact, they claim, there has been, since the beginning of the Republic, consistently a “sharing” of governmental functions between the central government and the states. “There has never been a time,” wrote the late Morton Grodzins, “when federal, state, and local functions were separate and distinct. Government does more things in 1963 than it did in 1790 or 1861; but in terms of what government did, *there was as much sharing then as today.*”¹⁰ Other prominent students of federalism have either accepted this revisionist historical construct outright¹¹ or have given it considerable credence.¹²

I know of no professional historian or legal scholar who accepts this construct; indeed, some distinguished political scientists, most notably

8. Abraham, *Effectiveness of Governmental Operations*, 426 ANNALS 81, 94 (1976).

9. Fellman, *Future of the States*, in STATE OF THE UNION 64 (R. Dishman ed. 1965). See also C. FRIEDRICH, TRENDS OF FEDERALISM IN THEORY AND PRACTICE (1968); W. RIKER, DEMOCRACY IN THE UNITED STATES 302 (2d ed. 1965) [hereinafter cited as W. RIKER, DEMOCRACY] (that historically “the central government has continually aggrandized itself at the expense of the states”).

10. Grodzins, *Centralization and Decentralization*, in A NATION OF STATES 7 (R. Goldwin ed. 1963); cf. D. ELAZAR, THE AMERICAN PARTNERSHIP: INTERGOVERNMENTAL COOPERATION IN THE NINETEENTH CENTURY U.S. 338 (1962) (that “cooperative federalism was the rule in the 19th century as well as in the 20th . . .”).

11. R. MARTIN, THE CITIES & THE FEDERAL SYSTEM 37, 38, 40 (1965); accord R. LEACH, AMERICAN FEDERALISM 15 (1970).

12. E.g., Gilbert, *The Shaping of Public Policy*, 426 ANNALS 116, 121-22 (1976).

Carl Friedrich, have contended against it.¹³ Nonetheless, the idea is still heard that “from the early years of the Republic” to the present, *sharing* and *cooperation* have continuously characterized federal-state relations in “the practice of federalism.”¹⁴

The concept of “noncentralization” has been advanced, moreover, to describe the distribution of real power in the current-day federal system — and, by extension, to describe the way in which the federal system has worked historically.¹⁵ According to this theory, because government at all levels typically is involved in any policy area — and because the political parties are decentralized, and power at all levels of government is fragmented — our example, above, of HUD suddenly announcing housing subsidies is not evidence of centralization. According to this view, as all levels of American government deal with housing in one aspect or another, no single federal policy may be adduced as evidence of centralized power. Thus, the HUD policy we have used as an example here is evidence only of one element of power in a “noncentralized” system.

The late Mr. Justice Black was not among those who accepted the view that sharing and non-centralization constitute both the contemporary norms and the historical legacy of American federalism. In his famous opinion in *Younger v. Harris*,¹⁶ Justice Black spoke of “Our Federalism” in terms strongly reminiscent of the rhetoric of the Founding era, especially the great 1787-89 constitutional debate. He declared the need to recognize that “the entire country is made up of a Union of separate state govern-

13. C. FRIEDRICH, *supra* note 9, at 8 n.9. See also W. RIKER, *DEMOCRACY supra* note 9. W. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 83 (1964) [hereinafter cited as W. RIKER, *FEDERALISM*].

14. R. MARTIN, *supra* note 11, at 37, 38, 40.

15. D. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES 3-4 passim* (1966). Elazar provides the fullest (and most persuasive) argument for the “noncentralization” thesis — which, I would maintain, is faulted by its failure to recognize that even where there is superficial “sharing” the dominance of one “partner” is possible, and even probable or certain when one “partner” holds the purse-strings and establishes the overall framework of policy decisions in a given policy area, as is true of many “shared” programs today. See M. REAGAN, *THE NEW FEDERALISM*, ch. 3 *passim* (1972); Wright, *Intergovernmental Relations: An Analytic Overview*, 416 *ANNALS* 1, 7 (1974) (that while there was, of course, some intergovernmental collaboration in the 19th century, it is not clear that this was either “the dominant fact of our political history,” as Elazar has maintained, or even “of major significance” at the time). I made the same argument some years ago, in H. SCHEIBER, *THE CONDITION OF AMERICAN FEDERALISM: AN HISTORIAN’S VIEW*, Senate Comm. on Govt. Operations, 89th Cong., 2d Sess. (Comm. Print, 1966) [hereinafter cited as SCHEIBER, *CONDITION OF AMERICAN FEDERALISM*].

16. *Younger v. Harris*, 401 U.S. 37 (1971).

ments," and he urged that "the National Government will fare best if the States and their institutions are left free to perform *their separate functions in their separate ways*."¹⁷ Justice Black's concern that the national government remain sensitive to the legitimate autonomy of the states has, more recently, been given new life in the Burger Court's *Usery* decision,¹⁸ in which Congress was barred from extending wage and hour legislation to reach the employees of state and municipal governments. If the *Usery* decision fell short of standards that, say, John C. Calhoun might have endorsed, still it gave heart to arch-traditionalists with its formulation of "degree of intrusion upon the area of state sovereignty"¹⁹ as a constitutional standard that could be invoked to bar action by Congress under the commerce power.²⁰ One is thus left with the impression that our jurists are no more ready than our historians or legal scholars to place time-honored concepts of federalism on the ash-heap, let alone to accept blandly that "sharing" was the norm in historic federal-state relations in the United States.

I. THE ORIGINAL UNDERSTANDING

The Framers, gathered at Philadelphia in the historic founding convention of 1787, did not have in mind "increased autonomy" that the central government might grant the states. Nor did they consider themselves as being in the business of obliterating distinctions between state authority and powers, on the one hand, and the authority and real power of the central government they were forming, on the other. In fact, they viewed their constitutional creation as "a novelty and a compound." As Madison later averred, the convention lacked for "technical terms or phrases appropriate" to describe the system they framed.²¹

17. *Id.* at 44 (emphasis added).

18. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

19. *Id.* *But see Baker, Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 184 (1977).

20. The *Usery* decision directly overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968) and it was the first decision since the late 1930's to make state sovereignty a bar to congressional action under the commerce power. It rendered obsolete the scholarly view that "there are no longer any constitutional barriers to the assertion of federal responsibility" on grounds of states' rights, as "not for a generation has the Supreme Court invalidated a law of Congress as an invasion" of those rights. The fairly typical statement was made by James L. Sundquist in *J. SUNDQUIST, MAKING FEDERALISM WORK* 11 (1969).

21. Letter from Madison to N.P. Trist (Dec. 1831), *reprinted in* 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 517 (M. Farrand reprint ed. 1966) [hereinafter cited as RECORDS].

What distinguished the system from all previous governmental designs in the Framers' view, was the fact that the national government had power to exert "compleat [sic] and compulsive operation" upon individual citizens within its sphere of constitutional authority, while the state retained sovereign powers in the sphere marked out for them.²² It was, as James Wilson declared, "a perfect confederation of independent states."²³ It was what Madison termed a "compound" system because of both structural and operational features. In its structure, it brought the states as states into the central government, both in the Senate and in the House although upon differing bases of representation. Further, it provided certain guarantees to the states and to the people. The operational features that made the system a "compound" consisted, in essence, of what Wilson reduced to one "general principle":

that whatever object was confined in its nature and operation to a particular State ought to be subject to the separate government of the States; but whatever in its nature and operation extended beyond a particular State, ought to be comprehended within the federal jurisdiction.²⁴

To an extent, of course, the Constitution did explicitly specify powers given to the federal government; but there was considerable ambiguity — the possibilities (or perils) of which were not lost to the opponents of the Constitution — in such language as that of the general-welfare clause or in such authority as that in the spending power.²⁵ It was this that the author of *The Federalist* sought to clarify, though because of multiple authorship by men of divergent views *The Federalist* essays themselves were inconsistent on some major points.²⁶

Though there is no need to recapitulate here all the elements of the great debate of 1787-89, a few of the contentions made for the Constitution by its

22. Morris quoted in Madison's notes, May 30, RECORDS, *supra* note 21, vol. 1. at 34.

23. RECORDS, *supra* note 21, vol. 3, at 139.

24. Wilson, in the Pennsylvania ratifying convention, November 1787. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 339, 344 (M. Jensen ed. 1976).

25. See *inter alia* THE ANTIFEDERALISTS (C. Kenyon ed. 1966); J. MAIN, THE ANTIFEDERALISTS (1965).

26. See M. Diamond, *What the Framers Meant by Federalism, A Nation of States* 24-41, (the standard analysis of circa-1787 political terminology); Mason, *The Federalist: A Split Personality*, 57 AM. HIST. REV. 625-43 (1951), (analyzing the differences among the three authors of the essays). What follows here draws upon my own article, *Federalism and the Constitution: The Original Understanding*, in AMERICAN LAW AND THE AMERICAN CONSTITUTIONAL ORDER (Friedman & Scheiber eds. 1978).

champions will serve to evoke at least the spirit of their arguments for that document. These arguments from the Founding period are useful to us because, in both historical and contemporary analysis, we need to be reminded of the original understanding, especially of the way in which the ideas of 1787 underlay the concept of "dual federalism," a concept of separate state and federal governments operating in distinct spheres with little significant overlap or significant "sharing" of authority.²⁷

First of all, there is a distinct theme in the pre-Constitution arguments of 1787-89 that the states were to be "constituent and essential parts" of the new federal system, whereas the central government was "nowise essential to the operation or organization" of the states.²⁸ In his private correspondence, Madison contended that the national government would derive its powers "entirely from the subordinate authorities," a fact that would "effectually . . . guard the latter against any danger of encroachments."²⁹ In the event of any great pattern of federal encroachment on state prerogatives, Madison believed, "one spirit would animate and conduct the whole" of the body of individual states; and they would overwhelm the national government in a united counter-thrust.³⁰ Even Hamilton, who was contemptuous of the "political monster of an *imperium in imperio*"³¹ and was far less inclined than Madison to give any play to state sovereignty, admitted that in a confrontation between states rights and national power the people; in the last analysis, would align themselves behind the states.³²

A second theme of the debates worth recalling concerns the presumed character of the central government. "The Federal and State governments," Madison wrote, were "instituted with different powers, and designated for different purposes."³³ Given the limited (as he argued) range of powers vested in the national government, its civil establishment "will be much smaller" than the officialdom of the states. Given the limited range of federal functions, it was unlikely that Congress would ever resort to direct internal taxation. And even if so dangerous a confrontation should arise as to result in a direct military threat, the states could expect to command far

27. "Dual federalism" is treated at length in Part II of this article, *Dual Federalism and Rivalistic State Mercantilism, 1789-1861, infra*.

28. THE FEDERALIST No. 45, at 311 (J. Cooke ed. 1961).

29. Letter from Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in 3 RECORDS *supra* note 21, at 134.

30. THE FEDERALIST No. 46, *supra* note 28, at 320.

31. *Id.*, No. 15, at 19.

32. *Id.*, No. 17, at 106-08.

33. *Id.*, No. 46, at 315.

greater strength in their combined militia than the central government could hope to command in a standing army.³⁴

Finally, among the themes of the Founders' debates, we may usefully recall that the Federalists stressed in all their arguments for the Constitution that "the general government is not to be charged with the whole power of making and administering laws."³⁵ In the 14th FEDERALIST, Madison argued:

Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments which can extend their care to all those other objects, which can be separately provided for, will retain their due authority and activity.³⁶

And in the 39th essay, he contended that since the jurisdiction of the national government "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects," any fear of massive and coercive unitary government was misplaced.³⁷

Thus, in summary, the Framers conceived of the central government and the states operating in different spheres. To be sure, Madison contended that the powers that would remain "exclusively" with the states would be "numerous, indefinite"; whereas Hamilton spoke more vaguely (and certainly less expansively in concept) of "those residuary authorities, which it might be judged proper to leave with the states for local purposes," citing specifically only private law, agriculture, and local government.³⁸ Still, however, there is no question that the states were to have exclusive authority. Moreover, the champions of the Constitution, in the face of dire warnings by their opponents as to the despotic potential of the new central government, contended that the central government would be small in the size of its civil establishment, would be without a large standing army, and would make only small tax exactions from the population. Finally, the enumeration of federal powers, along with the natural predisposition of the citizens to give first loyalty to their respective states — and also to the overall interest of the states as states — were relied upon to limit and constrain the central government.

34. *Id.*, No. 45, at 312-13.

35. *Id.*, No. 14, at 86.

36. *Id.* at 86.

37. *Id.*, No. 39, at 256.

38. *Id.*, No. 17, at 105-06.

In the long run, of course, the Antifederalists proved more prophetic. Their nightmares were chillingly accurate in broad outline and even detail, though their sense of predictive timing was a bit off. But in the short-run, if seven decades can fairly be termed short-run, *The Federalist* papers' authors and their pro-Constitution colleagues were right: (1) the model of dual federalism that they propounded, with state and central governments operating in different spheres, proved to be accurately descriptive of the system as it functioned — even with a strong dose of Hamilton's nationalism in public policy, hammered home by Marshall's judicial doctrines; (2) the people did prove remarkably faithful to their states, so that the stand of the South in the 1861 secession crisis was the culmination of a major strain of the American politics from the Founding to that day; and (3) the central government did not, as the Antifederalists predicted would be inevitable, produce a massive standing army and civil establishment, nor did it, despite a vigorous protective-tariff policy through much of the period, exact taxes at anything like the levels associated with government finances in Europe.

That American government did, in fact, operate in a manner close to the prescription of the Founders during the period from 1790 to the Civil War is argued at some length in the following section of this article. If the argument is correct — that is, if “dual federalism” did indeed characterize the federal system as it operated in the antebellum years — then there is little if any empirical basis for the historical construct that contends that ‘cooperative federalism’ (on the 1960's-1970's model) has existed since the beginning of the Republic.

II. DUAL FEDERALISM AND RIVALISTIC STATE MERCANTILISM, 1789-1861

The axioms of dual federalism as a constitutional doctrine have been described as follows:³⁹

1. The national government is one of enumerated powers only.
2. Also, the purposes which it may constitutionally promote are few.
3. Within their respective spheres the two centers of government are ‘sovereign’ and hence ‘equal.’
4. The relation of the two centers with each other is one of tension rather than collaboration.

Recognition of, and adherence to, the doctrine of dual federalism is frequently to be found in the opinions and decisions of the courts — both state and federal — in the early period of the Republic, from 1789 to 1861. Thus a New York jurist in 1819 referred to “the complex and peculiar

structure and relations of our federal government and our state governments, *moving, indeed in different spheres* but occupying the same territorial space, operating upon and for the benefit of the same people."⁴⁰

The Marshall Court's famed nationalistic doctrines established the critical importance of the supremacy clause, the commerce power, and the contract clause as controlling when state and national power came into conflict with one another. Yet even so nationalistic a decision as that in *Cohens v. Virginia*⁴¹ spoke of the states "as members of one great empire — for some purposes sovereign, and for some purposes subordinate."⁴² Similarly, the great commerce clause decision in 1824, *Gibbons v. Ogden*,⁴³ explicitly recognized inspection, quarantine, and other laws enacted under the police power of the states as forming "a portion of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government; all of which can be most advantageously exercised by the states themselves."⁴⁴ Five years later, the Marshall Court opened the door wide to state regulation of commerce and navigation so long as Congress had not acted to preempt the field; "a power which has not been so exercised by Congress as to affect the question" before the Court, in this case the damming of a navigable creek by state authority, was not deemed a barrier to state action.⁴⁵ In 1833, yet another constitutional prop of state sovereignty was bolstered when the Court ruled that the Bill of Rights amendments did not apply to state action.⁴⁶ Meanwhile the Court, over the objections of the Chief Justice, upheld bankruptcy laws in the states⁴⁷ and, with Marshall's assent, ruled that the

39. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950), reprinted in *ESSAYS IN CONSTITUTIONAL LAW* 185, 188-89 (McCloskey ed. 1957). This essay by Corwin provides a useful survey of adjudication on the four axioms, though different in evidence and thrust from what follows here.

40. *United States v. Lathrop*, 17 Johns. 3, 22 (N.Y. 1819) (Platt, J., dissenting).

41. 19 U.S. (6 Wheat.) 264 (1821).

42. *Id.* at 414.

43. 22 U.S. (9 Wheat.) 1 (1824).

