Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective

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The last time a Republican Party majority in Washington referred to itself as "radical," let alone "revolutionary," as the congressional Republicans elected in 1994 are wont to do, was in the Civil War and Reconstruction period. Charles Sumner, one of the party's ideological leaders in the causes of antislavery and civil rights in that critical era of the nation's history, declared triumphantly in 1862: "'This is a moment for changes. Our whole system is like molten wax, ready to receive an impression.'"[1] With the Contract with America firmly in hand before the television cameras, those who have sought to craft today's Republican-led "revolution" in government and public policy

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1. *Quoted in* DAVID DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 192 (1970).

seem at times to believe that a similar receptivity to "an impression" prevails in the country. It is in the context of such insistent and sometimes ebullient faith that the country is ready to endorse a great transformation—what the Republican Governors Conference in 1994 termed "a historic moment of opportunity—an occasion when the political climate makes possible fundamental change in the federal-state relationship"[2]—that the broad range of proposals for devolution of power to the states in so many vital areas of policy has been debated since 1994.

Whether the political climate has been interpreted accurately by the advocates of devolution and the larger "revolution" that the congressional majority has professed to endorse remains to be seen. Even in Charles Sumner's day, despite the sweeping changes that were wrought the political and governmental system proved to be something less than completely malleable, and the processes of radical change did not go forward at one stroke. Traditional constitutional norms and the established institutional structures of governance influenced and constrained the radical movement, even in the crucible of a civil war and its aftermath; and (not least important) what proved to be a changeable and sometimes mercurial public mood on the matter of deep reform worked in the longer run to frustrate and reverse some of the most far-reaching changes that were in fact put in place by the triumphant radical faction during Reconstruction.[3] And so, when Senator Robert Dole declares in our own day that "America's historical detour into bureaucracy and centralization is over" and that the country is "chart[ing] a new course toward another American century,"[4] we are probably well advised to ask whether there are cautionary tales to be heeded in the history of earlier efforts to reform and restructure the architecture of American federalism.

Such an historical inquiry needs not only to be focused upon the experience with change in times of true and far-reaching national crisis such as Sumner and the country experienced, or such as the New Deal responded to in the Great Depression of the 1930s, but must also consider other periods of national history truly comparable to the present era in terms of the conditions shaping the context of political debate. This Article will make such an effort, not in comprehensive terms but only to survey the ground, to argue that what I term re-design of the architecture—or what might alternatively be termed "tinkering with the architecture"—has been a recurring and significant element of American policy debate as well as of the historic constitutional dialogue. There

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2. *Williamsburg Resolves, excerpted in* ROCKEFELLER INST. BULL. 17 (Public Policy Institute, State University of New York, Albany, 1994).

3. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 564-612 (1988); *see also* JOHN HOPE FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR (1961); C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877-1913 (1951).

4. Robert Dole, *It's Time to Start Trusting the States, in* ROCKEFELLER INST. BULL., *supra* note 2, at 24, 26.

stands behind today's political exchanges, and especially behind what its proponents have enthusiastically termed the proposed "Devolution Revolution," an important tradition of federalism reform; its history requires analysis fully as much as doctrinal elements and policy issues require study if we are truly to follow the maxim that we ought to "take federalism seriously" in legal scholarship.[5] Moreover, important as it is to deal with the normative issues in constitutional theory—issues that the recent decisions of the Supreme Court on the Tenth Amendment, preemption, and state autonomy have reflected and revitalized—it is also necessary to be aware of the ways in which federal design historically has affected both the terms of policy process and specific policy outcomes, on the one hand, and the larger dynamics of political, social, and economic change on the other.[6]

It is evident, reading the rhetoric of the devolutionists today, that underlying the self-styled "revolution" proposed in 1994 is a bedrock historic foundation of continuous conservative resistance (a strong element of which used to be known forthrightly as "reactionary" political impulses) to the New Deal and post-New Deal order in law and policy. The intellectual history of the Yale Law School can serve to remind us also, however, that the current-day furor over federalism, the states, the Tenth Amendment, and devolution did not burst forth without an equally important background in serious scholarly

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5. The phrase "taking federalism seriously" has special significance in constitutional scholarship, since it is in common use as a shorthand characterization of writings—my own included, I need to say—that regard federal structure and doctrine as something worthy of analysis. This is in contrast to studies that dismiss the doctrines of federalism, and the democratic normative values they profess to advance, either as mere sophistries or else as disingenuous forms of cover for substantive policy preferences. For a thoughtful and wide-ranging analysis of this and other basic conceptual issues in the literature on federalism, see DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE (1995); *see also* Harry N. Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663 (1980).

It is important to note that in recent years there has been an effort by "conservatives," who seek to effect a radical reversal of post-New Deal and even post-1861 jurisprudence, to appropriate to themselves and their style of thinking designation as those who alone are taking federalism seriously! *See, e.g.*, Edwin Meese III, *Taking Federalism Seriously*, INTERGOVERNMENTAL PERSPECTIVE 8-10 (Winter 1987), a document notable for colossal neglect of (or contempt for) a huge scholarly literature that certainly takes federalism seriously but not with the same ends in view as Attorney General Meese had in mind.

6. Not often enough, I think, have historians attempted the kind of analysis (isolating federalism as a variable in policy process and outcome) that Paul Peterson and other political scientists have applied to contemporary policy issues. For an attempt of my own to probe how such a methodology—undertaking to analyze the impact on policy of federal structure and constitutional doctrine, and of the federalistic elements in political credos of the political parties—might usefully be applied in historical study, in this instance transport policy and "commerce," see Harry N. Scheiber, *The Transportation Revolution and American Law: Constitutionalism and Public Policy*, *in* TRANSPORTATION AND THE EARLY NATION 1-29 (Indiana Historical Society ed., 1982). That work, in turn, borrowed heavily from the methodology developed as part of the much more comprehensive historical approach to law and sectoral policy and economy, in JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915 (1964). *See also* Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 LAW & SOC'Y REV. 57, 97-98 (1975) (discussing "federal effects"); Harry N. Scheiber, *State Law and "Industrial Policy" in American Development, 1790-1987*, 75 CALIF. L. REV. 415 (1985).

discourse about such matters.

Consider first, for example, the contributions to this discourse of Professor Charles Black of the Yale Law School. In 1963—a time when the issues of civil rights and of court-ordered school desegregation were central to national political debate, but well before the Great Society proposals of the Lyndon Johnson Administration would create a storm over federalism at least as turbulent as today's—Professor Black raised in very blunt terms questions about what he called "the key issue of federalism, considered as a legal system."[7] He acknowledged that as a reality of politics and the structure of governance—so long as members of Congress continued to regard themselves, and behave as, representatives of state interests—there would be some measure of protection for the autonomy of the states.[8] He insisted, however, that beyond such practical implications of federal organization in governance, there remained the more fundamental issue: "whether the federal system has any *legal* substance, any core of constitutional right that courts will enforce."[9] Reminding us that "the defining character of our national political system is that it is 'federal'—composed of semi-independent states sometimes called sovereign, or, more accurately, 'quasi-sovereign',"[10] Black offered no formulaic solution to the problem that he posed. Rather, he suggested that if accepted constitutional doctrine no longer provided specific guarantees of state autonomy, it was important at the threshold to recognize that fact and forthwith to move on to another sort of formulation—but at the same time he distinguished his approach from what the opponents of civil rights at that time were seeking to accomplish in the arena of controversy over Equal Protection. Thus Black wrote:

> If [the federal system] . . . exists only at the sufferance of Congress, that cardinal fact should be recognized. The only viable alternative is the working out of a body of doctrine stating limitations on Congress that are implied from the existence and authority of the states.
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> (The question has been confused by the fact that discussion of "states' rights" usually centers around the Fourteenth Amendment, which enunciates prohibitions against the states, thereby settling that, in the areas of prohibition, they are to be the reverse of independent. No more ill-chosen terrain can be imagined for a traditional defense of states' rights.)[11]

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7. CHARLES L. BLACK, JR., PERSPECTIVES IN CONSTITUTIONAL LAW 29 (1963).
8. *Id.* at 30.
9. *Id.*
10. *Id.*
11. *Id.* Although Black cited the internal logic of the Fourteenth Amendment to warn against occupying this ground for a defense of so-called state sovereignty, there could have been no doubt that the substantive policy goals of those who were fighting against the extension of Equal Protection

In Black's reminder as to the essential federal character of the American system one is haunted by echoes of Thomas Jefferson's reflections on the same issues a century and a half earlier: for Jefferson similarly declared, in a letter written in 1815 to Judge Spencer Roane of Virginia, his "true zeal" for the essential maxim that "the spirit of our government" and not only its charter, was "republican, but also federal."[12] Black's prescient commentary also looked forward in time, however, anticipating with truly startling accuracy the scope and specific agenda of later constitutional dialogue and Supreme Court decisions in regard to the Tenth Amendment and the authority of Congress to preempt important areas of policy formerly occupied in whole or part by the states.[13]

When another distinguished member of the Yale faculty, Alexander Bickel, had occasion fully a decade later, in 1973, to reflect in a public forum on the constitutional and normative imperatives of federalism in American law, the context had changed. The issues were immediate, and the debate over how far national powers could properly run had come to a sharp focus, because of the legacy of Great Society innovations and also the efforts of the Nixon Administration to introduce some far-reaching changes in what had become known as the program of Nixon's "New Federalism." Meanwhile, Justice Hugo L. Black had recently set forth his theory of "Our Federalism,"[14] in terms framed in the rhetoric of the Founding era and insisting "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[15] Speaking to these issues in informal but eloquent remarks at a Wilson Center symposium on the New Federalism (1973-style), Bickel urged the need to recognize the core political objectives of the federal design. "If there hadn't been any states," he contended,

> the framers undoubtedly would have invented them, and . . . for reasons that essentially were political. They believed that the secret of liberty lay in the diffusion of power; they perceived the states as natural centers of power that would insure against the concentration of total

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doctrine were abhorrent to him as well. *See* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

12. Letter of Thomas Jefferson to Spencer Roane, in Boalt Hall Library Manuscripts Collection, University of California, Berkeley, School of Law (n.d., but believed to be from 1815).

13. For analyses of the modern constitutional jurisprudence, since National League of Cities v. Usery, 426 U.S. 833 (1976), see Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303 (1994); Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994).

14. Reference is to Black's opinion for the Court in Younger v. Harris, 401 U.S. 37 (1971).

15. *Id.* at 44.

power in the central government, or indeed anywhere.[16]

It needs to be emphasized that Bickel not only reasserted a traditional view of the importance of the state governments in the federal design; he also was concerned to stress the importance of confining and restraining power not only in the national authorities but "indeed anywhere"—a theme that Professor Amar has so fruitfully taken up and elaborated in his studies of sovereignty, individual liberty, and federal design.[17]

It is not surprising that two thoughtful scholars so learned as Black and Bickel, differing in their views of constitutional law and the proprieties of judicial activism, and to some degree in their positions on substantive social policy questions, were in full agreement that federalism doctrine mattered, that federalism debate must be textured, and that it must remain sensitive not only to core principles but also to the ubiquitous presence of ambiguities and paradoxes that inhere in a political system that leaves a constitutional "door" open when advocacy of a policy on the merits runs into trouble.[18] A parallel concern was expressed in an earlier commentary on the federalism question by the eminent political scientist Robert McCloskey of Harvard University. A consistent advocate of the modern extension of federal guarantees of racial equality and civil rights, McCloskey too was troubled by the prospect that the commitment to limited government embodied in a federal design was in jeopardy. Thus he argued in 1957 that the question of how far national standards should be allowed to prevail over claims of state autonomy under federalism was a matter that required historical as well as normative inquiry. The question that must be pursued without prejudgment, McCloskey insisted,

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16. Alexander Bickel, *in* THE NEW FEDERALISM: POSSIBILITIES AND PROBLEMS IN RESTRUCTURING AMERICAN GOVERNMENT 43 (Washington, D.C.: Woodrow Wilson International Center for Scholars, 1973). I wish to acknowledge in this context that when I was a junior colleague of Prof. Bickel's, during a time when both of us held appointments as fellows of the Center for Advanced Study in the Behavioral Sciences at Stanford, he took a keen interest in my early efforts to pursue historical and doctrinal studies of federalism, suggesting to me many fruitful lines of inquiry. I borrowed from him the phrase "diffusion of power," which Bickel had contributed to the 1970s literature as a major focus of discussion and as a term of art, in the title of an historical paper that I wrote for a symposium on "The New Federalism" some years later. *See* Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619 (1978) [hereinafter Scheiber, *American Federalism*].

17. *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1232, 1245-58 (1994). For a classic statement of the argument *against* a reliance upon federalism as a bulwark of liberty, see Franz L. Neumann, *Federalism and Freedom: A Critique*, *in* FEDERALISM: MATURE AND EMERGENT 44-57 (Arthur W. MacMahon ed., 1955).

18. This is what Richard Stewart, in his comments at the environmental law and policy panel of the symposium at Yale March 1996, termed "playing the 'opportunistic card'" by invocation of the principles of federalism, at moments when such a tactic becomes convenient and efficacious. (Such recognition that putting federalism principles into play, in policy debates, frequently serves as a smokescreen for a policy agenda is not, alas, a highly discernible element in much of the political rhetoric today advancing the agenda of the "Devolution Revolution.")

was:

> [D]o we want a federalism in which the national government's powers are almost unrestricted, its purposes unconfined, its ascendancy over the states indubitable, and its relation to the states one of paternal collaboration? . . .
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> . . . [T]he idea that governmental purposes and societal needs are something less than coterminous may still have some merit in America. And there may remain something to be said for local vitality as a protection against tyranny and as an alternative to static national uniformity.[19]

The only responsible approach to weighing these vital issues, he argued further, must be systematic inquiry into the record, to "take careful stock of the constitutional values that have been vitiated as well as those which have been elevated to a new place." Above all, McCloskey warned, "there is nothing at all to be said for letting the question be answered by default."[20]

It is in the spirit of McCloskey's call for appraisal of the record, as well as with a concern for the substance of the issues Black and Bickel called to public attention with such precision, that one wants to know how the federal system has actually performed as well as to know how doctrine has been developed and political claims formulated in the past. Hence it is hoped that the following brief examination of aspects of federalism and its reform in our history will cast some useful light on the present turmoil over proposals for federal redesign.

I. From the Founding to the Progressive Era: Dual Federalism, Rivalistic State Mercantilism, and the Compact Theory

When we examine historic performance, we are concerned not only with how federal design and doctrine have colored debate and decision, but also with outcomes and consequences. This is a useful starting point for a brief consideration of the record of American federalism from the Founding to the end of the nineteenth century, because this was an extended era when the pretensions of federal doctrine with respect to protection of liberty were belied by the actual results of federalism in action. It is a cautionary tale in the most profound sense. For if one were required to identify the single most important result of federalism as a framework for political decisionmaking and as a constitutional doctrine in that era, the inescapable conclusion is that federalism

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19. Robert G. McCloskey, *A 'Constitution of Powers' and Modern Federalism*, *in* Essays In Constitutional Law 181, 184 (Robert G. McCloskey ed., 1957).

20. *Id.*

protected slavery for the first seven decades of the nation's history. Then, for nearly another century, it served as a reliable fortress for the perpetuation of systematic racial segregation and discrimination. Whenever issues of federalism were debated, slavery and civil rights were ineluctably in the background, influencing the alignments in politics on federalism "principles" and constantly constraining and channelling political debate.[21] Constitutional values of the highest priority were thus "vitiated" while others were being advanced.

A second important general feature of federalism as a working system of government in the antebellum years was the degree to which it reflected in reality the theoretical postulates of "dual federalism," the doctrine advanced in contemporary constitutional discourse that regarded the states and the national government as operating in most respects in "separate spheres."[22] To be sure, there were important areas of government policy in which there was an interpenetration of national and state resources, authority, and decisionmaking—for example, in the building of the nation's transport infrastructure; or in the allocation of lands from the national public domain for the support of schools within the states. Such "sharing" as existed, however, was basically different from what has come to be known as the grant-in-aid and other joint or cooperative programs of the modern era, with their extensive auditing and oversight functions, conditional terms, and (above all) agenda-setting and basic policy formulation by Congress and federal administrators rather than at the state or local level.[23] The doctrine of dual federalism thus was not a sterile legalistic doctrine, divorced from reality; it was in vital respects an accurate model of how power relationships in the public sector were organized in fact before 1861 and, residually, in important ways after the war as well.

Given this reality, the allocation of policy responsibilities in the working governmental system before 1861 meant that a great range of important policy

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21. I will cite here only three exemplary studies, in an enormous literature on the relationships of slavery and race issues to antebellum politics more generally, that are particularly illuminating on the relationship of federalism and constitutionalism: Arthur Bestor, *The American Civil War as a Constitutional Crisis*, 69 AM. HIST. REV. 327 (1964), *reprinted in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 219 (enlarged ed., L. Friedman & H. Scheiber eds., 1988); Paul Finkelman, *States' Rights North and South in Antebellum America*, *in* AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 124 (K.L. Hall & J.W. Ely, Jr. eds., 1989). The moral dimension of these controversies is etched in sharp lines in the analysis provided by ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

22. The authoritative exposition of the theory of dual federalism is in an article by Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) [hereinafter Corwin, *The Passing of Dual Federalism*].

23. This is not an uncontroverted point of view. *See, e.g.*, DANIEL J. ELAZAR, THE AMERICAN PARTNERSHIP: INTERGOVERNMENTAL CO-OPERATION IN THE NINETEENTH-CENTURY UNITED STATES (1962). Documentation for my own views, as in the text above, together with a detailed critique of Elazar's analysis, appeared in HARRY N. SCHEIBER, THE CONDITION OF AMERICAN FEDERALISM: AN HISTORIAN'S VIEW (Study submitted by the Committee on Government Operations, Subcomm. on Intergovernmental Relations, U.S. Senate, 89th Cong., 2d Sess., 1966); *see also* Scheiber, *American Federalism*, *supra* note 16, at 633-34.

areas remained exclusively within state control. Thus family law, criminal law, business organization law, labor law (including slavery), inheritance, local government organization, education at all levels, even much of the relationship of religious organizations to the state, and other areas of social and economic ordering—including the vital matter of property rights, albeit within the framework of Contract Clause jurisprudence, in a capitalist system—all were largely or entirely in the hands of the state governments.[24]

Two important features of the dynamics of politics and of policy process had their origins in this reality of federal governance. First, the large degree of autonomy enjoyed by the states meant that there was room for highly significant variations from one state to another in the substantive policies that they adopted. Quite apart from the differences between the slave and free states, such variations prevailed in many areas of policy and the law. Hence it is not surprising to find that the reach and effect of judicial doctrines on a wide range of important issues in both constitutional law and common law served to reinforce interstate differences in statutory and administrative policy during the antebellum period. As was often remarked by jurists in that day, the United States did not comprise a single legal system; rather there were as many systems as there were states in the Union. Business enterprises, Daniel Webster thus declared in 1827, found themselves the servants of "'four and twenty masters.'"[25] Similarly, Justice Story stressed that the federal courts had to cope with "the jurisprudence of twenty-four states, essentially differing in habits, laws, institutions, and principles of decision."[26] Even the language in which the doctrines of the various states were expressed tended to differ. A federal judge, typically learned only in the jurisprudence of a single state, was "compelled to become a student of doctrines to which he has hitherto been an entire stranger. . . . The words seem to belong to the dialect of his native language; but other meanings are attached to them."[27]

In banking policy, for example, the regimes adopted by the states ranged over the whole spectrum from outright prohibition to regulated systems to state-owned institutions.[28] In tax law, eminent domain rules, land disposal policy, transportation policy, and natural resources protection, an equally

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24. Scheiber, *State Law and Industrial Policy*, *supra* note 6, at 418-25. *But see* Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135 (stressing framework of federal law as constraining and channeling state policy).

25. *Quoted in* Peter J. Coleman, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900, at 278-79 (1974).

26. AN ADDRESS BY MR. JUSTICE STORY ON CHIEF JUSTICE MARSHALL 45-46 (reprint ed., 1900). This address later appeared in substantially the same form as *The Life of Chief Justice Marshall*, 6 AMER. L. MAG. 294 (1846).

27. *Id.*

28. BRAY HAMMOND, BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR (1957).

impressive range of substantial variation prevailed.[29] The result was that a snapshot of the policy "mix" in the states, at any point in time, would be a mosaic of varying colors and patterns. And over time, the changes in one particular or another of policy in the laws and administration of the individual states meant that the effect was one of a kaleidoscope. What is most important to keep in mind, in considering this picture of a bygone era in American federalism, is that the coloration and patterns of law and policy mattered enormously: they represented state autonomy in a host of areas vital to everyday life and defined in large measure the political culture (or cultures) of the nation.[30]

Vertical tensions in the system—centering on questions of federalism and the allocation of authority between the national government and the states, always implicating but not restricted to the crucial question of authority over the institution of slavery—thus involved the reality of states as the principal arenas for legal ordering and policymaking. And when claims were advanced for "states' rights," whether by states in the north or the south, they were in the context of holding the line against constitutional or policy incursions largely unprecedented in the nation's experience to that time. The idea of "devolution" of power from the center to the states, as a matter of sufferance and favor, was therefore unthinkable in that era: it lay entirely outside the mind set, for any of the actors in debate of federalism issues, in antebellum politics. Reinforced by the implicit threat that constitutional nationalism posed to the slave system, this is what lent unique urgency to the debates of that day—very different, therefore, in historic context well as in specific content from today's debates over devolution and other federalism issues.[31]

There was also an exceptional pattern of horizontal tension within the system in the nineteenth century—continuing, despite the advent of the revised (and essentially new) Constitution created by the Civil War and Reconstruction amendments; and this pattern continued in modified form into the twentieth century. I have elsewhere termed this pattern "rivalistic state mercantilism," since it pitted the states against one another in competition for immigrants, capital, and political advantage.[32] Each state's policy had many of the

29. *See* Lawrence M. Friedman, A HISTORY OF AMERICAN LAW 202-47 (1973); Donald Pisani, *Promotion and Regulation: Constitutionalism and the American Economy*, 74 J. AM. HIST. (1987), *reprinted in* THE CONSTITUTION AND AMERICAN LIFE 80 (D. Thelen ed., 1988).

