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This is a different world, a different America, a different government. Government lives in an entirely new and ever-changing environment, and the question we have to ask ourselves is: "Has the legislative machinery or the legislative process adjusted itself to its new responsibilities?"

The relationship between federal and state governments is a great and important problem, but the relationship inside the federal government among the judicial, legislative, and executive branches is a problem that requires even more careful consideration and analysis. Far too little attention is given to the role of Congressional responsibility. The many criticisms that have been leveled at the current session of Congress demonstrate what is happening to Congressional responsibility, Congressional power, and Congressional adequacy.

We must look beyond mere *mechanical* refinements of the legislative process or of the executive operation. What we need to understand more clearly is the relationship of people in a representative democracy to its government. The "citizenship gap"—that dead-air space, so to speak, that vacuum—between the people and their government promotes very serious political and social manifestations in our country. Respect for law and order, faith in representative government, confidence in national policy, are engendered not only by tested and accepted institutions and allegiance to the Constitution, but also by the conviction that government can translate into action the popular will or the national consensus. And the gap that has developed between the people and their government is a greater threat to our government and our social structure than any external threat by far.

One manifestation of the gap, of course, is the civil rights issue. Millions of people who have the obligations of citizenship are not given the privileges of citizenship; millions of people feel excluded from the protections of the law when they are not able to participate fully in the decision-making process of popular sovereignty.

The gap has been expanded by those who have been very successful in preaching the doctrine that federal government is bad, that it is an enemy of the people. This has reached the border of outright hatred, prejudice, and bigotry, with a belligerency and an arrogance that have produced the most brutal demonstration of lack of humanity that our people have ever witnessed in the assassination of our President. Politics has been described so often as dirty business that we tend to forget that representative government is not expected to produce an elite or a group of philosopher-kings, or a congress of saints and angels. Representative government represents the good and the bad, the clean and the dirty, the excellent and the mediocre and the poor. The duty is to set high standards and to insist upon excellence, even from those who never demonstrated such excellence prior to their election to responsibility.

One of the most hopeful things that has happened to our representative government in many years was the far-reaching Supreme Court decision on Congressional reapportionment, giving more adequate, honorable, and just representation to the voters of the states. It is particularly important because the population explosion in the United States is radically altering the character of the electorate. By 1980 there will be more than 260,000,000 of us. We are coalescing and clustering in giant urban complexes. By 1980 there will be more than 80,000,000 persons living in only one of these great urban chains stretching along the Eastern Seaboard from Boston to Washington, D. C. Another string will run along the rim of the Great Lakes from Buffalo to Chicago. The population cluster in Flor-

ida and some other spots along the Gulf Coast will intensify and thicken. A few inland webs will develop around the Twin Cities of Minnesota, around Denver, Salt Lake City, and Phoenix. And there will be a massive movement of population to the West.

By 1980 the face of the Congress will be greatly altered by these changes in population. Cities will be under-represented in the Senate, but they will dominate the House membership. The recent projections for 1980 prepared by the United States Bureau of the Census show these major changes in the House of Representatives: A shift of power to the great city areas all across the board; a shift of power clearly westward beyond the mountain states and to the West Coast; the Middle West barely holding its own; the states of the Old South, the border states, New England, and the large Middle Atlantic states losing representation.

A few examples: the Old South will lose 10 per cent or more of its House seats. The border states will lose almost 15 per cent of their House seats. New England will lose more than 15 per cent of its House seats. Texas and Florida, with their fast-growing cities, will pick up about 15 per cent more than their present House seats. The mountain states will pick up another 15 per cent in their representation. The Pacific Coast, which will add more than ten seats, will thus register a gain of almost 20 per cent in the House. Virtually every new seat in Congress will be one that represents a large city.

In short, by the time the toddlers of today are able to vote, the House of Representatives will be a body measurably more western and much more urban-oriented. A major proportion of the population will have no contact with, no understanding of, no experience in, rural America, although the literature and the culture of our democracy have always been oriented around the small rural town or the middle-sized community.

What will this mean to Congress in such matters, for example, as planning, a word that is still considered almost un-American? What will happen in city planning, not just conventional city planning but vast regional and area planning? To cite one small example, it is almost impossible today to get the Congress of the United States to say anything about open spaces in its legislation for urban renewal or urban housing in view of the present mental and social attitudes of our legislators. And yet, where are people going to live—on strips of concrete?

With regard to transportation, it does not matter how many ribbons of highways are built; with the population projection that faces us it is impossible under present engineering studies to move people from their homes to their jobs. The massive waste of time, money, and energy caused by faulty transportation makes the federal deficit fade into insignificance.

What about our agricultural patterns? We can produce all the food and fiber that this nation needs in the foreseeable future with one half of the people that we presently have on the farms. Our farms today are literally spewing out their population to the cities. American agricultural efficiency has staffed our factories and universities and populated our cities.

What about the dispersal of industry? What happens in mid-America? What about financing and credit for those vast areas of America where population seems to be drifting away? They will have little or no representation in the House of Representatives. Who will speak for them?

We will be faced with a backwash of areas of chronic unemployment because people cannot always pick up and leave just because an expert's blueprint says they should. Many things hold people to communities when there is no economic base—loved ones, age, sentiment, or just an inability to liquidate and get out. Increased efficiency of workers, wholesale changes in raw material production, the technological revolution in agricultural methods, are releasing millions of people to our cities and frequently to unemployment.

We have not even touched the surface of school and hospital needs. There is no national education plan for this country (and thank goodness the Center for the Study of Democratic Institutions is giving attention to such a plan for this great source of power that America ought to have).

I do not need to remind city people that their air is getting foul, their water is a problem both in purity and in sufficiency, their surroundings are either un-

planned or inadequately planned and are ugly and depressing, their educational systems are having difficulties, their transportation and communication lag behind population needs. I do not need to remind them either that the central cities and the suburbs are dividing along lines of race and class, and that this is intolerable. This is built-in destruction of democracy. We see it in the massive migration of Negroes into the core cities of the North and West from the rural slums of the South. And to deal with all these problems of our cities we have almost hopeless tangles of city governments, suburban councils, county governments, and state authorities, trying to stay afloat with stop-gap measures, inadequate tax bases, uncertain jurisdictions, and less than friendly and understanding legislators.

Yet these tough domestic problems are less important than the problem of achieving world peace. The military power of the United States has been a shield for the protection of that peace, but we know that armed power alone or arms alone are a bleak and uncertain insurance against the holocaust of thermonuclear war. I am afraid that many of us fail to recognize the impact of twenty-five years of military mobilization upon democratic institutions. It was difficult enough for this Republic to face a depression in the 1930's, even under the dynamic leadership of a Franklin Roosevelt. That tested democratic institutions, but in a real sense it invigorated and strengthened them. But I find very few examples in history where a prolonged garrison state, prolonged military mobilization—and the fear, suspicion, doubt, and uncertainty that are a part of and often the cause of military mobilization—have strengthened democratic institutions. We should be searching within our own experience to learn how we can maintain the military strength that is necessary in an uncertain world and at the same time strengthen the democratic institutions that this mobilization is designed to protect and defend. I am not sure that any of us has found the answers—including an answer to the problem of the military-industrial complex that Dwight Eisenhower discussed in his farewell address.

Some day we may face the possibility of the Soviet Union's taking a bold leap toward disarmament. If it proposes genuine disarmament with the safeguards that we believe are essential—and this is not improbable—we would be ill-prepared to seize the opportunity. In fact, we would be terrified. Our almost total absence of planning to offset the impact of major arms reduction on our economy is disgraceful. What would happen if there were to be in the next two years a twenty-five-billion-dollar cut in federal defense expenditures? What happens to whole cities when there is as much as a hundred-million-dollar reduction in federal spending for space programs?

Surely our country cannot be put in the position of rejecting the path to peace through safeguarded disarmament simply because we cannot afford the economic adjustments that a slow-down or shutdown in defense expenditures would require. Planning for the conversion from defense industry to peacetime industry is an absolute essential. Yet our government is totally unprepared, executive and legislative branches alike, and so are most of our communities.

Nor are we equipped to cope with the revolutionary ferment stirring in the societies of Latin America, Africa, and Asia. There are new wants and new demands, new power structures, here that we are totally unfamiliar with. "Those who make peaceful revolution impossible," President Kennedy said, "make a violent one inevitable." But it is the United States of America, born in revolution, dedicated to progressive thought, committed to liberal democratic institutions throughout our entire history, that seems least capable today of understanding the methodology of a peaceful revolution or of how it is to be accomplished.

We have left the doctrine of revolution to the reactionaries and to the brutes and the tyrants. The revolution of democracy has become a chapter in our history, not a page of living faith and living practice. All the foreign aid we can give will not help us—or the recipients either—until we know the kind of world in which we want to live, the kind of philosophy that should motivate men's actions. We have been long on the check-book and short on ideology, long on

money and short on thought. We have never dreamed the great and beautiful dream of a better world. We have just used Band-Aids to patch up old sores.

Can democratic representative government really meet these problems? I think so. But fundamental improvements are going to have to be made. It will require the federal government to share generously in the problems of our local states. It cannot do it alone, nor should it, but it does have a special and real responsibility that more of our people must recognize.

To deal with such critical matters, domestic and foreign, and at the same time to maintain rapport with the people is the task of the Congress. Congress must therefore know more, and the people must be more fully informed. Congress needs to streamline its procedures. Newton Minow has told me that as chairman of the Federal Communications Commission he testified on the Communication Satellite Bill before thirteen separate committees and subcommittees of the Congress. How can the people expect effective administration if agency heads are engaged in a sort of long-distance bicycle race wheeling back and forth among committees, attempting to educate and inform—or even to communicate—with a pocketful here, a handful there?

Congressional committees and subcommittees are more jealous of their jurisdiction than they are concerned with solutions—and I speak as a practitioner of the legislative process. The protection of this jurisdiction is second only to one's allegiance to the Constitution. One improvement in this area would be the formation of more *joint* committees at the subcommittee level, thus conserving the time of our administrators. But the greatest problem in the Congress today is how to equip ourselves more effectively to handle matters of national security, matters of peace and war.

I have proposed a *Joint Committee on National Security*. After World War II, President Truman established the National Security Council within the executive branch. He did so because he had to bring together the Secretary of State with the Secretary of Defense, the chairman of the Council of Economic Advisers with the Secretary of the Treasury. In other words, he had to bring into the decision-making process of the executive branch of the government the conflicts of ideas and the separate jurisdictions so that they could be harmonized and, indeed, homogenized.

But what do we have in Congress? The nuclear test ban treaty may be taken as an example. The decision to sign the nuclear test ban treaty was made in the National Security Council after working out conflicts of ideas, after exchanges of information within the confines of this established Council mechanism, after exploring the opinions and attitudes of the Joint Chiefs of Staff. Without this kind of coordination of thinking and of policy through one organized body there would have been a thousand voices in a thousand different directions.

