Is Government the Problem or the Solution?*

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Is government the problem or the solution? In his First Inaugural Address, President Reagan answered, confidently, that "government is not the solution to our problem. Government is the problem."[1] Three years earlier, in his State of the Union Address, President Carter anticipated his successor by proclaiming that "government cannot solve our problems. It can't set our goals. It cannot define our vision. Government cannot eliminate poverty, or provide a bountiful economy, or reduce inflation or save our cities or cure illiteracy or provide energy."[2] But listen to President Franklin Delano Roosevelt explaining the meaning of the New Deal in 1937. The word "New," said Roosevelt, "implied that a new order of things designed to benefit the great mass of our farmers, workers, and business men would replace the old order of privilege in a Nation which was completely and thoroughly disgusted with the existing dispensation." The word "Deal," said Roosevelt, "implied that the Government itself was going to use

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1. *Quoted in* ARTHUR M. SCHLESINGER, JR., THE CYCLES OF AMERICAN HISTORY 219 (1986).

2. Address delivered by President Carter before a Joint Session of Congress, January 19, 1978. Compilation of Presidential Documents for week ending January 20, 1978, at 90.

affirmative action to bring about its avowed objectives rather than stand by and hope that general economic laws alone would attain them."[3]

Government (by which term I mean to include the federal, state and local governments) has always been the problem for some and the solution for others. Edmund Burke, to whom all conservatives pay homage, wrote that "[g]overnment is a contrivance of human wisdom to provide for human wants" and that "[m]en have a right that these wants should be provided for by this wisdom."[4] But not all of us want the same things. A large amount of government intervention is a response to "a cry for help", to keep some people from being hurt by other people,[5] or to give some people an advantage over others. So, when you hear the aphorism "that government is best which governs the least," always ask: Best for whom? Special interest always claims to speak in the name of the general interest. "What's good for General Motors is good for the country," a GM CEO once said.[6] At the same time, we should be open to the possibility that this claim may not be false.

There are certain objectives that only government can achieve and about which there is little or no dispute. Only the federal government can provide for the common defense against external danger. State and local governments are depended upon to provide for our domestic security. Yet, efforts to federalize elements of our criminal law and its administration are winning the support of both political parties, notwithstanding the commitment to devolution by the proponents of the Contract With America.

Nor is there objection when government, acting primarily through its judicial branch, erects the legal framework for our market economy and the conduct of other aspects of daily life. We look to state courts and legislatures to develop and apply the laws governing property, contract, business associations, commercial transactions, torts, insurance and domestic relations. These are the areas of law referred to as "private," but they have consequences for the society as a whole and must be evaluated in terms of their social functions. Private law always has a public face.

For the most part, to this day, these areas of law fall within the jurisdiction of the states and not the federal government. Yet, the

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3. Samuel I. Rosennman, comp., II THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 5 (New York, 1938-1950).

4. Edmund Burke, *Reflections on the Revolution in France*, in 3 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 310 (1865).

5. HERBERT KAUFMAN, RED TAPE: ITS ORIGINS, USES AND ABUSES (1977).

6. Charles Wilson, Chairman of the Board of General Motors, from his testimony before the Senate Armed Forces Committee in 1952.

proponents of devolution would also federalize significant aspects of tort law. If they succeed in weakening government regulation, and their reforms of tort law cripple its value as a deterrent to anti-social behavior, there will be no way to either prevent or remedy such behavior.

Many who believe that government is the problem have only the federal government in mind. But President Reagan and many supporters of the Contract With America want the federal government to shed certain responsibilities, not because they wish to see state and local government assume them, but because they expect to wage a successful struggle against their assumption at the state and local level.

The conflict over the proper role of government and the allocation of responsibilities among the federal, state, and local governments in achieving the noble ends proclaimed in the Preamble to our Constitution—to establish justice, insure domestic tranquility and promote the general welfare—is as old as the Republic itself. Each of the themes sounded in the Contract With America—the glorification of laissez faire and the free market, the condemnation of government regulation, and the devolution of power from the federal government to the states and localities—is an echo from the past. The Federalists, who fought for the ratification of the 1787 Constitution advocated a nation-centered federalism; the Anti-Federalists, who opposed ratification, argued for a state-centered federalism. The Federalists won, but their victory was not certain until the Civil War and the 13th, 14th, and 15th Amendments to the U.S. Constitution demonstrated that our federal Union was more than a compact among the states. The lost cause of the Anti-Federalists is now championed by the proponents of the Contract With America and the exponents of the "New Federalism."[7]

The Constitution of the United States itself shaped the framework of our market economy. It federalized admiralty and bankruptcy law and the law governing intellectual property. In addition, the decisions of the Supreme Court prohibiting states from obstructing interstate or foreign commerce helped to create a free trade area of continental size that

7. The cause of the Anti-Federalists has won support in unexpected quarters. *See* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1875 (1995) (Thomas, J., dissenting, joined by Rehnquist, C.J., O'Connor, J., and Scalia, J.). If Justice Kennedy had joined the four dissenters, John C. Calhoun's theory of federalism would have become the law of the land. *Id.* at 1872.

stimulated economic development—something that the European Union of thirteen states is still trying to accomplish.

