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## THE FUNCTION OF THE STATES

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## THE FUNCTION OF THE STATES

*William B. Cudlip\**

For the second time in this century, thoughtful men are studying plans for the stabilization of a post-war world, determined to devise a pattern of peace which shall embody new moral and economic standards and the highest ideals of human liberty, intent on fashioning a design for living under which the nations of the world may find freedom, justice, dignity, and prosperity. In this high adventure the United States has a full role to play, for, without our interest and cooperation, there can be no enduring compact. But, important as this quest may be, another task of at least equal significance awaits us in this historic time—the task of formulating a contemporary political philosophy as to the function of the states in our system of government.

Interest in this highly controversial subject is presently heightened, for sober men are aware that the influence and effectiveness of our nation in the post-war world will be in direct ratio to our political stability and efficiency at home. Moreover, it is realized that our capacity to cope adequately with the many complex domestic problems and responsibilities which will be unleashed with the coming of peace—problems and responsibilities which will strain to the limit all of our spiritual, economic and political resources—is dependent upon a balanced internal political structure. These added factors sharply emphasize the present need for lucid and constructive thought regarding our intergovernmental relationships.

## NATURE OF THE QUESTION

Because of the unique character of the American Commonwealth there is implicit in the subject the following sets of formal relationships:

- (a) The relationship between the several states and the federal government.
- (b) The relationship among the several states.
- (c) The relationship among the states joined in interstate compact and their relationship with the federal government.<sup>1</sup>
- (d) The relationship between the state, its citizens and its units of local government.

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<sup>1</sup> Under U. S. Const., Art. 1, § 10.

On account of its overshadowing importance, this discussion is devoted primarily to the first of these relationships. This approach in no way minimizes the importance of the kindred subjects. But, important as they are, the essential political problems which they shape are in no way as intricate as those inherent in the constitutional alliance between the states and the federal government; for, except as provisions of the federal Constitution are relevant, the several states are not impeded in developing relationships with each other and in the exercise of sovereign power over their citizens and constituent political subdivisions. Further, in a very important sense, the key to any effective approach to these problems different from that now employed necessarily rests upon the development of a basic political philosophy which defines the office of the state in relation to the federal government.

The problem of intergovernmental and interjurisdictional relationships in a federal government is not new. It is not peculiar to our federal system nor even to the age in which we live. It is as old as federalism. It is a fluid problem, and essentially a human problem to be answered anew by each succeeding generation. It is a problem inextricably associated with the kind and amount of legitimate power exercised by the central and state governments. It is a problem that does not admit of any permanently satisfactory solution. At intervals it returns to vex us whenever profound economic and social changes occur. The question is posed again for our generation because of dynamic changes in modern living, born of revolutionary events in the fields of science, industry, sociology, economics and political history—events which, in recent years, have left deep marks upon our lives.

#### PHILADELPHIA—1787

Our basic political architecture has served amazingly well in the most eruptive century and a half in the history of mankind. Our blueprint of government has been transcribed by many peoples who watched the unequalled rise of America and sought in our charter the impelling spark of our political genius. It is fitting then—yes, essential—that we re-examine the principles and the spirit which guided the founders and inquire into the philosophy of government which inspired them. To know what should be, calls for knowledge of what has been and what is.

On May 14, 1787, pursuant to a resolution adopted at the Annapolis Convention of 1786, delegates from seven of the thirteen colonies met in Philadelphia to discuss methods of enabling the Continental Congress to regulate interstate commerce, which was greatly retarded due to currency depreciation and the burdensome regulations

imposed by each state. There were also other internal difficulties occasioned by lack of national cohesion, but probably the most important reason for the assembly was the growing instinctive desire on the part of the colonies for closer union. The Convention adopted a report condemning the existing state of affairs, declaring that reforms were necessary and suggesting a further general convention to consider the condition of the Confederate States and needed amendments to its constitution. Congress approved the report and recommended that the states send delegates to a convention "for the purpose of revising the Articles of Confederation and perpetual Union between the United States of America and reporting to the United States in Congress assembled and to the States respectively such alterations and amendments of the said Articles of Confederation as the representatives met in such convention shall judge proper and necessary to render them adequate for the preservation and support of the Union."<sup>2</sup>

These were not hopeful men. Franklin's suggestion for assembly prayer was rejected for fear that the public might suspect the grave difficulties attending the task of welding a union of states.<sup>3</sup> The immortal Gladstone once wrote, "As the British Constitution is the most subtle organism which has proceeded from . . . progressive history, so the American Constitution is . . . the most wonderful work ever struck off at a given time by the brain and purpose of man."<sup>4</sup> Even the most inspired and purposeful delegate dared not hope for such an accolade at any time. Such contrast! What was the order of the collective genius that made triumph of despair?

