

# Michigan Law Review

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Volume 58 | Issue 7

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1960

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### Recommended Citation

John R. Brown, *Free Will in the Frontiers of Federalism*, 58 MICH. L. REV. 999 (1960).

Available at: <https://repository.law.umich.edu/mlr/vol58/iss7/3>

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## FREE WILL IN THE FRONTIERS OF FEDERALISM\*

*John R. Brown†*

**I**N an assembly dedicated, as this one is, to frontiers in law and legal education in celebration of the centennial of this great Law School and forecasting what is to be expected in the next one hundred years, the idea of states' rights—of the federal-state relationship—has seemed almost ironic.

### *What Is a Frontier?*

A frontier is normally one of two things—either a boundary marking the last extreme of development or dominion, or, on the other hand, the point of departure—the jumping-off place into a new and untried field—the wild blue yonder and the great unknown. But the notion that the federal-state relationship is a frontier seems not to fit either definition. The boundaries have not been limited and we are certainly not dealing with the great unknown.

### *Federalism Is Timeless*

The fact is, as Justice Frankfurter has declared, "The problem . . . is as old as the Union and will persist as long as our society remains a constitutional federalism."<sup>1</sup> And Woodrow Wilson thought, "The question of the relations of the states and the federal government is the cardinal question of our constitutional system."<sup>2</sup>

These ideas were echoed by President Eisenhower's message of March 30, 1953, and the congressional declaration in the act creating the Commission on Intergovernmental Relations. It seems odd that after one hundred seventy-two years Congress found it necessary to declare, "It is necessary to study the proper role of the Federal Government in relation to the States and their political subdivisions . . . to the end that these relations may be clearly

\* The opening address presented at the program held in observance of the Centennial of The University of Michigan Law School, October 22, 23, 24, 1959.—Ed.

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<sup>1</sup> *Irvin v. Dowd*, 359 U.S. 394 at 407 (1959).

<sup>2</sup> ANDERSON, *THE NATION AND THE STATES, RIVALS OR PARTNERS?* 3 (1955).

defined and the functions concerned may be allocated to their proper jurisdiction. . . ."<sup>3</sup>

### *The Problem Won't Stay Away*

But notwithstanding such ambitious undertaking that "these relations . . . be clearly defined and the functions . . . allocated . . ." we shall always have this problem. Like Mordecai at the Gate, we shall always have to deal with it for the simple reason that there is no legal way to banish it—not, at least, so long as courts are open and citizens may petition their legislators. Nor can there be anything but the most superficial selectivity in choosing the time, or place, or circumstance, for decision.<sup>4</sup> Voters—pressure groups—compel legislative bodies to listen and perhaps enact, and litigants with an actual case and controversy compel courts to hear and adjudicate though the cause has an unsavory flavor or the timing is inopportune.<sup>5</sup> The stress on this relationship is seldom a direct contest, legislative or judicial, between the two levels of government. Nearly always is the dispute between citizens, on the one hand, and one of the two governments on the other.<sup>6</sup> But being the many-sided paradox that it is, it is this un-

<sup>3</sup> 67 Stat. 145, §1, 5 U.S.C. (1958) §§138a-138j note, approved July 10, 1953. This resulted in the appointment of the Commission on Intergovernmental Relations whose report to the President for transmittal to Congress was published in 1955. In addition to the commission report comprising Part I, a general treatment and conclusions, and Part II on specific recommendations in functional responsibilities of various specific activities, there was also published as an appendix fifteen Study Committee Reports covering in detail such problems as federal aid to agriculture, highways, education, public health, national resources, airports, urban redevelopment and impact of federal grants-in-aid. This culmination of the persistent tireless efforts of individuals and agencies is well traced in the annotated chronology, *INTER-GOVERNMENTAL RELATIONS IN THE UNITED STATES* (RM-321), published by the Council of State Governments, especially pages 63-108 (1958).

<sup>4</sup> "[W]hat the Government never can do, whatever techniques of legislation it employs, is to change the way in which the problems keep coming to it, emerging at the level of private activity with the gloss of private adjustments and maladjustments already put upon them." Hart, "The Relations between State and Federal Law," 54 *COL. L. REV.* 489 (1954), in *MACMAHON, FEDERALISM MATURE AND EMERGENT* 177 (1955), compiling papers presented at the Conference on Federalism, January 1954, Columbia University.

<sup>5</sup> The famous "sick chicken" [*Schechter Corp. v. United States*, 295 U.S. 495 (1935)] is a notable example. See *SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT*, 2d ed., 931 (1954). On the other hand, there are highly respected sources that think that "timing" is a legally relevant and important factor in the determination of controversial constitutional issues. This was a major theme of Dean Ray Forrester, Tulane University Law School, in a paper presented to the institute on constitutional law held by the Houston Bar Association in April 1959, the proceedings of which were published in 4 *SO. TEX. L.J.* 107 (1959). See Forrester, "The Supreme Court and the Rule of Law," 4 *SO. TEX. L.J.* 107 at 114 (1959), and the question and answer discussion at pages 120-128 concerning the propriety of "timing" as a factor.

<sup>6</sup> Of course, state legislatures may, and often do, memorialize (or even "interpose") Congress if sufficiently provoked, and the respective governments frequently enter private litigation as intervenor or as *amicus*, but responsible control is elsewhere.

amenability to authoritative direction that assures continued vitality to federalism.

### *Federalism Insoluble*

Not only does its emergence from private affairs assure that the problem will be with us—the only uncertainty being where or when will it strike—the fact is that by its very nature it must be with us because it is insoluble. This leads me to confess that in the many hours I have spent in the education of this judge on the meaning of federalism, I have been more and more impressed with its kinship to theology. I hope you will not treat it as an undue trespass on this nonsectarian gathering for me to say, in illustration, that it resembles in many ways controversial areas of my Calvinistic faith as we have, for example, undertaken to reconcile the contradictions of Free Will and Predestination. But the fact is that the very nature of federalism defies categorical delineation. Pointing up the inherent contradictions, MacMahon applies Dicey's classic statement that federalism "requires for its formation two conditions." On the other hand, there must be "a body of countries . . . so closely connected by locality, by history, by race, or the like, as to be capable of bearing, in the eyes of their inhabitants, an impress of common nationality." On the other hand, there must exist "a very peculiar state of sentiment among the inhabitants of the countries, which it is proposed to unite. They must desire union, and must not desire unity."<sup>7</sup>

Even the classic outlines of that great expounder, Chief Justice Marshall, carry their own seeds of uncertainty. He declared, "That the United States form, for many and for most important purposes, a single nation," and the states as "constituent parts of the United States . . . are members of one great empire—for some purposes sovereign, for some purposes subordinate;"<sup>8</sup> and the "Powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."<sup>9</sup>

It is no modern cynical rejection of these profound statements which had decisive significance in the constitutional history of our nation to suggest that the concept of *sovereignty* was unavoidably given an elasticity which political science had theretofore not

<sup>7</sup> MACMAHON, *FEDERALISM MATURE AND EMERGENT* 6 (1955).

<sup>8</sup> *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264 at 413-414 (1821).

<sup>9</sup> *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 at 410 (1819).

known. Especially is that so if we add to the two governments, as such, the ultimate sovereignty of the people. Either the term "sovereign" is elastic<sup>10</sup>—and hence needs continuous definition; or these flowery statements were palpable demagoguery.