30. Some scholars may be prepared to go farther than to identify regional cultures and to argue, not only for the early Republic but for present-day federalism, that each state may be seen as having a unique "legal culture" or "political culture." This was suggested, for example, by Professor Daniel Rodriguez in his presentation at the March 1996 Yale symposium. *See generally* Daniel B. Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Competition*, *in* YALE LAW & POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 149 (1996).

31. *See generally* Finkelman, *supra* note 21.

32. Scheiber, *State Law and "Industrial Policy"*, *supra* note 6, at 629.

characteristics of classical British and European mercantilism, other states of the Union commonly were characterized in political rhetoric as "foreign" entities with rival goals, and the active quest for advantage was no less evident in competition for federal largess than it was in negative measures—sometimes violative on their face of the Commerce Clause strictures of the Marshall Court—designed to burden interstate trade or investment to the disadvantage of competing state interests. To cite but two important examples, the rate-making policies of the canal states were designed explicitly to serve as protective tariff systems for in-state industry and commercial interests before the Civil War; and in the period after the war, as earlier, state regulations of insurance companies were frequently designed as much to retaliate against hostile regulation in rival states as to provide for probity or other objectives in the operations of in-state firms.[33]

Despite the significant shift of power represented by the role of federal courts after the Civil War—and despite the manifest importance of centralizing tendencies in policy that came to dominate in the banking, transportation, and fiscal areas beginning in the Civil War era—there still was significant continuity in the pattern of competitive horizontal relationships among the states within the system. Rivalries were evident in many realms of action, as the states established railroad rate regulation and other transport policies that were basically competitive in objectives and implementation; and in the regulation of absentee landownership, discrimination in taxation, subsidization of private enterprises, and other policies, many states pursued with ingenious persistence the objectives of a stubborn and parochial—sometimes almost paranoid—localism.[34]

The war did not put to an end, moreover, the vertical tensions within the system. The debate over the proper definitions of national *versus* state powers followed familiar lines, within the framework of compact theory and limited government inherited from the prewar controversies—albeit with the slavery question and the specter of secession as a plausible alternative now removed (but with civil rights and racial segregation questions very much present). While debate in that mode was thus still a prominent element of the American political dialogue,[35] noisy skirmishes also broke out over the issue of the

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33. Scheiber, *Federalism and the American Economic Order*, *supra* note 6, at 92-94 (on canals), 106 (on insurance, carrying into postbellum era).

34. *Id.* at 107-18; *see also* DONALD J. PISANI, TO RECLAIM A DIVIDED WEST: WATER, LAW, AND PUBLIC POLICY, 1848-1902, at 1-10 (1992) (case study of localism, state authority and federalism); Harry N. Scheiber, *Xenophobia and Parochialism in the History of American Legal Process: From the Jacksonian Era to the Sagebrush Rebellion*, 23 WM. & MARY L. REV. 625 (1982); Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 85 NW. U. L. REV. 74, 99 (1990) (on "stubborn local particularism" in relation to Federalist political legacy).

35. *See, e.g.*, Charles W. McCurdy, *Federalism and the Judicial Mind in a Conservative Age: Stephen Field*, *in* POWER DIVIDED: ESSAYS ON THE THEORY AND PRACTICE OF FEDERALISM 31-41

jurisdiction of federal courts. One such instance occasioned an attack from many rural communities in the Midwest, stung by federal decisions holding their citizens to the obligations incurred to support interest and principal on public debt floated to subsidize construction of railroads that were never built or went bankrupt. What an Iowa editor charged was "the evidence of the growing disposition of the federal government to absorb all the power unto itself," with the federal courts trampling state prerogatives (as he claimed) in adjudication of property and contract disputes, blossomed into a controversy that bore all the earmarks—and sounded all the clarion calls—of earlier constitutional confrontations of North and South.[36] Similar regional tensions worked vertically through the federal system on the question of federal jurisdiction over corporations.[37] Instances of angry resistance to federal equity courts exercising jurisdiction over bankrupt railroad corporations in the South also punctuated the history of this period. Thus Governor Tillman of South Carolina, for example, complained bitterly in 1894 that "one by one, the reserved rights of the States are being absorbed by the federal judiciary."[38] At about the same time, Governor Hogg of Texas made an outright demagogic appeal to states' rights when he asked his legislature to require the forfeiture of railroad property when companies were in receivership three years or more (whether or not under federal equity court jurisdiction) and calling for state prosecution of federal officials who would "violate State laws or willfully infringe on States' rights"![39]

Perhaps the most enduring of federalism effects in that era, extending in time well into the 1930s, was the support that federal structures and doctrines lent not only to legalized racial discrimination but also to the entire spectrum of policies that constituted the legal dimension of "southern exceptionalism." Low taxation and public services, including poor levels of support for education; lax pollution controls; labor laws that protected peonage, child labor, and antiunion employer and community practices: with these instruments of control, afforded them by state autonomy under federalism, the southern states institutionalized irresponsible social attitudes and sacrificed the mass of their own people for racist and class ends.[40] Political wrangles such as these

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(Harry N. Scheiber & Malcolm M. Feeley eds., 1989).

36. *Keokuk Constitution* (Iowa), May 22, 1869, *quoted in* Charles Fairman, 1 RECONSTRUCTION AND REUNION, 1864-1888, at 972-73 (1971).

37. Tony Freyer, *The Federal Courts, Localism, and the National Economy, 1865-1900*, 53 BUS. HIST. REV. 343 (1979).

38. *Quoted in Memorial of the General Assembly of the State of South Carolina in the Matter of Receivers of Railroad Corporations and the Equity Jurisdiction of the Courts of the United States*, 24 AM. L. REV. 161, 172 (1893).

39. Special Message to Legislature, Mar. 8, 1893, *in* JAMES STEPHEN HOGG, ADDRESSES AND PAPERS 335, 340 (Robert C. Cotner ed., 1951).

40. WOODWARD, *supra* note 3, at 60-63; *see also* Harry N. Scheiber, *Federalism, the Southern Regional Economy, and Public Policy Since 1865*, *in* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE

served well to set up scapegoats in the midst of a period when the southern economy was encountering major dislocations, and when southern governments were doing little to address the problems of welfare and public education—to say nothing of how well they dovetailed with racist views that dictated opposition to any aggrandizement of federal authority over the states.

Southern exceptionalism not only had a political and distinctive constitutional dimension; it also rested upon the realities of income lag and economic stagnation. In a brilliant essay in this volume on the theory and condition of modern federalism, Professor Peter Schuck has called attention to how air conditioning transformed the realities of life in the South and consequently the relationship of the region to the federal system and federal politics.[41] I would like to call attention, in this regard, to the much larger dimensions of southern exceptionalism—a condition and a set of attitudes that were firmly anchored in the economic backwardness and income lag in the Old South and also much of the Black Belt well into the 1930s.[42] It proved to be a benchmark era in the history of federalism and national politics—not a "constitutional moment," to use Bruce Ackerman's phrase, but certainly the equivalent in impact upon the basic political configuration of the nation—when the New Deal policies, the wartime buildup, and the post-1945 defense industry expansion compressed dramatically the income gap between much of the South and the rest of the nation. The civil rights revolution in law and policy after 1964 disconnected the race issue from the federalism issue to some degree—though, as the present-day welfare debate reminds us, not entirely so. It thereby further weakened southern exceptionalism, as the Sunbelt economy flourished, leading the South's role in federalism to conform much more closely with national norms of regional political behavior than it had ever done in earlier periods of American history.[43]

One last dimension of federalism debates and the dynamics of politics implicating federalism issues in the pre-1900 period needs to be considered: this is what may be termed the "federalism creed," which informed much of political discourse and may fairly be said to have dominated it almost

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SOUTH 49 (David J. Bodenhamer & James W. Ely, Jr. eds., 1984) [hereinafter Scheiber, *Southern Regional Economy*].

41. *See* Peter Schuck, *Some Reflections on the Federalism Debate*, *in* YALE LAW & POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 1 (1996).

42. *See* Richard A. Easterlin, *Regional Income Trends, 1840-1950*, *in* AMERICAN ECONOMIC HISTORY 525, 528-29 (Seymour E. Harris ed., 1961) (data on regional per-capita income in relation to national income averages).

43. On how the civil rights revolution placed federalism in a new light, in political discussion, by (at least partially) disconnecting federalism from discrimination and segregation issues, I am indebted to the comments of Professor William E. Leuchtenburg of the University of North Carolina, at a seminar on federalism at UC-Berkeley in December 1995. On significance of the 1930s-1940s watershed in the South's relationship to the nation more generally, *see* RICHARD FRANKLIN BENSEL, SECTIONALISM AND AMERICAN POLITICAL DEVELOPMENT, 1880-1980 (1984); Scheiber, *Southern Regional Economy*, *supra* note 40, at 93-97.

continuously until the 1890s.[44] In the great nationalistic moments of the Marshall Court and at the height of the Civil War and Reconstruction movements for deep reform, the imperatives of nationhood and the claims of national community were set forth eloquently—and they won broad political support and resonated in ideological terms with the proponents of change. (They also were sounded, of course, in the face of bitter opposition, in the case of the Marshall Court; and the major issues were settled on the bloody battlefields of the war, in the other instance.) The virtues of decentralization in "normal" issues of governance were taken, however, more or less as truisms. If "states' rights" or "sovereignty" were phrases that called forth, after 1865, ominous echoes of the Slave Conspiracy and its sordid role in the nation's history, still most American political leaders regularly paid lip service to the idea that smaller government was better than larger. They also were prone to regard government closest to home as best, that is, as a reality that comfortably reflected constitutional norms—and probably comported well with their own interests as politicians in a largely fragmented, decentralized republic.[45]

"The American people, their legislatures and their judges," a leading scholarly commentator on this period has concluded,

> were unprepared to recognize that their national government had any power which was necessary to meet a national need. Most of them had never come to terms with John Marshall's concept of a Constitution which, if "intended to endure for ages to come," of necessity had to be adapted to the various crises of human affairs. . . . For the majority of Americans, the Constitution of the United States was a charter of granted powers rather than description of a national government possessed in latent form of all powers logically inherent in such government.[46]

At a very minimum, when any policy was examined on the merits, not only was the question asked: Should government do this? but it immediately followed that one must ask: Which level of government has the legitimate authority to do it? And the answer tended to be cast in terms of "compact theory," postulated on the notion of a strict division of powers between the

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44. WILLIAM F. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY, 1889-1932, at 26-27 (1969); Harry N. Scheiber, *Federalism and the States*, *in* ENCYCLOPEDIA OF THE UNITED STATES IN THE TWENTIETH CENTURY 427 (S. Kutler ed., 1996).

45. *See* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 210-11, 286-87 (describing governmental system as one dominated by political parties and courts, with both institutions impeding development of modern administrative state).

46. SWINDLER, *supra* note 44, at 26.

state and national governments, rather than on the theory of one nation, one people, one national government which "is the government of all" (as Mr. Justice Harlan, a rather lonely voice in constitutional discourse at that time, declared in a speech on the centennial of the federal judiciary in 1890): "its powers are delegated by all, and it acts for all."[47] Few indeed were the voices raised in "respectable" mainstream constitutional discourse in the academy—that is, among political scientists and legal scholars, as opposed to the more reform-minded and radical analysts based in the newer disciplines of sociology or economics—in support of ideas such as those of Munroe Smith, a Columbia professor who predicted in 1887 that "no theory of state rights, no jealousy or fear of centralization will prevent so practical a people as ours from satisfying its real needs."[48] As government and the economy became more complex, Smith predicted, there would be a "tendency of decentralized administration . . . result[ing] in increased autonomy in our cities and counties"—an idea later echoed in the influential writings of Frederick C. Howe, who also regarded home rule for the growing urban centers as essential to the preservation of democratic society even as centralization of regulatory powers over the economy had to be accepted.[49] Anticipating the major thrust of Progressive Era federalism reform ideas, Smith contended further, however, that

> it will be seen, also, that the making of laws concerning matters of national interest is no legitimate function of local government, and that an American citizen is no freer because these laws are made at Albany or Trenton than he would be were they made at Washington.[50]

The basic postulates of the compact theory and the more comprehensive federal creed of the nineteenth century began to come under frontal attack from the Populist Party and various radical intellectuals in the 1890s, and by 1900

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47. *Id.* at 26. For an insightful general discussion of compact theory and national theory, *see* SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 14, 21, 349 (1993) (on compact theory and alternative view that "the American republic is one nation served by two levels of government, the object of both being to protect and advance the well-being of the nation"). An interpretation of the evidence from 1787-89 that makes a powerful argument for the nationalist theory, and against the compact interpretation, is advanced in an essay by J.R. Pole, *The Individualist Foundations of American Constitutionalism, in* TO FORM A MORE PERFECT UNION: THE CRITICAL IDEAS OF THE CONSTITUTION 73, 92-101 (H. Belz, R. Hoffman & P.J. Albert eds., 1992). Of special importance to this discussion is the contribution of Akhil Reed Amar, in his essay *Of Sovereignty and Federalism*, *supra* note 17.

On the constitutional "cosmology" that the Supreme Court developed in the immediate post-Civil War years to revitalize the classical constitutional ideas, see McCurdy, *supra* note 35.

48. MUNROE SMITH, A GENERAL VIEW OF EUROPEAN LEGAL HISTORY AND OTHER PAPERS 62, 108 (reprint 1967) (1926).

49. *Id.* at 108-09; FREDERICK CLEMSON HOWE, THE CITY: THE HOPE OF DEMOCRACY (1905).

50. SMITH, *supra* note 48, at 109.

was drawing fire from many leading political figures in both major parties (and, of course, by 1912 most notably by Theodore Roosevelt and the Progressives).[51] The effectiveness of the emerging assault on the old creed was all the greater because it coincided with the changes in political economy demanded by advent of modern large-scale corporate industrialization. That is to say, it coincided with confrontation in the United States of industrialism and its social consequences: the Social Question, as the issue was called in Europe—the great issue common to all the industrialized countries, but confronted effectively last of all by the United States—as to how to maintain humane standards of income distribution and welfare, and to achieve social peace without class warfare, in the new industrial regime.[52] All this meant that federalism issues would assume successive new configurations in the modern era. As will be explained in the following sections of this Article, it also meant that gradually, over time, the conception and the procedures for federalism reform would take on new configurations as well.

II. THE NEW NATIONALISM, THE OLD CREED, AND "MIDDLE-GROUND REFORMISM," 1900-1933

Reflecting on the dynamics of the political contests that led to secession and the Civil War, the historian Roy Nichols observes that the debate "passed through a significant evolution."[53] The contest began, he asserts, as a rising confrontation between the proponents of the nationalist interpretation of the Constitution, with its assertion of implied authority for a strong central government, and the neo-Jeffersonian states' righters, who remained true to the idea of limited national authority and the strict doctrinal interpretation of the enumerated powers. But within a few years, in the middle and late 1840s, Nichols notes, the scope of this contest "broadened to embrace more revolutionary ideas." This happened first as the debates came to focus upon demands for expanded congressional authority to subsidize economic enterprises (especially railroads). It then intensified with the confrontation over the creation and governance of the western territories. And finally—the fatal turn toward war—there burst into flame the long-agitated but suddenly

51. *See, e.g.*, LAWRENCE GOODWYN, DEMOCRATIC PROMISE: THE POPULIST MOVEMENT IN AMERICA (1976); JOHN DONALD HICKS, THE POPULIST REVOLT: A HISTORY OF THE FARMERS' ALLIANCE AND THE PEOPLE'S PARTY (1931); GEORGE EDWIN MOWRY, THE ERA OF THEODORE ROOSEVELT, 1900-1912 (1958). Of particular note is the National People's Party Platform (July 1892), *reprinted in* A POPULIST READER at 90-96 (George Brown Tindall ed., 1966) (numerous provisions calling for significant nationalization of regulatory authority and policy control).

52. The history of this confrontation is given a fresh interpretation in MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900-1933 (1990).

53. Roy Nichols, *Federalism versus Democracy*, *in* FEDERALISM AS A DEMOCRATIC PROCESS 54 (1942).

ascendent question of slavery.[54]

This reminder of how federalism issues became intertwined with others, and ultimately recruited to substantive causes that had political life and a dynamic of their own, serves as a cautionary tale: it is another example of how efforts to redesign the architecture can have unanticipated results. It serves, also, however, to provide a crucial insight into what federalism reform meant in American politics from the 1890s to 1933. For what happened then, as had occurred during the pre-Civil War crisis, was a similar broadening of the debate "to embrace more revolutionary ideas" than those that had inaugurated it. This is not the occasion to attempt a full historical analysis of this complex story, of such wide scope; but I will attempt to identify the contending proposals for reform of the federal system, and how the outcome of this renewed contest over centralization *versus* decentralized power was a reflection of more basic changes occurring in both the society at large and the working governmental system in particular.

A focus upon the academic writings and the active political career of Woodrow Wilson, one of the leading actors in this era of political change, captures with almost uncanny accuracy several of the most critical elements in the confrontation over federalism and governance. In his early work as a political scientist in the 1880s, for example, Wilson became an eloquent advocate of stronger governmental competence through attention to public administration and bureaucratization. "Like a lusty child," he declared, "government with us has expanded in nature and grown great in stature, but it has also become awkward in movement. . . It has gained strength, but it has not acquired deportment."[55] By comparison with the European states, American government had enjoyed the luxury of developing in a process "long exempted from the need of being anxiously careful about plans and methods of administration;" but in an era of technological transformation, industrialization, and international movements, the nation could no longer afford such carelessness.[56] In bringing this kind of insistence about the need for strong administrative competence—with the challenge it bespoke to traditional parties, the spoils system, and a striking lack of professionalism and expertise in government at all levels—Wilson was an intellectual and ideological pioneer. Both as an academic and, later, as Progressive governor of New Jersey and candidate for the presidency in 1912, he pursued with great persistence the

54. *Id.* The contest over the western territories also included debate of the public lands policy and the terms on which the national government would encourage (or constrain) new settlement. For Nichols' comprehensive interpretation of federalism and political change, see his seldom-noticed but splendid book, ROY F. NICHOLS, BLUEPRINTS FOR LEVIATHAN: AMERICAN STYLE (1963); *see also* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978).

55. Wilson, *The Study of Administration*, *quoted in* SKOWRONEK, *supra* note 45, at 37.

56. *Id.*

theme of his early declaration in favor of professionalized public administration. Indeed, Wilson's position on this issue was emblematic of one of the key elements in the controversies over federalism and governance during the 1890s and Progressive periods: the concern to modernize the public sector. The cause focused on the need to build up the expertise of an underdeveloped government, and above all to provide the public sector with the competence for policy formulation, oversight and regulation, and administrative implementation that would make it the equal (or even the master, as some hoped) of the private sector. It was, in sum, a contest over whether the locus of decisionmaking power in settlement of the key policy issues for a democratic society would remain with the electorate and their government, or instead be abdicated in an age of rising concentrated corporate power.[57] For in the last decades of the nineteenth century, it became clear, the private corporate sector had clearly outstripped government in its resources in labor, money, and efficiency. Whether this industrial behemoth could be harnessed was a question, therefore, that ineluctably would serve to fuse in a creative tension the ongoing debate on federalism and centralization, on the one hand, with, on the other, the urgent social issues that were raised by antitrust and other regulatory policies, labor policy, and social welfare policy.[58] These social and economic issues were the counterpart, in the Progressive era, to the "more revolutionary ideas" embodied in the antislavery movement that Nichols described for the pre-Civil War era.

In his writings on government before entering into politics and assuming public office, Wilson revealed himself as a man well prepared for what would follow in the arena of federalism debate. Some two decades after doing much to establish the terms of the governmental-modernization debate with his early writings, Wilson penned his thoughts on the politics of federalism, asserting:

> The question of the relation of the states to the federal government is the cardinal question of our constitutional system. . . . Indeed, it cannot be settled by . . . one generation, because it is a question of growth, and every new successive stage of our political and economic development gives it a new aspect, makes it a new question.[59]

Each generation had to test its opinions against objective changes in the fabric

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57. *See, e.g.*, JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 71-108 (1956); KELLER, *supra* note 52; SKOWRONEK, *supra* note 45.

58. In addition to works cited in the previous note, see Pisani, *supra* note 29; Harry N. Scheiber, *Public Economic Policy and the American Legal System: Historical Perspectives*, 1980 WISC. L. REV. 1159, 1168.

59. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 173 (rev. ed. 1911) (1908).

of the nation's life. A tough realism, Wilson insisted, must be brought to bear as each generation tested and reconsidered inherited precepts regarding the efficacy of the governmental system's federal design.[60]

Interestingly, though he became one of the leading voices in the politics of his era for strengthening the capacity of the state governments—and as governor of New Jersey undertook to assert the public interest in control of corporate behavior as well as in cleaning up spoils politics—Wilson did not match his enthusiasm for administrative modernization with enthusiasm for nationalization of authority. In essential respects, he remained true to his Virginia origins, not only in his devotion to racial segregation, but also in his traditional views on the desirability of restraint at the center. His vision was for limited interventions from Washington, mainly in the fields of banking and corporations policy, and even in these areas (ironically enough) without recourse to a regulatory approach that would involve massive bureaucratization.[61] When Wilson set out on his presidential quest, in sum, he was still (as his biographer Arthur Link has written) "[f]undamentally a state rights Democrat," a politician "of the Jeffersonian persuasion."[62] His skepticism of centralized power was reinforced, moreover, by what may fairly be termed his traditional Victorian liberalism—an unwillingness to embrace as part of the Progressive cause sweeping programs of social welfare and regulatory intervention intended to strengthen the power of organized labor—that made his ideology much closer to Grover Cleveland's than anything remotely like Franklin D. Roosevelt's or Lyndon Johnson's. Only gradually, and under considerable political pressure as it turned out, did Wilson move away from his almost exclusive concern with limited intervention that would focus on the question of restoring free competitive enterprise in the industrial order.[63]

With respect both to his sympathy for the states' rights philosophy and to his opposition to strong interventionism on issues of social welfare and social justice, Wilson reflected the prevailing framework of constitutionalism that the Supreme Court had been setting out since the 1880s. It does not do great violence to the subtleties and ambiguities of the Court's position, I hope, to summarize its doctrines in the following brief terms.[64] In its Commerce

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60. *Id.*

61. ARTHUR S. LINK, WOODROW WILSON AND THE PROGRESSIVE ERA, 1910-1917, at 1-80 (1954).

62. *Id.* at 20.

