bureaucracy and the constantly-shifting political whims of lawmakers in Washington.

With all these factors in mind, it is easy to see why the early Texans were eager to become part of the United States. At heart, most always had been Americans.

However much we might romanticize about a different historical outcome, I think few of us would really want to change it. We are Americans today because our Texan ancestors desperately wanted to be. Though most native Texans feel a special patriotism toward our state, it is subordinate to the patriotism we feel toward our nation. We are Americans and proud of it. We would want it no other way. Whatever the faults and excesses of our federal government, we love our country. However much we may revere the Lone Star flag fluttering in the dry west wind, we feel that it is right and proper for Old Glory to wave above it.

Each time I let my eyes rest upon the American flag, I remember a Memorial Day in France in 1945, shortly after V-E Day. I was in a military hospital near Paris, recuperating from an injury suffered in Germany three weeks before the war's end. A group of us, the so-called "walking wounded," were taken by bus to an American Army cemetery for memorial ceremonies.

The scene has been etched in my memory like few others: the ringing of taps, echoing across row upon row of white Christian crosses and Jewish Stars of David all the way to the brow of a distant hill, and above it all, floating in a soft spring breeze, the stars and stripes of the American flag.

I have thought so many times of the young men who lie in that sacred ground, of all they could have been and done had they been allowed to live as I have lived, to marry and have families and careers as I have done. They gave all they had for their country – *my* country – and I could not without dishonoring their sacrifice have a moment's doubt that my forefathers did the right thing.

I am grateful to be a Texan, but I am even more grateful to know that I am an American, that my children and grandchildren are Americans.

Great-great Granddad knew what he was doing. ★

Kathleen Hartnett White

TWO QUESTIONS COME TO MIND on this 150th anniversary of Texas statehood: Would it have been to the advantage of Texas if the Republic had not joined the United States in 1845? Would it be to the advantage of Texas if it were an independent republic and not part of the United States in 1995?

I choose to address the second question and will for the most part leave to the eminent historians in whose company I write the question of whether the original Texans who chose annexation made the better decision.

Although I reverently pledge allegiance to the United States, with regret I hazard the claim that Texas would be better off today as an independent republic free of the yoke of the present federal government. I pledge allegiance to my country and to the "republic" for which it stands – a republic composed of states sovereign within their own borders – a republic with a national government of very limited, specifically enumerated powers – a republic that actively upholds the 10th Amendment of its Constitution, guaranteeing states' rights against federal encroachment. The current federal government, in my opinion, has grossly departed from the republican vision of national government that inspired the signers of the U. S. Constitution and the early Texans who chose annexation.

Texas, 150 years after becoming the 28th state, is fettered by a domineering federal government whose mandates, taxation, and even federally-funded, erstwhile state programs restrict the liberty and prosperity of individual Texans and hobble state and local government. If the majority of the 104th U.S. Congress represents a national consensus, there is not a state in the union whose elected officials do not now view the federal government as a shackle on states' rights and an excessive drain on state revenues. Yet Texas has perhaps more distinctive and historically grounded reasons for resenting the present federal burden.

As early as 1846, the federal government had blithely ignored territorial boundaries claimed by Texas a year earlier at the time of annexation. In the Treaty of