Then the treaty came to the Senate. Had it followed regular procedures it would have passed through at least the following jurisdictions: the Armed Services Committee, the Armed Services Special Subcommittee on Preparedness (a dukedom all in its own right!), the Joint Committee on Atomic Energy, the Foreign Relations Committee. These, at least. It was only because of an *ad hoc* arrangement suggested by Senator Fulbright that the committees be pooled into one for the hearings that we were able to finish the discussions in six weeks. I don't like to think what might have happened if the treaty had also had to go through the House with *its* committees and subcommittees.

If Congress is to have anything more than a negative voice on foreign policy, if it is to get beyond the attitude of just digging its feet into the sand and holding back, it needs a joint committee on national security as a counterpart of the National Security Council of the executive branch. It would be composed of those who now have the main responsibility in the committees relating to trade, disarmament, armament, diplomacy—members of the Atomic Energy Committee, the Appropriations Committee, the Foreign Relations Committee, and the Military Affairs or Armed Services Committee. Today, when members of Congress are doubtful about some executive action, their automatic reflex is to say no. The way to remove doubt is through information.

Another improvement the Congress can make is the establishment of a permanent *Joint Committee on Congressional Organization and Operations* for constant review on a year-by-year basis of the institutions of the Congress for the purpose of upgrading them. In connection with this, I would like to be personal for a moment:

I consider my life to be at least up to the average standard in Congressional activity. I receive over a thousand letters every day in the week. I have hundreds of visitors, because the modern jet has brought a Senator's whole constituency within a few hours of his office! I receive not less than seventy long-distance calls every day of my life through that amazing instrument of communication and self-destruction, the telephone—not to mention the calls from my colleagues. How does one find time to think? How does one find time to tend to the duties of Congress?

Absenteeism in the committees and on the floor of Congress does not arise from the laziness of the members; it happens because they are some other place at the insistence of their constituents. I have to fight for time to get even to those committees of which I am a chairman. Why are the members of the Senate not in the Senate? They are not out on the golf course. They are in subcommittee or committee, but, more and more, they are most likely to be stuck in their offices with a backlog of constituents and of mail and of telephone calls.

The members of Congress have become the brokers between the executive branch and the people. The executive branch—which is what most people consider the "Government"—is big; it is like a maze; people do not know where to go. They have lost contact, except through their Congressman or their Senator. We spend our time trying to get a Social Security check for a person who should already have had it, or getting a veteran into a hospital when he ought to have been admitted in the first place. There are thousands and thousands of what we call "cases" like these. Congress is so overworked that the whole process gets choked up and we act like victims of paralysis, attempting somehow or other to meet just the most immediate problems that beset us with too little time and too little staff.

If I work less than fourteen hours a day, I feel that I have denied both my work and my official duty. It is utterly impossible to work less if you want to be effective in Congress. To be effective, it is helpful if you are intelligent, but it is more helpful if you are there! And I mean *there* where the decisions are made, in the subcommittees or the committees. But, of course, we will not even have a chance to be at the subcommittees if we are not seeing the folks that sent us there, or answering the phone and the mail: "My son, I have not heard from him for three months, Senator. He is in Korea. Get him to answer, to write to me." What do you tell this mother? She does not want to speak to my secretary; she has never met him. She wants to talk to me.

Other nations have established separate agencies to deal with matters of this sort. The Scandinavian countries, for example, have an office of complaints, like a major department store. Imagine if the head of a department store had to spend all his time arguing with the girls when they bring the stuff back and say, "It's the wrong size," or "It doesn't live up to what you advertise."

My second proposal, then, is a permanent joint committee on Congressional organization.

My third proposal revolves around finding some way of bringing to the Congress the brainpower, the reservoir of intellect, of intelligence, of expertise, that modern government requires. We have a government of separation of powers, of checks and balances. There are certainly plenty of checks. The Congress can dig its feet in and stop the government dead in its tracks. But what about balance? The balance between the legislative and executive branches can never be righted until the legislature has within its mechanism the kind of brains that the executive departments have long been able to attract.

The time is at hand to consider the creation of a new arm of the Congress, which, for lack of better identification, I call a *Congressional Institute*—a group of scholars who would serve the Congress as a pool of knowledge, thought, and expertise. (The Center for the Study of Democratic Institutions is very much this sort of operation for the entire nation.)

As long ago as 1922, Walter Lippmann said that one of the difficulties with the Congress was that the members could not get on top of what they needed to know. This is the gap between what one ought to know and what one does know. The situation has now become explosive and Congress is not equipped to handle it. I must confess that I am insulted when people say to me, Senator, did you read this book or that book? Read a book! I am trying to keep up with the documents that flow through the Congress. If I lived to be a hundred, I could not even get the table behind my desk unloaded!

I try to know something about disarmament. And how many people does the Congress of the United States have working on disarmament: one staff member! Fortunately, the executive branch has established a disarmament agency—and that is one of the miracles of our time! Congress is suspicious of this Arms Control and Disarmament Agency. It ought not to be, but it is. And the reason is that when a man is without enough information he acts from fear and suspicion and says no.

The Congress deals with a budget that will amount to almost one hundred billion dollars next year. How is it equipped to handle that budget? I serve on the Appropriations Committee. If I never served on anything else for the rest of my life, it would be ten jobs in one. How can any man know about a hundred billion dollars? All the Bureau of the Budget has to do is to accumulate and present that budget. The Congress has to decide on it. The Budget Bureau has thousands of employees. There are less than a hundred on the staffs of the Appropriations Committees of both houses of Congress. The best minds that we can find in the country should be examining this budget—and not only this one but projecting ahead down the years: What does the population change mean in terms of the budget? Should the budget be the kind that we now have—which is about as antiquated as a smoke signal—or should we be looking forward to a kind of capital budget, as well as an expenditure budget?

Unless this kind of thinking is tied into the Congressional process itself, unless it is a part of the Congressional establishment, it will be suspect. It must be brought into the cathedral of government.

The proposed Congressional Institute should be staffed far beyond the size of the present Appropriations Committees. A one- to three-year term of service would permit scholars to rotate from the best of our institutions of higher learning, and such a rotation would serve to keep vitality of ideas both in Congress and in the university community as well.

The Congress is discussing a tax bill now. It should have been discussing long-range tax adjustments and tax policy years ago. We have no answers to the relationship between federal and state revenues. We have no answer to the long-term problem of capital financing of the underdeveloped countries of the world. We have not come to grips with the balance of payments, and everybody knows it. We do not even know what we are talking about when we spout that high-sounding phrase, "international liquidity." We have not the slightest idea of the capital needs of the world in which we live, much less how we are going to answer them. The private enterprise system of the United States will rise or fall on what we do internationally in terms of the fulfillment of capital needs and long-term credits for the growing population of the world, and I would think that some banker or merchant or manufacturer who loves capitalism would say to one of his friends in Congress, "Good God, let's look ahead."

How about trade, the chicken war? Well . . . that describes it! We are just feather-picking on this problem. Do we really know what we are talking about when we reiterate President Kennedy's great concept of the Atlantic partnership? What does it mean for America, for its families, for its business? We talk about strengthening the peace-keeping operations of the United Nations. Let us get people working on that instead of trying to find out how to perfect a new soap. This is important; I am for soap. But I am for the United Nations, too.

The scholars for the Congressional Institute should be selected by their peers, by their professional associations. Freedom of inquiry should be not only permitted but assured, so that there would be no directed verdicts. At the same time, Congress would retain the powers of decision, and individual committee staffs would have the responsibility for specific legislation. The executive branch has developed

the use of scholars and has thus been able to provide some over-all designs and to make some long-range proposals. If there is to be a system of checks and balances that has some meaning, Congress must have the same kind of professional, scholarly support.

This paper has been rather a smorgasbord, but I believe in thinking out loud. It is more dangerous, but it is more fun. You might get other people to think out loud too, if only to prove how wrong you are. I want this dialogue. America needs a dialogue. It seldom hears even a monologue about these problems. I have confidence, however, in the toughness and the flexibility of our political system, in its capacity to adjust. In the last resort, this experiment in representative government which is ours is being made on faith.

When the world is filled with doubters, what we need are advocates—men and women of faith. We who have faith in democracy believe in a system based upon a desire for social justice, a system that welcomes a willingness to try new things—which is the essence of liberalism—a system that requires tolerance and respect for the views of others and engenders unity without unanimity.

In the end, we believe that this system will prove to be the most efficient, the most responsive, the most just, and the most humane of all the political systems ever designed by man.

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LeRoy Collins

In these comments on our changing federal-state system of government, I have been assured that I am not expected—because I am from the South—to start off with a rebel yell and wind up with an impassioned defense of states' rights! For the truth is, the South has never enjoyed any monopoly in championing the sovereignty of states. Bruce Catton tells this mordant anecdote to illustrate the point:

General Thomas, the phlegmatic Union commander, rode to the rescue of the Yankee troops at Chickamauga, and finally carried the day after some of the heaviest casualties of the war. After the battle, he went out, according to custom, with his quartermaster to pick the burying ground for the Yankee dead.

"Shall we do it the way we always do, General?" the quartermaster inquired. "Put the Illinois men together over there, and the Iowa men next, and the New York men over yonder . . . ?"

"No," the General replied. "Mix 'em all up. I'm getting pretty damned sick of states' rights."

I have no wish to leave the states defenseless, but I would strongly emphasize that the more pertinent issue is states' abilities rather than states' rights.

In the first place, states never have had rights in this country, not even during their heyday under the Articles of Confederation. It has always been the people who have had the rights, who have held the ultimate sovereignty. This has always been at the heart of our American form of government. The people have given nothing of their sovereignty away. All they have done is to authorize appropriate levels of government to exercise certain powers for them and in their name.

This course was set when the "divine right of kings" was rejected through the force of such documents as the Magna Carta, the Declaration of Independence, and the Constitution, with their avowal of the inalienable rights of individual human beings. We have tossed onto the junk-heap of history the notion about governments, as such, holding sovereignty.

Nowhere in its recitation of various rights does the Constitution mention any rights as belonging to the states—or to the federal government, for that matter. In the Constitution, rights pertain only to people. The Tenth Amendment, which is regarded as the ark of the covenant of states' rights, speaks only in terms of "powers" reserved to the states, not "rights" vested in them. To many the difference may seem to be one of semantics, but there is more to it than that.

As James Madison stated it in the *Federalist:* "The ultimate authority resides with the people alone, and it will not depend on the comparative ambition of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other."