The delegates, all men of great intellect and ripe experience, faced with enormous difficulties, boldly resolved to disregard their instructions and prepare a new Constitution. There was no nation, only the raw material from which one might be formed. The challenge was to create a union wherein there would be reserved a sphere of action broad enough to satisfy the sovereign states, with their local pride and sentiment, their institutions and traditions, yet not so broad as to imperil national unity. There were elements of unity and diversity. In language, in adherence to the Anglo-Saxon common law and the belief in the essential dignity of man and his inalienable right to freedom and representative government, there was common ground. In habits of

<sup>2</sup> Resolution of Congress of February 21, 1787 in 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1787 (Library of Congress) 71 (1936); see McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 147 (1936).

<sup>3</sup> Franklin's original note is preserved in the State Department at Washington.

<sup>4</sup> "Kin Beyond Sea," NORTH AMERICAN REVIEW 179 at 185 (1878).

life there was dissimilarity. Distances were great. Communication was difficult. The wealth of the states was disproportionate and varied in kinds. Manufacture had just begun. Shipping and agriculture were the predominant vocations. The nation was sparsely populated. But all prized liberty and equality; all were conscious of the new strength and majesty of the young states and these intangibles were the strong cords with which much could be bound together, from which a loose nationalism could become unionism.

Washington, Madison, Hamilton, Franklin and their gifted associates were well acquainted with political philosophy, with all theories of government, with the issues soon to flame in the French Revolution, with kings and tyrants, and with the stirring pamphlets and texts of their contemporaries at home and abroad. They were familiar with the reasons for the rise and fall of every federation from the time of the Achaen League to their own day. Above all, they possessed an infinite capacity for practical adjustment and strong determination to accomplish their fundamental purposes. They met in the climate of revolution, in an age of unrest when plain people, like an awaking giant bound while in slumber, were breaking the shackles of despots which had seared their flesh and souls for too long.

Drawing upon deep wells of wisdom, political genius and Anglo-Saxon traditions and philosophy, expressed in such immortal documents as Magna Charta, English Constitution, Colonial Charters, Declaration of Rights adopted by the Colonial Congress held at New York in 1765, Declaration of Independence and the Articles of Confederation, they deftly and judiciously struck off a new charter adapted to the requirements of the new nation into which they carefully wove the principles of justice, morality, freedom, popular sovereignty, balanced authority, representative government, protection of inalienable rights and state autonomy. Except to the extent that their powers were delegated to the federal government or restrictions imposed on them, the states were recognized as separate, independent and sovereign governments. The authority of the federal government was restricted and the states were permitted to exercise certain powers granted to the federal government until preempted.

Under the Constitution, the federal government has exclusive authority in such areas as foreign relations, taxation for federal purposes, foreign and interstate commerce, currency, the admission of new states and the maintenance of an army, a navy and a postal system.<sup>5</sup> All other

<sup>5</sup> See U.S. Const., Art. 1, § 8; Art. 2, § 2; Art. 4, § 3.

ordinary powers of internal government such as relate to intrastate commerce, domestic relations, property law systems, local taxation, judicial administration, education, the police power and control of local governments are reserved to the states.

The restrictions upon the states were intended to secure the federal government against attempts to trespass upon its political domain. For example, the states may not coin money, make treaties or alliances with foreign countries, make anything but gold and silver coin a tender in payment of debts, enact bills of attainder, or ex post facto laws, or laws impairing the obligation of contracts; and, without congressional approval, may not levy duties on exports or imports, keep troops or ships of war in time of peace, or enter into an agreement with another state or foreign nation. The states are obliged to recognize the public acts, records, and judicial proceedings of sister states, and must maintain a republican form of government.<sup>6</sup> It is interesting to note that a state is not prohibited from doing such things as establishing a religion, abolishing trial by jury, limiting or extending the electoral franchise, suppressing free speech within certain limits and restricting the right of the free press and public assembly. Wide latitude was left to the states on such subjects. Bulwarks against any such encroachments are provided for in state constitutions.