44. *Id.* at 203.

45. *Willson v. Black-bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829).

46. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). On other elements of Marshall Court jurisprudence that ran against the nationalistic grain, see Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 LAW & SOC. REV. 57, 78-85 (1975) [hereinafter cited as Scheiber, *Federalism*]; see also M. BAXTER, DANIEL WEBSTER & THE SUPREME COURT *passim* (1966); Grant, *The Scope and Nature of Concurrent Powers*, 34 COLUM. L. REV. 995 (1934).

47. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

tax power could not be presumed to have been surrendered or be read by implication into corporate charters.⁴⁸ Thus, while the nationalizing doctrines of the Marshall era were formidable indeed, still the Marshall Court was scarcely remiss in recognizing the attributes of state sovereignty.

The Taney Court carried deference to the precepts of dual federalism much farther than its predecessor court had done. Thus, in the famous *Charles River Bridge Case*,⁴⁹ the Court buttressed "the rights reserved to the States" and assured the vitality of that "portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity."⁵⁰ With this language, it may be said, the Taney Court helped erect a state-oriented doctrine whose basis in the commonwealth of the people served as a counterweight to the Marshall Court's earlier formulations of the "necessary and proper" clause and general-welfare doctrine. In a well-known line of commerce clause cases, moreover, the Taney Court developed the doctrine of "concurrent powers," presaged by the Marshall Court but never fully developed by it.⁵¹ Just as the taxing power had been given recognition as an essential attribute of sovereignty, universally recognized,⁵² so now did the Taney Court majority contend that the states must have "complete, unqualified, and exclusive" power where such matters as quarantine are concerned.⁵³ As Professor Corwin has written, the Taney Court's view of the commerce clause and state police powers threatened to "render the supremacy clause entirely nugatory."⁵⁴ While the revised view of the commerce power gave the doctrines of dual federalism new impetus, the Court was also asserting the virtually unlimited power of the states to exercise their eminent domain power — even where obvious injustices to individuals resulted — as "paramount to all private rights vested under the government."⁵⁵ And in

48. *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514 (1830).

49. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837). A full treatment of this case is provided by S. KUTLER, *PRIVILEGE & CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* (1971).

50. 36 U.S. (11 Pet.) 420 at 552.

51. See text accompanying note 45 *supra*.

52. See text accompanying note 48, *supra*.

53. *New York v. Miln*, 36 U.S. (11 Pet.) 102, 138 (1837).

54. E. CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS* 126 (1936). See also F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE* *passim* (1937); and Newmyer, *History over Law: The Taney Court*, 27 STAN. L. REV. 1373 (1975), an excellent analysis of the Court's handling of the commerce clause questions (Newmyer contends the Court "stopped looking" for doctrinal clarification and settled for obfuscation!).

55. *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 at 532 (1848). On eminent

the landmark case of *Prigg v. Pennsylvania*,⁵⁶ adjudicating the vexing question (originating in 1793 legislation) of whether Congress could require or rely upon state instrumentalities to enforce federal fugitive-slave laws, the Court ruled that the state courts could not be obliged — only authorized — to enforce a national law. Here again, the Court paid its respects to the state police power, which “in virtue of their general sovereignty . . . extends over all subjects within the territorial limits of the States and has never been conceded to the United States.”⁵⁷

For their part, the state courts pressed the claims of state sovereignty. State judges contended in many areas of the law that certain powers of the states were inalienable; that the attributes of sovereignty — including the eminent domain, taxation, and police powers — provided the constitutional (extraconstitutional, “higher-law”) basis for state independence from federal control; and that even the mandates of the federal Supreme Court ought to be closely scrutinized, and in certain instances legitimately could be resisted by the states.⁵⁸ If, as Professor Kurland states, the Supreme Court “has been engaged from the beginning in a constant attrition of state power,” it was not without resistance.⁵⁹ There was, in fact, often stout refusal to comply with the doctrines of the Marshall and Taney courts at key junctures in the nation’s early development, as when Georgia (supported by President Andrew Jackson) refused to accept the *Cherokee Cases* decision,⁶⁰ or when numerous state courts set themselves against acceptance of a federal common commercial law after the *Swift v. Tyson* decision.⁶¹ The travails of the Bank of the United States in the state courts are also well known.⁶² In light of these precedents, the dramatic confron-

domain law. see H. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, in *LAW IN AMERICAN HISTORY* 327-402 (Bailyn & Fleming eds. 1972) [hereinafter cited as Scheiber, *The Road to Munn*].

56. 41 U.S. (16 Pet.) 539 (1842).

57. *Id.* at 624. See E. CORWIN, *COURT OVER CONSTITUTION* 140-44 (1938).

58. Scheiber, *Federalism*, *supra* note 46, at 84-85.

59. P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 57 (1965). Kurland properly stresses that the very exercise of judicial power is “centralizing,” when the Supreme Court acts vigorously as umpire of the federal system. “The Court is and always has been an integral part of the central government” and is not neutral or somehow a third party. *Id.* at 56-57.

60. *Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). *But see* Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 *STAN. L. REV.* 500, 526-31 (1969).

61. 41 U.S. (16 Pet.) 1 (1842).

62. *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 739 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

tation of state judicial power and federal supremacy in the fugitive-slave cases of the 1850's must be regarded as within a major constitutional tradition of the antebellum years.⁶³

So much for the doctrines of dual federalism. What of "realities" of the federal system as it actually worked? Few things so warm the heart of a social scientist as to find a well-known and accepted constitutional or legal doctrine to be completely inconsistent with the actual structure and dynamics of power. This is one reason, no doubt, why the notion of "cooperative federalism" has such appeal as a description of the early 19th century realities; it is in striking contrast with dual federalism. On closer examination, however, the deviation of political realities from doctrine may have been in precisely the opposite direction; that is, the federal system may well have been even more decentralized than "dual federalism" would suggest.

If one of the tests of a federal system is that it assures the constituent governments will retain significant power, the American system prior to 1861 conformed well to the ideal. Not only was the doctrine of federal supremacy hedged in by the jurists in the ways already indicated, but Congress elected to leave dormant many of the powers that the Supreme Court indicated it might properly exercise, either concurrently with the states or exclusively if it wished. The list of functional areas of policy that consequently were left (undisturbed, as it were) in the hands of the states was a formidable one. The states enjoyed virtually exclusive control over elections and apportionment, civil rights, education, family and criminal law, business organization, local government, and property rights. They also controlled the conditions of labor and race relations, including slavery.⁶⁴ Moreover, the locus of power in banking and even monetary policy shifted to the states in the 1830's, with the decline of the Bank of the United States.⁶⁵

"Rivalistic state mercantilism" is a term that can fairly be applied to the way in which the states related to one another in many, highly important areas of policy. They were rivals in a struggle for investment, immigrants, and entrepreneurial and other skills, all scarce in the early 19th century;

63. R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 175-225 (1975); Nichols, *Federalism versus Democracy: The Significance of the Civil War in the History of United States Federalism*, *FEDERALISM AS A DEMOCRATIC PROCESS* 49, 67 (1942).

64. W. ANDERSON, *INTERGOVERNMENTAL RELATIONS IN REVIEW* 142 (1960); W. RIKER, *FEDERALISM*, *supra* note 13, at 83.

65. B. HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* (1957).

and they adopted policies designed to give themselves a head start over other states. With power highly decentralized in transportation policy (an area of policy left almost exclusively to the states, although with some infusions of federal aid) the states entered into a frenzied competition with one another, and the result was often overbuilding and effective duplication of new facilities; planning and rational investment constraints were virtually impossible.⁶⁶ Similarly, in banking policy, the states contended with one another for capital; and when one state or another adopted a tough regulatory policy, its borders might be deluged with the debased currency issued by out-of-state institutions.⁶⁷ In all states, the adoption of regulatory legislation generally was difficult because they competed in a single national market; as with state environmental controls today, conservation-minded regulation raised operating costs and tended to disadvantage a state's own producers in competition with producers in states with less stringent regulation.⁶⁸

Significant diversity among the states, important matters of social and economic policy left exclusively in the hands of the states, intense rivalries among the states, and often, too, robust resistance to federal authority were features of antebellum federalism as a working system which conformed well indeed to the predictions and assumptions of *The Federalist* essays. The system conformed to the Framers' predictions in another important respect, namely the central government. Though it gathered to itself powers formidable enough to spark the formation of a principled opposition in the 1790's, the central government's authority remained relatively small in its civil establishment, its standing army, and its tax impositions on the people. By comparison with our own day, the federal government took only a tiny fraction of resources out of the private sector. The states as well, of course, were a much smaller presence than today in terms of personnel and funding.⁶⁹

The evidence of "sharing" and "cooperative federalism" in the pre-1861

66. SCHEIBER, CONDITION OF AMERICAN FEDERALISM, *supra* note 15, at 5-6.

67. E. ERICKSON, BANKING IN FRONTIER IOWA 1836-65, at 62 (1971); G. GREEN, FINANCE & ECONOMIC DEVELOPMENT IN THE OLD SOUTH: LOUISIANA BANKING 1804-1861, at 78 (1972); B. HAMMOND, *supra* note 65, *passim*.

68. W. HURST, LAW & ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915, at 52-54 (1964); E. MURPHY, MAN & HIS ENVIRONMENT: LAW (1971).

69. B. HAMMOND, SOVEREIGNTY AND AN EMPTY PURSE: BANKS & POLITICS IN THE CIVIL WAR 18-26 (1970); W. HURST, LAW & THE CONDITIONS OF FREEDOM IN THE 19TH CENTURY U.S. *passim* (1956); Broude, *The Role of the State in American Economic Development*, in UNITED STATES ECON. HIST. (Scheiber ed. 1964).

period is slight indeed. Grants-in-aid to the states were almost entirely in the form of land grants — for education and transport, primarily — but the states were able to retain control over all the main elements of policy and law. Contrary to the impression conveyed by scholars who believe that modern cooperative federalism has a precise counterpart in the antebellum era, there was little federal supervision or auditing in the grant programs, and only a tiny fraction of state revenues was derived from the federal grants.⁷⁰

The decentralized nature of political parties reinforced dual federalism. “Multiple political organization,” with parties organized on a state basis primarily, and with significant variation in the party constituencies and ideological preferences from one state to another, helped to institutionalize the “dualism” of loyalty to both state and nation.⁷¹ Where ideology was imposed from above, the resultant differences tended to focus in sharp perspective the very issues of formal federalism — states’ rights and sovereignty, national supremacy, the imperatives of Union — that reinforced the widespread belief in constitutionalism, or what many historians have seen as the “worship” of constitutionalism.⁷²

Also setting the antebellum period apart from the era that followed the Civil War was the plausibility of secession as the ultimate political tactic. Until 1861, the idea had to be taken seriously; it was a weapon in the arsenal of parties and factions; and it was a threat explicitly resorted to on numerous occasions.⁷³ As Corwin has written, “Secession was the serious threat that it was in 1860 not because the states rights theory was strong in the South but because it was strong throughout the whole country.”⁷⁴ The coming of war in 1861 not only set this spectre to rest for all time; it also led to a transformation of the federal system, as the contours and dynamics of

70. Up to 1860 only \$42 million in cash was granted to the states and localities by the federal government, apart from assumption of debts in 1790; and two-thirds of the money was a one-time distribution in 1837. Generally, moreover, cash payments ran to only one to two percent of state budgets, even in the period *after* 1860. See Trescott, *Federal-State Financial Relations, 1790-1860*, 15 J. OF ECON. HIST. 227 (1955); the data on post-1860 taken from examples in the work of Elazar, who makes what I think is the spurious argument that cash aid in the 19th century was somehow comparable to the modern distributions, D. ELAZAR, *supra* note 10, at 280. For full discussion of the notion of comparability, see SCHEIBER, *CONDITION OF AMERICAN FEDERALISM*, *supra* note 15, at 2-4.

71. Nichols, *supra* note 63, at 68-72.

72. E. CORWIN, *supra* note 57, at 210-12.

73. *But see* D. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 417-19 (1965).

74. Corwin, in Nichols, *supra* note 71, at 86.

the polity were forced to shift in consonance with changing political and social realities.

That the federal government was kept “in a stunted condition” by limited personnel, limited revenues, and circumscribed reach of its policies was “acclaimed a blessing by most Americans” in the antebellum period.⁷⁵ “The people of the United States,” Roger Sherman had said in 1790, “are like masters prescribing to their servants the several branches of business they would have perform. It would not comport with their interest if the Federal Government was to interfere with the Government of particular States”⁷⁶ A third of a century later, it might still be said plausibly in Congress that there was a “wise distribution of power” under the Constitution which assigned “to the General and to the several State Governments, each its own proper orbit, in which to move for the general good.”⁷⁷ And near the eve of war, in 1858, Chief Justice Taney presented as a description of working reality and not merely prescriptive theory this view of federalism: “The powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.”⁷⁸ Granting the obvious — that there had to be some areas of overlap in power and that some cooperation was necessary to make government work — still the record of the pre-1861 era of rivalistic state mercantilism indicates that dual federalism was no sterile legalistic concept divorced from reality. Dual federalism in fact provided a fairly sound description of things as they were.

Two of the most important arguments in favor of a federal system are that the diffusion of power protects liberty and that the possibilities for diversity permit the constituent governments to act as “laboratories” for experiment. The antebellum American record illustrates the possibilities and pitfalls of federal governance in both these respects. On the one hand, government was indeed kept “close to the people.” In this respect, federalism “provided Americans with the cherished experience of controlling their own destiny,” as one historian has contended.⁷⁹ Moreover, that Americans in the political process held dear this feature of their system was

75. B. HAMMOND, *supra* note 69, at 25. This is also a main theme in Paludan, *A COVENANT WITH DEATH: THE CONSTITUTION, LAW & EQUALITY IN THE CIVIL WAR ERA* 1-26 (1975).

76. 1 ANNALS OF CONG. 1684 (Gales & Seaton eds. 1790)

77. 41 ANNALS OF CONG. 1006 (Gales & Seaton eds. 1824).

78. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 516 (1859).

79. Paludan, *supra* note 75, at 12.

evident in the jealousy with which they guarded local and state prerogatives. But the record of liberty was stained by the legitimacy given slavery. To be sure, it was part of the federal bargain, embedded in the Constitution itself, that slavery would be permitted. Yet, it was the legal precepts of states rights and the dynamics of federalism in political processes that allowed slavery to persist, and that shaped the conflict leading to war in 1861.⁸⁰ The relationship of federalism to liberty, in sum, was not all on one side of the ledger. As to the states "as laboratories" (a phrase resorted to frequently by Holmes, Frankfurter and Brandeis),⁸¹ the antebellum federal system gave extensive play to diversity. Innovative states offered models of policy and administrative organization to other states; the rules of law, as well as the mix of statute law, varied immensely from one state to another; and there was a great range of differences in patterns of taxation, expenditure, and public policies generally.⁸² Indeed, it was this very record that would serve as evidence for those who invoked the "states-as-laboratories" argument later, down the corridors of time in American constitutional development.

III. TRANSITIONAL FEDERALISM, 1861-1890

We are told on excellent authority that the Civil War did not transform the federal system.⁸³

No centralized leviathan developed in Washington to replace state-centered federalism; no huge national, coercive bureaucracy substituted for local decision-making. The overall War and Reconstruction result was not, as frequently intimated, an absolute increase in positive national powers and functions, but as Carl Friedrich perceived, "a decrease in state and local autonomy."⁸⁴

80. T. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780-1861* (1974); Bestor, *The American Civil War as a Constitutional Crisis*, 69 AM. HIST. REV. 327-52 (1964).

81. See, e.g., Holmes on the states as "insulated chambers" for experimentation, in *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (dissenting opinion).

82. Hence Justice Story's claim that the federal judge had to cope with "the jurisprudence of twenty-four states, essentially differing in habits, laws, institutions, and principles of decision." Story, *Life of Chief Justice Marshall*, 6 AM. L. MAGAZINE 294 (1846). On states innovating and following, see H. SCHEIBER, *OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY 1820-1861* (1969); Rubin, *Canal or Railroad? Imitation and Innovation in the Response to the Erie Canal*, 51 AM. PHIL. SOC'Y TRANSACTIONS, pt. 7 (n.s. 1961). On diversity of policy, see G. TAYLOR, *THE TRANSPORTATION REVOLUTION 1815-1860 passim* (1951).