Throughout American history the states' rights argument has been put repeatedly to test. But most people have wanted a "more perfect union" and a less disjointed one, and have said so emphatically, time and time again—by ballot and by bayonet.

Many states'-righters contend that state and local governments are being hog-tied by swiftly growing encroachments of the federal government into what heretofore were constitutionally reserved functions of state and local governments. On the other hand, detractors of the states argue that state governments are useless relics of a bygone era and that the only answer is to throw the full weight of the federal government into providing the entire cafeteria of services once left to the state and local governments. I do not find myself in harmony with either position.

The states' rights banner has been waved so often in our history that we tend to forget it has been most generally used essentially as a political weapon—first by one group and then by another, as it seemed to suit their various purposes. In American political life it has been an expression of protest or a defensive

tactic, far more than a sincere call for constructive effort.

This has been true from the beginning of our federal republic. Thomas Jefferson, in the early part of his career, had no more love for strong state governments than he had for a strong national government. James Madison, at the Constitutional Convention, actually sought to give the federal Congress the power to nullify any enactment of a state legislature. Yet both exploited the states' rights issue as a means of driving the Federalists out of power, and in the process they became the real fathers of the "interposition" doctrine, although this could not have been more inconsistent with Madison's basic philosophy or with Jefferson's subsequent actions as President. The Federalists, on the other hand, responded with a defense of their New England commercial interests under the banner of states' rights, and even very seriously considered secession.

Even Calhoun's position on states' rights was somewhat flexible. As that perceptive southern scholar and author, James McBride Dabbs, has pointed out: "Calhoun's brilliant theory [the independence of states] was motivated by his devotion to the southern situation. The South opposed states' rights when that seemed profitable, as in its bitter condemnation of certain northern states which refused, on the ground of states' rights, to return fugitive slaves."

Just after the turn of the century, Congress was faced with a strong plea to grant home rule to the voteless District of Columbia, which has been committed to its care by the Constitution. Fearing a heavy [illegible] registration, many Congressmen, from the North as well as from the South, strong champions of states' rights back home, argued that the "federal interest" in the District of Columbia could not be jeopardized by local self-government.

States' rights always have been a favorite haven of refuge for special interests in fear of government regulation.

In the latter part of the nineteenth century the states' rights argument played a prominent part in the debates over social legislation and economic regulation. Then, railroads and their political spokesmen first vigorously denied the power of states to regulate interstate railroads. To prevent the states from regulating them, they strongly argued that this was a job for the federal government. But when the U.S. Supreme Court finally agreed with them, they quickly lost interest in federal regulation.

State legislators often scream for "local rights" in opposition to the exercise of powers of state government on behalf of human rights and needs, and frequently it turns out that they are advancing the same special interests whose cause governors and congressmen and senators espouse when they call for "states' rights" in opposition to the exercise of federal authority on behalf of the same human rights and needs. Often it really is not the "rights" of county or state or federal or any other government about which these people are primarily concerned. Rather, it is the "right"—or, more precisely, the preferential advantage—of the particular special interests they seek to serve.

Minimum wages are a good example. Those economic interests which have opposed—in the name of states' rights—every single effort at the federal level to provide American citizens assurance of decent minimum wages have not encouraged the state governments to provide such. It is not really the "federal encroachment" they oppose: it is minimum wages. Lost somewhere in all of this are the human rights and needs involved.

Much of the change and shifting in government power has come about through the fault of no one, including local, state, and federal governments. Rather, it has been attributable directly to the national character of the growth and change taking place in the economy and in the society.

Initially, both the federal and state levels of government performed a minimum of functions—in keeping with the needs of a predominantly agricultural society in which each family could provide, more or less independently, for its own sustenance and security. But that society changed rapidly in the nineteenth century. The industrial and scientific revolutions were beginning. In the last quarter of that century state governments began to enact laws es-

tablishing the eight-hour workday, regulating working conditions of women and children, requiring safety and sanitary facilities in factories, and creating local boards of health and public welfare.

Yet the great revolution in American government had scarcely begun to take place. And when the depression of the late 1920's and early 1930's struck, it was national, and, therefore, most of the remedy had to be national in character. One result was Social Security, which obviously could be created and administered only on a national scale by a national government.

A state government still possesses complete and exclusive authority over any railroad that is entirely within its territory and that handles no significant amount of traffic originating in other states. The states still have the regulatory power, but the railroads which fit that description are now virtually non-existent. With the nationwide evolution of transportation, commerce, and communication, the regulation of industries serving the public in these categories clearly could not be left exclusively in the hands of state governments. More recently we have learned that through-highways linking the nation's major population centers, essential to the national convenience and defense, could not be left to the initiative and exclusive control of dozens of different state governments.

These examples can be multiplied many times, as the growth of the nation and its technology and the interdependence of the states have dictated that the country must become more united, more truly national, in many of its characteristics.

In many cases, however, it is not the evolution of our society that has made the exercise of greater federal power necessary but the lack of will and the limited abilities of the states. State failures and mounting national concern about them have invited and encouraged the federal government to move in.

As governor, I served on a joint federal-state commission, created by President Eisenhower in cooperation with the Council of State Governments. The commission set out bravely to examine the whole field of federal-state relations and to identify functions that should be returned to state jurisdiction. It turned out to be an exercise in futility. We found that, notwithstanding all the return-to-states'-rights talk, there were no substantial federal functions that the states really wanted back.

The reason was simple: "New" functions that the federal government had undertaken were, by and large, serving important needs of national scope and characteristics. There was widespread unwillingness or inability by the states to provide such services. The states needed all their revenues for other purposes. For example, no state wanted the federal government to stop its assistance to hospital construction within the states or to stop making it possible for states to build college dormitories with long-term federal loans or to discontinue its stimulative grants for improved health and education services, and so on.

Now, every state in the union had the power, the legal authority, to undertake such services. But state governments lacked either the desire to make the try or the ability to do so in terms of facilities, funds, and the extent of geographical jurisdiction.

The whole blame for this cannot reasonably be visited upon state officials. The people who have elected them too often have insisted upon or encouraged commitments of "no additional taxes"; they have cheered the ringing promises of candidates to get the "federal government off our back"; they have lighted up with hope and expectation for pension increases and countless new services—all at the same time.

Another very strong reason for increasing federal power has developed in the area of national civil rights. The protection and advancement of the individual rights of American citizens should be the primary aim of all government. To the degree that a government fails to serve this fundamental purpose, to that extent it fails as a government. Much foundering by the states can be measured directly from this standard.

The sad truth is that the states have allowed their own prominence to be lowered, their own effectiveness to be impaired, their own stature to be tarnished, by their failure to serve that fundamental purpose of meeting the clear needs of their citizens. In this last half of the twentieth century, the world has grown too small and the times too perilous for us, for

the nation, to be divisible into fifty different concepts of our central rights of American citizenship.

While I was governor of Florida, our legislature joined several other southern legislatures in adopting a resolution of "interposition," which, on the face of it, declared void the U.S. Supreme Court school desegregation ruling and sought to "interpose" the doctrine of states' rights. I had no veto power over it, for it was a simple expression of the legislature's viewpoint, but I publicly branded it as a fraud and hoax. Further, I could not let it pass my desk without in some way registering my disapproval, and so I picked up my pen and wrote a little message on the face of the original recorded resolution before it went into the state archives.

In that message I stated that if this resolution "declaring decisions of the Court to be 'null and void' is to be taken seriously, it is anarchy and rebellion against the nation which must remain 'indivisible under God' if it is to survive." And I said if history was to judge me wrong in this regard, there would be proof of where I stood.

I have always felt rather good about having done that. But I also wrote something else—another sentence in which I stated that in my opinion the U.S. Supreme Court had improperly usurped powers reserved to the states under the Constitution, but that the state should seek only legal means of avoidance.

I wish I had not written that last part. I do not feel that way now. But since I did, and feel differently now, I think I should say so. Looking at the desegregation decision of the Court in the light of a longer perspective, with the benefit of experience and reflection that the passage of time has brought, I do not now feel that there was any usurpation of the powers of a state.

Granted that the Constitution reserves to the states the power to provide for the education of their residents, it does not reserve to the states the power to provide adequate educational opportunities to some American citizens living within their boundaries and not to others. Indeed, there is an overriding obligation on the federal government to see to it that the rights of all Americans as citizens of the United States are not abridged by actions or by defaults of state governments. I am now convinced that the Court was acting entirely within its authority in taking that step to assure the full rights of American citizenship for all American citizens. It is just unfortunate that the long failure of state governments made federal action necessary.

There simply can be no state right to default on a national duty.

As a state legislator and state senator and as a governor in a state which had the most malapportioned legislature of all the fifty states, I used to feel that substantial reapportionment could be obtained from within the legislature itself—not on the first try, but certainly in stages. That is the way it should come, through the legislative bodies themselves. After six years of trying and failing, and trying and failing, I learned by bitter experience that this was impossible. I did not want to see reapportionment come through coercion by the federal government. But now that I am convinced this is the only way it can come, I welcome the recent entry of the federal courts into this field. Our whole system would be in serious peril if such a glaring fault in government should be without a remedy.

What is more, I am pleased to note the grounds upon which that federal judicial entry has been made —the federal protection of a federally assured right, the right to equal protection of the laws. There is no question in my mind that the courts are entirely within their proper jurisdiction in this instance, that citizens living in the more heavily populated sections of persistently malapportioned states are, without question, being denied equal protection of the laws. And in this historic decision the highest court in the land may well have saved the state governments from being wrecked by those who profess to be their strongest defenders.

It is ironic indeed that many of those who scream loudest against this effort to assure all the people the equal protection of the laws in legislative representation are the first to insist upon the federal protection of their property rights—such as keeping inviolate contract obligations and making private property safe from confiscation—all guaranteed under the same organic provisions. Rather than an improper invasion or smothering of the prerogatives of the states, I regard the action by the federal judiciary in

this field as the greatest liberating force for restoration of the effectiveness and prestige of the states in a long, long time.

The day will come—as come it must—when state government, freed of the highly favored predilections of malapportioned legislatures, will be championing the cause of those in the society who are not adequately represented under the existing arrangement. When that happens, state governments will be in position to command the respect and stir the enthusiasm of greater numbers of their citizens. There will be a much wider range of opportunities for state governments to exercise their powers which now are too often in atrophy.

State government is not dead; it is not dying; if it is sick, the disease is curable.

As a system, its greatest fault is that too often and in too many places it has been dominated by, and made to serve the advantages of, a whole band of special interests which have no intention of voluntarily yielding more control of the ship of state to the people.

While many states have moved effectively, it seems that in many others it is going to be necessary for the federal government—in this instance, the federal judiciary—to follow up the shot it has fired across the bow and actually clear the decks of malapportioned legislatures.