The prohibitions imposed on the national government, among other things, interdict the suspension of habeas corpus, the passage of bills of attainder, ex post facto laws, the imposition of taxes or duties on state exports or any direct tax unless in proportion to the census, and preferential commercial treatment among the states.<sup>7</sup> Certain powers such as those relating to interstate commerce, insolvency laws and maritime matters are exercisable by both the nation and the states.<sup>8</sup>

In such fashion did the delegates treat with the basic relationship between the nation and the states—a relationship of balanced dualism which is the genius of our system. This type of political organization

<sup>6</sup> *Id.*, Art. 1, § 10; Art. 4, §§ 1, 4.

<sup>7</sup> *Id.*, Art. 1, § 9.

<sup>8</sup> For example, in a recent case, *Parker v. Porter L. Brown*, 317 U.S. 341 at pp. 359-360, 63 S. Ct. 307, decided January 4, 1943, involving the "commerce clause" (U.S. Const., Art. 1, § 8), Mr. Chief Justice Stone said:

"The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers. This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken."

was new to the world. It was an ingenious response to geographical size. It became a reality in 1789 upon the acceptance of the Constitution and, with it, the United States of America.

#### GROWTH OF THE CONSTITUTION AND THE CHANGING RELATIONSHIP BETWEEN THE STATES AND THE FEDERAL GOVERNMENT

Contention over distribution of authority between the federal government and the states did not abate with the ratification of the Constitution. The controversy has raged intermittently for one hundred and fifty years. "States' Rights" has been an issue in every national election. This is not surprising, for history relates that states forming federal unions are, later, certain to deny the extent to which they have delegated power or to give new meaning to the scope of authority retained by them. Because of this experience many have doubted whether any federal form of government can permanently exist; have asserted that sooner or later the members must inevitably make a choice among independent state governments, a unitary government, as in France, Belgium, Norway, Sweden, Spain and Italy, or a loose confederacy.

At no time has the federal government possessed wider powers than those originally conferred upon it and those contained in subsequent constitutional amendments. But the Constitution has grown because of amendments, of which there have been twenty-one,<sup>9</sup> and the judicial decisions of the final arbiter, the Supreme Court of the United States, which, in reviewing Acts of Congress, expanded federal authority through its construction of express grants of power, its doctrine of "implied" and "resultant" powers, and its interpretation of provisions imposing limitations upon the states. From the beginning and particularly since the time of Chief Justice Marshall, the interpretative decisions of the Supreme Court have been the greatest single influence in molding the shape of the republic. As the occasion arose, these have marked the respective provinces of state and nation and enabled the Constitution to keep pace with the constantly changing economic and social needs of the country. In response to these forces the Constitution has become a document more human than legal. It

<sup>9</sup> The first Amendments, 1-10, inclusive, embraced the Bill of Rights. They were proposed by Congress to the legislatures of the states, September 25, 1789, and ratified during the period 1789-1791, pursuant to Article 5 of the Constitution. These Amendments imposed further restrictions on the central government, denying it, for example, the power to establish or prohibit any religion, to abridge the freedom of speech or press, to forbid peaceable assembly and to create arbitrary methods of judicial proceedings.

is no longer static. It is dynamic. It has been vitalized and infused with the spirit of a vibrant, pulsing, growing nation. Lord Bryce once said, "The American Constitution has been worn away in one part, enlarged in another, modified in a third, by the ceaseless action of influences playing upon the people. It has necessarily changed as the nation has changed, has changed in the spirit with which men regard it, and, therefore, in its own spirit."<sup>9a</sup> This process has paralleled the forward march of the young nation.

Because of the essential characteristics of the first states, matters of government were largely local. In the early days of the republic, there was little need for judicial development of constitutional limitations. There was relative political quiescence. Few important questions involving spheres of governmental authority arose. But, during the first half of the nineteenth century, new problems appeared. Following the Industrial Revolution, inventions like Eli Whitney's cotton gin became numerous and accelerated the increase of manufacturing; the star of empire moved westward; communication systems improved due to better roads and the development of the steamship and railroad; wars were waged with England and Mexico; new political parties were born; great internal improvements were undertaken; cities grew; knowledge spread; trade and commerce increased; and a banking system was developed. Legislative action by the states and the federal government was required to meet the new problems, and conflicts ensued. During this time, the Court began its real work in defining areas of governmental action and the spheres of authority of the states and the nation. These questions were gradually but surely resolved by the Supreme Court in decisions which strengthened the young republic and made of it a united nation.