63. *Id.* at 54-80. Never in his presidency, however, did Wilson demonstrate any willingness to back off his racist position on segregation in the federal service, except insofar as his Cabinet persuaded him it was necessary for purposes of conducting the war effort after April 1917. Nor, it must be said, did Wilson's progressivism embrace a strong commitment to civil liberties, as the World War I experience demonstrated. *See* HARRY N. SCHEIBER, THE WILSON ADMINISTRATION AND CIVIL LIBERTIES, 1917-1921 (1960); Harry N. Scheiber & Jane L. Scheiber, *The Wilson Administration and the Mobilization of Black Americans*, 10 LABOR HIST. 433 (1969).

64. No effort is made here to provide case citations for the great range of constitutional issues covered in the next few sentences. For documentation that will, I believe, support the view advanced

Clause jurisprudence the Court had gradually expanded the legitimate range of power at the national level; at the same time, however, it had deployed Commerce doctrine to hedge and constrain interventionism by the state governments, especially where the states took action in ways that challenged entrepreneurial freedom or established property rights. Assertion of nationalizing norms had a dual influence, then, in opening the way to new congressional regulatory initiatives (in the development of what came to be called the national police power); but federalism values had another side—they served well the goals of social and economic conservatives by legitimatizing the role of the federal courts as censors of state legislation deemed threatening to the social status quo.[65]

The conservative side of this Janus-faced jurisprudence was further ornamented by doctrinal innovations from "public purpose" jurisprudence, by the skillful manipulation of the "affectation with a public interest" doctrine, and by the elaboration of "vested rights" constitutionalism that culminated in the flourishing of the notorious judicial philosophy of Lochnerism after the turn of the century.[66] The fecundity of these jurisprudential innovations was such that the two sides of the Court's centralizing doctrines amounted to two "revolution[s]" in doctrine, as one commentator has argued.[67] To a political reformer—Theodore Roosevelt in 1912, for example—committed to shifting the locus of policy control on crucial economic and social issues away from the states and toward the center, then, the Court's legacy provided strong encouragement, despite the occasional application of property-minded doctrines to strike down congressional legislation.[68] For a mentality like Woodrow

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here, see the detailed study of the Fuller Court (1888-1910) in JOHN R. SCHMIDHAUSER, THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS, 1789-1957, at 115-40.

65. Robert Post has written insightfully on how this view of the instrumental value of federalism infused the jurisprudence of William Howard Taft as chief justice. *See* Robert Post, *Chief Justice William Howard Taft and the Concept of Federalism, in* FEDERALISM AND THE JUDICIAL MIND 53 (H. Scheiber ed., 1989). In a book, *Popular Government*, published in 1913, Taft had set forth clearly his belief that the "New Nationalist School" (comprising Herbert Croly and the TR Progressives) threatened to engulf the country with radical social legislation. The existence of the state governments, he wrote, "is one of the chief grounds for hope" that deplorable legislative tendencies in some of the more radical states would be resisted and "halted by the conservatism of other states;" and, in addition, the strength of constitutional doctrines against massive centralization assured that "hair trigger" national legislation would not be permitted to preempt vital policy areas altogether. Quoted in Post, *supra*, at 66.

66. *See* Walton H. Hamilton, *The Path of Due Process of Law, in* THE CONSTITUTION RECONSIDERED 167-90 (Richard B. Morris ed., 1968); Harry N. Scheiber, *The Road to* Munn: *Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSPS. AMER. HIST. 330, 381-402 (1971) (placing Lochnerism in longer perspective afforded by tracing public purpose and other inherited doctrines) [hereinafter Scheiber, *Road to* Munn]; *see also* Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations*, 61 J. AMER. HIST. 970 (1975).

67. SCHMIDHAUSER, *supra* note 64, at 140 (suggesting that scope of centralization doctrines innovated by Fuller Court exceeded the Marshall Court's).

68. Included in the legislation struck down was the modest income tax enacted in 1893, by Pollock v. Farmers Loan and Trust Co., 158 U.S. 601 (1895), a decision that required a constitutional amendment to fix. The Fuller Court also invalidated congressional legislation of 1906 providing a system of unemployment compensation for railroad workers, did much to vitiate the effectiveness of the

Wilson's, the lesson to be drawn was much more limited: the tools were given for modest intervention from the center, restrained by the faith of old-style Victorian liberalism; but the deployment of property-minded conservative doctrine (embodied in Lochnerism) was a minefield which even a reformer with modest goals might have to traverse.

The allocation of powers in a formalistic reading of constitutional provisions was thus in the forefront of political debate in the post-1880 period. It never took the form of discussion about "devolution" from the center; it all had to do with how much expansion at the center might be permitted, either against the authority of the states or against the traditional legal barriers that protected private property and the corporate capitalist system. In a fragile equipoise, reform ideas and a constitutionalism in the traditional dual-federalist mode strained against one another. To be sure, there was abundant evidence of class conflict and class consciousness, especially during the great outbreaks of violence in the 1870s and 1890s.[69] Even so, what defined a "radical" position in politics at that time—not only in the political lexicon, but also in the arena of real-life politics—arguably was as much determined by how willing a critic of the system was to launch a frontal assault on the old federal creed as it was determined by the critic's position on specific social causes. This aspect of American exceptionalism may be illustrated by reference to one of the most influential political thinkers (and actors) of the era, Herbert Croly.

Croly's great book, *The Promise of American Life*, published in 1909, might as suitably have carried the alternative title, "A (Radically) Reformed Federalism." It established Croly as the most influential intellectual architect of reformist design in the discussion of federal-state relationships, and it departed radically from the premises of existing discourse by forcing into the forefront of federalism debate the meaning of national community and its imperatives in an era of advanced industrialization.[70] Nationalization of America as "a people" had already occurred, Croly argued; from this social fact certain political imperatives must be recognized. He deplored the ideological habit of viewing any and all policy proposals that required centralization in Washington as "an unqualified evil" on their face.[71] He did admit forthrightly that "any increase in centralized power . . . is injurious to certain aspects of traditional American democracy," but then offered the

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antitrust laws, and pushed the "reasonableness" doctrine to the fore as a check upon the administrative discretion of regulatory agencies in railroad and corporate regulation. For full documentation, see, e.g., SWINDLER, *supra* note 44.

69. Compare the analysis of this period, stressing a somewhat different configuration of ideas and social pressures from what I offer here, in Ann Shola Orloff, *The Political Origins of America's Belated Welfare State*, *in* THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 37, 53-61 (Margaret Weir, A.S. Orloff & Theda Skocpol eds., 1988) [hereinafter POLITICS OF SOCIAL POLICY].

70. HERBERT CROLY, THE PROMISE OF AMERICAN LIFE (reprint 1963) (1909).

71. *Id.* at 275, 276.

discomfiting explanation that

> the fault in that case lies with the democratic tradition; and [this] erroneous and misleading tradition must yield before the march of a constructive national democracy. The national advance will always be impeded by these misleading and erroneous ideas [founded on the ideals of federalism] . . . because at bottom ideas of this kind are merely an expression of the fact that the average American individual is morally and intellectually inadequate to a serious and consistent conception of his responsibilities as a democrat.[72]

Inveighing against the "ideals . . . embodied in our existing system"—which, "enveloped in a cloud of sacred phrases," served in fact as sources of constitutional legitimacy for antidemocratic special interests—Croly called for a redefinition of constitutional sovereignty that would recognize the need for the writ of centralized authority to run as far as the needs of a democratic people required.[73]

Croly built on what Theodore Roosevelt had already staked out as new territory in the domain of major-party (and nationalist) politics, and he quickly became anointed as the principal house intellectual for TR's Progressive (Bull Moose) campaign against Wilson and William Howard Taft in 1912. Roosevelt had set his course while President and then as a critical observer of Taft's presidency on the matter of what form a new federalism should take—and how to evaluate the problem of jurisdictional competence. In a speech delivered at the dedication of a new state capitol building in Pennsylvania in 1906, Roosevelt invoked the nationalist jurist and patriot of the Founding era, James Wilson, to argue that

> it should be made clear that there were neither vacancies nor interferences between the limits of State and National jurisdiction; and that both jurisdictions together composed only one uniform and comprehensive system of government and laws; that is, whenever the States cannot act, because the need to be met is not one of merely a single locality, then the National Government, representing all the people, should have complete power to act.[74]

The presidential campaign of 1912 occasioned an historic confrontation of views on the question of how, if at all, the federal system should be reordered.

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72. *Id.* at 276.
73. *Id.* at 276-88.
74. *Quoted in* Gifford Pinchot, *The State, the Nation and the People's Needs*, 129 ANNALS AM. ACAD. POL. & SOC. SCI. 72 (1927).

Pressed hard by Roosevelt, who championed creation of a powerful federal regulatory commission to address the problem of corporate concentration, Wilson began to dissociate himself from a narrow Jeffersonian position on federalism. At a campaign speech in New Haven, he explained that it was the proposal to vest administrative discretion in Republicans like TR, and not centralization of power itself, to which he raised objections. "The Democratic party," Wilson declared, "does not stand for the limitation of powers of government, either in the field of the state or in the field of the federal government. There is not a Democrat that I know who is afraid to have the powers of the government exercised to the utmost. . . . [But] we prefer to be governed by the power of laws, not by the power of men."[75]

If Wilson was rather disingenuous in thus representing the views of his fellow Democrats on the issue of limited government, during his presidency, in both peacetime and war periods, he seemed to move ever closer to the position that TR had occupied—that the national government must have "complete power to act" when it was manifest that the states could or would not do what was needed. As President, then, Wilson became an important figure in the longer-term process by which federalism has become adapted and refigured during the modern era. The influences upon policy outcomes of his and Roosevelt's ideas on federalism marked a significant watershed, therefore, in national politics: pragmatic criteria, rather than immutable precepts inherited from a much simpler past—when Jeffersonian ideals comported with the realities of economic and social life—were now given much greater appeal than ever before. The criteria of the new realism about the allocation of national *versus* state powers often skirted the formalistic issues of doctrine. Instead, they addressed such questions as the matter of areal jurisdiction and policy congruence—how well the areal boundaries of state jurisdiction matched the dimensions of the problems to be addressed. And they also gave a high priority to the issue of competence—that is, the question whether the states had the fiscal resources, the expertise and personnel, and the technology to address specific policy challenges effectively. What may be termed "middle-ground reformism" was emerging—an approach to allocation of powers that certainly fell short of Herbert Croly's wholesale and contemptuous rejection of the federal creed, but that clearly represented a major departure from the inherited

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75. Address Delivered at New Haven, Connecticut, Sept. 25, 1912, *reprinted in* A CROSSROADS OF FREEDOM: THE 1912 CAMPAIGN SPEECHES OF WOODROW WILSON 264-65 (John Wells Davidson ed., 1956). Ironically, in his efforts to distinguish his views from those of Theodore Roosevelt on the issue of commission government and administrative discretion, Wilson in 1912 expressed hostility more generally to reliance upon experts in the public sector as an antidemocratic tendency—a departure, in effect, from his advocacy of strong public administration as a necessity of modern life and a counterweight to corrupt political influences. *See infra* text accompanying notes 55-56; *cf.* John Wells Davidson, *Wilson in the Campaign of 1912*, *in* THE PHILOSOPHY AND POLICIES OF WOODROW WILSON 85, 92-95 (Earl Latham ed., 1958).

doctrines of the earlier era.

Thus the overall record of national policies during the Progressive era involved a strong movement of the locus of power away from the states and toward the center in American governance—not a comprehensive shift as would later be experienced in the New Deal era, but certainly a significant one. Federal administrative law was significantly expanded, especially in transport regulation and in the organization and oversight of the banking sector. Maritime and railroad labor relations, credit provision to the agricultural sector, and regulation of food and drug manufacture all became the objects of national legislation. (This represented, of course, advancement of the movement toward policy preemption by Washington that had been manifest since 1887, when the Interstate Commerce Act was passed, and carried forward in the 1890s when the Sherman Act and resource conservation measures had been put in place.) Of special importance for the future, moreover, was the expansion in scope and size of federal grant-in-aid programs in this era, initially for road-building and for agricultural research and education. These early programs lay the foundation for what in the years after 1933 would become the heart and soul of the New Deal reformation of American federalism—and would remain at the core of controversies over intergovernmental relations to the present day.[76]

The postwar decade of the 1920s brought a pause in the movement for nationalization of authority. To a large degree, this was attributable to the conservative Republican resurgence in politics and consequent loss of enthusiasm for reform. Even the conservative GOP regime, however, was not altogether ready to retreat from the field of innovation. The most surprising episode, in this regard, was the enactment in 1921 of the Sheppard-Towner bill for federal assistance to the states for maternal and child care. The program is remembered today principally for the constitutional challenges it provoked, resulting in the landmark Supreme Court decisions in 1923 of *Frothingham v. Mellon* and *Massachusetts v. Mellon*.[77] In the first place, the Court held that an individual taxpayer did not have standing to challenge a federal grant-in-aid program. Second, the Court announced a crucially important doctrine on the spending power: that conditions could be attached by Congress to grants, with the states free to refuse the assistance—but without possibility of relief from the courts if a state objected to "strings" tied to the funds.[78]

Lest the reader be left with the impression that the Taft Court was

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76. W. BROOKE GRAVES, AMERICAN INTERGOVERNMENTAL RELATIONS: THEIR ORIGINS, HISTORICAL DEVELOPMENT, AND CURRENT STATUS 825-32 (1964); DAVID B. WALKER, THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON 81-85 (1995); Scheiber, *American Federalism*, *supra* note 16, at 640-43.

77. 262 U.S. 447 (1923).

78. *Id.* *See* Edward S. Corwin, *The Spending Power of Congress*, 36 HARV. L. REV. 548 (1923).

consistently friendly to the new pragmatic approach to federalism, it is important to take note of its controversial invalidation of federal tax legislation designed to curb the use of child labor—an alternative attempted by Congress when the Court struck down outright prohibitory legislation earlier.[79] The cases are interesting for another reason: the arguments of the Solicitor General before the Court offered a striking example of middle-ground reformism, challenging established dogma but stopping short of a frontal assault on the cherished precepts of Dual Federalism and the inherited creed. "Under our dual form of government," Solicitor General Beck contended, it was "inevitable" that some national laws should have incidental effects upon the states and "affect subjects which are within [their] reserved rights."[80] "As a result," Beck argued, "there are many laws—Federal and State—which are *politically anticonstitutional* [sic], without being *juridically unconstitutional*."[81] By his invention of the intriguing term "politically anticonstitutional," Beck sought to bring the regulatory tax bill into the ambit of "political question" jurisprudence; thus he argued that if such a measure were deemed objectionable, the remedy rested properly "with the people," since judicial review would require a judgment on legislative motives—"a futile and impossible task," one that must necessarily be based upon conjecture rather than principles of law.[82] Chief Justice Taft rejected such arguments without reservation, asserting that use of a tax measure to get around a constitutional prohibition would "break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."[83]

Thus the Court reasserted its traditional posture on maintaining a bright line between the reserved powers of state, so far as subject areas were concerned (in this instance, regulation of child labor), having at the same time found no substantial threat to core state sovereignty in the practice of attaching conditions to grants in aid.[84] Moreover, the Court held to this position despite

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79. Bailey v. Drexel Furn. Co., 259 U.S. 20 (1922); *see, e.g.*, STEPHEN B. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW (1968).

80. Solicitor General's arguments in Bailey v. Drexel Furn. Co., 259 U.S. 20 (1922), *quoted in* EDWARD S. CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS 232 (1936).

81. *Id.*

82. *Id.* at 233.

83. 259 U.S. 20, at 38. Of course it did not escape notice of commentators that the Court's zeal—whether through application of the Fourteenth Amendment, the Commerce Clause, or the Tenth Amendment—to defend the states against remedial legislation in the labor field and other areas of social policy itself constituted a threat to the previous balance of national *versus* state power. *See, e.g.*, Thomas Reed Powell, *The Supreme Court and State Policy Power, 1922-30*, 17 VA. L. REV. 529, 531 (1931) ("For one interested in local self government the work of the Supreme Court of the United States in applying the Fourteenth Amendment to state legislation must raise the question whether judicial centralization is not pushed to an extreme under our system.").

84. The constitutionality of conditions attached to grants, under the spending power, it has been observed by many commentators, has apparently survived the attack on federal power in the recent Tenth Amendment cases. Thus the Court has reasserted explicitly that while Congress has no warrant to "conscript" the states for administrative enforcement of federal laws, still Congress retains the power

the overwhelming evidence that the social evil of child labor was the product of a "race to the bottom"—with the southern states offering up their poorest and most deprived young people as a lure for capital investment in textile, mining, and other industrial activities. It was clear to everyone in the debate, moreover, that the evil—as it was seen by reformers, but of course not by their southern opponents—could not possibly be halted and controlled effectively except through exercise of federal authority.[85] The child labor issue was the nightmare scenario, in a sense, that served to confirm the appeal of Herbert Croly's most strident denunciations of a politics shackled by the shibboleths of constitutional federalism.

I have said that the 1920s decade did not, as a general proposition, involve much innovation in policy that advanced the reformation of the federal design and working federal governance. It must be noted, however, that the liquor prohibition amendment and its implementation, coming only shortly after other constitutional amendments that provided for women's suffrage, a federal income tax, and direct popular election of Senators, all represented important changes in the fundamental federal design in that era. There continued to be intellectual ferment too, as legal scholars and political writers sought to evaluate the significance of innovations already established, of ideas advanced earlier, and of new schemes for tinkering with the federal architecture. One inherited idea that had continuing vitality was represented by the campaign for uniform state laws. Codification had long been an intriguing cause for legal reformers, but uniformity as a goal took on new urgency for commentators in the Progressive era who regarded it as an alternative to the nationalization of law that some of them regarded as undesirable and others regarded as politically infeasible, regardless of the merits. Elihu Root of New York—patrician lawyer and a member of the national Republican elite who served as Secretary of War and as Secretary of State—had spoken out in criticism of states' rights formalism in a much-noticed speech given in New York in 1906.[86] Root regarded with dismay the prospect of new national legislation in such areas as insurance control, divorce, child labor, and many other areas traditionally under exclusive control by the states. The state governments, he warned, could not hope to stand on their "rights" or claims

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to achieve some of the same ends through attaching conditions to grants under the spending power. *See, e.g.*, Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996); New York v. United States, 505 U.S. 144 (1992); South Dakota v. Dole, 483 U.S. 203 (1987).

85. *See, e.g.*, WOOD, *supra* note 79. Anyone who is tempted to dismiss the dangers of "race to the bottom" behavior by the states today if devolution goes far enough ought to consider seriously the history of the child labor question in this earlier era of our history. Nothing written in some of the other papers in the Yale symposium, I have to say, persuaded me that the race to the bottom is a paper tiger. *See generally* PETER K. EISINGER, THE RISE OF THE ENTREPRENEURIAL STATE: STATE AND LOCAL ECONOMIC DEVELOPMENT POLICY IN THE UNITED STATES (1988) (describing interstate competitiveness and its costs).

86. Substantial portions of the speech are reprinted in GRAVES, *supra* note 76, at 798-99.

of "sovereignty," in the face of pressures for federal action, if they persisted in maintaining legislative regimes that were offensive to the people of the nation as a whole by their failure to control corporate power and political corruption. When the American people cannot obtain "the control they need" from the state governments, ineluctably they will turn to Congress and gain what they want there.[87] Therefore Root proposed uniform state codes in urgently needed areas of legislation such as mining safety, viewing the uniform code as the best practical alternative to surrender of state autonomy and a transforming tendency toward centralization.[88] Root's ideas represented an essentially conservative variant of middle-ground reform that commentators on federalism carried forward in a continuing dialogue in the twenties.

One of the most interesting of the contributors to the ongoing dialogue was Felix Frankfurter, who had served in the wartime Wilson administration both in public utilities regulation and as a special labor adviser. Frankfurter's writings in the 1920s discussion of federalism are best remembered, of course, for the campaign he waged for restoration of state autonomy in commercial common law and in opposition to the imposition of federal common law doctrines that dated from the 1840s—a campaign that would finally achieve success only with the *Erie* decision in 1938.[89] His solicitude for states' rights carried over, surprisingly enough, to determine his view of child labor regulation, one of the most volatile issues of the day: in 1922, he welcomed the Supreme Court's invalidation of the anti-child labor tax law, asserting in an article in the *New Republic*:

> So long as we are governed by a written Constitution, distributing powers of government between the federal government and the states, just so long will there be occasions . . . when a good law will not be a 'just' law, because it will violate the bonds of union. We must pay a price for federalism—at one time the impotence of the federal government to correct glaring evils unheeded by some of the states, at other times the impotence of states to correct glaring evils unheeded by the federal government.[90]

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87. *Id.*

88. *See* William Graebner, *Federalism in the Progressive Era: A Structural Interpretation of Reform*, 64 J. AMER. HIST. 331, 347-49 (1977).