### *Contradictions in Federalism*

The conceptual uncertainties of this unique political complex find tangible expression in limitless ways. For example, as I elucidate further, it was the complete independence of the states under the Confederation and the lack of power in the central government to enforce its proper demands upon the constituent states that was once the chief weakness of that structure and, more important, a main precipitant for the Constitutional Convention. There seems to have been unanimous agreement among the delegates that the country was facing political life or death. These sentiments and the necessity for strong therapy were reflected in the resolution proposed which gave the National Legislature power "to call forth the force of the Union against any member . . . failing to fulfill its duty under the Articles thereof."<sup>11</sup> Madison first thought well of this, but on more reflection on the use of force, the more he doubted the practicability, the justice, and the efficacy of it when applied to people collectively and not individually. Efforts to revive this mechanism were soundly denounced. Its wisdom is demonstrated in our own historical perspective, and perhaps more vividly in the spectacular failure of South American countries—whose governmental structure is largely patterned on ours—to capture the real spirit of freedom through federalism. There subjugation of the constituent states by military forces of the central government has not only imperiled the qualified sovereignty of the parts; it has, within the central government, made it a question of *who* has the effective control of the military.<sup>12</sup>

Our own experience—some of it tragic and contemporary—attests that when the contest is between two states, or between a

<sup>10</sup> As much was recognized by the letter of transmittal from the Convention to the Congress of the Confederation. "It is obviously impracticable in the Federal Government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest." WARREN, *THE MAKING OF THE CONSTITUTION* 688 (1947).

<sup>11</sup> WARREN, *THE MAKING OF THE CONSTITUTION* 171 (1947).

<sup>12</sup> This is well traced by Arthur N. Holcombe in the chapter on "The Coercion of States in a Federal System," in MACMAHON, *FEDERALISM MATURE AND EMERGENT* 137 (1955).

state and the national government, and the controversy is translated into the demand for positive—not negative—action, ordinary judicial processes lack their usual coercive effect<sup>13</sup> and the use of sheer force is an unsatisfactory substitute for a disciplined submission to law.<sup>14</sup> But the paradox remains: the one must yield to the other, but must not be forced to yield against its real will.

### *Federalism Bears Prenatal Marks*

Apparent contradictions do not end in the conceptual definitions. For our Constitution, and hence the governmental structure of federalism, is a product of dual and competing demands. Its continued vitality depends upon its capacity to respond to like demands emerging in different ways and on different subjects, but still a reflex of the yearning for strength in unity and diverse expression in localized independence. The clash existed at the moment of birth. Indeed, the impact of these prenatal forces was vivid on this political structure which Washington called “a child of fortune, to be fostered by some and buffeted by others.”<sup>15</sup>

While the demand for protection of interests, which we vaguely describe as “states’ rights,” was persistent and effective and resulted in many of the great compromises of the Convention, the current excitement in the name of states’ rights frequently lacks historical balance. I would hasten to add that in making that statement, I do not disparage those, or their motives, either now or at other times, who are so vocal.<sup>16</sup>

But I think it fair criticism to suggest that much of the contemporary protest gives the impression that states’ rights as the so-called law of the land was the principal concern of the Constitu-

<sup>13</sup> See, for example, *Virginia v. West Virginia*, 246 U.S. 565 (1918), and the prior appearances of this case, 206 U.S. 290 (1907); 209 U.S. 514 (1908); 220 U.S. 1 (1911); 222 U.S. 17 (1911); 231 U.S. 89 (1913); 234 U.S. 117 (1914); 238 U.S. 202 (1915); 241 U.S. 531 (1916), in the nearly sixty-year effort to enforce on West Virginia a portion of the public debts assumed by West Virginia at the time it was carved out of Virginia as a new state.

<sup>14</sup> This is generally exemplified by the action of Governor Almond of Virginia once the series of unsuccessful appeals through the federal courts authoritatively nullified the structure of Virginia’s massive resistance legislation.

<sup>15</sup> Washington’s letter to Lafayette, Sept. 18, 1787, WARREN, *THE MAKING OF THE CONSTITUTION* 725 (1947).

<sup>16</sup> Critics of those now invoking states’ rights may be open to like criticism of selfish motive. For example, supremacy of the federal government under the commerce clause was for long a tool of laissez-faire, not to assure federal regulation, but to prohibit that by the states. The consequence was, at times, almost to force the states to find an *enumerated* power (the police power) to sustain local legislation. See SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT*, 2d ed., 188-207 (1954). Much the same is true of those attacking state acts regulating business under the Fourteenth Amendment.

tional Convention. The historical truth is that the Convention was assembled and the writing of the Constitution undertaken not to perpetuate the states as they then existed. The Convention did, of course, deal with the imperative need for (1) unity for survival, but equally important was the demand for (2) effective curbs on the states *vis-à-vis* their own inhabitant citizens and to prevent discriminations and obstacles to trade and commerce among the states. The first factor of necessity is well known. Washington, then respected by all, described the shaky condition of the Confederation. "In a word, it is at an end; and, unless a remedy is soon applied, anarchy and confusion will inevitably ensue."<sup>17</sup> To him the first requirement to "the existence of the United States, as an independent power" was "an indissoluble union of the States under one Federal head."<sup>18</sup>

But no less important was the second factor. Indeed, inclusion of new express prohibitions upon the powers of the states was—a noted author states—a response "in favor of honesty and morality" by putting "an end to statutes enacting laws for special individuals, setting aside Court judgments, repealing vested rights, altering corporate charters, staying the bringing or prosecution of suits, preventing foreclosure of mortgages, altering the terms of contracts, and allowing tender in payment of debts of something other than that contracted for."<sup>19</sup>

And the story of the need for national control of interstate and foreign commerce is a familiar one which is, and necessarily will be, never finished.<sup>20</sup>

Of course, this is not the whole picture.<sup>21</sup> It serves our present purpose of illustrating the intense competition between forces which would, at one and the same time, produce a nation and a union of separate independent states having dominion over all things internal.

<sup>17</sup> Washington's letter to Jefferson, May 30, 1787, WARREN, *THE MAKING OF THE CONSTITUTION* 155 (1947).

<sup>18</sup> General Washington's letter to the governors of the states, June 8, 1783, *id.* at 13.

<sup>19</sup> *Id.* at 552. The author earlier stated: "[O]ne of the causes of the calling of the Convention was the unjust and harmful legislation which had been indulged in by the State Legislatures." *Id.* at 548.

<sup>20</sup> An excellent review is that of Professor Allison Dunham, "Congress, The States and Commerce," 8 *UNIV. CHI. L. SCHOOL RECORD* 54 (Special Supp. 1958). This is one of seven monographs prepared for use of the Committee on Federal-State Relationships as Affected by Judicial Decisions of the Conference of Chief Justices which subsequently adopted the Brune report.

<sup>21</sup> These manifold interlocking forces are well summarized by SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT*, 2d ed., 26 (1954).

*Federalism a Frontier of Uncertainty*

So you can see from this very extensive prologue that states' rights or federal-state relationships hardly satisfy either definition of a frontier. There is and can be no fixed boundary and one could hardly say that something that has been with us for one hundred seventy-two years is an advanced region of unexplored thought. But having demonstrated this to talk myself off this program, I fear it has done just the reverse. It has demonstrated, I think, that in a very real sense this is a frontier. For having had the problem with us so long and being by nature an insoluble one, we must recognize that the future holds *uncertainty*.

But uncertainty does not daunt me. In today's tensions we would be demanding a luxury out of step with the times if we were either to insist on—or regret the absence of—*certainty* in the field of constitutional government. Indeed, I would think that certainty—almost universal certainty in the era of 1890-1920 that experimental state legislation would be annulled by Supreme Court action—may have been one of the principal causes for the revolutionary changes of the New Deal period. That certainty was also one which—too many are too prone to forget too soon—came from the use of the same broad guaranties of the Federal Constitution to strike down state action—in short, to deny states' rights.