The Founders of our Republic were not devotees of laissez faire. They intended to create a strong central government and rejected the view that the government closest to the people geographically was necessarily the best government. By unanimous order of the Convention, a letter signed by George Washington, as President of the Convention, accompanied the proposed Constitution when it was transmitted to the President of the Articles of Confederation on September 17, 1787. The letter began by stating that the "friends of our country have long seen and desired[ ] that the power of making war, peace, and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union."[8]

Dismissing the "reveries" of Adam Smith, Alexander Hamilton advocated a federal government "adequate to the exigencies of the Union."[9] This, to him, meant a government that would promote economic development along capitalist lines and thereby hasten the transition from an agricultural to an industrial society. Jefferson wanted government to safeguard an agricultural society based on the family farm. Hamilton prevailed. The federal and state governments during the 18th and 19th centuries promoted economic development by constructing roads, improving rivers and harbors, and giving the railroads about 180 million acres of land, more than the size of Texas and worth about $700 million or two-fifths of the total cost of the railroads. 70% of the total investment in canals was government money. Government also subsidized the merchant marine and paid for the first magnetic telegraph line. Agriculture, too, was subsidized through the sale of public lands in small lots at low prices. Lincoln's Homestead Act of 1862 was the great entitlement program of the 19th century.

To ensure a sound supply of money and credit for economic expansion, the federal government created the first two Banks of the United States, and then, during the Civil War, created the National Banking System. It taxed state banknotes out of existence. It aided manufacturing more directly by protective tariffs.

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8. FORMATION OF THE UNION OF THE AMERICAN STATES 1003 (Charles C. Tansill ed., 1927). *See* Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615 (1995).

9. SCHLESINGER, *supra* note 1 (1986) (quoting John C. Miller, ALEXANDER HAMILTON, PORTRAIT IN PARADOX 293 (1959)).

The Northwest Territorial Ordinances of 1785 and 1787 provided the first federal aid to education. They required that a section of land in every township in the Northwest Territories be set aside for the support of schools. About 145 million acres—an area larger than France—were set aside and used for this purpose.

The federal and state governments also engaged in a great deal of regulation, as well as promotion of private enterprise, particularly in the last half of the 19th century. The rapid industrialization of the United States and the triumph of American capitalism were accompanied by staggering human and environmental costs that did not show up in the accounts of private enterprise. Government intervened to limit the social damage. Let me give you some examples of the nature of this intervention:

The states were the first to intervene to curb the exercise of private economic power. The farmers' Granger movement of the 1870's captured a number of state legislatures, which then enacted laws creating administrative agencies to end malpractices of the railroads—defrauding investors, ignoring passenger safety, fixing rates that discriminated against farmers and small shippers, and pooling to eliminate competition. When the Supreme Court held, in 1886, that the states had no power to regulate interstate transportation,[10] the federal government stepped in and passed the Interstate Commerce Act of 1887.

States were unsuccessful in their attempts to destroy the monopolies created in the last quarter of the 19th century—like John D. Rockefeller's Standard Oil Trust, which controlled 90% of the oil refining business and 90% of the pipelines of the country. Again, Congress responded with the passage of the Sherman Antitrust Act of 1890.

Little was done to enforce the Sherman Act, and the Supreme Court contributed to the fiasco when, in 1895, it declared that the sugar trust, which controlled 95% of the production of refined sugar in the country, was not a combination in restraint of trade.[11] In the same year, the Supreme Court upheld the use of the Sherman Act to break the railway strike of 1894 and to jail Eugene Victor Debs, President of the American Railway Union, for violating a federal court injunction to desist from

10. Wabash, St. Louis & Pacific Ry. Co. v. Illinois, 118 U.S. 557 (1886).
11. U.S. v. E.C. Knight & Co., 156 U.S. 1, 16-17 (1895).

obstructing interstate commerce and the carriage of the mails.[12] In the same year, too, the Court declared the income tax provision of the 1894 Tariff Act unconstitutional.[13] It took the 16th Amendment to overturn this decision.

States subjected privately owned public utilities furnishing light, heat, power, and water to regulation of the prices charged and services furnished. States supervised banks and insurance companies. States passed pure food and drug laws that were not effective. From 1887 to 1893, the U.S. Department of Agriculture published bulletins showing that "wines were made of alcohol, sugar, and water; lard was adulterated, coffee was fabricated out of wheat flour and sawdust; [and] canned vegetables sometimes contained sulfurous acids."[14] But it was not until 1906, after the publication of Upton Sinclair's *The Jungle*, which described conditions in the Chicago stockyards, that Congress passed the Pure Food and Drug Act.