89. Erie RR. Co. v. Tompkins, 304 U.S. 64 (1938), overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). On Frankfurter's states' rights orientation in his commercial common law writings and his jurisprudence as a Supreme Court justice, *see* Mary Brigid McManamon, *Felix Frankfurter: The Architect of 'Our Federalism,'* 27 GA. L. REV. 697 (1993).

90. *Quoted in* Michael E. Parrish, *Felix Frankfurter and American Federalism*, *in* FEDERALISM: STUDIES IN HISTORY, LAW, AND POLICY 27, 27-28 (Harry N. Scheiber ed., 1988); *see also* MICHAEL PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 168-71 (1982) (attributing Frankfurter's localist views regarding federalism to his disapproval of then-conservative Supreme Court's results-oriented judicial activism).

In respect to this discrete legislation, then, Frankfurter proved to be a reformer carrying heavy doctrinal baggage from the era of dual federalism; he was scarcely recognizable as the same scholar as had deplored, in other writings, the notion "that the wisdom of 1875 is the exact measure of wisdom for today. . . ."[91] In other aspects of his scholarship in the twenties, however, Frankfurter revealed the magisterial breadth of institutional experimentation that even his constrained brand of middle-ground reformism might warrant. This innovative strain came through most vividly in a law review article on state compacts, federalism, and "interstate adjustments" that he coauthored with his student James Landis in 1925.[92]

Rejecting at the outset of their argument as an "untrue antithesis" the central precept of the old federal creed—its conception that problems of centralization and state authority should be regarded as problems of "exclusive duality"—Frankfurter and Landis contended that modernization, growth, and complexity required a different view: "Creativeness is called for to devise a great variety of legal alternatives to cope with the diverse forms of interstate interests."[93] They proceeded to offer an inventory and analysis of experiments with "new technique and new machinery"[94] that had already been put in place, many of them shaped by political and administrative precedents that reached back even as early as colonial times. The list is impressive as a reminder of how the Progressive challenge to the old federal creed had produced significant results, despite the persistence of the dualist orthodoxy both in politics and in constitutional jurisprudence. This inventory set forth the following departures from convention: (1) Uniform state legislation, under leadership of the National Conference of commissioners on Uniform State Laws founded in 1890; (2) the formalization of intergovernmental cooperation through the Conference of Governors, founded on President Theodore Roosevelt's initiative in 1908, and a great number of associations of governmental officials organized on professional lines; (3) adoption of grants-in-aid as a means of encouraging state involvement in policy areas deemed of great national importance; (4) reciprocal legislation in fields such as corporations regulation; (5) the judicial practice of harmonizing law through recognition of the need for uniformity in fields such as marine insurance law; and (6) the establishment of interstate commissions and other administrative bodies, such as the New York-New Jersey commission for managing conservation of the Palisades on the Hudson River shoreline.[95] By these means, working outside

91. *Quoted in* McManamon, *supra* note 89, at 787.
92. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925).
93. *Id.* at 688.
94. *Id.*
95. *Id.* at 688-91.

traditional constitutional boundaries and constraints, alternative models of effective problem solving had proven themselves. They were available for emulation: how much better to build creatively upon such imaginative precedents, Frankfurter and Landis argued, than to lapse back into the paradigm of compartmentalized state governments, "independent but futile in their respective spheres"[96] at times when the areal dimensions of the problems confronted were manifestly incongruous with state jurisdictions. They also pointed out the more traditional devices available, familiar in the constitutional background, which won their enthusiastic endorsement as models for action: first, the practice in federal courts of referring complex interstate disputes for settlement; and second, resort to the interstate compact form which had explicit constitutional mandate.[97]

In both his joint work with Landis and his popular book on federalism themes published in 1930, *The Public and Its Government*, Frankfurter made clear his admiration for Mr. Justice Holmes and the critique of property-minded conservative Fourteenth Amendment jurisprudence that Holmes had led. Nonetheless, Frankfurter worked hard to find in judicial precedent evidence of reasoning that would lend respectability—give conservative cover, as it were—to his more innovative ideas for flexibility in constitutional interpretation. He found the model that he wanted in the Supreme Court's Commerce Clause holdings. Substantively, Frankfurter contended, the Clause had been interpreted "as a source of Federal power and not a dam against State action, as state action;" hence there was a substantial reservoir of power remaining with the states so long as Congress abstained from preemption.[98] But he regarded as equally interesting the "process" that was implicit in the Court's commerce jurisprudence. That process was "an accommodation of actualities . . . deal[ing] with real interests."[99] Doctrinal categories and labels such as "direct" and "concurrent," by contrast, have "only served to confuse. To discard them will tend to clarify. They are labels of a result, and not instruments for the solution of a problem."[100]

In this manner, Frankfurter's arguments for a highly pragmatic approach to administrative needs were cloaked in the garb of an established judicial model of reasoning: this model he termed "the traditional [sic] technique of judicial empiricism."[101] He urged that the lesson to be learned, in pushing

96. *Id.* at 697.
97. *Id.* at 691.
98. *Id.* at 720-21.
99. *Id.* at 719.
100. *Id.*
101. *Id.* at 720. Of course, as did federalism reformers more generally in the Progressive era and the postwar years, Frankfurter drew inspiration from the innovative style and empirical-minded realism (but also evidences of judicial self-restraint, another great cause of Frankfurter's over the years) of Chief Justice Marshall in his commerce power decisions. *See* Felix Frankfurter, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 40-41, 42 (1937) (on Marshall's admirable "organic conception

against the artificial constraints of federalism, was the need to abandon the myth of a jurisprudence of "the unfolding of logical inevitabilities," and to emulate instead the model of "conscious balancing of practical considerations."[102] Frankfurter thus trod softly in showing deference (at least tactical deference) toward the judiciary, indeed finding much to praise in the Court's flexible stance on separation of powers and its rejection of "sterile dogma"[103] when it had upheld delegation of powers over railroad rates. In Justice Holmes's decisions (predictably enough) Frankfurter found the encapsulated formula that could serve as his lodestone: a Constitution which had "ample resources for imaginative statesmanship, . . . the concept of a nation adequate to its national and international duties, consisting of federated states possessed of ample powers for the diverse uses of a civilized people."[104] With respect to the politicians who remained faithful to anachronistic orthodoxies, Frankfurter was prone to be more direct. Thus, when a congressional resolution was introduced, for example, for a Commission on Centralization which would report on "what steps, if any, should be taken to restore the government to its original purposes and sphere of activity,"[105] Frankfurter scornfully suggested that was a view no more worthy of serious attention than "the cry for the return of the stagecoach and the peaceful countryside."[106]

The intellectual style as well as substantive content of Frankfurter's appeals exemplified how middle-ground reformers kept alive the concept of an organic Constitution in the 1920s, espousing a new realism about federalism. But the intellectual dialogue engaged in by Frankfurter and other constitutional commentators in the 1920s went forward at the same time as a policy debate was in progress as to the proper federal role in regulation and promotion of new technologies—air transportation, radio broadcasting, electric power production and distribution; congressional Progressives pressed reform legislation not only in the child labor field, already mentioned, but in farm support programs, public financing and operation of waterpower production, and reclamation and irrigation.[107] The grant-in-aid programs expanded

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of commerce").

102. Frankfurter & Landis, *supra* note 92, at 722 n.139.

103. FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 78 (1930)

104. *Id.* at 80.

105. *Quoted in id.* at 28.

106. *Id.* Frankfurter was kind enough, it should be noted, to reject the notion, which must come easily to mind, that "the Congressman is descended from King Canute and Mrs. Patington"! No, Frankfurter went on to assure the reader, "he is merely ingenuously acting upon a view of government which Presidents and eminent lawyers and leading industrialists voice from time to time." *Id. See generally* David W. Levy & Bruce A. Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1916-1983*, 78 MICH. L. REV. 1252 (1980).

107. *See, e.g.*, ELLIS HAWLEY, THE GREAT WAR AND THE SEARCH FOR A MODERN ORDER: THE AMERICAN PEOPLE AND THEIR INSTITUTIONS, 1917-1923 (1979); HERBERT HOOVER AS SECRETARY OF COMMERCE: STUDIES IN NEW ERA THOUGHT AND PRACTICE (Ellis Hawley ed., 1981); Donald Pisani,

regularly, too, registering a nine-fold increase in funding from 1916 to 1925. Thus this element of a changing federalism became ever more firmly entrenched, establishing the institutional foundation for administration of many of the New Deal's programs in the following decade.[108]

Developments in some of the more reform-oriented states were also changing the map of federalism as a working system. Professionalization was enhanced by the spread of civil service merit systems, and many states instituted new or expanded programs for regulation of business, industrial safety, and public health. Some fiscal and organizational reforms were also set in place. To be sure, the overall indictment that "centralizers" might levy against the states—and indictment that middle ground reformers such as Root and Frankfurter offered only in temperate terms, as friends of the states—still applied accurately enough: that they were in considerable measure still run by the political machines and rife with the corruption of influence, that too often they had become enclaves under virtual dictatorial control of particular interests (the cattle industry in the mountain states, the corporations in Delaware, etc.), and that in the South they were the constitutional fortresses of racial segregation.[109]

III. TRANSFORMATION: THE NEW DEAL ERA

And so matters stood when the Great Depression brought government at all levels to an unprecedented crisis after the 1929 Crash. With the advent of the New Deal in 1933, the entire structure of federalism underwent sudden and comprehensive change. Senator Sumner's vision of 1862, of the system as "molten wax," ready to be refashioned at will, was again a plausible depiction of the political reality. And it offered an opportunity for experiment and reform that Franklin D. Roosevelt and the New Dealers were energetic and imaginative in exploiting.

The New Deal period witnessed fundamental transformations not only of the political landscape but also of governance and politics. Capitalist economic organization, and even a high degree of corporate concentration, survived in full vigor; in fact, as is often remarked, much of the New Deal program was specifically designed to prevent the collapse of the basic institutions of the economy that was clearly a real threat at the depths of the crisis.[110] Nonethe-

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State versus Nation: Federal Reclamation and Water Rights in the Progressive Era, 51 PAC. HIST. REV. 265 (1982).

108. U.S. BUREAU OF THE CENSUS, STATISTICAL HISTORY OF THE UNITED STATES 484-516 (1965). The greatest part, by far, of the increase was accounted for by the highways aid program instituted in 1916. *Id.*

109. *See generally* BALLARD CAMPBELL, THE GROWTH OF AMERICAN GOVERNMENT: GOVERNANCE FROM THE CLEVELAND ERA TO THE PRESENT (1995).

110. *See, e.g.*, ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR (1995). A fascinating work from the immediate postwar period which—anticipating later New

less, the changes in political economy, far from being superficial or trivial, were truly profound: they set in place the programs of social welfare and economic regulation that were to dominate the national government from that era to the present day—programs that not only survived the determined ideological opposition of conservatives in the 1930s and 1940s but that subsequently were expanded and elaborated by Republican and Democratic administrations alike. In addition, the great "constitutional revolution" of the 1930s, marked by the reversal of the Supreme Court's position on the central issues of federalism doctrine as well as revision of the law in other basic respects, proved to be an enduring one. As new programs were instituted, moreover, their administration increasingly involved new kinds of relationships between the federal bureaucracy and the states.

Each of these dimensions of change will be briefly treated in the pages that follow, so as to recall the depth and scope of the changes wrought in the federal system during the New Deal era. What is most relevant, perhaps, to our concerns with the history of federalism reform in itself, is that the main thrust of explicit reform proposals and controversies in this period concerned the specific New Deal policies designed to respond to the Depression crisis—and, perforce, concerned demands that the Supreme Court accept changes in prevailing constitutional doctrine so as to validate these policy initiatives and to accommodate expanded powers in the national government. Largely unforeseen and not often explicitly expressed in the early course of New Deal reform, however, was the administrative issue of how to involve the states and local government in implementation. As the result of the persistent need to compromise in Congress—in light of the realities of political support for state interests and state claims, whether or not cloaked in "states' rights" doctrinal orthodoxy—intergovernmental relations (centering on the grant-in-aid issue) emerged as one of the key areas of reform and change. And since the 1930s, a focus on intergovernmental relations per se has been a major strand in the continuing debates over the structures, policy process, and operations of American federalism as a working system.

It must be made clear at the outset that the dominant and unremitting trend in the policy realm throughout the 1933-40 period was centralization of power.[111] The list of policy areas in which the power of decisionmaking and

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Left critiques—systematically faulted the New Deal in nearly all aspects of its programs on account of the program emphasis on shoring up capitalism, instead of undertaking radical reform, was BROADUS MITCHELL, DEPRESSION DECADE: FROM NEW ERA THROUGH NEW DEAL, 1929-1941 (1947). *Compare* essays in POLITICS OF SOCIAL POLICY, *supra* note 69.

111. The following passages rely upon the standard sources of the New Deal and public policy, the most notable of which in my view is the classic study by WILLIAM EDWARD LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940 (1963). Rather than provide detailed citations for my own arguments in this section, I would also refer the reader to the documentation given in three earlier works of my own: Scheiber, *American Federalism*, *supra* note 16, at 644-49; Scheiber, *State Law and Industrial Policy*, *supra* note 6; and Scheiber, *Federalism and the American Economic Order*, *supra* note

administrative responsibility formerly had been almost exclusively with the states, but now was preempted in whole or large part by Congress, was a formidable one indeed. A laggard among the western industrial democracies in centralizing responsibility for care of the aged, the infirm, children, and the unemployed, the United States finally adopted comprehensive programs of entitlements with the advent of the Social Security legislation of 1935. Despite the difficulties posed initially by the Supreme Court, by 1936 agriculture had been transformed into a managed sector of the economy; the basic policies, financing of price support mechanisms, and administrative organization were also determined in Washington. In the field of labor relations, the 1935 Wagner Act inaugurated a new system in which the national government established the framework of rights for organized workers and administered the system nationally through an agency (the National Labor Relations Board) with broad discretionary powers. This labor policy initiative was augmented by the program of minimum wage and maximum hour legislation, extending the national government's power dramatically both in terms of its impact over the economy generally and in terms of its authority relative to that of the states in what is commonly known as the "balance" of federal powers. The Tennessee Valley Authority introduced a powerful federal role in regional development; there was either altogether new or else significant extension of the national government's presence in electrical power development nationally, in guarantee programs for home mortgages and business credit, in rural community development, in urban public housing finance and construction, and, of course, in emergency relief and unemployment provision. As the modern welfare state and mixed economy took form, moreover, there was a proliferation of regulatory initiatives that still further centralized real power in the governmental system: the securities market, the banking system, commerce and business organization, and transportation all were placed under the jurisdiction of new agencies or subjected to enlarged powers in the hands of older agencies such as the Federal Trade Commission, the Interstate Commerce Commission, and the Federal Reserve system.

As a result of the policy and structural transformation that these and other New Deal initiatives represented, the national government not only became vastly larger in size (as well as power) than ever before in American history, but also accounted for a vastly larger percentage of public-sector revenues and expenditures. The massive rise in federal expenditures, which in turn was supported by expansion of the national income tax (effectively preempting that tax for Washington, leaving the states with very limited options except to rely primarily on sales and property taxes), also contributed to the importance of the government's explicit commitment by 1938 to Keynesian policies—that is,

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to the use of its massive role in the nation's fiscal and economic systems for purposes of promoting growth and moderating the business cycle.

All the foregoing innovations and shifts of power were accomplished without benefit of formal constitutional amendment, although a few key figures in the New Deal brains trust had in fact advocated formal centralizing amendments as the most effective approach to the question of nationalizing power and authority.[112] Absent the amendment process, however, the Supreme Court by 1941 had completed a fundamental restructuring of our constitutional law—a set of changes that some commentators regard as innovative in most essentials, but that others regard as a restoration of once-established principles much more receptive to nationalized power and regulation of property rights. Whatever the merits of the two sides in that controversy, the dimensions of the doctrinal shift were impressive indeed. In jurisprudence of the Commerce Clause, separation of powers and delegation, the Tenth Amendment, and the general-welfare clause, the Court eventually found constitutional grounds for broad discretionary authority in the Executive and a virtually plenary police power in the national government. The Court had read the Commerce Clause to be "as broad as the economic needs of the nation,"[113] and it had construed the Tenth Amendment as having no limiting effect independently of other sections of the Constitution.[114] Even the Hughes Court, before the appointment of new Justices by FDR, had established a firm basis for later dramatic decisions with its repudiation of a half century's jurisprudence that had turned the "affected with a public interest" doctrine—originally invoked as a warrant for public regulation of privately owned businesses[115]—into a powerful instrument of judicial discretion for the censorship of state regulation; and with its decision in the Minnesota mortgage relief case that found limits on the reach of the Contract Clause, on the theory

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112. The only amendment of the period was the repeal of Prohibition, which, of course, was a decentralizing measure to the extent that it removed the national ban on liquor production and sale. Nonetheless, it is important to note, the national government maintained a strong presence in administration of liquor tax and anti-smuggling enforcement, extending over the years into active involvement in anti-racketeering enforcement.

The idea of formal constitutional amendment to declare a plenary national police power and modification of the Tenth Amendment was most prominently pursued by Lloyd Garrison, who served on the National Labor Relations Board and was dean of the University of Wisconsin Law School. Professor Kjell Modeer of the Lund University (Sweden) law faculty is pursuing this nearly-forgotten episode in the political history of constitutionalism, in a biography in progress of Garrison; I am indebted to him for this reference.

The "Legal Realists" who dominated social analysis in the law schools in the late 1930s were particularly hostile to federalism, viewing federal structure and the confining doctrines that the Supreme Court had deployed in the name of federalism as evidence of a sterile formalism entirely inappropriate to the realistic needs of industrial society in crisis. *See, e.g.*, K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

113. American Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946).

114. United States v. Darby, 312 U.S. 100, 124 (1941) (calling Amendment "but a truism").

115. Scheiber, *Road to* Munn, *supra* note 66. The case referred to in the text is Nebbia v. New York, 291 U.S. 502 (1934).

that "while emergency does not create power, [it] may furnish the occasion for the exercise of power."[116] Even while Congress was seizing the reins of authority in policy areas formerly left to the states, it was also permitting power within the national government itself to shift over into the new agencies that it authorized for administration of the emerging complex regulatory and welfare systems. Thus Professor Willard Hurst, a scholar who certainly has not expressed any strong criticism of the substance of policy reforms in that era, was moved to remark upon the "array of presidential, departmental, and independent agency power of such unprecedented sweep," occurring in the New Deal years, "as to put into question Congress's capacity significantly to determine national public policy."[117]

In sum, the new structure and distribution of governmental power reflected what FDR had proclaimed in his first radio address of his second term (the same speech in which he announced his court-packing plan), as a movement to vest in the national government the powers necessary "to protect us against catastrophe by meeting squarely our modern social and economic needs."[118] Adverting to the enormous electoral majorities he had won in 1936 and his party in successive congressional elections, Roosevelt rested his demands for constitutional change upon a majoritarian-plebiscitary basis: it was outrageous, he insisted, that a judiciary committed to misguided and mischievous doctrines should frustrate an "overwhelming mandate" for change that would assure the strength of legal foundations for the programs of what he termed "liberal democracy."[119] By the end of the decade, the "horse and buggy" constitutional version of federalism doctrines that Roosevelt had condemned so colorfully in his attacks on the Hughes Court after 1936, had thus been put in the barn.[120] There it would remain until nearly the current day, when an activist court with a very different agenda has opened the barn door again and so brought up for reconsideration and possible reversal questions that seemed

116. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934). On the Court's transformation of doctrine in the 1930s, see WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995).

117. JAMES WILLARD HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 147 (1977). For subsequent Supreme Court reconsideration of the delegation doctrine, see Russell K. Osgood, *Governmental Functions and Constitutional Doctrine: The Historical Constitution*, 72 CORNELL L. REV. 533 (1987).

118. *Quoted in* Harry N. Scheiber, *New Deal, in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, SUPPLEMENT I, 335, at 336 (Leonard W. Levy et al. eds., 1992).

119. Quotations in *id.* at 336. On Roosevelt and the Court, see, e.g., LEUCHTENBURG, *supra* note 116; WILLIAM M. WIECECK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 110-39 (1988).

120. Roosevelt's specific reference, in a press conference in 1935 at the time of the fight over the court, was to "the horse-and-buggy definition of interstate commerce," a comment that caused an enormous reaction in conservative circles, even leading Senator Vandenberg of Michigan to suggest that Hitler and Mussolini might very easily have voiced a similar sentiment! LEUCHTENBURG, *supra* note 116, at 90.

settled for half a century or more.[121]

Over the long haul, the New Deal court's innovations proved equally important in the area of civil liberties and civil rights, as the foundations were set for modern Fourteenth Amendment jurisprudence extending the "incorporation" doctrine significantly. In a parallel move, the New Deal administration organized a civil rights division in the Department of Justice, and by 1941 it was actively pursuing causes involving voting rights for African-Americans and a range of issues in the field of civil liberties. In this regard, too, the historic trend manifest in the changes effected in constitutional interpretation was toward a greater role for the national government at the expense of state autonomy.[122]

Finally, we come to the matter of structural changes in administration and their relationship to policy process and the distribution of real power in the government. The familiar label for this subject, widely accepted since the early 1950s, is "intergovernmental relations" (IGR); and it is symptomatic of the depth of changes in the New Deal era that they fully justify definition of the interactive processes among the different units of government within the American federal system as a discrete topic of importance in itself.[123]

A very large number of newly instituted programs of the New Deal involved use of the grant-in-aid mechanism for administration. These included the welfare and relief programs that accounted for some 80 per cent of domestic spending, but also including many specific programs in community development, public housing, health, transportation, agricultural education, and the like. The now-familiar term "New Federalism" early became current among academic commentators who turned the light of analysis upon the new administrative developments of the New Deal era. Later, the new arrangements—not only use of the grant-in-aid device in several variants, but also the large reallocation of policy responsibilities that was instituted—came to be known as "Cooperative Federalism." This new style of federalism which was the product of the New Deal era, as the great constitutional scholar Edward S. Corwin would later characterize it, represented an abandonment of the old model of state and national governments as largely operating in separate

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121. Reference is to the recent federalism decisions of the Court, especially regarding the Tenth Amendment, cited earlier in this essay and given abundant attention in other papers from the Yale symposium, in this issue. On how settled the Stone Court revisions of the old federal creed seemed forty years after they had been formulated, see the interesting comments in Martin Shapiro, *American Federalism, in* CONSTITUTIONAL GOVERNANCE IN AMERICA 359 (R.K.L. Collins ed., 1990), and Jesse H. Choper, *Federalism, in* CONSTITUTIONAL GOVERNANCE IN AMERICA 373 (R.K.L. Collins ed., 1990).