*Uncertainty From Explosive Growth*

This uncertainty will comprehend many areas. One will be the question of *who*, in actual practice, will be the ultimate significant determiner—the judiciary, the executive, or the legislative. Others will be the likely trends in specific areas, such as criminal law. Others may arise in areas of new technological development of which atomic energy may now be regarded as almost ancient as the nations of the world probe into outer space. All of these will be complicated by an exploding population which will run our population from 172 million in 1958 to the staggering total of 272 million in 1980—just twenty years away.<sup>22</sup> And cutting across all others in another facet of our mushrooming population and economy—the modern metropolitan area. Defined by the Census Bureau as a complex community of 50,000 population or more

<sup>22</sup> BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1, 6 (1958).



with an urban fringe, there were in 1955 over 170 such areas. Of them, 23 extend across and 28 others up to a state line. Forty-three million persons—one out of every four—live in metropolitan areas that are now, or may soon become, interstate.<sup>23</sup> Yearn as we will for the days of old, the 160 miles which General Washington travelled back on departure from Philadelphia to his beloved Mount Vernon is now so short that a modern jet could not be efficiently employed. And in this small area over six and one-half million people make up the metropolitan areas of Philadelphia, Wilmington, Baltimore and Washington. And all of this is accompanied by ceaseless movement in the nation's 66 million motor vehicles.<sup>24</sup>

If, in the midst of a nationwide steel strike which cripples the economy of the industrial state of Michigan, we could declare in the old absolutisms that there was no "possible legal or logical connection . . . between an employee's membership in a labor organization and the carrying on of interstate commerce,"<sup>25</sup> I would have to acknowledge that the Constitution takes no heed of

<sup>23</sup> Report of the Commission on Intergovernmental Relations 50-51 (1955). See also STATISTICAL ABSTRACT OF THE UNITED STATES, note 22 *supra*, Table 11 at p. 15, and Table 38 at p. 39. Our restless undulating mobility is shown by the fact that in the year 1956-1957 over five million persons moved from one state to another.

<sup>24</sup> *Id.* at 557, Table 709. This brings sharply to mind the humorous wisdom of Lord Simonds, Lord High Chancellor of Great Britain, in his address to the American Bar Association [39 A.B.A.J. 1060 at 1116 (1953)] concerning English welfare legislation. "Such legislation, which dates back now for many decades, has become an essential feature of the civilization that we know. It has its dangers in the proliferation of regulations and of officials to enforce them and of tribunals to determine their application, and there are many who sigh for more Arcadian simplicity of life. But in Arcadia, the sound of the internal combustion engine had not silenced the pipes of Pan; it is vain to seek pastoral ease in the hearts of great industrial cities."

<sup>25</sup> *Adair v. United States*, 208 U.S. 161 at 178 (1908). The statement is even more startling since the legislation was the outgrowth of the bloody pullman strike. SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT*, 2d ed., 520 et seq. (1954).

In retrospect, the economic legalisms of *Carter v. Carter Coal Co.*, 298 U.S. 238 at 309 (1936), uttered in 1936 in the depths of a nationwide depression, are perhaps even more surprising. "Such effect as [labor controversies] may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character."

When the problem is excised from the context of controversy over the Supreme Court or federal encroachment and approached as a matter of economics, even the most conservative sources consistently critical of federal encroachment and judicial legislation by the Supreme Court recognize the devastating economic impact of strikes over labor contracts. See, e.g., *HOUSTON CHRONICLE*, Sept. 26, 1959, editorial, "Steel Strike Can't Continue Without Disastrous Effects": "From here on the effects of the 74-day-old steel strike will snowball. The past week brought the closing of the first automobile components plant as a result of lack of steel. From now on, unless the mills reopen soon, plants large and small will be closing throughout the country. Unemployment will rise sharply. Business in all lines will be adversely affected."

population<sup>26</sup> as such. And of automobiles, of course, it knew naught. But my departure is not over the declaration of legal principles. Infirmary comes from the misinterpretation of economic factors and those which—until a few years ago—we could safely describe as sociological. The aggregation of these large masses in compressed areas foretells the stress upon interstate commerce for the mere supply of daily needs of food and fuel, and the undulating mobility across lines, artificial, unseen, and incapable of containing the constant pressure of social and economic forces.<sup>27</sup>

### *Who Will Draw the Line?*

In all of these uncertainties I think the thing most certain is the agency which will be the principal ultimate determinant in outlining state and federal relations. Based upon the development of the last forty years, it is my belief that Congress—in the last analysis—will bear the principal responsibility and perform the most important role in this process.

I arrive at this prediction through the interplay of several factors. One, of course, is the commerce clause expanded under the influence of the New Deal era decisions.<sup>28</sup> Another factor, of course, is the Court's marked change in its attitude toward state legislation.<sup>29</sup> But in my approach I prefer to minimize these factors. Each was an overturning of the past so that many—especially at the bar—sincerely think that the very Ark of the

<sup>26</sup> Excepted, of course, is apportionment for the House of Representatives and a direct tax.

<sup>27</sup> American history, so far as I know, deals with no isolated panics of consequence; they were either nationwide or affected substantial sections of the country.

<sup>28</sup> The National Labor Relations Act upheld in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); Railway Labor Act upheld in *Virginia R. Co. v. System Federation No. 40*, 300 U.S. 515 (1937); the amended Agricultural Act upheld in *Mulford v. Smith*, 307 U.S. 38 (1939); *Currin v. Wallace*, 306 U.S. 1 (1939). See *Wickard v. Filburn*, 317 U.S. 111 (1942), and the highly critical comments of it in White, "The Supreme Court's Avenues of Escape from the Constitution," 4 So. Tex. L.J. 129 at 136-137 (1959), one of a series of papers presented at the institute on constitutional law by the Houston Bar Association in April 1959. The Fair Labor Standards Act upheld in *United States v. Darby*, 312 U.S. 100 (1941); *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1941).

<sup>29</sup> Spectacular cases in the same field of labor relations were *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), overruling *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

Never in our history have the states been accorded a greater opportunity for legislative experimentation. See Rostow, "The Court and Its Critics," 4 So. Tex. L.J. 160 at 172-173 (1959), one of five papers presented at the two-day institute on constitutional law held by the Houston Bar Association in April 1959. See KAUPER, *FRONTIERS OF CONSTITUTIONAL LIBERTY* 34-38 (1956), the seventh series of the Thomas M. Cooley Lectures delivered at the University of Michigan.

Covenant was carried away by the Philistines when *Hammer v. Dagenhart* was rejected.<sup>30</sup>

### *The Power of the Purse*

In my analysis I avoid most of these allergical implications by a third route. For all practical purposes, I think now the most effective power of federal intervention with constitutional implications is the power of the purse.

While the triple-A processing tax went down in *United States v. Butler*,<sup>31</sup> that case, much like *Marbury v. Madison*, was in some aspects a mighty build-up for an awful letdown. For Justice Roberts at great length expounds, and the Court adopts, the Story concept in opposition to that advanced by Madison to hold that the power to lay and collect taxes was to collect and appropriate taxes for the general welfare and not merely as an incident to the enumerated powers. The tax and appropriation, of course, must bear some reasonable relationship to a national objective, but the burden would be heavy to upset the discretion of Congress in the ascertainment of that end. And so long as some professional skill is exercised in the avoidance of the pitfalls of *Butler*, there is really no effective method of judicial review, and hence no prospect of judicial disapproval. Grants-in-aid and tax rebates, credits or refunds, cannot effectively be challenged by the states whose internal affairs are affected in a practical way by the federal stimulus to policy, nor by individual taxpayers whose burden is that only of taxpayers generally.<sup>32</sup>

<sup>30</sup> 247 U.S. 251 (1918) and see the sequel, *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

<sup>31</sup> 297 U.S. 1 (1936).