During this period the distinctive characteristics between the northern and southern states became more pronounced. The problems of the industrial north and the agricultural south with its slave labor gave rise to clashing issues which smoldered for years while the political questions of secession and nullification became ascendant. The Constitution was silent. The flames burst upon the nation in 1861 and it took a civil war to establish that the Union was not dissoluble, that it was "an indestructible union of indestructible states." Federalism became ascendant.<sup>10</sup>

<sup>9a</sup> WILLIAM B. MUNRO, *THE GOVERNMENT OF THE UNITED STATES*, 4th ed., 74 (1936).

<sup>10</sup> Amendments 13, 14 and 15 were adopted in 1865, 1868, and 1870, respectively, as the "terms of peace in the war between the states." These amendments imposed further restrictions on both the national and state governments. Among other

The years following the war ushered in the period of reconstruction. There was a great swell in immigration; new cities rose; political philosophies clashed; new territories were annexed; railroads and other arteries spanning the entire country were further developed. Industrialization brought the modern corporation, business monopoly, labor unions, mass production methods, mechanized agriculture, and a variety of financial mechanisms. Periodic dislocations in the economic structure occurred. There was war with Spain. The development of the motor car, the radio, the airplane, the moving picture, the telephone, telegraphy, electricity, and an abundance of other startling inventions added to the enjoyment and complexity of living.

Because of their character and their effect on national life, these and other important events served to make our social structure increasingly interdependent and augment the sphere of action of the federal government. It assumed new authority over industry, agriculture, commerce, taxation, and problems of social welfare. This exercise of power was sanctioned by the Supreme Court whenever it appeared that federal action was necessary in the solution of our growing economic and social problems. During and since World War I, the trend towards federal intervention in governmental problems has continued to grow. War and depression nourish the centralization of power which is oft-times difficult to reclaim. During this period several constitutional amendments were adopted.<sup>11</sup>

Throughout our history the center of political gravity has tended to shift towards Washington in direct proportion to our economic and territorial growth, our material progress, and our rate of ascendancy as a primary world power. Steadily the powers and functions of the federal government have expanded, though not without opposition,

things, they abolish slavery; provide for dual citizenship of persons born or naturalized in the United States; and prohibit the states from making or enforcing laws which abridge the privileges or immunities of citizens of the United States; from depriving any person of life, liberty, or property without due process of law; from denying to any person within its jurisdiction the equal protection of the laws. They also guarantee that no citizen of the United States shall be deprived of the electoral franchise on account of race, color or previous condition of servitude.

<sup>11</sup> In 1913 the Sixteenth and Seventeenth Amendments were proclaimed. The former permits Congress to tax incomes without apportionment between the states and without regard to any census. The latter provides for the direct election of senators. These Amendments provide instruments of direct political action and give to our government characteristics of a democracy as distinguished from a true republic.

Amendment 18 was adopted in 1918 and repealed by Amendment 21 in 1933. It prohibited the manufacture, sale or transportation of intoxicating liquors. Amendment 19 was adopted in 1920 and provides equal suffrage for women.

until today its activities directly or indirectly touch every person and every social and economic enterprise except in matters of peculiarly local concern. We cannot here further trace this historical development nor further indicate the ebb and flow of the historical tide, the highly pitched political campaigns, the complexity of the problems, the hopes, fears and passions of men as expressed in the great popular and judicial debates; suffice to say that history does not record a more fascinating human and political drama. However, it is interesting to observe that during our turbulent history, the important clashes over the distribution of authority arose mainly in connection with problems of economic and social reconstruction. The lances were broken over issues which called up the scope and meaning of the "commerce," "general welfare" and "tax" clauses of the Constitution; although it is also noteworthy that under the "equal protection" and "due process" clauses<sup>12</sup> of the Fourteenth Amendment the Supreme Court has interposed its veto to strike down state action in over two hundred cases.<sup>13</sup>