83. H. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR & RECONSTRUCTION ON THE CONSTITUTION* 306 (1973).

84. C. FRIEDRICH, *THE IMPACT OF AMERICAN CONSTITUTIONALISM ABROAD* 49 (1967).

Although there was constitutional change, and although the central government undertook new functions, the same commentator asserts, there was little need for "new administrative bureaus, sharp personnel enlargements, or innovative enforcement techniques."⁸⁵ In sum, there was remarkably little shift toward the center in real power.

Before accepting this view wholesale, we ought to recognize some fairly compelling evidence of centralization in the Civil War era. For example, banking policy was clearly centralized; the fact that little new enforcement machinery or the like accompanied this shift cannot detract from its importance. With the institution of the national banking system during the war years, the issue of currency and mechanisms of credit came under a degree of centralized control for the first time since the 1830's, and they would remain under increasingly centralized control thereafter.⁸⁶ Even allowing for the rhetorical excess of argument in the heat of legal confrontation, one must consider the view of counsel in challenging the Legal Tender Act that "the limited and localized system of government established by our fathers" was in danger of "passing irretrievably into a centralized, consolidated, absolute government."⁸⁷

Other policy measures of the era that bespoke centralization, whether or not they aroused similar expressions of passionate concern, included: the federal charter of the transcontinental railroad corporations, and their subsidization with massive land grants and bond support; the very considerable wartime expansion of civilian federal employment; and the institution of new federal agencies, including a Department of Agriculture.⁸⁸ Enactment of the Homestead Law bespoke a new determination to effect guided, rapid settlement of the West, moreover; and this innovation was at least matched in importance by the imposition of new internal-revenue taxes and a temporary income tax. Indeed, these taxes placed the central government on an unprecedented new fiscal basis, ending the nearly-exclusive reliance (dating from 1790) on tariff and land-sale revenues.⁸⁹

85. H. HYMAN, *supra* note 83, at 381.

86. B. HAMMOND, *supra* note 69, *passim*.

87. Clarkson Potter, argument in Legal Tender Cases (1871) quoted in C. FAIRMAN, RECONSTRUCTION & REUNION, 1864-88, Part One, at 758-59 (1971).

88. L. CURRY, BLUEPRINT FOR MODERN AMERICA: NONMILITARY LEGISLATION OF THE FIRST CIVIL WAR CONGRESS *passim* (1968); H. HYMAN, *supra* note 83, at 381; P. VAN RIPER, HISTORY OF THE U.S. CIVIL SERVICE (1958).

89. L. HACKER, THE COURSE OF AMERICAN ECONOMIC GROWTH & DEVELOPMENT 180-92 (1970); Scheiber, *Economic Change in the Civil War Era*, 11 CIV. WAR HIST. 396, 407-08 (1965).

Meanwhile, postwar constitutional changes (the thirteenth, fourteenth, and fifteenth amendments) and the enactment of civil rights laws,⁹⁰ on the one hand, and laws vastly expanding the jurisdiction of the federal courts,⁹¹ on the other, wrought virtually revolutionary change in the political system. Well might the federal attorney, prosecuting Klansmen under national civil rights laws in a South Carolina district in 1871, exclaim: "We have lived over a century in the last ten years!"⁹² Ironically, it was the federal Supreme Court that stemmed the tide of constitutional change, serving as the vanguard of reaction on civil rights.⁹³

Despite the Court's raising of barriers against vigorous federal prosecution of civil rights questions, the federal judiciary was a force for centralization of power generally in this period, both in validating new congressional assertions of power and in laying the groundwork for future action by the national legislature. In ruling on the commerce power, the Court moved beyond *Paul v. Virginia*,⁹⁴ a decision of 1869 giving the states wide powers over "foreign" corporations, to hedge in the states and broaden congressional control. Thus, the principle that Congress's power must be adequate to control the newest technologies was established in 1877,⁹⁵ and, in subsequent years, the Court not only approved regulatory legislation of wide reach but also validated the use of taxation as a regulatory instrument.⁹⁶ The Court also advanced a doctrine of "general jurisprudence" — a derivative of *Swift v. Tyson*⁹⁷ — which provided grounds for the overturn of state constitutional interpretations or rules of decision where issues of overarching concern to the national economy were at stake.⁹⁸ In the 1870s

90. Most notably the Civil Rights Acts of 1866, 1870, 1871, and 1875. See G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 901-04 (1975). See also Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

91. See H. L. A. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 39-40 (1973); Wiececk, *The Reconstruction of Federal Judicial Power*, in L. FRIEDMAN & H. SCHEIBER, *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* (1978).

92. Quoted in H. HYMAN, *supra* note 83, at 543. But see S. KUTLER, *JUDICIAL POWER & RECONSTRUCTION POLITICS* (1968).

93. S. KUTLER, *supra* note 92, *passim*; C. FAIRMAN, *supra* note 87, *passim*.

94. 75 U.S. (8 Wall.) 168 (1868) (that "the whole matter rests in their discretion," as to the states' power to restrict or exclude foreign corporations).

95. *Pensacola Tel. Co. v. W. Union*, 96 U.S. 1 (1877) (invalidating a state law in conflict with congressional regulation of a telegraph company).

96. Thus in the mid-1880s Congress established a tax on oleomargarine, seen by its opponents as a blatant perversion of the taxing power for regulatory purposes. A. LEE, *A HISTORY OF REGULATORY TAXATION* (1973).

97. See note 61 *supra*.

98. *Township of Pine Grove v. Talcott*, 86 U.S. (19 Wall.) 666 (1873) (upholding the

and 1880s, moreover, the Court relied upon both “general jurisprudence” principles and the fourteenth amendment to support its emergent role as the censor (generally conservative) of state legislation.⁹⁹ There were also some essentially “decentralizing” doctrines and decisions, most notably *Munn v. Illinois*,¹⁰⁰ upholding the state police powers where business “affected with a public interest” were to be controlled, and in decisions upholding broad state powers to exclude corporations domiciled in other states. In the area of property law the Court continued to give wide latitude to the states, although it did tighten constitutional standards of compensability in eminent-domain proceedings or “takings” resulting from action under the police power.¹⁰¹

The states continued to exercise many of the powers they had enjoyed, without interference by the central government, in such areas as family and criminal law, elections, control of local government, and commercial law, (albeit the federal courts, by dint of diversity jurisdiction, were seeing a greatly increased volume of business in commercial law).¹⁰² A strong degree of localism continued to mark state policy in many areas. In railroad promotion, aid, and regulation, for example, the pre-Civil War pattern of rivalistic state mercantilism continued to be evident.¹⁰³ Moreover, a great many types of discriminatory and parochial measures, such as license fees and special taxes, slipped through the gaps left in the Supreme Court’s nationalizing doctrines.¹⁰⁴ The states’ exercise of police power functions became wider in scope and more intensive, especially in the area of railroad regulation. And by the 1880’s the legislatures and state courts were deeply preoccupied with the problems of subjecting giant corporate enterprise to meaningful public control.¹⁰⁵ Withal, there was

validity of bonds issued to aid railroads, overturning a Michigan Supreme Court decision). See C. FAIRMAN, *supra* note 87, at 935; Scheiber, *The Road to Munn*, *supra* note 55, at 391-95.

99. *E.g.*, in *Loan Assoc. v. Topeka*, 87 U.S. (20 Wall.) 655 (1874).

100. *Munn v. Illinois*, 94 U.S. 113 (1877); *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1877).

101. *Holyoke Co. v. Lyman*, 82 U.S. (15 Wall.) 500 (1873); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872).

102. See F. FRANKFURTER AND J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 60-69, ch. 2-3 *passim* (1927).

103. C. GOODRICH, *GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS 1800-1890*, at 207-62 (1960).

104. Charles McCurdy, work in progress on Chief Justice Field and the commerce clause, based on his Ph.D. dissertation, submitted at University of California, San Diego, 1975.

105. See S. FINE, *Laissez Faire and the General-Welfare State . . . 1865-1901*

still significant decentralization of power and even a large degree of balkanization in the workings of the federal system.

In its quantitative dimensions, the federal system of the 1880's was much closer to the government as it had been in the 1790's than it was to the post-New Deal system: the federal government still took less than five percent of national income, and the number of civilian employees relative to population did not change greatly.¹⁰⁶ What makes it appropriate to regard the 1861-1890 period as "transitional" was the gradual increase in the overall activity of government and the long-term trend toward centralizing doctrine in the constitutional realm; the emergent professionalization of government, although still at a rudimentary level; and, finally, the strong move at the end of this period toward vesting new powers in the central government, notably in the Interstate Commerce Act of 1887 and the Sherman Act of 1890. With these two measures, the federal government inaugurated the era of regulation by commission and also undertook, for the first time, comprehensive control over the growth of business institutions. A basic revision of the American political economy was under way, and a period of accelerating centralization began.¹⁰⁷

IV. CENTRALIZING FEDERALISM AND MODERNIZATION OF GOVERNMENT, 1890-1933

By the 1890's, the realities of the governmental system began to deviate significantly from the model of dual federalism. Not only was there more centralized governmental activity than formerly, but now Congress was acting in areas such as transport regulation and corporation law that had been largely state responsibilities. Overlapping of functional responsibilities became more common as federal activity reached into new areas. As the progressive period of American politics reached high tide during the Roosevelt, Taft, and Wilson presidencies, Congress established or strengthened the federal presence in such areas as food and drug control, regulation of merchant seamen's working conditions, labor relations in the railroad industry, and provision of farm credit. Establishment of the

(1956); see also McCurdy, *The Road to Knight* (manuscript lent by the author), forthcoming as an article in the *Business History Review*.

106. Computed from U.S. COMMERCE DEPT., BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE U.S.* 1125-26, 1102-04 (1976 ed.) (raw data on finances, employment).

107. H. SCHEIBER, H. VATTER, & H. FAULKNER, *AMERICAN ECONOMIC HISTORY* 297-316 (1976). But see M. KELLER, *AFFAIRS OF STATE passim* (1977).

Federal Reserve System capped this record of major additions to the list of federal initiatives and functions.¹⁰⁸

This period was also the heyday of judicial activism by a conservative Supreme Court, which by its censorial functions further centralized power in the federal system.¹⁰⁹ Formalistic constitutional controversy (and significant court action) marked three major areas of policy in this period: child labor legislation, the income tax, and prohibition. In each instance, the final outcome was a significant augmentation of centralized power.¹¹⁰

The nascent professionalization of government bureaucracy, perceptible before 1890, accelerated in this period. Despite the continued strength of old-fashioned political machines in many states and cities, and despite abundant corruption and inefficiency of a blatant variety, still this was the time when "modernization" of American government occurred — if we use the term to refer to the advent of civil service merit systems, institution of bureaucracies, introduction of experts in such areas as public health and conservation (then other areas), and proliferation of functions that depended heavily on expertise (research, factory inspection, *etc.*).¹¹¹

Closely associated with the professionalization trend was a strong movement in intergovernmental relations toward the sort of "cooperative federalism" that characterizes the system in our own day. Regular cash-aid grant programs had begun in 1887, with the Agricultural Experiment Station Act. In 1902 cash-grant programs still numbered only five, involving aid to agriculture, to veterans, and to the blind. The Carey Act of 1894 had inaugurated large-scale aid for irrigation, and in 1902 the Newlands Act set an important precedent by establishing a revolving fund (or trust fund, outside regular congressional budgeting).¹¹² Other innova-

108. See A. LINK, *WOODROW WILSON & THE PROGRESSIVE ERA 1910-17 passim* (1954), (1954).

109. A. PAUL, *THE CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895. passim* (1960).

110. A. LINK, *WOODROW WILSON*, *supra* note 108, at 54-80, 223-51; W. SWINDLER, *COURT AND CONSTITUTION IN THE 20th CENTURY: THE OLD LEGALITY 1889-1932 passim* (1969).

111. See L. BETH, *DEVELOPMENT OF THE AMERICAN CONSTITUTION 1877-1917*, at 72-138 (1971); M. KELLER, *AFFAIRS OF STATE*, *supra* note 107; C. YEARLEY, *THE MONEY MACHINES: THE BREAKDOWN AND REFORM OF GOVERNMENTAL AND PARTY FINANCE IN THE NORTH 1860-1920* 242-44, 253-79 (1970).

112. W. GRAVES, *AMERICAN INTERGOVERNMENTAL RELATIONS: THEIR ORIGINS, HISTORICAL DEVELOPMENT AND CURRENT STATUS* 14-15 (1964) (Graves' work is the standard study of grants-in-aid); H. SCHEIBER, *CONDITION OF AMERICAN FEDERALISM*, *supra* note 15, at 6-7.

tions followed: the Forests Act of 1911 instituted "matching-fund" requirements and provided for federal inspection; states were required to submit plans in advance of aid for reclamation; and, in a major departure, the 1916 Highways Act, instituting aid for roads, required the states to establish highway departments deemed acceptable as to organization and staffing quality to federal authorities, to submit plans for federal approval, and to submit to auditing.¹¹³

By 1920, some eleven programs were channelling \$30 million annually to the states; this was only about 2.5 per cent of state revenues, and as the 1920's were a time of rising state revenues and expenditures, the share represented by grants-in-aid from Washington actually fell to under 2 per cent by 1927.¹¹⁴ This leveling-off in expansion of aid in the 1920s — a period that Elazar has aptly termed one of "normalized retrenchment"¹¹⁵ — was, in effect, a manifestation of "normalcy" in accord with the design of successive Republican administrations. President Harding did support the Sheppard-Towner Act¹¹⁶ in 1921, inaugurating grants-in-aid on a matching-fund basis for infant and maternity care in the states. This proved enormously controversial, bringing down on its authors the hostility of the American Medical Association and a host of conservatives and states-righters.¹¹⁷ Coolidge, succeeding Harding, declared himself not only opposed to Sheppard-Towner but dubious of any program of aid that would threaten the autonomy of the states.¹¹⁸ Consequently, the interest in aid programs waned along with reform zeal generally.

One salutary effect of Sheppard-Towner, from the vantage point of those who favored grants-in-aid, was its validation by the Supreme Court in the face of challenges by the Commonwealth of Massachusetts and by a private taxpayer.¹¹⁹ The Court ruled in the Massachusetts case that there was no coercion or attack upon state sovereignty; grants-in-aid merely were an inducement, and a state was free (as some did) to decline participation.¹²⁰ In the private-taxpayer suit, the Court ruled flatly that an

113. W. GRAVES, *supra* note 112, at 516-19.

114. Campbell, *National-State-Local Systems of Government and Intergovernmental Aid*, 359 ANNALS 96 (1965).

115. Elazar, *The Shaping of Intergovernmental Relations*, 359 ANNALS 10, 18 (1965).

116. 42 Stat. 224 (1921) (repealed 44 Stat. 1024 (1927)).

117. Lemons, *The Sheppard-Towner Act: Progressivism in the 1920s*, 55 J. AM. HIST. 776 (1969).

118. N. Y. Times, Feb. 10, 1924, § 8, at 14.

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

120. *Id.* at 482.

individual citizen had no standing in such a case, a decision that has bothered constitutional scholars ever since, as the ruling seemed to close the door to any taxpayer challenge to the spending power.¹²¹

Outside the formal constitutional structure, the 1890-1933 era witnessed an acceleration of the trend toward entrenchment of expertise and career employment in government, a key element of governmental modernization. Functional bureaucracies cut across federal-state-local divisions and geographical or agency boundaries, and shared professional standards and biases began to affect both policy-making (especially in agriculture) and administration.¹²² This tendency would become more pronounced as legislators became more reliant upon experts in formulating statute law and instituting administrative bodies in a complex industrialized society, and, of course, it became one of the dominant features of our polity when giantism in government emerged in the 1930's.¹²³

If the twenties were a period when there was "expansion of existing programs" (though only modest in scope) "and refinements of their co-operative administration,"¹²⁴ there was nothing either gradual or refined about what followed in the New Deal years.

