THE FEDERAL ROLE IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH

The Condition of Contemporary Federalism: Conflicting Theories and Collapsing Constraints

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS
Washington, D.C. 20575 • August 1981

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A Commission Report

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Foreword

The Advisory Commission on Intergovernmental Relations was established by Public Law 380, which was passed by the first session of the 86th Congress and approved by the President September 24, 1959. Section 2 of the act sets forth the following declaration of purpose and specific responsibilities for the Commission:

> Sec. 2. Because the complexity of modern life intensifies the need in a federal form of government for the fullest cooperation and coordination of activities between the levels of government, and because population growth and scientific developments portend an increasingly complex society in future years, it is essential that an appropriate agency be established to give continuing attention to intergovernmental problems.
>
> It is intended that the Commission, in the performance of its duties, will:
>
> 1) bring together representatives of the federal, state, and local governments for the consideration of common problems . . . ;
>
> 5) encourage discussion and study at an early stage of emerging public problems that are likely to require intergovernmental cooperation;
>
> 6) recommend, within the framework of the Constitution, the most desirable allocation of governmental functions, responsibilities, and revenues among the several levels of government. . . .

Pursuant to its statutory responsibilities, the Commission has from time to time been requested by the Congress or the President to examine particular problems impeding the effectiveness of the federal system. The 1976 renewal legislation for General Revenue Sharing, Public Law 94–488, mandated in Section 145 that the Commission:

> . . . study and evaluate the American federal fiscal system in terms of the allocation and coordination of public resources among federal, state, and local governments including, but not limited to, a study and evaluation of: (1) the allocation and coordination of taxing and spending authorities between levels of government, including a comparison of other federal government systems. . . . (5) forces likely to affect the nature of the American federal system in the short-term and long-term future and possible adjustments to such system, if any, which may be desirable, in light of future developments.

The study, "The Federal Role in the Federal System: The Dynamics of Growth," of which the present volume is one component, is part of the Commission's response to this mandate. Staff were directed to: (a) examine the present role of the federal government in the American federal system; (b) review theoretical perspectives on American federalism, the assignment of functions, and governmental growth; and (c) identify historical and political patterns in the development and expansion of national governmental domestic activities. This volume on the condition of contemporary federalism is one of 11 prepared by Commission staff pursuant to this assignment.

Abraham D. Beame
Chairman

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Full responsibility for content and accuracy rests, of course, with the Commission and its staff.

Wayne F. Anderson
Executive Director

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Alternative Perspectives On Federalism

I
Introduction

American federalism has undergone enormous change during the last 50 years. The transformation has been so extensive as to warrant a reexamination of the principles which uphold the federal system itself. In this way, the significance of this transition is highlighted and alternative responses to it can be better considered. Several distinct and frequently competing theories of federalism currently exist which suggest very different responses to the issues raised by governmental growth and change. The object of this chapter will be to examine these alternative views of federalism in light of both their implications for federal growth and their potential guidance in the alteration or restructuring of an evolving federal system.

GOVERNMENTAL GROWTH AND POLITICAL PURPOSE

Intergovernmental relations today clearly have crossed a new threshold of complexity and confusion. Many believe that citizen understanding of government, as well as governmental performance, have begun to deteriorate as the modern federal goals of "sharing" and "cooperation" become transformed into extraordinary interdependence and extreme fragmentation. The looming fear is one of unrestrained intergovernmentalism, of governmental pragmatism out of control.[1]

The immediate source of these problems lies in the enormous governmental, and especially federal, growth

which has occurred in recent years.[2] In part, this represents a process of federal involvement in traditionally state and local functions such as education, welfare, and law enforcement. In part, it represents federal involvement in largely new fields of governmental activity, stimulating state and local involvement in the process. Environmental programs stand out in this regard, but aid to the handicapped and employment and training programs are examples of this pattern as well. In each case, the end result has been considerably more intergovernmental "cooperation," more divided responsibilities, and more intricate patterns of governmental administration. This situation has contributed to numerous difficulties—problems of planning, coordination, accountability, perhaps even "governability"[3] — that characterize contemporary critiques of programs and policies. Among the underlying causes of this development is a fundamental philosophical one.

Historically, federal growth has occurred within the context of broad yet relatively coherent notions of the government's role in addressing social and economic issues. The burst of federal activity in the 1880–1920 period sought in various ways to strengthen the nation's social and economic structure, to further national development. New Deal programs sought to alleviate widespread conditions of social and economic insecurity through regulation, social insurance, and the creation of sources of countervailing power in the economy.[4] As Samuel Beer observes, these broad approaches reflected relatively coherent "public philosophies."[5]

More recent federal efforts in the 1960s and especially the 1970s appear to lack this degree of conceptual unity. Various aims have been espoused, notably the pursuit of social equality, but such aims have been subsumed within multiple and often contradictory approaches toward public policy. Beer writes that:

> During that brief middle period of the Great Society, it did look as if new attitudes, technocratic and romantic, were being fused in an outlook that would supplement or supplant the old liberalism. These attitudes survive powerfully, but with nothing in common except their negativism. . . . We do not enjoy a public philosophy.[6]

Beer and several other political analysts point, instead, to a new policy process responsible for governmental growth, one characterized by "growth without purpose" rather than guidance by a public philosophy:

> [I]t is not so much the consumers of public goods, the voters . . . but rather the producers of public goods, influencing government from within the public sector itself, that exert the main thrust toward an increase in the [Public Expenditure]/GNP ratio and specifically toward that sharp surge upward during the past decade or so. The problem . . . is not . . . restricted to the political difficulties of restraining public expenditures. The more fundamental question is how a polity can impose upon public expenditure any rationale, any coherent view of government action, any scale of priorities . . . if its decisionmaking starts from the extreme pluralism . . . of public sector politics. . . . The upshot of this politics of adjustment is not simply growth of the public sector, but growth without purpose.[7]

It is this process of growth which Walker and Elazar interpret as extreme pragmatism.[8]

THE LOSS OF PURPOSE IN FEDERAL THEORY

In the intergovernmental arena, the loss of philosophical direction in governmental policymaking has a parallel in the recent evolution of federal theory. The conceptual clarity of dual federalism has been replaced by models of "cooperative federalism," in recognition of the growing functional interdependence of all levels of government since the 1930s. While descriptively appropriate, however, a retrospective evaluation of cooperative federalism suggests that it lacks the conceptual lucidity and prescriptive utility that characterized its predecessor.

Modern federalism, as it was established under the U.S. Constitution and refined through subsequent judicial and political developments, was largely dual federalism. In contrast to older confederal arrangements, this system was characterized by the division of governmental authority between two permanent levels of government, each having a direct relationship with the citizenry, with the functions of government clearly divided between the two levels. While implicit within the Constitution itself, this concept of federalism was sufficiently new as to permit initially a range of interpretations on the precise nature of American federalism. Inventive thinkers such as Jefferson and Calhoun went so far as to attempt reconstruction of a confederal arrangement out of the Constitution. Such ambiguities, together with the exigencies of governing, stimulated elaboration of the new federal Constitution by the Supreme Court. In

various decisions, the Court clarified fundamental tenets of federalism such as:

- The doctrine of Constitutional supremacy: "The Constitution and the laws of a state, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate." *(Cohens v. Virginia).*[9]
- The structural rigidity of federalism under the Constitution: "The Constitution, in all its provisions, looks to an indestructible union, composed of indestructible states." *(Texas v. White).*[10]
- The doctrine of dual 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 separate and independent of each other, within their respective spheres." *(Abelman v. Booth).*[11]

With the clarification of old confederal ambiguities, the American structure of government became the model of modern federalism. In theoretical treatments, federalism itself was defined in dual federal terms, and this conception of federalism remained relatively unchanged into the 1940s. Thus, E.A. Freeman wrote in 1863:

> Two requisites seem necessary to constitute a federal government. . . . On the one hand, each of the members of the Union must be wholly independent in those matters which concern each member only. On the other hand, all must be subject to a common power in those matters which concern the whole body of members collectively. . . . Each member is perfectly independent in its own sphere, but there is another sphere in which . . . its separate existence vanishes.[12]

In a similar fashion, Wheare wrote of federalism in 1946:

> By the federal principle I mean the method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent.[13]

In strictest terms, dual federalism constituted an ideal form. The courts used the concept as an analytical device for interpreting the Constitution. Scholars used it for examining governmental forms, to evaluate their degree of federalism. Yet, it also remained a close approximation of predominant American federal practice up to 1930. As historian Harry Scheiber explains:

> [Before 1933] the evidence for genuine dual federalism is sound, and the areas of autonomous state-local functions were hardly unimportant. . . . None of the features of the New Deal's brand of cooperative federalism . . . had characterized intergovernmental relations in a significant way prior to 1933.[14]

Samuel Beer agrees:

> Both state and federal governments were active [from 1860–1932]. While the logic of the nationalization of externalities was continually adding to federal authority there remained functions which . . . still had effects confined largely within state boundaries. For this period, therefore, the term commonly applied to it is appropriate: dual federalism.[15]

In the influential works of Morton Grodzins and Daniel Elazar, attempts were made to apply the concept of cooperative federalism to the whole of American history, thus obscuring the significance of 20th Century developments in intergovernmental relations.[16] Their work usefully demonstrated that dual federalism was never practiced with the degree of totality implied by the Supreme Court's language. Yet political, fiscal, and administrative realities were reasonably well described by the model. As Scheiber, Beer, and others show, elements of shared functions and cooperative relationships, while slowly increasing, were relatively minor up to the 1930s. This was evident in the functional scope and fiscal magnitude of cooperation, in the power relationships between levels of government, and in the most prevalent administrative arrangements of intergovernmental relations.[17]

COOPERATIVE FEDERALISM

The New Deal altered the pattern of dual federalism irrevocably. This was evident, first of all, in the changing fiscal relationships of the 1930s. An enormous increase in the size and number of federal grants-in-aid resulted from the New Deal.[18] Equally significant, the qualitative nature of federalism changed as well. The federal government became involved in more traditional state and local functions (welfare, social services, local public works), and it created essentially new areas of governmental responsibility (social security, employment programs). Federal leadership in the development of new policies became the norm rather than the exception, and

new patterns of cooperative administrative relationships became predominant. A new concept of federalism was required to describe these new developments. This new concept was labeled "cooperative federalism," characterized by the intergovernmental sharing of functions and the breakdown of sharply delineated patterns of authority and responsibility inherent in dual federalism. As Grodzins wrote:

> All levels of government in the United States significantly participate in all activities of government. . . . The many governments in this country intermesh with each other to produce what we call the 'marble cake' of American government. . . . The American federal system, far from being three separate 'levels' of institutions, can profitably be viewed as a single mechanism of government.[19]

William Anderson wrote in agreement:

> [I]n broad outline, [there] is an extensive and complex but not uniform system of cooperation 'vertically' between national, state, and local governmental agencies. . . . [T]he lines of cooperation crisscross in every major function like highways, welfare, and public health and in every region of the country.[20]

The importance of cooperative federalism extended far beyond its descriptive utility, however. While empirically accurate, cooperative federalism was conceptually complex. It created theoretical ambiguities, such as blurring the distinction between federalism and decentralization. As Carl Friedrich wrote:

> The broadening scope of effective cooperation between state and federal agencies obscures the difference between a closely knit federal setup and an effectively decentralized government such as that of England—so much so that years ago one could foresee the day "when the character of a state is changed or modified into a kind of administrative unit to carry out federal plans and policies."[21]

Most importantly, cooperative federalism lacked the prescriptive power of dual federalism. It offered no rationale for assigning of intergovernmental functions or for directing governmental growth. Cooperative federalism prescribes only intergovernmental "sharing," as can be seen in this statement by William Anderson:

> To achieve the maximum goal of public welfare, there is need to utilize the services and the resources of every level of government. . . . [A]ll are likely to have some contribution to make. . . . In every field then the question is this: what specific division of labor and what combination of national, state, and local authorities working together will produce the best results in administering the function? . . . [T]he arrangements that I visualize . . . are . . . based upon . . . the progressive development of better and better ways for all levels of government to cooperate in performing functions.[22]

In this fundamental way, cooperative federalism has endorsed and contributed to policymaking through intergovernmental pragmatism. This is evident in its shallow concept of the "national interest." Anderson cautioned that: "it is unrealistic to try to lay down in advance a comprehensive allocation of all internal functions of government among national, state, and local units."[23] Rather, the national interest can only be determined through the *process* of governing itself:

> If the proposal is for national action, let Congress debate the matter fully before acting. . . . [B]ecause there is no scientific way of deciding such questions, this full consideration of the issues offers the best practical substitute. If the members of Congress are willing to pass the bill, knowing full well how they probably will be attacked in their home states for their actions, one can be reasonably sure that there is a sufficient national interest in the function to justify it, at least on a trial basis.[24]

Contemporary notions of federalism reflect the consequences of this implicit vagueness in cooperative federalism. One scholar recently complained that: "the 'new' federalism . . . does not offer a precise operational, still less a normative, code of conduct befitting a federalism of sharing."[25] As cooperative federalism became prevalent, many political scientists began to ascertain that federalism itself lacked any implicit rationale. For example, Franz Neumann wrote in 1955 of:

> . . . the futility of any discussion of the merits of federalism as an arrangement considered abstractly. There are no values that adhere in federalism as such.[26]

Once federalism was cut adrift from the rigidities and constitutionalism of dual federalism, it became, in the words of Carl Friedrich, merely a political "process:"

> None of the major theories of federalism have given . . . an adequate interpretation of this complex political phenomenon. . . . [I]nstead, "federalism" seems the most suitable term by which to designate the process of federalizing a political community. That is to say, the process by which a number of separate political organizations . . . enter into arrangements for working out solutions, adopting joint policies, and making joint decisions on joint problems.[27]

By this definition, the concept of federalism came to be applied to such diverse organizations as the United Nations and NATO. Thus, influential scholars examining cooperative federal relationships from a comparative perspective began to interpret federalism as simply a state of social and political development,[28] lacking any inherent value beyond its existence as a "political bargain."[29] Others, studying cooperative federalism in America, concluded that "federalism is dead," replaced by the mundane administrative realities of intergovernmental relations.[30]

Efforts to reconcile cooperative federalism with underlying political values have largely foundered. Daniel Elazar has suggested a new definition of federalism which seeks to advance this aim:

> Federalism . . . describe[s] the mode of political organization which unites separate polities within an overarching political system so as to allow each to maintain its fundamental political integrity. Federal systems do this by distributing power among general and constituent governments in a manner designed to protect the existence and authority of all the governments.[31]

Acknowledging the shift from dual federalism, Elazar has replaced the concept of divided "powers" (i.e., functions) with the notion of a balance of "power." Yet recent intergovernmental trends bode ill for this concept of federalism. In terms of governmental finance, policy initiation, and regulation, American federalism has become considerably more centralized in recent years.[32] Moreover, if the state/local balance of power in the federal system rests upon the party system, as many analysts argue, then the advanced decomposition of American parties indicates a further erosion of state and local power.[33] It is precisely on the basis of such power relationships that Reagan argues that "federalism is dead."

This inability to compose an acceptable definition of modern federalism, which is consistent with current practices and yet embodies a meaningful set of political values, illustrates the present disarray of federal thought. Such confusion has led some federal theorists to conclude that federalism is either of "infinite variety"[34] or of little consequence.[35] This situation can only contribute to the seeming inability of current federal thought to lend guidance to federal decisionmakers or coherence to federal policymaking.[36]

Thus, the concept of federalism in recent years has been a troubled one. If there is no longer an underlying rationale behind federalism, then it is indeed reduced merely to intergovernmental relations—a set of complex and more or less convenient or inconvenient administrative relationships—and little more. In such a case, the interpretation that recent federal growth has been "without purpose" would not seem out of place.

THREE ALTERNATIVE THEORIES OF FEDERALISM

Naturally, not all adhere to a developmental interpretation of federalism. In addition to this model, there are essentially three other broad schools of federal thought which invest varying degrees of normative value in the concept of federalism—the democratic, economic, and administrative models of federalism. While these three perspectives commonly overlap in various treatments of federalism, each is analytically distinct to a considerable degree. Generally speaking, the democratic perspective argues that federalism contributes to democracy and liberty. The other schools maintain that federalism promotes economic or administrative efficiency respectively. Given the confusion evident in the developmental perspective on federalism, it is imperative that these three conceptions of federalism be examined in some detail to determine their potential for directing governmental growth.

II
Democratic Theories of Federalism

An important school of democratic thought has long maintained that genuinely democratic government can only flourish in a small political entity. With roots extending back as far as the Greeks, this notion has powerfully influenced American federalism from colonial times to the present. It is unmistakably apparent in the writings of Jefferson, in the doctrine of states' rights, and in the continuing belief that local government is "closer to the people." Its implications for the role of the federal government are clear: in order to maximize democratic participation and accountability, all governmental functions which lack a compelling rationale for federal involvement should be left to the states and localities.[37]

This decentralist argument arises ultimately from the physical constraints on direct democracy. A true democracy cannot exceed a size that will accommodate a decisionmaking assembly of its citizens. Even allowing for representation, many believe the association between democratic vigor and small size to be a strong one. In a small community, citizens are thought to be more familiar with both issues and leaders. They may perceive a greater stake in governmental affairs and have a greater sense of political efficacy. Both motivationally and logistically, then, smallness is thought by many to contribute to democracy. Citizen participation in and control of government are believed to be enhanced.[38]

This "small republic theory" of democracy[39] has been advocated by many illustrious political philosophers. Outstanding among these was Montesquieu, who wrote that:

> It is natural for a republic to have only a small territory; otherwise it cannot long subsist. In an extensive republic there are men of large fortunes, and consequently of less moderation . . . the public good is sacrificed to a thousand private views; it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is more obvious, better understood, and more within the reach of every citizen.[40]

In a large nation, however, Montesquieu wrote that:

> A large empire supposes a despotic authority in the person who governs. It is necessary that the quickness of the prince's resolutions should supply the distance of the places they are sent to; that fear should prevent the remissness of the distant governor or magistrate.[41]

Thus, he concluded that:

> If it be, therefore, the natural property of small states to be governed as a republic, of middling ones to be subject to a monarch, and of large empires to be swayed by a despotic prince; the consequence is, that in order to preserve the principles of the established government, the state must be supported in the extent it has acquired, and that the spirit of this state will alter in proportion as it contracts or extends its limits.[42]

Among American subscribers to this theory was Thomas Jefferson. As Samuel Huntington observed of Jefferson:

> [Jefferson's] second means of insuring an identity of interest between government and society was decentralization of the functions of government. . . . Pure republics are possible, however, only within "very narrow limits of space and population." . . . [T]he people were to discharge all functions which they were "competent" to handle, and then delegate the remainder to responsible agents. . . . [T]he great bogeyman in Jefferson's thought was centralization, "toryism in disguise," and a single, consolidated government would quickly become "the most corrupt government on earth."[43]

In his autobiography, Jefferson wrote:

> [I]t is not by the consolidation, or concentration of powers, but by their distribution, that good government is affected. Were not this country already divided into states, that division must be made, that each might do for itself what concerns itself directly, and what it can so much better do than a distant authority.[44]

Anti-Federalist opposition to the Constitution stemmed from similar concerns. In what has been called "a sort of textbook" for the anti-Federalists, Richard Henry Lee maintained that the most fundamental defect in the proposed Constitution was that:

> . . . there is no substantial representation of the people provided for in [the federal] government in which the most essential powers . . . [are] proposed to be lodged.[45]

Developing this point at length, Lee wrote:

> The first interesting question suggested [by the Constitution] is how far the states can be consolidated into one entire government on free principles. . . . [T]he House of Representatives, the democratic branch, as it is called, is to consist of 65 members; that is about one representative for 50,000 inhabitants. . . . [T]his federal representative branch will have but very little democracy in it.[46]

Similar views remain popular today. The common belief that local government is "closer to the people" is essentially a reflection of this position. Compare the above statements with former President Nixon's 1971 State of the Union Address:

> The time has come in America to reverse the flow of power and resources from the states and communities to Washington, and start power and resources flowing back from Washington to the states and communities and, more important, to the people, all across America. . . . [T]he further away government is from people, the stronger government becomes and the weaker people become. . . .[L]ocal government is the government closest to the *people* and it is most responsive to the individual *person*; it is peoples' government in a far more intimate way than the government in Washington can ever be.[47]

This small republic theory of democracy was widely held in America during the post Revolutionary period. Members of the Constitutional Convention had been profoundly influenced by Montesquieu, whose arguments concerning size and democracy were sufficiently influential that Hamilton felt compelled to deliberately distort them in *Federalist* 9.[48] The anti-Federalists opposed strengthening the central government essentially on these grounds of liberty and democracy.

CRITIQUES OF LOCALISTIC DEMOCRACY

In order to gain ratification of the Constitution, advocates of a more energetic national government were compelled to refute the small republic theory. While numerous arguments were advanced on behalf of a stronger central state, the key argument was that presented in Madison's famous *Federalist* 10. This essay not only maintained that republican democracy is compatible with a large state, it argued that democracy is more likely to succeed in such a state. Madison felt that a small state is more susceptible to domination by a narrow local faction:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.[49]

The greater diversity of a larger state mitigates this tendency and promotes, instead, a freer, more Constitutional government:

> Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. . . . [I]n the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government.[50]

Many modern political scholars agree with this assessment. For example, Grant McConnell argues that small constituencies tend to undermine democracy rather than promote it:

> The effect of a small constituency is to enhance the power of local elites, whatever their character or sources of power. . . . [T]he claims that small units ensure democracy are erroneous. . . . [D]ecentralization to local . . . units does not make for democracy; indeed, in the sense that democratic values center about liberty and equality, it creates conditions quite hostile to democracy. The tendency inherent in small units to stratification of power relationships and to protection of established informal patterns of domination and subordination is most alien to equality.[51]

Similarly, Morton Grodzins disputes the assertion that local government is "closer to the people."

> It is often claimed that local or state governments are "closer" to the people than the federal government and therefore the preferred instrument for public action. If one carefully examines this statement, it proves to be quite meaningless. . . . [I]n few, if any, [ways] are the state and local units "closer" to the people than the federal government. The big differences are between rural and urban areas.[52]

In the absence of small governmental units, political parties and representative institutions are viewed by most political scientists today as acceptable or even superior mechanisms for the transmission of popular will and the maintenance of democratic accountability. Ranney and Kendall explain at length that:

> The traditional institutions of representation and direct legislation are . . . attempts to . . . provide a community of many millions of citizens with something close to the kind of popular consultation that the town meeting provides in the small community. In addition . . . *a system of political parties* has . . . emerged in every modern nation/state that has attempted to achieve democracy in its governing system. Many modern scholars will agree with the following statement by Professor MacIver: "party . . . is an essential organ of every large democracy. . . . [T]he organization of opinion by parties inevitably followed the rise of large-scale democracy. The principle of representation had to be vitalized by the conflict of parties. When parties flourish we have in effect passed from a pre-democratic mode of representative government to a genuinely democratic one."[53]

In his classic study of public opinion, V.O. Key agrees that: "A solid basis remains for the theory of the party as a link between public opinion and public policy.[54] In somewhat stronger terms, Prof. McConnell argues that strengthening the national party system would do much to offset the problems of localism discussed above:

> The quest of the public interest is neither simple nor open to rapid achievement. . . . In general [it requires] the strengthening of those elements of the political order which tend toward the creation of a constituency of the entire nation. These include the party system . . . and the national government.[55]

It is, therefore, an open question today whether local government or national government is "better," or more democratic. Despite the controversy, a generally acceptable degree of democracy appears possible at either level of government under the appropriate conditions. However, different levels of government may make unique and possibly complementary contributions to various aspects of democratic government.

The federal arena seems to possess advantages for organized electoral participation. As a rule, party competition appears to be stronger at the national level.[56] Moreover, the nationalization of the media means that political information is increasingly focused on the national government. Studies of governmental salience have found that people are more aware of the federal government.[57] Other studies show that more people can identify their national elected officials than their state and local officials,[58] while electoral statistics demonstrate that voter participation is higher in national elections.[59]

On the other hand, local government offers unique opportunities for direct individual participation. Tocqueville believed this to be the case and argued that local government serves as a training ground for citizens and public officials alike:

> The strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. . . . [I]n the restricted sphere within his scope, [the citizen] learns to rule society; he gets to know those formalities without which freedom can advance only through revolutions, . . . understands the harmony of powers, and in the end accumulates clear, practical ideas about the nature of his duties and the extent of his rights.[60]

Modern studies of public attitudes reveal that people believe local government is more understandable to them, and they feel more capable of affecting a governmental policy at the local level.[61] With the apparent dissolution of our political parties, this local socialization function may become an increasingly important factor of democratic stability.

THE FEDERAL BALANCE

Given the differential effects of various levels of government on popular participation, it may be that feder-

alism offers a desirable combination of each level's respective advantages. It must be noted that the advantages of local participation pertain mainly to very small units of government. Dahl and Tufte estimate the optimal size of a jurisdiction to be less than 10,000 inhabitants, much smaller than any state or medium sized city.[62] However, one recent theoretical treatment of federalism and democracy suggests that multiple levels of government may prove beneficial to representational democracy. Samuel Beer writes that federalism promotes a system of complementary representation and a balance of power:

> Governing himself through two different governments, the voter views the political world from two perspectives, one shaped by the social pluralism of the general government, and the other shaped by the territorial pluralism of state government. . . . One may call this process "representational federalism" because it gives representation in the general government to the territorial pluralism of the states and representation in the state governments to the social pluralism of the general government.[63]

Assuming such a complementary relationship exists, then the size theory of democracy does not prove very helpful in determing the assignment of functions or power to the federal government. If it were possible to make a determination of democratic superiority on behalf of either the federal or local level, this might become a useful criterion in the intergovernmental assignment of functions. Absent this, such allocations must be made on the basis of alternative criteria.

PLURALIST THEORY

The concept of checks and balances implied by "representational federalism," and by Constitutional approaches to federalism as well, can be incorporated into a broader school of democratic thought known as pluralism. This theory argues for the maintenance of multiple levels of government as a means of protecting liberty and expanding citizen access to government.[64] Its implications for intergovernmental relations are clear: concentrations of governmental powers and authority should be avoided, particularly at the central level since there is but one government there.

Federalism is often viewed as an effective device for the protection of territorially defined minorities. As such, it has been supported in this country by the white south and by sparsely populated rural states. The use of federalism to divide power between territorially distinct groups and to insulate minorities is most evident in ethnically divided countries: Canada, Switzerland, Nigeria, and most recently, Belgium.[65] As Eric Nordlinger observes:

> With its division of powers between central and local governments, federalism would seem to be especially appropriate in divided societies with territorially clustered segments, as in the case of many linguistically and tribally divided societies.[66]

Yet, the relationship between federalism and the insulation of minorities is quite complex. Indeed, federalism can exacerbate the exploitation of minorities as well as contain it. This was Madison's concern in *Federalist* 10, [67] and Nordlinger affirms this fear:

> [F]ederalism may actually contribute to a conflict's exacerbation and the failure of conflict regulation. In some deeply divided societies it is impossible to draw state boundaries without including a large number of individuals belonging to segments whose territorial base is elsewhere. Federalism thus allows or encourages the dominant segment in any one state to ignore or negate the demands of the minority segment.[68]

In the early 1960s and in a hyperbolic manner, William Riker asserted this point in the American context as well:

> If one approves the goals and values of the priviledged minority, one should approve the federalism. Thus, if in the United States one approves of southern white racists, then one shall approve of American federalism.[69]

One need not go to this extreme to recognize the disjunction apparent in this aspect of federal and pluralist values.

A broader pluralist argument asserts that federalism promotes individual liberty. In particular, federalism is thought to provide a check on the domination of individual rights by a large, centralized government in a mass society. As Daniel Elazar observes: "As a political device, federalism . . . [emphasizes] the value of dispersed power centers as a means for safeguarding individual and local liberties."[70] This concept was advanced by Madison, as well, in the *Federalist*.[71] It finds adherents in many countries, such as Spain, where federalism is viewed by the democratic left as a check on an authoritarian central government.[72]

Nevertheless, many democratic theorists dissent from

this presumed relationship between federalism, pluralism, and individual liberty. From a comparative perspective, the relationship is questionable. As Riker observes:

> Local self government and personal freedom both coexist with a highly centralized unitary government in Great Britain and the Vargas dictatorship in Brazil managed to coexist with federalism.[73]

Franz Neumann agrees:

> [F]ederalism cannot be defended successfully on the grounds that the inevitable tendency of a unitary state is toward political repression. The testimony of history will not support this assertion.[74]

Similarly, Michael Reagan argues that federalism is, at best, a secondary Constitutional technique for the protection of individual liberty. He identifies national Constitutional guarantees of individual rights as the primary defense of civil liberties:

> What is essential to free government is not formal federalism, but First Amendment freedoms—those of speech, press, and assembly—and the right to organize groups and petitition, and the right to vote. These outlets, for whatever pluralism of ideas and interests and values exist in the society, constitute the essence of freedom.[75]

Moreover, it is possible to seek the advantages of decentralization without acquiring the rigidities of federalism. In such a case, lesser jurisdictions in a unitary system are subject to possible alteration over time, as political, social, and economic conditions change. They thus can be adapted from the center to the requirements of a new mix of governmental functions or to changing externalities, as recent British and Swedish experiences demonstrate. Even as great an individualist as John Stuart Mill questioned the need for federalism in his classic treatment of representative government:

> The question then is, whether the different parts of the nation require to be governed in a way so essentially different that it is not probable the same legislature, and the same ministry . . . will give satisfaction to them all. Unless this be the case, which is a question of fact, it is better for them to be completely united. . . . [A]ll that is needful is to give a sufficiently large sphere of action to the local authorities. Under one and the same central government there may be local governors, and provincial assemblies for local purposes.[76]

A final pluralist argument maintains that federalism results in more responsive government through the provision of additional access points for citizen or group input. In his classic treatment of interest groups, David Truman observed:

> A characteristic feature of the governmental system in the United States is that it contains a multiplicity of points of access. The federal system establishes decentralized and more or less independent centers of power, vantage points from which to secure privileged access to the national government.[77]

However, many have followed Madison in arguing that access at the local level is more likely to be fragmentary and biased toward parochial or special interest groups. As Schattschneider writes, "scope and bias are aspects of the same tendency."[78] Survey data available at the community level also tend to dispute this relationship. Research shows that both the extent and the forms of participation tend to vary with the size of jurisdiction, but larger cities (those over 25,000) tend to have above-average levels of political participation, particularly with respect to voting and campaign activity.[79]

In conclusion, no democratic argument concerning federalism has gone undisputed, whether it involves a locally centered, a nationally centered, or a balanced system. The loudest claims have been made for decentralized federalism, but many of these were refuted by the founders of the Constitution. It is reasonable to believe that several relatively balanced levels of government may prove most useful in promoting individual liberty, reinforcing democratic norms, and providing political experience. Accordingly, many contend that no level of government should become so dominant as to threaten the basic integrity of the others. Some observers believe that the federal government is approaching such a position now and that steps should be taken to strengthen state and local governments. Yet, if it is consistent with such aims, democratic theory provides no reliable guidance as to the manner of achieving it.

III
Federalism and Rational Choice Theory

One of the most influential modern arguments for federalism is provided by "rational choice" theory, which applies the concepts and instruments of marginal economic analysis to the study of public decisionmaking. At the most general level, rational choice theory provides a simple and elegant theoretical justification for decentralization based on the rational economic behavior of individuals.[80] In addition, it attempts to provide a basis for the intergovernmental assignment of functions in a multilevel system. While acknowledging complexities which seriously hinder this task, Wallace Oates contends:

> This . . . is the central theoretical problem of . . . fiscal federalism: the determination of the optimal structure of the public sector in terms of the assignment of decisionmaking responsibility for specified functions to representatives of the interests of the proper geographical subsets of society.[81]

The justification for "federalism" in rational choice theory derives from the distribution of what economists call pure public goods. The crucial variables include the degree of regional variation in public preferences for such goods and the geographical extent of the impact of these goods (externalities). By definition, pure public goods are indivisible, affecting all individuals equally within a given group.[82] People's preferences for such goods may differ, however. Given regional variations in the demand for a particular public good, governmental production of the good can more closely match the preferences of more individuals through a decentralized system of government. Each jurisdiction can then respond to local preferences precisely, rather than having the central government produce a uniform level of the collective good. As Oates explains:

> A decentralized form of government . . . offers the promise of increasing economic efficiency by providing a range of outputs of certain public goods that corresponds more closely to the differing tastes of groups of consumers.[83]

This efficiency can be enhanced through the market-like conditions of residential mobility, allowing like-minded individuals to migrate to jurisdictions producing a "market basket" of public goods corresponding to their own preferences. This reinforces the correspondence between public production and individual consumption, thus strengthening the economic gain from decentralization:

> The possibilities for welfare gains through decentralization are further enhanced by the phenomenon of consumer mobility. . . . One can envision a system of local governments where . . . each community provides a different level of consumption of a local public good and. . . . The consumer . . . selects . . . the level of public output that best satisfies his tastes. Through this mechanism, one can get a sort of market solution to the problem of producing efficient levels of output of some public goods.[84]

FUNCTIONAL ALLOCATION

The basis for allocating governmental functions can be found in the argument that welfare is maximized when individual preferences match jurisdictional boundaries. Mancur Olson calls this concept the "principle of fiscal equivalence."[85] He argues that inefficiencies will occur when:

> (1) the collective good reaches beyond the boundaries of the government that provides it;
> (2) the collective good reaches only a part of the constituency that provides it.[86]

Each case results in economic externalities (or "internalities") which may encourage suboptimal production of collective goods. When benefits from a local function extend to nonpaying residents outside a jurisdiction, incentives exist to support the program at levels below its total social value. On the other hand, if a portion of the costs flow to individuals on the outside, the jurisdiction may overproduce the good because it is not bearing the total costs of the program. Similar effects result from "internalities," wherein a public good reaches only a geographic subset of a jurisdiction's population:

> If the benefits are local and the taxes national, even a collective good which brings gains much greater than its costs will still create more losers than gainers.[87]

The interest of these losers is to support a suboptimal level of this public good.

These propositions, then, provide the bases for allocating intergovernmental functions. Economists assign the tasks of economic stabilization and income redistribution to the central government, due to the national scope of their impact and the constraints on decentralized response to them.[88] Other governmental functions are then assigned to various levels of government according to their externalities. According to Oates: "The most basic determinant of the proper level of government to provide a particular public service is the geographical pattern of the effects of the output."[89] On the basis of this principle, economist George Break prepared one such grouping of governmental functions (see *Exhibit I*).

Serious complications in performing this task of allocation are acknowledged by economists. Carried to an extreme, optimizing the concurrence of individual preference and governmental jurisdictions would require:

> . . . a separate governmental institution for every collective good with a unique boundary, so that there can be a match between those who receive the benefits of a collective good and those who pay for it.[90]

Balanced against this would be the recognized need to simplify governmental structure, thus reducing citizens' decisionmaking costs and enhancing their participation and expression of policy preferences.[91] Similarly economies and diseconomies of scale are recognized to produce countervailing effects which may justify a different jurisdictional mapping.[92] The use of interjurisdictional grants to deal with externalities is widely accepted.[93] The nature and purity of a public good, the extent of its externalities, and consumer mobility are all acknowledged to create tradeoffs in efficiency that must be carefully weighed in assigning governmental functions to various levels of jurisdiction. As Oates remarks: "These kinds of tradeoffs constitute the problem of determining the optimal size jurisdiction for providing a particular public service."[94] Despite these difficulties, however, the rational choice theorists conclude that, "*in economic terms*, federalism represents the optimal, form of government."[95]

Exhibit I

CLASSIFICATION OF SELECTED GOVERNMENT SERVICES BY THE GEOGRAPHICAL SCOPE OF THEIR BENEFITS

1. Local (a)	Fire Protection Police Protection Parks and Recreation Public Libraries Water Distribution City Streets
2. Intermediate (b)	Air and Water Pollution Water Supply Parks and Recreation Public Libraries Sewage and Refuse Disposal Mass Transit Arterial Streets and Intercity Highways Airports Urban Planning and Renewal
3. Federal (c)	Education Parks and Recreation Aid to Low Income Groups Communicable Disease Control Research

a. Services with few important benefit spillovers beyond the local level of government.
b. Services with significant spillovers beyond the local level but not beyond the regional level.
c. Services with significant spillovers beyond the regional level.

SOURCE: George Break, *Intergovernmental Fiscal Relations in the United States*, Washington, DC, Brookings Institution, 1967, p. 69. This table was prepared to indicate priorities for federal aid, but the concept of externalities is identical.

RATIONAL CHOICE THEORY APPLIED

In application, rational choice theory has proven to be adaptable to differing perspectives on the assignment of intergovernmental functions. In fact, its adherents have adopted starkly opposing positions on the structure of federalism. On the one hand, it has been used to promote increased centralization of governmental functions. As Alan Campbell observes:

> To minimize the flow of externalities, a greater number of activities must be assigned to large jurisdictions—to metropolitanwide ones, to states, and frequently to the national government.[96]

George Break adopts this perspective in justifying increased federal grants-in-aid, pointing to the "widespread, and ever-increasing, spillover of benefits from some of the most important state and local expenditure programs."[97]

On the other hand, rational choice theory has been used to justify decentralization in an era of increasing centralization. Providing a theoretical basis for governmental localism is, perhaps, its most prominent current role. This is true of Wallace Oates' *Fiscal Federalism*, for example, in which he concludes after analyzing tendencies toward centralization that:

> Both formal analysis and recent historical trends indicate that, for the performance of certain functions, decentralized decisionmaking in the public sector has compelling advantages over wholly centralized control.[98]

In fact, Oates' "decentralization theorem" is stated so as to favor decentralized government:

> . . . it will always be more efficient (or at least as efficient) for local government to provide the Pareto-efficient levels of output for their respective jurisdictions than for the central government to provide *any* specified and uniform level of output across all jurisdictions.[99]

A somewhat similar perspective is evident in Mancur Olson's work as well. Although the principle of "fiscal equivalence" is explicitly developed to justify a very broad and complex range of governmental structures,[100] the author emphasizes its application to the smallest jurisdictions:

> [T]here is also a need for new governments as well, including some small ones. The metropolitan transport commissions, the port authorities, the soil conservation districts, the suburban towns, and the neighborhood school boards that have been created are in many cases probably a response to the forces described in this paper.[101]

This decentralizing focus is developed most clearly in the works of Bish, Ostrom, Tiebout, and other "public choice" economists focusing on the distribution of governmental authority in metropolitan areas.[102] They look favorably on a great diversity of small, local governments that can establish market like conditions in public services, as each jurisdiction competes for resident taxpayers through its offering of services and its rate of efficiency and taxation. Public choice economists have also expressed strong opposition to governmental centralization in other forms. Ostrom, Niskanen, and Buchanan, for example, have all stressed the administrative and representational weaknesses of large, centralized bureaucracies.[103] In so doing, they have attempted to apply the methodology of rational choice theory to bureaucratic behavior as well.

PROBLEMS OF APPLYING ECONOMIC THEORY TO FEDERALISM

Despite the apparent promise of rational choice theory in establishing a modern theoretical justification for federalism, several fundamental problems seriously undermine its actual contribution to federal thought or to functional assignment. Most importantly, rational choice theory does not appear to justify a system of federalism at all. Rather, it provides a justification for multiple levels of government in a vertical arrangement. Oates acknowledges this point explicitly:

> [I]t makes little difference to the economist whether or not decisionmaking at a particular level of government is based on delegated or Constitutionally guaranteed authority. What matters is simply that decisions regarding levels of provision of specified public services for a particular jurisdiction . . . reflect to a substantial extent the interests of the constituency of that jurisdiction. . . . *In economic terms*, most if not all systems are federal.[104]

Accordingly, one recent cross-national analysis of fiscal federalism, which attempted to "describe [the] federative structures" of six countries and to "demonstrate how relevant the economic approach is to fiscal federalism," included both Great Britain and France in its sample of "federal" nations.[105]

In fact, genuine federalism may be inimical to rational choice theory. The fixed jurisdictional boundaries and rigid constitutionalism inherent to federalism are inconsistent with the precepts of rational choice. The ideal system envisaged in this economic theory is a highly flexible one. It requires the easy creation of new jurisdictions and the simple alteration or elimination of established ones in response to constantly changing conditions of economic development, externalities and individual preferences. Political scientist Samuel Beer argues that a political system designed by rational choice theory would have to be:

> Very flexible, indeed flexible to the point of continual change, as periodic comprehen-

> sive calculations of utility led to new combinations by polities and new partitions by their citizens in the search for a better all-round balance of welfare.[106]

Mancur Olson makes it clear that great numbers of these pliable jurisdictions would be required, of all shapes and sizes:

> Only if there are several levels of government and a large number of governments can immense disparities between the boundaries of jurisdictions and the boundaries of collective goods be avoided.[107]

The likelihood that federalism's rigid structures would meet these jurisdictional requirements could only be a short-lived accident.

A further serious difficulty concerning rational choice theory involves its potential use in the intergovernmental assignment of functions. In application, its promise here is sharply limited. To begin with, externalities cannot be accurately measured in many, and perhaps most, cases. As Oates acknowledged recently:

> In practice . . . possibly the most difficult dimension of this optimal jurisdiction problem has proved to be the geographical delineation of the benefits and costs. It is not clear, for example, just what the geographical range of *significant* benefits is for functions like education and police services.[108]

Similarly, from an evaluation of the cost-benefit measurements developed in a number of different studies, economist Roland McKean concludes that:

> Even in the best analyses, imputed prices are inherently controversial. . . . These inherent difficulties should not be brushed aside as having no practical significance. It does not seem to me that we can say, "Damn the defects; full speed ahead," for these defects definitely reduce the value that shadow prices can be expected to have. . . . [E]ven the best analyses . . . cannot claim to employ "the" correct prices or to point to "the" correct choices.[109]

McKean goes on to reject attempts to quantify those public decisions which are best left to political processes:

> I am forced to conclude that one must settle for extremely imperfect information regarding price ratios. . . . A few modest adjustments for externalities and anticipated demand-and-supply changes may be in order. Making adjustments to allow for special values introduced through the political process is not very promising. Traditional thoughtful analyses . . . still seem . . . to be on the right track in providing some quantitative estimates and discussing major qualifications and nonquantified considerations. Quantitative evaluations of governmental expenditure programs will always be consumers research—not solutions to straightforward maximization problems.[110]

Apart from problems in measurement, several additional difficulties seriously complicate the use of rational choice theory in functional assignment. As Mancur Olson observes, in understated fashion: "If some of the assumptions of the arguments are relaxed, the situation becomes complicated."[111] Oates agrees, noting that in contrast to the ideal model sketched earlier, countervailing factors may erode the gains in efficiency postulated by the minimization of externalities:

> A more careful examination of the issue reveals . . . that the selection of the proper level of government to provide a particular public good or service is not an easy problem; there are typically a number of variables that figure in this decision, and in most instances, some form of tradeoff between welfare gains and losses is involved.[112]

Economists recognize, for instance, that governmental fragmentation may undermine citizen understanding of and participation in government, thus creating increased "information costs" for voters. This is especially important for rational choice theory because the often explicit linkage between economic externalities and governmental output is the median voter model of political behavior.[113] Similarly, the welfare gains postulated by fiscal equivalence must be measured against economies of scale and centralized coordination.

Additional difficulties result when public goods fail to affect a well-defined territory. As territorial matching declines, the gains derived from decentralization become increasingly small. Territorial matching can be enhanced through consumer mobility, allowing like-minded individuals to congregate in homogenous jurisdictions, but increased segregation for one function may reduce it for others. Moreover, experience suggests that it will result in considerable racial and income segregation in opposition to fundamental political values of our society.[114] Rational choice economists suggest that income segregation be addressed through redistributive grants from

the central government, but other observers note that an unintended by-product of segregation may be the erosion of political support necessary to sustain redistribution. Beer concludes that:

> For the political economists to say that the federal government ought to step in and do what the subnational governments will not or cannot afford to do, however, does not mean that anything will actually happen. If a policy of redistribution is to be adopted, there must be some political cause. . . . [T]o amass the political support to cope with . . . hard choices of public policy today, such as the problem of redistribution, . . . is insoluble in terms of rational choice theory.[115]

Moreover, the serious administrative problems associated with federal grants may render them unworkable tools of efficiency. Robert Reischauer states that, "the diversity of American governmental structure dooms the grants strategy to failure."[116]

The combined result of these considerations is to enormously complicate the already difficult task of measuring welfare gains. This is particularly true when the inevitable tradeoffs are recognized between competing values of efficiency, effectiveness, liberty, participation, and equity.[117] Including these last four unavoidable but largely unquantifiable factors in the calculation of governmental efficiency precludes making precise and "objective" determinations of governmental functions, roles, and boundaries. An intellectually honest and comprehensive rational choice analysis yields conclusions that are as judgmental and heuristic as those of alternative analytic frameworks. "Rules of thumb" remain the critical instruments of decisionmaking.[118]

A final difficulty confronting rational choice theory concerns the actual locus of power that is likely to result in a system so designed. Rational choice theorists tend to assume a simplified, normative structure of democratic decisionmaking in which popularly elected representatives respond to the majority wishes of an informed electorate.[119] To the extent that this model lacks correspondence with reality, the policy outcomes hypothesized in rational choice theory are subject to significant distortion. For example, the functional and territorial fragmentation of governmental authority that is suggested by the theory of fiscal equivalence[120] may well have the real, though Constitutionally informal, effect of stimulating the transfer of decisionmaking authority away from electorates and popularly elected officials to professional and bureaucratic interests. This has certainly been a major tendency in intergovernmental relations to date, as Beer attests:

> The problem is to control bureaucratic autonomy. . . . [T]he confederal model offers the solution of dividing the bureaucratic forces and dispersing control over their incentives among several levels of government linked by contract. The reality, as the American experience with functional federalism amply attests, is that such a classic confederal tactic is weak and even dangerous in the face of the tendency of professionals to work together across intergovernmental boundaries for policy aims of their own.[121]

A concomitant result may be to ultimately strengthen the power of the central government, which will stand firmly in the midst of a proliferating array of shifting sub-governments. Such a prospect is surely consistent with current trends in the development of grants-in-aid, territorial fragmentation, and functional specialization. Unfortunately, the rational choice paradigm provides much too little consideration of such political and administrative responses to economists' recommendations.

A NOTE ON PUBLIC CHOICE

In recent years, one subcategory of rational choice theorists has proven especially prominent. Often called the "public choice" school, this group has increasingly diverged from certain views expressed by more "orthodox" economists. As a general characterization, public choice theorists have proven more willing to defend fragmented and highly localistic governmental structures—and even the contracting-out of many services to private providers—in order to promote greater public service competition and diversity.[122] They also have tended to devote more attention to the internal workings of government and the behavior of public officials, especially bureaucrats.

As a result, the public choice theorists have begun to grapple with some of the deficiencies apparent in rational choice theory. Many of them appear willing to accept the durable structures inherent in true federalism—even at the immediate cost of some efficiency—in order to limit centralization and governmental "monopoly." Moreover, they have begun to explore some of the operational costs and consequences apparent in federalism.[123] As a result, they have chosen to sacrifice some of the elegance and simplicity of rational choice theory. By acknowledging more structural and largely unmea-

surable variables, public choice tends to further erode the elusive goal of rendering precise or "scientific" judgments on the assignment of intergovernmental functions.[124] Surprisingly, given their concern about centralization and bureaucratic behavior, public choice theorists have not dealt comprehensively with interaction between governmental fragmentation and bureaucratization. Even more than other rational choice theorists, they have tended to view governmental diversification and competition as the preeminent check on bureaucratic power. Rarely have they addressed the paradox noted earlier by which structural fragmentation has served to enhance bureaucratic influence.

The growth of differences within the public choice school serves to further indicate that economic theory about federalism is developing but incomplete. It is possible that a viable and coherent economic perspective on federalism might emerge, but the field is growing increasingly divergent at present. Nevertheless, economic theorists of all persuasions have already made one useful contribution to contemporary federal thought. In an era dominated by behavioralist skepticism of the importance of governmental structures, economic theory has served to demonstrate how territorial organization of government can significantly and systematically influence policy outcomes.

IV
Public Administration Theory and Federalism

An additional source of discussion on issues of federalism can be found in the literature of public administration. This includes arguments pertaining both to centralization and decentralization, with implications for the arrangement of functions between levels of government. At certain times in the past, administrative considerations have figured prominently in discussions of federalism, notably among the American founders. However, administrative theory on federal issues has generally remained incomplete and inadequately developed.

In contrast to democratic theories of federalism, which focus on issues of participation and liberty, public administration treatments of federalism are essentially concerned with the effective operation of government. As in rational choice theory, governmental efficiency is a primary concern.[125] However, in focusing on the organization, public administration approaches the issue of efficiency in a very different manner. The perspective is largely that of the governmental manager, whose aim is to enhance effective service delivery and organizational manageability. In contrast, rational choice theory begins with the public service consumer as the unit of analysis. It adopts a "micro" analytic approach rather than what might be called the "macro" approach of public administration theory.

To a certain extent, the two approaches represent opposing perspectives on a similar issue. To the extent that rational choice theory accurately describes human behavior, public administrators must learn to recognize and respond to such behavior. Thus, in cases of differentiated, geographically organized preference functions—where rational choice theory suggests that decentralization would improve individual welfare gains—public administration might recommend a similar separation of tasks or administrative units due to administrative overload, inefficiency, or organizational discord. Yet the methodologies and premises of both schools are very different and, in other instances, give rise to conflicting prescriptions.[126] In particular, the literature of public administration, while insightful, shows little tendency toward quantification and deductive analysis that so characterizes rational choice theory.

DECENTRALIZING TENDENCIES IN PUBLIC ADMINISTRATION THEORY

Public administration theory seeks to identify factors of organizational behavior and design which contribute to effective management, and many of these factors have implications for governmental centralization and decentralization. These are sometimes explicitly developed, but often they are only implied. Those administrative factors which encourage decentralization arise ultimately from problems of organizational overload and administrative complexity. These, in turn, are related to size. George Benson has observed that:

> [M]any students of governnent are convinced that a government adequate to a large country necessarily becomes unwieldly when its administration is too highly centralized. Economists tell us that it is possible for cor-

> porations to reach a size at which the economies of large-scale operation are more than counterbalanced by the inefficiency of a top-heavy overhead management.[127]

Such problems are common and are widely recognized. Information and decisionmaking at the top of an organization are inherently limited. Sheer numbers of tasks, employees, or service delivery units may become unwieldly for an organization. These problems may be greatly compounded if tasks or procedures vary significantly and if these varied requirements bear little relationship to one another. One scholar illustrated the consequences of such administrative overload in the field of manpower training as follows:

> Now . . . we have the federal agency dealing with something like 10,000 sponsors of 30,000 separate [manpower] contracts. The federal agency has the authority, but it doesn't know what is going on out in the field because it is just not administratively possible to have the span of control to know what is going on in each community, what the performance is, and then enforce accountability in the system. . . . It is very risky to decentralize authority, but . . . having authority you can't exercise isn't much help either.[128]

Several administrative concepts have been developed to deal with aspects of this problem. The concept of span-of-control, for example, forms the basis on which some administrative analysts have placed considerable weight in devising administrative schemes.[129] The most fundamental method of dealing with such difficulties, of course, involves the division of governmental tasks.

Public administration literature observes that governmental tasks may be divided on either a territorial or a functional basis.[130] If tasks are organized on an areal basis, then administrative units will tend to reflect the territorial nature and scope of each problem. Among the criteria for areal organization that James Fesler suggests are: "the span of control . . . the concept of the natural area . . . [and] the workload."[131] Behind these criteria rests the goal of administrative efficiency, which Fesler explains has both centralizing and decentralizing aspects:

> For many governmental functions efficiency requires the development of a staff of officials of diverse skills; otherwise the people are denied the fruits of expertness developed in the specialized channels of education and experience. . . . A staff of specialists will have an adequate work-load only . . . in the larger governmental areas. . . . Administrative efficiency also sets *limits* to the optimum size of governmental areas. As in industry, bigness can be pressed beyond the point of efficiency.[132]

This view of efficiency is translated into support for a multileveled system of government:

> Despite the relatively greater centralization today, Cassandras who prophecy the end of local or state government ignore the areal requirements of a country as large as the United States. Such territorial expanse requires at least three levels of governmental areas—national, subnational, and local.[133]

This areal technique of administrative simplification has long been recognized. Administrative arguments, after all, played an important role in the *Federalist*. Although governmental efficiency was a major justification for stronger union in the *Federalist*,[134] Madison argued that centralized government would be administratively unmanageable:

> [I]t would not be difficult to show that if [the states] were abolished the general government would be compelled, by the principle of self-perservation, to reinstate them in their proper jurisdiction.[135]

Administrative considerations as well as democratic ones played a part in Jefferson's localism also. Jefferson believed centralized government to be unworkable:

> Our country is too large to have all its affairs directed by a single government. Public servants at such a distance . . . must . . . be unable to administer and overlook all the details necessary for the good government of the citizens, and the same circumstance, by rendering detection impossible to their constituents, will invite the public agents to corruption, plunder, and waste.[136]

Similarly, John Stuart Mill prominently employed administrative arguments in justifying decentralized government:

> There is a limit to the extent of country which can advantageously be governed, or even whose government can be conveniently superintended from a single centre. There are vast countries so governed; but they, or at least their distant provinces, are in general deplorably ill administered.[137]

Elsewhere Mill states:

> If only on the principle of division of labour, it is indispensable to share [the public business] between central and local authorities. . . . [E]ven if the local authorities and public are inferior to the central ones in knowledge of the principles of administration, they have a compensating advantage of a far more direct interest in the result. . . . In the details of management, therefore, the local bodies will generally have the advantage.[138]

CENTRALIZING TENDENCIES IN PUBLIC ADMINISTRATION THEORY

In spite of this territorial tradition in political theory, the organization of governmental tasks on a functional rather than areal basis has been far more prevalent in public administration literature and practice. In general, functional organization permits a more elaborate division of labor.[139] Thus it is better adapted to the utilization of scientific and professional knowledge. Importantly for federalism, however, functional organization and functional expertise both tend to be centralizing.[140] As Arthur MacMahon observes:

> [A]dministrative integration has tended thus far to work within functions, rather than between them. Where different levels exist, notably in federal systems, the intergovernmental bridges that are most easily erected are almost wholly functional. Within each function, the integrative pull is toward the centre.[141]

Scientific and professional knowledge tends, in itself, to be centralizing. It pursues the "best way" of accomplishing a task which, if determined, encourages unitary rather than diversified action.[142]

Like functional organization, other principles of public administration have had centralizing effects as well. Perhaps no subject in public administration is as heavily emphasized as coordination. It has been defined as "the determining principle of organization, the form which contains all other principles, the beginning and the end of all organized effort."[143] In contrast to economics,[144] administrative doctrines of coordination are strongly centralizing, stressing central planning, management, and direction and a unified chain of command. Vincent Ostrom summarizes the administrative approach:

> The standard format of administrative surveys includes a diagnostic assessment of pathologies attributed to the proliferation of agencies, the fragmentation of authority, overlapping jurisdictions, and duplication of services. . . . Strengthening of the government is viewed as the equivalent of increasing the authority and powers of the chief executive. General-authority agencies are preferred to limited-authority agencies. Large jurisdictions are preferred to small. Centralized solutions are preferred to the disaggregation of authority among diverse decision structures.[145]

Administrative economy is another important goal of public administration. Theoretically, efforts to promote efficient, economical operations might be either centralizing or decentralizing according to economies and diseconomies of scale.[146] In fact, however, the administrative orientation on such issues is primarily centralizing. Savings from reduced duplication, plus increased productivity and effectiveness due to specialization are the factors emphasized in public administration. Fesler writes that:

> The assumption of an expanded role by the larger governmental areas—big government—. . . parallels the growth of big business. As in the case of big business, we can either accept the bigness with its greater efficiencies . . . or we can indulge our nostalgia for the small units of the nineteenth century and atomize the existing concentration of functions.[147]

In a similar vein, Ostrom writes:

> Duplication of services and overlapping jurisdictions are presumed, on prima facie grounds, to be wasteful and inefficient [in public administration theory]. The proliferation of agencies and fragmentation of authority are presumed to provoke conflict, and create disorder and deadlock.[148]

The result may be seen in the strong preference in public administration for regional government rather than for public service competition in metropolitan areas.[149]

Public administration treatments of democratic responsibility and accountability suggest a preference for centralized systems of governmental organization as well. As previously discussed, many democratic theorists have advocated highly decentralized government in order to enhance democracy and governmental accountability. This approach has not been prevalent in administrative theory. Rather, public administration literature has stressed the role of strong, responsible political par-

ties in providing democratic control of government. This form of control is more consistent with the administrative advantages of centralized government and a unified chain of command.[150]

PROBLEMS WITH ADMINISTRATIVE APPROACHES TO FEDERALISM

There are several limitations on the administrative approach to federalism. First of all, it has been theoretically underdeveloped.[151] Perhaps because public administration is a realm dominated by practitioners, with much knowledge compiled directly from experience, the literature has not included many abstract theoretical treatments, in contrast to political science or economics. There is no administrative theory of federalism, in the sense of a coherent model of how a federal system should operate from an administrative perspective. Only fragments of such a theory exist.[152] This is unfortunate, because some of the strongest arguments on behalf of decentralization and federalism in recent years have been administrative in nature. Considerable impetus for the new Federalism resulted from administrative shortcomings of the Great Society. Many experienced individuals came to support decentralization for pragmatic, administrative reasons:

> By and large, those programs which have stressed detailed planning and detailed administration have either not worked, or have worked only on a scale which was very small compared to the size of the problem. . . . The detailed administrative approach does not work for clear enough reasons—which start with the impossibility of writing detailed rules to fit every case, assuming even that an administrative solution is possible. . . . The setbacks of the War on Poverty arise, in part, from the difficulties of applying a specific and administered program to more than 30 million poor individuals.[153]

> If the designers of future urban policies take away any single lesson from model cities, it should be to avoid grand schemes for massive, concerted federal action.[154]

Other problems exist for public administration theory as well. As in the case of rational choice, most administrative arguments for decentralization are not truly consistent with federalism. If the aim of administrative decentralization is managerial simplification, then the units of decentralization must be flexible enough to be constantly reorganized, in light of changing conditions. Otherwise, the consequence may be a system which is more complex and unwieldly than a unitary one. This dissatisfaction with the rigidity of federalism can be clearly seen in Mill, who was nonetheless a strong supporter of administrative and political decentralization:

> Whenever it is not deemed necessary to maintain permanently, in the different provinces, different systems of jurisprudence, and fundamental institutions founded on different principles, it is always practicable to reconcile minor diversities with the maintenance of unity of government. All that is needful is to give a sufficiently large sphere of action to the local authorities.[155]

And MacMahon writes that:

> Under federalism, the boundaries of the constituent governments tend to become fixed . . . and, even where they originally suit demographic and economic conditions, changes in the distribution of population and industry may render the old boundaries increasingly inconvenient.[156]

This tension between administrative principles and federalism underlies Fesler's recommendations as well:

> The reconciliation of function and area . . . can come about in part through basic structural reform. . . . The national, subnational, and local governments must be made satisfactory vessels for those functions or parts of functions that have a predominantly national, subnational, or local character. . . . Basic readjustment of governmental areas is important if we are to have areas that can assure fiscal adequacy and general efficiency. . . . I rule out readjustment of state boundaries, for we are not constructing a utopia. But readjustment of local government areas is urgent.[157]

Public administration theory is also inconsistent with federalism in another respect. Administrative doctrine assumes the presence of a formal hierarchy, whereas federalism is incompatible with such a form of organization. By definition, federalism presumes the structural autonomy of the states, in terms of their formal policy processes, their elected officials, their personnel systems, and so on.[158] Naturally, informal mechanisms of coordination have arisen between the federal government and subnational jurisdictions, but there can be no national

chain of command.[159] It is for this reason that the federal government has resorted to techniques of grant incentives as well as a range of regulatory conditions in order to win "cooperative" action.

Public administration theory has not adequately adjusted to this situation. It continues to be the study of hierarchical organizations, rather than one which is appropriate to more complex conditions of political bargaining and informal cooperation. In this regard, then, the contribution of established public administration theory to an understanding of federalism is necessarily limited.[160]

All in all, the weight of administrative analysis is heavily centralizing. This orientation in the literature of public administration has a long history. It can be traced back to Weber's conclusion that bureaucratic organization and centralization go "hand in hand" and to Wilson's belief that unitary organizations perform most effectively.[161] Recent treatments of this subject continue the tradition. For example, the best modern work on the implications of territorial scale and differentiation for organizational behavior and management focused on the techniques with which a national agency "conquered" the "centrifugal" forces of diverse tasks and interests.[162] Given public administration's emphasis on the functional division of labor, professionalism, and coordination, the tendency toward centralization is unavoidable. Fesler poses the crucial issue from an administrative perspective. He supports the *concept* of decentralization, but he admits the contrary logic of administrative criteria:

> The logic of . . . upward transfers of authority has in most cases forced the opponents back on the argument that state and local government must continue to exercise important functions, however ineffectively. . . . Nonetheless, we are today confronted with soundly-bottomed demands for increased federal participation in education, health, and welfare functions. . . . The expanding role of the larger governmental areas is an honest if tacit recognition of the inability of lesser areas to embrace the natural problem areas, of their administrative inefficiency, their fiscal inadequacy, or their escape from popular control.[163]

V
Conclusion

American federal theory is in a troubled state today. Apart from the political development model, which offers little direction for decisionmaking, there are three approaches to federalism that provide some guidance in the making of federal policy. Taken individually, however, not one appears capable of accomplishing this task since each suffers serious limitations. None is entirely consistent and none can make undisputed claims. Democratic theory appears to provide the strongest arguments for federalism, per se, but each of its argument has been seriously challenged. On the assignment-of-functions question, democratic theory suggests only the broadest generalities. With regard to the rational choice and public administration theories, the problems may be even more severe. In particular, a growing disjunction between federalism and decentralization appears to be developing as the pace of socioeconomic change accelerates. Neither the economic nor administrative approaches deals effectively with this.

Two examples might be useful in further demonstrating the problems of federal theory. In the case of federal grants-in-aid, dollars spent through intergovernmental transfers have enormously different consequences for federalism than do federal dollars spent directly. In large part, in fact, it was the development of this system of cooperative federalism that did so much to complicate modern federal theory. None of the three analytical perspectives examined above has yet dealt fully with the significance of this intergovernmental system. None of them deals realistically with a system dominated by intergovernmental transfers. Democratic theories assume interlevel autonomy. Administrative theory assumes the presence of organizational hierarchy. Even rational choice theory, which devotes the most attention to interlevel transfers, tends to view grants as a device used for secondary adjustments to a rationalized system of jurisdictions.

Similarly, the issue of governmental accountability presents difficulties for each of the theories. Each approaches accountability in a different way. Democratic theories stress the representational process in accountability. Economic theory attempts to align functions and

levels with public preferences. Administrative theory stresses accountability in a chain-of-command sense and in the use of federal funds. None of them really considers the obfuscation of governmental accountability in a highly complex intergovernmental system.

Recognizing these present difficulties, it should not be assumed that no improvement in federal theory is possible. Improvement lies in seeking to integrate the different schools of federal thought that have been discussed above. Although each is analytically distinct, the natural tendency is, and has been in the past, to seek a more comprehensive approach through a combination of the three.

Some observers are relatively optimistic that these various approaches can be melded into a useful guide for action. The ACIR has identified four criteria for assigning governmental functions in metropolitan areas which have been drawn from the broad schools of federal thought examined above: economic efficiency, fiscal equity, political accountability, and administrative effectiveness.[164] The Commission has expressed hope that these criteria may enable, "a normative approach to functional assignment," in substate areas.[165] Although problems in operationalizing these criteria are acknowledged,[166] the general perspective is one of determined optimism.[167] In part, such optimism sprang from the somewhat simpler task of applying functional assignment criteria at the metropolitan level rather than at the federal level. It must be recognized, however, that this attempt does not resolve the fundamental conflicts within and between the varying approaches of federalism, even if some method may be discovered of accurately measuring those variables that are subject to quantification. At present, these criteria provide no theory for balancing tradeoffs. They comprise only a checklist of frequently competing factors.

This situation leads other observers to conclude that no consolidated theory will be forthcoming. Such analysts conclude, first, that each perspective on federalism is deficient in itself, and secondly, that these difficulties are compounded when considering the various approaches at once. The result is deemed to be a series of unreconciled tradeoffs which defy scientific, or mutually agreed upon, solutions. Alan Campbell develops this position at length:

> Easy generalizations are often used which hide the complexity of the issue [of functional assignment]. For example, all government should be as close to the people as possible, or jurisdictions should be of a size which maximize economies of scale, or jurisdictions should be large enough to capture all externalities. Just stating these propositions demonstrates . . . their inconsistency; each suggests different jurisdictional boundaries or functional assignments. . . . In fact, there is no internally consistent theory which can be used to guide either the placement of functions or the design of a system in which to place those functions. Nor at a more general level do theories of federalism offer much help. . . . I do not believe that pursuing the theoretical underpinnings of federalism provides much guidance. . . . Without theory, however, there can be no consistent guide to action other than expediency, which produce ad hoc arrangements with consequences impossible to predict. . . . Combining criteria is no easy task unless it is assumed they possess different priorities. If they could be ranged from most to least important, they could be made operative—but not, of course, without difficulty because of measurement problems. Yet there seems no "objective" means for such a ranking; it would have to be subjective. In the end, such choices are value laden.[168]

At present, Campbell's evaluation must be taken as an accurate assessment of the current state of functional assignment criteria—and of federal thought in general. In the future, some answers may be derived from experience. For example, help in defining the federal role may be provided by thoughtful practitioners like Alice Rivlin, who make persuasive arguments for more decentralization:

> I . . . once thought that the effectiveness of a program like Headstart or Title I of the *Elementary and Secondary Education Act* could be increased by tighter management from Washington. . . . This view now seems to me naive and unrealistic. The country is too big and too diverse, and social action is too complicated. . . . Universal rules are likely to do more harm than good. Nor, given the numbers of people involved, is it possible simply to rely on the judgement or discretion of federal representatives in the field.[169]

But eventually, theory must be developed to guide action. Given the present state of federal theory, this will require considerable work if it is to be attempted. Moreover, it is not clear at this point whether a more useful

perspective on federalism would be forthcoming from such an effort. But it is imperative to recognize that the present disarray of federal thought is part of the current problem. By default, it is helping to contribute to the growing confusion and predominant pragmatism in intergovernmental relations today.

FOOTNOTES

[1] According to a recent report of the ACIR: "The overwhelmingly dominant trait of contemporary intergovernmental relations . . . is the extraordinary degree of 'marblelization' that has emerged over the past decade. . . . [T]he nation has evolved—without really knowing it—a new American federal system with a transformed and terribly complex network of intergovernmental relations." ACIR, *Summary and Concluding Observations*, A-62, Washington, DC, U.S. Government Printing Office, 1978, pp. 65, 71. See also David B. Walker, "A new Intergovernmental System in 1977," *Publius* 8, Winter, 1978, and Daniel Elazar, "Is Federalism Compatible With Prefectorial Administration?" Paper prepared for the 1978 meeting of the American Political Science Association, August 31–September 3, 1978, New York, NY.

[2] See *Volume I* of this study for more detail.

[3] See series by John Herbers on "Governing America," beginning with "Deep Government Disunity Alarms Many U.S. Leaders," *New York Times*, November 12, 1979, p. 1.

[4] Samuel Beer, "The Modernization of American Federalism," *Publius* 3, Fall, 1973.

[5] Samuel Beer, "In Search of a New Public Philosophy" in *The New American Political System*, ed. by Anthony King, Washington, DC, American Enterprise Institute, 1978, pp. 5-44.

[6] *Ibid.*, p. 44. An example might be the effort to combat poverty, which has stressed at various times over the last 15 years the "service strategy," the "income strategy," and an attempt to assist local units of general government according to rates of poverty and unemployment.

[7] Samuel Beer, "Political Overload and Federalism," *Polity*, Fall, 1977, pp. 15, 16.

[8] See note one, *supra*.

[9] *Cohens vs. White*, 6 Wheaton 264 (1821).

[10] *Texas vs. White*, 7 Wallace 700 (1869).

[11] *Abelman vs. Booth*, 21 Howard 506 (1859). The doctrine of dual federalism was used by the Court to assign intergovernmental functions in many late 19th Century and early 20th Century cases. See *United States v. E.C. Knight Co.* (1895) and *Hammer v. Dagenhart* (1918).

[12] E.A. Freeman, *The History of Federal Government*, quoted in M.J.C. Vile, "Federalism in the United States, Canada, and Australia," *Commission on the Constitution, Research Papers*, London, England, 1973, p. 34. See also John Stuart Mill, *Considerations on Representative Government*, ed. by Currin Shields, Indianapolis, IN, Bobbs-Merrill, 1958.

[13] K.C. Wheare, *Federal Government*, New York, NY, Oxford Press, 1951, p. 11.

[14] U.S. Congress, Senate, Committee on Government Operations, *The Condition of American Federalism: An Historian's View*, Committee Print, 89th Cong., 2nd Session, 1966, pp. 5, 12.

[15] Samuel Beer, "The Modernization of American Federalism," *op. cit.*, p. 69.

[16] For example, Grodzins wrote that: "Political behavior and administrative action of the 19th Century provide positive evidence that, throughout the entire era of so-called dual federalism, the many governments in the American federal system continued the close administrative and fiscal collaboration of the earlier period." Morton Grodzins, *The American System*, Chicago, IL, Rand McNally and Co., 1966, p. 31. Similarly, Elazar states: "[V]irtually all the activities of government in the 19th Century were shared activities, involving federal, state, and local governments in their planning, financing, and execution." Daniel Elazar, "Federal-State Collaboration in the Nineteenth Century United States," in *American Federalism in Perspective*, ed. by Aaron Wildavsky, Boston, MA, Little, Brown and Co., 1967, p. 192. See also Daniel Elazar, *The American Partnership*, Chicago, IL, University of Chicago Press, 1962.

[17] U.S. Congress, Senate, "The Condition of American Federalism," pp. 2–12.

[18] For example, there was nearly a five-fold increase in the amount of federal grants between 1932 and 1934. U.S. Department of Commerce, Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1957*, Washington, DC, U.S. Government Printing Office, 1961, p. 726.

[19] Grodzins, *The American System*, *op cit*, pp. 13, 14.

[20] William Anderson, *The Nation and the States, Rivals or Partners?* Minneapolis, MN, University of Minnesota Press, 1975, p. 48.

[21] Carl Friedrich, *Constitutional Government and Democracy*, Waltham, MA, Blaisdell Co., 1968, p. 223.

[22] Anderson, *op. cit.*, pp. 149–50.

[23] *Ibid.*, p. 148.

[24] *Ibid.*, p. 149.

[25] S. Rufus Davis, *The Federal Principle*, Berkeley, CA, University of California Press, 1978, p. 202.

[26] Franz Neuman, "Federalism and Freedom: A Critique," in *Federalism: Mature and Emergent*, ed. by Arthur MacMahon, New York, NY, Doubleday, 1955, p. 54.

[27] Friedrich, *op cit.*, p. 193.

[28] See, for instance, William Livingston, *Federalism and Constitutional Change*, New York, NY, Oxford University Press, 1956.

[29] William Riker, *Federalism: Origin, Operation, Significance*, Boston, MA, Little, Brown and Co., 1964.

[30] This point is made explicitly by Michael Reagan, *The New Federalism*, New York, NY, Oxford University Press, 1972. It is also implicit in the gradual substitution of the term "intergovernmental relations" for American "federalism."

[31] Daniel Elazar, "Federalism," in *International Encyclopedia of the Social Sciences*, Vol. 5, ed. by David Sills, New York, NY, MacMillian Co. and Free Press, 1968, p. 353.

[32] See Volume I of this study.

[33] See Grodzins, *The American System*, *op. cit.*, and Riker, *Federalism*, *op. cit.*

[34] Valerie Earle, ed., *Federalism: Infinite Variety in Theory and Practice*, Itasca, IL, Peacock, 1968.

[35] "Federalism . . . is not very significant as an institution." William Riker, "Federalism," in *Handbook of Political Science*, Vol. 5, ed. by Greenstein and Polsby, Reading, MA, Addison-Wesley, 1975, p. 159.

[36] Although one of the architects of the concept of cooperative federalism, Daniel Elazar appears to have reached a similar conclusion in recent years. He writes that: "The very promulgation of the theory of cooperative federalism has apparently had unanticipated consequences. . . . Once the idea that the federal government could act in any area as it willed became accepted as the norm under the theory of cooperative federalism, no further justification was needed. . . . Apparently the old theory of dual federalism was functional . . . as a Constitutional constraint of a kind. With its abandonment came an abandonment of all restraint." Daniel Elazar, "Cursed by Bigness on Toward a Post Technocratic Federalism," *Publius* 3, Fall, 1973, pp. 245–46.

[37] Samuel Huntington demonstrates that this logic lay behind Jefferson's advocacy of noncentralized governmental activity. Explaining Jefferson's position, Huntington writes: "A consolidated government is necessarily removed from the people and popular control. To be effective, the latter must be felt throughout the range of governmental activity, not just at a single focal point. Local units of government are naturally more responsive to the popular will, and hence they should perform all governmental functions which they are capable of performing." Samuel Huntington, "The Founding Fathers and the Division of Powers," in *Area and Power*, ed. by Arthur Maass, Glencoe, IL, The Free Press, 1959, p. 163.

[38] Elements of this argument have been advanced by a number of classical political philosophers, including Plato, Aristotle, Montesquieu, Rousseau, and Tocqueville. Recent critiques of the relationship between localism and democracy can be found in the works of Morton Grodzins, William Anderson, Grant McConnell, and E.E. Schattschneider. Among empirical analyses which deal with this subject, a fairly comprehensive one is Robert Dahl and Edward Tufte, *Size and Democracy*, Stanford, CA, Stanford University Press, 1973.

[39] The term is taken from Patrick Riley, "The Origins of Federal Theory in International Relations Ideas," *Polity*, Fall 1973.

[40] Montesquieu, extracts from *The Spirit of the Laws*, Book VIII in *The Great Political Theories*, ed. by Michael Curtis, New York, NY, Avon Books, 1961, pp. 395–96.

[41] *Ibid.*, p. 396.

[42] *Ibid.*

[43] Huntington, *op. cit.*, p. 163.

[44] Quoted in Walter Bennett, *American Theories of Federalism*, Birmingham, AL, University of Alabama Press, 1964, p. 90. In a letter to John Adams in 1813, Jefferson described his proposal for organizing local government in Virginia in the late 1770s: "This proposed to divide every county into wards of 5. or 6. miles square, . . . to establish in each ward a free school for reading, writing, and common arithmetic. . . . My proposition had for a further object to impart to these wards those portions of self-government for which they are best qualified, by confiding to them the care of their poor, their roads, police, elections, the nomination of jurors, administration of justice in small cases, elementary exercises of militia, in short, to have made them little republics, with a warden at the head of each, for all those concerns which, being under their eye, they would better manage than the larger republics of the county or state." Jefferson to Adams, 10/13/1813, in *The Adams-Jefferson Letters*,, ed. by Lester Cappon, New York, NY, Clarion Books, 1971, p. 390.

[45] Richard Henry Lee, "The Federal Farmer," in *The People Shall Judge: Readings in the Formation of American Policy*, Vol. I, Chicago, IL., University of Chicago Press, 1949, p. 344.

[46] *Ibid.*, pp. 331–33.

[47] President Richard Nixon, "Annual Message to Congress on the State of the Union, January 22, 1971," *Public Papers of the Presidents of the United States, Richard Nixon, 1971*, pp. 53–55.

[48] *Federalist* 9. All references are to the Mentor Book edition, introduction by Clinton Rossiter, New York, NY, New York American Library of World Literature, Inc., 1961.

[49] *Federalist* 10, p. 83.

[50] *Ibid.*

[51] Grant McConnell, *Private Power and American Democracy*, New York, NY, Vintage Books, 1966, pp. 109, 114. For somewhat similar arguments on constituency size and democracy, see E.E. Schattschneider, *The Semi-Sovereign People*, Hinsdale, IL, Dryden Press, 1960, pp. 10, 11.

[52] Morton Grodzins, "Centralization and Decentralization in the American Federal System," in *A Nation of States*, ed. by Robert Goldwin, Chicago, IL, Rand McNally and Co., 1963, pp. 9, 10. This point is discussed at more length in Grodzins, *The American System, op. cit.* See also William Anderson, *op. cit.*

[53] Austin Ranney and Willmoore Kendall, *Democracy and the American Party System*, New York, NY, Harcourt, Brace and Co., 1956, p. 81.

[54] V.O. Key, *Public Opinion and American Democracy*, New York, NY, Alfred A. Knopf, 1961, p. 432.

[55] McConnell, *op. cit.*, pp. 367–68.

[56] See, for example, Richard Leach, *American Federalism*, New York, NY, Norton, 1970, p. 124. This is not necessarily true of party organizations, however.

[57] M. Kent Jennings and Harmon Zeigler, "The Salience of American State Politics," *American Political Science Review*, 64, 1970, pp. 523–34. Also, Jennings, "Pre-adult Orientations to Multiple Levels of Government," *Midwest Journal of Political Science*, August, 1967, pp. 291–317.

[58] Mavis Mann Reeves and Parris Glendening, "Areal Federalism and Public Opinion," *Publius*, Spring, 1976, p. 145.

[59] Sidney Verba and Norman Nie, *Participation in America*, New York, NY, Harper and Row, 1972, p. 31. Also, Dahl and Tufte, *Size and Democracy, op. cit.*, p. 57.

[60] Alexis deTocqueville, *Democracy in America*, ed. by J.P. Mayer, Garden City, NY, Anchor Books, 1969, pp. 63, 70.

[61] Dahl and Tufte, *op. cit.*, pp. 53–61.

[62] *Ibid.*, p. 65.

[63] Samuel Beer, "Federalism, Nationalism, and Democracy in America," *American Political Science Review*, 72, 1978, p. 15.

[64] The political justifications for federalism and pluralism overlap considerably at the level of basic values. However, federalism is not a central focus of most pluralistic literature, which deals primarily with cultural and functional divisions in government and society. This may reflect its early origins in European corporatist thought. See, for an example, William Kornhauser, *The Politics of Mass Society*, Glencoe, IL, Free Press, 1959.

[65] Martin Heisler writes that increased ethnic divisions in Belgium have produced movement toward federalism: "Not until recently did a massive ethno-cultural cleavage between Flemings, Walloons, and . . . residents of . . . Brussels become politically salient. . . . (T)he response to the ethnic cleavage has been . . . to decentralize: Belgium has moved from a unitary to a federal regime in the past decade." Martin Heisler, "Managing Ethnic Conflict in Belgium," *Annals*, 443, September 1977, p. 32.

[66] Eric Nordlinger, *Conflict Regulation in Divided Societies*, Cambridge, MA, Center for International Affairs, 1972, p. 31. See also Ivo Duchacek, *Comparative Federalism: The Territorial Dimensions of Politics*, New York, NY, Holt, Rinehart, Winston, 1970.

[67] This is the problem of minorities within minorities, highlighted recently by the situation of British Canadians in Quebec.

[68] Nordlinger, *op. cit.*, p. 31.

[69] Riker, *Federalism: Origin, Operation, Significance*, *op. cit.*, p. 155.

[70] Elazar, "Federalism," *op. cit.*, p. 354.

[71] See numbers 10, 46, and 51 for example.

[72] For a general defense of pluralism as a safeguard against totalitarianism, see Kornhauser, *op. cit.*

[73] Riker, *Federalism: Origin, Operation, Significance*, *op. cit.*, p. 140.

[74] Neumann, *op. cit.*, pp. 54, 55.

[75] Reagan, *op. cit.*, p. 159.

[76] Mill, *op. cit.*, p. 247.

[77] David Truman, *The Governmental Process*, 2nd ed., New York, NY, Knopf, 1971, p. 507.

[78] E.E. Schattschneider, *The Semi-Sovereign People*, *op. cit.*, p. 34. See also McConnell, *Private Power and American Democracy op. cit.*

[79] Verba and Nie, *op. cit.*, pp. 236–39.

[80] Despite its common denomination as "fiscal federalism," it is important to recognize that rational choice theory is not confined to the economic or fiscal affairs of government. Rather, it is a comprehensive political theory pertaining to government as a whole which is founded on economic concepts of human and organizational behavior.

[81] Wallace Oates, *Fiscal Federalism*, New York, NY, Harcourt, Brace, Jovanovich, 1972, p. 19.

[82] *Ibid.*, pp. 8, 9. See also Paul Samuelson, "The Pure Theory of Public Expenditure," *Review of Economics and Statistics*, 36, November, 1954, pp. 387–89. The degree to which a public good is "pure" will be an issue in determining the welfare gains from decentralization.

[83] Oates, *Fiscal Federalism, op. cit.*, p. 12.

[84] *Ibid.* See also Charles Tiebout, "A Pure Theory of Local Expenditures," *Journal of Political Economy*, October, 1956, pp. 416-24.

[85] Mancur Olson, Jr., "The Principle of 'Fiscal Equivalence': The Division of Responsibilities Among Different Levels of Government," *American Economic Review*, 59, May, 1969, pp. 479–87.

[86] *Ibid.*, 482.

[87] *Ibid.*

[88] For example, see Oates, *Fiscal Federalism, op. cit.*, pp. 4–11, 31–33.

[89] *Ibid.*, p. 223.

[90] Olson, "The Principle of 'Fiscal Equivalence'," *op. cit.*, p. 483.

[91] Wallace Oates, "An Economist's Perspective on Fiscal Federalism," in *The Political Economy of Fiscal Federalism*, ed. by Wallace Oates, Lexington, MA, D.C. Heath and Co., 1977, p. 6.

[92] *Ibid.* See also Olson, "The Principle of 'Fiscal Equivalence'," *op. cit.*, p. 485.

[93] *Ibid.*, pp. 485, 486. See also George Break, *Intergovernmental Fiscal Relations in the United States*, Washington, DC, The Brookings Institution, 1967, chapter 3.

[94] Oates, "An Economist's Perspective on Fiscal Federalism," *op. cit.*, p. 6.

[95] Oates, *Fiscal Federalism, op. cit.*, p. vi. (original emphasis).

[96] Alan Campbell, "Functions in Flux," in Advisory Commission on Intergovernmental Relations, *American Federalism: Toward A More Effective Partnership*, A report of, and papers from the National Conference of American Federalism in Action, Washington, DC, February 20–22, 1975, Washington, DC, U.S. Government Printing Office, 1975, p. 36.

[97] Break, *Intergovernmental Fiscal Relations, op. cit.*, p. 62. Oates writes that: "There will probably be increased centralization in a number of areas; in particular, the analysis presented here points to a continued trend toward greater centralization of essentially redistributive programs." *Fiscal Federalism, op. cit.*, p. 240. See also pp. 222–29.

[98] *Ibid.*, p. 237.

[99] *Ibid.*, p. 35. (original emphasis). Oates, himself, acknowledges that, "The Theorem establishes a presumption in favor of decentralized finance," p. 37.

[100] Olson writes that: "There is a case for every type of institution from the international organization to the smallest local government." Olson, "The Principle of 'Fiscal Equivalence'," *op. cit.*, p. 483.

[101] *Ibid.*, p. 484.

[102] See, for example, Tiebout, "Pure Theory," *op. cit.*; Robert Bish, *The Public Economy of Metropolitan Areas*, Chicago, IL, Markham Pub. Co., 1971; and Vincent Ostrom, *et al.*, *op. cit.*, "The Organization of Government in Metropolitan Areas: A Theoretical Inquiry," *American Political Science Review*, December 1961, pp. 832–42.

[103] Vincent Ostrom, *The Intellectual Crisis of American Public Administration*, Birmingham, AL, University of Alabama, 1973; James Buchanan, "Why Does Government Grow?" in *Budgets and Bureaucrats*, ed. by Thomas Borcherding, Durham, NC, Duke University Press, 1977; and William Niskanen, *Bureaucracy and Representative Government*, Chicago, IL, Aldine-Atherton, 1971.

[104] Oates, *Fiscal Federalism, op. cit.*, pp. 17, 18.

[105] Werner Pommerehne, "Quantitative Aspects of Federalism: A Study of Six Countries," in Oates, ed., *The Political Economy of Fiscal Federalism, op. cit.*, p. 275.

[106] Samuel Beer, "A Political Scientist's View of Fiscal Federalism," in *ibid.*, p. 27.

[107] Olson, *op. cit.*, p. 483.

[108] Oates, "An Economist's Perspective of Fiscal Federalism," *op. cit.*, p. 6. (original emphasis).

[109] Roland McKean, "The Use of Shadow Prices," in *Problems of Public Expenditure Analysis*, ed. by Samuel Chase, Washington, DC, The Brookings Institution, 1966, p. 54.

[110] *Ibid.*, pp. 64, 65.

[111] Olson, *op. cit.*, p. 486.

[112] Oates, *Fiscal Federalism, op. cit.*, pp. 18, 19, 37, 38.

[113] For example, see Olson, "The Principle of 'Fiscal Equivalence', *op. cit.*" See also Break, *Intergovernmental Fiscal Relations, op. cit.*, p. 71, and *Chapter 4* of this volume.

[114] Oates, "An Economist's Perspective of Fiscal Federalism," *op. cit.*, pp. 6–9.

[115] Samuel Beer, "A Political Scientist's View of Fiscal Federalism," *op. cit.*, pp. 41, 42.

[116] Robert Reischauer, "Governmental Diversity: Bane of the Grants Strategy in the United States," in Oates, *The Political Economy of Fiscal Federalism, op. cit.*, p. 126. See also David Beam, "Economic Theory as Policy Prescription: Pessimistic Findings on 'Optimizing' Grants," paper prepared for the Annual Meeting of the American Political Science Association, Washington, DC, August 31, September 3, 1978.

[117] See J. Stefan Dupre, "Intergovernmental Relations and the Metropolitan Area," in *Metropolitan Problems in International Perspectives*, ed. by Simon Miles, 1970, and Campbell, "Functions in Flux," *op. cit.*

[118] Dupre, *op. cit.*, p. 364.

[119] Break, *Intergovernmental Fiscal Relations, op. cit.*, p. 71.

[120] Olson, *op. cit.*, p. 484; and Dupre, *op. cit.*, pp. 354, 356.

[121] Beer, "A Political Scientist's View of Fiscal Federalism," *op. cit.*, p. 33. See also Dupre, *op. cit.*, pp. 358–60.

[122] See for example, Robert Bish, *The Public Economy, op. cit.*, and recent works by Elinor Ostrom.

[123] On this point, Breton and Scott have been particularly active. In fact, in assigning intergovernmental functions, they emphasize the varied distribution of governing costs (voter information, coordination) over presumed advantages of government levels. Albert Breton and Anthony Scott, *The Economic Constitution of Federal States*, Toronto, Canada, University of Toronto Press, 1978.

[124] In fact, Robert Bish discounts the value of such assignments altogether in "Economic Theory, Fiscal Federalism, and Political Federalism," a paper prepared for the 1977 meeting of the American Political Science Association, Washington, DC, September 1–4. In contrast, Breton and Scott consider assignment of functions "the basic question" in the theory of federalism. Breton and Scott, *The Economic Constitution of Federal States, ibid.*, p. 41.

[125] See, for example, Leonard White, *Introduction to the Study of Public Administration*, New York, NY, MacMillan Co., 1948, p. 5.

[126] This is notably evident with respect to the governance of metropolitan areas. Public choice literature has prominently argued the merits of governmental fragmentation, in providing consumer choice, public service competition, and jurisdictional coincidence with externalities. Public administration literature, on the other hand, has tended to stress the advantages of metropolitan government in achieving areawide coordination, professionalized services, and metropolitan tax-base sharing.

[127] George C.S. Benson, *The New Centralization: A Study of Intergovernmental Relationships in the United States*, New York, NY, Farrar and Rinehart, 1941, pp. 12, 13.

[128] Testimony of Garth Magnum before the House Committee on Education and Labor, *The Manpower Act of 1969, Hearings before the Select Subcommittee on Labor*, 91st Cong., 2d sess., p. 451. Similarly, Charles Gilbert and David Smith write that: "So far as the administrative and regulatory activities of the states are concerned it can certainly be argued that administration and decisionmaking at the state level help to avert central overload in a central government that can hardly afford more difficulties of coordination and accountability than it suffers now." Charles Gilbert and David Smith, "The Modernization of American Federalism," in *Modernizing American Government*, ed. by Murray Stedman, Englewood Cliffs, NJ, Prentice-Hall, 1968, p. 130.

[129] See the President's Committee on Administrative Analysis, *Administrative Management in the Government of the United States*, January, 1937. See also James Fesler, *Area and Administration*, Birmingham, AL, University of Alabama, 1949, p. 51; and Procter Thomsen, "Size and Effectiveness in the Federal System: A Theoretical Introduction," in *Essays in Federalism*, Institute for Studies in Federalism, Claremont, CA: Claremont Men's College, 1961, pp. 184–85.

[130] Fesler, *op. cit.*, p. 16; and Arthur MacMahon, *Delegation and Autonomy*, Bombay, India, Asia Publishing House, 1961, p. 17. A more detailed analysis of this can be found in Arthur Maass, "Division of Powers: An Areal Analysis," in *Area and Power: A Theory of Local Government*, ed. by Arthur Maass, Glencoe, IL, The Free Press, 1959.

[131] Fesler, *op. cit.*, pp. 51, 52.

[132] *Ibid.*, p. 25 (original emphasis).

[133] *Ibid.*, p. 46. Elsewhere Fesler writes: "There can be no satisfactory adjustment of function and area that is not rooted in the need for vital, healthy democratic government at all three levels—national, subnational, and local, for each level and its corresponding governmental area have unique importance. . . . This approach runs contrary to the advocacy of centralization based on the superior administrative efficiency of central governments;" *ibid.*, p. 29.

[134] See *Federalist* 1 and 4.

[135] *Federalist* 14, p. 102. George Benson writes that: "When Madison said [this] . . . he was by no means pacifying his opponents. Every ardent antifederalist realized too clearly the difference between political and administrative decentralization to accept, as a substitute for the former, a system based on the expediency of breaking down a large area into more workable units of control." *The New Centralization*, p. 9.

[136] Thomas Jefferson, "Letter to Gideon Granger, 1800," in Thomas *Jefferson on Democracy*, ed. by Saul K. Padover, New York, NY, New American Library, 1939, p. 30.

[137] Mill, *op. cit.*, p. 247.

[138] Quoted in Dupre, *op. cit.*, pp. 350, 351.

[139] Fesler writes that: "If the jack-of-all-trades has become as limited in value in government as in our division-of-labor industrial life, the impulse to bigness is as characteristic of government as of industry." *Area and Administration*, *op. cit.*, p. 25. Procter Thomsen argues, however, that: "The advantages of large scale operation are far less considerable for public than for private organizations, whilst the disadvantages apply with equal force to both." "Size and Effectiveness in the Federal System," *op. cit.*, p. 194.

[140] Maass, *op. cit.*, p. 11. See also Gerald E. Caiden, *The Dynamics of Public Administration*, New York, NY, Holt, Rinehart and Winston, Inc., 1971, chapter 6.

[141] MacMahon, *Delegation and Autonomy*, *op. cit.*, pp. 7, 8.

[142] Beer, "The Modernization of American Federalism," *op. cit.*, p. 79.

[143] James Mooney, "The Principles of Organization," quoted in Harold Seidman, *Politics, Position, and Power*, New York, NY, Oxford University Press, 1970, p. 169.

[144] For example, see Charles Lindblom, *The Intelligence of Democracy: Decisionmaking Through Mutual Adjustment*, New York, NY, MacMillan, 1965.

[145] Vincent Ostrom, *The Intellectual Crisis of American Public Administration*, Birmingham, AL, University of Alabama, 1973, pp. 34, 35. As MacMahon writes: "The tasks of governments today . . . involve specialization and subdivision of labour in new ways among individuals, occupational groups, and also among localities, regions, and far-distant countries. Subdivision of labour, in turn, leads to increasing interdependence. . . . The need for coordination of some kind is the imperative corollary when subdivision is attended by interdependence." *Delegation and Authority*, *op. cit.*, p. 3.

[146] An excellent discussion of these countervailing tendencies can be found in Thomsen, "Size and Effectiveness in the Federal System," *op. cit.*

[147] Fesler, *Area and Administration*, *op. cit.*, p. 44.

[148] Ostrom, *op. cit.*, p. 34.

[149] *Ibid.*, p. 114.

[150] See Dimock and Dimock, *Public Administration*, New York, NY, Holt, Rinehart and Winston, 1969, p. 90; and Don K. Price, "Democratic Administration," in *Elements of Public Administration*, ed. by Fritz Moorstein Marx, Englewood Cliffs, NJ, Prentice Hall, 1959, p. 82; and George Graham, "Essentials of Responsibility," in *ibid.*, pp. 468, 469.

[151] Maass, *op. cit.*, p. 19.

[152] For instance, Fesler's study, which is the most extensive one, focuses largely on administrative decentralization.

[153] Robert Levine, "Rethinking Our Social Strategies," quoted in Alice Rivlin, *Systematic Thinking for Social Action*, Washington, DC, Brookings Institution, 1971, p. 124.

[154] Bernard Frieden and Marshall Kaplan, *The Politics of Neglect*, Cambridge, MA, MIT Press, 1975, pp. 237–38.

[155] Mill, *op. cit.*, p. 248.

[156] MacMahon, *op. cit.*, p. 46.

[157] Fesler, *op. cit.*, pp. 132, 133.

[158] As legal creatures of the states, and certainly in operation, cities, counties, and many special districts must be included here as well.

[159] See Elazar, "Is Federalism Compatible With Prefectorial Administration," *op. cit.*

[160] In practical terms, the disjunction between administrative theory and federalism has been highlighted by the growing literature on policy implementation. Investigating the administrative difficulties of the Title I educational grant program, Jerome T. Murphy wrote that: "The primary cause . . . is political. The federal system—with its dispersion of power and control—not only permits but encourages the evasion and dilution of federal reform, making it nearly impossible for the federal administrator to impose program priorities: those not diluted by Congressional intervention, can be ignored during state and local implementation." Jerome T. Murphy, "Title I of ESEA: The Politics of Implementing Federal Education Reform," *Harvard Educational Review*, February, 1971, p. 60.

[161] H.H. Gerth and C. Wright Mills, *From Max Weber: Essays in Sociology*, New York, NY, Oxford University Press, 1958, pp. 211, 221–24, and Ostrom, *Intellectual Crisis*, *op. cit.*

[162] Herbert Kaufman, *The Forest Ranger: A Study in Administrative Behavior*, Baltimore, MD, Johns Hopkins University Press, 1960.

[163] Fesler, *op. cit.*, p. 41.

[164] Advisory Commission on Intergovernmental Relations, *Government Functions and Processes: Local and Areawide*, Vol. IV of *Substate Regionalism and the Federal System*, A-45, Washington, DC, U.S. Government Printing Office, 1974, p. 7.

[165] *Ibid.*

[166] *Ibid.*, pp. 15, 132.

[167] *Ibid.*, pp. 14–25.

[168] Campbell, *op. cit.*, pp. 34–37.

[169] Rivlin, *op. cit.*, pp. 123, 124.

Breakdown Of Constitutional Constraints: Interpretive Variations From The First Constitutional Revolution To The "Fourth"

I
The Foundations of American Federalism

In 1787, James Madison wrote that the proposed Constitution of the United States was "neither wholly federal nor wholly national."[1] Rather, it was a hybrid—the product, to a certain extent, of political expediency, pragmatism, and convention bargaining.

The document claimed to be the "supreme law of the land,"[2] was ratified as such, and rapidly gained a near reverential acceptance among the nation's citizens. The product of foresight, the Constitution was both flexible and timeless. The product of bargaining among a variety of political ideologies and sectional rivalries, it necessarily lacked specificity. Thus, those questions over which there existed the least fundamental agreement became the least precise components of the Constitution and foremost among such questions was the nature of the Union itself.

The result of this imprecision was a national paradox: "American federalism was a by-product of the compromises of constitution making but the Constitution quickly acquired a patina of sanctity while the federal structure became the battleground on which diverse interests competed."[3] Seventy-four years after the signing of the Constitution, the "battleground" of federalism ceased to be a metaphorical reference to intellectual sparring. Instead,

it became a tragic series of realities known variously as Sumter, Gettysburg, and Atlanta.

THE CREATION OF FEDERALISM AND UNION: DEFINITIONAL AND THEORETICAL DISCORD

In retrospect, it is hardly surprising that confusion over the powers and the proper roles of the states and central government—not to mention the nature of the Constitution itself—persisted long after the great debates of the late 1780s. The root of that confusion, the Constitutional Convention of 1787, was itself far from a harmonious meeting of like minds or similar dispositions. More important, many of the delegates held radically different views regarding the very definition of federal union—the fundamental debate centering less on variations among types of federalism than on the notion of a federal system as the term was then understood versus a system which would be "neither wholly federal nor wholly national." Thus, 18th Century federalism was synonymous with confederalism and those who came to be known as "Anti-Federalists" were, in fact, the true federalists of the time while those who were called "Federalists" were supporters of the new hybrid form.[4]

Part of this nominal confusion was probably intentionally construed. The basic notion of federalism, after all, was almost revered among Americans and, politically, it behooved any group to identify itself with the term, an exploit which the Federalists simply accomplished more quickly and with greater acumen than the Anti-Federalists. Thus, according to Martin Diamond, ". . . Hamilton's definition and discussion of federalism is, at least, incomplete, and consequently is misleading, perhaps deliberately misleading."[5] In *Federalist* 9, Hamilton attacks his opposition in the following manner:

> A distinction, more subtle than accurate, has been raised between a *confederacy* and a *consolidation* of the states. The essential characteristic of the first is said to be the restriction of its authority to the members in their collective capacities, without reaching to the individuals of whom they are composed. It is contended that the national council ought to have no concern with any object of internal administration. An exact equality of suffrage between the members has also been insisted upon as a leading feature of a confederate government. These positions are, in the main, arbitrary; they are supported neither by principle nor precedent. . . .
>
> The definition of a *confederate* republic seems simply to be "an assemblage of societies," or an association of two or more states in one state. The extent, modifications, and objects of the federal authority are mere matters of discretion. So long as the separate organization of the members be not abolished; so long as it exists, by constitutional necessity, for local purposes; though it should be in perfect subordination to the authority of the union, it will still be, in fact and in theory, an association of states, or a confederacy. The proposed Constitution, so far from implying an abolition of state governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government.[6]

However clever Hamilton's discourse, the "positions" of his opponents were not "arbitrary" but, rather, were well-grounded in the federalist thinking of the time, which defined a federation as a league exhibiting three characteristics: "government over collectives, abstinence [on the part of the center] from internal administration, and equal suffrage of the members [states]"—precisely the type of government which had existed under the ineffective Articles of Confederation.[7] Hamilton (or, more correctly, Publius),[8] therefore, had ample practical reason to undermine his opposition, a feat which he and his fellow Federalists performed deftly if not always accurately.

Having impugned the form of federalism adhered to by their opponents, the Federalists proceeded to point out the benefits of a stronger center. Foremost among such advantages was that espoused by Hamilton in *Federalist* 17, a statement permeated with more than a little irony for the 20th Century reader:

> Allowing the utmost latitude to the love of power which any reasonable man can acquire, I confess I am at a loss to discover what temptations the persons entrusted with the administration of the general government could ever feel to divest the states of the authorities of that description. The regulation of the mere domestic police of a state appears to me to hold out slender allurements to ambition. . . . It will always be far more easy for state governments

> to encroach upon the national authorities, than for the national government to encroach upon the greater degree of influence which state governments, if they administer their affairs with uprightness and prudence, will generally possess over the people; a circumstance which at the same time teaches us that there is an inherent and intrinsic weakness in all federal constitutions; and that too much pains cannot be taken in their organization, to give them all the force which is compatible with the principles of liberty.[9]

Thus, the center would have little inclination to usurp the functions of the constituent states—in fact, according to Publius, quite the opposite was true.

Nor were the form of federation and the relative strength of its parts the only questions which had to be resolved by the Convention and, afterward, by its supporters and opponents. On a more theoretical level, the very foundation or contractual (constitutional) basis of such a government, and therefore the notion of sovereignty, were also fundamental to the debate.

Of course, the Anti-Federalists—those who opposed many portions of the proposed Constitution and supported the traditional definition of federalism/confederalism—claimed that the basis of legitimate contract was an agreement among sovereign states. However, the Federalists sought to place sovereignty with the people. Madison defends the logic of this position:

> . . . [A system founded on state legislatures] in point of *moral obligation* might be as inviolable as [a system founded on the people.] In point of *political operation*, there were two important distinctions in favor of the latter. 1. A law violating a treaty ratified by a pre-existing law, might be respected by the judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the judges as null and void. 2. The doctrine laid down by the law of nations in the case treaties is that a breach of any one article by any of the parties, frees the other parties from their engagements. In the case of a union of people under one constitution, the nature of the pact has always been understood to exclude such an interpretation. Comparing the two modes [of ratifying the United States Constitution] in point of expediency . . . all the considerations which recommended this Convention in preference to Congress for proposing the reform were in favor of state conventions in preference to the legislatures for examining and adopting it.[10]

Arguments over the basis of compact were not mere rhetorical exercises nor fruitless intellectual meanderings. Indeed, determining the "authors" (the states or the people) of the compact was felt to be critical to the future of the new nation and the "best and brightest" of the Anti-Federalists countered accordingly.[11] Thereafter, the arguments having been made, they next required translation into action.

THE CREATION OF FEDERALISM AND UNION: CONVENTION POLITICS AND COMPROMISE

Because of the practical necessity of creating a real document to serve as the foundation of a real government, the ideological and political predilections of the Convention delegates were forced from the high plane of philosophic debate and into real politik dominated by bargaining and even a little stylistic obscurantism. Of the bargains, certainly the most renowned was the Great Compromise.

In large part, the Great Compromise created the "neither wholly federal nor wholly national" character of the Constitution. A settlement between the highly nationalistic Virginia Plan and the New Jersey Plan, which proposed little more than a strengthening of the Articles of Confederation, the compromise (otherwise known as the Connecticut Compromise) is generally credited with saving the Convention. Thus, the federal character of the Constitution (supported by the Anti-Federalists and a number of small state interests) was supposedly ensured by equal state representation in the upper house of Congress while the national character (supported by the Federalists and a number of large state interests) was ostensibly guaranteed by proportional representation in the lower house. However, despite its intrinsic value as a convention-saving device and its role in establishing a "constitutional character," according to Constitutional scholars, Alfred H. Kelly and Winfred A. Harbison:

> The Great Compromise did not, in fact, affect the subsequent development of the Constitutional system very profoundly. The supposed conflict between small-state interests in the Senate and large-state interests in the House failed to materialize. Nor did the Senate become the champion of the states against the

national government (The one notable exception occurred during rhe slavery controversy, when the Senate tended to become the champion of states' rights and southern sectional interests, while the House became the champion of northern nationalism and northern sectional interests) . . . [Instead, as] Madison predicted in the Convention, the great controversies of American history have been drawn along the sectional rather than interestate lines. Hence, though the Senate theoretically represents the states, the chamber has on most occasions been as nationalistic as the House, if not more so, and was divided along the same sectional lines.[12]

Article I, Section 8: The Mouse That Roared

If this representative scheme proved to be relatively unimportant in succeeding years, the intent of the delegates regarding the powers of Congress was historically more troublesome. In particular, several clauses are worth noting briefly.

Article I, Section 8 of the new Constitution set forth Congressional and, thus, national powers. By virtue of such a listing, the central national government was considered one of enumerated powers, most of which were limited in scope and quite unambiguous in meaning (See *Exhibit I*). However, two powers—added to the Constitution precisely because their exclusion from the Articles of Confederation had badly impaired the position of the Continental Congress—later were to be the sources of intense debate and increasing national power.

Under the Articles of Confederation, Congress was not allowed to levy taxes, an obvious reaction to colonial experience with Britain. Instead, it was forced to rely on state appropriations, a situation which Hamilton described as ". . . afford[ing] ample cause of mortification to ourselves, and triumph to our enemies."[13] Certainly, in this instance, the New York statesman was espousing common wisdom, for the old system of taxation was, at least, inefficient; at most, debilitating. Accordingly, the Constitution empowered Congress "To lay and collect taxes, duties, imposts, and excises. . . ;"[14] Because the major prevailing concern was that a national system of taxation might be pre-emptive, Hamilton assured the readers of the *Federalist* Papers that taxation "is manifestly a concurrent and coequal authority in the United States and in the individual states. There is plainly no expression in the granting clause which makes the power exclusive in the Union."[15]

More important in succeeding years, however, would be court interpretations of direct versus indirect taxes and their Constitutionally specified means of apportionment. Hence, Article I, Sections 2 and 9 state that *direct* taxes (early on defined as land taxes and capitations) were to "be apportioned among the several states . . . according to their respective numbers. . . ."[16] In the late 19th Century, a series of conservative court decisions (generally considered to be the product of faulty interpretation and unsound reasoning) would interpret direct taxation in such a way as to thwart the collection of a federal income tax and, contrary to judicial intentions, would eventually force a Constitutional amendment, the legal circumvention of prior judicial obstruction.

Like taxation, the Congressional power to regulate commerce was born of reaction to the chaos produced by its absence under the Articles of Confederation. "Failure to delegate to the Confederation the power to regulate interstate commerce led to disastrous 'economic wars' among the various states, and made a national commercial policy impossible."[17] That situation, in turn, made the commerce clause one of the more popular provisions in the Constitution or, at least, according to Madison, ". . . a new power . . . that seems to be an addition which few oppose and from which no apprehensions are entertained."[18] After 1787, however, what seemed clear to James Madison became successively murkier. Even more than the power to tax, the commerce clause became a Constitutional source of confusion, a phrase subject to multiple interpretations, and the vehicle through which judges would make economic policy and define the parameters of federal and state regulatory powers. In contradiction to the "Father of the Constitution," it became a power from which many apprehensions were entertained.

In addition to listing the specific functions of Congress, Article I, Section 8 contained two clauses which generalized or gave legislative scope to the enumerated powers. Thus, the first clause of Section 8 reads: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and *provide for* the common defence and *general welfare* of the United States. . . ."[19] Coming directly before the list of Congressional powers, this phrase was meant as an umbrella generalization encompassing the ensuing powers. Yet, the term, "general welfare," was viewed by some as being too vague and, perhaps, as yielding to Congress powers which were unenumerated and unintended. Such contentions were dismissed as inconsequential by Madison who seemed to view the phrase merely as a useful literary device.[20] Indeed, he viewed the enumerated powers and "the common defence and general welfare" as

Exhibit I

THE POWERS OF CONGRESS
ARTICLE I, SECTION 8 OF THE U.S. CONSTITUTION*

The Congress shall have power *to lay and collect taxes, duties, imposts and excises to pay* the debts and provide *for the* common defence and *general welfare* of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To *regulate commerce* with foreign nations, and *among the several states*, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;—And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

*Emphasis added.

the specific and general sides of the same coin. Latter-day readers of the Constitution would not be as certain.

The final clause of Section 8, "the coefficient clause," elicited even more criticism than the prior inclusion of the general welfare clause. In order to give legislative scope to the powers immediately proceeding, the framers gave Congress the power "To *make all laws which shall be necessary and proper* for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any other department or office thereof."[21] Needless to say, Constitutional critics claimed that this clause gave the national government vast and even dangerous powers since necessity and propriety were not defined. Nor, it appears, did Madison adequately explain the meaning or limits of necessary and proper. Instead, he sidestepped the issue by listing the pitfalls of deleting or changing the phrase—to the "Father of the Constitution," necessary and proper meant necessary and proper.[22]

Like Madison, Hamilton wisely refused to dwell upon precise definitions which would have reduced Constitutional flexibility and bound future generations to an 18th Century notion of necessary and proper.[23] That this was political as well as statesmanlike wisdom would become clear in the not too distant future: whether or not "Publius" realized it, Madison and Hamilton harbored vastly different notions of necessity and propriety.