#### THE PLACE OF THE STATES IN THE NATION OUTSIDE THE GENERAL CONSTITUTIONAL RELATIONSHIP WITH THE FEDERAL GOVERNMENT

Despite the increase of federal power, it must not be assumed that in the process of apportionment of power the states have been completely eclipsed. The state is still the pivot around which the American political system revolves. The states are the source of the federal machinery. They control and supervise local government. They are still the principal areas in which lawmaking and the administration of multitudinous public affairs are carried on. The drama of national government oftentimes obscures these facts, but, from birth to death, in a variety of circumstances, the citizen is intimately connected with state and local government. The states are still doing a very large part of the governing.

In addition to performing their own functions, the states have been cooperative with the federal government. For example, during the last war and now, the machinery of state government was and is organized to assist in matters relating to the complex and cumbersome wartime regulations. In peace, this spirit manifests itself through collaboration in the fields of cyclical unemployment, crime prevention, emergency relief, social welfare, utility regulation, game supervision, and similar activities. In these pursuits a harmonious and invaluable

<sup>12</sup> See note 10 supra.

<sup>13</sup> For a summary of these cases to 1938, see FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT, App. I, pp. 97-137, incl. (1938).

relationship has been developed by the interchange of ideas, supplementary legislation and the dovetailing of administrative functions. Because of federal grants in aid and other incentives, there is a virtual partnership between the states and the nation in such matters as trunk highway construction, vocational and other types of education, employment service, agricultural problems, the conservation of national resources, and in the field of social welfare.

For some time now regional problems of various sorts between two or more states have been resolved by formal compacts. These agreements between the states, if political, require the consent of Congress.<sup>14</sup> They have been utilized in connection with the conservation of natural resources, minimum wages for women and children, taxation, boundary disputes, construction of interstate public services, allocation of waters, crime control and oil and tobacco production.<sup>15</sup>

The states have also established cooperative relationships with each other through the employment of different media. They have supported private agencies working in the field of state relationships. To secure uniformity in the administration of many problems, especially in the field of commerce, they have adopted uniform state laws and administrative agreements covering a variety of important subjects such as traffic and liquor regulation, oil and milk production, sanitation and flood control, population movements and interstate trade barriers. Through reciprocal and conditional legislation, particularly as respects the subjects of taxation, commerce and judicial procedure, the states through joint action have eliminated numerous interstate conflicts.

There are 165,000 units of local government in the United States such as counties, cities, towns, townships, school districts and other special units. Of late the states, appreciating that vital and efficient systems of local government are necessary for the progressive development of true democracy, have turned their attention to the reorganization of local government. However, progress in this direction has been slow due to such factors as sociological considerations, the natural conflict between urban and rural areas and the instinctive fear on the part of the people that modernization of local government might deprive them of control.<sup>16</sup>

<sup>14</sup> See note 1 *supra*.

<sup>15</sup> For a discussion of recent developments in interstate compacts, see 4 *THE BOOK OF THE STATES, 1941-1942*, pp. 56-61, incl. (1941). This work is published by the Council of State Governments.

<sup>16</sup> For an interesting study of this important question, prepared by William Anderson of the University of Minnesota, see *ANDERSON, THE UNITS OF GOVERNMENT*

## IS THE SHIP OF STATE ON THE RIGHT COURSE?

What role should the states play in our political system? Are they performing their proper functions or is there a present lack of balance in our federal structure? At no time since the war between the states has this problem received greater attention than at present. Not long ago the nature of the constitutional alliance and the obligation of the states to recapture lost power was posed by the courageous and able Governor Edison of New Jersey. In an interview with a representative of the *Saturday Evening Post*, the governor said:

"To me, one of the most important needs of our times is for our individual states to stand on their own feet. In the last fifty years the nation has been drifting toward centralization of power in Washington. Invention and Supreme Court decisions have all but erased state lines, and war and economic crises have done the rest. In World War One, national interest made centralization a necessity. After that war, power started to go back to the states slowly, and then came the depression, which swung us back to centralization again. Washington's hold began to relax once more a few years back, but then came World War Two, and again we are highly centralized. The spirit of local responsibility is dying. The feeling in the states is, 'The Federal gravy train is going by and we might as well get ours.' Local pride is gone.