122. David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at* United States v. Classic, 90 YALE L.J. 741 (1981).

123. On IGR terminology and concepts, *see* DEIL S. WRIGHT, UNDERSTANDING INTERGOVERNMENTAL RELATIONS 8-24 (2d ed. 1982); Deil S. Wright, *Intergovernmental Relations: An Analytical Overview*, 416 ANNALS AM. ACAD. POLI. & SOC. SCI. 1 (1974).

spheres, in a competitive relationship with little overlap or sharing of functions and administration. Instead, in its place, had emerged a system in which extensive sharing of policy authority and administrative responsibilities was the rule rather than the exception; and in which the concept of strictly defined enumeration of constitutional powers for the national government, as the basis for its separate-sphere relationship to the states, had given way to an elastic definition of authority.[124]

The adoption of the grant-in-aid mode for administration of new programs was itself, therefore, a reform measure affecting the federal system that would have profound longer-term effects. The features of the new pattern of IGR that deserve our attention most, in light of subsequent history of reaction to the New Deal legacy and efforts at reform, may be categorized briefly in the following terms:[125]

First, it was in this period that Congress began to attach conditions to grants that required the states to present planning documents in order to qualify for aid, undertake administrative reforms, and submit to federal auditing and review; and in some programs also introduced principles of equalization, gearing assistance levels to needs and resources. Second, administrative discretion in the central federal agencies was often very large. Most notable was the power vested in Harry Hopkins as administrator of the vast relief programs to withhold assistance altogether or take over the administration directly, pushing the states aside, if federal rules were resisted or violated.[126] Moreover, discretion in Washington—and hence the centralizing impact of the new cooperative arrangements—was enhanced further in many programs by the provision for "demonstration" grants, which offered funding to selected units of governments that applied for aid, rather than providing aid to all eligible units on a formulaic basis (the "categorical" grants). Third, in providing aid to local governments directly, as in the urban housing area, or to special-district local governments, the New Deal posed a challenge to the existing

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124. Corwin, *The Passing of Dual Federalism*, *supra* note 22. The first comprehensive account of the changes that had occurred in the 1930s was a work, still highly useful to scholars, by Jane Perry Clark. *See* JANE PERRY CLARK, THE RISE OF A NEW FEDERALISM (1938); *see also* V.O. KEY, THE ADMINISTRATION OF FEDERAL GRANTS TO STATES (1937) (pioneering study of grant-in-aid system).

125. The following is based upon works by KEY, *supra* note 124; CLARK, *supra* note 124; GRAVES, *supra* note 76; JAMES ACKLEY MAXWELL, FISCAL IMPACT OF FEDERALISM IN THE UNITED STATES (1946); WALKER, *supra* note 76; and my own studies, especially Scheiber, *American Federalism*, *supra* note 16.

126. On this point, see JAMES T. PATTERSON, THE NEW DEAL AND THE STATES: FEDERALISM IN TRANSITION 74-101 (1969). The actual experience with the Works Progress Administration program under Hopkins, in this respect, provides evidence against the argument sometimes made that the federal government has only limited leverage against the lower-level governments in administrative sharing arrangements, since the ultimate sanction is to withhold aid for the program in question—and thus frustrate the national purpose that motivated Congress to fund the program in the first place. For as the New Deal experience demonstrated with WPA, a federal takeover of administration can serve amply as leverage against the states in such a confrontation when Congress wishes to include such a sanction in the terms of the legislation.

political power relationships that supported the specific interests and authority of the states—traditionally the only other governments that interacted directly with the national government—in the IGR system. Fourth, there was fiscal "skewing" of priorities, as many observers believed, because of the incentive that availability of funds held out to the states and other units of government in the areas to which the federal government was giving priority. Finally, there was a discernible effect in these and other ways to produce a fragmenting of not only *power* but, at least putatively, also of *responsiveness* and *accountability*. Professional bureaucrats and groups of experts within the structures of government as a whole—what have been termed "communities of experts," or, alternatively, simply "technocrats"—coalesced into informal subsystems within and between governments. All this lent additional complexity to government and administration, with feedback effects in the form of influence on policy process as well as on power relationships in the field.[127] The same structural developments, however, also provided a great variety of openings for cooptation of existing governmental and private-sector units and interests—a point made long ago in my colleague Philip Selznick's classic study of TVA but one that applied in myriad ways to the broad administrative designs and "sharing" strategies of a host of other agencies.[128]

It is a matter of controversy among scholars as to whether, in retrospect, these innovations in IGR meant that the system was in fact as a result "noncentralized," with diffusion of power and widespread sharing of responsibilities far more important than "centralizing" tendencies. My own view is that the impact should be seen as one of comprehensive centralization, modified but hardly nullified by the fragmentation effects that I have cited. For even in a more complex system with elaborate structures and rules for "sharing" of administration, the locus of decision making had shifted decisively to the center. It was in Washington that the programs were defined, the regulations were formulated, and the ultimate authority for modification or repeal was retained. Agenda setting, the framework of implementation, and the final responsibility for oversight all were at the center.

Some advocates of federalism reform today have expressed particular concern that the states as states are no longer given the respect they deserve as constitutional entities—that they are dragooned, or "conscripted" into service for administration of programs which are designed and supervised from Washington, and which (at least in recent years) are subject to rising numbers

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127. Samuel H. Beer, *The Modernization of American Federalism*, 3 PUBLIUS 80 (1973). *But cf.* GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY (1960) (analyzing ways in which local elites were able to capture and maintain control of national grazing lands, by dint of structures of federalism and devolution of national power to local authorities).

128. For the cooptation thesis, see, inter alia, PHILIP SELZNICK, TVA AND THE GRASS ROOTS (1966).

of unfunded mandates that further debase the state role in federalism.[129] Apposite to this kind of criticism of the contemporary system, two observations as to the New Deal's transformation of federalism can be made: The first is that the unfunded mandates device is in a direct line (even if it departs in severity and depth of impact on policy choices) from the conditional grants mechanism that was largely perfected in the New Deal era. Whether this and other elaborations of the legacy of grants-in-aid should be seen as a qualitative departure from the New Deal system, or instead only as an intensification and continuation of centralizing trends from the earlier period, is a question that properly belongs in the forefront of federalism analysis. The second observation that I would like to offer, even at the risk of being seen as revivifying a commonplace analytic point from scholarship of an earlier era, is that it was not for lack of "respect" for the states that the centralization of the thirties occurred as it did. It was, rather, as a remedy—seemingly the only efficacious one in the face of such an emergency—for failure of American governing mechanisms (but also the unresponsiveness of American politics, to that time in the nation's history) to deal adequately with the deeply rooted problems of social dislocation, human suffering, and long-term economic instability of the modern industrial system. Perhaps what is most extraordinary, in more than half a century's retrospective view, is the extent to which the states and local governments alike were in fact consciously designed into the system to play important roles in the emergent administrative mechanisms for the new policies and programs.

IV. DURABILITY OF THE MODERN FEDERAL ARCHITECTURE: THE EISENHOWER, GREAT SOCIETY, AND NIXON YEARS

Tinkering with the architecture of post-New Deal Cooperative Federalism, sometimes with prominent elements of the system's superstructure and at other times with its very foundations—has been on the agenda of the Republican Party and Republican presidential administrations fairly consistently since World War II. Yet (as will be argued below) prior to 1983 the Democratic ascendancy during Lyndon Johnson's administration produced the most significant changes in federal governance—whether one is assessing consciously designed reforms, or, alternatively, the effects of largely unplanned change—as the Great Society programs were put in place. Indeed, an overview of the period 1945-1983 suggests that the march toward centralization of both policy responsibilities and administrative power continued throughout these years. Despite ideological jousting and a few dramatic triumphs for the right wing

129. One such example of criticism is Martha Derthick's account of "regulatory excesses of the federal government vis-a-vis the states" in *The Enduring Features of American Federalism*, 7 BROOKINGS REV. 34, 38 (1989).

such as the enactment of the Taft-Hartley legislation returning to the states important powers that in 1935 had been nationalized in the regulation of labor relations, conservative efforts at turning back the clock on the New Deal welfare and regulatory state were clearly defeated. To the degree that postwar policy continued to be strongly tempered and moderated by traditional American preferences associated with the old federal creed and with the commitment to individualist ideals—preferences that were reflected in the middle-class orientation of many "welfare state" policies, and in the use of sharing mechanisms to administer grant-in-aid programs—it remained consistent with, rather than a departure from, policy design in much of the inherited New Deal program.[130]

Congress in the Truman Administration period signalled a national commitment to consolidation of New Deal programs, perpetuation of the institutions of "big government" associated with those programs (and so radically expanded from the size of the federal establishment before 1933), and continued reliance upon the grant-in-aid approach that was central to Cooperative Federalism.[131] When the Republicans mounted their successful challenge to the Democratic succession with Dwight D. Eisenhower as their candidate in 1952, it was no surprise, therefore, that the campaign platform inveighed against the way in which the New Deal had "weakened self-government which is the cornerstone of the freedom of men."[132]

Shortly after assuming office, President Eisenhower called for creation of a commission on intergovernmental relations that would "review and assess, with prudence and foresight, the proper roles of the Federal, State and local governments."[133] It was not only the New Deal legacy that he deplored, when Eisenhower offered his critique of the condition of American federalism, though he did single out the post-1933 programs as having brought the federal government into "fields which, under our Constitution, are the primary responsibilities of State and local governments;" he spoke, rather, of "more than a century and a half of piecemeal and often haphazard growth" of governmental programs. There had been a blurring of the jurisdictional lines that marked out the proper sphere of local government, he declared, also pointing to "duplication and waste," excessive costs and taxes, and distortions

130. This is a major theme, for example, in the landmark study of welfare reform politics and law by THEODORE R. MARMOR, JERRY L. MASHAW, & PHILIP L. HARVEY, AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES 36-49 (1990). *See also* Wright, *supra* note 123, at 8 (explaining how New Deal and postwar political action was based on awakening of awareness by "American middle class . . . of the positive and program-specific capability of governmental action" and on localism as political value).

131. *See* Richard Neustadt, *Congress and the Fair Deal: A Legislative Balance Sheet*, 5 PUB. POL'Y 351-81 (1954).

132. *Quoted in* WILLIAM ANDERSON, THE NATION AND THE STATES: RIVALS OR PARTNERS? 9 (1955).

133. *Quoted in id.* at 11.

in state government priorities and burdens because of grant-in-aid skewing effects.[134]

Thus the Eisenhower Administration years opened with the issue of federalism reform given high visibility. But with what results? I think that the major importance of that period consists of the success Eisenhower enjoyed in placing on the political agenda in sharply defined terms the matter of "sorting out" of functions—of seeking to address not only the constitutional questions, but also in a much more pragmatic mode the efficiency issues, associated with the allocation of powers to state and local versus the national government. A concrete result of this initiative was institutionalization of federalism and IGR studies that occurred when Congress, responding to the recommendations of the commission study that the President had requested, established on a permanent basis the Advisory Commission on Intergovernmental Relations. With members appointed to represent all levels of government, this commission soon developed staff capacity to produce analysis of IGR problems. The emphasis in ACIR's work prior to the 1980s was quite heavily technocratic, rather than ideological, but its principal long-term historical contribution would consist of its role in developing arguments and data that would be used to advance proposals for block grants and general revenue sharing that were ultimately adopted by Congress in the Nixon years.[135]

Thus Eisenhower gave specific focus to federalism and administrative aspects of IGR in the continuing debates of larger social and economic policy, centralization, and the basic public philosophy in American politics.[136] In doing so, the President sustained the robustness of limited-government ideas and endorsed the orthodox precepts of the old federal creed in the rhetoric of conservatism—expressive of values that would later be drawn upon and exploited to great effect by some of his successors, most notably Ronald Reagan in the 1980s and the congressional leadership after the self-styled "revolutionary" Republicans won control of the House and Senate in the 1994 election.

For a realistic appraisal of the 1950s, however, the Eisenhower administration's concern with federalism and IGR must be viewed in the perspective of the legislative record of Eisenhower's presidential years. This was a period when, in fact, a major expansion in coverage of the Social Security system was

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134. *Quoted in id.* at 11-12.

135. On ACIR generally, see GRAVES, *supra* note 76; *Symposium on Federalism*, 359 ANNALS AM. ACAD. POLI. & SOC. SCI. (1965). On the role of ACIR in the block-grant debates, see TIMOTHY CONLAN, NEW FEDERALISM: INTERGOVERNMENTAL REFORM FROM NIXON TO REAGAN 180-82 (1988).

136. In June 1957, Eisenhower took an initiative with the Governors' Conference to further advance his project for sorting out of governmental responsibilities, resulting in an abortive joint federal-state commission effort to return certain federal programmatic responsibilities to the states—an effort notable, in retrospect, for its importance as precedent to the turnback proposals of the Reagan era and the mid-1990 conservative Republican devolution campaign. *See* WRIGHT, *supra* note 123, at 53-55.

instituted, the federal urban housing program was enlarged, a significant rise in grant-in-aid funding for a national highway system was enacted, and the 1957 National Defense Education Act instituted a large-scale shift in the role of the national government in educational funding. Moreover, the administration undertook (albeit the President did so most reluctantly) the vigorous enforcement of federal courts' civil rights orders after the School Desegregation decisions: it was, then, a President with strong states' rights sympathies who presided over the sending of federal troops into Little Rock.[137] The advancement of centralizing tendencies went forward with considerable momentum, despite the new visibility of federalism reform as a project on its own terms—and despite the passionate commitment of the President to this cause.[138] There is little evidence that the Eisenhower administration moderated significantly the strong auditing and supervisory roles of the national government in grant-in-aid administration, the skewing effects on state finances, or the problems of multi-level and multi-agency fragmentation.[139]

An episode late in Eisenhower's second administration provides a telling commentary on the political realities of federalism. The President appointed a high-level "joint action committee," consisting in part of Cabinet members and governors, who were asked to designate federal programs that ought to be turned over entirely to the states.[140] After two years of effort, the committee recommended two such programs—vocational education and municipal waste treatment. It was a pathetic denouement for the work of a committee that had been sent forth on its great mission with a presidential warning that governmental power must be "checked, hedged about, and restrained," and that "those who would be free must stand eternal watch against excessive concentration of power in government"![141] The reason, ironically, was that the governors, who habitually lamented the perils of an overweening federal presence at the expense of "states' rights," rejected a host of other proposals out of fear that they would make political trouble for themselves or cause a loss of state revenues; for example, they rejected devolution of the $290 million school lunch and milk program because "there were too many parochial

137. *See* TONY ALLAN FREYER, THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION (1984).

138. *See* ANDERSON, *supra* note 132, at 10-11.

139. Indeed, I have found in none of the 1960s critiques of such tendencies in the intergovernmental programs any evidence of admiration for reforms at this level instituted in the previous decade by Eisenhower's administration.

140. Reference is to the Joint Federal-State Action Committee, formed on the President's initiative when he proposed the idea at the June 1957 annual Governors' Conference. Its membership consisted of ten governors, three department secretaries from the President's Cabinet, three White House staff persons, and the Director of the Bureau of the Budget. The committee's history is analyzed in MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES 308-16 (Daniel J. Elazar ed., 1966).

141. *Quoted in id.* at 308.

schools and too many voters attached to parochial schools, making the political issue too explosive because the states [could not] constitutionally give money to parochial schools."[142]

Efforts to work out a satisfactory funding plan for even the two programs recommended for devolution caused similar problems, based on fears that many states would either suffer a net loss in revenue or else (at a minimum) that the governors would face troublesome political opposition at home. In the end, even the modest two-program transfer proposed by the committee could not muster the necessary votes in Congress.[143] The governors had proven adept, withal, at finding "excuses for not accepting powers that [might] be politically awkward. . . ."[144]

The 1950s thus present, in retrospect, a picture of reformism in which the rhetoric of federalism values was demonstrably disconnected from underlying political realities—and belied the continuing aggrandizement of centralized functions and power that those political realities supported.

The processes of innovation that were set in motion during the mid-1960s by the Lyndon Johnson administration were of another character altogether. With the election of John F. Kennedy in 1962, the new administration made clear its dedication to elevating civil rights and domestic reform to new salience on the policy agenda. It was only after Kennedy's assassination, when Johnson gave new energy to the reform drive, that a recasting of the basic structure of IGR became a central component of the administration's new program. How the Great Society agenda expanded enormously the federal role in public policy and intensified the centralization of power is a storied chapter in American political history that requires no detailed re-telling here: new civil rights, public housing, medical care, welfare, and educational programs were put in place; benefits under the Social Security program were expanded; and the number and scope of grant-in-aid programs proliferated, so that federal grant sums rose from $9 billion in 1958 to $23.9 billion in 1970, constituting a fifth of total

142. *Id.* at 311.

143. *Id.* at 310-11, 315-16. Grodzins argues that the committee's failure reflected above all the lack of party discipline at both the national and state levels, hampering elective leaders who would seek to innovate. *Id.* at 315-16. An alternative explanation, not requiring rejection of party weakness as a factor, would, in my own view, stress simple self-interestedness compounded by the unwillingness of governors and congressional members to introduce still further complexity when the two admittedly important programs at issue were working perfectly well to fulfill a national purpose. Note that a quarter century later, Ronald Reagan's plan for a "swap" of federal and state programs—a major "devolution" effort—met with failure for much the same reasons: the states stood to lose, and possibly to lose in truly major proportions, and one does not have to search too hard for explanatory variables to know why in the end the state-based political forces and the governors rejected Reagan's proposal. *See* CONLAN, *supra* note 135, at 192-98.

144. Edward C. Banfield, *Revenue Sharing in Theory and Practice*, PUB. INTEREST (1971), *reprinted in* THE UNEASY PARTNERSHIP: THE DYNAMICS OF FEDERAL, STATE, AND URBAN RELATIONS 62, 70 (Richard D. Feld & Carl Grafton eds., 1973).

federal domestic civilian expenditures.[145] The national government was enjoying buoyant revenue increases, enough that there were major income and corporate tax cuts in 1962 and 1964 without interrupting the trend of rising federal revenues. Until the costs of the Vietnam War reversed the fiscal trend, the Johnson administration's economists treated the projected future federal surpluses as a major opportunity for returning tax money to the state and local governments, and not only as the putative basis for financing new or enlarged federal programs.[146]

The Great Society programs involved important structural changes in the administration of grants-in-aid as well a major shift in the programmatic focus. The most prominent departures in this respect included a new emphasis upon expansion of the welfare and health programs, community development and "model cities" aid, and educational programs. There was also an increasing reliance upon project grants, as opposed to formulaic categorical grants, in many areas of policy; some tentative experimentation with block grants, used in the criminal justice and health fields; and the direct grant of funds, bypassing state government altogether and sometimes municipal governments as well, to local governmental entities and extragovernmental bodies such as the community action organizations funded through the War on Poverty legislation.[147] This last development was particularly disruptive politically, since it effectively provided funding for organizations that were often engaged in political combat against the "establishment" party organizations and local governments.[148]

Two features of the Great Society debates in the Johnson years revealed a dual concern on the Johnson administration's part with improving intergovernmental relations: first, through tinkering with the administration, as it were; but, second, also a more elevated concern with some of the fundamentals of the federal design for governance—that is, tinkering with the architecture, or at least approaching the issue with an entirely new arsenal of rhetoric. The first reform concern had as its focus clearly and narrowly defined efficiency questions; it was technocratic in tone and focus, and the major issues were defined as administrative and coordinative. With leadership principally from Senate Edmund Muskie of Maine, but encouraged by the White House, Congress sought to improve the coordination and integration of administrative

145. Wright, *supra* note 123, at 10. There had been 40 major grant programs in 1958, but the number had risen by 1969 to more than 160 deemed major (and more than 220 in all) operating under some 400 to 500 statutory authorizations. Scheiber, *American Federalism*, *supra* note 16, at 660.

146. A uniquely valuable work in this area is DAVID M. WELBORN & JESSE BURKHEAD, INTERGOVERNMENTAL RELATIONS IN THE AMERICAN ADMINISTRATIVE STATE: THE JOHNSON PRESIDENCY 11-14, 166-69 (1989).

147. WALKER, *supra* note 76, at 132-33; Scheiber, *American Federalism*, *supra* note 16, at 659-68; WRIGHT, *supra* note 123, at 57-68. *See generally* JAMES L. SUNDQUIST, MAKING FEDERALISM WORK: A STUDY OF PROGRAM COORDINATION AT THE COMMUNITY LEVEL (1969).