<sup>32</sup> *Massachusetts v. Melon*, 262 U.S. 447 (1923), rejecting the attack on the constitutionality of federal grants-in-aid to Massachusetts for maternity benefits. See SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT*, 2d ed., 837 (1954); Furman, "The Impact of Federal Subsidies on State Functions," 43 A.B.A.J. 1101 at 1145, n. 73 (1957), prize-winning paper in the 1957 Ross Essay Contest. White, "The Supreme Court's Avenues of Escape from the Constitution," 4 So. TEX. L.J. 129 at 130-131 (1959), given as a part of the two-day institute on constitutional law held by the Houston Bar Association in April 1959; *Florida v. Mellon*, 273 U.S. 12 (1927), sustained 80% federal estate tax credit which had the effect of closing down state estate tax oasis and thereby achieve an assumed federal policy of relative uniformity of state taxation of estates. Strong, "Cooperative Federalism," 23 IOWA L. REV. 459 (1938), thought this constituted almost outright dictation of policy by Congress. Somewhat on the strength of these, the Social Security Act (Titles II and VIII) was upheld in *Helvering v. Davis*, 301 U.S. 619 (1937), and (Titles III and IX) in *Stewart Machine Co. v. Davis*, 301 U.S. 548 (1937). Operating in parallel was the Court's more tolerant view of state experimentation in upholding state unemployment compensation acts of Alabama and New York. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937); *Chamberlain v. Andrews*, 299 U.S. 515 (1936). Some, including the Commission

Occasionally there may be an activity whose adequate national control will require punitive-regulatory sanctions of a type beyond the permissible direct use of taxes, such as those used to stamp out narcotics, oleomargarine, hoodlums' weapons, local tin-horn gamblers and petty grafters.<sup>33</sup> If so, reliance on enumerated powers, the most likely being commerce, may be necessary. The Court will then resume its role of marking the line.

But except for these the federal government—especially in areas of great controversy—will have virtually a hand free of judicial restraint in formulating, in effectuating, in encouraging, in stimulating a federal policy through state action financed through federal grants-in-aid<sup>34</sup> or tax credits.

### *Areas of General Welfare*

Probably one of the most controversial areas of proposed federal intervention is that of aid to education on a widespread scale. Few would assert the presence of any express enumerated power to justify any such comprehensive program. And yet none could deny the national interest and the immediacy of the general welfare of the United States in the adequate education of its children, and hence its citizens. Historically the federal government has aided education from an early day.<sup>35</sup> And so long as regulations

on Intergovernmental Relations, consider that "Coming full circle after 125 years by the route of implied powers, the Supreme Court now gives to the list of powers delegated to Congress in Article I, Section 8, of the Constitution approximately the same broad sweep of meaning conveyed by the Virginia Plan . . ." [Report of the Commission on Intergovernmental Relations 28-29 (1955)] which initially proposed that the national government have "power to legislate in all cases to which the separate States are incompetent or in which the harmony of the United States may be interrupted by the exercise of individual legislation." An interim resolution subsequently passed by the Convention was even closer. It authorized Congress to "legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted. . . ." WARREN, *THE MAKING OF THE CONSTITUTION* 315 (1947).

<sup>33</sup> Tax on narcotics: *The United States v. Doremus*, 249 U.S. 86 (1919) (license tax on dealers); *Alston v. United States*, 274 U.S. 289 (1927) (tax on narcotics). Tax on oleomargarine: *McCray v. United States*, 195 U.S. 27 (1904). The Wagering Stamp Tax Act, now 26 U.S.C. (1958) §§4411-4414, upheld in *United States v. Kahriger*, 345 U.S. 22 (1953). The dissent points up some limitations. Tax on firearms upheld in *Sonzinsky v. United States*, 300 U.S. 506 (1937). See the annotation, *Validity of Federal Tax as Affected by Restrictive Suppressive or Other Ulterior Purpose*, 97 L.Ed. 767 (1953).

<sup>34</sup> As Anderson points out in *THE NATION AND THE STATES, RIVALS OR PARTNERS?* 177 (1955), financial grants-in-aid are not new. Four programs were begun before 1900, the earliest in 1879; none from 1901 to 1910; eight from 1911 to 1920; one from 1921 to 1930. Since then, of course, the expansion has been spectacular—15 from 1931 to 1940, 23 from 1941 to 1950 and 1 in 1951.

<sup>35</sup> This included the Morrill Land Grant Acts for state agriculture and mechanical schools in 1862, the 1887 Hatch Agricultural Experiment Station Act, the grant to Ohio

on the disbursing of federal funds did not trespass the vague outlines of the *Butler* case, the exertion of that control would not subject the state to impermissible coercion or arrogate to the federal government a right beyond its powers.

Housing, urban resettlement, slum clearance, mortgage insurance, public health, and related activities are less controversial in the public mind but essentially similar to education.<sup>36</sup>

### *Tax Grants—Persuasive or Coercive?*

This power through taxation (credit and grant) is spectacular. We have witnessed its use bring about almost uniform state policies overnight. To avoid a penalty on its industrial taxpayers and to obtain for them the 90 percent credit against the federal employment security tax, every state fell in line.<sup>37</sup> Here there was no prohibition by the federal government, no extra payment by the employer beyond that which he would have to pay if his state had a suitable unemployment compensation act, and no coercive penalties. Yet through this exertion of the taxing power and simultaneous use of the tax credit, the federal government was able to achieve what its Congress then thought was a desirable nationwide policy for state-local administration.

### *Congress an Experienced Line Drawer*

But to frankly recognize this power in Congress is not necessarily to signal the end of the world. The judiciary is not the sole

of school lands on its admission in 1803, the Smith-Hughes Vocational Education Act of 1917, and others. See BOWIE AND FRIEDRICH, *STUDIES IN FEDERALISM* 485-496 (1954); Gaus, "Agricultural Policy and Administration in the American Federal System," in MACMAHON, *FEDERALISM MATURE AND EMERGENT* 283 et seq. (1955).

<sup>36</sup> Vocational rehabilitation is a sharp illustration. In 1955 the present backlog of persons in need of vocational rehabilitation was estimated to be 2,000,000. Without fixing responsibility for their rehabilitation as between state, local or federal government, it is unthinking to assert that the federal government facing its admitted responsibility for preservation of the nation in world affairs is not concerned with the welfare of these people. By changes in the program, the number rehabilitated annually has increased from 9,000 in 1943 to 52,000, and under the 1954 amendments, it is estimated that the number will be 200,000. The states will contribute approximately 40% of the cost. Report of the Commission on Intergovernmental Relations 256 (1955).

<sup>37</sup> The impact of the Federal Social Security Act on state legislation is traced in *Steward Machine Co. v. Davis*, 301 U.S. 538 at 587-588 (1937). In 1931 Wisconsin stood alone. In 1935 four states passed unemployment compensation laws on the eve of the adoption of the Social Security Act. "In 1936 twenty-eight other states fell in line, and eight more the present [1937] year." The opinion points out that it was not the lack of political power which had previously resulted in nonaction by the states. The deterrent was the fear of economic disadvantage in competition with other states not imposing that burden on industry.

guardian of the Constitution.<sup>38</sup> Congress has a compelling obligation to give heed to it, and constitutional historians uniformly consider that, in point of bulk and volume, Congress has stopped more unconstitutional legislation than courts could have possibly annulled.