"In wartime, any democracy must temporarily function in a totalitarian manner, and Washington today is bigger and more bureaucratic and unwieldy than it has ever been before. After the war, decentralization must start, but who will start it? Certainly Washington won't; it will be too full of vested bureaucratic interests. Only the states can do the job and, some of them, at least, must be strong and ready. My deepest hope is that New Jersey will be one of the refuges to which democracy can retreat after the war is over."<sup>17</sup>

With equal sincerity others applaud centralized government, believe it to be an essential political counterpart of modern life and even necessary if the best interests of the country are to be served.

Opposition to unbalanced government, resentment over bureau-

IN THE UNITED STATES (1942). This is publication No. 83 of Public Administration Service of Chicago, Illinois.

<sup>17</sup> Jack Alexander, "Ungovernable Governor," 215 SAT. EVE. POST 9 at 54 (January 23, 1943).

cracy and political immorality, passionate hatred of federal control over economic and social matters, partisan prejudice and fear of removal of government from the people all find expression in the cry "States' Rights," an expressive phrase which seems to mean different things to different people. But the essential dispute revolves around the question of proper distribution of governmental power and the tendency towards a social state.

The divergence of opinion is not confined to any strata of society. This is manifest in the acute conflicts in the last decade among the members of the Supreme Court of the United States. For example, in the case of *United States v. Butler*,<sup>18</sup> in which the court held the Agricultural Adjustment Act void as an improper invasion of the powers of the states, Mr. Justice Butler, one of the majority, sharply criticized the legislation as obliterating the independence of the states, but Mr. Justice Stone countered that such opinion "hardly rises to the dignity of argument" and warned his colleagues against "a tortured construction of the Constitution."<sup>19</sup>

While the technological revolution accentuated the trend towards centralized power, it does not appear that the states have thereby lost powers in the sense of things to do, but, on the contrary, have acquired more legislative subjects. However, it is true that of the aggregate new powers exercised by both state and federal governments, the latter has assumed more authority in several directions on the theory that the larger share of the problems have been of a general nature and, therefore, peculiarly within the province of the general government. Also of great significance is the fact that, since 1933, the concept of the social state has been increasingly reflected in a variety of legislative enactments. The sphere of federal government has been redefined to embrace planning and control over agriculture, industry, labor, public utilities, the marketing of securities and other segments of our socio-economic fabric. This new theory of government and the attendant rise of a vast bureaucracy have created considerable opposition from those who believe that such control, as distinguished from necessary regulation, is not a proper function of the central government, or for that matter, of any government. While government must be vital and attuned to the realities of this modern age, any inclination towards unitary government or totalitarianism must necessarily undermine and perhaps

<sup>18</sup> 297 U.S. 1, 56 S. Ct. 312 (1935).

<sup>19</sup> *Id.* at 87.

destroy the American political philosophy and, with it, our traditional way of life.

The expansion of federal power in the debated areas has been in response to the demands of this dynamic age, and, while the problems are different and more numerous, aside from the new emphasis on governmental control and regimentation, the development has followed an historical pattern. The national approach has always been that federalism is not a conclusion or a syllogism, not something fixed and immutable, but the product of applied knowledge, sociological experiment, and inescapable demands. The growth of national power springs from the growth of the nation itself and the process commenced during our earliest history when, for example, it was found expedient to use this power to establish a national bank and erect a protective tariff. Even Jefferson, always solicitous of state rights, gave powerful impetus to nationalism when, at one majestic stroke, through the Louisiana Purchase, he doubled the national territory.

The rise of federal power has in large measure resulted from the inability of the forty-eight separate states to cope with such general problems as interstate railroads, immigration, business monopolies, labor unions, interstate securities distribution and a host of other problems. There were also other significant factors. In some instances, inertia or even indifference on the part of the states prompted federal action, and, in others, the states requested such action because of their financial inability or unwillingness to assume the burden of economic and social programs. In too many cases, the states have been supplicants. While judicial veto of state action by the Supreme Court under the Fourteenth Amendment<sup>20</sup> has prevented the exercise of state power in some fields, abundant authority may be lawfully exercised by them in numerous fields, many of which have been subjects of federal legislation. The states have not always measured up to the problems of reorganizing our industrial life.