148. *See generally* SAR A. LEVITAN, THE GREAT SOCIETY'S POOR LAW (1969).

efforts, to reduce duplication and friction in the grant-in-aid programs, and to encourage the professionalization of state-local bureaucracies and the institutionalization of working intergovernmental relationships.[149] Within the Bureau of the Budget and White House staff circles, moreover, many key figures demonstrated an abiding concern for the Planning Program Budgeting System concept (PPBS) imported from the Pentagon, and more generally were absorbed with the challenges of "articulation" and other modish management concepts as they might apply to both grant-in-aid administration and federal-level horizontal agency coordination.[150]

The second thrust of federalism reform—focusing upon the basic architecture—was pushed hard by the President himself, and it became one of the hallmarks of the Great Society program and its political packaging. This consisted of Johnson's call for an "expanded partnership" that would embrace not only government at all levels within the federalism system but also the private sector—a partnership "of business and of labor, and of private institutions and of private individuals"—in what Johnson termed "Creative Federalism."[151] The solution to such national problems as poverty, Johnson declared,

> does not rest on a massive program in Washington, nor can it rely solely on the strained resources of local authority. They require us to create new concepts of cooperation, a creative federalism, between the National Capital and the leaders of local communities.[152]

This idea, presented initially as a rather vague and unformed notion of partnership, appeared at first blush to carry the unique Johnsonian imprint of boldness and some degree of hyperbole and sloganeering. On closer examination of the evidence, however, one learns that Johnson's closet policy advisers had been urging upon him the notion of a new public stance on revitalization of federalism. As Professor Laura Kalman's research has shown, for example, Johnson's confidante Abe Fortas—who surely was no states' rights ideologue—had drafted language a few months earlier that he suggested Johnson use in the State of the Union Message. Fortas proposed that Johnson should assert:

> We have a profound and abiding faith in our people and in our

149. The Muskie effort, supported by the Advisory Commission on Intergovernmental Relations, resulted in enactment of the Intergovernmental Cooperation Act in 1968 (P.L. 90-577). *See* WELBORN & BURKHEAD, *supra* note 146, 199-207.

150. WELBORN & BURKHEAD, *supra* note 146, at 210, 212-27.

151. Lyndon B. Johnson, Address to New York Liberal Party, Oct. 15, 1964, PUBLIC PAPERS OF LYNDON B. JOHNSON 1963-64, at 1350-51; *see also id.* at 1096, 1131, 1158.

152. *Id.* at 706.

> institutions and in local government. We do not want our federal government unnecessarily to spread its roots so widely that the strength of our local institutions is sapped. . . . The truth and the fact are that too many of our citizens have not adequately participated in the processes of government or in the political life of the nation.
>
> I think that the emphasis upon individual, state and local activity —as against further centralization in the federal government to the extent avoidable—will be well received. I also believe that it is sound—provided it is accompanied by an effort to obtain greater efficiency . . . at the federal level.[153]

When Johnson unveiled his Creative Federalism proposal a few months later, his sympathy for the concerns Fortas expressed were apparent—a sympathy doubtless reinforced by the fact that the "expanded partnership" was, in a sense, a means of translating "consensus politics" into a working principle for the machinery of intergovernmental relations and ultimately into a new variant of federalism. The intention proved serious: in fact, in subsequent years all the major programs instituted by the Johnson administration (with the sole exception of Medicare) did incorporate one feature or another of cooperation by "partners" in administration. Moreover, Johnson presided over a number of organized efforts by his top advisers, Cabinet officers, and managers to strengthen mechanisms of intergovernmental administration and to work out new models for delivering services and benefits through the IGR machinery.[154]

The official version of the philosophy that the Johnson Administration brought to public administration was succinctly expressed by Charles Schultze, director of the Bureau of the Budget, in testimony in 1966 at congressional hearings on Creative Federalism. Schultze opened his statement by calling attention to the magnitude of policy innovation—21 new health programs from the last Congress alone, seventeen in education, fifteen in economic development, twelve in aid to cities, four for manpower training, and seventeen in resource development—and new dimensions in patterns of intergovernmental action that had been established during the previous two-year period. One change of special importance had been the increased direct participation by the national government in "specific projects in States and communities" (that is, the awarding and administration of project grants); government at several levels acted as "coequal partner[s]," and in many instances two or more local

153. *Quoted in* Laura Kalman, *Abe Fortas and Strategic Federalism, in* FEDERALISM AND THE JUDICIAL MIND 119 (Harry N. Scheiber ed., 1992).

154. WELBORN & BURKHEAD, *supra* note 146, at 199-234.

governments would be organized in a single project.[155] In addition, many of the grant programs involved more than one federal agency, often many agencies.[156] The new complexities of implementation that were inherent in such a pattern of administration worked against reliance upon hierarchical authority, Schultze argued. "To be effective we must decentralize"—an imperative that would provide "greater room for diversity" (a reference to one of the central virtues of federalism, as stated in the orthodox creed), even if it meant accepting some of the inconsistencies and the "irreducible quota of anomalies and errors which inevitably accompany decentralization."[157] Why, then, had the administration decided to accept such risks and certain costs? Schultze explained in terms similar to those that had informed Abe Fortas's advice to Johnson, and that had been reiterated by the President when he first announced his vision of Creative Federalism:

> The Congress and the Executive could well have bypassed the State and local governments in devising these new programs . . . . by establishing the new programs as direct Federal operations. But this would have flown in the face of our whole national history as a federal system And it would not have led to effective solutions, since most of the problems which these programs attack are not the same nationwide, and can only be solved in the context of widely different local conditions and requirements. . . .
>
> In short, the formidable managerial and intergovernmental problems of the new programs reflect [the actual] complexity of the social needs they are designed to meet and our determination to utilize the federal system of government in meeting them.[158]

Here, then was a reaffirmation of the traditional American distrust of nationalizing power—so central to the orthodox federal creed—and the theoretical preference for state and local authority. That it was set forth, paradoxically, by one of the principal figures in Washington, amidst a virtual avalanche of new legislation that was shifting the locus of decision making and

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155. Not only did many programs require establishment of new coordinating organizations, but in the programs of assistance to cities the program held out the incentive of funding to be used for planning directed by "councils of governments" (COGs) that might be formed in metropolitan areas (with their membership to be voluntary, and with the governments that participated to be represented by their top elective officials). In 1965 the nation had 35 such councils (the first dating from 1954), but with the incentive of funding for planning efforts held out afterward, the number grew to 103 in 1967 and to some 450 three years later! WELBORN & BURKHEAD, *supra* note 146, at 218.

156. Charles L. Schultze, testimony in CREATIVE FEDERALISM: PART I—THE FEDERAL LEVEL 388 (Hearings before the Subcommittee on Intergovernmental Relations, Committee on Government Operations, U.S. Senate, 89th Cong., 2nd Sess., Nov. 16-21, 1966).

157. *Id.* at 389.

158. *Id.* at 390 (emphasis added).

administrative control so decisively to the center, makes it all the more intriguing. To explain the paradox is not so difficult, I think, when one considers the ambivalence with which these matters had been approached by the middle-ground reformers such as Felix Frankfurter in the 1920s, and by old-style Progressive reformers who were largely in sympathy with the New Deal policies and yet continued to associate the ideal of an energetic democratic polity with governmental power and decision making close to home. I have already called attention to Charles L. Black, Jr., as exemplary of a liberal in whose legal thought there persisted an abiding concern about the integrity of the federal design, and about the need for vigor of local and state government. Another such figure was Justice William O. Douglas—a nationalist, certainly, with respect to the need for accommodating national regulatory powers and extending equal protection guarantees, but still clearly a jurist solicitous of the integrity and autonomy of the states.[159] The paradoxical hybrid of preferences and values—which had its more focused administrative variant in the musings of Budget Bureau Director Schultze—may be viewed, I think, perhaps, as a powerful Jeffersonian-Brandeisian strain which remained still a potent residual element in the ideological mix that comprised the liberal heritage by the 1960s.[160]

The Johnson administration's expressions of concern about federalism values and its confession of difficulties inherent in a complex IGR system may also have been inspired by the need to blunt the edge of Republican candidate Barry Goldwater's attack in his 1964 campaign on excessive centralization.[161] One can speculate reasonably, too, that politicians who came out of the state party machines, and who carefully nurtured their mutually profitable ties to the state party throughout their careers in national politics—certainly Johnson epitomized the breed in this respect—were entirely comfortable with the rhetoric of federal values (even while they championed the positive state in Washington, standing foursquare behind national civil rights legislation, preemption laws in the regulatory area, vigorous judicial enforcement of individual rights against the

159. See, e.g., Justice Douglas's dissent in Maryland v. Wirtz, 392 U.S. 183 (1968), foreshadowing the later states' rights decision in National League of Cities v. Usery, 426 U.S. 833 (1976), first in the series of Tenth Amendment-oriented decisions of recent years.

160. For the way in which this element of inherited ideas has worked, for example, in the welfare policy field, see MARMOR, MASHAW, & HARVEY, *supra* note 130, at 45-46, 240; *see also* Edward L. Rubin and Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (arguing that federalism values in orthodox creed prove upon analysis to be valid only as arguments for decentralized management). For a more general critique of the traditional view, see BEER, *supra* note 47, at 379-88.

For an incisive analysis of how the Supreme Court has treated claims of state autonomy in the context of preemptive legislative initiatives, see John P. Dwyer, *The Practices of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1186-90 (1995).

161. Goldwater had also proposed a return to each state of the share of income tax collected, with supplements to be awarded to jurisdictions with low income; he also proposed phasing out some $10 billion in categorical-grant programs. WELBORN & BURKHEAD, *supra* note 146, at 168.

states, etc.). These politicians, again certainly including Johnson, also knew what they were doing when they designed new structures, such as the community action programs in the anti-poverty effort, that challenged the established local and state political machines; for it was from their own experience and knowledge that they could be certain the machines, if left unchallenged, would undermine national objectives, out of motives of either racism, or inertia, or self-aggrandizement. But there was also a strong liberal commitment to restoring the integrity and rebuilding the capacity of the state and local governments, and the capacity of institutions such as the schools, with strong reformist objectives expressed and built solidly into such programs as Model Cities, Head Start, and the Job Corps—quite apart from programs that would fund directly the improvement of administrative infrastructure in state and local government.[162]

No matter how eloquently or persistently the President and his team reiterated the Creative Federalism theme and values of local government, the more enduringly important development of that period was the larger and more encompassing pattern of centralization. Federalism was transformed in basic respects, with the national government more dominant than ever before, the complexity and fragmentation in government operations more salient, and the accelerated pace of centralization itself a factor almost staggering in its magnitude. As seemed clear to this writer and to many others, at the time, an entirely new phase in the history of federalism was taking shape. And this meant that it was time when alertness to the implications—for accountability and for democratic governance, not only for efficiency—was imperatively needed. Conservatives who chanted the mantra of states' rights had formulaic responses and solutions, of course; but the liberal response to such challenges, in great contrast with the thoughtful and candid musings of figures such as Charles Schultze,[163] was often dismayingly glib and almost surrealist in its uses of history and logic.

Euphoria seemed to be the standard instrument of analysis, for example, in the writings of Max Ways, an apologist for the Johnson programs who wrote a much-noticed article in Fortune in 1966, declaring that "the over-all degree of centralization or decentralization is seldom an interesting or even useful question."[164] Time-honored ways of examining power relationships, Ways argued, could be safely discarded in this new era of limitless growth: It is possible, he contended,

> to think of vast increases of federal government power that do not

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162. WELBORN & BURKHEAD, *supra* note 146, at 207-12 (on building state and local infrastructure). *See generally* LEVITAN, *supra* note 148 (on poverty program).

163. *See supra* text accompanying note 156.

164. Max Ways, *Creative Federalism and the Great Society*, FORTUNE, Jan. 1966, at 12.

> encroach upon or diminish any other power. Simultaneously, the power of states and local governments will increase: the power of private organizations, including business, will increase; and the power of individuals will increase.[165]

This intoxicating doctrine did not survive for long in the maelstrom of working politics and governance. The heady rhetoric was out of touch with the troubled realities of day-to-day governance and administration (let alone large questions of power allocation within the system) that even top-level insiders such as Schultze or Senator Muskie were entirely willing to air publicly. "The pleasant but totally unrealistic notion that power was no longer an interesting problem did not survive the Johnson Presidency."[166]

A more interesting response to the Great Society came out of political science, and took the form of portraying the new national programs and their impact on the federal system—what appeared to ordinary intelligence as commanding evidence of rapidly expanding centralized power—as merely a modest variation on the historic record of federalism in action. Advanced most prominently in the writings of Morton Grodzins, this interpretation of the American experience in government sought to argue that

> [t]here has in fact never been a time when federal, state, and local functions were separate and distinct. Government does more things in 1963 than it did in 1790 or 1861; but in terms of what government did, there was as much sharing of functions then as today. The effort to decentralize government through the ordered separation of functions is contrary to 170 years of experience.[167]

This view seemed at the time spurious and insupportable even on Grodzins' own evidence, and it still appears so to me today.[168] Authoritative studies of

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165. *Id.* at 122.

166. Scheiber, *American Federalism*, *supra* note 16, at 664.

167. Morton Grodzins, *Centralization and Decentralization in American Federal System*, *in* A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM 1, 7 (Robert A. Goldwin ed., 1963). Grodzins' views were based in some measure upon the work of his student Daniel Elazar, who examined in detail the history of grant-in-aid programs and concluded that "co-operative—not dual—federalism has been the mode since the establishment of the Republic, in the nineteenth century as well as in the twentieth. . . ." DANIEL ELAZAR, THE AMERICAN PARTNERSHIP: INTERGOVERNMENTAL CO-OPERATION IN THE NINETEENTH-CENTURY UNITED STATES (1962), *excerpted in* AMERICAN INTERGOVERNMENTAL RELATIONS: FOUNDATIONS, PERSPECTIVES, AND ISSUES 36, 41 (Laurence J. O'Toole, Jr. ed., 1985).

168. My initial critique, in 1966, is in Scheiber, *The Condition of American Federalism*, *reprinted in* AMERICAN INTERGOVERNMENTAL RELATIONS, *supra* note 167, at 51. Academic disenchantment with the Grodzins thesis began to take hold when the eminent political scientist Carl Friedrich examined the problem in CARL T. FRIEDRICH, TRENDS OF FEDERALISM IN THEORY AND PRACTICE (1968) and came down against the Grodzins view and largely endorsed my position (which was built upon the standard historical literature). *Id.* at 8. Further distinguished authority on the side of discontinuities and progressive centralization came into the discussion with the publication of an important article by Samuel

federalism written in recent years give the idea little credence.[169] At the height of the intense debates that were sparked by the Creative Federalism idea and the Great Society proposals in the 1960s, however, this extraordinary effort at historical revisionism won wide currency among political scientists (though never with historians); and, more importantly, it penetrated deeply into academic and generalist discussions of the Johnson era programs.[170] The Grodzins notion of historic continuity and time-out-of-mind "sharing" in American federalism resonated perfectly with the spirit of consensus politics and the Johnsonian "expanded-partnership" federalism model.

This was a usable past, par excellence: it represented history appropriable as a palliative for any anxiety that might be generated by the uncertain prospects generated by sudden and extreme institutional change. As such, it was comforting, of course, to liberals who approved of the Great Society programs but might still be worried by the prospect that the radical revisions of the federal design and a move of the locus of decision making so decisively to Washington might generate troubling problems with respect to political accountability—or even with respect to individual liberty as it might be confronted with still further concentration of public authority. Like Max Ways in his journalistic forays declaring power issues to be obsolete, if not absurd, this historical revisionist view rather cavalierly set aside power and its implications for basic values.[171] Indeed, this new way of looking at power and historic change inspired Grodzins' student Professor Daniel Elazar to argue in 1965 that even the New Deal decade was only a blip on the historic radar screen: it did not qualify as an era of discontinuity in governmental institutions and of federalism. Because grants-in-aid had been relied upon so heavily in program design and implementation, Elazar contended, he could not agree that there had been a centralization of real power in the 1930s anything like "equivalent" to what he admitted was the "tremendous growth in national governmental activity."[172]

The credibility of such revisionist ideas about history, so supportive of consensus political theory and consonant with the political apologia for Creative Federalism innovations, proved to be of transient vitality. With the rising divisiveness of politics in the late 1960s, and with the Republican counterattack that zeroed in on the Great Society's centralization of power as a key target of reform (or, more accurately, retrenchment), the revisionist historical model

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Beer, *The Modernization of American Federalism*, 3 PUBLIUS 69 (1973).

169. *See, e.g.*, WALKER, *supra* note 76, at 64-65, 71-72.

170. *Cf.* C.E. Gilbert, *The Shaping of Public Policy*, 425 ANNALS AM. ACAD. POLI. & SO. SCI. 116, 121-22 (1976).

171. On Max Ways's polemics regarding the Great Society's virtues, see *supra* text accompanying note 164.

172. Daniel J. Elazar, *The Shaping of Intergovernmental Relations in the Twentieth Century*, 359 ANNALS AM. ACAD. POLI. & SOC. SCI. 10, 19 (1965).

faded quickly out of the political debates; and, as scholars pondered the academic critique that Grodzins and Elazar had provoked, the newly minted myth of basic continuity in the history of federalism was pretty much discarded in the political science literature.[173] Scholars reaffirmed what was obvious, viz., that power does matter, in historical analysis no less than in contemporary politics—and so the practice of taking power seriously, which is certainly indispensable to any research enterprise that seeks to take federalism seriously, has been fully restored to its place at center stage. How a later phase of federalism-reform politics would invoke its own historical models, in appropriating the past to its own instrumental purposes, is a topic to which I shall return in a later section of this Article.[174]

The Creative Federalism era is of signal importance to the present discussion because it set in place the basic framework of governmental organization and basic public policy debate for the three decades that followed, down to the present day. The storm over devolution and the "Republican revolution" proclaimed after the 1994 elections has been, after all, largely about turning the clock back on the Johnson-era innovations. (Not exclusively so, to be sure, since turning the clock back on the entire New Deal legacy is also a stated aim of the more extreme devolutionists.) Hence before attempting a very brief summary view of the subsequent record, since 1972, I would like to call attention to some of the other features of political and legal change in the 1960s that lend that period its signal importance in regard to federalism.

Consider first the role of the federal courts. The evidence all points to the fact that doctrinal change in constitutional law took the same direction, for the

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173. *See supra* note 168. By 1984, for example, Theodore J. Lowi would write of the 1930s:

> National government did not merely grow larger during the 1930s; it took on some entirely new functions, new at least to the national government. An examination of the New Deal programs shows that they were not merely an expansion of the traditional national government programs of subsidies, land grants, and public works but were regulatory and redistributive policies that looked a lot more like traditional state government than national government.

Theodore J. Lowi, *Why is there No Socialism in the United States? A Federal Analysis*, *in* THE COSTS OF FEDERALISM: IN HONOR OF JAMES W. FESLER 37, 49 (Robert T. Golembiewski & Aaron Wildavsky eds., 1984). Elsewhere Lowi had written that by the end of the New Deal era this was truly a single nation-state, with federalism fundamentally transformed: "The modern, positive national state in the United States," he continued, "is a product of the years since 1933. . . . [T]he New Deal is significant far beyond its contribution to the size and scale of the national government. . . . [T]he factor of far greater significance is the change during the New Deal in the *functions* of government." NATIONALIZING GOVERNMENT: PUBLIC POLICIES IN AMERICA 15-17 (Theodore J. Lowi & Alan Stone eds., 1978).

It is important to recognize, in the context of this discussion that Grodzins's views of how party decentralization (or "noncentralization") may have worked in various ways as a factor in the allocation of real decision making power have continued to have an important influence on federalism studies. These views were worked out most fully in his book *The American System*, cited *supra* note 140; but see the provocative reconsideration of how party organization and dynamics have interacted with federal structure, offered in Leon Epstein, *American Parties and Federalism*, *in* POWER DIVIDED: ESSAYS ON THE THEORY AND PRACTICE OF FEDERALISM 3 (Harry N. Scheiber & Malcolm M. Feeley eds., 1989). Parties and also the larger phenomenon of political culture underlie much of the analysis of federalism in each of its historic stages, in WALKER, *supra* note 76.

174. *See infra* note 232.

most part, as Great Society legislation and program implementation: that is to say, the federal courts contributed strength to the quick march toward intensifying centralization. The only respect in which the Supreme Court significantly challenged the new role of the national government was by its decisions that extended due process rights to individuals and groups who challenged administrative procedures, or who were pursuing their claims to programmatic entitlements such as welfare payments. The exercise of federal judicial censorial power in the latter area of the law was, of course, a variant of centralization in itself because most such suits were directed against the state agencies through which federal aid funds passed; it was the states that were mainly responsible for setting the ground rules and actually administering the aid programs.[175]

In the realm of constitutional law, the Supreme Court's reapportionment decisions, its rulings which upheld the new civil rights legislation of the sixties, its continuing receptiveness to federal administrative preemption of policy areas formerly under state control, its doctrinal support for a virtually plenary national regulatory power over the economy, the abortion decision and other rulings (as in the libel, obscenity and church-state areas) that overturned state law and imposed national standards, and the extended string of criminal justice and other Fourteenth Amendment "incorporation" decisions all worked in one direction: they deployed federal judicial power largely to constrain and displace state autonomy and discretion.[176] The announcement of a doctrinal retrenchment in the name of "Our Federalism" came only at the end of the Johnson era, with Younger in 1971; and after that, the Court's nationalist jurisprudence would not yield ground on basic federalism issues until some years later, when the Nixon-appointed Justices began to exercise their influence.[177] So intense was the reaction at the time, however, that serious efforts at starting constitutional amendment campaigns were focused on nearly all the major decisions of the Warren Court that came down against state authority.[178] The most bitterly intense attacks upon the Supreme Court came in the 1950s from southern segregationists and elements of the far right (angry not only over integration decisions, but also decisions upholding rights of political dissenters and

175. *See* PHILLIP J. COOPER, HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS (1988); R. Shep Melnick, *Federalism and the New Rights*, *in* YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 325 (1996).