It should not be concluded from what I have said that states have been idle, leaving the whole job up to the federal government. In 1962, federal expenditures—not counting what was spent for defense and foreign aid, for veterans' affairs, for interest on the national debt and for Social Security payments—were less than $35 billion. State and local governments, on the other hand, spent in 1962 a total of more than $81 billion. Total federal aid to the states was less than $7 billion in 1962—a very small fraction of the total expenditures of state and local government. And the direct federal contributions to our local governments were less than $800 million.

What has actually happened is that as our nation has grown, so have the needs of its people. And government—federal, state, and local—simply has been slow to serve these human needs as they have developed.

Instead of demeaning the importance of states, the increased need for human services should increase the importance of states, for it calls upon them to become more and more effective in terms of service to their citizens.

In every state in the union there is a crying need for stronger efforts by the state governments to advance programs that will enrich and safeguard the lives of people—in such fields as expanded public education, public health and hospitalization, slum clearance and urban renewal, industrial development, rehabilitation programs, juvenile delinquency and the whole gamut of services for children, air-land-water pollution control, conservation of natural resources, civil rights and public defenders, consumer protection—all the things that bear on the welfare and happiness of people.

There is need for more uniform laws of state-wide application to provide higher standards in such areas as zoning and planning, building codes, fair tax assessment, traffic control, law enforcement—the list seems almost endless. Anyone with any doubts about this should just take a look at the figures showing future population projections.

And in none of these areas is there any lack of state authority.

Once the federal courts are able to break the legislative apportionment deadlock, I predict that we will see a real resurgence of progressive, human-need-oriented legislation from legislative halls in state after state. When this happens, state government will become a far more exciting and vital force in American life, opening up new vistas for serving the needs of all our people. Once they get moving with greater effectiveness in this direction, the state governments are quite capable of making the federal efforts appear pallid in contrast.

We may be seeing the beginning, rather than the end, of the golden age of state government in America. We may stand at the threshold of a period in which state governments will be able to demonstrate all of their inherent flexibility, all of the great potential they actually have, to make the adjustments and provide the services required by a future which will

be marked by increasingly rapid social, economic, and political change.

In 1960, almost seven out of every ten Americans lived in urban areas, on only 1 per cent of the land area of our country. If our state governments should fail to respond to the need and attitudes of this increasingly urban America, they could become the unnecessary middle-man and cease to contribute any meaningful political vitality in our system, forcing a larger and larger degree of local home rule and stronger and stronger ties with a national government more responsive to their needs.

However, if state governments can excel in the quality of their service, they can become, perhaps for the first time, what the founding fathers thought they would be: the best guardians of the individual liberties of our people and the best servants and ministers of their needs.

I want to see us prepare for that day now, and hasten its coming. I would like to see the development of an *annual national federal-state conference,* called by the President of the United States and in cooperation with the Council of State Governments. Representing the federal government would be the President and key executive department personnel designated by him, and senators and representatives selected by their respective houses of Congress. Representing the states would be governors and top state executive department personnel designated by the governors, and key members of the state legislatures.

The purpose of the conference would be threefold:

1) To generate a better understanding—within the federal government and among the American people —of unmet needs within the states, of what the states are doing to meet those needs, and of what the federal government might properly do to help the states meet such needs.

2) To generate a better understanding—within the state governments and among the American people —of the role being performed by the federal government, of what it proposes to do in meeting national needs, and of how the states may be actively helpful in these efforts.

3) To arrive, if possible, at some common understanding as to what programs will be undertaken—and by whom—to meet the needs of modern America.

I recognize immediately many inherent difficulties, such as the possibility of the conference degenerating into tawdry, self-serving political grandstanding. But this presupposes human failures that I believe we could rise above.

I cannot help feeling that—if projected with the full power and prestige of both federal and state leadership behind it—such an annual conference would provide an opportunity for injecting some fresh breezes into the stale fog which now closes in on too much of our federal-state relationships. A meeting like this well could serve as a catalyst for sound common understanding and common action.

Vast new horizons beckon to this nation and its people. It is a time to fashion some fresh approaches. Those who persist in trying to sail state governments into the backwaters of sectionalism and special-interest service, and who visualize a prime role of the states to be the detractor and antagonist of the union, some day will discover they are at the tiller of a ghost ship.

I hope this never happens. It will not happen if our hearts and efforts are with the people and their rights. It is with them that we must take our stand and do our fighting. We have run out of time for anything less.

[1964]

A Lawyers' Trust: Equilibrium in the Federal System

The conflict between national supremacy and states' rights goes back to the earliest days of the Republic, and, except for the generation immediately preceding the Civil War, the trend has favored expansion of national power at the expense of the states. Mr. Evans believes that this trend has now led us to the point where the fundamental equilibrium of our federal system may be upset. He declares that it is up to the Bench and Bar, whom de Tocqueville called "the American aristocracy", to assume the leadership in restoring the true spirit of federalism.

by William Evans III • *of the New York Bar (Utica)*

ONE OF THE MOST bristling problems woven through the fabric of American history has been the conflict of national supremacy with states' rights in the federal system. The issue fired the debates of the architects of the Constitution, propelled a tortured Union into civil war, and, in all its implications, is still the most important political problem facing us today as we evolve toward a world in which the rule of law[1] becomes supreme—a world whose government may some day be modeled on our own great federal system;[2] and whose peace will not depend on precarious balances of power, but on enforcement of codified laws. The issue is also momentous because it deals with the individual liberties of man pitted against an almost centripetal impulsion toward central government.

Roots of the Nation

What was the role of the nation and the states originally intended to be? What are "states' rights"? Have the equilibrium and harmony intended for our federal system been seriously impaired by the progressive accretion of national power and encroachment on the states' domain, and if so, what can be done to curb it?

Insight of the present requires understanding of the past. We need to look back at our religious and philosophic heritage and consider historical developments. The Constitution and the federal system do not seem so remarkable against the backdrop of the religious and philosophic convictions of the great lawyers who were the principal technicians. Long before the age of Adams, Hamilton, Madison and Jefferson, the colonists had rejected the Puritan absolutism of Jonathan Edwards and Calvin's doctrine of predestination. Americans were no longer hidebound by pessimistic theological tenets. They believed they could shape their own destiny.

Because the framers of the Constitution were students of the political philosophies of the giants—Plato, Aristotle, Locke and Rousseau—the Constitution and federal system have their roots deeply imbedded in the ideas and principles of the great theses of these philosophers: natural justice, supremacy of natural and moral law, sanctity of the individual, belief in collective judgment and the great equilibrium of life, the golden mean.[3] The Constitution was fashioned by men who believed the goal of government is the common good of the whole people and that *law* is supreme, not man, for man's soul can be possessed by passion.

The overriding concern of the architects of the Constitution, despite Ham-

1. See Malone, *Promoting the Rule of Law*, 45 A.B.A.J. 242 (1959).

2. Arnold Toynbee makes an interesting comment on the future of the United Nations and its confederate qualities in 2 A STUDY OF HISTORY (abridged edition by Somervell) at 329:

> [The] U.N.O. seemed unlikely to be the institutional nucleus out of which an eventually inevitable world government would grow. The probability seemed to be that this would take shape through the development, not of U.N.O., but of one or other of two older and tougher political "going concerns", the Government of the United States or the Government of the Soviet Union.

3. Jean Bodin on Plato, SIX BOOKS OF THE REPUBLIC (1583 ed.); ARISTOTLE, POLITICS; LOCKE, CIVIL GOVERNMENT (1689); ROUSSEAU, SOCIAL CONTRACT (1762).

ilton's aristocratic tendencies for an imbalance on the side of national power,[4] was the preservation of the balance between "nation and state", and "liberty and order", within the framework of the federal system. Their zeal for the preservation of sovereignty of state and nation each within its own sphere related to philosophy inbred, that the individual has basic liberties living as a citizen even in a sovereign state. The architects were influenced by the philosophy of Rousseau. Paraphrasing the statement in *The Social Contract* that "man is born free and is now everywhere in chains", Rousseau had implied that man under the terms of the "contract" had conditionally surrendered certain liberties for chains or bonds which were in accordance with natural law, but which would lead to a greater freedom through the orderly government of society. Every man, then, would be a sovereign but a subject at the same time. The architects rejected Hobbes's antithetical philosophy demanding man's unconditional surrender of liberty and soul to the leviathan state in return for everlasting paternal securities meted out by the completely dominant sovereign.[5]

Original Emphasis on States

Following the Revolution, the colonists were faced with the state of "liberty" without "order". What form would "order" take? Again, considering the underlying philosophy of the political leaders of the times and the heady feeling of new-found freedom, it is not surprising that government took the loose form of the Articles of Confederation made up of the thirteen states that had just won their independence.[6] The desire for independence was so strong that each state would not surrender any part of its sovereign power.[7] The Confederation was not in any sense a national government with both external and internal powers, but was a league of independent states joined in loose union principally for self-protection against foreign powers. There was no executive department to administer and enforce national laws; it had no power to deal with *individuals*, only with states.[8]

Hamilton would say it is historical irony that the American people have run the course from loose, localized government to prominent, centralized national government. He had completely misjudged the trend of the future when he sought to compensate against the awesome role he expected the *states* to assume, by pressing for a supreme and indissoluble union with complete subordination of the states.[9] His position was far to the right of Madison who subscribed to the theory of "requisite power" for the central government within the republican structure, and even farther to the right of Jefferson, with whom the doctrine of "states' rights" had its beginning.

Factors in the Accretion of National Power

How did we reach our position today and where are we headed? Have we lost control of our destiny? There have always been periods in civilizations in which certain dominant figures have had a greater influence on the course of history than any other events or factors. Certainly the principal influence upon the direction of our government from the Revolution through ratification of the Constitution and the early years of the nation's history was the character and intellectual fibre of the men who played the dominant roles in launching the ship of state—men like Adams, Hamilton, Jefferson and Madison, and John Marshall, who as Chief Justice from 1801 to 1835 charted the direction the ship would take.

The nature of the federal system with its enumerated and implied constitutional powers and the entirely unique principle of "judicial review"[10] is the most influential element in the process of the evolving national supremacy, and particularly a federal system overlaid on a country with boundless resources whose economy and industry suddenly developed with a rush following the Civil War. The exploitation of national resources and manipulations of the great financial banking and railroad titans transcended state lines and commanded *national* attention, and eventually, legislative reform.[11]

The bench marks in the development of national centralization with the consequent contraction of state government were the Civil War, from which emerged the Fourteenth Amendment, a fickle sword used by the judiciary in its formative years in the *Slaughter-House* cases to protect state police powers to regulate health, safety and morals, and in later years to cut down state legislation; the Sixteenth Amendment in 1913, permitting a direct income tax by the Federal Government without apportionment; and later in the course of history the era of the New Deal, which fostered the most revolutionary Congressional legislation the nation had ever seen, the era in which the scope of federal grants-in-aid was transformed from a brooklet to a torrential river.