Who Shall Judge? The Problem of Federalism and a National Judiciary

Any human organization or union is subject to error, misjudgment, or even chicanery, a fact of which the Convention delegates were well aware. Of course, the supporters of a strong national government feared that such "errors" would occur on the part of the states, while the states' rights advocates believed the central government to be more prone to "misjudgments." Nonetheless, the delegates did recognize the need for an arbiter of some sort. What the arbiter would be, however, and where it would be located were questions not easily resolved.

An early Convention proposal derived from the nationalistic Virginia Plan and would have given Congress the power to negate state laws which contradicted the Constitution. This Congressional negative suffered not only from the enmity of the states' rights/Anti-Federalist delegates but from a legal imbroglio as well. As the delegate from Connecticut, Roger Sherman, pointed out, any law not specifically negated by the Congress would implicitly be Constitutional whether or not, in fact, it did comply with the Constitution. In order to "right" such a "wrong principle" the Congress would have to consider every state law—a manifestly unrealistic burden even within the context of 18th Century theories of limited government.[24]

As an alternative to the Congressional negative, New Jersey Plan advocates proffered a compromise whereby federal law would be supreme but state courts would settle questions of Constitutionality. In fact, this proposal did find its way into the Constitution but in a manner which tended to obscure rather than clarify:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and *the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.*[25]

Moreover, as Kelly and Harbison point out, this apparent states' rights victory was short lived indeed:

> The supremacy clause of Article VI, inserted at the suggestion of Luther Martin, arch-champion of states' rights, later became the cornerstone of national sovereignty. This occurred because the *Judiciary Act of 1789* provided for appeals from state courts to the federal judiciary, and finally to the Supreme Court of the United States. The ultimate effect of this statute was to give the Supreme Court, an agent of the national government, the final power to interpret the extent of state and national authority under the Constitution.[26]

Thus, it appeared (and certainly was assumed by the likes of Luther Martin and William Paterson) that state courts would have ultimate authority over the Constitutionality of state laws. The Supreme Court of the United States, on the other hand, was given jurisdiction over

> . . . all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state

claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.[27]

Lower courts were not specified in the Constitution but Congress was given the power to establish inferior courts as it saw fit. The question of "who shall judge," then, was left largely unresolved—its determination would require the evolution of law and time.

Render Unto the States . . .: Reserved Powers Under the Tenth Amendment

Throughout the ratification debates, Constitutional proponents had promised the creation of a bill of rights in exchange for adoption in several states. This promise was realized in the form of the first ten amendments submitted in 1789 and ratified by 1791.[28] Until 1868, the first nine amendments did not directly pertain to federal-state relations or to the states; thus, they will be discussed in a later section. However, the Tenth Amendment to the Constitution sought to acknowledge the powers of the states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.[29]

Obviously, this was less a clarification of powers than, as Chief Justice Harlan Stone described it 152 years later, an attempt "to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers."[30]

Yet, the fact that Stone needed to address the Amendment so many years after its adoption is testament to its interpretive flexibility. To some commentators, the Amendment implied state sovereignty; to others, such as Tenth Amendment expert, Walter Berns, the implication is clearly one of national supremacy:

> . . . the meaning of the Tenth Amendment assumes importance . . . only after the essence of the state-sovereignty doctrine has been abandoned. The reason for this is almost obvious; if the states themselves were intended to be the judges of the legitimate extent of their own and federal power . . . they would not require a tenth amendment to remind them that they intended, when they established the Constitution, to set the limits to their agent's (that is, the federal government's) power. Under this condition, there would be no need for a tenth amendment. Thus, by taking a stand on the ground of the Amendment, the states-rights advocates have retreated to a second line of defense: they have conceded, whether they realize it or not, the right of the federal government, and in practice the Supreme Court, to arbitrate federal-state relations. The Tenth Amendment would make no sense as an admonition to the states. It can only be understood as an admonition to the Supreme Court that the federal government may not legitimately exercise all the powers of government.[31]

A further interpretive dilemma was caused by the absence of a single adverb. At the time of the Amendment's drafting, states' rights advocates sought to have the modifier, "expressly" inserted into the language. Under this scheme, the Amendment would have read, "The powers not *expressly* delegated. . . ." According to Kelly and Harbison, "[t]his move was blocked by Madison and other moderates as well as the nationalists all of whom believed that in any effective government 'powers must necessarily be admitted by implication.' "[32] Although the framers had specifically deleted the term "expressly," it refused to die quietly. In years to come, it would contribute to Constitutional confusion, foster bitter debate, and find its way into Supreme Court decisions designed to deny the Constitutionality of legitimate Congressional action.[33]

Clearly, even from its inception, the Constitution was no simple document. Rather, it reflected the compromises of a variety of men whose views on federal government and the relative strength of its parts were often less than perfectly compatible. Eventually it would be up to Constitutional arbiters (ultimately, the courts) to determine the intent of the framers—arbiters who themselves varied considerably over time. Thus, to Chief Justice Roger Taney, the Constitution was static:

> It speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of the framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this Court and make it the mere reflex of the popular opinion or passion of the day;[34]

while, to Chief Justice John Marshall, it was fluid and

living:

> . . . [this] Constitution [is] intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs.[35]

But, perhaps, it was best described by Charles Evans Hughes, prior to his own tenure as Chief Justice:

> We are under a Constitution, but the Constitution is what the judges say it is. . . .[36]

II
John Marshall and The National Judiciary

Few Americans, if asked to identify the greatest and most influential Chief Justice, would hesitate to answer, "John Marshall." Presiding over the Supreme Court for a record 34 years, Marshall shaped its character, ensured it of its high prestige, and so defined its role as to make it a coequal branch of government. In his own time, he was often opposed by powerful adversaries[37] but he was, nonetheless, always respected. At the very least, he created a national judiciary; at the very most, he began the process of expanding the scope of legitimate national actions.

LAYING THE GROUNDWORK: A BRIEF WORD ON THE FIRST 14 YEARS

The Federal Judiciary Act of 1789

As mentioned previously, the question of a federal judiciary was left largely unresolved by the Constitution. By default, therefore, resolution of the issue fell to the first Congress.

The *Judiciary Act of 1789* established a Supreme Court composed of a Chief Justice and five associate justices—which justices would, in turn, preside over three federal circuit courts. In addition, the act provided for a number of inferior courts—13 federal district courts. More important, however, for the future direction of the federal judiciary and the Constitutional foundation of the country, was Section 25 of the act:

> Under this section, appeals could be taken to the United States Supreme Court whenever the highest state court having jurisdiction of a case (1) ruled against the Constitutionality of a Federal treaty or law; (2) ruled in favor of the validity of a state act which had been challenged as contrary to the Constitution, treaties, or laws of the United States; or (3) ruled against a right or privilege claimed under the Constitution or federal law. In effect, this meant that appeals would be taken in all instances where the state judiciary assertedly failed to give full recognition to the supremacy of the Constitution, or to the treaties or laws of the United States, as provided by Article VI of the Constitution.[38]

Framed largely by Federalists, Section 25 gave an enormous boost to the idea of national sovereignty. Furthermore, while the act did not specifically endow the Supreme Court with the power to ultimately determine the Constitutionality of Congressional acts, "[i]t might have been considered implied . . . since decisions of state courts involving the Constitutional construction of acts of Congress might be appealed to the Supreme Court and there presumably either affirmed or reversed."[39]

The Constitution Broadly Construed: Alexander Hamilton and the Extent of Federal Power

Those who had primary control over the new government, quite naturally, were those who had been the strongest advocates of its creation within the framework of the Constitution. Among these was the first President of the United States, George Washington, and his closest advisor, Alexander Hamilton. The historical importance of Hamilton's proximity to Washington was more profound than the mere incidence of one Federalist advising another since, in a variation of an Orwellian phrase, "All Federalists were nationalists, but some were more nationalist than others." And, Alexander Hamilton was

the most nationalist of all. This fact became eminently clear in the case of the national bank and Hamilton's resultant "test" for determining Constitutionality.

In 1791, Hamilton proposed that Congress charter a national bank as a center for the federal government's income and control of its resources. While the bill managed to pass, it precipitated the first major split between Hamilton and his old Constitutional ally, James Madison. Thus, Madison was compelled to remind Hamilton that the Convention had specifically rejected a proposal which would have given Congress the power to "grant charters of incorporation." This rejection, he contended, meant that the chartering of a national bank was clearly not within the necessary and proper powers of Congress.[40]

Furthermore, President Washington requested that his fellow Virginian, Thomas Jefferson, submit to Hamilton his opinion of the case. Jefferson's construction of the Constitution was even more narrow than Madison's:

> . . . [Jefferson] denied that authority to establish a bank could be derived from either the "general welfare" or the "necessary and proper" clause. The Constitutional clause granting Congress the power to impose taxes for the "general welfare" was not of all-inclusive scope, he said, but was merely a general statement to indicate the sum of the enumerated powers of Congress. . . .
>
> With reference to the clause empowering Congress to make all laws necessary and proper for carrying into execution the enumerated powers, Jefferson emphasized the word "necessary," and argued that the means employed to carry out the delegated powers must be indispensable and not merely "convenient."[41]

Hamilton's rebuttal was strong enough to ensure establishment of a national bank and to offer a powerful precedent to those who would broadly construe Congressional powers. Hence, Hamilton contended that in addition to its enumerated powers, Congress possessed resultant powers (powers directly resulting from the enumerated powers) and implied powers. Those implied powers, stemming from the necessary and proper clause, formed the basis of his argument. In contrast to Jefferson, he asserted that "necessary often means no more than needful, requisite, incidential, useful, or conducive to. . . . The degree in which a measure is necessary can never be a test of the legal right to adopt it; that must be a matter of opinion, and can only be a test of expediency."[42]

And how does one determine the Constitutionality of a Congressional act? According to Hamilton:

> This criterion is the *end*, to which the measure relates as a *mean*. If the *end* be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that *end*, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority.[43]

Such arguments would become exceedingly important during the Chief Justiceship of John Marshall.

The Pre-Marshall Judiciary

In the 12 years which elapsed between the creation of the Union and the beginning of John Marshall's tenure as Chief Justice, three Chief Justices (one unconfirmed) presided over the high court.[44] Three early decisions were particularly significant for the future direction of federalism and the emergence of national judicial power.

The aftermath of *Chisholm v. Georgia* (1793)[45] bode ill for the power of the Supreme Court. The product of a dispute between two citizens of South Carolina and the State of Georgia, the case was brought to the Supreme Court under the terms of its original jurisdiction as stated in the Constitution. Yet, the Court's unpopular decision—finding against the State of Georgia—evoked an immediate upsurge of states' rights sentiment which, in turn, resulted in the ratification of an eleventh amendment to the Constitution. The Amendment, ratified in 1798, states that "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."[46] In years to come, the Court itself would erode the meaning of this Amendment, but, for the time being, it posed a serious threat to the emergence of a strong national judiciary.

Three years after the Court's "defeat" in *Chisholm v. Georgia*, an attempt was made (this time successful, though highly unpopular) to assert national supremacy. In the case of *Ware v. Hylton* (1796),[47] a Virginia statute, contradictory to the terms of the Treaty of Paris, was struck down and national supremacy vis-a-vis treaty obligations asserted.

Finally, in the same year, the Court agreed to hear an historically oft-forgotten case involving the Constitutionality of a tax enacted by Congress. The fact that the justices, in *Hylton v. United States* (1796),[48] found in

favor of the Congressional act is less important than the unrealized and unanticipated precedent which was set. Thus, the case preceded *Marbury v. Madison* in assuming that the Supreme Court possessed the authority to judge a Congressional law. Though his own decision was bolder and more clearly definitive, the great Chief Justice Marshall had his own precedent for claiming the right of judicial review.

Judicial Interpretation vs. State Interposition: The *Alien and Sedition Acts* and the Virginia and Kentucky Resolutions

Unfortunately for national peace of mind, the ratification of the Constitution did little to squelch arguments over the proper spheres of authority between the center and the states. Quite the contrary, such contentions remained critical to almost every practical and theoretical aspect of national life until at least the Civil War; at most, the end of the Great Depression. Throughout much of the nation's history, federalism has been a determinative factor.

One of the first great post-Constitutional debates to occur along federal lines centered around the infamous *Alien and Sedition Acts of 1978*. Aimed at France and French nationals, the *Alien Act* authorized the deportation of foreigners felt to be dangerous to the security of the United States. More Constitutionally questionable, however, was the *Sedition Act,* which made it high misdemeanor to falsely or maliciously defame Congress, the President, or the government of the United States. Even worse was the blatantly political use to which the act was put—often used as a means of punishing political enemies of the Adams Administration and of the Federalists generally.[49] Throughout, the Federalist-dominated judiciary refused to allow a test of the act's Constitutionality. Thus, tacitly, the national judiciary interpreted the *Alien and Sedition Acts* as permissible under the Constitution.

In response, Madison and Jefferson (acting for Virginia and Kentucky respectively) began formulating the notion of state interposition. The concept had far reaching implications.

> The [Virginia and Kentucky] Resolutions were meant to be protests against the *Alien and Sedition Acts* passed in 1798 by a Federalist-dominated Congress, but they contained statements of much more general import. In the Virginia Resolutions, Virginia's General Assembly declared that it viewed the powers of the central government as resulting from the "compact" to which the states were "parties," and that "in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact," the states had the right and were duty bound "to interpose, for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights, and liberties appertaining to them." In the Kentucky Resolutions it was declared that each state had acceded to the "compact" of union as a state and was an "integral party," that the government created by the "compact" was not made "the exclusive or final judge of the extent of the powers delegated to itself," and that "as in all other cases of compact, among private parties having no common judge, each party has an equal right to judge for itself, as well as of infractions, as of the mode and measure of redress."[50]

Although Virginia's and Kentucky's fellow states did not respond to their rallying cry, the concept of state interposition was to remain important. Years later, it would be articulated—in far more extreme form—by a South Carolinian, John C. Calhoun.

The Decline of the Federalists—But not Quite

In 1800 the Federalists lost both the Presidency and Congress. The reasons for their defeat were manifold and complex including a national division—precipitated by the French Revolution—over the rights of unpropertied masses (a group clearly distasteful to the Federalists) versus those of the propertied classes; the supervening rise of a genuine opposition party, the Democratic Republicans; increasing divisions within the Federalist ranks; and the death of the Federalists' popular and beloved leader, George Washington. Moreover, states' rights advocates had seen their ideas gain ascendancy over the strong nationalism of the Federalists and had successfully employed the ill-conceived and unpopular *Alien and Sedition Acts* to their advantage. Yet, despite this defeat (a defeat from which the Federalists never recovered), in the twilight of his administration, President Adams played a trump card of extreme and protracted significance. In February of 1801, Adams appointed John Marshall to the Chief Justiceship of the Supreme Court.

JOHN MARSHALL AND CONSTITUTIONAL NATIONALISM

The Opening Wedge: Establishing the Judiciary's Right to Review

Though certainly not his most significant case from the standpoint of federalism and national powers, John Marshall's decision in *Marbury v. Madison* (1803)[51] was a landmark for the functional independence of the national judiciary. Among the most politically astute of his contemporaries, Marshall imbued his court with potentially vast powers, while managing to temporarily mollify his rivals, President Jefferson and Secretary of State Madison. Thus, he refused to issue a Writ of Mandamus on behalf of the plaintiff, William Marbury, to Secretary James Madison on the grounds that Section 13 of the *Judiciary Act of 1789*, which allowed the Court to issue such writs to officials, was unconstitutional. Going a critical step further than Justice Paterson in *Hylton v. United States*, Marshall asserted:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the court must decide on the operation of each.[52]

For the first time, the Court had declared an act of Congress unconstitutional and had definitively affirmed its right to do so. Yet, the impact of *Marbury v. Madison* (like so many other "Constitutional landmarks") was muted for years to come. Marshall's decision to rule in favor of his political opponents and his failure to declare any other act of Congress unconstitutional throughout the remainder of his Chief Justiceship, gave the case far more potential rather than immediate importance. The lack of immediacy was, no doubt, fortuitous (allowing the Chief Justice a great deal of latitude among his "enemies"); the potential would be realized repeatedly.

Power by Implication: "Let the End be Legitimate"

In 1819, Marshall made his most important contribution to federalism and Constitutional construction. In *McCulloch v. Maryland* (1819),[53] the Chief Justice expounded in Hamiltonian breadth on the scope of federal powers and national supremacy. No narrow constructionist, Marshall viewed the Constitution as flexible, providing the national legislature with unspecified means to carrying out its Constitutional duties. Marshall's interpretation in *McCulloch v. Maryland* of the necessary and proper clause of the Constitution was one of the most, if not the most, significant Constitutional statements of all time. It vastly expanded the potential realm of the national government within the federal system and denied the existence of strict limitations on the Congressional role. The decision is worth quoting at length:

> . . . [T]here is no phrase in the [Constitution] which . . . requires that everything granted shall be expressly and minutely described. . . .
>
> . . . [T]he Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on government, to general reasoning. To its enumerated powers is added, that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States. . . .
>
> . . . We admit, as we all must admit, that the powers of government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which shall enable the body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional. . . .[54]

Having established the doctrine of implied national powers, Marshall went on to powerfully and clearly state the principles of national supremacy:

> . . . [T]he Constitution and the laws made in pursuance thereof are supreme . . . they control the constitution and the laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries. . . . These are, 1st. That a power

to create implies a power to preserve; 2d. The power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and preserve; 3d. That where this repugnancy exists, that the authority which is supreme must control, not yield to that over which it is supreme. . . .

. . . [*T*]*he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general government.* This, we think, the unavoidable consequence of that supremacy which the Constitution has declared. . . .[55]

The Commerce Power: "Something More"

Five years after its McCulloch decision, the Court gained the opportunity to consider the implications of the interstate commerce clause. In the case of *Gibbons v. Ogden* (1824),[56] Marshall was compelled to address four crucial questions of significant breadth. First, what is commerce? Ogden's counsel and a great deal of prevailing opinion had reduced it to its lowest common denominator, traffic. But Marshall rejoined,

> . . . Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. . . .[57]

Second, to what extent did the power of Congress to regulate commerce reach? Ogden and states' rights advocates demanded that it was confined to the external boundaries of any given state. Marshall, however, countered that,

> . . . The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior. . . .[58]

Third, should the Constitution in general be construed narrowly or broadly? The feeling outside the Court (now increasingly coming under attack) held that the Constitution was subject to precise and narrow construction. The Chief Justice left no doubt as to his opinion on this sensitive subject:

> Powerful and ingenious minds, taking as postulates that the powers expressly granted to the government of the Union, are to be contracted by construction into the narrowest possible compass, and that the original powers of the states are retained, if any possible construction will retain them, may, by a course of well-digested but refined and metaphysical reasoning founded on these premises, explain away the Constitution of our country, and leave it a magnificent structure indeed, to look at, but totally unfit for use. . . .[59]

In contrast to the judicial intrepidation and clarity which had characterized his answers to the foregoing questions, Marshall was apparently unable to adequately address the question of concurrent powers over commerce. Thus, he strongly stated that the Congressional power was complete but failed to say whether it was preemptive:

> . . . what is this power?
>
> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . .[60]

Marshall's decision not to address concurrency or exclusivity did little to rob *Gibbons v. Ogden* of its extreme historical/Constitutional significance. Moreover, in this instance, the facts and parties to the case contributed to its acceptance and, probably, to its eventual widespread and longterm importance. By 1824, nearly every word that John Marshall uttered was coming under attack. Certainly, the political and popular tides were increasingly turning toward narrow Constitutional construction and states' rights—the polar opposites of Marshall's broad construction and nationalism. Thus, by all rights, the Court's broad interpretation of the national commerce power should have met with extreme anti-national sentiment and resistance. Circumstances, however, made it one of Marshall's most popular decisions. His ruling against Aaron Ogden's steamboat monopoly met with acclaim and apparently over-shadowed the broader implications. According to Kelly and Harbison, this had important economic as well as Constitutional implications:

The broader significance of *Gibbons v. Ogden* became evident only with the passage of time. Steamboat navigation, freed from the restraint of state-created monopolies, both actual and potential, increased at an astonishing rate. Within a few years, steam railroads, encouraged by the freedom of interstate commerce from state restraints, were to begin a practical revolution of internal transportation. The importance of national control of commerce in the rapid economic development of the country is almost incalculable. For many years after 1824 Congress enacted but few regulatory measures, and commerce was thus free to develop without serious monopolistic or governmental restraint. The Constitutional result of this situation was that the Supreme Court became a virtual collaborator with Congress in the regulation of foreign and interstate commerce.[61]

By 1835, when John Marshall died, the forces of decentralization were predominant. Jeffersonian Republicanism and the first waves of Jacksonian Democracy were far more descriptive of the national frame of mind than was Marshall's Federalist nationalism. Within 30 years, Marshallian centralism would give way to extreme sectionalism, states' rights, and, eventually, secession. Yet, his contribution to the Constitutional shape of federalism and the scope of national power survived Jefferson's theory of state interposition and Calhoun's theory of nullification.

Marshall attributed to the national legislature broad, unspecified "means to ends," he expanded its most significant enumerated power, and he definitively asserted the supremacy of the nation over the states. To this end, he undoubtedly made his most important contribution: he made it clear that the Constitution was the purview of the people rather than the states; that it was a document of union rather than confederation.

III
From Jefferson to Calhoun: The Constitution and States' Rights

The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric. They are construing our Constitution from a coordination of a general and special government to a general and supreme one alone. This will lay all things at their feet. . . .

An opinion is huddled upon in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning. . . .

A judiciary independent of a king or executive alone, is a good thing; but independent of the will of the nation is a solecism, at least in a republican government.[62]

Written in 1820, the quotation noted above clearly referred to the Supreme Court of the United States and its Chief Justice. Nor was the author some alienated firebrand or disappointed litigant. Rather, he could number himself among the most popular leaders in the nation, among the most astute and successful politicians, and among the greatest thinkers of his time. He was Thomas Jefferson and his nemesis was John Marshall. Moreover, Jefferson, his contemporary allies, and his philosophical successors (many of whom, it should be noted, used Jefferson's ideas quite selectively) probably reflected the predominant national thinking more accurately than did the Marshall Court.

Before examining the prevailing states' rights opinion, an historical aside is necessary. It would be a mistake to so simplify American history or the ongoing Constitutional debate as to assume a perfect dichotomy of interests (a point which will become clearer later in the text). In fact,

> . . . the struggle from the Philadelphia Convention to the battlefield of Appomattox was [not] a simple and ever-present contest between capitalistic nationalists and agrarian champions of states' rights. At one time or

another every major economic interest, every geographical section, and almost every state, expounded a theory of states' rights to justify its opposition to the prevailing policies of the federal government. Likewise, every interest, section, and state supported some federal measures of a strongly nationalistic character, and practically every state eventually went on record in condemnation of what it considered an excessive states' rights position of a sister state. Much depended upon the particular issue involved and upon which political, economic, or sectional group was in control of the federal government.[63]

STATES' RIGHTS IN THE ERA OF JEFFERSONIAN REPUBLICANISM

The great Jeffersonian states' rights deposition, the Kentucky Resolutions, and its Madisonian complement, the Virginia Resolutions, have already been noted. Prepared prior to the Federalist defeat of 1800 (a Republican victory which Jefferson delighted in calling the "Revolution of 1800"),[64] the central thesis of the resolutions— that the "states alone were parties to the Constitution"[65]—remained the basis of all states' rights arguments throughout the period of Jeffersonian agrarian republicanism and beyond. This assertion of the state contractual basis was equally as important in the writings of a number of Jefferson's contemporaries and, like the state interposition doctrine (the result of opposition to the *Alien and Sedition Acts*), the chief instigation for states' rights polemics during the period remained jurisdictional disputes—national laws or courts versus state assumptions of sovereignty.

Ironically, although this thesis was created and employed most successfully by the Jeffersonians, it was also used by states opposed to certain measures for which the Jefferson and Madison administrations were primarily responsible. Thus, it was the New England states—the last remaining stronghold of the Federalists—which often utilized the states' rights arguments for their own political advantage. In protest over the calling of the state militia during the War of 1812 without the state's authority, the Connecticut legislature declared:

> . . . It must not be forgotten, that the State of Connecticut is *a free sovereign and independent state;* that the United States are a confederacy of states; that we are a confederated and not a consolidated republic. The Governor of this state is under a high and solemn obligation, "to maintain the lawful rights and priviledges thereof as a sovereign, free, and independent state," as he is "to support the Constitution of the United States," and the obligation to support the latter imposes an additional obligation to support the former. The building cannot stand if the pillars upon which it rests are impaired or destroyed.[66]

Needless to say, however, the "genuine" Jeffersonians were more apt to "fine tune" the states' rights/states as contractors' debates. Accordingly, John Taylor of Caroline County, VA, spoke of the "positive constitutional veto:"

> As contracting parties to the union, this right [to reject unconstitutional laws] is an appendage of that character. If they are not to be so considered, it goes to them as representatives of the people, because it is an appendage of the political power with which they are invested by the people. It is absurd to allow that they were entrusted by the Constitution with these powers, and yet prohibited from looking themselves into the Constitution, that they might exercise them faithfully. The states possessed political powers antecedent to the Constitution, as is acknowledged by their reservation. These state political powers previously possessed, never surrendered and expressly retained, inherently comprise a moral right of self-defense against every species of aggression; and the Constitution, instead of saying that it may be taken away by the federal government, expressly declares that they shall not; that they are without the compass of that instrument and not embraced by it at all. Here then is a positive Constitutional veto, clearly precluding both Congress and the federal courts from touching the reserved state rights.[67]

Finally, Jefferson himself put the case for states' rights into compelling historical perspective—simply and elegantly:

> What has destroyed the liberty and the rights of man in every government which has ever existed under the sun? The generalizing and concentrating all cares and powers into one body, no matter whether of the autocrats of Russia or France, or the aristocrats of a Venetian Senate.[68]

ECONOMICS, SECTIONALISM, AND THE QUESTION OF FEDERALISM

The debate over national versus states' rights, of course, did not occur in a theoretical vacuum. On the contrary, this "federal argument" was the theoretical underpinning of very real economic and sectional divisions which became increasingly important between the years 1820 and 1865, the years in which states' rights was in the ascendancy.

Agrarianism vs. Commercialism

One of the first major debates revolved around the virtues of agrarianism (with its implications for decentralization) on the one hand, and commercialism (with its implicit centralism) on the other. The most articulate proponents of each were Thomas Jefferson and Alexander Hamilton, respectively.

Hamilton's sponsorship of the national bank, his stand in favor of a strong protective tariff for some American industries, and his statements outlining the implied powers of Congress to accomplish these ends were the practical manifestations of his belief that a strong, prosperous America would be one with a strong, prosperous commercial/industrial base.[69] Furthermore, this base would be regulated among the parts by a powerful central government.

Jefferson, on the other hand, had little use for commercial manufactures. Instead, he was a thoroughly-grounded agrarian, believing that liberty, strength, indeed the full-flowering of humanity lay in agricultural pursuits.[70]

Jeffersonian writer and advocate, John Taylor, expanded on the notion of the farmer as the only basis of sound national economic life, placing agriculture in its Constitutional perspective. He held that Federalists were trying to subvert the Constitution and the agrarian base of the nation through laws which fostered centralization and commercialization. The states, he contended, were the "intimate associates and allies" of the farmers while the usurping federal government was "the associate and ally of patronage, funding, armies, and of many other interests."[71]

One Nation Divisible by Sections

By 1820, national agrarian/commercial divisions had begun to evolve into a far sharper and more dramatic controversy. The New England states' rights stand, articulated during the War of 1812, was transitory—predicated upon the exigencies of the moment—and quickly thereafter gave way to commercial nationalism. The south, on the other hand, was firmly rooted, both economically and culturally, in its agrarian traditions and its "peculiar [agrarian] institution," slavery. The important interests of these sections came into direct conflict more often than not.

SECTIONALISM, THE NATIONAL BANK, AND THE NECESSARY AND PROPER CLAUSE

Controversy over the need for and Constitutionality of a national bank had not withered away with the Hamiltonian charter of 1791.[72] In 1811 strict constructionist Republicans in Congress had succeeded in denying recharter to the bank. This refusal, in turn, gave rise to a number of state banks with more clearly unconstitutional results—they began to issue their own legal tender.[73]

Needless to say, the practice was not only unconstitutional but financially disruptive as well, a fact which did not escape the newer politicians in Congress. Represented by such outstanding American historical figures as Daniel Webster, Henry Clay, and John C. Calhoun, these new Congressional politicians had come of age under the Constitution, accepted it more readily, and tended toward nationalism.[74]

Thus, in 1816, Calhoun and Clay presented convincing arguments for recharter of the bank relying on the implied powers suggested by the necessary and proper clause. The opponents (mostly representatives of southern farmers who relied on the looser credit practices of the state banks), as might be expected, countered that the necessary and proper clause did not provide Congress with substantive powers and that any such nationalist interpretation was merely a usurpation of the reserved powers of the states.

In 1816, Congressional nationalists were in ascendancy and the bank bill passed. The ascendancy, however, was not long lived.

SECTIONALISM, INTERNAL IMPROVEMENTS, AND THE GENERAL WELFARE CLAUSE

Westward expansion brought with it population and commercial dispersion—a situation obviously antithetical to either strong union or large-scale, profitable commerce. Lack of roads, canals, or navigable inland waterways further exacerbated the problem and indicated the need for a system of internal improvements. Who should provide for such improvements and in what manner became questions of extreme Constitutional significance. Three schools of thought prevailed.

Congressional broad constructionists argued that internal improvements were the purview of the federal government and fell, quite legitimately, under its grant to provide for the general welfare. Thus, Calhoun argued that the framers had obviously contemplated a broad interpretation of the welfare clause for "if [they] had intended to limit the use of the money to the powers enumerated and defined, nothing could have been more easy than to have expressed it plainly."[75]

Moderates in Congress agreed in part with Calhoun. That is, they felt that the federal government could legitimately appropriate funds to states, localities, or private concerns for internal improvements but that it could not itself build any such projects nor operate them upon completion.

Finally, strict constructionists were vehement in their denials that the general welfare clause implied Congressional spending for any but the enumerated powers. Federally funded internal improvements, they contended, would require a Constitutional amendment.

The first serious Congressional internal improvements proposal was proffered in the form of a "Bonus Bill" by Senator Calhoun in 1816. The legislation would have created a $1.5 million permanent fund in the national bank for a system of improvements. Of course, Congressional objections were raised on Constitutional grounds but in keeping with the era, the remonstrances were, in reality, based more on sectional differences than on Constitutional distinctions. Thus, the well populated and developed sections of the New England and south Atlantic states would have gained precious little from the improvements fund while the west—and to a certain extent, the mid-Atlantic states—would have received the lion's share of appropriations. Nonetheless, probably aided by Calhoun's stature and forensic skills, the bill managed to squeak through both chambers by narrow margins.

Surprisingly, President Madison, "the man who in the Constitutional Convention had championed a strong central government,"[76] vetoed the bill on the grounds that the general welfare clause granted no implied powers to Congress. Ironically, then, the "Father of the Constitution," espousing its narrowest possible construction, was pitted against the broad constructionism of the bill's sponsor, "the man who was soon to become the most celebrated proponent of state sovereignty."[77]

From 1816 to 1825, the internal improvements debate raged, causing Congressional impasse and Presidential uncertainty.[78] The impasse remained unresolved; the issue eventually died. The result, however, was clear: a victory for narrow Constitutional construction, states' rights, and national decentralization.

SECTIONALISM, THE STATE OF MISSOURI, AND THAT "PECULIAR INSTITUTION"

If any event could be viewed as the "historical benchmark" issuing in the age of division, sectionalism, and states' rights and setting the tone of bitterness and acrimony which later would rip the nation apart, it was the admission to the Union of the State of Missouri. The Missouri Compromises are well known to every American school child and hence it is unnecessary to dwell at length on their content. Nonetheless, the Constitutional questions raised (the extent of national power over statehood and slavery) and the historical consequences (the virtual division of the nation into free states and slave states) do warrant a few brief comments.

Although the Constitution did not specifically use the word slavery, it did acknowledge its existence in three separate provisions: one ensuring state reciprocity in the return of escaped "person[s] held to service or labour;"[79] one disallowing Congress from interferring with "the migration or importation of such persons as any of the states now existing shall think proper to admit"[80] prior to 1808; and one allowing Congress to apportion taxes and states to be represented at a rate of three-fifths "of all other persons."[81] Obviously, the founders of the "great experiment in freedom" were less than comfortable with the word slavery and, in fact, by 1789 there seemed to be general cross-sectional agreement that the institution was dying out.

However, in the early 1800s the introduction of short-staple cotton into the south engendered an agricultural resurgence and slaves, once again, became a significant southern economic variable. At the same time, northerners (freed from the economic "necessity" of slavery) were beginning increasingly to frame the issue in moral terms. The moral/economic rift between the 11 northern and 11 southern states was growing, but the numerical balance was stable—until Missouri applied for admission.

As always seemed to be the case in the 19th Century, an otherwise moral/economic/sectional question was elevated to the high plane of Constitutional debate and from that plane into the realm of national versus state powers. In this instance, the pertinent Constitutional clause was found in Article IV, Section 3 which stated that "New states may be admitted by the Congress into the Union . . ."[82]—the only specific restrictions dealing with jurisdictional encroachments. Hence, when northern members of Congress sought to place an antislavery restriction on Missouri's admission, southern members countered that such restriction was not within the Constitutional powers of Congress—an assertion which was probably correct in a strictly Constitutional sense but

which lost its "punch" when Maine entered the Union as a free state, and consequently, restored the tenuous balance.

As a result of the Missouri Compromises,[83] the "line" was drawn between free and slave states and once obscure sectional interests were brought into full contradistinction. Northern and southern statesmen became less and less able to paper over differences in the name of Union or national interest as southerners became increasingly convinced that "national interest" was merely a metaphorical reference to "northern interests." To an increasing degree, they began cultivating the philosophical nuances of states' rights and the method of Constitutional construction most advantageous to state sovereignty, strict or narrow construction. Foremost among those southerners was a former young nationalist who only a few years before had fought for a national bank and system of national improvements—none other than John C. Calhoun of South Carolina.

JOHN C. CALHOUN AND THE DOCTRINE OF NULLIFICATION

The great South Carolinian nullification crisis occurred not as a result of a slavery dispute but rather as the result of the south's second major sectional grievance—the protective tariff. By the late 1820s, the economy of the south had begun to suffer, while the northern states appeared determined to add insult to injury by becoming ever more prosperous and disproportionately populous. The south came increasingly to picture itself as a sectional underdog, plagued variously by the capriciousness or design of a northern majority which used national measures (and judicial acquiescence) to its own advantage and to the south's disadvantage. It thus became a logical extension to assume that southern economic decline resulted from northern/national economic policy and the most visible of those policies was the tariff. To defy national policy, however, required more than mere force of will. It required, in addition, a theoretical foundation and satisfactory Constitutional interpretation—lofty hooks on which to hang otherwise rebellious behavior.

The Theory: Concurrent Majorities

The south found its great theoretician and Constitutional interpreter in John C. Calhoun, a man whose intellectual capabilities were matched only by his long and distinguished practical experience in government (serving his own state as Congressman and Senator, and the United States as Secretary of War, Secretary of State and Vice President).[85] A strong and outspoken defender of broad Constitutional construction and national powers, by 1828, Calhoun—albeit secretively[86]—had begun to question his own prior beliefs and to see his section and state as the losers in a national policy framework.

This situation had occurred, Calhoun reasoned, because a numerical majority was able to impose its will on a numerical minority—this, despite the fact that the minority was itself numerically substantial and possessed legitimate interests of its own. The minority was, in effect, disenfranchised and such was the stuff of tyranny. A new device, working in addition to popular suffrage, was needed to check such tyranny.

The theoretical device which Calhoun offered was the concurrent majority. In contrast to a numerical majority, the legitimacy of which was founded on popular suffrage, a concurrent majority was founded on the community of interests. Calhoun admitted that while it would be difficult to satisfy every interest, a "desired end [policy] would be largely if not fully achieved if the sense of a few and prominent interests was collected."[87] This being accomplished (how is not made clear),

> . . . it would require so large a portion of the community, compared with the whole to concur, or acquiesce in the action of the government, that the number to be plundered would be too few, and the number to be aggrandized too many, to afford adequate motives to opppression and the abuse of its powers.[88]

As opposed to the prevailing party, factional, and sectional stress, Calhoun argued that concurrent majorities would foster compromise and harmonious community spirit. Apparently, this spirit, together with patriotism and common political sense, would keep the differences of the various interests from reducing government to a dysfunctional paper tiger:

> Impelled by the imperious necessity of preventing the suspension of the action of government, with the fatal consequences to which it would lead, and by the strong additional impulse derived from an ardent love of country, each portion would regard the sacrifice it would have to make by yielding its peculiar interest to secure the common interest and safety of all, including its own, as nothing compared to the evils that would be inflicted on all, including its own, by pertinaciously adhering to a different line of action.[89]

The Interpretation: State Sovereignty

Not only Calhoun, but the entire State of South Carolina had, prior to about 1828, been atypical among southern states in espousing broad Constitutional construction and strong central government. However, the rising antislavery tide in the north, the south-Atlantic economic and population decline, and the sectionally distasteful *Tariff Act of 1828* had forced South Carolina, like its fellow southern states, into a defensive posture—a posture which South Carolina adopted with singular vigor.

The problem, then, became one of determining how a state could legitimately circumvent a national law without, at the same time, circumventing the national Constitution. The answer, as always, lay in interpretation. To this end, Calhoun employed a slightly different definition of "federal" and a somewhat tenuous reading of history.

In brief, Calhoun claimed that the central government of the United States was wholly federal rather than partly federal and partly national as Madison had asserted. This federal character occurred "because it was a government of states united in a political union, not a government of individuals united by what was usually called a social compact."[90] According to Calhoun, this could be readily proven by the following facts: (1) the colonies had acted as separate entities in declaring independence from Britain; (2) the Constitution was framed by state delegates and, later, ratified by the states; (3) in the 18th Century, the terms federal government, general government, and government of the United States tended to be used interchangeably to mean federal; (4) the term "people" in the Constitution meant the people of the states, and not people of the union in the aggregate; (5) members of the Senate were chosen by the states; (6) members of the House were chosen by state voting constituencies; (7) the President and Vice President were chosen by state appointed electors; and (8) "federal judgeships were state appointments, since the President and Senators who made these appointments owed their own offices to the states."[91]

Obviously, most of the "proofs" employed were highly debatable but they were certainly enough to convince the South Carolinian statesman that the United States was a government of sovereign states which had merely entrusted, not transferred, the delegated powers to the federal center. Transfer of powers would have implied that the states had divested themselves of a certain amount of sovereignty, an impossibility since sovereignty, according to Calhoun, was by definition a total characteristic:

> There is no difficulty in understanding how powers appertaining to sovereignty, may be divided; and the exercise of one portion delegated to one set of agents, and another portion to another; or how sovereignty may be vested in one man, or in a few, or in many. *But how sovereignty itself*—the supreme power—*can be divided*,—how the people of the several states can be partly sovereign and partly not sovereign—partly supreme, and partly not supreme, *it is impossible to conceive*. Sovereignty is an entire thing;—to divide, is,—to destroy it.[92]

Thus, the central government was not devoid of powers but, rather, had been delegated certain powers by the sovereign states. And, to the extent that it exercised these delegated powers, it retained "the right to determine the extent of its powers in the first instance, [but] by no means . . . had the right to make its judgement final and binding on all"[93] when one or more of the sovereign states were opposed. Through the years, Calhoun believed, this principle had been perverted by a system of judicial arbitration in which judges viewed their own appointments, promotions, protection against impeachment, and interests as being inextricably linked to the central government. This illegal form of arbitration had resulted in the curious situation whereby the states which had created the center were, in fact, at the mercy of their "offspring." The situation was in need of remedy.

The Practice: Nullification

Calhoun's remedy was two-fold—the first part relating to the "coordinate" relationship of the states to the central government; the second, relating to the ultimate sovereignty of the states themselves.

The first, the mutual negative, was derived from John Taylor's concept of a Constitutional veto. Serving largely as a stopgap measure, the negative could be employed if an act of the central government was offensive to one or more of the states. The "veto" power would then delay implementation of the act pending a Constitutional amendment. The central government retained the same prerogative over state acts. This veto power would not extend to all legislation—a condition which Calhoun admitted might have a stultifying effect—but "only to the execution of such acts of the central [state]

government as might present a question involving a division of powers between this government and the governments of the states [center]."[94]

The second remedy related exclusively to the states and their duty and right as sovereign parties to the Constitutional compact, to determine the parameters of the obligations set forth in the Constitution:

> . . . The right of states to determine the extent of obligations imposed by the Constitutional compact necessarily involved two additional rights; pronouncing a federal act in conformity or not in conformity with the compact's provisions and pronouncing an act judged inconsistent with these provisions to be null, void, and of no effect. Determining for themselves the mode and measure of redress to be adopted, the states could interpose for the purpose of arresting within their respective limits an act which they had found to be void. By the exercise of this right of interposition the delegated powers were prevented from encroaching on the reserved powers.[95]

Calhoun conceded that this right of nullification might be subject to abuse and cautioned the states to be exceedingly prudent and conservative in their use of it. In addition, he enumerated several systemic safeguards which would mitigate the possibility of abuse. First, if one state wrongfully nullified an act of Congress, the other states, correctly interpreting the act, would tend to support the center. Second, the two political parties, as interstate entities, would tend to unify the states and thus enhance their sense of union. Finally, a nullification conflict, like the mutual veto, could be clarified and resolved through the process of Constitutional amendment.

Be that as it may, the amendment process did not imply the same finality with regard to nullification as it did with regard to the mutual veto:

> . . . A case involving the interposition of a state in its sovereign character [nullification] was in a somewhat different category [from the mutual veto]. Here the state was bound to acquiesce in the decision reached by the amending process if the act of the central government was consistent with the character of the Constitution and ends for which it was established and was thus fairly within the scope of the amending authority. If it was not, the state was not bound to acquiesce in the decision. In such a case it could choose to secede from the Union. It made known its election to stay in the Union by rescinding the act by which it had interposed its authority and bound its citizens to disobedience to the federal act in question. A failure to rescind was itself tantamount to secession.[96]

In 1832, the United States Congress imposed still another protective tariff. In order to mollify southern protest, however, the new tariff was a more moderate version of the one enacted four years before. To South Carolinians, now represented by a new states' rights party, the moderation was quite clearly not good enough.

In November of 1832, a state convention "instructed the legislature to adopt all measures necessary to give full effect to the [Convention] ordinance and to prevent the enforcement of the tariff acts after February 1, 1833."[97] Further, the people of South Carolina were instructed that they owed allegiance only to the state—not to the federal government.

In response, President Jackson requested Congress to take steps in order to "solemnly proclaim that the Constitution and the laws are supreme and the Union indissoluble."[98] Congress, in turn, authorized the President to use military force, if necessary, to ensure South Carolina's compliance with the federal law.

Through the providence of the time, the crisis failed to materialize. Weakened and embittered by its fellow southern states' failure to support it, South Carolina was in no position to meet the federal force. On February 1, 1833, it rescinded nullification.

Though unsuccessful in 1833, the idea of nullification did not die. Nor did the sectional tensions and bitterness subside. Instead, as the nation became increasingly polarized through the succeeding 28 years, the theories of John C. Calhoun blossomed in southern esteem and were accorded the legitimacy of correct Constitutional interpretation. In its own feeble and unsuccessful way, South Carolina had set a powerful precedent. For his part, so too had Andrew Jackson.

IV
The Long Road to National Supremacy: From Duality of Powers to Duality of "Nations"

From the 1830s to the 1860s, the nation embarked on the long and treacherous journey that would eventually lead it to the ultimate mechanism for determining the nature of its Constitution—war. When the last battle ended, so also did the long debate pitting national supremacy against state sovereignty: the nation was clearly supreme. This was the federal legacy of the War Between the States. Yet, perhaps most significantly and certainly, to many observers, more surprising, the Constitution itself survived. Indeed, it survived the "decision" of its most heinous "interpreter," the gun.

THE PRESIDENCY, THE CONSTITUTION, AND THE LIMITS OF NATIONAL AUTHORITY

The Constitution, the National Bank, and Andrew Jackson

JACKSONIAN RESOLUTION OF THE NATIONAL BANK DEBATE

Ironically, the man whose threat of strong national action had averted the South Carolinian nullification crisis in 1833, was himself an avid states' righter and fervent crusader against the accoutrements of national power. This was particularly true in the case of the long embattled national bank.

By the 1830s, the bank (long a visible—almost symbolic—point of contention between Anti-Federalists and Federalists, Federalists and Republicans, and finally broad constructionist Republicans and strict constructionist Republicans) had become the debatable purview of the Democrats[99] on the one side and the Whigs[100] on the other. The basic arguments for and against the bank had changed little over the years. Thus, the Whigs, under the leadership of Henry Clay, argued the necessity and propriety of the bank as the basis of sound national monetary policy, while the Democrats dubbed it an unwarranted intrusion. New circumstances and personalities, however, would this time ensure its lasting demise.

The critical new personality was the leader of the Democratic Party, President Andrew Jackson. Unlike his recent predecessors, Jackson was, at the very least, a forceful President; at the very most, more than willing to take things into his own hands. At any rate, he was not the least bit hesitant to personally "handle" the bank.

In 1832, in an attempt to establish support for the institution, bank officers sought early recharter. The bill, subsequently sponsored by Sen. Clay, won Congressional approval despite the concerted opposition of states' righters. Jackson, however, vetoed the bill on the grounds that it was an unconstitutional invasion of state powers (this, in spite of the fact that the Supreme Court had previously ruled on the bank's Constitutionality) and Clay was unable to muster sufficient strength for an override. Far from resolved, the bank issue hung in limbo.[101]

Taking advantage of the obvious uncertainty, Jackson—unwilling to wait for the expiration of the bank's charter in 1837—simply began withdrawing funds from the institution and depositing them in state banks.[102] That this was an ultimately ingenious (if questionable) use of Presidential power became clear in 1837 when the depleted bank failed to gain recharter. Hamilton's nationalism was on the demise; his institution was dead.

SEPARATE POWER, SEPARATE INTERPRETATION

President Jackson's veto of the 1832 bank bill was in clear contradistinction to Chief Justice Marshall's ruling in *McCulloch v. Maryland*. In fact, Jackson did not accept the Supreme Court as the final arbiter of Constitutional questions in any case:

> The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the Constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges

has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.[103]

Obviously, Jackson's "method" for solving Constitutional disputations had one serious flaw: it would fail to solve Constitutional disputations. Presumably, the President considered a problem resolved if the three branches were in proximate agreement, a situation unlikely to occur in the event of a Constitutional emergency. Moreover, the Jacksonian position lacked historical validation. "So accepted was [the] conception of the Supreme Court as the final arbiter of the Constitutional system that Webster and Clay in Congress now attacked Jackson's stand as utterly unsound and revolutionary."[104]

Fortunately for the future of the Court and the concept of judicial arbitration, Jackson was able to appoint his own Chief Justice in 1835—a justice who was himself an agrarian Democrat. To Jacksonian Democrats, what the justices lacked in legitimacy and integrity as the Marshall Court, they gained as the Taney Court.

The Pierce Veto and the Strict Limits of the General Welfare Clause

Renewed acceptance of the Court after about 1835 did not end Presidential interpretation of the national Constitutional role. Thus, in 1854, President Franklin Pierce placed strict and significant limits on the scope of the general welfare clause:

> [If] Congress is to make provision for [paupers] the fountains of charity will be dried up at home, and the several states, instead of bestowing their own means on the social wants of their own people may themselves, through the strong temptations, which appeals to states as individuals, become humble suppliants for the bounty of the federal government, reversing their true relation to this Union.[105]

Pierce used the reasoning noted above to veto a bill which would have provided federal aid to the indigent insane. The bill, written by reformer Dorthea Dix, sought aid only for this very distinct category of poor. Yet, Pierce argued that the welfare clause of the Constitution did not empower Congress to provide for indigents of any sort outside the District of Columbia. In fact, he viewed even such a limited step as having an inherently insidious nature, for if Congress had the power to aid the destitute insane, it had "the same power to provide for the indigent who are not insane; and thus to transfer to the federal government the charge of all the poor in all the states."[106]

The 33rd Congress chose not to override the President and Pierce's veto remained the definitive statement on federal responsibility for aid to the poor until 1933. It would take a different kind of poverty, in a different slice of time, in a substantially different nation to "repeal" that veto.

ROGER TANEY AND THE DUALITY OF THE COMMERCE POWER

The concept of dual federalism has long been associated with the name of Chief Justice Roger Taney, the gentleman farmer and lawyer who succeeded the 34-year "reign" of John Marshall. In subsequent years, Taney (his contribution to Constitutional law often obscured by his untimely and unpropitious decision in the case of *Dred Scott v. Sanford*)[107] would be regarded in different ways by different scholars and jurists. So too, the meaning, scope and overall historical importance of Taney's commercial dual federalism would be debated.

Toward a Limited Dual Federalism: Distinguishing State Police Power From Federal Commerce Power

In *Gibbons v. Ogden*, Chief Justice Marshall had clearly stated the commerce power of the national government. However, he was somewhat less precise in addressing the question of concurrency. It will be recalled that he said, "[The commerce] power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations. . . ." Thus, it could be inferred that Marshall felt the Congressional commerce power to be preemptive of any similar state power. Yet, after 1824, Congress did little in the way of regulation and the Courts, consequently, did little in the way of expounding on this function.

From the outset of Taney's tenure, the Court began grappling with the meaning of the commerce clause vis-a-vis the federal and state governments. That the task was an arduous one is evidenced by the fact that it took the justices 16 years to arrive at something even approaching a definitive statement. In the interim, however, they were forced to distinguish between the state police function and the commerce function. And as the Marshall Court was characterized by its unanimity, so was the Taney Court characterized by dissension.

The first of the Taney commerce cases came before the Court in 1837. At issue in *New York v. Miln* (1837)[108]

was a New York state law which compelled ship captains arriving from foreign ports to delineate the physical condition of each passenger on their ships. The defendant in the case, Miln, argued that the New York act constituted a form of regulation on commerce, that the power to regulate commerce was exclusive to Congress, and, therefore, New York was in violation of the Constitution. New York, on the other hand, declared that the act was not violative of the Constitution for the simple fact that it did not regulate commerce but, rather, was a function of the state's legitimate internal police power.[109]

The state's argument allowed the Court to sidestep "the question whether the power to regulate commerce, be or not be exclusive of the states . . ."[110] Instead, the Court agreed that the law did not constitute regulation of commerce. In his opinion for the Court, Justice Barbour found New York rightfully employing its reserved powers.

In 1847, the Court came closer to espousing a doctrine of dual federalism but the division of opinion—six justices wrote nine separate opinions—kept the License Cases (1847)[111] from entering the realm of definitive judicial decisionmaking. Nonetheless, and significantly, Justice Daniel stated that

> Every power delegated to the federal government must be expounded in coincidence with a perfect right in the states to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation.[112]

Moreover, Justices Taney, Catron, Nelson, and Woodbury appeared to indicate that the states retained a concurrent right over commerce in the absence of federal regulation. Thus, Taney stated that ". . . the state may . . . make regulations of commerce for its own ports and harbors, and for its own territories; and such regulations are valid unless they come in conflict with a law of Congress."[113]

Two years later, in the *Passenger Cases* (1849),[114] the Court once more attempted to address itself to the concurrency of the commerce power. Again, however, the justices could hardly have been accused of resoluteness (the Court split 5-4 with all five majority justices writing their own opinions and three of the four dissenters separately expounding their views). Nonetheless, the majority, lead by nationalist Associate Justice McLean, stated that taxes imposed by the states of Massachusetts and New York on passengers arriving in their ports constituted state regulation of foreign commerce, that regulation of such commerce was "exclusively vested in Congress,"[115] and therefore the acts were void under the Constitution.

In his dissent, Taney denied that the states' taxes had been imposed for the purpose of regulating commerce. Rather, he found that the taxes had been imposed to keep undesirables (paupers and victims of disease) from entering Massachusetts and New York. This, he claimed, was a legitimate state police function carried on for the "well-being of the people of the states."[116]

Toward a Limited Dual Federalism: "Selective Exclusiveness"

In 1851, a more unified Taney Court (7-2) finally applied what has come to be known as the doctrine of "selective exclusiveness"—at best, a modified version of dual federalism. In *Cooley v. Board of Wardens of the Port of Philadelphia* (1851),[117] the Court asserted a limited sphere of commercial concurrency:

> . . . The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject matter. If they are excluded, it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the states. . . . [T]he mere grant of such power to Congress, did not imply a prohibition on the states to exercise the same power. . . . [I]t is not the mere existence of such a power, but its exercise by Congress, which make it incompatible with the exercise of the same power by the states. . . .
>
> Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessites of navigation.
>
> [T]he nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the states. . . .[118]

To many who associate dual federalism and states' rights with the Taney Court, a reading of *Cooley*, its

most famous and definitive commerce case, may come as something of a surprise. Indeed, the Court admitted that concurrent commerce powers did exist but not universally; and, in fact, one could infer that a specific Congressional decision to regulate in this area would preempt state authority. Certainly, the Court did nothing to alter the broad interpretation of the national commerce power which Marshall had articulated 27 years earlier, though it did attempt to maintain some measure of jurisdictional balance.

In the final analysis, the Taney Court was reacting to a different time, a different economy, and an increasingly different set of social and philosophical values than had John Marshall. Moreover, they, like Marshall, reacted to the lack (rather than onerous presence) of federal regulatory measures—if there was to be regulation, that task, in the mid-1800s, fell to the states. In such context, the Taney rulings—allowing for substantial jurisdictional latitude—were sound ones indeed.

The Taney Court version of commercial dual federalism, then, was merely a seed—a seed to be cultivated by succeeding judges, in less crisis prone times. As for Roger Taney and his associates, history would remember them less as the makers of generally reasonable and moderate case-by-case decisions bearing on the relationship between the states and the national government, than as advocates of dual federalism and states' rights or the unfortunate and misguided jurists who six years after the Cooley decision were to lead the nation headlong into civil war.

THE GREAT CRISIS IN FEDERALISM: SLAVERY, SECTIONALISM, AND STATES' RIGHTS (TO SECEDE)

By the 1840s, the Court's moderate seed of dual federalism would increasingly be offset by a national duality of far more extreme and tragic consequence. Obscured by the enlarged franchise and "commonizing" of government which Jacksonian Democracy had wrought, sectional antagonisms simmered below the surface—steadily worsening rather than abating as westward expansion and territorial acquisition extended the arena of hostility.

In the second third of the 19th Century, the basic source of sectional conflict remained economic. But, where the discrete economic issue of the first third of the century bore the wholly economic and comparatively innocuous trappings of a tariff, the issue surfacing in the second third bore noneconomic implications as well—implications of the most profoundly moral, human, and emotional nature.[119]

The "Great Divide:" The Rise and Sustenance of Congressional Sectionalism

STATE SOVEREIGNTY IN CONGRESS: CALHOUN'S SIX RESOLUTIONS

While it would be a mistake (albeit, a romantic one) to believe that the bulk of northerners (citizens or public officials) were full-blown abolitionists by the late 1830s, it was already obvious to astute southern observers that the tide was turning against slavery. Needless to say, among the shrewdest of these observers was John C. Calhoun.

By 1837, it had become clear to Calhoun that a northern dominated Congress (a phenomenon already extant in the House of Representatives) would increasingly find support for abolishing slavery in the District of Columbia and, eventually, use its power over interstate commerce to limit slavery in the southern states. This possibility, in turn, afforded Calhoun the opportunity to give legislative substance to his theories on state sovereignty, a task which took the form of six resolutions—only one of which failed to pass—presented to Congress in December of 1837. While the national legislature did not sanction nullification and secession, it had departed so far from the thinking of Hamilton and Marshall that, led by Calhoun, it now endorsed an official concept of state sovereignty—the Constitutional contradistinction of national supremacy.

RENEWAL OF THE TERRITORIAL DEBATE: 19th CENTURY CONGRESSIONAL BRINKMANSHIP

Increasingly, population gains and the greater, more balanced wealth of the north were destroying the delicate equilibrium established by the Missouri Compromises. This relative northern affluence, in turn, allowed the opponents of slavery the latitude to state their views more boldly and more frequently. Further exacerbating the widening sectional imbalance and enmity, the acquisition of new western lands in the mid-1800s again brought to the fore the question of slavery in the territories—an issue now of preeminent importance to both north and south.[120]

Of course, neither the supporters nor the opponents of territorial slavery lacked for Constitutional or philosophical justifications of their viewpoints. Certainly in slavery, as in other Constitutional questions, "what you wished to see, determined where you looked" or even "how you read." Hence, northern abolitionists pointed to the due process clause of the Fifth Amendment ("[no]

person . . . shall be . . . deprived of . . . *liberty* . . . without due process of law . . .");[121] expounded endlessly on full Congressional sovereignty over territories (and consequently, the slave status of territories); and looked ultimately to nature and a "higher law" (a law to which involuntary servitude was repugnant).

Southerners employed their own Constitutional construction to support territorial slavery. Using the Fifth Amendment as deftly as had his northern counterparts, Sen. Jefferson Davis argued that slaves were property and, therefore, were Constitutionally protected from confiscation ("[no] *person* . . . shall be . . . deprived of . . . *property* without due process of law . . ");[122] Calhoun's adherents held that because the federal government was a mere agency of the states, it "could not administer the common properties (territories) against the interests of any of the [states]";[123] and still other proponents of slavery endorsed the so-called doctrine of "squatter sovereignty," which contended that territorial legislatures (simple creatures of the national legislature) had not the power to deny personal rights (in this case, the right to own slaves) to territorial "squatters."[124]

Between 1846 and 1850, the foregoing arguments were the grist of unprecedented and debilitating debate between northern and southern Senators and Representatives. The ultimate status of the new western territories appeared irreconcilable and the "right to bear arms" was nowhere exercised more frequently than in the halls of Congress itself. In short, by 1849, the nation seemed destined for civil war. Yet, in the 11th hour, and each in his own way, the nation's now aging great statesmen would avert the tragedy. In the last major event of their lives, the Great Compromiser, the Great Orator, and the Great Carolinian would save the nation.

The Compromise of 1850, developed by Henry Clay and orchestrated by Daniel Webster and Stephen Douglas, was a series of bills which created the new territories of Utah and New Mexico with no stipulation as to slave status, greatly strengthened the *Fugitive Slave Law* by making federal marshalls responsible for the recovery of runaway slaves, admitted California as a free state, and abolished the slave trade in the District of Columbia. When Congress accepted the package, the nation-saving contribution of Clay and Webster, both of whom were to die less than two years later, became obvious. For his part, John C. Calhoun contributed to the success of the compromise in a negative way—a way which probably helped to save the nation but only at a substantial loss. In March of 1850, Calhoun—vehemently opposed to any compromise—died. His death left his followers in disarray, unable to effectively thwart the pending legislation.

Through the Compromise of 1850 Congress again took its turn as chief Constitutional arbiter and won a final decade of peace for its efforts. That decade, in turn, was probably crucial to the developing power of the north and the eventual victory of Union and national supremacy. From 1850 to 1860, the north became wealthier, more prone to nationalism, and increasingly gained the support of the northwest. Congressional compromise thus favored union—but only temporarily.

BEGINNING OF THE END: *THE KANSAS-NEBRASKA ACT*

The uneasy calm produced by the Compromise of 1850 was to last only four years. When the dream of a transcontinental railroad translated into further territorial organization, the slavery question burst forth once more—this time to confront Nebraska, the last of the Louisiana Purchase, and Stephen Douglas, the "little giant" from Illinois. Douglas' zeal for westward expansion and development; his desire for Presidential office; his relative disinterest in the slavery issue; and a strong dose of political savvy which led him to seek actively southern support, resulted in the *Kansas-Nebraska Act of 1854*.

In order to garner southern support, the 1854 act formed the Nebraska and Kansas territories on the basis of popular sovereignty and repealed the "36° 30′ line" of the Missouri Compromise of 1820. Those territories could henceforth decide for themselves whether or not to institute slavery. Compromise was forsaken for political expediency, an old wound was reopened, and thereafter, moderation on both sides was in short supply.[125] In the atmosphere of escalating crisis, it appeared only natural that the nation turn to its highest court for reasoned opinion. The nation was to be sorely disappointed.

Slavery and the Supreme Court: The Case of *Dred Scott v. Sanford*

In 1857, the Supreme Court of the United States, under enormous political pressure, decided to hear the case of Dred Scott, the former slave of a U.S. Army surgeon. Scott, originally from Missouri, had moved with his owner to the free state of Illinois and later to the free territory of Wisconsin. Shortly after his final move back to Missouri, Scott's owner had died, and title to Scott passed to a New Yorker, John A. Sanford. Scott then proceeded to bring suit against Sanford, claiming that his years of domicile in Illinois and Wisconsin had conferred freedom upon him. When the Missouri Supreme

Court rejected his claim, Scott took his case to the U.S. Supreme Court.

Unfortunately, from the beginning, the cards in the highly politicized case were stacked against Dred Scott. According to Edwin S. Corwin:

> From 1848, proslavery was in a majority on the Court, and that interest then and there started the drive which culminated in the Dred Scott case, to elevate decisions of the Supreme Court interpretative of the Constitution to a level with the Constitution itself.[126]

Nor did the Court—seven to two proslavery men—even attempt to hide what could only be considered its unseemly judicial "politicking:" before making its decision public, Justice Catron released the Court's opinions to President Buchanan as material for his forthcoming inaugural address.[127]

Not unexpectedly, the Court split 7 to 2 against Scott. As was usually the case with the Taney Court, this translated into nine separate opinions. Taney's opinion is generally cited.

The Court first took up the question whether Scott was a citizen of the United States and therefore entitled to sue in United States courts. The answer: "We think . . . not . . . ."[128] A strict historical as well as Constitutional constructionist, Taney apparently felt that because the founders regarded "Negroes of the African race . . . as beings of an inferior order,"[129] latter day America must also function according to that premise, regardless of "the justice or injustice, the policy or impolicy of [the] laws."[130]

Second, the Chief Justice pointed out that only two clauses in the Constitution referred to "Negroes of the African race," and both treated them as property.[131]

Finally, the leading opinion looked to the reserved powers of the states:

> The government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several states to deal with this race. . . . The states evidently intended to reserve this power exclusively to themselves. . . .[132]

Having decided that Dred Scott had no right to bring his case before the Supreme Court, the normal course of action would (and no doubt should) have been to simply drop the case. Yet, Taney felt himself under tremendous pressure to make a more definitive statement on slavery, particularly territorial slavery. Thus, he went on, "We proceed . . . to inquire whether the facts relied on by the plaintiff entitled him to his freedom. . . ."[133] In declaring that Scott was not entitled to freedom, the Chief Justice again used a state sovereignty argument very close to one employed by Calhoun. That is, the territories were merely held in trust for the sovereign states by the federal government which, therefore, had no right to impose any internal police mechanisms on them. Congress, according to Taney, had been acting unconstitutionally and hence, the Missouri Compromise was held void. In declaring the Missouri Compromise unconstitutional, Taney completed the work begun by Congress three years earlier. In an age of extremes, compromise had been put to rest, its last rites administered by the Supreme Court.

The Court's decision to rule on Dred Scott's claim to freedom and slavery in the territories after declaring that the case was not within the jurisdiction of the federal courts left the justices open to serious attacks that the decision was merely "obiter dictum"[134] and therefore not admissible as law. At any rate, Taney's static interpretation of history and the Constitution itself ignored historical and Constitutional realities. Furthermore, his explicit assumption of state sovereignty was highly inconsistent with his assertion that those same states could not even define citizenship. Worst of all, the Court had been given the opportunity to make sound Constitutional judgement but, instead had entered the political arena in order to advocate the continuance of slavery—an institution kindly described as "peculiar."

By 1857, civil war was, no doubt, inevitable. Certainly, it was neither planned nor caused by Chief Justice Taney or his associates on the Court. However, in as much as the Dred Scott case was badly decided on historical, Constitutional, logical, and moral grounds, it became the grist of bellicose debate which catapulted an antislavery northern Republican into the Presidency. *Dred Scott v. Sanford* was not the cause of war, but it was the "straw that broke the nation's back."

From Election to Secession: Constitutional Crisis and American Armageddon

To all but the most extreme southern Democrats, now led by Jefferson Davis of Mississippi, the Dred Scott decision was a disaster. Northern Democrats, under the tutelage of Stephen Douglas, were embarassed; the dying Whigs viewed it as an end to the moderation they had always advocated; and the new Republican Party was appalled, some of them openly advocating court-packing as a means of redress. One thing, at least, was clear to

all parties, every side, and both sections: compromise and conciliation had now become virtually impossible.[135] Nowhere was the irreconcilable national rift more apparent than in the election of 1860. When the smoke from the Presidential nominating conventions had cleared, the nation had four candidates (the products of only three parties) from which to choose. Representing the more moderate center position were Stephen Douglas, the choice of the northern Democrats, and John Bell, a Constitutional Unionist (formerly Whig) from Tennessee. Yet, as the nation had moved to extremes, so too had the real Presidential contest. Thus, the southern Democrats nominated John C. Breckenridge of Kentucky as the standard bearer for state sovereignty and southern institutional prerogatives. Denouncing *Dred Scott* and territorial slavery, the Republicans nominated Abraham Lincoln, a candidate just as unlikely to seek compromise. None could be expected to capture the majority of the popular vote—and none did.

Of course, the electoral college vote went to Abraham Lincoln, a bittersweet victory, indeed, which invited the inevitable.[136] Based on the outcome of the election, by January of 1861, seven southern states had seceded; on March 11, just seven days after Lincoln's inauguration, those states adopted a Confederate Constitution; and on April 12, following a southern attack on Fort Sumter and the addition of four more states to the Confederacy, the new President of the now precarious Union ordered suppression of the southern rebellion. The nation was at war.

FROM DISUNION TO NATIONAL SUPREMACY: THE CONSTITUTIONAL LEGACY OF THE CIVIL WAR

The ultimate Union victory in the Civil War acted as the official solution to the three great paradoxical dichotomies which had plagued the American federal system since its inception. Officially (though, in reality, not without much post-war struggle), northern triumph established the nature of the Union, the nature of American democracy, and the nature of the economy.

First, from an obviously Constitutional perspective, the most important result of the Civil War was the resolution of the nature of the Union. The long struggle between national supremacy and state sovereignty was militarily resolved in favor of national supremacy. Four years after the War's end, in *Texas v. White*,[137] Chief Justice Salmon P. Chase gave judicial sanction to national supremacy:

> The union of the states never was a purely artificial and arbitrary relation . . . [T]he Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not? . . . The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.[138]

Second, the Civil War ended the enslavement of black people in a nation which guaranteed to "all men . . . life, liberty, and the pursuit of happiness." Certainly, slavery was the great visible issue over which the War was fought. It was an American paradox, so immense in its moral and economic implications that it produced insoluble political polarization. Thus, according to Robert Dahl:

> Whether any republic could have arrived at a peaceful solution to any issue as monumental as slavery had become in the United States, no one can say with confidence. What we do know—what no American can forget—is that the American political system was unequal to the task of negotiating a peaceful settlement of the problem of slavery. Violence was substituted for politics.[139]

Through violence, a Constitution which had been repeatedly interpreted as safeguarding the institution of slavery, was significantly altered so that henceforth it barred that institution. Through violence, Roger Taney's interpretation of the Founders' position on black citizenship was robbed of its meaning—the Constitution now guaranteed national and state citizenship to "all persons born or naturalized in the United States."[140] The ultimate violence of human subjugation, then, was itself answered with violence. The manifest paradox of American democracy was solved—resolution of the subtle paradox, of course, would take more time.

Third, the War resulted in the triumph of commercialism over agrarianism, serving as America's violent introduction to the industrial revolution. With Union victory, Hamiltonian commercial expansion would prevail over Jeffersonian agricultural parochialism; northern capitalism over southern feudalism:

> Unimpeded by the political opposition of the southern slavocracy, the Republican coalition of north and west carried through a program of comprehensive changes that insured the expansion of industry, commerce, and free farm-

ing. . . . Instead of the policies of economic laissez faire that the slavocracy had demanded (side by side with a rigid and meticulous governmental intervention to protect slavery), the Republicans substituted the doctrine that the federal government would provide assistance for business, industry, and farming: the protective tariff, homestead, land subsidies for agricultural colleges, transcontinental railways and other internal improvements, national banks. When the defeated south came back into the Union, it had to accept the comprehensive alteration in government policy and economic institutions that the historian Charles A. Beard was later to name the Second American Revolution.[141]

In resolving the three paradoxes, the Civil War—that great and horrible maelstrom of American federalism and Constitutionalism—made the United States what many 20th Century Americans assume it always had been: a democratic, capitalist nation.[142]

V
No State Shall Make or Enforce Any Law . . .: The Fourteenth Amendment and The "Second Constitutional Revolution"

The second "American Revolution" that was the Civil War was Constitutionally acknowledged by way of the Fourteenth Amendment, particularly its first section:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[143]

Indeed, "the Great Fourteenth Amendment"[144] has itself been called a "revolution." First, and most readily apparent, it signaled a "revolutionary" change in federalism for it made "national citizenship primary and state citizenship derivative therefrom."[145] Second, through Court decisions, it institutionalized dual federalism, "the theory that the reserved powers of the states must be considered in determining the extent of the powers delegated to Congress. . . ."[146] The theory of state sovereignty was thus increasingly replaced with a judicial coupling of national supremacy and states rights. Third, and less obvious from the beginning, it "revolutionized" due process of law, elevating it from a procedural safeguard to a substantive Constitutional guarantee. Finally, in the years to come, the Amendment would be instrumental in "revolutionizing" the role of the Supreme Court, affording that body the opportunity to shape the economic policy of the nation and the states.

CREATION OF THE FOURTEENTH AMENDMENT: THE CONSTITUTIONAL LEGACY OF RECONSTRUCTION

It is one of the sadder ironies of history that during the second phase of American development the Fourteenth Amendment seemed to work its "Constitutional miracle" on all but its original intended purpose—the equal protection of the nation's black citizens. Thus, in 1935, Constitutional historian, Andrew C. McLaughlin wrote:

> So little has the Negro profited by the Fourteenth Amendment through judicial determination, so signally inoperative has it proved to be in establishing or maintaining social equality, that even . . . brief consideration [of its uses in this regard] seems unnecessary. One is tempted to say that, for the main purposes in the minds of its originators, the amendment has been a complete failure.[147]

What was in the "minds of its originators" has been debated quite vigorously over the years.[148]. However,

right or wrong, the accepted prevailing notion contends that the Fourteenth Amendment—along with the Thirteenth and Fifteenth Amendments[149]—was drafted by a Republican Reconstruction Congress for the primary purpose of assuring the rights of black citizens and for the secondary purpose of asserting national supremacy.[150] More specifically, the framing of the Fourteenth Amendment was probably a reaction on the part of the so-called Radical Republicans[151] to the *Dred Scott* decision, the southern "Black Codes," moderate Presidential reconstruction, and Constitutional attacks on the Freedmen's Bureau Bill and the *Civil Rights Act of 1866*.[152]

First, of course, the Amendment addressed *Dred Scott v. Sanford*[153] by offering national citizenship as well as the full range of privileges and immunities to blacks born or naturalized in the United States. Second, if correctly applied, it would negate the so-called southern "Black Codes" which, in effect, constituted a virtual continuation of black peonage and reinstitutionalized white economic and political hegemony.[154] Third, coming in a period of Radical ascendancy, the Amendment, at least in part, was framed in reaction to the moderate policies of President Johnson, an increasingly unpopular man both politically and personally. Finally, and most directly responsible, the Amendment was drafted because of the successful Johnson veto of the Freedman's Bureau Bill and the possibility of a Constitutional roadblock for the *Civil Rights Act of 1866*.[155]

The Fourteenth Amendment, modeled in many respects after the *Civil Rights Act*, was the product of the Joint Committee on Reconstruction, a body dominated by Radical philosophy. Following protracted debate, the proposed Amendment passed both houses in June of 1866 but the greater problem lay in ratification—three-fourths approval demanded the support of some of the southern states, if indeed those entities were to be considered states at all. This dilemma, in turn, depended upon the outcome of the Radical military reconstruction plan—at best, a Constitutional bugaboo.

Thus, in due course, the success of the Fourteenth Amendment became intricately involved with the success of Radical legislation and the theory of reconstruction which underlay that legislation. To this end, the Radicals propounded a "dead state" theory wherein the former confederate states were considered politically dead and therefore to have forfeited their rights. The practical application of this belief, the *Military Reconstruction Act* and the *Second Reconstruction Act*, both of March 1867, was to divide the ex-Confederate states into five military districts until they were readmitted to the Union. Readmittance would be granted when a state had passed (with black enfranchisement and rebel disfranchisement) an acceptable new Constitution and when the state legislature had ratified the Fourteenth Amendment.

These "nonstates," then, were obliged (indeed, for all practical purposes, were forced) to engage in one of the chief Constitutional privileges of the states, the amending process, in order to become states. Furthermore, if the southern states were "dead," and thus not technically part of the Union, any act of ratification on their part would seem superfluous. No doubt, through this rather convoluted Constitutional process, the Radicals sought to ward off dangers inherent in readmitting 11 states which had taken no part in ratification—an eventuality which might later call into question the legality of the Amendment.

Despite such Constitutional irregularities, the Radical strategy was a success. By June of 1868, three-fourths of the "states" had ratified and on July 28, 1868 the Fourteenth Amendment became a permanent part of the Constitution.[156]

THE FOURTEENTH AMENDMENT, PHASE ONE: THE RISE AND FALL OF BLACK CIVIL RIGHTS

From its inception, the Fourteenth Amendment offered little protection to the black population it was supposedly designed to benefit. In fact, it would take nearly 86 years for the Supreme Court to interpret the equal protection clause in such a way that some were not considered "more equal than others."[157] Nevertheless, the Court's initial reaction to cases brought under the Amendment was that the sole purpose of this Constitutional revision was to protect the freed man from overt discrimination on the part of the states and their agencies—if not well, then at least exclusively. This sense of limited purpose was first articulated in the *Slaughter-House Cases* of 1873.[158]

First Cut: *The Slaughter-House Cases*

The Slaughter-House Cases revolved around a Louisiana law which gave one slaughtering company exclusive rights to use its premises for all livestock slaughtering within the City of New Orleans. Presumably, the statute was passed as a public health measure but the effect was to create a gorvernment sanctioned monopoly. Subsequently, those companies which were excluded from using their own premises for slaughtering sued, claiming that the statute violated the Fourteenth Amend-

ment by impinging upon their privileges and immunities, denying them equal protection, and depriving them of property without due process of law.[159] This use of the Amendment was at least visionary; at most the beginning of a virtual Constitutional revolution. Yet, "the majority of the Court seemed genuinely shocked by [this] use of the new amendment."[160] And, having been duly "shocked," they proceeded to interpret it as narrowly as possible while, at the same time, being fully aware that the "Court [was being] called upon for the first time to give construction to these articles. . . ."[161]

Thus, the Court first used the opportunity to judicially overrule the *Dred Scott* opinion (though obviously it had little to do with the case in question) for this, the majority felt, was the major purpose of the Amendment:

> It declares that persons may be citizens of the United States without regard to their citizenship of a particular state, and it overturns the *Dred Scott* decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the Negro can admit of no doubt.[162]

Nonetheless, the quotation noted above served the Court well in another sense. In dividing "citizenship of the United States" from "citizenship of a state," the majority justices were able to take legal refuge in the old concept of dual citizenship. Hence, the Fourteenth Amendment protected *only* the privileges and immunities of United States citizens, which, according to the Court's listing, were relatively few in number. What the Court, in effect, was saying,

> . . . was that the whole body of traditional rights of the common law and of state bills of rights still remained solely under the protection of the states. The "privileges or immunities" clause of the Fourteenth Amendment had not placed the federal government under an obligation to protect these rights against state violation. So far as the federal Constitution was concerned, therefore, the "privileges" and "immunities" of the citizens of the separate states were in exactly the same status as they were before the amendment was adopted. By implication, the "privileges or immunities" clause had thus done nothing to disturb or restrict the power of the various states to regulate private property interests within their boundaries.[163]

However, to interpret the Amendment in any other way, the majority felt, would have the most dire consequences for the whole of American federalism:

> The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absense of language which expresses such a purpose too clearly to admit of doubt.[164]

Thus, while the *Slaughter-House Cases* had nothing whatever to do with black civil rights, they were used, by the majority, to establish a precedent—a precedent which, presumably, foreclosed Fourteenth Amendment interpretation for any other purpose but the protection of black rights. For the time being, this interpretation was of considerable importance and indeed defined the limits of the Amendment. In the years to come, however, quite a different aspect of the cases would come to carry the day, change the Constitution, and alter the framework of federalism. In the years to come, the majority opinion would fade into Constitutional oblivion; the four dissenters would prevail.

Second Cut: From Civil Rights to Separate But Equal

As the memory of the Civil War faded, the Court, like the nation, came to lose any of the fervor for black civil rights it might once have retained. Increasingly narrow interpretations of the federal protective role and state obligations to provide legal equality under the Fourteenth Amendment left the black citizen with only the shell of a Constitutional addition which supposedly had been designed almost exclusively for him.

Thus, in one case the Court could aver that juries which purposely excluded black participation were un-

constitutional,[165] while in a related case, state that "there shall be no [systematic] exclusion of [the black] race . . . but this is a different thing from the right . . . to have the jury composed in part of colored men."[166] With a minimum amount of subtlety, the states could sidestep civil rights.

In 1883, a mere 15 years after the ratification of the Fourteenth Amendment, the Court again dealt its positive civil rights features a massive blow. In the *Civil Rights Cases*,[167] a majority of eight ruled that the *Civil Rights Act of 1875*, a law forbidding segregation in transportation, inns, theaters, and jury selection,[168] was unconstitutional. "Individual invasion of individual rights," spoke Justice Bradley for the majority, "is not the subject-matter of the amendment."[169] The single dissenter, ex-slaveholder, Justice John Marshall Harlan, saw clearly and sadly what the Court had done in the name of Constitutional integrity and proprietary rights: "I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism."[170] Thus, subtly stripped of substance and spirit, it remained only for the Amendment to be legally stripped of those characteristics. That would await the passage of 13 more years.

In the year 1896, the Supreme Court of the United States used its now substantial power to completely contravene even the most narrowly defined intent of the Fourteenth Amendment. "Informally, [employing] 'sociological' considerations as readily as their successors [the Warren Court] 60 years later,"[171] eight justices sanctioned legalized state racism and thus chose to reflect the worst aspects of the times rather than transcend them. The tale of the Louisiana statute requiring racial segregation on railroads which promoted the landmark decision in *Plessy v. Ferguson*[172] has been ofttimes told. The Court's assertion that "if one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane. . . ."[173] was, according to perennial dissenter, Justice Harlan, "quite as pernicious as the decision made by this tribunal in the *Dred Scott* case."[174] And, over the years, "separate but equal" was practiced with heavy emphasis on "separate" and little if any regard for "equal."

The originally stated purpose of the Fourteenth Amendment was thus tragically voided. Federal protection of the Constitutional privileges and immunities and legal equality of blacks was made meaningless. Only the empty words of the Amendment remained—empty for the purposes of civil rights but increasingly meaningful for other, probably unintended purposes.

THE FOURTEENTH AMENDMENT, PHASE TWO: SUBSTANTIVE DUE PROCESS, VESTED RIGHTS, AND FREEDOM OF CONTRACT

If the Court was less than comfortable with the task of striking down state laws which abrogated the civil rights of black people, it came increasingly, in the late 19th and early 20th centuries, to find its niche in negating statutes which impinged upon the rights of private industry. This judicial tendency toward the protection of business and unregulated capital expansion often lay with the social and economic predilections of the justices themselves. Hence, as early as 1875, Supreme Court Justice Samuel Miller forewarned, in no uncertain terms, of the judicial bent of his "brothers" on the high court:

> I have for 13 years given all my energies and my intellect to the duties of my office, and to the effort to make and keep our court what it should be. . . . But I feel like taking it easy now. I can't make a silk purse out of sow's ear. I can't make a great Chief Justice out of a small man. I can't make Clifford and Swayne, who are too old, resign, nor keep the Chief Justice from giving them cases to write opinions in which their garrulity is often mixed with mischief. I can't hinder Davis from governing every act of his life by his hope of the Presidency, though I admit him to be as honest a man as I ever knew. But the best of us cannot prevent ardent wishes from coloring or warping our inner judgment.
>
> It is in vain to contend with judges who have been at the bar the advocates for 40 years of railroad companies, and all the forms of associated capital, when they are called upon to decide cases where such interests are in contest. All their training, all their feelings are from the start in favor of those who need no such influence.[175]

The Slaughter-House Cases: The Dissents

If the *Slaughter-House Cases* of 1873 were temporarily significant as strict limitations upon the use of the Fourteenth Amendment, the dissents of Justices Field (for himself, Chief Justice Chase, Justice Swayne, and Justice Bradley) and Bradley[176] were to have a longer range and more profound impact on Constitutional inter-

pretation. It will be recalled that the state legislature of Louisiana had granted a monopoly to a single slaughtering house in New Orleans for the stated purpose of protecting the health of the residents of that city. When the excluded butchers brought suit based upon their reading of the Fourteenth Amendment, the majority of five justices upheld the Louisiana statute by employing a dual citizenship argument. Accordingly, the Amendment applied only to the rights of United States citizens; the rights of the citizens of the several states were left to the several states. Such a reading, of course, might have occurred had the Fourteenth Amendment never been added to the Constitution at all, a point of which the dissenters were well aware. And, accordingly, Justice Bradley in his dissent contended that the whole realm of fundamental, traditional rights was the sacred trust of "*every* free government."[177] By implication, therefore, he placed the states under the constraining influence of the federal Bill of Rights.

From *Munn v. Illinois* to *Smyth v. Ames:* The Development of Substantive Due Process and Its Application to the States

The dissenting opinions expressed in the *Slaughter-House Cases* would not be fully incorporated into majority decisions for 17 years. Such an interpretative conversion required a fundamental reordering of judicial values. In the case of the *Slaughter-House* majority, the most prized of judicial sacred cows was the traditional relationship between the federal and state governments—a relationship which allowed for little federal interference into the state legislative process. This strictly defined dual federalism was the principal value of the old order and it would increasingly become an antebellum anachronism in a new world of expanding capital.

Of course, the Supreme Court was merely one of the major variables which colored and shaped America's late 19th Century struggle to emerge from its pre-war agrarian heritage. The others were the industrialists and capitalists, on the one hand, for whom that emergence was a preeminent goal, and a veritable bonanza of state legislation, on the other, which sought to regulate and control those capitalists. The two latter variables stood at cross-purposes and the former was forced to become arbiter—economic now as well as Constitutional.

The quarrel between industrialist and state legislature found its primary arena in the agricultural states of the plains, midwest, and west. Thus, for example, a granger-dominated legislature would fix the maximum charges which an elevator operator could charge a farmer for storing his grain. This, in fact, was precisely what prompted *Munn v. Illinois,*[178] the most famous of the so-called Granger Cases.

MUNN V. ILLINOIS AND OLD ORDER STATES RIGHTS

As in many of the agricultural states, the Illinois legislature of the 1870s was dominated by farmers—people who viewed the new wave of industrial expansion not as neutral progression, but rather as a force which moved forward only at the considerable expense of the agricultural economy and life style. Nor was this belief the product of agrarian paranoia. It was a reality; a reality which the legislatures sought to mitigate. In Illinois, the answer was legal rate fixing.

Hence, in 1877, a battle between Chicago grain elevator operators and the state of Illinois came before the Supreme Court. The state claimed that it was merely utilizing its Constitutional prerogative to regulate a business "affected with a public interest."[179] The elevator operators employed a more complex argument—one which would become increasingly significant in the years to come. The nature of their argument is worth noting.

The operators' case turned upon a number of key concepts: among them, state interference with interstate commerce,[180] vested rights, and due process of law. The latter two are of special importance to this section.

The concept of vested rights is synonymous with that of natural rights and, therefore, was well-established at the time of the *Munn* case. Moreover, throughout most of American (and, before that, British) history, the most sacred of the vested rights was a person's right to his property. This was certainly the case in 1877. However, the postwar use of the concept by emerging industrialists was somewhat novel. First, the operators claimed that they were "persons" as that term was used in the Fourteenth Amendment. In addition, they asserted that their ability to charge whatever reasonable rate the market would bear represented the earning capacity of their property and thus, in a legal sense, the fixing of that charge constituted a deprivation of the property itself.

Such deprivation was not inherently unconstitutional but the elevator operators claimed that they had been deprived of property without due process of law. Due process, of course, was an equally old concept—dating back at least to the 13th Century and the Magna Charta. Yet, its traditional function had been to serve as a procedural safeguard. That is, due process of law had always been interpreted to mean that a law or justice was equitably (and Constitutionally) created and applied. Even

this would be a somewhat broad description, for in practice due process was almost exclusively applied to the administration of criminal justice. Nonetheless, a law created by a duly elected state legislature and applied to all elevators in the City of Chicago bore the trappings of a statute which adhered exactly to due process. The operators, however, had another view of due process; one that was not necessarily new[181] but which certainly was not widely accepted or used. They viewed due process as a substantive Constitutional guarantee. In other words, it was their belief that due process acted as "a guarantee against unreasonable legislative interference with private property."[182] Thus, a law itself could be unconstitutional on Fourteenth Amendment due process grounds. Obviously, such an interpretation could effect a legal revolution. It could. It would. But with *Munn v. Illinois,* it did not.

The majority of justices (seven as in the *Slaughter-House Cases*) strongly disagreed with the operators' contention. With regard to the plaintiffs' vested rights and due process guarantees, Chief Justice Waite averred:

> Under [its police powers] the [state] government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. . . . Looking . . . to the common law, from whence came the [property] right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only."[183]

Yet, perhaps even more important in explaining the majority's position was its overriding "old order" belief that state legislation seldom came within the purview of federal judicial decisionmaking—state legislatures were their own best judges. Again, the Chief Justice spoke:

> For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because [it is] in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.[184]

Once more, Justice Field dissented; once more, he demurred of the thinking of his judicial brothers; and once more, he reflected a new, coming order of national judicial preeminence and unrestricted private property:

> I am compelled to dissent from the decision of the Court in this case, and from the reasons upon which that decision is founded. The principal upon which the majority proceeds is, in my judgement, subversive of the rights of private property, heretofore believed to be protected by Constitutional guarantees against legislative interference. . . .[185]

The new order was rapidly approaching and Justice Field would live to see it.

SMYTH V. AMES AND NEW ORDER PRIVATE PROPERTY RIGHTS

Between 1877 and 1890, the Court moved slowly toward the concept of substantive due process, though it was careful to restrain itself from actually overruling a piece of legislation on those grounds.[186]

A change of attitude so profound as to repeal a state law on Fourteenth Amendment due process grounds required more than the judicial version of a revelation. In fact, it required a new Court.

By 1890, all but two of the *Slaughter-House Cases* justices had died or retired. The two remaining were Field and Bradley, the dissenters. If the old justices were men whose values were colored and ordered by a deep-seated belief in the almost sacrosanct separation of the federal and state governments, the new justices held no such beliefs. If the old Court was weaned on antebellum ideals, the new Court was weaned on those of Reconstruction. Thus, the new Court (the Court of the 1890s and beyond) was a new Republican Court—a Court which treasured the postwar principal of national supremacy and, even more, the tenets of unrestrained capital expansion. These men with a firm view of their Constitutional role and an even firmer one of their economic doctrine. They saw the potential power of the Court and they intended to use it.

In 1890, the Chicago, Milwaukee, and St. Paul Railway Company brought suit against the state of Minnesota for establishing a railroad commission which fixed carrier rates with no regular procedures for notice or hearings. Now the Court, once reticent to interfere with state legislation and regulation, declared that "the question of the reasonableness of a rate charge . . . is eminently a question for judicial investigation, requiring due process of law for its determination."[187] And having investigated the Minnesota statute, the Court found it unconstitutional, on due process and equal protection grounds.

The Court of nine new men had thus opened the Constitutional Pandora's box which their predecessors had refused to breach. The Supreme Court of the United

States had taken a first step toward establishing itself as the final judge of state legislation. It was a bold step and "an assumption of authority," which the dissenters vigorously declared, "it [had] no right to make. . . ."[188] Ironically, the dissent was written by Justice Bradley.

Eight years after the *Chicago, Milwaukee, and St. Paul Railway Company* decision, the Court completed its reversal—now, embellishing its role of umpire over state legislation with that of " 'super-commission,' . . . concerned not only with the reasonableness of rates but whether the rates fixed permitted a 'fair return on a fair valuation' of property."[189] Thus, in *Smyth v. Ames*,[190] the Court set forth a "test"[191] for determining what was "fair." The vagueness of the *Smyth* standard was so outstanding that the justices assured themselves no lack of business in the future—thrust, in the years to come, "constantly into rate issues on a case-by-case basis. . . ."[192] Nor did the Court's vague ruling merely generate more business for itself. By the very fact of this case-by-case consideration, the whole arena of state regulation was thrown into confusion—a confusion which profitted industry by tying the hands of the state commissions. The federal Court had come full circle from refusing to deem almost any state legislation Constitutionally unacceptable to preempting the economic regulatory function of the states. The result was a tremendous new national potential for power achieved at the expense of the states but it was power held by men whose goal was not necessarily to aggrandize the central government itself. On the contrary, the power was used, according to Bernard Schwartz, to convert "the Fourteenth Amendment . . . into a Magna Carta for business, in place of the Great Charter for individual rights which its framers had intended."[193] The new order had arrived.

The Freedom of Contract Cases: State Social Regulation and Judicial Laissez Faire Economics

In the same year that it decided *Smyth v. Ames*, the Court agreed to hear a case involving a state statute limiting the hours per day which people working in mines, smelters, or refineries could labor. The Utah statute in question in *Holden v. Hardy*[194] had been enacted to protect those engaged in these particularly unhealthy and dangerous occupations. Significantly, the Court's decision to hear the case revolved around the workers' right to enter freely into contract—the argument being that any limitation of the workers' right amounted to deprivation of liberty without due process of law. This use of substantive due process was relatively new[195] and the Court trod carefully as it initially had done in the property cases, wanting not "to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare. . . ."[196] Unlike the property cases, however, the Court needed relatively little time to determine that the sanctity of the state police power paled in comparison with the new due process.

Thus, in 1908, in *Lochner v. New York*,[197] a majority of five justices held that a New York statute limiting the hours that bakers could labor "necessarily interferes with the right of contract between the employer and employees . . . [and] the general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment to the federal Constitution."[198] In this instance, the very language of the decision belied an underlying economic ideology far more than any Constitutional doctrine, for in the pristine world of perfectly free markets unhindered by all but the most laissez faire concept of government, employees were on equal contractual footing with employers. In theory, sellers of labor had all the advantages on their side that buyers had on theirs.

Justice Harlan dissenting for himself, Justice White, and Justice Day noted now that the Court had

> . . . enlarg[ed] the scope of the [Fourteenth] Amendment far beyond its original purpose . . . involv[ing] consequences of a far-reaching and mischievous character . . . [which] would seriously cripple the inherent power of the states to care for the lives, health, and well being of their citizens. . . .[199]

More compelling, however, was Justice Holmes dissent, for he saw clearly that the Court had done more than merely misinterpret the Fourteenth Amendment:

> *This case is decided upon an economic theory which a large part of the country does not entertain.* If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . *The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.* . . . [*A*] *Constitution is not intended to embody a particular economic theory*, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views,

> and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgement upon the question whether statutes embodying them conflict with the Constitution of the United States.[200]

During the next several years, the Court appeared to back down from its much criticized *Lochner* decision, partially due to Holmes' stinging criticism, partially due to special circumstances surrounding ensuing cases, and partially due to a brilliant brief presented by then attorney Louis Brandeis in favor of state work-hour limitations.[201] It seemed that the Court had reversed itself on *Lochner*. In fact, the Court simply lacked for related cases. Far from abandoning its laissez faire concept of economics, the Court increasingly, in other sorts of cases, used every opportunity to further it. And as for the *Lochner* decision, "reports of [its] demise were greatly exaggerated as events of the next decade [the 1920s] were to prove."[202]

By the first decade of the 20th Century, the "meaning" of the Fourteenth Amendment had been well- (if to many minds, incorrectly) established. Certainly, its interpretation had effectuated a new use of the centuries old concept of due process, a new Constitutional "personhood" for corporations, and, indirectly, a new and vast source of power for the federal judiciary—one which was used to assert national supremacy not for its own sake, but for the sake of business. To those "great laboratories of social, political, and economic experimentation"—the states—the new national judicial power meant legislative uncertainty and political limitation. Yet, such limitation did not necessarily result in a quid pro quo national gain. Dual federalism could be revived to exclude regulation on both sides. And, the Court was to prove time and again that "Mr. Herbert Spencer's Social Statics" could as easily be applied to Washington as it could to Minnesota.

VI
Court Constraints on Early Economic Regulation: Dual Federalism and The Regulatory "No-Man's Land"

The great industrial growth of the late 19th and early 20th Centuries did not confine itself neatly within the borders of the several states. Railroads carried people and cargo across the nation and the "captains of industry" readily created "interstate trusts." It was an era that saw small entrepreneurs locked out of the "competitive" process and the public locked into the stranglehold of rampant industrial expansion. The states were helpless to control the transnational arrogance of the "robber barons" and, by the turn of the century, the Court had badly curtailed even their internal controls. By the 1880s, it was becoming increasingly clear that only Congress could act to abate all the ill-effects of America's industrial revolution. It alone possessed a powerful Constitutional tool in the interstate commerce clause and it remained only to find a systematic and legally acceptable means of employing that tool.

THE INTERSTATE COMMERCE COMMISSION: REGULATORY PROMISE VERSUS JUDICIAL REALITY

As early as 1874, the Senate began considering legislation to control the competitive practices of the railroads.[203] Invariably, however, over the next decade, railroad interests proved too powerful an obstacle to overcome: Congressional ideas foundered along with state regulations. Thus, it was not until 1886 that Congress was compelled to serious action—the result of the changing attitude of the Court toward state legislation.

The case of the *Wabash, St. Louis, and Pacific Railway Company v. Illinois*[204] revolved around an Illinois statute prohibiting long-short haul rate discrimination; in this case, between certain Illinois cities and New York City. The Court's ruling found that

> . . . if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by Congress of the United States under the commerce clause of the Constitution. . .[205]

Clearly, the Supreme Court was telling the states that they had no Constitutional right to regulate railroads once they had crossed state lines. In 1886 this was no mere

preemptive decision. Quite literally, state legislation was the only regulatory game in town.

The Congressional answer to the Court's "challenge" was the *Interstate Commerce Act of 1887*. In view of recent events, little debate seemed necessary and little, apparently, occurred:

> Constitutional issues were scarcely touched upon during the debate that preceded the passage of the bill, for few questioned that the federal government had authority thus to regulate under the interstate commerce clause. Only Sen. Leland Stanford of California had the temerity to suggest that transportation was not commerce and that a law regulating common carriers would therefore be unconstitutional. Stanford's rail interests were well known, and no one took his argument seriously.[206]

The *Interstate Commerce Act* averred that common carrier rates should be just and reasonable. Rebates and rate discrimination between persons or places were declared illegal. Long-short haul discrimination was forbidden. Pooling and traffic agreements were outlawed.[207] Finally, the new law created a five-member Interstate Commerce Commission (ICC).

The ICC was significant for a number of reasons. First, and most apropos of this chapter, the Commission was authorized to administer this completely overt manifestation of the Congressional interstate commerce power. Second, to that purpose, it was given the power "to hear complaints, to inquire into the books and accounts of railroads, to hold hearings . . . to compel attendance of witnesses . . . [and] to issue cease-and-desist orders against any carrier found to be violating the provisions of the law."[208] Third, the ICC was wholly unique at the time because it was the first federal commission to be given what appeared to be quasi-legislative, quasi-administrative, and quasi-judicial powers. It appeared, that is, to cut through the normal "separation of powers" at the federal level as well as to place federal regulations where, until recently, only state regulations had existed.

All of this gave the Commission a substantial amount of potential power to bring order to an increasingly chaotic situation. This potential, unfortunately, was not soon to be realized:

> The Commission started out bravely and accomplished something. Little by little, however, its power for good was so whittled away by judicial decisions that by the end of the century it had become little more than a body to collect data and make reports.[209]

The problem was two-fold. In the first place, the Court—as it had done with state regulations—was attempting to shore up its own laissez faire economic doctrine by ruling against some of the clear statutory authority of the ICC. Thus, in *Interstate Commerce Commission v. Brimson*,[210] the Court stated that

> A quasi-judicial agency cannot be granted by Congress the power to compel testiomony or to make a final determination of private rights. Such an agency cannot be invested with authority to punish for contempt by fine or imprisonment. The proper procedure is for the agency to place the witness before a federal court. The courts support the valid findings of quasi-judicial agencies and issue enforceable orders.[211]

Obviously, the *Brimson* ruling drastically curtailed the hearing capacity of the ICC, one of its most important statutory functions.

In the second place, and in some fairness to the Court, the enabling legislation may have assumed too much but said too little. That is, certain capabilities essential to the effectiveness of the ICC were not actually stated in the *Interstate Commerce Act*. This was glaringly true of the Commission's power to fix rates. And when the ICC attempted to do just that, the Court made clear "that the grant of such a power is never to be implied."[212]

Despite such Congressional lapses, however, the real problem lay more with the first issue than with the second. What the Court had done, through continual negative interpretation on both the federal and state levels, according to Rozann Rothman, was to make a judicial mockery of dual federalism:

> It was not until dual federalism was put to a new use in the 1880s and the Supreme Court used the concept to protect industrial capitalism from regulation that the legitimacy of the concept was eroded. This interpretation created a no-man's land in which neither federal nor state governments could act to remedy inequities.[213]

Hence, finally, in perhaps its "unkindest cut of all," the Court even curtailed the Commission's fact-finding role. In *Interstate Commerce Commission v. Alabama Midland Railway Company*,[214] the Court asserted its own right to "reverse the Commission on its facts or determine new ones."[215] The result, according to Justice Harlan, dissenting, was to go "far to make that Commission

a useless body for all practical purposes."[216]

By the turn of the century, the Commission, courtesy of the Supreme Court, had become little more than a glorified public information agency. For the time being, control of interstate commerce was a sham, existing (or, rather, "nonexisting") in that Constitutional "no-man's land." Lest it feel lonely, however, it was soon to be joined there by government antitrust activities.

THE *SHERMAN ANTITRUST ACT:* THE PROBLEM OF TRUST, ANTITRUST, AND ANTI-ANTITRUST

The railroads were not the only industrial giants whose often unscrupulous activities gave cause for concern. On another front, some industries were seeking to avoid the pitfalls of cut-throat competition through combination. Thus, for instance, the Standard Oil Company was the product, in 1882, of a trust combination of the 39 leading refinery companies. Needless-to-say, this trust resulted, for all practical purposes, in a monopoly of the nation's oil refining capacity. Moreover, similar mergers were occurring in the sugar industry and in steel and iron production.[217]

All of this aroused the wrath of public opinion and substantially undercut small-scale free enterprise. So obviously unsavory had this wholesale monopolizing become and so outraged were public opinion, small businesses, liberals, and other reform elements, that in 1888 both political party platforms endorsed some form of antitrust legislation.[218] The result was the *Sherman Anti-Trust Act of 1890:*

> Naturally the Constitutional basis for the act was the interstate commerce clause. It declared every contract or combination or conspiracy in restraint of interstate or foreign trade or commerce to be illegal. It also declared it illegal to monopolize or attempt to monopolize any part of interstate or foreign commerce. Violation of the act was made a punishable offense. The act lay on the statute book for several years without serious ruffling of its pages.[219]

The several years were five.

In 1895, the federal government brought suit against the American Sugar Refining Company in an attempt to dissolve its near-monopolistic holdings—in this case, "near"-monopolistic meant 94% of the U.S. sugar refining capacity.[220] The government claimed that this resulted in a restraint of interstate commerce, unnaturally high prices, and a restriction of trade. However, the Court ruled against the government. In so doing, it fell back upon the narrowest possible definition of commerce, declaring that "commerce succeeds to manufacture, and is not a part of it."[221]

Thus, although the Court admitted the sugar trust to be a monopoly restraining free manufacture, it declared that it was not on this account illegal for manufacturing was not commerce. Further, if this unregulable manufacturing trust did restrain commerce, it was an "indirect" restraint and, therefore, presumably, legally benign. Again, the Supreme Court—bastion of *laissez faire* economic purity—had turned dual federalism upside-down. Again, it had created a Constitutional "no-man's land" in which no one could act to protect the public, small business, and, increasingly, the economy itself. According to Kelly and Harbison:

> *United States v. Knight* marked the beginning of a "twilight zone" between state and national powers—a zone in which neither the federal government nor the states could act. Certain economic problems it was obviously beyond the competence of the states to regulate; yet they were now Constitutionally beyond the authority of the national government. . . . In other words, certain phases of national economic life lay outside the control of both the states and the national government. No more complete perversion of the principles of effective federal government can be imagined.[222]

Yet even in this perverse state, a use—acceptable to the Court—could be found for the *Sherman Anti-Trust* and *Interstate Commerce Acts.*

WHEN THE COMMERCE POWER AND NATIONAL SUPREMACY ARE "LEGITIMATE:" *IN RE DEBS* AND THE RESTRAINT OF ORGANIZED LABOR

In 1895, the same year in which it attempted to dissolve the American Sugar Refining Company, the U.S. Justice Department issued an injunction against Eugene V. Debs and other leaders of the American Railway Union and the Pullman Strike on the bases of the *Interstate Commerce Act* and the *Sherman Anti-Trust Act.* When the Chicago Circuit Court upheld the injunction, Debs petitioned the Supreme Court for a writ of habeas corpus. Significantly, the Court denied the writ.[223]

Suddenly, all the powers of the national government and Congress, effectively buried for the purpose of pros-

ecuting business, were exhumed for use against the struggling labor movement. Suddenly, the federal government was unquestionably supreme. Suddenly, it possessed herculean strength and, more important, could legitimately use it:

> The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. *The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce* or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation, to compel obedience to its law.[224]

If the Court was inconsistent in its application of the Constitution, it succeeded in retaining meticulous coherency in its economic doctrine.[225] Labor unions, after all, were antithetical to the laissez-faire notion of individual freedom of contract. Collective labor advantage, this notion held, would be won only at the expense of capitalism. Thus, whether or not the Debs injunction was a legitimate federal function under the *Interstate Commerce Act*, the *Sherman Anti-Trust Act*, and the Constitution, was quite beside the point. For the Supreme Court of the late 19th and very early 20th Centuries, the Constitution had taken second place to economic theory; Congressional statutes were selectively applied; and dual federalism was used to create a legal chasm—the realm of business and industry and *no one else*.

In 1901, President McKinley was assassinated and his Vice President succeeded to the high office. A liberal nationalist, Theodore Roosevelt obviously was not aligned with the conservative limbo typified by the Court. He considered himself progressive and intended to use the federal government in general and the Presidency in particular to further his objectives. Thus would begin a 20-year period in which, for the most part, judicial laissez faire economics lay dormant. To be sure, it was merely a period of latency, but a latency long enough to allow a significant coup in federalism. The "third revolution" did not occur until the era of the second Roosevelt, but the planting of its seeds were begun by the first.

VII
The Progressive Interlude: Growth of the National Police, Regulatory, Spending, and Taxing Powers

For the nearly four decades since the death of Abraham Lincoln, the White House had been occupied by a series of individuals whose conception of the Presidency was anything but dynamic. Thus, on the one hand, power and leadership had accrued to a generally conservative Congress, while, on the other, the Court kept the economic life of the nation in a virtual stranglehold. The Presidency had become the least potent branch of government—in this form, hardly the place for a man of Theodore Roosevelt's temperament.

Roosevelt envisioned the Presidency to be a "stewardship" charged with the responsibility of caring for the welfare of the American people. To this end, he believed that any power not specifically denied to the President by the Constitution could be used by him. Hence, the President later wrote:

> The most important factor in getting the right spirit in my Administration, next to the insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. My view was that every executive officer, and above all every executive officer in a high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was

> imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do it . . . . In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever measure was necessary, unless prevented by direct constitutional or legislative prohibition.[226]

Roosevelt's personal "stewardship," in turn, had telling ramifications for the entire federal system, for that position was born of what he called the "New Nationalism:"

> The state must be made efficient for the work which concerns only the people of the state; and the nation for that which concerns all the people. There must remain no neutral ground to serve as a refuge for lawbreakers, and especially for lawbreakers of great wealth, who can hire the vulpine legal cunning which will teach them how to avoid both jurisdictions . . . . The New Nationalism puts the national need before sectional or personal advantage. It is impatient of the utter confusion that results from local legislatures attempting to treat national issues as local issues . . . . This New Nationalism regards the executive power as the steward of the public welfare . . . .[227]

In spirit and in practice, the New Nationalism would persist for the most part until after World War I.

CREATING A FEDERAL POLICE POWER: THE CONSTITUTIONAL CONTRIBUTION OF THE "MUCKRAKERS"

One would search endlessly and in vain for the "police clause" in the United States Constitution. If the founders possessed legal vision, they were neither social nor economic prophets. Thus, they failed to foresee the beginning of urbanization, the crushing floods of immigrants, or the problems of an era two centuries removed. They failed to foresee the merchandizing of putrid meat from the great packing houses of the Midwest—they failed, for that matter, to foresee even the packing houses. Nor did they possess the prescience to conjur up visions of widespread, sophisticated international trafficking in prostitutes. Finally, the mostly gentlemen farmers who framed the Constitution did not envision small children laboring 60 hours a week and more in industrial sweatshops. In short, national police problems in times of peace were simply unanticipated. Police problems were local in their narrowest definition; state problems in their broadest.

That the founders were not in this respect oracular may have been Constitutionally fortuitous. Such powers could well have resulted in a document cumbersome in its specificity, on the one hand, or delphic in its obscurity, on the other. And, whether or not intended, the framers had provided the means for the federal government to don the uniform of "super-cop." What 18th Century lawyers, scholars, and farmers did not see, 20th Century progressives did—the power to regulate commerce and the power to tax could be transformed into the power to police.

Policing Through Commerce: The Lottery Case

The first Congressional attempt to police or regulate the public morals occurred in the area of gambling. The opening wedge was an 1895 act which declared illegal the interstate shipment of lottery tickets. Needless-to-say, "interstate" was, in this case, the significant variable, and what was the shipment of tickets but commerce in its most obvious form, traffic?

The Supreme Court did not gain an opportunity to comment upon the Congressional policing of gambling for eight years. When it did, in *Champion v. Ames*,[228] it was asked by those opposed to the law to judge the case on two counts: first, that lottery tickets had no "real or substantial value in themselves, and therefore [were] not subjects of commerce;"[229] and second, that Congress could not use the commerce power at any rate in a prohibitory form—that is to eliminate entirely a certain activity.