V. A RETROSPECT ON FEDERALISM AND LIBERTY, 1933

The continuing autonomy of the states in major areas of public policy during the long period from the Civil War to 1933 did not contribute very persuasively to the notion that federalism serves as a guarantor of liberties. In the first place, the grotesque failure of Civil War egalitarian ideals and the surrender in the fight for civil rights — or, perhaps more accurately, the fading of public will to support civil rights — had taken full hold by the 1890's. Disfranchisement of blacks in the South, the tightening of Jim Crow laws, repeal of federal civil rights statutes, reinstatement of discrimination in the federal establishment during the Wilson years, and extensive legal segregation all followed.¹²⁵ Moreover, except on rare occasions the

121. *Id.* at 487. See J. W. HURST, *LAW AND SOCIAL ORDER IN THE U.S.* 113 (1977) (on barring individual suits against action under the spending power).

122. This movement is considered more fully, especially with regard to the agricultural establishment, in H. SCHEIBER, *CONDITION OF AMER. FEDERALISM*, *supra* note 15, at 7, 8.

123. A development that Deil Wright treats as central to the structure of modern "picket-fence" federalism. See Wright, *supra* note 15.

124. Elazar, *supra* note 115, at 18.

125. P. MURPHY, *THE CONSTITUTION IN CRISIS TIMES 1918-1969* (1972); G. TINDALL, *EMERGENCE OF THE NEW SOUTH 1913-45* (1967); C. WOODWARD, *THE STRANGE CAREER OF JIM*

Supreme Court resisted the extension of federal guarantees to the police station, court house, or jail; state and local authorities enjoyed wide discretion in the criminal justice process.¹²⁶ The twenties were also a decade when numerous states enacted repressionist anti-syndicalist laws and when the Ku Klux Klan enjoyed a high degree of official tolerance from state governments.¹²⁷

There was only a tiny "civil liberties constituency" in the forefront of American politics, and the degree to which the few elite or articulate leaders who were concerned with civil liberties actually had a following is problematical: it was not an era of tolerance in American society generally. But for those who still believed that federalism served as a structural guarantee of civil liberties and civil rights, squaring such old-fashioned Jeffersonian values with current realities had its difficulties. There was increasing agreement among those concerned with such things that perhaps only vigorous action by the federal government and advancement of Bill of Rights freedoms by the Supreme Court could achieve meaningful reform.¹²⁸

VI. THE NEW DEAL: COOPERATIVE FEDERALISM AND INTENSIVE CENTRALIZATION, 1933-41

In many basic respects, modern cooperative federalism was the child of the Great Depression and the New Deal. The principal dimensions of the modern system were: (a) intensive centralization of power in numerous policy areas formerly left largely or nearly exclusively to state and local government; (b) a major shift in formal constitutional doctrines, as the Supreme Court, after initial recalcitrance and a confrontation with the President, reversed long-held positions on the tax and commerce powers, due process, and states rights; (c) the definitive and apparently permanent emergence of giantism in government, as governmental taxing, spending, and employment rose to new high levels relative to national population and income; and (d) development of new patterns in intergovernmental relations, both fiscal and administrative. These developments occurred

CROW (3d ed. 1976); Scheiber & Scheiber, *The Wilson Administration and the Mobilization of Black Americans*, 10 LAB. HIST. 433, 453 (1969).

126. See P. MURPHY, *supra* note 125, at 41-96; see also H. ABRAHAM, *FREEDOM AND THE COURT: CIVIL RIGHTS AND CIVIL LIBERTIES IN THE U.S. passim* (2d ed. 1972).

127. P. MURPHY, *supra* note 125, at 89.

128. *Id.* at 82-83, 170-73; P. MURPHY, *THE MEANING OF FREEDOM OF SPEECH: FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR passim* (1972); W. PRESTON, *ALIENS & DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-33* (1963).

simultaneously with another key change in the governmental system, the expansion of Executive power in the federal government, both in the executive agencies and in the administrative-regulatory agencies.

Scholars concerned with analysis of changing federal-state relationships in the New Deal period tend to concentrate attention upon the mechanisms, fiscal and administrative, of intergovernmental relations. This is a subject we, too, will probe later in this article. But at the outset, if we are concerned to judge the changing character of the federal system — and particularly the key issue of how centralized real power became, and how much power remained diffused — the most important evidence lies outside the intergovernmental-relations arena. The most vital evidence is that of concentration of power by the movement of Congress into areas formerly left largely untouched (or only slightly affected) by federal power. The list is well known, and it need only be summarized here to remind us of how formidable it was.¹²⁹ Agriculture was made a managed sector, with basic crops subject to regulation of output and, effectively, prices. Industry was brought under the control of the central government through the National Recovery Act's provisions, albeit on that basis only until 1935. In 1935 the Wagner Act instituted a decisive, permanent federal presence in the field of labor-industrial relations, a presence that was felt even more directly with institution of minimum wage legislation. Regional development under federal auspices began with the Tennessee Valley Authority, and the central government also expanded its role in reclamation and conservation with vast new public-works projects. After 1935 the federal Social Security and unemployment-compensation system, established with a cooperative provision allowing an administrative role to the states, instituted the modern welfare state, such as it is. And within three years, the federal government had become heavily committed to a Keynesian counter-cyclical policy — a policy closely linked to the massive rise in federal expenditures, which in turn were supported by expansion of the income tax and its effective preemption by the central government.

Taken together with the massive relief programs of the New Deal, the magnitude of these changes and the proliferation of regulatory agencies

129. For a full overview and analysis of the New Deal, stressing innovations and the authentic "reform" character of 1930s programs, see W. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940* (1963). O. GRAHAM, *New Deal Historiography: Retrospect and Prospect*, *THE NEW DEAL: THE CRITICAL ISSUES* 171-79 (3d ed. 1971) offers analysis of the full range of scholarly opinion on the New Deal. Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform*, in *TOWARDS A NEW PAST* (1968) is a concise critique from the left.

and powers amount to a centralization of power that renders trivial, by comparison, the "cooperative" aspects of intergovernmental administrative relationships. To be sure, this is not a judgment shared by some in the field of political science,¹³⁰ but the conclusion that the New Deal effected a virtual revolution in the federal-state power balance seems to me inescapable.¹³¹

Let us pass now from changes in formal constitutional doctrine and the overall pattern of centralization, which are well known, to the narrower issues of intergovernmental relations. The pattern of intergovernmental relations that developed in the 1930's was aptly termed "the New Federalism" by Jane Perry Clark.¹³² It was indeed "new" in basic respects, several of which deserve attention here. First, the flow of dollars from Washington to the states quickly rose to flood-tide proportions after Franklin Roosevelt's inauguration. From a level of \$193 million in grants-in-aid in fiscal 1933, the amount rose to \$1.8 billion in 1934 and to \$2.3 billion the following year. The peak reached in the thirties was \$2.9 billion in 1939. Welfare and relief payments comprised some 80 per cent of these sums.¹³³ Secondly, the grant programs of the 1930's involved a large measure of administrative discretion — especially in the dominant relief program, in which Harry Hopkins enjoyed enormous discretion, even to the point of bypassing state and local officials altogether where he deemed it appropriate.¹³⁴

Third, Congress began to attach important new conditions to grants as it expanded the number of policy areas in which grants-in-aid were used to achieve national objectives. These areas included health services, expanded highway aid, distribution of farm products to the needy, expanded fish and wildlife programs, public housing development, aid to dependent children and the aged, and Social Security.¹³⁵ In numerous programs, the states

130. See text accompanying notes 10-12 *supra*.

131. See J.W. HURST, *supra* note 121, at 147. The remainder of this section, on cooperative federalism in the New Deal period, is drawn from and follows closely H. SCHEIBER, *CONDITION OF AMERICAN FEDERALISM*, *supra* note 15.

132. J. CLARK, *RISE OF A NEW FEDERALISM* (1938). See also J. MAXWELL, *FISCAL IMPACT OF FEDERALISM IN THE U.S.* (1946); J. PATTERSON, *THE NEW DEAL AND THE STATES: FEDERALISM IN TRANSITION* (1969).

133. These data constitute a revision of the official U.S. government series on grants-in-aid; as they include relief payments, in the annual totals, they run as much as three times higher than the official series' figures. See H. SCHEIBER, *CONDITION OF AMERICAN FEDERALISM*, *supra* note 15, at 9, Table I and notes.

134. J. PATTERSON, *supra* note 132, at 74-101.

135. W. GRAVES, *supra* note 112, at 526-36; J. MAXWELL, *FISCAL IMPACT*, *supra* note

were required to submit plans in order to qualify; the principle of equalization (gearing grants to formulas based on states' needs and resources) was instituted in several programs; states were required to institute administrative reforms or civil-service programs in agencies that used grant-in-aid funds.¹³⁶

Fourth, some of the grant-in-aid programs, and also some others administered directly through federal agencies, were established on a "project grant" or "demonstration" basis. This meant that some communities received a great deal of aid, while most received little or nothing through these programs. Department of Agriculture demonstration projects bypassed, or at least upstaged, both regular state-local governmental agencies and the bureaucratic "establishment." More direct bypassing and dramatic use of the demonstration-grant technique came with the Farm Security Administration programs of the late thirties.¹³⁷

Fifth, both bypassing and "skewing" affected the state governments as grants on the new model expanded in number and impact. As other federal programs followed the lead of emergency relief in giving aid directly to local governments, there was also a tendency, as in the conservation programs, to create new special-district local government, or to develop regional relationships and organizations that were superimposed on the existing, traditional system, as in TVA.¹³⁸ "Skewing" was a major effect of massive funding through the grants-in-aid, as state and local legislators tended to favor programs that could qualify for federal aid and thus leaving other, often no less deserving, programs starved for appropriations. The skewing also affected state and local debt, as federal program administrators encouraged governments to issue non-guaranteed bonds as means of obtaining matching funds for aid programs.¹³⁹

Finally, there were major changes in the informal power relationships that interacted with, and were affected by, the new grant-in-aid programs and the larger pattern of centralization. Of crucial importance was multi-

132. at ch. 6-11; ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, PERIODIC CONGRESSIONAL REASSESSMENT OF FEDERAL GRANTS IN AID 44-67 (Report A-8, 1961).

136. J. CLARK, *supra* note 132, at 178; V. KEY, ADMINISTRATION OF FEDERAL GRANTS TO THE STATES 266 (1937); J. PATTERSON, *supra* note 132, *passim*; MALONE, *The Montana New Dealers*, in THE NEW DEAL (Braeman ed. 1975), *supra* note 134, at 240, 250-52.

137. C. CAMPBELL, THE FARM BUREAU AND THE NEW DEAL: A STUDY OF THE MAKING OF NATIONAL FARM POLICY, 1933-40, at 156-95 (1962); R. MARTIN, GRASS ROOTS (1964).

138. P. SELZNICK, TVA AND THE GRASS ROOTS 117, 169 (1966).

139. J. MAXWELL, FINANCING STATE AND LOCAL GOVERNMENTS 72, 199 (1965); J. MAXWELL, *supra* note 132, at 88, 390.

level and multi-agency fractionalization of power. Both program planning and administration became dependent upon action at more than one level of government, and often action in several agencies. Resultant fragmentation of authority had the effect of creating multiple routes of "access" for individuals and groups seeking to influence the governmental process. Meanwhile, the professional bureaucrats in each of these emergent systems, or subsystems, of authority within the federal structure developed further their special expertise-based relationships. Consequently, "functional communities of specialist civil servants" became a major force in government.¹⁴⁰ Here, then, in the 1930's were found already flourishing many of the features of complex, bureaucratized modern government that thirty years later would lead many to argue that "coordination" and simplification were essential if government were to function effectively.¹⁴¹

Today, even mainstream-liberal analysts of the American governmental system often concede that this record of the New Deal, with the centralization/bureaucratization/fragmentation phenomenon of that period, was productive of some serious problems for the system. Whether or not one regards the New Deal record in reform, relief, welfare, and regulation as accomplishing the degree of change required to assure decent minimum living standards and effective protection of the public interest, clearly the basic ideals of representative government were not always well served by 1930's innovations. The accretions of power in the Executive, the insulation and secrecy achieved by administrative and regulatory agencies, the loss of separation-of-powers as an effective check — in sum, the diminution in diffusion of power as a bulwark of liberty — all led in direct historical line to some serious failures of government in the years that followed.¹⁴²

VII. SINCE THE NEW DEAL: "NEW FEDERALISMS" (PLURAL) AND THE EROSION OF LIMITS ON GOVERNMENTAL POWER

The Founders in 1787, Mr. Justice Harlan has said, "staked their faith that liberty would prosper in the new nation not primarily upon declara-

140. Anderson, *Pressure Groups and Intergovernmental Relations*, 359 ANNALS 119-21 (1965); Fesler, *Understanding of Decentralization*, 27 J. OF POL. 536, 556-58 (1965).

141. See M. REAGAN, *THE NEW FEDERALISM*, *supra* note 15; J. SUNDQUIST & D. DAVIS, *MAKING FEDERALISM WORK: A STUDY OF PROGRAM COORDINATION AT THE COMMUNITY LEVEL* 1-31 (1969).

142. See J. W. HURST, *supra* note 121, at 143-54.

tions of individual rights but upon the kind of government the Union was to have."¹⁴³ Governmental structure — the diffusion of power through adoption of federal structure — was originally designed as a more important guarantor of liberties than such "direct limitations" as are in the 1787 Constitution or (it is argued) even the Bill of Rights.¹⁴⁴

Since the New Deal era, however, the centralization of governmental functions, together with the augmented executive power and other problems mentioned above, has served to undermine the limitations upon the power of those who govern. Whether one calls it "Government Unlimited"¹⁴⁵ or any other name, the problem is manifest: power is a two-edged sword, and the same concentration of power as produces programs promoting social justice, regulation of private-sector organizations in "the public interest," or racial equality before the law can also function to undermine the ideal of representation, to erode due process, to intimidate individuals or groups, and generally to frustrate the processes of responsible government. These criticisms have been made eloquently elsewhere — by commentators speaking from a great variety of political and scholarly orientations.¹⁴⁶

The question that principally concerns us here is whether (and if so, how) the changing character of federalism relates to these problems. Major issues in constitutional law, administrative arrangements in intergovernmental relations, and public policy receive close scrutiny in other essays in this symposium; we will focus here on how "cooperative federalism" has evolved since the New Deal.

A. *The Larger Context*

The demands that society makes upon government, the responses that are regarded as feasible and desirable, and the politics of our mass society that ultimately shape "our federalism" all provide the vital context of

143. Harlan quoted in Mason, *Judicial Activism, Old and New*, 55 VA. L. REV. 385, 395-96 (1969).

144. Strong, *Court versus Constitution*, 54 N.C.L. REV. 125, 125-27 (1976).

145. *Id.* at 127.

146. E.g., A. BICKEL, *THE NEW FEDERALISM: POSSIBILITIES AND PROBLEMS IN RESTRUCTURING AMERICAN GOVERNMENT* 41-43, 50-51 (Woodrow Wilson Internat'l Ctr., 1973); J.W. HURST, *supra* note 121, at 147; A. MILLER, *THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION* 200 (1976); Gilbert, *The Shaping of Public Policy*, 426 ANNALS 116, 121-22 (on federalism and accountability), 136-38, 147-48 (1976); Kurland, *The Impotence of Reticence*, 1968 DUKE L.J. 619 (1968); Strong, *supra* note 144, at 125-27.

intergovernmental relations. The major shifts in the larger social context of modern, post-New Deal federalism must therefore be kept in mind.

One of the foremost changes has been of sheer scale: each of several metropolitan areas in the United States today has a population greatly exceeding the entire nation's in 1787. Government employees alone are about the same in number as the entire national population during Andrew Jackson's presidency. The meaning of such concepts and ideals as "local values," closeness of state or local government to the citizenry, representation, etc., change radically in the face of shifting demography. The greater "distance" that accompanies depersonalization in mass society, the collapsing of "distance" that modern communications makes possible, and the bureaucratization of government at all levels have refashioned the context of basic questions — for example, of how governmental units ought to be structured, or what functions should be allocated to them for the sake of (a) efficiency, or (b) diffusion of power deemed necessary for the protecting of liberties.¹⁴⁷

The institutional hardening of corporate capitalism, as a concomitant of the rise of the mixed economy or "Positive State," has produced similar magnitudes of change in the context in which power is exercised in our system.¹⁴⁸ Indeed, some analysts have contended persuasively that the political system is actually one of "functional federalism," in which private units (particularly corporations, unions, and congeries of interests such as the defense complex, overlapping with public bureaucracies) are no less important than the states.¹⁴⁹ Recognizing this development, many social scientists and legal scholars have insisted that "private governments" such as corporate bureaucracies need to be made subject to standards of responsibility and due process no less than formal governmental institutions.¹⁵⁰

A closely related development is the permanent change in the scale of government, as measured by percentage of GNP absorbed by government, proportion of workers employed, and size of bureaucratized governmental

147. D. BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING* 313-15 (1973) (on "distance" and communications). Bell refers to "the problems, terrifying in number, which automatically flow today to Washington as a political center." See also Kurland, *Can Law Protect and Enforce Individuality? in AMERICA AND THE FUTURE OF MAN* 182, 183-84 (J. Scheiber ed. 1973) (on size and democracy).