The 19th century also saw a great deal of social legislation by the federal and state governments. In 1840, after Congress failed to pass a law shortening the workday for federal employees, President Van Buren issued an Executive Order instituting a ten-hour day on the public works of the Federal government. Congress eventually enacted an eight-hour day for federal employees and prohibited discrimination against railroad workers for joining unions.

States required mining and manufacturing companies to pay their employees at least once a month. They limited the maximum hours of work and some prohibited child labor. They narrowed the scope of judge-made rules that imposed the terrible cost of industrial accidents upon workers, not employers. They provided for the inspection of factories to assure safety and sanitation. Some of them outlawed yellow dog contracts under which workers agreed not to join unions and prohibited discrimination against those workers who did.

The states acted to protect the public health and included sumptuary laws in this category. Iowa even enacted a statute subjecting to fine and imprisonment any person who manufactured cigarettes or sold them or gave them away. They resorted to all manner of occupational licensing that stifled competition.

States built and maintained institutions to care for the blind, the deaf, the orphans, the feebleminded, the epileptics, the juvenile delinquents, and the mentally handicapped. They regulated charitable institutions and

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12. *In re* Debs, 154 U.S. 564 (1895).
13. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).
14. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 462 (2d ed. 1985).

tenement housing. They tried to safeguard their natural resources and control land use.

But state governments were not effective regulators; they lacked the money and the trained personnel to do the job. They were powerless to control the periodic cycles of boom and bust or to alleviate the distress caused by financial panics, recessions and depressions. Nor did the federal government do anything to curb the business cycle.

In any case, there is no evidence that laissez faire ideology was reflected in the *practice* of the federal and state governments during the 19th century. The end of the century, however, saw a change in the position of the political parties that shaped the future course of the country. Jefferson, Jackson, and the Republican Party—which became the Democratic Party in 1840—all advocated, for most of the 19th century, a weak central government in order to prevent it from promoting the interests of merchants, bankers, and manufacturers at the expense of the planters and farmers they favored. The 1860 Republican Party, the successor to the Federalists and Whigs, favored a nation-centered federalism and federal government intervention on behalf of business interests—high tariffs, aid to the railroads, and sound money.

By 1896, however, under the leadership of William Jennings Bryan, the Democratic Party became Populist enough to threaten the Republican ascendancy and with it the domination of industrial capitalism. In his famous *Cross of Gold* speech, Bryan attacked what Democrats ever since have described as "trickle-down" theory, referred to by the Republicans as supply-side economics. Bryan proclaimed:

> There are two ideas of government. There are those who believe that, if you will only legislate to make the well-to-do prosperous, their prosperity will leak through on those below. The Democratic idea, however, has been that if you legislate to make the masses prosperous, their prosperity will find its way up through every class which rests upon them.[15]

Ever afterwards, the Democratic Party was committed to an active federal government to accomplish Jeffersonian ends—to use the power of democracy to counter concentrated economic power in the interest of the small farmer, the small businessman, the industrial worker, and the general public.

15. I SPEECHES OF WILLIAM JENNINGS BRYAN 238-49 (1913).

On the other hand, the Republican Party came to regard a strong federal government as a danger to corporate ascendancy and turned to a laissez faire ideology to oppose regulation and taxation, but not, of course, to continued assistance to business, such as high tariffs and tax reductions. The voice of the Republican Party became that of Calvin Coolidge—who said that the business of government was business and vetoed a bill to aid distressed farmers—and Herbert Hoover—who proclaimed in 1931 that the "sole function of government is to bring about a condition of affairs favorable to the beneficial development of private enterprise"[16] and watched the Great Depression engulf the country.

The voice of President Theodore Roosevelt was no longer heard in the Republican Party. T.R.'s "New Nationalism," influenced by Herbert Croly's *The Promise of American Life*,[17] advocated the exercise of federal power to regulate capital so that it could exist in harmony with labor. "Every man holds his property," he said in 1910, "subject to the general right of the community to regulate it to whatever degree the public welfare may require it."[18] In a message to Congress, he wrote that the "effective fight against adequate government control and supervision of individual, and especially of corporate, wealth engaged in interstate business is chiefly done under cover; and especially under the cover of State's rights."[19] Only the national government, he maintained, can exercise the needed control over the industrial order. He explained that:

> This does not represent centralization. It represents merely the acknowledgment of the patent fact that centralization has already come in business. If this irresponsible outside power is to be controlled in the interest of the general public, it can be controlled in only one way—by giving adequate power of control to the one sovereignty capable of exercising such power—the National Government.[20]

This power would be exercised, added the great lawyer and T.R.'s friend, Henry L. Stimson, in a speech in 1911, "to protect the individual citizen against the oppression of this unofficial power of business."[21]

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16. SCHLESINGER, *supra* note 1, at 239 (quoting II HERBERT HOOVER, STATE PAPERS AND OTHER PUBLIC WRITINGS 8-9 (William S. Myers ed., 1934)).
17. HERBERT CROLY, THE PROMISE OF AMERICAN LIFE (1909).
18. SCHLESINGER, *supra* note 1, at 237 (quoting THEODORE ROOSEVELT, THE NEW NATIONALISM 23-24 (1910)).
19. SCHLESINGER, *supra* note 1, at 243 (quoting Theodore Roosevelt, *Message to Congress*, December 8, 1908).
20. SCHLESINGER, *supra* note 1, at 237 (quoting Theodore Roosevelt, *Message to Congress*, December 8, 1908).
21. SCHLESINGER, *supra* note 1, at 237 (quoting HENRY L. STIMSON AND MCGEORGE BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR 60 (1948)).