In a rather tentative, case-specific, but nonetheless progovernment decision, the Court rejected both arguments. Thus, to the first point, Justice Harlan answered:

> We are of opinion that lottery tickets are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers is a regulation of commerce among the several states.[230]

While to the second point he replied:

> If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the

> power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another? . . .[231]

As had so often been the case in the past, the Court proceeded with caution, seemingly aware of the potential functional applicability of *Champion v. Ames*. Indeed, the case did open the way for increasing and more significant use of the commerce power as a federal policing device. Yet, first, Congress was to invent another Constitutional means to the same approximate end, for as John Marshall had once taught the nation, "the power to tax involves the power to destroy . . . ."[232]

Policing Through Taxation: The Case of Oleomargarine

In the year before the lottery case came to the Court, Congress took action to limit the sale of artificially colored oleomargine. The law was largely the result of intense lobbying from the nation's dairy producers—margarine obviously cut into their markets—but it was also predicated upon a valid social concern: margarine producers were passing their product off as real butter. Unlike the lottery law, however, Congress here looked beyond its power to regulate interstate commerce. Instead, it levied a prohibitory (ten cents per pound) tax upon colored margarine, while requiring a benign one-quarter cent per pound on color-free margarine. The intent was exceedingly clear and the case was before the Court in near-record time.[233]

Again, the six to three decision favored the government and therefore denied the two major contentions of the litigant: (1) that Congress could only tax for the purpose of raising revenues and not "to suppress the manufacture of the taxed article;"[234] and (2) that "the power to regulate the manufacture and sale of oleomargarine [was] solely reserved to the several states . . . ."[235] The judicial blessing apparently given, the Congressional "police power" moved full speed ahead.

THE NEW NATIONALISM AND THE EXPANSION OF THE POLICE POWER

If the first decades of the 20th Century could be characterized by any particular phenomenon it would probably be the rise of progressive movements and groups—social crusaders, urban reformers, labor union organizers, a New Nationalism charged with the energy of Theodore Roosevelt, and a New Freedom championed by his able adversary, Woodrow Wilson. Moreover, urbanization stimulated the widespread distribution of popular, printed news and that, coupled with the zeal for social reform fostered a sort of crusading, investigative journalism known both fondly and derisively as "muckraking."[236]

Quite early in the century, the problem of tainted food, shipped to markets throughout the country, became grist for the battle of these reform-oriented newspeople. Stories of bad, often physically injurious, products were, in turn, absorbed by a public no longer quite as willing to "be damned" by industry. More important, however, the news was received with characteristic enthusiasm by a President inclined toward the initiation of dramatic legislation. Thus, in 1906, the *Pure Food and Drug Act* became law, augmenting the growing police power of the federal government[237] and on the same day, Congress passed the *Meat Inspection Act,* the legislative goal of the most famous "muckraker" of all, Upton Sinclair.[238]

Five years later, the Court ruled in favor of the *Pure Food and Drug Act*. In *Hipolite Egg Company v. United States*,[239] a unanimous Court found that

> Congress had the power to pass the *Pure Food and Drug Act of 1906* which prohibited the introduction into the state by means of interstate commerce of impure foods and drugs. [T]hese could be seized at any time since the purpose of the act was to prevent the use of such items, . . . The power of Congress to make "outlaws" of commerce applies to any trade.[240]

That power would next turn to a more overt "outlaw."

Even before the turn of the century, the large waves of immigrants had been an enormous boon to the business of prostitution. According to some accounts, by 1909, New York had become one of the world's centers of the illicit traffic[241] — a sort of underground waystation for the shipment of women to other cities throughout the country. Obviously, such interstate movement was well beyond the reach of the Bureau of Immigration.

In 1909, as a result of increased publicity over the problem, President Taft asked Congress for legislation to control what had become commonly known as the "white slave trade." In response, Rep. James Mann (D.-IL) introduced the *White Slave Trade Act* (or *Mann Act*) *of 1910*.[242] The law made it a federal offense to ship women across state lines for immoral purposes. An exceedingly popular piece of legislation, the *Mann Act* was sustained by the Court despite the fact prostitution could hardly be considered within the normal channels of commerce.[243] Nonetheless, the Court had now adapted itself to a more flexible form of dual federalism:

> Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said; but it must be kept in mind that we are one people and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material or moral.[244]

Having shed its 1980s antiregulatory skin, the Court, it seemed was now in full step with the popular mood.[245]

REVITALIZING THE FEDERAL REGULATORY ROLE: A NEW LIFE FOR "SHERMAN" AND THE ICC

Roosevelt Versus the Trusts: The Northern Securities Case

If the 26th President of the United States will forever be associated with any concept, that concept would be "trust busting." From the outset of his Administration, Theodore Roosevelt pledged to break the stranglehold of the great productive combinations which had developed in the 1880s—combinations, it will be recalled, which were protected by the Supreme Court from even the most rudimentary form of government control.[246]

Thus, as early as his first address to the Congress, Roosevelt asked for new laws to supplement or replace the *Sherman Anti-Trust Act*. Barring any such federal legislation, he further announced plans to draft a Constitutional amendment with the same ultimate effect. However, as often was the case, the former "Roughrider" was less than successful against the strong conservative elements in the Senate—a situation which he tended to exacerbate by backing down too easily.[247] Yet, if Roosevelt failed to show his strength amid the Senate "oligarchs," he and his Attorney General, Philander C. Knox, showed brilliance and fortitude in their dealings with the Court. Roosevelt's failure to secure more effective antitrust legislation led him to attempt renewed and vigorous prosecution under the existing *Sherman Act*—a law which had gone virtually unused since the *E.C. Knight* case of 1895. The Administration's first major success culminated in 1904.

The details of *Northern Securities Company v. United States*[248] were illustrative of the extreme audacity of the industrial magnates of the late 19th and early 20th Centuries. More important, it was an audacity mixed with extreme power and wealth—a dangerous combination which could throw the market into a panic upon the impulse of big business. The situation, of course, was anathema to small investors and the public was becoming increasingly resentful. Hence, at the turn of the century, E. H. Harriman (Union Pacific Railroad) locked horns with James J. Hill and J.P. Morgan (Northern Pacific and Great Northern Railroads) causing the Northern Pacific (stock market) Panic of 1901. Thereafter, having rather whimsically thrown the economy into turmoil, the industrial "leviathans" settled upon the popular business compromise of the day: as easily as they had battled, they then combined. This time, however, the "captains of industry" had gone too far and the Justice Department quickly brought suit.[249] To the surprise of nearly everyone—and seemingly overturning *E.C. Knight*—the Court held for the government:

> In this, as in former cases [monopolies] seek shelter behind the reserved rights of the states and even behind the Constitutional guarantee of liberty of contract. But this Court has heretofore adjudged that the act of Congress did not touch the rights of the states, and that liberty of contract did not involve a right to deprive the public of the advantages of free competition in trade and commerce. Liberty of contract does not imply liberty in a corporation or individuals to defy the national will, when legally expressed. Nor does enforcement of a legal enactment of Congress infringe, in any proper sense, the general inherent right of everyone to acquire and hold property. That right, like all other rights, must be exercised in subordination to the law. . . .[250]

For Future Reference: *Swift & Company* and the "Stream of Commerce"

The following year, the Roosevelt Administration repeated its *Northern Securities* success in its prosecution of meat packers alleged to have entered into conspiracy to fix prices. In a sense, *Swift and Company v. United States*[251] merely upheld another government antitrust prosecution. Yet, the more substantial contribution of *Swift* was Justice Holmes' formulation of the so-called "stream of commerce" doctrine. Thus, Holmes contended that even though the cattle sales in question had occurred entirely within one state they affected interstate commerce:

> Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the

states is not accidental, secondary, remote, or merely probable. . . .

It is said that this charge is too vague and that it does not set forth a case of commerce among the states. Taking up the latter objection first, commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.[252]

Curiously, there were no dissents in the *Swift* case, perhaps because the justices failed to see its implications. But, telling and vast implications it had:

The Court's conservatives apparently considered this dictum to be harmless enough; the combination was in sales and not production, and there was no dissent. In reality, the "stream of commerce" doctrine was to become a basic legal concept in the expansion of the commerce power. The idea provided a logical premise under which production itself could later be held to be a part of commerce. Should this occur, the distinction between commerce and manufacturing would break down. This, in fact, is what happened after 1937.[253]

Between 1905 and 1937, however, lay 32 long years.

Rebirth of the Interstate Commerce Commission

Crippled by a series of adverse judicial decisions in the 1890s,[254] the Interstate Commerce Commission had become a regulatory shell—little more than a public information agency and an ill-informed one at that. In large measure, this had been the result of a pervasive judicial "confusion" between Constitutional interpretation and economic indoctrination. However, a not insubstantial part of the ICC's problems lay with its weak enabling legislation, a weakness which needed correction if that body were to function on even the most minimally effective level. Roosevelt had failed in the legislative arena with antitrust but he experienced no such failure in the area of the Interstate Commerce Commission.

Thus, in 1905, the President's request for adequate regulatory powers was met favorably by Rep. William P. Hepburn (R. IA). The Hepburn Bill amending the *Interstate Commerce Act* became the subject of protracted and vitriolic debate, particularly in the Senate, with most of the fighting centering around the issue of appeals courts' right to review Commission decisions.

As originally presented to the Senate, the bill severely limited the courts' reviewing powers, a provision which met with hostility among Senate conservatives. Their answer was a vague provision which failed to define the bounds of judicial review. Because the Senate would not have passed the act in more specific form, the bill's supporters were forced to accept the conservatives' amendment and hope for the best.[255] Nonetheless, the *Hepburn Act*[256] substantially strengthened the Commission's hand, for it gave the ICC power to set rates (albeit ultimate, not original), with the burden of appeals placed upon the carrier rather than upon the Commission. Both these provisions were a vast improvement over the past. Their fate now lay with the courts.[257]

As amenable as it had been to the new police powers and antitrust, so the Court now proved equally amenable to the strengthened ICC, claiming, the following year, that "the findings of the commission are made by law prima facie true."[258] This, of course, was an absolute reversal from the Court's stance just ten years earlier. Nor was it to be an isolated nor an upper limit decision.

In 1910, in *Interstate Commerce Commission v. Illinois Central Railroad Company*,[259] the Supreme Court gave its blessing to the Commission as a policymaking body.[260] In the same year, Congress further fortified the ICC by giving it an original rate-setting function[261]—a function which the Court thereafter approved.[262] Yet, the Court's most remarkable decision was still to come.

The case of *Houston, East and West Texas Railway Company v. United States*[263] (otherwise known as the Shreveport Case) revolved around a rate structure set by the Texas railroad commission. Apparently, in an effort to undercut out-of-state competition, the commission had set rates at an unusually low level between Texas cities—rates which were considerably less than those for comparable distances between Shreveport, Louisiana and the same Texas cities. Thereupon, the Louisiana railroad commission requested the ICC to "lower the interstate rate charges to equalize competition. The Commission equalized competition—by ordering an increase in the *intrastate* rate structure."[264] The Court's reaction, known as the "Shreveport Doctrine," speaks for itself:

> Whenever the interstate and intrastate transactions of carriers are so related that the government of one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its Constitutional authority and the state and not the nation, would be supreme within the national field. . . .[265]

The Court had truly come full circle.

"TO. . .PROVIDE FOR THE . . .GENERAL WELFARE:" BIRTH OF THE FEDERAL GRANT-IN-AID

Unlike the police power, federal grants to the states were not unique to the "progressive interlude" of the early 20th Century. Certainly, land grants had not been at all unusual and financial grants too had been in existence—if not prominently, at least consistently since the 1880s.[266] However, the first of the modern grants (those which, in years to come, would greatly increase the federal role) was developed in the *Weeks Act of 1911*. By the *Weeks Act*, Congress authorized the Secretary of Agriculture "to cooperate with any state or group of states, when requested to do so, in the protection from fire of the forested watersheds of the navigable streams. . . ."[267] According to Morton Grodzins:

> This enactment was legislative news. It not only made federal aid conditional upon advance approval of state plans for forest guardianship, but also provided federal inspection of state procedure. Whereas previous grants-in-aid were embodied in directives of a general nature, the states were not subjected to national scrutiny intended to be both continuing and particularized.
>
> The *Weeks Act*, besides requiring state matching, also described in some detail how the state as well as the national contribution should be overseen by national officers.[268]

In practice, the *Weeks Act* was hardly an earth-shaking example of intergovernmentalization—total appropriations amounted to only $200,000. Yet, it was prototypical. Thus, three years later, Congress enacted the *Smith-Lever Act* and if the *Weeks Act* was a conditional prototype, *Smith-Lever* set a financial pattern. Establishing the Agricultural Extension Service, the act allocated millions of dollars in its first years of operation—paltry sums by 1981 standards but colossal by those of the 1910s.[269] Moreover, within the next seven years, subsequent grants-in-aid included highway construction funds (the Congressional response to the automobile),[270] appropriations for vocational education,[271] public health allocations,[272] and maternity care grants.[273] By 1925, grants-in-aid totaled about $93 million.[274]

Constitutional authority for this spurt of Congressional spending activity derived from the general welfare clause in Article I, Section 8. Accordingly, Congress was entitled ". . .To . . . provide for the . . . general welfare of the United States. . . ."[275] Like so much of the Constitution, this grant of authority was somewhat enigmatic. Hence, it will be recalled that early in the 19th Century, the internal improvements debate[276] had revolved around the meaning of the general welfare clause, and the so-called Pierce Veto of 1854[277] had severely limited the scope of the clause for purposes which today would seem to fit most overtly under the category of welfare. However, despite this history, the widespread progressivism and general awakening to social problems during the first and, even more, the second decade of the century fostered acceptance of such Congressional spending. Little debate appeared to ensue over the issue; no doomsayers prophesized the end of federalism.

In 1923, the State of Massachusetts brought suit against the Secretary of the Treasury, Andrew Mellon, claiming that the maternity care grants offered by the *Sheppard-Towner Act of 1921* were unconstitutional.[278] Rather than rule directly on the merits of the grants, the Court dismissed the case on the grounds that it lacked jurisdiction. Nonetheless, Justice Sutherland, opining for a unanimous Court, indicated his acceptance of this form of Congressional spending. Such grants, he claimed, were not coercive instruments and "probably it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation, but simply extends an option which the state is free to accept or reject."[279] Though they would experience little growth in the next several years, grants-in-aid were here to stay.

THE INCOME TAX AMENDMENT: THE CONSTITUTIONAL CONTRIBUTION OF THE PROGRESSIVES

Professor of history, Harry N. Scheiber, has described the Constitutional period 1890 to 1933 as, overall, an era of "centralizing federalism."[280] It is a characterization—particularly as it pertains to the first two decades of the 20th Century—with which few would argue. A

new police power, a revitalized regulatory function, and the growth of conditional grants-in-aid had tilted the scales of "dual federalism" toward the center. Yet, one single event, more than any of the others, contributed to this trend: the *piece de resistance* of the Progressive movement, the Sixteenth Amendment.

The Statutory Income Tax: A Case of Judicial Resistance

The basic Congressional power to tax derives from three Constitutional sources. One, of course, is Article I, Section 8 which states that "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States. . . ." Another, found in the same article, Section 2, lays down the specifics of the taxing power: "Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers. . . ." Finally, Article I, Section 9 reasserts that "No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken."

Obviously, the founders were quite concerned that direct taxes be proportional. They were not, however, equally concerned over the question, "What is a 'direct' tax?"[281] In fact, Constitutional scholar, C. Herman Pritchett, observes that "when this provision was under discussion in the Constitutional Convention, [Rufus] King asked precisely this question, and according to Madison's notes, 'No one answered.' "[282]

The Court first answered the question in 1796.[283] In this case, a tax on carriages was alleged to be a direct tax and therefore unconstitutional. The Court did not agree, claiming instead, with less than judicial certitude, that "perhaps a direct tax . . . can mean nothing but a tax on something inseparably annexed to the soil, something capable of apportionment under all such circumstances. A land or a poll tax may be considered in this description."[284]

During the Civil War, Congress, for the first time, levied an income tax to raise vital revenues. Although the successful tax was repealed in 1872, a case against the tax was brought before the Supreme Court in 1881—the litigant complaining that it had been a direct tax, not proportioned among the states, and hence, unconstitutional.[285] Relying on the precedent set in 1795, the Court upheld the income tax, claiming that it could not be defined as direct. For those who favored a permanent income tax, this was a momentous decision.

Indeed, it seemed patently clear that Congress had the power to employ this most efficient, revenue inducing tax for peacetime purposes—a step it confidently took 13 years later in 1894:

> Congress had every reason to be confident of its authority when in 1894 it levied a tax of 2% on incomes in excess of $4,000. This statute was a great victory for the progressive forces of the country, and a sectional triumph for the south and west over the industrial northeast, where persons with such incomes were mostly located. Before the Supreme Court the tax was depicted as a "Communist march" against the rights of property, and the Court was told that it had never heard nor would ever hear a case more important than this.[286]

Given the makeup of the Court in the 1890s, it is not difficult to guess how it decided.

The case attacking the income tax provisions of the *Wilson-Gorman Act* came before the Court in 1895—in fact, it came before the Court twice in that same year! Moreover, it has been argued ever since that the Court should never have agreed to hear *Pollock v. the Farmers' Loan and Trust Company*[287] in the first place—so dubious was its foundation. Hence, the plaintiff—circumventing an 1867 act of Congress which "banned suits 'for the purpose of restraining the assessment or collection of a tax' "[288]—sued the loan and trust company in question as a stockholder opposed to the tax. Not only was the case sidestepping the 1867 law, but it constituted, quite manifestly, an instance of collusion between plaintiff and defendant.[289] All of this, the Court chose to ignore.

The first of the *Pollock* cases was "decided" in as indecisive a manner as possible—one justice was absent and the remainder split equally over the Constitutional validity of the income tax. However, one month later, "*Pollock* II" played to a full judicial house, which declared the tax to be "unconstitutional and void because not apportioned according to representation."[290]

Ratification of the Sixteenth Amendment: The Constitutional Repeal of *Pollock*

Needless-to-say the Court's decision in *Pollock* was absolutely consistent with other opinions of the day.[291] Ideologically, that Court could not have decided affirmatively for such a tax on private property. One can only speculate that, given the disposition of the "new" Court of the 1900s, another *"Pollock"* would have been de-

cided quite differently. That, however, would be fruitless speculation for the nation's Progressives had another, more drastic, strategy in mind.

Immediately after the 1895 antitax opinion was announced, a campaign began to amend the Constitution in order to clarify the Congressional taxing power. That drive culminated 18 years later in, perhaps, the Progressives' greatest achievement, the Sixteenth Amendment to the Constitution:

> The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.[292]

As clear and concise as any portion of the Constitution, the Sixteenth Amendment offered the federal government a vast and ever-expanding source of revenue. According to Andrew C. McLaughlin, writing in 1935:

> As a matter of plain fact, it rivals in importance the first section of the Fourteenth Amendment; and, indeed, if we consider all its possible effects, it may be considered the most far-reaching addition to the Constitution in the last hundred and forty years.[293]

Truly, the power to tax opened the way for the power to spend. The great centralizing mechanism had been added; the dispersal of its product would centralize even further.

THE EARLY 20th CENTURY AS YEARS OF CHANGE: A BRIEF WORD ON THE SEVENTEENTH, EIGHTEENTH, AND NINETEENTH AMENDMENTS TO THE CONSTITUTION

The Seventeenth Amendment: Repeal of the Great Compromise

The reader will recall that Madison's "neither wholly federal nor wholly national" description of the Constitution had been given its most overt expression in the make-up of Congress. Hence, the Great Compromise of the Constitutional Convention required that members of the House of Representatives be popularly and proportionately elected (theoretically making that body representative of the people), while the Senate (two members per state) was to be chosen by the respective state legislatures (theoretically making that body representative of the states.)[294]

In practice, the compromisers' plan had never quite materialized in the ideal manner. Instead, because of population trends, the House, historically, tended to represent northern, more densely populated parts of the country and the Senate, the south. In a sense, then, the result had been sectional, rather than state representation. However, because Senators were chosen by the state legislatures they were, to a certain extent, creatures of those legislatures and thus the selection method "merely succeeded in converting the elections to state legislatures into indirect senatorial elections."[295] A more sophisticated population saw the anomaly and that insight, coupled with the widespread belief that state legislatures were less than trustworthy seats of great statesmanship, led to the drive—begun as early as 1828—for the Seventeenth Amendment.

Ratified just three months after the Sixteenth Amendment, the Seventeenth Amendment to the Constitution states that, "The Senate of the United States shall be . . . elected by the people thereof. . . ." The effect of the Amendment has been the subject of some debate. While some contend that it has had very little effect on the course of American federalism, others contend that, in fact, the Amendment required a formal repudiation of the state-centered theory of federalism—that it constituted the first successful drive to democratize the federal government. Certainly, inasmuch as it divorced the choice of Senators from the more overt politics of state legislatures, it created a less state-beholden Senate. Directly elected Senators have been far less willing to act as spokespersons for their respective states—in a governmental, not a constituency sense—than their predecessors.[296] Finally, of course, the Amendment was symbolic of an era—an era of national feeling ostensibly to be expressed by a national legislature.

The Eighteenth Amendment: The Constitutional Mistake

The social reformers active in the first part of the century left few moral stones unturned. Certainly, they viewed one of the most vexatious problems to be solved as that of liquor or, more specifically, its effects on the "weak." Working at the state level, prohibitionists had succeeded, by 1919, in enacting anti-drink laws in nearly every state. The problem of interstate enforcement and national commitment, however, remained.

Thus was added on January 29, 1919, the Eighteenth Amendment to the Constitution, the complete prohibition of intoxicating liquors within the United States. Few would deny prohibition represented the ultimate in Con-

stitutional mistakes—a fact made manifest 14 years later when it became the only amendment ever repealed.

If the amendment contributed in any way to the strengthening of the federal government, it was probably only in the increased size and public esteem garnered as a result by the Federal Bureau of Investigation—the police arm of the U.S. Justice Department.

The Nineteenth Amendment: Achievement of Universal Suffrage

In 1920, after a long (well over 50 years) and valiant struggle, the drive for at least formal universal adult suffrage was achieved. Hence, Article XIX of the Constitution reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex." Though a great human rights victory, the addition of the Nineteenth Amendment has probably had no effect on the course of federalism or the breakdown of Constitutional constraints. Women voters and public officials have tended to choose and act along the same lines as their male counterparts.

In 1913, the nation elected a man who was to become its strongest President since Abraham Lincoln. Woodrow Wilson viewed the Presidency not as a passive chief executiveship but as a crucial policymaking center. Thus, before assuming the Presidency he wrote that

> . . . a new role, which to many persons seems a little less than unconstitutional, is thrust upon our executives. The people are impatient of a President or a Governor who will not formulate a policy and insist upon its adoption.[297]

This role, the 28th President took on with great vigor. According to Robert Dahl:

> As President, Wilson lived up to his conception; no President since Jefferson worked so closely with his party in Congress nor was more effective in gaining Congressional support for his policies: tariff reform, the *Federal Reserve Act*, the Federal Trade Commission, the *Clayton Anti-Trust Act*.[298]

All of this was legislation which considerably centralized the regulatory functions of government.

As the United States broke out of its isolation to enter World War I, Wilson, too, increasingly broke with the traditional bounds of Presidential power. In 1908, Wilson wrote prophetically:

> One of the greatest of the President's powers . . . [is] . . . his control, which is very absolute, of the foreign relations of the nation. The initiative in foreign affairs, which the President possesses without any restrictions whatever, is virtually the power to control them absolutely. . . . The President can never again be the mere domestic figure he has been throughout so large a part of our history. The nation has risen to the first rank in power and resources. . . . Our President must always, henceforth, be one of the greatest powers of the world, whether he act greatly and wisely or not. . . .[299]

Truly, Woodrow Wilson went far to create the modern Presidency—he prepared for it studiously, assumed it with great verve, and finally, was himself crushed by the very role he had created.

Following the war, the United States returned to what has been called a period of "normalcy." The great sweep of progressivity had seemingly run its course. For the Court and the Constitution which it interpreted the years ahead were to be ones of reaction—years in which it appeared almost as if the Court of the 1890s had been somehow miraculously revived. For laissez faire economics and dual federalism the next few years would be ones of resurgence: the last calm before the storm that was to issue in the "Third American Revolution."

VIII
Judicial Reaction in the 1920s: The Constitutional Rebirth of Dual Federalism and Laissez-Faire Economics

The first two decades of the 20th Century had witnessed an unprecedented growth in the powers and functions of the federal government. The Congressional powers to tax and to regulate interstate commerce were transformed not only into effective means of economic regulation but into a theretofore unheard of federal police

power. To these accumulated powers was added a great potential revenue source, the income tax, and with the power to efficiently tax would come the power to spend—directly and through the states, with "strings attached."

Those years had seen the growth and development of the modern dynamic Presidency—a Presidency of some formal powers but, more important, of vast informal powers. Congress also had begun its modern metamorphosis—creating strong commissions to which it could delegate its own Constitutional authority. And, the Court had changed—becoming more flexible, more accepting of Congressional action, less bound to economic dogmatism. The lone dissents of John Marshall Harlan had been transformed into leading opinions written by the same Mr. Justice Harlan.

Late in the period, the nation entered its first major international conflict, World War I; and, with the War over, the national progressive mood had changed. To replace the vigorous Woodrow Wilson, the voters elected Warren G. Harding, a man who gave new meaning to the terms "cronyism" and "uninspired leadership." Harding, in turn, was succeeded by "Silent Cal." Most important for our purposes, the Court had changed, responding to what previously seemed to be discarded Constitutional theories and obsolete economic doctrines and a new twist as well—the "red scare." The so-called liberal bloc, once regularly able to sustain a majority, was whittled down to the point where it merely whispered in the dissents of Justice Holmes, for himself and Justices Brandeis and Stone.

In short, the nation and most of its major institutions had entered upon a period of reaction, spawned by the rapid movement of previous decades, the fear of alien thoughts and ideas, and the ascedancy of business and the entrepreneurial ethic. But, like the tenuous calm produced by the Compromise of 1850, this intervening "normalcy," too, would be short-lived.

THE FIRST AMENDMENT CASES: AN OMEN WITH A TWIST

If the American involvement in World War I was met with some resistance by a traditionally isolationist nation, it was met with downright hostility (albeit, for other reasons) by the country's radical groups. The burgeoning socialist movement, anarchists, and others generally contented themselves with pamphleteering and oration—certainly harmless activities. Yet, the War heightened the national sense of security and that, in turn, translated into a profound distrust of dissident voices. Moreover, the era of the first World War—itself a monumental event—produced what stands as one of the most significant occurrences of the 20th Century, the Russian Revolution. And, if the instance of war was not enough to make the public and the institutions of government wary, a Communist revolution was. Such was the stuff of judicial decision.

Of course, the whole battery of "radical cases" which made their way before the Supreme Court from 1919 to 1927 were of extreme importance to the area of First Amendment freedoms.[300] Yet, despite their significance to the study of Constitutional law, the cases contained little in the way of a protracted meaningful relationship to the realm of federalism nor to the breakdown of Constitutional constraints. Nonetheless, they deserve brief mention for two secondary reasons. First, the Court's reaction to radical opinion was a portent of its generally reactive stance throughout the period following the War. Second, and in an entirely different vein, was the Court's important shift in attitude regarding the Fourteenth Amendment and its application to the states.

While the War and post-War "red scare" was national in scope, it manifested itself at the state level as well. Hence, the State of New York passed a criminal anarchy statute under which it arrested, prosecuted, and convicted Benjamin Gitlow, a Communist, for publishing a manifesto urging revolutionary action. That the Supreme Court sustained the conviction in *Gitlow v. New York*[301] came to no one's surprise. However, Justice Sanford's opinion did contain a surprise of another sort:

> For present purposes we may and do assume that the freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the states. We do not regard the incidental statement in *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 543 [1922], that the Fourteenth Amendment imposes no restrictions on the states concerning freedom of speech, as determinative of this question.[302]

The old *Slaughter-House* distinction between citizens of the United States and citizens of the states and, consequently, the different obligations of those governments to their citizens was seemingly abolished.[303] In an almost casual aside, the Court now showed its willingness to apply First Amendment freedoms to the states through the Fourteenth Amendment. Increasingly, that decision would be very important.

THE POLICE POWER RECONSIDERED: THE CHILD LABOR CASES AND THE REVITALIZATION OF DUAL FEDERALISM

Hammer v. Dagenhart: Reconsideration of the Commerce Power

Midway through the Progressive interlude the Court's membership had begun to change. Most noticeably, in 1911 death had ended the 34-year term of John Marshall Harlan. Though he was to be replaced five years later by another liberal—Wilson appointee, Louis D. Brandeis—by the end of the decade, the Court was coming increasingly to resemble its predecessor of the late 19th Century. In 1918 the first major break occurred.

One of the most vexing concerns of the social reformers and others had long been the exploitation of children (often, very small) as a source of cheap factory and mine labor. This concern was finally acted upon by Congress in 1916 through the *Keating-Owens Act,* barring commodities from interstate commerce which had been produced by manufacturers employing children under 14 years of age, or, in the case of mining, under the age of 16.[304] Certainly, based upon prior commerce decisions—such as those concerning lottery tickets, impure foods, and prostitution—the Congress had absolutely no reason to believe that there would be any question whatever regarding the Constitutionality of *Keating-Owens.* Then, in 1918, Roland Dagenhart brought suit on behalf of himself and his two minor children, employees of a cotton mill. Dagenhart challenged the child labor law as an improper use of the interstate commerce clause and to the wonderment of many, the Supreme Court concurred.[305]

The opinion in *Hammer v. Dagenhart*[306] which split the Court, 5 to 4, was delivered by Justice Day:

> Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation. . . .
>
> The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.
>
> The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution. . . .[307]

If, up to this point, the decision seemed generally incongruous with prior commerce decisions, what came next was a distortion of the Constitution itself:

> In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the *powers not expressly delegated* to the national government are reserved . . . the power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. . . .[308]

Hence, the Court had suddenly revived dual federalism for the purpose of invalidating child labor regulation, something it had not seen fit to do for almost 20 years. Moreover, Justice Day actually amended the Constitution, asserting that, under the Tenth Amendment, the states retained all powers not "expressly" enumerated. "Expressly," it will be recalled, was the very word the framers had so assiduously avoided in composing the amendment nearly 130 years before, so cognizant were they of its possible misuses.[309]

Finally, Justice Day put the finishing touches on his opinion, employing the *argumentum ad horendum* (a sort of judicial version of Johnathan Edward's "A Sinner In the Hands of An Angry God" sermon) to bolster his case:

> Thus the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.
>
> For these reasons we hold that this law exceeds the Constitutional authority of Congress. . . .[310]

Bailey v. Drexel Furniture Company: Reconsideration of the Tax Power

Almost immediately upon hearing the Court's decision in *Hammer v. Dagenhart,* Congress drafted legislation using its other "sure" Constitutional resource, the power to tax. Through the *Child Labor Tax Law of 1919* employers using children under the age of 14 were to be taxed 10% of their net profits. In a brilliant legal manuever, Drexel Furniture Company[311] brought suit against the act as an invasion of state powers,[312] rather than challenging the well-grounded federal taxing power.

The Court agreed. Again employing a Tenth Amendment, dual federalism argument and again predicting the virtual end of the states and federalism, Chief Justice Taft overruled the newest Congressional attempt at regulating child labor.

The decision in *Bailey v. Drexel Furniture Company* sidestepped the question of the Congressional taxing power as a punitive, regulatory measure. Indeed, it would have been difficult to do otherwise given the powerful precedents set so recently by the Court in favor of this device. Nonetheless, the *Drexel Furniture* decision together with the *Dagenhart* decision were effective in arresting child labor legislation until 1938, 22 years after the first attempt made by *Keating-Owens.*[313]

DUE PROCESS IN DEFENSE OF PRIVATE PROPERTY AND FREEDOM OF CONTRACT: THE REVITALIZATION OF JUDICIAL LAISSEZ-FAIRE

The Court, Organized Labor, and the Fourteenth Amendment: *Truax v. Corrigan*

If the Court, in the late 19th Century, had virtually stripped the *Interstate Commerce* and *Sherman Anti-Trust Acts* of their usefulness for regulating business, it will be recalled that it was not equally adverse to their use as devices to regulate organized labor.[314] Thus, the Supreme Court had given its blessing to a federal injunction issued against union leader, Eugene V. Debs—the purpose of which was to halt the Pullman Strike—based upon the two aforementioned acts.[315] In fact, such high court approval for federal injunctions of this sort (as well as most other cases against labor)[316] had persisted even through the Progressive interlude.

Despite tremendous obstacles, however, unionism had prospered, refusing to die in adversity. This became especially true at the state level where the lobbying efforts of the A.F. of L. and others resulted in increasing amounts of labor-protective legislation. Moreover, in 1914, Congress enacted the *Clayton Anti-Trust Act,* amending the *Sherman Act,* with a special provision for labor. Hence, Section 6 of the act exempted labor "from the injunction and from the requirements of antitrust legislation that had been so applied as to limit the rights to organize and strike."[317] So optimistic was the labor movement about this provision, that Samuel Gompers was inspired to call it a "new magna charta."[318] Such optimism was entirely unwarranted.

In 1921, the Supreme Court dealt the labor movement a series of legal blows. At first, chipping away at the provisions of the *Clayton Act,*[319] it finished its antilabor bombardment with a Fourteenth Amendment case against the State of Arizona. In this instance, a state law forbidding injunctions against peaceful picketing was challenged on due process grounds. In *Truax v. Corrigan,*[320] the plaintiff argued that the "law . . . denied him an equitable remedy in cases where his property was threatened. He contended that the effect was to deprive him of his property without due process of law and that he was denied equal protection of the laws because injunctions were still available to persons not involved in labor disputes."[321] A badly divided Court, 5 to 4, agreed:

> The Fourteenth Amendment . . . forbids any state to deny to any person the equal protection of the laws . . .[and] it does not seem possible to escape the conclusion that by the clauses of Paragraph 1464 of the Revised Statutes of Arizona, here relied on by the defendents, as construed by its Supreme Court, the plaintiffs have been deprived of the equal protection of the law. . . .[322]

Hence, the Court of the 1920s was acting as its predecessor had 30 years before. As it once did in the area of economic regulation, it now created a Constitutional "no-man's land" in the area of labor legislation—a place where neither state nor federal government dare tread.

Having assumed the role of perennial dissenter, left vacant by Justice Harlan, Justice Holmes now spoke passionately against what he considered a dangerous use of the Fourteenth Amendment; a use which, he claimed, would "prevent the making of social experiments that an important part of the community desires."[323] But, as the Court was eager to strike at the "laboratories of experimentation,"—the states—it was equally as eager to strike at the beneficiary of those experiments—the federal government.

The Court and Old Style Freedom of Contract: A Return to *Lochner* From Out-of-the Blue

In 1908, in *Lochner v. New York*,[324] the Supreme Court had declared unconstitutional a New York state law limiting the hours that bakers could labor.[325] The ruling, which was roundly criticized both within and without the Court, declared that the law interfered with the right of contract, a right protected by the Fourteenth Amendment. A remnant of the most drastic form of laissez faire economics (more typical of the 1890s), few outside the Court believed that employer and employee were on equal contractual footing except in the theoretical marketplace. As a result, the Court—obviously taken aback by the criticism—had retreated later in the same year, and thereafter consistently upheld similar state legislation.

Based on such successful wage and hour legislation at the state level, the federal government, in the 1920s, had enacted its own minimum wage law for women in the District of Columbia. From all accounts, no one anticipated the response of the Court's majority.

In *Adkins v. Children's Hospital*,[326] the Court—again immersing itself in economic dogmatism—unearthed the *Lochner* decision, all intervening precedents to the contrary. To those who thought that the social legislation of the preceding years had meant a movement away from the Constitutional emphasis on private property, towards one on personal liberty and security, the Supreme Court's affirmation of the circuit court's ruling came as a rude awakening. Thus, the lower court asserted "that of the three fundamental principles which underlie government, and for which government exists, the protection of life, liberty, and property, the chief of these is property,"[327] and the high court readily concurred.

That Justice Holmes objected strongly to the *Adkins* decision was certainly to be expected but nowhere was a measure of the ruling's Constitutional illogic more apparent than in the thoroughly shocked dissent of the Court's most conservative member, Chief Justice Taft: "I have always supposed the *Lochner Case* was . . . overruled *sub silentio*."[328]

Despite the Chief Justice's expression of chagrin over the *Adkins* case, he and his colleagues believed freedom of contract to be the rule, a fact which they unanimously proved in the same year. *Wolff Packing Company v. Court of Industrial Relations*,[329] however, differed considerably from the maximum hours/minimum wage cases previously mentioned. In question was a Kansas law requiring compulsory arbitration for certain labor disputes and the Court's decision to overrule the statute on Fourteenth Amendment due process grounds was a popular one since both business and labor opposed such legislation.[330] Nonetheless, the case was instructive for it favored labor only in spite of itself. In *Wolff Packing Company*, as in most similar cases of the 1920s, the Court employed "an expansive laissez faire concept of property rights and a narrow restrictive theory of public interest. . . ."[331] The ideological underpinnings of the 1890s thus were completely revisited.

CALM BEFORE THE STORM: THE STATE OF THE CONSTITUTION IN 1929

If the Court of the 1920s, like its prototype 30 years before, was a Court of Constitutional contradictions, it was at least perfectly consistent in its economic and philosophical view of the world. According to Kelly and Harbison:

> . . . in the twenties there were two streams of Constitutional thought upon the issue of national power. Sometimes the Court found itself in one, sometimes the other. Its selection did not appear to be dictated so much by any logical Constitutional principle as by the social and economic implications of the case at hand. When a nationalistic decision would serve the interests of conservative property rights the Court cheerfully cited precedents supporting the doctrines of national ascendancy. When a dual federalist decision appeared most appropriate, the Court cited *U.S. v. E.C. Knight Co.*, and ignored the federal police power. . . .
>
> By the close of the twenties the Court, employing an expansive laissez faire concept of property rights and a restrictive theory of public interest, had [also] imposed unprecedented limits upon the state police power. Had this trend continued, there would before long have been little left of the former well recognized right of the states to impose regulations upon private property in the interest of public welfare. The identity between laissez faire social philosophy and the prevailing interpretation of due process was now very nearly complete.[332]

Again, the Court had created a void in regulatory policy. Again, it had preempted the actions of both state and federal governments. Again, in the name of dual

federalism, public initiative was thwarted in favor of private indulgence. But lest the picture be painted too simply, all was not as it had been in the 1890s. For the two decades before 1920, powerful precedents had been established. The powers to tax and spend, to regulate the economy, and to police may have been relegated to a state of relative dormancy through individual judicial decisions, but they had not been consistently nor definitively overruled. Such functions could be revived and strengthened as a result of changing economic conditions, societal outlooks, or judicial tendency. In 1929, the nation was on the verge of experiencing a radical change in the first two variables and though the third would resist it would ultimately have no choice but to change itself. At the close of the "Roaring Twenties"—the age of "normalcy" and reaction—the nation teetered on the brink of great economic upheaval and the "third Constitutional revolution."

IX
Origins of Modern American Federalism: The Great Depression, The New Deal, and The "Third Constitutional Revolution"

In the year 1929, the age of normalcy came to an abrupt end. Symbolized by a devastating failure of the stock market, the nation entered the age of the Great Depression, an economic cataclysm which would endure for more than a decade. In its inception, the Depression was typified by uncertainty at the very least and by outright panic at the very most. Its life cycle was one which alternately witnessed the greatest of public despair or its opposite, extreme hope. Finally, at its end, the nation was embroiled in the second of the world wars.

By the end of the Depression, the American governmental system was transfigured. Whether or not conscious of its plunge into modernity, the nation had modified its view of economy, realigned itself politically, and amended its attitudes on poverty and unemployment. Yet, most important for the purposes of this chapter, the Constitution stood practically if not formally transformed. When the clouds of depression lifted, the remaining Constitutional constraints to the growth of the central government had been eroded. The character of American federalism was thenceforth forever changed.

IN THE BEGINNING: THE DEPRESSION, THE STATES, AND THE HOOVER PRESIDENCY

In his book, *The New Deal and the States*, James T. Patterson has summarized the years 1929 to 1933 in the following manner:

> The Depression staggered state and local officials, and it was years before they recovered from the blow. Already deep in debt from the deficit spending of the 1920s, they now faced sharply rising welfare costs at a time when tax revenues were falling with equal speed. The economic crisis, descending so quickly and unexpectedly paralyzed state governments. The resulting chaos between 1929 and 1933 exposed the limits of the states in an increasingly centralized age.[333]

The chaos percolated upward. Local coffers were quickly depleted as demands for relief rose precipitously and property tax revenues declined just as precipitously. Naturally, demands shifted to the states and the states "responded" often by economizing. Hence, in 1933 a *New York Times* reporter commented that "the cry of economy has been something more than a campaign catchword, it has amounted to an obsession with the average legislator."[334]

Despite their distress, most states chose initially to "go it alone" and, as a result, the virtual paralysis of the Hoover Administration was not a cause for grave concern:

> Most Governors, anxious to preserve states rights or underestimating the suffering, told [Arthur] Woods [Chairman of the President's Emergency Committee for Employment] that they had matters in hand. In November 1930, Republican Gov. John S. Fisher of Pennsylvania rejected Woods' offer to provide him with a federal advisory committee. . . . Huey Long of Louisiana wrote that though his state had considerable unemployment, "we believe we will be able to handle our own conditions. . . ."

> . . . The mayor of Hartford, Connecticut, insisted, "We believe in paying our own way. It is cheaper than to bear the cost of federal bungling." And Vermont's Governor concluded, "I think I am speaking for the great majority of the people of Vermont when I say . . . that the people of Vermont are for a government supported by the people rather than a people supported by the government. . . ."[335]

Still another Governor put the theme of state self-sufficiency in broader perspective: "There is a tendency, and to my mind a dangerous tendency, on the part of the national government to encroach, on one excuse or another, more and more upon state supremacy. The elastic theory of interstate commerce . . . has been stretched almost to the breaking point."[336] The author of the quote was the Governor of New York, Franklin Delano Roosevelt.

Yet, as the crisis worsened and deepened, demands again percolated upward. Having proven themselves unable—or in some cases unwilling—to alleviate the worst of the Depression ills, the states were increasingly forced to seek aid from Washington. The Administration's response was less than magnanimous and certainly unequal to the extraordinary task before it.

President Hoover's problems were twofold. First, he possessed an unwarranted faith in private initiative and the ability of the "normal" market mechanisms to correct themselves:

> The evidence of our ability to solve great problems outside of government action and the degree of moral strength with which we emerge from this period will be determined by whether the individuals and local communities continue to meet their responsibilities.
>
> Throughout this Depression I have insisted upon organization of these forces through industry, through local government, and through charity, that they should meet this crisis by their own initiative, by assumption of their own responsibilities.
>
> The federal government has sought to do its part by example . . . and thus to avoid the opiates of government charity and the stifling of the spirit of mutual self-help.[337]

Second, in adversity he tended to procrastinate. The result was too little, too late. In the summer of 1932, Hoover signed the *Emergency Relief and Construction Act*, a program authorizing $322 million in loans to the states of which only about $30 million were actually distributed.[338]

If the overall picture inspired only pessimism, at times a more telescopic view inspired hope. Coining what later would become a catchphrase in the lexicon of federalism, Supreme Court Justice Louis D. Brandeis wrote in 1932:

> It is one of the happy incidents of the federal system, that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel experiments without risk to the rest of the country.[339]

Hence, New York—later, for obvious reasons, to serve as a national prototype—established a Temporary Emergency Relief Administration which was copied by several other states shortly thereafter.[340] In November 1931, Wisconsin enacted the nation's first Unemployment Compensation Act.[341] In 1933, Minnesota passed a mortgage protection law to prevent hasty bank foreclosures on hapless homeowners unable to meet loan payments.[342]

Such "telescopic" relief measures, however, meant little, for the depression was not a local phenomenon. Being nationwide in scope and impact, it called for nationwide solutions, something the governors were patently unable to achieve:

> The Depression failed to change old habits. At the 1930 [Governors] conference in Salt Lake City the Governors managed to squeeze in a discussion on the causes of the crash but avoided the problem of remedies. . . .
>
> The 1931 Governors conference was slightly more newsworthy, mainly because a few activists insisted on dragging the Depression into the discussions. . . . Otherwise, the conference was hardly a forum for serious discussion. . . . The host Governor summed up the gathering: "I think at this time we have in our country too many politicians and too few statesmen. . . . I think we are long on pleasantries and short on intestinal fortitude." His remarks applied equally to the 1932 conference.[343]

In 1932, the President waited, the Governors floundered, and local officials found themselves drowning among the jobless and hungry. If nothing more, the nation demanded active, innovative, and inspired leadership at the center and in November that demand was achieved: in the 11th month of 1932, the Governor of New York was elected President.

CONCEPT AND CRISIS IN MID-DEPRESSION: ROOSEVELT, THE FIRST NEW DEAL, AND THE COURT

If Franklin D. Roosevelt was to become the nation's most dynamic President, there were few clues to that trait in the 1932 election campaign.[344] Nor was there much intimation that he would so centralize and enlarge the scope of government as to alter the Constitutional, economic, and political shape of the nation. If anything, quite the opposite was true:

> Roosevelt's campaign did very little to reassure critics who thought him a vacillating politician. His speeches sounded painfully discordant themes. He assailed the Hoover Administration because it was "committed to the idea that we ought to center everything in Washington as rapidly as possible. . . ." He struck out at disastrous high tariff policies of the Republicans . . . His Topeka speech left farm leaders, as it was to leave historians, arguing over precisely what he intended. He would initiate a far-reaching plan to help the farmer; but he would do it in such a fashion that it would not "cost the government any money," nor, unlike Hoover's farm program, would it "keep the government in business."
>
> Yet all this was nothing compared to his oscillations on fiscal policy. He would increase aid to the unemployed, but he would slash federal spending. . . . At Sioux City, Iowa, in September, Governor Roosevelt stated: "I accuse the present Administration of being the greatest spending Administration in peace times in all our history. It is an Administration that has piled bureau on bureau, commission on commission, and has failed to anticipate the dire needs and reduced spending power of the people." In Pittsburg, the next month, he declared, "I regard reductions in federal spending as one of the most important issues in this campaign. In my opinion, it is the most direct and effective contribution that government can make to business." One of his New Deal administrators reflected subsequently: "Given later developments, the campaign speeches often read like a giant misprint, in which Roosevelt and Hoover speak each other's lines."[345]

That, of course, was Roosevelt the candidate; Roosevelt the President would be a vastly different person.

Centralizing Relief: FERA and the Repudiation of the Pierce Veto

> If, as our Constitution tells us, our federal government was established among other things "to promote the general welfare," it is our plain duty to provide for that security upon which welfare depends.[346]

On June 8, 1934, 80 years after President Pierce had vetoed the Dix bill for the indigent insane,[347] President Roosevelt forcefully restated the meaning of the welfare clause. This statement followed by one year the legal manifestation of that reinterpretation, the *Federal Emergency Relief Act of 1933* (FERAct). The act was to have profound implications not only for public assistance but for all intergovernmental arrangements in the provision of social welfare.

Hence, FERAct represented the first instance of direct federal grants-in-aid to the states for the purpose of providing public relief. These funds, amounting to a total of over $3 billion between 1933 and 1936,[348] were allotted to the states in two forms: half on a matching basis[349] and half on a discretionary basis to states where the need was greatest.[350] Moreover, the funds could be used by the states for either "direct" emergency relief or for "work" relief, a strategy which the President much preferred.

The administration of FERAct fell, not surprisingly, to Harry Hopkins, former administrator of New York's Temporary Emergency Relief Act. Though, in the abstract, Hopkins was "profoundly convinced of the values of decentralization,"[351] he used the extensive powers conferred on him as chief of the Federal Emergency Relief Administration (FERA) to run his operation in the most centralized, federally dominated manner possible. Accordingly, Hopkins was proffered broad authority to make "any investigation pertinent or material to the furtherance of the purposes" of the act;[352] to rule upon the merits of state expenditures;[353] and to "assume control of the administration in any state or states where, in his judgement, more effective and efficient cooperation between the state and federal authorities may thereby be secured in carrying out the purposes of [the] act."[354] This latter provision, Hopkins employed in Oklahoma, Louisiana, Georgia, Massachusetts, North Dakota, and Ohio, thus completely federalizing relief in six states.

As mentioned previously, Roosevelt was less enamoured with the idea of "direct" relief than he was with that of "work" relief. Because of this predilection, the New Deal became, additionally, the source of the

first federal employment programs. Among these, the largest was the Works Project Administration (WPA) created by executive order under the authority of the *Emergency Relief Appropriation Act of 1935*.

Aside from its employment component, WPA signalled another "first" for the federal government. Thus, unlike the FERA programs, WPA "was run by federal instead of state officials, and required no specific amount of matching state money."[355] A large program by any standards, at its peak in 1936, the WPA employed three million people [356] paid by an initial appropriation of $1.4 billion,[357] a far cry from the $200,000 *Weeks Act* which had made "legislative news" just 20 years before. Having centralized and vastly expanded temporary relief, Roosevelt then focused his energies on a more ambitious project, the management of the economy itself.

Managing the Economy: From NIRA to AAA

SECTOR ONE: BUSINESS

The Great Depression of the 1930s was the catastrophic culmination of a major malfunctioning in the economic system of the capitalist world, a failure which temporary relief measures would do little to correct. To the nation's radicals, this was both an anticipated and desired phenomenon. Yet, few Americans were willing to "throw in the towel" on the existing system, preferring instead to correct the defects which had so disrupted their lives. Free enterprise would be retained but at the cost of its own management. The question remained, however, "what constituted a 'managed' economy?"

In the Spring of 1933, while still in the midst of its "Congressional honeymoon," the Roosevelt Administration asked for and received the Tennessee Valley Authority (TVA), "the most imaginative in conception and one of the most successful [New Deal programs] in operation."[358] Representing a quantum leap in what constituted the proper sphere of government activity,

> The TVA would build multipurpose dams which would serve as reservoirs to control floods and at the same time generate cheap, abundant hydroelectric power. Its power operations were designed to serve as a "yardstick" to measure what would be reasonable rates for a power company to charge. The Authority, which would be a public corporation with the powers of government but the flexibility of a private corporation, would manufacture fertilizer, dig a 650-mile navigation channel from Knoxville to Paducah, engage in soil conservation and reforestation, and, . . . co-operate with state and local agencies in social experiments.[359]

Having succeeded in gaining regionally and functionally limited management, the Administration next eyed the broader arena.

The *National Industrial Recovery Act* (NIRA) of 1933 was the symbolic centerpiece of the early New Deal. An omnibus bill, the NIRA created a massive Public Works Administration (PWA) under long-time Roosevelt cohort, Harold Ickes. More important, however, the legislation brought into being the National Recovery Administration (NRA), the purpose of which was to promulgate "code agreements" with the nation's major industries.

As originally conceived by "braintruster," Rexford Tugwell, the notion of a managed economy under an agency such as the NRA would probably have frightened off any potential supporters, for when Tugwell said "managed" he meant "managed:"

> In Tugwell there were faint echoes of technocracy, a hint of the corporate state, and a near arrogant contempt for such traditional values as competition, small economic units, and fee simple property. His policies suggested enough varied controls to frighten almost everyone.[360]

At any rate, the sort of regimentation and centralized planning which Tugwell proposed had little appeal for the typically practical Roosevelt who "could not be induced to think and act outside of a political context."[361] Hence, the President's version of NRA offered "a little for everyone:"[362]

> Business got government authorization to draft code agreements exempt from antitrust laws: the planners won their demand for government licensing of business; and labor received Section 7(a), modeled on War Labor Board practices, which guaranteed the right to collective bargaining and stipulated that the codes should set minimum wages and maximum hours.[363]

Yet, if everyone got something, initially at least, it was corporate America which got the most. Allowed to write its own regulations, in the beginning, the business world dominated even the code enforcement mechanisms, a veritable bonanza which allowed open price collusion at the same time that it permitted many corporations to evade "the labor codes (bargaining rights,

wage-hour protection, prevention of child labor) required by Section 7(a) . . . either by establishing company unions or by deliberate refusals to recognize legitimate unions."[364] For all but a few crusty old nonconformists like Henry Ford, the business community found precious little to complain about being "managed."[365]

Needless-to-say, however, there were many both within and without the NRA who did complain:

> . . . the NRA codes invited concerted opposition not only of those who genuinely feared monopoly, hated bigness, and loved consumers, but of all who were disgruntled with the actual operations of the NRA. These critics scrutinized the codes, endlessly and critically investigated the NRA, forced [Hugh] Johnson [the first administrator] out, and pressured the NRA toward more circumspect, consumer-oriented codes and more scrupulous enforcement by code authorities. With personnel changes, government representatives became more independent and demanding. More and more businessmen became disillusioned with the NRA. . . .[366]

And if, by the NRA's second year of operation, the business community was growing restless under its codes and regulations, that community would soon be "liberated." In 1935, the NRA's days were numbered.

Sector Two: Agriculture

Among those hardest hit by the Great Depression were the nation's farmers.[367] Plagued by an economic crisis which deflated their dollars and left them unable to sell their crops profitably, many were additionally scourged by the heavens themselves as cruelly unremitting dust storms and drought revaged the mid- and southwest. To the dustbowl farmer of the 1930s, deciding who was his worst enemy, nature or banker, was a difficult choice indeed.

Thus, in 1933, threatened by a nationwide farm strike, Roosevelt and Congress decided to speed through pending agricultural legislation. The resulting *Agricultural Adjustment Act* (AAA) horrified conservatives not only with its price-setting provisions, subsidies, land retirement program, and its promise of government payments at parity in exchange for decreased production, but in a last minute amendment which took the nation off of what William Jennings Bryan had much earlier called its "cross of gold"—this latter provision signalling to Budget Director, Lewis Douglas, "the end of western civilization."[368]

Although the AAA offered less than they had requested, beleaguered farmers considered it a godsend:

> The act gave the farmer the price supports he desired, and more besides. The Thomas [gold] amendment held out to the debt-ridden farmer the prospect of freshly printed greenbacks; the *Supplementary Farm Credit Act* of June 16 promised to keep the sheriff and mortgage company away from his door. Within 18 months, the Farm Credit Administration, a merger of government farm loan agenries under the energetic Henry Morgenthau, Jr., and his deputy, William Myers of Cornell, would refinance a fifth of all farm mortgages. After more than half a century of agitation, the farmer had come into his own.[369]

Yet, like the *National Industrial Recovery Act*, the bolder and more effective *Agricultural Adjustment Act* had powerful enemies—enemies in a position to cripple the fledgling law. And, like the NIRA, the AAA's swan song would follow swiftly upon the footsteps of its overture.

New Deal in Disarray: The "Nine Old Men" and Dual Federalism's "Last Hurrah"

Beginning in January of 1935, the Supreme Court of the United States made up its collective mind to substantially crush the New Deal. Working incrementally through the first five months of that year, the Court picked away at or hinted its displeasure with the NIRA,[370] portions of the AAA,[371] and the *Railroad Retirement Act of 1934*,[372] until on "Black Monday," May 27, 1935, those decisions came to an ominous crescendo. On that day, the Supreme Court reached out to quell the New Deal through a singularly humble instrument: the Schechter brothers and their "sick chickens."

STEP ONE: THE CASE OF THE "SICK CHICKENS"

The case of *Schechter Poultry Corporation v. United States*[373] rocked the Roosevelt Administration to its foundations. At issue was the NRA's live-poultry code for the New York metropolitan area poultry industry. The code regulated wages, hours, production, and marketing in the area and as a result, the local Schechter brothers were accused by the federal government of selling "unfit chickens."[374] When the Schechters decided to fight back,

the end of the NIRA—Roosevelt's centerpiece legislation—was clearly in sight. Chief Justice Hughes delivered the Court's shattering opinion:

> The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the Constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-Constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment. . . .
>
> [W]here the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. . . .
>
> It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the federal Constitution does not provide it. . . . [T]he authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between "commerce among the several states" and the internal concerns of a state. . . ."[375]

The NIRA was dead, the victim of dual federalism and a narrow interpretation of the commerce clause. The broader implications of *Schechter* were aptly summed up by a *London Daily Express* headline: "AMERICA STUNNED; ROOSEVELT'S TWO YEARS' WORK KILLED IN TWENTY MINUTES."[376] In 1935, however, the Court was not through "stunning;" the New Deal was not yet thoroughly "killed."

STEP TWO: THE CASE OF SOFT COAL

Roosevelt's troubles with the Court, which had erased his NIRA, did not end in 1935. In fact, during the following year, the situation worsened. Thus, attempting to recoup some of the loss incurred by the Court's *Schechter* decision, the President and Congress began creating so-called "little NRAs," individual recovery acts aimed at specific industries. The most ambitious of these was the *Guffey-Snyder Act of 1935*, which, for all practical purposes, re-enacted the NIRA's bituminous coal code:

> The Guffey bill guaranteed collective bargaining, stipulated uniform scales of wages and hours, created a national commission which would fix prices and allocate and control production, authorized closing down marginal mines, and levied a production tax to pay for the mines and to rehabilitate displaced miners.[377]

Predictably, the *Guffey-Snyder Act* hadn't a prayer.

In the Spring of 1936, the Court went "out of its way to find the *Guffey Coal Conservation Act* unconstitutional."[378] In *Carter v. Carter Coal Company*,[379] the Court relied on the shaky *E.C. Knight* precedent,[380] established over four decades before, in order to strike down both the price-fixing and labor regulation provisions of the *Coal Act;* this despite the fact that "Congress had specifically . . . provided that the price-fixing and labor regulation sections of the code should be considered as separate Constitutional problems . . ."[381] Justice Sutherland spoke for the Court:

> The ruling and firmly established principle is that the powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as necessary and proper to carry into effect the enumerated powers. Whether the end sought to be attained by an act of Congress is legitimate is wholly a matter of Constitutional power and not at all of legislative discretion.
>
> The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, may enact laws to promote the general welfare, have never been accepted but always definitively rejected by this Court. . . .
>
> The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—

whether carried on separately or collectively—each and all constitute intercourse for the purpose of production, not of trade. The latter is a thing apart from the relation of employer and employee, which in all producing occupations is purely local activity. . . .[382]

If the federal government could not regulate labor, could that regulation be assumed by the individual states? Both logic and the tenets of dual federalism would have suggested "yes." Yet, one month later, in a ruling that "shocked even conservatives,"[383] the Court said, "no!" In *Morehead v. New York ex rel. Tipaldo*,[384] the Supreme Court rejected as unconstitutional a minimum wage law of the State of New York. Labor legislation had reached an impasse and President Roosevelt, echoing the frustration of reformers and others in the 1890s, noted that the Court had created a " 'no man's land,' where no government—state or federal" could operate.[385] Clearly, the "twilight zone" of dual federalism had reappeared at a time when such a legislative void could ill be afforded. And, with business and labor legislation in shambles, the Court next focused on agriculture.

STEP THREE: *BUTLER* AND THE "TORTURED CONSTRUCTION"

By 1936, it had become quite obvious that the Court was not apt to rule favorably on broad regulatory legislation employing the interstate commerce power. Nonetheless, Congress still had its taxing gambit and it was, after all, a form of taxation which had been used as a regulatory and spending device in the major provision of the *Agriculture Adjustment Act*. Hence, "cooperating farmers in several basic crops, by voluntary contractual agreement, reduced production in return for sufficient government payments to provide prices as close to parity as possible. The payments came from taxes on processing companies. . . ."[386] The majority of the Court, led by Justice Roberts, proved to be equally as unamenable to "taxing" as it was to "commerce:"

> The question is not what power the federal government ought to have but what powers in fact have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments—the state and the United States. Each state has all government powers save such as the people, by their Constitution, have conferred upon the United States, denied to the states, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are conferred upon it and such as are reasonably to be implied from those granted. . . .
>
> We are not now required to ascertain the scope of the phrase "general welfare of the United States" or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from the question, another principle embedded in our Constitution prohibits the enforcement of the *Agricultural Adjustment Act*. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction of their disbursement, are but parts of the plan. They are but means to an unconstitutional end.[387]

The court's decision in *United States v. Butler* is generally considered to be one of the most inconsistent and inappropriately narrow in its history, a fact which was not lost on dissenters, Stone, Brandeis, and Cardozo, who angrily decried the Court's use of "tortured [Constitutional] construction" to place itself above the other two branches of government:

> That the governmental power of the purse is a great one is not now for the first time announced. . . .
>
> The suggestion that it must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused. . . .[388]

Despite the fact that *Butler* so summarily (and clumsily) dismissed the AAA as unconstitutional, the majority and minority did reiterate and clarify a long-standing Court policy which held that "the mere expenditure of funds [does not] violate the 'general welfare' provision."[389] In other words, the Court saw nothing inhibiting the Congressional spending in and of itself. In fact, it specifically endorsed the Hamiltonian approach to Article I, Section 8:

> Hamilton . . . maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare. . . .[390]

Hence, in a perverse manner, the Butler majority strengthened and broadened the Congressional spending power,[391] a power which, foreboding developments aside, would be extended to its fullest in only a year's time.

In the face of the resounding judicial defeat of the AAA, the Court's "approval" of spending *qua* spending offered the Roosevelt Administration little cause for rejoicing. Yet, in spite of the setbacks which were *"Schechter,"* *"Carter,"* and *"Butler,"* the President had begun a new legislative offensive nearly a year before, and this legislative offensive would be joined thereafter by the great Court battle of 1937. Whether or not all of this had any substantive, long-term economic effect on the depression-ravaged nation is open to dispute. But, when the smoke cleared and the battles ended, one substantive effect would be exceedingly clear: the "narrow" Constitution of 1936 would become the "broad" Constitution of the 1940s and beyond.

TOWARD A CONSTITUTIONAL REVOLUTION: ROOSEVELT, THE SECOND NEW DEAL, AND A "SWITCH IN TIME"

Origins of the Second New Deal: The Legislative Bonanza of 1935

Both contemporary journalists and historians have agreed that in 1935 the New Deal began to change. The extent of that metamorphosis, its meaning, and the reasoning behind it, however, have remained open to a great deal of debate. Some argue that the second New Deal signalled a movement away from favoritism for large corporations toward the more classical conception of capitalist free enterprise; from Tugwellian planners toward Brandeisian traditionalists. Others insist that 1935's importance lies in the birth of the so-called welfare state. Still others contend that because much of the 1935 legislation had been in the works for well over a year, the second New Deal was not so much a conscious policy shift as it was a happenstance point in the legislative life cycle. Nonetheless, almost everyone agrees that 1935 saw a great flurry of lawmaking—most of it seemingly rushed through Congress—and that much of that flurry came on the heels of the Court's devastating *Schechter* decision. Perhaps, then, given *Schechter* and the succeeding 1936 decisions which wreaked havoc on Roosevelt's "best laid plans," the 1935 policy differential was less a "second" New Deal than the "only" New Deal.[392]

THE SOCIAL SECURITY ACT

On August 14, 1935, President Roosevelt signed into law one of the most (if not the most) important and profoundly consequential pieces of American legislation ever conceived. With a stroke of his pen on that mid-August day 46 years ago, Roosevelt increased the size and scope of the federal role a thousandfold, for thus had the central government permanently and massively entered the realm of old age insurance, unemployment insurance, categorical cash assistance (or welfare), and social and health services.[393] The Court willing, the temporary FERA precedent had given way to social security, the permanent programmatic reinterpretation of the general welfare clause.

THE NATIONAL LABOR RELATIONS ACT

With the virtual death of the NRA in May, Roosevelt threw the weight of his office behind Sen. Robert Wagner's labor bill—an act which he had theretofore assiduously avoided supporting. Hence, after many abortive attempts over the past four decades, labor finally came close to achieving its "magna charta:"

> The *Wagner Act* was one of the most drastic legislative innovations of the decade. It threw the weight of government behind the right of labor to bargain collectively, and compelled employers to accede peacefully to the unionization of their plants. It imposed no reciprocal obligations of any kind on unions. No one, then or later, fully understood why Congress passed so radical a law with so little opposition and by such overwhelming margins. A bill which lacked the support of the administration until the very end, and which could expect sturdy conservative opposition, it moved through Congress with the greatest of ease.[394]

THE WEALTH TAX ACT

Although in its final form the *Wealth Tax Act* was hardly the radical redistributive plan which Roosevelt had rhetorically advocated, it did add to the increasingly substantial federal taxing power. Thus, the measure increased "estate, gift, and capital stock taxes, levied an excess profits tax . . . and increased the surtax to the highest rates in history. . . ."[395] In the summer of 1935, the second New Deal moved full steam ahead.

THE PUBLIC UTILITIES HOLDING ACT

After an initial flirtation with large-scale corporations, in 1935, Roosevelt donned the robes of "trust-buster" worn 33 years before by another Roosevelt, his cousin, Theodore. Apparently prodded into action by the "small is good" Brandeis faction of the Administration, Roosevelt supported and, in August, won the *Wheeler-Rayburn Public Utilities Holding Act*. The act greatly expanded the powers of the year-old federal Securities and Exchange Commission, empowering that body to break up the vast majority of the nation's utility holding companies and allowing it to oversee the companies' financial transactions.[396]

THE BANKING ACT

On August 23, Roosevelt signed into law a bill which would, at the very least, have made Alexander Hamilton supremely happy. A radical revision of the Federal Reserve System, the *Banking Act of 1935* "marked a significant shift toward the centralization of the banking system and federal control of banking."[397] After almost a century and a half, Hamiltonian theories of centralized monetary practices—albeit, altered in modernity—were finally coming into their own.[398]

Throughout the turbulent summer of 1935, one question must have plagued Roosevelt more than any other: "Would the Court approve?" And, as that turbulent summer gave way to the disastrous spring of 1936, time and the Supreme Court would prove to be unkind respondents. If the first New Deal was Constitutionally unacceptable, what of the equally unorthodox second? Thus were the seeds of "interbranch warfare" planted and thus lay the impetus of the Court battle of 1937.

Executive Versus Judiciary: The Court Battle of 1937

If one thing is clear regarding the Roosevelt Court battle of 1937, it is that no two historians can agree on who, if anyone, "won." Did Justice Roberts, fearing for the institutional life of the Court, buckle under to political pressure, or did Roosevelt, in his insistence upon passage of the Court bill, commit the greatest tactical blunder of his career? To these questions, there are no plain answers but what evidence does exist indicates (perhaps surprisingly) that the latter was more true than the former.

Stung by the defeats of his major first New Deal legislation, early in 1937 Roosevelt decided that the same fate would not befall the laws of his second New Deal, particularly the *National Labor Relations* and *Social Security Acts*. His "enemy" was evident and he deemed to fight it on Congressional turf. His weapon was the Court Bill of 1937.

Whether Roosevelt really expected anyone to believe that the Court Bill was a genuine reform, needed in the long-run for the efficacy of government, is open to question, but if in fact he did hold such expectations, he was to be sorely disappointed. At any rate, the President claimed that the Court system was inefficient, partially due to "the question of aged or infirm judges. . . ."[399] Hence, his proposed court reform

> . . . recommended that when a federal judge who had served at least ten years waited more than six months after his seventieth birthday to resign or retire, the President might add a new judge to the bench. He could appoint as many but no more than six new justices to the Supreme Court and 44 new judges to the lower federal tribunals.[400]

Obviously, what Roosevelt was suggesting was "court packing," and the very fact that this ploy was so obvious brought down the wrath not only of conservatives, Republicans, and die-hard Roosevelt haters, but of many of his long time supporters as well. Despite initial cries of indignation, however, the President persisted—in fact, seemed obsessed—with the Court legislation. To its end, he wasted an entire session of Congress; angered or insulted many groups whose support he badly needed (including, needless-to-say, the nation's elderly);[401] made himself appear vulnerable for, perhaps, the first time in his Presidency; strengthened the position of the anti-New Dealers; and worst of all, destroyed the tenuous unity of his own party.[402] What, if any, positive effect all this produced is uncertain, but on March 29, 1937, the Court did indeed begin to change.

In a series of precedent-breaking decisions, the Court chipped away at the "no man's land" in regulatory policy and the first to be eroded were some of the constraints on state action. Thus, in *West Coast Hotel Company v. Parrish*,[403] Justice Owen Roberts first made his much touted defection from the conservative ranks of the Court. Upholding a Washington state minimum wage law, the Court reversed (5–4) its 15-year old Adkins[404] precedent and paved the way for such laws in all the states. Only two weeks later, Roberts cemented his defection,[405] and one month after that conservative Justice Willis Van Devanter retired, to be replaced by a Roosevelt-man, Hugo Black. Together these events sealed the Court Bill's fate. Had there existed even a small

chance for its passage before (and that is highly improbable), a majority of Congress now stood firmly against the act. As a result, on July 22, 1937, the President "surrendered;" the Court bill was recommitted.

To reiterate a question posed earlier, then, "who 'won' and who 'lost'?" Of course, Roosevelt claimed to have "lost the battle but won the war."[406] Congress-watchers, on the other hand, could reasonably contend that as the bill lost, so lost the President. As for Justice Robert's defection, some conclude that the move was indeed made to undercut Roosevelt's anti-Court offensive,[407] while others assert that the so-called "switch in time that saved nine" has been only "falsely viewed as a political move"[408]—that the Court would have changed regardless and Roosevelt's resulting political losses were far more profound than any perceived judicial gains. To all these assertions no one has (or perhaps ever can) respond with complete certainty. Nonetheless, and no matter what the answer, in the year 1937 the remaining legal barriers to the scope of the federal role began, one-by-one, to fall by the Constitutional wayside.

Five Years that Changed the Constitution: From the "Switch" of '37 to the Climax of '42

NLRB AND THE REVIVAL OF "STREAM OF COMMERCE"

Like 1789 and 1865, 1937 was a banner Constitutional year, for between April and May the legal foundation of America began a metamorphosis, the effects of which have persisted to this day. Hence, in April, the Court handed down its much heralded decision upholding the *National Labor Relations Act*. In *National Labor Relations Board (NLRB) v. Jones and Laughlin Steel Corporation*[409] the plaintiff understandably relied upon the precedents established in the recent *Schechter* and *Carter* decisions: that is, that the federal government had no Constitutional right to regulate terms of production. Yet, without specifically overruling its earlier opinions, the Court's majority suddenly "switched" (or, more appropriately, a new majority of Hughes, Roberts, Brandeis, Cardozo, and Stone was formed) and revived the "stream of commerce" doctrine first enunciated more than 30 years before in *Swift and Company v. United States*:[410]

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise the control. . . .[411]

Thus, the Court had taken a first (albeit tentative) step toward redefining Congressional powers under the commerce clause. The following month it would dramatically expand the Congressional grant to tax and spend for the general welfare.

TAXING, SPENDING, AND THE GENERAL WELFARE: THE SOCIAL SECURITY CASES

On May 25, 1937, the Court considered the Constitutionality of the *Social Security Act* in two companion cases: *Steward Machine Company v. Davis*[412] (regarding the Constitutionality of the unemployment insurance tax) and *Helvering, Welch, and the Edison Electric Illuminating Company v. Davis*[413] (regarding the Constitutionality of the old age social security tax). In both cases, the use of taxes to provide for so broad a definition of the general welfare was contested and in both cases, the Court upheld that new, massive use. Because *Helvering* was considered second and relied so heavily on *Steward*,[414] the *Steward* case is generally cited:

> The assault on the statute proceeds on an extended front. Its assailants take the ground that the tax is not an excise; that it is not uniform throughout the United States as excises are required to be; that its exceptions are so many and arbitrary as to violate the Fifth Amendment; that its purpose was not revenue, but an unlawful invasion of the reserved powers of the states; and that the states in submitting to it have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender. . . .
>
> The excise is not void as involving the coercion of the states in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government. . . .
>
> During the years 1929 to 1936 . . . [t]he fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. . . .

> The *Social Security Act* is an attempt to find a method by which all these public agencies may work together to a common end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the nation as long as states are unwilling, whether through timidity or for other motives, to do what can be done at home. . . .[415]

Thus, in *Steward Machine Company v. Davis*, not only had the Court denied plaintiff's recourse to a Tenth Amendment argument, but it had actually gone so far as to chastise the states for abrogating their own responsibilities. In the resulting void, the Court indicated, the federal government had no choice—in fact, had the right—to meet a national emergency. Moreover, in the *Helvering* case Justice Cardozo spoke of the Congressional power to determine welfare in very definitive terms:

> When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not by the states. So the concept be not arbitrary, the locality must yield.[416]

The meaning of the general welfare clause had been changed dramatically; judicial restraints lifted. The remaining constraints on the commerce power would soon be swept away also.

UPHOLDING MINIMUM WAGES AND AGES: *U.S. V. DARBY*

In 1938, Congress passed the *Fair Labor Standards Act*. By almost any analysis the act could hardly have been considered a strong piece of legislation, so watered down had it become by the time of its passage. Yet, significantly, the law established a national minimum wage and prohibited the shipment in interstate commerce of goods produced by child labor.[417] Even more significantly, in 1941, a new "Roosevelt Court,"[418] drawing heavily upon John Marshall's decision in *Gibbons v. Ogden*[419] and overruling *Hammer v. Dagenhart*,[420] held the law Constitutional:

> While manufacturing is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of commerce. . . .
>
> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. . . .
>
> Our conclusion is unaffected by the Tenth Amendment. . . . The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. . . .[421]

Obviously, *United States v. Darby Lumber Company* was a monumental Supreme Court decision for, in effect, it laid official waste to what for years had been interpreted as the Constitutional centerpiece of dual federalism, the Tenth Amendment. Hence, nine years after the decision, Edward Corwin asserted that:

> The entire system of Constitutional interpretation touching the federal system is today in ruins. It toppled in the *Social Security Act* cases and in *NLRB v. Jones and Laughlin Steel Corp.*, in which the *Wagner Act* was sustained. This was in 1937 while the "Old Court" was still in power. In 1941 in *United States v. Darby*, the "New Court" merely performed a mopping-up operation. The act of Congress involved was the *Fair Labor Standards Act of 1938*, which not only bans interstate commerce in goods produced under substandard conditions but makes their production a penal offense against the United States if they are "intended" for interstate or foreign commerce. Speaking for the unanimous Court, Chief Justice Stone went straight back to Marshall's opinions in *McCulloch v. Maryland* and *Gibbons v. Ogden*, extracting from the former his latitudinarian construction of the necessary and proper clause and from both cases his uncompromising application of the supremacy clause.[422]

Darby may indeed have been a mopping-up operation but it did not complete the task at hand. That would occur in the following year.

POWER UNLIMITED: WICKARD V. FILBURN

In 1942, "the judicial reinterpretation of the national government's economic regulatory power was completed. In scope and effect that power was now virtually unlimited."[423] At issue in *Wickard v. Filburn*[424] was the *Agricultural Adjustment Act of 1938* and its consequent fixing of acreage quotas—even when excesses were to be consumed by the individual farm family itself.[425] Certainly, this constituted the most *intra* of intrastate consumption. Yet, the Court now recognized no bounds to Congressional power over commerce. Justice Jackson, Roosevelt's newest appointee, delivered the opinion of the Court:

> Whether the subject of the regulation in question was "production," "consumption," or "marketing" is . . . not material for purposes of deciding the question of federal power before us. That an activity is of a local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of Congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect." . . .
>
> It is said, however, that [the *Agricultural Adjustment Act*], forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers. It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness of the plan of regulation we have nothing to do. . . .[426]

Wickard v. Filburn served as the judicial finale to the New Deal, a finale which was to be repeated time and again by the Court. How far the Court had come in relatively few short years from disallowing nearly all Congressional attempts at economic regulation to giving Congress free reign, for the Court—once economic watchdog of the nation—now stated that in this area, "we have nothing to do." Where Congress chose to act in economic and regulatory matters, it would thenceforth be Constitutionally—if not politically—absolute, and as the Court asserted in 1946, the commerce power is "as broad as the economic needs of the nation."[427] The interstate commerce clause had recaptured and gone far beyond the scope of its first broad constructionist, John Marshall; necessary and proper had, at last, reached its Hamiltonian conclusion; and national supremacy, won in principle by the outcome of the Civil War, had been achieved some 77 years later in Constitutional practice.

END OF CONSTRAINTS: THE CONSTITUTIONAL LEGACY OF THE NEW DEAL

In a recently published analysis of the state of American federalism, Harry N. Scheiber summarizes the vast expansion of federal functions and powers wrought by the New Deal:

> *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 device, *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 became heavily committed to a Keynesian countercyclical 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*.[428]

Astounding even when viewed out of context as a series of functional acquisitions, the above list is nearly unfathomable when viewed in its historical perspective:

> By 1937, the rebellion against the constraints of dual federalism was complete; the belief that powers of the national government were limited by its sphere of action was overturned. Generations of reformers had seen their plans stymied by the Court's interpretation of the complexities of action in a federal system, but the Court constraint ended in the trauma of the Great Depression.[429]

A central government, long constrained, was Constitutionally "liberated" to meet a national crisis, and when the crisis was over, the constraints would seemingly be impossible to reapply.

X
Acquiescence and Activism: Judicial Schizophrenia and the "Fourth Constitutional Revolution"

Constitutional development did not end with the New Deal. Rather, what did end was a long held judicial notion that the federal government was somehow strictly limited as to the sphere and scope of its undertakings. Hence, as early as 1946, Carl Brent Swisher could assert that "[i]n a sense, what has happened is that the Supreme Court has gotten out of the way of Congress. . . ."[430] Indeed, the New Deal left in its wake a legacy of judicial passivity vis-a-vis Congress—a passivity that has persisted to form half of the character of the modern Court.

Yet, that the whole character is somewhat schizophrenic is evidenced by the active—and more widely noted—other half, for in the past three decades the Court has been a policy leader in advancing racial justice, securing civil liberties, developing criminal procedures, and reforming political processes. The Court, thus, has variously displayed the dichotomous traits of acquiescence on the one hand and activism on the other.[431]

CONGRESSIONAL ACTIVISM, JUDICIAL ACQUIESCENCE, AND THE CHANGING FACE OF CONSTITUTIONAL FEDERALISM

> We have returned to the original proposition that the Courts do not substitute their social and economic beliefs for the judgement of legislative bodies, who are elected to pass laws.[432]

Obviously, the above noted quotation from a 1963 opinion is illustrative of how fully the Court's vision of its role—at least in relation to the legislature—has changed since 1937. Moreover, this attitudinal conversion has been accompanied by an even more significant Congressional metamorphosis—a metamorphosis transforming the Congress from a group of individuals acting as a relatively constrained collectivity, to what, in the past 20 years, has become, practically, a mere architectural resting place for a loose body of individual activist policy entrepreneurs. The combined effect of these two transformations—in concert, of course, with other systemic changes[433]—in turn, has altered the face of Constitutional federalism, the meaning of national supremacy, and the extent of national purpose.

National Supremacy and the Power to Supersede: The Unleashing of a Constitutional Concept

Since 1937, when the Supreme Court "got out of the way of Congress," much of the expansion of the federal government has been accomplished through the highly elastic Congressional power to regulate commerce and through extension of the Bill of Rights to the states through the Fourteenth Amendment. Largely uninhibited by judicial taboo, these powers have allowed Congress to increase substantially both the breadth and depth of

national functions and goals.

There being, presumably, a finite number of actions or items which may be subject to legislation (perhaps only because everything on Earth—cockroaches and clotheshangers being notable exceptions—has some upper numerical limit) and 51 major legislatures in the United States, at least some functional overlap is bound to occur. As previous sections have detailed, this problem of concurrent powers has been a major Constitutional dilemma since the founding of the Republic. In retrospect, though the debate was often more scurrilous and vocal than today, for the first one and one-half centuries of the nation's existence, the dilemma was comparatively mild—the number of laws enacted by any of the legislatures, especially Congress, were relatively few. However, in the past 30 years, encouraged by the widespread acceptance of active government,[434] the opportunities for overlap and conflict have increased tremendously. In such cases, the law of one legislative body may supersede or preempt those of the others and, though hardly imagined by the founders for the breadth of its authority, Article VI of the Constitution, containing the national supremacy clause, has determined whose laws shall preempt and whose shall be preempted.

Though Congress has long been in the business of preempting state laws which conflict with national objectives, the body of supersessive legislation enacted since the mid-1960s has been multiplying at a rate that has begun to alarm many observers. Hence, a study of federal preemption by the Oklahoma Legislative Council found 48 acts of Congress, passed between 1964 and 1973, which contained supersessive language.[435]

If supersession is a federal problem or, at the very least, a source of intergovernmental pique, it is a problem compounded by opacity—just when is a federal law supersessive? Of course, some laws are so obviously supersessive that no question arises. A piece of legislation which states that its provisions are intended to "supersede any or all laws of the states" is easily classified as preemptory. An example is the *Civil Rights Act of 1964*.

Beyond such direct preemptions, however, four other less overt categories of supersessive law have been identified by James B. Croy. Thus, as a second means of preemption, Croy notes laws of the "unless-surprise" variety:

> Basically, this category begins by stating that it is not the intent of Congress to supersede state authority "unless" state law disagrees with the provisions of the federal act, in which case—surprise—the state must give way.[436]

Laws falling under the "unless-surprise" category include the *Gun Control Act of 1968*, the *Drug Abuse Control Amendments of 1965*, the *Federal Metal and Nonmetallic Mine Safety Act*, and the *Federal Election Campaign Act of 1971*.

"If-then; if-then" supersessions, such as the *Water Quality Act of 1965*, typically give the states an "option" to issue their own minimum regulatory standards. However, "if" the regulations are unacceptable to the federal authority, "then" the federal administrative agency in question will promulgate rules for the state. Moreover, "if" a state does not adopt or enforce the regulations, "then" the federal government will assume jurisdiction.[437]

At times, the federal government may preempt by "fiat." Thus, the *Cigarette Labeling and Advertising Act* declares that:

> No statement relating to smoking and health, other than the statement required by section 4 of this act, shall be required on any cigarette package.[438]

Finally, according to Croy:

> The last classification of supersession concerns the involvement of the federal government in substate political units or the dictation of duties by the federal government to the officials of a state. An example of the former would be the *Food and Agriculture Act of 1965*, in which the Secretary of Agriculture is given authority to determine the apportionment of wheat acreage allotments among the counties of the various states, as opposed to allowing states to make this determination. The 1965 amendments to the *Federal Coal Mine Safety Act*, in which state agencies are directed to require state personnel to carry out certain actions, would be an example of the latter.[439]

Needless-to-say, the spate of relatively recent preemptory activity has prompted a great deal of concern over the modern meaning and significance of the Tenth Amendment, that addition to the Constitution which the New Deal Court asserted to be "but a truism." And, by and large, the contemporary Court has treated it as just that. However, on June 24, 1976, the Supreme Court handed down a decision which at least was surprising and at most seemed to disrupt long established policy toward the commerce power and the "reserved powers" of the states. At issue in *National League of Cities v. Usery*[440] were the 1974 amendments to the *Fair Labor Standards Act of 1938* (FLSA). The amendments extended the minimum wage and maximum hour provisions of the act to most state and local employees. Given the

fairly deferential attitude which both the Warren and Burger Courts had exhibited toward Congress, there was little reason to believe that the amendments would be questioned. Moreover, in 1968, the Court had upheld extension of the FLSA wage and hour provisions to state hospital and school employees in *Maryland v. Wirtz*.[441] Yet, strong precedent notwithstanding, Justice Rehnquist, speaking for a narrow majority (5–4), revived an interpretation of the commerce clause and Tenth Amendment thought to have been judicially buried almost 40 years before:

> If Congress may withdraw from the states the authority to make those functional employment decisions upon which their systems for performance rest, we think there would be little left of the states' "separate and independent existence." . . . Congress has sought to wield its power in a fashion that would impair the states' "ability to function effectively [with] in a federal system." . . . This exercise of Congressional authority does not comport with the federal system of government embodied in the Constitution.
>
> [W]e have reaffirmed today that the states as states stand on quite different footing than an individual or corporation when challenging the exercise of Congress' power to regulate commerce. . . . Congress may not exercise that power so as to force directly upon the states its choices as to how essential decisions regarding the conduct of intergovernmental functions are to be made. . . .[442]

Coming as it did with so little warning,[443] the decision astounded nearly everyone, particularly those who had assumed for nearly half a century that the "plenary" Congressional commerce power was indeed "plenary." No one, however, was more thoroughly nonplussed than the Court's minority, led by Justice Brennan, who felt that *NLC v. Usery* was, at best, a "mischievous decision:"

> Today's repudiation of [an] unbroken line of precedents that firmly reject my brethren's ill-conceived abstraction can only be regarded as a transparent cover for invalidating a Congressional judgement with which they disagree. . . .
>
> Judicial redistribution of powers granted the national government by the terms of the Constitution violates the fundamental tenet of our federalism that the extent of federal intervention into the states' affairs in the exercise of delegated powers shall be determined by the states' exercise of political power through their representatives in Congress. . . .[444]

If not greeted with rave reviews by Justice Brennan, the decision was widely praised and heralded for its supposed landmark qualities by state and local governments and their national associations. Yet, in the long-run, how significant is the *NLC* decision? A flurry of analysis attending the publication of the opinion, along with a number of subsequent related decisions,[445] suggests, not very significant.

Thus, William J. Kilberg and Linda Batchelder Fort point out that,

> Review and analysis of the *National League of Cities* and subsequent cases lead to the conclusion that the applicability of the *Equal Pay Act* (EPA) and *Age Discrimination in Employment Act* (ADEA) to state and local government employees remains unimpaired. All but two of more than 30 cases deciding this issue since *National League of Cities* have held that equal pay and age discrimination statutes still apply to state and local government workers.[446]

In addition, as it has often manifested in the past, Congress does possess other means for achieving any one of its desired ends. Fred W. Rausch and Thomas A. Shannon note, accordingly, that,

> . . . the spending power may be the exception that engulfs the rule. All one need to do is look at Title VI of the *Civil Rights Act of 1964*, and the *Family Education Rights and Privacy Act* to recognize that conditioning the granting of federal funds upon compliance with federal standards is a powerful weapon in the Congressional arsenal.[447]

And, finally, Lawrence H. Tribe states:

> If *National League of Cities* is to be read as protecting rights to certain government services, then it follows, perhaps surprisingly, that Congress could alter the result of that decision by reenacting minimum wage regulations for public employees as one possible vindication of the rights of those employees to equality, liberty, and property. For the recognition of a governmental duty to assure that basic material needs are somehow met precludes the response that minimum wage legislation is necessarily reflective only of a policy

> preference based on concerns with national economy. Once we have recognized affirmative rights against government, Congress may claim that it is just such rights that it is vindicating for public employees by ensuring that they receive a minimum wage. So long as this is in fact the basis of Congress' action,it could well prove sufficient to override the claims of the state.[448]

Hence, it is doubtful that *NLC v. Usery* has set an immutable precedent reviving old interpretations of the Tenth Amendment and repudiating the totality of the Congressional commerce power.[449] Yet, even if that were the case, as Rausch and Shannon and Tribe note, Congress may achieve virtually the same ends through other means. It is to the most powerful of these methods which we shall now turn.

The Conditional Spending Power: Coming at National Purpose Through the Backdoor

Over the past two decades, if there has been a single phenomenon which has worked to permute practical intergovernmental relations and erode the concept of federalism, it has been the dramatic expansion in the number, nature, scope, and purpose of federal grants-in-aid. Thus, not only have federal aid flows increased 900% since 1963, but the number of programs has swelled from 160 to 500, activities aided have come to encompass not only such major functions as welfare but such relatively trivial or traditionally local concerns as urban gardening and the development of bike paths, and, in many cases, local desire for grant-in-aid funds has been transformed into local reliance or outright dependence.[450]

More significant, however, over the past several years has been the extraordinary proliferation of grant conditions—the increasingly tangled strings of national purpose. Such conditions—applied either across-the-board to the receipt of all aid[451] or attached as specific regulations to individual programs—have become the single most important means for the transmission and realization of nationally articulated goals and policies, as well as the greatest sore spot in contemporary intergovernmental relations.

Recent controversy over grant related mandates has centered on two major complaints voiced with increasing frequency and alarm by recipient jurisdictions. The first, and no doubt the most obvious, of these involves the hidden but often burdensome costs of such requirements.[452] However, for the purposes of this chapter, the second complaint, revolving around the perceived or real coerciveness of conditions, is the most important. In other words, as a practical matter, how much leeway does a grant recipient have in accepting or rejecting a particular grant and, thus, its requirements? A rising number of jurisdictions think not much.

Hence, what would appear at first blush to be a simple matter of saying no to new federal funds, may be, for the recipient, a complex, painful, or even impossible decision. A few examples lend support to the more strident protests of the affected jurisdictions:

> The choice to participate in the federal program may be made by state officials, but the burden of administering the program in accordance with federal regulations falls on local governments. For example, Aid to Families with Dependent Children (AFDC) is a grant program available to the states. Yet, in 18 states, local government agencies are responsible for administering the program. The regulations guiding local administrators come from their state governments, but may have their source in federal regulations.
>
> —Conditions of aid may have changed since the decision to participate was orginally made. While participation remains voluntary, state and local officials may believe that despite the change in regulations they have no option but to continue participation, since constituents rely on the service provided. . . . The 1976 amendments to the Unemployment Insurance (UI) law offer an example. In order for states to continue to qualify for grants for administration and for employers within the state to continue to receive a federal tax credit for UI taxes paid to the state, coverage must be extended to all public employees. The costs of noncompliance are perceived as being so high as to make the change in regulation seem coercive.
>
> —Current constraints may stem from decisions made several years earlier. For example, in order to receive federal aid for the construction of a highway, a state must agree to keep the road up to federal safety standards. Decisions made as long ago as 20 years thus constrain the budgetary choices available to present day state and local officials.[453]

In such cases, the imposition of conditions indeed would appear, in a practical sense, to be coercive. Yet, practical

and legal are not necessarily synonymous adjectives. And, nowhere is this divergence seen more clearly than between the claims of recipients on the one hand and decisions of the courts on the other.

Like the issue of preemption, the problem of grants and their conditions is no newcomer to the realm of judicial decisionmaking. Hence, in 1923, in the case of *Massachusetts v. Mellon*,[454] the Court dismissed a state challenge to a grant-in-aid program by noting that:

> Probably, it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation but simply extends an option which the state is free to accept or reject. . . . If Congress enacted [the program] with the ulterior purpose of tempting [the states] to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.[455]

Moreover, in the case of *U.S. v. Butler*,[456] though the Court chose to void the *Agricultural Adjustment Act*, it once again sanctioned the use of the Congressional spending power to achieve ends not necessarily included in the enumerated powers. Finally, as an early example of judicial dicta on grants, in *Oklahoma v. Civil Service Commission*,[457] the Court opined that, supplementing its power to spend for the general welfare, Congress possesses the "power to fix the terms upon which its money allotments to the states shall be disbursed."[458]

Certainly, the above would suggest a rather coherent judicial doctrine regarding the conditional spending power—more coherent, perhaps, than in almost any other area of Constitutional concern. Yet, as one observer has noted, "In numerous [recent] Federal court decisions, the courts have treated grant issues as novel issues even though the issues have been decided by other federal courts."[459] The reason, as alluded to previously, is the vast difference between the number, nature, and complexity of grants and their conditions 60, 40, or even 20 years ago and today. Hence, litigation and, consequently, a body of grant law has only recently begun to grow apace.

Yet, despite this proliferation of grant-related litigation and the "surprise" with which it has been judicially met, the Court has retained a fairly consistent commitment to its 1923 precedent. Even the apparent state victory in the *Usery* case was attended by a footnote which warned that:

> We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power.[460]

Moreover, in one of the most celebrated recent cases of its kind, a District Court went so far as to assert that the State of North Carolina could be required to amend its constitution in order to remain eligible for receipt of federal funds under the *National Health Planning and Resources Development Act of 1974*.[461]

Needless-to-say, all of this represents something of an over-simplification of grant law and judicial decisions affecting that law.[462] In fact, the issues addressed may often be exceedingly complex. And, the Court's two most recent grant-related opinions serve to illustrate the extent of that complexity.

Thus, the June 25, 1980 decision in the case of *Maine v. Thiboutot*,[463] touches not only upon federal grants and state obligations under those grants, but upon civil rights, statutory rights, and, potentially, according to Justice Powell's dissent, to "literally hundreds of cooperative regulatory and social welfare enactments,"[464] some of which do not involve grants at all.

At issue in Lionel and Joline Thiboutot's class action against Maine's commissioner of human resources was their claim that Joline Thiboutot's children had been unfairly denied the benefits of the Aid to Families with Dependent Children program (AFDC).[465] The Thiboutot's based their claim upon the *Civil Rights Act of 1871*. The act, originally passed to implement the new Constitutional rights that blacks had gained after the Civil War, had always been interpreted as allowing individuals to collect damages for deprivation of Constitutional rights. Welfare payments, it should be noted, have never been ruled by the courts to be a Constitutional right.

However, in his opinion for the majority, Justice Brennan upheld the Thiboutot's claim, allowing them to collect damages, including attorney's fees, from the state of Maine. Hence, he asserted that the 109-year old act also extended to any law enacted by Congress—in other words, to statutory rights.

Critics of the decision immediately impugned it as an appalling blow to federalism—"*Maine v. Thiboutot* couldn't do more harm if it were deliberately designed to subvert the federal system and bankrupt cities from coast to coast."[466] Though no one knows what effect the opinion will have, opponents believe that it will unleash a deluge of special interest litigation aimed at collecting damages from state and local governments, since they, unlike the federal government, must pay attorney's fees when they lose such suits. Moreover, although no one

is certain to which federal-state-local cooperative agreements future litigation might apply, one account listed a variety of statutes running the gamut from the financing of historic preservation sites to food stamps.[467]

The second of the Court's 1980 grant decisions also revolved around more than just the spending power. At issue in *Fullilove v. Klutznick*[468] was the minority business enterprises (MBE) set-aside in the *Public Works Act of 1977*. The MBE provision prohibits the Secretary of Commerce from making public works grants available to localities unless they provide assurances that 10% of the amount of the grant will be spent on minority contractors—businesses in which at least half the ownership is comprised of "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, [or] Aleuts."[469]

Claimants in the suit, state associations of contractors and non-minority contractors, alleged that the MBE clause illegally discriminated on the basis of race and was in violation of their Constitutional rights under the due process clause of the Fifth Amendment. However, on July 2, 1980, the Court, in what has been deemed "the most unequivocal victory yet for advocates of affirmative action,"[470] denied that claim. Instead, in a 6–3 decision, the majority, led by the Chief Justice, ruled that in spending for the general welfare, Congress does not have to be "color blind"[471] and may impose racial quotas in order to correct past discrimination.

Although both *Thiboutot* and *Fullilove* are unique cases dealing with issues which extend far beyond the relationship between Congress and grant recipients, they do add substantially to the body of existing grant law. Thus, on the one hand, both represent a continuation of a long line of judicial reasoning which sanctions the attachment of Congressional conditions to the receipt of federal funds. However, on the other hand, both are characteristic of a relatively new but growing class of grant-related litigation—a sort of sub-category within the body of grant law. That is, as opposed to most of the early grant cases which sought to define the rights of second party beneficiaries (states and localities), *Thiboutot* and *Fullilove* originated in suits of third party beneficiaries (in the above cases, AFDC clients and local contractors) seeking to establish their rights, either with regard to the parent federal grant law or with regard to the terms of individual state plans established under a federal law.[472]

In the 1978 case of *Southern Mutual Help Association v. Califano*,[473] Circuit Court Judge Tamm called the law on the administration of federal grants a "slumbering giant." The *Thiboutot* and *Fullilove* decisions may not have fully awakened the giant but they may be part of a rapidly expanding litigational trend forcing it, at the very least, from the realm of deep sleep to that of fitful dozing.

THE NEW JUDICIAL ACTIVISM

In any discussion of the new judicial activism, two widely held misconceptions should be dismissed at the outset. First, both the praise and criticism which have been heaped upon the post-World War II Courts have centered upon their activist natures. In particular, critics of the Court have missed few opportunities to malign the "activist" or "policymaking" character of the modern judiciary, treating it as a completely new and unprecedented phenomenon, while wistfully longing for the good old days when the Court merely acted as an impartial arbiter. Yet, as previous sections have shown, those judicial good old days are nothing if not somewhat fanciful imaginings. In the first place, impartiality in any human undertaking, while a highly worthwhile goal, is seldom if ever realized in practice. In the second place, Court "activism" is hardly a recent innovation. If the contemporary Courts have been bullish in asserting their own social proclivities through Constitutional dicta, the pre-New Deal Courts were equally as adept at enveloping their economic (and occasionally their social) leanings in the aura of true Constitutionalism.

A second misconception,shared by many on both sides of the political coin, holds that the Warren and Burger Courts are near polar opposites of one another—Earl Warren giveth racial and civil rights and Warren Burger taketh them away. Yet, the record is hardly so black and white. Hence, while in a few recent Burger Court decisions, local police have been given somewhat more leeway in questioning suspects under the *Miranda* rule and have been afforded a little additional discretion in searches and seizures,[474] several other decisions, reached nearly simultaneously, have extended the Fourth Amendment Rights of suspects.[475] Moreover, while the Court sanctioned a Congressional limitation on funding for poor women's abortions,[476] in the same week, in *Fullilove vs. Klutznick*, it advanced what some have called the greatest civil rights victory since *Brown*. In fact, one authority has observed that:

> Analysis of a cluster of key cases in the civil rights and civil liberties areas suggests a [Burger Court] activism and sensitivity to the libertarian and racial norms nearly as great as, if not, in a few instances, greater than its predecessor.[477]

Thus, while the Burger Court has (in some very significant instances) exhibited a somewhat more conservative nature than the Warren Court, the decisions of both Courts have been consistent enough in certain areas to be characterized as a now longstanding judicial stream—a stream which, for the most part, has seen vigorous judicial application of the Bill of Rights to the states through the Fourteenth Amendment.

The New Judiciary and Racial Justice

If the Warren and Burger Courts have been notable for their acquiescence to Congressional preemption and mandating, they have been far more notable for their activism in creating a legal framework for racial justice. Beginning with the *Brown* decision in 1954, which denounced the "separate but equal" dictum of *Plessy v. Ferguson*,[478] and continuing through to its blessing of affirmative action in *Fullilove*, the High Court has, with only a few exceptions over the past 26 years, constructed a judicial stream espousing as its goal equality and integration.

While it is unnecessary to rehash the well known and abundantly analyzed record of the Supreme Court's involvement in civil rights, it is useful to note very briefly the broad outlines of its history. Hence, in the realm of integration, the Court, despite encountering massive state and local resistance in the south, tenaciously pursued a policy of school desegregation, based upon application of the due process and equal protection clauses of the Fourteenth Amendment.[479]

In spite of the fact that school integration represented a radical judicial departure, it was, nonetheless, a relatively simply Constitutional matter—most primary and secondary schools are public institutions and therefore are subject to charges of discrimination under the Fourteenth Amendment.[480] Less easily resolved from a Constitutional/judicial branch perspective, was the widespread racial discrimination practiced by private intrastate entrepreneurs.

This judicial perplexity was seen for some time in the Court's attempts, on a case-by-case basis, to tie private discrimination to state action. Thus, in the so-called "sit-in" cases of the early 1960s,[481] in which black protestors would enter and refuse to leave all-white establishments such as theaters and restaurants, the Court sidestepped the real problem surrounding the heinous practice of private discrimination. Rather, the justices chose to overturn the convictions of the demonstrators on a variety of grounds, moving "close [by 1964] to the theory that arrests for sit-ins meant in effect that the state was supporting a segregation policy and that the convictions were therefore illegal under the equal protection clause."[482]

In 1964, judicial floundering on the matter of private discrimination was Congressionally corrected with the *Civil Rights Act*. And, as had been the case in the 1930s, the legislative branch employed its substantial powers under the commerce clause to effect dramatic change. By Title II of the act, any private establishment affecting commerce or supported in its activities by state action was thenceforth banned from discriminating against persons on the bases of race, color, religion, or national origin. However, in Title VI, Congress bolstered its case by using the spending power to ensure against discrimination by recipients of federal grants. The legal stalemate was broken, the policy circle was completed, and the Court moved full speed ahead.[483]

During the same period, the Warren Court and Congress also attacked the problem of voting rights and housing discrimination. Hence, in 1965, Congress enacted the *Voting Rights Act* which severely curtailed racist state voting procedures and the Court, quickly thereafter, upheld Congress' Fifteenth Amendment right to do so.[484] In addition, both the Court and Congress began to chip away at discrimination in property rentals and sales[485]—a task culminating with enactment of Title VIII of the *Civil Rights Act of 1968* which prohibited such discrimination.

Burger Court civil rights opinions, while somewhat more inconstant than those of the Warren Court, have sustained, at least generally, the decisions of its predecessor and, in a few instances, have gone even further. Thus, in ordering the first major busing effort,[486] the Burger Court exhibited its willingness to go beyond the Warren Court in the area of desegregation. Yet, three years later, it displayed a measure of inconstancy when—in an admittedly difficult and complex case—it overturned a District Court ordered busing scheme for the City of Detroit and its suburbs,[487] leaving the whole question of busing in the most confused state possible.[488]

The recent far-reaching *Fullilove* affirmative action decision of the Burger Court has already been discussed; its description, by some, as the greatest civil rights decision since *Brown* also has been noted. Yet, oddly, less than three months before—this time, in the area of voting rights—the Court, in apparent contradiction of one of its own earlier rulings,[489] overturned a District Court ruling that the City of Mobile's at-large electoral system invidiously discriminated against blacks in violation of the Fifteenth Amendment and the equal protection clause of the Fourteenth Amendment.[490]

Needless-to-say, such apparent flip-flops invite varying interpretations. Critics have accused the Burger Court of vacillating and, thus, bringing uncertainty to that area of Constitutional rights which can least afford such judicial fluctuation. While few would accuse the current Court of turning its back on civil rights, some charge that it has unduly confused the issue.

Proponents of the Court, on the other hand, claim that other factors have entered into the Court's civil rights decisions—factors against which the Court has had to weigh its role as protector of minority rights. Hence, in the *Mobile* case, the Court claimed that the city's at-large electoral system was not purposely constructed to discriminate against blacks, that such districts do not depart from the principle of apportionment on the basis of population, and that so long as a local electoral process adheres to the "one man, one vote" rule, it is not within the purview of the Court to interfere with local practice. Such an opinion, say Court proponents, does not imply an insensitivity to minority rights but, rather, a sensitivity to local rights and the federal principle. Whether the area of civil rights allows for such "weighing" will, undoubtedly, be a critical subject of debate for some time to come.

The New Judiciary and Civil Liberties

Over the past 25 years, Court dicta have engendered a revolution in First Amendment freedoms at least comparable to the revolution effected in civil rights. This extension of civil liberties has enveloped the rights of political dissent, unhindered speech, an unfettered press, and personal privacy.

The first hints of the new and expansive judicial attitude toward civil liberties became evident in the 1950s and 1960s in a series of rulings regarding the Communist Party. Such decisions struck heavy blows at restrictive McCarthy-era controls on party members and other so-called subversives at both the national and state levels.[491]

Political dissent and the right to articulate such dissent came once more to the Court's attention during the Vietnam War. In these cases, the tendency of the Court was to distinguish between actual speech and action. Hence, it held a state law which punished the casting of verbal aspersions on the American flag unconstitutional,[492] but upheld a local ordinance which outlawed the burning of draft cards.[493]

If the Burger Court has been somewhat less vigorous than the Warren Court in its civil rights rulings, it has been more forceful in rulings on free speech and political association. Again confronted with the question of legitimate antiwar protest, the Court reversed the California conviction of a protester whose shirt expressed in a four-letter word exactly what the authorities could do with their draft.[494] Moreover, this line of reasoning was extended to the case of a New Jersey defendant who had voiced a particularly offensive obscenity at a public school board meeting.[495]

In 1976, the Burger Court moved beyond the realm of alleged subversion and political dissent into the question of political patronage as a potential infringement upon First Amendment rights. Thus, in the case of *Elrod v. Burns*,[496] a Court plurality held that the Constitutional rights of some noncivil service employees were violated when they were fired for Republican Party affiliation in Democratic Cook County, IL. Four years later, in *Branti v. Finkel*,[497] the Court elaborated on the *Elrod* decision, declaring that:

> If the First Amendment protects a public employee based on what he has said, it must also protect him from discharge based on what he believes. Under this line of analysis, unless the government can demonstrate "an overriding interest of vital importance," requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.[498]

All of the free speech/association cases noted above presented the Court with grave questions of political freedoms under the First Amendment. However, throughout the 1960s and 1970s the Court was forced into the netherworld of pornography—an unusually difficult judicial undertaking. Clearly, the Founders had not envisioned the First Amendment as an umbrella protecting the exhibition of explicit—often violent—sexual acts. Yet, neither, in all likelihood, would those learned people have denied a First Amendment defense to such outstanding authors as Henry Miller and D.H. Lawrence, despite the sexual nature of their works. Hence, the Court has been asked to draw lines (or abolish them altogether) and, in so doing, to substitute its moral judgement for its legal judgement. The near impossibility of this task is still apparent in the exceedingly ambiguous body of pornography-related law.

In spite of all this, the Warren Court did move to liberalize considerably the "banned in Boston" syndrome. Thus, the justices labored to achieve something approaching a national standard applicable to state and local obscenity laws, creating, in the offing, a series of "tests" which culminated in its opinion that a work had to be "utterly without social value" to justify its being censored.[499]

For its part, the Burger Court has seen fit to offer somewhat more leeway to individual communities in determining their own moral standards.[500] While a local community may not be able to ban pornography outright, under Burger Court dicta, it may at least regulate certain aspects of pornographic businesses within its boundaries.[501]

Freedom of the press cases generally have dealt with one of four issues: prior restraint, press access (particularly with regard to court trials), the right to withhold information regarding news sources, and libel. Of particular interest has been the Court's "nationalization of the law of libel."[502]

With few exceptions,[503] throughout most of American history, libel has been considered either a matter for state statutes or for state courts to determine based on common law. Despite its manifest connection with the press, libel was not officially considered a First Amendment problem. However, beginning in 1964, the Warren Court took steps to bring it under the umbrella of the Constitution.

In the case of *New York Times v. Sullivan*,[504] the Court first enunciated the so-called "New York Times formula." Thus, in a unanimous decision, the Supreme Court held that:

> The Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . . [505]

Of course, the decision was a tremendous boon to reporters and newspapers, freeing them, in many instances, from the threat of substantial money damages. Yet, by no means, are public officials the only persons about whom journalists write. And, in subsequent years, the Court extended libel immunity to cases involving such diverse public figures as a football coach,[506] a retired army officer,[507] and even a family whose privacy allegedly had been invaded.[508]

Although the Burger Court refused, in 1974, to go so far as to extend libel immunity to stories concerning any peripherally-public figure,[509] it nonetheless has articulated three very broad rules which all but free responsible publishers and reporters from successful libel suits. Hence, the Court has declared that:

> 1) The Constitution gives absolute freedom to publish statements about public figures which turn out to be false and defamatory unless the publisher knew them to be false or was reckless as to their truth.
>
> 2) The Constitution frees the press from liability where there is neither negligence nor more serious fault.
>
> 3) Injury must be proved: it cannot be presumed from the bare publication of a libel, and the damages may not exceed 'actual injury' unless the falsehood was intentional or reckless.[510]

As alluded to previously, one person's news story may well constitute the invasion of another person's privacy. In other words, freedom of the press may run counter to the right of privacy. However, while the Constitution clearly guarantees a free press, one would search in vain to find a Constitutional clause guaranteeing privacy. Despite the explicit lack of such a Constitutional guarantee, the Court, beginning in 1965, moved toward imbuing privacy with an implicit Constitutional aura.