Whether any one factor—people, events or the inherent qualities of the federal system—has been more responsible for the accretion of national power is not important, but most historians agree that national feeling of the peo-

4. See Koch, *Hamilton and Power*, 47 YALE REVIEW (1958).

5. HOBBES, LEVIATHAN (1651).

6. The League of States under the Articles of Confederation lasted for six years, 1781-1787.

7. The feeling of intense loyalty to the states persisted even after ratification of the Federal Constitution to the early 1800's. But by 1830 no citizen of the United States except in Virginia, Georgia and South Carolina would have followed his state out of the Union on any issue. MORISON & COMMAGER, GROWTH OF THE AMERICAN REPUBLIC 537.

8. In disputes between the central government and a state the only courts available were the state courts. When a citizen violated one of the laws of the Congress of the Confederation, all it could do was request the proper state to take the necessary disciplinary measures. Some of the states became involved in serious disputes among themselves. Pennsylvania and Connecticut came to armed blows over the Wyoming Valley, located within the present state of Pennsylvania, but then claimed by both under the terms of their original charters. Each state retained the right to coin money and regulate commerce. See SALISBURY & CUSHMAN, THE CONSTITUTION, THE MIDDLE WAY 13-17.

9. Seeking to reassure those who feared for the states when the new Constitution was put forward, Hamilton prophesied that it would "always be far more easy for the state governments to encroach upon the national authorities than for the national government to encroach upon the state authorities". THE FEDERALIST, No. XVII. (Lodge's ed.) 98.

10. Although the doctrine of "judicial review" does not exist in any other country, nor is it specifically provided for in the Constitution, a review of legislation by the courts is in full accord with the general spirit of the National Constitution not only as to federalism, but with respect to the principle of checks and balances which pervades the entire Constitution. Furthermore, the Judiciary Act of 1789 authorized the Supreme Court to review any case in which a state court had upheld a state law alleged to be in conflict with the Constitution, a statute, or treaty of the United States. *Marbury* v. *Madison*, 1 Cranch 137 (1803), was the first case to hold an act of Congress unconstitutional and void.

11. See JOSEPHSON, THE ROBBER BARONS.

ple in the end determines the course a country will take within the structure of its government, even though great stresses and strains may be placed on the government's framework or constitution to achieve the results demanded. Free governments cannot be any different from the desires of the people they serve. If government grows imperceptibly away from the people, the time comes when people will change either the mode or direction of the government.

Leaders in Society

Who represents the people and expresses their basic feelings? The great political leaders in American society have for the most part been the lawyers and judges. They have had a special responsibility. Over a century ago de Tocqueville said:

> If I were asked where I place the American aristocracy, I should reply, without hesitation, that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and bar.[12]

The members of the Bench and Bar have the same responsibility today to monitor and guide the direction their principles and heritage tell them the country should take. If the delicate equilibrium of nation and state seems to be imperiled, it is the job primarily of lawyers and judges to restore that equilibrium.

The Constitution and States' Rights

The makers of the Constitution did their best to define the spheres of the national and state governments, but differences of opinion arose from the very beginning in the debates of the Constitutional Convention and persisted long after the new constitutional government was launched. The Articles of Confederation still influenced those who felt that sanction of the National Government's powers should operate only on the states instead of directly on individuals.[13]

In the form the Constitution was finally drawn, the National Government became supreme within the sphere assigned to it, and the state no less in its sphere. This did not mean the two governments were to enjoy equal footing within the federal system. One of the Constitution's most remarkable clauses reads:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the *supreme Law of the Land;* and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding [emphasis added].[14]

The supremacy clause is said to be the central clause of the Constitution upon which national law becomes supreme. Nothing of the kind can be said for the laws of any state. The National Government has certain enumerated powers,[15] but the great source of exploitation by Congressional action and judicial construction, at least in the early years of the Union, was through its "implied powers".[16] Today, however, through judicial development, there is almost no sphere of activity that Congress cannot regulate through the taxation and commerce clauses.

The Constitution also defines specific powers which the state may not exercise,[17] and enumerates the obligations of the National Government to the states,[18] the most important of which is its obligation to guarantee a republican form of government to each state and protect each state against invasion and domestic violence. All powers not delegated to the United States nor prohibited by it were reserved to the states or to the people.[19]

Even though the Federal Government has never had general police powers to regulate health, morals and welfare, it soon effected the same result through the increasingly important commerce and taxation clauses.

The new national supremacy implicit in the federal system fanned the first sparks of states' rights. We find, then, the Supreme Court holding in 1793 that a citizen of one state could sue another state in the federal courts.[20] This was shocking doctrine to people of the states' rights persuasion like Jefferson.

"States' Rights" Is Not State Sovereignty

A long line of Supreme Court decisions under the imprint of Marshall demonstrated that states' rights were not synonymous with state sovereignty. "States' rights" as a popular slogan reached crescendo proportions in the age of the "fire-eater" Calhoun, whose tirades against tariffs imposed by the North on the South's cotton economy completely warped the doctrine to one of state sovereignty.

To Jefferson, however, must be attributed the beginnings of states' rights as a serious political doctrine. Jefferson was fearful that under the new Union the extension of federal power in the hands of the conservatives would so reduce the authority of the states that their governments would be completely absorbed. He therefore advanced the theory of strict construction of the Constitution which came to be known as "states' rights".

Prompted by the Alien and Sedition Acts directed toward suppression of Republican critics of the Federalists, Jefferson and Madison joined with the legislatures of Virginia and Kentucky in advocating disregard by any state of all acts of Congress which the state might consider unconstitutional and contrary to its legitimate interests. The word "nullification" appeared for the

12. 1 DEMOCRACY IN AMERICA (ed. by Francis Bowen 1862).

13. The Virginia and New Jersey Plans submitted to the Constitutional Convention of 1787 provided coercion against states that came in conflict with the national laws. When it was settled that the new National Government was to operate directly upon individuals and not merely on the states, as under the Confederation, the idea was given up.

14. UNITED STATES CONSTITUTION, art. VI, § 2.

15. Powers to maintain an Army and Navy, coin money, levy taxes, regulate interstate commerce, admiralty, etc., art. I, § 8.

16. The Congress shall have power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof", art. 1, § 8.

17. For example, among other things, states may not make treaties, alliances or compacts with other states without consent of Congress. (There have been several compacts between states, however, probably the most successful being the Port of New York Authority); nor may they lay imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, or coin money, pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, art. 1, § 10.

18. Art. IV, §§ 1-4. The obligations in these sections include also the full faith and credit and privileges and immunities clauses.

19. Tenth Amendment.

20. *Chisholm* v. *Georgia*, 2 Dallas 419 (1793). The ruling in this case was later overcome by Amendment XI, ratified in 1795.

first time in the Virginia and Kentucky Resolutions, but the principle was not strongly featured until it was linked many years later with the doctrine of states' rights by Calhoun.

The fickle quality of states' rights as a factional doctrine is expressed in the following words of one eminent work on American history:

> In any federal government there is a possible conflict between powers of the nation and powers of states. A minority party, interest or sectional combination, if ridden too hard, or too proud to be ridden at all, will try to escape the consequences of its position by raising the banner of state rights. In American history the "doctrine" of state rights has not been a cause, but an effect of this condition. Almost every man in public life between 1798 and 1860 spurned it when his section was in the saddle, and embraced it when his constituents deemed themselves oppressed. Almost every state in turn declared its own absolute sovereignty, only to denounce as treasonable similar declarations by other states.[21]

Throughout American history "states' rights", in its chauvinistic sense, reduces itself primarily to a sectional problem. We can understand and sympathize in terms of history with the recent automatic reaction of some of the Southern states in the form of threats of "nullification" and "interposition" to the Supreme Court's reversal of the doctrine of "separate but equal" in the *School Segregation Cases*,[22] but we do not believe the Court's position was an encroachment on states' rights in the sense that Jefferson viewed them. On the contrary, it was a reaffirmation, foreshadowed in prior court decisions of fundamental rights of *individual citizens*, implicit in "equal protection"; the problem concerned the entire nation, and not just individual states or sections. On the other hand, the method of enforcement of the law employed by the Federal Government in the State of Arkansas through the use of federal troops is more readily debatable because it hinged on a factual situation. When there is threat of invasion, or the republican form of government of a state is imperiled the President may act without waiting for the request of state authorities. If the situation involves merely domestic disorder not menacing the republican form of government, he cannot act under the Constitution until requested by the state unless the execution of a national law, the carrying out of a national activity, or the safety of national property is imperiled. The argument surrounding the action of President Eisenhower in calling the National Guard into federal service in Little Rock revolved around those issues. The action of President Kennedy in bringing federal forces to bear in the matriculation of a Negro at the University of Mississippi was not only to enforce the federal law but was to ensure domestic tranquility within the State of Mississippi. It was the contention of the executive in both cases that the law of the land was being subverted.[23]

Judicial Review and National Powers

The aspect of states' rights with which we should be principally concerned relates to those economic functions of government which states are capable of performing themselves, but which gradually have been lost to the Federal Government both by failure of the states to act and by judicial construction of the Constitution almost invariably in favor of the Federal Government.

A political writer once remarked:

> The Supreme Court throughout our history has been as impartial an umpire in national-state disputes as one of the members of two contending teams could be expected to be. As an organ of the national government it has, however, undeniably shown predisposition, if not downright favoritism, toward that government. The States have had to play against the umpire as well as against the national government itself. The combination has been too much for them.[24]

Experience shows that national powers once asserted and safely past the hurdle of the courts are almost never relinquished. Very few important instances of retrenchment can be cited, except abandonment of the prohibition of the liquor traffic, which was brought about by direct constitutional amendment rather than by judicial interpretation.[25]

The first decisions of the Supreme Court in the early 1930's overruling the massive New Deal legislation (with the exception of NIRA,[26] which was never revived) were soon followed by the most revolutionary switch in the Supreme Court's history. The Court proceeded to validate all of the same type of legislation it had just rejected, giving the Federal Government the green light to regulate the economic life of the nation.[27]

The decisions of Marshall's Court had unalterably established the dominant position of the Federal Government over the states through the process of judicial review.[28] In *McCulloch* v. *Maryland*[29] Marshall had expounded the doctrine of "loose" construction of "implied powers":

> This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising and will probably continue to arise as long as our system shall exist. . . . The powers of the government are limited, and its powers are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that

21. 1 MORISON & COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 1763-1865 274.

22. *Brown* v. *Board of Education*, 347 U.S. 483; 349 U.S. 294 (1954).