Herbert Croly saw T.R.'s "New Nationalism," the rallying cry of T.R.'s losing 1912 campaign for the Presidency, as a movement to "'emancipate American democracy from its Jeffersonian bondage' and to 'give a democratic meaning and purpose to the Hamiltonian tradition.'"[22] This was the task that the Democratic Party eventually undertook during the administrations of Presidents Woodrow Wilson and Franklin Delano Roosevelt.

I should like now to describe the specific ends that government has sought to accomplish in the 20th century because I believe they reflect common values shared by most Americans. It is easy to say that government should not intervene if voluntary action or the market can better achieve the end in view. It is also easy to say that, in addition, the federal government should not intervene unless state and local governments are incapable of doing the job. But it is not easy to apply these precepts. So, as I describe the purposes for which government has acted, ask yourself whether these ends can be achieved without public decision-making and without action by the federal government.

1. To establish justice, government has guaranteed that every citizen possesses the full rights of citizenship and has sought to lessen the degree of inequality in the opportunities open to different individuals in our society.

At a minimum, justice requires that all claims made by individuals and groups should at least be heard and considered by the law-making authorities. To achieve this objective, the right to vote and the freedom of speech and association must be protected. Experience has demonstrated that federal action is necessary to afford this protection.

Not until the middle of the 19th century did the states enact universal white manhood suffrage. It took the Civil War and the 13th, 14th, and 15th Amendments to the United States Constitution to extend suffrage to the newly-freed slaves and to guarantee them the equal protection of the laws. Not until 1920, when the 19th Amendment was ratified, were women enfranchised.

The Civil Rights Acts of the Reconstruction Period, which sought to enforce the constitutional guarantees to black citizens, were emasculated by the Supreme Court. In 1957, eighty-two years after the last of these Acts and three years after *Brown v. Board of Education*, Congress

22. SCHLESINGER, *supra* note 1, at 238 (quoting CROLY, *supra* note 17, at 169-70).

passed a Civil Rights Act dealing with voting rights. The ensuing civil rights movement brought about the enactment of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. Together, Congress and the Supreme Court dismantled the legal structure of apartheid in the United States—a great achievement indeed. Government has also expanded the grounds upon which discrimination is prohibited, to include not only race, color, religion, and national origin, but also sex, age, and disability and, in some states and localities, sexual preference.

As of 1988, a greater percentage of African-Americans of voting age (63.7%) than of whites were registering to vote in the eleven southern states. The black vote was pivotal in electing Presidents Kennedy, Carter, and Clinton. In the seven southern states originally targeted by the Voting Rights Act, the number of black-elected officials increased from fewer than 100 in 1965 to 3,265 in 1989. In 1992, thirty-eight African-Americans were elected to the House of Representatives; each of them was reelected in 1994.

Today, African-Americans have achieved near parity with whites in illiteracy rates, school enrollment rates, and median years of schooling completed. But they are still less likely than whites to graduate from high school and to enroll in and graduate from college. In 1992, almost three-quarters of all the bachelor's degrees, four-fifths of the master's degrees, and all the doctoral degrees earned by African-Americans were awarded by colleges and universities other than the historically black institutions.[23]

Yet, despite African-American electoral gains and educational attainment and the growth of a black middle class, significant wage disparities between them and comparable whites continue to exist. Since the mid 1970's, black college graduates have suffered the greatest deterioration in relative earnings.

The median income of white households in 1993 was $39,310; that of black households, $21,550—a disparity of $17,760 a year. The percentage of black families earning less than $10,000 a year increased from 20.9% in 1970 to 26% in 1990. African-Americans suffered losses in all income brackets, except those earning more than $35,000.

The dismantling of the legal structure of apartheid has not resulted in improved jobs, housing, education, or health care for the majority of African-Americans, nor has it halted the terrible decline of the urban ghettos in which they live. African-Americans continue to be the most

23. *See* Walter R. Allen and Joseph O. Jewell, *African American Education: An American Dilemma*, 124 DAEDALUS 77 (1995).

residentially segregated racial group in the United States regardless of level of income, education, or occupation. Many researchers maintain that covert racism in the criminal justice system continues to affect decisions regarding bail, charging, jury selection, and sentencing.[24]

The causes of the African-American condition in our society are disputed. But the relation of the races, complicated by "identity politics," remains the most important issue facing us. Every major domestic problem—poverty, welfare, crime, the decline of our cities, the deterioration of our public schools—is bound up with race. Will not action on every level of government, and a particularly strong federal presence, be required to assure the well-being of the diverse populations that make up the United States today? Had we relied on voluntary action and the states alone, God knows when slavery would have been abolished and, surely, the civil rights revolution would have been stillborn.