The case of *Griswold v. Connecticut*[511] involved a state law "prohibiting the use of contraceptives and the dispensing of birth control information to married couples. . . ."[512] In writing the majority opinion for the Court, Justice Douglas asserted:

> . . . that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[513]

Of course, the Griswold case was highly controversial not for Douglas' stunning enunciation of a Constitutional

right of privacy, but, rather, because it dealt with the emotion-charged issue of birth control. Yet, any outcry which attended that decision paled in comparison with that which attended the Burger Court's furtherance of the right to privacy concept.

Hence, in two closely related 1973 decisions,[514] the Court struck down Texas and Georgia statutes which made abortion a criminal offense. Based upon its reading of "the Fourteenth Amendment's concept of personal liberty and restrictions upon state actions," the Court determined "that the right of personal privacy includes the abortion decision. . . . "[515] The Burger Court, thus, added to Justice Douglas' First, Third, Fourth, Fifth, and Ninth Amendments, a privacy protective Fourteenth Amendment.[516]

In a very real sense, the Warren and Burger Courts have suffused rather abstract liberties with practical Constitutional meaning—advancing the concept of a genuinely free citizenry. That such an expansive notion of freedom may have undesirable side-effects is obvious: the right to associate freely includes the right to wear white hoods or don the swastika and the right to publish freely includes the right to print the grossest pornography. Yet, the modern judiciary has decided that to censor even the vast majority's idea of patent offensiveness is always to run the risk of abridging legitimate free expression. So too, to deny fair treatment to even the most abominal criminal is to gamble on the rights of the innocent. It is to this aspect of the new judiciary which we shall now turn.

The New Judiciary and Criminal Procedure

In no area did the activism of the Warren Court meet with more widespread and sustained hostility than its reform of criminal procedure. Employing the Fourteenth Amendment, the Court began in the early 1960s to apply Fourth, Fifth, and Sixth Amendment guarantees to state and local police departments and courts and in so doing ran squarely into claims that it was hamstringing officers of the law, being soft on criminals and hard on innocent victims, intruding on local prerogatives, and encouraging ubiquitous criminality.

An early principle established in connection with federal criminal procedure was the Fourth Amendment "exclusionary rule" which ordained as inadmissable trial evidence anything obtained through illegal (warrantless or without "probable cause") search and seizure.[517] For years, however, the Court had refused to apply the rule to the states, arguing that it was merely a procedural means to an end and not in and of itself a right.[518] That position was reversed in 1961.

In the much heralded case of *Mapp v. Ohio*[519] the Court held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments,"[520] while one year later, the Court extended and solidified its position by asserting that the rule "is the same under the Fourth and Fourteenth Amendment."[521]

Two years after its *Mapp* decision, the Court moved to place Sixth Amendment guarantees under the Fourteenth Amendment. Hence, in 1963, "Gideon's Trumpet"[522] sounded and the Warren Court declared that "the right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[523] Thereafter, the states were obliged to provide defense attorneys to indigent defendants in criminal cases.

The *Gideon* case and its successors[524] were based upon the right of one accused "to have the assistance of counsel for his defense."[525] Yet, the Sixth Amendment also asserts that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."[526] Again, this was a federal Constitutional right not necessarily practiced consistently in all the states. And, again, the Warren Court used the Fourteenth Amendment to apply this guarantee to state criminal cases, "because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice. . . ."[527]

Of all the Warren Court criminal procedure decisions, perhaps the most controversial were those dealing with the pre-trial rights of the accused.[528] Certainly, the crowning case in this particular line stands second only to *Brown v. Board* as the most celebrated opinion of that Court. Thus, in *Miranda v. Arizona*[529] the Court not only moved to apply the Fifth Amendment to the states but greatly expanded its prohibition against self-incrimination, averring that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."[530]

Miranda may take second place to *Brown* in terms of celebrity, but it is second to no case in modern judicial history for the sustained vituperation to which it has been subjected. Fourteen years after being handed down, it is still popularly (though with no real substantiation) blamed for what many perceive to be a society-wide breakdown of law and order. The subject of countless critical books, essays, editorials, documentaries, and reproachful asides by every good television cop, it was primarily toward overruling or substantially diluting *Miranda* that Richard Nixon promised to appoint a conservative Supreme Court.

If the President's primary judicial appointment goal had been to overrule *Miranda,* he was to be disappointed. Yet, if he considered dilution a sufficient end, he accomplished, with the Burger Court, exactly that, for it has been within the realm of the Fifth Amendment that the current Court has most often shown its conservative bent.

Hence, in a series of cases beginning in 1971,[531] the Burger Court has accomplished a minor erosion of the Warren Court self-incrimination prohibition. Most recently, this trend manifested itself in the case of *Rhode Island v. Innis,*[532] in which an accused armed robber admitted his misdeed without benefit of counsel upon hearing from the two arresting officers that the area in which the unlocated shotgun had been discarded was the site of a school for handicapped children and "it would be too bad if a little . . . girl would pick up the gun, maybe kill herself."[533] Despite vehement protest from dissenters Brennan, Marshall, and Stevens that such statements constituted psychological coercion, the majority upheld Innis' conviction on the grounds that the defendant had been read his rights and that "nothing in the record . . . suggest[s] that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children."[534]

In the area of Sixth Amendment rights, the Burger Court has been less than consistent. Thus, Kelly and Harbison assert that "it broadened the guarantee [of the right to counsel] even while it weakened its force through a 'law and order' interpretation."[535]

If the Burger Court has moved to limit *Miranda* and shown a certain amount of Sixth Amendment inconstancy, it has exhibited a recent tendency to further Fourth Amendment protections. Despite a series of decisions in the early 1970s which appeared to reduce the exclusionary rule to a mere technicality,[536] at least three opinions announced over the past year seem to be liberal extensions of Warren Court prohibitions against police arrests made without probable cause and searches conducted without proper warrants.[537]

The Eighth Amendment to the Constitution reads in part that, "cruel and unusual punishments [shall not be] inflicted."[538] Of course, what constitutes cruel and unusual is highly subject to personal variation. Hence, despite its extreme severity and a longstanding minority movement to abolish it, the death penalty has been an historically accepted mode of punishing particularly invidious crimes—especially first-degree murder.

In 1972, in a decision which delighted opponents of the death penalty and shocked proponents of the punishment, the Supreme Court overturned two state death penalty statutes as violations of the Eighth Amendment's cruel and unusual clause. That *Furman v. Georgia*[539] was one of the many instances where Court decisions (often because the decisions themselves are not especially well written) are neither well reported nor well understood is quite evident in retrospect—even the majority justices were badly divided and only Marshall and Brennan stated opposition to the death penalty in general. Yet, many took the decision to signal a move toward the total interstate prohibition of the punishment.

Any notions, however, that the Burger Court would do for the Eighth Amendment what the Warren Court had done for the Fourth, Fifth, and Sixth were shattered in 1976 when the Court declared that:

> Consideration of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe. . . .[540]

Recently, the Court used a similar justification ("Texas is entitled to make its own judgements as to where [criminal] lines lie. . . .")[541] in a rather astounding nondeath penalty Eighth Amendment decision. At issue in that case was a Texas recidivist statute which imposes mandatory life prison sentences on individuals convicted of a third felony. In refusing to overturn the decision of the Texas court, the Supreme Court upheld the life imprisonment sentence of the defendant—his crime: obtaining $120.75 by false pretenses.

The New Judiciary and Equity

While civil rights constitutes a very distinctive and discrete category of equity concerns, other grave matters coming before the Court have also revolved around questions of equity. Among these, the most notable have been those involving legislative apportionment.

Though in the long-run less controversial than the Court's civil rights and criminal procedures decisions, "Chief Justice Warren regarded the Reapportionment Cases as the most important decisions of the decade and a half in which he presided over the Court."[542] Indeed, in many states of the Union, the apportionment of state legislatures and Congressional delegations was nothing less than scandalous. For instance:

> In California . . . the population of the state

> senate's county districts varied from six million for Los Angeles down to a mere 14,000 for the least populous rural district in the state. In Florida, senate districts ranged in population from a maximum of 900,000 to a minimum of 9,500, a difference that apportionment experts expressed as a 'variance ratio' of 98 to 1. In Vermont, the population differential for districts in the lower house extended from a maximum of 33,000 to a minimum of 238, a variance ratio of about 140.[543]

Despite the tremendous representational inequality involved in such grossly malapportioned states, the Court had long fallen back on an 1849 doctrine which held that certain problems were inherently "political problems" and, therefore, "beyond [the Court's] appropriate sphere of action."[544] In 1946, this area of judicial self-restraint was extented to the question of Congressional districts in Illinois with Justice Frankfurter's admonition that "Courts ought not to enter this political thicket."[545] It was a thicket, however, like so many others, which the Warren Court chose, with some relish, to enter.

The year was 1962 and the issue was a 1901 Tennessee law apportioning its general assembly. Not surprisingly, the federal district court declined to hear the case on grounds that it was a political question and the expectation was that the Supreme Court would do the same. Yet, on appeal, the majority asserted that, "It is clear that the cause of action is one which 'arises under' the [equal protection clause of] the federal Constitution."[546] That said, the case was remanded to the lower court for decision.

Although the Court did not rule on the equity of Tennessee's law, its 6-2 decision finding the case a legitimate judicial question, was more than enough to precipitate a veritable stampede of appointment litigation. Amid this rush of action, four suits are of particular significance.

Hence, early in 1963, in what was actually a voting rights case, the Court overturned Georgia's "county unit" rule, which effectively discriminated against the state's most populous counties.[547] Moreover, the following year, the Court first enunciated its "one man, one vote" rule to nullify Georgia's method of Congressional apportionment.[548]

In its most famous apportionment decision, *Reynolds v. Sims*,[549] the justices elaborated on "one man, one vote," while, at the same time, admitting that variations among and within the states demanded "developing a body of doctrine on a case-by-case basis. . . ."[550] Finally, in 1964, the Court determined that the division of Colorado into a number of natural geographic districts was unconstitutional. Thus, despite the fact that the divisions did not result in major population disparities and were approved by popular election, the Court held that even a variance ratio of 3.6 to 1 represented "departures from population-based representation too extreme to be acceptable."[551] Moreover,

> . . . the plan's employment of multimember delegations for the more populous districts in the upper house deprived the people of such districts of the "intimate and direct" representation to which they were entitled. The plan therefore violated the equal protection clause and was unconstitutional.[552]

While on the surface, apportionment may be dismissed as an exercise in mathematics, the real product of extreme reappportionment is the redistribution of often long-held power centers. As such, several attempts—including two Constitutional amendment drives—were made to undermine the Court's authority to reapportion.[553] Significantly, none succeeded,[554] and "one man, one vote" became the generally accepted basis of apportioning districts.

As might be expected, the Burger Court has been less expansive in its equity decisions than its predecessor. For instance, in its reapportionment cases,

> Slightly larger disparities in the size of electoral districts have been upheld than would have been permitted in the sixties. Moreover, the "one man, one vote" rule was not extended to invalidate various extraordinary majority requirements.[555]

Be that as it may, reapportionment/voting cases (and, of course, the civil rights cases) have not been the only equity issues with which the Court has had to grapple. Indeed, "[t]he successful accomplishment of [the reapportionment] reforms by Constitutional litigation led other groups to invoke the Equal Protection Clause in an effort to obtain by adjudication what they could not win in the political arena."[556] The majority of these cases fell upon the Burger Court.

One such category of equal protection cases encompassed state residency requirements of various sorts. In such cases, the Court held prior residency unconstitutional as it applied to welfare payments,[557] some voting requirements,[558] and free hospital care[559] and Constitutional as it applied to less lengthy voting requirements[560] and tuition differentials between in-state and out-of-state students at state universities.[561]

Another broad grouping of equal protection cases has involved local methods of taxation and zoning. In the

area of zoning, the Burger Court has exhibited a certain "degree of deference to referendums and other forms of state and local decisionmaking designed to distill and reflect the particular will of local majorities."[562]

Among local taxing cases, the 1973 decision in *San Antonio Independent School District v. Rodriguez*[563] stands out. At issue were the disparities created among Texas school districts by the widespread use of local property taxes to partially finance local schools. The most commonly employed means of financing public schools throughout the nation, use of the local property tax often means that wealthy areas beget wealthy schools, while poor areas—where the need for good education is even more crucial—are saddled with poorly financed schools. Hence, the case has major nationwide implications.

In pressing their claim, litigants argued that there existed a "fundamental right" to education, that the disparities among school districts created by the property tax "amounted to 'invidious' classification upon grounds of wealth,"[564] and that such classification violated the equal protection clause. A closely divided Court (5–4) rejected their argument on both counts, holding that education is not a "fundamental right" nor the classification "invidious." Yet, according to Archibald Cox, while

> These elements and the underlying issues concerning the reach of the Equal Protection Clause undoubtedly carried weight. . . . . I am inclined to think that the decisive factor was the Court's scarcely expressed worry about the difficulty of the judiciary's laying upon communities essential affirmative, on-going obligations for the benefit of disadvantaged groups. . . . [A]nyone proposing a ruling of unconstitutionality would be hard put to answer the question: what happens next?[565]

Finally, the Supreme Court has been asked to rule upon classifications according to sex as violations of the equal protection clause. In the absence of the Equal Rights Amendment, it has chosen to refrain from basing its rulings on the issue of sex as a suspect classification. Rather, it has opted for case-by-case decisionmaking, judging sex differentiating statutes "on the basis of the rationality test."[566] In other words, does the statutory differentiation have a "clear relationship to the statute's objective?"[567]

CONCLUSION

In the area of equity, as in civil rights, civil liberties, and criminal procedure, the Burger Court, apparently, has attempted to weigh individual rights against the rights of the states in a federal system. Indeed, in one way or another, the Supreme Court has been grappling with this dilemma for almost 200 years. Yet, in so doing the Burger Court often has tended to appear inconsistent, if not incomprehensible, on both counts. Thus, at times the current Court has prompted such comments as, "it's not at all obvious . . . that even the Warren Court would have gone this far" in advancing the rights of the accused,[568] while, at other times, it has incited allegations that "the Burger Court [has] consistently out-Wallaced George Wallace.[569] Likewise, while the Court has been accused of "subvert[ing] the federal system"[570] it has also been the recipient of such admittedly reserved praise as, "The Supreme Court's efforts to date do reveal an awareness of the need for new judicial solicitude toward state autonomy. . . ."[571] Clearly, all concerned—analysts, casual observers, the ever-increasing army of litigants, even the Court itself—are confused. Nor, is it immediately apparent whether this confusion is the symptom of a wrenching Constitutional transition, a genuine attempt to balance the protection of individual rights "with the protection of the traditional institutional relationships such as federalism,"[572] the legal manifestation of an overloaded society, or merely the product of faulty judicial logic.

Of course, any given judicial philosophy or the lack thereof, particularly regarding the federal system, is a fleeting thing. As Woodrow Wilson asserted more than 70 years ago:

> The question of the relation of the states to the federal government is the cardinal question of our Constitutional system. It cannot be settled by the opinion of any one generation, because it is a question of growth, and each successive stage of our political and economic development gives it a new aspect, makes it a new question.[573]

Or perhaps, to end as we began:

> We are under a Constitution, but the Constitution is what the judges say it is. . . .[574]

FOOTNOTES

[1] *Federalist* 39, p. 246. All references are to the Mentor Book edition, introduction by Clinton Rossiter, New York, NY, The New American Library of World Literature, Inc., 1961.
[2] U.S., *Constitution*, Art. VI.
[3] Rozann Rothman, "The Ambiguity of American Federal Theory," in *Publius*, Volume 8, No. 3, Summer 1978, p. 104.
[4] Martin Diamond, "The Federalist's View of Federalism," in *Essays in Federalism*, ed. by Institute for Studies in Federalism, Claremont, CA, The Institute for Studies in Federalism at Claremont Men's College, 1961, p. 23.
[5] *Ibid.*, p. 24.
[6] *Federalist* 9, pp. 75–76.
[7] Diamond, "The Federalist's View of Federalism," *op. cit.*, pp. 25–27.
[8] Publius was the thin veil of anonymity employed by Alexander Hamilton, James Madison, and John Jay in writing the *Federalist* Papers. The papers appeared first in the New York newspapers as a defense and explanation of the proposed new Constitution and an attack on the Articles of Confederation. Of the 85 articles, 51 have been attributed to Hamilton, 26 to Madison, 5 to Jay, and 3 jointly to Hamilton and Madison.
[9] *Federalist* 17, pp. 118–19.
[10] *Records of the Federal Convention of 1787*, ed. by Max Farrand, New Haven, 1911, II, p. 93 as quoted in Walter Hartwell Bennett, *American Theories of Federalism*, Alabama, University of Alabama Press, 1964, p. 55. See also Hamilton's argument in *Federalist* 22, p. 152.
[11] See Luther Martin and Patrick Henry quoted in Bennett, *American Theories of Federalism*, *op. cit.*, pp. 64–66.
[12] Alfred H. Kelly and Winfred A. Harbison, *The American Constitution: Its Origins and Development*, 5th ed., New York, NY, W. W. Norton and Company, Inc., 1976, p. 122.
[13] *Federalist* 30, p. 189.
[14] U.S., *Constitution*, Art. I, Sec. 8.
[15] *Federalist* 32, p. 199. This "concurrent and coequal authority," however, did not apply to taxation on exports and imports which, with an exception, was an exclusive federal function. U.S., *Constitution*, Art. I, Sec. 10: "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: . . ."
[16] U.S., *Constitution*, Art. I, Sec. 2.
[17] Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 99.
[18] *Federalist* 45, p. 293.
[19] U.S., *Constitution*, Art. I, Sec. 8. (emphasis added)
[20] *Federalist* 41, p. 263.
[21] U.S., *Constitution*, Art. I, Sec. 8. (emphasis added)
[22] *Federalist* 44, pp. 280–88.
[23] See *Federalist* 23, p. 153 and *Federalist* 33, p. 202.
[24] Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 129.
[25] U.S., *Constitution*, Art. VI. (emphasis added)
[26] Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 130. The *Judiciary Act of 1789* was undoubtedly the most significant enactment of the 1st Congress and will be returned to later.
[27] U.S., *Constitution*, Art. III, Sec. 2.
[28] In all, 12 amendments were submitted to the states but only ten were ratified.
[29] U.S., *Constitution*, Amendment X.
[30] *United States v. Darby*, 312 U.S. 100 (1941)
[31] Walter Berns, "The Meaning of the Tenth Amendment," in *A Nation of States: Essays on the American Federal System*, ed. by Robert A. Goldwin, Chicago, IL, Rand McNally and Company, 1963, p. 130.
[32] Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 165.
[33] The most blatant example of this occurred in *Hammer v. Dagenhart*, 247 U.S. 251 (1918). In this case the Supreme Court overruled a Congressional attempt to regulate child labor under the commerce clause. In his opinion, Justice Day went so far as to say, "In interpreting the Constitution, it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not *expressly* delegated to the national government are reserved . . ." This was, indeed, a most incredible case of judicial amendment and will be discussed more fully in a later section of the text.
[34] *Dred Scott v. Sanford*, 19 Howard 393 (1857)
[35] *McCulloch v. Maryland*, 4 Wheaton 316 (1819)
[36] Charles Evans Hughes as Governor of New York cited in Edward S. Corwin, *The Constitution And What It Means Today*, 12 ed., Princeton, NJ, Princeton University Pres, 1958, p. xv.
[37] Most notably, Marshall aroused the enmity of Presidents Thomas Jefferson and Andrew Jackson. In response to one of Marshall's decisions, Jackson is alleged to have said, "John Marshall has made his decision, now let him enforce it."
[38] Kelly and Harbison, *The American Constitution*, *op. cit.*, pp. 162–63.
[39] *Ibid.*, p. 163.
[40] *Ibid.*, p. 168.
[41] *Ibid.*, pp. 168–69.
[42] Alexander Hamilton quoted in *Ibid.*, p. 169.
[43] Alexander Hamilton quoted in *Ibid.*
[44] John Jay (1789–1795), John Rutledge, unconfirmed (1795), and Oliver Ellsworth (1796–1800).
[45] *Chisholm v. Georgia*, 2 Dallas 419 (1793).
[46] U.S., *Constitution*, Amendment XI.
[47] *Ware v. Hylton*, 3 Dallas 199 (1796).
[48] *Hylton v. United States*, 3 Dallas 177 (1796).
[49] Kelly and Harbison, *The American Constitution*, *op. cit.*, pp. 188–89.
[50] Walter Hartwell Bennett, *American Theories of Federalism*, *op. cit.*, p. 93.
[51] *Marbury v. Madison*, 1 Cranch 137 (1803).
[52] Paul C. Bartholomew, *Governmental Organization, Powers, and Procedure*, Vol. I of *American Constitutional Law*, 2d ed, Totowa, NJ, Littlefield, Adams, and Company, 1978, pp. 4–5. Among President Adam's "midnight appointments" to the positions of Justice of the Peace to the District of Columbia was William Marbury. However, in the change of government, the Federalist Secretary of State had not issued Marbury's commission. When the new Secretary of State, James Madison, withheld the commission, Marbury applied to the Supreme Court for a preliminary writ which Madison chose to ignore. In one of history's many ironies, the Federalist Secretary of State who had originally neglected to issue the commission was John Marshall.
[53] *McCulloch v. Maryland*, 4 Wheaton 316 (1819). The case involved the State of Maryland's right (which right Marshall asserted it did not possess) to tax the Bank of the United States.
[54] *Ibid.*
[55] *Ibid.* (emphasis added). Marshall reiterated and, thus, strengthened the McCulloch opinion five years later in *Osborn v. The Bank of the United States*, 9 Wheaton 738 (1824).
[56] *Gibbons v. Ogden*, 9 Wheaton 1 (1824).
[57] *Ibid.*
[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid.*
[61] Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 280.
[62] Thomas Jefferson, "Letter to T. Ritchie, 1820," in *Thomas Jefferson on Democracy*, ed. by Saul K. Padover, New York, NY, The New American Library, Inc., 1939, pp. 63–64.
[63] Kelly and Harbison, *The American Constitution*, *op. cit.*, pp. 194–95.
[64] *Ibid.*, p. 193.
[65] Bennett, *American Theories of Federalism*, *op. cit.*, p. 93.
[66] *Ibid.*, pp. 103–04.
[67] *Ibid.*, pp. 120–21. Note the early propensity of Taylor, a genuinely respected intellect, to insert the work "expressly" into the discussion of reserved powers.

[68] Thomas Jefferson, "Letter to Joseph C. Cabell, 1816," in James Jackson Kilpatrick, "The Case for States' Rights," in *A Nation of States*, *op. cit.*, p. 88.

[69] This should in no way imply that Hamilton was the workingman's friend. Quite the opposite was true. Unlike many of his contemporaries (and though he himself was politically astute enough *not* to openly press the point) Hamilton believed that government should be aristocratically controlled, particularly by commercial and manufacturing aristocrats.

[70] Jefferson, "Notes on Virginia, Query 19," in *Thomas Jefferson on Democracy*, *op. cit.*, p. 70.

[71] John Taylor quoted in Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 195.

[72] Unless otherwise noted, most of the following section is based on excellent description of events provided in Kelly and Harbison, *The American Constitution*, *op. cit.*, pp. 238–56. For a description of the original bank controversy, see p. 35 in this chapter.

[73] This was clearly unconstitutional. According to Article I, Section 10, "No state shall . . . coin money . . ." U.S., *Constitution*, Article I, Section 10.

[74] Ironically, Webster had begun his career as an exponent of New England states' rights during the War of 1912 while Calhoun, of course, was later to become the country's most articulate and vigorous spokesman for southern states' rights.

[75] John C. Calhoun quoted in Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 244.

[76] *Ibid.*

[77] *Ibid.*

[78] The issue lasted through three presidencies running the gamut from the narrow construction of Madison to the moderate viewpoint of James Monroe to the broad construction of John Quincy Adams.

[79] U.S., *Constitution*, Article IV, Section 2.

[80] U.S., *Constitution*, Article I, Section 9.

[81] U.S., *Constitution*, Article I, Section 2.

[82] U.S., *Constitution*, Article IV, Section 3.

[83] Needless to say, this is a highly simplistic description of the outcome of the first Missouri Compromise. The second compromise, orchestrated by the "Great Compromiser" himself, Henry Clay, was more concerned with the national citizenship status of free blacks. The issue became especially thorny when Charles Pinckney, a delegate to the Constitutional Convention who claimed authorship of the privileges and immunities clause, declared that it applied only to whites since the founders had never considered the possibility of blacks as United States citizens. While Clay succeeded in conditioning the admission of Missouri on the grounds that it offer full privileges and immunities to all citizens (black or white) of other states, the question of black citizenship would only be solved by the outcome of the Civil War and the inclusion of the Fourteenth Amendment to the Constitution.

[84] In particular, the cultivation of cotton had spread to regions outside the immediate South Atlantic states causing lower cotton prices overall. In addition to the economic depression, this caused regional out-migration and, consequently, population decline.

[85] Bennett, *American Theories of Federalism*, pp. 128–29. Calhoun served 22 years in Congress, eight years as Secretary of War under President Monroe, seven years as Vice President under Presidents Quincy Adams and Jackson, and one year as Secretary of State under President Tyler.

[86] As Vice President, Calhoun secretly authored the South Carolina Exposition of 1828, the state's first major tariff protest and discourse on state interposition.

[87] Bennett, *American Theories of Federalism*, *op. cit.*, p. 130.

[88] John C. Calhoun, *The Works of John C. Calhoun*, ed., by R.K. Crallé, I, New York, NY 1854–57, pp. 24–27 in *Ibid.*

[89] *Ibid.*, I, 68.

[90] According to Calhoun, Madison had incorrectly implied this characteristic. Therefore, his interpretation was wrong and in this case he was not to be taken as authority.

[91] Bennett, *American Theories of Federalism*, *op. cit.*, pp. 132–35. This is an incomplete list. Calhoun employed a number of additional proofs in his argument—an argument which obviously ran counter to other historical interpretations as well as to a great portion of the *Federalist Papers*.

[92] Calhoun, *Works*, I, 146 in *Ibid.*, p. 137. (emphasis added).

[93] *Ibid.*, p. 140.

[94] Bennett, *American Theories of Federalism*, *op. cit.*, p. 144.

[95] *Ibid.*, p. 145.

[96] *Ibid.*, p. 148.

[97] Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 295.

[98] President Jackson quoted in *Ibid.*, p. 296.

[99] The Democrats, led by Andrew Jackson, had emerged by the mid-1820s from the ruins of Jefferson's Democratic Republican Party. Thus, they tended to have a states' rights and agrarian thrust. These Democrats and their Jeffersonian forebears, of course, were the direct predecessors of the current Democratic Party.

[100] The Whigs began as something of a "pot pourri" party in opposition to Jackson's Democrats. In time, under the leadership of Henry Clay, they came to reflect nationalist and commercial interests. When the Whigs dissolved in 1854, a number of their members joined the new Republican Party.

[101] Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 314.

[102] *Ibid.*, p. 315.

[103] President Andrew Jackson quoted in *Ibid.*, p. 317.

[104] It should be noted that Jackson did not single out the Marshall Court in particular nor the Supreme Court in general. He was also largely disdainful of Congress, viewing himself as the champion and spokesperson for the common people. *Ibid.*, pp. 316–21.

[105] President Franklin Pierce, *Congressional Globe*, 33rd Cong., 1st Sess., May 3, 1854, p. 1062.

[106] *Ibid.*

[107] *Dred Scott v. Sanford*, 19 Howard 393 (1857).

[108] *New York v. Miln*, 11 Peters 102 (1837).

[109] Stanley I. Kutler, ed., *The Supreme Court and the Constitution*, 2nd ed.; New York, NY, W. W. Norton and Company, Inc., 1977, p. 126.

[110] 11 Peters 102 (1837).

[111] *The License Cases*, 5 Howard 504 (1847).

[112] *Ibid.*

[113] Chief Justice Roger Taney quoted in Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 329.

[114] *The Passenger Cases*, 7 Howard 283 (1849).

[115] *Ibid.*

[116] Chief Justice Taney dissenting in *Ibid.*

[117] *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 Howard 299 (1851).

[118] *Ibid.*

[119] It is neither the purpose nor the place of this chapter to attempt a detailed historical discussion of the slavery issue. However, its importance to the breakdown of the American federal union is indeed incalculable and a brief, if admittedly incomplete, outline of its major manifestations and impacts is in order.

[120] To many northern members of Congress the annexation of Texas was viewed as an insidious plot on the parts of President Tyler and his Secretary of State, John C. Calhoun, to extend slavery. Moreover, President Polk was accused (by, among others, young Representative Abraham Lincoln) of starting the Mexican War for the sole purpose of gaining new slave territory. Such thinking prompted the Wilmot Proviso of 1846 which sought to ban slavery from all former Mexican lands. For its part, the Proviso (ultimately unsuccessful) touched off a four-year crisis which nearly resulted in an early civil war. Unless otherwise noted the following section is based upon the account in Kelly and Harbison, *The American Constitution*, *op. cit.*, pp. 343–53.

[121] U.S., *Constitution*, Amendment V. (emphasis added). In this case, the word "person" was attached to the slave.

[122] *Ibid.* (emphasis added). In contradistinction to the abolitionist interpretation, Davis' interpretation of the Amendment applied the word

"person" to the slaveholder, while the slave was delegated to the "property" portion of the clause.

[123] Kelly and Harbison, *The American Constitution, op. cit.*, p. 347.

[124] Interestingly, "squatter sovereignty" was also employed by northern moderates seeking compromise. In their interpretation, however, the territorial legislatures were not viewed as Congressional creatures and therefore, as agents for the people of the territories, could decide the slavery issue for themselves.

[125] Anti-Nebraska forces from both of the older parties began to coalesce to form a new political party, the Republicans. The strongly unionist Whigs simply disappeared.

[126] Edwin S. Corwin, "Curbing the Court," *The Annals*, Vol. 185, May 1936, p. 52.

[127] Kelly and Harbison, *The American Constitution, op. cit.*, p. 362.

[128] *Dred Scott v. Sanford*, 19 Howard 393 (1857).

[129] *Ibid.*

[130] *Ibid.*

[131] *Ibid.*

[132] *Ibid.*

[133] *Ibid.*

[134] Obiter dictum is defined as "any part of the opinion of a court entirely unnecessary to the decision of the case at hand, and hence regarded as not binding predecent for future decisions." Kelly and Harbison, *The American Constitution, op. cit.*, p. 1072.

[135] All of the political, economic, theoretical divisions were exacerbated by John Brown's raid on Harper's Ferry which Southerners viewed as the practical manifestation of northern aggression toward southern institutions.

[136] In his inaugural address Lincoln stressed national supremacy, calling secession "legally void" and the "essence of anarchy."

[137] *Texas v. White*, 7 Wallace 700 (1869).

[138] *Ibid.*

[139] Robert A. Dahl, *Pluralist Democracy in the United States: Conflict and Consent*, Chicago, IL, Rand McNally and Company, 1967, p. 302.

[140] U.S., *Constitution*, Amendment XIV, sec. 1. The Fourteenth Amendment will be discussed in greater detail later in the text. The Thirteenth Amendment abolished slavery; the Fifteenth guaranteed blacks the right to vote.

[141] Dahl, *Pluralist Democracy in the United States, op. cit.*, pp. 318–19.

[142] Samuel Beer presents an elegant alternative means of examining and organizing the nation's pre-Civil War history. According to Beer's typology, it was characterized by PORKBARREL POLITICS; DISTRIBUTIVE POLICY; DECENTRALIZING INTERGOVERNMENTAL RELATIONS; and STATES' RIGHTS FEDERALISM. This antebellum model is followed by the Republican period which was characterized by "SPILLOVER" POLITICS; REGULATORY POLICY; CENTRALIZING INTERGOVERNMENTAL RELATIONS; and DUAL FEDERALISM. (These distinctions will become clearer in the following section.) Samuel H. Beer, The Modernization of American Federalism," *Publius*, Vol. 3, No. 2, Fall 1973, pp. 57–63.

[143] U.S., *Constitution*, Amendment XIV, Section 1.

[144] Corwin, *The Constitution and What it Means Today, op. cit.*, p. 248

[145] *Ibid.*

[146] Bennett, *American Theories of Federalism, op. cit.*, p. 201.

[147] Andrew C. McLaughlin, *A Constitutional History of the United States*, New York, NY, D. Appleton-Century Company, 1935, p. 727.

[148] Quite early, the Fourteenth Amendment was asserted to have been the result of a conspiracy among the Joint Committee which drafted it. First espoused by Roscoe Conkling and later adhered to by Charles A. Beard, the Fourteenth Amendment conspiracy theory held that the framers had deliberately drafted it in order to protect corporate interests, not to protect the new freedmen. In fact, the amendment came to be used in exactly this way by the Supreme Court but historians now generally believe that this was a result of the Court's philosophy and not the result of any conspiracy on the part of the framers. Kelly and Harbison, *The American Constitution*, p. 434.

[149] The Thirteenth Amendment prohibited slavery and the Fifteenth Amendment gave blacks the right to vote.

[150] Henry Steele Commager, "Historical Background of the Fourteenth Amendment," in *The Fourteenth Amendment*, ed. by Bernard Schwartz, New York, NY, New York University Press, 1970, pp. 19–27.

[151] The Radical Republicans arose as a Congressional bloc during the war. At that time they "sought a more vigorous prosecution" of the conflict. Beginning late in 1865, these Republicans—now also called Radical Reconstructionists—started to gain ascendancy and voice strong opposition to the Lincoln-Johnson Reconstruction policies. They felt that: (1) Congress should move much more swiftly to legally guarantee black suffrage and civil rights; (2) southerners should be severely punished for secession and subsequent war; (3) Congress should be more intimately involved in all phases of Reconstruction; and (4) readmittance of southern Democratic states should be delayed until Republican power had been consolidated. Kelly and Harbison, *The American Constitution, op. cit.*, pp. 424–25.

[152] Commager, "Historical Background of the Fourteenth Amendment," *op. cit.*, p. 19.

[153] See pages 88–93 in this chapter.

[154] Kelly and Harbison, *The American Constitution, op. cit.*, p. 428.

[155] The act enumerated civil rights and provided for federal protection of those rights.

[156] Kelly and Harbison, *The American Constitution, op. cit.*, pp. 435–40.

[157] That case, of course, was *Brown vs. the Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954).

[158] 16 Wallace 23 (1873).

[159] These assertions, in turn, were based upon the traditional doctrine of vested rights, the most important of which at that time was considered the right to be secure in the ownership of private property.

[160] Kutler, *The Supreme Court and the Constitution, op. cit.*, p. 225

[161] *Slaughter-House Cases*, 16 Wallace 36 (1873).

[162] *Ibid.*

[163] Kelly and Harbison, *The American Constitution, op. cit.*, p. 475.

[164] 16 Wallace 36 (1873).

[165] *Strauder v. West Virginia*, 100 U.S. 303 (1880).

[166] *Virginia v. Rives*, 100 U.S. 313 (1880).

[167] 109 U.S. 3 (1883).

[168] Kutler, *The Supreme Court and the Constitution, op. cit.*, p. 200.

[169] 109 U.S. 3 (1883).

[170] Justice Harlan dissenting in *Ibid.*

[171] Kutler, *The Supreme Court and the Constitution, op. cit.*, p. 216.

[172] 163 U.S. 537 (1896).

[173] *Ibid.*

[174] Justice Harlan dissenting in *Ibid.*

[175] Charles Fairman, "Justice Samuel Miller: A Study of a Judicial Statesman," *Political Science Quarterly*, L, 15, pp. 42–43 as quoted in Corwin, "Curbing the Court," *op. cit.*, pp. 50–51.

[176] Although Justice Bradley concurred in the dissent of Justice Field, he presented a few further remarks in dissent.

[177] Justice Bradley dissenting in the *Slaughter-House Cases*, 16 Wallace 36 (1873).

[178] 94 U.S. 113 (1877).

[179] Kutler, *The Supreme Court and the Constitution, op. cit.*, p. 242.

[180] Regulation of interstate commerce will be discussed in the following *Section VI*.

[181] A rare but notable instance of this use of due process occurred in Chief Justice Taney's *Dred Scott* decision, "in which Section 8 of the Missouri Compromise, whereby slavery was excluded from the territories, was held void under the Fifth Amendment, not on the ground that the procedure for enforcing it was not due process of law, but because the Court regarded it as unjust to forbid people to take their slaves, or other property into the territories, the common property of all the states." Corwin, *The Constitution and What It Means Today, op. cit.*, p. 218.

[182] Kelly and Harbison, *The American Constitution, op. cit.*, p. 473.

[183] 94 U.S. 113 (1877).
[184] *Ibid.*
[185] Justice Field dissenting in *Ibid.*
[186] *Mugler v. Kansas*, 123 U.S. 623 (1887) as quoted in McLaughlin, *A Constitutional History of the United States*, *op. cit.*, pp. 744–45.
[187] *Chicago, Milw, & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418 (1890).
[188] Justice Bradley dissenting in *Ibid.*
[189] Kutler, *The Supreme Court and the Constitution*, *op. cit.*, p. 254.
[190] 169 U.S. 466 (1898).
[191] The Court's "test" follows: "We hold . . . that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of its construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We did not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. . . ." 169 U.S. 466 (1898).
[192] Kutler, *The Supreme Court and the Constitution*, *op. cit.*, p. 254.
[193] Bernard Schwartz, "The Amendment in Operation: A Historical Overview," in *The Fourteenth Amendment*, ed. by Bernard Schwartz, New York, NY, New York University Press, 1970, p. 31.
[194] 169 U.S. 366 (1898).
[195] In 1897, in *Allgeyer v. Louisiana*, 165 U.S. 578, the Court had first hinted at this use of due process.
[196] *Holden v. Hardy*, 169 U.S. 366 (1898).
[197] 198 U.S. 45 (1905).
[198] *Ibid.*
[199] Justice Harlan dissenting in *Ibid.*
[200] Justice Holmes dissenting in *Ibid.* (emphasis added)
[201] The first related case to come before the Court was the recipient of the famous "Brandeis Brief." In *Muller v. Oregon*, 208 U.S. 412 (1908), however, the Court held in favor of a state limitation on maximum hours of labor because the law in question dealt exclusively with female labor. This fact apparently vindicated the Oregon statute in the eyes of the Court since, according to Justice Brewer, "history discloses the fact that woman has always been dependent upon man. . . . The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence." Nine years later, in 1917, the Court upheld another Oregon statute, this one dealing with both men and women (*Bunting v. Oregon*, 243 U.S. 426.) This decision appeared more decisively to be an overruling of *Lochner*. However, the Court was careful to officially ignore its *Lochner* decision and thus to divorce the *Bunting* case from it.
[202] Kutler, *The Supreme Court and the Constitution*, *op. cit.*, p. 291.
[203] Kelly and Harbison, *The American Constitution*, *op. cit.*, pp. 516–57.
[204] 118 U.S. 557 (1886).
[205] *Ibid.*
[206] Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 518.
[207] McLaughlin, *A Constitutional History of the United States*, *op. cit.*, p. 773.
[208] Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 518.
[209] McLaughlin, *A Constitutional History of the United States*, *op. cit.*, p. 773.
[210] 154 U.S. 447 (1894).
[211] Bartholomew, *American Constitutional Law*, *op. cit.*, Vol. I, p. 242.
[212] *Interstate Commerce Commission v. Cincinnati, New Orleans, and Texas Pacific Railway Company*, 167 U.S. 479 (1897).
[213] Rothman, "The Ambiguity of American Federal Theory," *op. cit.*, p. 112.
[214] 168 U.S. 144 (1897).
[215] Kutler, *The Supreme Court and the Constitution*, *op. cit.*, p. 261.
[216] Justice Harlan dissenting in 168 U.S. 144 (1897).
[217] Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 522.
[218] *Ibid.*, pp. 522–23.
[219] McLaughlin, *A Constitutional History of the United States*, *op. cit.*, pp. 777–78.
[220] *United States v. E.C. Knight Company*, 156 U.S. 1 (1895).
[221] *Ibid.*
[222] Kelly and Harbison, *The American Constitution*, *op. cit.*, pp. 528–29.
[223] *In Re Debs*, 158 U.S. 564 (1895).
[224] *Ibid.* (emphasis added)
[225] Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 529.
[226] Theodore Roosevelt, *An Autobiography*, p. 357, quoted in McLaughlin, *A Constitutional History of the United States*, *op. cit.*, p. 422.
[227] In a speech made at Osawatomie, Kansas, on August 31, 1910. Theodore Roosevelt, *The New Nationalism*, pp. 27–28, quoted in *Ibid.*
[228] 188 U.S. 321 (1903).
[229] *Ibid.*
[230] *Ibid.*
[231] *Ibid.*
[232] *McCulloch v. Maryland*, 4 Wheaton 316 (1819).
[233] Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 555.
[234] *McGray v. United States*, 195 U.S. 27 (1904).
[235] *Ibid.*
[236] The term "muckraker" was coined by President Roosevelt.
[237] Kelly and Harbison, *The American Constitution*, *op. cit.*, pp. 556–57.
[238] Sinclair's sensational novel, *The Jungle*, was the result of an investigation into the filthy, disease-ridden conditions of the Chicago meat packing houses.
[239] 220 U.S. 45 (1911).
[240] Bartholomew, *American Constitutional Law*, Vol. I, *op. cit.*, p. 242.
[241] Kelly and Harbison, *The American Constitution*, *op. cit.*, p. 558.
[242] *Ibid.*
[243] *Hoke v. United States*, 227 U.S. 308 (1913).
[244] *Ibid.*
[245] An excerpt from a 1910 federal circuit court decision illustrated how far the federal "police power" had extended by the second decade of the 20th Century: "Congress has enacted a safety appliance law for the preservation of life and limb. Congress has enacted the antitrust statute to prevent immorality in contracts and business affairs. Congress has enacted the livestock sanitation act to prevent cruelty to animals. Congress has enacted the cattle contagious disease act to more effectively suppress and prevent the spread of contagious and infectious diseases of livestock. Congress has enacted a statute to enable the Secretary of Agriculture to establish and maintain quarantine districts. Congress has enacted the meat inspection act. Congress has enacted a second employer's liability act. Congress has enacted the obscene literature act. Congress has enacted the lottery statute . . . Congress has enacted (but a year ago) statutes prohibiting the sending of liquors by interstate shipment with the privilege of the vendor to have the liquors delivered c.o.d. . . ." *Shawnee Milling Company v. Temple*, 179 Fed. 517 (1910). Moreover, the government had occasion again to "police through taxation" in the Harrison Narcotics Act of 1914, held constitutional by the Court in *United States v. Doremus*, 249 U.S. 86 (1919).

[246] See *Section VI* of this chapter.
[247] Roosevelt had a tendency to initiate legislation and, when the going got rough, withdraw his support, leaving the bill's Congressional backers in an embarrassing situation. Kelly and Harbison, *The American Constitution, op. cit.*, p. 566.
[248] 193 U.S. 197 (1904).
[249] Kelly and Harbison, *The American Constitution, op. cit.*, pp. 566–67.
[250] *Northern Securities Company v. United States*, 193 U.S. 197 (1904).
[251] 196 U.S. 375 (1905).
[252] *Ibid.*
[253] Kelly and Harbison, *The American Constitution, op. cit.*, p. 569.
[254] See *Section VI* of this chapter.
[255] Again, as was often his style, the President withdrew his support from a stronger amendment (one he had originally proposed) framed by liberal members of Congress.
[256] *The Interstate Commerce Act* as amended by the *Hepburn Act*, 24 Stat. 379 (1906).
[257] Kelly and Harbison, *The American Constitution, op. cit.*, pp. 572–74.
[258] *Illinois Central Railroad Company v. Interstate Commerce Commission*, 206 U.S. 441 (1907).
[259] 215 U.S. 452 (1910).
[260] Kutler, *The Supreme Court and the Constitution, op. cit.*, p. 261.
[261] *The Interstate Commerce Act* as amended by the *Mann-Elkins Act*, 35 Stat. 60 (1910).
[262] *United States v. Atchison, Topeka, and Santa Fe Railroad Company*, 234 U.S. 476 (1914).
[263] 234 U.S. 342 (1914).
[264] Kutler, *The Supreme Court and the Constitution, op. cit.*, p. 264.
[265] *Houston, East and West Texas Railway Company v. United States* (The Shreveport Case), 234 U.S. 342 (1914).
[266] Morton Grodzins, *The American System*, Chicago, IL, Rand McNally and Co., 1966, p. 36.
[267] *Ibid.*, p. 36.
[268] *Ibid.*
[269] *Ibid.*, p. 43.
[270] *Federal Aid Road Act* of 1916. Harold F. McClelland, "Financing Decentralization," In *Essays in Federalism, op. cit.*, p. 68.
[271] *Smith-Hughes Act of 1917*. Grodzins, *The American System, op. cit.*, p. 374.
[272] *Chamberlain-Kuhn Act* of 1918. *Ibid.*
[273] *Sheppard-Towner Act* of 1921. *Ibid.*, p. 47.
[274] Kelly and Harbison, *The American Constitution, op. cit.*, p. 673.
[275] U.S., *Constitution*, Art. I, sec. 8.
[276] See *Section III* of this chapter.
[277] See *Section IV* of this chapter.
[278] *Massachusetts v. Mellon* (Frothingham v. Mellon), 262 U.S. 447 (1923).
[279] *Ibid.*
[280] Harry N. Scheiber, "American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives," *The University of Toledo Law Review*, Vol. 9, No. 4, Summer 1978, pp. 640–43.
[281] C. Herman Pritchett, *The American Constitution*, 3rd ed.; New York, NY, McGraw-Hill Book Company, 1977, p. 168.
[282] *Ibid.*
[283] *Hylton v. United States*, 3 Dallas 171 (1796).
[284] *Ibid.*
[285] *Springer v. United States*, 102 U.S. 586 (1881).
[286] Pritchett, *The American Constitution, op. cit.*, p. 168.
[287] 157 U.S. 429 (1895); 158 U.S. 601 (1895).
[288] Kelly and Harbison, *The American Constitution, op. cit.*, p. 532.
[289] *Ibid.*
[290] *Pollock v. Farmers' Loan and Trust Company*, 158 U.S. 601 (1895).
[291] See *Section VI* of this chapter.
[292] U.S., *Constitution*, Amendment XVI.
[293] McLaughlin, *A Constitutional History of the United States, op. cit.*, p. 785.
[294] See *Section I* of this chapter.
[295] Dahl, *Pluralist Democracy in the United States, op. cit.*, p. 48.
[296] Advisory Commission on Intergovernmental Relations, *Citizen Participation in the American Federal System*, A-73, Washington, DC, U.S. Government Printing Office, 1979, pp. 50–51.
[297] Arthur W. MacMahon, "Woodrow Wilson: Political Leader and Administrator," in *The Philosophies and Policies of Woodrow Wilson*, ed. by Earl Latham, Chicago, IL, University of Chicago Press, 1958, p. 100, quoted in Dahl, *Pluralist Democracy in the United States, op. cit.*, p. 99.
[298] *Ibid.*
[299] Woodrow Wilson, *Constitutional Government in the United States*, New York, NY, Columbia University Press, 1908, pp. 77–78.
[300] Briefly, the major cases were *Schenck v. United States*, 249 U.S. 47 (1919), in which Holmes produced the "clear and present danger" test; *Abrams v. United States*, 250 U.S. 616 (1919), in which Clarke produced the "bad tendency" test; *Gitlow v. New York*, 268 U.S. 652 (1925); and *Whitney v. California*, 274 U.S. 357 (1927).
[301] 268 U.S. 652 (1925).
[302] *Ibid.*
[303] See *Section V* of this chapter.
[304] Bartholomew, *American Constitutional Law, op. cit.*, Vol. I, p. 254.
[305] *Ibid.*
[306] 247 U.S. 251 (1918).
[307] *Ibid.*
[308] *Ibid.* (emphasis added)
[309] See *Section I* of this chapter.
[310] 247 U.S. 251 (1918).
[311] *Bailey v. Drexel Furniture Company*, 259 U.S. 20 (1922).
[312] Bartholomew, *American Constitutional Law, op. cit.*, Vol. I. p. 158.
[313] Dahl, *Pluralist Democracy in the United States, op. cit.*, p. 162.
[314] See *Section VI* of this chapter.
[315] *In Re Debs*, 158 U.S. 564 (1895).
[316] See *Loewe v. Lawlor* (Danbury Hatters' Case), 208 U.S. 274 (1908) and *Adair v. United States*, 208 U.S. 161 (1908).
[317] David B. Truman, *The Governmental Process: Political Interests and Public Opinion*, (2nd ed., New York, NY, Alfred A. Knopf, Inc., 1971, p. 71.
[318] *Ibid.*, p. 70.
[319] See *Duplex Printing Press Company v. Deering*, 254 U.S. 443 (1921) and *American Steel Foundries v. Tri-Cities Trades Council*, 257 U.S. 184 (1921) in which, most significantly, the Court decided that secondary boycott was illegal regardless of the *Clayton Act*.
[320] 257 U.S. 312 (1921).
[321] Kutler, *The Constitution and the Supreme Court, op. cit.*, p. 344.
[322] 257 U.S. 312 (1921).
[323] Justice Holmes dissenting in *Ibid.*
[324] 198 U.S. 45 (1905).
[325] See *Section V* of this chapter.
[326] 261 U.S. 525 (1923).
[327] *Children's Hospital v. Adkins*, 284 Fed. 613, 622 (D.C. Cir. 1922) cited in Schwartz, "The Amendment in Operation: A Historical Overview," *op. cit.*, p. 32.
[328] Chief Justice Taft dissenting in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).
[329] 262 U.S. 522 (1923).
[330] Kutler, *The Constitution and the Supreme Court, op. cit.*, p. 356.
[331] Kelly and Harbison, *The American Constitution, op. cit.*, p. 662.
[332] *Ibid.*
[333] James T. Patterson, *The New Deal and the States: Federalism in Transition* Princeton, NJ, Princeton University Press, 1969, p. 26.
[334] *New York Times*, April 8, 1933, IV, 6 cited in *Ibid.*, p. 47.
[335] *Ibid.*, p. 30.
[336] Speech delivered at the annual governors conference cited in *Ibid.*, p. 3.
[337] Lincoln Day Address, Feb. 12, 1931, *Public Papers of the Presidents*, 1931, p. 75.
[338] Josephine C. Brown, *Public Relief, 1929–1939* New York, NY, Henry Holt and Co., 1940, pp. 126–27.
[339] *New York State Ice Company v. Leibmann*, 258 U.S., 262 (1932)

cited in Patterson, *The New Deal and the States, op. cit.*, p. 3.

[340] *The Wicks Act*, September 23, 1931. Brown, *Public Relief*, pp. 90–91.

[341] *Ibid.*, p. 96

[342] Kutler, *The Supreme Court and the Constitution, op. cit.*, p. 365.

[343] Patterson, *The New Deal and the States, op. cit.*, pp. 45–46.

[344] Political pundit Walter Lippman said of Roosevelt in 1932 that he was "a pleasant man who, without any important qualifications for the office, would very much like to be President." Cited in William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal*, New York, NY, Harper and Row, Publishers, 1963, p. 10.

[345] *Ibid.*, pp. 10–11.

[346] Message to Congress, June 8, 1934, *Public Papers of the Presidents*, 1934, as cited in Brown, *Public Relief, op. cit.*, p. 147.

[347] See *Section IV* of this chapter.

[348] The $3 billion total came from the original legislation as well as four subsequent acts of Congress. Other acts which authorized funds for the use of or allocated funds to FERA were the *National Industrial Recovery Act of 1933* ($148,035,000); Act of February 15, 1934 ($605,000,000); the Emergency Appropriation Act, fiscal year 1935 ($980,590,000); and the Emergency Relief Appropriation Act of 1935 ($944,005,625). Source: International City Manager's Association, *Municipal Yearbook, 1937*, ICMA, April, 1937, p. 404.

[349] The matching section provided $1.00 of federal funds for each $3.00 of state funds from all sources.

[350] For a more complete discussion of FERAct and FERA, see ACIR, *Public Assistance: A Case Study of the Growth of a Federal Function, The Federal Role in the Federal System*, Report A–79, Washington, DC, U.S. Government Printing Office, 1980.

[351] Arthur M. Schlesinger, Jr., *The Coming of the New Deal*, Vol. II of *The Age of Roosevelt*, 3 vols., Boston, MA., Houghton Mifflin Company, 1958, p. 267.

[352] *The Federal Emergency Relief Act*, 1933, Sec. 3(b) and (c).

[353] *Ibid.*, Sec. 4(e).

[354] *Ibid.*, Sec. 3(b).

[355] Patterson, *The New Deal and the States, op. cit.*, p. 74.

[356] Brown, *Public Relief, op. cit.*, p. 168.

[357] *Ibid.*, p. 167. For a more complete discussion of the WPA see *Reducing Unemployment: The Changing Dimensions of National Policy, The Federal Role . . .*, Report A–80, forthcoming.

[358] Paul K. Conkin, *The New Deal*, 2d ed., Arlington Heights, IL, AHM Publishing Corporation, 1975, p. 46.

[359] Leuchtenburg, *Franklin D. Roosevelt and the New Deal, op. cit.*, p. 57.

[360] Conkin, *The New Deal, op. cit.*, p. 36.

[361] *Ibid.*

[362] Leuchtenburg, *Franklin Roosevelt and the New Deal, op. cit.*, p. 57.

[363] *Ibid.*

[364] Conkin, *The New Deal*, p. 33.

[365] *Ibid.*, p. 34.

[366] *Ibid.*, pp. 33–34.

[367] According to Paul Conkin, "Agriculture led all other industries into the Depression, and suffered the most. In 1930 alone, farm income dropped by 20% and then by 30% in 1931." *Ibid.*, p. 38.

[368] Raymond Moley, *After Seven Years*, New York, NY 1939, p. 160, cited in Leuchtenburg, *Franklin D. Roosevelt and the New Deal, op. cit.*, p. 30.

[369] *Ibid.*, p. 52.

[370] *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935) in which the Court held that in the case of the NIRA's transportation of "hot oil" provisions, Congress had delegated too much legislative power to the President.

[371] *Perry v. United States*, 294 U.S. 330 (1935) in which the Court ruled against plaintiff Perry's right to sue but hinted that if the "right case" came along, it might hold the gold clause unconstitutional.

[372] *Railroad Retirement Board v. Alton Railroad Company*, 295 U.S. 330 (1935) in which the Court found the *Railroad Retirement Act* unconstitutional.

[373] 295 U.S. 495 (1935).

[374] Kutler, *The Supreme Court and the Constitution, op. cit.*, p. 373.

[375] *Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935).

[376] Leuchtenburg, *Franklin D. Roosevelt and the New Deal, op. cit.*, p. 145.

[377] *Ibid.*, p. 161.

[378] *Ibid.*, p. 231.

[379] 298 U.S. 238 (1936).

[380] See *Section VI* of this chapter.

[381] Kutler, *The Supreme Court and the Constitution, op. cit.*, p. 378.

[382] *Carter v. Carter Coal Company*, 298 U.S. 238 (1936).

[383] Leuchtenburg, *Franklin D. Roosevelt and the New Deal, op. cit.*, p.231.

[384] 298 U.S. 587 (1936).

[385] Samuel Rosenman (ed.), *The Public Papers and Addresses of Franklin D. Roosevelt* (13 vols., New York, 1938-50), V. pp. 191–92 as cited in Leuchtenburg, *Franklin D. Roosevelt and the New Deal, op. cit.*, p. 231.

[386] Conkin, *The New Deal, op. cit.*, pp. 39–40.

[387] *United States v. Butler*, 207 U.S. 1 (1936).

[388] Justice Stone dissenting in *Ibid.*

[389] Bartholomew, *American Constitutional Law, op. cit.*, p. 188.

[390] *United States v. Butler*, 297 U.S. 1 (1936).

[391] "The Federal Conditional Spending Power," *Northwestern University Law Review*, Vol. 70, No. 2, May–June, 1975, 298–301. The Court, of course, had indicated its acceptance of the Congressional conditional spending power 13 years earlier in *Massachusetts v. Mellon* (Frothingham v. Mellon), 262 U.S. 447 (1923). See *section VII* of this chapter.

[392] Leuchtenburg, *Franklin D. Roosevelt and the New Deal, op. cit.*, pp. 143–66.

[393] *The Social Security Act of 1935*, Ch. 531, 49 Stat. 620, 42 U.S. The purposes of the original 1935 titles are as follows: I—Grants to the States for Old Age Assistance; II—Federal Old Age Benefits (Social Security Insurance); III—Grants to the States for Unemployment Compensation Administration; IV—Grants to the States for Aid to Dependent Children; V—Grants to the States for Maternal and Child Welfare; VI—Public Health Work; VII—Social Security Board; VIII—Taxes with Respect to Employment; IX—Tax on Employers of Eight or More; X—Grants to the States for Aid to the Blind; XI—General Provisions. For discussions of the origins of the *Social Security Act of 1935*, as well as detailed analyses of its public assistance and unemployment insurance components see "Public Assistance: A Case Study of the Growth of a Federal Function," *op. cit.*, and "Reducing Unemployment: The Changing Dimensions of National Policy," *op. cit.*

[394] Leuchtenburg, *Franklin D. Roosevelt and the New Deal, op. cit.*, pp. 151–52.

[395] *Ibid.*, p. 154.

[396] *Ibid.*, pp. 154–57.

[397] *Ibid.*, p. 160.

[398] For the history of Hamilton's "National Bank," see *Sections II, III*, and *IV*, of this chapter. Obviously, the foregoing cursory presentation of New Deal legislation neither exhausts the realm of that legislation nor offers more than the briefest outlines of the laws presented. For more detailed listings, descriptions, and analyses of New Deal legislation see, among others: Leuchtenburg, *Franklin D. Roosevelt and the New Deal, op. cit.*; Conkin, *The New Deal, op. cit.*; and Schlesinger, *The Age of Roosevelt, op. cit.*, (3 vols.).

[399] *Public Papers*, VI, pp. 51–66 as cited in Leuchtenburg, *Franklin D. Roosevelt and the New Deal, op. cit.*, p. 233.

[400] *Ibid.*

[401] Ironically, at the time of the Court battle, Justice Louis Brandeis, one of the liberal, pro-Roosevelt members of the Court, was 80 years old!

[402] See Conkin, *The New Deal*, pp. 88–92 *op. cit.*, and Leuchtenburg, *Franklin D. Roosevelt and the New Deal, op. cit.*, pp. 231–39.

[403] 300 U.S. 379 (1937).

[404] See *Section VIII* of this chapter.
[405] *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U.S. 1 (1937). This case will be discussed in some detail later in the text.
[406] Roosevelt paraphrased in Leuchtenburg, *Franklin D. Roosevelt and the New Deal, op. cit.*, p. 238.
[407] *Ibid.*, pp. 236–37.
[408] Conkin, *The New Deal, op. cit.*, p. 89.
[409] 301 U.S. 1 (1937).
[410] Kutler, *The Supreme Court and the Constitution, op. cit.*, p. 394. For a discussion of the *Swift and Company* decision see *Section VII* of this chapter.
[411] *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937).
[412] 301 U.S. 548 (1937).
[413] 301 U.S. 619 (1937).
[414] Bartholomew, *American Constitutional Law, op. cit.*, p. 185.
[415] *Steward Machine Company v. Davis*, 301 U.S. 548 (1937).
[416] *Helvering, Welch, and the Edison Electric Illuminating Company v. Davis*, 301 U.S. 619 (1937).
[417] The child labor provisions nearly duplicated those of the *Keating-Owens Act of 1916* which a very different Court had declared unconstitutional in *Hammer v. Dagenhart*, 247 U.S. 251 (1918). See *Section VIII* of this chapter.
[418] By 1941 most of the old conservative opposition on the Court had died or retired. Moreover, without recourse to "packing," between 1937 and 1943, Roosevelt appointed eight justices (Black, Reed, Frankfurter, Douglas, Murphy, Byrnes, Jackson, and Rutledge) to the Court and "promoted" long-time pro-New Deal Justice Harlan Fiske Stone to the Chief Justiceship!
[419] 9 Wheaton 1 (1924). See *Section II* of this chapter.
[420] 247 U.S. 251 (1918). See *Section VIII* of this chapter.
[421] *United States v. Darby Lumber Company*, 312 U.S. 100 (1941).
[422] Edward S. Corwin, "The Passing of Dual Federalism," *Virginia Law Review*, Vol. 36, No. 1, February 1950, 17.
[423] Robert S. Hirschfield, *The Constitution and the Court: The Development of Basic Law Through Judicial Interpretation*, New York, NY, Random House, Inc., 1962, p. 60.
[424] 317 U.S. 111 (1942).
[425] Kutler, *The Supreme Court and the Constitution, op. cit.*, p. 406.
[426] *Wickard v. Filburn*, 317 U.S. 111 (1942).
[427] *American Power and Light v. Securities and Exchange Commission*, 329 U.S. 90 (1946) cited in Kutler, *The Supreme Court and the Constitution, op. cit.*, p. 406.
[428] Scheiber, "American Federalism and the Diffusion of Power," *op. cit.*, p. 645. (emphasis added)
[429] Rothman, "The Ambiguity of American Federal Theory," *op cit.*, p. 13.
[430] Carl Brent Swisher, *The Growth of Constitutional Power in the United States*, Chicago, IL, University of Chicago Press, 1946, pp. 43–44.
[431] Of course, neither judicial activism nor acquiescence are particularly clear-cut concepts. For instance, a favorable judicial ruling on an act of Congress may be considered a matter of acquiescence to Congressional authority or a matter of broad and liberal Constitutional interpretation. Conversely, a case such as *Brown v. the Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954), generally touted as a plain instance of judicial activism, was really—as judicial rulings always are—a matter of judicial response rather than of the pure policy activism in which members of Congress may engage. Finally, in delimiting the notions of Court passivism and activism, there is the problem of circularity. Hence, to use the *Brown* case once more as an example, it and subsequent Court rulings in the area of civil rights created a mood favorable to civil rights actions in Congress and the Executive Branch. Thereafter, judicial rulings were made on and based upon such pieces of legislation as the *Civil Rights Act of 1964*. In other words, to apply the terms passivism or, especially, activism to the Court is actually to be employing a convenient and popular literary device rather than rigorously defined descriptives. Nonetheless, and precisely because they are convenient and commonly understood judicial adjectives, those terms will be used throughout the remainder of this chapter.
[432] *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).
[433] These include the breakdown of certain political and fiscal constraints, the rise and extreme proliferation of special interests, changing social and moral attitudes, and a number of unanticipated events and trends. See especially, "Government Un*Locked*: Political Constraints on Federal Growth Since the 1930s," Chapter 3, Volume II; "Financing Federal Growth: Changing Aspects of Fiscal Constraints," Chapter 4, Volume II; and "The Political Dynamics of Governmental Growth: An Analysis of the Case Study Findings," Chapter 2, Volume X in Advisory Commission on Intergovernmental Relations, *The Federal Role in the Federal System: The Dynamics of Growth*, forthcoming.
[434] Though Americans generally have remained philosophically adverse to "big government," we have tended since the New Deal to accept a large and active government in a practical programmatic sense. This striking American ambivalence, characterized by simultaneous attraction toward and repulsion from government has been described by public opinion experts, Free and Cantril, as "operational liberalism" and "ideological conservatism." Lloyd Free and Hadley Cantril, *The Political Beliefs of Americans*, New York, NY, Clarion Books, 1968, pp. 32–37. See also, "Government Un*Locked*: Political Constraints on Federal Growth Since the 1930s," Chapter 3, of this volume.
[435] Oklahoma Legislative Council, *The Supercession of Sovereignty*, (Oklahoma City, OK, State Legislative Council, May, 1974.
[436] James B. Croy, "Federal Supersession: The Road to Domination," *State Government*, Winter 1975, p. 33.
[437] *Ibid.*, p. 34.
[438] Cited in *Ibid.*
[439] *Ibid.*
[440] 426 U.S. 833 (1976).
[441] 392 U.S. 183 (1968).
[442] *National League of Cities v. Usery*, 426 U.S. 833 (1976).
[443] In *Fry v. United States*, 421 U.S. 542 (1975), the Court, though upholding the *Economic Stabilization Act of 1970*, had stated that Congress could not "exercise [its] power in a fashion that impairs the State's integrity or ability to function in a federal system."
[444] Justice Brennan dissenting in 426 U.S. 833 (1976).
[445] Most notably, a group of lower court decisions issued several years after NLC have all upheld application of the Equal Pay Act provisions of FLSA, prohibiting wage discrimination based on sex, to state and local governments. However, unlike the wage-hour provisions, the equal pay provision has been justified as enforcing the equal protection guarantees of the Fourteenth Amendment and not as being dependent upon the commerce clause.
[446] William J. Kilberg and Linda Batchelder Fort, "*National League of Cities v. Usery*: Its Meaning and Impact," *The George Washington Law Review*, Vol. 45, No. 4, May 1977, pp. 617-18.
[447] Fred W. Rausch and Thomas A. Shannon, "Public Education," *The Urban Lawyer*, Vol. 9, No. 4, Fall 1977, p. 828.
[448] Lawrence A. Tribe, "Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services," *Harvard Law Review*, Vol. 90, No. 6, April 1977, p. 1103.
[449] In a few additional preemption type cases, the Burger Court has ruled in favor of the states. See for example *DeCanan v. Bica*, 424 U.S. 35 (1976); *Kewanee Oil Company v. Bicron Corp.*, 416 U.S. 470 (1974); *Askew v. American Waterways Operations, Inc.*, 411 U.S. 325 (1973); and *Goldstein v. California*, 412 U.S. 546 (1972).
[450] Direct aid to cities with populations over 500,000 soared between the years 1976 and 1978 alone from 28% of their own source revenues to over 50%. David B. Walker, "Federal Judges and Federal Grants: A Dimension of Today's Dysfunctional Federalism," paper presented at Advisory Commission on Intergovernmental Relations, Conference on Grant Law, Washington, DC, December 12, 1979, p. 8.

[451] Broadly defined, crosscutting national policy requirements are those which are generally applicable to many or most federal grants. However, within this broad characterization, several differentiating shades of crosscutting requirements exist. For instance, at the most literal definitional level, a crosscutting requirement is one arising from a law "adopted without relation to any particular grant program [but which] appl[ies] to the grant system on an across-the-board basis." A major example of this sort is Title VI of the *Civil Rights Act of 1964*. Some conditions may not literally be "across-the-entire-board" but, for all practical purposes, have the same effect. Such "conditions have become a general policy by reason of being inserted repeatedly in individual statutes that authorize a wide range of grant programs." A prime example is provided by the minimum wage provisions of the *Davis-Bacon Act*. Finally, some national policy conditions "only appl[y] to single grant programs or closely related groups of programs but elaborate on general policy." For example, Section 16 of the *Urban Mass Transportation Act of 1964* extends the rights of the handicapped and elderly to federal transportation grant programs. Advisory Commission on Intergovernmental Relations, *Categorical Grants: Their Role and Design*, Report A-52, Washington, DC, U.S. Government Printing Office, 1977, p. 234.

[452] No one knows how high the total fiscal costs of federal mandates run. Even the most recently completed and most extensive study on the subject does not attempt to measure actual costs. Years of prior expenditures, a variety of hidden costs, and the difficulty involved in even identifying mandates have probably made such an after-the-fact task nearly impossible for anyone. Nonetheless, the study does present some significant findings about mandated fiscal costs and all lead to the conclusion that "the concern of local government officials about the burden that mandating is placing on their local resources is justified. Catherine H. Lovell, *et al, Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts*, Final Report to the National Science Foundation, Riverside, CA, University of California, June 20, 1979, p. 168.

[453] Congressional Budget Office, *Federal Constraints on State and Local Government Actions*, Washington, DC, U.S. Government Printing Office, March 1979, pp. 10–11.

[454] 262 U.S. 447 (1923).

[455] *Ibid.*

[456] 297 U.S. 1 (1936). For a discussion of the immediate impact of *Butler* see *Section IX* of this chapter.

[457] 330 U.S. 127 (1947).

[458] *Ibid.*

[459] Thomas J. Madden, "The Law of Federal Grants," paper presented at Advisory Commission on Intergovernmental Relations Conference on Grant Law, Washington, DC, December 12, 1979, p. 1.

[460] 426 U.S. 833 (1976).

[461] *North Carolina v. Califano*, 445 F. Supp. 532 (E.D.N.C. 1977).

[462] Among the ever increasing body of grant law, some of the more significant cases include, *Shapiro v. Thompson*, 394 U.S. 618 (1969), in which the Supreme Court ruled that state AFDC residency requirements violated the equal protection clause of the Fourteenth Amendment; *Montgomery County, Maryland v. Califano*, 449 F. Supp. 1230 (D. Md. 1978), in which the District Court ruled that local health agencies could not be overruled by local county governments under the terms of the *National Health Planning Act; Florida Department of Health v. Califano*, 449 F. Supp. 274 (N.D. Fla. 1978) in which the District Court upheld conditional requirements under the *Rehabilitation Act*. For more detailed discussions of grant law and the conditional spending power see: Richard B. Cappalli, *Rights and Remedies Under Federal Grants*, Washington, D.C., Bureau of National Affairs, Inc., 1979; Thomas J. Madden, "The Right to Receive Federal Grants and Assistance," *Federal Bar Journal*, Volume 37, Fall 1978, 17–60; Thomas J. Madden, "The Law of Federal Grants," paper presented at ACIR, Conference on Grant Law, Washington, DC, December 12, 1979; David B. Walker, "Federal Judges and Federal Grants: A Dimension of Today's Dysfunctional Federalism," paper presented at ACIR, Conference on Grant Law, Washington, DC, December 12, 1979; and "The Federal Conditional Spending Power: A Search For Limits," *Northwestern University Law Review*, Volume 70, Number 2, May–June 1975, 293–330.

[463] *Maine, et al v. Thiboutot, et vir*, 448 U.S._____ (1980).

[464] Justice Powell dissenting in *Ibid.*

[465] From previous marriages, the Thiboutot's had a total of eight children, five of whom were Mrs. Thiboutot's and three of whom were Mr. Thiboutot's. In computing the benefits to which Mr. Thiboutot was entitled, the Maine Department of Human Services decided that he was entitled only to benefits for his three children even though he was legally obligated to support the other five.

[466] "Pandora's Mandate," *The Wall Street Journal*, June 27, 1980, p. 24.

[467] Three categories of statutes have been identified as potentially being affected by the Thiboutot ruling: (1) joint regulatory endeavors such as the *Federal Insecticide, Fungicide, and Rodenticide Act of 1972;* (2) resource management programs such as the *Outer Continental Shelf Lands Act Amendment of 1978;* and (3) grant programs such as the *Urban Mass Transportation Act of 1964*. *Maine v. Thiboutot*, 448 U.S._____ (1980), Appendix.

[468] *Fullilove v. Klutznick* (preliminary publication), Docket No. 78-1007, July 2, 1980.

[469] *Public Works Employment Act of 1977*, P.L. 95-28, 95th Cong., 1st Sess., 1977.

[470] Fred Barbash and Jean Seaberry, "Law to Remedy Bias Is Upheld," The Washington Post, July 3, 1980, p. A-1.

[471] *Fullilove v. Klutznick* (preliminary publication), Docket No. 78-1007, July 2, 1980.

[472] The generally cited lead decisions in this area are *Lau v. Nichols*, 414 U.S. 563 (1974), in which, based upon Title VI of the *Civil Rights Act of 1964*, the San Francisco School District, as recipient of federal funds, was ordered to begin bilingual education for Chinese-speaking children; and *Goldberg v. Kelly*, 397 U.S. 254 (1970), in which the Court decided that a recipient of AFDC, whose welfare benefits the New York City Commissoner of Social Services had decided to terminate, had a "property interest" in the continued receipt of benefits.

[473] 572 F. 2d 518 C.V.C. Cir (1978).

[474] See especially *Rhode Island v. Innis* (preliminary publication), Docket No. 78-1076, May 12, 1980.

[475] See for example, *Payton v. New York* (preliminary publication), Docket No. 78-5420, April 15, 1980, *Dunaway v. New York* (preliminary publication), Docket No. 78-5066, June 5, 1979, and *Ybarra v. Illinois* (preliminary publication), Docket No. 78-5937, November 28, 1979.

[476] *Harris v. McRae*, partial text of preliminary publication printed in *Congressional Quarterly Weekly*, July 5, 1980, 1864–66.

[477] David B. Walker, *Toward a Functioning Federalism*, Cambridge, MA, Winthrop Publishers, Inc., 1981, p. 139.

[478] Even before *Brown*, it should be noted, the pre-Warren Court had been moving toward rejection of the *Plessy* doctrine in a variety of rulings which knocked down restrictive covenants in housing and segregation in interstate transportation and higher education. See: *Shelly v. Kraemer*, 334, U.S. 1 (1948); *Mitchell v. United States*, 313 U.S. 80 (1941); *Morgan v. Virginia*, 328 U.S. 373 (1946); *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948); *Henderson v. United States*, 339 816 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

[479] See for example: *Cooper v. Aaron*, 358 U.S. 1 (1958), *Faubus v. Aaron*, 361 U.S. 197 (1959), and *Griffin v. County Board of Prince Edward County*, 377 U.S. 218 (1964).

[480] In addition to schools, the Court had a relatively easy time in its Fourteenth Amendment desegregation rulings on other state facilities and functions. See for example: *Baltimore v. City of Dawson*, 350 U.S. 877 (1955), *Holmes v. City of Atlanta*, 350 U.S. 879 (1955), *State Athletic Commission v. Dorsey*, 359 U.S. 903 (1956), and *Evers v. Dwyer*, 358 U.S. 202 (1958).

[481] See *Garner v. Louisiana*, 368 U.S. 157 (1961), *Taylor v. Louisiana*, 370 U.S. 154 (1962), *Edwards v. South Carolina*, 372 U.S. 229 (1963), *Peterson v. Greenville*, 373 U.S. 244 (1963), and *Lombard v. Louisiana*, 373 U.S. 267 (1963).

[482] Kelly and Harbison, *The American Constitution, op. cit.*, p. 879.

[483] The impact was felt immediately. See: *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), in which the Court barred racial discrimination in hotels and motels serving interstate customers (in other words, all hotels and motels) and *Katzenbach v. McClung*, 379 U.S. 294 (1964), in which the Court ruled against a restaurant which served only in-state residents but served some food which had moved in interstate commerce (again, for all practical purposes, a ruling which could be applied to every restaurant in the nation).

[484] See: *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), in which the Court upheld the *Voting Rights Act* as legitimate under the Fifteenth Amendment, *Katzenbach v. Morgan*, 384 U.S. 641 (1966), in which the Court ruled that the Act's ban on literacy tests did not violate the Tenth Amendment, and *Harper v. Virginia Board of Education*, 383 U.S. 667 (1966), in which the Court ruled that poll taxes violated the equal protection clause.

[485] See: *Reitman v. Mulkey*, 387 U.S. 369 (1967), *Jones v. Mayer Co.*, 392 U.S. 409 (1969), and *Hunter v. Erickson*, 393 U.S. 385 (1969).

[486] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[487] *Milliken v. Bradley*, 418 U.S. 717 (1974).

[488] Archibald Cox, *The Role of the Supreme Court in American Government*, New York, NY, Oxford University Press, 1976, pp. 80–81.

[489] *White v. Regester*, 412 U.S. 755 (1973).

[490] *City of Mobile, Alabama, et al v. Bolden, et al*, (preliminary publication), Docket Number 77–1844, April 22, 1980.

[491] See: *Yates v. United States*, 355 U.S. 66 (1957); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Brandenberg v. Ohio*, 393 U.S. 948 (1969); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965); *United States v. Brown*, 381 U.S. 437 (1965); *United States v. Robel*, 389 U.S. 258 (1967); and *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967).

[492] *Street v. New York*, 394 U.S. 576 (1969).

[493] *United States v. O'Brien*, 391 U.S. 367 (1968).

[494] *Cohen v. California*, 403 U.S. 15 (1971).

[495] *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972).

[496] 965 U.S. 2673 (1976).

[497] Docket No. 78–1654, preliminary publication, March 31, 1980.

[498] *Ibid.*

[499] *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 338 U.S. 413 (1966).

[500] *Miller v. California*, 413 U.S. 151 (1973).

[501] *Paris Adult Theater I v. Slayton*, 413 U.S. 49 (1973).

[502] Kelly and Harbison, *The American Constitution, op. cit.*, p. 958.

[503] *Near v. Minnesota*, 283 U.S. 697 (1931).

[504] 376 U.S. 254 (1964).

[505] *Ibid.*

[506] *Curtis Publishing Company v. Butt*, 388 U.S. 130 (1967).

[507] *Associated Press v. Walker*, 388 U.S. 130 (1967).

[508] *Time v. Hill*, 385 U.S. 374 (1967).

[509] *Gertz v. Welch, Inc.*, 418 U.S. 323 (1974).

[510] Cox, *The Role of the Supreme Court in American Government, op. cit.*, p. 40.

[511] 381 U.S. 479 (1965).

[512] Kelly and Harbison, *The American Constitution, op. cit.*, p. 963.

[513] 381 U.S. 479 (1965).

[514] *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973).

[515] 410 U.S. 113 (1973).

[516] In *Planned Parenthood of Central Missouri v. Danforth*, 44 LW 5197 (1976) the Court extended right to privacy/abortion by asserting that wives were not required to obtain the consent of their husbands for abortions. Increasingly, the right of privacy is being extended in lower courts to another controversial issue: the right of terminally ill patients or their conservators to refuse extraordinary medical treatment. See: *In re Eichner*, 48 LW 2650, NY SupCtAppDiv2ndDept (March 27, 1980), *Satz v. Perlmuter*, 48 LW 2503, Fla SupCt(January 17, 1980), and *In re Young*, 48 LW 2238, Calif SuperCt Orange City (September 11, 1979).

[517] *Weeks v. United States*, 232 U.S. 383 (1912).

[518] *Wolf v. Colorado*, 338 U.S. 25 (1949).

[519] 367 U.S. 643 (1961).

[520] *Ibid.*

[521] *Ker v. California*, 374 U.S. 23 (1962).

[522] From the title of an excellent and moving journalistic account of the case. Anthony Lewis, *Gideon's Trumpet*, New York, NY, Vintage Books, 1966.

[523] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[524] See especially, *Douglas v. California*, 372 U.S. 352 (1963).

[525] U.S. *Constitution*, Amendment XI.

[526] *Ibid.*

[527] *Duncan v. Louisiana*, 391 U.S. 145 (1968).

[528] See especially *Haynes v. Washington*, 373 U.S. 503 (1963) and *Escobedo v. Illinois*, 378 U.S. 478 (1964).

[529] 483 U.S. 436 (1966).

[530] *Ibid.*

[531] See especially *Harris v. New York*, 401 U.S. 222 (1971).

[532] *Rhode Island v. Innis* (preliminary publication), Docket No. 78–1076, May 12, 1980.

[533] Testimony of Patrolman Williams cited in *Ibid.*

[534] *Ibid.*

[535] Kelly and Harbison, *The American Constitution, op. cit.*, p. 988. See: *Argersinger v. Hamlin*, 407 U.S. 25 (1972), in which the Court extended the right to counsel to all criminal offenses no matter how trivial and *Kirby v. Illinois*, 406 U.S. 682 (1972), in which the Court limited the right to counsel in the pretrial process.

[536] See: *U.S. v. Harris*, 403 U.S. 924 (1971), *Cady v. Dombrowski*, 410 U.S. 952 (1973), *Schneckleth v. Bustamente*, 412 U.S. 218 (1973), *United States v. Robinson*, 412 U.S. 936 (1973), and *United States v. Calandra, 414 U.S. 338 (1974)*.

[537] See: *Dunaway v. New York* (preliminary publication), Docket No. 78–5066 (June 5, 1979), *Ybarra v. Illinois* (preliminary publication), Docket No. 78–5937 (November 28, 1979), and *Payton v. New York* (preliminary publication), Docket Nos. 78–5420 and 78–5421 (April 15, 1980).

[538] U.S. *Constitution*, Amendment VIII.

[539] 408 U.S. 238 (1972).

[540] *Gregg v. Georgia*, 44 LW 5230 (1976).

[541] *Rummel v. Estelle* (preliminary publication), Docket No. 78–6386 (March 18, 1980).

[542] Cox, *The Role of the Supreme Court in American Government, op. cit.*, p. 68.

[543] Kelly and Harbison, *The American Constitution, op. cit.*, pp. 941-942.

[544] *Luther v. Borden*, 7 Howard 1 (1849).

[545] *Colegrove v. Green*, 328 U.S. 549 (1946).

[546] *Baker v. Carr*, 369 U.S. 186 (1962). Two years earlier, in *Gomillion v. Lightfoot*, the Court struck down an Alabama statute which redrew the boundaries of Tuskegee in order to exclude blacks. That decision, however, was decided as a civil rights case on Fifteenth Amendment grounds.

[547] *Gray v. Sanders*, 372 U.S. 368 (1963).

[548] *Wesberry v. Sanders*, 376 U.S. 1 (1964).

[549] 377 U.S. 533 (1964).

[550] *Ibid.*

[551] *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964).

[552] Kelly and Harbison, *The American Constitution, op. cit.*, p. 947.

[553] A bill which would have denied federal judicial jurisdiction over reapportionment passed the House but failed to gain adequate support in the Senate. A Constitutional amendment, proposed by Sen. Everett M. Dirksen (R-IL), would have allowed bicameral states to divide representation in one of their houses on other than a strict population

basis. Moreover, the states instituted a drive for a Constitutional Convention to decide the apportionment issue.

[554] However, the Constitutional Convention drive came only two states short of succeeding.

[555] Walker, *Toward a Functioning Federalism, op. cit.*, p. 142. The cases in question are *Mahan v. Howell*, 410 U.S. 315 (1973), *Gordon v. Lance*, 403 U.S. 1 (1971), and *Bogert v. Kinzer*, 403 U.S. 914 (1971).

[556] Cox, *The Role of the Supreme Court in American Government, op. cit.*, p. 69.

[557] *Shapiro v. Thompson*, 394 U.S. 618 (1969).

[558] *Dunn, v. Blumstein*, 405 U.S. 330 (1972).

[559] *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

[560] *Marston v. Lewis*, 410 U.S. 679 (1973).

[561] *Starns v. Malkerson*, 326 F. Supp. 234, affirmed, 401 U.S. 985 (1971).

[562] "Developments in the Law: Section 1983," *Harvard Law Review*, 90 (1977), p. 1180 as cited in Walker, *Toward a Functioning Federalism, op. cit.*, p. 142.

[563] 411 U.S. 1 (1973).

[564] Cox, *The Role of the Supreme Court in American Government, op. cit.*, p. 92.

[565] *Ibid.*, pp. 93–94.

[566] Walker, *Toward a Functioning Federalism, op. cit.*, p. 142.

[567] *Ibid., p. 103. See: Reed v. Reed*, 404 U.S. 71 (1971), *Stanton v. Stanton*, 421 U.S. 7 (1975), *Frontiero v. Richardson*, 411 U.S. 677 (1973), *and Kahn v. Shevin*, 461 U.S. 351 (1974).

[568] Professor of criminal law Yale Kamisar quoted in Linda Greenhouse, "On Balance, Defendants Still Gain New Rights," *New York Times*, June 22, 1980, p. G1.

[569] Charge advanced in libertarian circles. Quoted in Kelly and Harbison, *The American Constitution, op. cit.*, p. 984.

[570] "Pandora's Mandate," *Wall Street Journal*, June 27, 1980, p. 24.

[571] Lewis B. Kaden, "Federalism in the Courts: An Agenda for the 1980's" prepublication draft of paper prepared for Advisory Commission on Intergovernmental Relations, Conference on the Future of Federalism, Alexandria, VA, July 25–26, 1980, p. 60.

[572] Neil D. McFeeley, "The Supreme Court and the Federal System," *Publius*, Vol. 8, No. 4, Fall 1978, 6.

[573] Woodrow Wilson, *Constitutional Government in the United States*, New York. Columbia University Press, 1908, p. 173.

[574] Charles Evans Hughes quoted in Corwin, *The Constitution and What It Means Today*, p. xv.

Chapter 3

Government Un*locked*: Political Constraints On Federal Growth Since The 1930s

I
Introduction

As the previous chapter has demonstrated, Constitutional constraints on the size and scope of the federal government were greatly diminished after 1937. In the words of one professor of public administration:

> There no longer seems to be any fixed Constitutional barrier at which the courts will protect the absolute independence of the states, or of private corporations, against the power of the federal government on any major issue of policy.[1]

In fact, a Constitutional scholar has gone so far as to claim that: "In fact, if not in form, we live today under a national, not a federal, Constitution."[2]

The Constitutional "revolution" of the 1930s did not mean that constraints upon federal growth and activism ceased to exist, however. On the contrary, it was not so long ago that discussion in political circles was repleat with reference to the "deadlock" of American democracy. Regarding the early 1960s, James Sundquist wrote of a prevalent sense of "gloom" about the federal government's ability to act in domestic affairs.[3] Much attention was devoted to the "Conservative Coalition," which consistently stymied attempts to promote federal involvement in a host of domestic policy areas. In short, the diminution of Constitutional limitations on federal activism in the late 1930s shifted the focus of governmental constraint from the courts to the elected and ad-

ministrative branches of government. As Leonard White wrote in 1953:

> I consider the Constitutional issue settled against the states. The national government can now go a long way under the interstate commerce clause and the general welfare clause; and by grants-in-aid it can buy whatever additional authority Congress believes desirable. The future of the states rests not on Constitutional protection but on political and administrative decisions. . . . The issues of the future in this area are consequently political and administrative in nature.[4]

C. Peter Magrath concurs that the center of decision-making on questions concerning the federal role now rests in the political arena:

> Although the Supreme Court has put the final gloss on the Constitution's commerce, tax, and welfare provisions, the interpretations are merely permissive. They allow, but they do not compel, Congress and the President to undertake far-reaching programs of economic regulation and social welfare. In this sense, then, the modern court has conferred supreme economic and social welfare policymaking power upon Congress and the President and, ultimately, upon the nation's dominant political majorities.[5]

Contemporary constraints on federal growth, then, have been largely political in nature. Such constraints exist in several different forms, including political values and ideologies, organized interests opposed to federal growth, and the structure of our political institutions. As they have evolved over time, both the independent and collective influences of political constraints have varied. Fifteen years ago, for example, it could be argued that the doctrine of states' rights continued to exert a powerful influence over policy decisions. In the words of Walter Bennett:

> If the doctrine of states' rights has ceased to influence the Supreme Court, there has been no noticeable lessening in the role of this doctrine in American political controversy.[6]

Today, however, many believe that federal growth is no longer effectively constrained, agreeing with Daniel Elazar that there has been an "abandonment of all restraint."[7] Thus, the character of these constraints, and their marked diminution over time, require examination in some detail.

II
The Role of Ideas as Political Constraints

An important set of political constraints are philosophical in nature. Included here are political values and political ideologies. Ideologies are fairly elaborate conceptions of what government legitimately ought to do and how it should go about doing it; these questions will be examined subsequently. Broader notions of government's role in society comprise political values, which form a normative foundation on which ideologies are constructed. Political values help shape popular expectations as to the proper role of government. They also constitute limitations on the role, setting boundaries of conceivable and acceptable political behavior.

Over time, public opinion in the United States has undergone a fundamental transformation—from an overwhelming belief in a severely restricted federal government to a position of ambivalence. Elements of the old, restrictive values remain, but their ability to constrain governmental growth has been undermined by simultaneous popular support for a broad range of governmental programs. Most importantly, there now exists a popular expectation that the federal government will actively address a wide spectrum of contemporary problems. Many social and economic issues that were assumed to be private concerns in the 19th Century are now considered by many people to be legitimate targets of governmental response.

III
Political Values: The Rise of the Positive Liberal State and The Growth of Popular Pragmatism

The traditionally accepted role of the state through much of American history has been the "negative liberal state."[8] This concept of government is based upon a preeminent concern with individual liberty, in the sense of freedom from governmental coercion and constraint. It is characterized by extraordinary latitude in private and corporate decisionmaking, on the one hand, and by government severly limited through expressly defined powers, on the other. The functions of the state within this system center largely on the chores of commercial and community housekeeping, on the protection of individual rights, and on the exchange of private property.

While never fully practiced, this concept of the role of government was politically dominant at the federal level from 1800 to the 1930s. Its original roots can be traced in political theory to the writings of John Locke. Within the American political culture at large, the influence of Lockean values has been brilliantly expounded by the political historian Louis Hartz. Hartz described America as a nation characterized by "national acceptance of the Lockean creed, ultimately enshrined in the Constitution."[9] "There has never been," he wrote, "a 'liberal movement' or a real 'liberal party' in America: we have only had the American way of life, a nationalist articulation of Locke."[10]

The values of negative liberalism were given prominent expression by a succession of political leaders from Thomas Jefferson to Herbert Hoover. None advanced the doctrine more forcefully or clearly than Jefferson, who helped shape the dominant public stance toward governmental action that prevailed through much of the 19th Century. Jefferson adhered to the doctrine that "government is best which governs least." He premised this conclusion on three convictions. First, he believed that, in the agrarian society of the 18th Century, the necessary scope of governmental functioning was quite small, as he explained in his first inaugural address:

> A wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government, and this is necessary to close the circle of our felicities.[11]

Secondly, in the tradition of negative liberalism, Jefferson believed that any governmental activity, no matter how necessary, involved a diminution of individual freedom and, thus, should be constrained to the greatest extent practicable. "I own that I am not a friend to a very energetic government," he stated. "It is always oppressive."[12] Thirdly, he opposed governmental activism on the grounds that governmental power corrupts its holders. To Jefferson, this last conviction required especially that constraints be placed on the federal government's role. He believed that most of the meager needs of domestic government should be provided at the state and local level, where they could best be overseen by the electorate:

> It is not by the consolidation, or concentration of powers, but by their distribution that good government is effected. Were not this country already divided into states, that division must be made.[13]

The influence of negative liberalism over American political values continued well into the 20th Century, as can be seen in a comparison of Herbert Hoover's views with those of Jefferson. Like Jefferson, Hoover conceived of governmental actions in a negative sense—necessary in certain instances, perhaps, but acquired only at the cost of popular liberties. "I am opposed," he said, "to any direct or indirect government dole. The breakdown . . . in Europe is due in part to such practices."[14] Harkening back to the metaphors of the 19th Century, he advocated a sharply restricted sphere of federal activities. He compared government's role in society with that of an umpire, which oversees the rules of the game without actually participating in it:

> It is as if we set a race. We, through free and universal education provide the training

> of the winners; we give to them an equal start; we provide in the government the umpire of fairness in the race. The winner is he who shows the most conscientious training, the greatest ability, and the greatest character.[15]

He staunchly opposed the "socialistic methods" of the New Deal.[16]

EROSION OF THE NEGATIVE LIBERAL STATE

Although the negative liberal state was always an abstraction, it had considerable applicability at the federal level until the 20th Century. Over time, the forces of national development—industralization, the growth of commerce, the rise of cities—began to erode this concept of limited government. Such changes helped spur increasing demands for piecemeal reform and governmental intervention—through the regulation of trusts, railroads, commerce and trade, wages and working conditions, and through the construction of urban water and transit systems, roads and so forth. Initially, the influence of localistic values, localized impact, and Constitutional interpretation helped to confine most of the demands and responses for governmental involvement to the state and local levels. But with continued economic development and national interdependence, federal intervention into many of these areas was increasingly appropriate and commonly forthcoming, despite Constitutional restraints.[17]

Gradually, as these changes occurred, the values of negative liberalism themselves came under attack. A serious challenge to the concept of negative government began to gain prominence in the Progressive era. For example, Herbert Croly, the founder of the *New Republic* magazine, delivered a comprehensive critique of the doctrine in 1909. In *The Promise of American Life*, Croly attacked the excessive individualism of Jefferson and the corresponding "fatal policy of drift:"

> In Jefferson's mind democracy was tantamount to extreme individualism. . . . It was unnecessary . . . to make any very artful arrangements, in order to effect an equitable distribution [of] . . . the good things of life. Such distribution would take care of itself. . . . The motto of a democratic government should simply be "HANDS OFF."[18]

Croly pointed, instead, to the need for a more positive conception of the role of government in society, promoting democracy and enhancing the national community:

> A more scrupulous attention to existing federal responsibilities, and the increase of their number and scope, is the natural consequence of the increasing concentration of American industrial, political, and social life. . . . The democracy has a machinery in a nationalized organization, and a practical guide in the national interest. . . . Insofar as Americans timidly or superstitiously refuse to accept their national opportunity and responsibility, they will not deserve the names either of freemen or of loyal democrats.[19]

THE NEW DEAL

Part of this Progressive critique was reflected in Theodore Roosevelt's "New Nationalism" proposals in 1912 and, to a lesser extent in the reformism of Wilson's "New Freedom." Yet, the values of negative liberalism held sway until the New Deal. Implicit in the New Deal was a new philosophical conception of the federal government's role in society.[20] The steady accumulation of new programs and policies in the 1930s—and the shifting balance of power which they implied between the federal government and the states—testify to the emergence of a new role for the nation as a single political entity.[21] In a broad sense, this represented an acceptance of the positive liberal state, whose intervention into the lives of its citizens is felt in an affirmative sense, by helping to modify or regulate great economic forces beyond their control or by enhancing their economic security. As V.O. Key put it:

> The federal government underwent a radical transformation after the Democratic victory of 1932. It had been a remote authority with a limited range of activity. It operated the postal system, improved rivers and harbors, maintained armed forces on a scale fearsome only to banana republics, and performed other functions of which the average citizen was hardly aware. Within a brief time it became an institution that affected intimately the lives and fortunes of most, if not all, citizens.[22]

Basic values do not change overnight, but popular acceptance of the New Deal programs suggested the erosion of negative liberal values. Certainly, these values were no longer effective in restraining federal growth to the extent that they had done so previously. Prior to 1932, citizens had been sufficiently conditioned by political values to expect little from the federal government.

In the three years from 1929 to 1932, despite 25% unemployment, there was little in the way of mass protests and demonstrations demanding relief from Washington of the type one would expect today, except for the Veterans' Bonus March. In contrast, the activist stance of the New Deal won immediate political endorsement from the public.[23] In the highly unusual midterm election of 1934, the Democrats actually gained seats in Congress rather than losing them, setting the stage for Roosevelt's landslide reelection in 1936.

This fundamental change in political outlook was tirelessly promoted by President Roosevelt. In his speeches and addresses, FDR sought repeatedly to explain that social and economic conditions had changed, that government could play a positive role in bettering people's lives if it were permitted and asked to do so.[24] He argued that the days of rugged individualism were over: "Even a glance at the situation today only too clearly indicates that equality of opportunity as we have known it no longer exists. . . . We have all suffered from individualism run wild."[25] Industrialization, he stressed, had altered the context of man in society, requiring a new role for government:

> In the early days of colonization and through the long years following, the worker, the farmer, the merchant . . . came here to build, each for himself, a stronghold for the things he loved. The stronghold was home. . . . His security, then as now, was bound to that of his friends and neighbors. But as the nation has developed, as invention, industry, and commerce have grown more complex, the hazards of life have grown more complex. Among an increasing host of fellow citizens, among the often intangible forces of giant industry, man has discovered that his individual strength and wits were no longer enough. This was true not only of the worker at the shop bench or the ledger; it was true also of the merchant or manufacturer who employed him. Where heretofore men had turned to neighbors for help and advice, they now turned to government.[26]

Again and again, the President insisted that government had to respond to this new situation and assume an affirmative stance with regard to the economic and social needs of its citizens:

> I have . . . described the spirit of my program as a "new deal" . . . a changed concept of the duty and responsibility of government toward economic life.[27]
>
> I see one-third of a nation ill-housed, ill-clad, ill-nourished. It is not in despair that I paint this picture. I paint it for you in hope—because the nation, seeing and understanding the injustices in it, proposes to paint it out. We are determined to make every citizen the subject of his country's interest and concern.[28]
>
> It is not enough that the wheels turn. They must carry us in the direction of a greater satisfaction in life for the average man. The deeper purpose of democratic government is to assist as many of its citizens as possible, especially those who need it most, to improve their conditions of life, to retain all personal liberty which does not adversely affect their neighbors, and to pursue the happiness which comes with security and an opportunity for recreation and culture.[29]

Finally, Roosevelt maintained that the bulk of this governmental responsibility belonged to the federal government because we had become one nation economically: "America is an economic unit. New means and methods of transportation and communication have made us economically as well as politically a single nation."[30]

CHANGING POLITICAL VALUES

In the years following the New Deal, this effort at conversion of the nation's fundamental political values has had a notable effect. The older, Lockean notions of government's role in society have not been completely discarded, but a curious ambivalence has developed within Americans' political beliefs. Undermining these older notions has been massive public support for the programs of an activist federal government. Everett Ladd writes of "the almost universal acceptance among Americans of the general policy approach of the New Deal."[31] *Table 1* displays this popular acceptance of positive government in attitudes toward a variety of governmental functions in the 1970s. Those favoring additional or continued spending outweigh those favoring a reduction in the government's role in every single case.[32] On the other hand, the traditional Lockean values of individual initiative, private enterprise, and limited, localized government have continued to elicit substantial support from the American people.[33] This can be seen clearly in *Table 2*.

Examining this popular ambivalence toward the modern state in 1964, Free and Cantril determined that 65% of the public could be classified as liberals in an "op-

Table 1

PUBLIC ATTITUDES ON GOVERNMENT PROGRAMS, 1976

Government Activity	Should be Increased	Kept the Same	Reduced or Ended
Developing Self-Sufficient Energy Supplies	73%	18%	6%
Helping the Elderly	66	29	3
Combating Crime	59	28	8
Reducing Water Pollution	59	30	7
Supporting Public Schools	51	33	12
Improving Medical Care	50	35	12
Improving Mass Transit	34	36	22
Expanding Parks and Recreation	30	49	18
Aiding Low Income Families through Welfare	22	39	35

SOURCE: William Watts and Lloyd Free, *State of the Nation III*, Lexington, MA, DC Heath & Co., pp 214–16.

erational'' sense—through the support of specific governmental programs. Yet only 16% could be termed liberals in terms of their political ideology.[34] Many who continue to identify with the negative liberal state in the abstract fully support governmental activism in specific programs.[35] Thus, Free and Cantril concluded that there exists a ''paradox'' in American public opinion with, ''a large majority of Americans qualifying as operational liberals while at the same time a majority hold to a conservative ideology.'' They continued, stating:

Table 2

IDEOLOGICAL VIEWS OF AMERICANS, 1964

Ideological Position	Agree	Disagree
Too Much Federal Interference in State and Local Matters	40%	47%
Anyone Who Wants a Job Can Find One	76%	21%
Need More Reliance on Individual Initiative and Less on Government	79%	12%

SOURCE: Lloyd Free and Hadley Cantril, *The Political Beliefs of Americans*, New York, NY, Clarion Books, 1968, pp. 24, 26, 30.

> We have described this state of affairs as mildly schizoid, with people believing in one set of principles abstractly while acting according to another set of principles in their political behavior. But the principles according to which the majority of Americans actually behave politically have not yet been adequately formulated in modern terms. . . . *Because the American system has demonstrated such flexibility . . . this schizoid state has not more seriously impeded the operation and direction of government.*[36]

The consequence of this philosophical ambivalence has been to neutralize the constraining influence of remaining Lockean values upon government growth. Popular restraint is unavoidably undermined when many of the advocates of limited government in the abstract demand governmental action in so many specific cases. Some observers have stressed the important role traditionally played by political pragmatism in American values,[37] and it appears that such pragmatism, rather than principled restraint, characterizes the era of federal growth from the 1930s to the present.

The continuing disjunction between certain abstract attitudes and programmatic preferences may be contrib-

uting to the current growth of popular disaffection with government. Moreover, strong indications exist that public preferences may no longer countenance continued growth of the federal government and that even modest retrenchment could gain popular support.[38] Nevertheless, the fundamental transformation in values has been accomplished. A positive, active federal governmental role has been established both in fact and in the minds of citizens. Presidents no longer must exhort the public to believe that government can address the nation's problems. People now *expect* the government to do so, and they evaluate their leaders accordingly. Despite stirrings of retrenchment as the 1970s near their end, the major issues of the day elicit new demands for governmental action. Hence, popular support for new federal regulatory measures like gasoline rationing and wage/price controls help to prod reluctant national leaders in these directions.

IV
Political Ideology as a Constraint: The Rise of Governmental Pragmatism

While political values form an underlying stratum upon which governing and public policy formation take place, a connecting link between such values and public policy is provided through political ideology. Ideology translates and expresses differing values into terms more directly applicable to the decisions of governing. The ideological framework which organized domestic political discussion and decisionmaking from the 1930s to the 1960s was the familiar liberal-conservative continuum, formed around the central issue of governmental activism. This was the operational expression of the new conception of the positive liberal state. As the value structure of American politics came to allow the potentiality of federal growth, the issue of the federal role became the battleground of competing ideologies. Over the years, however, this ideological debate evolved, undergoing first a gradual loosening in the definitions and strictures placed upon the various intergovernmental roles and then a decline in the pertinence of ideology altogether and a corresponding increase in pragmatism.

The liberal-conservative continuum is frequently thought of in European terms, as a debate over income distribution and social equality. This issue, however, comprised only a subset of the broader American debate over federal activism. It has been an important ideological element because it corresponds to the cleavage of social classes that formed one element of the party alignment during this period.[39] Moreover, this was a powerful element in the debate over governmental activism because it coherently addressed the critical question of, "governmental activism for what purpose?" Redistributive policy can represent both a means and an end to this question.[40]

Nevertheless, questions of redistribution did not nearly encompass the full range of policies advanced by liberal activists during the post-New Deal period that engendered ideological conflict. Numerous measures of distributive and regulatory policy were important items on their agenda as well, reflecting, perhaps, the diverse social bases of each of the two parties.[41] Such strategies abound in the major policy debates of the time, including rural electrification, dams and water projects, general aid to education, agricultural price supports, urban renewal, space exploration, countercyclical fiscal policy, civil rights protections, and so on.[42] Rather than redistribution, these governmental policies are more accurately described as organizing and modifying the private economy, promoting social and economic development within diverse sectors of the economy, or regulating various sectors of society on behalf of some general public interest. Even those policies at the center of the New Deal, with all its rhetoric of "economic royalists" and "malefactors of great wealth," are more accurately viewed as redistributing power than redistributing wealth.[43] Accordingly, following a thorough study of public policymaking and political controversy in the 1950s and 1960s, James Sundquist defined the ideological combat of the era in terms of "activists" and "conservatives." He wrote that: "The advocates of national action were . . . perhaps best described . . . as 'activists,' a term that suggests both their temper and their pragmatism."[44] Sundquist stressed this pragmatic character of the activists, which centered in their willingness to seek federal solutions to the problems at hand:

> The proponents of national action . . . of the period 1953–66 were a diverse lot. What they had in common was a desire to act and

> a readiness to take *national* action through the national political and governmental processes. . . . The national government was an instrument to be used, if that were the quickest and surest way to the solution of the problem.[45]

Thus, the underlying values of the liberal-conservative dichotomy were those of positive vs. negative liberalism, involving a broad range of governmental activities aimed at intervention into the private market and the enhancement of people's lives.

IDEOLOGY AND FEDERALISM

As Sundquist affirms, the ideological cleavage of the New Deal era centered on governmental activism at the national level. Liberals looked upon the federal government as the primary instrument of positive government. Ladd and Hadley put it this way:

> The New Deal joined the egalitarian and reformist strains [of] . . . American political history through governmental nationalism. The thrust of American nation-building shifted from the business community to the public sector. . . . The Democratic party . . . became the liberal coalition; while the Republicans became the partisan instrument of conservatism—here defined as opposition to the governmental nationalism embodied in the New Deal.[46]

Several different factors supported this ideological cleavage over federal-state roles, most of which had emerged as early as the 1930s and were subsequently elaborated and refined.

To begin with, activists have preferred federal action because of superior federal resources. The bankruptcy of hardpressed state and local treasuries in the 1930s was a major spur to the initiation of massive emergency federal relief programs.[47] As William Leuchtenberg explains:

> By the spring of 1933, the needs of more than 15 million unemployed had quite overwhelmed the resources of local governments. In some counties, as many as 90% of the people were on relief. Roosevelt was not indifferent to the plea of Mayors and county commissioners for federal assistance.[48]

Depression era authors were well aware of the "advantages of federal fiscal superiority."[49] In the words of George Benson:

> Larger units [of government] have proved to be far more efficient in the collection of taxes. . . . The smaller units are becoming less able to carry unaided the burden of government services.[50]

With the passage of time, of course, arguments concerning the relative strength of national resources were developed even further, Keynesian macro economic theory, which detailed the unique expansionary fiscal potential of the federal government, gained widespread acceptance. In addition, the theory of "fiscal mismatch" explained the federal government's increasing relative strength.[51]

Conservatives, on the other hand, were left in the increasingly weak position—given post-1937 Supreme Court interpretations—of having to fall back upon the Constitution. They had to argue that traditional state and local responsibilities should not be the subject of federal involvement, regardless of resources. Otherwise, they could simply oppose governmental activism at any level, arguing instead for balanced budgets and lower taxes in order to stimulate private rather than public initiatives.