148. Cf. MILLER, *supra* note 146, at 86 ff.; A. BERLE, *THE AMERICAN ECONOMIC REPUBLIC* (1963).

149. A. MILLER, *supra* note 146.

150. H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* 195 (1952); G. McCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966).

units. The shift in the scale of civilian government has been accompanied, of course, since 1945 by the massive standing "peacetime" military force. (The size of the military-industrial establishment, so alarming to President Eisenhower, would confirm the worst fears of the Antifederalists of 1987 quite apart from how they would have viewed the civil establishment.)

More intangible, but certainly a pervasive and influential force in the larger context of federalism, is the pressure of demands upon government to do more and more. As Kurland argues, we have "concentrated governmental authority in Washington, at the greatest distance in time, space, and identity of interests from the individual;"¹⁵¹ we have also witnessed the range of demands widen and have seen the intensity of pressures rise to terrific levels, as in the urban riots of the mid-1960's. Some commentators refer to "rising expectations" in a very general sense, arguing that the elite groups no less than middle-class elements or the poor come to expect government to maintain the upward curve of income and services as their material welfare improves.¹⁵² Other critics identify egalitarianism as the chief source of pressure on government to do more,¹⁵³ or they find the source of pressure in elite manipulation of the political system and consequent frustrations of the disadvantaged,¹⁵⁴ or, alternatively, in the realities of modern economic and social life in an industrial-urban age, requiring not only increasing governmental power but also more centralization.¹⁵⁵

The most visible of such pressures on government to do more tend to be associated with the giant corporate interests or else with the disadvantaged. Thus, everyone knows of the Lockheed Corporation's successful pressure for aid from Congress in the great "bailout." Outrage was not matched by genuine surprise when the public learned how IT&T, Gulf Oil, and other corporate firms manipulated the lines of politics (or in some cases, were willingly manipulated by the Nixon White House and the Committee to Re-elect the President). Pressures for protective tariffs, tax write-offs and exemptions for corporations, or special legislation to favor labor union interests are unremarkable. Equally visible are pressures at

151. Kurland, *supra* note 147, at 184.

152. See, e.g., D. BELL, *supra* note 147, at 319.

153. Kelly & Miles, *Maintenance of Revolutionary Values*, 426 ANNALS 25, 37-52 (1976).

154. E.g., D. DOWD, *THE TWISTED DREAM: CAPITALIST DEVELOPMENT IN THE U.S. SINCE 1776*, at 246-72 (1974).

155. O. GRAHAM, *TOWARD A PLANNED SOCIETY: FROM ROOSEVELT TO NIXON* 310-16 *passim* (1976).

the other end of the spectrum, such as the great civil rights movement of the 1960's, the demands of the organized poor for genuine welfare action by government, or the pressure-group activities of the National Organization of Women. What is often forgotten, however, is the way in which a vast and more amorphous middle-class interest also raises the level of demands upon government. In that sense, the Nixon technique of finding the pulse of "Middle America" was ruthlessly realistic (even if he misjudged how tolerant Middle America's representatives in Congress might be of colossal malfeasance). Thus, Deil Wright, a leading commentator on intergovernmental relations, finds the outstanding substantive feature of grant-in-aid programs over the long period 1945-60 was their responsiveness to emergent white suburbia — programs that bespoke the political reality "that government generally, and IGR particularly, was capable of reacting to particularistic middle class needs."¹⁵⁶

Also important in shaping the context within which American federalism has changed since 1945 is ideology, for there remains in the nation's political dialogue a robust strain of Jeffersonian faith that government close to the people is a good thing. Whether this is based on hard-rock political principle (and in that sense is authentically ideological) or is instead based on vague preference (or even on cotton-candy nostalgia) is not necessarily important. Calls for increased local autonomy and a curbing of the giant federal government have come from all points on the political spectrum in recent years; and concern, or at least rhetoric, about "shoring up" state and local government has played a major part in the politics of the Revenue Sharing bills.¹⁵⁷ Today only an occasional voice is heard — and usually it is not that of a politician, but rather an academic's voice — echoing what was not long ago the conventional wisdom of liberal thought: that "decentralization [is] . . . a much-honored word which in theory stands for public participation and in reality stands for the frustration of national majoritarian purpose."¹⁵⁸

B. *The Courts and Modern Federalism*

Doctrinal changes in constitutional law have vitally affected the state-

156. Wright, *supra* note 15, at 10.

157. See R. NATHAN, A. MANVEL, & S. CALKINS, *MONITORING REVENUE SHARING* Appendix C (A Brief History of Revenue Sharing) 346-72 (1975) [hereinafter cited as NATHAN, *MONITORING REVENUE SHARING*].

158. O. GRAHAM, *supra* note 155, at 316. For a sharply different view, compare Goodwin's widely reprinted essay: *The Shape of American Politics*, COMMENTARY, May 1967, an influential piece that made the case from the left for more local autonomy.

federal relationship in the modern period of federalism no less than before. Indeed, both of the two critically important movements in the history of the modern Supreme Court — the ascendancy of “judicial self-restraint” in the late thirties, and the dramatic revitalization of “judicial activism” in the Warren Court era — have done much to shape the framework of our federalism.

Self-restraint was a doctrine — or, to put it more accurately, a judicial style — that the last analysis meant staying the judicial hand in order to give Congressional power a wider play. Thus the Court signalled that the “constitutional revolution” was under way when, in 1937, it approved the Social Security Act as constitutional under the taxing power — an important decision for intergovernmental relations, since it rejected arguments that conditional federal cash grants were coercive of the states.¹⁵⁹ In rapid succession, commerce and tax decisions came down from the Court that validated the power of Congress to regulate labor-industrial relations,¹⁶⁰ to establish minimum wages,¹⁶¹ and to go far beyond control of marketing to regulate output and prices in agriculture (which was by then a managed sector).¹⁶² Thus was economic due process laid to rest, and states rights as a bar to federal action under the commerce clause were rendered nugatory.¹⁶³

The “preferred freedoms” doctrine¹⁶⁴ and the more comprehensive formula giving federal constitutional protection to freedoms that the Court deemed “implicit in the concept of ordered liberty”¹⁶⁵ established the doctrinal basis for a new judicial activism — a judicial activism that would be mobilized mainly against the states in the cause of the Bill of Rights freedoms and, ultimately, with the effect of energizing the fourteenth amendment by dint of “incorporation.”¹⁶⁶ To be sure, the Court in the

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

160. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

161. *United States v. Darby*, 312 U.S. 100 (1941).

162. *Wickard v. Filburn*, 317 U.S. 111 (1942). See also P. BENSON, *THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-70* ch. 3 (*The Demise of Dual Federalism*) (1970); C. PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947* ch. 4 (1948).

163. A. SUTHERLAND, *CONSTITUTIONALISM IN AMERICA* 496-501 (1965); Stern, *The Problems of Yesteryear — Commerce and Due Process*, 4 *VAND. L. REV.* 446-68 (1951).

164. Set forth in Mr. Justice Stone's footnote in *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938). See also H. ABRAHAM, *FREEDOM AND THE COURT* 166 (1967).

165. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). But see H. ABRAHAM, *supra* note 164, at 54-56.

166. H. ABRAHAM, *supra* note 164, at 46-73; Cushman, *Incorporation: Due Process and the Bill of Rights*, 51 *CORNELL L. Q.* 467 (1966).

1940's and 1950's was hardly a bastion of freedom of speech or of association, given its controversial decisions in the midst of Cold War pressures, to say nothing of the internment of the Japanese during World War II. Still, the doctrinal basis remained intact for a Court that would prove to be more concerned with civil liberties and civil rights.¹⁶⁷

The Warren Court carried judicial activism to a new level. On the one hand, it nationalized the Bill of Rights through a series of decisions that brought incorporation to a climax and expanded federal power fundamentally by placing much stricter limits on the states. The decisions affecting law-enforcement and criminal justice practices were but the most dramatic of these innovations by the Warren Court; its activist philosophy carried far into some other areas, as when in *Griswold v. Connecticut*¹⁶⁸ the Court found a "right to privacy" implied in the Constitution. Justices Goldberg and Brennan meanwhile read from the ninth amendment the conclusion that there are additional fundamental rights, protected from governmental infringement, which exist alongside the more specific rights enumerated in the first eight amendments.¹⁶⁹ In this spirit, the Court — either out of "intoxication with its own power" as Philip Kurland charges, or, as others contend, from devotion to the "fundamental principles" of justice under the Constitution¹⁷⁰ — moved into a posture of "telling the government what it must do," of playing "an affirmative role" in governance,¹⁷¹ as in civil rights and reapportionment.

Needless to say, the critics of the Warren Court contended steadily that the Justices were rudely kicking over the historic features of American federalism. Phrases such as "tying the hands of the police" became a by-word in law-enforcement circles and among the Court's detractors more generally. The assault on the reapportionment decisions — which, unlike the decision in *Brown v. Board of Education*¹⁷² or some other landmark civil rights cases, had prompted a bitter division within the Court itself — was marked by outrage that the Court should so suddenly invade a province historically deemed an exclusive state responsibility.¹⁷³ *Brown*

167. C. PRITCHETT, *supra* note 162, at 272-87.

168. 381 U.S. 479 (1965).

169. *Id.* at 488-93.

170. P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 78 (1970); Wright, *Role of the Supreme Court In a Democratic Society — Judicial Activism or Restraint?*, 54 *CORNELL L. Q.* 1, 12 (1968).

171. Wright, *supra* note 170, at 12.

172. 344 U.S. 483 (1954).

173. P. MURPHY, *supra* note 125, at 386-91.

and subsequent decisions in the field of race relations sparked one of our Union's greatest crises as angry forces (at first in the South, later elsewhere in the country) tried to counter the Court's influence. Ironically, as Chief Justice Warren later pointed out, the Court in *Brown* had proven itself highly sensitive to the reality that "under our Federal system there were so many blocks preventing an immediate solution of the thing [segregation] in reality." It was for this reason, and out of solicitude for the principles of federalism, that the Court had decided only to order "all deliberate speed" instead of comprehensive and immediate integration.¹⁷⁴ At the time, however, not even the Court's warmest friends were very sensitive to this subtlety.

The Court's new activism, especially insofar as the Justices told the government what it must do, also played a key part in producing federal civil rights legislation. Needless to say, this legislation greatly expanded individual citizens' rights while it pruned back the autonomy of the states and centralized real power in the political system.¹⁷⁵

The Burger Court has marched to a different drummer in recent years. But even while modifying or reversing some of the Warren Court's legacy, the Burger Court has perforce accepted at least some of that legacy. Even the Court's work of dismantling newly proclaimed liberties (also one liberty that goes back half a millenium, viz., jury trial) has not gone as quickly nor as far as extreme conservatives might like.¹⁷⁶ The travails of our liberty in the hands of the Burger Court receive closer attention elsewhere in this symposium; let it simply be noted here that the fate of critically important constitutional doctrines is in some instances, at least, still unsettled.

Finally, the framework of constitutional law must be given attention because even the Burger Court has granted that *in interpreting their own constitutions* the state courts remain free to hold state government to a higher standard of liberty than the federal Supreme Court chooses to hold the federal government, even when the language of germane constitutional provisions is identical in the state and federal documents.¹⁷⁷ Thus we have

174. Warren, interview, quoted in N. Y. Times, Dec. 20, 1972, at 43, col. 5.

175. H. ABRAHAM, *supra* note 164, at 264-93.

176. For the astonishing manner in which alleged judicial "conservatives" swept off the tablet of assured American liberties, i.e., the right to trial by jury "as it had been known in Anglo-American jurisprudence since the 14th century," in *Williams v. Florida*, 399 U.S. 78 (1970), see L. LEVY, *AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE* 264 (1974).

177. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

the California court boldly taking different ground from the Burger Court on fourth amendment rights and in other areas of liberty, with a few sister states' courts following suit. While the United States Supreme Court has refused to require states to equalize the funding of schools in all local districts, the highest courts in three states have struck down school financing systems based on the historic property tax on grounds that the differences in funding among different school districts is a denial of equal protection.¹⁷⁸

Mr. Justice Brennan has candidly called upon the states to remember "that one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens," and, when the Supreme Court deprives citizens of the "federal half" of this protection, state legislatures and courts should step into the breach.¹⁷⁹ The Massachusetts legislature led with new statutory requirements protecting rights in search and seizure.¹⁸⁰ The California court has led by providing judicial preservation, at the state level, of Warren Court doctrines that have been attenuated by action of the Burger Court. "Using the state courts in this way," Judge Mosk of the California high court has written, "is no mere scheme to thwart federal review by the current Supreme Court, though that may be a salutary byproduct. And though some fragmentation may occur . . . the expanded liberty of individual citizens that this approach makes possible fully justifies any absence of uniformity."¹⁸¹

The states as a second line of defense — or a principal line of defense — for individual liberties is a notion that was central to the intent of the Framers. If the post-Civil War amendments and subsequent jurisprudence intended the federal government to guard more vigorously against state and local governmental abuses of liberty than the Burger Court is willing to acknowledge, still at least in those constituent governments where the popular "spirit of liberty" is powerful enough to move

178. See Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976). Reference to decisions on the equal protection requirement and state school finance is specifically to *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973).

179. Brennan, *supra* note 177, at 503.

180. Arons & Katsh, *Reclaiming the Fourth Amendment in Massachusetts*, 2 CIV. LIB. REV. 82 (winter 1975).

181. Mosk, *In the Future, Will State High Courts Guard Our Individual Rights?* L.A. Times, Jan. 1, 1978, § 8, at 5. See California and other state decisions cited in Brennan, *supra* note 177, *passim*; Johansen, *The New Federalism: Toward a Principles Interpretation of the State Constitution*, 2 STAN. L. REV. 297 (1977).

legislatures and influence courts, federalism provides the structure for protection and expansion of liberty. At the very least, this aspect of contemporary constitutional law has lent diversity to the system and reminds us that the structure of old-style "dual federalism" has residual strength.

The classic issues of state sovereignty, quite apart from questions of liberty, have also been the focus of recent decisions that rest on the old-style premises of "dual federalism." In the 1976 case of *National League of Cities v. Usery*,¹⁸² the Supreme Court, overturning a 1968 decision,¹⁸³ ruled that Congress overreached its power when it applied wage-and-hour legislation to the employees of state and local governments. The *Usery* decision, which distinguished admissible regulatory legislation from laws that impinged upon the authority of "the States as States," signalled the Court's new determination to give serious importance to what has been termed "formal federalism."¹⁸⁴ The Court's reasoning in *Usery* seems perilously close to the long-discarded doctrines by which it had once prevented the federal government from taxing the income of state and local officials.¹⁸⁵ In a 1977 decision, moreover, the Court again overturned a recent ruling (of 1973), to assert the rights of states to apply their law on riverbed lands.¹⁸⁶ Again, strong echoes of dual-federalist doctrine from times past filled the corridors of constitutional law. Some other important decisions have run in a different direction from these and from the new rulings on federal protection of individual liberties, e.g., the recent decision overturning Wisconsin's prohibition against twin trailers on interstate highways.¹⁸⁷ Still, the Burger Court has given ample notice that any obituary notices for dual federalism are premature.

C. Centralization of Policy Responsibilities

The post-New Deal years have witnessed a continuation, and in major respects an acceleration, of the long-term trend toward centralization of policy responsibilities and real power in the federal system. In recent years we have become accustomed to a focus in scholarly debate of the federal

182. 426 U.S. 833 (1976).

183. *Maryland v. Wirtz*, 392 U.S. 183 (1968).

184. 426 U.S. at 837. On formal federalism, see Baker, *Federalism and the Eleventh Amendment*, 48 *COL. L. REV.* 139, 172, 178 (1977).