While there is no escape from these realities, it should not be concluded that there is no limit to the exercise of federal authority. Except in time of war or other grave national crisis, that authority should not be utilized except in response to demands of a peculiarly national character. To attempt to arbitrarily catalogue the governmental functions best performed by the state and federal governments respectively would be an unsafe and futile exercise. Except where authority is

<sup>20</sup> See note 13 supra.

clearly defined, the practical question in many instances is not whether the state or the nation is to exercise a particular power, but how much and what part of that power is to be exercised by each. Tradition and experience do, however, suggest certain applicable standards and principles against which proposed legislative action might be tested. These were exceedingly well stated by Henry Steele Commager,<sup>21</sup> who said:

“The true principle of federalism is that it be adjusted to realities. The line of division between State and central governments is a pragmatic, not a syllogistic, line. Those powers which can best be exercised by State governments should be left with State governments; those powers which can best be exercised by the central government should be allocated to the central government. This was the philosophy which animated the framers of the Constitution in 1787; it is the philosophy which permeates the decisions of John Marshall; it is the philosophy behind the growth of nationalism in the United States in the last three-quarters of a century.

“But it must be remembered that the determination of the allocation of powers rests not alone upon considerations of efficiency but even more emphatically upon considerations of larger social welfare and liberty. If the growth of Federal power should threaten the liberties of men under government, that growth should be stopped. It is essential, therefore, that the Federal Government and the men who staff it should be animated by a disinterested regard for national welfare, that they do not encourage the development of a bureaucracy, that they guard against the temptations of abuse of power for personal or party purpose, and that they beware even the appearance of dictatorial powers.”

If these tests of constitutional relationship seem simple, perhaps enduring political philosophies, like great moral judgments, are simple. Tested by these criteria, a careful and impartial survey of national legislation would most certainly reveal that the federal government is now stretched beyond its capacity. It would also suggest the desirability of partial realignment of the legislative treatment now accorded to such subjects as labor, housing, public health, public works, taxation, education, agriculture, phases of business and utility regulation and social

<sup>21</sup> Extract from an article written by Henry Steele Commager, “Nation or States: Which Shall Dominate?” *NEW YORK TIMES* (Magazine, section 8) 4 at 24 (November 28, 1937). Dr. Commager is now professor of history at Columbia University.

welfare. It would also disclose the lack of efficiency in certain activities of the national government and the need for truly liberal social and economic policies.

The assumption by the states of greater responsibility in these fields, or in any field, should never be championed on the theory that states' rights are an end in themselves, but only to insure efficiency, balance, stability and flexibility in the affairs of a great nation. If democracy is to work at the apex of the governmental pyramid, it first must be made to work at the base. Our aims should be to avoid paternalism and preserve the maximum amount of local rule consistent with the welfare and protection of the people. Nostalgia for past glories will not solve the problem. As a practical matter, such changes as are made will depend largely upon the prevailing political philosophy and the techniques employed in our social reconstruction; but there is much that all can do in attaining unity in diversity, in preserving the dignity of the states and in implementing their powers. Efforts to this end lie in the following directions:

1. The states must be keenly sensitive to the discordant economic and social changes which are constantly occurring in the national life. With courage, vision and efficiency they must stand ready to exercise their powers respecting subjects which they can supervise as well or better than the federal government.

2. The state is not a natural economic unit. By the intelligent use of administrative agreements and interstate compacts the states can continue to solve many regional problems in areas where common action will secure the best results. These devices offer ways and means of accomplishing the tasks of government when other channels are blocked or not appropriate.

3. Where necessary, the states should revise the structure of local government, not to obtain state centralization of power but to adapt internal governments to the realities of life in this century. Such action coupled with the improvement of governmental administration is of high importance for, according to the condition of its roots, the American system will flourish or wither.

4. Today, a large portion of the states' income is obtained from the federal government. The states should adopt and maintain sound fiscal policies and encourage local units to do likewise. Lack of foresight and wisdom in this respect has been a major cause for federal intervention in local affairs. The governors of many states have recently announced that they plan to husband growing cash surpluses in

order to be prepared for leaner periods. In this direction lies the recovery of many state powers and responsibilities which of late years have been assumed by the national government.