A second element in the liberal argument for federal activism has involved the issues of equity and uniformity. In the provision of vital public services, liberals have maintained that there should be, at least, minimum standards of services available to all, regardless of a local jurisdiction's ability to pay. Benson argued this, stating:

> In the gigantic economic system of the United States the wealth of different areas varies widely. . . . Within a state the disparity of tax resources between areas may be even greater. Complete decentralization—complete local responsibility for governmental services—may then result in a "spread" between the standards of different districts that would shock even the uncritical believer in a national "American" standard. . . . One shocking situation—the existence of a considerable amount of illiteracy in this great and wealthy country—is in large part a result of these financial inequities.[52]

Such equity considerations on behalf of federal action have also been expanded over the years. Liberal economists have utilized the notion of economic externalities to reinforce the position that redistributive functions require national legislation.[53] This argument was also presaged, in part, nearly 40 years ago by George Benson:

> The fear that large industries would move

> out of [a] state and into the jurisdiction of some more lenient legislature . . . [has] withheld . . . voting for improved working conditions or imposing taxes on industry with which to finance social welfare activities.[54]

An additional equity consideration that has been used to advance national action involves racial equality. Particularly before the civil rights initiatives of the 1960s, state legislation implied, in many cases, racially discriminatory activity in the south. It was this situation which provoked William Riker to comment caustically in 1964 that: "If in the United States one approves of southern white racists, then one shall approve of American federalism."[55]

While liberals drew upon equity to defend national action, conservatives spoke in terms of liberty to oppose it. On the one hand, the centralization of governmental functions threatened the loss of individual liberty, as President Hoover argued in 1931:

> The moment responsibilities of any community, particularly in economic and social questions, are shifted from any part of the nation to Washington, then that community has subjected itself to a remote bureaucracy. . . . It has lost a large part of its voice in the control of its own destiny.[56]

Similarly, the States Rights Party of 1948 railed against what it perceived as motion toward, "a totalitarian, centralized, bureaucratic government."[57] As the "states rights" label implies, the second concern of conservatives involved the traditional and Constitutional prerogatives of the states rather than individual liberty. In fact, the strongest adherents of this school were interested in the continuation of segregation laws in the south without federal interference. However, segregationists were by no means the sole advocates of this position. This is clear from the joint dissent expressed by conservative Governors from both northern and southern states to the Kestnbaum Commission's broad support for federal grants-in-aid:

> In the relationship between the national government and the states, it is important that we maintain . . . a reasonable balance between the collective powers and responsibilities of the states on the one hand and the national government on the other. A grant-in-aid program should be the exception rather than the rule. . . . If grants should become a part of every governmental activity, there is good reason to believe we would lose some of the substance of our present republican form of government. . . . President Andrew Jackson foresaw this result in 1833, when he stated that Congress should not be the tax gatherer and paymaster for state governments. "It appears to me," he said, "that a more direct road to consolidation cannot be devised. Money is power, and in that government which pays all the public officers of the states will all political power be substantially concentrated."[58]

In addition to superior federal resources and a belief in more equitable federal policies, liberal activists have pointed also to the refusal or inability of many state and local governments to act. Such state and local default has been used to justify federal action. "Too many states," wrote Benson, "lacked vitality and failed to supply aggressive leadership in the campaign against economic disaster. As a result the impetus to action came from the national government."[59] He concluded that: "state and local units do not seem generally to have functioned as satisfactory experimental laboratories."[60] More recent observers have reached similar conclusions. One writes that: "The idea that 'government is best when it governs least' was repudiated forever—but only at the national level. . . . Negative government [continues] for cities and states."[61]

Relatedly, liberals have questioned the capacity of state and local governments to act. They point to their traditional administrative backwardness, weak executives, numerous elected posts, outdated constitutions, part-time legislatures, backward personnel systems, etc. As recently as 1972, Michael Reagan argued that: "State governments are structurally inadequate and politically weak even when not actually corrupt."[62] Even with reforms, he maintained that state competence would inevitably suffer relative to the federal government because

> No matter what the salary scales of the states might be, there just wouldn't be enough top-drawer talent trained in each field to go around. We cannot multiply 50 times the number of first rate people in order to have some of them on the payroll of each individual state.[63]

Conservatives, in contrast, have tended instead to question the competence of a "distant" and "bureaucratic" federal government. The states, they have argued, have indeed proven active in many fields where such activity is justified.[64] Moreover, they contend that, despite past problems, state and local governments have been successfully reformed. Daniel Elazar writes of a

"quiet revolution which has transformed state government, as it transformed local government in the decade of the 1950s, into a solid instrument for meeting the complex needs of American society today."[65] He concludes that:

> Today there is simply no justification for thinking that the states and localities, either in principle or in practice, are less able to do the job than the federal government.[66]

IDEOLOGY AND PARTY

To a considerable extent, ideological differences have been reflected in the political parties. This is not wholly the case since American parties are traditionally diverse and rather incoherent. Certainly, regional differences within them have often been pronounced, and formal methods of enforcing party discipline have been sorely lacking. Over the years, these difficulties have led many to complain that the parties are insufficiently ideological and distinct. Yet at the core, the parties have differed broadly in their ideological approach. As *Congressional Quarterly* remarked in 1962:

> The search for a definition of a "Democrat" and a "Republican" almost inevitably leads to a discussion of the parties in terms of their philosophies of government—how large a role each thinks the federal government should play.[67]

In fact, careful studies of the parties have discovered substantial, consistent differences between them corresponding to the basic ideological cleavage of the post-New Deal era.[68] The threads of party and ideology have been roughly woven together through much of contemporary politics.

Partisan Ideology And The New Deal

As with the reformulation of political values, this partisan cleavage can be traced back to the realignment of the parties during the 1930s. Federal activism lay at the center of the policy initiatives of the New Deal. Under FDR's leadership, the Democratic party advanced a broad range of innovative programs which jointly constituted an enormous transformation in the functions, size, and power of the federal government. Included were major relief programs of the Federal Emergency Relief Administration, The Works Progress Administration, and the Civilian Conservation Corps.; programs like the *Agricultural Adjustment Act* directed at economic stabilization; programs such as the *Wagner Act* which, through regulation, had a modestly redistributive effect and programs intended to promote minimum standards of social welfare such as Social Security and the *Wage-Hour Act*. The most expansive proposals put forward by the Democratic Administration during the New Deal era were contained in President Roosevelt's 1944 State of the Union Address, which set forth the Administration's domestic policy agenda for the postwar period. In this "Economic Bill of Rights," the President proposed to establish "a new basis of security and prosperity" by ensuring to all such things as:

> The right to a useful and remunerative job; . . .
> The right to earn enough to provide adequate food and clothing and recreation; . . .
> The right of every family to a decent home; . . .
> The right to adequate medical care; . . .
> The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; . . .
> The right to a good education.[69]

Despite the number of new federal programs and far-reaching proposals for further expansion, federal growth in the 1930s was not promiscuous or unrestrained. Most of the programs could be reasonably defended as falling within the legitimate scope of federal activities permitted under an expansive reading of the Constitution. Those programs designed for relief were intended to be a temporary response to economic crisis.[70] Moreover, Roosevelt himself often proved to be a moderating influence on activists within the administration. Leuchtenburg described him as "a man with deeply ingrained conservative traits."[71] He was resistant to both a massive public works programs and to federal housing assistance.[72] Some Congressional initiatives such as federal aid to education failed to gain the President's endorsement.[73] Others, like the *Wagner Act*, were less ambitious than they might have been for want of stronger Presidential support.[74]

Much of the most far-reaching legislation of the New Deal era was initiated in Congress. In the early years, Congressional conservatives were largely kept at bay, although they influenced such legislative provisions as state authority under the *Social Security Act*.[75] Conservatives rallied to support Alf Landon in the 1936 election, but opponents of the welfare state were decisively repudiated by the electorate.[76] As the 1930s progressed,

however, political and ideological resistance to federal growth became a more important factor in Congress. Just as the Supreme Court was loosening the grip of Constitutionality on the federal government, conservative forces in Congress coalesced in numbers sufficient virtually to halt the addition of major new domestic initiatives. The "Conservative Coalition," composed of conservative Republicans and southern Democrats, was born. Leuchtenburg summarized the situation as one of "stalemate."

Political Stalemate

World War II shifted the attention of Congress and the President alike to issues of national defense, war mobilization, and foreign affairs. The federal government expanded greatly in response to these demands and, with the cold war, retained much of this war-time expansion afterwards. The broad national consensus on a strong defense posture helped to further acclimate the public to a large federal establishment. Moreover, it served to enhance the President's resources and leadership role, which later would be used to promote federal growth in nondefense areas.[77]

Conservative opposition in Congress constrained the resumption of bold initiatives in domestic policy, however. The postwar agenda outlined in President Roosevelt's Economic Bill of Rights and in President Truman's "Fair Deal" did poorly in Congress. President Truman's comprehensive health insurance proposal went nowhere. Federal aid to education was defeated. Social security reform and a federal urban renewal and housing program took years to struggle through Congress. The *Taft-Hartley Act*, passed over President Truman's veto, seriously undercut the labor organizing gains of the *Wagner Act* and reduced national authority by allowing states to exact "right to work" laws. Even the historic *Employment Act of 1946* passed Congress only in weakened form. *Congressional Quarterly* described the experiences of the postwar Congresses as follows:

> [The 80th Congress] In domestic affairs, the Democratic President and Republican Congress generally were at loggerheads. Presidential recommendations to extend New Deal social welfare concepts . . . were largely ignored.
>
> [The 81st] Congress in general proved to be a disappointment to the liberal camp on domestic affairs.[78]

Despite these successes by the Conservative Coalition in Congress in opposing new measures, the Republican Party had gradually begun to reconcile itself to the New Deal. In 1940, the Republicans nominated Wendell Willkie, a darkhorse candidate and recently converted Democrat. Leuchtenburg writes that, in addition to a platform that "embraced many of the Roosevelt achievements,"

> Willkie went well beyond the GOP platform. In Oregon, the leading foe of public power upheld the people's right 'to take over the private utilities'; elsewhere he promised to maintain the *Wagner Labor Relations Act*, to give government aid to agriculture, to extend social security, and to 'provide jobs for every man and woman in the United States willing to work and to continue public relief to those who could not work.'[79]

The Republican Party's candidate in 1944, Gov. Thomas Dewey of New York, attempted a similar reconciliation with national programs of social reform. Wilfred Binkley wrote that Dewey accepted:

> . . . the maintenance of the great labor statutes, the expansion of social security . . . and the achievement of full postwar employment even if it required federal spending.[80]

A Washington observer wrote after the election, though, that: "The Republican party's Congressional record, even after Pearl Harbor, was an unsurmountable [sic] burden for Mr. Dewey."[81]

Dewey ran again in 1948 and, to the surprise of virtually everyone, was defeated once more. Nevertheless, the Republican Party continued to reject highly conservative Presidential candidates. With the support of the Republican "Old Guard," Sen. Robert Taft made another strong attempt to capture the party nomination in 1952. The *Congressional Quarterly* described Taft's supporters as, "Republicans who favored an absolute minimum of federal government action in domestic affairs."[82] Once again, however, more moderate elements of the party succeeded in averting this, attaining instead the nomination of Dwight Eisenhower. While Eisenhower was fiscally conservative and seemingly grew more so over the years, no attempt was made under the new Republican Administration to achieve a significant reversal of the New Deal. Rather, the Eisenhower Administration focused on a modest reappraisal of the federal government's role in domestic affairs, while supporting incremental growth of federal activities in selected areas. Hence, the Administration delayed consid-

eration of federal aid to education until recommendations were returned by the President's Commission on Intergovernmental Relations. With the creation of the Joint Federal-State Action Committee a few years later, the President again requested guidance on which federal functions could be decentralized and returned to the states. Above all, perhaps, the President sought to control federal expenditures.[83]

In keeping with this approach, the Administration's domestic initiatives were generally modest, and many of the decade's legislative proposals came instead from Democratic activities in Congress.[84] The Administration opposed major Democratic programs in employment and aid to education, for instance, although it accepted some proposals in other areas. Reflecting the President's "moderate conservatism" and the strength of entrenched southern Democrats and conservative Republicans in Congress, most of the legislative proposals which successfully maneuvered their way through Congress were primarily incremental and modest. The few major new departures relied upon association with traditional conceptions of federal responsibilities. Thus, the interstate highway program was the "Defense Highways Act," and the major educational initiative was the "National Defense Education Act."

The Legislative Outpouring of the 1960s

The election of John F. Kennedy in 1960 placed a liberal activist in the White House. Proposals for important new federal programs were quickly readied by the President's staff for introduction into Congress in the first weeks and months of the new Administration. Although many of these programs had been developed earlier by Democrats in Congress, Theodore Lowi argues that, as a new and relatively youthful group, President Kennedy and his staff were largely unencumbered by prior philosophical constraints concerning the legitimate scope of expansion of the federal role:

> The return of the Democrats in 1961 brought with it far more than a commitment to the completion of the unfinished New Deal and Fair Deal programs. Of far greater significance was the new attitude they brought with them. Whereas the rhetoric of the 1930s had conceded that the new interventions were departures from tradition, and whereas even the New Deal Democrats attempted to justify many new programs as necessary evils, the leadership of the New Frontier accepted the positive national state and its programs as a positive virtue, as something desirable for its own sake and patently necessary for society.[85]

Proposed federal initiatives included: federal aid to education, medicare, federal aid to depressed areas, and manpower training assistance. Much of the new President's program, however, was blocked in Congress by an active and effective conservative coalition. Sundquist traces the strength of this political opposition to the 1960 election:

> The trouble was the ambiguity of the 1960 election. That election did not resolve the partisan conflict between the executive and legislative branches that had wracked the Eisenhower Administration in its last two years. It merely reversed the terms of that struggle. . . . After 1960, the activists held the Presidency but they had lost enough seats in the House . . . to restore effective control of that body, on most controversial domestic issues, to the conservatives.[86]

A new political climate developed in 1964, however, in the wake of President Kennedy's death and the leadership ability of President Lyndon B. Johnson. Previously frustrated liberals achieved major federal initiatives in the fields of civil rights, poverty, and aid to higher education. The legislative outpouring of the Great Society era, which stimulated the enormous federal growth of the 1960s and 1970s, had begun. If the 1960 election had contributed to the frustration of liberal activists, the 1964 election was a major factor in reducing the political constraints on federal growth.

With the nomination of Sen. Barry Goldwater in 1964, the Republican party reversed a 24-year tradition of selecting moderate candidates. It endorsed an outspokenly conservative one. The Republican party platform in that year opened with an attack on federal growth and a defense of individual liberty and limited government:

> Individual freedom retreats under the mounting assault of expanding centralized power. . . . Year after year, in the name of benevolence, these [Democratic] leaders have sought enlargement of federal power. Year after year, in the guise of concern for others, they have lavishly expended the resources of their fellow citizens. And year after year freedom, diversity and individuality, local and state responsibility have given way to regimentation, conformity and subservience to central power. . . . Such

> leaders are federal extremists—impulsive in the use of national power, improvident in the management of public funds, thoughtless as to the long-term effects of their acts on individual freedom and creative, competitive enterprise. . . .
>
> Every person has a right to . . . make his own way with a minimum of governmental interference. . . .
>
> The federal government should act only in areas where it has Constitutional authority to act, and then only in respect to proven needs where individuals and local or state governments will not or cannot adequately perform.[87]

During the campaign, Goldwater, himself, stressed that the central issue was

> Whether we will take a path that leads to socialism, or whether we will get back on the road of individual freedom, individual responsibility, and individual initiative.[88]

In contrast, President Johnson urged continuation of an activist federal government, summarizing his philosophy with the remark that: "We're in favor of a lot of things, and we're against mighty few."[89]

Goldwater sought to give the nation "a choice, not an echo," and the electorate responded in resounding fashion. Lyndon Johnson received 61.4% of the popular vote and 486 electoral votes, while 38 new Democrats were elected to the House.[90] The trait of "operational liberalism" that Free and Cantril identified within a schizophrenic public had won out over more traditional values, and the remaining conservative logjam was broken in Congress.

The new political strength of the liberal activists in Congress was reflected in the Great Society's flood of legislation. In keeping with liberal priorities, concern over maintaining a balance between the levels of government declined while interest in addressing a broad range of contemporary social problems at the federal level increased. A host of new grant programs gained enactment in 1965 and 1966: medicare, medicaid, federal aid to education, model cities, water pollution control, and a public works and economic development act. This accumulation of programs constituted a critical expansion of federal activities and expenditures, although continuing use of the grant-in-aid mechanism suggests the persisting influence of certain political constraints and a lingering attachment to the structure of federalism.[91] New federal regulatory programs were advanced during the Johnson years as well—in civil rights, automobile safety, consumer protection, and sex discrimination. These established a pattern for the "new social regulation" developed in subsequent years in the fields of environmental protection, occupational safety, and the protection of additional categories of disadvantaged groups.

This latter pattern—in which Great Society initiatives were expanded in later years despite the disappearance of the political majorities of 1965—suggests that a major alteration in the functioning of ideological constraints occurred. A resurgence in Republican strength in Congress and the Presidency did not reestablish the ideological stalemate that characterized the postwar era. This older pattern of deadlock was muted and transformed. Besides the landmark regulatory programs cited above, major new federal initiatives were passed during the Nixon-Ford years, including General Revenue Sharing, a major public employment program, three countercyclical spending and work programs, and wage-price controls. Older programs such as AFDC and food stamps grew enormously. From 1969–76, federal domestic spending rose from $92.9 billion to over $265 billion, federal aid tripled, while federal indebtedness rose from $367.1 billion to $631.3 billion.[92]

Such developments led Theodore Lowi to reach the conclusion that:

> The national state is no longer a partisan matter at all. . . . There is no longer any variation between the two parties in their willingness to turn to the positive state, to expand it and to use it with vigor, whenever society's problems seem pressing and whenever governmental inaction may jeopardize electoral opportunities.[93]

In a similar but more cautious vein, Samuel Beer distinguished the older brand of anti-New Deal conservatism, typified by Barry Goldwater, from this more recent form of "conservative activism . . . formulated mainly during the Great Society period."[94] The new brand of Republican conservatism typified by the Nixon Administration, he writes, represents, "an acceptance of the American welfare state that goes well beyond what we associate with Goldwater or Herbert Hoover."[95] Symbolized by the New Federalism, it proposes, "not that the welfare state be dismantled, but that it be decentralized,"[96] and thus it has its roots in the moderate Republicanism of Dwight Eisenhower.

There is some interesting empirical evidence which serves to illustrate this decline in partisan-ideological constraints to federal growth in the 1960s. For nine years, beginning in 1960, *Congressional Quarterly* calculated

an index of Congressional voting on issues involving the nature of the federal governmental role.[97] Based upon their individual voting records, each member of Congress acquired a Federal Role Index score, which, in turn, was annually averaged for each party in each chamber of Congress. From year to year, the average party score on the Federal Role Index tended to fluctuate up and down, but Democrats consistently exhibited higher average support for federal activism than did Republicans—in every single year, in both the House and Senate.[98]

As time wore on, however, these partisan differences declined, as can be seen in *Figure 1*. This depicts the differences between the party averages on the Federal Role Index from 1960–68. To emphasize the long-term trend instead of yearly fluctuations, the nine-year data have been divided into three-year periods.[99] For both the House and Senate, the trend is clearly one of decreasing party differentiation concerning the federal role. This was, perhaps, the reason that *Congressional Quarterly* discontinued calculating the Federal Role Index after 1968 with the statement that, "fairly broad agreement was reached in Congress" on questions of federal involvement as the 1960s drew to a close.[100]

Figure 1 can be interpreted as a further indication of declining partisan and ideological division over the question of federal growth in the 1960s and as an indication of increasing pragmatism on this issue through the decade. This conclusion is particularly plausible considering the source of the convergence between the two political parties. The trend results primarily from the growth of Republican support for activist federal policies, as can be seen in *Figure 2*.[101]

FEDERALISM AS A "TECHNICALITY"

This data on Republican Congressmen during the 1960s, plus the behavior of the Nixon and Ford Administrations in the 1970s, bear witness to a decline in ideological constraints on federal growth since 1960. James Q. Wilson has observed that a characteristic feature of politics in the 1940s and 1950s—"debates over the philosophical wisdom and Constitutional propriety of new public initiatives"—became much reduced in importance.[102] As in the case of public opinion, a growing pragmatism concerning federal activism appears to have developed, replacing the ideological stalemate that characterized much of the period from 1937 to 1964.[103] Such pragmatic activism is most apparent in Congress in the kind of legislation that is now routinely sponsored there and frequently is passed. Recent examples include federal aid to urban parks (dubbed "park barrel" by one opponent),[104] "emergency" federal aid to repair potholes, a proposed program to address the problem of wife abuse, and a proposed federal program to combat arson. Each of these programs represents what has traditionally been considered a state or local responsibility. A listing of them suggests that prior distinctions concerning the "proper" roles of our multiple levels of government have been considerably eroded and that the older political constraints which precluded consideration of such legislation have vanished. The basic premise of such legislation is similar to that voiced by proponents of federal assistance to remove asbestos from the nation's schools. One advocate argued that to allow this task to remain "the responsibility of state and local governments" merely permits "a technicality to deny a few million dollars to protect our school children."[105]

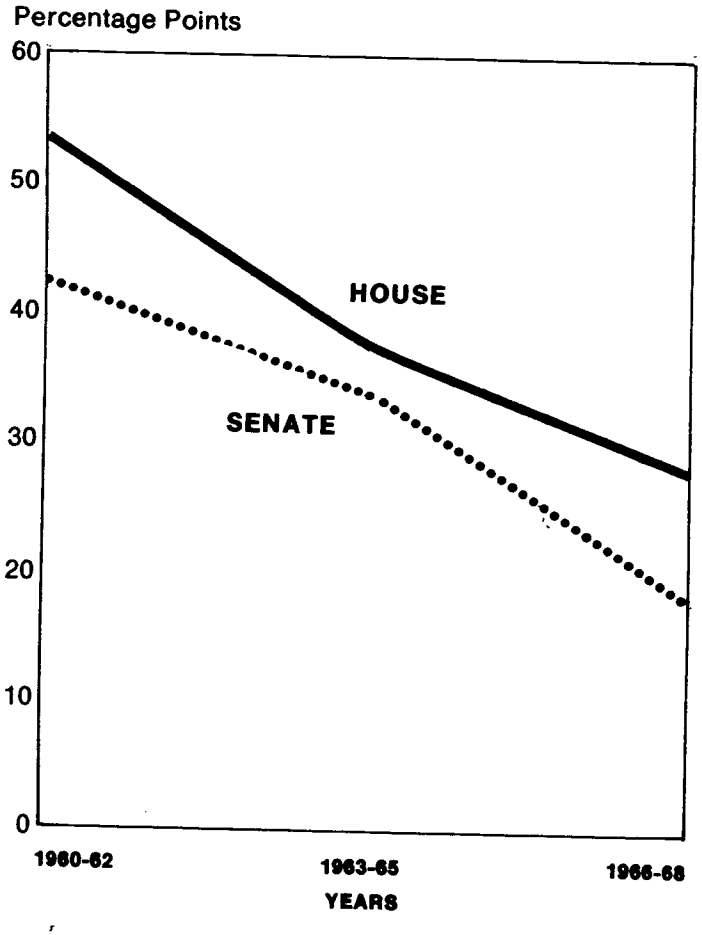
This very process of program proliferation may act to erode intellectual constraints on governmental growth, making governmental expansion a self perpetuating phenomenon. Of course, it is widely recognized that new programs have a tendency to generate communities of interest among program sponsors, administrators and beneficiaries, seeking to promote and expand their services. This dynamic of growth is examined elsewhere in this volume. In addition, the launching of a new initiative appears to relax conceptual barriers to governmental expansion. According to Wilson, familiarity tends to undermine conceptions of impropriety:

> Until very recently, the chief issue in any Congressional argument over new policies was whether it was legitimate for the federal government to do something at all. . . . But once the initial law is passed, the issue of legitimacy disappears. . . . Political conflict [then] takes a very different form. New programs need not await the advent of a crisis or an extraordinary majority, because no program is no longer "new"—it is seen, rather, as an extension . . . of something the government is already doing.[106]

As one new function becomes justified, a precedent may be established for further expansion. Analogous cases fall within the mantle of legitimacy established by the earlier initiative and claim a similar response. Thus, early civil rights provisions helped to stimulate a proliferation of programs intended for other classes of disadvantaged, while federal aid to one region tends to provoke claims for similar treatment by others.

Figure 1

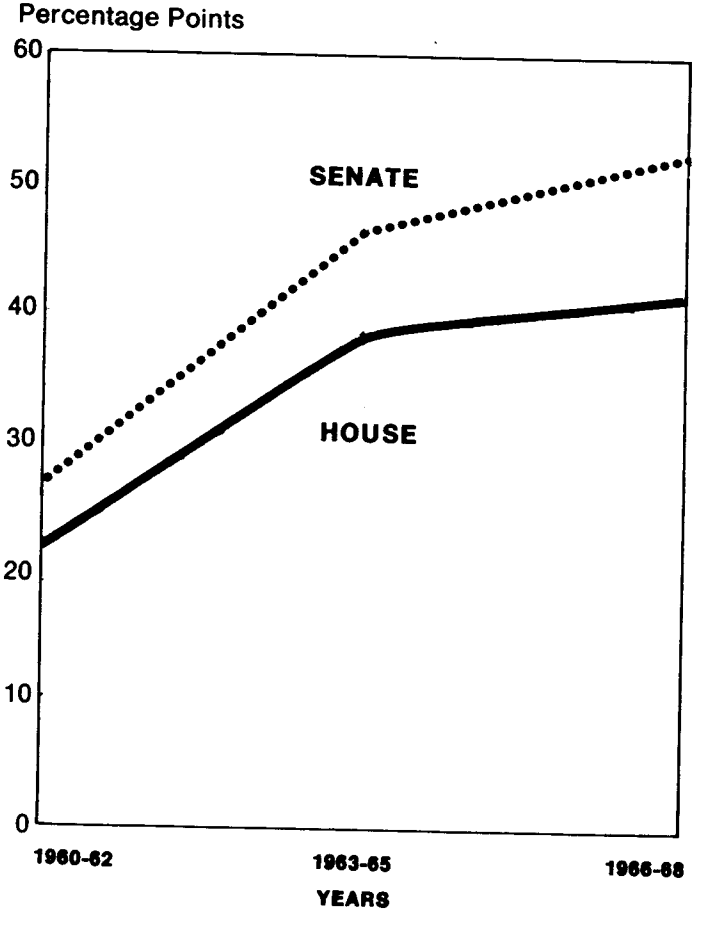
Percentage Point Differences Between the Average Scores for Each Party on CQ's Federal Role Index, 1960-68



SOURCE: *Congressional Quarterly Almanac,* 1960-1968, and ACIR staff computation.

Figure 2

Average Republican Support Scores for a Growing Federal Role, 1960-68



SOURCE: *Congressional Quarterly Almanac,* 1960-1968, and ACIR staff computation.

Recent Congressional behavior suggests that, in the absence of constraining conceptions of ideology, federal representatives have emerged more than ever before as local representatives. Naturally, members of Congress always have functioned as the representatives of local opinion within the national government, particularly given our decentralized party system. However, the erosion of traditional notions of intergovernmental roles and the mass acceptance of federal activism have enhanced the temptations for Congressmen to assume the functions of local government as well. "Many federal categorical grants," writes Charles Schultze,' . . . probably serve no major national purpose but simply reflect the substitution of the judgement of federal legislators and agency officials for that of state and local officials about what specific local services should be available.[107] This process of substitution has certainly been encouraged by the expansion of the federal grant-in-aid system.[108] An historian suggested recently that the President today has, in many ways, become similar to a Mayor.[109] Likewise, Congressmen appear to behave increasingly like local aldermen. As Morris Fiorina expressed it:

> *The Growth of an activist federal government has stimulated a change in the mix of Congressional activities.* Specifically, a lesser proportion of Congressional effort is now going into programmatic activities and a greater proportion into pork-barrel and casework activities.[110]

V
Political Interests as Political Constraints: Changing Patterns of Interests

Values and ideas can have a strong effect upon behavior, but these are not alone in this regard. Political and economic interests exert a powerful influence as well. Ideas may shape the perception of interests and define the limits of behavior, but interests frequently have a most direct relationship to action.

Many different sets of political interests affect the federal system and the growth of federal functions and power. Not all of these interests can be examined individually, but three important sets of them require some attention. Most generally, a variety of territorial interests are expressed through federalism. Sectional and regional interests, for example, have affected federal policies throughout history. As society has developed and become increasingly nationalized, it could be expected that these territorial interests have changed accordingly. Another set of political interests affecting federalism is institutional. State and local governments and their representatives possess distinct interests of their own vis-a-vis the federal government, which have also exerted an effect upon the character and pattern of federal growth. At the confluence of these varied institutional and territorial interests have been the political parties. Apart from matters of ideology, many believe that the structure of the political party system has itself comprised an important influence upon the federal governmental role. As the role of the party system has evolved, its corresponding effects upon the federal system also may have changed.

TERRITORIAL INTERESTS AND FEDERALISM

During the course of history, countless numbers of jurisdictional interests have exerted an influence on federal policy. Whether readily apparent in policy debate or expressed indirectly, beneath a veil of philosophical argument, the instances of such territorial interests have been so numerous—from farming, mining, commercial, and marine interests to varied demographic patterns of ethnic and religious groups—that they cannot, in themselves, be examined. The broad outlines of such interests have changed over time, however, with consequences for the federal role.

In many respects, American society began as a series of localized communities, fragmented econmically, politically, and socially. This was most evident in the successive patterns of competing interests over time, between north and south, east and west. As the nation industrialized, however, the economy became increasingly integrated and interdependent. This nationalizing economy, in turn, contributed to a relative decline in territorially based politics and the growth of functionally oriented politics.[111] This process was evident in the Pro-

gressive era, for example, with the development of functional interest groups in business and labor on a national scale and in the increasing nationalization of the media.[112] Politically, it was epitomized in the shift from sectional politics to the more class or functionally oriented politics of the New Deal. Today, as Richard Leach explains, America's localistic characteristics have diminished to the point that the country

> . . . is virtually a national state in terms of economics, culture, education, athletics, labor organization, employer organization, and most of the other indices that could be used to measure nationalization. That it would seem desirable now to begin a nation with a pledge to small constituencies and a division of power in their behalf is doubtful.[113]

This phenomenon has significance for national policy because localistic, segmented interests represent a constraint upon national political action. Indeed, this was a matter of Constitutional intent. Madison's justification for a more centralized system was that interest fragmentation would prevent most narrow interests from obtaining sufficient political leverage to procure national government action.[114] Within a poorly developed society, interests and problems are likely to be parochial and individualistic, neither concerning nor affecting others. In the absence of common interests, the predominant form of collective action is political logrolling—the exchange of unrelated goods for the mutual benefit of the trading partners.[115] This is a limited instrument, so the scope of governmental activities is likely to remain small. With the nationalization of society, however, comes an increasing commonality of interests. More and more members of society are tempted and have cause to use the federal instrumentality to achieve their goals. This process of development, according to some authorities, has left its imprint on federal policy—in the *cumulative* evolution from distributive politics based on log-rolling, to regulatory politics founded on widespread group interest, to "redistributive" politics influenced by broad functional and even class interests.[116] In both of the latter, more recent stages, some people throughout the nation have interests in common. Although people may find themselves on opposite sides of a question, they are, at least, arguing over the same issue rather than a series of disconnected ones. Hence, the constraint imposed by localized, fragmented interests is reduced.

This process should not be overemphasized, of course. Development exerts an important influence over politics and policy, but not a deterministic or conclusive one. Canada, for example, has become increasingly interconnected economically but not socially or politically. Still, in the U.S., modernization has worked to modify the traditional territorial element of political restraint upon the federal government.

Two other factors concerning political interests deserve attention. First, the development of society not only increases the number of people with interests in common, it multiplies the number of interests as well. The interest group spectrum has diversified far beyond the economic groups of earlier days to include a new range and variety of social interests. This process reflects the increasing specialization and diversification of society and also the growing number of groups created by government programs. These newly established groups clamor for governmental attention along with the older ones and thus help contribute to governmental growth.

The changing composition of group interests may also reflect a changing role played by interest groups in the political process. Older references to groups as "veto" groups emphasized their constraining effect on governmental activity. Older economic groups frequently were engaged in resisting government regulation. Since the New Deal, and especially the Great Society, however, government spending has played a much greater role in federal activity. Correspondingly, group behavior appears to have shifted largely to obtaining a piece of the federal largess, a process stimulated by the increasing number of interest groups representing program beneficiaries or service providers.

INTERGOVERNMENTAL INTERESTS

State and local officials have an institutional stake in federal growth as well. Historically, the federal government has been regarded jealously, as a competitor and an interloper in state-local autonomy. Deil Wright, for instance, refers to pre-1930 intergovernmental relations as "conflict" federalism. "Opposition and Antagonism," he writes, seemed "to be part of the normal process of learning who is empowered to do what."[117] Such behavior stems naturally from a fundamental principle of Constitutional design—that the powers of government be divided and shared so that: "ambition [can] be made to counteract ambition.[118] Examples of such behavior typify much of the early history of intergovernmental relations. A relatively recent case was the dissent by all five Governors serving on the Kestnbaum Commission decrying, "The use of the federal expenditure power in areas historically within the jurisdictions of the states."[119]

Since the 1930s, however, this constraint has undergone considerable change. Far from working actively to counteract federal growth, the intergovernmental lobby has become, in many instances, an active force in its promotion. This process began during the Depression, when many hardpressed states and cities found their resources dangerously depleted. Once emergency federal programs were established, Mayors in particular became lobbyists on behalf of continued federal aid, as Leuchtenburg attests:

> This elephantine growth of the federal government owed much to the fact that local and state governments had been tried in the crisis and found wanting. When one magazine wired state Governors to ask their views, only one of the 37 who replied announced that he was willing to have the states resume responsibility for relief. Every time there was a rumored cutback of federal spending for relief, Washington was besieged by delegations of Mayors protesting that city governments did not have the resources to meet the needs of the unemployed.[120]

Despite earlier suspicions, then, the fiscal and political benefits of federal funds proved difficult for many state and local officials to resist. As in New Haven, a federal program like urban renewal could be utilized by local officials to garner powerful political support:

> The entrepreneur, in the heyday of a Lee or Allen, made a career of cultivating their federal relations and, more concretely, of working the federal grants process to their advantage. Lee in particular built his local political power, his national reputation, and, indeed, his city with federal money.[121]

Thus, the earlier pattern of competitive intergovernmental relationships gradually gave way to a more "cooperative" pattern, with both the states and localities seeking to play a "partnership" role with the federal government. As one Senator is said to have remarked: "They used to call this tainted money; now all they say is 'taint' enough." Of course, this is not to say that differences between federal and state-local officials did not continue to exist. Friction remained, particularly over the structure of federal aid. Friction also arose between state and local spokesmen and between elected officials and specialist program administrators.

Even at the height of state and local demands for less restrictive federal grants, however, the pressure for more money never ceased and continued to take precedence over grant reform. By the 1970s, far from exercising an increasingly distant tradition of checking federal growth, state and local officials had become identified as an important force in the promotion of federal expenditures:

> Certainly, the role of the intergovernmental lobby in the politics of public expenditures dims the hope that the growth of public expenditure will be restrained by measures of decentralization. . . . The story of the intergovernmental lobby is a strong indication of the kind of political influences contemporary federalism tends to produce. These influences . . . do not restrict overall public expenditure, but march hand in hand with the functional centralizers toward its steady expansion.[122]

POLITICAL PARTIES AS CONSTRAINTS

Another institution which has frequently been granted significant weight as a constraint on federal growth is the political party system. Due to their traditionally decentralized structure, American parties have frequently reflected a confluence of both institutional and territorial influences on federal policies. The structural foundation of the party system rests at the subnational, not the national, level where state and local officials play a crucial, often dominant role. Such localized constituencies, moveover, tend to emphasize localized concerns.[123] For these reasons, a number of prominent political scientists have argued that the party system has been the single most important factor in limiting the federal government and preserving state and local prerogatives. William Riker states that

> The proximate cause of variations in the degree of centralization . . . in the Constitutional structure of a federalism is the variation in degree of party centralization. . . . What maintains federalism? . . . There is one institutional condition that controls the nature of the [federal] bargain in all the instances here examined. . . . This is the structure of the party system.[124]

Similarly, Morton Grodzins asserted:

> The nature of American political parties accounts in largest part for the nature of the American governmental system. The specific point is that the parties are responsible for both

the existence and form of the considerable measure of decentralization that exists in the United States.[125]

If these analysts are correct in attributing a crucial role to the parties in maintaining the federal system previously, then the decomposition of the party system since 1960 may well have entailed a major diminution in political constraints on federal growth. The concept of party decomposition reflects several changes in party structure and voting behavior which have significantly altered and reduced the influence of political parties. Such changes include the dramatic rise in Presidential primaries in recent years, which has shifted much of the nomination process outside of party conventions; the so-called national convention "reforms," which focused more on demography than on political geography; the growth of independent, candidate-centered political organizations; increasing candidate reliance upon the mass media, rather than the party organization, to communicate with voters; and the rise of political independents and split-ticket voters among the electorate.[126] The combined effect of these changes has been to strip from the parties many of their traditional functions and, in so doing, reduce their capacity to preserve federalism.

It is important to recognize, however, that the links between the party system and balance in the federal system are not entirely clear. First of all, the direction of causality implied above may be dual or reversed. That is, decentralization in the party system may have *reflected* a healthy, independent system of state and local governments rather than have been responsible for this. If political power resides locally, there will be an attraction for parties to form there, where they can influence significant political decisions. As David Truman argued:

> In a federal system, decentralization and lack of cohesion in the party system are based on the structural fact of federalism. . . . Three factors derived from the existence of the states as separate and largely self-sustaining power centers—channeling the claims of local socio-economic interest groups, inviting their use as leverage against federal action by interests which are only tactically local, and providing for competing and frequently incompatible nuclei of decentralized intraparty conflict—. . . go a long way toward indicating that there is something inherent in federalism which induces decentralization and lack of coherence in a party system.[127]

In this instance, the inverse relationship between party decomposition and federal growth would still be related, but the decline of local party organizations would be interpreted as a product of, rather than principle cause of, the centralization of political decisionmaking and the weakening of state and local autonomy.[128]

In a very different vein, there is also reason to believe that political parties have served to enhance federal growth rather than to retard it. In the past, parties have played an important role in mobilizing consent and political resources for the expansion of the federal role. In both the post Civil War era and the New Deal era, the dominant political party served to promote a policy of federal activism. This view, in short, would emphasize political ideology and the important mobilization function performed by political parties rather than the structural attributes of the party system. However, it is important to recognize that federal growth has continued and even accelerated in recent years despite the demise of the parties, suggesting that other forces have assumed whatever prior role the parties may have played in advancing federal growth.

On balance, it is clear that the role of political parties as a force of political restraint on the federal government is complex. Each of these three interpretations can marshall evidence on its behalf. The coincidence of party decline and federal development demonstrates, at least, that our political system is undergoing rapid, massive change and suggests a *prima facie* case for a relationship between the two, however complicated.

VI
Structural Constraints on Federal Growth

Structural obstacles to governmental action have represented another important constraint on federal growth. A complicated system of checks and balances was central to the Constitutional design of our government. The result has been a multiplicity of veto points which have frequently served to stymie legislative initiatives. The

difficulty of overcoming such obstacles has often provoked cries for fundamental change in the system. In the words of one commentator:

> Our form of government makes wise, preventive, sustained action almost impossible. Our Constitution is over-praised. Its central feature of "checks and balances" is really a host of vetoes . . . granted to districts and states and regions. The feature makes it very hard to get action and very easy to prevent action.[129]

However, the fact of substantial federal growth during the last two decades suggests that the effectiveness of these structural obstacles has been reduced or circumvented in many areas of policy.

OBSTACLES IMPOSED BY CONSTITUTIONAL DESIGN

The structure of government established by the Constitution was deliberately imposed to make vigorous governmental action difficult. This reflected the Founders' concern for protecting individual liberty from reckless acts of government. As Madison wrote in *Federalist* 47:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.[130]

Consequently, of course, they devised a system of multiple centers of shared power, with authority divided between the legislative, executive and judicial branches at the federal level, between the two chambers of Congress, and between this fragmented federal structure and the states. Louis Hartz described this product as a government of "delay and deliberate confusion," maintaining that:

> The solution the constitutionalists offered to the frightful conflicts they imagined was a complicated scheme of checks and balances which it is reasonable to argue only a highly united nation could make work at all.[131]

James M. Burns wrote in agreement that:

> This is also the system . . . of interlocked gears of government that requires the consensus of many groups and leaders before the nation can act; and it is the system that exacts the heavy price of delay and devitalization. . . . Our system was designed for deadlock and inaction.[132]

Federalism was also designed to contribute to governmental lethargy. In the words of Richard Leach:

> Federalism . . . was designed as one of a parcel of negative devices which inhibit the use of power in the United States. It was not designed to facilitate that use.[133]

It has become apparent, however, that this instrument of structural constraint has lost much of its effectiveness. This can be attributed to the erosion of the Constitutional restrictions on federal action, abundantly illustrated in the previous chapter, and to the transformation of state and local officials from jealous guardians of localized powers into major supplicants of federal expansion.

The Constitutional separation of powers within the federal government has also been subject to periodic circumvention. Political parties have helped to bridge the gap between the branches of government on many crucial occasions. This was true of both the New Deal and the Great Society when the Presidency and the Congress were each controlled by the Democratic Party. In other cases, political logrolling represents a means of overcoming this obstacle. When two or more parties cannot agree on what government should do, one mode of reaching an accommodation is to do several different things at once. In this perverse manner, structural obstacles can contribute to the growth of government as well as to its limitation. The more different parties that have to be satisfied, the larger the policy package may potentially become.

CONGRESSIONAL ORGANIZATION

In establishing a bicameral system, the Constitution mandated a significant degree of structural complexity within the legislative branch itself. Thus, the *Federalist* describes the Senate as an "additional impediment . . . against improper acts of legislation," and as a "complicated check on legislation."[134] This situation was exacerbated, however, by the evolution of internal Congressional organization. Over time, the Senate developed a highly decentralized system with unlimited debate, a handy device for paralyzing the legislative process. For its part, the House of Representatives evolved a committee structure which generally served to bolster the role of conservatives through the seniority system, while it regulated floor activity through a Rules Committee which frequently thwarted liberal activists.

It was this derivative structure of Congressional organization that led Robert Bendiner to complain that the Congress was simply an "obstacle course":

> Indeed if that government is best which governs least, then Congress is designed, by rule and tradition, to be one of the most perfect instruments of government ever designed. . . . The course of a bill through Congress is [a] peril-strewn path . . . [a] mountain range of obstacles which one critic has described as "so formidable that they might well have been devised by men who hated the thought that legislation would ever be enacted."[135]

This classic critique must be modified in recent years, however, by changes in the composition and the organization of Congress. Organizationally, reforms undertaken in 1961, 1970, and 1974 have brought the House Rules Committee under greater control by the House majority and have decentralized the House Committee system. This reduced the power of committee chairmen and granted increased power to subcommittee chairmen, who frequently have sought to utilize their position through legislative activism and policy entrepreneurship.[136] For its part, the seniority system's conservative effect has been much diminished, as Samuel Patterson explains:

> Less than a third of the Democrats are southerners now, compared to more than half in the 1950s. . . . Accordingly, southern representation in the positions of seniority leadership in Congress has declined very sharply. From the 1920s to the 1940s, about three-fourths of the Democratic seniority leaders in the House were southerners; in the 1950s and 1960s this proportion had declined to about two-thirds; by the early 1970s, somewhat more than two-fifths were southerners. By the 95th Congress, only slightly over one-fifth (23%) of the seniority leadership was southern.[137]

THE PERVERSE CONSEQUENCES OF STRUCTURAL CONSTRAINTS

These changes can account for only a portion of the Congress' recent contributions to federal growth. In addition, structural obstacles appear to have promoted unexpected forms of behavior and encouraged what might be termed "ramrod" legislation. This was a method used by President Johnson to overcome the difficulties imposed by legislative hurdles. Many legislative proposals for the Great Society were developed in secret by legislative task forces and then hurriedly sprung on Congress intact and rushed through before political opposition could be mobilized. Doris Kearns writes that:

> Johnson felt that it was necessary to act swiftly, since he could not know how long his consensus would last. . . . Pass the bill now, worry about its effects and implementation later—this was the White House strategy. For now, the legislative architects must be guided by the need to design each program in the manner best calculated to attract support so as to make it easier for reluctant Congressmen to join with Johnson. The objective was to make laws, not raise problems.[138]

The pattern was apparent in the war on poverty and aid to education proposals, for instance.

The difficulty of legislative approval also encourages omnibus legislation and logrolling in order to enhance political appeal, as well as symbolic legislation, such as regulations that may entail enormous costs which are ignored because attention is focused on their objectives. This pattern appeared with area redevelopment and model cities in the 1960s,[139] while recent renewals in the the areas of primary and secondary education, vocational rehabilitation, and public health are but a few additional examples of multifaceted measures with numerous titles and an extensive range of specialized and generalized beneficiary groups.[140]

Experience suggests, then, that the effect of structural constraints may not simply be to encourage policies so exceptional that they can attract very broad support. Rather, a common result appears to be the promotion of policies which spend profusely or ineffectively in order to broaden their appeal, or which skirt opposition by virtue of being vague. This perverse and unexpected consequence, which can contribute to governmental growth and poor policymaking, brings into question the wisdom of utilizing structural constraints in order to curb government. Rapid governmental growth in a system already so contorted by procedural obstacles strongly militates against further reliance on this strategy.

VII
Evaluating the Effects of Political Constraints

Modern growth of the federal government suggests that existing political constraints have had limited success in constraining the size of the government. This does not mean, though, that they have had no effect. Some believe that political constraints have served to keep the government smaller than it would otherwise have been. Moreover, constraints appear to have shaped the forms of federal involvement. Finally, there is growing evidence that new opposition to governmental growth is developing.

To a certain extent, political values and ideology may have exerted a degree of restraint on federal growth even through the recent period of expansion. Despite popular acceptance of governmental activisim and almost 20 years of rapid growth, the public sector in the United States still comprises a smaller percentage of the Gross Domestic Product (GDP) than in the major industrialized nations of Europe (see *Table 3*).[141] Anthony King attributes this result to American values: "The state plays a more limited role in America than elsewhere because Americans, more than other people, want it to play a limited role."[142] Similarly, David Cameron associates public sector growth with the ideological complexion of governing parties:

> Politics is important in influencing the scope of the public economy. The partisanship of government is associated with the rate of expansion, and whether a nation's government was generally controlled by Social Democrats (and their leftist allies), or by nonleftist parties, provides a strong clue to the relative degree of change in the scope of the public economy.[143]

Table 3

TOTAL GOVERNMENT REVENUE AS A PERCENT OF GDP, 1973

United States	32.3%
Canada	35.7
France	37.6
United Kingdom	38.0
West Germany	40.8
Sweden	51.7

SOURCE: World Bank

More importantly, political constraints have affected the forms of governmental expansion in the United States. Unlike many countries, the U.S. has not nationalized major industries such as coal mining, railroads, power production, automobile production, or petroleum. The American pattern has been to utilize regulation instead, as James Q. Wilson observes:

> The separation of powers makes difficult, in ordinary times, the extension of public power over private conduct—as a nation we came more slowly to the welfare state than almost any European nation, and we still engage in less central planning and operate fewer nationalized industries than other democratic regimes. But we have extended the regulatory sway of our national government as far or farther than that of most other liberal regimes.[144]

Governmental regulation can surely become intrusive, as many complain today, but it is clearly not on the order of public ownership or central planning insofar as forms of governmental intervention are concerned.

Moreover, governmental policy in the U.S. has skirted many policy areas which tend to be highly redistributive. Public involvement in health insurance and housing is limited, while Social Security is contributory and only mildly redistributive. These characteristics reflect, quite clearly, political obstacles to governmental involvement. Efforts to achieve broad national health insurance have been frustrated for over 30 years. Political constraints in the 1930s prohibited establishment of a uniform, national program of unemployment insurance and strengthened state discretion in the old age and public assistance programs of Social Security.[145] In fact, as discussed above, much of the liberal activist program of the post-New Deal era emphasized distributive, regulatory, and developmental programs rather than highly redistributive ones.

Political constraints have affected the character of federal programs in yet another way. In most domestic policy areas, federal involvement is not direct but has been undertaken through grants-in-aid to states and localities. Even a number of income transfer payments are not

administered directly from Washington, including AFDC, Medicaid, and Food Stamps. The reasons for this predominance of the grant mechanism are not entirely clear. Certain federal relief programs during the 1930s were directly administered, and some officials in the Roosevelt Administration advocated direct national programs for all of social security and unemployment insurance. But political obstacles and Constitutional concerns at the time encouraged intergovernmental administrative arrangements instead. Some members of Congress were concerned about governmental centralization; southern conservatives wished to maintain segregation; and the Supreme Court's Constitutional interpretations were continuing to pose obstacles to federal involvement. The grant mechanism was clearly a method of accommodating many such concerns and thus reducing opposition to these programs as a whole.

The factors causing continued reliance on the categorical grant strategy in the 1960s were somewhat similar. Despite a quantum leap in federal spending and involvement in new local functions, direct federal action apparently received less consideration than in the 1930s. This fact is evidence of the continuing influence of political constraints. Although constraints no longer effectively defined the functional scope of federal action, they strongly affected its means.

Conceivably, Administration officials could have chosen some other approach. Besides a system of direct national administration or a large-scale income support program, tax sharing or revenue sharing could have been utilized, as they are in other federal countries. Revenue sharing plans were seriously proposed in Congress as early as 1958, and a Johnson Administration task force explored the concept in detail in 1964.[146] But many conservatives disliked revenue sharing because it separates taxing and spending responsibility, liberals distrusted its reliance on the states, while President Johnson was angered by the early release of the task force proposals to the press. Moreover, tax sharing proposals were caught up in disputes between two critical groups of supporters—the cities and the states. Suzanne Farkas relates that:

> Distrust feeds the already intense rivalry between state and local chief executives as to which level of government ought to get most federal money and have greater administrative jurisdiction over federal programs. "Tax sharing" proposals . . . have been held up for years. The Mayors of cities and the Governors of states cannot, it seems, resolve the struggle as to what proportion of the coveted funds each should receive, and whether the city share should first go through the state.[147]

While these alternatives were problematic, categorical grants were the established pattern of federal involvement. In addition to various forces which strongly supported categorical grants (Congressional and professional specialists, for example), they continued to represent the path of least political resistance. Given the Johnson Administration's strategy of avoiding unnecessary controversy in the process of rushing new programs through Congress, grants-in-aid were a logical decision. Even policy departures like Community Action were presented to Congress as part of an established tradition of equal opportunity and local decisionmaking, into which the grant mechanism fit easily.[148]

Moreover, adoption of a "service strategy" in the approach to social problems under the Great Society implied the use of federal grants as well. Services, in contrast to income transfers, require an extensive network of local administrators and providers. As Sen. Gaylord Nelson remarked concerning manpower services; "In a federal system . . . the obvious way to . . . deliver manpower services to any individual . . . is through the existing structure of state and local government."[149] Naturally, once the grant mechanism was adopted, it established a pattern for future governmental growth as well, setting into motion forces of continued categorical accumulation. As Theodore Lowi has explained, policies help to shape their own political environments: "A political relationship is determined by the type of policy at stake."[150]

NEW FORCES OF RETRENCHMENT

The growth of government resulting from the New Deal enjoyed popular support, but subsequent expansion over the next 20 years was moderated by a variety of political constraints. Renewed growth of large proportions breached this pattern in the 1960s and continued into the 1970s. Yet strong indications exist today that the forces of retrenchment are growing once again and are waging a more effective campaign to limit governmental growth. The after-shocks of Proposition 13 and growing public resentment over taxes are evidence of such a trend, as is speculation about Republicans soon gaining control of the Senate, the defeat of a federal consumer agency and so on.[151] Public attitudes toward the power of the national government reflect this trend as well. In 1964, 26% of the respondents to an opinion

survey agreed that the federal government "has too much power," while 31% believed that it "should use its power more vigorously." By 1978, however, 38% believed that the federal government had grown too powerful (an increase of 50%), compared to 36% favoring more federal activism.[152] Thus, the electorate remains torn over its support for governmental services and its expectations of governmental activism, on the one hand, and widespread, growing disenchantment with the outcomes of the these expectations on the other. Whether this frustration reflects latent Lockean values, as Free and Cantril believed, or whether it represents a new reaction to rising taxes and a perception of poor governmental performance, popular dissatisfaction seems clearly on the rise.[153]

This public mood is evident in Congress as well. The election of several new conservative Senators in place of liberal incumbents has contributed to this, as has the perception of public opinion by current office holders. Explaining his opposition to a federal consumer agency, one senior liberal Congressman remarked that:

> There is a mood in the country . . . reflected in the Congress, that government action is not . . . always the perfect solution to social problems. . . . I don't think we ought to create new agencies unless there's a clear mandate for them.[154]

In addition, Congressional behavior is also indicating a growing concern with the workability of government programs. Rep. Patricia Scnroeder (D-CO) stated that:

> Before I support the creation of yet another office, I had better be convinced that . . . it is going to do some good—or at least enough good to offset the added intrusion.[155]

This concern with performance arises from intellectual sources as well as public opinion. It reflects the rise of neo-conservatism and the broad skepticism over governmental performance apparent in the influential policy evaluation and implementation literature. According to Henry Aaron, such analyses display an inherent conservative bias: "Formal evaluation and program analysis [shows] a profoundly conservative tendency."[156] Samuel Beer concurs:

> The capacity to demonstrate that programs have not worked sometimes seems far in advance of the capacity to determine what will work. . . . The widespread application of the new methods of testing performance . . . has contributed to the skepticism, bordering on defeatism, that conditions current expectations of what government can and should do.[157]

The present is a period of flux and uncertainty concerning the future of federal growth. Powerful forces in support of growth were set in motion during the 1960s. Traditional constraints—from the Constitution, to the parties, to state and local officials, to the Conservative Coalition—were all shown to be vulnerable at that time. Yet new forces of opposition appear to be developing. The rate of increase in federal aid has slowed dramatically.[158] Both federal spending and spending by all governments have fallen as a percentage of GNP since 1975.[159] Attacks on federal regulation continue to mount. It seems, in short, that stronger political constraints on federal growth perhaps may be emerging once again. Their effectiveness may well depend upon which economic evil—unemployment or inflation—is viewed as the number one public agenda item.

FOOTNOTES

[1] Don K. Price, *The Scientific Estate*, New York, NY Oxford University Press, 1968, p. 164.
[2] C. Peter Magrath, "The Supreme Court and a National Constitution," in *Modernizing American Government*, ed. by Murray Stedman, Jr., Englewood Cliffs, NJ, Prentice Hall, 1968, p. 64.
[3] See James Sundquist, *Politics and Policy*, Washington, DC, The Brookings Institution, 1968, Chapter 1.
[4] Leonard White, *The States and the Nation*, Baton Rouge, LA, Louisiana State University, 1953, p. 4.
[5] Magrath, "The Supreme Court, *op. cit.*, p. 67.
[6] Walter Bennett, *American Theories of Federalism*, University, AL. University of Alabama Press, 1964, p. 205.
[7] Daniel Elazar, "Cursed by Bigness or Toward a Post-Technocratic Federalism," *Publius* 3, Fall 1973, p. 246.
[8] See Isaiah Berlin, *Two Concepts of Liberty*, New York, NY, Oxford University Press, 1958. It is also referred to as the "nightwatchman state."
[9] Louis Hartz, *The Liberal Tradition in America*, New York, NY, Harcourt, Brace and World, 1955, p. 9.
[10] *Ibid.*, p. 11.
[11] Thomas Jefferson, "First Inaugural Address," in *Free Government in the Making*, ed. by Alpheus T. Mason, New York, NY, Oxford University Press, 1949, p. 355.
[12] Thomas Jefferson, "Letter to Kercheval," in *ibid.*, p. 324.
[13] Thomas Jefferson, quoted in Walter Bennett, *American Theories of Federalism*, p. 90.
[14] Herbert Hoover, quoted in Richard Hofstadter, *The American Political Tradition*, New York, NY, Vintage Books, 1961, p. 307. Hofstadter writes that: "With Jefferson and the economic individualists, [Hoover] agreed, on the whole, that government is best which governs least," p. 295. Hoover was not alone in such views at this time but rather was typical of many people. Numerous pre-

1933 pronouncements by Franklin Roosevelt testify to the continuing appeal of these views.

[15] *Ibid.*, p. 298.

[16] *Ibid.*, p. 308.

[17] For a description of this gradual process of centralization, see Samuel Beer, "The Modernization of American Federalism," *Publius* 3 Fall 1973.

[18] Herbert Croly, *The Promise of American Life*, Cambridge, MA, Belknap Press, 1965, p. 43.

[19] *Ibid.*, pp. 274, 278, 279

[20] This point is elaborated in Samuel Beer, "In Search of a New Public Philosophy," in *The New American Political System*, ed. by Anthony King, Washington, DC, American Enterprise Institute, 1978, pp. 6–13.

[21] See Harry Scheiber, *The Condition of American Federalism: An Historian's View*, U.S. Congress, Senate, Committee on Government Operations, Committee Print, 89th Cong., 2nd Sess., 1966.

[22] V.O. Key, Jr., *The Responsible Electorate*, New York, NY, Vintage Books, 1966, p. 31.

[23] For details on this, see *ibid.*, Chapter 3.

[24] For example, Beer relates that: "During 1935–1936, I . . . frequently . . . helped Thomas G. Corcoran . . . with speeches for President Roosevelt. I vividly recall our preoccupation with persuading people to look to Washington for the solution of problems and our sense of what a great change in public attitudes this involved." Beer, "A New Public Philosophy," *op. cit.*, p. 8.

[25] Franklin Roosevelt, Speech, October 14, 1936, in *Selected Addresses of Franklin Roosevelt*, ed. by B.D. Zevin, Boston, MA, Houghton Mifflin, 1946, p. 66.

[26] *Ibid.*, p. 62.

[27] Radio Address on the Third Anniversary of the Social Security Act, *Ibid.*, p. 154.

[28] Second Inaugural Address, *ibid.*, p. 91.

[29] Annual Message to Congress, 1/6/37, *ibid.*, p. 82.

[30] Franklin Roosevelt, *Looking Forward*, New York, NY, John Day Co., 1933, p. 241.

[31] Everett Carll Ladd, Jr., "The Democrats Have Their Own Two-Party System," *Fortune*, October, 1977, p. 213.

[32] William Watts and Lloyd Free, *State of the Nation III*, Lexington, MA, D.C. Heath & Co., 1978, pp. 214–16. As the Free and Cantril work in 1968 makes clear, these figures from the 1970s remain roughly comparable with data from the 1960s.

[33] See Lloyd Free and Hadley Cantril, *The Political Beliefs of Americans*, New York, NY, Clarion Books, 1968, pp. 24, 26, 30.

[34] *Ibid.*, p. 32.

[35] *Ibid.*, p. 37. See also Ladd, "The Democrats Have Their Own Two-Party System."

[36] *Ibid.*, p. 180. Added emphasis.

[37] See, for instance, Daniel Boorstin, *The Genius of American Politics*, Chicago, IL, University of Chicago Press, 1953.

[38] On both of these points, see *Chapter 5* in this volume for more detail.

[39] For a discussion of the ideological and class basis of the political parties during and after the New Deal, see Everett C. Ladd, Jr., and Charles Hadley, *Transformations of the Party System*, New York, NY, W.W. Norton, 1975, Chapters 1 and 2; also Samuel Lubell, *The Future of American Politics*, New York, NY, Harper Colophon Books, 1965.

[40] See Theodore Lowi, "American Business, Public Policy, Case Studies, and Political Theory," *World Politics* 16, July, 1964, on the relationship between class politics and redistributive policy.

[41] See Ladd and Hadley, *Transformations of the Party System*, *op. cit.*

[42] For example, many of these issues, plus airport subsidies, water pollution grants, labor relations, and mining subsidies were included in *Congressional Quarterly's* 1960 index of controversial Federal Role issues. *Congressional Quarterly Almanac*, 1960, Washington, DC, Congressional Quarterly, Inc., 1961, pp. 133, 134.

[43] Beer, "A New Public Philosophy," *op. cit.*, p. 10.

[44] James Sundquist, *Politics and Policy*, Washington, DC, Brookings Institution, 1968, p. 385. Similarly, Colin Greer writes that: "Liberalism [can be] defined for the most part as the demand for government intervention in social and economic life." Colin Greer, "To be on but not in the right," *New York Times*, April 16, 1979, p. A17.

[45] *Ibid.*, original emphasis.

[46] Ladd and Hadley, *Transformations of the Party System*, *op. cit.*, pp. 39, 40.

[47] Even where temporary, these massive emergency relief programs served as important precedents for later activist programs such as the Job Corps and public employment. See the case study on *Reducing Unemployment*, *Volume IV* of this study.

[48] William Leuchtenburg, *Franklin D. Roosevelt and the New Deal*, New York, NY, Harper Colophon Books, 1963, p. 52.

[49] George C.S. Benson, *The New Centralization: A Study of Intergovernmental Relations in the United States*, New York, NY, Farrar and Rinehart, 1941, p. 79.

[50] *Ibid.*, p. 32.

[51] For more on this, see *Chapter 4* in this volume.

[52] Benson, *The New Centralization*, *op. cit.*, pp. 30, 31.

[53] See, for example, George Break, *Intergovernmental Fiscal Relations in the United States*, Washington, DC, The Brookings Institution, 1967. Also Richard Musgrave, *The Theory of Public Finance*, New York, NY, McGraw-Hill, 1959; and Wallace Oates, *Fiscal Federalism*, New York, NY, Harcourt, Brace, Jovanovich, Inc., 1972.

[54] Benson, *The New Centralization*, *op. cit.*, p. 24.

[55] William Riker, *Federalism: Origins, Operation, Significance*, Boston, MA, Little, Brown, 1964, p. 155.

[56] Quoted in Hofstadter, *The American Political Tradition*, *op. cit.*, p. 307.

[57] Congressional Quarterly, *Politicis in America, 1945–1966*, Congressional Quarterly, Washington, DC, Inc., 1967, p. 6.

[58] Governors Driscoll, Battle, Thornton, and Peterson, "Comment," *Final Report of the Commission on Intergovernmental Relations*, House Document No. 198, 84th Congress, 1st. Session, Washington, DC, U.S. Government Printing Office, 1955, pp. 130, 131.

[59] Benson, *The New Centralization*, *op. cit.*, p. 88.

[60] *Ibid.*, p. 35.

[61] Clydes D. McKee, Jr., "Local and State Government," in Stedman, *Modernizing American Government*, p. 154. Similarly, Sen. Joseph Tydings argued that state default has stimulated federal activism: "Those who criticize 'Washington' for interfering with 'states' rights' should first consider whether the federal government would have acted at all if the states had fulfilled their responsibilities in . . . areas of proper state concern." *Congressional Quarterly Almanac*, *op. cit.*, 1967, p. 137.

[62] Michael Reagan, *The New Federalism*, New York, NY, Oxford University Press, 1972, p. 111. See also Benson, *The New Centralization*, *op. cit.*, pp. 40–42.

[63] *Ibid.*, p. 114.

[64] See Ira Sharkansky, *The Maligned States*, New York, NY, McGraw-Hill, 1972 for this position.

[65] Daniel Elazar, "The New Federalism: Can the States be Trusted?" *Public Interest*, Spring 1974, p. 90.

[66] *Ibid.*, p. 102.

[67] *Congressional Quarterly Almanac, 1961*, Congressional Quarterly, Inc., 1962, p. 631.

[68] This is evident, for example, in two important studies of the attitudes held by delegates to national party conventions. Herbert McCloskey found significant differences in the attitudes held by such party delegates in the 1950s, stating: "The political views of the influentials [i.e., convention delegates] are relatively ordered and coherent. As liberals and conservatives, Democrats and Republicans, they take stands on issues, choose reference groups, and express preferences for leaders that are far more consistent than the attitudes and preferences exhibited by the electorate. . . . The political elite . . . tends to be united on basic values but divided on issues by party affiliation." Herbert McCloskey, "Consensus and Ideology in American Politics," *American Political Science Review* 58, June 1964, pp. 373-74. Similar conclusions are evident from the 1972 data presented

in Jeanne Kirkpatrick, *The New Presidential Elite*, New York, NY, Russel Sage Foundation, 1976, p. 318.

[69] Franklin D. Roosevelt, "State of the Union Address, 1944," in *State of the Union Messages of the Presidents, Vol. III*, ed. by Fred Israel, New York, NY, Chelsea House, 1966, p. 2881.

[70] Leuchtenburg, *Franklin D. Roosevelt, op. cit.*, p. 85.

[71] *Ibid.*, p. 336.

[72] *Ibid.*, pp. 52, 134.

[73] Frank Munger and Richard Fenno, *National Politics and Federal Aid to Education*, Syracuse, NY, Syracuse University Press, 1962, p. 101.

[74] Leuchtenburg, *Franklin D. Roosevelt, op. cit.*, p. 151.

[75] See the case study on *Public Assistance*, Volume III (A-80) of this study.

[76] Landon said in response to his defeat that: "I didn't have enough help on the Progressive and Liberal side to pick up the ball and emphasize our really liberal stand on many questions." Quoted in Leuchtenburg, *Franklin D. Roosevelt, op. cit.*, p. 179.

[77] See *Chapter 5* in this volume for further discussion of the effects of war and other dislocations on governmental growth.

[78] Congressional Quarterly, *Politics in America, op. cit.*, pp. 4, 10.

[79] Leuchtenburg, *Franklin D. Roosevelt, op. cit.*, p. 320.

[80] Wilfred Binkley, *American Political Parties*, New York, NY, Alfred Knopf, 1959, p. 390.

[81] Quoted in *ibid.*

[82] Congressional Quarterly, *Politics in America, op. cit.*, p. 14.

[83] Sundquist, *Politics and Policy, op. cit.*, pp. 424-26.

[84] See *ibid.*, Chapter 9.

[85] Theodore Lowi, "Europeanization of America: From United States to United State," *Nationalizing Government*, ed. by Theodore Lowi and Alan Stone, Beverly Hills, CA; Sage, 1978, p. 18.

[86] Sundquist, *Politics and Policy, op. cit.*, p. 480.

[87] Donald Johnson and Kirk Porter, eds., *National Party Platforms, 1840–1972*, Urbana, IL, University of Illinois Press, 1973, p. 677.

[88] Barry Goldwater, quoted in *Congressional Quarterly*, "Congress and the Nation, 1945–1964," Washington, DC, Congressional Quarterly, Inc., 1965, pp. 57, 58.

[89] Lyndon Johnson, quoted in David Broder, *The Party's Over*, New York, NY, Harper Colophon Books, 1971, p. 45.

[90] Congressional Quarterly, *Politics in America, op. cit.*, p. 59.

[91] Subnational governments and the private sector were the prime implementors of these programs, since federal grants were—with the exception of Medicare—the nearly exclusive means used to achieve new national goals. This suggests the absence of any strong sentiment for unitary government even during this period of liberal nationalism.

[92] ACIR, *Significant Features of Fiscal Federalism, 1978–79*, Report M-115, Washington, DC, U.S. Government Printing Office, 1979.

[93] Lowi, "Europeanization of America," *op. cit.*, p. 18.

[94] Beer, "A New Public Philosophy," *op. cit.*, p. 40.

[95] *Ibid.*, p. 38.

[96] *Ibid.*, p. 39.

[97] In 1960, the issues used to construct this index included urban renewal, airport construction grants, water pollution grants, aid to veterans, minimum wage, aid to schools, fishing industry subsidies, lead and zinc mine subsidies, civil rights, labor relations, wheat price supports, and court jurisdiction over the states. See *Congressional Quarterly Almanac, 1960, op. cit.*, pp. 133, 134.

[98] Within each party, of course, significant differences existed between northerners and southerners, and liberals and conservatives.

[99] The complete data are presented in the *Appendix* to this chapter.

[100] *Congressional Quarterly Almanac, 1968, op. cit.*, p. 843.

[101] Those familiar with recent literature on voting behavior may find the thrust of this argument troublesome. In contrast to this pattern of increasing consensus on federal role issues in the 1960s, voting analysts have focused in recent years on the rise of issue voting and ideology in the electorate [See Norman Nie, *et. al., The Changing American Voter*, Cambridge, MA, Harvard University Press, 1976. For a summary of this literature, see Chapter V.] A potential explanation of this seeming paradox is manifold. First, it is significant that the research on issue voting has studied electorial, not Congressional, behavior. Moreover, much of the rise of issue voting was related to the growth of new issues in foreign policy, civil rights, social services, etc., in contrast to the issue of governmental size and activism. In fact, the question of governmental size did not fit easily into the pattern of growing issue consistency identified by Nie (pp. 125–28). With the influx of "new" Democrats into Congress in the 1970s—following the termination of the Federal Role Index—the issue of federal size appears to have lost much of its partisan coherence within Congress as well as outside it.

Second, partisan decline and issue voting may be entirely consistent with—and even partial explanations of—the increased pragmatism on federal role issues evident within Congress during the late 1960s and 1970s. Issue voting may tend to encourage the growth of single purpose organizations and a process of segmented consideration of individual issues, rather than a focus on broad policy tradeoffs. It thus may stimulate Congressional approval of multiple, independent projects and programs and concomitant governmental growth, while, at the same time, contributing to widespread dissatisfaction with the overall result.

[102] James Q. Wilson, *Political Organizations*, New York, NY, Basic Books, 1973, p. 341.

[103] To the extent that such a change has occurred, it has certainly been only relative. Many conservatives have actively continued to oppose governmental growth in this period, and there are significant indications that conservative opposition to federal activism has grown stronger recently. For this trend in public opinion, see *Chapter V* of this volume. The recent growth of the New Right in American politics is detailed in the *National Journal*, Washington, DC, (1/21/78), pp. 82–92, and was evidenced in conservative successes in the 1978 elections, ranging from Proposition 13 to the election of new Senators.

[104] Dick Kirschten, "Park Barrel Politics Triumphs on Capitol Hill," *National Journal, op. cit.*, (9/19/78), p. 1320.

[105] Letter by Dr. S.E. Luria, Director of MIT's Center for Cancer Research, to the *New York Times*, March 8, 1979, p. 20. While some may consider federalism a mere technicality in determining what functions of government Washington becomes engaged in, federalism has not yet become a technicality with regard to the manner of federal involvement. As will be discussed in this chapter, federal grants—rather than direct services—continue to be the primary instrument employed, apparently due to the continuing role played by certain political and Constitutional constraints.

[106] James Q. Wilson, "American Politics, Then and Now," *Commentary*, February 1979, p. 41.

[107] Charles Schultze, "Federal Spending: Past, Present, and Future," *Setting National Priorities: The Next Ten Years*, ed. by Henry Owen and Charles Schultze, Washington, DC, The Brookings Institution, 1976, p. 367.

[108] For a description of how Congressmen use federal grants to appeal to local constituencies, see David Mayhew, *Congress: The Electoral Connection*, New Haven, CT, Yale University Press, 1974, Chapter Two, especially, pp. 114, 129.

[109] Henry Graff, "Presidents are now Mayors," *New York Times*, July 18, 1979, p. A23.

[110] Morris Fiorina, *Congress: Keystone of the Washington Establishment*, New Haven, CT, Yale University Press, 1977, p. 46. Original emphasis.

[111] See Beer, "The Modernization of American Federalism," *op. cit.*, and Everett Ladd, *American Political Parties: Social Change and Political Response*, New York, NY, W.W. Norton, 1970.

[112] See Samuel Hays, "Political Parties and the Community-Society Continuum," in *The American Party Systems*, ed. by Chambers and Burnham, New York, NY, Oxford University Press, 1967, pp. 166, 167; and Richard Hofstadter, *The Age of Reform*, New York, NY, Vintage Books, 1955, p. 187.

[113] Richard Leach, *American Federalism*, New York, NY, W.W. Norton, 1970, p. 9.

[114] *Federalist* 10. All references are to the Mentor Book edition, intro-

duction by Clinton Rossiter, New York, NY, The New York American Library of World Literature, Inc., 1961.

[115] Beer, "The Modernization of American Federalism," *op. cit.*, pp. 58, 59.

[116] Both Beer *ibid.*, and Lowi, "American Business and Public Policy," *op. cit.*, argue this point strongly.

[117] Deil Wright, *Understanding Intergovernmental Relations*, North Scituate, MA, Duxbury Press, 1978, p. 42. Similarly, James Bryce wrote at the turn of the century that state constitutions "witness also to a jealousy of the Federal Government." James Bryce, *The American Commonwealth* Vol. 1, New York, NY, MacMillan, 1909, p. 459.

[118] *Federalist* 51, p. 322.

[119] *Report of the Commission on Intergovernmental Relations*, p. 60.

[120] Leuchtenburg, *Franklin D. Roosevelt, op. cit.*, pp. 333, 334. On the development of the urban lobby at this time, see also Suzanne Farkas, *Urban Lobbying*, New York, NY, New York University Press, 1971, pp. 35–56.

[121] Douglas Yates, *The Ungovernable City*, Cambridge, MA, MIT Press, 1978 p. 162. Also see Robert Dahl, *Who Governs?*, New Haven, CT, Yale University Press, 1961.

[122] Samuel Beer, "Political Overload and Federalism," *Polity* 10, Fall, 1977, p. 15.

[123] Banfield and Wilson write that: "The connection between local and national politics is peculiarly close. . . . The national parties . . . are hardly more than loose conjeries of local parties. Congressmen and Senators are essentially local politicians, and those of them who forget it soon cease to be politicians at all." Edward Banfield and James Wilson, *City Politics*, New York, NY, Vintage Books, 1963, p. 2.

[124] William Riker, *Federalism: Origin, Operation, Significance*, Boston, MA, Little, Brown, 1964, pp. 129, 136.

[125] Morton Grodzins, *The American System*, New York, NY, Rand McNally, 1966, p. 254.

[126] For details on this, see Ladd and Hadley, *Transformations of the American Party System, op. cit.*; Norman Nie, Sidney Verba, and John Petrocik, *The Changing American Voter*, Cambridge, MA, Harvard University Press, 1976, and Walter Dean Burham, *Critical Elections and the Mainsprings of American Politics*, New York, NY, W.W. Norton, 1970.

[127] David Truman, "Federalism and the Party System," in *Federalism, Mature and Emergent*, ed. by Arthur MacMahon, Garden City, NY, Doubleday and Co., 1955, pp. 125, 133.

[128] Alternatively, of course, the causes of party decomposition could be relatively unrelated to the dynamics of federalism and reflect changes in socioeconomic makeup, the growth of media, increasing education, and so on. See *Chapter 5* in this volume.

[129] Howard K. Smith, quoted in Charles Gilbert and David Smith, "The Modernization of American Federalism," in Stedman, *Modernizing American Government, op. cit.*, p. 122.

[130] *Federalist* 47, p. 301.

[131] Hartz, *The Liberal Tradition In America, op. cit.*, p. 85.

[132] James M. Burns, *The Deadlock of Democracy*, Englewood Cliffs, NJ, Prentice-Hall, 1964, p. 6.

[133] Leach, *American Federalism, op. cit.*, p. 57.

[134] *Federalist* 62, p. 378.

[135] Robert Bendiner, *Obstacle Course on Capitol Hill*, New York, NY, McGraw-Hill, 1964, pp. 15–17.

[136] On the Rules Committee changes, see Lawrence Dodd and Bruce Oppenheimer, "The House in Transition," in *Congress Reconsidered*, ed. by Dod and Oppenheimer, New York, NY, Praeger, 1977, p. 46. The Committee system reforms are discussed in *ibid.*, pp. 26–40, and Norman J. Ornstein, *Congress in Change*, New York, NY, Praeger, 1975. Although the reforms may have contributed to the proliferation of categorical programs, they have made concerted legislative action more difficult by adding to the fragmentation of Congress.

[137] Samuel Patterson, "The Semi-Sovereign Congress," in King, *The New American Political System, op. cit.*, p. 157.

[138] Doris Kearns, *Lyndon Johnson and the American Dream*, New York, NY, Signet Books, 1976, pp. 226, 228.

[139] Norton Long states, "We do not ordinarily think of the nation's urban policies as being much the same as the pork barrel of the rivers and harbor bill. In fact they are." "Federalism and Perverse Incentives," *Publius* 8, Spring 1978, p. 86.

[140] David B. Walker, "The Balanced Budget Movement: A Political Perspective," *Intergovernmental Perspective*, Washington, DC, Advisory Commission on Intergovernmental Relations, Spring 1979, p. 19.

[141] World Bank, *World Tables, 1976*, Baltimore, MD, Johns Hopkins University Press, 1976, p. 447.

[142] Anthony King, "Ideas, Institutions, and the Policies of Government: A Comparative Analysis: Part III." *British Journal of Political Science*, 1973, p. 418.

[143] David Cameron, "The Expansion of the Public Economy: A Comparative Analysis," *American Political Science Review* 72, December 1978, p. 1251.

[144] James Q. Wilson, "The Rise of the Bureaucratic State," *The Public Interest* 41, Fall 1975, p. 102.

[145] See the case studies on *Public Assistance* and *Reducing Unemployment, Volumes III* and *IV* of this study.

[146] For more detail on the history of Revenue Sharing, see Paul Dommel, *The Politics of Revenue Sharing*, Bloomington, IN, Indiana University Press, 1974, Chapter Two.

[147] Suzanne Farkas, *Urban Lobbying: Mayors in the Federal Arena*, New York, NY, New York University Press, 1971, p. 41.

[148] See the case study on *Reducing Unemployment, Volume IV* of this study.

[149] Senator Gaylord Nelson, *Congressional Record*, September 16, 1970, p. 32159.

[150] Lowi, "American Business," p. 688.

[151] See, for instance, David Nyhan, "Can the Democrats hold on to the Senate?" *Boston Globe* 7/29/79, p. 21; Warren Weaver, "Republicans Hope to Win Senate Majority in Next Three Years," *New York Times* 8/14/79, p. A14; John Herbers, "Nationwide Revolt on Taxes Showing No Sign of Abating," *New York Times*, 8/5/79, pp. 1, 38; and Linda Demkovich, "Where is the Consuming Public on the Proposed Federal Consumer Agency?", *National Journal*, 12/10/77.

[152] The 1964 figures come from Free and Cantril, *The Political Beliefs of Americans, op. cit.*, p. 192. The 1978 results are from the ACIR, *Changing Public Attitudes on Governments and Taxes, 1978* S-7, Washington, DC: U.S. Government Printing Office, 1978, p. 2.

[153] For details on growing resentment to taxes and rising political alienation, see *Chapter 5* of this volume.

[154] Rep. Thomas Foley (D-WA), quoted in Demkovich, "Where Is the Consuming Public," *op. cit.*, p. 1913.

[155] Quoted in *Ibid.*, p. 1914.

[156] Henry Aaron, *Politics and the Professors*, Washington, DC, The Brookings Institution, 1978, p. 33.

[157] Samuel Beer, "The New Public Philosophy," *op. cit.*, pp. 33, 34.

[158] ACIR, *Significant Features of Fiscal Federalism—1978–1979*, report M-115 Washington, DC, U.S. Government Printing Office, 1979, p. 1.

[159] *Ibid.*, p. 7.

Appendix

DATA ON CONGRESSIONAL QUARTERLY FEDERAL ROLE INDEX, 1960–68 AVERAGE PARTY VOTES FOR A LARGER FEDERAL ROLE

House of Representatives

Year	Average Yearly Democratic Score	Three Year Democratic Average	Average Yearly Republican Score	Three Year Republican Average	Percentage Point Difference Dem.-Rep.	Three Year Percentage Difference
1960	74%		17%		57%	
1961	78		12		66	
1962	76	76%	38	22%	38	54%
1963	83		52		31	
1964	69		32		37	
1965	79	77	33	39	46	38
1966	69		39		30	
1967	73		39		34	
1968	69	70	48	42	21	28

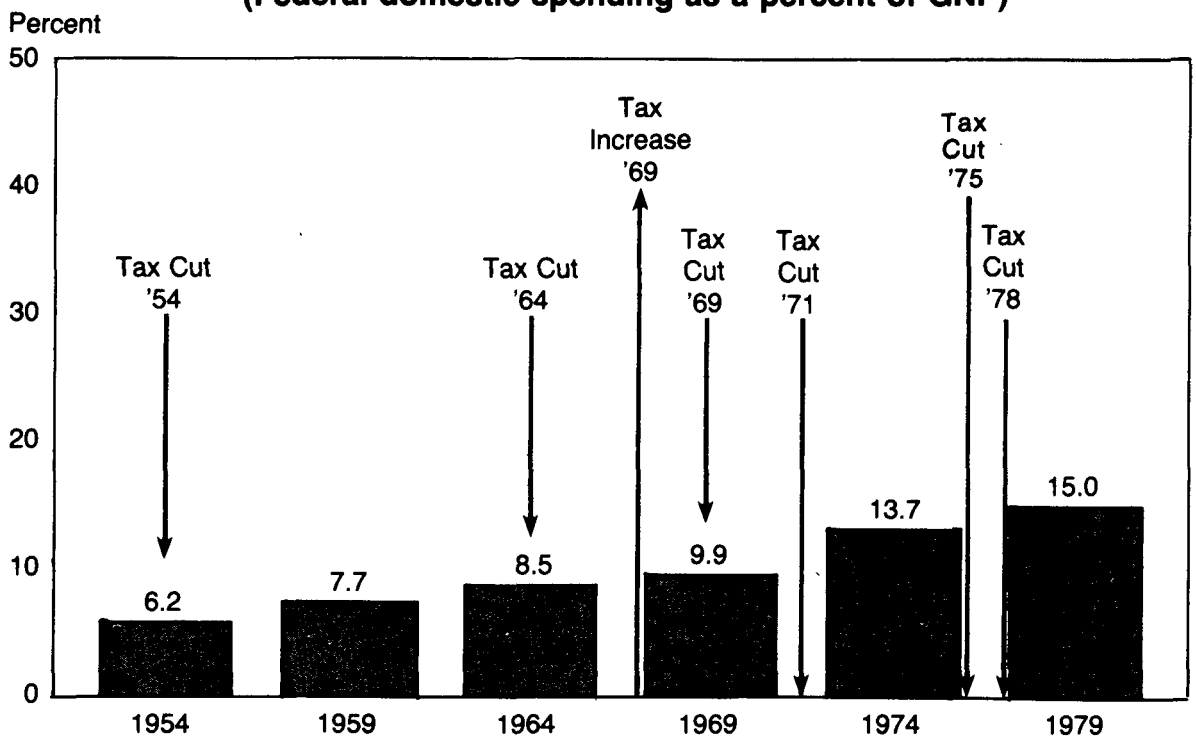
Senate

1960	74%		27%		47%	
1961	67		32		35	
1962	63	68%	20	26%	43	42%
1963	84		49		35	
1964	74		43		31	
1965	82	80	46	46	36	34
1966	74		58		16	
1967	69		44		25	
1968	66	70	55	52	11	18

SOURCE: *Congressional Quarterly Almanac*, 1960–1968, and ACIR staff computation.

SINCE 1954, FEDERAL DOMESTIC SPENDING HAS TAKEN AN EVER-INCREASING SHARE OF GNP DESPITE TAX CUTS

(Federal domestic spending as a percent of GNP)



SOURCE: ACIR, *Significant Features of Fiscal Federalism*, 1978–79 and 1979–80 editions, Washington, DC, U.S. Government Printing Office; and staff computations.

Chapter 4

Financing Federal Growth: Changing Aspects Of Fiscal Constraints

I
The End of a Fiscal Era—Uncle Sam Loses His Trump Cards

In retrospect, the 1954–79 period may well go down in history as the golden fiscal era for the federal government. It was a period in which the federal government could repeatedly cut personal income taxes while more than doubling its real presence on the domestic expenditure front. During this 25-year period, federal outlays for domestic programs (including aid to states and localities) rose from about 6% to 15% of Gross National Product (GNP) (see *Chart 1*).

This remarkable federal growth performance takes on added significance when it is recalled that state and local expenditures from own funds rose far more modestly—from 7 to 10% of GNP—*despite* the fact that they did a very brisk business in new and used taxes. Moreover, in striking contrast to the relatively tranquil federal experience, the road to stronger state and local revenue systems was paved with the political bones of many state and local policymakers. No wonder the demand for federal revenue sharing.

These facts raise a nice question: why did the federal government move so much farther, faster, and more safely than did the states and the localities into the domestic public sector—an area that historically had been of primary concern to state and local policymakers?

The answer: federal policymakers held several fiscal trump cards which enabled them to expand rapidly in the domestic public sector at little political risk. A fiscal

trump can be defined as one that helps policymakers (a) expand programs while cutting taxes, (b) pay for expanded program benefits with tax hikes that meet with little public opposition, or (c) co-opt the resources of another level of government. In addition, they could finesse revenue short-falls with deficit financing.

THE INCOME TAX TRUMP CARD

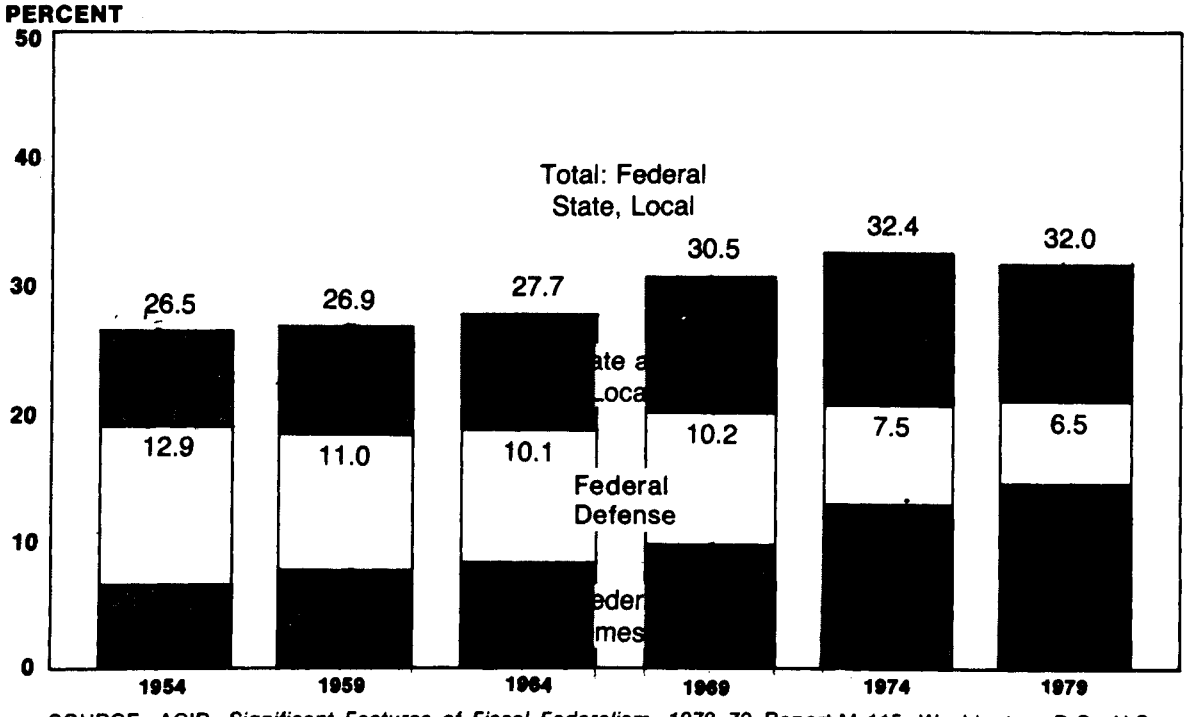
The federal government came out of the Korean War with a powerful personal income tax system—the most massive self-assessment revenue instrument ever created in history. It had been forged largely over the two decades before the Korean War, first to finance the New Deal programs and then expanded greatly to help underwrite the World War II, Cold War, and Korean War commitments.

During most of the 1955–79 period, the interaction of economic growth and inflation against the progressive personal income tax structure produced sufficient additional revenue to help finance six major tax cuts and expand domestic programs at the same time.

While federal policymakers still hold a valuable income tax card, it can no longer be played with the same flourish that characterized its play in the 1960s and early 1970s. There is clear evidence of growing public opposition to the income tax—a development that can be traced in part to the fact that "taxflation" has automatically pushed taxpayers into brackets with higher marginal tax rates. This inflationary wind may soon be taken out of the income tax sails through indexation. There is also growing agreement that income tax rates must be pruned to help a sluggish private economy enhance its productivity and thereby compete more effectively in the world market.

Chart 1

GOVERNMENT EXPENDITURES FROM OWN FUNDS AS A PERCENT OF GNP, 1954–79



SOURCE: ACIR, *Significant Features of Fiscal Federalism, 1978-79,* Report M-115, Washington, D.C., U.S. Government Printing Office, and staff computations.

THE DEFENSE TRUMP CARD

The United States also came out of Korea with heavy defense commitments; it spent almost twice as many dollars for defense-related functions as did all state and local governments for all their programs combined. Since that time, there has been a steady decline in real defense outlays—they fell from approximately 13% of GNP in 1954 to about 6.5% of GNP in 1979 (see *Chart 1*). Part of this drop in real defense spending was used to finance tax cuts and part to underwrite the shift from defense to nondefense spending.

Now federal policymakers can no longer play the defense card because there is growing recognition that the U.S. "underinvested" in defense during the 1970s. It now appears fairly certain that the generals and admirals will be claiming an increasingly larger share of the federal budget for the next several years.

THE SOCIAL SECURITY TRUMP CARD

Until recently, the Congress repeatedly increased social security benefits and then raised social security tax rates to finance the broadened coverage. These repeated social security tax hikes met with very little public opposition, probably because most of the public viewed them as higher premiums needed to pay for better social insurance protection.

Now due to the recent and sharp increase in public awareness of higher social security taxes (and their contribution to high total tax loads) there are no more easy votes in the Congress for social security tax hikes. In all likelihood, general tax revenue will have to be siphoned off to help meet steadily growing social security obligations thereby intensifying the financial crunch.

THE FEDERAL AID TRUMP CARD

Massive federal penetration of the domestic field can also be attributed to a fourth trump card—federal aid to states and localities. By means of conditional matching grants, the Congress developed a facile method for co-opting state and local policymakers and their resources. As a result, the federal aid system grew prodigiously from about 38 programs amounting to $3 billion in 1954 to approximately 500 programs distributing almost $83 billion by 1979—with thousands of "strings" attached.

Critics now contend that the Congress has badly overplayed its federal aid card. Instead of bringing clear-cut federal control, it has resulted in a mishmash of federal-state-local authority with a resultant loss of efficiency, accountability, and public confidence. While basic reform of the federal aid system is uncertain, there is growing evidence to suggest that the Congress will be forced to slow down federal aid flows as one way to help meet the expansion of defense and social security commitments and the strident demand for tax cuts.

THE DEFICIT FINESSE

During this 1954–79 period, federal policymakers also could cover their revenue shortfalls with deficit financing thereby avoiding the political pain associated with tax hikes or expenditure cutbacks. In 19 of the last 20 years, Congress spent more than it collected—these deficits total about $400 billion.

Now, confronted with chronic inflation of major proportions the deficit finesse can no longer be worked with the ease of earlier years. The business community, and especially foreign investors, regard perennial deficits as convincing evidence of poor fiscal discipline and a major contributor to inflation—the nation's number one domestic problem.

II

Federal Preeminence in the Income Tax

The most important single factor which has enabled the federal government to expand at a rate so much greater than that of the state-local sector has been the federal preeminence in the field of the individual income tax. Since its beginning, after the passage of the Sixteenth Constitutional Amendment in 1913, the federal income tax has proved to be a potent and responsive producer of ever increasing amounts of revenue for the federal government. Its high elasticity makes it so responsive to the conditions of economic growth and inflation which have been characteristic of the last few decades that the federal government has been able to

make a series of tax cuts and still enjoy constantly increasing revenues.

In fiscal 1954, the federal government raised 47% (or $29.5 billion) of its total revenues of $62 billion from the individual income tax; in fiscal 1979, it raised about 68% (or $218 billion) of its $319 billion total revenues in this way.[1]

In contrast, the state-local government sector has never used the individual income tax to raise a comparable proportion of its revenues. The individual income tax accounted for 5% (or a billion dollars) of its $22 billion total revenues in fiscal 1954, and 18% (or $37 billion) of total revenues of $205 billion in fiscal 1979.[2] The state-local sector relies on other sources of revenue, such as sales and property taxes, which are less responsive than the income tax in the present economic climate, and have not provided the constant automatic increases in revenues characteristic of the income tax.

Two factors are primarily responsible for federal preeminence in the income tax field:

1. the restraining effect of interjurisdictional tax competition on state and local income taxes; and
2. the expansive effect of a series of events and historical accidents (especially war and depression) on the development of the federal income tax.

INTERJURISDICTIONAL TAX COMPETITION

The federal government's relative freedom from tax competition—the enviable position of a national government—has enabled it to enact tax laws with relatively high rates without fear of driving individuals and businesses to move to other jurisdictions. In contrast, states and local governments are constantly restricted in their freedom to enact certain taxes or to impose high rates by fears of tax competition from other governments.

There is an iron rule that governs utilization of a progressive income tax in our federal system—the more extensive a jurisdiction's tax reach, the higher the tax rate. Thus, New York City's rate schedule ranges from 0.9% to 4.3%; New York State's from 2% to 15%; while the federal income tax rate starts at 14% and climbs to 70%. The mobility of capital and wealthy persons places a real damper on the enthusiasm of even the most populist minded state legislature to push income redistribution ("soak the rich") policies too far.

A 1965 ACIR study, *Federal-State Coordination of Personal Income Taxes,* pointed out still another aspect of the impact of tax competition on the adoption of income taxes by states:

> Finally, the growing intensity of interstate competition for industry also placed a damper on the individual income tax movement—due at least in part to the fact that the adoption of a personal income tax is said to dampen incentives and often forebodes a corporate income tax enactment. . . . Opponents of income taxation often argued that state adoption of progressive income tax policies tends to create a tax climate somewhat hostile to the location and expansion of industry. These warnings undoubtedly carried weight, particularly in certain northeastern state legislative bodies, many of whose members were keenly concerned about the emigration of industrial firms to the middle atlantic and southern states.[3]

KEY EVENTS FOSTERING FEDERAL PREEMINENCE IN THE INCOME TAX

There are several crucial periods in the early history of the federal income tax up to 1945 which helped the federal government stake out a claim to most of the personal income tax field, thereby forcing the state-local sector to rely heavily upon less elastic sources of revenue. Without the impact of wars and the Great Depression upon the development of the federal individual income tax, the use of this productive tax might presently be shared more evenly among federal, state, and local governments. This section briefly discusses the crucial events:

- the adoption of the first income tax and its expansion to help finance World War I;
- the impact of the Depression of the 1930s upon the federal income tax;
- the expansion of the income tax to a mass tax during World War II; and
- the adoption of withholding and collection at the source during World War II.

As a result of these developments, after World War II the federal government found itself using the income tax to provide 40% of its revenues. In contrast, state use of the income tax had not shown comparable growth; states raised less than 8% of their revenues from the individual tax at that time.

Federal Resources Prior to the Passage of the Sixteenth Amendment

In the first half of the 1800s the United States did not have serious difficulties in raising revenue to finance its rather limited needs. The two principal sources of funds were the tariff, which produced needed government revenues while curtailing foreign competition with new industries, and revenues from the sales of public lands.

Although these sources tended to provide irregular yields, they frequently provided more funds than needed; there were surpluses in 18 of the 21 years between 1816–36. Students of government finance discussed the "serious inconvenience of an overflowing Treasury" and a short-lived experiment in "revenue sharing" was made during the 1830s by distributing the surplus to the states.

When the Civil War forced the federal government to search for new sources of revenue, Congress passed a series of income tax laws between 1861–65 which provided a progressive income tax collected at the source with rates ranging from 5 to 10%. By 1866, about 500,000 taxable returns were received (the estimated total population was about 36 million then); the income tax contributed $61 million, or almost 20% of the $311 million total federal receipts.[4] Following the end of the War, the tax was gradually phased out, and its repeal took place in 1872.

Despite its demise, the Constitutionality of the income tax was challenged in 1880 on the grounds that it was a direct tax not apportioned according to population while the United States Constitution specifically provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken."[5] The Supreme Court unanimously held that it had been Constitutional (*Springer v. United States* (102 U.S. 586 [1880]) on the grounds that "direct taxes, within the meaning of the Constitution, are only capitation taxes and taxes on real estate, and that the tax of which the plaintiff complains is within the category of an excise or duty."

In 1894, Congress yielded to pressures from the Populists, representing the farmers of the west and the south and urban laborers, and enacted another federal income tax. This, too, was challenged on the usual Constitutional grounds. In 1895, the Supreme Court declared the tax unconstitutional by a 5-4 majority in *Pollock v. Farmers Loan and Trust* (157 U.S. 429, 158 U.S. 601). The decision, reached after two hearings, reversed the *Springer* 1880 decision by holding that the tax on income from land was direct; and that all the income tax sections were inseparable and therefore inoperative and void.

At the time of this decision, the federal government was experiencing its first of a series of peacetime deficits. It gradually became apparent that federal reliance upon tariffs and excises would not provide sufficient funds for the program expansions demanded by the public. Proposals were made in the House of Representatives to add an inheritance tax to the Payne-Aldrich Tariff of 1909. Democrats, led by Cordell Hull, attempted to add an income tax to the bill on the grounds that it was based on the ability to pay. Their proposals met with great opposition from conservatives who charged that an income tax was socialistic and furthermore would encourage wide-spread evasion.

The debate dragged on interminably, and finally President Taft suggested a compromise that included the suggestion that Congress pass a joint resolution presenting for ratification by the states a Constitutional amendment authorizing a federal income tax. Conservatives did not oppose the suggestion because they believed that an income tax amendment had no chance of ratification; it passed the Senate by 77-0 and the House by 318-14 in July 1909. The final form of the proposed Constitutional amendment gave the Congress the power to tax incomes "from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

The strong progressive sentiment pushed the amendment (which became the Sixteenth) through the states, with Alabama being the first to ratify it in 1909 and Wyoming, the 36th in 1913. Only four states rejected it: Connecticut, Florida, Rhode Island, and Utah. Two states failed to act upon it: Virginia and Pennsylvania.

Although states had just begun to experiment with the state income tax at this time (Wisconsin's income tax of 1911 is generally regarded as the first effective use by a state of modern income tax),[6] some of the opponents of the Sixteenth Amendment cited potential competition with state taxing authorities as an argument against the federal tax. Speaker Richard E. Byrd (grandfather of the present Virginia Senator Byrd) of the Virginia House of Delegates was quoted in the Richmond *Times-Dispatch* of March 3, 1910, as opposing the amendment on the grounds that the state would give up a legitimate and long-established source of revenue and yield it to the federal government. The state according to Mr. Byrd, would actually invite the federal government "to invade its territory, to oust its jurisdiction and to establish a federal dominion within the inner-most citadel of the reserved rights of the Commonwealth." He continued:

> . . . I do not hesitate to say that the adoption

> of this amendment will be such a surrender to imperialism that has not been seen since the northern states in their blindness forced the Fourteenth and Fifteenth Amendments upon the entire sisterhood of the Commonwealth. I am not willing by any voluntary act to give up revenue which the State of Virginia herself needs, nor to surrender that measure of states rights which. . . the construction of the federal courts have permitted to remain.

However, the majority of the country did not agree with Speaker Byrd; the ratification of the Sixteenth Amendment to the Constitution laid the groundwork for the establishment of the federal income tax which we know today.

The Federal Income Tax in World War I

Congress acted rapidly after the ratification of the Sixteenth Amendment to enact an income tax. An indication of its insignificant early role lies in the fact that the new income tax was enacted as Section II of the *Act to Reduce Tariff Duties and to Provide for the Government and for Other Purposes*. The 1913 tax had a basic rate of 1% with graduated surtax rates reaching 6% on the top bracket of incomes of $500,000 or more. The yield of $28.3 million in the first year was only half of what had been expected; yet, 357,598 returns were filed.[7] As the federal tax collectors gained experience, yields increased, and in 1916, collections totaled $67.9 million.[8]

World War I cast its shadow and the new income tax was put to work as Congress began to consider it as a revenue-producer in its own right and a promising new way to finance war costs. Congress enacted a series of rate increases that culminated in the 1918 normal rates of 6% on the first $4,000 and 12% above that, combined with a surtax reaching a top level of 65%. The maximum effective rate was 77%; the patriotic fervour generated by the war effort served to gain acceptance by both high and lower income groups of a degree of progressivity that a short time earlier would have been considered intolerable. The personal income and corporate income and excess profits taxes were the main support of the war, eventually financing about one-third of its cost to the United States. Though over four million taxable income tax returns were filed annually, the tax still covered only a small portion of the total population—less than 10%.[9]

Use of the federal income tax to finance World War I had a significant impact on its future development. Both the high rates, and the relatively broad coverage (for that period) conditioned public acceptance of greatly expanded use of the income tax in the future. At the end of the War, the federal government found itself with a powerful revenue source.

In contrast, states did not move towards adoption of income taxes with comparable speed. Many state administrators believed that state income taxes were too difficult to enforce, and very expensive to administer. However, a few states were willing to experiment. Between 1911–18, seven states adopted income tax laws: Wisconsin, Mississippi, Oklahoma, Massachusetts, Virginia, Delaware, and Missouri.[10] Some of the considerations influencing state adoption of the tax were the need for additional revenues to finance increased expenditures, a desire to equalize the burden between property owners (who previously had borne the major tax burden) and nonproperty owners, and the opportunity for introducing a progressive element into the tax system. Although the newly introduced income taxes played a relatively minor role in most states, by the end of the 1920s Massachusetts, New York, and Wisconsin relied upon them for significant portions of their revenues.[11] All told, 13 states and one territory (Hawaii) had adopted the levy by the beginning of 1930.[12]

From World War I Through the Depression Years

The first World War left its imprint. Federal expenditures, which had never exceeded a billion dollars a year in the pre-War period, reached $18.5 billion in 1919 and never again dropped below a level of about $3 billion.[13] In addition, substantial amounts of revenue were needed for reduction of the public debt which had reached unprecedented heights during the War. The federal government also was faced with the need to replace the revenues lost by the ratification of the Prohibition Amendment in 1918. Federal taxes on alcoholic beverages produced almost $400 million in revenue in the final year prior to its ratification.

After the War, income tax rates were reduced and the percentage of the population covered dropped to 4.2% by 1926.[14] The income tax continued to produce the same share of federal receipts as it did during the War.

The Depression of the 1930s posed the first serious challenge to the efficiency of the income tax as a revenue producer. A progressive income tax responds well to prosperity and inflation: tax yields rise at a faster clip than personal income. However, the converse is true

when incomes fall, and the yield of a progressive tax is cut even more sharply than the rate of decrease in national income.

The impact of the Depression was not felt in a drop in tax collections for some time since there was no withholding system to register quickly changes in the economy. When tax receipts began to show drastic declines (the first quarter of 1931 was 40% below the comparable quarter of 1930), President Hoover recommended and Congress enacted an increase in income tax rates—in the best orthodox tradition of balancing the budget. The results were disappointing—a total tax yield less than that of the period immediately preceding the tax increase.[15]

As the Depression's effects continued to be felt in a massive erosion of the income tax base, the new Roosevelt Administration and Congress responded by more tax increases in 1934 and 1935.[16] The new laws relied heavily on increasing the progressivity of the income tax—with the *Revenue Act of 1935* providing for a maximum surtax of 75% on incomes of $1 million or more. Such measures promoted public acceptance of what otherwise might have been an unpalatable tax by presenting it as an instrument of social reform and income redistribution (soak the rich) policy. At any rate, its impact on the unemployed was negligible. By 1937, federal income tax collections had returned to the pre-Depression levels.[17]

The base of the income tax was further broadened in 1939 by the *Public Salary Tax Act* which made state and municipal salaries subject to the federal income tax; this legislation also permitted nondiscriminatory taxation of federal salaries by states. The exemption of federal judges' salaries from income tax also was ended. Although the revenue gains of this measure were small, the psychological effect was to strengthen "the fabric of both federal and state income taxes, for private citizens who had to pay these taxes (and were uninitiated in the niceties of legalistic doctrines) could never understand why public employees should be exempted from these taxes."[18]

Between 1919 and 1929, only six additional states had adopted income taxes. When the Depression grew more severe states desperately needed additional tax revenues and were also faced with constant pressures for property tax relief. As a result, in the period 1930–38, 18 additional states adopted income tax legislation.[19] States felt the impact of the Depression on the yield of their income taxes: state personal income tax collections fell from $133 million in 1929 to $59 million in 1933. As more states adopted the personal income tax, collections improved, recovering by 1936 to exceed the pre-Depression levels and to $217 million by 1937.[20]

Financing World War II

A strengthened federal income tax emerged from the Depression only to face a greater test in the demands put upon it as the primary instrument of financing United States participation in World War II.

Aware of the high probability of the United States entrance into the conflict, the Administration began preparing before the Japanese attack on Pearl Harbor in December 1941—expenditures for national defense jumped from about a billion dollars in fiscal 1938 and 1939 to $6 billion in the fiscal year which ended June 30, 1941. By the end of the War in 1945, defense spending had reached 86% of total budget expenditures of $95 billion.[21]

In order to meet the increased needs for funds, and to withdraw money from general purchasing power as an anti-inflationary measure, during the War the Administration relied heavily on the personal income tax. A series of new tax laws were enacted which reduced personal exemptions and raised rates.

The reduction in personal exemptions had the effect of turning this levy into a "mass tax." In 1941, there were almost 26 million tax returns, of which 17.5 million were taxable. At the end of the War in 1945, there were 50 million returns, of which about 43 million were taxable.[22] At that time, the individual tax covered 74.2% of the population, and the tax took 10% of personal income.[23]

Increases in rates, particularly in the upper brackets, combined with the rduction in personal exemptions, resulted in a steeply progressive tax under which persons in the $500 to $750 bracket income paid at an effective rate of about 2%, and those with income over $1 million paid at an effective rate of about 67%.[24] In 1944 about 43% of the total generated by the tax was contributed by taxpayers earning between $2,000 and $5,000, who paid rates ranging from 9 to 14%; 54% of the yield came from taxpayers with taxable incomes of $5,000 or lower. Only those with incomes below $500 did not pay[25] (see *Table 1*).

Adoption of Withholding and Collection at the Source

One of the most significant contributions to the efficiency of the federal income tax as a revenue producer was made during the War when the tax was put on a current basis and withholding with payment at the source was initiated. Serious problems always had resulted from the practice of collecting income taxes in March of the

Table 1

1944 INCOME TAX RETURNS

Income		Number of Returns (000's)	Total Tax (billions)	Effective Tax Rate
Under $500		3,260	—	—
$ 500 – $	2,000	20,154	$1.8	2– 9%
2,000 –	3,000	11,302	2.7	9–10
3,000 –	5,000	9,736	4.3	11–14
5,000 –	10,000	1,834	2.0	15–21
10,000 –	25,000	495	2.0	22–34
25,000 –	100,000	129	2.4	38–58
100,000	and over	8	1.0	61–76

SOURCE: U.S. Treasury Department, Bureau of Internal Revenue, *Statistics of Income for 1944*, Part 1, Washington, DC, U.S. Government Printing Office, pp. 15, 96–97.

year after the income had been earned: many individuals already had spent the income on which taxes were due and the Treasury was faced with difficulties in collecting taxes after the ability to pay got "cold."

The idea of collection at the source was particularly appealing to the Treasury during the War, because it could guarantee a prompt and certain flow of funds to finance defense spending. Moreover, it could increase the efficiency of collection by reducing the possibility of evasion and could contribute to the fight against inflation by withdrawing funds before they hit the income stream. The Bureau of Internal Revenue was not enthusiastic about the prospect, pointing out that it imposed a considerable burden upon them at a time when personnel was almost impossible to obtain. However, once faced with the challenge, they managed to overcome it.

Between 1944–70, an increasing proportion of personal income tax collections was withheld from employees; withholding accounted for almost 74% of collections by 1970, and almost 78% in 1979 (see *Table 2*).

The adoption of withholding made a substantial contribution to strengthening the federal income tax system by its facilitation of tax collections. It eased payment for the individual taxpayer by collecting the tax due in a series of small almost unnoticeable bites. As the Bureau of Internal Revenue gained experience, tax collections at the source proceeded smoothly and yields increased. The federal income tax had become a highly effective mass tax, largely self-administered by the taxpayer, with greatly reduced possibilities of evasion.

The federal government emerged from the second World War in a dominant position, with a strong and efficient revenue system which had shown its ability for tremendous expansion. In the course of the War, the national debt had increased from $51 billion in June 1940 to $279.2 billion in February 1946, but interest rates had been kept low and the burden of interest on the debt (at about $5 billion annually) was relatively light.

State Income Taxes During World War II

The effect of the heavy reliance by the federal government upon the income tax for financing the war effort was virtual preemption of the field and a stifling of further state efforts to adopt individual income tax legislation. After 1938 and throughout the period of World War II, not one single state enacted a new individual tax.[26] Instead states tended to adopt sales taxes, possibly influenced in the early years of the period by the fact that during the Depression the sales tax had proved to be a much more stable source of revenue. State adoption of income tax laws also was discouraged by difficulties in amending state Constitutional provisions prohibiting progressive income taxes (the states which were still without authority to impose income taxes tended to have the difficult legislative problems) and by fears of inter-

Table 2

INCOME TAX COLLECTIONS WITHHELD BY EMPLOYERS, 1944–79

Fiscal Year	Percentage of Collections Withheld by Employers
1944	4.28%
1945	53.1
1950	57.7
1955	67.2
1960	70.5
1965	68.7
1970	74.7
1975	78.1
1979	77.7

SOURCE: U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970, Bicentennial Edition*, Part 2, Washington, DC, U.S. Government Printing Office, p. 1091; and *Statistical Appendix to the Annual Report of the Secretary of the Treasury, Fiscal Year 1979*, Washington, DC, U.S. Government Printing Office, p. 46; and ACIR staff computations.

state tax competition. States did not attempt to withhold income taxes until later.

