

CHAPTER 1

National-State Relations

The United States, with 3,628,150 square miles of territory, is one of the largest and most diverse nations in the world. An understanding of the nation's federal system cannot be gained without knowledge of the nation's diversity. Individual states vary in size from Alaska with 586,400 square miles of territory to Rhode Island with only 1,214 square miles of territory. Equally great population differences are found in the population of the states, ranging in 2004 from 509,294 in Wyoming to 19,254,630 in New York to 36,132,147 in California. Population density ranges from 1.1 per square mile in Alaska to 1,134.4 per square mile in New Jersey. A sharp shift has occurred since 1945 with the fastest-growing states in the south and the west, and several states losing population. New York lost more than 126,000 residents in the year ending on July 1, 2006. Similar differences exist between the populations of local governments ranging from 75 residents in Dixville Notch, New Hampshire, governed by an open town meeting, to more than 8,000,000 in New York City.

Racially, the nation is diverse with whites of various ethnicities constituting 67.9 percent of the population, blacks (African Americans) 15.9 percent, Asian 5.5 percent, American Indian and Alaska natives 0.4 percent, native Hawaiian and other Pacific islanders less than 1.0 percent.

Several states have sizable economies and California has the seventh largest economy in the world with its 2006 gross state product totaling \$1,621,843 million compared to \$24,178 million in North Dakota. Per capita personal income varied from \$24,820 in Louisiana to \$47,819 in Connecticut. Tax collections in the United States are large: \$2,398,000,000,000 in fiscal year 2007 by the U.S. government and \$2,435,084,000,000 by the fifty States and their local governments. Congress annually appropriates approximately \$450,000,000,000 in financial assistance to subnational governments.

There are significant political cultural differences between the States and often within a state such as New York. These differences affect the functioning of the federal system with respect to the extent of cooperation and conflict between the national government and individual states, and between states. Daniel J. Elazar developed a typology of political culture facilitating an understanding of why government systems differ in various states.¹ The marketplace underlies the individualistic political culture, which “places a premium on limiting community intervention—whether governmental or non-governmental—into private activities to the minimum necessary to keep the market place in proper working order.”²

Elazar defined the moralistic political culture as one committed to promoting the public interest that may necessitate governmental intervention in private matters in order to achieve goals benefiting the general public.³ Hence, governmental activism is more common where this type of culture prevails.

The traditionalist political culture “accepts government as an actor with a positive role in the community, but it tries to limit that role to securing the continued maintenance of the existing social order.”⁴ In such a society, politics tends to be conservative and the role of government is custodial and not activist.

The federal system since 1965 has become more complex and has been characterized by the increasing concentration of political powers in the national government flowing from congressional preemption statutes removing completely or partially regulatory powers from subnational governments and generally broad U.S. Supreme Court interpretations of the scope of the delegated powers of Congress.

NATIONAL GOVERNANCE SYSTEMS

Governments may be classified in terms of the geographical distribution of political power as unitary, confederate, and federal. The terms “confederation” and “federation” were synonymous in the eighteenth century. An understanding of a federal system is promoted by comparing it with the unitary and confederate systems.

A Unitary Government

In a unitary form, one central government wields supreme power over all territorial divisions within the nation. Provinces, cities, counties, and other political units owe their creation and continued existence to the central gov-

ernment and they possess only such powers as the central government grants them. The central government can make a broad or a limited devolution of powers to lower planes of government.

Unitary governments are the most common form in the world and sub-national governments are viewed primarily as administrative subdivisions to carry out national policies. Commonly, the national government prescribes in minute detail the policies to be implemented and the procedures to be followed. Since the lower-tier units are subject to more or less continuous supervision and control, the unitary organization is able to achieve a degree of national homogeneity, provide uniformity of policy and administration, and concentrate power swiftly and completely in times of national emergencies and wars.

The major disadvantage of this system may be its inflexibility. Identical policies and methods are applied to all local conditions regardless of their applicability in specific areas; sometimes they are suited ideally to solve certain local problems, but at other times they are unsuitable and unadaptable.

The relationship between a state government and its political subdivisions in the United States historically was unitary. Today, the relationship is unitary in some states and federal in other states as explained in chapter 8.

A Confederation

The reverse of a unitary system, a confederate system is one in which two or more independent states band together to establish a central government agency designed to accomplish certain specific common purposes including typically the conduct of foreign affairs and national defense. Each state retains its sovereignty and control over all persons and things within its boundaries with the exceptions of the powers delegated to the central agency. Hence, a confederacy is a system adaptable readily to regional policy preferences.