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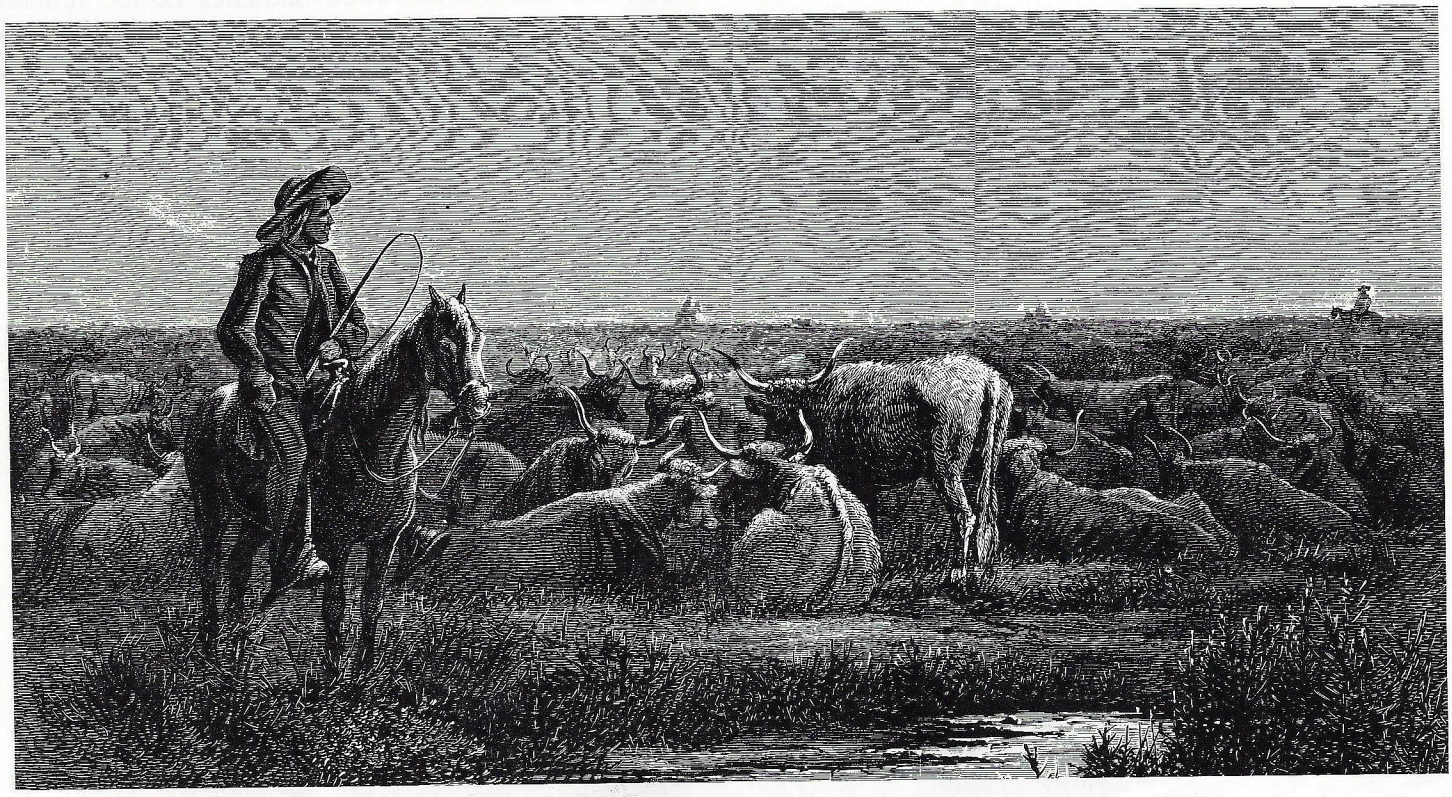
Guadalupe Hidalgo, the federal government ignored Texas maps and claimed New Mexico as a U.S. territory. The U.S. Army's pitiful inability to protect Texans from Indian marauding led, in 1850, to the governor's call for Texans themselves, specifically the Rangers, to get the job done. Texan dissatisfaction with federal policy and action was pervasive.

The character of the government of the nation that Texas originally joined in 1845 changed after the Civil War. Reconstruction policies and laws justified the broad exercise of federal powers. Originally acting as a government with the narrowly circumscribed powers of a republic composed of states largely sovereign unto and among themselves, the national government began to acquire massive, centralized power, actively intervening in state affairs. If Texans viewed the federal government as impotent and aloof before the Civil War, resistance to the victorious Yankees and their interventionist "know what's best for Texas" ways took hold after the war. Congress began to pass one after another of the now innumerable federal laws implemented by huge federal bureaucracies manned by millions of bureaucrats writing volumes of regulations – federal mandates that directly affect and dominate the internal affairs of the states.