More than that, Congress has had long experience in the constitutional drawing of lines. The Supreme Court for over a century has recognized that under the commerce clause, for example, the Keys of the Kingdom are in the hands of Congress. For in the wake of *Cooley v. The Board of Port Wardens*,<sup>39</sup> where nonaction by Congress became the subject of judicial evaluation, it was soon made clear that Congress had but to speak either in determining whether the subject was of a nature requiring national uniformity or in relinquishing all or portions of the field to the states even if that were so.<sup>40</sup>

We have seen spectacular exertions of this ultimate congressional determination in the area of commerce. Ironically, the necessity of this may again have been the outgrowth of the *certainty* of pre-existing judicial attitude.<sup>41</sup> This led Congress, then, by careful draftsmanship of new legislation to make broad claims. Once the legislation was upheld, the presence of such sweeping

<sup>38</sup> The Executive has frequently recognized this duty. See, for example, President Johnson's veto of the first Civil Rights Act because the provisions of the act "interfere with the municipal legislation of the states, with the relations existing exclusively between a state and its citizens . . . — an absorption and assumption of power by the general government which, if acquiesced in, must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the states. . . ." SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT*, 2d ed., 316 (1954). And see that of President Franklin Pierce, May 3, 1854, vetoing a grant of public lands for the benefit of indigent, insane persons, quoted at length in the dissent of Justice McReynolds, *Steward Machine Co. v. Davis*, 301 U.S. 548 at 600-609 (1937).

<sup>39</sup> 12 How. (53 U.S.) 299 (1851).

<sup>40</sup> BOWIE AND FRIEDRICH, *STUDIES IN FEDERALISM* 354 (1954). Strong, "Cooperative Federalism," 23 *IOWA L. REV.* 459 (1938), especially on congressional divestiture of the interstate character of the goods (liquor) under the Webb-Kenyon Act, upheld in *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311 (1917); and prison-made goods, see *Whitfield v. Ohio*, 297 U.S. 431 (1936); *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U.S. 334 (1937). Ribble, "National and State Cooperation Under the Commerce Clause," 37 *COL. L. REV.* 43 at 50 (1937). Dunham, "Congress, The States and Commerce," 8 *UNIV. CHI. LAW SCHOOL RECORD* 54 (Special Supp. 1958).

<sup>41</sup> The labor decisions on minimum wages and hours of work presented an earlier no-man's land. See BOWIE AND FRIEDRICH, *STUDIES IN FEDERALISM* 587 (1954). The action of the Supreme Court "meant that there could in fact be no minimum wage legislation at all, since the commerce clause could not cover the federal power, and the contract clause limited the power of the States."

See also Kurland, "The Supreme Court and the Attrition of State Power," 10 *STAN. L. REV.* 274 at 284 (1958). Ribble, "National and State Cooperation under the Commerce Clause," 37 *COL. L. REV.* 43 at 44-45 (1937).

claims led to tangible assertion of federal control in areas best left to the states. Thus, in labor-management relations, the Taft-Hartley Act undertook to permit the limited cession of power over some activities to the states. The National Labor Relations Board by administrative dollar standards reduced the areas in which it would assert its conceded power. The result was that there were areas within the power of the Board, but over which the Board would not act. Were the states free to? We all know the answer. By a series of decisions, the Court, broadly speaking, held that the federal act pre-empted the field.<sup>42</sup> And it was this no-man's land where the federal board would not, and the states could not, act that became one of the principal matters dealt with in the very recent amendments to the Taft-Hartley Act. Thus did Congress respond to the Court's earnest plea that it draw the line.<sup>43</sup> Even more recently we have seen Congress act in the opposite direction. After the Court in February of 1959 upheld a state net income tax on the solely interstate operations of a foreign corporation,<sup>44</sup> Congress responded quickly by an act which expressly excludes from the power of state taxation many of the ac-

<sup>42</sup> The principal cases most discussed are *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957); *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957); *San Diego Bldg. Trades v. Garmon*, 353 U.S. 26 (1957); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); *Garner v. Teamsters, C. & H. Union*, 346 U.S. 485 (1953); *NLRB v. Fainblatt*, 306 U.S. 601 (1939).

See also Knee, "Federal Supremacy in Labor Management Relations," 27 *FORD. L. REV.* 373 (1958); Van de Water and Petrowitz, "Federal-State Jurisdiction and the Constitutional Framework in Industrial Relations," 31 *SO. CAL. L. REV.* 111 (1958).

The whole subject is extensively dealt with by Professor Bernard Meltzer, University of Chicago Law School, in "The Supreme Court, Congress and State Jurisdiction Over Labor Relations," 8 *UNIV. CHI. LAW SCHOOL RECORD*, No. 1 (Special Supp. 1958), one of the monographs prepared for and used by the Committee on Federal-State Relationships of the Conference of Chief Justices leading to the adoption of its celebrated report in August 1958.

<sup>43</sup> This is well developed by Professor Cox in "Federalism in the Law of Labor Relations," 67 *HARV. L. REV.* 1297 (1954). He points out that Congress with the ultimate power to draw the line frequently does not. Sometimes competing pressures are too great, in others it is too complicated with the resulting situation of seeming despair, and sometimes out of a recognition, accidental or conscious, that the court in its slow and plodding case by case system is best able to weigh and work out carefully the subtle implications of federalism. And see Rostow, "The Court and Its Critics," 4 *SO. TEX. L.J.* 160 at 171 (1959), one of the papers of the two-day institute on constitutional law held by the Houston Bar Association, April 1959.

<sup>44</sup> *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). This was one of several significant cases involving the power of a state to tax the subjects of interstate or foreign commerce: *Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434 (1959); *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534 (1959); *Allied Stores v. Bowers*, 358 U.S. 522 (1959); *E. T. & W. N. C. Trans. Co. v. Currie*, 359 U.S. 28 (1959).

S. Rep. 453, 86th Cong., 1st sess. (1959), submitted by the Senate Select Committee on Small Business, discusses problems raised by these decisions.

tivities held by the Court to be within the permissive constitutional reach of the states.<sup>45</sup>

We recall other experiences of Congress in drawing the constitutional line. This includes the McCarran Act<sup>46</sup> which overturned the effect of a recent decision holding that the insurance business was interstate despite decades of contrary judicial holdings.<sup>47</sup> Likewise, Congress has relinquished much of federal immunity to state and local taxation of property of the federal government or its instrumentalities.<sup>48</sup>

### *Congress Experienced in Refusing To Act*

Oddly enough, nonaction by Congress, better than affirmative action, reflects an awareness by Congress of the awesome powers it holds and the necessity for responsible action.

For example, with the acknowledged power to obliterate altogether the source for much of the criticism that federal encroachment results from unsound decisions by the Supreme Court, the Congress has resisted all demands to reduce the appellate jurisdiction of the Court. It has also resisted thus far all efforts for an automatic anti-federal-preemption statute although one nearly squeaked by. And in the irritating field of review of state criminal convictions,<sup>49</sup> Congress with a power to withdraw habeas corpus jurisdiction of such cases entirely from federal courts has been slow and cautious despite a universal recognition that some change is

<sup>45</sup> 73 Stat. 555 (1959), 15 U.S.C.A. (Supp. 1959) §381.

<sup>46</sup> 59 Stat. 33 (1945), 15 U.S.C. (1958) §1011.

<sup>47</sup> *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946), upheld the McCarran Act's overruling the effect of *United States v. Southeastern Underwriters Assn.*, 322 U.S. 533 (1944). See Handler, "Patterns of Trade Regulation in a Federal System," in MACMAHON, *FEDERALISM MATURE AND EMERGENT* 352 (1955).