After the War, state interest in adoption of income taxes was dampened by the fact that the federal government was already using this tax source to such an extent that there was very little room for the states to move in. Throughout the War years, state income tax collections reached a high of $368.7 million (by 33 states) in 1945, compared to federal collections of $17 billion in the same year.[27]

The Federal Income Tax in the Postwar Period

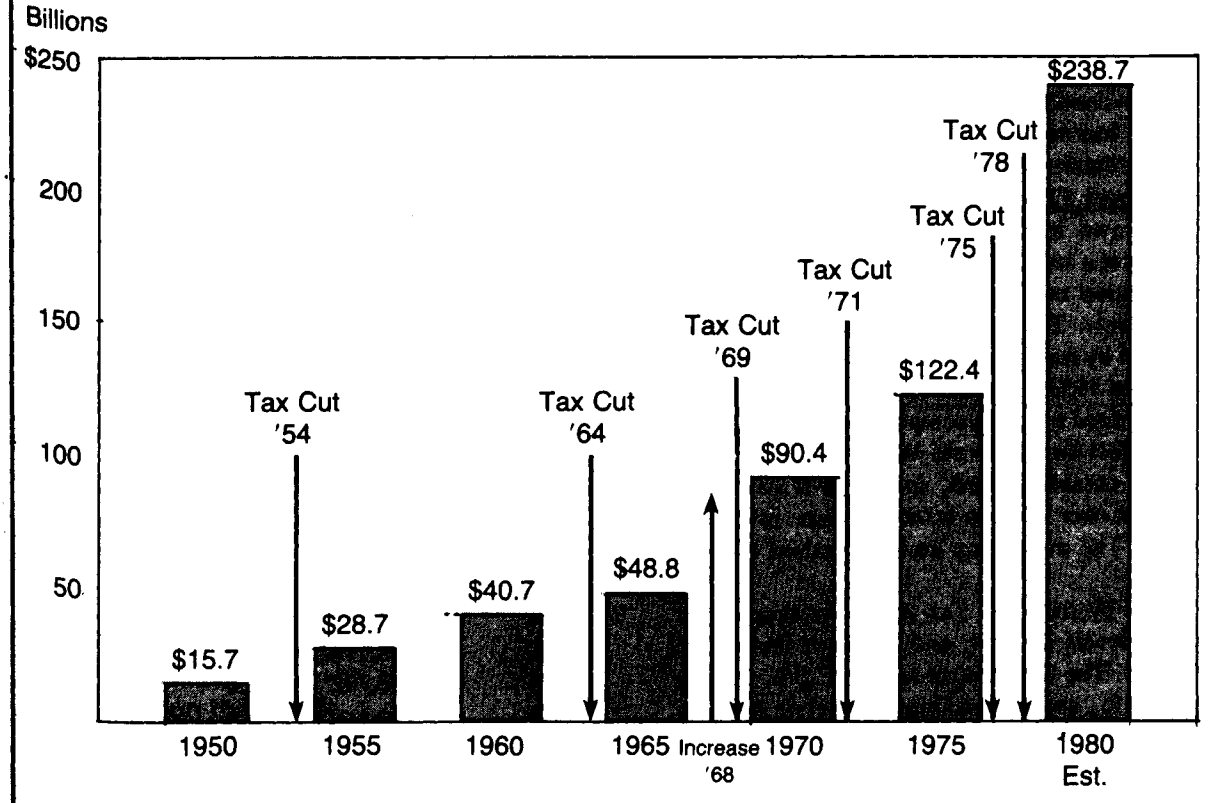
The course of the income tax in the years directly following World War II gave important indication of its role in the future years. Income tax receipts had risen from $1.4 billion in 1941 to over $19 billion in 1945; accounting for over 40% of all federal internal revenue collections.[28] As victory came in sight, public demand for tax relief found a receptive ear in Congress which overrode a veto by President Roosevelt to enact tax cuts in the *Individual Income Tax Act of 1944*. Still another tax relief bill was enacted in 1945. Yet, even after two tax relief measures, income tax receipts continued at a level much closer to the wartime level than the prewar level—1946 collections were $18.7 billion.

Congress pressed for further tax relief and passed two more tax reduction bills, only to have them vetoed by President Truman who argued in his Budget Message of January 1947 that tax reduction must be delayed:

> As long as business, employment, and national income continue high, we should maintain tax

Chart 2

FEDERAL INDIVIDUAL INCOME TAX RECEIPTS



SOURCE: ACIR, *Significant Features of Fiscal Federalism, 1979–80,* Washington, DC, U.S. Government Printing Office, Table 45.

> revenues at levels that will not only meet current expenditures but also leave a surplus for retirement of the public debt. There is no justification now for tax reduction.[29]

In the prosperity which followed immediately after the War, total personal income tax collections continued to increase—they reached almost $21 billion in 1948. Total federal internal revenue collections remained high also, between $39 and $42 billion compared to a prewar range of between $1.6 billion and $5.3 billion between 1933–40.[30] The Depression and World War II had greatly magnified the scale of government activities and the receipts necessary to finance them. With the end of the War, postwar reconstruction (the loan to the United Kingdom, the Marshall plan, and veterans programs) and the approach of the Cold War (new defense expenditures and aid to Greece and Turkey) all required substantial increases in federal funds; the cost of single programs (such as the Marshall plan) frequently exceeded the level of the entire federal budget in prewar years.

Taxes were cut again in 1948 when Congress mustered enough votes to enact cuts of 5 to 12.6% in personal income taxes over still another Truman veto. Total receipts dropped to the postwar low of $17 billion in 1949.[31]

In 1950, the conflict in Korea began. The Administration policy was to finance it as much as possible through taxes. This avoided increasing the war-swollen public debt (about $257 billion at that time)[32] and also helped hold down inflationary pressures, which then were mounting at a sufficiently alarming rate to persuade the Administration and Congress to impose new price and wage controls. The first tax increase was in 1950; it was followed by another in 1951, which was to apply only to 1952 and 1953 incomes. Rates on 1952 and 1953 incomes were raised to levels comparable to those which had been in effect during World War II: 22.2% on the first $2,000 of taxable income, and up to a maximum effective rate of over 87% on taxable income in excess of $200,000.[33] The overall tax limit was raised to 88% on net income.

As provided by the 1951 *Tax Act*, rates reverted to slightly lower levels in 1954, and remained there until the mid-1960's. The first bracket rate was 20%, the top bracket was 91%, and the maximum effective tax was 87%.[34] These high rates were applied to incomes which reflected an increasingly prosperous economy, and federal individual income tax yields continually rose. Thus the federal government emerged from the Korean War with a massive income tax system—one in which the high rates previously characteristic only of wartime were applied to incomes which reflected the prosperity of postwar United States, and later, an increasing degree of inflation.

As prosperity and inflation pushed taxpayers' incomes into higher and higher brackets, and the income tax collections rose from $28.7 billion in 1955 to almost $40.7 billion in 1960 and $47.5 billion in 1963, federal legislators discovered that they could give a series of tax cuts to the taxpayers, and still enjoy increased yields (see *Chart 2*). Prompted by fears that the high federal tax collections were dragging down the economy, the Kennedy Administration gave a major tax cut in 1964. It was followed by a series of smaller tax cuts in subsequent years—there were cuts in 1969, 1971, 1975, and 1978. In some of these years, the reductions consisted of raising exemptions; in other years, there were rebates, or tax credits. Despite the reductions given the individual taxpayer, the yield of the individual income tax continued to rise—it reached $90 billion in 1970 and $122 billion in fiscal year 1975, and an estimated $238.7 billion in 1980. As a percent of GNP, federal individual income taxes rose from 5.95% in 1950 to 8.17% in 1960, 9.42% in 1970, 9.66% in 1980, (and an estimated 10.33% in 1981).[35]

State-Local Income Taxes Since World War II

Continuing reliance by the federal government upon

Table 3

FEDERAL, STATE, AND LOCAL SHARES OF TOTAL INDIVIDUAL INCOME TAX RECEIPTS, 1950–80

Year	Total Income Tax Receipts (in Billions)	PERCENT Federal	State	Local
1950	$ 16,533	95.2 %	4.4 %	.4%
1955	29,984	95.9	3.6	.5
1960	43,178	94.3	5.1	.6
1965	48,792	92.3	6.9	.8
1970	90,412	89.3	9.1	1.6
1975	143,840	85.1	13.1	1.8
1980 Est.	279,417	85.4	12.9	1.7

SOURCE: ACIR, *Significant Features of Fiscal Federalism, 1979–80*. Report M-123, Washington, DC, U.S. Government Printing Office, October 1980; p. 59; and ACIR staff computations.

an income tax with high rates had had the effect of partially preempting its use; the hiatus in state adoption of income taxes which had begun in 1930 continued. Until 1961 there was little activity in the area of state-local use of the income tax. During that period no state joined the rank of those imposing income taxes; state income tax rates were kept low, and receipts grew slowly, rising from $.4 billion in 1946 to $2.2 billion in 1960.[36]

After 1960, state interest in income taxes again revived, stimulated by the states' needs to strengthen and diversify revenue sources. Ten more states adopted income taxes in the period between 1960 and the present.[37] Receipts of states imposing a broad-based income tax—40 at present[38]—have gradually increased from $2.2 billion in 1960 to $9.2 billion in 1970, $18.8 billion in 1975, and an estimated $36.0 billion in 1980. In 1980 individual income taxes will account for about 26% of state revenues.[39]

Local governments also have begun to use the income tax, but with comparatively low rates. By 1980, income taxes accounted for almost 6% of total local receipts.[40]

Despite this increased interest by the state-local sector, the federal government continued its dominant role in the use of this levy. In 1950, the federal government received 95% of the total income tax receipts of $16.5 billion; by 1980, its share had dropped to 85% of the estimated total $279.4 billion in total receipts. State governments received 13% and local governments, almost 2% (See *Table 3*).

III

Federal Transfers of Funds From Defense to Domestic Expenditures During the Past 30 Years

A source of funds for the expansion of federal domestic expenditures during the past 30 years has been the ability of the federal government to reduce the proportion of funds devoted to defense expenditures and to increase the proportion spent on domestic purposes. Here again, the federal government has a singular advantage, since this method of increasing funds spent on domestic programs is not available to the state-local sector.

During the intense military effort of World War II, defense expenditures reached a peak proportion of over

Table 4

Federal Outlays, by Major Function, 1946–50

(in billions of dollars)

Function	Federal Outlays				
	1946	1947	1948	1949	1950
Total Outlays	$61.7	$36.9	$36.4	$40.6	$43.1
Defense	44.7	13.1	13.0	13.0	13.1
International Affairs and Finance	2.7	4.6	4.7	6.1	4.8
Veterans Benefits and Services	3.4	6.9	6.4	6.6	8.8
Interest on the Public Debt	4.7	4.9	5.1	5.4	5.7
Subtotal	55.5	29.5	29.2	31.2	32.4
Other Functions	6.2	7.4	7.2	9.4	10.7

SOURCE: U.S. Department of Commerce, Bureau of the Census, *Historical Statistics of the United States, Bicentennial Edition*, Washington, DC, U.S. Government Printing Office, Part 2, p. 1116.

Table 5

NATIONAL DEFENSE AS A PERCENT OF TOTAL OUTLAYS, 1950–80

Fiscal Year	National Defense as a Percent of Total Outlays
1950	30.4%
1955	58.7
1960	49.8
1965	41.9
1970	40.0
1975	25.6
1980	22.9

SOURCE: 1950–65: U.S. Department of Commerce, Bureau of the Census, *Historical Statistics of the United States, Bicentennial Edition*, Washington, DC, U.S. Government Printing Office, Part 2, p. 1116, 1970–80; Executive Office of the President, Office of Management and Budget, *Budget of the United States for Fiscal Year 1982*, Washington, DC, U.S. Government Printing Office; and ACIR staff computations.

80% of total federal expenditures (between 1943 and 1945). Following the War, defense expenditures were cut sharply, dropping from the $90 billion wartime level to a postwar level of $13 billion in 1947—around 35% of total outlays. Other expenditures began to expand: for example, the "other" category (all expenditures except defense, veterans, international, and interest on the public debt) expanded from a level of $6.2 billion in 1946 to almost $11 billion (see *Table 4*).

The conflict in Korea and other defense expenditures related to the "Cold War" sent outlays for defense to almost 66% of total outlays in 1953 and 1954. Following that period, the share of total budget outlays spent on defense dropped steadily (see *Table 5*).

A chart in the *Special Analyses of the Federal Budget for 1981* shows that in the period between 1952–80, defense purchases of goods and services have taken a smaller share of the total federal spending in each five-year period (see *Chart 3*). There has been a corresponding rise in the share taken by domestic expenditures such as grants-in-aid and domestic transfer programs. As de-

Table 6

FEDERAL SECTOR EXPENDITURES AS A PERCENT OF GNP, 1949–51 TO 1979–81

	1949-51 Average Actual	1959–61 Average Actual	1969–71 Average Actual	1979–81 Average Estimate
Defense Purchases	5.5%	9.3%	7.8%	4.7%
Foreign Transfer Payments	1.5	.4	.2	.2
Domestic Nondefense Programs:	6.6	8.1	11.2	15.5
Nondefense Purchases	2.2	1.8	2.3	2.6
Domestic Transfer Payments	3.3	4.3	5.9	9.1
Grants-in-aid to State and Local Governments	.8	1.4	2.4	3.4
Subsidies Less Current Surplus of Government Enterprise	.3	.6	.6	.4
Net Interest Paid	1.5	1.3	1.4	1.9
Total Expenditures	15.2	19.0	20.6	22.1

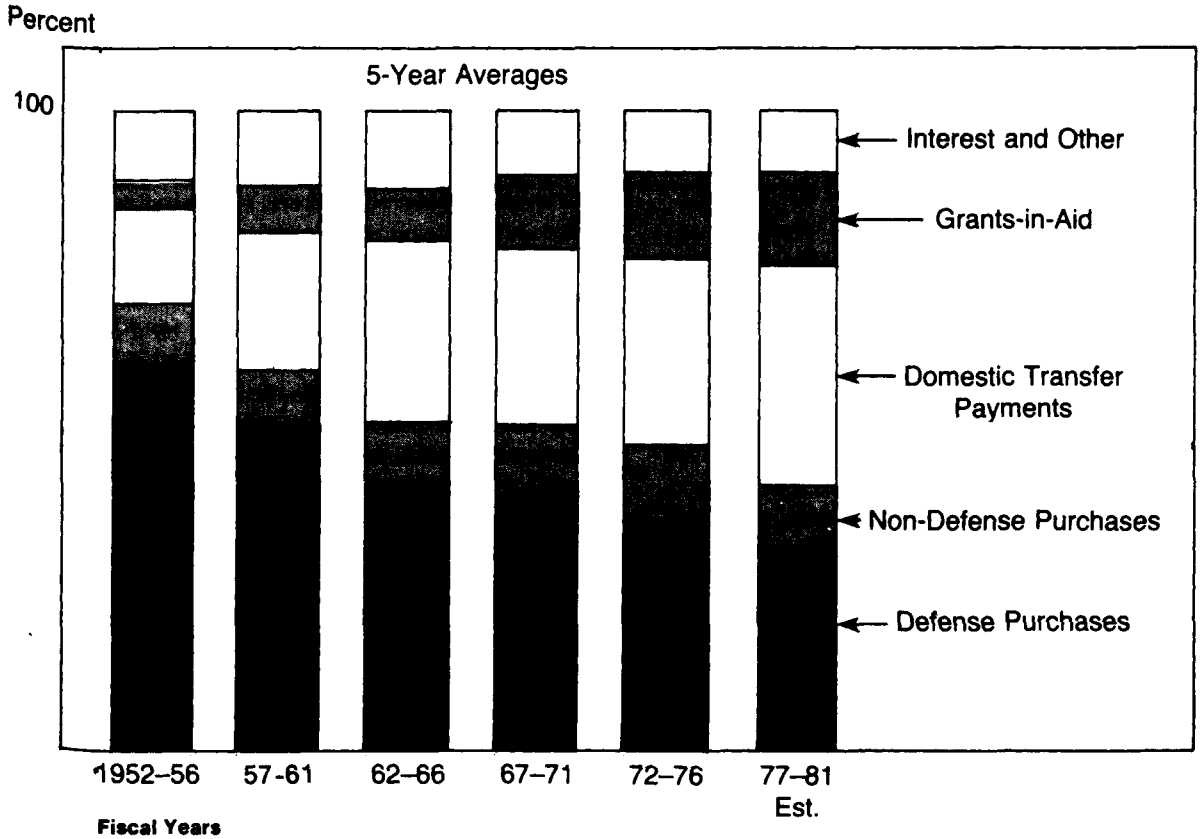
SOURCE: Derived from Executive Office of the President, Office of Management and Budget, *Special Analysis B, The Budget for Fiscal Year 1981*, Washington, DC, U.S. Government Printing Office, p. 53.

fense expenditures dropped from 60% of all federal expenditures for the five-year period between 1951–56 to a little more than an estimated 20% in the 1977–80 period, domestic transfer payments and grants-in-aid rose from a little more than 20% in the 1952–56 period to almost 50% in 1977–80.

The shift is apparent not only in the proportion of federal government expenditures devoted to each category, but in figures showing federal sector expenditures as a percent of the GNP. Domestic nondefense programs accounted for 6.6% of GNP in 1949–51, and rose to an estimated 15.5% in 1979–81 (see *Table 6*). Since 1949–51, the three-year average of grants-in-aid to state and local governments has risen from 0.8% of the GNP to an estimated 3.4% for the three-year average for 1979–81; domestic transfer payments have risen from 3.3% of GNP to 9.1% in the same period. Defense purchases have declined: although in 1949–51, the average percent was a low 5.5% because expenditures were offset by receipts from sales of surplus World War II materials, in 1959–61, it rose to 9.3% of GNP, and then gradually dropped off to an estimated 4.7% in 1979–81.[41]

Chart 3

DISTRIBUTION OF FEDERAL SECTOR EXPENDITURES BY CATEGORY



SOURCE: Special Analyses, *The Budget for Fiscal Year 1981*, p. 52.

IV
The Separate Social Security System

The third most important factor which contributed to the expansion of federal revenues stems from the separation of the federal Social Security system from general budget expenditures and revenues. From the beginning of the Social Security program until quite recently, the public and legislators tended to regard the Social Security system as a self-financing insurance plan. Expenditures were made from the segregated Social Security trust fund; receipts of the trust fund came from a payroll tax which was separate from the individual income tax. This produced a "two-track" federal revenue system.

The separation of the two systems directed attention away from the significant increases in Social Security payroll tax receipts—from 9.3% of total federal revenues in 1939 to nearly triple the amount, or 27.7% of total federal revenues in 1979. The two-track system also has stimulated the growth of the Social Security system by protecting it from head-to-head competition with other federal programs funded from general revenues. This insulation is a two-way street, since programs funded from general revenues also have been protected from competing for revenues with the Social Security program. As a result, general government programs are probably larger than they would be if they had been forced to compete with the popular Social Security system for a share of the general revenue pie.

DEVELOPMENT OF A TWO-TRACK SYSTEM

The Social Security system evolved from a modest beginning as a limited retirement insurance program into the 'fourth level" of U.S. fiscal federalism. In 1939, total Social Security payroll taxes amounted to $490 million or 0.6% of the Gross National Product (GNP); four decades later, payroll tax revenues totalled $120 billion, or 5.2% of GNP. Social Security taxes now exceed local governments' total tax levy—3.4% of GNP—and are on a par with the tax burden imposed by the states—5.5% of GNP (see *Table 7*).

The Social Security Act of 1935 (P.L. 74–271) established a system of federal old age retirement benefits covering workers in commerce and industry. The system was financed not by the income tax, but rather by a payroll withholding tax, shared equally by employers and employees. The initial rate was 2%, payable on the first $3,000 of a worker's wages. Benefits were to be based on cumulative wages on which the tax had been paid and were payable only to individuals who had made payroll tax payments. The tax was inaugurated on January 1, 1937, but in order to allow an operating fund to accumulate, initial benefit payments were scheduled for 1942.

It quickly became apparent that the system's original financing and benefit structures would produce a huge surplus, projected to total $47 billion by 1980. Two factors accounted for the predicted vast reservoir of untapped funds: the five-year head start given to the payroll tax, and the system's "immaturity"—the fact that even after benefit payments had begun, there would be many more workers paying into the fund and not yet eligible for benefits than would be currently receiving payments.

The *Social Security Act Amendments of 1939* pared down the surplus and expanded benefits. The provisions of the act: (1) advanced the starting date of benefit payment to 1940, (2) extended benefits to dependents and survivors of covered workers, (3) liberalized the benefit formula by basing payments on average monthly wages rather than cumulative wages, and (4) deferred a payroll tax increase scheduled for 1940 until 1943.

The 1939 amendments proved to be a crossroads in the development of Social Security as the system was placed on a pay-as-you-go financing plan. From 1939 on, the Social Security revenue structure was no longer designed to accumulate a large surplus of funds, but rather simply to generate annual revenues roughly equal to current-year operating costs.[42] As a result of this revision, workers making payroll tax contributions were and are not directly providing for their own future retirement benefits, but instead financing the benefits of current Social Security recipients. During their retirement years current workers, in turn, will have their benefits financed by a younger generation of taxpayers.

The 1939 amendments were merely the first in a series of significant revisions and expansions of Social Security. Disability benefits were incorporated into the system in 1956 and medical benefits were added in 1965 through enactment of the Medicare program. Between 1950–71, Congress approved several ad hoc benefit increases and in 1972 benefits were "indexed" to automatically reflect increases in the cost of living.

Table 7

FEDERAL, STATE, AND LOCAL TAXES, AS A PERCENT OF GROSS NATIONAL PRODUCT, SELECTED YEARS, 1939–80

Fiscal Years	Total Public Sector	Federal			State	Local
		Total	Other than Social Security	Social Security		
1939[1]	14.6%	6.0%	5.4%	0.6%	3.5%	5.1%
1949	19.9	14.3	13.6	0.7	2.8	2.8
1959	22.9	16.0	14.3	1.8	3.4	3.5
1969	28.4	19.9	16.1	3.7	4.6	3.8
1974	28.0	18.4	13.6	4.9	5.5	4.2
1975	27.9	18.2	13.0	5.2	5.5	4.2
1976	27.0	17.3	12.4	4.9	5.5	4.2
1977	28.3	18.4	13.3	5.0	5.7	4.2
1978	28.2	18.5	13.3	5.1	5.7	4.0
1979	28.1	18.9	13.6	5.3	5.6	3.6
1980[1]	28.4	19.5	14.0	5.5	5.5	3.4

[1] Partially estimated.
Note: Details do not necessarily add to total because of rounding.
SOURCE: ACIR staff computation based on various *Economic Reports of the President*, Washington, DC, U.S. Government Printing Office; U.S. Department of Commerce, U.S. Bureau of the Census, Governments Division, various reports; U.S. Department of Commerce, Office of Business Economics, *Survey of Current Business*, Washington, DC. U.S. Department of Commerce, various issues; and ACIR staff estimates.

Expansion of the Social Security system also included extension of coverage to a larger proportion of the nation's workforce. The original program encompassed workers in commerce and industry or approximately 60% of the working population, but several piecemeal expansions have produced a system that today includes nine out of ten workers. The 10% of the workforce not covered by Social Security is composed primarily of employees of the federal government, about 28% of all state and local government employees,[43] and employees of certain nonprofit institutions.

THE ROLE OF THE PAYROLL TAX

The payroll tax lies at the very heart of the Social Security system. Over the past four decades, it has served as a pervasive influence shaping public perceptions of the system as a secure, responsive, powerful revenue mechanism, and as a critical factor determining the growth and development of both Social Security and federal government programs funded from general revenues.

The two-track federal revenue system created by the adoption of the payroll tax had largely removed the Social Security system from the competitive arena of the normal budgetary process. Payroll tax revenues are not deposited in the general revenue fund, but instead are placed in special trust funds reserved exclusively for the Social Security system. In addition, prior to the 1969 fiscal year the system was further insulated from the budgetary process by what might be described as a two-track expenditure system: Social Security receipts and expenditures were not included in the administrative budget of the federal government.[44]

Social Security traditionally has enjoyed public and political support and a key to this widespread approval is the contributory nature of the system that enabled participants to view their benefits as an "earned right" rather than as a government handout. Indeed, supporters of Social Security have always taken great pains to present the program as a vast insurance system, and the payroll tax had been instrumental in fostering this analogy between Social Security and private insurance.

CURRENT PROBLEMS

Though as recently as 1979 Social Security was described as "the government's most successful social program,"[45] over the past several years the fortunes of the system have taken a decided turn for the worse. Soaring costs, slumping revenues, eroding public support and a growing perception in Congress that the payroll tax rate is at or very near its maximum politically tolerable level have all cast an ominous shadow on the future of Social Security.

The first warning signals of Social Security's deteriorating fiscal health appeared in the early 1970s when official forecasts began projecting long-range deficits. Following hot on the heels of these pessimistic projections came four consecutive years (1975–78) in which current expenditures exceeded revenues by amounts ranging from $1.5 billion to $5.5 billion. While in 1977, Congress approved a package of reforms intended to ease the fiscal strains upon the system, the full recuperative effect of these measures will not be felt immediately. Thus, the Congressional Budget Office has predicted that the system's reserve fund may dip to dangerously low levels in the mid-1980s.

Economic "stagflation" has contributed heavily to the current woes of Social Security, as high levels of both inflation and unemployment represent a burdensome "double whammy." Persistent and substantial increases

Table 8

SOCIAL SECURITY PAYROLL TAX WAGE BASE, COMBINED EMPLOYER-EMPLOYEE TAX RATE, AND MAXIMUM EMPLOYEE ANNUAL TAX, SELECTED YEARS, 1937–81

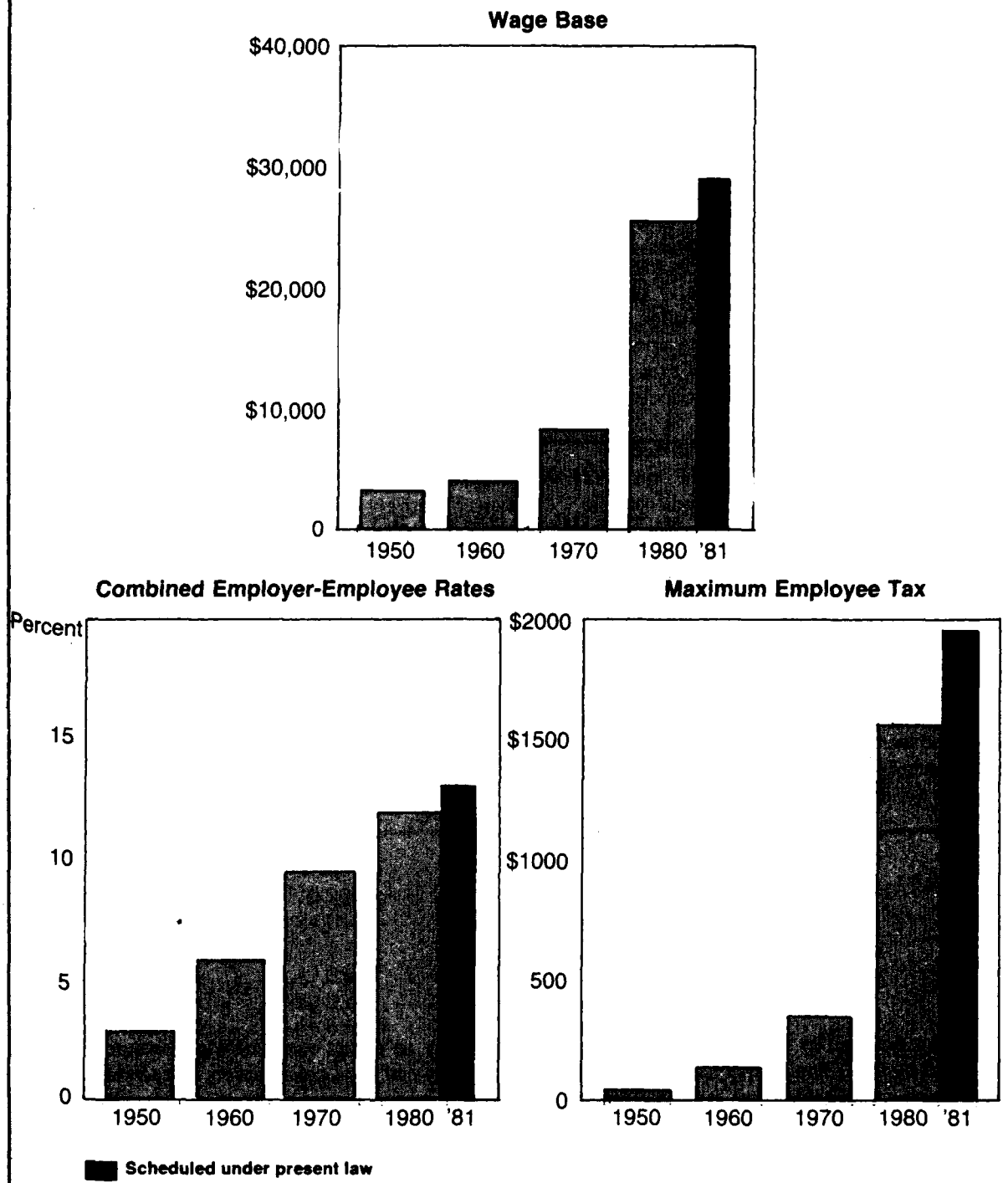
Period or Year	Wage Base	Combined Tax Rate[1]	Maximum Employee Annual Tax	Percentage Increase From Previous Year
1937–49	$ 3,000	2.00%	$ 30.00	—
1950	3,000	3.00	45.00	50%
1960	4,800	6.00	144.00	12.3[2]
1970	7,800	9.60	374.40	10.3[3]
1971	7,800	10.40	405.60	8.3
1972	9,000	10.40	468.00	15.4
1973	10,800	11.70	631.80	35.0
1974	13,200	11.70	772.20	22.2
1975	14,100	11.70	824.85	6.8
1976	15,300	11.70	895.05	8.5
1977	16,500	11.70	965.25	7.8
1978	17,700	12.10	1,070.85	10.9
1979	22,900	12.26	1,403.77	31.1
1980	15,900	12.26	1,587.67	13.1
1981	29,700[4]	13.30[4]	1,975.05[4]	24.4
1990	[5]	15.30[4]	—	—

[1] Includes both OASDI and health insurance.
[2] Average annual percentage increase 1950–60.
[3] Average annual percentage increase 1960–70.
[4] Scheduled under present law.
[5] The wage base for years 1982 and beyond will be determined by a formula that is based on the rate of inflation.

SOURCE: ACIR staff compilations based on Social Security Bulletin, *Annual Statistical Supplement, 1976,* Washington, DC, U.S. *Government Printing Office.*

Chart 4

THE DRAMATIC GROWTH OF THE SOCIAL SECURITY TAX



SOURCE: ACIR Staff computations based on *The Social Security Bulletin, Annual Statistical Supplement*, Washington, D.C., U.S. Government Printing Office.

in the cost of living have driven the price tag of the system's indexed benefit structure ever upward, while chronic unemployment has weakened its revenue position, because unemployed workers do not make payroll tax contributions. While "stagflation" has imposed significant short-run fiscal strains upon the Social Security system, the long-run impact of the precipitous decline in the birth rate in the United States over the past two decades could prove even more burdensome. In 1957, women of childbearing age were expected to give birth to an average of 3.8 children during their lifetime, while in 1976, the corresponding figure stood at 1.8. Continued lower fertility rates would mean that when the post-World War II "baby boom" generation reaches retirement age early in the next century there will be a smaller workforce making payroll tax contributions to support a substantially larger benefit recipient population. This decline in the ratio of contributors to beneficiaries will necessitate heavier payroll tax burdens and exacerbate a stormy political controversy already surrounding the payroll tax.

Traditionally a source of strength for Social Security, the payroll tax ironically has become the system's Achilles heel. As *Table 8* and *Chart 4* indicate, the maximum tax burden has risen sharply in recent years. For 1980, the maximum annual tax liability for an individual worker stood at $1,588—more than double the figure of only six years earlier. Wage base and tax rate hikes scheduled for 1981 raise the maximum by another 24%. In addition, over the next ten years the combined tax rate will increase by more than two percentage points, to a level of 15.3%.

As the scheduled increases over the past six years have pushed Social Security payroll taxes to amounts approaching $2,000 for the maximum annual tax paid by the employee, the public tendency to view the Social Security System as separate and apart from the federal general revenue system has diminished. Analyses and articles have begun to add the individual income tax payments to the Social Security payments as representative of an individual's total tax burden, instead of considering the Social Security payment as contribution to retirement insurance. Legislators began to suggest cuts in individual income tax rates as offsets to scheduled Social Security rate increases. The 1978 cut in individual income taxes was presented as alleviating the impact of Social Security rate increases. (See, for example the 1978 *Congressional Quarterly Almanac*, p. 223, for a table drawn up by the Congressional Joint Committee on Taxation presenting a summary of the 1978 income tax cut, the inflation tax increase, and the Social Security tax increase to arrive at net changes for individual taxpayers in 1978.) The two-track system then has begun to merge.

In its final report, the 1979 Advisory Council on Social Security declared that, "the time has come to finance some part of Social Security with nonpayroll tax revenues." The Council recommended that the hospital insurance component of the Medicare program be "financed entirely through earmarked portions of the personal and corporation income tax." [46] The Council also proposed a countercyclical general revenue funding plan designed to insulate Social Security from economic fluctuations. The system would provide general revenue payments to the Social Security trust funds during periods of economic recession to offset the loss of payroll tax revenues resulting from high unemployment. The net impact of these suggested changes is to place ths Social Security system in the arena competing for tax revenues against other government programs in general and against federal aid claimants in particular.

V
Federal Aid

Federal programs financed by the constantly increasing funds provided by the federal individual income tax might have met with considerably more resistance from the states and local governments if the revenues had been devoted exclusively to federal programs. However, by devoting an increasing proportion of federal domestic expenditures to federal grants-in-aid to state and local governments, potential state and local objections were muted. Federal grants-in-aid provided Congress with a facile way to co-opt state and local resources, and to enlist state and local policymakers and administrators in domestic program aims.

The development of the massive federal aid programs has been long and complicated. (Other volumes in this series on the *Federal Role in the Federal System* are devoted to studying specific aid programs). However, early steps toward developing the present large-scale grant-in-aid program (block grants and General Revenue

Sharing as well as the categorical aid programs) were related to the emergence of the federal individual income tax as a powerful revenue producer during the 1960s.

During the early 1960s, attention began to focus on the "fiscal drag." At the federal level during this period, economic growth combined with the potent revenue system generated funds faster than increases in public demands for new or expanded federal programs. Economists pointed out that the federal tax system channeled about one-fifth of economic growth into additional revenues, but that the normal growth of defense and domestic programs would absorb only a fraction of this increase. The potential increase in each year's revenues was large enough to exert a significant depressing influence upon the economy unless the "fiscal dividend" thus generated could be returned to the income stream either in the form of reduced taxes or increased expenditures.[47]

This reasoning supported the tax cut of 1964, which had a gratifying stimulative effect upon the economy. As Walter Heller commented: "Careful appraisal of the tax cut's impact on the GNP shows a remarkably close fit of results to expectation."[48] But a one-time tax cut was not sufficient to take care of what was seen as a long-term problem.

Walter Heller pointed out an intergovernmental fiscal imbalance. In contrast to the bounty provided by the federal revenue system, state-local revenues were not sufficient to meeting growing needs.[49] He suggested solving problems of fiscal imbalance by sharing the federal fiscal dividend (in the form of General Revenue Sharing) with state and local governments. Such a measure would eliminate the federal fiscal drag, and at the same time compensate for the anemic nature of state-local revenue sources. Heller also believed that unrestricted grants to the states would encourage nonfederal initiatives to solve pressing domestic social problems upon which attention had focused during the 1960's.

The suggestion that General Revenue Sharing be adopted was rejected by President Johnson who chose

Table 9

HISTORICAL TREND OF FEDERAL GRANT-IN-AID OUTLAYS, 1950–80

(fiscal years: dollar amounts in millions)

	Composition of Grants-in-Aid			Federal Grants as a Percent of Budget Outlays		
	Total Grants-in-Aid	Grants for Payments to Individuals	Other	Total	Domestic [1]	State and Local Expenditures [2]
Five-Year Intervals						
1950	$ 2,253	$ 1,257	$ 996	5.3%	8.8%	10.4%
1955	3,207	1,623	1,584	4.7	12.1	10.1
1960	7,020	2,479	4,541	7.6	15.9	14.7
1965	10,904	3,931	6,972	9.2	16.5	15.3
1970	24,014	9,023	14,991	12.2	21.1	19.4
Annually						
1975	49,834	17,441	32,392	15.3	21.3	23.1
1976	59,093	21,023	38,070	16.1	21.7	24.4
1977	68,414	23,860	44,555	17.0	22.7	25.8
1978	77,889	25,981	51,908	17.3	22.9	26.4
1979	82,858	28,765	54,093	16.8	22.4	25.6
1980	91,472	34,174	57,298	15.8	21.1	26.3

[1] Excludes outlays for the national defense and international affairs functions.
[2] As defined in the national income and product accounts.

SOURCE: U.S. Office of Management and Budget, *The Budget for Fiscal Year 1982,* Special Analyses H, p. 252.

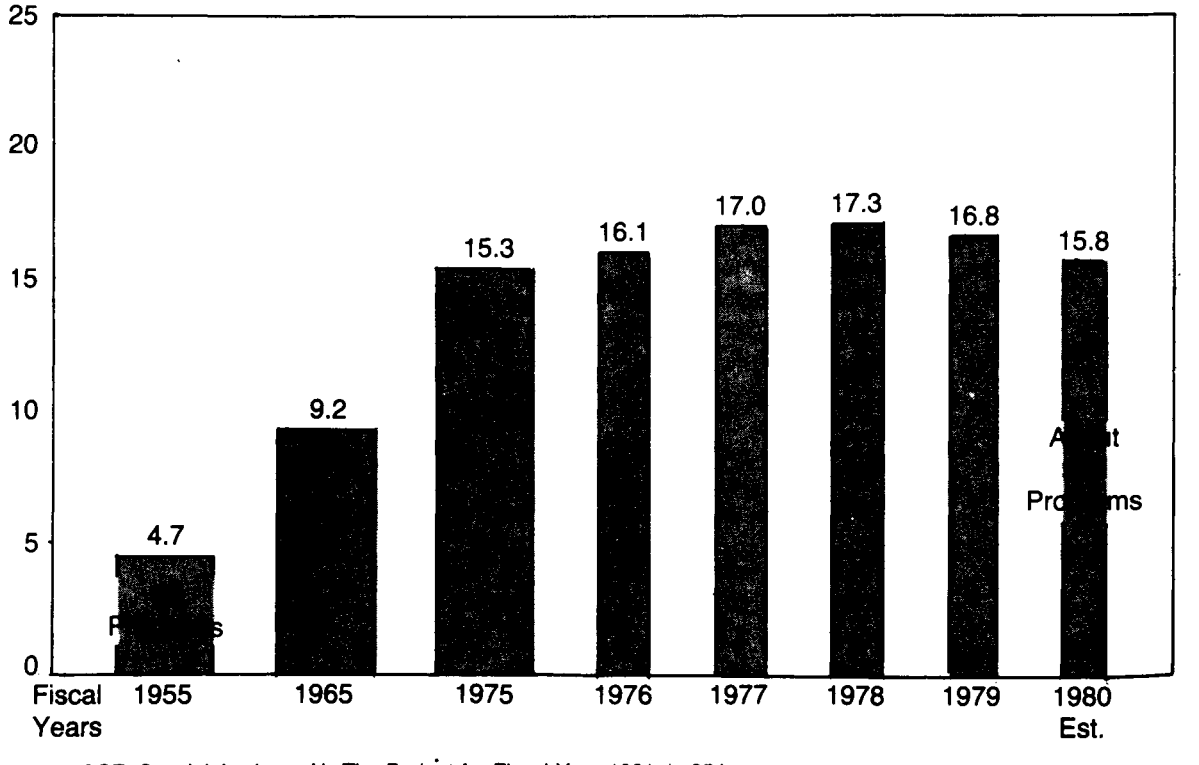
to use the fiscal dividend for the expansion of categorical social welfare grants to state and local governments—his "Great Society" program. These programs, which contained substantial built-in annual expenditure increases together with the Vietnam War more than fully absorbed the fiscal dividend in the period following 1964.

The realization of Heller's General Revenue Sharing came not at the end of the Vietnam conflict, but at the inauguration of a new President. President Nixon came to office with a commitment to strengthen states and local governments by providing them with additional funds in the form of General Revenue Sharing and by consolidating categorical grants into block grants so that recipients would have more freedom in deciding how to spend their federal funds.

Although the federal government was still running a substantial deficit, the supporters of General Revenue Sharing pointed out that postponing the beginning of revenue sharing would be assigning a lower priority to state and local financial problems than to all other federal needs. Congress enacted (albeit somewhat reluctantly) General Revenue Sharing Legislation in 1972, at an initial annual level of over $5 billion. Thus, the fears of the potentially adverse effects of the federal fiscal dividend gave way to practical political concerns which first caused an increase in categorical grants and then the introduction of block grants and General Revenue Sharing during the Nixon Administration.[50] In the past few years, expansion in programs of aid to the state-local

Chart 5

FEDERAL GRANTS-IN-AID AS A PERCENT OF FEDERAL BUDGET OUTLAYS 1955–80



SOURCE: Special Analyses H, *The Budget for Fiscal Year 1981*, p. 254.

sector also has come from the economic stimulus program which Congress began and which were expanded at President Carter's urging in hopes of combatting the effects of the mid-decade recession.

Federal grants-in-aid then rose from $2.2 billion in 1950 to $7.0 billion in 1960, $24 billion in 1970, and an estimated $89.8 billion in 1980. In constant dollars, the 1980 figure represents a 70% increase over 1970.[51] Federal aid rose from 5.3% of total federal budget outlays in 1950 to 15.8% in 1980 (see *Table 9* and *Chart 5*). It accounted for an estimated 25% of all state-local expenditures.

The potent federal income tax made it possible for the federal government to provide a significant proportion of the funds used by states and local governments, thereby increasing state-local dependency upon federal resources and lessening somewhat pressures on them to increase their own tax resources, such as the income tax. However, there is also the counterbalancing effect of the stimulative impact of over 500 federal grant programs, which frequently led states and local governments to initiate or fund programs which they might not have funded without the lure of federal aid.

In view of the constantly increasing yield of the federal tax system, and the widely discussed problem of the "fiscal drag," why was major tax reduction consistently rejected as a policy alternative to continuous program and federal aid expansion during the past 30 years? In the immediate post-World War II period—when the major tax reduction act of 1948 was passed over a Truman veto—the Administration opposed tax reduction on several grounds: its potential contribution to already troublesome inflationary pressures; the need for funds to reduce the public debt which had been substantially increased by the War; and fears that substantial reduction in government activity might return the economy to the traumatic situation of the Great Depression. During this period then the decisions not to reduce taxes were made for reasons of economic and fiscal policy. After 1950, although there were six tax cuts, none of them were of sufficient size to halt the steady long-term growth in individual income tax receipts (see *Chart 2*).

Soon after the end of World War II, the growing program demands of the reconstruction in Europe (the loan to the United Kingdom and the Marshall plan), and the beginning of the Cold War, which was to lead to the war in Korea, put pressures on government resources which made tax reduction seem impossible.

The continuation of the Cold War and public apprehension concerning the "missile gap" continued throughout the 1950s and the beginning of the 1960s. However, prosperity and economic growth pushed revenues up, and public attention began to focus on the fiscal dividend and the fact that federal tax receipts had begun to grow at a rate more rapid than program demands.

The problem of the fiscal dividend was first (temporarily) solved by the tax reduction of 1964—here, again, the primary purpose was economic stimulation, rather than tax relief—and then by the increased grant-in-aid programs. Finally, major and continued tax reduction began to seem impossible as programs of federal aid to states and local governments began their escalation, the cost of entitlement programs began to soar, and demands for new programs mounted. During this period, the government began running a substantial deficit which also militated against the possibility of tax reduction.

Why—during the relative prosperity of the mid-60s—was the decision made to increase programs, rather than to make larger tax cuts? Herbert Stein, formerly chairman of the Council fo Economic Advisers under Eisenhower, commented that "increasing expenditures, other than social insurance, at the federal level always seemed a bargain because there was a large flow of revenue available for that purpose, without requiring any overt action to raise taxes."[52] Some of the popular economic writers of the period have commented that expenditures have a tendency to rise to meet revenues. When such expenditure programs have built-in escalators, eventually expenditures may rise considerably above available revenues.

VI
Federal Deficit Financing

Despite the increased resources available to it, since 1950 the federal government frequently has found itself without sufficient funds to pay for its expanded programs and has consistently resorted to deficit financing. Before the middle of this century, such a course would have been inconceivable; public opinion was firmly opposed to continued deficit financing by any level of government. Since the end of World War II, and especially since the mid-60s, public resistance to deficit financing on the part of federal government has weakened, thus

relaxing a previously strong constraint on federal spending. However, public sufferance of deficit financing has not extended to state and local government spending; these levels of government are still prevented by constitutional and legal provisions from operating with continued deficits. The change in public opinion concerning federal deficit financing has come about gradually, but it is possible to identify some of the key influences and events which have led to public acceptance of continued federal deficits.

DEFICITS DURING THE PERIOD BEFORE 1945

At the beginning of World War I, the federal public debt was $1.2 billion; at its end, it was $25 billion. The size of the federal debt was considered very threatening to the government's financial stability and the government planned a systematic debt reduction program financed by planned federal surpluses. The federal government surplus during the post-World War I years ranged between $500 million and one billion dollars (compared to total budget expenditures which averaged about $3 billion annually). By 1930, before the full impact of the Depression was felt, the debt had been reduced to $16 billion. However, federal expenditures to alleviate the effects of the Depression of the 1930s led to a series of deficits, ranging up to $4.5 billion in 1936, and the gross federal debt reached about $50 billion at the beginning of the United States' World War II effort. Following the substantial deficits of World War II, the gross federal debt reached $269 billion in 1946. President Truman made a valiant effort to follow the former pattern of debt reduction by budgeting substantial surpluses in 1947 and 1948; by 1948, he had managed to reduce the public debt to $252 billion (see *Table 10*).

During the period immediately following the War, the enactment of the *Employment Act of 1946* demonstrated the marked change in official attitudes as well as in public opinion concerning deficit financing in peacetime. This act had its genesis in the fears that a new depression and massive unemployment would follow the end of the War.

In 1944, President Roosevelt had begun to prepare the public for the transition to peacetime by issuing an economic bill of rights which included "the right to a useful and remunerative job." Legislation seeking to implement this declaration was introduced by Sen. James Murray of Montana as the "Full Employment Act." It stated that all who sought jobs had a right to them, and further stated that

> . . . to the extent that continuing full employment cannot otherwise be achieved it is the . . . *responsibility of the federal government to provide such volume of federal investment and expenditures as may be needed to assure continuing full employment.* (italics supplied)

After a lengthy Congressional and public debate, the *Employment Act of 1946* was passed in a somewhat weakened form:

> It is the continuing policy and responsibility of the federal government to use all practical means consistent with its needs and obligations and other essential considerations of national policy, with the assistance and cooperation of industry, agriculture, labor, and state and local governments to coordinate and utilize all its plans, functions, and resources for the purpose of creating and maintaining in a manner calculated to foster and promote free competitive enterprise and the general welfare, conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and to promote maximum employment, production, and purchasing power.

Despite the watered down language, with the passage of the *Employment Act of 1946* the federal government officially accepted the concept of compensatory fiscal policy which sanctioned deficits in recession and during periods of high unemployment, to be balanced by surpluses and debt reduction in times of prosperity and high employment. President Truman expressed this position when he vetoed the 1947 tax reduction bill:

> A time of high unemployment and high prices, wages, and profits calls for a surplus in government revenue over expenditures and the application of all or much of this surplus to the public debt . . . if the government does not reduce the public debt during the most active and inflationary periods, there is little prospect of material reduction at any time.

His concern was prophetic. From 1947–57, the deficits were balanced by periodic surpluses, but following that period, a continual stream of deficits, sometimes large and sometimes small, began. Most of them during the period from 1958–74 were in the range between $3 and $9 billion, with the exception of two significantly larger deficits ($12.9 billion in 1959 and $25.2 billion in 1968).

Table 10

FEDERAL BUDGET SURPLUS OR DEFICIT IN DOLLARS AND AS A PERCENT OF RECEIPTS, 1945–80

(dollar amounts in millions)

Fiscal Year	Surplus or Deficit (–)	
	Amount	Percent of Receipts
1945	$–47,474	105.0%
1946	–15,856	40.3
1947	3,862	10.1
1948	12,001	28.7
1949	603	1.5
1950	–3,112	7.9
1951	6,100	11.8
1952	–1,517	2.3
1953	–6,533	9.4
1954	–1,170	1.7
1955	–3,041	4.6
1956	4,087	5.5
1957	3,249	4.1
1958	–2,939	3.7
1959	–12,855	16.2
1960	269	0.3
1961	–3,406	3.6
1962	–7,137	7.2
1963	–4,751	4.5
1964	–5,922	5.3
1965	–1,596	1.4
1966	–3,796	2.9
1967	–8,702	5.8
1968	–25,161	16.4
1969	3,236	1.7
1970	–2,845	1.5
1971	–23,033	12.2
1972	–23,373	11.2
1973	–14,849	6.4
1974	–4,688	1.8
1975	–45,154	16.1
1976	–66,413	22.1
1977	–44,948	12.6
1978	–48,807	12.1
1979	–27,694	5.9
1980	–59,563	11.5

Note: Data for 1945–80, are for the unified budget. Excludes off-budget federal entity outlays, which began in 1973.
SOURCE: U.S. Office of Management and Budget, *The United States Budget in Brief, 1982*, p. 91; and ACIR staff computations.

From 1975 through 1978, annual deficits were between $45 and $48 billion, except for 1976 which had a $66 billion deficit (see *Table 10*).

The tendency toward constant deficit financing had theoretical underpinning. During the 1960s, economists began to believe that discretionary monetary and fiscal policy had eliminated the possibility of severe recession, and therefore it was no longer necessary to attempt to control the business cycle. Instead, the emphasis was shifted to the federal government's responsibility for maintaining long-term growth with full utilization of resources. In pursuit of this goal, the federal government was expected to take action to eliminate the estimated GNP gap—the difference between actual and potential GNP full employment.[53]

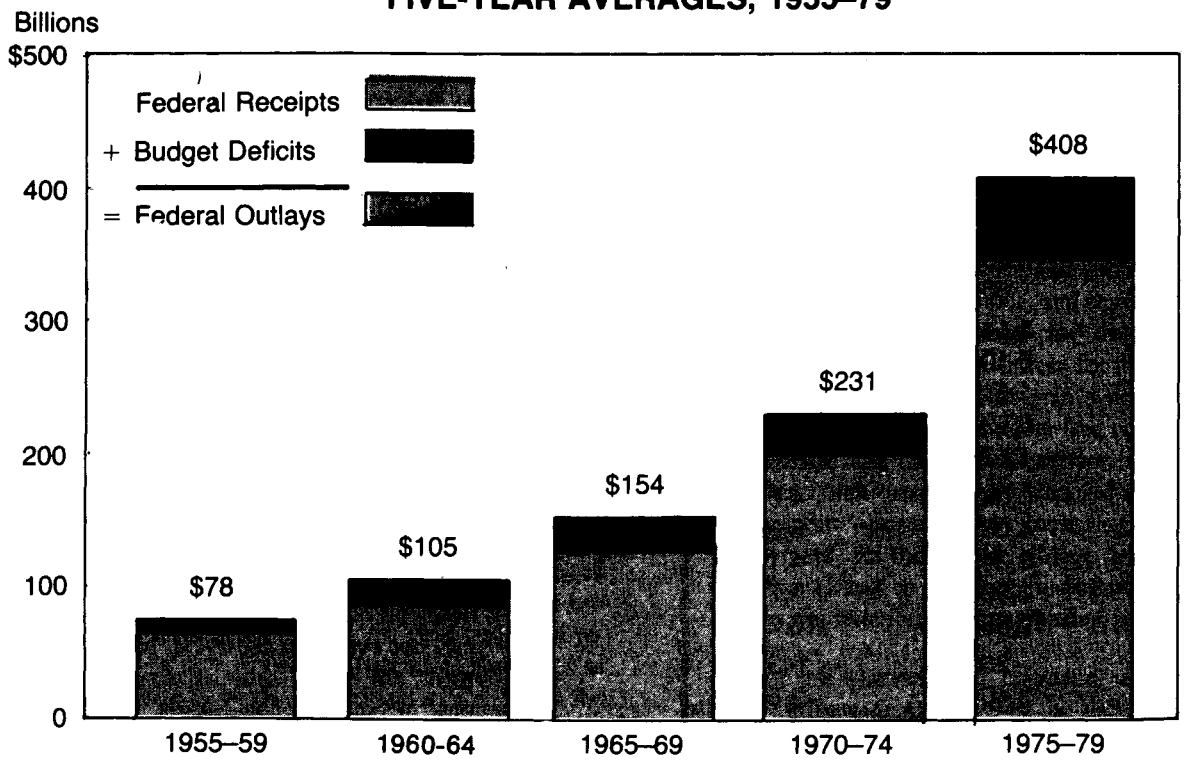
Walter Heller, in his Godkin lectures of 1966 reflected the elation of the 1960s when politicians and economists were united in belief that they had discovered the way to manage the economy and to cure a variety of social and economic ills.[54] They saw the success of the Kennedy tax cut of 1964 as cracking the old "molds of ideology and error" which had led to the fiscal constraints of a balanced budget. Instead the tax cut was advocated on a new basis that

> . . . a balanced budget was to be sought not every year, nor even over the cycle, but at full employment; not in the administrative, but in the national income-accounts budget. The implict standard for national debt reduction was shifted from an absolute to a relative basis—the national debt should decline as a proportion of GNP. As to deficits, a new distinction was drawn between "deficits of weakness" that arise out of backing into a recession and "deficits of strength" that arise out of measures to provide fiscal thrust to a lagging economy. And, in government spending, sin is now correctly identified not with spending more dollars per se, but with failure to deliver "a dollar's worth of value for a dollar spent." So the standards of fiscal soundness, even while "sailing under the familiar colors" have become more modern and rational.[55]

Under such a concept of the federal role, and given that not many years are characterized by full employment, it was unlikely that there would be very many years in which surpluses would occur. In contrast to the early part of the century in which there was constant pressure to accumulate a surplus and apply it to debt reduction, the constituency for debt reduction had be-

Chart 6

FINANCING FEDERAL BUDGET OUTLAYS: FEDERAL RECEIPTS, BUDGET DEFICITS, FEDERAL OUTLAYS FIVE-YEAR AVERAGES, 1955–79



Budget Deficit as a Percent of Budget Receipts			
1955–59	3%	1970–74	6%
1960–64	4%	1975–79	13%
1965–69	5%		

SOURCE: *The Budget for 1981,* Table 8, and ACIR staff computations.

come so small as to be almost nonexistent. Hence, the rare potential surplus is more likely to be eaten up by expenditure increases, less likely by tax relief. The federal government began to rely on deficit financing for an ever-increasing proportion of its total outlays (see *Chart 6*).

The United States thus entered a period characterized by Rose and Peters as "economics without constraint" or "one eyed Keynesianism in which deficits are common and surpluses rare"—and in which the level of the public debt was not particularly important.[56] The federal government found a source of funds for program expansion in deficit financing. However, at the beginning of the 1980s public concern over the possible impact of continued deficit financing upon inflation is beginning to be reflected in Congressional and Administration efforts to return to the balanced budget and end deficit financing.

VII
Prognosis

The federal government appears to be entering a period of sustained fiscal stress. Once again, to use the card game analogy, federal policymakers are being forced to make higher and higher expenditure bids with fewer top revenue cards. To make the situation more binding, it also is becoming increasingly difficult to finesse revenue shortfalls with heavy deficits.

Conceivably, Uncle Sam's fiscal fortunes could rebound fairly quickly, but this would take an extraordinary luck of the draw—a dramatic reduction in international tensions, a rapid and sustained economic recovery, a sharp drop in energy prices, the enactment of a "popular" new federal tax, and/or renewed public toleration of heavy deficits.

FOOTNOTES

[1] The federal corporate income tax also yielded substantial amounts: in fiscal 1979, it added another $66 billion or 21% of total revenues. ACIR, *Significant Features of Fiscal Federalism, 1979–80*, Report M-123, Washington, DC, U.S. Government Printing Office, October 1980, *Table 45*, pp. 59–60.

[2] *Ibid.*

[3] ACIR, *Federal State Coordination of Personal Income Taxes*, A-27, Washington, DC, U.S. Government Printing Office, October 1965, p. 61.

[4] U.S. Treasury Department, *Report of the Commissioner of Internal Revenue for the year ending June 30, 1866*, Washington, DC, U.S. Government Printing Office, 1866, pp. IV and 263.

[5] Article 1, section 9, cl. 4.

[6] ACIR, *Federal-State Coordination of Personal Income Taxes, op. cit.*, p. 49.

[7] U.S. Treasury Department, *Annual Report of the Commissioner of Internal Revenue for the Fiscal Year ended June 30, 1914*, Washington, DC, U.S. Government Printing Office, 1914, p. 20.

[8] *Ibid., for Fiscal Year ended June 30, 1916*, p. 33.

[9] Goode, Richard, *The Individual Income Tax*, Revised Edition, Washington, DC, The Brookings Institution, 1976, p. 302.

[10] ACIR, *Ibid.*, p. 52.

[11] *Ibid.*, p. 54.

[12] *Ibid.*, p. 52. The states were Wisconsin (1911), Mississippi (1912), Oklahoma (1915), Massachusetts (1916), Virginia (1916), Delaware (1917), Missouri (1917), New York (1919), North Dakota (1919), North Carolina (1921), South Carolina (1922), Arkansas (1929), and Georgia (1929).

[13] U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970, Bicentennial Edition, Part 2*, Washington DC, U.S. Government Printing Office.

[14] Goode, *op. cit.*, p. 4.

[15] ACIR, *op. cit.*, p. 59.

[16] *Ibid.*, p. 58.

[17] U.S. Bureau of the Census, *op. cit.*, p. 1107.

[18] Studenski, Paul and Krooss, Herman E., *Financial History of the United States*, New York, NY, McGraw-Hill, 1952, p. 424.

[19] Oregon (1930), Idaho (1931), Utah (1931), Vermont (1931), Illinois (enacted and declared unconstitutional in 1932), Alabama (1933), Arizona (1933), Kansas (1933), Minnesota (1933), New Mexico (1933), Iowa (1934), Louisiana (1934, California (1935), South Dakota (1935), West Virginia (1935), Kentucky (1936), Colorado (1937), and Maryland (1937). South Dakota and West Virginia repealed theirs in 1943, but West Virginia re-enacted the tax in 1961. ACIR, *Federal-State Coordination of Personal Income Taxes, op. cit.*, p.56.

[20] *Ibid.*, Table 9, p. 59.

[21] U.S. Department of Commerce, Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970, Bicentennial Edition*, Part 2, *op. cit.*, Series Y467 and Y473.

[22] U.S. Census, *Ibid.*, p. 1110.

[23] Goode, *op. cit.*, p. 4.

[24] U.S. Treasury Department, Bureau of Internal Revenue, *Statistics of Income for 1944*, Part 1, Washington, DC, U.S. Government Printing Office, 1950, pp. 96–97.

[25] *Ibid.*, p. 16.

[26] ACIR, *op. cit.*, p. 58.

[27] ACIR, *op. cit.*, p. 62.

[28] U.S. Census, *op. cit.*, p. 1107.

[29] "Annual Budget Message to the Congress, Fiscal Year 1948," *Public Papers of the Presidents of the United States. Harry S. Truman, Containing the Public Messages, Speeches and Statements of the President*, January 1 to December 31, 1947. Washington, DC, U.S. Government Printing Office, 1963, p. 56.

[30] U.S. Census, *op. cit.*, p. 1107.

[31] *Ibid.*, p. 1107.

[32] *Ibid.*, p. 1105.

[33] *Ibid.*, p. 1095.

[34] *Ibid.*, p. 1095.

[35] ACIR, *Significant Features, 1979–80, op. cit.*, p. 57 and staff computations.

[36] ACIR, *Federal-State Coordination of Personal Income Taxes, op. cit.*, pp. 58–62.

[37] ACIR, *Significant Features, 1979–80, op. cit.*, p. 95. West Virginia (1961), Indiana (1963), Michigan (1967), Nebraska (1967), Illinois (1969), Maine (1969), Ohio (1971), Pennsylvania (1971), Rhode Island (1971), New Jersey (1971).

[38] *Ibid.*, p. 95, shows 41, but in 1980 Alaska repealed its income tax retroactively to January 1, 1979.

[39] *Ibid.*, p. 59.

[40] *Ibid.*, p. 60.

[41] Special Analyses, *The Budget for Fiscal Year 1981, op. cit.*, p.53.

[42] Although the original financing plan would have produced a large reserve fund, even at the outset the system was designed to rely on current payroll tax revenues for only approximately two-thirds of benefit outlays. The remaining one-third was to come from interest on the reserve fund.

[43] ACIR, *State and Local Pension Systems—Federal Regulatory Issues*, Report A-71, Table 1, Washington, DC. U.S. Government Printing Office, p. 14.

[44] Prior to fiscal 1969 the federal budget was presented in three different forms: an administrative budget, a consolidated cash budget, and a national income accounts budget. The administrative budget, which was the document generally emphasized by both the public and government officials, did not include the receipts and expenditures of various trust funds, including Social Security. However, the "unified" budgetary approach adopted in fiscal 1969 does include Social Security transactions.

[45] 1979 Advisory Council on Social Security, *Social Security Financing and Benefits*, p. 1.

[46] Medicare is composed of two parts—a hospital insurance program, and a supplemental medical insurance (SMI) program. The hospital insurance portion is currently financed almost entirely from payroll tax revenues, while SMI is funded primarily (70%) from general revenues, with the remaining 30% coming from premiums paid by individuals.

[47] Schultz, Charles L; Fried, Edward R; Rivlin, Alice M.; and Teeters, Nancy H., *Setting National Priorities, The 1973 Budget*, Washington, DC, The Brookings Institution, 1972, pp. 394–409.

[48] Heller, Walter W., *New Dimensions of Political Economy*, Cambridge, MA, Harvard University Press, 1966, pp. 72–73.

[49] Heller's case was reinforced by the widely disseminated writings of John Kenneth Galbraith (especially *The Affluent Society*, 1958) which stressed the "undernourished" state of the public sector, particularly state-local governments, in an economy marked by private affluence.

[50] Two block grants—the "Partnership for Health" and the "Safe Streets" programs—were launched during the Johnson Administration.

[51] ACIR, *Significant Features, 1979–80, op. cit.*, Table 103, p. 161.

[52] AEI Studies, *Contemporary Economic Problems, 1977*, Washington, DC, American Institute for Public Policy Research, 1977, p. 78.

[53] For a more detailed discussion of this concept see ACIR, *State-Local Finances in Recession and Inflation*, A-70, Washington, DC, U.S. Government Printing Office, pp. 41–43.

[54] Heller, Walter W., *New Dimensions of Political Economy, op. cit.*

[55] *Ibid.*, pp. 39–40.

[56] Richard Rose and Guy Peters, *Can Government Go Bankrupt?*, New York, NY, Basic Books, Inc., 1978, Chapter 6, pp. 133–53.

Theoretical Perspectives On Governmental Growth: Interpretations In The Social Sciences

I
Introduction

A SIGNIFICANT ISSUE

The question of governmental growth has been of interest to a large number of social scientists. In this respect, academicians and research professionals have shown themselves to be no different from public officials, journalists, and citizens, who also comment frequently on this subject. Like these others, social scientists wish to apply the tools of their trade to what is widely regarded as one of the major issues of the day. They too seek both personal enlightenment and the opportunity to enlighten—and often to persuade—others.

The issue, however, lies nearer the heart of some social sciences than others. It has been a special concern of economists dealing with public finance. Indeed, a discussion of the size of the public sector and the causes of expenditure growth seems to be a mandatory feature of the textbooks of this field. Political scientists speak less frequently in terms of the "size" of government, but do direct much attention to the sources of public policies, policies which in the aggregate determine the magnitude of the public sector. Governmental regulation, as well as public expenditure, has been of increasing interest to economists, economic historians, and political scientists. Some sociologists and historians also have addressed these questions.

The topic has well-established roots. One of the classic works on the growth of government was published in the 1880s. Several other important studies appeared in the late 1950s and early 1960s. But, given a tendency for the subjects of social science investigations to follow the course of public events, this literature has grown prodigious in recent years. The character of the contemporary work is suggested by the titles of some research studies and serious academic commentaries published in 1977 and 1978:

> "The Rise in Public Expenditure—How Much Further Can it Go.?"[1]

"The Growth of Government in the West"[2]
"The Governmental Habit"[3]
"Red Tape: Its Origins, Uses, and Abuses"[4]
"Political Overload and Federalism"[5]
"Why Government Grows (and Grows) in a Democracy"[6]
"Budgets and Bureaucrats: The Sources of Government Growth"[7]
"Congress: Keystone of the Washington Establishment"[8]
"Toward A Tax Constitution for Leviathan"[9]

Most of these titles evince a certain degree of concern about an important recent development and a major public issue. Though scholarly, few of these books and articles are entirely "academic." Many of the writers are frankly evaluative, and some offer prescriptions for policy change, often with much conviction.

Paralleling these "growth" studies have been a very large number of others which attempt to describe and explain, and in some instances propose improvements in, the processes through which national governmental policies are formulated, implemented, and evaluated. This literature on public policy reflects, to a considerable degree, the same motivation which has encouraged studies directed specifically at governmental growth. Shortcomings in the attainment of national objectives are subjected to critical analysis. One of the most widely read studies is subtitled, "How Great Expectations in Washington Are Dashed in Oakland: Or, Why It's Amazing That Federal Programs Work at All."[10]

Finally, in this same period, there also have been many scholarly reappraisals of the major political institutions: the Presidency, the Congress, bureaucracy, political parties, interest groups, and elections. While these are drawn from the mainstream of traditional research interests in political science, they also are intended to provide new insights into the complexities of government in an era of unprecedented public responsibilities.[11]

This chapter reviews the alternative theories or interpretations of governmental growth which are contained in this large body of recent literature, as well as the classic statements, with three objectives in mind. First, the literature is useful, in itself, for the potential insights which have been provided by the scholars who have given sustained and careful attention to the growth issue. Secondly, this theoretical review identifies many of the causal variables which are examined by the case studies in later volumes. For this reason, it is an essential backdrop for the balance of this report. Finally, a theory of the causes of governmental growth should underlie a consideration of possible new policy responses to it. In this respect, the chapter is intended as a contribution to the current public debate.

THEORETICAL APPROACHES

The theoretical approaches adopted by various writers on governmental growth differ sharply. One recent survey identified some nine general modes of explanation.[12] Specific hypotheses are more numerous still.

Conclusions also differ. To some extent, this results from having examined a different set of facts or variables, or different historical periods. But this is not the sole source of variation. Some studies, looking at very similar evidence for the same points in time, still reach different or even flatly contradictory conclusions. In part, this reflects the different ideological predelictions of the writers themselves. (This latter problem is considered briefly below.)

Thus, depending upon the study examined, the growth of government is regarded alternately as inevitable, unlikely, essential, or extremely dangerous. Each point of view embodies both an interpretation of certain relevant facts and a commitment to certain important values.

THREE ORIENTATIONS

For clarity and greater simplicity in presentation, this wide range of studies and conclusions is grouped below into three categories, each of which corresponds to a particular style of interpretation. The first of the three theoretical orientations taken up looks to the political life of a nation for the wellsprings of governmental activity. It finds the initiative and explanation for public policy outcomes in the opinions and values of the people, in the great electoral contests between political parties, in the machinations of factions or interest groups, in the conflict of will and judgment among elected officials. The character of governmental institutions—the extent of the franchise, the separation of powers, the Constitutional allocation of authority and responsibility, and so forth—also influences the resolution of this political combat: they are the "rules of the game." The rules, as in any game, may advantage or disadvantage certain kinds of players.

This orientation, of course, stems from traditional democratic theory. It is also at the center of much modern political science, which sees the demands of the citizenry, as articulated through a variety of input processes, as the causal forces for governmental action. The systems analysis of David Easton provides the theoretical underpinnings for this approach. Here, consistent with his terminology, it will be called the political demands orientation.

A second theoretical orientation regards public policies and indeed, political life itself, as largely incident to and derivative from the course of other historical trends. A principal focus of attention is the process of economic development—the attainment of higher levels of national income through the division of labor, industrialization, urbanization, and large-scale organization. Each of these processes alters the nature of essential governmental tasks and also transforms the political composition of society. Broadly speaking, then, this orientation employs a kind of environmental determinism, and will be termed the environmental orientation in this chapter.

Much of this research has been derived from, or is a critique or counterpoint to, the early writings of the economist Adolph Wagner. Wagner asserted that governmental expenditures invariably rise in relation to the size of the economy as a nation advances. Much of the existing literature on the size of government accepts, at least implicitly, an hypothesis of this kind. Furthermore, many interpretations of political activity find their origins in the different economic interests of the social classes, or of various producer and consumer groups. Some writers trace a process of political development, paralleling economic development, from an agrarian to post-industrial society.

Both of the preceding orientations look *outside* of government for the stimulus to governmental growth, though in different directions. A third type of theory, for the most part more recent, looks *inside* government itself. The focus of attention is generally the bureaucracy.

This approach has been devised to explain apparent shortcomings in the other two. It argues that, when government becomes sufficiently large, it creates its own momentum for further expansion. Initiative and control shift from representative processes and elected officials to appointed ones, and government becomes effectively disengaged from environmental influences as well.

This style of interpretation is perhaps most closely associated with the humorous writings of C. Northcote Parkinson, the author of "Parkinson's Law." But many serious—and concerned—scholars have provided similar analyses, all aimed at correcting what they view as oversights in the more traditional theories when they are applied in a very different historical context.

Disciplinary Contributions

The first of these three orientations, it should be apparent, is concerned principally with political variables, the second with economic ones. Each might therefore be identified with one of the two academic disciplines most concerned with public affairs, political science and economics. This would be an error.

In fact, both approaches are accepted, and have been studied and refined, by many practitioners of each of these disciplines. A number of political scientists have appropriated economic methodologies and assumptions for use in their own research. Even more stress the role of economic development as an influence on public policy. At the same time, a growing school of public choice economists has applied the deductive analytic techniques of economics to such overtly political questions as voting, party competition, interest group formation, and legislative and bureaucratic behavior. Furthermore, members of each discipline have made significant contributions to the growing literature of public policy analysis. Thus, while the two fields remain distinct in some areas of inquiry, neither provides a single clear interpretation of governmental growth. In this area, their approaches and conclusions overlap.

The same is true of the third orientation. Contributions have been made about equally by both political scientists and economists. Although public administration—the field of study focused most directly on the bureaucracy—developed within political science, many of the most stimulating contributions to its literature in the past decade or so have been written by, or influenced by, economists.

For these reasons, this chapter draws about equally on the work of economists and political scientists. An attempt has been made to present the views of scholars in both of these two policy sciences on each of the questions which is explored.

WARNINGS ON LIMITATIONS

No review of the varied theories, values, and conclusions which appear in the growth-of-government literature can reconcile tham all, or even present them each fully and fairly. There are certain limitations in what is attempted in this chapter, some of which are inherent in the literature itself. These deserve mention.

First, all that is attempted here is the presentation, in summary form, of the major lines of argumentation, together with some of the most relevant data or contrary opinion. The theories are not tested in this chapter or even examined closely for consistency and sound reasoning. These are tasks for the case studies which follow, and for the broader academic community.

Secondly, many of the studies summarized do not distinguish adequately between the growth of the public sector in general, the growth of the federal government in particular, and the centralization of public responsi-

bilities from the state and local to national levels. Often hypotheses which deal most directly with governmental growth are applied only to the national government. In such cases, the complexities inherent in a federal system, with its multiplicity of actors, are overlooked. In a few instances, this occurs because a theory was formulated initially for some other, unitary governmental system; more often, it indicates a certain degree of imprecision in the analyses themselves. No attempt has been made to correct these shortcomings here.

A third limitation involves the possibility of bias on the part of the various researchers. Bias may occur in any social science study—indeed, in any intellectual inquiry—but raises special problems in research concerned with such a central issue of American political ideology and contemporary public policy.

The question is a critical one, and cannot be dismissed by reference to traditions of scholarly neutrality. In fact, most (though not all) of the recent studies do reflect what might be called a conservative orientation toward the question of government growth. Many of the writers would not hesitate to apply the conservative or neoconservative label to their views.

This probably is the case because governmental growth appears now to be a topic worthy of exploration primarily from a "conservative" point of view. In contrast, it should be remembered that many of the earlier academic studies, especially those published before about 1964, had a "liberal" orientation. They were supportive of, and often sought to rationalize, a larger public sector.

All this suggests the close correspondence between the nation's political and intellectual life. In the social sciences, many theories have clear implications for policy or politics.[13] Despite a commitment to the scientific approach, the debate within the academic community can be as heated, and as ideological, as that in the political arena. A major difference is, however, that all the parties to it are expected by their professional peers to offer informed judgments, based on evidence or proofs derived through the accepted procedures of their discipline. In this respect, scholarly debate is usually more precise or refined than other forms, but not necessarily less contentious.

II
External Political "Demands"

Many recent political science studies, following the pioneering conceptual work of David Easton, explain public policy outcomes in terms of the "demands" placed upon government by the citizenry, which in turn reacts to changes in its social or economic circumstances and gives "feedback" regarding its assessment of existing policies. The "political system," in Easton's conception, is the network of human interaction which is concerned with the creation of public policy—"the authoritative allocation of values for a society." Basically, it is a process by which certain "inputs" are converted into public policy "outputs" (official decisions and actions). The inputs take two forms. "Supports" include such things as loyalty to a nation, a willingness to pay taxes, and obedience to the law. "Demands" are desires for governmental actions.[14] These might be expressed by voting, campaign activities, interest group lobbying, protests and demonstrations, and so forth.[15] Easton's model is illustrated, in very simplified form, in *Figure 1*.

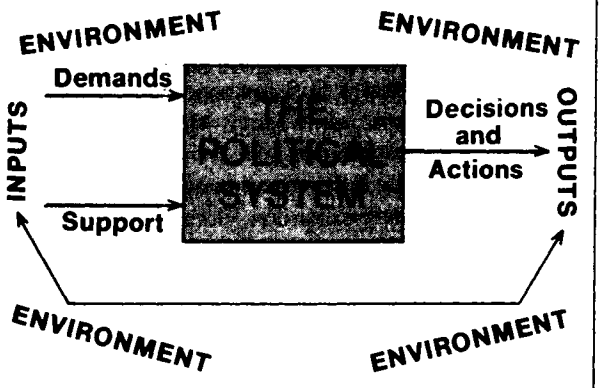
Initially presented in 1953, Easton's conception of the political system became accepted as the standard framework for interpreting political action, and was employed in a considerable number of textbooks and research studies. Explicitly or implicitly, it has guided much of the analysis of political behavior over the past 25 years.

A related conceptual scheme was provided in another highly influential book in the field of comparative government. Almond and Coleman's *The Politics of Developing Areas* distinguished four political "input functions" performed in any political system. These are:

> *political socialization and recruitment*—the processes by which the young acquire a set of attitudes toward the political system (knowledge, values, feelings) and through which adult members are drawn into political roles and offices:
>
> *interest articulation*—the process by which individual and group interests, claims, or demands are articulated for political action;
>
> *interest aggregation*—the process through which interests are combined, accommodated, or otherwise taken account of; and
>
> *political communication*—the processes and

Figure 1

A Model of the Political System



SOURCE: David Easton, *A Framework for Political Analysis*, Englewood Cliffs, NJ, Prentice-Hall, Inc., 1965, p. 112.

channels of communication through which the three above functions are performed.[16]

This analytical model can be viewed as an elaboration of Easton's conception of political "demands."

The Eastonian model, though dressed in scientific garb, obviously has much in common with traditional interpretations of the democratic process. Betty Zisk's summary of the major features of democratic theory points up these parallels:

> All theories of the process of policy formulation in a democracy have certain points in common. They assume that in any society men will differ in their views of the way to utilize material and human resources. These differences will be expressed in the form of competing demands or claims, which are channeled through a body of decisionmakers who are recognized as legitimate by the majority. The decisions made by this authoritative body will take the form of laws and administrative arrangements that are binding on the society.[17]

The most important point for purposes here is that all of these theoretical models suggest that the origin of public policies lies outside the formal institutions of government.[18] Such things as shifts in public opinion, election results, and facilitative activities of interest groups, the President, and Congress are regarded as the determinative forces. While the political process is related to the "environment" of economic and social forces, these do not act directly on governmental outcomes. Such forces must be translated into policies through a complex and shifting network of input processes.

A number of analysts imbued with one or another of these closely-related theoretical perspectives have applied their skills to the question of governmental growth. Hypotheses of this kind are in fact the most numerous, and for that reason are given detailed treatment here. Specific types of "political demands" models are examined in four separate subsections.

PUBLIC OPINION

The Eastonian "political demands paradigm," bolstered by traditional democratic thought, looks to public opinion as the ultimate source of the stimulus for governmental action. Consistent with this, many analysts have examined the attitudes and preferences of the public-at-large in order to account for the general size and scope of governmental activities, as well as to explain the adoption (or rejection) of particular policies.

At the most general level, such leading experts on public finance as Richard and Peggy Musgrave suggest that the "vast changes in social philosophy" which have occurred over the past century "have had a deep effect not only on what individuals consider to be the desirable size of the public sector, but also on the force with which the views of various groups make themselves felt in the political decision process."[19] Quite possibly, they indicate, these attitudinal changes have outweighed economic and structural factors in raising governmental outlays relative to GNP.

Somewhat more narrowly, political scientists Everett C. Ladd and Seymour Martin Lipset comment that the two major periods of rapid governmental growth also were marked by substantial changes in what the public expected government to do and the kinds of problems the public held officials responsible for. While the traditional American commitment to individualism was not altered during the 1930s, government was charged with helping to maintain economic prosperity and meeting basic welfare needs. Then, in the 1960s,

> . . . more and more Americans accepted the notion that if there is a problem, government must find the solution. It is striking to see in the body of public opinion information how gradually—almost imperceptibly, but clearly—an expanded definition of governmental responsibilities came to be accepted by broad segments of the public as the 1960s progressed. As the winds of change started blowing across the

landscape, it was not long before Congress adjusted its sails and enacted a whole generation of social programs.[20]

Other analysts have suggested that the connection between public attitudes and governmental activities is very immediate and direct. The underlying theory here is that "consumer sovereignty" reigns in an open, competitive political "marketplace," just as it is supposed to in a competitive economic one. Thus Daniel Tarschys comments in his comprehensive review of theories of government growth that

> . . . the paradigms of David Easton and Gabriel Almond are two examples of schemes that . . . lend themselves particularly well to an analysis of politics from the "consumer perspective." The Eastonian analyst is predisposed to look for demands originating in the social environment, i.e., chiefly among the citizens, and then combining and pushing their way to the institutions of rule making. In a similar vein, the Downsian analyst wishes to know how parties or candidates vie for power by adapting to each other and by making an appeal to various groups in the electoral market. A common presupposition in both cases is that, given a muitiparty system and universal suffrage, it is ultimately the citizens as consumers of public goods who decide on the scope and substance of government action. This comes very close to the political doctrine taught in all democratic nations. The notion of "the citizens in power" is ubiquitous in our civics textbooks.[21]

Peter O. Steiner also has stressed the parallels between such theories of democratic government and textbook interpretations of the market economy:

> In one view of the political process is a market-like mechanism that coalesces the views of the members of the society. Here the political process is a facilitating and implementing one, not intrinsically a formative one. An efficient government, like an efficient market, quickly and accurately translates inherent preferences into explicit consensus. . . . Government (in this view) is a decisionmaker only in the limited sense of a reactor to and processor of signals it receives. A properly functioning government will arrive at an optimal decision set without exercise of independent judgement.[22]

The social science literature provides a variety of specific hypotheses about the impact of public opinion on the size of government. For example, Anthony Downs and John Kenneth Galbraith both argued (in now-dated articles) that public opinion tends to constrain governmental spending to excessively low levels. Other writers, including Samuel C. Huntington, argue that public opinion has encouraged a shift in spending from defense to domestic problems, while James M. Buchanan and several other economists contend that the public consistently underestimates the full costs of many domestic programs, leading to their over-expansion. Both Charles L. Schultze and Herbert Kaufman attribute the overuse of regulatory mechanisms and the abundant supply of red tape to the application of certain American values. Finally, a British political scientist, Anthony King, as well as several American historians, political scientists, and sociologists, stress the content of the nation's political ideology as a limitation of the expansion of the public sector.

Each of these theories is presented briefly here, along with the relevant findings of major public opinion survey studies. Topics examined include public attitudes toward governmental spending, regulation, and taxation. A final section considers the ideological or philosophical attitudes on the governmental role which have been embodied in public opinion.

What available survey data seem to show, however, is that it is difficult to relate public opinion to the growth of government—chiefly because the content of public opinion is in many respects contradictory. While there has long been substantial public support for high and rising levels of federal expenditures, as well as for a variety of types of federal regulation, most of the public also has regarded tax levels as too high and adhered to a rather conservative political ideology. Thus, the changes in the size and scope of the public sector in the past two decades must be considered against a matrix of of varied, often-conflicting opinions and values. Furthermore, a variety of studies suggest that it is difficult to demonstrate clear connection between public opinion on the one hand and the adoption of specific governmental policies and programs on the other.

Support for Public Spending

One of the clearest findings of the many public opinion polls compiled over the past two decades is that there has been—and continues to be—widespread support for increased governmental expenditures for many domestic programs. This fact provides an essential backdrop in any consideration of the expansion of governmental ac-

tivity over this period. At least in general outline, the steady enlargement of the public sector has been quite consistent with the most widespread political aims of the public-at-large.

The patterns of public support for domestic expenditures may be traced by reference to a study of "Public Attitudes Toward Fiscal Programs" published in 1963;[23] a widely read report, *The Political Beliefs of Americans* by Free and Cantril, published in 1968;[24] a series of three more recent volumes, *The State of the Nation,* written by Watts and Free and including data gathered in 1972, 1974, and 1976,[25] and a survey conducted by the Louis Harris organization for the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations,[26] as well as other reports. All have reached similar conclusions.

The results of a series of public opinion polls conducted in 1960 and 1961 indicated that "a large majority of the American people have favorable attitudes toward a number of major government expenditure programs."[27] The supporters of increased expenditure outnumbered the advocates of cutbacks in 11 of the 14 program areas examined, and constituted the majority opinion in five: help for older people, help for needy people, education, slum clearance and city improvement, and hospital and medical care. Only in foreign aid—"help to other countries"—did a majority of respondents desire lower levels of governmental expenditure.[28]

A more detailed analysis provided through polls taken in 1963 and 1964—just prior to President Johnson's major "Great Society" initiatives—was quite consistent. It showed substantial majorities in favor of further federal spending for aid to depressed areas, nursing homes, mental health, public housing and loans, unemployment compensation, preschool education, job training, education, urban renewal, health insurance, and the elimination of poverty.[29]

On the basis of these results, sociologists Free and Cantril concluded that

> . . . about two-thirds of the American people have assumptions which lead them to perceive the utilization of the power and resources of the federal government as a good and proper way to achieve a wide range of social purposes. And the more an individual's own purposes are furthered by such government action, the greater his feeling that such action is legitimate and desirable. . . .
>
> In brief, as of 1964 a large majority of Americans were congenial to the practical operations required to attain and improve the welfare state. In this sense, at the operational level of government programs, President Johnson was correct when he indicated that the argument over the welfare state had been resolved in favor of federal action to achieve it.[30]

Although federal domestic outlays rose sharply in the late 1960s and early 1970s, these changes resulted in very little slackening in the public's support for further spending. The analysis of survey data obtained in 1976 and presented in *The State of the Nation III* indicates that the advocates of increased public expenditure continue to greatly outnumber those favoring reductions for a broad range of domestic services, as *Table 1* illustrates. Popular majorities still favored increased expenditures for seven specific functions: energy, aid to the elderly, combating crime, reducing water pollution, public education, higher education, and health care. Reductions of expenditures were not favored by a majority in any *domestic* field, although cutbacks in foreign economic and military aid were desired.

Even after the June 1978 California Proposition 13 "tax revolt," a Gallup survey for *Newsweek* magazine failed to identify *any* category of local service in which a majority of the population thought that too much money was being spent. *Table 2* indicates that, in eight of the nine fields considered, more people felt that "too little" was being spent for services than "too much"—frequently by large pluralities. The sole exception was social services (including welfare, counseling, mental health, and others not specified). In this area, 42% of the respondents indicated that expenditures were excessive—but even here, the critics were outnumbered by those who thought expenditures were "too little" or "the right amount."

All of these results are of considerable interest because they contradict some of the most widely read earlier theorizing to be found in the academic literature on the size-of-government question. Both Anthony Downs and John Kenneth Galbraith attempted, in essays published in 1960 and 1958 respectively, to explain why governmental expenditures tend to be "too small" in a democracy by reference to the presumed content of public opinion.

Downs, a noted political economist, argued that democratic nations tend to have "too small" a governmental budget because the voting public lacks complete information on the costs and benefits of governmental programs.[31] Downs defined the "correct" budget as that which would be adopted if voters and officials did pos-

Table 1

POPULAR ATTITUDES TOWARD GOVERNMENT SPENDING, 1972 and 1976

PROGRAM AREA	Attitude Toward Spending			
	1972		1976	
	Should be Increased	Should be Reduced or Ended	Should be Increased	Should be Reduced or Ended
Developing Greater Self-Sufficiency in Energy Supplies[1]	—	—	73%	6%
Helping the Elderly[2]	74%	2%	66	3
Combating Crime	77	2	59	8
Reducing Water Pollution	64	5	59	7
Coping with Narcotic Drugs and Drug Addicts	74	3	56	12
Reducing Air Pollution	61	5	52	10
Supporting and Improving Public Schools[2]	62	5	51	12
Making a College Education Possible for Deserving Young People[2]	54	11	50	11
Improving Medical and Health Care for Americans Generally	62	4	50	12
Helping the Unemployed[2]	48	15	43	18
Providing Adequate Housing for All the People[2]	30	10	40	23
Rebuilding Run-Down Sections of Our Cities	51	16	37	23
Meeting the Overall Problems of Our Cities	41	7	30	15
Providing Better and Faster Mass Transportation Systems	41	12	34	22

Establishing More Parks and Recreation Areas	*41*	*9*	*30*	*18*
Building Better and Safer Roads, Highways, and Throughways	37	11	26	20
Total Spending for Defense and Military Purposes[1]	—	—	28	24
Improving the Situation of Black Americans	33	18	24	27
Helping Low-Income Families Through Welfare Programs	30	24	22	35
Providing Food Stamps for Low-Income Families[1]	—	—	22	37
Maintaining U.S. Military Bases Throughout the World[1]	—	—	10	41
Contributing to the Work of the United Nations[1]	—	—	6%	48%
Furnishing Economic Aid and Loans to Less Developed Countries[1]	—	—	10	53
Providing Military Aid to Some of Our Allies[1]	—	—	4	57

[1]Question not asked in 1972.
[2]Somewhat different wording in 1972.
SOURCE: William Watts and Lloyd A. Free, *State of the Nation III,* Lexington, MA, D.C. Heath and Company, 1978, pp. 61, 214–16; William Watts and Lloyd A. Free, *State of the Nation,* New York, NY, Universe Books, 1973, pp. 294–97.

Table 2

ATTITUDES TOWARD SPENDING FOR COMMUNITY SERVICES, JUNE 1978

"Does Your Community Spend Too Much, Too Little, Or Just About The Right Amount for Local Services?"

Service	Too Much	Too Little	Right Amount	Don't Know	Don't Have That Service
Public Schools	25%	33%	35%	7%	0%
Fire Department	5	24	59	8	4
Police Department	12	28	52	7	1
Road Repair and Maintenance	14	47	33	5	1
Local Library	7	18	59	13	3
Parks and Recreation	16	25	48	8	3
Sanitation	9	19	58	8	6
Public Hospitals	15	25	34	14	12
Social Services (Welfare, Counseling, Mental Health, etc.)	42	19	28	10	1

SOURCE: Gallup Organization Poll in *Newsweek,* 19 June 1978, p. 22.

sess complete information. Few voters, he pointed out, devote much time and energy to evaluating each of the multitude of programs; such efforts would, indeed, be "irrational." But the lack of information does bias the political process, he concluded.

Downs suggested that each voter is aware of the benefits of those programs which serve him personally, but often is not aware of the indirect benefits of other governmental activities. Some programs assist the members of other groups. Many (preventative programs, for example) provide benefits which are remote from an individual's personal experience or which are difficult to evaluate without detailed technical information. Others involve a high degree of risk taking: whether or not they are needed, or will be effective, cannot be known in advance.

On the other hand, Downs contended that the tax costs of these activities are far more apparent. The annual preparation of an income tax form brings home the full financial burden. And voters are also very much aware of the alternative benefits they could receive from comparable expenditures in the private marketplace, since in this sector one pays for what he receives on a strict *quid pro quo* basis. The net result, then, is that

> . . . *every citizen believes that the actual government budget is too large in relation to the benefits he himself is deriving from it.* Even if he feels the optimum budget would be much larger than the actual one, he believes the actual one could be profitably reduced "through greater economy"—i.e., elimination of projects from which he does not benefit.[32]

Consequently, Downs argued that the government is under tremendous pressure to reduce the budget wherever it can, and to make only those expenditures which provide obvious (as opposed to remote) benefits to a substantial number of people. Many worthwhile expenditures therefore are not made and the actual government budget is much "too small." Downs predicted that as society becomes more complex, the need for programs with less obvious benefits will increase and the shortfall in public spending will grow apace:

> As remote benefits become more important, they become less likely to be attained. Their greater importance is accompanied by greater remoteness, and this makes governments more wary of devoting resources to them. . . . The actual government budget shrinks to an ever-smaller percentage of the "correct" budget, even if it increases in size absolutely. Yet most people do not realize this increasing distortion because they are blanketed by an ignorance of political realities which becomes deeper and deeper as the realities become more significant. This ignorance is abetted by every citizen's belief that the government budget is too large

in relation to the benefits he is getting from it, because so much of it benefits others at his expense.[33]

A somewhat similar theory was espoused by the economist John Kenneth Galbraith in a widely read book published during the same period. Galbraith's *The Affluent Society* contrasted the increasing wealth of the nation in consumer products with the poverty of its public services: schools, roads, parks, police. This "social imbalance," Galbraith believed, could be traced to popular attitudes, especially as they were influenced by advertising. The drumbeat of publicity for new or "improved" products created its own demand for them, he said. No comparable force was at work calling attention to those goods and services which are provided by governments, rather than the market.[34] In his view, as in Downs', the public sector therefore was too small—and apt to remain so.

Contrary to both of these hypotheses, the expansion of federal spending programs proved to be a popular cause. As noted above, public opinion polls published shortly after Downs and Galbraith wrote showed widespread support for more vigorous governmental activity. Furthermore, during the years of the Great Society and thereafter, this aim was largely realized. Neither author anticipated these developments.

Some more recent writers provide an alternative interpretation. These analysts share with Downs and Galbraith a belief that public opinion, in the end, largely determines the outcomes of the governmental process. But they view public opinion as having been a major force for governmental expansion, rather than an obstacle to it.

Political scientist Samuel Huntington suggests that public opinion has brought about important changes in the content of governmental outlays in the post-war period. He identifies two major redirections in expenditure policy in these years. The first, termed the "Defense Shift," resulted in the military mobilization of the Cold War era. The second, the "Welfare Shift" begun in the mid-1960s, produced a marked expansion of human service and antipoverty programs. The causal patterns differed, in Huntington's view. The defense shift was initiated by the governmental elite in response to the Soviet challenge. The welfare shift, on the other hand, was the result of "popular expectations and group demands." But both shifts, Huntington indicates, were given willing support by the public-at-large.[35] He cites the evidence provided in the 1974 *State of the Nation II* study to demonstrate the far greater public support for domestic than foreign affairs spending.[36]

Huntington was not certain how long the governmental expansion of the welfare shift would prevail. The defense shift, he pointed out, was terminated by a drastic change in the climate of public opinion. Huntington detected some evidence in the most recent (1972–74) polls that the public was adopting more "conservative" orientations. On the other hand, he noted that the well-organized beneficiaries of spending programs and the governmental employees allied with them had a substantial stake in the continuation of large-scale spending programs.[37]

More recent poll data, especially that from the 1976 *State of the Nation III* survey, does indicate a declining level of popular support for many domestic programs. This is most obvious in connection with welfare programs aimed directly at helping the poor. In the early '60s, the proportion of the public advocating reductions in such welfare spending was very small (7%).[38] But, by 1976, those advocating reductions in spending for welfare and food stamps had become a third of the population, outnumbering the proponents of increases by a goodly margin. The modal (or most common) view was that spending for these programs should be kept at the existing level, as shown in *Table 3*.

Such opposition to expenditure increases has *not* appeared on social welfare programs construed more broadly—those aimed at assisting the elderly, improving medical and health care, upgrading education, and solving urban problems. However, a close comparison of the Watts and Free surveys for 1972 and 1976 does indicate a more modest slackening of support for increased spending in these and many other areas. The relevant data appear in *Table 1*.

Table 3

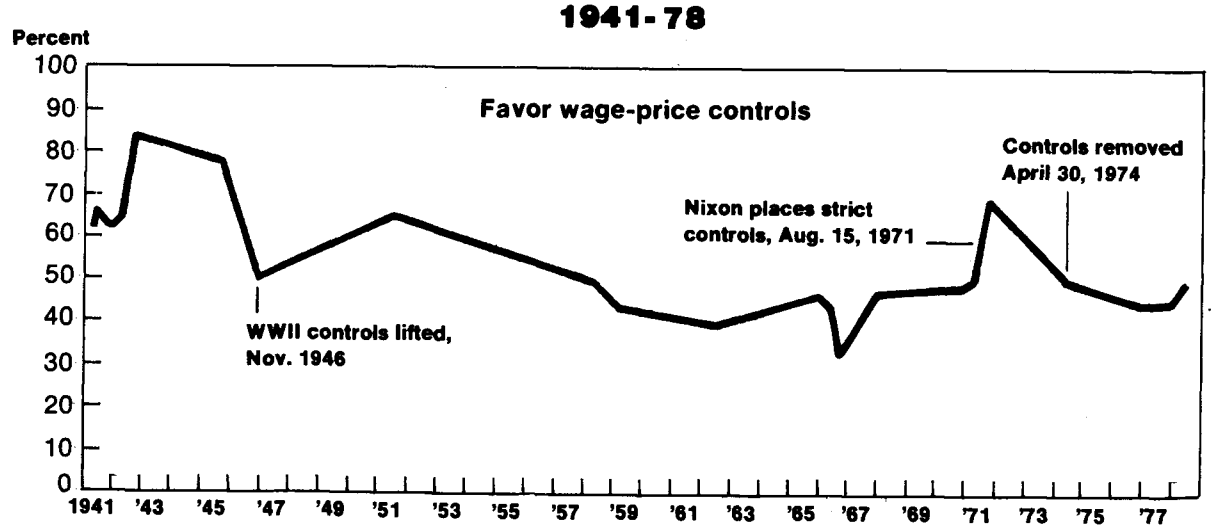
ATTITUDES TOWARD WELFARE SPENDING, 1976

Desired Expenditure Level	Welfare	Food Stamps
Increased	22%	22%
Kept at Present Level	39	38
Reduced	28	27
Ended Altogether	7	10
Don't Know	4	3
TOTAL	100	100

SOURCE: William Watts and Lloyd A. Free, *State of the Nation III* Lexington, MA, D.C. Heath and Company, 1978, p. 193.

Figure 2

Public Support for Wage and Price Controls 1941-78



SOURCE: *Public Opinion*, May/June 1978, p. 25.

Finally, Watts and Free comment that their results confirm

> . . . The widespread "gut feeling" that Americans are becoming somewhat less enthusiastic than before about federal programs that have a big price tag. The shifts . . . indicate that there has been a significant decline in public support for no less than 13 domestic programs. . . .[39]

Thus far, these changes have not been large enough to much alter the balance of opinion on public expenditures. But the trend indicated—if it should persist—could mark the close of the "welfare shift," as Huntington has described it.

Regulation

A second area in which public opinion polls have frequently found support for governmental activism involves regulatory policies. Popular majorities have often indicated a willingness to use the power of government to influence the operation of the economy and to control socially unacceptable activities. Yet, at the same time, increased regulation has lacked the kind of lopsided advocacy which has generally appeared in responses to questions on domestic expenditures. On these issues, public opinion is more frequently divided, and the nation appears to be far more selective in its desire for governmental intervention.

The evidence on these questions is less complete than that regarding spending. Fewer questions have been asked by the pollsters, and those which they have used have been asked less frequently. Thus, it is more difficult to detect trends in sentiment over time.

Still, the available survey data certainly does indicate that the public believes it necessary for the government to provide a protective shield against the abuse of economic power. A general expression of this interventionist philosophy was provided by results to the 1973 Senate committee study. At that time, a large majority of the population—76%—indicated agreement with the statement that "the federal government should not run the life of the country, but should regulate major companies, industries, and institutions to be sure that they don't take advantage of the public."[40] Similarly, just one-third of the public agreed with the classic statement of laissez faire doctrine, "the best government is the government that governs least."[41]

When it comes to the central issues of national economic performance, tough federal measures have frequently found substantial backing. For example, the use of wage and price controls was advocated by popular majorities during the Second World War, in the early '50s, and again in the early '70s, as *Figure 2* illustrates. At certain times, the public has been more interventionist

minded than governmental leaders. In February 1972, 55% of the public indicated that they wanted stronger controls on prices than those the Nixon Administration had already put into effect.[42] In April 1978, a Gallup poll indicated that 50% of the population favored "bringing back wage and price controls," although neither President Carter nor key Congressional leaders believed that controls were justified or would prove effective.[43]

In the view of some analysts, public acceptance of governmental regulation of the economy has become more widespread in the post-war years, as groups which formerly voiced opposition have changed their stance. In the New Deal period, Ladd points out, economic regulation was supported by members of the working class, but opposed by most professionals and managers. This has changed. In 1940, some 70% of professional and managerial personnel surveyed by the Gallup organization indicated that there should be *less* federal regulation of business than there was at that time. By 1961, on the other hand, 37% of the same population group believed that laws regulating business corporations were "not strict enough," while only 16% felt that such laws were "too strict." Nearly identical support for increased regulation was voiced in the latter year by the manual workers surveyed.[44]

Yet, acceptance of the necessity of some governmental intervention stops far short of the regulatory equivalent of a "blank check," even when the goals are regarded as important. Survey responses to regulatory measures in recent polls are highly selective. Certain proposals receive strong backing: for example, in 1972, 81% of those surveyed indicated that they would favor a national law prohibiting the sale of beverages in throw-away bottles or cans. But another measure aimed at enhancing the quality of the environment was quite unpopular: only 27% of the population supported "prohibiting an increase in certain kinds of industrial activities" as means of curbing environmental pollution.[45]

In 1973, responses to the Senate committee study revealed a high degree of opposition to several regulatory policy proposals, especially those which might be construed as infringing upon First Amendment rights or violating an individual's privacy. These poll responses appear in *Table 4*. It is noteworthy, for example, that 73% of the respondents indicated that they would object to police searches without a warrant as a means of controlling drug abuse. But control of drug abuse was at that time a major national concern, as the *State of the Nation* survey indicated, and three-quarters of the population in 1972 believed that spending for narcotics control should be increased.[46] Similarly, a majority opposed tough restrictions on the use of handguns, although crime rates and violence were also regarded as two of the foremost domestic problems.[47]

Current polling data, obtained from a 1978 *CBS News/New York Times* survey, also illustrate the selectivity of public opinion in the use of governmental regulation to control various "harmful" conditions. As indicated in *Table V*, large majorities favor regulation of unsafe job conditions but oppose restricting the sale of the sweetening agent, saccharin. Opinion on other contemporary issues is more closely divided.

Table 4

PUBLIC OPPOSITION TO VARIOUS REGULATORY POLICIES, 1973

Policy	Percent Opposing
If the police said they needed to come into your home without a search warrant to control drug abuse.	73%
If government said price of bread had to go up five cents in order to send wheat to Russia and China to keep peace.	73
If government said people had to keep their gun at a local police station.	68
If police made spot checks at traffic lights to see if people have safety belts on.	64
If government required every residence to be inspected for leaks that wasted heat or fuel.	60
If government required auto owners to bring in their cars every three months for inspection.	55
If government asked all demonstrations to be called off so government leaders could get their work done.	48
If government imposed a stiff fine for littering.	10

SOURCE: A Survey of Public Attitudes by the Subcommittee on Intergovernmental Relations of the Committee on Government Operations. *Confidence and Concern: Citizens View American Government.* U.S. Senate, 93rd Cong., 1st sess.; Part I, December 3, 1973, p. 151.

Table 5

ATTITUDES TOWARD GOVERNMENTAL REGULATION, 1978

"I'm going to name some of the ways government regulates things it thinks might be harmful. I'd like to know if you think the government should regulate these things or if it should leave decisions to individuals."

Regulatory Activity	Percent Favoring Regulation
"Should government set safety standards and require changes in job conditions if it thinks they are harmful, or should each factory set its own rules?"	72%
"Should government restrict the sale of handguns, or should adults be able to buy any gun they feel they need?"	61
"Should the government restrict the sale of marijuana if it thinks it is dangerous, or should it warn people and let them make their own decisions?"	57
"Should the government restrict the sale of food and drugs that it thinks are dangerous, or should it warn people and let them make their own decisions?"	48
"Should government, at some level, restrict the sale of pornography to adults, or should adults be permitted to buy and read whatever they wish?"	44
"Should the government restrict the sale of saccharin if it thinks it is dangerous, or should it warn people and let them make their own decisions?"	29

SOURCE: CBS News/New York Times poll, January 8–12, 1978, quoted in *Public Opinion* May/June 1978, p. 26.

Yet, while popular attitudes are mixed, many analysts of regulatory policies do explain their widespread use and growth by reference to the presumed content of public opinion and various aspects of the American political culture. Political scientist Donald J. Devine notes that regulation has been the American alternative to a socialist economy through the nationalization of key industries.[48] Many polls in the Great Depression and the post-war years revealed a clear preference for private ownership, with limited governmental controls. Even under serious hardship, the belief in a free enterprise system remained strong. This has also been true during the more recent economic setbacks.[49]

On the other hand, support for economic regulation reflects, in the view of such commentators as journalist Paul H. Weaver, a widespread distrust of business, especially big business. Although most Americans regarded the nation's economic system as the most productive and generally most admirable in the world, large corporations are nonetheless regarded as unscrupulous in the pursuit of goals which may be harmful to individuals. Moreover, corporate profits are thought to be excessive, and are estimated to be six or seven times higher than they actually are. It is on this basis, Weaver observes, that the general public calls for the continuation and even the expansion of federal regulatory activities.[50] Recent opinion poll findings seem consistent with Weaver's conclusion, as *Table 6* illustrates.

In the view of these analysts, then, there is a certain discontinuity in attitudes toward "private enterprise" on the one hand and "big business' on the other. The former is widely applauded, while the latter is regarded with some suspicion. Everett Ladd is explicit on this point:

> It is one thing to attack certain business firms and practices and quite another to devalue private property. In the public's eye, private enterprise and Exxon are not one and the same. It is perfectly possible to say, "Damm those oil companies; they're doing this and that

wrong." and still be committed to property rights and to a private enterprise system.[51]

Other theorists suggest that the historical tradition of limited government may also encourage the use of command-and-control regulatory techniques, rather than more indirect fiscal incentives, to accomplish public purposes. Charles L. Schultze observes that the Constitutional structure of western democracies has always focused on protecting individuals from the abuse of governmental authority. This protective framework has been provided by a detailed legal prescription of individual rights and governmental powers. A legalistic strategy has been transferred, Schultze believes, to the newer spheres of governmental activity involving economic and social problems—although it is much less appropriate in these fields. Lawyers tend to dominate the policy-making process and continue to rely on these techniques, although the results are often both inefficient and unnecessarily intrusive.[52]

A related argument is offered by Schultze's former Brookings Institution colleague, Herbert A. Kaufman. Kaufman sees the real origins of governmental "red tape" in such widely accepted political values as compassion and representativeness. Although bureaucrats are often made the scapegoats for the profusion of procedures and requirements, Kaufman believes that this only directs attention away from the real perpetrator: ourselves.[53]

Table 6

TRUST AND CONFIDENCE IN AMERICAN BUSINESS AND INDUSTRY, 1972 and 1976

"How much trust and confidence do you have in American business and industry today when it comes to operating efficiently and in the interest of consumers?"

Degree of Confidence	1972	1976
A Great Deal	10%	9%
A Fair Amount	50	46
Not Very Much	30	36
None At All	6	6
Don't Know	4	3
TOTAL	100%	100%

SOURCE: William Watts and Lloyd A. Free, *State of the Nation*, New York, NY, Universe Books, 1973, p. 299; *State of the Nation III*, Lexington, MA, D.C. Heath and Company, 1978, p. 32.

Compassion, Kaufman suggests, spurs procedures to protect people from each other—buyers from sellers, for example. It requires that individuals be protected from hardship, and that "systemic breakdowns" of basic industries be prevented. Each of these goals requires governmental policies and procedures. Similarly, the historical distrust of government, and the quest for safeguards against the abuse of authority, has produced complex procedures to assure the representativeness of governmental action. A desire for due process, for the consideration of all affected interests, and for public access and participation, each contributes to "red tape" in governmental decisionmaking.[54]

Concern About Taxation

Despite the substantial support for governmental activism indicated in the previous sections, the size of contemporary government is also a source of very significant public concern. This appears in a number of areas, each of which will be discussed. One of the most prominent and obvious, however, is the pocketbook issue: taxation.

Popular advocacy of increased governmental expenditures does not imply an equal public willingness to bear new or larger taxes. The opposite is true: while most polls have shown that much of the public believes that public expenditures are in many fields "too small", the majority also believes that taxes are "too high". Gallup surveys on federal income tax levels over the past 35 years make this conclusion plain, as *Table 7* indicates. In 14 of the 17 years included, more than half of the respondents insisted that their own income tax payments were too high. Similarly, Louis Harris survey data indicate that two-thirds or more of the populace has consistently regarded its federal income tax payment as too high in the period 1969–78.[55]

This point of view has often been stated in quite vociferous terms. Thus, since 1969, a majority of the population has regularly declared that it had reached the "breaking point" on taxation. Almost three-quarters of the respondents to a Harris poll took this position in 1977, as *Table 8* shows. Deep distress as also indicated in responses to the polls conducted in the wake of the June 1978 "taxpayers revolt." Sixty-seven percent of the population professed to favor a Constitutional amendment "that would cut the amount federal, state, and local governments collect from you in taxes, and that would limit future taxes."[56] Twenty percent were opposed. In the same poll, 56% of the population indicated that they favored "a one-third cut in federal

Table 7

OPPOSITION TO FEDERAL INCOME TAX LEVEL, 1941–73

"Do you consider the amount of federal (national government) income tax you have to pay as too high, about right, or too low?"