The 10th Amendment guarantees that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Although the United States was founded in opposition to excessive government, and the language of the 10th Amendment appears clear, not one of the three branches of the federal government has ever acknowledged specific limits to the scope of federal power in the states. Although federal laws did not regularly interfere with internal state affairs until the late 19th century (e.g., the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890), as early as 1824 the Supreme Court gave constitutional sanction for practically unlimited federal power over state affairs through the regulation of interstate commerce.

One of the very few federal powers enumerated by the U.S. Constitution, the power to regulate interstate commerce, has been used to justify any and every

intrusive federal law, from wage and price controls to environmental regulation. The Supreme Court has consistently ruled that if the federal law in question in any way affects commerce between the states – however minor, indirect, or aggregate are the effects – it constitutes a valid exercise of the commercial power granted to Congress, is not barred by the 10th amendment, and preempts any conflicting state law. Although at times the Supreme Court has appeared tempted to rein in federal power in the name of the 10th Amendment, the Court generally defers to Congress in matters affecting commerce. The Supreme Court is reluctant to stipulate limits for the popularly elected Congress.



Federal laws now restrict Texas state governance and individual Texans' rights in four major ways. First, and most obviously, the federal income tax stifles the state economy. Texan U.S. Representatives Dick Armey and Bill Archer now lead Congressional efforts to repeal the current Internal Revenue Code and to replace it with a more equitable, more simple system.

Second, many federal laws mandate state or local programs but provide no federal funding to pay for federal requirements. Such "unfunded mandates" are an enormous drain on the State Treasury and can bankrupt local communities. The federal Clean Water Act's complicated requirements for municipal water treatment facilities are an excellent example of an onerous unfunded mandate. Current regulations can dictate multi-million dollar renovations or completely new construction of treatment facilities in medium-sized-to-small towns – even where there is no evidence of water problems. The U.S. Congress, early in this 104th session, passed legislation to limit the amount of expenditures required by federally mandated programs. The Texas delegation voted almost unanimously for this relief, and President Clinton signed the bill. Nevertheless, this new law will affect only certain federal regulations and mandated expenditures. It does not completely solve the problem.

The well-funded federal option, the opposite of the unfunded mandate, is a third major and often unnoticed means of federal intrusion. The lure of new or continued federal money motivates state bureaucrats and some elected officials to facilitate enforcement of many federal regulations. Aware of resistance to blatantly coercive federal regulations, the U.S. Congress often structures statutory mandates as a *quid pro quo*: If you take federal money, you must enforce certain regulations.

The federal Coastal Zone Management Act (CZMA), with which the Texas legislature and governor's office

has contended this past year, operates in this manner. In exchange for new and continued federal grants, the CZMA requires Texas to submit a plan (to be approved by the EPA) setting forth how the state will implement the EPA's "guidance" (the new, politically correct term for regulation) on land use controls to prevent alleged non-point-source pollution of the waters off the Gulf Coast. The controls would affect considerable inland property, the runoff from which, the EPA claims, can pollute coastal waters.

The most overt and coercive means of federal domination is direct federal regulation. Federal environmental laws offer graphic examples of federal shackles on basic states' rights.

For some time, Texas resisted submitting its state plan. Then, under the Richards administration, there was a rush to get this and many other federal plans approved. The rapid growth in the state government of Texas is directly related to the state government's eagerness to accept federal funding and the accompanying federal dictates. The self-aggrandizing tendency of bureaucracies leads them to seek money from any source as a means of increasing their power and influence. Many federal laws stipulate conditions for federal grants, requiring "cooperative agreements," through which Texas state agencies voluntarily assent to further some federal objective in exchange for cash. The Texas Parks and Wildlife Department has signed such an agreement providing biological data to the U.S. Fish and Wildlife Service (USFWS), which will expedite enforcement of the Endangered Species Act (ESA) on Texans' private property. The Bush administration has given some sign it will attempt to eliminate this method for increasing federal power in and over Texas.