<sup>48</sup> Of course, *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), considerably restricted the area, but much remains. The problem of loss of tax revenues to local governments from widespread government ownership of property, the mechanisms for alleviating the burden, and the separation of types of property and activities as fields to be reserved for federal, or state, or local taxation to the exclusion of the others has been one of the major concerns of those participating in organized treatment of federal-state relationship. See, e.g., Joint Conference on Federal-State Tax Relations established 1947, House Subcommittee on Tax Coordination established October 1951, and others summarized in the annotated chronology *INTERGOVERNMENTAL RELATIONS IN THE UNITED STATES* (RM-321), published by the Council of State Governments (1958).

Congress has frequently waived immunity. Freund, "Umpiring the Federal System," 54 *COL. L. REV.* 561 at 562 (1954).

<sup>49</sup> See the exhaustive review by Professor Allen, "The Supreme Court, Federalism, and State Systems of Criminal Justice," 8 *UNIV. CHI. LAW SCHOOL RECORD* 3 (Special Supp. 1958), one of a series of monographs prepared for the Conference of Chief Justices.



needed.<sup>50</sup> We are also acutely conscious that Congress has not responded to the bitter criticism of the Court by disavowing the doctrine of preemption in the allgerical fields of state subversive acts and right-to-work bills.<sup>51</sup>

Congress is not, therefore, setting sail on an uncharted sea. It has a century or more of discipline in the use of this vast and awesome and important power.

### *Policy Guides for Congressional Line Drawing*

This digression to demonstrate that Congress has historical experience in the discipline of constitutional determination has perhaps caused you to forget that I have advanced it here merely as a facet of my theme that Congress is the ultimate determinant, largely through the purse.

That, of course, creates problems on the exercise of that power of tax and appropriation. The restraints, we have seen, are to be largely self-imposed. Many of them will lend themselves to elaboration in the kind of terms (e.g., "power areas") a court would employ in expounding constitutional limitations were these cases judicially reviewable. They are, however, in my judgment, much more likely to involve other factors more akin to the field of political science and on which I will have had no skill or training. Fortunately for you, I have not, in the figure of the day, had to blast off wholly unaided into unknown space. There is a tremendous body of literature.<sup>52</sup>

### *Commission Searches for Guides*

It was to ascertain these considerations which should impel federal governmental action or nonaction which principally occu-

<sup>50</sup> Justice Schaefer of the Supreme Court of Illinois, in "Federalism and State Criminal Procedure," 70 HARV. L. REV. 1 (1956), discusses federal habeas corpus and some of the proposed statutory changes, including those of the federal Judicial Conference.

<sup>51</sup> State Subversion Act: *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). See the monograph for the Conference of Chief Justices by Professor Crampton, "Supersession and Subversion: Limitations on State Power To Deal with Issues of Subversion and Loyalty," 8 UNIV. CHI. LAW SCHOOL RECORD 24 (Special Supp. 1958).

Nebraska Right to Work Act v. Railway Labor Act: *Railway Employees' Dept., A.F.L. v. Hanson*, 351 U.S. 225 (1956).

<sup>52</sup> One of the best surveys is the annotated chronology of significant events, developments and publications, INTERGOVERNMENTAL RELATIONS IN THE UNITED STATES (RM-321), published by the Council of State Governments (1958), by W. Brooke Graves, Senior Specialist Division, Legislative Reference Service, Library of Congress. And there is a lifetime of reading material listed in the 119-page selected bibliography on INTERGOVERNMENTAL RELATIONS IN THE UNITED STATES, Intergovernmental Relations Subcommittee of the House Committee on Government Operations [Committee Print] 84th Cong., 2d sess., 1956 compiled under the direction of W. Brooke Graves.

pied the Commission on Intergovernmental Relations. Earlier I referred to the congressional declaration that the purpose of this study was so "these relations [between state and federal government] may be clearly defined and the functions concerned may be allocated to their proper jurisdiction." It is no reflection upon this distinguished commission<sup>53</sup> that this extravagant ambition was never realized—at least not in the sense of a clear chart of respective areas. But its general objective discussion with full opportunity to register dissents (which are few in number) is worthwhile. And its major conclusions are quite significant.

Recognizing that the full exertion of the powers of the federal government to legislate in matters of national welfare could destroy the vitality of state and local institutions, it emphasized several major aspects of the responsibility of the national government to preserve and strengthen the federal system.<sup>54</sup> Amplifying these general considerations, the main burden of the commission's report, together with its recommendations in specific areas,<sup>55</sup> is this. The subject matter must concern the national welfare<sup>56</sup> before the problem even arises whether it is fit for national action. But having decided that, vital questions still remain. Obviously there is a national interest in almost everything which conscientious governments at all levels undertake to provide. But is that national interest to be best served by national or state or local action? What will happen, for instance, to the influence and vitality of local government if the federal government takes it over? Is it an interest which should be left to the states and local subdivisions alone? Or is it one requiring joint action?<sup>57</sup> Once it is determined

<sup>53</sup> It was made up of six state governors or former governors, several congressmen and senators, representatives of major federal executive departments, outstanding public citizens and political scientists.

<sup>54</sup> Significant conclusions of this aspect were "(1) The Constitution sets only maximum limits to National action. . . . The National Government need not do everything that it can do. . . . (2) Where National action is desirable, greater attention should be given to minimizing its extent and to leaving room for and facilitating cooperative or independent State action. . . . (3) The organization of the National Government does not at present afford adequate recognition of the national interest in State and local government. . . ." Report of the Commission on Intergovernmental Relations, c. 3, p. 60 et seq. (1955).

<sup>55</sup> Agriculture, civil aviation, civil defense, education, employment security, highways, housing and urban renewal, national disaster relief, natural resources and conservation, public health, vocational rehabilitation and welfare.

<sup>56</sup> Justice Schaefer of the Supreme Court of Illinois, in "Federalism and State Criminal Procedures," 70 HARV. L. REV. 1 at 26 (1956), in quite a different context, suggests a likelihood of a national interest from the impact of state criminal cases on our international relations. Civilization, he points out, is not measured merely in retrospect. "It is taken from day to day by the peoples of the world, and to them the criminal procedure sanctioned by any of our states is the procedure sanctioned by the United States."

<sup>57</sup> This is illustrated by the limited effectiveness of state regulation of milk resulting in the Agricultural Marketing Agreement Act of 1937 upheld in *United States v. Rock*

that some character of national action is needed, many further problems arise on its administration. Shall it be by joint action such as is found under the Motor Carrier Act and under the Employment Security statute? Should it be by sole action of the federal government, such as the Old Age Survivors Insurance program?

Running through the congressional analysis of any such proposed action must always be the basic query: what will this national action do to the essential existence of strong, independent local and state governments?

### *Dangers of Federal Grants*

As this congressional constitutional line drawing will come largely through exercise of the power of the purse, it was natural that the commission was vitally concerned with the impact of federal subsidies of grants-in-aid. In additions to the Commission Report, its studies on this subject comprise two printed volumes.<sup>58</sup>

A reading of these studies reveals some interesting things. There were, for example, in the early days of the programs instances of irritating experiences in some states with overbearing bureaucrats imposing rather artificially rigid controls. But as competent state professional staffs have been developed, these have been eliminated by close and cordial collaboration. But in none do they feel that the state is being destroyed<sup>59</sup> by the receipt of the

Royal Co-operative, 307 U.S. 533 (1939). SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT*, 2d ed., 961 (1954).