Year	Percent saying "too high"
1941	54%
1948	57
1949	43
1950	56
1951	52
1952	71
1953	58
1957	61
1959	51
1961	46
1962	48
1963	52
1964	55
1966	52
1967	58
1969	69
1973	65

SOURCE: *Gallup Opinion Index*, summarized in Parris N. Glendening and Mavis Mann Reeves, *Pragmatic Federalism*, Pacific Palisades, CA, Palisades Publishers, 1977, p. 141.

income taxes even if it meant a substantial cut in federal programs," while 30% objected to this proposal.[57] Whether these opinions were in fact much different from those expressed in previous years, or whether the vociferous opposition to taxation was only a temporary response to the national publicity given to a California referendum, was a matter of disagreement among various commentators.

At any rate, it is with good reason that opinion analysts over the years have stressed the contradictory nature of popular views on taxation and spending. Poll after poll has produced similar results. The 1963 Mueller study noted that there was a "lack of congruence" in public opinion in this area.[58] A decade later, in 1973, the *Gallup Opinion Index* noted:

> Voters of the nation find themselves in their usual dilemma regarding federal spending, as revealed by Gallup surveys over a period of many years. On the one hand, they would like Congress to appropriate ample funds for their favorite social programs. On the other, they think the budget should be balanced and that income taxes should not be increased.[59]

More recent studies also note the same contradiction. *The State of the Nation III* found "rhetoric and reality" to be "strongly at odds" on the issues of taxation and balancing the budget:

> On the one hand, it is beyond doubt that the individual American would like to pay fewer taxes and would find great psychological and philosophical satisfaction in seeing a neat annual balance between federal revenues and expenditures. But, at the same time, our survey data and other sources confirm that the public has a marked preference for maintaining, if not increasing, the present level of spending on a broad array of domestic programs. The fact that these two goals are logically incompatible has never diminished the ardor with which they may be espoused. . . .[60]

This dichotomy appeared again in the wake of the June 1978 "Proposition 13" survey study for *Newsweek* magazine. The magazine reported that

Table 8

TAXES AT THE BREAKING POINT, 1969–77

"As far as you (and your family) are concerned, do you feel that you have reached the breaking point on the amount of taxes you pay or not?"

Year	Percent at Breaking Point
1969	61%
1970	60
1971	64
1974	57
1977	72

SOURCE: Louis Harris and Associates surveys, summarized in *Public Opinion*, March/April 1978, p. 26; and Parris Glendening and Mavis Mann Reeves, *Pragmatic Federalism*, Pacific Palisades, CA, Palisades Publishers, 1977, p. 142.

> . . . 57% of the public favors a Jarvis-style tax cut in their states. But the vast majority do not believe that their communities are spending too much on local services. In short, the American tax payer seems to want it both ways—lower taxes and ample services.[61]

Similarly, a *CBS News/New York Times* poll indicated that, while 75% of the respondents favored the idea that "the national government should be required by law to have a balanced budget," only 42% agreed that "the federal government must have a more balanced budget even if it means spending less money on programs for such things as health and education."[62]

These contrary views make themselves heard in Washington, of course, and influence public policy. James L. Sundquist comments:

> As every politician knows, the average voter feels no compulsion to be consistent. Asked whether he feels that the government should take action to solve a pressing social problem—be it unemployment, civil rights, a school shortage, or whatever—he is likely to answer in the affirmative. But asked whether the federal government is doing too much—whether it should cut spending and cut taxes and return governmental functions to the states—he is apt to answer in the affirmative also.[63]

Similarly, David R. Mayhew observers that "in the public mind the connection between [spending and taxation] is there, but it is decidedly ambiguous."[64]

Individual Congressmen seem to regard the conflict in public values as quite real. In the wake of the June 1978 "tax revolt," a frustrated Representative drafted an imaginary letter to his constituents: "Thank you for the 'message,' but I need a little guidance on your priorities. Am I, for example, to consider your latest communication as canceling previous messages you have sent me in behalf of bigger and better federal services?" It seemed unlikely to this anonymous Congressman that his constituents really wanted cuts in spending for national security, Social Security, unemployment compensation, agriculture, interstate highways, industrial safety, environmental protection, public health, veteran's benefits, and other extremely popular public programs.[65]

Many political analysts have attempted to discern how public officials cope with the conflicting fiscal pressures placed upon them. First, it seems probable that the concern about taxation does temper the desire for additional spending, and thus slows expenditure growth. Thus, a series of ACIR polls have suggested that very, very few Americans—just 6% in 1979—want to increase *both* services and taxes, while substantial numbers (39%) would prefer cutbacks and a plurality (46%) favors simply maintaining current levels.[66]

The impact is apparently felt in Washington. Political scientist David R. Mayhew observes that the Congress has necessarily established institutional points of constraint within the budget and appropriations processes to prevent the pressure for additional spending to push taxes to intolerable levels. The members who serve on these committees are "rewarded" with internal prestige and perquisites for performing a task which is generally unpopular, but necessary to the successful functioning of the Congress as an institution.[67]

Another student of the Congress, political scientist Gary Orfield, believes that the spending-taxation conflict is an important source of political deadlock, since each of the two inconsistent positions of the public is amply represented. It also encourages the Congress to traffic in small new programs, rather than large-scale reforms which would require a visible increase in taxation and results in the underfunding of those large new programs which are established.[68]

The popularity of administrative reforms aimed at reducing "waste" and raising "productivity" also makes sense in this context. Departmental reorganization, new management and budgetary processes, and personnel incentive systems all hold out the promise of maintaining or improving services while holding the line on—or even reducing—taxes.[69] In the midst of the Proposition 13 revolt, opinion analyst Everett Carll Ladd, Jr. commented that

> The public has virtually been shouting: "You can make cuts in our taxes *without* reducing public services. We know you can." Almost every major survey on the topic documents the exceptional emphasis voters place on governmental waste and inefficiency.[70]

Rightly or wrongly, government is regarded as very wasteful in its use of funds, and this belief has been growing. Between 1964-78, the percentage of the citizenry believing that "government wastes a lot of tax dollars" rose from 48 to 79%.[71] The federal government bears the brunt of the criticism, as *Figure 3* shows. A 1978 Gallup poll found that the public thinks Washington wastes half of all the tax moneys it receives.[72]

A desire to offer public benefits without increasing taxes might also encourage the use of regulatory measures, rather than fiscal subsidies, to accomplish domestic objectives. Because the costs of governmental regulation

FIGURE 3

Attitudes of Governmental Waste[1]

SOURCE: Survey by *CBS News/New York Times*, June 19-23, 1978, in *Public Opinion*, July/August 1978, p. 33.

[1]Question: "Which level of government do you think wastes the biggest part of its budget—the federal government, the state government, or local governments?"

are borne by the industries affected, or are passed on to consumers, instead of being paid directly by taxpayers and the national treasury, they are less visible—and less likely to create popular discontent.

Tax policies may also be affected. A number of political economists believe that the opposition to taxation encourages the overuse of those taxes which are least visible and hence arouse the least public opposition. Anthony Downs, for example, has argued that governmental officials tend to hide the full costs of government programs through excessive reliance on indirect taxation and inflationary finance.[73] James M. Buchanan has explored the probable consequences of a Machiavellian-style political system in which the ruling group sought to minimize the level of taxpayer resistance to revenue collections. Some, but not all, of the major features of the U.S. tax code can perhaps be accounted for by this line of theoretical inquiry.[74]

Other analysts note that, whether deliberately or by happenstance, certain features of the system of taxes (or "Fiscal Extraction Devices"—FEDs, as one writer terms them) do reduce the public's perception of the overall tax burden.[75] This problem of "fiscal illusion" might encourage the over-expansion of those public programs which utilize the most confusing forms of finance (Social Security is an example)[76] and, indeed, could result in an excessively large public sector as a whole.

Similarly, tax expenditures—or "loopholes," to their critics—provide tax relief to particular groups or for particular purposes while their costs are largely hidden from the general public, since they involve foregone revenues rather than budget outlays and are dispersed very widely among all taxpayers. Yet the true economic costs in the aggregate are quite substantial, amounting (in FY 1978) to $113 billion, or more than one-fourth of all federal outlays.[77]

The Dilemma of Ideology

A second way in which the general public has expressed opposition to the growth of the federal government is apparent at the ideological level. As indicated in *Chapter 3* of this volume, the responses to survey questions concerned with such emotionally charged issues as the power and size of government and governmental "interference" with private or local affairs show an attitude which conflicts with that implied by answers to questions on specific expenditures and regulatory issues. Many Americans are not comfortable with the new role of the national government, and say they would welcome a return of greater responsibility to the private sector, local communities, and to individuals themselves.

This dilemma of consistency was a central theme of the 1968 study, *The Political Beliefs of Americans*. Free and Cantril stressed the sharp difference in popular attitudes toward federal spending programs on the one hand and ideological views on governmental intervention on the other. A substantial majority of the public (65%) could properly be classified as "operational liberals," they said, because of their support for many specific types of federal expenditures.[78] But, in contrast, the survey respondents were much more closely divided on questions with marked ideological content. Conservative views tended to predominate (by a small margin) on questions relating to governmental "interference" with the economy and subnational governments, and were expressed even more frequently on questions relating to individual responsibility for economic advancement. Hence, while a substantial majority of the public could be classified accurately as operational liberals because of their support of federal spending programs, many also could be described as "ideological conservatives" according to their basic values.

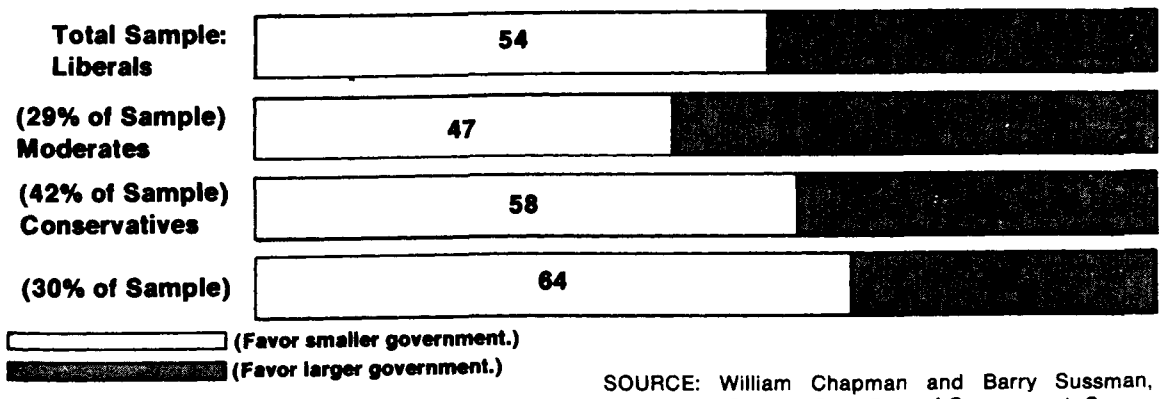
This same dichotomy has been reaffirmed in many succeeding studies. Indeed, in the late 1970s, it appeared

Figure 4

Attitudes Toward Size of Government

Q. In general, government grows bigger as it provides more services: Do you favor:

- Smaller government with fewer services, OR
- Large government with more services?



(Based on 1,117 interviews. Figures may not add to 100% because of rounding.)

SOURCE: William Chapman and Barry Sussman, "Americans Divided Over Role of Government, Survey Finds," *The Washington Post*, May 16, 1976, pp. A 1, A 9.

that ideological conservatism had been growing as a partner to continuingly dominant liberalism.[79] Moreover, during the 1970s, a concern that the federal government has grown "too big" became widely shared by many liberals as well as conservatives. Survey data gathered in 1964 found that 71% of "conservative" respondents (as they decribed themselves) felt that the government was "too big." Only 24% of "liberals" held this view—as might be expected, given the traditional ideological frames of reference. But in 1972, and again 1973, these differences were drastically reduced, according to a study prepared for the Twentieth Century Fund. In these years, majorities of *both* liberals and conservatives believed that the government had become too large.[80] Similarly, a survey conducted in 1976 for *The Washington Post* found that attitudinal differences between liberals and conservatives on the proper size of the national government were surprisingly small, as *Figure 4* shows. Almost half of the liberals indicated that they would prefer a "smaller government with fewer services," as did 64% of the conservatives.

The results of these and other surveys thus indicate, in the view of many thoughtful commentators, that there has been for more than a decade an inadequate alignment between political values and political actions. As a practical matter, most of the public has supported a wide range of governmental initiatives to solve domestic problems; on a philosophical basis, however, many citizens express concern about the aggregate consequences of these interventions. In 1968, Free and Cantril concluded that political ideology had lagged behind the social, economic, and governmental changes of the 20th Century, reflecting more

> . . . the underlying assumptions of a laissez-faire philosophy than . . . the operating assumptions of the New Deal, the Fair Deal, the New Frontier, or the Great Society.[81]

From an historical and comparative perspective, the persistence of conservative "Lockean" values seems to account for both the comparatively small size of the public sector in America and the rejection, by the left as well as right, of socialist doctrines. To a foreign observer, these attitudes are both striking and unusual. British political scientist Anthony King has considered the question of why the role of government is so much smaller in the U.S. than in other advanced nations. After reviewing a broad range of political and economic theories, he has concluded that the ideas of the Lockean tradition are the crucial factor: *"the state plays a more limited role in America than elsewhere,* King explains, *"because Americans, more than other people, want it to play a limited role."*[82]

While such observations do not help explain the dynamics of recent governmental growth in the U.S., they probably do indicate why the process of public sector expansion has been greeted by serious ideological misgivings. The growth of governmental responsibility—throughout the course of American history but especially in the past 40 years—has necessarily compromised traditional values. Yet traditional doctrines have not been much altered to keep in step with these events. The credos of the early 18th century still constitute our most valued political heritage and provide the rhetoric and symbolism for our political life. Indeed, the major shifts in public responsibility have been justified as ways to protect traditional values, not attempts to modify or replace them. The governmental and economic reforms of the Progressive era, the New Deal, and the Great Society were said to be harmonious with a social order based on private enterprise, individual responsibility, federalism, and limited government. And the leaders who articulated the purposes of these efforts were themselves experimenters seeking solutions to particular problems, not the advocates of a new political and social order. Pragmatism, too, is a national philosophy. Daniel J. Boorstin comments:

> The mystic rigidity of our "performation" theory has been consistent with great flexibility in dealing with practical problems. Confident that the wisdom of the Founding Fathers somehow made provision for all future emergencies, we have not felt bound to limit our experiments to those which we could justify with theories in advance. In the last century or so, whenever the citizens of continental western Europe have found themselves in desperate circumstances, they have had to choose among political parties, each of which was commited to a particular theoretical foundation for its whole program—"monarchist," "liberal," "catholic," "socialist," "fascist," or "communist." This has not been the case in the United States. Not even during the Civil War: historians still argue over what, if any, political theory Lincoln represented. In the crisis which followed the Great Depression, when Franklin D. Roosevelt announced his program for saving the American economy, he did not promise to implement a theory. Rather, he declared frankly that he would try one thing after another and would keep trying until a cure was found. "The country demands bold, persistent experimentation. It is common sense to take a method and try it: if it fails, admit it frankly and try another." Neither he nor his listeners doubted that whatever solution, within the limits of common-law liberties, might prove successful would also prove to have been within the prevision of the Founding Fathers.[83]

Yet, the twin traditions of pragmatism and Locke, of governmental action and limited government, have increasingly clashed. Whatever the virtues of each individual program, the combined effect—as indicated by the opinion polls—has been discomfiting. And the net results of this governmental pragmatism—judged by the appropriate pragmatic standard, "does it work"—have fallen well short of popular expectations. Thus, in the view of political scientist Gary Orren, what appears to be a "shift to the right" over recent years does not reflect an abandonment of traditional liberal objectives but rather dissatisfaction and disenchantment with governmental performance.[84] Ladd and Lipset concur, noting that

> . . . one cannot find a single area involving a change in governmental or social values over the past decade and a half where people now want to go back to the condition that prevailed earlier. . . . Indeed, there is still a demand for governmental answers to the entire assortment of national problems.[85]

Doubts and Dissents

The contradictory elements of public opinion as noted above, when coupled with a variety of empirical investigations of the linkages between public opinion on the one hand and actual governmental policies on the other, raise serious doubts about the extent to which changes in governmental size may be attributed directly to public desires. Indeed, political researchers have found it difficult to establish clear connections between the two.

V. O. Key, Jr., the author of an early and influential text on the subject, found the interaction between public opinion and public policy to be extremely complex and varied, but still concluded that "government may be regarded as operating within a context of public opinion that conditions its actions."[86] Though this context seemed neither "rigid" nor "precise," it could "limit either the range or timing of public action."[87]

At the same time, however, Key stressed that public opinion usually left political leaders with much room for maneuver:

> . . . the articulation between government and mass opinion is so loose that politicians enjoy a considerable range of discretion within which to exercise prudence and good sense. Our explorations into the nature and form of mass opinion leave no doubt that its directives tend toward generality rather than specificity. Even on broad issues on which opinion becomes fairly well crystallized room may remain for choice among a variety of specific actions.[88]

Key also distinguished three different patterns of popular consensus, each with a different relationship to public policy.[89] Most continuing governmental services, programs, and rules, he suggested, are bolstered by a "supportive consensus." In these cases, the public gets what it wants because it likes what it has. A second common type of relationship is the "permissive consensus," which provides general support for some form of governmental action—if and when technical problems are solved and the key opponents quieted. In these instances, public opinion is tied only loosely to specific governmental decisions:

> The consequence of a permissive consensus is not necessarily action tied closely to the development of that consensus. Rather the timing and precise form of the action taken, if it is taken at all, depend on circumstances peculiar to each issue. The press of other matters may divert attention. Small groups may be able to block action. Indeed, those responsible may judge it not in the long-run public interest and may decline to act, usually without fear of public reprisal. Yet the context of public attitudes gives government freedom to act if that is judged desirable.[90]

Finally, on rare issues of great moment, there is formed a "consensus of decision" in which public opinion is decisive, even directive, of some particular policy. Key's example: U.S. entry into World War II.

More recent research offers little that contradicts Key's basic perspective. At most, public opinion may be said to help "set the agenda" for political debate on major issues[91]—but it certainly does not usually dictate outcomes. Even when the public's views are well-formulated, they usually "emphasize the achievement of results, rather than the means used to achieve those results. Therefore, [public opinion] characteristically offers little direction as to what new policies ought to be adopted."[92]

On the great majority of policy questions—the bread and butter issues of government—public opinion has been found to be weak, inarticulate, or even nonexistent. Thus, Richard Rose observes that

> . . . studies of public opinion . . . have found that the fundamental obstacle to government by public opinion does not rest in the communication process, but rather in the character of public opinion. The mass of the . . . people have a limited range of things that they wish to communicate to their governors; on many everyday concerns of government, the majority opinion is "Don't Know". . . . This is not to say that people have no views about what the government should do, or about the competency or sincerity of men in government. At election times, members of the general public can express their preference about *who* should govern. Between elections, the measures that most concern them are simple but basic—peace and prosperity. The complex diplomatic means to these ends are hardly appropriate for solution by referendum.[93]

Using similar terms, Ladd and Lipset have concluded:

> . . . public opinion is clearly not the sole or even the main determinant of public policy at the national level. Many of the specific reactions that are voiced to the pollsters reflect weakly held views. Opinion surveys have reported sharp reversals in popular sentiment following decisive actions by the President and Congress. What the polls reveal is the general mood of the electorate; their results are not the equivalent of referenda held following campaigns in which arguments on both sides have been presented to the electorate.[94]

Looking at the matter from the receiving end, it seems plain that the "roar of the crowd" is often no more than a murmur in Washington. Members of the Congress do not and cannot know the views of their constituents regarding the specifics of most of the matters which come before them. Hence, they must instead rely upon other sources of advice. Donald E. Matthews and James A. Stimson, two experts on the legislative process, comment that

> The trouble with the direct-representation model is that it assumes far too high an infor-

mation level on the part of both members of Congress and their constituents. It may be a fairly accurate picture of the process of representation when constituents *are* highly involved and the matter simple—emotionally charged, symbolic issues like flag-burning or school busing, for example. The decision-processes of House experts, when dealing with issues falling within their area of special competence, may also bear some similarity to this process. But the vast bulk of matters—including most of the "important" ones—coming before the House are low-saliency issues for most Congressmen and for most constituencies as well.

Thus, they argue that, in the "normal" voting situation,

> . . . the linkage between the member and his constituents is indirect and attenuated. He has received no authoritative policy guidance from "back home" and, instead, makes up his mind on the basis of cues from his colleagues.[95]

Similar conclusions about the modest impact of public opinion also are suggested by those studies which have compared poll results with actual public policy outcomes. Congruence between the two is by no means the general rule, suggesting the need for the term "opposing consensus"—a category Key did not mention. For example, a detailed analysis of a broad range of policy fields by Robert Weissberg concluded that

> . . . depending on the topic and the time period, opinion-policy congruence does occur; however, widespread instances of incongruity can also be found. For instance, on the subject of Communist China's admission to the United Nations the preferences of a majority were in accord with government action for a period of 20 years. On the other hand, perfect *in*congruity is displayed in the area of religious observances in public schools. Between these two extremes we find almost every conceivable type of relationship. In some policies, e.g., capital punishment for murder, opinion-policy congruence occurs in some years, but not in others.[96]

Moreover, he believed that much of the congruence he found could plausibly be attributed to chance alone, while "the voice of the people" was barely intelligible on a great many issues. Only on very broad policies not part of the political struggle—national sovereignty, capitalism, the Constitutional order—was opinion-policy congruence the rule.[97]

Another recent study, by Alan D. Monroe, found the level of opinion-policy congruence on 248 items during 1960–74 to be 64%—somewhat higher than chance might dictate, but still not very high. And, as Key suggested, policy was most likely to be in accord with popular views when the latter favored the status quo, rather than when it called for change. Furthermore, Monroe found a number of instances in which a decade or more elapsed between the expression of a public preference and the ultimate legislative enactment. Thus, the American political system seemed, in his view, to be "biased against change."[98]

In sum, those who have examined the influence of public opinion on governmental decisionmaking in an empirical, rather than purely theoretical, manner stress the weak coupling between the two. The work of these analysts suggests that, if public opinion has influenced the growth of government in any way, it could only have provided the foundation, not erected the structure.

Summary and Conclusion

Many political analysts look to public opinion as a major motivator and chief constraint upon public activities, the ultimate foundation upon which the edifice of modern government rests. Economists such as Downs and Galbraith, political scientists like Huntington and Devine, and sociologists including Cantril and Free, all share a common belief that the direction and content of public opinion is a major influence on the eventual outcomes of the political process. Thus, these writers suggest that both the size of government and, at least in general outline, the nature and content of public policy can best be explained by reference to the political values and orientations shared by large groups in American society.

The survey findings and scholarly commentary reviewed in this section provides a number of insights into public opinion as it relates to the question of governmental growth over the period since 1960. Various studies have suggested that

- Public opinion has generally been supportive of increases in federal spending for a very broad range of domestic purposes. This may have encouraged the broadening role of the national government. At the same time, however, most of the public has opposed increases in taxes. These contradictory attitudes are felt in the Congress, and leave a mark on the development of public policy.

- Changes in expenditure priorities from defense to domestic fields in the post-war period corresponded to a major shift in public opinion. The most recent survey studies indicate a modest slackening in support for domestic spending. If this trend continues, it might result in lower rates of growth for public expenditures.
- Many individuals appear to have inaccurate appraisals of the costs and benefits of public programs. This could encourage the overexpansion of programs for which costs are underestimated, and underspending for programs for which the benefits are not fully recognized.
- While the support for specific regulatory measures is quite selective, the general public does believe that federal regulatory activities are necessary to improve the operation of the economy and to protect the public interest. Over-reliance on regulatory techniques might result from the American legal tradition, the need to assure due process and public participation in governmental processes, and the success of irrational and emotional political appeals.
- A great many Americans retain faith in a traditional, Lockean political ideology stressing limited government, individual responsibility, private property, and federalism. In historical and comparative terms, these attitudes have been a significant constraint on the growth of the public sector.
- Many individuals hold ideological views which are not consistent with their practical political attitudes and actions. In particular, many "conservatives" have supported the expansion of domestic expenditure programs. In recent years, many "liberals" as well as conservatives have become increasingly concerned about the size and scope of the national government.
- Most major new governmental undertakings have been justified as pragmatic responses to particular problems, and have been said to be consistent with traditional values. New political philosophies have not been devised. Yet, the increasing gap between political ideals and rhetoric on the one hand, and the actual character and performance of government on the other, is a source of deep distress and concern.
- Empirical studies have been unable to identify much of a direct link between public opinion on the one hand and public policies on the other. At most, government may be said to operate within a loose, permissive "context" of opinion which allows decisionmakers substantial discretion in the creation and design of new programs.

ELECTIONS AND POLITICAL PARTIES

The electoral process, which at the national level is dominated by the two major political parties, is generally regarded as the most important mechanism for the expression of public opinion on policy questions and the involvement of the citizenry in actual policymaking. This belief has been supported both by traditional political science and by an important body of recent economic scholarship, as this section will illustrate.

Still, this fundamental democratic premise has been the subject of severe criticism derived from the results of empirical research, especially public opinion polls and surveys of actual voting behavior. The literature of "behavioral" political science—at least until recently—has generally denied that either voters or the parties play a significant policy role within the American system. Ballot box choices, in this view, are determined largely by traditional party loyalties. The parties themselves have been regarded as too diverse internally and too weak organizationally to have much influence on policy outcomes.

On the other hand, these contentions were never accepted unanimously, and have been challenged repeatedly in recent years. A growing body of new scholarship asserts that the electoral process has had a greater impact on at least the broad outlines of governmental action than was recognized previously. Furthermore, the relationship among voting, political parties, issues, and policy outcomes is now viewed as dynamic, not static, and subject to important changes over time.

Each of these schools of thought, especially as it relates to the question of the size and scope of government, is discussed briefly in this section.

Voting Choices and Public Policy

Traditional democratic theory stresses the electoral process as the basic mechanism for popular control of governmental action. The right to vote has usually been regarded as the most significant tool which citizens possess for influencing the course of public policy.[99]

This perspective has been shared by both expert and layman alike. As Hugh Heclo notes:

> The most pervasive analytical tradition identifies the electoral process and party competition as central to policy formation in democratic states.

> Few suggest that elections permit citizens to participate directly in policy formations; rather, such writers as Schumpeter and Lipset have argued that elections allow indirect popular guidance through choice among competitors for public office. Those in office are thus held accountable for what they have done, and those both in and out of office can seek the favor of electors on the basis of what they promise to do. . . .
>
> The democratic influence of elections and parties has usually been considered particularly important in the development of modern social policies, because these polikies are thought to be of most direct interest to electoral "consumers." The extension of democratic political forms is said to have provided greater popular control of leaders, who responded over the years with the broader welfare policies the electorate wanted.[100]

"Man-in-the-street" theories of democratic governance also stress the centrality of electoral control:

> The idea that elections are intended to facilitate citizen control over leaders and public policy is among the most deeply entrenched American political beliefs. From childhood, Americans appear to develop a commitment to the electoral process and come to view voting as the principal vehicle for popular influence in government. The image of citizen control via the ballot box is shared by virtually all strata of American society.[101]

While it is recognized that actual behavior may fall short of this standard—witness the frequency of "get out the vote" drives and the urgings by reformers for greater civic awareness—the norm itself has been accepted very widely.

Certain economists who have applied their conceptual tools to political problems have often utilized a similar interpretation and have, at the same time, refined and clarified the traditional theory. The single most influential study is Anthony Downs' book, *An Economic Theory of Democracy*.[102] In Downs' economic model, political parties are regarded as analogues of entrepreneurial firms in the private economy: they formulate policies which they believe will attract the most voters, just as companies seek to develop products which will attract purchasers. Citizens also are assumed to behave in an economically rational fashion, and each voter is expected to support the party which he believes will maximize the benefits he receives from government. To adopt the terminology of Albert Breton, the act of voting is a "signal" from the electorate to public officials regarding any discrepancies between the set of policies which they desire and those which the government actually provides.[103]

It should be apparent that *policy issues* are at the heart of such descriptions of politics: they are the basic commodities which are "sold" and "bought." It is the policy positions of the political parties, and not the personality characteristics or appearance of particular candidates, party loyalties, or the opinions of one's family, or friends, or co-workers, which are regarded as crucial determinants of voting choices.[104] Political parties, in turn, are in the business of formulating policies which will maximize their support at the polls. It is political *parties*, in Downs' theory, and not such other actors as individual candidates, officeholders, interest groups, or bureaucrats, which are at the heart of the policy formulation process.

Although there can be a number of complicating circumstances, in simple models of this type, the policy preferences of the majority will always be adopted. The "median voter"—the individual whose views are at the mid-point in the general distribution of preferences—will see his personal goals realized in law. The force of competition between parties necessitates this result; indeed, Downs endeavors to demonstrate that, in a two-party system, *both* parties will usually come to accept any policy favored by a "passionate majority."[105]

The same factors also determine the level of governmental expenditures. Downs says

> The government is likely to adopt any act of spending which, coupled with its financing, is a net addition of utility to more voters than it is a subtraction, i.e., it pleases more than it irritates. Otherwise the opposition may approve it and make an issue of it in the forthcoming campaign. Conversely, whenever a proposed expenditure irritates more voters than it pleases, the party in power will most likely refuse to carry it out. . . . .

For these reasons, he has concluded that

> In a democratic society, the division of resources between the public and private sector is roughly determined by the desires of the electorate.[106]

A number of other writers have agreed with these views, and believe that they are supported by the evidence of experience. After a brief exposition of the median voter model, McKenzie and Tullock state

> The basic conclusions we've drawn here

> show that public decisions will tend to reflect the views of the median voter group and have considerable predictive power. A number of Presidential elections in the post-World War II years, such as the elections of 1948, 1960, and 1968, have been very close; and when the elections have not been close, the losing political party has in succeeding years taken steps to move its political position closer to the position of the other party. . . . In addition, the . . . median voter model has been found to be very useful in sophisticated statistical studies in predicting government policies toward such public concerns as the absolute size of school budgets and conservation programs.[107]

Under these models of the political process, then, it is to be expected that the principal source of changes in governmental policy and size would be the mandates for change offered by the voters. Furthermore, one would expect that the size and activities of government at any point in time would reflect popular desires quite accurately. In a later work, Downs was quite specific on this point, denying that the government could have grown "too large" and "bureaucratic" under the conditions of party competition found in the U.S.:

> If the bureaucracy as a whole were really excessive in size, some political party would advocate drastic reductions affecting a whole political spectrum of . . . bureaus. This party would receive the vote of every citizen who believed he was paying more to support wasteful bureaus than he was receiving in from those . . . bureaus that benefited him directly. If such citizens were in the majority, the bureau-wrecking party would be elected, and would presumably slash the size of the bureaucracy as a whole. Until this occurs, we are forced to conclude that the overall size of the bureaucracy is not excessive in relation to the services it is providing for society.[108]

On the other hand, these models also suggest government is likely to grow larger under vigorous two-party competition, in accord with majority preferences. Since incomes tend to be distributed unequally, with poorer citizens outnumbering the very wealthy, it follows logically that the political parties will seek to maximize their support by offering large-scale, redistributive social welfare programs. In his classic investigation of southern politics, V.O. Key, Jr. concluded that the one-party factional systems he found in these states tended to hold down levels of public expenditure which would benefit have-not groups. On the other hand, he believed that strong party competition provided the poor with a mechanism for increasing tax and benefit programs.[109]

Meltzer and Richard have recently restated Key's argument, though in critical terms:

> Government continues to grow because there is a decisive difference between the political process and the market process. The market produces a distribution of income that is less equal than the distribution of votes. Consequently, those with the lowest income use the political process to increase their income. Politicians have an incentive to attract voters with incomes near the median by offering benefits that impose a net cost on those with incomes above the median. The redistributive programs offered vary from place to place and time to time, as the composition of the electorate changes. But as long as the disincentive to work, save, and invest does not lower future income enough to turn the expected gain into a loss, support for redistribution will continue.[110]

Hence, the authors concluded, "although large government poses a threat to many of our freedoms, government grows in every society where the majority remains free to express its will."[111]

The Behavioral Critique

Both of these models—traditional democratic theory and the similar, but more contemporary, economic models of voter choice—depart rather broadly from the principal research findings of modern political science. On a normative basis—as statements of what "should be"—they enjoy considerable support. But it is widely felt that they are inaccurate characterizations of the actual behavior of the American electorate and the political parties. On a factual, "what is" basis, such visions are "more misleading than helpful in describing the democratic political process."[112]

The behavioral critique suggests that the electoral process has very little impact on policymaking. Thus, it also implies that electoral outcomes are *not* a significant determinant of the size of the public sector. For the most part, in this interpretation, policy outcomes are said to be shaped by interest group activities. Robert A. Dahl, an eminent democratic theorist, has written:

> [N]either elections nor interelection activity

provide much assurance that decisions will accord with the preferences of a majority of adults or voters. Hence we cannot correctly describe the actual operations of democratic societies in terms of the contrasts between majorities and minorities. We can only distinguish groups of various types and sizes, all seeking in various ways to advance their goals, usually at the expense, at least in part, of others. . . .

A good deal of traditional democratic theory leads us to expect more from national elections than they can possibly provide. We expect elections to reveal the "will" or the prefences of a majority on a set of issues. This is one thing elections rarely do . . . .[113]

The key assumptions that voters hold strong policy prefences, that they take the trouble to inform themselves about the policy positions of political candidates, and then vote accordingly, have been attacked in repeated survey studies. The authors of the landmark analysis of voting behavior, *The American Voter*, which was based upon survey data from the 1952 and 1956 elections, stressed that most voters lacked either a clearly defined ideology or specific policy-relevant information.[114] Hence, issue positions were comparatively unimportant in determining voting choices.

The most important determinant of voting choices, in the view of these political scientists, was "party identification"—a sense of loyalty to one or the other of the major parties, usually acquired in one's youth and reinforced through social contacts. Such allegiances lack much policy content. Instead, in Wahlke's description,

> Voters identify with a political party much as they identify with a baseball or soccer team. Many voters in many lands are better described as "rooters," team supporters, than as policy advocates or program evaluators.[115]

These observations are important aspects of what is termed the "behavioral" model of politics, which rests principally on survey studies. Formulated in the '50s and early '60s, this theory has dominated most political science scholarship up to the present time. The picture it presents of the political process is strikingly *apolitical*. Voting, and most other political acts are explained largely in *sociological* terms—that is, by reference to attitudes learned during childhood, the opinions of friends and co-workers, and social status and ethnic and religious characteristics. This interpretation bears little similarity to the premise of either traditional democratic theory or to the median voter models of the political economists.

The authors of *The American Voter* believed that two consequences for policy formulation followed from their findings. First, there is the implication

> . . . that the electoral decision typically will be ambiguous as to the specific acts government should take. The thinness of the electorate's understanding of concrete policy alternatives—its inability to respond to government and politics at this level—helps explain why efforts to interpret a national election in terms of a policy mandate are speculative, contradictory, and inconclusive.[116]

The second consequence is that

> . . . the electoral decision gives great freedom to those who must frame the policies of government. If the election returns offer little guidance on specific policies, neither do they generate pressures that restrict the scope of President and Congress in developing public policy.[117]

Wahlke has summarized these and other salient points, stressing that many of the research findings of political scientists are quite inconsistent with a simple "demand-input" model of policymaking. In his view, the body of empirical studies has indicated that:

1. Few citizens entertain interests that clearly represent "policy demands" or "policy expectations," or wishes and desires that are readily convertible into them.
2. Few people even have thought out, consistent, and firmly held positions on most matters of public policy.
3. It is highly doubtful that policy demands are entertained even in the form of broad orientations, outlooks, or belief systems.
4. Large proportions of citizens lack the instrumental knowledge about political structures, processes, and actors that they would need to communicate policy demands or expectations if they had any.
5. Relatively few citizens communicate with their representatives.
6. Citizens are not especially interested in or informed about the policymaking activities of their representatives as such.

7. Nor are citizens much interested in other day-to-day aspects of parliamentary functioning.
8. Relatively few citizens have any clear notion that they are making policy demands or policy choices when they vote.[118]

These conclusions should not necessarily be regarded as disparaging the electoral process or the fact of voting as unimportant. Voting does serve other critical functions in a democratic nation: it provides a bulwark of protection against arbitrary governmental action, provides for the selection and rotation of policymakers, and can create a pressure to act even when a specific policy "mandate" is lacking.[119] Furthermore, it "legitimizes" policies created by other means. But, the behavioral political scientists concluded, it is necessary to look elsewhere for the sources of most important changes in public policy. As later discussion will indicate, interest groups have generally been thought to dominate the policy process.

Parties as Policymakers

The political science literature (and, indeed, most of the writing on American political affairs) has also denigrated the contributions of the political parties to policy-formulation. The direct evidence here is less than complete: as Hugh Heclo has observed, the "effect of parties on policymaking is probably the most poorly investigated topic in the entire vast literature on political parties."[120] Still, the dominant interpretation in political science suggests that the political parties make minimal contributions to public policy. In contrast to the much more programmatic parties of most European nations, American parties lack both ideological and organizational solidarity. According to a common criticism, they neither formulate a coherent set of proposed policies nor possess enough internal cohesion to see such policies carried out.[121] Indeed, as Lowi observes, the significant debates on policy questions occur as often *within* each of the parties as between them.[122] American parties are "constituent" parties in his terminology, contributing much more to the functioning of free government than to the resolution of specific policy problems. Their day-to-day business, then, involves selecting candidates for office, conducting campaigns, and organizing the internal offices of the legislative branch—not policymaking.[123]

Futhermore, to some observers, the general areas of agreement between the two major parties seem to be of more importance than their points of difference. "Both political parties," Thomas R. Dye writes,

> . . . subscribe to the same fundamental political ideology. Both share prevailing democratic consensus about the sanctity of private property, a free enterprise economy, individual liberty, limited government, majority rule, and due process of law. Moreover, since the 1930s, both parties have supported the same mass-welfare domestic programs of social security, fair labor standards, unemployment compensation, and graduated income tax, a national highway program, a federally aided welfare system, countercyclical fiscal and monetary policies, and government regulation of public utilities.[124]

For this reason, in Dye's view, there is substantial continuity in public policy, regardless of the outcomes of elections: "A change in party control of the Presidency or Congress has not resulted in any significant shifts in the course of American foreign or domestic policy."[125] In summary, he asserts that

> Parties are important institutions in the American political system, but it would be a mistake to overestimate their impact on public policy. It makes relatively little difference in the major direction of public policy whether Democrats or Republicans dominate the political scene. American parties are largely "brokerage" organizations, devoid of ideology and committed to winning public office rather than to advancing policy positions. Both the Democratic and Republican parties and their candidates tailor their policy positions to societal conditions. The result is that the parties do not have much independent impact on policy outcomes.[126]

A similar conclusion is advanced by Peter Woll:

> Wherever policy power lies, it seems clear that it does not reside in an entity called "the political party." The party model does little to clarify the way in which policy is formulated. . . . At the present time, and for the foreseeable future, parties as a collective force do not significantly shape the content of public policy.[127]

The Contemporary Reappraisal

Although the behavioral interpretation of elections and parties held, at least until recently, an almost unassailable position within the discipline of political science, the consensus which it represented is now foundering. New

views, backed by a growing body of empirical evidence, are gaining supporters. Although the philosophical, definitional, methodological, and empirical points of contention are many and unsettled, some recent research has reached conclusions which conflict with behavioral orthodoxy, and which adhere somewhat more closely to traditional democratic theory. For example, policy differences between the two major parties are being described as considerable and important. Second, certain key or "critical" elections are regarded as having a significant impact on the development of policy. Third, issues are said to loom much larger in the mind of the electorate than had been recognized previously, and in recent years may even be overshadowing traditional party loyalties as an influence on electoral choice. Each of these points is considered below.

Party Differences

Although many students (and critics) of American political parties have argued that the policy differences between them were few, at least on key issues, other commentators take a different view. They suggest that in a number of significant areas—including those relating to the size and scope of government—party differences loom large.

A major theme of much of this commentary is suggested by the assessment of James L. Sundquist, a political scientist on the staff of the Brookings Institution and an official in the executive branch during both the Kennedy and Johnson Administrations. Sundquist argues that, in the period since the New Deal, the Democratic Party has provided the principal support for governmental expansion. Republican opposition made this a central point of contention between them. In his words,

> The 20th Century extensions of federal responsibility were . . . almost all of Democratic origin. The Republican Party and its leadership attacked the expansion of federal power, and much of the political debate from Woodrow Wilson to Lyndon Johnson centered upon that issue.[128]

Furthermore, Sundquist concluded (in a detailed study of the adoption of major domestic legislation) that the principal political issues of the '50s and '60s involved disputes between "activists," who wanted to use the national government as an instrument to solve domestic problems, and "conservatives," who were concerned about bigger national budgets, higher taxes, governmental centralization, and the emergence of a "welfare state." Although both political parties included some individuals of each persuasion among their members, the activists clearly dominated the Democratic party, and conservatives the Republican party.[129]

Other, more recent, studies offer a similar interpretation. Tufte asserts that political parties in the U.S. and many other nations have generally adopted clearly differentiated positions on major economic issues, including those relating to the size of the governmental budget and its rate of expansion.[130] In the U.S., the existence of these party differences can be gleaned from a careful study of party platforms and Presidential policy statements on the economy. (For example, in 1976, the Republican platform contained 42 references to the problems of "federal spending," "big government," and "deficit spending," while there were only nine such references in the Democratic platform.)[131] Furthermore, Tufte argues, the voters have shown themselves able to perceive and respond to these differentiated party positions and to reward and punish politicians who depart from their own preferences.

A recent analysis of Congressional voting on "urban-oriented" legislation in the period 1945–74 also concluded that party differences were extremely important.[132] (Among the bills studied were food stamps, aid to highways, medicaid, model cities, public housing, water pollution, construction grants, and elementary and secondary education aid). A majority of Democrats favored the "pro-urban" position on every one of the 44 key votes examined. In contrast, a majority of Republicans took the "anti-urban" position in 37 of the 44 cases.[133]

Both Tufte and Sundquist specifically challenge Downs' assertion that both political parties seek to move towards a midpoint on the political spectrum, toward the position of the "median voter." While recognizing some degree of partisan overlap, they believe that the Democrats and Republicans differ in significant ways. "The evidence," Tufte writes, "does not support the key deduction from the Downsian party model."[134]

The Impact of Critical Elections

A second area of scholarship undergoing re-evaluation concerns the impact of electoral outcomes on policy. At least at certain key historical points, several researchers contend, questions of policy were at the heart of the electorate's choice. They believe that the decisions which were made at these times resulted in sharp departures from established policies. In their view, the later development and elaboration of policy, and the terms of the debate between the two parties, was largely fixed by these key contests.

"Critical" or "realigning" elections, as they are termed, thus are said to have unusual political and governmental significance. They signal the emergence of both new governmental issues and new partisan alignments. At such points in history, which have occurred at about 30-year intervals, both the initiatives of national political leaders and the responses of the electorate may have a substantial impact on at least the general thrust of public policy, if not its specific content.

There appear to have been three major periods of partisan realignment (each comprised of one or more critical elections) which have been especially crucial to the development of modern American government. These occurred in the 1850s, the 1890s, and 1930s. Each had somewhat different outcomes: in the 1850s, a new political party—the Republican Party—supplanted the Whigs; in the 1890s, an emergent third party, the Populists, was absorbed by Democrats and the Republicans emerged as the clear majority party for the first time; and in the 1930s, there were significant shifts in the composition and major policy positions of the two existing parties, with the Democrats becoming the dominant coalition after three score years of minority or near-minority status.[135]

Realigning elections, as described by such analysts as James L. Sundquist and Walter Dean Burnham, are characterized by intense conflict at both the nomination and electoral stages and sharp ideological polarization between the parties. Conflict centers on one or more major political issues (slavery, industrialization, the Great Depression) and a realignment is followed by dramatic new departures in public policy.[136]

The years following these periodic disruptions are comparatively calm. The existing realignment may be reinforced from time to time by the emergence of the problems or issues which coincide with it. On the other hand, new cross-cutting issues can weaken it and—if they become sufficiently intense—cause a new realignment.

The normal pattern is that the separate identities of the parties are retained between realigning elections, but their ideological differences are muted. "Polarization," Sundquist says, "gives way to conciliation. As it does, the parties move from the poles toward the center and the distance between them narrows."[137] It is in these periods that the complaint arises that "the parties don't stand for anything." Under the conditions of "politics as usual," it may be true that even the election of the opposition party does not necessarily produce dramatic policy changes.

The 1950s, the period in which the model of behavioral politics typified by the *American Voter* gained acceptance, appears in retrospect to have been one of these eras of political quiescence. At that time, the political system did closely resemble the descriptions of the behavioralists and pluralists. But, the new wave of political analysts contend, this was just a part of the story, a single chapter in an historical dynamic which differs radically from orthodox behavioral interpretations.[138]

The Great Depression and the Roosevelt response to it, the New Deal, exemplify the process of partisan realignment and have largely determined the contours of politics up to the present. Samuel H. Beer has observed that, during the Depression, the Democratic party became the proponent of the "national idea," urging unprecedented federal governmental action in the face of conditions of economic emergency. It identified two principal problems stemming from the impact of industrial growth: the over-concentration of economic power and inequities in the distribution of economic well-being. Beer acknowledges that these dilemmas had also been recognized by the earlier Progressive movement, but the New Deal employed different means for similar ends. Its principal instruments involved the more extensive use of taxing and spending powers (as in the social security and public housing acts) and the creation of what became known as "countervailing power" (typified by the *Wagner Act*, the AAA, and the TVA).[139] V.O. Key, and many other analysts, agree. Key observes that

> The federal government underwent a radical transformation after the Democratic victory of 1932. It had been a remote authority with a limited range of activity. It operated the postal system, improved rivers and harbors, maintained armed forces on a scale fearsome only to banana republics, and performed other functions of which the average citizen was hardly aware. Within a brief time it became an institution that affected intimately the lives and fortunes of most, if not all, citizens. Measures of recovery and of reform—as the categorization of the time went—contributed to this fundamental alteration of federal activities. Legislative endeavors to achieve economic recovery from the Great Depression shaded over into steps toward basic reform: both types of policy touched the interests and hopes of great numbers of people and ignited the fiercest political controversy.[140]

The political effects of the new policy thrusts can be identified in the voting behavior of Congressmen. In these years, new dimensions of partisan conflict emerged

over governmental management of the economy, agricultural policy, natural resources, and social welfare.[141]

Later political debate, too, frequently has focused on the issues first raised in the New Deal years. Richard Boyd indicates that

> Since the realignment of 1928–36, much of the conflict between the parties has centered upon two broad issues: (1) What is the public responsibility to the private individual for the calamities that can befall him—from economic dislocation, sickness, unemployment, injury, indigence? (2) If there is a public responsibility, what level of government carries its burden? The answers of the majority Democratic party have been that there is a proper governmental role in these matters, a role of the national government. Out of this majority have come federal programs such as farm price supports, old age and survivor's insurance, unemployment compensation, and Medicare. The Republican party has, for the most part, resisted the expansion of the federal role at each stage. Because of this continuing conflict, these issues still stand out as the major, long-term issues dividing the parties' adherents.[142]

Questions of the size and scope of government, then, were at the center of the New Deal realignment and the development of the post-New Deal party system. Politics was also given a new socioeconomic orientation based in social classes. Sundquist observes that

> . . . an activist-conservative line of cleavage and a class-based rationale for the party system are two ways of describing the same structure, for it was the lower economic classes who wanted to use the powers of government for the relief of economic hardship and the reform of the economic system in their interests. The party conflict thus reflected at the same time a policy disagreement as to the role of government and a struggle between broad class and interest groups for the control of government.[143]

Some other elections, while not resulting in a realignment of the parties, may also have an unusual impact on public policy. The key requirement appears to be that both the legislative and executive branches are controlled by the same political party. (Indeed, it may be that this is the most crucial factor in explaining policy outcomes during realignments as well).[144] The general election of 1964, which produced a landslide victory for President Johnson and the heaviest Democratic majorities in Congress since the Depression era, provides the most recent example. In response to the President's urging, the Congress enacted in rapid succession a wealth of major items of domestic legislation.[145] Although not a "realigning" election in the view of most scholars, the 1964 Presidential contest did have special significance for the thrust of public policy.

Brady provides a useful summary of this point of view. He concludes that

> Major shifts in public policy are most likely to occur during periods when the parties and the candidates take divergent issue positions and the electorate sends to Washington a new Congressional majority party and a President of the same party. Since 1896 this set of conditions has occurred only four times—in 1896, 1912, 1932–36 and 1964—and in each instance there were major shifts in policy. When these conditions are met, there are relatively strong connections between the electorate, representatives, and public policy. During such periods the American system of government exhibits many of the characteristics of responsible party government.[146]

In contrast with the behavioral model, then, scholars who have focused their attention on certain key elections suggest that the voters can exercise significant influence over the general outlines of public policy and the ultimate resolution of the most pressing political issues. Even in intervening years, politics is carried out within the newly formed "consensus." This position is stated nicely by political scientist Benjamin Ginsberg, who has undertaken a detailed analysis of party platforms and legislative enactments over the course of the nation's history. "Approximately once a generation," he says,

> Voters are given the opportunity to alter national policy significantly. The decisions made by voters during these critical periods define the termini of broad epochs in American political behavior. . . . While the magnitude of the difference between the two parties and thus the opportunity for voter choice generally diminishes following the critical era, in each case, the general terms of choice established by the two parties prior to voter realignment persist following realignment. Some opportunity for choice thus continues beyond critical periods.

> . . . Our findings suggest that voter alignments are, in effect, organized around substantive issues of policy and support the continued dominance in government of a party committed to the principal elements of choice made by voters during critical eras. Stable partisan alignments are, in effect, the electorate's choice in favor of the continuation of a particular set of politics.[147]

The Growth of Issue Voting

Another body of research suggests that, even in *non*critical election years, political issues are more important to voters than behavioral theory recognized. The role of issues in past elections was underestimated, many analysts now believe. Furthermore, they assert, issue voting has grown steadily for more than a decade, and is even becoming the dominant pattern. Simultaneously, the grip of the political parties on the electorate appears to be declining dramatically.

On the other hand, though these viewpoints have gained a number of proponents in both the professional literature of political science and the more popular commentaries on politics, they are by no means universally accepted. Adherents of the behavioral model of voting stress the flaws and inconsistencies of this newer work.[148] The matter remains, then, intensely controversial.

The recent studies of issue voting were stimulated largely by the reassessment provided by V.O. Key, Jr., the foremost student of American politics, shortly before his death in 1963. Key's last book, *The Responsible Electorate,* stressed the *rationality* of electoral choices in the period 1936–60. It took up what Key recognized to be "the perverse and unorthodox argument . . . that voters are not fools."[149]

Key examined in detail the opinions of those voters who supported the candidate of one political party at one Presidential election and the opposition candidate at the next—"switchers," as he termed them. He found that these shifting voters were more numerous than had been supposed (ranging from about one-eighth to one-fifth of the electorate) and, furthermore, that they moved from party to party in a manner which was quite consistent with their views on major policy issues. Party loyalties—while a source of some inertia—did not prevent all change. Even most "standpatters" stayed where they belonged in the light of their policy commitments. Thus the picture of voting behavior which Key provided differed considerably from behaviorialist orthodoxy:

> In American Presidential campaigns of recent decades the portrait of the American electorate that develops from the data is not one of an electorate straitjacketed by social determinants or moved by subconscious urges triggered by devilishly skilled propagandists. It is, rather, one of an electorate moved by concern about central and relevent questions of public policy, or governmental performance, and of executive personality.[150]

A similar appraisal has been provided by James L. Sundquist. His own analysis of party switchers in the 1954–60 period also concluded that

> . . . issues do count. By their votes the people do exercise their right of proprietorship and determine the policy and program direction of the government.[151]

In his opinion, the question of governmental "activism" and the rate of social change were the central issues of these elections.[152]

A somewhat different perspective is provided by writers who stress the growth in the importance of issue voting in the '60s, following the comparatively nonideological politics of the '50s. But the new attention to issues in these years did not displace party; rather, it reinforced it. Gerald M. Pomper has attempted to demonstrate that party identification "meant more" in the '60s than it had in the previous decade—that it had become suffused with greater ideological content.[153] Survey questions concerning the appropriateness of federal involvement in such fields as education, employment, job discrimination, and school integration showed little difference between Democrats and Republicans in 1956 and 1960 reports, but considerably more in 1964 and 1968. 1964 appeared to be the crucial turning point. Pomper also indicated that, over time, voters perceived greater differences between the two parties on questions relating to federal governmental power. These shifts, he argued, could largely be traced to the more ideological campaigns and political events of the '60s, rather than demographic changes in the composition of the electorate.

In this manner the relationship between issue voting and party loyalties is shown to be fluid or dynamic, not static. Furthermore, changes in the relationship appear to be responses to the character of the political environment—to the intensity of the political problems and issues of the day, and to the manner in which they are perceived by the voters.

Later research indicates that although, during the '60s, the rise of issue voting reinforced traditional party loyalties, in later years these two forces tended to diverge.

More and more voters were faced with an important conflict between their normal party preference on the one hand and their view of the dominant issues of the day on the other. Increasingly, issue positions took priority, and—some analysts claim—the "New Deal" party alignment has been weakened, even shattered, as a consequence.

The authors of an important reappraisal of electoral behavior, *The Changing American Voter*, assert that "For the public of the late '50s, party was the guide to political behavior. It no longer is."[154] As party has declined, they argue, issues have become more important. Another analyst states this interpretation still more boldly. "Issue politics," Huntington writes, "has replaced party politics as the primary influence on mass political behavior."[155]

According to the Nie, Verba, and Petrocik study, the period 1964–74 has seen the most rapid change in the partisan composition of the population of any decade in the past 60 years.[156] Political "independents," who claim no party loyalty, are now more than twice as numerous as Republicans and also outnumber Democrats. Even among those who do identify with a party, the pull of loyalty is less. Voters are more apt to desert their party's candidate in both national and local elections.[157]

The weakening of party bonds appears to have resulted from the emergence of issues unrelated to, and conflicting with, the old economic concerns of the post-New Deal: race, Vietnam, crime, drugs, inflation. While these issues are quite different from one another, they have some important characteristics in common:

> They do not clearly divide the population into opposing groups: the positions that citizens take on these issues do not clearly coincide with major demographic divisions in the population. Nor do the political parties take sharply opposing views on these issues. . . . Issues of this sort . . . are likely to weaken party ties—simply because neither party is seen as responsive to the issue. They do not generate clear group conflict but they do help create a climate of discontent in which other conflicts can become more intense.[158]

The result has been the "decomposition" of the political parties and an "individuation" of American political life. Neither party identification nor social characteristics (such as religion, region, or class) are now as good predictors of political beliefs or behavior. Increasingly, candidates are evaluated on the basis of their issue positions and personal characteristics as conveyed through the mass media. Party organizations have grown weaker, especially at the Presidential level, where campaigns are waged by the personal entourage of individual candidates, rather than by the parties.[159]

The implications of party decomposition for the size of government, nature of public policy and the future course of American federalism are not certain. The authors of *The Changing American Voter* believe that we may be entering a "post partisan" era, dominated by political factionalism, but regard the implications of this change as "unclear."[160] Other observers are profoundly pessimistic. In Burnham's view,

> It seems fairly evident that if this secular trend toward politics without parties continues to unfold, the policy consequences will be profound. To state the matter with the utmost simplicity: political parties, with all their well-known human and structural shortcomings, are the only devices thus far invented by the wit of Western man which with some effectiveness can generate countervailing collective power on behalf of the many individually powerless against the relatively few who are individually—or organizationally—powerful.[161]

A number of observers fear an "overload" of political institutions by the claims of competing special interests. Not just in the U.S., but in other advanced nations, political parties—which have traditionally "made democratic government possible" by aggregating interests and shaping policies—are increasingly unable to perform this crucial function.[162] A pattern of "anomic democracy," involving the assertion of multiple, frequently narrow, conflicting interests rather than the building of broad coalitions and political consensus may be the result.[163]

Such disturbing views are not, however, shared universally. James L. Sundquist, for one, expects a re-emergence of the party alignment of the New Deal period after the effects of the significant, but temporary, cross-cutting issues have subsided.[164]

The Limits of Electoral Control

Taken against the background of some of the strongest statements of the behavioral position—that of Wahlke, for example—this recent research on issue voting may seem sharply contradictory. Indeed, it does assert that electoral control of public policy is considerably greater than the behavioralist model indicated. Yet, when judged by comparison with the traditional democratic faith in the efficacy of the electoral process, or the "demands"

oriented approach of the systems model, its similarities with the behavioral conclusions are highlighted. Even the most ardent exponents of the issue-voting approach recognize the limitations of electoral control.

Two such limits deserve stress here. First, as Key indicates, the electorate's appraisal of public policy is normally both highly generalized and retrospective. Even at times of realignment, such as the New Deal, or in other major elections, such as that in 1964, specific policy mandates may be unclear. Thus, while the electorate may "energize" the political system, it does not "guide" it with much precision. V.O. Key's own view on this question is stated clearly:

> The patterns of flow of the major streams of shifting voters graphically reflect the electorate in its great, and perhaps principal, role as an appraiser of past events, past performance, and past actions. It judges retrospectively; it commands prospectively only insofar as it expresses either approval or disapproval of that which has happened before. Voters may reject what they have known; or they may approve what they have known. They are not likely to be attracted in great numbers by promises of the novel or unknown. Once innovation has occurred they may embrace it, even though they would have, earlier, hesitated to venture forth to welcome it.[165]

Secondly, the parties, and candidates may state their policy objectives in highly generalized, or even muddled, terms. This was the case at the beginning of both the Great Society and the New Deal. The Democratic platform in 1964, journalist David Broder recalls, devoted three times as much space to listing democratic accomplishments than promises. Its pledges were "vaguely worded:" as Lyndon Johnson told one campaign audience, "We're in favor of a lot of things, and we're against mighty few."[166] Even greater distortion occurred at the start of the New Deal. The 1932 Democratic platform called for a balanced budget and urged "an immediate and drastic reduction of governmental expenditures . . . to accomplish a saving of not less than 25% in the cost of the federal government."[167]

There is a danger, then, that the importance of both issues and party in voting choice will be overstated, that differences in the findings of both types of research will be exaggerated. Reconciliation may not prove impossible. A thoughtful statement combining both the behavioral and issue-voting schools of thought has been provided by Richard W. Boyd, who puts the matter in terms of the *constraints* (rather than "mandates") developed through the electoral process. First, Boyd recognizes that

> On many, perhaps most, governmental policies, the public as an electorate has *no voice*. On these policies, only the few have influence because the many have no interest and no information. Issues that do not impinge upon people's economic needs or ego defenses fall into this category, as do, no doubt, policies of abstruse complexity.[168]

These correspond to the behavioralists' claims. Yet there is a second important class of cases:

> On other issues the public does find its voice, but it still leaves political leaders with so many options that leaders retain responsibility. . . . In the main, policy initiatives lie with the leaders, not the voters. After a policy is enacted, voters make a retrospective evaluation of its success.[169]

This kind of situation, Boyd believes, corresponds to issue voting of the type stressed by Key and Pomper, and is a good description of the issue content of the elections of the mid-'60s.

Finally, under unusual conditions, there are "issues on which voters do severely restrict the options of the leaders."[170] Only a small number of issues meet the very stringent conditions for this sort of "mandate," which corresponds closely to the expectations of traditional democratic theory.

Summary and Conclusion

The electoral process is the primary link between the citizenry on the one hand and public officials on the other. The political parties are essential to representative democracy, since they recruit and select candidates for office, conduct campaigns, encourage voter participation, and assist in the organization and staffing of the Congress and Executive Branch. At the least, then, the political parties and free elections assure the legitimacy of public undertakings: it is through these mechanisms that the "consent of the governed" is obtained.

Many theorists have assigned these institutions a still more vital role in the process of policymaking. Both political scientists and political economists have suggested theories of policymaking and governmental growth in which elections and political parties are the key elements. At the same time, these theories have been challenged by many other analysts. Conclusions based on this body of scholarship vary widely.

A number of hypotheses relevant to the growth-of-government issue are suggested by this literature. In brief, these are:

- Competition for popular support between the two political parties should assure, in theory, that the policy preferences of the average citizen—the "median voter"—are enacted into law. Some research studies provide a degree of support of this hypothesis. For these reasons, some analysts believe that the government is quite responsive to public opinion. They deny that the public sector could either become much "bigger" or "smaller" than the people desire.
- In contrast, other empirical research on political behavior indicates that most voters do not hold clear opinions on many policy issues, and that issue positions are not a primary influence on voting decisions. Furthermore, American political parties make slight contributions to the process of policymaking, according to many political analysts. These views suggest that the electoral process probably is not a primary influence on the size and growth of the public sector.
- Certain key elections do result in significant shifts in the content of public policy, and provide the framework of debate between the two parties in later years. The "critical" elections, however, have occurred infrequently, approximately once a generation.
- Although neither political party adheres rigidly to a clear political philosophy, differences in the historical positions of the two political parties on the role of the federal government have been clear. The Democratic Party has provided the leadership and support for most extensions of new federal responsibilities since the New Deal.
- Since the mid-'60s, the strength of traditional party loyalties on the electorate has declined, and issues have played an increasing role in voter choices. Many analysts are concerned that the diminishing role of the political parties will weaken popular control over governmental activities.

INTEREST GROUPS

Interpretations of the contribution of interest groups (or "pressure groups," a common but less neutral term) to policymaking differ sharply. On no other issue does the scholarship of the past dozen years seem to be so seriously divided. Early academic literature often assigned such organizations to a significant, and frequently pre-eminent, position. Some contemporary observers also believe that groups, especially new groups representing previously neglected interests, are one of the most important political phenomena of our time. Yet others—including many who have made detailed studies of interest group lobbying and specific legislative enactments—believe that such theories greatly exaggerate the real role such groups play in making public policy.

Group Primacy

At least until recent years, most political scientists have looked upon interest groups as extremely important actors in the political arena. Following the early work of Arthur Bentley, the political process itself was regarded as "the equilibration on interests, the balancing of groups." After World War I, the political science literature generally accepted this view of policy as the product of competing group interests.[171] The popularity of this doctrine was increased further by David Truman's forceful reinterpretation, *The Governmental Process,* and through such texts as *A Grammar of American Politics* by Binkley and Moos, both published in the early 1950s.[172]

Although some writers have regarded interest groups as simply one of several important forces in the political process, many assigned them a principal or even exclusive role. "Group theory," which became a leading school of thought, offered in its pure form a single-factor explanation of policy outcomes:

> Group theorists start with the assumption that in the political process people do not function as individuals but through interest groups. Public policy decisions are always made on the basis of interaction of interest groups. An interest group is very broadly defined as an organized or unorganized group of people with a common interest. In the political sphere, an interest group is one which shares common public policy objectives and generally agrees on the means of achieving them. Since individuals can function only as members of interest groups by definition, the group theorists emphasize that group politics is a natural and desirable part of the democratic process.[173]

Thomas Dye has commented,

> Group theory purports to describe all mean-

> ingful political activity in terms of the group struggle. Policymakers are viewed as constantly responding to group pressures—bargaining, negotiating, and compromising, among competing demands of influential groups.[174]

Arthur Bentley's own view, enunciated in 1908, made it plain that he believed that group phenomena were universal and all-encompassing in the political realm: "there are no political phenomena except group phenomena," he said. He regarded society itself as "nothing other than the complex of groups that compose it." When these groups are fully analyzed, Bentley claimed, "everything is stated. . . when I say everything, I mean everything."[175]

Thus, group theory allows for little discretionary activity or real choice on the part of public officials. Officeholders are thought to do little more than respond to the pressures placed upon them. Policy outcomes are viewed as the resultant of a balancing of group interests, and are described in mechanistic terms (government as a neutral scale) or hydrological analogies.[176] Or, in imagery of modern computer technology, the institutions of government simply are a "black box" which "converts" the inputs of group demands into policy outputs (laws and budgets). Earl Latham stated this interpretation clearly:

> What may be called public policy is actually the equilibrium reached in the group struggle at any given moment, and it represents a balance which the contending factions or groups constantly strive to tip in their favor. . . . The legislature referees the group struggle, ratifies the victories of the successful coalition, and records the terms of the surrenders, compromises, and conquests in the form of statutes.[177]

While not all political scientists would accept such extreme claims,[178] a belief that interest groups are the most important of political actors and the principal source of policy initiatives has been quite widespread. Moreover, such interpretations find some support in certain case studies of the legislative process. James L. Sundquist's thorough investigation of the development of major new domestic programs in the period 1953–66 determined that about half of the measures originated in the Congress and half with outside interest groups.[179] Regardless of the source, however, the formation of alliances between these two political forces was crucial to the ultimate success of the legislation. Interest groups played a vital role in almost every case:

> They organized local support. They conducted research and fed information to the political sponsors of the measures. They disseminated publicity through the media. They identified the key Senators and Congressmen and concentrated pressure on them, directly and through the members' constituencies. They stimulated a flow of mail from home to the members whose votes they needed . . . . With varying degrees of effectiveness the interest groups provided political support, including campaign contributions, to the politicians who embraced their cause.[180]

Furthermore, a break in the ranks of opposing interest groups was usually the key to the ultimate victory by the champions of the bills.

Interest Groups and Federal Growth

Given the heavy stress on interest group activity in much of the literature of political science, it is not surprising that some effort has been made to interpret the growth of the federal government in these terms. One analyst, J. Leiper Freeman, concluded in 1955 that

> . . . the growth of the federal government has most frequently occurred when new activities have been urged on the Congress and the Administration by special segments of the population. If there is any creeping socialism in American government, it has come and is coming largely as an accompaniment of what might be called "creeping pluralism," that is, the gradual growth of political groups especially concerned with the protection and promotion of particular interests.[181]

At the same time, he noted, the expansion of federal responsibilities had been gradual, and had usually been resisted by other "special interests."[182] Many groups sought benefits for themselves but opposed those for others. Thus, the balance of federalism seemed from Freeman's perspective to be an essentially political balance, created by the conflict of contending organized interests.

In a now-classic article, political scientist Philip Monypenny utilized the interest group approach to explain the growth of the federal grant-in-aid system. The frequent resort to these programs, he believed, could only be accounted for in political, not strictly economic, terms. Writing in 1960, Monypenny pointed out that many aid programs failed to satisfy the standard "text-

book" justifications of fiscal equalization among the states or the advancement of particular national purposes, and hence could not be accounted for by these theories. He believed that a sharing of program responsibility through a grant program—using federal fiscal resources but offering the states significant administrative discretion—resulted when an interest group lacked sufficient strength to attain all of its objectives in either the state capitals or Washington. Monypenny wrote:

> It can be asserted therefore that politically speaking, federal aid programs are the outcome of a loose coalition which resorts to a mixed federal-state program because it is not strong enough in individual states to secure its program, and because it is not united enough to achieve a wholly federal program against the opposition which a specific program would engender.[183]

A related point has been made by another political scientist. Deil Wright suggests that interest groups attempt to maximize their effectiveness while minimizing organizational costs by taking their causes to Washington. A single victory in the national capitol may result in a uniform policy throughout the country, with much less expenditure of effort than separate lobbying efforts in the 50 states would require.[184] In this manner, Wright suggested the federal government is urged to enter many fields which are within the competence of subnational governments.

While these hypotheses have not been tested rigorously, some empirical support is suggested by a recent study of lobbying groups concerned with environmental, consumer, peace, and other "public interest" issues. Of the 83 Washington-based organizations studied, 56 (or 67%) lacked a network of chapters in other parts of the nation. Over half also lacked branch offices. Just 17 of the groups (21%) had as many as 26 chapters. Moreover, many of the groups had too small a membership to mount effective lobbying campaigns at the state level. Fully 30% had no members at all, and a total of 57% had fewer than 25,000 members.[185] It is not surprising that such organizations focus their attention on national, rather than state, policy proposals.

It also is argued that certain interest groups—those representing lower (and perhaps also middle) income people—have an economic incentive to have services funded by the national, rather than state or local governments. This hypothesis rests on the greater progressivity of the national income tax system. Equivalent services financed through the property and sales taxes—which are principal sources of revenue for state and local governments—would weigh more heavily on lower income groups than those financed on a national basis. Similarly, the lower income states and communities have an economic incentive to shift some taxing responsibilities to the national government.[186]

Other analysts note there are theoretical reasons for believing that interest group activities may tend to produce a level of governmental expenditure which is "excessive" from the point of view of the national welfare and citizen preferences. Economists J. Ronnie Davis and Charles W. Meyer suggest that interest groups will favor expenditures or policies which bring net benefits to their members even if these policies result in a net reduction in the welfare of their entire population. Drawing upon the approach of "game theory," they point out that a "majority rule" decision criterion (as is employed in most governmental decisionmaking) will produce a budget that is "too large" in economic terms. That is, a majority coalition will support policies which provide a net benefit to its members, regardless of their effect on nonmembers.[187]

Using similar reasoning, Mancur Olson has pointed out that the interest group system generally represents narrow interests more effectively than those which are shared by very large groups.[188] This is the case because the benefits of many public programs are "collective" (or even "public") in nature—that is, they are consumed jointly, rather than individually. There are comparatively strong economic incentives for the members of a *small* group to organize and lobby for a collective good to be shared by all of them. Since each member will receive a large portion of the benefits from governmental action, he will be compensated sufficiently for the costs of organizing (or belonging to) a lobbying organization. On the other hand, these same economic incentives usually work against the formation of *large* groups in support of collective goods which will be shared very broadly, because the aggregate benefits realized by each individual member will be too small to cover his share of the organizational costs. Furthermore, since the policy pursued involves a collective good, the benefits will accrue even to nonmembers of the lobby organization. From an individual point of view, then, the most rational course of action is to let others bear the costs of lobbying, while receiving some of the benefits as a "free rider" on their efforts.

It is for this reason, Olson believes, that the interest group system is business-oriented.[189] The number of firms in most industries is very small, so there is a strong incentive for members to organize in pursuit of tax concessions, tariff protection, special grants, and other benefits. On the other hand, those potential groups which

are very large—taxpayers and consumers, for example—have much less incentive to organize in self-protection.

This theory would seem to have significant implications for the nature of public policy and the size of government. To the extent that interest groups are able to influence public policy, it is to be expected that government action would generally favor the organized few over the unorganized many. Given the concentration of the benefits from most spending programs in comparatively small groups, and the wide distribution of costs among personal income taxpayers, one would predict excessive levels of expenditure from the point of view of economic efficiency criteria. That is, programs will be adopted in which the total benefits (to group members) are smaller than the total costs, which are borne by all taxpayers. A similar dynamic could produce large numbers of tax concessions for special interests, or might result in the "capture" of regulatory agencies by the regulated industry.

Consistent with this, the existence of a large number of tax incentives (tax "loopholes," as opponents term them) in the U.S. tax code is frequently attributed to the successful machinations of narrow special interest lobbies. On this point, the economist Robert E. Haveman quotes approvingly from the remarks of Sen. Paul Douglas. The best legal minds in the nation, Douglas observed, appear in the hearing room when the Senate considers a tax bill, all representing wealthy clients and business interests. But "not more than one out of every hundred . . . is trying to represent the general interest." This, Douglas suggested,

> . . . raises the question whether this is a fundamental weakness of our democratic system, namely, that the producing and possessing interests are compact, powerful, and well-organized, while the consuming and nonpossessing classes are busy with other things, and their interests diffused; and that while the people are numerically more numerous, they are collectively weak, ignorant, and unorganized.[190]

Similarly, economic interest groups are thought to lie behind much regulatory activity. Surprisingly, perhaps, the principal beneficiaries of regulation are frequently members of the regulated industry: policies which restrict entry or set rates, for example, protect the financial interests of existing firms by limiting competition among them, or from new entrants.[191] Because the costs of these actions are borne by a comparatively large and unorganized group of service consumers, their interests—some theorists hold—are usually given little weight in the political process. Thus,

> . . . the existence of the older regulatory agencies might be explained as successful endeavors on the part of compact interest groups. These groups' gains are extracted from the population, but the costs of the regulation are so broadly diffused that, individually, none of the losers has a sufficiently strong incentive to take counteraction.[192]

A Danger of "Overload?"

One of the most common interpretations of the recent expansion of social welfare activities by the federal government attributes these changes to the demands of newly mobilized interest groups. Some observers of American politics believe that the number of interest groups—and their associated demands for governmental action—is on the rise, sparked by significant societal changes and following the example of the successful civil rights "protest" movement. Sociologist Amitai Etzioni, for one, suggests that

> . . . a key feature of recent American power relations has been the mobilization of more and more societal groupings into organized groups that are actively political. As a result of myraid factors, the spread of college education, the rise of social movements, the development of new communications and production technologies, and the social effects of World War II and the war in Vietnam, minorities, farmworkers, welfare clients, women, and youths, among others, became more self-aware and active.[193]

Both the expanding scope of governmental services and increasing cost of governmental expenditures have been attributed to this phenomena. Daniel Bell discusses the growth of

> . . . claims on government to implement an array of newly defined and vastly expanded social rights. . . . Just about *all* grievances now get dumped into the lap of government, while the voluntary associations that once furthered the claims of different groups are withering.[194]

The old economic interest groups (business, labor, agriculture) no longer seem to be the most important, Bell finds. A much broader range of social and political divisions are now involved. "All this," Bell writes,

> . . . portends the emergence of a new kind of political economy. The major conflicts, increasingly, are not between management and labor within the framework of the economic enterprise but between organized interest groups claiming their share of government largess. The political cockpit in which these battles are fought is the government budget. These battles have become the "class struggles" of the present and the future.[195]

This new group activism is thought to have increased the level and stridency of political conflict and raised the demands for governmental action. At the same time, it may have actually *reduced* the capacity of the government to meet popular expectations and deal with social problems. This case is argued by social critics who believe that a "revolution of rising expectations" has resulted in "demand overload" which may seriously threaten the whole social and political fabric. Daniel Bell believes that goals have escalated well beyond the capacity to attain and pay for them, undermining faith in political institutions and eroding the spirit of *civitas*—the willingness to forgo private enrichment for the common good, respect for others, and for the law. Loyalty to interest groups replaces loyalty to some conception of the public interest, resulting in the breakup of political parties and the fragmentation of authority in legislative bodies.[196]

Aaron Wildavsky asserts that many current demands of interest groups are conflicting and, for that reason, difficult or impossible to satisfy. And pressures seem to mount regardless of improvements in social conditions, as measured historically and objectively. Thus, in field after field, we are "doing better but feeling worse."[197]

Many of these criticisms are well-summarized in the writings of Theodore J. Lowi. A prominent opponent of what he terms the philosophy of "interest group liberalism," Lowi contends that an over-reliance on group policymaking has created a government which is big, but lacking in coherent policy direction and thus unable to accomplish broad objectives. Indeed, in an important sense, interest group government is "antigovernmental." Specifically, Lowi charges that

> Liberal governments cannot plan. Planning requires the authoritative use of authority. Planning requires law, choice, priorities, moralities. Liberalism replaces planning with bargaining. . . . Application of pluralist principles in the construction of liberal government has made it possible for government to expand its efforts but not to assemble them.[198]

Similar phenomena have been identified in other nations. The authors of a report to the Trilateral Commission on *The Crisis of Democracy* believe that increasing group and individual demands lie behind the growing role of government in the economy and society of most of the trilateral nations (North American, Western European, and Japan). They attribute this expansion not to the strength of government, but instead "to its weakness and the inability and unwillingness of central political leaders to reject the demands made upon them by numerically and functionally important groups in their society."[199] Inflation, too, has been a natural consequence of the inability of democratic governments to cut spending, increase taxes, and regulate prices and wages in the face of claims from business and labor groups and the numerous other beneficiaries of current spending programs. Thus, these writers believe that "inflation is the economic disease of democracies."[200]

The perceptions of growing participation rates which underlie these analyses are largely impressionistic, since there is no adequate tabulation of organized groups or other forms of citizen "pressure." Yet, many close political observers do agree on the basic trend. Journalist Richard Rovere comments that "it has been estimated that in the last few years more than two thousand new lobbies have come into existence."[201] Nearly half of the "public interest" lobby groups with Washington offices in 1973 were established after 1968,[202] while there was a rapid increase in the number of business-related "political action committees" following the 1976 amendments to the *Federal Election Campaign Act*.[203] In addition, past survey data on the involvement of adults in political campaigns since the 1950s do show a generally increasing trend, even over and above what might be expected on the basis of rising educational levels.[204]

Still, the "overload" theories are not now widely espoused—and are in fact objectionable to many who adhere to traditional democratic values of citizen activism. Despite this, however, they are quite consistent with the view, previously widespread among political scientists, that the traditionally *low* levels of citizen involvement in politics were *not* dysfunctional to Constitutional democracy. A high level of citizen activity, they believed, might endanger the social fabric by "politicizing" most human relationships.[205] The fundamental question, then, is whether such a process has already begun.

Does Lobbying Really Matter?

Despite the substantial literature on group activities,

it is by no means clearly established that interest groups play the prominent role in policymaking which all of these theories suggest. Indeed, it appears that the group theorists overstated their case—or else that the political process has been altered considerably since their theory was first formulated. Case studies of the "agenda setting" function in government have pointed to many additional factors. Charles O. Jones takes the position that

> The group theorist's analysis is certainly helpful and, when examined carefully, suggests an enormously complex process by which problems get to government. But as one also examines specific cases of "problem to government," it is discovered that action of the type suggested by [the theory] constitute only one type of process—perhaps one which is *not* very typical. The group process . . . simply does not account for all of the problems which get on the agenda of government.[206]

The classic and probably the most influential study in the "revisionist" literature on group politics was the study *American Business and Public Policy* by Bauer, De Sola Pool, and Dexter.[207] This volume offered a detailed study of the politics of foreign trade legislation—specifically, the tariff. Influenced by the "group theory" literature which was then dominant in political science, as well as the "muckraking" exposes of "pressure group" activities, the authors had expected to find that tariff legislation was devised by "deals" between well-financed lobbies representing business interests and members of Congress who were "pressured" (or threatened with political reprisals) by them. Given these expectations, the authors were surprised to discover

> . . . that the lobbies were on the whole poorly financed, ill-managed, out of contact with Congress, and at best only marginally effective in supporting tendencies and measures which already had behind them considerable Congressional impetus from other sources.[208]

As anticipated, there *were* a large number of groups active in tariff politics, but these were far less influential in determining outcomes than had been supposed. The groups acted for the most part as channels of communication—as sources of facts, arguments, and other information—rather than exerters of "pressure." Surprisingly, they communicated largely with members of the Congress who already were sympathetic to their cause, rather than with opponents who might be converted to it.[209] The overall process did not resemble the system of "fluid mechanics" suggested by the group theory literature: "the pressure is applied here and the results come out there." Congressmen had considerable discretion in determining who they would listen to, and organizational activities were "conspicuously less effective" than analysts had believed previously.[210]

This view of interest group activities has many advocates. James Q. Wilson's study of political organizations noted that

> It is now well understood that what an organizational representative does in furthering his group's interests before government has more to do with his management of a communications system than with his exercise of influence. "Pressure groups" rarely "press."[211]

Like Jones, Wilson believes that it is possible to identify a considerable number of recent major legislative initiatives in which the role of organized groups was minimal.[212] The expanding scope of government over the past 20 years, in his view, has not been caused solely or even primarily by the agitation of organizational lobbyists, although groups have played a role in certain specific instances.[213] Rather similarily, Meier and Van Lohuizen found no evidence that interest groups were able to raise the appropriations levels of the federal agencies they supported. "The lack of influence by pressure groups here *implies* pressure groups have little impact on the policy process in general," the authors conclude.[214]

Some of these writers even suggest that the practical effect of interest group activity may often be to retard rather than expand the federal role. Much lobbying is defensive, in that it is aimed at stopping a proposed action, rather than encouraging a new innovation.[215] It appears to be easier for many interest groups to mobilize their members against some threat to the status quo rather than for some new objective. Thus, on balance, the interest group system—to the extent it is in fact influential in forming policy—may have worked to limit the scope of national authority. On the other hand these observations also indicate the difficulty of dismantling (or even modifying) a federal program after it has been established.[216] In these cases, defensive lobbying would support the continuation of benefit programs and, in the aggregate, at least maintain the size of the public sector.

Summary and Conclusion

At least since Arthur Bentley's 1908 text, *The Process of Government*, many political scientists have identified

interest groups as the chief—sometimes the sole—influence on public policy. In a sense, the group theorists may be said to have restated traditional democratic theory in more "modern" terms, with groups playing the role which had historically been ascribed to the individual.

Many explanations of the growth of government have focused on interest group activity. At the same time, the premises of group theory have been attacked by other analysts, who argue that the role of groups has been overstated. These contradictory views have not yet been resolved.

The interest group literature provides the following interpretations or hypotheses related to the growth-of-government question:

- The growth of the federal government has occurred in response to pressures from a variety of interest groups. Interest groups have been credited with the creation of many grant programs, tax incentives, and regulatory activities. In turn, the principal source of opposition to new federal programs has come from competing organized interests.
- Many interest groups look to Washington, rather than the states, to achieve their objectives. This may reflect the lower costs of organizing on a national scale; the redistributive advantages of financing a service through the national income tax; or the value of achieving, by a single action, a uniform policy effective throughout the nation.
- The rapid rise of newly organized interests, including ethnic and racial minorities, women, youth and the elderly, and others, has vastly expanded the pressure for governmental benefits and the protection of social "rights." The resulting "demand overload" has been difficult to satisfy, and is fragmenting the traditional institutions of democratic governmental authority.
- In contrast to these interpretations, other scholars contend that the influence of interest groups and the effectiveness of lobbying has been greatly overstated. Many groups function chiefly as a source of information for their Congressional allies, rather than as a source of political "pressure".
- Interest group activities have not been crucial to the adoption of many of the major programs of the past decade. Much lobbying is defensive, and is aimed at preventing governmental action, rather than obtaining it. For these reasons, the growth of government in recent years should not be attributed chiefly to the pressure of organized interests.

THE PRESIDENT AND CONGRESS

While public opinion, elections, and interest groups must be examined as potential influences on public policymaking, the governing process itself depends upon formal actions of the President and the Congress. Both of these institutions share a Constitutional role in the legislative process—the Congress, because it must enact all laws, including fiscal measures, and the President, because of his veto power and his authority to provide Congress with information on the "state of the Union" and to recommend measures for its consideration. Contemporary government thus takes its size and shape from the actions, present and past, of these officeholders.

This section deals with relatively limited aspects of Presidential-Congressional behavior which have the most direct bearing on the size-of-government issue. These include the relative contributions of the two branches as policy innovators; basic approaches to Congressional policymaking—including the "entrepreneurial" pattern, the operation of "subgovernments," and "logrolling;" and the decisionmaking process on budgetary and tax questions.

President and Congress As Policy Leaders

Until quite recently, scholars, journalists, and citizens have regarded the President as the motive force in the operation of the engines of democracy. Evolving since the nation's founding from a relatively weak office, the Presidency has endowed with ever-growing responsibilities and respect. The President, in now-common imagery, wears several hats: chief diplomat, commander in chief, chief economist, chief executive. In addition, according to conventional theory, the President is also the nation's chief policymaker, the source of most major legislative initiatives. Thus, the White House is often taken to be the origin of most components of the expanding federal role. As one writer has put it,

> There is no getting around the fact that the President plays the major policy role in American government. Congress participates in making policy, but it does not carry the main burden for the initiation of policy. It is not constituted to exercise initiative broadly or regularly; nor can it be without sacrificing too much else.
>
> The President normally initiates. It is in the executive branch that campaign promises are drafted into concrete proposals, departmental

programs screened and coordinated, priorities established, and the agenda for the legislative process determined. Congress normally responds to executive impulses, questions Presidential priorities, and rearranges the agenda. In doing this it takes proposals, examines them in the light of alternatives, and then renders its judgment.[217]

This description is quite different from those written a century ago, a time when professor Woodrow Wilson declared that the Congress was by far the dominant force within the American system.[218] Later, as President, Wilson himself played an activist role in proposing new legislation—as did Theodore Roosevelt before him and Franklin Delano Roosevelt not long after. This became the accepted pattern. Thus, at least until the mid-'60s, most commentators agreed that

> In the 20th Century, whenever the American political system has moved systematically with respect to public policy, the direction and the initiative have come from the White House. . . . Since Theodore Roosevelt, at least, the Presidency has been viewed as the most popular branch and that which is most likely to provide the leadership for progressive reform. Liberals, progressives, and intellectuals have all seen the Presidency as the key to change in American politics, economics, and society.[219]

Evidence of the quantitative magnitude of modern Presidential leadership is indicated in *Table 9*. Until 1972, the President's annual legislative program normally included more than 200 bills. The Democratic administrations in 1961–68 were unusually active, averaging some 370 proposals in each year. Some fall-off may be noted during the Republican years of 1969–75—the average is just 165—but even in this period the President's role was obviously substantial.

Table 9

PRESIDENTIAL LEGISLATIVE PROPOSALS AND ENACTMENTS, 1954–75

Year	Proposals Submitted	Approved by Congress	Percent Approved
1954	232	150	65
1955	207	96	46
1956	225	103	46
1957	206	76	37
1958	234	110	47
1959	228	93	41
1960	183	56	31
1961	355	172	48
1962	298	133	45
1963	401	109	27
1964	217	125	58
1965	469	323	69
1966	371	207	56
1967	431	205	48
1968	414	231	56
1969	171	55	32
1970	210	97	46
1971	202	40	20
1972	116	51	44
1973	183	57	31
1974 (Nixon)	97	33	34
1974 (Ford)	64	23	36
1975	110	30	27

SOURCE: Stephen J. Wayne, *The Legislative Presidency*, New York, NY, Harper & Row, Publishers, 1978, p. 170.

In a reflection of similar historical judgement, students of federalism have regarded the Presidency as a major "nationalizing"[220] force. The office is, after all, the only one (along with the Vice Presidency) which is elected on a truly *national* basis. Furthermore, through the 1960s a steady stream of "strong" American Presidents sought to enhance simultaneously both the power of the national government and the Presidency itself. The Congress, in comparison, has been widely regarded as more "localistic" and inherently "conservative" because of its structure and procedures. Many liberals have viewed it as an obstacle to the progressive leadership provided by the White House.[221]

These differences in political activism between the two branches have been traditionally ascribed to differences in the composition of Executive and Congressional constituencies. The "unit rule" in the electoral college means that Presidential contenders must be especially responsive to the concerns of the large, urban states, most of which have sizeable working class and racial or ethnic populations. Hence, prospective Presidents espouse the "liberal" policies these groups favor. Congressional constituencies are much smaller, more homogeneous, more rural, and hence more "conservative." Furthermore, the seniority system (at least traditionally) operated so as to enhance the authority of members from the least progressive districts, which frequently exhibit little real interparty competition at the polls.[222] Similar influences are thought to be at work on the Congress itself, with the result that the Senate is the more "liberal" of the two chambers because its constituencies are larger, more heterogeneous, and more competitive. Thus it is the House, more often than the Senate, which has been the chief obstacle to major new federal programs.[223]

In interesting and pointed contrast, it was the Senate which was actually intended by the framers to be a "peripheralizing" institution. It still continues to be a symbol of the federal basis of American government, in that every state is represented equally among its membership (regardless of population), and until 1913 Senators were selected by state legislatures as their delegates to Washington, rather than directly by the voters. Despite this aim, William Riker argues that the Senate has never served its original purpose. This failure altered the nation's expected Constitutional balance, and may help explain, in his view, "why the United States has always been a bit on the centralized side of the scale."[224]

Despite their widespread acceptance in the past, these interpretations of both contemporary and historical politics have been challenged more and more frequently. In part, this might seem to reflect the declining importance of Presidential leadership since 1969, as was suggested by *Table 9*. But it, in fact, goes deeper, and has a longer historical dimension. Thus, political scientist Richard M. Pious declares that

> . . . the orthodox generalization that the President is both chief initiator and chief legislator is simply wrong. Congress has taken the initiative on many pieces of major legislation, such as social security, collective bargaining arrangements, public housing, atomic energy, the space program, the environment, and manpower training. . . . In only a few domestic areas, such as civil rights and antipoverty legislation, have Presidents played the leading role in policy initiation. And even in these fields Congress eventually dominates the process.[225]

Another analyst takes the position that, while the Congress normally prefers that the President play the leadership role in matters of policy innovation, it can and does step out in front when the President holds back.[226]

An appraisal of published legislative case studies in a dozen fields of domestic and foreign policy for the period 1940-67 demonstrated the significance of Congressional policy leadership. Moe and Teel found that "the evidence suggests that Congress continues to be an active innovator and very much in the legislative business"—a conclusion they said is consistent with that of Lawrence Chamberlain three decades earlier.[227]

Even in those fields and during those periods in which Presidential leadership is at its apogee, the Congressional contribution to policy development has been greater than was recognized generally. Certainly a careful reading of Presidential-Congressional relations in the early New Deal period underscores this interpretation. In addition, a study by David Price of the Congressional role in policy development during 1965-66—another period of unusual Presidential activism—reveals the inadequacy of the generalization that the President is the "motor" of the system, while Congress provides the "brakes." Breaking the policy development process down into six separate functions or stages—formulation, instigation-publicizing, information-gathering, interest aggregation, mobilization, and modification—Price showed that these activities were performed by both of the two branches, with the Congress playing an important role in many of the cases studied. While the executive branch did tend to dominate the information-gathering function, and Congress the modification process, the four others were mixed and shared.[228]

Recent scholarship, then, has stressed that the Congress makes very substantial contributions to the development of new public policies. Past generalizations of Presidential dominance seem to have been based upon too superficial characterizations of very complex processes.

One of the reasons that the significance of the Congressional role was so long ignored probably stems from the greater degree of public attention given to Presidential activities. Gary Orfield believes that the myths of Presidential initiative and dominance reflected a fixation with three types of issues: foreign policy crises, military problems, and the President's own domestic agenda.[229] In these areas, the President's role may well be most decisive—although the Congress is still not an insignificant force.

Another difficulty is that Congressional policy leadership is often indirect and obscure. Many proposals which incubated in the Congress for years attract widespread public attention only after they receive Presidential backing. Furthermore, some Congressional initiatives are "pre-empted" by a President. Others are advanced largely to "force a President's hand" in fields he might have otherwise ignored.[230] For example, as Sundquist pointed out in his excellent study of national policymaking in the '50s and '60s, "nobody talked any longer about 'the Democratic party program'" after the inauguration of President John F. Kennedy. Instead, "they talked about 'the Kennedy program' and after that 'the Johnson program'." In the period 1961-66, Sundquist found, almost all of the "major legislative impulses" came from the White House.[231] But few of the notions were truly new, having been advanced by Democratic Congressmen in earlier years.[232]

Of course, tracing the "real" source of many items on the legislative agenda is made difficult by interactions among key participants. Many of the ideas which members of Congress and Presidents formulate into legislative proposals came to them initially from experts in the bureaucracy, interest groups, or academia, and had been "kicking around" in their circle for some time.[233]

Observers also have neglected the major role played by Congress after the initial enactment of legislation. The legislative branch continually modifies and remolds existing programs, and by its interaction with the bureaucracy and courts gives shape to sometimes vague statutory mandates.[234]

Now, however, the new scholarship on Congressional policy initiation is gaining more and more recognition. In fact, matters have shifted to the point where some observers regard the Congress, rather than the President or the bureaucracy, as the principal architect of "big government." Political scientist Morris P. Fiorina charges that it is the national legislature which is truly the "keystone of the Washington establishment."[235]

The Congress, he says, both legislates new programs and their accompanying bureaucracies into existence *and* later acts as an intermediary in dealing with bureaucratic snafus for their constituents. Successful "ombudsman" efforts of this kind, Fiorina argues, increasingly assure the re-election of incumbents, and he cites as evidence a decline in competition for Congressional seats.[236] He has summarized the process in the following manner:

> The nature of the Washington system is now quite clear. Congressmen (typically the majority Democrats) earn electoral credits by establishing various federal programs (the minority Republicans typically earn credits by fighting the good fight). The legislation is drafted in very general terms, so some agency, existing or newly established, must translate a vague policy mandate into a functioning program, a process that necessitates the promulgation of numerous rules and regulations and, incidently, the trampling of numerous toes. At the next stage, aggrieved and/or hopeful constituents petition their Congressmen to intervene in the complex (or at least obscure) decision processes of the bureaucracy. The cycle closes when the Congressman lends a sympathetic ear, piously denounces the evils of bureaucracy, intervenes in the latter's decisions, and rides a grateful electorate to ever more impressive electoral showings. Congressmen take credit coming and going. They are the alpha and the omega.[237]

In this manner and for these reasons, he asserts, "Congress does not just react to big government—it creates it."[238]

The Entrepreneurial Pattern

Congressional policy leadership seems to possess distinctive characteristics, although these are not widely recognized. One of the most common patterns may be described as "entrepreneurial" in character. Consistent with the dictionary definition, an individual Congressman "assumes the risk" of advancing a new "product"—in this instance, a public problem and its solution. John R. Johannes has pointed out that one or two key legislators usually deserve most of the credit for each Congressional initiative. These individual activists typ-

ically are experts in their field, and frequently (but not always) are chairmen of relevant subcommittees. Johannes adds that most of the legislative activists are Democrats and, moreover, members of the Senate, rather than the House.[239] Professor James Q. Wilson also notes this tendency, and offers an explanation:

> [M]any Congressmen are continuously surveying their political horizons in search of issues with which they can become personally identified and which can become the basis of subcommittee chairmanships, highly publicized hearings, and state or national visibility. This is especially true of Senators, who not only must appeal to larger, harder-to-reach constituencies but who, unlike Representatives, can take advantage of televised hearings.[240]

Other contemporary political analysts also have discussed this behavior. To use the terms of political scientist David R. Mayhew, Congressmen engage in a great deal of "position taking" and "credit claiming" in order to improve their standing with constituents and to advance their political careers. That is, they introduce or support legislation, give speeches, write books, and appear on television in order to make judgmental statements on matters of political concern. Such "statements" sometimes take the form of roll call votes.[241] They also attempt to take credit for specific governmental actions, including government projects (the traditional "pork barrel"), new programs, or tax benefits.[242]

Senators, Mayhew believes, generally put more emphasis on position taking than do members of the House, who are apt to stress their ability (real or contrived) to "bring home the bacon" in the form of particularized benefits for their district.[243] But the former pattern is particularly important to "upwardly-mobile" Congressmen: members of the House who hope to win election to the Senate, and members of the Senate who aspire to the Presidency.[244]

Specialization in a particular policy field, small enough so that the claim of personal responsibility seems credible, is essential to these activities.[245] Thus many Congressmen concentrate their efforts in one or a few narrow areas for much of their career. But Congressmen facing possible electoral defeat sometimes act as issue pioneers, striking out into new fields in a quest for public support. The problems of consumer protection, hunger, and communism in government are historical examples of issues which were successfully exploited in this fashion.[246]

Position takers are not necessarily concerned with seeing their proposal enacted into law, or with working to defeat proposals which they oppose. Such serious legislative work is time consuming and difficult, and victory is less important in the public eye than taking the "right" stance.[247] Furthermore, the adroit position taker may be able to present his position in opposing terms to various constituency groups and actually take opposing positions at different stages in the legislative process.[248]

It should be added that both public opinion and interest groups do have significant roles in entrepreneurial politics: members of Congress would have little incentive to "play the game" unless some public attention was forthcoming. But the pattern of interaction is rather different than that implied by "demands-oriented" models of policymaking. The political actors do much more than respond to problems and proposals forced upon them. Instead, by the skillful exercise of political leadership, they influence the character of the items on the public's agenda and also help build support for particular policy responses. Like their counterparts in the world of advertising, they "sell" the public on the presence of a problem (a new "crisis") and a solution to it (a new government program).

In the case of the recent consumer and environmental protection legislation, Wilson believes, a "symbiotic political relationship" was developed between the Congressional activists and "public interest" lobbies. Presidents involved themselves in these questions well after they had been given impetus by the Congress and generally favored "weaker" bills.[249] Wilson also believes that the kind of regulatory legislation which emerges from such an entrepreneurial process is likely to possess certain distinctive features:

> First, in order to ensure vital publicity and to develop political momentum in the competition for attention in and around Congress, the bills will focus attention on an "evil," personified if possible in a corporation, industry, or victim. Second, the proposal will be "strong"—that is, there will be little incentive in the developmental process to accommodate conflicting interests and thus little incentive to find a politically acceptable formula which all affected parties can live with. (To compromise the proposal would be to sacrifice the capacity of the bill to mobilize support by its moralistic appeal.) Third, though few *substantive* bargains will be struck, many procedural ones will, especially ones that recognize the central structural fact of the American Congress—namely, that it is a federal institution based on

> state and district representation. Concessions will often be made to recognize existing state programs or to provide incentives for states to develop new programs. Finally, the proposed solution to the problematic business practice will be shaped as much by the political process by which the proposal is generated as by an analysis of the problem itself.[250]

It must be added that Congressmen are not alone in playing a role as policy entrepreneurs. Presidents, and sometimes executive branch leaders and even nongovernmental political actors, can behave similarly. Presidents possess a greater capacity than do individual members of Congress to identify a public problem, place it before the American people as a significant issue, devise a possible solution, and mobilize support behind it. There are numerous examples of successful efforts. The idea of a national "War on Poverty" apparently originated with President Kennedy himself, following a review of economic conditions by Executive Office staff.[251] In the same way, President Johnson personally devised the "new towns in-town" program as a way of solving the twin problems of disposing of surplus government property and encouraging urban redevelopment.[252] Like members of Congress, Presidents also have been known to engage in position taking by proposing a legislative solution to a problem without providing the follow-through needed to get it enacted.

Committees and "Subgovernments"

Other features of the Congressional approach to policymaking also deserve attention. Among these is its reliance upon committees to examine most legislation and the interaction of these committees with the executive branch and public.

The Congress is quite a large body faced with a gigantic workload: the necessity to adopt every law and authorize each expenditure, and to oversee their execution by the bureaucracy. Of necessity, it has simplified its collective task as does every organization—through subunit specialization and procedures for internal coordination. While some of these practices are formalized in rules or law, others have simply evolved into social norms.

The real legislative work of the Congress is performed for the most part in its standing committees and especially their numerous subcommittees. Each has jurisdiction over particular items of legislation (although the authority over any given functional area may be dispersed among several). Traditionally, individual Congressmen were expected by their colleagues to become expert in a few substantive areas related to their committee assignments and to work diligently in these. Here, their expertise will be respected; in turn, each member must respect the expertise of his colleagues in their fields.[253] Partly in consequence of these norms, the bills resulting from committee are usually accepted without amendment on the floor of the Congress itself.[254]

In their legislative work, committee members and staff usually are in close communication with their specialist counterparts in the executive branch agencies and nongovernmental interest groups. In fact, many political scientists have argued that the key to understanding governmental policymaking lies in the interactions of these three groups, which form "subgovernments" ("subsystems" or "whirlpools") of political activity.[255] It is at this level, rather than by the interactions of the President, Congress and its leadership, and the political parties, that most policy questions are decided. Freeman says:

> The resolution of most policy questions tends more often to be left to secondary levels of the political setting. Policymaking is often left to essentially subordinate units of the Administration and Congress. Similarly, the parties often leave issue politics to interest groups. In this sense, such subunits of the political setting, encouraged by diffused power and functional specialization of political expertise, tend to enjoy a relatively wide range of autonomy. Policy tends to be "farmed out."[256]

These subgovernments appear to dominate policymaking on "routine" matters—which is to say on *most* governmental matters, *most* of the time. Though perhaps of minor importance individually, these questions in the aggregate constitute much of all governmental activity. But there are, of course, certain issues which escape their grasp and are influenced by "outsiders." This may happen if an issue becomes particularly controversial within the subgovernment, if the President or other top leaders decide to focus their attention on relevant policy questions, or if some new problem (perhaps a sudden "crisis") brings established policy into question.[257]

In some interpretations, the existence of such subgovernments is described as a natural consequence of the complexity of modern political affairs and the consequent need for specialization, as well as a search for interpersonal harmony. Thus Randall Ripley finds that

> . . . there is a great amount of cooperation between Congress and the bureaucracy and it is in good measure based on mutual self-in-

terest. There is nothing insidious about this cooperation; most prolonged human relationships are characterized by the desire for relative harmony and calm. Harmony and calm may produce either beneficial or useless public policy. However, the same may be said for conflict.[258]

At most, he suggests, such patterns of interaction load the legislative process in favor of the status quo.

Some other commentators are far more critical. They point to a tendency for Congressional committees, bureaucrats, and special interest groups to work together to advance their own shared goals at the expense of the public good. The resulting handiwork, these critics stress, may include narrow categorical aid programs, undesirable tax concessions ("loopholes"), a fragmented administrative system, inadequate policy coordination, excessive levels of expenditure, protective regulations and tariffs, and an unwillingness to recognize the undesirable side-effects or costs of their activity. To these critics, who are numerous, the three-partite subgovernments are most accurately described as "iron triangles" or "triple alliances." They form the foundations of what Fiorina terms "the Washington establishment."[259]

Voting Procedures and "Logrolling"

A number of commentators have suggested that other prominent features of the Congressional decisionmaking process may incline it to excessive expenditures. These include the rule of majority voting and the practice of logrolling. These points have been given particular stress by a group of "public choice" or "political" economists. James M. Buchanan, one of the foremost thinkers of this persuasion, has thus concluded that "even under the most favorable conditions the operation of democratic process may become its own Leviathan. . . ." The past growth of government, he believes, "has occurred, almost exclusively, within the predictable workings of orderly democratic procedures."[260] Though capable of detailed elaboration, these points may be illustrated briefly with simple examples.[261]

In a recent textbook, Richard B. McKenzie and Gordon Tullock suggest that

> The voting rule followed by government is important because it will be influential in determining the size and scope of government activities. A voting rule which requires very few people to agree on, for example, budgetary proposals will generally mean a large scope and size of government. With such a voting rule, small and different groups of people can make budgetary proposals, vote for and pass them, and, in that way, expand the scope of governmental activities. Conversely, a voting rule which requires unanimous agreement among voters is likely to mean that very few things will be agreed to and will be done by government.[262]

Although the principle of majority rule is accepted in most American political decisionmaking (but *not* in ratifying Constitutional amendments or treaties and in some other special cases), some "public choice" economists have demonstrated how this rule can result in "inefficient" expenditures—that is, expenditures in which net costs exceed net benefits. This is a likely outcome in cases in which the benefits of a project or activity are received by a small majority (say 51%) of the members, but the costs are spread more broadly (perhaps among all of the members).[263] This situation is analogous to the practice of splitting a restaurant bill equally among a group of diners. Each diner is encouraged to order a more expensive meal than he would if he were paying just his own tab, since his costs will be shared by the others. The result may be that the group consumes more (or higher-priced) food than its members really-wanted.

A hypothetical political illustration is provided in *Table 10*. This case involves a project costing a total of $500, financed through tax payments of $100 from five individuals (see column 3). Total benefits of the project are, however, somewhat lower than aggregate costs—only $430 (column 2). Thus, the project is "inefficient" in economic terms. But, although costs are distributed evenly, benefits are not: they are concentrated disproportionately in individuals A, B, and C, each of whom would realize net benefits from the undertaking. Because of this, it is to be expected that the project would win a majority of votes (as shown in column 5).

There is room to question how well this abstract model fits the real world of affairs. On the one hand, most federal expenditures are financed through the income tax system, the costs of which are distributed very broadly. In comparative terms, the benefits of many expenditures (public works projects, for instance) are more concentrated. But in practice, the national government does not rely upon simple majority voting to create new programs. Instead, the legislative process is a complex labyrinth of successive stages, each of which can spell defeat for a proposal. Not one majority, but concurrent majorities in authorizing, appropriations, and other committees, as well as floor votes in two chambers and signature by the President, are required.

Table 10

HOW AN "INEFFICIENT" PROJECT CAN BE APPROVED UNDER MAJORITY VOTING: A HYPOTHETICAL EXAMPLE

Individuals (1)	Dollar Value of Benefits to Each Person (2)	Tax Levied on Each Person (3)	Net benefit (+) or Net Cost (−) [(2)−(3)] (4)	Vote For or Against (5)
A	$140	$100	+$ 40	For
B	130	100	+ 30	For
C	110	100	+ 10	For
D	50	100	− 50	Against
E	0	100	− 100	Against
Total	$430	$500		

SOURCE: Richard B. McKenzie and Gordon Tullock, *Modern Political Economy: An Introduction to Economics*, New York, NY, McGraw-Hill Book Company, 1978, p. 395.

For this reason, the Congress, and indeed the entire structure of American government, has often been condemned as irresponsible and inefficient, incapable of acting with dispatch to translate popular preferences into law.[264] Sundquist—just one of many critics—has written:

> The United States is unique among the world's democracies in the extent to which the institutional system is weighted on the side of restraint regardless of the mandate of the people. . . . The total effect can be not just to delay action in the interest of free and full debate, but to forbid action.[265]

The complaint in this case is that the procedural rules of the system—which are far more complex than simple majority voting—bias the government against desirable and popular activities.

Still, many close observers of the political process do agree that the comparative *distribution* of costs and benefits, rather than their net *magnitudes*, can be crucial in determining the likely fate of a legislative proposal. Wilson discusses four different kinds of cases. To summarize briefly, he suggests that

a) Policies with widely distributed benefits and costs "will tend to become easily institutionalized and to produce increases in benefit levels. . . ."

b) Policies with concentrated benefits and distributed costs "will attract the support of organizations representing the benefited group and the opposition of none. . . . [T]he beneficiaries . . . will be able to mobilize effective political support for the policy."

c) Policies with distributed benefits and concentrated costs are difficult to adopt, and are usually dependent upon a "crisis" or successful exploitation of the mass media.

d) Policies with concentrated benefits and concentrated costs "generate continuing organized conflict. Revisions and amendments and interpretations are endlessly contested and sometimes efforts are made to repeal the initial policy."[266]

Point (b) above is consistent with the deductions made regarding the majority vote rule. However, the reasons for which these outcomes are expected are quite different, having more to do with the "costs" of organizing interest groups, the dispersion of decisionmaking responsibility in the Congress, and the weaknesses of links between representatives and their constituencies, than with the use of a majority rule criterion.

Public choice theorists also have voiced concern that another aspect of the Congressional policy process—the practice of vote trading or "logrolling"—also may promote excessive, inefficient expenditures. Another hy-

pothetical example is offered in *Table 11*. In this case, there are three projects under consideration simultaneously. (I, II, and III). Again, each costs $500, to be provided through tax payments of $100 by individuals A through E. Total costs, then, are $1500. The benefits from each project are well below costs, only $350. However, all of the benefits are received solely by a single individual in every instance.

Each project would certainly be defeated if considered separately: only individual A would vote for project I, only B for II, and only C for III. But the picture is altered if vote trading is permitted. A, B, and C would then be expected to support each other's projects in exchange for support of their own. The total package, then, would be accepted by a vote of 3-to-2.

How important is such logrolling? On this point, there is no clear evidence. McKenzie and Tullock speculate that it "dominates the policy selection process" in most democracies—but this is, almost certainly, an exaggeration.[267] While many Congressional actions do depend upon some form of "bargaining" among the interested parties, a process of compromise may be just as frequent as vote trading.[268]

On the other hand, there is no doubt that logrolling does occur. A classic example involved an exchange of support by urban and rural Congressmen for agriculture subsidies and the food stamp program; other instances appear regularly in public works "pork barrel" legislation.[269]

Furthermore, logrolling takes several forms, and may be implicit as well as explicit.[270] The former may be most common. Implicit lorolling is encouraged when a large number of projects or programs are "packaged" together in a single omnibus bill. In this manner, a majority of representatives can each be granted some favorable provision. Congressional norms of reciprocity, which call for the approval of most committee actions, may also be taken as a form of implicit logrolling.