23. See Art. IV, § 4. In 1894 Cleveland intervened independently in the State of Illinois over the protest of Governor Altgeld when the carrying of the mails, and therefore the flow of interstate commerce, was obstructed by a major railway strike.

24. Field, *States versus Nation, and the Supreme Court*, 28 AM. POL. SCI. REV. 233 (1934).

25. Twenty-first Amendment repealing Eighteenth Amendment.

26. The National Industrial Recovery Act was held unconstitutional in *Schecter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935), and *Panama Refining Co.* v. *Ryan*, 293 U.S. 388.

27. The National Labor Relations Act was upheld in a series of five decisions headed by *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); the revised Farm Mortgage Act and Railway Labor Act were upheld in *Wright* v. *Vinton Branch Bank*, 300 U.S. 440 (1937), and *Virginia Railway Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937); social security legislation was upheld in *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), and *Helvering* v. *Davis*, 301 U.S. 619 (1937); the Agriculture Adjustment Act of 1938 was upheld in *Mulford* v. *Smith*, 307 U.S. 38 (1939), overruling *U.S.* v. *Butler*, 297 U.S. 1 (1936).

28. See footnote 10.

29. 4 Wheat. 316. The case arose out of the refusal of the cashier of the Baltimore branch of the second United States Bank, chartered in 1816, to pay a tax levied by the State of Maryland on the issues of the bank. The constitutionality of the bank was upheld, and therefore its immunity as a federal instrumentality from state taxation.

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discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in a manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the constitution, are constitutional.

The doctrine gained general acceptance and is today deeply imbedded in our constitutional law. The latitude of governmental functions resulting from such a doctrine is almost limitless. Armed with such a broad definition of "implied powers", it is not surprising the Supreme Court at a later date also expanded the scope of the key enumerated powers in the taxation and commerce clauses, thereby permitting national legislation by the 1930's to affect almost all types and phases of business operations within the economy.

Continuing with *Fletcher* v. *Peck*[30] the Marshall Court, in a line of cases extending to the era of Chief Justice Taney, established the dominance of the Federal Government over the states in connection with every national-state issue that came before the Court,[31] as well as crystalizing the discretionary powers of the executive branch of the Government.[32]

The trend of the Supreme Court, with the exception of the Taney era from 1835 to 1865, when states' rights flourished, has continued in the general direction of expansion of national power.[33]

Following the Civil War, however, when the country passed from an agrarian to an industrial economy, the Court, expressive of the spirit of *laissez-faire* that pervaded the country, used the fathomless powers of the equal protection and due process clauses of the newly adopted Fourteenth Amendment to cut down much of the social legislation offered by some of the more progressive states under their traditional police powers.[34] Many state acts during this period were held unconstitutional as imposing burdensome taxes in violation of the commerce clause. This phase of assertion by the Supreme Court exemplified a kind of negative federal encroachment, for since the era of the New Deal we generally think of federal encroachment as the positive pre-emption by the Federal Government, through its various agencies and congressional acts, of the spheres of activities that might otherwise be exercised by the states under their inherent police powers.

Other drastic influences of the National Government upon states have been of a more indirect character. There has been an increasing reliance of states and their subdivisions upon the output of research from the various federal bureaus—bureaus in the Departments of Agriculture and Labor, Bureau of Standards in the Department of Commerce, the Office of Education in the Department of the Interior, and more recently the Department of Health, Education and Welfare, and many other federal bureaus, agencies and commissions. The dissemination of information from these sources and others very often became the basis for widely standardized state legislation and administrative policy.

But by far the most effective and responsive source of control by the Federal Government has been through federal grants-in-aid. Grants-in-aid had rather modest beginnings,[35] but after the turn of the century a new form of *conditional* grant gained large fiscal, administrative and social importance. Its cardinal principle is that Congress will appropriate money for the promotion of a specified activity carried on by the states, apportioning the sum among all the states, but permitting a state to share in the subvention only, as a rule, on four conditions: (1) the state may spend only for the exact purposes and under the conditions specified; (2) the state must make concurrent appropriations for the purpose in hand, usually in amounts at least equal to its share of the national grant; (3) the state must create and maintain a suitable administrative agency with which the Federal Government can deal in relation to the function performed; (4) in return for the assistance received, the state must recognize the National Government's request to interpose regulations, fix standards and inspect results.[36]

30. 6 Cranch 87 (1810). The first state legislative act was held unconstitutional in this case.

31. Other famous cases that followed were *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816), and *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), affirming supremacy of federal courts over state courts; *Dartmouth College* v. *Woodward*, 4 Wheat. 518 (1819), invalidating state impairment of contracts; *Brown* v. *Maryland*, 12 Wheat. 419 (1827), limiting states' taxing power; *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), the first case decided under the commerce clause.

32. *Marbury* v. *Madison*, 1 Cranch 137 (1803).

33. The *Dred Scott* decision in 1857 was the high water mark of states' rights. For the second time in the history of the Court an act of Congress was declared unconstitutional. It held Congress had no power to prohibit slavery in the territories and therefore no power to make the Missouri Compromise of 1850 which had limited the spread of slavery. *Dred Scott* v. *Sandford*, 19 How. 393 (1857).

34. During this period corporations became "persons" within the meaning of "due process" and "equal protection", and the theory of "substantive due" process was introduced. *Munn* v. *Illinois*, 94 U.S. 113 (1877).

35. Grants by the National Government to the states are not of recent origin. Beginning in Ohio in 1802, Congress bestowed the equivalent of one section in every township on newly admitted states to be used for the development of permanent school funds. In the famous Morrill Act of 1862 it set aside still more land for the benefit of the states, stipulating that the proceeds be used for agricultural and mechanical arts colleges.

36. The social security and unemployment insurance systems today are based on the grants-in-aid system reminiscent of the pre-depression period. For a recent review of federal subsidies and grants-in-aid see Furman, *Impact of Federal Subsidies on State Functions*, 43 A.B.A.J. 1101 (1957).

The voluntary aspects of grants-in-aid are doubtful, since the power of the purse usually prevails. The same considerations that induce a state to accept its share of a grant in the first place impel it to live up to the standards and specifications required by the Federal Government rather than run the risk of having the subsidy cut off. The states are inextricably drawn into the whole scheme, because the federal funds represent the proceeds of taxes paid by the people of the entire country, and if any state refuses to participate, it cuts itself off from the benefits which its taxpayers are contributing to the states that participate.

The magnitude of the proportions to which grants-in-aid have grown is demonstrated by the fact that in 1920 they aggregated about $37.5 million; in 1930 hardly more than $101 million, and by 1937 the states as a group were deriving more of their revenue from this source alone than from any other source except gasoline taxes and general sales taxes for more than a score of different local purposes and services.[37] In 1958 the budget of the United States recommended expenditures of $5.2 billion for grants-in-aid to the states.[38] By 1963 grants-in-aid had swollen to over $12 billion, and pressure will be for an even faster rate of increase in the next few years with the emphasis shifted from defense spending to spending for domestic welfare programs.

How Can Federal Encroachment Be Curbed?

The Federal Government, particularly in the last three decades has projected itself directly into traditional state domains through Congressional legislation, for example in the area of labor relations,[39] and more recently in the area of subversion and loyalty under the Smith Act of 1940.[40] Many critics felt that Congress should have drawn the provisions of the Smith Act originally in such a way as to make it perfectly clear that the states could legislate concurrently within this field as long as the legislation did not contravene the federal statute.

We prefer the pattern of legislation enacted following the decision of *United States* v. *South-Eastern Underwriters Association.*[41] (This decision overruled the Court's long-standing principle announced in *Paul* v. *Virginia*[42] that the regulation of insurance is outside the scope of the commerce clause.) Under the McCarran-Ferguson Act[43] Congress declared that the continued regulation and taxation by the several states of the business of insurance was in the public interest and that silence on the part of Congress should not be construed to impose any barrier against the states' regulation, with the saving clause that after a specified future date, the Sherman Act, Clayton Act and the Federal Trade Commission Act would be applicable to the business of insurance *to the extent that such business was not regulated by state law.* The obvious purpose of the McCarran-Ferguson Act was to remove the cloud cast by the *South-Eastern Underwriters Association* case upon the right of the states to continue to regulate and to tax interstate insurance business under their own laws as they had done for over seventy-five years. The legislation harmonized the co-operative efforts of federal and state government, and tended to restore equilibrium in this respect to the federal system.

There are important social areas in which the states operate exclusively and with eminent success. The states for example enacted the first workmen's compensation laws following the turn of the century. Workmen's compensation benefits are still underwritten by private insurance companies in most of the states, subject to the laws of the states and under the administration of industrial commissions and workmen's compensation boards.[44] For many decades there was nothing on the horizon that appeared to threaten this arrangement, as there was no evidence that a change would be beneficial or desirable for either labor, industry or the general public. But today there is a threatening encroachment developing in this area which takes a subtle form. In recent years Social Security disability benefits have been broadened to extend to more and more of the population. Duplication of benefits was avoided, however, by a provision offsetting the federal benefits against state workmen's compensation benefits. In 1958 a seemingly innocent amendment that did not attract widespread attention at the time was enacted by Congress, without public hearing, removing the offset. Overnight the Federal Government was in the business of providing another layer of benefits on top of state benefits for industrial accidents. There are those in Congressional committees who say that Social Security should be the "underlying" benefit for disabilities of all types, including industrial accidents. We cite this development to demonstrate the way in which the Federal Government can move like a crab into a traditionally state sphere of activity to upset the equilibrium in the federal system even further. The tragedy of such a development is the dampening effect it has on the states' incentive to elevate benefits continually, as well as discouraging employees, employers and state agencies from placing the emphasis on safety and rehabilitation programs.

The Federal Government has made signs that foreshadow long-range moves into other phases of the private insurance business.

There was justification for federal imbalance during the earlier period of our history when the states refrained from enacting legislation along social and economic lines which was clearly needed, and the Federal Government moved in to fill the vacuum. Ironically, though, when some of the state governments began to enact such legislation following periods of economic distress, much of this legislation was invalidated by the Supreme Court,

37. Some of the chief purposes supported by grants-in-aid are: highways, agriculture, education, unemployment insurance, vocational rehabilitation, relief and welfare measures, conservation, and the National Guard. See Ogg & Ray, Essentials of American Government 88 (3d edit.)

38. The Budget of the United States Government for the Fiscal Year Ending June 30, 1958, 1127.

39. The Taft-Hartley Act., 29 U.S.C. § 141 *et seq.*, which followed the Wagner Act, 29 U.S.C. § 151.

40. In *Pennsylvania* v. *Nelson*, 350 U.S. 497, the Supreme Court held, under the doctrine of federal pre-emption, which had its origin under the commerce clause, that the Smith Act and other federal statutes invalidated the Pennsylvania Sedition Act.