2. Government has continued to intervene to curb the exercise of private economic power.

To eliminate anti-competitive practices before they eliminated competition, President Wilson secured the enactment of the Federal Trade Commission Act and the Clayton Anti-Trust Act. There are now counterpart statutes in most states. The New Deal subjected the airlines, trucking and water transport, as well as the power, radio and television, and telegraph and telephone industries to public utility-type regulation. It was believed that competition in these industries was either non-existent and could not be restored or that competition would produce socially undesirable results.

It is in this area that most deregulation has occurred, initiated by a Democratic President, Jimmy Carter. Whether an industry should be regulated does not raise an issue of principle that should divide liberals and conservatives. It does raise the empirical question as to what means will best achieve agreed upon ends.

3. A third objective of government intervention is to protect all of us as consumers

Consumers seem unable to organize effectively to protect interests which tend to be ignored in our producer-minded economy. We now have comprehensive laws to assure pure food, drugs, and cosmetics; to

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24. *See* Cassia C. Spohn, *Courts, Sentences, and Prisons*, 124 DAEDALUS 119 (1995).

assure the safety of other products, such as children's toys and autos; to prohibit false labeling and false advertising; to regulate the issuance and trading of securities and the operation of the stock and commodity exchanges; to insure deposits in banks and savings and loan associations; and to protect pension funds.

4. Government has acted to assure safe and healthful conditions in the workplace.

The federal Occupational Safety and Health Act, passed in 1970, now has counterparts in most, if not all, states.

5. Government has acted to develop and conserve our natural resources and to preserve our environment.

Portions of the vast lands acquired by purchase or conquest from France, Spain, Mexico, and Russia were given away in order to promote settlement and agricultural and industrial development. Even today, they continue to be leased on terms that amount to a subsidy for private enterprise. The New Deal financed the great civil engineering projects which brought water to California and the other arid western states for agricultural and other purposes.

Until President Nixon's second term, the regulation of air and water pollution, ground water contamination, and hazardous waste disposal, was left to state and local governments. They were not up to the task. As Professor Friedman has written, "[b]ig business was poisoning the rivers and darkening the air; lumber companies were chopping down irreplaceable trees; cities were pouring tons of muck into lakes and oceans; highway engineers were driving concrete paths through pieces of the American heart and heritage."[25]

In 1968, with the creation of the Environmental Protection Agency by Executive Order of President Nixon, an environmental revolution was launched. In quick succession, Congress enacted the National Environmental Policy Act of 1970, the Clean Air Act of 1970, the Clean Water Act of 1972, the Marine Mammal Protection Act of 1972, the Endangered Species Act of 1973, the Safe Drinking Water Act of 1974, the Toxic Substances Control Act of 1976, the Resource Conservation and Recovery Act of 1976, and later, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (known as CERCLA or Superfund) (the response to the Love Canal incident), and the Oil Pollution Act of 1990 (the response to the Exxon Valdez oil spill). Excluding the Defense Department, EPA is now the largest federal administrative agency. It employs about eighteen thousand people and

25. FRIEDMAN, *supra* note 14, at 680.

has an annual operating budget of $6.7 billion—one third of the entire federal regulatory budget.

All available data show that a solid majority of Americans favor vigorous federal enforcement of the environmental statutes, even if it means more government, more taxes, and higher consumer prices. Of course, there is argument about the best means to protect the environment. But again, the argument involves no issue of *principle* that should divide liberals and conservatives. No liberal principle rejects out of hand the use of market mechanisms—such as the creation of permits to pollute that may be bought and sold at prices determined by market forces, or taxes on pollution, or emission fees—in the administration of the federal statutes. In principle, the Clinton Administration has accepted the use of these mechanisms. The only questions they raise are empirical: Will these means achieve the statutory ends in a more cost-effective way than by "command and control" regulation, and can the practical problems of implementing them be surmounted?