The fourth, and most overt coercive means of federal domination is direct federal regulation. Federal environmental laws offer graphic examples of federal shackles on basic state rights in Texas. In environmental regulation, the U.S. Congress and the courts have stretched the commerce clause to preposterous lengths. The Clean Water Act now authorizes federal regulation of wetlands, however small, dry, or isolated from any commercial water course. So vague and inclusive are the criteria for "federal jurisdictional wetlands," that they give the federal government power over hundreds of thousands acres of land – not simply swamps. When one beleaguered landowner in Illinois challenged the constitutionality of such federal land use control, a federal court argued, based on the Commerce Clause, that a duck that "might" affect interstate commerce in duck hunting "might" fly across state lines and "might" rest or nest on land that "might" be wetland. (According to this argument, even Death Valley would be subject to wetlands regulation.)

It is the federal ESA that has to be currently the most heinously dominating federal legislation. There are many as-yet-unresolved battles over the ESA in diverse regions of Texas. The songbirds around Austin, the woodpecker in East Texas, weeds and wolves in West Texas – these are a few of the most high profile controversies; literally hundreds of other listed and candidate species wait in the wings. Yet, as an instance of truly outrageous federal intrusion into the business of Texas with profound ramifications for states' rights across the country, consider the case of the Edwards Aquifer.

Both advocates and foes of the ESA characterize it as the "pit bull" of federal environmental law; i.e., it permits virtually no compromise when state or individual rights conflict with ESA mandates. The Supreme Court has twice upheld the almost absolute authority of the ESA. In 1978, the court ruled that the law gives the USFWS the authority to protect endangered species regardless of human and economic cost. Earlier this year, the Supreme Court held that even inadvertent alteration

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of a species habitat (e.g., clearing a fence row of brush) could mean violation of the ESA's basic prohibition and trigger onerous civil and criminal sanctions.

In 1991, the Sierra Club sued the USFWS in the federal district court in Midland, claiming that it had violated its ESA responsibility by failing to establish and maintain minimum levels of water in the Edwards Aquifer and the Comal and San Marcos springs fed by the aquifer. The USFWS had earlier claimed certain spring flows were necessary for the survival of several endangered invertebrates. The species in question include two species of tiny fish and salamanders and a type of wild rice.

The controversial Edwards Aquifer, discussed in **TR** last year ["Irrigating Problems," November/December 1994], is a huge underground reservoir stretching 175 miles just south of Austin to 100 miles west of San Antonio. The aquifer provides the sole source of drinking water for San Antonio as well as irrigation and municipal water for at least six Texas counties. In 1993, U. S. District Judge Lucius Bunton of Midland ruled in favor of the Sierra Club, agreeing that the ESA mandates minimum aquifer levels and spring flows to protect the habitat of the listed species. USFWS must set those minimum levels, and use of the aquifer must be regulated to maintain those levels. The federal ruling allowed the state legislature a limited time to establish regulations to limit pumping from the Edwards Aquifer.

The desire of many Texans to be free from the federal yoke is far more than historical nostalgia for the Lone Star Republic. It is a well-warranted desire, shared by increasing numbers in every state, to reduce the domain of federal power and to return to the understanding of federalism that informed the founding of the United States.

The stakes of this litigation are high for Texas and the entire country. The court ruled that, through ESA authority, a federal wildlife agency shall determine how Texans will use their water. Although neither the federal courts nor the U.S. Congress has ever acknowledged inviolable state rights, use of land and water always has been viewed as a basic state right. Federal legislation that even remotely affects water allocation in western states always includes an explicit provision that the law in no way affects the state's right to allocate quantities of and rights to water. If the federal government controls allocations of water, it *de facto* owns the land sustained by the water. A deed to land is superfluous if the government controls the water supporting land use.

The Texas legislature began consideration of legislation to regulate use of the aquifer soon after Judge Bunton's decision. After several false starts and several years of debate, this legislation (SB 1477) finally passed. This new Texas law for the first time limits the amount of water a property owner can pump and creates the Edwards Aquifer Authority to regulate water use. The board of the authority may also levy user fees and broker water sales and trades.