5. The states should continue to utilize the device of reciprocal and conditional legislation to eliminate interstate conflicts and antagonisms in such fields as judicial administration, commerce, trade barriers<sup>22</sup> and taxation, and thereby uproot sources of dispute, which, of necessity, often evoke the exercise of federal authority at the expense of the importance of the states.

6. The states should encourage administrative cooperation with the central government and other states through the conference method and otherwise; adopt supplemental legislation when necessary to assist in the effectuation of appropriate or necessary federal policies, as, for example, bank deposit insurance, rural electrification and public works; and strive for more uniform state legislation.<sup>23</sup>

7. Finally, the states must through educative processes employ every opportunity to inculcate in their citizens, a thorough knowledge of local and national history, applied economics, the meaning of democracy and free institutions, and the proper use of the instruments and processes of government.

Today, with the state in the center, the units of our government are interlaced with a growing maze of relationships, legal and extra-legal. The processes of government are undergoing tremendous changes—changes which modify long established forms, structures and methods. We are proceeding by trial and error to adapt our democratic processes to the relentless demands of the industrial age. As we lay the foundation for a new America bottomed on the free enterprise of free men, the entire problem of proper intergovernmental relationships might well be studied by a national commission appointed by the President in order to obtain correlated basic information which might serve as

<sup>22</sup> Because of the variety of onerous state laws, there is presently considerable agitation by truckers for federal regulation of interstate trucking.

<sup>23</sup> The desirability of uniform standards was sharply illustrated in the recent case of *Williams v. The State of North Carolina*, 317 U.S. 287, 63 S. Ct. 207 (1942). A divided court held that the extremely lenient divorce laws of Nevada were entitled to full faith and credit under U.S. Const., Art. 4, § 1. Mr. Justice Jackson's dissent speaks of the ruling as in effect substituting the lower standards of Nevada for those of the other states. Forthwith, Senator Capper of Kansas proposed a constitutional amendment to provide for a national marriage and divorce law. Reflection upon the difficulties in treating the collateral problems and relationships of the marital union retards enthusiasm for this approach to the problem.

the basis for the determination of optimal units for specific governmental purposes, and the development of proper future thinking in this important but neglected field. We must end the haphazard, quick and expedient approach. Disraeli once said that time is precious, but truth is more precious than time.

At different times throughout our history great strains have been imposed on our federal system. We are living through such a period today. The revolutionary and convulsive forces which were loosed after the last world war and are still rampant have not left America untouched. They have been the source of problems which, in their quick assault, have seemed to uproot our established political traditions. They have forced a rapid adaptation of our governmental processes to their new requirements. Keeping abreast meant sudden and startling change. Later we shall be better able to appraise the effects of the impact of recent events upon our dual system of government. In our hurried effort, there has not been time to consider carefully proper federal and state relationships. There are maladjustments. There is lack of balance in many areas. There is an excess of bureaucratic government. Notwithstanding the war, now is the time to take an accounting so that we can right our course and better prepare for the problems of peace and avoid the protraction of crisis power.

The people are facing a trial of their faith in self-government and a test of their beliefs regarding the very fundamentals of national life. The answer to all doubts is that our federal system must be preserved and improved. Though of subtle and complex character, it is the fount of our greatness, our strength and our national character. Whether it is preserved depends upon our attitudes, the desires of all national groups, their love for state and nation. Remember, we are citizens of both and the ultimate source of all political power. State and nation are of our design. Our pattern of government will be as we wish it to be. The basic responsibility is ours. If there have been maladjustments, they can be corrected. But this is not a paper process. It is a vital process of harmonizing and adjusting national and local interests. It is a laborious and demanding task.

It means the elimination of greed, selfish blocs and groups and a willingness to sometimes give rather than always receive. It means the inclusion in our life of the selfless urgings of conscience along with pragmatic science and the economic man. It means placing greater emphasis on duties and less on rights. It means wanting to preserve creative energy, liberty and freedom in every human pursuit. It means

forcible and certain rejection of the false and glimmering ideologies which teach that human beings exist for the state. It means that while valuing progress, we must cherish the traditions upon which our very genius depends and draw strength from the noble ideals, the beliefs and the hopes that are our priceless heritage. It means that we must build as we have never built and dream as we have never dreamed in our forward march of destiny. Therein lies the promise of American life. Ours is a sacred trust, especially today when in a turbulent world this heritage gleams so brightly against the dark shadows that now envelop us.