<sup>58</sup> Professional management-consulting and research organizations were retained to make special on-the-ground studies on the impact of federal grant-in-aid policies in seven states, including Michigan. An additional group of twenty-five states was covered in a separate study under the guidance of outstanding authorities in the field of government in each state. *THE IMPACT OF FEDERAL GRANTS-IN-AID ON THE STRUCTURE AND FUNCTIONS OF STATE AND LOCAL GOVERNMENTS*, a survey report by the Government Affairs Institute submitted to the Commission on Intergovernmental Relations (June 1955) and a summary of the original survey, *THE ADMINISTRATIVE AND FISCAL IMPACT OF FEDERAL GRANTS-IN-AID*, by the Management Consulting and Research Organizations (June 1955).

<sup>59</sup> The underlying assumption seems to be that whoever receives any form of aid has, to that extent, become beholden, with the recipient's independence and integrity being undermined. So far as this may be a political-sociological truth, a likely safeguard is the recognition of it. Whether this was a timeless warning or a mere prophecy, others will have to decide. But in 1857 when Congress donated to the states and territories 67 million acres of land for schools and universities, one senator raised the question: "How long will it be before they will ask for every object, and come to rely entirely upon the federal government even for the expenses of their own, until they have become so dependent on the national Treasury that they will have but a shadow of sovereignty left, and be mere suppliants at the doors of Congress for anything that the general government may have at its disposal?" Similar views were expressed by Senator Ingalls of Kansas in connection with the 1887 Hatch Act. SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT*, 2d ed., 274, 384 (1954).

grants, or by the assertion of a limited control on the disposition of funds. Indeed, in two of the states of the Deep South where states' rights is a constant battle cry, there was a recognition that specific vital needs had been met which the states never would have met. There are some other serious implications. Many reported that the grants tend further to undermine the already weakened power of the state governor because the programs generally bypass the state executive to deal directly with the local state operational agency.

State governments may also be weakened by grants going directly to local subdivisions for airports and the like. But this reflects the internal state conflict which pits rural against urban to send the city fathers to Washington.

But in all of these phases, the states have it within their power, as some have done, to channel all federal grants to fix responsible direction in seeking and administering such grants.

Most serious, of course, is the indeterminate significance of the impact of the distribution of these huge sums (5 billion dollars in 1958). Incidentally, over 90 percent of this is in the three fields of highway construction, public health, and welfare (federal subsidy to state old-age pension programs). The amount is indeed large and the recipients become vocal and effective pressure groups within the states. But the economic importance of the grants is distorted. For the grants are small, indeed, in contrast to the large local expenditures by the federal government for national defense, postal service, rivers and harbors, interstate commerce, and the like.<sup>60</sup> But the impact may be much more than economic. What are grants actually doing to state and local gov-

Indiana acted collectively by its 1947 Resolution against federal handouts, guardians, the magic of federal money and which ended with the ringing declaration: "We are fed up with subsidies, doles and paternalism. We are no one's stepchild. We have grown up. We serve notice that we will resist Washington, D.C. adopting us. Resolved: '. . . We want government to come home.'" ANDERSON, *THE NATION AND THE STATES, RIVALS OR PARTNERS?* 6 (1955). At the last word Indiana still exists and in 1956 received from the federal government \$50,523,000. STATISTICAL ABSTRACT, BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, Table 515 at p. 416 (1958).

Besides the impact studies of the Commission, this serious problem has been the subject of much other comment. See Furman, "The Impact of Federal Subsidies on State Functions," 43 A.B.A.J. 1101 (1957), the prize-winning essay in the 1957 Ross Essay Contest, American Bar Association; Richardson, "The Impact of Federal Subsidies on State Functions," 47 Ky. L.J. 47 (1958).

<sup>60</sup> Using at random a few of the states whose federal grants comprise an above the national average percentage of total tax revenues, the following reflects the relative financial importance to the state economy of federal grant payments in comparison to federal civilian payrolls on the national average of \$4,690 annual wage.

ernments? Well, using tax revenue and comparative rolls of civilian employees as a measure of governmental activity, the death or creeping demise of state (and local) government is, in the famous words of Mark Twain, grossly exaggerated.<sup>61</sup> Seriously,

State	Number of Fed. Civ. Employees 1957 (a)	Gross Fed. Payroll (b)	Fed. Grants to State (c)	Approx. % of Grants to State Tax Revenue (c)
Alabama _____	53,479	\$250 mil.	\$80 mil.	22%
Mississippi _____	17,300	81 mil.	51 mil.	32%
Arkansas _____	14,531	68 mil.	44 mil.	25%
Georgia _____	54,623	256 mil.	79 mil.	20%

On a national average the percentage of federal civilian employees is approximately 45% defense, 23% postal, 8% V.A., 24% others.

In addition to direct payrolls there will be large sums spent locally for materials, supplies, transportation, etc.; e.g., the \$39 billion military defense budget includes military industrial installations such as Oak Ridge, Tennessee; Redstone Arsenal, Alabama; Cape Canaveral, Florida. Expenditures, either direct or through governmental contractors, for 1957 totaled \$19 billion for work to be done within the United States. STATISTICAL ABSTRACT, BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, Table 302, p. 243 (1958).

(a) Table 493, p. 397, STATISTICAL ABSTRACT (1958)

(b) Table 494, p. 398, STATISTICAL ABSTRACT (1958)

(c) Table 515, p. 416, STATISTICAL ABSTRACT (1958)

<sup>61</sup> The relative civilian employment in 1958 was:

Federal			
Dept. Defense _____	1,058,326	State _____	1,358,000†
Postal _____	539,927		
V.A. _____	174,675		
Others _____	539,414	Local _____	4,249,000†
Total _____	* 2,333,942		*** 5,608,000

Annual federal payroll was \*\*\$919,000,000 and for state-local governments — \$1,615,000,000.

\* Table 493, p. 397, STATISTICAL ABSTRACT (1958)

\*\* Table 520, p. 423, STATISTICAL ABSTRACT (1958)

\*\*\* Table 522, p. 424, STATISTICAL ABSTRACT (1958)

While the state roster equals the federal non-defense roll, as Anderson points out, the number of employees of local units exceed four times that of federal non-defense; and state and local combined are five times greater than federal non-defense. ANDERSON, *THE NATION AND THE STATES, RIVALS OR PARTNERS?* 19 (1955).

The rate of increase in state-local is also greater. State-local units jumped from 4.2 million in 1951 to 5.6 million in 1957 with payrolls increasing from \$1 billion in 1951 to \$1.6 billion in 1957. In contrast federal employment decreased from 2.5 million to 2.4 million while payrolls increased slightly from \$793 million to \$919 million. Table 520, p. 423, STATISTICAL ABSTRACT (1958).

The increase in tax revenues has been as rapid in state and local governments as in the national government increasing from \$8.5 billion in 1942 to \$26.3 billion in 1956. This contrasts with federal revenues of \$12.2 billion and \$65.2 billion out of which allowance must be made for a \$40 billion peacetime military budget in the federal government. Table 501, p. 405, STATISTICAL ABSTRACT (1958).

Based upon revenue (tax collections, federal grants-in-aid, income from utility and liquor store operations, and payments into trust funds for employee retirement, unemployment compensation), there has been a like increase in state and local governments from \$5 billion in 1922 to \$13 billion in 1942 and the staggering total of \$41 billion in 1956; there has been a like increase in direct expenditures of \$5 billion, \$10 billion and \$43 billion, respectively. Table 512, p. 412; Table 500, p. 404, STATISTICAL ABSTRACT (1958).

the complaint today is not of too little local-state government. The protest is against too much local, too much state, too much federal, and now too much international.

But no study can ever prove or disprove their subtle influence on traditional local responsibility. No doubt grants create habits of thought and action. Local problems are too often "solved" in Washington.