185. E.g., *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871), overruled in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 486 (1939).

186. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 368-82 (1977) (overruling *Bonnelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973)).

187. *Raymond Motor Transp. Inc. v. Rice*, 434 U.S. 429 (1978).

system upon the more technical, fiscal, administrative aspects of intergovernmental relations. In light of this, it is well to remind ourselves that the critical question in American politics in the 1940's and 1950's was whether the New Deal policy legacy would be dismantled. The resolution of that question was far more important in determining the character of American federalism — especially the degree of centralized power in the system — than any technical features of intergovernmental programs.

Despite ideological conflict, relatively little was done even by the Eisenhower administration to reverse the tide of centralization or to dismantle social programs. (By contrast, the Nixon-Ford administrations were far more successful in matching conservative rhetoric with serious reversal of reforms inaugurated by the preceding administrations.) The 81st Congress (1949-51) significantly advanced the New Deal programmatic legacy with public housing and urban-redevelopment legislation, expansion of Social Security coverage and benefits, broadening of minimum-wage legislation, a doubling of grants-in-aid for hospital construction, establishment of the National Science Foundation, development of comprehensive new agricultural and conservation programs, and infusions of new funds into rural electrification, public power facilities, state and local public-works planning, and reclamation.¹⁸⁸ In addition, centralization of real power in the political system was dramatically advanced (often in ways that became fully manifest only years later) by institution of loyalty-security programs, significant extension of FBI and other domestic intelligence activities, and the burgeoning of the Pentagon bureaucracy and what Eisenhower was to call the Military-Industrial Complex.¹⁸⁹

Despite Eisenhower's stated intentions, his administration witnessed extension of Social Security programs, institution of the enormous new federal highway program, and a dramatic move into aid to education — marking large-scale invasion of an area that historically had been under control of state and local governments despite some federal aid — with the 1958 Defense Education Act.¹⁹⁰

The Kennedy-Johnson years brought not only the Vietnam war, which ultimately would overshadow domestic programs in political importance, but also the historic move of the federal government into vigorous lawmaking and enforcement in the field of civil rights. Also, the War on

188. See Neustadt, *Congress and the Fair Deal: A Legislative Balance Sheet*, 5 PUB. POL. 51-81 (1954).

189. A. HARPER, *THE POLITICS OF LOYALTY: THE WHITE HOUSE AND THE COMMUNIST SUSPECT, 1946-1952* (1969); P. MURPHY, *supra* note 125, *passim*.

190. W. GRAVES, *supra* note 112, at 892.

Poverty, in all its aspects, and an expansion in the number and funding of federal aid programs were part of a major effort to recast the *structure* of federal-state-local relationships.¹⁹¹ These legislative and executive initiatives, moreover, came in the context of the Supreme Court's activism during the era of Chief Justice Earl Warren.

The record of the Nixon years is a curious one. It is indeed paradoxical in the sense that while achieving a measure of the decentralization he promised, by attacks upon federal social-welfare programs and by other means, Nixon was greatly augmenting centralized *executive power* (of the White House over departments and agencies) and he used Presidential power in ways that directly threatened liberty on a wholesale basis. The first open manifestations of the new Presidential determination was impoundment of funds appropriated by Congress and extraordinary claims made for Presidential power in the "executive privilege" national-security area (including wiretapping and surveillance activity).¹⁹² Later, of course, the full scope and implications of the Nixon Presidency became known when the Watergate and impeachment sequence brought revelations of the most sinister and sordid uses of the Internal Revenue Service, the FBI, the CIA and other executive agencies.¹⁹³ Here was the kind of centralized power that anti-federalist opponents of the Constitution in the great debates of 1787-89 had predicted would "speedily issue in the supremacy of despotism."¹⁹⁴

D. *Cooperative Federalism: The Contemporary Phase*

All of the major characteristics of New Deal-style cooperative federalism (then known as the New Federalism) have persisted to the present day: bypassing, fractionalizing of responsibility through multi-level and multi-agency fragmentation, skewing effects on state finances, use of action and demonstration projects, *etc.*; they are found in post-1945 federalism and continue to be highly important. But some equally important changes in contemporary federalism (that is, federalism since World War II) also require notice.

Long-term proliferation in the number of programs involved in the

191. D. GRANTHAM, *THE UNITED STATES SINCE 1945: THE ORDEAL OF POWER* 191-25 (1976); H. SCHEIBER, *CONDITION OF AMERICAN FEDERALISM*, *supra* note 15, at 14-16.

192. R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 285-97 (1974).

193. *Id. passim*; A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973). *See also* the impeachment hearings in the House of Representatives, 1974.

194. N. Breeding (18 Dec. 1787), 2 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION OF THE CONSTITUTION BY THE STATES* 617, 639 (M. Jensen ed. 1976).

grant-in-aid mechanisms, together with a highly dramatic expansion of funds involved in the last five years, constitute one major shift. On a per-capita basis, federal aid to the states more than doubled between 1944 and 1952; aid continued to rise during the Eisenhower years, increasing from \$16.47 in 1952 to \$38.86 in 1960.¹⁹⁵ The Kennedy-Johnson years witnessed further expansion, and by 1972, grants had reached nearly \$40 billion (four times the 1964 level, and nearly one fourth of federal domestic civilian expenditures). Average annual growth in grant-in-aid funds was 18.3 per cent during 1965-75, compared to an average annual growth in overall federal outlays of 11 per cent. Thus, grants rose from just under \$100 per capita in 1969 to \$233 in 1975.¹⁹⁶ The grants were 21.1 per cent of 1975 federal civilian outlays. The increase would have been even greater had not certain forms of income-security grants (supplemental security income) been shifted from a grant-in-aid program to a direct federal program in 1973.

There also occurred significant shifts, after 1945, in the purposes for which the grants were distributed. Welfare and health programs constituted 45 to 50 per cent of grants during 1944-52, then declined as highways became a principal component in the Eisenhower years (reaching 41.5 per cent in 1960). In the 1960's community and regional development rose relative to other programs, but the major upward shift came in the category "education, training, employment and social services".¹⁹⁷ The Johnson years witnessed a massive increase in the number of programs, as new policy areas were added and new agencies were opened. Whereas 40 major grant programs were functioning in 1958, by 1969 there were over 160 deemed "major" (and over 220 in all), operating under some 400 to 500 statutory authorizations.¹⁹⁸

There is an important distinction between "project grants" and "formula grants" — the former being grants to individual applicant units (governmental entities, universities, research institutes, private organizations, individuals) and involving broad discretion for federal administrators,

195. See Appendix A *infra*.

196. EXECUTIVE OFFICE OF THE PRESIDENT, OBM, SPECIAL ANALYSES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 1977, at 263.

197. See Appendix B *infra*.

198. *Creative Federalism: Hearings Before the Senate Comm. on Gov't Operations, Subcomm. on Intergovernmental Rel.*, 90th Cong., 1st Sess., Part 2A, at 472, 481 (1967) [hereinafter cited as *Creative Federalism*]; 1 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, FISCAL BALANCE IN THE AMERICAN FEDERAL SYSTEM 151, 155 (1967) [hereinafter cited as ACIR, FISCAL BALANCE].

whereas the latter are grants distributed on the basis of formulae according to such varying criteria as income, tax effort, and population. During the Johnson years, the number of project-grant programs grew quickly, most of them associated with the Departments of Health, Education, & Welfare (HEW) and Housing & Urban Development (HUD). From 1962 to 1967 the number rose from 107 to 280; formula grant programs rose from 53 to 99 in the same period.¹⁹⁹ Still another basic form of grant program — the “block grant” — was instituted in the Johnson years, in 1966, with the Partnership for Health Act; and two years later the “Safe Streets” Crime Control Act provided for block grants on a large-scale basis for law enforcement and crime prevention — grants that “bundled” various categorical grants for a particular unit of government and its programs.²⁰⁰ The commentary by President Johnson’s budget director, Charles Schultze, in 1966 on the block grant approach, indicated something of the administration’s style of effecting reform and its hopes:

We want to find out whether further progress can be made in overcoming the problem of excessive categorization and fractionating of Federal aid. A major step in this direction has already been taken in the [Health Act of 1966] . . . , which did make it possible to merge a number of previously separate health grants, combining operational grants with health planning assistance to State governments. I am very hopeful that the Congress and the Executive have hit upon one concrete contribution to overcoming some of the confusion that has crept into the categorized Federal aid system.²⁰¹

Given the rapidity with which programs proliferated, the rate at which categorical grants on a project basis came to dominate in numbers if not in dollars, and the escalation of “fractionating” during the Johnson administration, it would be accurate to say that the problems Schultze identified *leapt*, and not *crept*, into the aid system in the 1960’s. Indictments of the results came from all points on the political spectrum.

A significant faction of liberal-reform congressional leaders, basically sympathetic to the welfare goals of Johnson’s “Great Society” programs was still deeply concerned that effectiveness was being lost in the delivery of services. Led by Senator Edmund Muskie of Maine, who was certainly

199. J. MAXWELL & J. ARONSON, FINANCING STATE AND LOCAL GOVERNMENTS 61-76 (3d ed. 1977).

200. *Id.*; Walker, *How Fares Federalism in the Mid-Seventies?*, 416 ANNALS 17, 20-27 (1974). Partnership for Health Act of 1966, 42 U.S.C. § 241 (1970); Safe Streets Crime Control Act of 1968, 42 U.S.C. § 3701.

201. *Creative Federalism*, *supra* note 198, at Part I, 395.

among Congress's best informed and most articulate students of the federal system, this group singled out for attention the problems of personnel quality (especially in state and local government), coordination of federal programs and agencies with one another, coordination of state-local and federal program and administrative efforts, and improvement of state and local financing.²⁰²

Many of these concerns were also central in the studies and recommendations of the Advisory Commission on Intergovernmental Relations, founded in 1959 and throughout the 1960's a source of high-calibre staff research on intergovernmental problems. By the late sixties, the ACIR had become a highly visible and respected advocate of fiscal reforms that would relieve the problems of state and local government, of coordination and simplification of federal grants-in-aid, and, more generally, of reforms that would produce a devolution of real decisionmaking power rather than mere funding or formalistic authority through "coordination."²⁰³

The Republican Party's leading spokesmen in Congress were generally concerned to curb the reach of the Great Society programs and more specifically concerned to reduce the interference by federal officials in state and local programs. The conservative elements in the Republican ranks, of course, were more interested in a genuine dismantling of as much of the federal apparatus as possible (in the civilian sector of the bureaucracy) and a major cutback in social programs.²⁰⁴ Interestingly, both from within the Johnson administration and from conservative ranks in Congress there was rising interest in the 1960's in "no-strings" grants as they were initially called, or "revenue-sharing," as Johnson's economic advisers came to call them and as the Nixon administration endorsed the program.²⁰⁵ Those who took a more radical perspective, from the left, regarded the whole controversy as marginal to the issue of the proper governmental role in social and economic reform — a perspective that over the next few years won some adherents in the "mainstream" political dialogue.

202. *Id.*, Parts I, II, *passim* (Sen. Muskie's statements).

203. The policy controversy is reviewed in M. REAGAN, *supra* note 15, *passim*; see also Myers, *A Legislative History of Revenue Sharing*, 419 ANNALS 1 (1975). On the ACIR see *Five Year Record of the Advisory Commission on Intergovernmental Relations Joint Hearings Before the Subcomms. on Intergov. Rel., Senate and House Comms. on Gov't Operations*, 89th Cong., 1st Sess. (May 25-27, 1965); see also 359 ANNALS *passim* (1965).

204. See the authorities cited in the preceding footnote.

205. Myers, *supra* note 203, *passim*. See also H. REUSS, *REVENUE SHARING: CRUTCH OR CATALYST FOR STATE AND LOCAL GOVERNMENTS?* *passim* (1970); *Intergovernmental Revenue Act of 1971: Hearings Before the Senate Comm. on Gov't Oper., Subcomm. on Intergov. Rel.*, 92d Cong., 1st Sess., 88-93, 93-100 (1971).

Not only did the Johnson programs proliferate in number, complexity, and degree of discretion vested in the federal bureaucracy; they also involved a new concept of an "expanded partnership" that gave the Great Society programs a distinctive character. When Johnson initially announced what he called "Creative Federalism," it was in the context of increasing direct federal aid to local governments, especially in the cities. This was the feature that Johnson emphasized in a May 1964 speech that first introduced his Creative Federalism as a formal concept.²⁰⁶ But as he elaborated his reform and welfare programs, Johnson began to stress not only direct federal-local action but "the cooperation of the state and the city, and of business and of labor, and of private institutions and of private individuals."²⁰⁷ an expanded partnership that would mobilize private interests as well as public agencies in grant-in-aid programs. In this sense, Johnson translated consensus politics into intergovernmental relations and Creative Federalism.

In the remaining years of the Johnson Presidency, the expanded partnership did indeed characterize federal programs. The partnership also became a major source of administrative conflict and built-in interest-group counterpressures that bedeviled the fulfillment of programmatic aims. In addition, the incorporation of community action programs and citizens' advisory groups in the urban programs involved an effective assault upon established jurisdictional relationships and the bureaucratic establishment, as well as upon mayors and governors. This, too, tended to intensify, often to inflame, political controversy within programs.²⁰⁸ Meanwhile, the Johnson administration added a heavy dose of "program evaluation," "coordination," and similar types of concerns, all rooted in modern management concepts and experience, to the already complex politics of the grant-in-aid programs. Some commentators regarded coordination, "articulation," and the Pentagon-inspired "Planning-Program-Budgeting System" (PPBS) as a panacea for all that troubled governmental affairs. Emblematic of this attitude was the statement by Max Ways in *Fortune*, that "the over-all degree of centralization or decentralization is seldom an interesting useful question."²⁰⁹ Ways, who

206. L. JOHNSON, PUB. PAPERS, 1963-64, at 706.

207. Address to N.Y. Liberal Party, Oct. 15, 1964, *id.* at 1350-51. See also *id.* at 1096, 1131, 1158.

208. To say nothing of raising some major legal and constitutional issues. See D. HOROWITZ, THE COURTS AND SOCIAL POLICY 68-105 (1977); S. LEVITAN, THE GREAT SOCIETY'S POOR LAW (1969); J. SUNDQUIST, *supra* note 20, *passim*.

209. Ways, *Creative Federalism and the Great Society*, FORTUNE, Jan. 1966, at 121.

became a sort of unofficial spokesman for the concept of Creative Federalism, declared that traditional methods of looking at power relationships were wrong-headed: "[I]t is possible to think of vast increases of federal government power that do not encroach upon or diminish any other power. Simultaneously, the power of states and local governments will increase; the power of private organizations, including business, will increase; and the power of individuals will increase."²¹⁰ This was intoxicating doctrine indeed; unfortunately, the realities of governmental operations did not conform to the heady rhetoric. The pleasant but totally unrealistic notion that power was no longer an interesting problem did not survive the Johnson Presidency.

(E.) *The Nixon-Ford "New Federalism" and Revenue Sharing*

The legacy of the Great Society and Creative Federalism programs inherited by Richard Nixon in 1969 was one in which intergovernmental relations and the "expanded partnership" were dominant elements. For Lyndon Johnson had matched rhetoric with action in this major respect: every principal policy initiative of his administration except for the Medicare program had involved intergovernmental efforts. When Nixon took office, then, whether from a concern to improve managerial efficiency or from much more deeply rooted political and ideological motives, dealing with federal-state-local relationships became virtually imperative. This issue was at the forefront. During the 1960's, there had been rising state and local debt, raising serious questions about the ability of government at the sub-national level to continue to expand capital spending or even to maintain service on the debt.²¹¹ There had been a sharp rise in both state-local spending and state-local governmental employment. Despite evidence that the federal government's expenditures for civilian programs were growing still faster than those of lower levels of government, there was much talk about the state-local sector being "the most dynamic" — and in public employment, at least, this was true.²¹² Finally, there was a cluster of

210. *Id.* at 122; A cogent analysis of the Great Society — Creative Federalism approach may be found in James, *Epitaph for an Experiment: Model Cities and the New Federalism*, 52 J. OF URB. L. 83, 84-91 (1974).