Impatient with the state's efforts to begin regulation of water withdrawals, the Sierra Club went back to the federal court in Midland demanding federal action on the issue. In response to the Sierra Club, Bunton in early October said that he would order federal control of the aquifer and his court would impose regulations by January 1, 1996. Two weeks later, in response to Texas Attorney General Dan Morales' request to allow Texas to resolve the issue on its own, the Fifth Circuit Court of Appeals ordered Bunton not to place the aquifer under federal control, but the case is far from resolved.

Although it is unquestionably preferable that state government, rather than a federal wildlife agency, regulate water use, why must state legislation or state courts so readily defer to the federal court's interpretation of the ESA? Acceptance of the federal district court's decision about the needs of salamanders and minnows entirely overlooks what many Texans believe are the guarantees of the Texas Constitution and the vested water rights of Texas landowners, water districts, and municipalities. To date, no state government has formally challenged ESA authority over matters long held within the orbit of state constitutions and statutes. A resolution of the controversy surrounding the Edwards Aquifer may require Texas to draw the line. Such a challenge might force the Court to reconsider the guarantees of the 10th Amendment – perhaps imposing some limits on the federal government's interference in Texas' affairs. The high court has indicated new sympathy for states' rights after 150 years of looking the other way.

The Supreme Court, the new Republican majorities in Congress, the Western Governors' Association, county governments, presidential candidates, and a critical mass of the populace are now rethinking what the 10th Amendment should mean about real limits to federal power. As a former republic and then a state long resistant to federal interference, Texas should take a stand and help restore a national republic with limited federal powers and respect for strong states' rights.

Texans cherish the legacy of the battle of San Jacinto. They also cherish the legacy of Iwo Jima, of Normandy – battles in which so many Texans fought and died for freedom from tyrannical government. The development of Texas since 1845 into a strong, prosperous state is an integral part of the history of the United States as a nation of free and independent people.

The massive federal government that originally arose after war, industrialization, and national economic depression to provide safety and opportunity for previous generations has become a yoke for this and future generations. The desire of many Texans to be free of the federal yoke is far more than historical nostalgia for the Lone Star Republic. It is a well-warranted desire, shared by increasing numbers in every state, to reduce the domain of federal power and to return to the understanding of federalism that informed the founding of the United States as a republic. The sesquicentennial of Texas statehood is not a happy occasion. ★

KEN TOWERY

THINK OF IT: 150 years of glorious statehood. For those of us getting a little long in the tooth, it seems like only yesterday.

Oh, there are cynics among us who dream of days gone by, of what might have been, had we taken a different path back in 1845. They may even argue, to themselves if not out loud, that Texans would have lived in a veritable paradise for the past 150 years, with cattle, oil, cotton, and stuff like that running out our ears, carrying on trade with all the world. They envision what they think would have been a great and powerful nation, the Republic of Texas, sending its ambassadors to governments around the world, entering into trading and security alliances with the world's great powers. They see a strong Texas Army, and a strong Texas Navy, and a strong Texas Air Force, guarding a safe and secure border. After all, these dreamers say, a Republic of Texas, rich in natural resources, peopled by a citizenry of proud, energetic entrepreneurs, would have had far better prospects for establishing a strong nation than the state of Israel, with less than one-fourth the population of Texas and no natural resources to speak of.

But wait. Before we get carried away with what might have been, let us examine, in a purely objective way, the positive aspects of our "union-hood."

Indeed, there are many positive aspects of being a dues-paying member of this particular union of sovereign states. It is true, of course, that they are not all capable of being measured by an analysis of the "bottom line." Many are somewhat esoteric, having to do with the joys and satisfactions inherent in being part of a noble undertaking. Much of the current trend toward "feel good" politics, in our opinion, comes from the realization, finally, that group responsibility outweighs individual responsibility, and that group rights outweigh individual rights. That realization has led to the discovery that individual rights and individual responsibility are not necessarily necessary for the proper functioning of a

If Texas had remained a republic, we could not have given the nation Jim Wright as Speaker of the House or Lyndon Johnson as President. Nor could we have given the nation Molly Ivins as our moral philosopher laureate. And where would the country be then?

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