### *Congressional Power To Destroy*

Now we move to a mighty climax. For this discussion demonstrates that as Congress has its last say, it has the capacity to destroy our federal system. It must be conscious, then—step by step—day by day—that the proposed national action—standing alone or with other programs—may destroy, or weaken, or undermine, or sap the energy of the states.<sup>62</sup>

Now my beginning takes on relevance. For you can see that creeping in again are these analogies from the study of theology. For like the dogma of Free Will which recognizes that man as a moral agent can claim no virtue for a life of good unless he has had the capacity for wrong and has overcome it, Congress is now placed in the position of being controlled by its own self-imposed discipline. No longer can it legislate in the knowledge that if what it does exceeds the powers of the national government, it will be held unconstitutional by the Court.<sup>63</sup> Now Congress must indeed impose upon itself the same self-restraint which it and its members have often urged upon the Judiciary.

### *Bulwarks for Congress*

What does this conclusion do to this assembly? If constitutional federalism is ultimately in the hands of Congress, is there a need

<sup>62</sup> George C. S. Benson, Director of Research, Commission on Intergovernmental Relations, in *THE NEW CENTRALIZATION: A STUDY OF INTERGOVERNMENTAL RELATIONSHIPS IN THE UNITED STATES* 79 (1941), puts the problem through the question: what is the aim of the proposed grant-in-aid? Is it to furnish money so that the states can adopt the policy, correct a state policy or effectuate a federal policy? In answer, he warns, "But the 'correction' of a state policy amounts in practical fact to a substitution—at least in a limited field—of federal policy. It is one step on the road to political—even if not administrative—centralization. . . ."

<sup>63</sup> Nor can it succumb to the importunities of a strong President that Congress should "not permit doubts as to constitutionality, however reasonable, to block the suggested legislation." President Roosevelt's message on the proposed Bituminous Coal Conservation Act of 1935, SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT*, 2d ed., 935 (1954). Actually Jefferson's views may be strikingly parallel, for on the constitutionality of the proposed National Bank bill, he advised President Washington that "if the pro and the con hang so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion." *Id.* at 73.

for law schools? And will there be any frontier for either law or the teaching of it?

Perhaps what we are really trying to say is: does Congress stand alone and unarmed?

We know, first, that it is not unarmed. It is equipped with much experience responsibly exercised. There are many other tools which it must develop and many forces which, because of this shift, must now be developed acutely. It will require that the members of Congress be trained not alone in legislative skills but, more important, in all those academic fields of history, philosophy, political science, law, and government which sustain in each generation a living conviction of the indispensable importance of the states and the necessity of preserving this system which has served so well. There will be an even greater need for articulate, effective and energetic pressure groups. On bar associations, state and national, and other organized professional groups must now fall much responsibility for relentless continuous education of the Congress lest, in effectuating some transitory policy, it undermine the strength of the constituent units. Political parties, through platforms, candidates and campaigns, must become vital responsive mechanisms through which the national is not allowed to swallow up the parts. More vital than ever before will also be the responsible use of the presidential veto power. But no longer can the Congress check it to the President who checks it to the Court. Now each must sing with the spiritualist, "I've Got the Whole Constitution in my Hand."

One important aid to Congress, too often obscured and never overestimated, is non-federal. I speak here of the states, of state and local government. The best way to prevent federal encroachments is to satisfy the responsible demands of society by the local, state government. How true has history made the celebrated 1906 prophecy of Elihu Root!<sup>64</sup> And for the states effectively to meet these demands, there is need for the internal strengthening of the machinery and administration of state governments. For each state to judge, this may include basic constitutional revisions to

<sup>64</sup> "The intervention of the National Government in many of the matters which it has recently undertaken would have been wholly unnecessary if the States themselves had been alive to their duty toward the general body of the country. It is useless for the advocates of state rights to inveigh against the supremacy of the constitutional laws of the United States or against the extension of National authority in the field of necessary control where the States themselves fail in the performance of their duty." Address by Elihu Root, delivered December 12, 1906, to the Pennsylvania Society in New York.

assure responsible direction and control and eliminate artificial restraints, and reapportionment to eliminate the urban-rural conflict now so common.<sup>65</sup>

And finally—and to most of us thankfully—for a vital aid Congress will have the Supreme Court. The Court will have to be there to draw the line where Congress, having the power to do it, declines to do so. The Court must be there as an indispensable instrument to interpret federal legislation and, where appropriate, state enactments or local action to determine whether Congress has claimed all or relinquished part of a field within its competence. It will still have to be there to assay the validity of state legislation attacked under the Fourteenth Amendment. The Court must be there to vindicate substantive and procedural guarantees of the Fourteenth Amendment in state criminal cases and in the many facets of the critical race relations problem. And finally the Court must be there in the all important areas of fundamental constitutional rights of the citizen, such as freedom of thought, when they are threatened by actions of a federal or state agency.

This will reveal the Court in one of its greatest roles. Its opinions are for more than the mere decision of a case. They are to expound the great truths of our freedom and life under the rule of law. They are to serve as fresh lessons of our heritage. And in the delicate relationship between the nation and the states Congress will, and should, be greatly influenced by the elaboration of these complex factors.<sup>66</sup> The Court by what it says in the limited cases properly before it will have influence in those now left ultimately to Congress. The Court, no longer the decider, becomes instead the teacher.

<sup>65</sup> See Report of the Commission on Intergovernmental Relations (1955) at 36, "The Role of the States"; Blough, "Fiscal Aspects of Federalism," in MACMAHON, *FEDERALISM MATURE AND EMERGENT* 384-396 (1955); BENSON, *THE NEW CENTRALIZATION: A STUDY OF INTERGOVERNMENTAL RELATIONSHIPS IN THE UNITED STATES* 86-116 (1941).

John Pryor Furman in the Ross Essay article, "The Impact of Federal Subsidies on State Functions," 43 A.B.A.J. 1101 at 1146 (1957) reports similar conclusions by the Eighth American Assembly, October 1955, on the theme "The Forty-Eight States: Their Tasks as Policy Makers and Administrators."

<sup>66</sup> See Anthony Lewis, of the Washington Bureau of the *New York Times*, "A Newspaperman's View: The Role of the Supreme Court," 45 A.B.A.J. 911 (1959); Rostow, "The Court and Its Critics," 4 So. Tex. L.J. 160 at 161-164 (1959); and of the decisional-opinion process, Justice Schaefer writes: "What is involved, however, is not just the enforcement of defined standards. It is also the creative process of writing specific content into the highest of our ideals." Schaefer, "Federalism and State Criminal Procedures," 70 HARV. L. REV. 1 at 25 (1956).



*Beyond the Veil*

What does the future hold? What is there in this frontier of the great beyond? Well, it holds this much: we are apprehensive about the very existence of our world, our civilization, our freedom. These fears arise from the outside forces of the world. We are apprehensive, though, that resisting these, we may lose what has been our vital force.

Never in a period of American history has there been such a necessity for protection of that constitutional federalism by the Congress, by the Executive and by the Judiciary. Each now having a vital role to play in its protection—and none any longer able to count solely on the other—there must come an awareness of its daily importance. Protection of constitutional federalism will become an affirmation and not, as so often in the past, a negative prohibition. If it is done, we shall continue strong as a nation of independent—yes, *independent* and *sovereign* states.

To have all committed—to require that all be committed—to the preservation of this unique structure assures to me that it will live. Despite the pessimism of the day that our government and way of life is done, I am willing to say with Franklin, “Now at length I have the happiness to know that it is a rising and not a setting sun.”<sup>67</sup>

<sup>67</sup> WARREN, THE MAKING OF THE CONSTITUTION 717 (1947).