Similarly, no conservative principle requires the rejection of command and control regulation if the alternative means suggested fail to accomplish the allotted task or the dismissal of the view that cost-benefit analysis cannot answer questions of value, such as how much economic growth should be sacrificed to save an endangered species.[26]

6. Government has sought to maintain full employment, economic growth, and price stability.

Markets—the arenas of private economic decision-making—continue to play a crucial role in reflecting consumer wants, distributing the national income, and determining the rate of economic growth. But experience has shown that, if left to itself, the market is incapable of avoiding recession or inflation. In the 19th century, we had recessions, depressions, or panics almost every twenty years. In the 20th century, the Great Depression of 1929 threatened the very survival of American Capitalism. Until the New Deal, the federal government took no responsibility for the waves of unemployment, insecurity, and misery that accompanied the fluctuations of the business cycle. Since then, we have not experienced depressions, but only because of the New Deal

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26. I have benefitted from a paper delivered by Professor Thomas Merrill. Thomas Merrill, *The Environmental Revolution Rolls On—But in a More Sensible Direction?*, Paper Delivered at the 33rd Annual Corporate Counsel Institute, Northwestern University School of Law (1994).

measures enacted to assure that they would not happen again. The Employment Act of 1946, part of President Truman's "Fair Deal," committed the federal government to have a macroeconomic policy to maintain full employment, economic growth, and price stability. It was implemented in 1978 by the Full Employment and Balanced Growth Act, known as the Humphrey-Hawkins Act—an Act that has been totally ignored.[27]

The Acts envisage three ways in which the federal government may expand or contract spending for investment in capital goods and for consumer goods and services. One way is fiscal policy, that is, raising or lowering taxes, or spending, or both. Raising taxes, however, seems to be proscribed politically. Increasing spending, even for long term investment, seems to enjoy equal disfavor—with the exception always of military spending.

The second way is to limit increases in wage and other costs that threaten to exert upward pressure on prices. Because this may involve some form of wage, price, and profit regulation, it has become unthinkable, though President Nixon resorted to it in the 1970's.

This leaves only monetary policy—raising or lowering interest rates to control the volume of borrowing and lending. This stabilization policy is the exclusive province of our central bank, the Federal Reserve Board, which governs the Federal Reserve System created during the Wilson Administration in 1913 and reshaped by the Banking Acts of 1933 and 1935. These Acts give to the seven members of the Board the power to affect the behavior of every consumer and business in the country and makes its Chairman more powerful than the President or Congress. The Humphrey-Hawkins Act tries to circumscribe this power in ways consistent with the premises of democratic government. But, as I said, this Act has been consigned to limbo.

It is apparent that Mr. Alan Greenspan, the present Chairman of the Federal Reserve Board, and the majority that he commands fear inflation more than unemployment. Raising interest rates—instead of taxes—when inflation threatens, curtails longer-term productive investment, perpetuates the existence of a permanent army of the unemployed, and transfers income and wealth from consumers and producers to banks. William MacChesney Martin, chairman of the Federal Reserve Board from 1951 to 1970, is reported to have said that "the job of the Fed is

27. The only living vestiges of this Act are the required biennial reports on the state of the economy that the Chairman of the Federal Reserve Board makes to Congress, usually in person.

to take away the punch bowl just when the party is getting good."[28] You can count on Alan Greenspan to do just that.

7. Government has fostered the advance of knowledge.

I have mentioned the federal subsidization of elementary and secondary education in the Northwest Territories. Federal aid to education, including higher education, has continued to this day. The GI Bill was a boon to our institutions of higher learning, as well as to the returning war veterans. By giving them the education to make them more productive, the GI Bill also helped the economy to grow. Federal outlays for agricultural research and development and technical assistance to farmers helped to bring about amazing increases in agricultural efficiency and productivity.

Special government agencies have been established to advance knowledge, including the Bureau of the Census, the National Academy of Sciences, the National Research Council, state agricultural and historical societies, federal and state geological surveys, the National Science Foundation, the National Institutes of Health, the Corporation for Public Broadcasting, and the National Endowments for the Arts and Humanities.

The advance in knowledge has itself generated pressure for social change. At the same time, it has revealed the complexity of the problems that efforts to change will confront.

8. Finally, Government has acted to assure every individual in our society a minimum decent life.

This is the area in which there is now the greatest public controversy. Let me enumerate the most important of the measures adopted to achieve this end: minimum wages, the prohibition of child labor, Social Security, ERISA (the Employment Security Act of 1974, which seeks to protect private pensions), the insurance of deposits in banks and savings and loan associations, Medicare, Medicaid, Aid to Families with Dependent Children (AFDC), medical care and nutrition for pregnant women and infants, Supplemental Security Income (which provides cash aid to poor people who are aged, blind, or otherwise disabled), Food Stamps, school lunches, subsidized housing, FHA loans, disability insurance, unemployment insurance, agricultural price supports (when the family farms were the principal beneficiaries), rural electrification,

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28. Mark Willis, THE N.Y. TIMES, Aug. 17, 1980, § 3, at 16.

federal crop insurance, Head Start, college loans, the GI Bill, and legal services to the poor. Together, these government interventions created the welfare state which the current Congress is determined to dismantle.