211. L. ECKER-RACZ, *THE POLITICS AND ECONOMICS OF STATE-LOCAL FINANCE passim* (1970). Alarm about the rise in state-local debt was a common theme in ACIR publications in the 1960s; e.g., ACIR, *FEDERAL APPROACHES TO AID STATE AND LOCAL CAPITAL FINANCING* 25, 29-30 (1970).

212. See Appendix C *infra*. See also data on finances and employment in other tables herein and in U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, *CENSUS OF GOVERNMENTS*

issues that related to intergovernmental program, policy, and administrative relationships more narrowly. These issues were debated most prominently in the political discussions of the late 1960's that centered on how to "revitalize" state and local government, how to "coordinate" grant-in-aid programs, and how to solve the manifest problem of administrative/managerial "congestion" (what Senator Muskie called a "management muddle") in the delivery of governmental services at all levels.²¹³ These narrower concerns about intergovernmental operations centered on matters such as the following:

a.) the reputation of state and local governments for poor quality of administrations as well as for anti-urban bias (and often racial bias) in their social programs;²¹⁴

b.) the failure of substantial success in moving toward regional and metropolitan government at the sub-state level, a structural reform that probably a substantial majority of both liberals and conservatives viewed as desirable for improvement of governmental delivery of services (seen, however, by others as a dangerous sort of concentration of power that would eliminate the diffusion-of-power advantages of fragmented governmental systems in the states);²¹⁵

c.) the heavy reliance by the states and local governments upon the regressive property and sales tax systems, as both these types of taxation were less responsive than the income tax to economic growth and also were falling hard on lower and middle income groups;²¹⁶

d.) the complexity of federal aid programs that by 1969 numbered more than 220, resulting from under 400 to 500 authorizations, and which were administered by more than 150 Washington-based bureaus and offices with some 400 major field offices;²¹⁷ and

e.) the rising difficulties in administration of the Great Society and Creative Federalism programs.

1972, Vol. 6, No. 4 (1974). The myth mentioned is present in Campbell, *Most Dynamic Sector*, 53 NAT'L CIVIC REV. 74-82 (1964).

213. Sen. Muskie in *Creative Federalism*, *supra* note 198, Part 2A, at 469-81.

214. ACIR, FISCAL BALANCE, *supra* note 198, at 169; COMMITTEE FOR ECONOMIC DEVELOPMENT (CED), MODERNIZING STATE GOVERNMENT 10-19 (1967); T. SANFORD, STORM OVER THE STATES I (1967). For commentary on the antidemocratic tone and implications of the CED study, see J. O'CONNOR, THE FISCAL CRISIS OF THE STATE 89-91 (1973).

215. J. O'CONNOR, *supra* note 214, at 89-91; R. WOOD, 1400 GOVERNMENTS *passim* (1961); *Metropolitan America: Challenge to Federalism: Study Paper Prepared by Bernard Frieden for House of Rep., Committee on Gov't Operations*, ch. 5, 7 (1966); essays in EXPLORING THE METROPOLITAN COMMUNITY (J. Bollens ed. 1961).

216. ACIR, FISCAL BALANCE, *supra* note 198, at 118-32; J. MAXWELL, FINANCING STATE AND LOCAL GOVERNMENTS, *supra* note 199, at 125-78.

217. *Creative Federalism*, *supra* note 198, Part 2A, at 472, 481. In 1967 President Johnson himself spoke on "The Quality of American Government," declaring:

These difficulties transcended the technical questions such as fragmentation of policy responsibilities, overlapping of functions, occasional conflicts of ground-rules and the like that plagued certain programs. Indeed, the difficulties were often most visible in the very programs where strong-handed "coordinating" was attempted. Thus, the community action programs, in the "War on Poverty" agencies, had the effect of presenting a direct challenge to political and bureaucratic establishments at the state and local level; and so by 1968, predictably enough, a major counter-attack by the political regulars and the bureaucratic elites was having an effect in Congress.²¹⁸ Similarly, the quest for a more effective urban policy, which was a focal point of Great Society and Poverty programs alike, triggered a struggle for federal aid funds among not only political coalitions at the local level but also neighborhoods and social classes. What began as a planned dispersal of decision making power seemed to some observers by the late 1960's a decentralization that mounted to a "lack of federal commitment and, if one tends to the uncharitable, an abdication of responsibility."²¹⁹ There had been a strong expressed concern for "planning" and "planning capabilities" in state-local government since New Deal days. Now, in response to some of the admitted "fragmentation, overlapping, and needless complexity" of federal programs,²²⁰ federal policy-makers sought not only to achieve coordination but also to introduce a stronger planning component in local and state government. In the years 1964-66 alone, some 47 aid programs included newly enacted requirements for some sort of planning, and Congress specifically addressed the twin problems of planning and coordination with two statutes specifically directed at these issues.²²¹

There are today a very large number of individual grant-in-aid programs, each with its own set of special requirements, separate authorizations and appropriations, cost-sharing ratios, allocation formulas, administrative arrangements, and financial procedures. This proliferation increases red-tape and causes delay. It places extra burdens on the State and local officials. It diffuses the channels through which federal assistance to State and local governments can flow.

Reprinted in P. DOMMEL, *THE POLITICS OF REVENUE SHARING* 64 (1974). Johnson promised a study that would lead to "modernization" of the grant-in-aid system, but he took no further action himself on this front.

218. See note 208 *supra* and accompanying text. See also ACIR, *INTERGOVERNMENTAL RELATIONS IN THE POVERTY PROGRAM* 23-132 (1966); F. Piven, *The Great Society as Political Strategy*, in *THE POLITICS OF TURMOIL* 271-83 (R. Cloward & F. Piven eds. 1974).

219. C. HAAR, *BETWEEN THE IDEA AND THE REALITY: A STUDY IN THE ORIGIN, FATE, AND LEGACY OF THE MODEL CITIES PROGRAM* 262 (1975).

220. Taylor, *Greatest Opportunity: Making Model Cities Work*, 50 *PUB. MANAGEMENT* 45, 46 (1968).

221. ACIR, *FISCAL BALANCE*, *supra* note 198, at 177-81.

But still, the administrative, political and managerial morass prevailed. Seen by admirers of the Great Society initiatives as a small price to pay for social gains (and as an inevitable concomitant of major policy innovations), the "muddle" became grist for the political mills of two very distinct elements in the dialogue on intergovernmental relations: on the one hand, the conservatives who were looking for data that would justify dismantling the Johnson-era social programs; and, on the other, the technocrat-observers, mainly (though not wholly) in the academic world, who were inclined to view such problems as "management" and "efficiency" issues.²²²

To complete adequately a portrayal of the immediate historical background for analysis of the Nixon-Ford years, we need to give attention to some additional changes in the structure of governmental finances. During the height of the "Creative Federalism" debates, in the mid-sixties, proponents of the Johnson programs argued that some new mechanism must be created for passing back federal revenues to the states: the income tax assured rising federal revenues (even beyond normal expenditures, it was argued, with prospective surpluses in the offing, once the war had ended and the much-vaunted "post-Vietnam dividend" or "peace dividend" appeared on the ledgers), while state-local taxes were not keeping up with pressures for expenditure.²²³ This worry was as pleasant — and, as it proved, as misplaced — as the related and equally euphoric view that power was no longer an interesting question. For by the early Nixon years, inflationary pressure had worsened, finally prompting one of the most dramatic power-centralizing measures of the years since 1953, federal wage and price controls;²²⁴ rising expenditures generated by the Johnson domestic and Vietnam spending patterns, and a rise as one component of this trend in "uncontrolled" (trust fund) federal expenditures, were obliterating the prospective peace dividend; and successive tax cuts in the

222. For commentary from several political perspectives, see P. DOMMEL, *supra* note 217, at 58 and R. NATHAN, *THE PLOT THAT FAILED; NIXON & THE ADMINISTRATIVE PRESIDENCY 13-30* (1975) [hereinafter cited as *NATHAN, PLOT THAT FAILED*]. Deil Wright makes the important observation that concentrating on efficiency issues, or what he terms "IGR techniques" (intergovernmental techniques) "fitted middle class values of professionalism, objectivity and neutrality. It appeared that objective program needs rather than politics were being served." Wright, *supra* note 15, at 8.

223. COMM. FOR ECONOMIC DEVELOPMENT, *A FISCAL PROGRAM FOR A BALANCED FEDERALISM 50-54, 60-61* (1967); NATHAN, *MONITORING REVENUE SHARING, supra* note 157, App. C (Brief History of Revenue Sharing) 344 (1975); Ways, *supra* note 209.

224. Ironically, virtually all the scholarly studies of centralization and decentralization in the Nixon period ignore this episode.

Johnson years, followed by others in the early Nixon years, contributed to a changing fiscal picture.²²⁵

With Nixon's presidency came a series of interrelated policy initiatives and administrative changes which, like Johnson's Great Society programs, made intergovernmental relations a central concern. In presenting his overall domestic program proposals to the nation in August 1969, Nixon introduced the term "The New Federalism" — or, to put it differently, he exhumed a term that had been extensively used in the early years of the 20th century and again, of course, in the New Deal period²²⁶ — and the President tied his plans for reforming intergovernmental relations to welfare reform, a new plan for manpower training, reorganization (what later proved to be dismantling) of the poverty program, and revenue sharing.²²⁷ The key to Nixon's program, as one of his aides described it, was a "single idea — the need to sort out and rearrange responsibility among the various levels and types of government in American federalism, including federal, state, local and private [sic] groups."²²⁸

This "sorting-out" process can be viewed, retrospectively, from a number of perspectives. It is perhaps a severe judgment, but I think a defensible one, to stress first of all that in the period between Nixon's advent to the presidency and six months that followed the enactment of the famous Revenue Sharing Act of October 20, 1972,²²⁹ the President not only advocated this law, which would channel funds to the states relatively free of restrictions such as characterized categorical or formula grants, but he also engaged in wholesale empoundment of funds that Congress had appropriated for social programs and capital construction.²³⁰ The impoundment measures, and the political and legal controversies they engendered, signalled that reform of American federalism — both through Revenue Sharing and through other measures — was to have a very prominent component of retrenchment. The announced, explicit, and determined effort by Nixon's administration to "restructure" and cut back the poverty programs merely underlined this side of his New Federalism.

225. See W. HELLER, *NEW DIMENSIONS OF POLITICAL ECONOMY* (1966) (worrying about "fiscal drag" from federal tax collections exceeding in rate of expansion overall economic growth).

226. As by J. CLARK, *supra* note 132.

227. R. NATHAN, *supra* note 222, at 16-18.

228. *Id.* at 18.

229. State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (1972).

Secondly, it should be recognized that while the Nixon and Ford administrations did press for cutbacks and administrative change in the nation's social programs, they also presided over a massive increase in federal payments to individuals with income-redistributive consequences. The individual-grant programs (following the so-called "income strategy" formulated by Patrick Moynihan for the Nixon administration) involved a massive rise in expenditures for human resources which substituted both for (a) provision of governmental services and (b) items formerly in the grants-in-aid portion of the federal budget, hence with the statistical effect of softening the sharp rise of the 1970-75 period in federal grants.²³¹ A little-noted concomitant effect of the income strategy, with important effects so far as income redistribution was concerned, was the relative increase it meant in the share of federal revenues (and the share of private income) represented by Social Security and other related payroll taxes, the most regressive element of the whole federal tax structure.²³²

Third, the Nixon reforms, so-called, may have stressed decentralization and a return of power to state-local government in theory and rhetoric, yet they also had an administrative dimension in which power of the Executive branch was to a startling extent concentrated and centralized. This was accomplished through Nixon's creation of an Office of Intergovernmental Relations (entrusted to Vice President Agnew, whose experience in state government was later learned to be even wider-ranging than the public knew at the time of his election in 1968), the replacement of the Bureau of the Budget with the Office of Management and Budget (OMB), which gained sweeping powers of review and control, as well as becoming the instrument of impoundment, and the institution of both a Domestic Council and federal regional councils.²³³ After his reelection in 1972, the

230. *A New Federalism*, *infra* note 232, at Pt. 1, 71-87, 101-03, 195-205, Monitoring Revenue Sharing.

231. SPECIAL ANALYSES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 1977, at 263-64; Nathan, *Federalism and the Shifting Nature of Fiscal Relations*, 419 ANNALS 120, 124-25 (May 1975); Walker, *How Fares Federalism in the Mid-Seventies?*, 416 ANNALS 17, 18-22 (1974). In November 1970, Nixon reportedly ordered his staff to consider elimination of all categorical-aid programs and use of the funds for revenue sharing. P. DOMMEL, *supra* note 217, at 107-08.

232. *A New Federalism: Hearings Before the Senate Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Operations*, 93d Cong., 1st Sess. 81 (1973) [hereinafter cited as *A New Federalism*] (statement of Walter Heller).

233. ACIR, IMPROVING FEDERAL GRANTS MANAGEMENT: THE INTERGOVERNMENTAL GRANT SYSTEM, AN ASSESSMENT AND PROPOSED POLICIES 145-204 (1977); Graves, *IGR and the Executive Branch: The New Federalism*, 416 ANNALS 40-51 (1974).

President moved still further in the direction of centralizing control over the departments and agencies. When the White House tapes were made public, the full depth of Nixon's concern that dissidents in the bureaucracy be brought into line, and that the civil service be subjected to political and managerial discipline, became known: "We have no discipline in this bureaucracy. We never fire anybody. We never reprimand anybody. We never demote anybody. We always promote the sons-of-bitches that kick us in the ass. . . . We are going to quit being a bunch of God damn soft-headed managers."²³⁴ The appointments made in 1973, the new regulations issued that were designed to attenuate the reach and force of social programs, and the concentration of power generally, did not escape public comment and they cast the Revenue Sharing program in a sharp new perspective so far as liberal critics were concerned.²³⁵

Nixon had flirted briefly with calling his programs the "New American Revolution."²³⁶ In the second administration, neither rhetoric nor political initiatives were even vaguely calculated to recall such political imagery. As Richard Nathan, one of Nixon's advisers in the first term (one who had obviously been cut off by 1973, as Ehrlichman, Haldeman and the inner-circle figures closed doors with such effect) has remarked: "The tone of the second term and the content of the Administration's policy statements indicate(d) a decided shift to the right, to a more pessimistic and conservative position in the area of domestic affairs."²³⁷ Understandably, one who was so much a part of the first administration is not prone to remark upon the elements of continuity between 1969-73 and the second term to Watergate. Journalist Max Frankel's view that the New Federalism and revenue sharing were "a counterrevolution," despite Nixon's rhetoric, provides a more accurate perspective that permits recognition of continuity.²³⁸ The central element of continuity was, of

234. Quoted in R. NATHAN, *supra* note 222, at 69. See, *inter alia*, THE ADMINISTRATION OF THE NEW FEDERALISM (L. Grosenick ed. 1973).

235. See, e.g., regular reports in the NAT'L J., 1970-75, on Nixon appointments, managerial reorganization, and bureaucratic morale; Herbers, *Nixon's New Era of Federalism*, N.Y. Times, Nov. 21, 1972, at 23, col. 1 ("While the machinery of government is being decentralized, the policy-making process is expected to be further centralized, taken out of the departments and moved to the White House, where it is much more difficult for Congress and the public to trace how the decisions are made"); Wicker, *Watch That Reorganization*, N.Y. Times, Nov. 21, 1972, at 43, col. 1 (arguing that the "elitist system" of policy making already established in foreign affairs, with Kissinger at the center, was being considered for domestic policy making).

236. State of the Union Address, January, 1971.

237. R. NATHAN, *supra* note 222, at 70.

238. Frankel, *Revenue Sharing is a Counterrevolution*, N.Y. Times, Apr. 25, 1971, § 6 (Magazine), at 28, col. 1.

course, the dual effort to cut back on social programs and to tighten White House control over federal administration. Dr. Nathan is correct in stressing, however, that the burgeoning of payments to individuals was also an element of continuity — one that contributed to making the Nixon years “a period of fundamental change in domestic policy” with income support emerging as a large and growing component of the federal role.²³⁹

Revenue Sharing itself must be confronted by any analyst of federalism in the Nixon-Ford years. This was the keystone of the Nixon domestic program, what in 1971 he declared would set in motion “a peaceful revolution in which power was turned back to the people — in which government at all levels was refreshed and renewed, and made truly responsive.”²⁴⁰ The rhetorical borrowing from the New Left and militant civil rights and Black Power movements — “Power to the People” — would, within 18 months, give way to a different sort of emphasis:

“The average American,” Nixon said, “is just like the child in the family. You give him some responsibility and he is going to amount to something. He is going to do something. . . .”