Even when it occurs, logrolling does not necessarily lead to an unwarranted expansion of government. From an economic perspective, it may be equally necessary to win approval of an "efficient' project in which benefits are highly concentrated.[271] In the terms of democratic political theory, it offers a solution to the "intensity problem," which results from differences in the strength of views held by different representatives and their constituencies.[272] Finally, logrolling can be used in some instances to build coalitions *against* inefficient projects, rather than for them.[273] Thus, neither the extent nor real costs of logrolling have yet been determined adequately.

Budgets: Spending and Taxation

Almost as important as the politics of legislation is the politics of finance: expenditure, taxation, and budgeting. Yet these have received far less academic attention, and are much less understood by the public-at-large.

Traditional stereotypes have frequently portrayed Presidents as struggling to "reorder priorities" in favor of greater spending for domestic programs against an unwilling Congress.[274] More recently, the Congress has

Table 11

HOW AN "INEFFICIENT" GROUP OF PROJECTS CAN BE APPROVED UNDER LOGROLLING: A HYPOTHETICAL EXAMPLE

Individuals (1)	Net Benefits (+) or Costs (−) to Each Individual: Project I (2)	Project II (3)	Project III (4)	Vote for or Against (5)
A	+$350	−$100	−$100	For
B	−$100	+$350	−$100	For
C	−$100	−$100	+$350	For
D	−$100	−$100	−$100	Against
E	−$100	−$100	−$100	Against
Total	−$ 50	−$ 50	−$ 50	

SOURCE: Based upon Richard B. McKenzie and Gordon Tullock, *Modern Political Economy: An Introduction to Economics*, New York, NY, McGraw-Hill, 1978, p. 405.

been branded "big spenders" by both critics and Presidents: the issue was an important one in the 1972 national election. Both these images contain some truth, but the reality is both complex and changing.

The first essential point is that government budgets are made "incrementally" rather than "comprehensively." Annual spending changes are usually quite small in proportion to the previous year's expenditures. The common pattern is that the President's budget proposes marginal spending increases for most agencies, and these are generally accepted—but at a slightly reduced rate—by the Congress.[275] This has been true even under such budgetary reforms as PPB (planning-programming-budgeting) and ZBB (zero-base-budgeting).

Yet, while incrementalism is descriptive of most outcomes, it does not fully describe the politics of the budgetary process. There are multiple actors involved. Any description of a "President's expenditure proposals" is made complex by the division of labor within the executive branch. Presidents devote very little of their own time to budgetary questions. Instead, the budget process is executed as a matter of routine by lower organizational components. Budget proposals are prepared initially by executive agencies and then reviewed by a Presidential staff agency,—the Office of Management and Budget—before they are forwarded to the Congress. The typical positions of these two kinds of units are clearer. Agencies normally propose expanded budgets (although they differ in their budgetary strategies and degree of "acquisitiveness"). The OMB, on the other hand, regards itself as a guardian of the public purse, and usually attempts to cut agency requests, drastically in some cases. The President's budget emerges from the process of interaction between these actors.[276]

The same is true on the legislative side. [277] Different roles are played by the members of different organs within that complex body. One important point is that decisions regarding the amounts of annual expenditure, the structure of governmental programs, and the raising of tax funds are performed largely by separate committees: the Appropriations, Authorizing, and Ways and Means (or finance) committees (and subcommittees) respectively. (In addition, there are contrasts between the House and Senate). Authorizations, depending upon the particular program involved, may be permanent, multiyear, or annual. These set the upper limits of expenditures. Appropriations are in almost every instance made annually. Finally, tax code changes, which determine the amount of revenue received available without borrowing, are much less frequent: between 1948–76, the Congress enacted only 16 major tax bills (although there were dozens of lesser bills).[278]

Some economists, sensitive to this point, feel that the Congressional division-of-labor may well bias the decision process toward excessive expenditure. Buchanan and Flowers suggest a homey analogy:

> Suppose that an agreement is made between husband and wife to the effect that the wife does all the shopping while the husband pays the bills at the end of the month. It may be predicted that, under this arrangement, the family spending will tend to be larger than it would be if both the spending and the bill-paying chores should be assigned to the wife. If she is not confronted with the cost side of a purchasing choice, the wife will tend to overestimate the relative desirability of available commodities and services and she will tend to overextend family purchases. . . .
>
> The institutions of fiscal decisionmaking in most democratically organized governments are analogous to the family example suggested. Those legislators who are charged with the responsibility of making decisions about the size of specific budgetary outlays are not the same subgroup of legislators who are charged with making decisions about the level of taxes to be imposed. Those members of appropriations or budgetary committees, the first group, will tend to overestimate the desirability of additional government spending because they will not be fully consious of the costs that such spending necessitates. This proclivity to spend is reinforced by the political process itself. Legislators want to secure reelection, and they know that voters want spending projects.[279]

This effect, the authors suggest, is apt to be particularly pronounced at the national level, since the federal government (unlike state and local governments) is not constrained by a legal requirement to balance its budget.

While such reasoning might appear sound, it departs from well-established facts. The committees on appropriations, which Buchanan and Flowers believe will "overestimate the desirability of additional government spending," have in fact traditionally been one of the more important forces for fiscal restraint. The House Appropriations Committee, which dominates the process, attempts to economize and protect the treasury against excessive expenditure, and is *expected* to do so by the House and Congress as a whole. Over the years, it has usually acted to reduce agency budget requests while providing marginal increases over the previous

year's funding.[280] The Senate Appropriations Committee, on the other hand, functions as a "court of appeals" for aggrieved executive branch agencies. It often attempts to restore a portion of the House's "excessive" cuts.

The House of Representatives is also the key factor on tax issues, since it is the chamber in which all such bills must originate. Its committee on Ways and Means, which has jurisdiction over tax bills, has generally been described as "conservative," cautious, somewhat nonpartisan, and very "professional" in its approach: consequently, its recommendations are seldom challenged on the floor of the House, and more than modest tinkering by the Senate and its Finance Committee also is unusual.[281] In the postwar period, tax bills have for the most part been drafted in the executive branch, but they are reviewed thoroughly on Capitol Hill. The net result of Congressional action usually has been to provide a greater reduction in revenue or a lesser gain than the President had proposed. In the two instances in which the Congress seized the initiative in tax policy (in 1948 and 1969), it reduced rates. The powerful chairman of Ways and Means for some 16 years, Rep. Wilbur Mills (D-AR.), frequently made statements in support of tax rate reductions and economizing in government.[282] In the mid-60s, he strove to reduce the rate of governmental expenditure growth at several critical junctures.[283]

On the other hand, differences which are consistent with the Buchanan-Flowers hypothesis may be found in the orientation of the authorizing or legislative committees on the one hand and two fiscal-oriented committees on the other. The former bodies establish new programs and administrative arrangements, and set—often on a multiyear basis—the upper limits for their spending. Most of the authorizing committees experience continual tension with Appropriations, Finance, and Ways and Means. This stems both from a tendency for the more "liberal" or "activist" members to be drawn to the authorizing committees and the more "conservative" (and senior) members to the fiscal committees, as well as their different responsibilities within the Congress. One consequence of this tension is a gap between authorized expenditures and those actually appropriated. Large programs may be legislated into existence, but later provided with only token levels of funding.[284] In extreme cases, programs established by law may not be funded at all. This is not at all uncommon: ACIR staff estimates suggest that there were as many as 150 grant-in-aid programs for state and local governments which were authorized but unfunded in FY 1975, in comparison with a total of some 447 operating grants.

If there has been a "bias" in Congressional arrangements for fiscal policymaking, then, it has probably been traditionally on the "conservative" side. The appropriations committee has usually provided smaller expenditure increases than were sought by the President, his budget office, and administrative agencies than had been anticipated by the legislative committees of the Congress, and—opinion polls suggest—than would have been supported by the public-at-large. Similarly, Ways and Means has frequently attempted to moderate the rate of tax rate expenditure growth. In the past, it has been an obstacle in the path of expanded federal responsibilities.

In recent years, however, the budgetary politics arena has been quite unstable. Some old traditions have been eroded, while new procedures and roles are being established. Increasingly the Congress has seemingly become an advocate of higher levels of domestic spending, while Presidents frequently seek to "hold the line." Analyst Gary Orfield observes that

> . . . since the mid-1960s there has been increasingly severe pressure on the federal budget, and a major reversal of the roles of the White House and Congress in the budget process. In many cases the President has assumed the position, once occupied by the House Appropriations Committee, of chief naysayer to the expansion of domestic programs. Growing deficits, massive tax cuts, severe inflation, and the built-in growth of well-established programs have sharply constrained budget opportunities for both the President and Congress, creating strong pressure against new programs. Since the late 1960s the President has often responded most vigorously to these fiscal problems, but Congress has tended to become increasingly responsive to the new program constituencies created by the Great Society legislation.[285]

Thus, in the late 1960s, Orfield points out, President Johnson found it necessary to restrain the Congress from expanding "his own" Great Society programs. In the early 1970s, President Nixon was forced to continue domestic programs which he wished to eliminate or cut back drastically.[286] Most of the spending increases in the Nixon years, however, were financed through reductions in defense activities, rather than by aggregate increases in outlays.[287] Congress actually *reduced* President Nixon's overall budget requests by some $30 billion during his years in office.[288]

Recent years have seen some erosion of the Appropriations Committee's traditional "guardianship" role.

Challenges to committee recommendations on the floor of Congress—unusual in the past—have become more frequent, and committee members have necessarily adjusted their own actions to the new pro-spending climate.[289] By 1977, it could be said that "it appears that for the first time in decades the net effect of Appropriations Committee action may be to increase the President's budget."[290]

Significant changes also have been made in the composition and procedures of Ways and Means. Actions in the 93rd and 94th Congresses "democratized" and "opened up" the operations of the committee, changed its composition, reduced the power of its chairman, and also reduced its autonomy and standing within the House itself. The policy consequences of these important modifications are not yet altogether clear, but there are some indications that the committee became more "liberal" on fiscal matters than it had been previously.[291]

Many observers feel that these changes may reduce significantly the institutional forces for fiscal constraint within the Congress. Working in the opposite direction, however, is the new congressional budget process. The Senate and House Budget committees, established under the *Congressional Budget and Impoundment Control Act of 1974*, reflected (among other objectives) a desire on the part of some members of Congress to impose added restraints on federal expenditures. The budget act was passed in response to President Nixon's 1972 campaign charges that the Congress failed to consider the "total financial picture" in its piecemeal approach to budgetary policy—a criticism accepted by many members of the Congress itself.[292] The result is that, for the first time, the Congress had a mechanism for setting overall spending ceilings to guide the appropriations process.

Whether the still-new budget committees actually have restrained expenditure levels is not at all clear. Budget committee members can claim billions of dollars in savings, since total authorization and appropriations requests have exceeded the limits contained in the budget resolutions. Yet some of this may be artificial, since the requests themselves may have been "padded" by committees interested in protecting themselves from excessive cuts.[293] The growing importance of the Budget committees on the one hand, weighed against apparent declines in the role of Appropriations and Ways and Means on the other, leaves the Congressional role in federal spending unclear and in flux.

Another consideration is the growing use and expanding size of "uncontrollable" forms of federal expenditure, which lie outside the budget process and thus the points of fiscal constraint in both the executive and legislative branches. These have become far more important in determining the magnitude of governmental outlays than the more numerous "controllable" programs.

Such "backdoor spending," as it is sometimes termed, takes three principal forms.[294] First, "mandatory entitlement" programs require federal payments in fixed amounts to those persons or governments which meet whatever standards are established by law. Examples include payments for social security, unemployment compensation, medicare and medicaid, and public assistance. "Contract authority," a second common form, permits executive agencies to enter into contracts before receiving appropriations. Finally, "borrowing authority" allows agencies to obligate and spend funds which they borrow directly (through authority to spend agency debt receipts) or indirectly (through authority to spend Treasury debt receipts).

Outlays which are "relatively uncontrollable under present law," as they are described in the federal budget, now amount to about three-quarters of all budget outlays. This proportion has grown from 63.1% in 1969, to an estimated 74.9% in 1979, as *Table 12* illustrates. Most of the increase in total spending over this decade—81.9% of the change from $184.5 billion in 1969 to $500.2 billion in 1979—occurred in the relatively uncontrollable category.

This growth of uncontrollable spending may be traced to three distinct developments.[295] One of the most important is the shift in the composition of expenditures. Defense activities, because they consist so heavily of salaries and fringe benefits, are more controllable than domestic spending. The declining share of the budget spent on defense needs has, therefore, led to an increase in uncontrollability. Secondly, spending within the domestic area has become dominated increasingly by uncontrollable programs, especially transfer payments to individuals. Although this results in part from automatic increases for existing programs, another determinant lies in the political process. Blechman, Gramlich, and Hartman observe:

> Faced with executive branch admonitions to economize, Congressmen have carefully managed, year in and year out, to vote for reductions in appropriations bills, thereby taking credit for being responsible economizers. At the same time, they have voted for huge increases in entitlement programs by relaxing eligibility requirements and raising benefit levels that later resulted in higher spending in the uncontrollable accounts.[296]

These changes have substantially reduced the importance of the budget process in setting overall federal

Table 12

CONTROLLABILITY OF FEDERAL OUTLAYS, 1969 AND 1979

	Outlays (Billions of Dollars) 1969	est. 1979
Open-ended Programs and Fixed Costs		
Social Security and Railroad Retirement	$28.3	$108.0
Federal Employees' Retirement and Insurance	4.8	22.3
Unemployment Assistance	2.9	12.6
Veterans Benefits	5.7	12.6
Medicare and Medicaid	8.9	42.1
Housing Payments	0.3	4.3
Public Assistance and Related Programs	3.9	22.0
Net Interest	12.7	39.9
General Revenue Sharing	—	6.9
Farm Price Supports	4.1	4.5
Other	2.8	10.1
TOTAL	74.5	285.3
Outlays from Prior-Year Contracts and Obligations		
National Defense	24.6	33.8
Civilian Programs	17.3	55.7
TOTAL	41.9	89.5
Total, Relatively Uncontrollable Outlays	116.4	374.8
Total, Relatively Controllable Outlays	70.1	130.5
Total Budget Outlays	184.5	500.2

SOURCE: Executive Office of the President, *The Budget of the United States Government: Fiscal Year 1979*, Washington, DC, U.S. Government Printing Office, 1978, pp. 470–71.

spending levels. In the view of some expert observers, the rise of backdoor spending even threatens to make budget preparations a task for clerks and accountants, rather than policymakers.[297] Sen. Edmund Muskie, the chairman of the Senate Budget Committee, has warned that "the much-hailed new Congressional budget process could . . . become little more than the simple arithmetic sum of predetermined spending levels" if the pattern of reliance upon mandatory entitlements and permanent appropriations increases.[298]

Title IV of the *Congressional Budget Act* has apparently held down backdoor authorizations to a significant degree.[299] "Sunset" legislation, which would require the periodic evaluation and re-authorization of all programs and agencies, has been advocated by Senator Muskie and many others as a next possible step.

Summary and Conclusion

Under the Constitution, the President and Congress share responsibility for the legislative process. Each must play certain formally prescribed roles in the enactment of both statutory laws and spending and tax measures.

Within this framework, however, there are numerous opportunities for policy leadership, obstruction, com-

promise, and political "horsetrading." Many political analysts have attempted to discern the common patterns of interaction between the two branches. Their observations have a vital bearing on the growth-of-government question.

The conclusions reached vary considerably. The studies summarized in this section offer the following interpretations:

- The Presidency has generally been viewed as the source of innovation in the policymaking process. Throughout this century, the President's legislative program has become increasingly the focus of political attention. Similarly, the Presidency has seemed to many students of federalism to be a major centralizing force. The Congress, on the other has often been regarded as a source of obstruction and delay, and as a governmentally decentralizing institution.

- Other analysts believe that these orthodox views are incorrect, overstated, or at least outdated. They find that the Congress has served as a policy innovator in many fields. Furthermore, the legislative branch makes significant modifications in both Presidential proposals and existing programs. Some critics now even regard the Congress as the principal architect of "big government."

- Some individual Congressmen act as policy entrepreneurs in specialized fields of expertise. In this capacity, they may help structure public opinion around the nature of a problem and the need for its solution. One or a few individuals seem to lie behind each major case of Congressional policy initiation. This pattern is apparently more common in the Senate than the House, and among members of either chamber who aspire to a higher elective office.

- "Subgovernments" composed of Congressional specialists, the affected interest groups, and the relevant bureaucratic agencies appear to dominate policymaking on most routine matters. While a high degree of specialization is probably necessary because of the inherent complexity of many policy problems, critics are concerned that these subgovernments often harden into "iron triangles" which advance special interests at the expense of the general welfare.

- Voting procedures and rules influence the character of the policies adopted by the Congress. "Majority rule" may, under certain circumstances, lead to policies which impose on society total costs which are greater than the total benefits. This problem may be exacerbated if vote trading or logrolling is part of the process. Thus, normal democratic procedures could result in an excessively large public sector.

- On the other hand, the actual legislative process does not depend upon simple majority rule. There are numerous decisionmaking stages and centers, and hence a great many opportunities for an interest group to delay or obstruct policies which it opposes. Thus, the weakness of American political institutions may be that they put too many obstacles in the path of programs favored even by large popular majorities.

- The distribution of benefits and costs may be more important influences on public policymaking than their aggregate totals. There does seem to be a danger that policies with large but dispersed costs, and comparatively small but highly concentrated benefits, will be adopted too readily.

- Many distinct organizational subunits are involved in budgetary and tax politics. Typically, executive agencies and Congressional authorizing committees favor increased expenditures. On the other hand, reductions—or small budget increases—are frequently sought by the Office of Management and Budget and the appropriations and taxation committees of the Congress. At least in the past, the system has seemed to be biased toward fiscal conservatism.

- In recent years, these budgetary and fiscal roles have been in flux. Increasingly, the Congress has tended to advocate increased domestic expenditures, while Presidents have sought to constrain them. But changes in the organization and composition of key Congressional committees, including the creation of the new Congressional budget process, make any predictions extremely difficult.

- Outlays for controllable expenditures account for much of the growth in the federal fiscal role. About three-quarters of all spending is now classified as "relatively uncontrollable under existing law." Such open-ended transfer payments programs as Social Security, Medicare, and Medicaid, and interest payments on the national debt, are principal factors. The large size of uncontrollable expenditures reduces the importance of the budget process as a constraint upon, or stimulus to, federal spending.

III
Environmental Determinants of Governmental Growth

A second body of literature stresses, not "demands" expressed through the political process, but instead the much more direct impact of such "environmental" (or "contextual") forces as economic development upon public policy outcomes. As might be expected, explanations of this kind are given much attention in the public finance literature: recent texts list as possible "causes" of governmental growth such items as rising income levels, technological change, increasing international involvement, urbanization, population change, and increased concern for human resources.[300] While it might be taken for granted that such factors would be stressed by economists, this mode of explanation also is favored by many political scientists as well. And—interestingly—there are many economists among the most strident dissenters.

The classic statements of this kind are provided by "Wagner's Law" and the "Peacock-Wiseman displacement hypothesis," both of which are discussed below. There are, in addition, a number of other environmental factors which various analysts have identified, but which have not attained the status of real theory. These, too, are described.

ECONOMIC DEVELOPMENT AND "WAGNER'S LAW"

Before the turn of the century, the German economist Adolph Wagner propounded an influential theory on the size of government.[301] His observation of the growing size of the public sector in many European nations led him to adduce what has become known as "Wagner's Law:" the proposition that governmental expenditure will increase more rapidly than the level of economic activity. This view contrasted with the then-common view that governmental size would increase only in proportion to private economic output.

Wagner also hypothesized that certain types of public sector activity would tend to grow at the most rapid rates. These included cultural and welfare expenditures (especially those for education and income redistribution), public enterprise, and legal administration and protection.[302]

Wagner was not altogether clear as to why he expected this pattern to be followed, and he seems to have caused some confusion by interweaving his positive arguments (governmental expenditures *do* rise) with his normative preferences (certain kinds of governmental expenditures *should* rise).[303] Richard M. Bird points out, however, that Wagner was *not* propounding a theory of political activity. Instead, he regarded the state as an organic entity, possessing a will of its own, separate and distinct from the wills of the people composing it. From this perspective, governmental growth represented the inexorable unfolding of an historical process.

A contemporary restatement of Wagner's law was provided by Mosher and Poland in their 1964 study of American governmental finance. The basic principle, they believe, is aptly summarized in a quotation from the historian Charles A. Beard:

> As society *becomes more complicated*, as its division of labor ramifies more widely, as its commerce extends, as technology takes the place of handicrafts and local self-sufficiency, the functions of government increase in number and in their vital relationships to the fortunes of society and individuals.[304]

More specific causes cited and listed by Mosher and Poland include:

> *Urbanization*, with greater need for public service in urban and metropolitan communities than in rural areas;
>
> *Industrialization* and technological change in the private sector with attendant increases in social and public costs;
>
> Demands for *new kinds* of *public services*, which cannot, or will not, be effectively provided by the private sector;
>
> Demands for *higher standards of service* in established public fields, such as education and health;
>
> Increasing *costs of national defense*.[305]

These can, in turn, be subdivided into two general classes of cases.[306] First, under conditions of "market failure" in an economically advanced society, the private

sector may provide inadequate amounts of certain goods—or the actions of private individuals or businesses may impose external costs on others. This may require public interaction. Secondly, some public services are thought to be "income elastic" luxuries, likely to be consumed in increasing proportions as personal incomes rise. Thus, as Charles L. Schultze has written, it is widely accepted that

> . . . the growing industrialization, urbanization, and interdependence of society generate an array of problems that cannot be handled by the purely voluntary buy-and-sell mechanisms of private markets. Private markets cannot make it possible for individuals to buy clean rivers, uncongested city streets, safe neighborhoods, protection from exotic chemicals, or freedom from discriminatory practices. Growing affluence raises the expectations of the average citizen, and reduces his tolerance for the unpleasant side effects of economic growth. When the procurement of food, shelter, and clothing is still a struggle, environmental quality, neighborhood amenities, and safe workplaces rank well down the list of urgent demands. But they move toward the top when the struggle eases. Moreover, the burgeoning technical capability of modern societies also lifts expectations and lowers tolerance for imperfections . . . . Finally, perhaps nourished by growing affluence, a new sense of social justice for racial minorities and women occasions all sorts of collective intervention into the detailed workings of the marketplace.[307]

This kind of reasoning has been used to explain several specific types of federal policy instruments. "Market failure" is thought to justify and have stimulated both grants-in-aid and economic regulations. As regards grants, most state and local activities have "spillover" effects on neighboring jurisdictions or the nation at large. Waste water treatment is one clear case, since jurisdictions downstream from a polluting community may suffer serious environmental deterioration. The likelihood is that local communities will ignore such external effects in their own decisionmaking processes, since their residents are not affected directly. The result is that their level of expenditure is apt to be inadequate ("inefficient" in economic terms) from a national standpoint.

The solution, as economist George F. Break (and many others) has indicated, is a categorical grant-in-aid program, with the national government meeting the costs of the share of benefits which accrue to nonresidents. Such problems are thought to be numerous. Break contends that

> . . . external benefits, which will probably continue to grow in importance, are already pervasive enough to support a strong prima facie case for federal and state functional grants to lower levels of government.[308]

Much the same is true in the regulatory sphere:

> Economists often recommend government intervention, such as regulation, when a technical analysis indicates a market failure. The specific objective of such regulation is to repair a poorly functioning market and reduce the accompanying undesirable effects.[309]

Examples of the principal types of market failure requiring regulatory intervention include:

- natural monopoly, resulting in high prices, reduced output, and excessive profits;
- interdependencies in natural resource extraction, resulting in the inefficient use of natural resources;
- destructive competition, resulting in chronically sick firms unable to satisfy consumer demand;
- externalities, which impose costs on society but not on the person who causes them; and
- inadequate information in the marketplace, resulting in poor decisions and wasted resources.[310]

Economic Development and Federalism

Although often stated much less formally, similar theoretical interpretations appear to have been accepted by many students of American federalism. For example, Michael E. Reagan (the author of a popular textbook on intergovernmental relations) celebrates the death of "old-style federalism"—the legal separation of national, state, and local functions—which became outdated, in his view, because of the social and economic interdependence of modern society. Because of economic advances,

> . . . many more problems today than in the past are national in the sense of being affected by developments elsewhere in the nation or having their own impact upon other parts of the nation. Our society has become thoroughly interdependent in its economy, its transportation and communication patterns, etc.[311]

He adds that "there seems to be hardly anything that we think of as local that does not have national aspects. . . ."[312]

Similarly, a close student of American political parties, Everett C. Ladd, Jr., has described the development of the national political "agenda" in terms of shifts from a rural, to industrializing, then industrial, and finally an affluent technological society. Each phase of this dynamic process created new issues to which the parties were forced (often belatedly) to respond, and each led to governmental expansion and centralization:

> It seems clear that the steady growth of technological and economic capacity—properly described as economic development—has permitted, even demanded, certain parallel political responses. Advances in communications and transportation have moved political systems away from localism and parochialism, toward larger and larger units of operation. The industrially advanced society required enormously complex social organization, and large governmental bureaucracies as well as private bureaucratic structures are testimony to this; the more interdependent the society, the more complex the tasks of management.[313]

Such governmental growth has occurred regardless of which political party held power. Ladd observes that "the basic level of governmental activity in the United States has always been a function of the social setting, not of the particular administration."[314]

The most sophisticated and detailed treatment of the interrelationship between economic development and governmental policy within the American federal system has been provided by political scientist Samuel H. Beer. Beer believes that the principal sources of increasing governmental centralization in the U.S. reside in the "modernization" process.[315] He argues that the shift from a "segmented" economy of largely independent communities and regions to a complex national network of specialized, interrelated economic centers has had important government consequences. It has led, in a series of distinct phases or historical stages, to the creation of new political coalitions bent on reaching their objectives through national political action. During the period from the Civil War to the Great Depression, interest groups sought adjustments to emerging economic tensions by expanding the regulatory authority of the national government. A shift from state to federal jurisdiction occurred at this time in such diverse fields as railroads, quarantine, food and drugs, and water pollution control. Beginning with the New Deal, political coalitions based upon economic classes have sought "redistributive" policies aimed at redressing relative economic, social, and political deprivation. "Welfare state" activities have grown accordingly. Finally, the growing importance of technical expertise within the modern economic system has encouraged new "professional-bureaucratic complexes" which seek expanded national governmental leadership in such fields as transportation, welfare, health, education, housing, and urban development.

Beer also argues that the formal or Constitutional division of political authority within a federal system of government has little bearing on the degree of governmental centralization which actually pertains. The motive power for governmental growth is the process of development itself, which is apt to be just as potent in a unitary as a federal state.[316]

A complementary view is provided in much of the literature on American state politics, which has traced variations in state policies to differences in their level of socioeconomic development. A pioneering study by Soloman Fabricant concluded that most interstate differentials in per capita spending could be attributed to three variables: income levels, population density, and urbanization.[317] A group of contemporary political scientists, following the intellectual leadership of Thomas R. Dye, also believe that forces of economic development underlie many public policy outcomes, with per capita personal income the single most important determinant of levels of government taxation, spending, and service. Income and such other developmental variables as urbanization and education are, they believe, of greater importance in shaping public policy than the political characteristics generally stressed by students of government.[318]

Evidence and Critiques

As the literature cited above indicates, there is a large community of scholars who believe that the size and role of government can be accounted for in considerable part by development variables. Indeed, this may well be the single most widely accepted explanation of public sector growth.[319]

Still, the essentially deterministic statement of this theoretical orientation embodied in Wagner's law has also been criticized frequently. Empirical evidence brought to bear on Wagner's formulation has been weak or mixed, in the view of many analysts. There are, then, important differences in expert opinion. In part, this reflects the complexity of the questions involved, the vagueness of Wagner's theory itself, and the alternative methodologies employed to test it.[320]

Perhaps the most that can be said for Wagner's law is that it has roughly corresponded to the facts of expenditure growth for a number of modernized nations. But there are exceptions in particular time periods, countries, and specific functional areas. And, while the law does possess some degree of descriptive accuracy, it is too unclearly formulated to be explanatory. Lacking a grasp of the underlying causal pattern, predictions for future growth cannot be made with any certainty.

Some studies have provided empirical support. Bird's 1971 review of the relevant research suggested that it is true that *in general,* over the *long run,* governmental expenditures do seem to have risen along with the development of modern economies in many nations. He observes:

> . . . it appears that Wagner's law holds in aggregate terms for most periods for all the countries mentioned, and further, that the most rapid expenditure increases have generally been in the social services, a result again not inconsistent with Wagner's original ideas. . . . On the whole . . . the evidence, such as it is, must be considered mildly favorable to Wagner's law.[321]

As regards the United States in particular, Musgrave and Musgrave similarly conclude that "Wagner's law of rising public expenditures is borne out for the past 80-year period."[322] Recasting their data into the form of expenditure elasticities, they also demonstrate that the GNP elasticity for both total and civilian expenditures was well above 1.0 throughout this period, as the Wagnerian thesis requires.

On the other hand, there is much contrary opinion and evidence. Richard E. Wagner and Warren E. Weber, who have examined changes in governmental expenditure for 34 nations in the postwar period, conclude that

> Wagner's law is *not* a law. While there are countries for which Wagner's law seems to be aptly descriptive of the growth of government, there are many other nations for which Wagner's law clearly does not hold. Western democracies do seem to be a bit more on the side of a growing relative size of the public sector, but even here there are several notable exceptions, with France, Germany, and Iceland being particularly prominent with respect to the persistence with which Wagner's law can be rejected. In any event, the weight of evidence is sufficiently inconclusive to suggest that there is no universal, Wagnerian law of public spending.[323]

Similarly, Morris Beck finds that the governmental share of gross domestic product measured in real terms (that is, adjusted for price changes) had actually declined between 1950 and 1970 in eight of the 13 western nations he studied. In most of the others, public sector growth was very slight. The contrary appearance is explained by the fact that the cost of providing governmental services has risen more rapidly than general living costs. On this basis, Beck concludes that the real size of the public sector in many economically matured nations may already have peaked.[324]

Borcherding's study of the United States indicates that only about half of the total growth in government spending in this century can be explained by increased affluence, population growth, and other economic changes. He also concludes that "contrary to the widely stated position known as Wagner's law, it does not appear that the elasticity of public expenditures is greater than 1.0., but a great deal less. My own 'guesstimate' . . . places it around 0.75."[325]

What of the Future?

There is still greater criticism of one of the principal implications of Wagner's law—that governmental expenditures will continue their upward climb in the future. Even some of the writers who accept the descriptive accuracy of the Wagnerian hypothesis contest its validity for forecasting purposes. Bird advances this position strongly. The theory, he thinks, is teleological and logically weak, and does not account for the marked variations in growth rates for particular periods and nations. For this reason, it must not be employed as a kind of economist's crystal ball. Bird writes that, while "Wagner's law may help illuminate some aspects of past reality, it would be myth-making of the worst sort to contend that it has anything useful to tell us about the future."[326]

Musgrave takes a similar position, but for different reasons. He argues that it is meaningless to predict the growth of public expenditures *as a whole.*[327] Full understanding, he believes, is possible only if public expenditures are broken down into their several functional components.

A third reason for believing that Wagner's law is inapplicable to present-day America is suggested by some other critics. Bernard P. Herber takes the position that Wagner's law is useful only for industrializing nations, those involved in accumulating capital goods for communications, transportation, and education. Since such goods have collective characteristics, they are often provided through the public sector. But the law is irrelevant for either "preindustrial" or "postindustrial" nations.

The subsistence goods which are predominant in the former are generally provided through market arrangements. In fully industrialized nations, on the other hand, government has already provided those economic goods for which it enjoys an advantage, and the popular resistance against "too large" a public sector can be expected to increase.[328] A degree of empirical support for this proposition is suggested by cross-sectional comparisons among nations, which have indicated that there is little relationship between income and governmental size for countries ranking very high or low on a developmental scale.[329]

CRISES AND WARS: PEACOCK-WISEMAN

An important alternative hypothesis, based upon a critique of Wagner's law as applied to Great Britain, suggests that public expenditures do rise, over time, but in a series of irregular jumps or discrete steps, rather than steadily. Such steps, according to Alan T. Peacock and Jack Wiseman, correspond to certain national crises—most commonly, to wars.

Their important study, *The Growth of Public Expenditure in the United Kingdom,* attributed much of the expansion of the 20th Century British state to the influence of World Wars I and II.[330] Peacock and Wiseman suggested that there was a "displacement effect" on the ability to raise revenues during these national emergencies. Under wartime conditions, the population became willing to accept both techniques and levels of taxation which previously would have been regarded as intolerable. Once in place, the new revenue-raising instruments were comparatively easy to maintain, for "it is harder to get the saddle on the horse than to keep it there." Thus, wartime tax increases had a ratchet effect on public finance, making possible an expansion of domestic expenditures in the postwar years. The authors also noted a second trend, which they termed the "concentration process," involving a shift of responsibilities from local to central authorities. This, too, could be explained in part by the effects of wartime conditions.[331]

The Peacock-Wiseman hypothesis has two distinctive features. Most obvious, of course, is its identification of war as a force influencing even nondefense expenditures. Secondly, the theory is unusual in that it stresses the willingness to pay taxes as the principal determinant of the size of government, rather than the popular demand for services. In this respect, it offers a public sector analogy to Say's law: "supply creates its own demand."

American Applications

Various analysts also have attempted to apply this theory to the United States. A similar step-like pattern for federal outlays, corresponding to periods of war, has been identified, as *Figure 5* illustrates. Ott and Ott observe that

> . . . the most obvious influence on [the growth of federal outlays] has been war. Large expansions of federal spending occurred during the War of 1812, the Civil War, World War I, and World War II. The trend of federal outlays over the past 183 years may be described as a series of plateaus. Wars have pushed federal spending sharply upward. With the return of peace, expenditures have fallen, but never to prewar levels . . . .[332]

Other crises seem to have had an impact quite like that of war. The Great Depression is often cited as a domestic national emergency which produced a similar mobilization of resources. Mosher and Poland, in a study of government spending between 1902–62, concluded that

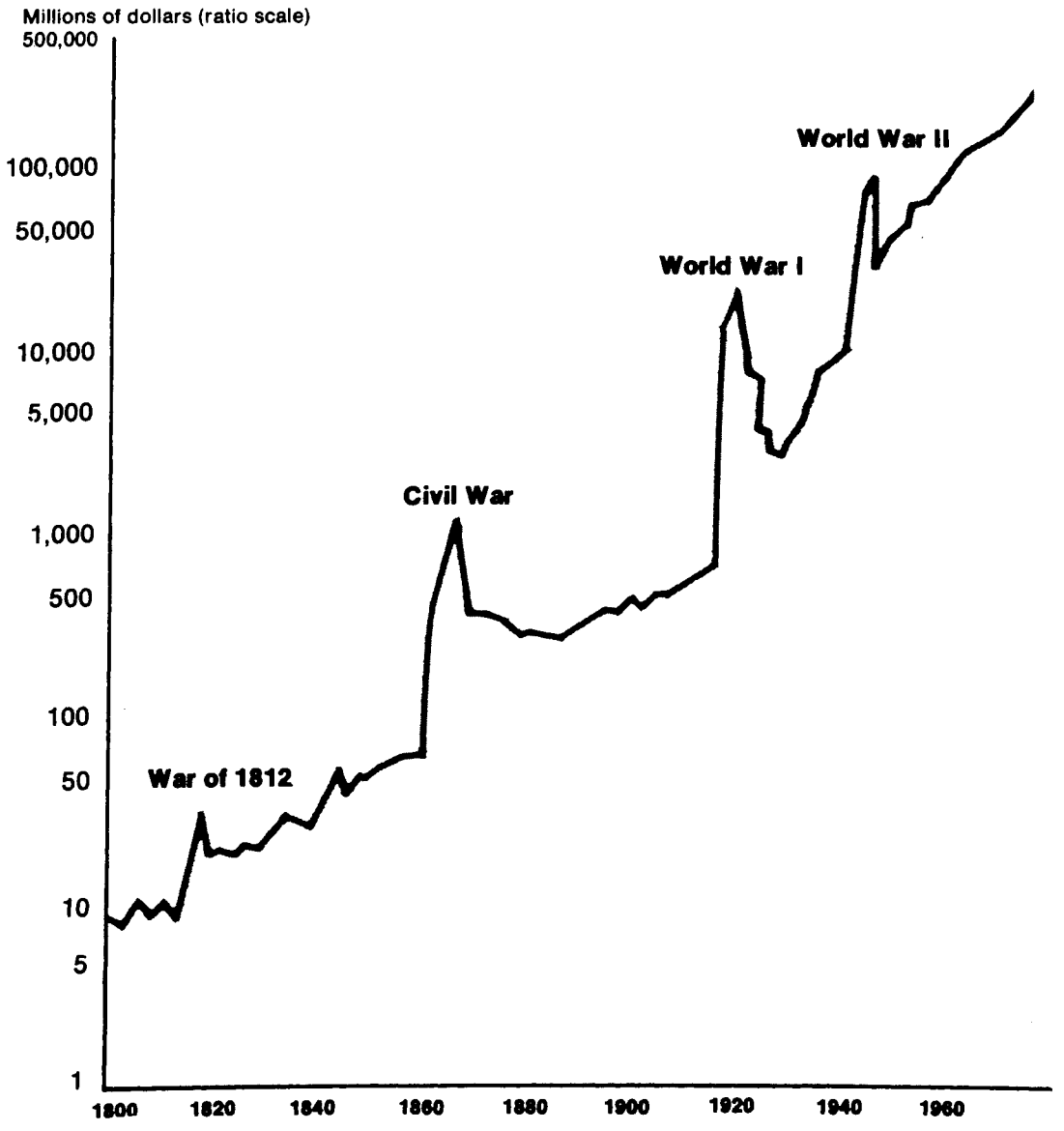
> Our expenditures have grown through a series of leaps following on the heels of international crises, principally wars, and, to a lesser extent, of one domestic economic crisis, the Depression. When the crises subside, expenditures associated with them decline and then stabilize at levels considerably higher than before. Costs and social responsibilities from the crises remain long after the war or depression has ended.[333]

Overall spending in noncrisis periods, they pointed out, has generally remained remarkably stable as a percentage of the gross national product. Conversely, nearly all of the significant increases in spending were products of crisis conditions. They suggested—as did Peacock and Wiseman—that it was only in the periods of crisis that the "stickiness" of tax revenues could be overcome, permitting an expansion of the public sector in later years.[334]

Some economic historians have associated changes in American tax policy with international conflict, just as Peacock and Wiseman suggest.[335] The income tax, adopted in consequence of the Sixteenth Amendment, became a major revenue-producer during World War I. It was considerably expanded in importance during World War II, which also saw the adoption of the pro-

FIGURE 5

Impact of War on Federal Outlays, 1794-1976



SOURCE: David J. Ott and Attiat F. Ott, *Federal Budget Policy* 3rd. ed., Washington, DC, The Brookings Institution, 1977, p. 54.

cedure for the automatic payroll deduction for tax payments. Necessary as a wartime measure, this innovation was retained in peacetime and has had, according to Jonathan R.T. Hughes, a dramatic effect on the role of government. He believes that the "pay-as-you-earn" system and the progressive structure of the income tax make government growth self-financing, especially during times of inflation. "It is thus no wonder that the federal government expenditures have increased eight times as fast as has the GNP since 1940 . . . . What the big revenues encourage is bold new spending."[336]

Other analysts point out that war may have an impact upon the size of the public sector beyond its influence on tax rates. Several writers have attributed the development of welfare state policies in both Great Britain and the U.S. to the stimulus of World War II. The successful wartime mobilization indicates a national capacity to devise and manage complex economic and social programs, and the events of the War strengthened the ideals of universalism and equality. The depth of human suffering was revealed by the large numbers of young men deemed medically unfit for military service.[337] In the U.S., federal economic controls imposed under emergency conditions in both World Wars later provided models of residual authority for dealing with purely domestic economic problems.[338]

Still, despite the attractiveness of the Peacock-Wiseman hypothesis, many other analysts have been quite critical and have marshalled some evidence against it. Musgrave indicates that the relevant data are subject to conflicting interpretations.[339] While some wartime displacement of public expenditures is apparent, it is not clear that its effects are more than temporary. He finds that it is extremely difficult to distinguish post-war increases in civilian expenditures from those which might have been expected under Wagner's law. Thus, he concludes that "the threshold theory, while interesting, cannot be taken to give a conclusive explanation of the growth of the public expenditure ratio, at least in the United States."[340]

Other researchers agree. In a study of nondefense governmental expenditures over the period 1900-69, Tussing and Henning also found little evidence of a "displacement effect"[341] on governmental expenditures for either of the post-World War periods (though there was some evidence of such an effect as regards taxation in the years after World War II). Borcherding, too, reports that the results of his study of the displacement and concentration effects in the U.S., using public employment rather than expenditure data, were negative. He indicates that

> It appears that the expansionary and centralizing trends in nondefense activities were present well before either World War II or the Great Depression. After these crises the spending returned to the long-term growth path as did the centralizing tendency that one might have predicted had these calamities not ever taken place. World War I, the Korean conflict and the height of the Vietnam action seemed to have no effect either. Thus, over the long run, growth rates of nondefense, nonrecession type activities are fairly stable as has been the rate of centralization.[342]

Others observe that it is particularly doubtful that the displacement effect can account for the growth of government expenditures over the past 15 years. Thus, Buchanan and Flowers note that the "Great Society spending boom took place alongside and not *after* the Vietnam War spending expansion."[343]

All in all, then, the Peacock-Wiseman hypothesis remains at best controversial. In identifying wars, crises, and the willingness to assume new tax burdens as possible influences on governmental size, it seems a useful corrective to the sheer economic determinism of Wagner's law. But the greater importance of these considerations, against the many others which appear operative, has not been demonstrated convincingly.

OTHER INFLUENCES

Although Wagner's law and the Peacock-Wiseman hypothesis represent the most comprehensive theories regarding the influence of environmental variables on government growth, a variety of other factors of a similar nature also have been identified. These are listed, and discussed very briefly, below.

Tax Structure

As noted in *Chapter 4* of this volume, many experts believe that the growth of the federal government has been encouraged in part by the strength of the national revenue system. Throughout much of American history, federal revenues have grown more rapidly than expenditures, rendering tax increases unnecessary except in time of war.[344] This has permitted and even encouraged new spending programs. For example, the prospect of continuing fiscal surpluses underlay the early proposals for revenue sharing in the mid-60s. More generally, as Daniel J. Elazar has observed, the federal government "has had to take the lead in expending large sums for the introduction of new programs managed by any level of

government in the United States'' because of its superior revenue system.[345]

In the postwar years, the key factor favoring the national government in fiscal terms has been the progressive structure of the personal income tax. Economic growth (whether real or inflationary) moves individuals into high tax brackets, and thus increases federal receipts automatically. The less ''income elastic'' property and sales taxes—the traditional sources of state and local revenue—lack this natural escalator. Economist Walter Heller has characterized this difference nicely: ''prosperity,'' he once wrote, ''gives the national government the affluence and local governments the effluents.''[346]

Though important historically, this argument has seemed less useful in the past decade. Federal deficits have replaced the traditional peacetime surpluses, while the ''fiscal dividend'' anticipated at the end of the Viet Nam War never materialized. The tax reductions of 1964 and other years, and rapidly expanding domestic outlays, have made the initiation of major new spending programs increasingly difficult from the fiscal standpoint.[347]

Demographic Change

Another important set of forces involves demographic characteristics.[348] Changes in the age composition of the population, for instance, may influence both the nature of the problems on the public agenda and even the outcomes of the political process. For example, the post-War ''baby boom'' created a need for greater investments in education in the 1950s and (given the large proportion of crimes committed by young adults) anticrime measures in the 1960s. As this group ages, it will require enlarged expenditures for social security retirement benefits, health care, and social services.[349] At the same time, declining birth rates could create a shortage of military manpower, reduce enrollments for higher education, and lower the level of unemployment.[350]

Since these responsibilities are allocated differently among the three levels of government, such demographic shifts could alter the balance of fiscal responsibility within the federal system. The overall effect seems likely to be centralizing, since the costs of education (a major state-local activity) will fall, while programs benefitting the aged (financed largely by the federal government) will increase.

Other social analysts suggest that the diminishing importance of the ''extended family'' in modern society also has placed increased burdens on governmental social services. The growing number of married women in the labor force both raises unemployment levels and may stimulate a demand for child care programs. In such ways, many demographic trends have a strong, though sometimes subtle, influence on public policy.

Productivity and Relative Costs

Increases in the relative size of the public sector have sometimes been attributed in part, to its lower productivity. Many public services—especially human and urban services, as the economist William Baumol has observed—are labor-intensive, which makes them less subject to productivity gains.[351] Hence the cost of providing public services rises more rapidly than the cost of most privately produced goods. Between 1929–74, the overall GNP price index rose by 236%, while that for government purchases climbed 448%, nearly twice as fast.[352] If, as Baumol believes, the demand for these goods is relatively price-inelastic, fiscal resources must be shifted increasingly from the high-productivity private sector to the low-productivity public sector just to maintain comparable levels of service.

Similar concerns have motivated public administration and ''good government'' reformers since early in this century. The absence of the ''profit motive'' in the public sector has often been described as a source of inefficiency, as has the intrusion of political considerations into personnel, procurement, and other managerial questions. The search for greater ''efficiency and economy'' has focused on stronger management, new budget processes, better personnel systems, departmental reorganization, cost-benefit analysis, and the like as ways to reduce the cost of government while maintaining existing services.[353]

Impact of Television

A final developmental influence—perhaps one of the more significant, but one of the least frequently noted—has been the rise of television as a medium of political communication. The process of communication is of course central to the development of political dialogue between the ''rulers'' and the ''ruled,'' public officials and the public-at-large. In the past, the development of new media appears to have vitally affected the fabric of politics. The ''muckraking'' reform efforts of the Progressive era, for example, were associated with the rise of inexpensive mass-market magazines, which sought to expand their circulation by publishing sensational *expose's* of corporate abuses and political corruption.[354]

Television, according to such media analysts as Michael J. Robinson, may have had a similar impact on

politics in the 60s and 70s.[355] Following the Kennedy-Nixon debates in that year, tv has become a fixture of Presidential campaigns and an important tool of incumbent Presidents. Old ties—those between political parties and the electorate, and members of Congress and their constituents—have consequently, diminished in significance.

Most importantly, from the standpoint of federalism, television has encouraged the development of a national political dialogue around the issues it publicizes. The civil rights movement of the early 1960s was perhaps the first example; the Viet Nam War, portrayed much more vividly than any previous conflict, was another. Even entertainment shows, by presenting certain kinds of "lifestyles" and human problems, can influence social and political perceptions. This element was new, in Robinson's view:

> [T]elevision is national news; print news is not, and has not been. We have never had a national daily newspaper, except for the *Wall Street Journal*, and the focus of news had always been local until the coming of the television news system. But the focus is now unmistakably national. . . . *When television shifted its focus toward Washington, it was only a matter of time before "Washington news" would also shift our political frustrations toward Washington*, instead of toward city governments or the state capitals.[356]

Thus, the apparently growing tendency to define domestic problems as national problems, even national crises, may stem in some measure from the new nationwide audience and political dialogue which television has made possible.

SUMMARY AND CONCLUSION

The literature reviewed in this section, drawn chiefly from contributions to the theory of public finance, has suggested a number of possible influences on the magnitude of the public sector and its rate of growth. Many of these theories are derived from, or were intended as correctives to, "Wagner's law," which stated the general principle that governmental expenditures tend to increase at a more rapid rate than the level of economic activity. In brief, various authors have suggested that:

- Governmental growth and centralization is an automatic and natural outcome of social, economic, and technological development.
- Problems of "market failure" and "externalities" have encouraged many governmental activities, including grant-in-aid programs and regulatory measures.
- Many public services are quite "income elastic," consumed in increasing proportions as incomes rise.
- The growth of the public sector has occurred largely in irregular steps, each corresponding to a major war or other crisis, in which the willingness to bear taxation increased.
- Wars and other emergencies have also stimulated a demand for new public services and a greater willingness to use government to attack post-war domestic problems.
- The United States may be entering a period of post-industrial development, in which the public sector will consume lesser amounts of economic resources.
- The superior tax structure of the national government, and its tendency to receive automatic revenue increases with economic expansion, have encouraged it to take the lead in providing new domestic services.
- Demographic trends, especially changes in the age distribution of the population, presage the rise of new domestic problems and remedial public policies.
- The growing size of the public sector stems in part from its greater inefficiency and susceptibility to inflationary cost-increases. And,
- The development of mass media, especially television, has altered political communications and generally served to focus public attention on the national government and "national" problems.

Important as these are, however, it should be added that few economists who have considered these questions believe that such "environmental" influences have caused *all*, or perhaps even *most*, public sector growth. Almost uniformly, they believe that various social and political considerations have been of perhaps equal or greater importance.[357]

IV
Intragovernmental Influences

Both the political demands and environmental models look outside government in an effort to identify the forces leading to governmental growth and major policy shifts. In this respect, they are similar. There is a third set of studies, however, which stresses influences on policy which are largely *internal* to the government itself. Most of these fix their attention on the bureaucracy.

In comparison with the theories described previously, these remain quite sketchy and untested. Indeed, the very notion that the bureaucracy has a significant impact on the policy process was foreign to political analysis for many decades. Commonly, the executive branch was regarded as a more or less neutral instrument for the *execution* of laws: *policymaking* was a responsibility of the Congress, the President, political organizations, and voters. Although a rigid interpretation of this "policy-administration" dichotomy has been rejected soundly, in practice political science still has not refocused its research agenda around the new issues raised by the fact of bureaucratic activism. While a number of economists have considered the impact of the bureaucracy on governmental growth, these studies have lacked the degree of empirical verification which has been applied to Wagner's law and the other more overtly economic formulations.[358]

Subject to these limitations, then, four basic points are taken up in this section. The first explores the context of advanced economic development in which large organizations, both public and private, have come to play principal societal roles. The second considers the extent to which organizational growth appears to be a major objective of bureaucratic activity. The role of bureaucrats as policy initiators—a closely related question—is examined next. Finally, the "professionalization" of government, and the political consequences of this trend, are discussed.

THE DEVELOPMENTAL CONTEXT

The development of large-scale organizations, in both the private and public sectors, is often viewed as closely related to the process of economic development discussed in the previous section. It appears, indeed, to be both a cause and consequence of economic change: the two are inextricably linked. Major economic advances probably would be impossible in a society of tiny firms, and without support from certain large-scale public undertakings. At the same time, government has also grown in response to the emergence of new, complex, technologically based problems and the political forces created in their wake.

John Kenneth Galbraith stated the general principle in his book, *The New Industrial State,* which is concerned with the impact of technological development on the industrial system. "Technology," Galbraith observes, "means the systematic application of scientific or other organized knowledge to practical tasks." (To many, the term implies "machinery"—but, as Galbraith indicates, this is only the physical manifestation of underlying ideas). Technology, in turn, requires specialized manpower, and an "inevitable counterpart" of this specialization is large-scale organization.[359] Thus economic advance and "bureaucraticization" are linked.

Expertise also inevitably affects the "power structure" of the organization which employs it. Hierarchical organization charts are misleading, and must be set aside if this point is to be grasped. The "political" effect of expertise is that power is transferred from the board of directors to top managers, and from managers to the persons below them who possess the information required for effective decisionmaking. Only in very simple organizations do those at the top give orders and those below relay them on or respond to them.[360]

A public sector counterpoint to Galbraith's analysis is provided by Samuel H. Beer. In his view, the growth of a "technocracy" within government has been one of the most significant aspects of political change in recent decades.[361] In part, this trend has been a necessary consequence of the growing complexity of public problems and the knowledge required to solve them. Yet the result has been that control over the operations of government has shifted—just as it has in modern corporations—from the "shareholders" (citizens) and their elected "board of directors" (the President and Congress) to specialists within the organizations:

> The political importance of this new direct relation of science to public policy arises from the fact that it shifts the initiative in government from the economic and social environment of government to government itself. The old pressure group model that found the origin of laws and programs in demands arising outside government does not hold of technocratic

politics. In technocratic policymaking the pressures and proposals arise *within* government and its associated circles of professionals and technically trained cadres. In a democratic country, of course, the electorate must be informed and its consent won, but in recent times it tends less and less to be the source of policy initiatives.[362]

The technocratic state, many writers fear, is both inherently centralizing and debilitating of traditional democratic processes.[363] Ladd observes that, in a technological society, massive organizations—big government, big business, big labor, big media—become the principal political actors. Problems are defined in a manner requiring very large commitments of resources, well beyond the reach of individual actions. Personal frustrations mount with the loss of meaningful personal control. At the same time, a "new political class" of managers and professionals emerges in the large organizations. "Big government" is no bugaboo to this new elite, nor is bigness of any other kind. The traditional distinction between the public and private sector blurs and collapses as interdependencies increase. The old question, "should government get involved," ceases to be of much political moment. It is replaced by another issue: "will government action help the interests I represent?"

Large public organizations also appear to elaborate themselves automatically, through an internal logic of their own. Herbert Kaufman notes that there is an inevitable process of increasing specialization within organizations, with some individuals gravitating toward particular areas of activity. As they acquire a knowledge of procedures, make the necessary contacts, and develop other forms of expertise, the relevant problems are increasingly routed to them. Eventually, this group of specialists attains separate organizational status, and a new governmental agency is born. Thus, the process is inexorable in Kaufman's view, governed as much by the internal realities of organizational life as by any outside force. Much of the governmental growth observed in his study, Kaufman writes, occurred in just this way.[364]

Furthermore, some analysts argue, one governmental intervention tends to lead necessarily to further related interventions. "Centralization," Beer writes, "breeds further centralization."[365] A policy with undesirable side-effects is not, he believes, usually terminated. Instead, a second ameliorative program is begun as a remedy for it. "Thus, conflicts within the vast organization of government are settled by further expansion of the activities of the organization."[366]

Governmental growth springing from such internal, technologically based sources may seem threatening not only because it may be excessive, but because it lacks direction or clean purpose. To quote Beer again, the consequence "is not simply growth of the public sector, but growth without purpose."[367]

Specific features of this model of self-sustaining bureaucratic growth in a modern (or "post-industrial") state are examined below.

GROWTH AS A BUREAUCRATIC OBJECTIVE

While a certain degree of bureaucratic growth may be an inevitable consequence of economic modernization, it also is ascribed to the purposive activities of the bureaucrats themselves. Many analysts believe that, once established, government agencies tend to expand because of the self-interested activities of their executives and employees.

One theory of this kind was given humorous expression by C. Northcote Parkinson, the author of a famous "law' of bureaucratic behavior: "work expands so as to fill the time available for its completion." A corollary further specifies that, "In any public administration department not actually at war, the staff increase . . . will invariably prove to be between 5.17% and 6.56% (per year), irrespective of any variation of the amount of work (if any) to be done."[368] For empirical support, Parkinson offered data showing that, while the number of ships in the British Navy fell by two-thirds betwen 1914 and 1928, the number of admiralty officials actually rose from 2,000 to 3,569—or 5.65 per annum.[369]

Although Parkinson's treatment was lighthearted, several serious scholarly inquiries have taken a similar approach. The economist William Niskanen, for one, believes that bureaucrats seek to expand their programs beyond economically efficient levels, and he attempts to demonstrate that under the normal operating conditions of modern democratic government, such efforts will usually be successful.[370]

Like much of the work by economists on political issues, Niskanen's model is deductive and theoretical, rather than empirical, and is based upon a few simple axioms. His research was stimulated initially by his recognition during government service that "there is nothing inherent in the nature of bureaus and our political institutions that leads public officials to know, seek out, or act in the public interest."[371] What, then, motivates governmental behavior? His hypothesis is that the wellspring of bureaucratic behavior is what he calls the bureaucratic maximand: a desire to maximize one's

agency's budget.[372]

A large budget, Niskanen suggests, is a good proxy for such other personal values and objectives as salary, perquisites of office, public reputation, power, patronage, and output. Furthermore, a higher budget permits a bureaucrat to satisfy any personal conception of the public interest, since he generally believes in the desirability and even necessity of whatever services his agency provides.[373] Though Niskanen does not make the point, it can be added that growth might seem to provide a greater opportunity for managerial improvements, too, since it permits greater use of the "carrot" of promotions and raises for subordinates, provides a chance to select more new personnel, reduces internal conflicts, and may result in certain "economies of scale."[374]

Niskanen attempts to demonstrate that bureaucratic output will usually be excessive (in comparison with that provided by a competitive industry) under the idealized operating conditions of American government: majority rule and a "streamlined" organizational structure. In effect, bureaucrats confront the Congress as a "monopoly" supplier of particular services; hence, they are able to extract from it an excessive level of financial support. (Similar "price gouging" occurs under monopoly conditions in the private sector). On this basis, Niskanen reaches the "unavoidable conclusion" that the government has grown too large.[375]

Niskanen therefore proposes a number of unorthodox policy recommendations: for example, that the provision of the same or similar services by more than one administrative agency be actively encouraged, instead of being suppressed through departmental reorganizations. He also states his conviction that the national government should provide a narrower range of services than at present, financed by lower but more progressive tax levies.[376]

Some other analysts have confirmed at least the general thrust of Niskanen's underlying hypothesis—the quest for larger budgets—which did, after all, reflect that author's personal experiences in the Office of Management and Budget as well as his theoretical predilections. Aaron Wildavsky, a leading academic expert on the budgetary process, has reached similar conclusions. He was written that:

> Administrative agencies act as advocates of increased expenditure. . . .
>
> Every agency wants more money; the urge to survive and expand is built in. . . .
>
> They all want more. Thus agencies are advocates of their own expenditure, not guardians of the nation's purse.[377]

The results of polls of federal bureaucrats also are consistent with the "bureaucrat's maximand." A 1970 survey of upper-level program officials found widespread support for the greater governmental provision of social services in the major social service agencies: HEW, HUD, and OEO. The staff of other departments were much more sharply divided on this question.[378] These results are indicated in *Table 13*. More recently, an ACIR survey of 268 grant-in-aid administrators disclosed that only one-fifth felt that their financial authorization and appropriations were fully adequate to achieve the purposes of their program. Fifty-two percent felt that financial support could be "improved substantially."[379]

On the other hand, many other aspects of the Niskanen hypothesis may be less sound. His work shows a "woeful ignorance" of the relevant empirical literature, according to one recent critic. The motivational system implied by the "bureaucrat's maximand" is overly simplified, and known cases in which agencies have fought against an expansion of their powers are ignored. The diversity of the kinds of "services" agencies distribute (including regulations) and differences in their relationships with other political actors, especially interest groups, are also neglected.[380]

It is not at all clear whether bureaucrats are able to exert as much upward pressure on expenditure levels as Niskanen suggests. Even some other writers in the political economy tradition believe that the rate of the expansion of the bureaucracy is controlled adequately by the nonbureaucratic institutions of government, such as the Congress.[381] Detailed studies of appropriations politics indicate that the agencies which seek the largest fiscal increases usually suffer the largest proportional cuts at the hands of the legislature. Although they still may win more than the less assertive agencies, these findings suggest that Congress does exert a substantial independent influence on program outlays. Other factors which Niskanen ignored, like the number and distribution of program constituents, also appear to be very influential in determining appropriations levels.[382] Finally, despite the continuing efforts of administrative reformers, competitive relationships among executive branch agencies remain the norm, rather than the exception.[383]

Bureaucrats as Policy Initiators

While the role played by bureaucrats in the budgetary process is widely recognized, their contributions to the development of new public policies is less well understood. (The distinction employed here is this: budget politics revolves around the magnitude of expenditures

Table 13

ATTITUDES OF FEDERAL BUREAUCRATS REGARDING THE GOVERNMENTAL PROVISION OF SOCIAL SERVICES, 1970

Agency Type	For Much More Government Provision of Social Services	For Some Additional Government Provision	For Present Balance	For Less Government Provision	For Much Less Government Provision of Social Services	Total
Social Service (HEW, HUD, OEO)	53%	18%	21%	6%	3%	100% (34)
Other	15	18	34	20	14	100 (80)

SOURCE: Joel D. Aberbach and Bert A. Rockman, "Clashing Beliefs Within the Executive Branch: The Nixon Administration Bureaucracy," *American Political Science Review* 70, June 1976, p. 461.

for *existing* programs, while the politics of policymaking involves the creation of *new* programs or major revisions of those in operation). Yet, it appears on the basis of somewhat fragmentary evidence to be extremely important. According to Ripley and Franklin, the relationship of bureaucrats to the Congress is in fact at the very *heart* of the policy process in American government—although, as they note, it is "not usually given sustained attention in the literature. . . ."[384] The President, they add, becomes personally involved in policy questions only rarely, given the vast workload placed upon him, although his staff agencies are more frequent participants.[385]

Other close observers suggest that most nominally "Presidential" initiatives should actually be attributed to the bureaucracy. William D. Carey, a top budget bureau official, declared in 1969 "that in the main, the Presidency is in the retail business when it comes to policy formulation; it reacts, responds, modifies and tinkers with departmental policy and program thrusts."[386] A more recent writer, who also observed White House operations from an excellent vantage point, agrees that

> Within the executive branch, the departments have historically been the primary source of the President's legislative recommendations. Within the departments, bureau chiefs have taken the initiative. . . .[387]

This fact has provided a very important element of continuity in the details of policy initiatives, even when control of the Presidency itself has switched from one party to another.

Apart from these assertions regarding its importance, however, little close attention has been given to the process by which policies are developed within the bureaucracy or to the objectives which are thereby advanced or neglected.[388] What research there is, is concerned primarily with foreign policy, rather than domestic issues. This field, however, may not provide a sound basis for generalization, since so many foreign policy decisions are made under hurried (and often secret) "crisis" conditions with little participation by the Congress, interest groups, or the public-at-large.

Some of the most interesting theoretical formulations have been provided by Graham Allison, Morton H. Halperin, and other writers of the "bureaucratic politics" school of foreign policy analysts. Allison's principal work, based upon a case study of the Cuban missile crisis, offers two different but compatible models of bureaucratic activity in policymaking: the "organizational process" and "governmental politics" models.[389] Both are suggested as alternatives to the "rational actor" model employed traditionally by most international relations theorists, in which the actions of a nation-state are interpreted as purposive choices made to advance its strategic interest.

The key feature of Allison's first model is its stress upon the power of organizational routines. Much organizational activity has a "programmed character," derived from the use of a limited number of "standard operating procedures."[390] These shape organizational responses in a wide variety of situations. Consequently, much public policy can be viewed simply as an "output"

of essentially mechanistic processes within the bureaucracy.

Alternately, Allison's second model describes policies as the resultants of competitive struggles among several organizational actors. The key bureaucratic players in these disputes all attempt to advance their own conception of national, organizational, group, and personal interests. For many of them, organizational position is particularly important: the general rule, according to "Miles' law," is that "where you stand depends upon where you sit."[391]

While the two models differ in certain respects, both are similar in their stress upon the multiplicity of organizational actors and perspectives within the executive branch, and the difficulty faced by top-level officials (including the President) in controlling or coordinating their activities. Furthermore, both models suggest that policy springs largely from sources deep within the bureaucracy, rather than from external political or environmental forces.

A second analyst, Morton Halperin, has attempted to describe organizational objectives in more detail, consistent with Allison's governmental politics model. He suggests that:

> 1) An organization favors policies and strategies which its members believe will make the organization as they define it more important.
>
> 2) An organization struggles hardest for the capabilities which it views as necessary to the essence of the organization.
>
> 3) An organization resists efforts to take away from it those functions viewed as a part of its essence.
>
> 4) An organization is often indifferent to functions not seen as part of its essence or necessary to protect its essence.
>
> 5) Sometimes an organization attempts to push a growing function out of its domain entirely. It begrudges expenditures on anything but its chosen activity.[392]

Perhaps the most striking point is Halperin's belief that an organization will seek to advance its "essence," but may fend off other activities. This contrasts with Niskanen's proposition regarding a single-minded devotion to budget maximization. Halperin argues that an organization will accept a new function only if "it believes that the new function will bring in more funds and give the organization greater scope to pursue its "own" activities," or if an activity is virtually forced upon it by "senior officials."[393] A similar point of view has been advanced by Matthew Holden, Jr., who believes that some agencies have dispositions toward programmatic maintenance or retrenchment, rather than expansion, if they can maintain a better constituency balance in this manner.[394]

Anthony Downs, a prominent political economist, also has described this phenomenon, using a geographic analogy. Every agency, he has written, occupies a "policy space." This includes a "heartland" (comparable to Halperin's "essence"), an "interior fringe," and a "periphery." Relationships between agencies are competitive and dynamic, often involving excursions into the unoccupied "no man's land" and the periphery of adjacent agencies. Some agencies are quite aggressive. Others, however, seek to protect their heartland by narrowing their scope and avoiding conflict—what Downs terms the "shrinking violet syndrome."[395]

None of these propositions has yet been subjected to close empirical investigation in connection with specific domestic policy proposals. Nevertheless, they do stress the importance of bureaucrats as policy actors and offer some hypotheses regarding the probable nature of bureaucratic initiatives. They also are consistent, in at least general outline, with the literature on bureaucracy-constituency relationships and the "professionalization" of the public service, discussed below.

Bureaucracies and Constituencies

In an effort to achieve their policy or budgetary objectives, bureaucrats often develop alliances with the organized clients and other beneficiaries of their programs. Thus, some of the literature on public bureaucracies stresses the influence of lobbies and interest groups, but in rather different terms than the traditional group theorists. The emphasis is placed upon the process through which bureaucrats seek to build or organize supportive constituencies for their programs and proposals. In this respect, the standard interpretation of interest group activity is reversed: instead of viewing the governmental sector as simply responding to outside pressures, government itself is regarded as the motive force, with interest group activity important but secondary.

This theoretical perspective was given an early boost in an article by Matthew Holden, Jr., titled "'Imperialism' in Bureaucracy."[396] Holden argued that administrative politicians must seek a favorable balance of constituencies if their agency is to survive and flourish.

Most governmental departments and agencies do ap-

pear to have forged strong ties with the beneficiaries of their programs. This accounts for much of their autonomy of action within the executive branch and for favorable treatment by the committees of the Congress. Political scientist Peter Woll observes that

> American bureaucracy is filled with examples of agencies that have garnered the support of outside pressure groups. The bonds that tie the Department of Defense to a huge armaments industry—what President Eisenhower once labeled the military-industrial complex—appear to be unbreakable. The armaments industry buttresses the Defense Department before the powerful Congressional Appropriations Subcommittees on defense as well as before the Armed Services Committees. . . .
>
> The list of departments and agencies with powerful political support could be extended almost indefinitely. Clientele departments such as Agriculture, Labor and Commerce all have a nationwide network of interest groups supporting them. The mammoth Department of Health, Education and Welfare . . . has the support of varied interest groups that are connected to its many different bureaus and divisions. . . .
>
> One of the most important segments of the bureaucracy that relies on powerful political support to survive is the independent regulatory agencies. . . . They have been accused of being too independent, overly solicitous of the interests of the agencies they regulate, inefficient, unfair, and not heedful of their mandates to advance the public interest. Although some changes have been made in the ways these agencies operate, they remain essentially intact and largely immune from outside pressures to reform them. Why? The answer lies in the powerful support they have obtained from industry groups they regulate as well as from labor groups.[397]

Some agencies were established for the purpose of advancing the interests of particular constituencies, and are generally expected to perform this function.[398] The Departments of Commerce, Labor, and Agriculture are the classic examples of departments organized by clientele. The Department of Housing and Urban Development (an advocate for "city" concerns), the Office of Economic Opportunity (for the poor), and Council on Environmental Quality (for environmentalists) are more recent cases-in-point. Most often, however, the focus of constituency organizations is at the agency (rather than departmental) level. Harold Seidman writes that

> . . . each of the agencies dispensing federal largesse has its personal lobby: the Corps of Engineers has the Rivers and Harbors Congress; the Bureau of Reclamation, the National Reclamation Association; the Soil Conservation Service, the National Association of Soil and Water Conservation Districts.[399]

These ties frequently are not recognized by the general public.

Many of the traditional clientele lobbies, including those Seidman lists and many others, were concerned with the "harder" governmental services—construction projects and the like. But a similar phenomenon has appeared over the past decade or so in the "soft" fields of social policy, according to some observers. In a strongly worded essay published in 1975, David Stockman—then the Executive Director of the Republican Conference in the House of Representatives—described what he termed the "social pork barrel" supporting the growth of people-oriented assistance programs. Stockman suggests that

> . . . the increase in the number of federal grant programs from about 200 in the early 1960s to more than 1100 today has spawned an array of public sector interest groups which have become just as sophisticated and savvy in the intricacies of legislative maneuvering and influence as any of the old-line economic interest groups. Possessing tentacles that reach out into every part of the country and having fully mastered the art of legislative logrolling, the health lobby, the education lobby, and the various organizational arms of state and local officials have in many ways become the real superpowers of Capitol Hill.[400]

Such constituencies of federal programs may be inside as well as outside the public sector. Samuel Beer believes that the major growth of the "intergovernmental lobby" of state-local officials occurred largely in response to the new categorical programs of the 1960s. He stresses that the causal sequence was the reverse of what many conventional interpreters of governmental action would suppose. Mayors and other public officials did *not* push through the federal urban programs of the mid-60s: the federal government took the initiative itself. However,

> As the mayors and other executives of the gov-

ernments through which these programs were being carried out became aware of their value—their political value and their problem solving promise—they developed heightened interest in and increasing contact with federal policy-making and administration. Their Washington activities grew and their national organizations headquartered there expanded in members, budgets, and staff. *It was not the lobby that created the programs, but the programs that created, or at any rate greatly expanded, the lobby.*[401]

Beer notes that the expansion of this "intergovernmental lobby" is apt to encourage the further centralization of financial responsibility. Despite certain areas of conflict between federal and state-local officials, the major actors at each level tend to favor increases in national expenditures.[402]

Because these clientele interest groups become important after the initial creation of a program, their efforts are devoted chiefly to defending it (from such threats as program consolidation, departmental reorganization, or termination) and securing larger appropriations. In these efforts, they often appear to be quite successful.

Constituency relationships are important determinants of success in budgetary politics. The agencies with large, organized and vocal constituencies appear generally to be most successful in winning big expenditure increases from the OMB and Congress. Those with small or widely dispersed constituencies, in contrast, may be forced to go "hat in hand" through the budget process, seeking only very modest increases.[403]

In federal grant-in-aid programs, bureaucratic constituency building may be practiced as a deliberate strategy in the way grants are awarded. According to Thomas J. Anton, some programs have obtained steadily increasing funding because

> . . . bureaucratic program managers energetically buy support by spreading their funds around to clientele groups while simultaneously cultivating members of Congress who can influence the next appropriation. Absent clientele and/or congressional support, program activities can be ended . . . . With clientele and/or Congressional support, programs can withstand even the determined opposition of the President, as Mr. Nixon learned and Mr. Carter is learning. The influence of these three-cornered "systems"—bureaucratic program manager, Congressional group, clientele groups—challenges the received wisdom about scarcity and the budget constraint, for there is always enough money for favored programs, whatever the condition of the public purse.[404]

The ability to attract and hold a constituency also explains the long lives of many governmental agencies. Herbert Kaufman, who has examined the tendency toward "immortality" among agencies, finds that there is no mystery in the reasons few bureaus or departments are abolished. He concludes that

> . . . services and programs are instituted because they fill a need not otherwise met, whereupon people begin to count on them and to plan in the light of them. Terminating them would therefore cause hardship and even suffering, the effects of which radiate outward through the society. [Along with other factors] these social costs tip the balance against termination. Government officials dare not ignore them the way private interests can. Governmental activities therefore tend to go on indefinitely.[405]

Rand Corporation analyst Peter deLeon argues that bureaucracies are much more effective in mobilizing a constituency to block the termination of a policy than they are in securing the adoption of a policy innovation in the first instance.[406] Or, to stress the role of the other half of the agency-interest group alliances, pressure groups (according to James Q. Wilson) are more influential in protecting existing governmental benefits than in establishing them in the first place.[407] Thus, while interest groups need not necessarily be regarded as the *source* of governmental growth, they do make a reversal of this trend exceedingly difficult. As Wilson puts it,

> . . . the rapid expansion of government policy . . . has produced a kind of immobilism to the extent that each new program has acquired, or even created for itself, a client association that makes it difficult to change and impossible to abandon the original measure. The competition of interest groups does not, in the long run, make it difficult for the government to start doing things, it only makes it difficult for the government to stop.[408]

Professionalization

Increasingly, the bureaucrats in whose hands the operation of the federal executive branch is placed are not just "bureaucrats." At an earlier time, such a description

might have been accurate: after the creation of the civil service system under the *Pendleton Act of 1883*, there was successive stress on *neutrality*, then *efficiency*, then good *management* in the staffing of government.[409] But, in more recent times, professions of many varieties have become more and more dominant. Much of the apparatus of government has been placed into the hands of members of both traditional and new professions—lawyers, educators, public health doctors, civil engineers, foresters, and natural scientists. In the view of Frederick C. Mosher, a prominent student of administrative history, this has been the distinguishing feature of the public service, and indeed society itself, since about 1955.[410]

This change, according to Mosher and such other writers as Don K. Price[411] and Samuel H. Beer, has been of considerable political importance. The professionals brought with them certain common concerns (including a desire to advance their group interests), relationships (ties to colleagues in the universities, state and local governments, and private sector), and beliefs (among them a faith in rationality and specialized knowledge or technique, and a disdain for and distrust of "politics.") And, because they control much of government below the thin layer of transient political appointees, they have been in a position to shape and reshape public policy.[412]

Professionals inside the executive branch are in continual communication with colleagues and specialists in other sectors of the government as well as outside it. To characterize these relationships, Beer use the term "professional-bureaucratic complex:"

> The term "professional bureaucratic complex" is singular, but the examples are many. One is the "military industrial complex," from which I adapted the name. A similar structure is shared by the "health syndicate," the "education establishment," the "welfare establishment," and so on. The main element in such a complex of political power is a core of officials with scientific and professional training. This bureaucratic core also normally works in close cooperation with two other components: certain interested legislators, especially the chairmen of the relevant specialized subcommittees, and the spokesmen for the group that benefits from the program initially brought into existence by bureaucrats and politicians.[413]

These networks appear, to many observers, to have become very important sources of policy initiatives. What Daniel P. Moynihan describes as the "professionalization of reform" occurred as professionals in the social service fields pushed for new programs of the kind which had normally been advocated by private groups in years past.[414] Within the Kennedy and Johnson Administrations, these individuals decided to make the poverty problem an issue of the 1964 campaign. As Nathan Glazer put it at the time, the fate of the poor

> . . . is in the hands of the administrators and the professional organizations of doctors, teachers, social workers, therapists, counselors, and so forth. It is these who, in a situation where the legislation and programs become ever more complex, spent the time to find out—or rather have brought home to them through their work—the effects of certain kinds of measures and programs, and who propose ever more complex programs which Congress deliberates in the absence of any major public interest. *When Congress argues these programs, the chief pressures are not the people, but the organized professional interests that work with that segment of the problem, and those who will benefit from or be hurt by the legislation.*[415]

Such "internal lobbying" proved successful in many cases, and has been a contributing factor in governmental centralization. Beer points to the growth in federal assistance programs from $7 billion in 1960 to $60 billion in 1970, and argues that

> This growth in categorical aid is itself a striking indication of the tendency of professionalism to expand government activity. The intellectual history of the individual programs tells the same story. The programs of the Great Society, for instance, were rarely initiated by the demands of voters or the advocacy of pressure groups or political parties. On the contrary, in the fields of health, housing, urban renewal, highways, welfare, education, and poverty, it was in very many cases people in government service, acting on the basis of specialized and technical knowledge, who conceived the new programs, initially urged them on the attention of the President and Congress, and indeed went on to lobby them through to enactment.[416]

There frequently is a degree of professional self-interest in the policies which are created in this manner. Thus Beer observes that the professionals who lay behind many Great Society programs showed a preference, not

for cash transfers or regulatory actions, but for the provision of specialized services delivered by technically trained persons like themselves.

Beer adds that professionalism, and professional expertise, also tends to be a centralizing influence because the knowledge of the scientist is general and theoretical, and hence can be applied to similar problems wherever they arise. Thus professionals seek to apply their knowledge through the most extensive governmental jurisdiction.[418] An example of this viewpoint is provided in a recent work on federalism by Michael D. Reagan. The national government, Reagan believes, is able to attract the best minds in any field and to devise the most adequate solutions to technical problems. Thus, it is far better equipped than local school boards or state education agencies to develop the best teaching approaches and curriculum. For this reason, Reagan claims, it is also in a position to devise the most effective educational policies.[419] Even in those instances in which a state has identified a useful innovation in some policy field, Reagan believes that the only way to assure its adoption on a nationwide basis is through a mandatory national program.[420]

Yet, while it is centralizing in jurisdictional terms, professionalism is often fragmenting from the functional perspective. Just as science progresses by the investigation of new, narrow fields of knowledge, professionalism in government has seemed to encourage the creation of many separately administered, narrow categorical programs.[421] This renders managerial coordination extremely difficult. Furthermore, professional doctrines generally permit consideration of only a very narrow range of goals, while competing values are suppressed.[422] In a complex society, and in the operation of complex, interrelated public programs, this can be a significant source of policy failure. Thus the professionalization of government, while a desideratum for action in many technical fields, is certainly a mixed blessing.

Professionals also influence policy because their ideas can shape the way others—including ordinary citizens and public officials—think about social problems and the solutions to them. The observation of Lord Keynes, who noted this tendency several decades ago, is quoted widely:

> . . . the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences are usually the slaves of some defunct economist. . . . I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas.[423]

In the terminology of one contemporary scholar, public programs often seem to spring from "policy paradigms" which are a "curious admixture of psychological assumptions, scientific concepts, value commitments, social aspirations, personal beliefs, and administrative constraint."[424] The intellectual component is a significant one: for example, the notion of a "poverty cycle" stood behind much of the social legislation of the mid-60s. Similarly, antijuvenile delinquency programs in the late 60s were premised on the belief of some sociologists that youth crimes were a consequence of blocked economic opportunity.[425]

Exactly how important such notions are in shaping policy has not been established clearly, but some expert observers stress them. Nelson Polsby, in an article concerned with the initiation of public policies, concluded that "it is pretty clear that Lord Keynes was right." The source of the ideas underlying many policy innovations he studied was in the community of "intellectuals," including "professors, interest group experts, and government specialists."[426]

SUMMARY AND CONCLUSIONS

Most theories of policymaking look outside government to explain the adoption of new programs and to account for the size of the public sector. In recent years, however, a number of analysts have argued that the bureaucratization and professionalization of government has markedly altered the traditional political process. Now, they believe, the impetus of many policies arises within government itself. In this way, the government may encourage its own expansion.

Specific hypotheses reviewed in this section include these:

- The development of large-scale organizations, in either the public or private sector, inevitably alters power relationships. It results in a transfer of effective decisionmaking authority from hierarchical leaders to expert "technocrats" within the organization. In government, the rise of a technocracy has reduced the authority of elected public officials and, through them, opportunities for political control by the general public.

- In technocratic politics, the stimulus for new policies tends to arise from within the machinery of

government itself, and from the closely-associated circles of professionals and other experts.

- The technocratic state tends to encourage its own expansion. Small agencies acquire specialized expertise and seek greater size and status, while shortcomings in one governmental program are dealt with by the creation of another, corrective public program.
- Bureaucrats seek to maximize their agency's budget, rather than to achieve social objectives. This might tend to produce excessive levels of governmental expenditures.
- Relationships between government agencies and Congressional committees are at the heart of the policy process. The President becomes involved in comparatively few issues, and for the most part simply reacts to agency initiatives.
- In order to achieve their budgetary or policy objectives, bureaucrats seek alliances with the beneficiaries of their programs. Pressure from such groups provides them with greater autonomy, ensures larger appropriations, and makes termination difficult. And,
- The professionalization of the public service has been a centralizing influence. It has encouraged a variety of new social programs and promoted the adoption of professionally approved techniques and standards. Professional views regarding the best solution to social problems tend to be accepted by public officials and citizens, at least in the long run.

V
Assessment and Implications

The size and growth of the national government has attracted the attention of many social scientists, just as it has many public officials, journalists, and the citizenry at large. To some of these scholars, it is a problem requiring solution; to others, it is simply a noteworthy phenomenon deserving explanation. But, whatever the motivation, the result has been a large number of distinct interpretations, models or hypotheses concerning the process of governmental growth and the development of public policies.

In this chapter, the relevant scholarship was examined in three parts. One set of interpretations stresses the political "demands" of the citizenry, expressed in public opinion, the electoral process, and interest group activities, and given form through the political leadership provided by the President and Congress. A second orientation focuses attention on such external environmental factors as the historical process of economic development, the impact of wars and crises, and other significant societal changes. Finally, a third perspective looks within government itself for the root causes of public sector expansion—specifically, to the actions and motives of the bureaucracy and its allies. Included in each of these three orientations are a considerable number of much more specific propositions.

While this scholarly literature does contain a number of possible insights into the dynamics of the public sector, it falls well short of presenting a single coherent theory. Indeed, it is a striking illustration of the inability of the social sciences to provide a clear, persuasive, and thoroughly objective interpretation of a complex and politically charged phenomenon. Despite the host of interesting observations, there is nothing approaching unanimity among scholars in identifying the relevant patterns and forces, nor is there compelling proof for any of the contending positions. As Tarschys has observed, "A general theory of government growth does not seem to be around the corner."[427] Consequently, the academic literature on the size of government probably does more to fuel the political debate on this subject than to help resolve it.

Despite the disputes and limitations which mark this body of scholarship, it still is possible to derive a number of potentially useful interpretations of the process of governmental growth. Nine specific propositions are suggested here. While each is based upon a reading of this literature, most are not simply taken from it. Instead, they represent an effort toward a synthesis and reconciliation of often-conflicting views in particular areas of inquiry. None should be regarded as conclusive, however. Each is intended only to serve as a hypothesis for further exploration and evaluation.

The concluding section of this chapter indicates both the chief limitations and central hypotheses which can be drawn from the social science literature on governmental growth, together with its implications for the

future role of the federal government in the federal system.

LIMITATIONS

Multiple Theories

The wide-ranging literature reviewed in this chapter presents a very large number of distinct hypotheses relating to the size and growth of government. Multiple factors of many different kinds apparently have encouraged the expansion of the federal role. These include the pressure of external political demands from the citizenry; the impact of environmental change, including the process of economic development; and forces internal to the government itself, stemming from bureaucratization. Each major type of political actor is described by one or more scholars as a principal determinant of the size of the public sector. These include the general public, as reflected in public opinion; the electoral process and political parties; interest groups; the President; the Congress; and the bureaucracy.

Yet, from both an analytic and policy perspective, the literature offers an embarrassment of riches. Each of the many specific interpretations cannot be equally important: better understanding requires some weighting among the various causal forces.

This is, at present, impossible, for most of the scholars have fixed their attention on only one or two of the major variables. Within political science, many specialists have focused their attention on a single type of governmental institution and devised single-factor theories on that basis. This pattern is even more apparent in the political economy studies, which often have employed highly simplified models of electoral, legislative, or bureaucratic behavior to analyze complex governmental events.

Despite the host of alternative hypotheses, then, it still can be said that the question of governmental growth has not received sufficient sustained attention. Many scholars have not developed their hypotheses in detail or sought to reconcile their conclusions with those of others.

As a result, selection among the many contending models and theories—most of which possess a certain degree of "face validity"—is largely arbitrary. There is a pressing need for new efforts at theoretical synthesis. Despite the steady additions to the governmental growth literature, such comprehensive treatments remain in short supply.

Weak Validation

Multiplicity aside, most of the hypotheses or conclusions presented in the growth-of-government literature have not been validated adequately by appropriate techniques of social science research. Many have not been subjected to any sort of careful empirical investigation and some would be quite difficult to test, owing to a lack of necessary data. The findings for those few that have been explored in detail provide results which are in some degree inconclusive or conflicting.

The work of the political economists is the most vexing in this regard. It has provided the largest number of specific and interesting hypotheses—yet few of these have been substantiated, or even fully explored, by empirical research. Hence, there are numerous conflicts between the deductive models of the political economists and the descriptive, more empirical findings of political scientists.

For these reasons, most of the existing studies must be regarded as the observations or interpretations of individual scholars which, however insightful they may seem, cannot yet be regarded as "scientific fact."

Focus on Expenditures

Another limitation is inherent in the exclusive focus on governmental expenditures which appears in most of the studies. Other aspects of national policy—public employment, tax rates and forms, functions, "red tape," the creation and demise of agencies, and regulatory policies—have received comparatively little treatment. Each of these, however, is relevant to any comprehensive consideration of the federal role in the federal system.

Over-Aggregation

Most of the growth-of-government literature deals with public expenditures in the aggregate. Even distinctions between national and state-local roles are not always made. At the national level, specific types of expenditure or discrete functional fields have not usually been considered separately. Yet, it seems unlikely that a full understanding of the development of national expenditures policies can be gained in such gross terms. Both the political pluralism stressed by modern political science and the theory of public goods employed in contemporary economics suggest that a variety of different patterns of policy development should be anticipated. Exploration of these patterns, however, is inhibited by a lack of agreement on the most appropriate taxonomy for functional studies. Instead, a variety of different classification systems have been suggested.

Possible Bias

Questions involving the size and growth of the national government lie near the heart of the contemporary political agenda. For this reason, they move hearts as well as minds, and have stimulated both sophistry and serious scholarship, or admixtures of the two.

Many of the writers on these questions have brought a clear (and often unabashed) ideological orientation to their work. Whether liberal or socialist, conservative or "neoconservative," such value commitments certainly affect the extent to which the growth of government is regarded as a "problem." They also may have influenced the perception of underlying causal processes. This possible danger counsels caution in the consideration of findings derived from this literature.

Different Conclusions

From a policy standpoint, what is perhaps most serious are the strikingly different conclusions which are suggested by the growth of government studies. These provide alternative interpretations of past trends and equally varied predictions regarding the future.

Two general schools of thought, each with quite different implications for national policy, can be formulated by abstracting from the various studies. While neither probably would be accepted in its totality by any individual scholar, most existing research is generally consistent with one or the other view.

In recent years, a large number of analysts has expressed concern that the size and growth rate of the federal government are excessive. In their view, governmental growth is no longer guided adequately by the democratic process or by any coherent political philosophy. Many of these critics believe that the political system has been "overloaded" by the demands of interest groups and rising popular expectations. Some believe that the political process is biased toward an excessive expansion of governmental services, regardless of the public interest. In their view the costs and benefits of governmental programs are inadequately balanced.

This situation is said to have been exploited (depending upon the writer) by one or both of the political parties, by Presidents, or the Congress, or bureaucrats. Political leaders have advanced their own personal objectives by encouraging the steady expansion of governmental responsibilities. Sometimes acting with the support of "iron triangles" composed of executive branch agencies, Congressional committees, and special interest lobbies, political leaders are said to have catered to particularized needs regardless of national priorities and total costs. The sources of constraint in the system (alternately identified as the political parties, the Presidents, or the Congress) are thought to have grown weak and increasingly ineffective.

Thus, while the *dramatis personae* are variously identified—an extremely important point—the main outline of this play is constant. Government is thought to have become increasingly "detached" from its democratic and even socioeconomic context. Beyond some critical point, large government is said to generate its own further growth: it feeds on itself. This conclusion poses a serious challenge to existing political processes and governmental institutions.

On the other hand, many analysts take the position that the public sector is neither excessively large nor "out of control." Such a position is, if anything, more firmly grounded in the traditions of economic and political thought.

First, many of these more optimistic scholars accept a developmental model in which public responsibilities inevitably grow in response to the requirements of an economically advanced society. Thus, they look to economic growth, higher incomes, urbanization, and new forms of transportation and communications as the major stimulus for new governmental services. In this view, the increasing size of the public sector is not a political abberation but an historical necessity.

Second, many analysts believe that democratic procedures provide fully adequate controls over the size of the public sector. The system of free, competitive elections guides the processes of policymaking. At least the general outline, if not the specific details, of public policies thus are established at the polls. Furthermore, a vast array of interest groups assures the representation of competing views at every stage of the decision process. The multiple "checks and balances" of American government and the "openness" of the decisionmaking process provide a serious inhibition against any unwarranted expansion of governmental responsibilities.

Indeed, many of these analysts believe that the political process is, if anything, biased against new policy initiatives and centralizing measures. Too often in the past, they claim, entrenched interests have been able to effectively veto even desirable public programs, including some favored by large popular majorities. Governmental responses to new economic and social realities thus seem to have lagged behind, rather than anticipated, each step in the developmental process.

Both of these schools of thought can muster some empirical and theoretical support for its interpretation, and each conclusion is accepted by many reputable schol-

ars. At this stage of inquiry, then, neither view has successfully displaced the other.

INTERPRETATIONS AND HYPOTHESES

Within these rather substantial limitations, the literature on the size of government and public policy formulation still suggests a number of potential insights and useful interpretations. For the reasons stated, these should be regarded only as hypotheses. Although they reflect the observations and research findings of scholars of considerable repute, none has been demonstrated conclusively, and each is subject to some important reservations or objections.

Nine general propositions are presented here.

1. The general public has provided conflicting signals to policymakers on the question of governmental spending. Increased federal outlays in a host of domestic fields have had strong popular support since the early 1960s, but there also has been pressure for lower taxes.

Both of these interrelated but rather contradictory findings have been stressed repeatedly by analysts of public opinion. Since the early 60s, those advocating increased outlays for most domestic functions have greatly outnumbered those in favor of cutbacks. Increased expenditures have even been sought by many citizens whose other political attitudes identify them as "conservatives."

Thus, although it is difficult to prove causality, increases in federal domestic outlays over this period have been consistent with public expectations and desires. At the very least, this fact constitutes a significant "background" factor in any investigation of the reasons for the growing federal role, and might have been determinative.

At the same time, most citizens have opposed tax increases and have felt that their own taxes were excessive. This attitude has often been expressed in quite vociferous terms. Although concern about taxes fluctuated considerably from year to year, since 1969 it has generally been higher than in the preceding eight years.

More recent polls (1976-78) do show something of a "backlash" against increased expenditures in welfare programs for the poor, while support for additional domestic outlays have declined modestly in most other program areas. Despite this, available polls do not suggest that there is widespread support for major reductions in governmental expenditures.

2. Regardless of their views on specific expenditure policies, most Americans have accepted a philosophy of limited government, private property, individual responsibility, and federalism. This ideology has clashed increasingly with governmental and political realities. In the past dozen years, concern about the size, efficiency, effectiveness, and responsiveness of the national government has risen sharply.

At the philosophical or ideological level, Americans are considerably more "conservative" than they are at the "operational" level of practical politics. Both sensitive foreign and domestic observers, as well as students of public opinion, have suggested that the nation has adhered to a traditional "Lockean" philosophy to a high degree. Some credit this with being an important constraint on the size of government in the U.S., compared to other nations.

At the same time, another national characteristic, pragmatism, has encouraged the assumption of new national responsibilities to deal with particular problems. Most major federal initiatives have been said to be consistent with traditional Lockean values, rather than a threat to them.

Still, the growing gap between the traditional belief in limited government on the one hand and the emergence of extensive national responsibilities on the other appears—to a number of observers, both "liberal" and "conservative"—to be a source of increasing popular tension and concern. These analysts suggest a need to alter either the philosophy or the practice to bring the two into better alignment.

There is clear evidence that, over the past ten years, citizens have become increasingly disenchanted with governmental performance and with public officials. It is not certain how much of this should be attributed to dissatisfaction with the size of government, rather than the reaction to such episodes as Viet Nam and Watergate.

3. The electoral process normally provides only highly generalized mandates on the major issues of public policy. The responsibility for policy development usually rests with public officials and interest groups. Nonetheless, certain critical elections, occurring about once a generation, may markedly alter the content of policy and set its outline for coming years.

Although many theories place the electoral process at the heart of democratic policymaking, the empirical research by political scientists indicates that most policy questions are settled by other means. Voters are influenced greatly by traditional party loyalties and by a variety of other social pressures. Furthermore, despite historical differences of orientation, the two political parties seldom adopt clear, unified and contrasting positions on

policy questions. As a result, electoral mandates are generally vague, frequently retrospective, and at best set the outer limits or general tone of policy deliberations.

Several recent studies do suggest that certain "critical" or "realigning" elections do lead to sharp departures from past policies. Furthermore, these elections may alter the composition of the political parties and determine the general course of political events in the coming years. Between such elections, policy differences between the parties usually become muted.

Some research also suggests that the level of "issue voting" has risen as party loyalties have declined. This seems to reflect an attempt to grapple with political issues unrelated to the present party alignment.

4. Increasing interest group activity has paralleled the expansion of federal responsibilities. Group pressures encourage increased expenditures and make it extremely difficult to terminate or reduce existing programs.

In years past, political science scholarship almost uniformly attributed the creation of public policies to the activities of interest groups. Thus, the balance of governmental responsibilities could be regarded as a balance struck by contending lobby organizations. The growth of federal subsidy and regulatory programs has often been described as a consequence of interest group pressures. The acceleration of national responsibilities since the mid-'60s reflects, in some interpretations, the growing influence of newly organized segments of society.

More recently, this premise has been strongly challenged. In some instances, scholars argue, interest groups have been formed in the wake of new benefit programs that were established as a result of other forces. Many believe that the influence of lobbying has been overstated.

Regardless of the outcome of this debate, analysts appear to agree that the level of group activity has paralleled the expansion of the national responsibilities. Organizations of private individuals and state-local officials have become important new political forces. Group activism tends to provide incremental, but steady, pressure for increased outlays and makes the termination of programs more difficult. Furthermore, pressure politics appear to be biased in favor of the organized interest groups.

5. New domestic programs and increased federal outlays have received both encouragement and opposition from within the executive branch and Congress. Because of the multiplicity of actors and stages in both the legislative and budgetary processes, and changes in personnel and procedures, neither branch has taken a unified nor consistent position on questions regarding the federal role.

Until recently, political science scholarship has assigned the main responsibility for domestic policy leadership within government to the White House. The Congress, most often, has been described as an obstacle to new initiatives and a source of deadlock and delay in the policy process. Of the two chambers, the Senate was described as the more "liberal." Similarly, on spending matters, the traditional view portrayed Presidents as seeking budgetary increases for domestic programs against the opposition of a more tight-fisted legislative branch.

Contemporary scholarship has begun to question both views. Some analysts now believe that the Congress plays, and played in the past, a far greater role in the policy process than is generally recognized, with individual Congressional "entrepreneurs" being the source of many new programs. On routine matters, "subgovernments" (or more pejoratively, "iron triangles") composed of Congressional committees, interest groups, and executive agencies appear to dominate the policy process, with little Presidential input.

In the expenditure arena, old patterns seem to be in flux, given changes in committee composition, leadership, and status, and new budgetary procedures. Since the late '60s, the Congress has tended to advocate increased domestic expenditures, and Presidents to constrain them, a reversal of past roles.

6. Growth of the public sector may be encouraged by many current governmental practices, including some with deep roots in our democratic values and institutions.

Much of the theoretical literature suggests that governmental growth is a natural, even inevitable, tendency of American governmental institutions. For example, some analysts see the process of party competition and the expansion of the suffrage as a stimulus to new, larger, "redistributive" programs. Others believe that the activities of organized lobbies—which follow naturally from First Amendment rights—have produced political "overload" and excessive demands. Yet others stress the use of majority rule, rather than a more stringent voting standard, or the opportunities for "logrolling" in the Congress. Some condemn the traditional quest for departmental consolidation as a source of new public sector "monopolies."

In the regulatory sphere, certain analysts suggest that the tradition of legally specified rights and responsibil-

ities encourages the use of regulatory standards in dealing with social and economic problems, even if other techniques would be more efficient. The need to assure adequate citizen participation and procedural fair play is said to result in complex, red-tape laden processes for decisionmaking.

Fiscal features singled out by various writers include payroll deductions for income tax payments, the progressive structure of the income tax itself, and the financial structure of the Social Security system. These, it is said, tend to hide the full costs of governmental operations or reduce popular opposition to tax payments.

All of these theories indicate that the causes of governmental growth may be deeply rooted in basic values and widely accepted practices and institutions. They imply that it would be difficult, or even impossible, to change the rate of growth without significant changes in governmental procedures or political philosophy.

7. Bureaucrats and professionals in the public service may now play significant roles in the initiation of public policies as well as in the budgetary process. They could be becoming a major force for governmental growth and centralization internal to government itself.

Some analysts suggest that the political process has been fundamentally altered by the creation of large-scale, professionalized bureaucracies as a part of the governmental apparatus. In their view, the development of large formal organizations—a necessary response to the need for technical expertise in dealing with complex problems—alters the location of effective power and weakens hierarchical controls.

At the federal level, bureaucrats are thought to play significant roles in the development of policy and spending proposals. In general, their self-interest and the mission of their agencies seems to be best served by expanding budgets and launching new programs. Some scholars believe that bureaucrats can influence greatly, or even dominate, the policy process.

Bureaucrats also are thought to seek political support by mobilizing their agency constituencies and through alliances with professional colleagues in the private sector, state and local government, or the academic community. These networks of interested professional specialists also appear to be the source of many ideas which ultimately are reflected in new legislation.

8. The process of economic development, and related social, demographic, and technological changes, influence the agenda for political debate and may have encouraged the steady expansion of public responsibilities.

One prominent school of thought suggests that governmental growth is an expected, even inevitable, concomitant of economic development and increasing social complexity. In this view, problems of "market failure" require governmental regulation or subsidies for their efficient solution, while other public services are quite "income elastic" and therefore are consumed in increasing amounts as incomes rise. The increasing scale of economic transactions, communications, and population mobility also have encouraged a centralization of governmental responsibilities.

Other social forces—for example, shifts in population composition, or changes in communications media—also may affect the course of public policy.

In such interpretations, the size of government, the nature of its tasks, and the degree of fiscal centralization is more a function of the socioeconomic environment than it is a reflection of political forces. Still, few writers suggest that such forces are fully determinative of policy outcomes. The complementary influence of more overtly "political" factors is also recognized.

9. Precedents established during wartime and such national crises as the Great Depression may have encouraged popular acceptance of a much broader federal role.

During time of war, according to one major public finance theory, the general public willingly acquiesces to higher rates of taxation than would be accepted under more normal conditions. In the post-war period, in this interpretation, tax rates may be lowered again, but not to the prewar levels. For this reason, governmental expenditures have grown in a "step-like" pattern.

Similarly, emergency conditions also may foster acceptance of governmental controls over the economy, strengthen the ideals of human equality, and demonstrate a governmental capacity to administer complex, large-scale programs.

Crises of other kinds, such as the Great Depression, can have a very similar effect on the size of the public sector. Temporary measures established under such conditions may be continued, or may provide a precedent for similar measures at a later time.

IMPLICATIONS

The literature reviewed here also has certain implications for the course of American federalism and the development of public policy. Two are most apparent.

First, it is extremely difficult to devise defensible predictions regarding the future role of the federal government in the federal system. There simply are too many theories, too many variables, too many conflicting interpretations.

Secondly, and despite the foregoing, most of the literature points in a particular direction for possible "reforms." It suggests that institutional and procedural change may be the most suitable strategy for regulating the size and growth rate of the federal government.

Predictions

The multiplicity of theories of governmental growth, the host of causal forces they identify, and the conflicting conclusions which they provide, make predictions regarding the future development of the federal role in the federal system very hazardous. Indeed, few of the scholars cited have attempted anything so difficult, even within the compass of their own research. Most were content with identifying, to the extent possible, either historical patterns or the direction of particular forces.

Past efforts at prediction have not been successful. None of the scholars cited foresaw the public sector "boom" of the Great Society years. Later trends—the rise of consumerism, environmental protection, and the "new social regulation," for example—also were not anticipated. Explanations, in nearly every case, have been constructed after the fact.

None of the major theoretical orientations is adequate to the task of prediction. Many analysts contend that forecasts based upon developmental of "environmental" factors are unwarranted. Adolp Wagner's ancient "law" of rising governmental expenditures has not been substantiated adequately for use as a crystal ball; some writers even suggest a cyclical, rather than linear, pattern of public sector development. Furthermore, to the extent that growth rates are affected by the occurrence of wars and crises, projections are necessarily difficult.

The same is true in the political sphere. The source of public opinion on fiscal issues is not certain. While some analysts do detect a recent slackening of support for public expenditures, causal patterns are not understood adequately to project the public mood into future years. In the past, the degree of opposition to taxation has fluctuated rather sharply, even from one year to the next. Finally, the extent to which public opinion influences governmental outcomes, either directly or through the electoral process, is still a matter for speculation.

Within the national government, budgetary and legislative processes are in flux. The ultimate outcomes of changes in committee organization, membership, and status, as well as the potential impact of zero-base budgeting, the new Congressional budget process, and possible "sunset" legislation, remain matters for guesswork.

Two factors do suggest that reductions in federal expenditures in future years may be exceedingly difficult: the influence of interest groups and of the bureaucracy itself. Both tend to encourage increased governmental outlays and the maintenance of existing programs. Yet accurate prediction of budget levels would require a balancing of these forces against possible sources of fiscal constraint—the electorate, one or both political parties, the Congress, or the President. Outcomes of the resulting conflicts are quite uncertain.

Institutional Change

A second feature of the scholarship on governmental size is that most of the authors regard institutional change as the appropriate means for regulating federal growth. This is not a unanimous opinion, for many writers offer no specific reform proposals at all. Others only imply courses of action that are not discussed fully. But this does seem to be the most common strategy.

As examples of the character of these reforms, some writers concerned with the bureaucratic contribution to governmental growth propose changes in executive branch organization and in the incentives provided for its employees. Others, seeing legislative encouragements to higher spending, suggest such things as extraordinary majorities as a condition for the passage of legislation, or new procedural obstacles to logrolling. A strengthening of the party system also seems to have its advocates, as do changes in the tax system to provide for a better weighing of the costs of federal programs.

This theoretical literature, then, is quite consistent with an historical and contemporary predeliction. It suggests that *institutions matter*, and that institutional change may be the best road to keeping governmental activity within the bounds of popular preferences and economic rationality. Other reforms have been adopted in the past for just these reasons: the executive budget, the appropriations process, the new Congressional budget act, and "zero base" budgeting. Others under consideration include "sunset" legislation and tax indexation. The governmental growth literature clearly implies that further changes merit study.

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Realignment of Political Parties in the United States, Washington, DC, The Brookings Institution, 1973, p. 36. Each of these periods is given detailed treatment. See also Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics*, New York, NY, W. W. Norton, 1970.

[136] Burnham, *Critical Elections, op. cit.*, pp. 6–10; Sundquist, *Dynamics of the Party System, op. cit.*, pp. 275–298.

[137] Sundquist, *Dynamics of the Party System, op. cit.*, p. 296.

[138] Burnham, *op. cit.*, pp. 182–83. See also Nie, Verba, and Petrocik, *op. cit.*, pp. 97, 192–93.

[139] Samuel H. Beer, "Liberalism and the National Idea," *Public Interest* 5, Fall 1966, p. 145. For a study of Congressional politics in these years, see Barbara Deckard Sinclair, "Party Realignment and the Transformation of the Political Agenda: the House of Representatives, 1925–1938," *American Political Science Review* 71, September 1977.

[140] V. O. Key, Jr., *The Responsible Electorate: Rationality in Presidential Voting, 1936–1960*, New York, NY, Vintage Books, 1968, p. 31.

[141] Sinclair, *op. cit.*, pp. 952–53. See also her article, "The Policy Consequences of Party Realignment—Social Welfare Legislation in the House of Representatives, 1933–1954," *American Journal of Political Science* 22, February 1978, pp. 83–105.

[142] Richard W. Boyd, "Popular Control of Public Policy: A Normal Vote Analysis of the 1968 Election," *American Political Science Review* 66, June 1972, pp. 436, 438.

[143] Sundquist, *Dynamics of the Party System, op. cit.*, pp. 202–03. Also pp. 297–98.

[144] Susan B. Hansen, "Partisan Realignment and Tax Policy, 1789–1970," paper prepared for delivery at the annual meeting of the American Political Science Association, Washington, DC, September 1–4, pp. 9–10.

[145] These events are reviewed in David S. Broder, *The Party's Over: The Failure of Politics in America*, New York, NY, Harper & Row, 1972, pp. 44–58.

[146] David W. Brady, "Critical Elections, Congressional Parties and Clusters of Policy Changes," *British Journal Political Science* 8, January 1978, p. 99.

[147] Benjamin Ginsberg, "Elections and Public Policy," *American Political Science Review* 70, March 1976, p. 49.

[148] For a methodological and definitional critique of the Key, Pomper, and several other "issue voting" studies see Michael Margolis, "From Confusion to Confusion: Issues and the American Voter (1956–1972)," *American Political Science Review* 71, March 1977, pp. 31–43. Margolis argues that the appearance of an increase in issue voting is largely an artifact of the measures employed or a misinterpretation of the data. See also John H. Kessel, "Comment: The Issues in Issue Voting," *American Political Science Review* 66, June 1972, pp. 459–65.

[149] Key, *The Responsible Electorate, op. cit.*, p. 7.

[150] *Ibid.*, pp. 7–8.

[151] Sundquist, *Politics and Policy, op. cit.*, p. 466.

[152] *Ibid.*, pp. 469–70, 499–503.

[153] Gerald M. Pomper, "From Confusion to Clarity: Issues and American Voters, 1956–1968," *American Political Science Review* 66, June 1972, pp. 415–28.

[154] Nie, Verba, and Petrocik, *op. cit.*, p. 96.

[155] Huntington, "The United States," *op. cit.*, p. 87.

[156] Nie, Verba, and Petrocik, *op. cit.*, p. 84.

[157] *Ibid.*, p. 346. See chapter 4.

[158] *Ibid.*, p. 105.

[159] *Ibid.*, pp. 346–47. This trend may not be altogether new. Burnham argues that the nation has been experiencing the decomposition of the political parties since about 1900. In retrospect, he believes, even the New Deal coalitions may appear only to have been a temporary aberration in the long-term toward the destruction of the parties. Burnham, *Critical Elections, op. cit.*, esp. pp. 132–33.

[160] *Ibid.*, p. 356.

[161] Burnham, *op. cit.*, p. 133.

[162] Crozier, Huntington, and Watanuki, *op. cit.*, pp. 165–66.

[163] *Ibid.*, p. 161.

[164] Sundquist, *Dynamics of the Party System, op. cit.*, p. 373.

[165] Key, *Responsible Electorate, op. cit.*, p. 61.

[166] Broder, *op. cit.*, p. 45.

[167] Everett C. Ladd, Jr., *American Political Parties: Social Change and Political Response*, New York, NY, W.W. Norton, 1970, p. 209.

[168] Boyd, *op. cit.*, p. 441.

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[170] *Ibid.*, p. 441.

[171] Easton, *The Political System, op. cit.*, pp. 270–72.

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[174] Dye, *op. cit.*, p. 23.

[175] Arthur Bentley, *The Process of Government*, Evanston, IL, The Principia Press, 1908, pp. 222, 210, 211. Cited in James Q. Wilson, *Political Organizations*, New York, NY, Basic Books, Inc., 1973, pp. 5–6.

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[178] Edward C. Banfield's "brokerage" model gives considerably more discretion to the political leader. See his *Political Influence*, New York, NY, The Free Press, 1961.

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