41. 322 U. S. 533.

42. 8 Wall. 168 (1869).

43. 59 Stat. 33, as amended 61 Stat. 448, 15 U.S.C.A. § 1011-1015.

44. In six states there are workmen's compensation state insurance funds operated exclusively by the state.

particularly in the early days of the New Deal.[45]

Despite the ravages to which the states have been subjected by the steady invasions of the Federal Government, their governmental integrity will undoubtedly survive. As a result of changing social and economic conditions and needs, the states have become more conscious of national standards. They have responded by developing new functions and activities on a scale where they are in a better position to compete with the Federal Government.

The state, with its components of counties, towns and other political subdivisions, is still the organ of government closest to the people. It is still the form of government that can co-operate most effectively with private enterprise. Collapse of state government would entail collapse of the local units of government in their present form because it is only by state authority and with the assistance of state grants that local governmental subdivisions exist.

But the dimensions of the Federal Government are indeed awesome. It employs over 2,500,000 civilians at an annual payroll of well over $9 billion, and expands $4 billion annually on paperwork alone. It owns 472 million acres of tax exempt land (almost one fourth the acreage of all the states), reducing state and local assessed valuation tax bases and adding further to the Federal Government's already overwhelming competitive advantage over the state for the citizen's tax dollar.[46] The result has been an ever-increasing vassal-like dependence by the states on federal grants-in-aid.

The first twinges of national conscience concerning imbalances in the federal structure were reflected in the reports of the initial Hoover Commission and the Council of State Governments.[47]

One of President Eisenhower's first recommendations to Congress following his election was the establishment of the Commission on Intergovernmental Relations. Congress, in setting up this commission, declared that "the activity of the Federal Government has been extended into many fields which, under our constitutional system, may be the primary interest and obligation of the several states".[48] The commission's report purports to be the first official study and survey of the federal system since the Constitutional Convention of 1787. Acting on the report, the House Intergovernmental Relations Subcommittee of the Committee on Government Operations has been conducting studies to evaluate the findings and recommendations of the commission.

In 1957, to implement further the task of the commission and the subcommittee, President Eisenhower and the Governor's Conference of that year created the Joint Federal-State Action Committee, premised on the principle that "it is idle to champion states' rights without upholding states' responsibilities as well", and that "an objective reappraisal and reallocation of those responsibilities can lighten the hand of central authority, reinforce our states and local governments, and in the process strengthen all America".[49]

Although the record of history clearly shows a national concentration of power that should be curbed, never before has the federal-state relationship come under such close scrutiny by the co-operative efforts of both federal and state elements. If the states are given the opportunity to fulfill their legislative responsibilities and become more effective governmental units, not only on a co-operative basis among themselves, but in partnership with the Federal Government, the trend may be curbed.

As a means of curbing the trend, however, we should not advocate restrictions upon the appellate powers or jurisdiction of the Supreme Court.[50] Such measures are as desperate in their conception as nullification and not consonant with the Jeffersonian approach to states' rights. To tinker with the established divisions of power between the judiciary, legislative and executive branches of government by restricting the reviewing powers of the Supreme Court could do more ultimately to undermine a balanced federal structure than would be occasioned by unpopular decisions.

A somber responsibility lies with members of the Bench and Bar, who have been called the "American aristocracy", to exercise the self-restraint and foresight necessary to restore the true spirit of federalism. If under the theory of "legal realism" the Constitution is whatever the judges say it is, the judiciary and Bar should have the same concern about curbing the alarming concentric trend in government as they had for fostering broad national legislation at a time when the states could not cope with fast-developing economic emergencies. The concern should manifest itself in the decisions of the courts,[51] in the legislative process at both federal and state levels, in the activities of study commissions and committees and in any activity of the Bench and Bar where the issue is implicated.

Most historians agree that America's greatest contribution to modern civilization has been its enduring system of federalism—the indissoluble union of indestructible states. But equilibrium in the system must be restored as a bulwark against the leviathan state, for symbolically the complete dominance of National Government over the states is as tyrannous as the autocratic rule of the king over his subjects. Without equilibrium there is danger that we shall have made the full circle through tyranny to unbridled freedom, to constitutional liberty and order, and back to tyranny.

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45. For example, in *Nebbia* v. *New York*, 291 U.S. 502 (1934), and *Moreland* v. *New York* ex rel. *Tipaldo*, 298 U.S. 587 (1936), the Court overruled the state regulation of the price of milk and its minimum wage act.

The New York legislature in its 1959 session passed a broad labor rackets bill, which was prompted in great measure by the evidence of widespread union corruption revealed in hearings before the Senate Labor Rackets Committee.

46. DIGEST AND ANALYSIS OF THE NINETEEN HOOVER COMMISSION REPORTS 2-4, 162 (February, 1955). Total ownership of the National Government is 838 million acres. 87.1 per cent of Nevada, 70.2 per cent of Utah, 65.2 per cent of Idaho and 51.3 per cent of Oregon is federally owned.

47. Commission on Organization of the Executive Branch of the Government, A Report to the Congress (March, 1949), FEDERAL-STATE RELATIONS, reprinted in Senate Doc. No. 81, 81st Congress, 1st Sess. (1949).

48. Public Law 109, 83d Congress, 1st Sess. (1953), 67 Stat. 145 §1.

49. President Eisenhower's address to the Governor's Conference, Williamsburg, Virginia, June 24, 1957.

50. The Jenner-Butler Bill and other similar proposals introduced and defeated in the 85th Congress limited the jurisdiction of the Supreme Court in several areas of loyalty and subversion and in admissions to the Bar and the right to practice law. Legislation of this type was intended to restore the states' prerogatives in determination of standards of eligibility for professional practice, which had been dissipated under the banner of "due process" in *Konigsberg* v. *State Bar of California*, 353 U.S. 252, and *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232.

51. See REPORT OF THE COMMITTEE OF THE CONFERENCE OF CHIEF JUSTICES ON STATE-FEDERAL RELATIONS AS AFFECTED BY JUDICIAL DECISIONS, adopted by a vote of ninety-six to eight by the Chief Justices of the states at their 10th Annual Conference in August, 1958.

[1964]

United States Senate

MEMORANDUM

Dear Pete
this stinks
a friend

From Sidney Hyman

The 1964 Presidential contest is but days away from the ballot box, and there is little time left for extended comments about new issues. There is time enough, however, for a summary of what has been said , and a university setting is the right place to venture such a summary. Here to-day, therefore, I want to state the heart of the case President Johnson and I have tried to make, and to compare it with the heart of the case Senator Goldwater has tried to make--insofar as we can decode his secret language.

President Johnson and I have both been school-teachers in our time, and everything we have said in this campaign bears the imprint of what we learned from American history and once taught to our students.

First of all, we have talked about the American purpose.

We have said that America was not brought into this world to live for itself alone, but to live for mankind as well. The idea is not new, and it is wholly false to claim--as the Goldwaterites do= that it marks a difference between the American liberal liberal or conservative, between the so-called "wooly idealist" and the down-to-earth realist. More plainly, it is ~~corrupt~~ dishonest ~~stupidity~~ to claim--as the Goldwaterites do--that the idea was infilitated into the blood-stream of American politics by secret agents of the Kremlin.

The idea that American lives best when he goes beyond the sphere of self and lives for others, has been affirmed and reaffirmed by successive generations of hard-headed Americnans beginning with the Pilgrim Father.

The idea that [redacted] America in living for itself, live best when they love for others, has been affirmed in thought and confirmed in deed by successive generations of Americans back to the time of the Pilgrim Fathers.

Read any of the majesterial works of the American heart and mind. Read the Mayflower Compact or the Declaration of Independence, the Constitution or the Federalist Papers, the Monroe Doctrine or the Gettysburgh Address. Read Wilson's Fourteen Points, or Franklin D. Roosevelt's Atlantic Charter, the Truman Doctrine or the Preamble to the original Marshall Plan law. Read President Kennedy's Inaugural Address or President Johnson's statement about the Great Society. Read any of these, in any time-sequence--backwards or forwards--and each in its own way turns out to be another clause in our birth certificate making us children of the world and servants of the common good.

In connected form, this is what these separate clauses say:

They say we were born to discover for ourselves and for all men, how to make real as a condition of daily life, the ancient ideal of liberty, equality, fraternity and happiness. [redacted]

They say that we were born to discove r for ourselves and for all men, how a federal Republic of continental size--mingling infinite interests, outlooks, and many ethnic and racial strains-- can achieve unity and yet preserve the creative powers of diversity.

They say we borm to discover for ourselves and for all men, how a government based on consent instead of coercision, can serve the joint causes of freedom and security, order and progress, individual conscience and authority, the rights of the individual and the needs of the community.

They say we were born to discover for ourselves and for all men, how to wed responsibility with massive power, how to use our massive power in order to create a world environment wherein each nation--strong or weak--will be free to develop in its own responsibile way.

Lyndon B. Johnson and I had all this in mind when we moved from teaching into elective politics--thirty years in his case, and twenty years in my own. That is why we proudly placed ourselves within the tradition we had inherited from the American past. That is why we tried within the limits of our power and knowledge to modernize old discoveries, to complete the solutions to half-answered problems, to explore a dark continent of wholy new problems and to take their measure. And for the same reason, that is why in this came, we have spoken as we have about the problems and dangers we face on the common frontier where domestic and foreign affairs meet.

What problems and dangers?

The danger of extremism in American life. The danger--as the Declaration of Independence put it--of "rendering the military independent of the civil odder." The dangers of removing from the hands of the President, a decisive right of yes or no in connection with the use of nuclear arms. The problems of trying to help the underdevloped countries get over the hump of mass misery and into the modern age of plenty. The problems of international economic policy. The problems of disaramement. The problems of the Grand Alliance. The problems of trying to lower the threshold of tensions in East-West relations.

In none of these matters can America act as if it were a plant unto itself. In everyone of these matter, the repercussion of what we decide here at home, will not be absorbed by the Arizona desert air. They will circle the world, affect it for good, or ill, and in the end effect all of Americans similarly.

The choice before us--as President Johnson and I see the case--is not whether we should stay in the world as it is, or get out of it. We can't get out of it. We are a part of it. The choice is whether we will play a responsible or irresponsible part in it. The choice is wthether we will bring to our role in it the qualities of self-discipline, courage, pateince, hard work, judgement, honesty and compassion--or whether, by our own decisions, we will entrap ourselves and the world in a fatal game of Russian roulette, plaed with thermonuclear war-heads as pistols.