Basic to his approach to future problem solving, the President made clear, is that “there will be no solutions or problems that require a tax increase.”

. . . “Another thing this election is about,” he went on, “is whether we should move toward more massive hand-outs to people . . . or whether we say, no, it is up to you. The people are going to have to carry their share of the load.”²⁴¹

The operational significance of this shift in Nixon’s views was to be reflected in the data on annual growth of federal grants-in-aid exclusive of general revenue sharing and grants to individuals. It was only after election of a more heavily Democrat Congress in 1974 and the succession of Gerald Ford to the White House that the grant expenditures on social programs began to rise once again.²⁴²

Although the post-1972 history of Revenue Sharing thus spans a time when the wheel of domestic program orientation turned sharply at least twice, certain continuing analytic problems are associated with this innovation, which Selma Mushkin termed “a new revolution in intergovernmental fiscal relations” in which state and local governments tap

239. Nathan, *supra* note 231, at 125.

240. State of Union Address, *supra* note 236, at 8.

241. Interview with Richard Nixon in Wash. Post (Nov. 9, 1972).

242. See Appendix D *infra*.

federal funds with few strings or conditions attached.²⁴³ These problems cannot be considered at length, but are noted here with a view toward suggesting both historical antecedents and contemporary policy concerns.

First, there is the changing mix of federal aid programs; the Revenue Sharing component has become a leading component in the rising annual total of grants flowing to the states.²⁴⁴

Second, the impact of the shift toward Revenue Sharing on other social programs, and the effects on the overall emphasis of federal domestic policy, has become a prime source of concern. Clearly, Revenue Sharing has militated to a degree against the specification of minimum national standard and even against the vigorous definition of national goals in certain policy areas. The price of expanding state-local discretion in use of funds, withal, has been a surrender of direction from the center — and a manifest weakening of commitments in areas of social policy to which liberals have been dedicated since the New Deal years.²⁴⁵

Third, the new emphasis on Revenue Sharing has had the planned effect of relieving some of the pressures upon the finances of state and local government. The short-term relief was seen in 1972 and 1973, when the operating accounts of state-local government were in surplus for the first time since the late 1940's. Although there was a return to the "normal" deficit condition in 1974, clearly tax increases had been forestalled and the possibility of rising grants under Revenue Sharing was present as the program was extended in 1976, although current rates of inflation could reduce the amount of grants in real terms (down 17 per cent from 1972 levels, by 1980).²⁴⁶ As Professor Reagan has observed, "Whether revenue sharing constitutes in the long run a decentralization and return of power to state-local levels, or the creation of a much broader (not restricted to specific categories) dependency of those levels on Washington than has ever existed, is an open question."²⁴⁷

In its original form, Revenue Sharing included "pass-through" provisions that assured that municipal and other local governments would

243. *Hearings on Regional Planning Issues Before the Jt. Eco. Comm., Subcomm. on Urban Affairs*, 92d Cong., 1st Sess., Part 2, at 263 (1971) (statement of Selma Mushkin).

244. See Appendix B (Panel 2) *infra*.

245. NATHAN, MONITORING REVENUE SHARING, *supra* note 157, at 246-53; R. NATHAN & C. F. ADAMS, REVENUE SHARING, SECOND ROUND ch. 2 *passim* (1977) [hereinafter cited as NATHAN & ADAMS, REVENUE SHARING].

246. NATHAN & ADAMS, REVENUE SHARING, *supra* note 245, at 171; SPECIAL ANALYSES, 1977 BUDGET, *supra* note 231, at 265-66.

247. Reagan, *The Pro and Con Arguments*, 419 ANNALS 23, 27 (May 1975).

receive two-thirds of funds granted to each state. It was allocated to the states on the basis of a formula that took account of population, general tax effort, relative income, and (optionally, applied only if to the advantage of a state) degree of urbanization and use of the state income tax. In addition, allocation formulae were designed to assure that the grants to local governments fell within a specified range.²⁴⁸ At the time of the program's extension in 1976, Congress strengthened civil rights provisions of the law, introduced a requirement that recipient governments hold local hearings on the proposed use of grant funds, and made some technical adjustments.²⁴⁹ The most interesting element of the political debates and conflict surrounding Revenue Sharing in 1976, however, was the extraordinary unity and power demonstrated by the organizations of mayors, governors, and the like — the so-called “public interest groups”²⁵⁰ whose influence and power constitute a major dimension in the alignments underlying the political dynamics of modern federalism.²⁵¹ In a sense, their virtually unanimous support of Revenue Sharing — highlighted by the President's very open appeal to them not to “rock the boat”²⁵² when Congress was considering changes in grant formulas — is a new working version of consensus politics. Unlike the Johnson-Great Society version, which envisioned an infinitely expanding “partnership” wondrously stripped of all inherent interest conflicts, this new version is a consensus of establishment political structures based on the most pragmatic sort of consideration: “governors, mayors, city councils, and the appointed officials who help spend the money,” as Reagan avers, “all enjoy receiving the quarterly checks.”²⁵³

Neither the new political alignments of “consensus” nor the new

248. NATHAN, MONITORING REVENUE SHARING, *supra* note 157, *passim*.

249. NATHAN & ADAMS, REVENUE SHARING, *supra* note 245, at 166.

250. Also known as the Big Seven: (1) National Governors Conference; (2) Council of State Governments; (3) National Legislative Conference; (4) National Association of County Officials; (5) National League of Cities; (6) U.S. Conference of Mayors; (7) International City Management Association. See Wright, *Intergovernmental Relations*, 416 ANNALS 1, 14-15 (1974).

251. *Id.* See also D. HAIDER, WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS AND INTERGOVERNMENTAL LOBBYING (1974); Elazar, *Federalism without Washington*, in AMERICAN FEDERALISM: A VIEW FROM THE STATES 158-62 (1966); Hillenbrand, *The Big Six — A New Force on the Washington Scene*, 53 PUB. MANAGEMENT (Dec. 1971).

252. NATHAN & ADAMS, REVENUE SHARING, *supra* note 245, at 10-11.

253. Reagan, *supra* note 247, at 24.

pragmatism can render obsolete the classic concerns of federalism. A frail thread in the political tapestry that was woven in 1972-73, when Revenue Sharing was first enacted and the initial reactions to its impact were registered, might easily have been lost from view except for later events: the only governor to oppose Revenue Sharing outright in 1973 (and in 1976 to oppose, this time with Representative, later Governor, Carey of New York, grants to the states instead of directly to local government) was Jimmy Carter of Georgia.²⁵⁴ In dramatic contrast to the pronouncements of President's Nixon and Ford on the meaning, putative redefinition(s), and future of the federal system, Governor Carter rather disarmingly stated in 1973:

I don't know the exact definition of federalism. To me, it's the interrelationship between or among different elements of government. Perhaps now, more than any other time since the War between the States, . . . the system of federalism has been broken or endangered. . . .²⁵⁵

Deploring the way in which social programs had been attacked by the Nixon administration, Carter declared that "New Federalism . . . is just a bunch of hokum" designed to centralize power in the White House and to turn back the clock on social reform. The "orderly process of government . . . has to be a mutually understandable process," he stated, "with mutual respect and an absolute absence of secrecy."²⁵⁶ Carter found the federal government wanting on all counts.

Since Jimmy Carter's transfer from the Georgia capital to the White House, doubtless some of his perspectives have changed. Before the end of his administration, Revenue Sharing will come up for renewal once again. Presumably, the criticism directed against that program — especially on grounds that the state and local governments have not used the funds to aid the poorer elements of our society to the degree those same funds would have been employed had they been given in categorical grants or spent directly by the federal government — will need to be met.²⁵⁷ Should the President maintain his skepticism of Revenue Sharing, it might well spark a momentous confrontation of the White House with the organized forces

254. Carter in *A New Federalism*, *supra* note 232, Part I, at 140; Carter, in *THE NEW FEDERALISM*, *supra* note 146, at 43-44 (1973); NATHAN & ADAMS, *REVENUE SHARING*, *supra* note 245, at 4.

255. In A. Bickel, *supra* note 146, at 44.

256. *Id.* at 44, 46. See Walker, *A New Intergovernmental System in 1977*, 8 *PUBLICUS* 101-16 (1978).

257. Reagan, *supra* note 247, at 29.

of the state-local political establishment. In any event, the vitality of federalism, with its residual elements of decentralized power and even its classic "dual federalism" constitutional dimension, has been prominent already in the Carter Presidency. The Supreme Court's attention to doctrines designed to extend Bill of Rights liberties to all citizens, and the response of some state courts and legislatures to the attenuation of these liberties, has already been mentioned.²⁵⁸ No less dramatic has been the emergent confrontation of "Sunbelt" versus "Snowbelt" states, forming new coalitions and organizations in the effort to exert greater leverage on the federal government in the quest for capital projects and other funds and programs.²⁵⁹ Moreover, the states continue to retain sufficient autonomy in economic policy and other areas of law that the problem of "competition in laxity" continues to plague the federal system, while "raids" and other evidence of an often-sordid competition for business investment remind us constantly of residual decentralization.²⁶⁰ Withal, the analysis here comes full circle to the story of Sohio's rather heady legal entanglement with the air quality control authorities in the Los Angeles basin, and the related story of HUD's sudden turnabout on middle-class housing subsidies.²⁶¹

Centralization and decentralization, power and helplessness, do after all continue to be interesting and useful questions. The classic twin concerns of the theory of federalism — governmental effectiveness and protection of liberty through diffusion of power — continue to pertain in a society of massive population, modern industrial structure, and hectic urbanization. Whether the Nixon administration's optimistic (and disingenuous) goal of "sorting out" functions by level of government had any real possibility of success may now have become a question mooted by the fortunes of politics. Whether centralization of real power in the most important respects has gone much too far in the last forty years to admit of even reasonable speculation about restoring government to the much neater (and simpler) basis of an earlier century seems a question already definitively answered. Even Revenue Sharing cannot obscure the fact that, while it is not a unitary state, the federal system of this nation has become one in which the levers of power are located mainly at the center.

258. See text accompanying notes 177-81 *supra*.

259. Special Report, *Federal Spending: The North's Loss is the Sunbelt's Gain*, 8 NAT'L J. 878 (June 26, 1976); Peirce, *Northeast Governors Map Battle Plan for Fight Over Federal Funds Flow*, 8 NAT'L J. 1695 (Nov. 27, 1976).

260. See text accompanying note 3 *supra*.

261. See text accompanying note 1 *supra*.

VIII. CONCLUSION: "ALL THE FORCE WHICH IS
COMPATIBLE WITH . . . LIBERTY"

In *The Federalist*, No. 17, Hamilton wrote that both the logic and the history of confederative government could be invoked to demonstrate that state governments could always "encroach upon the national authorities" much more easily than national government could encroach upon the states. Thus, Hamilton concluded, "too much pains cannot be taken," in the shaping of the central government's constitutional powers in a federal system, "to give them all the force which is compatible with the principles of liberty."

What degree of force should be deemed "compatible with . . . liberty" is a recurring question in the history of our constitutional law, in our political life, and, as we have seen, in debates of recent vintage on the proposed reach and limits of reform under the rubric of the New Federalism. The great watersheds of change, as has been argued here, occurred with the Civil War, when the era of governmental practice that conformed to the theoretical model of "dual federalism" came to a close; and with the New Deal, when the modern era of full-blown "cooperative federalism" commenced, bringing to a climax the centralizing trends that had operated since the 1860s and also bringing a very distinctive departure from past practices. Although the Johnson years' Great Society programs constituted still another set of departures, they were within the broad and liberal New Deal tradition with its reliance upon centralized power. The Great Society economists and policy makers gave the initial impetus to the Revenue Sharing proposals that were originally intended to produce a more genuine type of "sharing" but that soon had become the rallying-point of conservative forces with other objectives in mind, namely the dismantling of modern big government and the reversal of liberal or progressive trends in social policy. What began as a campaign to share financial resources and power on a more systematic basis ended by releasing, or at least giving focus to, much more deeply rooted challenges to modern governmental structure and authority.

The present essay is an excursus into the past, and the perils of retrospective analysis give an historian more than enough trouble without his undertaking the task of prophecy. But it is clear nonetheless that currently a new phase in the history of federalism may be taking shape, a phase in which the demands of privatism — the concern to conserve wealth and power in the private sector, with concomitant concern to curb government *at all levels* — may be casting its shadow, if not to say overwhelming, the more classic concerns about liberty, efficiency, and the diffusion of power within the governmental sector itself.

APPENDIX A

Year	Grants-in-aid (millions)	Per-capita aid
1944	\$ 1,072	\$ 7.75
1948	\$ 1,771	12.08
1952	\$ 2,585	16.47
1960	\$ 6,994	38.86
1965	\$11,062	57.07
1970	\$23,257	114.43
1973	\$41,268	196.65
1976	\$55,589	321.71

Source: U.S. Bureau of the Census data.

APPENDIX B (Panel 1)*
AMOUNT AND DISTRIBUTION-BY-FUNCTION OF FEDERAL AID TO STATE-LOCAL
GOVERNMENT, 1902-1972 (Census concept)

	1902	1913	1944	1948	1952	1960	1967	1972
Federal aid, total (millions)	\$7	\$12	\$1072	\$1771	\$2585	\$6994	\$15,027	\$33,584
Percentage distribution, by function:								
Education	14%	25%	18%	24%	17%	14%	26%	24%
Public welfare	14	17	39	41	46	30	28	40
Highways	—	—	14	18	16	42	27	15
Social insurance adm'n.	—	—	3	9	7	5	4	2
Health & hospitals	—	—	6	3	5	2	3	4
Housing & urban renewal	—	—	—	—	0.4	3	5	6
All other	71	58	20	6	8	6	9	9
Federal aid as percentage of state-local general revenues	0.7%	0.6%	9.8%	10.3%	10.3%	13.8%	16.4%	20.2%

Panel 2**

DISTRIBUTION BY FUNCTION OF FEDERAL GRANTS
TO STATE-LOCAL GOVERNMENT, 1957-75

(Budget concept)

	1952	1957	1962	1967	1972	1975	1977
Natural resources, environment and energy	1%	1%	2%	2%	2%	5%	6%
Agriculture	4	9	6	3	1	1	1
Commerce and transportation	18	24	36	27	15	12	12
Community & regional development	1	1	3	6	9	7	7
Education, training, employment and social services	9	8	8	25	26	23	23
Health	8	4	5	10	17	18	18
Income security	57	49	38	25	26	19	18
Revenue sharing and general purpose fiscal assistance	2	3	2	2	1	14	14
Other	—	1	—	—	1	2	2

*Source, Panel 1: U.S. Bureau of the Census, CENSUS OF GOVERNMENTS, 1972, Vol. VI, No. 4.

**Source, Panel 2: SPECIAL ANALYSES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 1977, p. 261; *ibid.*, Fiscal Year 1979, p. 182.

APPENDIX C

GOVERNMENTAL EXPENDITURES IN RELATION TO GNP*

	1954	1973
Federal civilian expenditures (domestic) as proportion of Gross National Product	5.4%	12.9%
State expenditures (own funds **) at proportion of Gross National Product	3.4	5.7
Local expenditures (own funds**) as proportion of Gross National Product	4.0	5.4

**Excludes grants-in-aid from higher level(s) of government

*Source: Advisory Commission on Intergovernmental Relations data, in D. Goldberg, "Intergovernmental Relations from the Legislative Perspective," 416 THE ANNALS 52-54 (1974).

APPENDIX D

ANNUAL GROWTH RATE IN FEDERAL GRANTS TO STATE
AND LOCAL GOVERNMENTS, Fiscal 1973-75
(per cent)

Type of grant	1973	1974	1975
All grants (excluding general revenue sharing, public assistance, and food stamps)	6.6	8.5	20.8
Social services	-12.2	-8.8	39.2
Elementary and secondary education	3.4	-8.5	36.6
Manpower training	-14.6	15.2	120.2
Community development	-2.5	3.5	6.2

Source: Budget of the U.S. Government, Special Analyses, as presented in Richard Nathan and Charles F. Adams, Jr. et al., *Revenue Sharing: The Second Round* (1977), p. 56.