The post World War II economic miracles were not achieved by following laissez faire policies. Thanks to the type of massive government intervention I have described, the peoples of the Western democratic welfare states have enjoyed economic prosperity and levels of affluence no one had ever thought possible. In our own country, during the 1960's, when the regulatory burdens on business were greatly enlarged, the gross domestic product grew at its highest rate since 1945—4.2%, compared to about 2% during the Reagan years. Indeed, the Welfare State is not only an instrument of social justice; it helps to stabilize the economy and even to stimulate economic growth by translating need into effective demand. The Reagan recession of 1982 and 1983 was contained by the stabilizing features built into the economy by the New Deal and Great Society. These same stabilizers prevented the 1987 collapse of stock prices from devastating the economy and threatening a world-wide economic crisis. Yet it is precisely these stabilizers that the Republican Congress now threatens to destroy.

During the Reagan-Bush years, the number of persons below the poverty level increased from about thirty-two million to thirty-seven million—14.5% of the total population in 1993. About twenty-two million whites and nine million African-Americans were in poverty in 1981; about twenty-five million whites and eleven million African-Americans in 1993. One of every five American children is born in poverty—more than double the proportion in Canada and Germany. Our poor live in squalid conditions in central cities infected with drugs and ridden with crime. Thirty-nine million people, 15% of the population, are without health insurance.

Despite increases in productivity, real wages, including fringe benefits, have stagnated. The average income for high school graduates, as well as dropouts, has fallen. The average income for college graduates and middle-income earners generally has not grown.[29]

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29. From 1973 to 1993, the earnings of men working full time:

fell 11 percent from $34,048 to $30,407, even though the earnings of the top 20 percent grew steadily and the real, per-capita gross domestic product (GDP) rose 29 percent . . . . Mostly by working many more hours per year, women kept median household incomes slowly rising until 1989. In 1989, however, median real wages for women working full time year-round also began to fall. Preliminary data for 1994 and early 1995 indicate that these wage declines are accelerating. As a result, since 1989 median household incomes have fallen more than 7 percent after correcting for inflation and family size, to $31,241

About 2.5 million Americans lost their jobs because of corporate restructuring between 1991 and 1995. Although more than this number of jobs has been created over the years, the replacement jobs, often part-time, offer less pay and fewer, if any, fringe benefits. Only about 35% of the laid-off workers found jobs paying as well as or better than the jobs they lost. White collar, middle-class Americans, and those aspiring to join the middle-class, have been adversely affected by this trend. Their trauma has disrupted the lives of families and entire communities.

There is an increasing concentration of the labor force in technically backward, labor intensive, non-union sections of the economy. Unions are in serious decline and are unable to function as institutions with power to countervail that of the big corporations and the ability to give individual workers a sense of community, status, and independence.

Yet corporate profits during the Reagan-Bush years increased 124% before taxes and 159% after taxes. Both wealth and income are more concentrated, and the gap between rich and poor has grown wider. By 1990, the total income of the top one percent of the population equaled the total income of the bottom forty percent. Lester Thurow writes:

> The share of total net worth of the top one-half of one percent of the population rose from 26 to 31 percent in just six years, between 1983 and 1989. By the early 1990's the share of wealth (more than 40 percent) held by the top one percent of the population was essentially double what it had been in the mid-1970's and back to where it was in the late 1920's, before the introduction of progressive taxation.[30]

Corporate executive salaries increased to nearly two hundred times that of the average worker, compared with only forty times that of the average worker twenty years ago.

It seems easier for our economic system to maximize wealth than to distribute it so that every person enjoys a minimum decent life. To exacerbate the situation, the current Republican Congress is insisting upon tax reductions for the rich and welfare cuts for the poor.

In justification, we hear it said that the poor need most of all the spur of their own poverty to help them to abandon their self-destructive behavior and become productive and self-reliant members of society.

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in 1993, from $33,585.
Lester Thurow, *Why Their World Might Crumble: How Much Inequality Can a Democracy Take?*, N.Y. TIMES MAG., Nov. 19, 1995, § 6 at 78.
30. *Id.*

But the rich, apparently, need the spur of more money to become socially useful.

Of course, people should take responsibility for their own lives; they should be sober and hardworking and care for themselves and their families. But the social and economic environment should enable their striving to succeed. The only answer to poverty is jobs. But there are not enough jobs for all the people who are able and willing to work. Unfortunately, I see no serious consideration of the measures that are necessary to enable the economy to grow faster and to transform the dependent poor into workers earning a living wage—such as greater investment in the infrastructure and research and development, better schools, job training and placement, good public housing and health care, treatment of drug addiction, family counseling, child care, a higher minimum wage,[31] an increasing Earned Income Tax Credit and, as a last resort, employment in the public sector if the private sector is unable to provide the jobs. All this will cost money—more money, in the short run, than the current welfare system costs. But there is no evidence yet that those who command a majority of the electorate are willing to pay the price.[32] It is no wonder that feelings of insecurity and frustration overwhelm the poor and are beginning to afflict the middle-class and those who aspire to be middle-class but find themselves among the 2.5 million Americans who have lost their jobs because of corporate restructuring between 1991 and 1995. This mounting discontent threatens to discredit the democratic political process itself.