176. An excellent overview and analysis of this period of the Court's history, stressing that wave after wave of decisions, spreading across the map of constitutional subject matter, imposed national standards and denied state autonomy, is in ALFRED KELLY, WINFRED A. HARBISON & HERMAN BELZ, THE AMERICAN CONSTITUTION 635-62 (6th ed. 1983).

177. *Id.*; *see also* Hans A. Linde, *Spending Power*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION: SUPPLEMENT I, at 507 (Leonard W. Levy & Kenneth L. Karst eds., 1992).

178. Arthur S. Miller, *Judicial Activism and American Constitutionalism: Some Notes and Reflections*, 20 NOMOS 333, 352-53 (1979).

freedom of association); but the criticism of liberal jurisprudence gained legitimacy and publicity from such quarters as the prestigious Conference of Chief Justices, which waged a long campaign (over objections of some of the members) against the Warren Court for its reapportionment, criminal justice, and segregation decisions.[179]

If one were to identify a counter-trend of any weight, it would be the movement toward public law litigation in which standing was extended to citizens and groups that challenged administrative discretion at all levels of government.[180] For conservatives who were alarmed by the welfare rights decisions, there was some comfort in the fact that the Court pulled back from the brink of declaring subsistence-level welfare support to be a protected right (at least against the states in administering federal aid programs) rather than an entitlement subject to legislative and administrative discretion.[181]

Second, the impression often prevails in discussions of recent American history that since the New Deal period, conservative and right-wing critics of modern liberalism have been the only elements in politics much concerned over the possible ill consequences of overly centralized government. To the contrary, however, there is abundant evidence in the 1960s that liberals and New Left critics raised a host of serious questions that expressed misgivings about centralized power; and that within the Johnson administration, the managers and technocrats also were explicitly concerned with the issue of how to maintain "balance" within the federal system.

The New Left slogan calling for "power to the people" was associated, after all, with activist attempts—both through the Poverty Program agencies and through other institutions and political action efforts—to decentralize both public-sector and private-sector power. Critics in this mode were hostile to the "establishment" as represented no less by Johnson and the Democratic Party than they were to the Right.[182] In a related mode, the famous critiques of the welfare system and of administrative law formulated by the legal scholar Charles Reich, then a professor at Yale Law School, gave brilliant expression to the persistent Jeffersonian strain—with its distrust of authority and

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179. Victoria A. Saker, *Federalism, the Great Writ, and Extrajudicial Politics: The Conference of Chief Justices, 1949-1966, in* FEDERALISM AND THE JUDICIAL MIND, *supra* note 153, at 131-48.

180. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

181. Dandridge v. Williams, 397 U.S. 471 (1970) (denying claim that discrimination on basis of wealth should, because it touched fundamental right, receive same strict scrutiny as discrimination on basis of race). A highly revealing account of the litigation strategies in the welfare rights cases is provided in MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (1993). *See also* R. SHEP MELNICK, BETWEEN THE LINES: REINTERPRETING WELFARE RIGHTS (1994).

182. *See, e.g.*, THE POLITICS OF TURMOIL: ESSAYS ON POVERTY, RACE, AND THE URBAN CRISIS (Richard A. Cloward & Francis Fox Piven eds., 1974); MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 36-78 (1989).

enshrinement of individualist values, albeit in the context of the new bureaucratic state—in post-New Deal liberal thought in the academy.[183]

Then, in one of the great ironies of the nation's modern political history, equally virulent intellectual and political attacks came from the right: By the end of the sixties, a conservative backlash to the Great Society was manifest in the sharp drop in public concern with civil rights, in angry reactions to the race riots and violence in the streets, and in the potency with voters of Republican and conservative Democrats' attacks on the "activism" of the federal courts. There was also manifest rising hostility to redistributive programs for the poor, and especially the turmoil generated by the War on Poverty community programs. Political leaders tapped into this public discontent, and the opposition crafted what has been termed, harshly but justifiably, the foundations of a strategy of "venomous redistributional politics" for the 1970s and 1980s.[184]

To be sure, once the Republicans had captured the White House in the Nixon victory in 1972, the rhetoric of decentralization proved to be inconsistent with the realities of centralization that President Nixon sought to effect within the federal government itself. The full extent of this aggrandizement of power in the White House finally came to light only with the investigation of the Watergate scandal.[185] Earlier, however, while Johnson was still president, the range and variety of concerns about undue centralization that found expression—especially in the myriad proposals for making federal aid administration more responsive and accountable—was truly remarkable.[186] Indeed, one can find at least the beginnings of serious (and often detailed) discussion of proposals designed to beef up state and local government, and to act as barriers to excesses that accompanied policy centralization, in almost every guise and particular that would emerge in the debates over federalism reform in the 1970s.

As an example of the discomfiture with centralization manifested by the Johnson administration's own bureaucratic managers, one can point especially to an extended analysis presented to Congress by Bureau of the Budget Director Charles Schultze that dealt with shortcomings and pressure points in

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183. Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964); Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965). For a critique of Reich from the left, see William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985).

184. MARMOR ET AL., *supra* note 130, at 56; *see also* James T. Patterson, *Wealth and Poverty, in* 3 ENCYCLOPEDIA OF THE UNITED STATES IN THE TWENTIETH CENTURY 1067, 1081 (Stanley I. Kutler ed., 1996); Gary Orfield, *Race and the Liberal Agenda: The Loss of the Integrationist Dream, 1965-1974, in* POLITICS OF SOCIAL POLICY, *supra* note 69, at 312, 334; BRINKLEY, *supra* note 110, at 270-71.

185. *See* Scheiber, *American Federalism*, *supra* note 16, at 669-70.

186. These reform ideas and the anxieties they revealed with respect to possible excesses of centralization are thoroughly documented and analyzed in WELBORN & BURKHEAD, *supra* note 146.

IGR aid in which he identified many of the serious issues that would later be exploited politically by the Great Society's critics.[187] Also very prominently included among the anti-centralist ideas that surfaced in the Johnson years, moreover, were the "block grant" and the "general revenue sharing" plans that later would become central to the Nixon program of reform and reorientation of federal aid—an approach that re-emerged in the Reagan presidency, and yet once more in the proposals for devolution (and divestiture, or "turnbacks," the phrase inherited from Reagan) that were floated by the "revolutionary" Republicans who took over Congress after the 1994 elections.[188]

A third important feature of federalism politics in the 1960s decade had to do with the public reputation of the states. Liberals in the New Deal tradition were so committed to the project of centralizing policy responsibilities not only because they regarded the nation's major social and economic problems as truly national in scope, but also because they held the states in low esteem—despite the distinguished records that had been made in both policy and administrative reform by individual states on the model, largely, of the LaFollette reforms in Progressive-era Wisconsin. Thus in the prevailing view in the postwar period, prior to the Great Society years, state autonomy was a principle that was notable above all because it supported segregation and discrimination; it was further discredited by the notorious malapportionment that virtually disfranchised urban voters in many states, by the influence of political machines (often themselves dominated by a single industry or even a single corporation), and by demonstrated lack of effectiveness in government operations. The states' tax systems—heavily regressive in nearly all states—were further evidence, in the view of critics, that if the country's problems were to be addressed effectively, it must be from Washington.[189] As many liberal intellectuals and centrist-libe-

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187. Some of the headings of Schultze's detailed analysis were as follows:

- Federal assistance is being provided through too many narrow categorical grant and loan programs. . . . An excessive categorization of grants reduces control of Governors and mayors over the shape of their own budgets . . . .
- [C]ertain of the planning requirements necessarily demanded as a condition of grants may be overlapping.
- Federal actions are sometimes taken and regulations are prescribed without sufficient consideration of State and local laws, government structure, financial and administrative capabilities, and ongoing programs.
- Federal, State, and local governments all need to do a much better job in formal systematic evaluations of the effectiveness of their programs.

Testimony of Budget Director Schultze, *supra* note 156, at 390-92. Obviously Schultze's reservations about the federal aid system were expressed in the context of support for the centralizing of program-design responsibilities in Congress; he did not propose major devolutions or divestitures of programs.

188. CONLAN, *supra* note 135, at 21-30. The block grant idea went back as far as the Eisenhower administration; in the Johnson period, general revenue sharing was put forward by Walter W. Heller, who later was chairman of the Council of Economic Advisors. *See* WELBORN & BURKHEAD, *supra* note 146, at 166-69.

189. IRA SHARKANSKY, THE MALIGNED STATES: POLICY ACCOMPLISHMENTS, PROBLEMS, AND OPPORTUNITIES 5-12 (1972).

ral politicians argued at the time, the states were disgraceful liabilities to democratic government because of what they did, not only how they were structured.

This reading of the states' failures to adopt and pursue policies adequate to the nation's needs was expressed in terms typical of the day by the political scientist David Fellman who discussed the states, in a 1945 essay, in the context of the federal design. "Federalism," he wrote, "has the result of giving the country too many laws and too many variations of law. . . . No less important, it has permitted and even encouraged the festering of local tyrannies and injustices."[190]

A wholesale indictment of the states typically took no account of the best of Progressive era reforms of policy and structure, spread of the merit system in civil service and consequent upgrading of expertise in some (hardly all) states' bureaucracies, and improvements in the tax systems in the more liberal states. The problem was that such changes were scattered, and any gains in these regards seemed more than offset by the widespread evidence of intractable structural problems that beset so many states—especially so in their failure to be responsive to the issues that were most important to the condition of the growing urban areas.[191] As the political scientist V.O. Key, Jr. wrote in 1956, "the idyllic conventional view" of the states as Jeffersonian communities of democratic virtue had been hopelessly tarnished by their actual collective record:

> Instead of political sensitivity we often have political stalemate. Instead of ready and easy ways for the expression of popular will we have confusion and obstruction. Instead of the alertness and sensitivity described by the political orators, the actual situation discourages the maintenance of a party leadership and a party competition that might provide dynamic forces necessary for the fulfillment of the mission of the states. At times, in fact, obstructions to political initiative within the states divert to Washington activities that might as well be handled at state capitals.[192]

The dismal estimate of state competence and probity that was manifested by such writings began to undergo a change, paradoxically, at the very time that the sharp turn toward centralization was occurring in the Great Society

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190. David Fellman, *Postwar American Federalism, in* PROBLEMS OF THE POSTWAR WORLD 179 (Thomas McCormick ed., 1945). This essay was later reprinted as *The Future of the States, in* THE STATE OF THE UNION: COMMENTARIES ON AMERICAN DEMOCRACY 61, 63 (Robert B. Dishman ed., 1965).

191. *See, e.g.*, Alan Campbell, *Breakthrough or Stalemate? State Politics, in* THE STATES AND THE URBAN CRISIS 196 (Alan K. Campbell ed., 1970).

192. V.O. KEY, JR., AMERICAN STATE POLITICS: AN INTRODUCTION 4-5 (1956).

years. The intransigent negativism regarding the expanded federal role that was voiced by the ideological opponents of centralization was now being crowded out—or at least rivalled—by a more positive defense of the states. This positive variant of state-centered philosophy came from liberals in both parties who accepted an active role for government generally, but insisted that the states should be given credit for having served as vital centers of creative experimentation. To cite a prominent example, the progressive Republican Nelson Rockefeller, in his widely cited Godkin lectures at Harvard, argued that a strong national "framework" policy in areas such as transportation or welfare had to come from Washington; but he also contended that when the national government did act effectively, it usually was on the basis of policy models already worked out in individual states that had innovated and experimented already. "The living purpose and intent" of federalism, Rockefeller insisted, "are creative and affirmative. It is not a theoretical device to narrow or constrict political action. It is a way to amplify it . . . to open not one but many avenues of political action for economic and social progress."[193]

Across the nation, in California, a liberal Democratic governor, Edmund G. Brown, Sr., gave voice to similar ideas. Writing at the very moment that Johnson's Great Society and Creative Federalism programs were being cast on turbulent political waters, Brown declared that strong federal initiatives were the best hope for those who wanted to "put the states back in business."[194] Insufficiently appreciated by the public, he argued, was the extent to which "the gears of federal and state machinery" were already tightly meshed. Denouncing orthodox states' rights philosophy, he pointed out that few governors were on record, whatever their philosophical views, as wanting to return or refuse federal aid funds. Brown called for a new realism about governance that would bring strong cooperative or coordinative regional arrangements into play, in the federal design, when problems had to be addressed by groups of states or communities; and he proposed a Council of Governors that would meet regularly with top federal elective officials to express the states' interests "and bring their knowledge to bear at the center of national power" as new policies were being debated by the administration and by Congress.[195]

These and other arguments for recognizing state competency and potential were important not only as counter-expressions to the conventional segregationist and anti-government-oriented states' rights talk; they were of great

193. *See generally* NELSON A. ROCKEFELLER, THE FUTURE OF FEDERALISM 17 (1962).

194. Edmund G. Brown, *How to Put the States Back in Business*, 229 HARPER'S MAG., Sept. 1964, at 98.

195. *Id.* at 100, 98-101. Another progressive governor who had much influence on the debate of the potential for a more vigorous role for state government in the new design of federalism was Terry Sanford, author of *Storm Over the States* (1967), a work that deserves more attention in this study than space constraints permit.

importance because they accurately reflected attitudes that were also gaining currency, as we have seen, within the highest ranks of the Johnson Administration officialdom. By the early 1970s, as the states were being forced by court orders and civil rights laws to give up malapportionment, segregation, and police and court procedures that defied simple justice, the contention that the states were irredeemably incompetent and/or corrupt began to fade out of the public discourse. To be sure, there was still great concern about the "race to the bottom" factor if states were left undue discretion in the regulatory area; and the effort to give palpable reality to concepts of due process and equal protection—for example, in state prison administration—still had far to go.[196] But in the perspective afforded by time, it is now evident that in the 1970s the states generally were entering into a period of modernization, institutional upgrading, and fiscal strengthening that justifies calling that decade one of "renaissance" for them: tax reforms and economic growth gave new buoyancy to state finances, state and local civil service rolls grew, and the administration of federal-aid programs reinforced other basic trends giving states new salience and credibility.[197]

Fourth, partly as the result of revitalization in state and local government, but even more so as a response to the new political opportunities offered by Great Society-era programs, the "Big Seven" intergovernmental lobby groups emerged as major players in the political system.[198] These organizations spoke for the institutional interests of states "as states," cities "as cities," etc., rather than acting as conventional interest groups; and they transcended the interests, also, of the communities of experts within the several levels of government. In the debate over Revenue Sharing proposals and, later, much more sweeping programmatic proposals for restructuring federalism, they had a powerful and sometimes controlling influence—sometimes by exercising a practical veto, and other times (as we would come to see in the welfare and medical care debates of 1994-95) by generating proposals of their own.[199]

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196. *See, e.g.*, Malcolm M. Feeley & Edward L. Rubin, *Federal-State Relations and Prison Administration*, *in* POWER DIVIDED, *supra* note 173, at 63.

197. This interpretation has been advanced forcefully by the U.S. Advisory Commission on Intergovernmental Relations, in its publication THE QUESTION OF STATE GOVERNMENT CAPABILITY (1985); and it has been argued also by scholars of varied substantive views on policy and political values (e.g., Martha Derthick, Richard Nathan, Victor Jones, and Timothy Conlon) who are close students of state government and politics. For the argument in brief, see CONLAN, *supra* note 135, at 228-31.

198. The Big Seven as they were in 1974 included the National Governors' Conference, the council of State Governments, the National Legislative conference, the National Association of County Officials, the National League of Cities, the U.S. Conference of Mayors, and the International City Management Association. Wright, *supra* note 123, at 14-15. *See generally* DONALD H. HAIDER, WHEN GOVERNMENTS COME TO WASHINGTON (1974) (describing governors and dynamics of public officials' organizations' influence).

199. On the earlier episodes, see generally CONLON, *supra* note 135. On the 1994-96 debates, see, e.g., Paul E. Peterson, *Devolution's Price*, *in* YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 111 (1996); Stephen D. Sugarman, *Welfare Reform and the Cooperative Federalism of America's Public Benefit Transfer Programs*, *in*

Fifth, the role that the intergovernmental lobbies carved out for themselves intensified an already-established trend in national politics, toward interest-group pluralism with resultant fragmentation and a resurgence of highly focused particularistic demands on the political system.[200] This much-discussed tendency, so corrosive to party discipline and (in the view of some critics) respect for political and legal principle as informing standards for legislation, was also implicated in federalism reform: for the grant-in-aid programs served as a magnet for highly focused interest-group demands, and then served equally well as a vehicle for delivery of the largess or services that were authorized by legislation. As policies and programs were disaggregated and fractionalized by the proliferation of aid programs, it provided expansion of the opportunities for satisfying a host of pressure groups in what David Walker calls a "co-optive" process by which "all groups that were directly or even indirectly affected" by a piece of legislation could be "'pacified'" by the resort to an omnibus bill that would create new aid programs or fuel existing ones with higher funding levels or enhanced scope.[201] As this political pattern became entrenched, it would pose serious obstacles to reformers (including Presidents Nixon, Ford, Carter and Reagan, successively) who sought to give up or modify the grant-in-aid approach for structural or administrative alternatives—or basic reallocative alternatives, such as have been proposed since the 1994 elections—complicating further the already vexed issues of ideology and naked policy preferences.

Sixth, while both process and substance underwent significant change with respect to distributional policies, exemplified in the aid programs, there was also a major shift in the dimensions and focus of the national regulatory state. Prior to the 1960s, the New Deal legacy of federal regulation had maintained its original focus upon the structure and commercial market operations of business and financial institutions—terms of entry and competition, etc.; with mandating of production levels, as in agriculture, or oversight of services, as in transportation; and with labor relations. By contrast, the 1960s witnessed a massive broadening of federal regulatory authority into the areas of public

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COBSTRUCTING A NEW FEDERALISM, *supra*, at 123.

200. *See, e.g.*, THEODORE J. LOWI, THE END OF LIBERALISM 311 (1969); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

201. WALKER, *supra* note 76, at 140. As early as 1960, Phillip Monypenny shrewdly observed 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. . . .
>
> The grant-in-aid system is by no means an undermining of federalism, but rather a refinement of it. It corresponds to a pragmatic pluralism, which has long been remarked as a characteristic of politics in the United States.

Monypenny, *Federal Grants-In-Aid to State Government: A Political Analysis*, 13 NAT. TAX J. 15 (1960), *reprinted in* AMERICAN INTERGOVERNMENTAL RELATIONS, *supra* note 167, at 154-55; *cf.* Wright, *supra* note 123, at 218-31.

health, worker and consumer safety, and environmental protection and planning. This aspect of the Johnson policies would stand and indeed be strengthened, especially as to environmental legislation, in the Nixon-Ford years; not until the 1980s, in the Reagan-Bush administrations, did repeal or weakening of social and environmental regulation become a prime aim of conservative Republicans.[202]

Finally, any account of change in the sixties has to take notice of the comprehensive context in which debates on issues of internal governmental architecture were conducted, even though their full impact would not be made felt until the Nixon years or later. In both its debilitating effect on government fiscal strength and the devastation it wrought in terms of polarization and loss of public confidence in government, the Vietnam War was of unique importance. War-bred price inflation, new volatility in the economy, and the beginnings of "stagflation" were evident during the war period and had a profound impact on the politics of the 1970s. Amidst the turmoil of radical politics, with pressures on the establishment from both the left and the right, there was evident also the beginnings of a sea change in public philosophy. Throughout much of the country, the electorate had seemed content, on the whole, to accept as axiomatic that an increasingly urbanized and complex society required public services from an expanding public sector. The individualist strain in American political thought—compounded by persistent antigovernmental ideological opposition, and of course by social or racial prejudice—remained potent enough that neither the AFDC program nor Medicaid was thoroughly nationalized so as to provide for a uniform national minimum standard or safety-net; administrative room was left for the states to perpetuate significant variations in benefit levels and eligibility standards.[203] The political strength of arguments against national standards was also a vivid portent of what would emerge a few years later as dominating forces in American politics: the gathering resistance to further public-sector expansion, especially if it was for the project of expanding the welfare-state benefits extended to the poor as opposed to those enjoyed by the middle class and the rising demands for halts to tax increases or even dramatic rollbacks.[204]

The Nixon Presidency is correctly remembered in the history of domestic

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202. *See* David Vogel, *The "New" Social Regulation in Historical and Comparative Perspective*, *in* REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS 155 (Thomas K. McCraw ed., 1981).

203. *See, e.g.*, MARMOR ET AL., *supra* note 130, at 86-96; Margaret Weir, Ann Shola Orloff, & Theda Skocpol, *The Future of Social Policy in the United States: Political Constraints and Possibilities*, in POLITICS OF SOCIAL POLICY, *supra* note 69, at 421; KATZ, *supra* note 182, at 112-13 (stressing that Great Society programs perpetuated dualism of welfare system, with distinction between social insurance and public assistance).

204. A perceptive snapshot view of these and other changes as they appeared a few years later is provided by the *Symposium, Intergovernmental Relations in America Today*, 416 ANNALS AM. ACAD. POL. & SOC. SCI. (1974); see especially David Walker, *How Fares Federalism in the Mid-Seventies? in id.* at 17.

politics for the intensity of Nixon's partisanship, his willingness to play the race card and the "law and order" card in relation to school desegregation and criminal justice rulings of the federal courts, and, in the end, above all the grotesque abuses of power that were manifested in the Watergate period and as the result of the Pentagon Papers revelations. His rhetoric, like that of the 1994 Republican congressional leadership, repeatedly came to a focus on what he announced as radical departures from the inherited policies of the New Deal-Great Society administrations. And his specific announcement of a "New Federalism" was cast in terms that seemed to leave no room to doubt his contempt for federal bureaucracy's stifling effects on creativity, his determination to dismantle much of the grant-in-aid apparatus, and his insistence on restoration of state and local autonomy as a key to revitalizing individualism. "It is time for a New Federalism in which power, funds, and responsibility will flow from Washington to the states and to the people," Nixon declared in 1969.[205] The key to his program, as his aide Richard Nathan later wrote, was "a single idea—the need to sort out and rearrange responsibilities among the various levels and types of government in American federalism, including federal, state, local and private [sic] groups."[206]

With the advantage of a quarter century's perspective now, a sound argument can be made that in many essential respects Nixon's record as to federalism reform and many aspects of substantive policy—if one can fairly isolate that record, for purposes of analysis, from the context of his racially and socially divisive appeal to the "Silent Majority"—was as much an extension and elaboration of the New Deal legacy as it was a harbinger of future directions of political change. The record, like the man, was enigmatic; for without question, it also prepared the political seedbed for the very different kind of programmatic and structural reforms that Ronald Reagan (and later Newt Gingrich) would seek to effect.