Yet everything President Johnson and I have said about these matters, has been attacked by Senator Goldwater thoughout his Senatorial career, in his bid for the Republican Presidential nomination, and now as a Presidential candidate. Based on his votes, his writings, and his speeches, there is but one conclusion to be reached about Senator Goldwater's view of America's purpose in human history. The conclusion is this:

America, to him, was born to be live in, for , and by itself alone. It was to prate about its highly developed conscience, and like a Pharisee praying loudly in a corner, it was to call the world's attention to its

piety. But it was born to conduct itself in practice like some obscene giant whose brains are his passions, whose heart is made of stone, whose glory is the weight of his heel, and whose nobility is the power of his arm to strike terror on opposite sides of the globe at the same time.

Once this is understood about Senator Goldwater's central view about the meaning of America, other mysteries become clear. The central view explains why he exaulted extermism as a virtue, and condemned moderation is a vice. It explains whoy he has been in the forefront of the effort to end our ancient tradition of civil supremacy over the military. It explains why he would endow our military men with the powers of an autonomous German General Staff which twice dragged Germany--and the world--through the Hell of terrible wars.

It explains why he voted against the nuclear test ban treaty, and why he voted against the trade expansion act. It explains why he voted against foreign economic aid, and why he originally voted against the peace corps (CHEK). It explains why he voted against our overseas information frpogram, and why he denounced all attempts to ease world tensions..It explains why he once urged that America leave the United Nation, and why he has urged a foreign policy based on ultimatums to the Soviet Union backed by the naked threat of a nuclear attack.

There is another area of fundamental difference between the case President Johnson and I have tried to make in this campaign, and the case Senator Goldwater has tried to make. It is a difference over what the Constitution says or doesn't say about the character of the American government as a government.

When President Johnson and I look at the Preamble of the Constitution, we see that the first phrase reads, " We, the people". It doesn't say just "some of the people. "It says "all of us." It says that since all of us are the source from which all governmental power is derived, all of us have a right to demand that the policies of the government shall be framed to serve the people as a united whole. And because the President and I read the opening phrase this way, we have set forth in this campaign the details of the programs "we the people" need as a united whole--programs of education, housing, medical care, urban renewal, mass transportation, conservation, civil rights.

Senator Goldwater, however, reads the opening phrase differently. To him it reads: "We, the States." People are dropped out of his picture. All he sees are geographical boundaries. And once Senator Goldwater's vision of the opening phrase of the Constitution is understood, it explains a mass of things in his voting record, in his writings and speeches.

It explains why he has voted against virtually every measure that would improve the conditoons of life for "We, the people." It explains why he has consistenly argued that everytime the government does anything "for the people" it weakens if not corrupts their character. It explains why he has consistenly found in his reading of "We, the States," a fictious excuse for willfully refusing to recognize and to answer the most urgent needs of "We, the people" who dwell in the states.

President Johnson and I, when we move on in our reading of the Preamable to the Constitution, see that "we the people are to form a more perfect Union, esatblish justice, insure domestic tranquility , provide for the common defense, promote the general welfare, and secure the blessing of liberty to ourselves and our posterity. " We note that none of these objects stands alone. We note that all our joined together in a single sentence. And so they are in reality.

A more perfect Union depends on justice. Justice is the servant of domestic tranqulity. Domestic tranquility is the predonditoon for the common defense. The common defense is the shield for the work of promoting the general welfare, and all these together are the pren-donditions for the blessings of liberty. That is why President Johnson and I have tried in this campain to make plain the ways and means for healing the divisions within our Union. That is why we have

talked as we have about the specific relationship between domestic disturbances and the denial of justice. That is why we have related our concern with the many elements that make for a common defense, to the many elements that make for the general welfare and the blessings of liberty.

But once again, Senator Goldwater reads all this differently. Instead of committing himself to the work of creating a more perfect union, he has tried to play the South off against the North. Instead of seeing the connection between domestic disorder and the denial of equal justice, he has denounced the disorders and would undercut the Courts where equal justice is dispensed. Instead of seeing that the common defense is but a shield behind which other work can be done, he has made armaments for the sake of armanents an all consuming end in itself. Instead of seeing that the general welfare and the blessing of liberty go hand in hand, he has denounced all programs to promote the general welfare as being anti-American, and hence an enemy of liberty.

But to go on.

When President Johnson and I look at the distribution of powers between the national government and the states of the Federal Union, and between the branches of the national government proper, this is what we see. We see that all arms of the federal Union have an oblogation of their own to advance the common purposes the Union as they are set forth in the Premable of the Constitution. We see, further, that the Constitution

vest specical powers and duties in each ~~division~~ arm of the federal ~~government~~ Union so that each can better to its assigned work--the Congress as a legislature, the Presidency as an Executive, the Court as a judiciary, the states as units of local government.

That is why President Johnson and I have argued in defense of ~~the~~ a federal Union. That is why we have argued for close cooperation between the Congress and the Presidency, and between the national and the state governments. That is why we have also argued in defense of the Courts Constitutional power of judicial review as the arbiter of ~~disup~~ disputes over constitutional questions.

But Senator Goldwater sees all this differently. The Constitution to him, means an arrangement where the Congress ~~will be~~ is supreme over the President, but ~~won't~~ doesn't do anything except repeal the laws on the statute books. The President ~~won't do~~ to him, shouldn't do anything except tinker with a ham radio. The States ~~won't do~~ shouldn't do anything except ask for grants-in-aid from the national government, and then denounce the national government for interfering with local government because it acceded to the request for grants-in-aid. Meanwhile, the Court ~~should not~~ does not exercise its right of judicial review — on pain of being abolished entirely — should not It ~~simply~~ should stands by and lets the strong take from the weak, and the cunning take from the strong, until the whole ~~government~~ order ~~in~~ the American state and society is made into a jungle where absolute freedom prevails. # And that, my friend, in essence, is the heart within the heart of the case Senator Goldwater has been trying to make in the name of conservatism. It is a case to end goverbment itself. And the

the only way that ~~xx~~ kind of case can be ended, is on November 3 when the voters by a massive majority declare Senator Goldwater a disaster area in American history.

Beautiful letter on federalism & refuting GW's concept of federalism.

August 31, 1964

Hon. Hubert H. Humphrey,
Room 1313, New Senate Office Bldg.,
Washington, D. C.

Dear Hubert:

The people in that hall the other night rejoiced in your nomination. But there were some of us who responded with a warmer glow and a louder shout. I thought of the causes you have championed. I thought of the battles you have fought. But most of all I thought of how through it all you have always been true to yourself. No easy task, but you do it - and you win.

I am writing you now to urge on you the importance of an idea for the Democratic campaign.

Some of the main themes of Goldwater's campaign have been picked out: his blatant plea for reaction, his latent appeal to racism, and his advocacy in general of More Warfare and Less Welfare. But to me the most disturbing thing about his line of talk is its deeply anti-national character. He makes great play with his attack on the federal government. But his version of states rights is not just an attack on Washington. Far more seriously, it is an attack upon the nation.

The other night, for instance, while chairing a TV discussion I was amazed to hear one of the panelists observe as a matter of course that "the states created the Constitution and the federal government." This man is vice-chairman of the state Goldwater organization and from reading Barry's book I should say that the Senator himself holds this view. That is hardly surprising. Even Eisenhower could say in 1952: "The Federal Government did not create the States in this Republic. The States created the Federal Government." (my underlining)

This view is, of course, that unfortunate "compact theory" of American government which has presided over some of the most tragic episodes in our history: nullification, interposition and secession itself. If you accept it, your view of states rights will not merely weaken federal authority. It will deny our unity as a nation. For if you believe that it was the states which established the Union, it is plausible to argue that each can interpret the terms of the contract, interpose its power when it decides the federal government has gone too far, and in the last resort withdraw altogether from the Union.

If deeds or words mean anything in our history the correct view is the "national theory." This theory follows the Constitution when it says that "we, the people" established the Union. For that reason the authority of the states as of the federal government is derivative, the source of that authority being the national will. It is the whole people, as a nation, that endows with authority not only any state government, but also the people of any state.

As a community of individuals (not a combination of states) we constitute a nation. To this community we owe our primary allegiance. The states as governments and as political communities derive their authority from that primary community, the nation. "The States", as Lincoln said, "have their status in the Union, and they have no other legal status...The Union is older than any of the States, and in fact, it created them as States." But, of course, the most impressive statement of this truth comes in Webster's great replies to Haynes.

Now, it makes a difference from which of these perspectives you look at American history and government. Ideas do have consequences. I am not concerned here with the strictly legal consequences, but rather with the effects on how people feel, think and choose up sides during an election such as the present one.

If you think the states are the creators of the federal government, then it is plausible to find cause for alarm in the continuous growth of federal activity. If the states are the primary political communities, it is convincing to argue that government by them is greatly to be preferred over government by the federal authority.

On the other hand, if it is realized that our essential form of political existence is national, that we are first of all "one nation, indivisible", then it becomes entirely necessary and proper that the one instrumentality which represents the nation as a whole, namely the federal government, should concern itself with most important purposes. Thus, as far back as 1821, Chief Justice Marshall, holding that "the United States form, for many, and for most important purposes, a single nation," concluded that "the government which is alone capable of controlling and managing these interests, in all these respects, is the government of the Union."

I should think that this national theory of our government is something that every American imbibes from his earliest years, not least from the daily pledge of allegiance in school. But the present campaign obliges us to restate it emphatically and persistently, if we are to counteract the pernicious plausibilities of Goldwater. To do so makes political sense. Our people are a nation and never fail to respond to the truly national appeal, if the issue is clearly drawn. You, Hubert, with your talent as a teacher can get across the idea to them and win that response. But I am thinking not only of this November. The long-run health of our society, ever more interdependent, requires that our consciousness of nationality keep pace.

Not so long ago, we could count on the Republicans -- as we counted on Federalists and Whigs before them -- to sustain the national idea. To the Democrats we looked for "the cherishment of the people", in Jefferson's words. To the other party, whatever its name, we looked for advocacy of the Union, the national framework within which we pursued our democratic ideal.

But today the Republicans not only repudiate the popular principle; they also -- as you suggested in your acceptance speech -- spurn the ideals of their founders and great leaders. What their "temporary spokesman" suggests is nothing less than the "balkanization" of the United States. For this reason our Party today must champion not only the cause of Democracy, but also the cause of Nationality.

I recognize that there may be problems in trying to present this idea to the voters. Some Southerners may think we are waving the Bloody Shirt again. There is also the difficulty of making an abstraction come alive. But the job must be done. I don't think I have ever been more serious about a political question in my life. It is certainly not just an "academic" matter. The basis of every viable nation is its sense of moral identity. This is especially true of the United States, which more than most depends upon ideas to hold it together and give it direction. Goldwater's attack upon the national idea is one of the most truly subversive movements in recent decades.

Yours sincerely,

SHB:mo

Samuel H. Beer

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