In creating a welfare state, did the federal government become too big? Should we cut down its size and devolve power to the states and localities? From 1949, when the federal government had returned to relative normalcy after World War II, until the end of 1993, population grew by seventy-three percent, but the number of federal civilian government employees grew by fifty-two percent, and so declined relative to population. Both in 1949 and 1993, ten of every 1,000 Americans worked for the federal government—no change in forty-four years. We should also appreciate the fact that approximately two-thirds of all federal civilian employees work for the Departments of Defense and Veterans' Affairs and for the Postal Service.

Over the same period of time, the number of state and local government employees increased by 306%. In 1949, thirty, and in 1993, sixty, of every 1,000 people worked for state and local governments—a

31. It is a myth that a higher minimum wage eliminates low-wage jobs. *See* DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995).

32. *See* JOHN K. GALBRAITH, THE CULTURE OF CONTENTMENT (1992).

doubling in forty-four years. There are now approximately five and one-half times as many state and local government employees (16,294,000) as federal employees (2,869,000).

The federal government does not step into a situation because it wishes to grab more and more power, but because there is a need and demand for its intervention. When the local poor laws of the 19th century proved inadequate, the states took over the administration of welfare. During the years of the Great Depression, the states could not bear the cost of alleviating the mass distress and demanded that the federal government take over. The New Deal responded. Though the federal government took over the fiscal responsibility, the state and local governments were—and still are—given significant roles in administering the programs. As the late Professor Morton Grodzins has written, the "American federal system is principally characterized by a federal-state-local sharing of responsibilities for virtually all functions."[33] Few local or state initiatives succeed without significant federal support.

Will the withdrawal of the federal government and the consequent shift from one federal bureaucracy to fifty state and an untold number of local bureaucracies produce a better welfare system? Will it be more cost-effective? Will there be less waste, fraud, and abuse? More accountability? Are state and local governments closer to the people in any meaningful sense other than geographic? Will powerful business, financial, and other special interests have less influence? Will political pressures be more resistible? Will Congress give the states the money they need for their welfare programs? Or will federal tax reductions and spending cuts be followed by state and local tax increases or cuts in welfare spending? Are states more considerate than the federal government of the needs of the more populous urban areas of the country? In the absence of national standards, will competition for the location of industry force states and localities to lower standards all along the line?

It is not the relative size or competence of the bureaucracies that motivates the advocates of devolution. Rather, it is their objective to gut entitlement programs for the poor.

Are federal expenditures so high that they threaten the health of the economy? In the forty-two years since President Eisenhower took

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33. MORTON GRODZINS, *Centralization and Decentralization in The American Federal System*, *in* A NATION OF STATES 1 (Robert A. Goldwin ed., 1961).

office, federal spending increased from 19.3% of the Gross Domestic Product to 21.6%—hardly an intolerable increase. As for federal taxes, they accounted for 19.1% of the GDP in 1953 and, it is estimated, will account for 19.1% in 1996—no change in forty-three years.

During the Reagan-Bush years, the annual federal deficit rose from $79 billion to $255.1 billion and the debt from $994.8 billion to $4,351.4 trillion. For the fiscal year ended September 30, 1995, it is estimated that the annual deficit will be $161 billion, or 2.3% of the GDP, compared to an annual deficit that amounted to 4.1 percent of the GDP when President Clinton took office. I will not argue that we should be complacent about the annual deficits and mounting national debt. But those now in the majority in Congress who supported the Reagan tax cuts and steep increases in military expenditures are without shame in laying claim to fiscal responsibility. Most of the almost five trillion dollar debt is accounted for by expenditures on past wars and preparation for future ones.

I will conclude by saying that we must continue to look to government and, particularly, the federal government, to establish justice, promote the general welfare, and ensure domestic tranquility. As Justice Scalia wrote before he ascended the Supreme Bench, "I urge you then—as Hamilton would have urged you—to keep in mind that the federal government is not bad but good. The trick is to use it wisely."[34] We should also be aware of what Reinhold Niebuhr, the great Protestant theologian, used to say—that the obstacle to all social change is the recalcitrance of the human material and that progress is only the substitution of new problems for old ones.

Nevertheless, the important thing, which President Truman emphasized in his first report under the Employment Act of 1946, is to reject the notion that "we are the victims of unchangeable economic laws, that we are powerless to do more than forecast what will happen to us under the operations of such laws[,]"[35] and that all will work out for the best in the long run. As John Maynard Keynes once wrote, "[t]his long run is a misleading guide to current affairs. In the long run we are all dead."[36]

Instead, as Truman urged, we should hold on to the conviction that our economy and our society "within reasonable limits will be what we make it" and that "intelligent human action will shape our future."

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34. Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL'Y 19, 22 (1982).

35. Economic Report of the President transmitted to the Congress, January 8, 1947.

36. JOHN M. KEYNES, A TRACT ON MONETARY REFORM 80 (1923).