The scope of this paper does not permit a discussion in any depth of this dualism in the Nixon record; but even told in brief form it carries an important message to those who contemplate, whether hopefully or with trepidation for the Republic, the zealous efforts going forward in the present day to throw out some of the essential baggage of the past.[207] It appears justified to regard a significant element of Nixon's redesign of federalism as of a piece, as it were, with much of the Great Society program that he condemned so roundly from the political stump, for the following reasons. First, Nixon showed no interest in weakening or cutting back federal regulation, either of the older style or of

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205. *Quoted in* CONLAN, *supra* note 135, at 31.

206. RICHARD P. NATHAN, THE PLOT THAT FAILED: NIXON AND THE ADMINISTRATIVE PRESIDENCY 18 (1975).

207. The Nixon-reforms story has been told well by many others, and brilliantly by Timothy Conlan; only its essentials need be reiterated here. *See* CONLAN, *supra* note 135.

the social and environmental mode that was instituted in the Johnson years. In fact, two of the major measures signed during his administration were the National Environmental Policy Act and the Clean Air Act Amendments of 1970.[208] Second, the Nixon administration did move to cut back on spending in certain aid programs, and indeed he pressed against the limits of and probably surpassed his constitutional authority by unilaterally impounding funds that had been authorized by Congress; he also favored block grants and finally an ambitious program for General Revenue Sharing (which became a centerpiece of aid programs for six years); and in the social welfare area he forthrightly proposed a uniform national standard and administration with "sharing" by the federal government for an income support policy, one of the administration's failures. These were all new thrusts; but at the same time, the direction of Great society reforms was manifest in some of the most important areas of policy: first, the number and scope of aid programs was not diminished in the Nixon years; second, it was his Administration that marked institution of most of the unfunded mandates, crossover sanctions, and other intergovernmental regulations complained of so bitterly in later years;[209] and third, as to the record of the entitlement programs the Nixon period was marked by a dramatic expansion in the number of states involved, individuals covered, and spending.[210]

Although return of power to state and local levels was a constant rhetorical theme in Nixon speeches and White House press releases, the so-called Nixon reforms had another dimension, one that in the end (with Watergate) was proven to have been sinister in much of its intent: this consisted of a set of strong executive initiatives to effect concentration and centralization of power in the hands of the President and his immediate circle. The power of the Office of Management and Budget (which oversaw the impoundment moves) was greatly enhanced in the areas of oversight and review; a Domestic Council was formed that gave the Oval Office staff (leading members of which later were convicted of Watergate offenses) much tighter control over the Cabinet departments and the bureaucracy, and worked to meet Nixon's mandate that the civil service bureaucrats must not be permitted to run the government.[211]

Professor Beer sums up the record in this way: "In contrast with Roosevelt ian liberalism, one might say, Nixon pursued Hamiltonian ends by

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208. Nixon did, however, veto the 1972 Water Pollution Control Act Amendments, passed in an override vote by Congress. *See id.* at 88.

209. *Id.*, 85; DAVID B. WALKER, TOWARD A FUNCTIONING FEDERALISM 110-12 (1981).

210. Scheiber, *American Federalism*, *supra* note 16, at 668-69; CONLAN, *supra* note 135, at 81-82. Conlan provides data on the programs, showing that spending for entitlements in constant 1972 dollars was $20.5 billion in 1964 and $27.4 billion in 1969, the first year of Nixon's presidency, then rose to $48.3 billion in 1974. Housing assistance increased fivefold, to $1.8 billion, during 1969-74; and food stamps nearly tenfold, to $2.8 billion, during the same period.

211. Scheiber, *American Federalism*, *supra* note 16, at 669-71.

Jeffersonian means"![212] The record also shows, as Beer writes, "how hard it is to remodel the federal system according to explicit, coherent criteria."[213] The years of Jimmy Carter's presidency were notable for the peaking of federal aid programs and a consolidation of administrative reforms.[214] Those years were but an interim, during which new tensions—especially the pressures of rising inflation on state and local governmental finances, weaknesses in the economy, and growing federal deficits—came into play, along with rising evidences of widespread loss of confidence in government.[215] With the election of Ronald Reagan as President in 1980, it was evident that a sweeping reconsideration of government's role in society—including, but certainly not confined to, the question of federalism reform—would be brought to center stage again in national politics.

V. THE CONTEMPORARY ERA: FEDERALISM VALUES, REAL PRIORITIES, AND THE NEW "CAMPAIGN OF HISTORY," 1980-1996

Redesigning the architecture of federalism has been a major theme in the rhetoric of conservatives since 1980. It has been presented to the public, moreover, not only as an urgent objective of policy but as a constitutionally mandated imperative. I do not undertake here to provide a detailed accounting and analysis of our political and constitutional history since Ronald Reagan made his New Federalism a centerpiece of the Republican agenda; but I will attempt to suggest the very broad outlines of context, content, and meaning in the record of modern-day federalism reform efforts.

The intense preoccupation of conservatives with the issues of centralized versus decentralized power is cast, typically, in terms of "principled" beliefs rooted deeply in the old federal creed. It is equally important to recognize, however, that the modern conservative record offers considerable reason to doubt that the imperatives of a principled federalism will consistently override other policy priorities. That is to say, there is abundant direct evidence that New Federalism devolutionists stand ready to permit priorities such as property rights to trump what strict adherence to federalism ideals would seem to require. A striking example is provided by the recent history of tort "reform," which has taken the form of a conservative movement for nationalization of tort liability rules in ways explicitly designed to reduce the autonomous authority

212. By contrast, that is, with FDR's pursuit of Jeffersonian ends through Hamiltonian means. Samuel Beer, *Introduction* to CONLAN, *supra* note 135, at xvi.

213. *Id.* at xxi.

214. WALKER, *supra* note 76; David A. Caputo, *Contemporary American Federalism: Implications for American Cities*, in THE COSTS OF FEDERALISM, *supra* note 173, at 187, 191-92.

215. Donald Haider, *Intergovernmental Redirection*, 466 ANNALS AM. ACAD. POLI. & SOC. SCI. 165, 170-72 (1983); John Shannon, *Fend-for-Yourself (New) Federalism*, *in* PERSPECTIVES ON FEDERALISM: PAPERS FROM THE FIRST BERKELEY SEMINAR ON FEDERALISM 31, 31-37 (Harry N. Scheiber ed., 1987).

of states—in an area of law in which both legislatures and courts in the states have shown creativity in adapting the law realistically to the conditions of modern corporate power and industrial society.[216] Similarly, in the Reagan administration years, there were many instances in which federal agencies dominated by "conservative" appointees acted to reduce or even to override altogether state regulatory authority in the field of consumer protection.[217]

No less striking is the evidence that while proclaiming the virtues of the states and local government in their rhetoric, the conservative leaders of New Federalism have lent their enthusiastic support to the anti-tax movement in the states and more generally to the populistic-style antigovernmental movement in its various manifestations. To that degree, the shifting of policy responsibilities to the states, at least in the redistributional field, will all too often mean—since in redistribution policy "race to the bottom" considerations will ineluctably come into play—that it is a predictable way of further cutting programs, reducing social benefits, and in the end harming most the elements of the population who are most deprived.[218]

The history of public policy seems to indicate that until the mid-1970s the American public largely accepted the proposition that mass society required growth in public services comparable to the rate of growth in population, private sector activity, collective wealth, and the complexity of an urbanized and modern-industrial society. Gathering controversy over the expanded government role in the 1960s, turmoil associated with the civil rights movement, the challenge of clashing cultural claims, urban riots, and the demystification of the "establishment" in the Vietnam protest era, all contributed to a disillusionment that ushered in a period of "anti-politics" with which we live still today.[219] Politicians who have spent their lives in government now shrewdly distance themselves, try to run against government in framing their election campaigns, and abandon even the pretense of realism in articulating new public philosophies, if they may be dignified with such a label. A recent and particularly grievous example was the spectacle of a serious candidate for the Republican presidential nomination, himself a former

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216. *See* CONLAN, *supra* note 135, at 213-14. It should be noted that in international trade talks, the Bush Administration (again, paying lip service in domestic politics to federalism and states' rights) committed itself to seek congressional legislation that would override state product liability law. *Key Elements of U.S.-Japan Structural Impediments Initiative Report*, 59 ANTITRUST & TRADE REG. REP. 28 (July 5, 1990). *See also* Harry N. Scheiber, *International Economic Policies and the State Role in U.S. Federalism: A Process Revolution?*, *in* STATES AND PROVINCES IN THE INTERNATIONAL ECONOMY 65 (Douglas M. Brown & Earl H. Fry eds., 1993). At the March 1996 Yale Symposium, Professor Robert Rubin of Stanford Law School commented insightfully upon the ironies of conservatives usually associated with states' rights standing at the forefront of the movement of national product liability laws.

217. *See, e.g.*, Susan B. Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 VA. L. REV. 1429 (1984).

218. *See, e.g.*, PAUL PETERSON, THE PRICE OF FEDERALISM (1995).

219. Donald W. Lief, *Revenue Sharing and Citizen Participation*, *in* GENERAL REVENUE SHARING AND DECENTRALIZATION 89, 107 (Walter F. Scheffer ed., 1976).

governor, proposing in 1996 that the federal government could simply phase out welfare altogether, leaving it to the states, where it belonged, and where apparently the programs might wither away altogether so far as he was concerned.[220]

After nearly two decades of what seems at times to be an ever-broadening attack on government at all levels, the homilies of federalism, states' rights, and "returning power" to the states begin to ring hollow. By contrast with the proposals now before the nation, the Revenue Sharing idea in the 1970s was based on the notion (enthusiastically taken up by Nixon and providing a basis for bipartisan support), that in shifting programmatic responsibilities and the concomitant fiscal burdens to the states, they should also be provided with a flow of federal funds that was designed in part to address interstate and interregional income and wealth disparities; and many of the categorical programs as well were also concerned explicitly with adjustment of grants according to the tax effort by the states, so as not to give advantage to those which taxed their citizens most lightly.[221] Now the premises are entirely different: when devolution is championed in the field of social welfare, its proponents seem willing to concede openly that increased suffering will ineluctably be the result.[222] Meanwhile, the programs of welfare that are aimed at providing for the needs and comfort of a middle class majority have been relatively secure—despite the uproar over entitlements and their fiscal impact—from political attack and attenuation.[223]

Another dimension of the large historical context of this nation's public

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220. Reference is to Governor Lamar Alexander's offhand proposals of February 1996. *See* Kevin Sack, *Alexander's Ideas: Alexander Builds His Hopes on Some Radical Departures*, N.Y. TIMES, Feb. 18, 1996, § 1, at 1. Peterson has observed that,

> The stance taken by Republican policymakers in 1995,is the mirror image of the one taken a generation ago by Democratic Presidents John Kennedy and Lyndon Johnson and, ironically enough, by Republican Richard Nixon. At that time almost every problem in society was deemed worthy of attention by the national government.

PETERSON, *supra* note 218, at xi.

221. CONLAN, *supra* note 135, at 19-35. In its studies and reports on "fiscal balance," which became crucial in setting the terms of the Revenue Sharing debates of the Johnson, Nixon, and Ford presidencies, the U.S. Advisory Commission on Intergovernmental Relations gave extensive attention to differential tax effort and differential wealth and income (and level of need) among the individual states. *See* ACIR, FISCAL BALANCE IN THE AMERICAN FEDERAL SYSTEM, Vols. 1-2 (1967).

222. The hope is held out by Speaker Gingrich and others that in the longer run, reformed private behavior—with respect to work ethic, marriage and family, sexual morality—will reduce the need for the programs. This behavioralist approach is more than a return to concepts of the worthy versus the unworthy poor; it also legitimates transparent callousness to immediate costs borne by those whose suffering has nothing to do with work ethic or sexual mores and the like. *See, e.g.*, NEIL GILBERT, WELFARE JUSTICE (1995) (arguing for "enabling state" that will take account of such differences of need and behavior in more positive vein); Richard Nathan, *The Role of the States in American Federalism*, *in* THE STATE OF THE STATES 13, 28-29 (Carl E. Van Horn ed., 1996).

223. *See* KATZ, *supra* note 182; Dennis J. Snower, *The Future of the Welfare State*, 103 ECON. J. 700, 701 (1993) (showing that this is more general phenomenon in course of modern "conservative revolution" and its attack on welfare state in advanced industrial nations). This is also a main theme in MARMOR ET AL., *supra* note 130.

policy development since 1980 is the controlling role that the Reagan-era deficits have come to play in national politics, including the politics of architectural tinkering with federalism structures. The tax cuts and vastly increased defense spending of the eighties, converging with the impact of Proposition 13 in California and tax limitation measures in other states that responded to the California model, worked with a pincers effect on state and local government: the federal deficits led to new demands by conservatives for cutbacks in the federal aid flow (which began to cut deeply into the state fisc by the late 1980s), at the same time as the self-imposed constraints on taxes, or actual cutbacks as in California, began to hit.[224] Some scholarly enthusiasts for devolution welcome the evidence that the states have responded with a great variety of programmatic adjustments which, they argue, bespeak creativity and renewed vigor and imagination in state government.[225] A closer look at the data often demonstrates, as even some of these champions of devolution will concede, that the "adjustments" consist largely of cutbacks in public services that have fallen hardest upon the people who are poorest and are least able to afford private alternatives.[226]

In any case, as Timothy Conlan has persuasively argued, the overriding policy goals of the Reagan conservatives were to effect a reduction in civilian governmental activity at all levels, even while building up defense expenditures; cutting taxes; and promoting deregulation of business.[227] Insofar as this would be accomplished because government closer to home would be less likely than the more remote government inside the Beltway to adopt expensive or unnecessary programs, Reagan sought to devolve national programs he could not cut back or eliminate. Thus speaking in support of his "program swap" proposal, which would have left the states with control of social programs they manifestly would not likely have sustained at then-current levels, Reagan declared: "It's far easier for people to come to Washington to get their social programs. It would be a hell of a lot tougher if we diffuse them, and

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224. PETERSON, *supra* note 218, at 62-67; Susan A. MacManus, *Financing Federal, State, and Local Governments in the 1990s*, 509 ANNALS AM. ACAD. POLI. & SOC. SCI. 22, 23-35 (1990); Shannon, *supra* note 215, at 31-37. John Shannon, assistant director of the U.S. Advisory Commission on Intergovernmental Relations, early identified the dilemma for the states, predicting that an extended period of "Austerity Federalism" lay ahead. *See* John Shannon, *New Federalism: Perspective and Solutions*, GOVERNMENTAL FINANCE, Sept. 1982, at 9-16.

225. *See, e.g.*, Nathan, *supra* note 222, at 16-17.

226. See, for extensive data analysis in PETERSON, *supra* note 218. A concession that the poor have suffered most is made, for example, by Richard Nathan, *Institutional Change Under Reagan*, *in* PERSPECTIVES ON THE REAGAN YEARS 121, 137 (John L. Palmer ed., 1986) ("cuts and changes in domestic grants-in-aid programs made in President Reagan's 1981 budget act had more adverse effects on people (notably the 'working poor') than on state and local governments"). *See also* RICHARD P. NATHAN, FRED C. DOOLITTLE, ET AL., THE CONSEQUENCES OF CUTS (1983), *reprinted in* AMERICAN INTERGOVERNMENTAL RELATIONS, *supra* note 167, 260, 262.

227. *See generally* CONLAN, *supra* note 135.

sent them out to the states."[228] Fiscal pressures at home, compounded by deficits generated through Reagan's own tax cut and defense budgets, made it certain that diffusion of authority would mean cutbacks in social welfare; what happened with diffusion of power as a defense of individual freedom, or what relationship freedom bore to material means for survival and comfort, seem to be questions not addressed in this particular monologue.[229] If anything, the exclusion of considerations of equity and what used to be termed matters of social conscience and social justice is an even more dominant aspect of comparable debates of policy in Washington in the present day.

It has been said often that "[t]he genius of the British constitutional system has been to disguise constitutional questions as mere political issues."[230] This is very unlike the genius of the American system, as is evident: in our system, questions of policy and of politics are wrapped in constitutional garments so routinely that it is not quite evident at times whether such wrappings are correctly described as "disguise." The relationship of federalism debates among legal scholars and jurists to policy debates, and especially to the conservative attack on civilian governmental activities at all levels, since the 1970s, thus constitutes an especially intriguing aspect of the history that we are considering.

The proximate origins of the modern neo-conservative jurisprudence of federalism is to be found in the arguments mounted against the Warren Court and its constitutional interpretations of civil rights, criminal process rights, and voting rights.[231] Proceeding parallel with the political forces of reaction to the Warren Court rights revolution (including the belated constitutional responses to McCarthyism) and to the post-New Deal and Great Society social programs,

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228. *Quoted in* James E. Swiss, *Intergovernmental Program Delivery: Structuring Incentives for Efficiency*, *in* THE COSTS OF FEDERALISM, *supra* note 173, at 276.

229. If California's experience has any general applicability, as I believe it does, the passage of time renders such questions even more difficult. The beguiling prospect of property tax relief (extending to corporate business landowners, not only residential properties) carried Proposition 13 to victory in 1978; but the state legislature was able to make up some of the deficits of county and municipal government for many years, until itself hobbled by subsequent initiative measures that constrained expenditures. As public services in medical care and welfare have declined, and deteriorated, and social needs could not be addressed at anything like the levels of spending that had once been taken as routine, the terms of the public debate have gone through a remarkable shift. So many years have gone by that it is difficult, even for politicians who are willing to risk their careers in public life (already made more difficult by term limits) by questioning the wisdom of tax cuts, to sustain public awareness that the current deterioration of government services is functionally related to the 1978 tax measure and its direct-ballot progeny. Explanation of a causal relationship that has become so complex because of the duration of the intervening episode of state bail-outs is part of the larger dilemma of explaining complexities to an impatient public in modern democratic governance in America, analyzed by Robert Dahl in *The New American Political (Dis)Order*, *in* THE NEW AMERICAN POLITICAL (DIS)ORDER 1-23 (1995). For specific evidence of impacts of policy reforms and retrenchment in one state, see also Papers on Welfare Policy and Administration, *in* THE NEW FISCAL FEDERALISM AND THE SOCIAL SAFETY NET: A VIEW FROM CALIFORNIA (James Hosek & Robert Levine eds., 1996).

230. MICHAEL BURGESS, THE BRITISH TRADITION OF FEDERALISM 3 (1995).

231. *See* Saker, *supra* note 179; Eugene W. Hickok, Jr., *Federalism's Future before the U.S. Supreme Court*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 73, 80 (1990).

constitutional theorists and jurists on the bench took up the cause of constructing a new doctrinal orthodoxy that incorporated essential elements of the old federal creed. It is one of the impressive triumphs of right-wing conservatism that it has so successfully advanced this doctrinal agenda, and shed itself of much of the obloquy associated with the darker side of those proximate origins.

I believe that in appraising the rising influence, in law and by extension in politics, of the new federalist orthodoxy, future historians will need to take account particularly of the way in which the claims of understanding "original intent" and mobilizing such claims to the conservative cause was accomplished. When conservative champions of original intent arguments such as Reagan's Attorney General Edwin Meese invoked the ideas (as they professed to understand them unerringly) of the Founders, they maintained an exclusive focus on the 1787 founding. The meaning of the Civil War-Reconstruction amendments as equally essential to a view of "intent" was virtually cast out of the arena of debate; indeed, a repudiation of the modern jurisprudence of the Fourteenth Amendment—that is, of incorporation of the Bill of Rights as a constraint on state action—became an explicit, central element of the conservative orthodoxy.[232] The obvious success with which this new jurisprudence has contributed to the quest for legitimacy of retrenchment and reaction in the conservative agenda, to say nothing of its ascendancy in some of the major recent decisions of the Rehnquist Court, is evidence of how profoundly the successful popularization of constitutionalism can influence political change.

The battle for a new jurisprudence of federalism has been, withal, a "campaign of history"—to employ a phrase used by Max Lerner to describe the long campaign conducted by John Marshall to implant the institution of judicial review in the very structure of republicanism in the new nation.[233] Its premises and its doctrines work almost always in one direction—against the policies of the modern liberal state associated with the New Deal and the Warren Court's rights revolution. The new constitutional orthodoxy will be seen in a long historical view, I think, as an integral element of the conservative political movement that has orchestrated the broad confrontation in our politics over basic matters of social, economic, and cultural policy in the mid-1990s. The intensity of the campaign must serve, in light of the lessons one can draw from past experience with reformation of federalism's architecture, as a sharp reminder that the real debate is about what kind of government this nation will have and ultimately about the process that will reveal through our policies what kind of people we have become. The final test will be not in any clever legal arguments about original intent or incorporation or (for that

232. *See* Harry N. Scheiber, *Constitutional Structure and the Protection of Rights: Federalism and Separation of Powers*, *in* POWER DIVIDED, *supra* note 173, at 17-29.

233. Max Lerner, *John Marshall and the Campaign of History*, 39 COLUM. L. REV. 396 (1939).

matter) about the details of the architecture, or about the fine points of intergovernmental relations as an administrative problem. That test will be found in how our politics defines and expresses the public philosophy of a mature democracy.