A confederation is inherently an unstable form of government since individual states may nullify the acts of the central agency and even withdraw from the confederation. In addition, each state may impose high tariffs on goods from other states and discriminate against noncitizens. The friction resulting from such measures tends to destroy the effectiveness of the confederation.

Despite its disadvantages, this system of government has been an instrument for cooperation in revolutionary emergencies and sometimes has been

a prelude to the establishment of a closer and more stable political union. The experience of the United States, which had a confederate form of government in the period 1781 to 1788, illustrates this point and is described in greater detail in chapter 2.

A Federal System

In a federal system, all exercisable governmental powers are divided between a national government and several state (canton, province, land, etc.) governments with the exception of concurrent powers exercisable by either plane of government. This system seeks to combine the advantages of the unitary system and the confederate system, but inherently involves exceedingly complex intergovernmental relations if states possess broad powers. In addition, this system may suffer from some of the disadvantages of the other two systems.

The distribution of political powers is made by means of a written constitution, the national government and each state government in theory are supreme within the respective fields assigned to them, and each possesses certain concurrent powers. Kenneth C. Wheare in 1964 defined “the federal principle” as “the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent.”⁵ The national government, if it so desires, can devolve responsibility for a national function—legislative, executive, administrative—on the states and the U.S. Congress has done so as noted in chapter 9.

Elazar provided a similar comprehensive definition of a federal system: “Federalism can be defined as the mode of political organization that unites smaller polities in an overarching political system by distributing power among general and constituent governments in a manner designed to protect the existence and authority of both.”⁶ Carl J. Friedrich in 1968 viewed federalism as “the process by which a number of separate political communities enter into arrangements for working out solutions, adopting joint policies, and making joint decisions on joint problems, and conversely, also the process by which a unitary political community become differentiated into a federally organized whole.”⁷

Richard H. Leach traced the development of the federal system to seventeenth-century England where “a strong feeling of local autonomy prevailed” which was transplanted to the North American colonies and added: “Federalism took root as well in the working relationship that evolved between the English Crown and government and the colonies during the colonial period. Isolated geographically from England, the colonies were tied governmentally to the other country only loosely, and the nature of the

ties varied from time to time and from colony to colony. Nor was a successful attempt every made to rationalize and formalize the relationship.”⁸

ADVANTAGES OF A FEDERAL SYSTEM

Supporters of a federal system cite eight advantages inherent in the system. First, uniformity of policy and administration can be achieved in national affairs to the extent needed while states retain control over their respective internal affairs. In particular, the high costs that may be associated with nationally uniform policies are avoided.

Second, the retention of a number of powers by the states acts as a safeguard against undue concentration of governmental authority in the nation that might result in the abridgement of the rights of citizens, in general policies harmful to sections of a geographically large nation, or both. James Madison in *The Federalist Number 51* emphasized the prevention of the overconcentration of political power inherent in a federal system.

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other at the same time that each will be controlled by itself.⁹

Third, individual states may serve as laboratories of political experimentation for innovations in governmental policies. Successful experiments in individual states have led to sister states and Congress adopting the new policies.¹⁰

Fourth, states do not have to wait for the national government to formulate and implement a program to solve a problem since each state can use its own good judgment and resources in fashioning a remedy.

Fifth, minorities concentrated within one or more states are able to elect their members to state and local government offices, and to influence national policies through the pressure asserted by their state and local government officers on the national legislature.

Sixth, the political decentralization of power provides citizens with additional opportunities to participate in the governance system. There are

more appointed and elected offices in a federal system and most of these offices are located in close proximity to the residences of citizens.

Seventh, Friedrich maintained federalism “enhances consensus in political discussion in the sense that solutions are sought that will reduce the size, resentments, and coercion of defeated minorities as well as of permanent minorities which cannot hope to become majorities . . .”¹¹

Eighth, Friedrich also is convinced a federal system “enhances confidence in, and loyalty to a constitutional polity.”¹²

Disadvantages of a Federal System

Four major disadvantages of a federal system have been identified. First, the system may be rigid if the power distribution can be changed only by means of a formal constitutional amendment, a process that often is prolonged and typically difficult.

Second, existence of concurrent powers, exercisable by the national government and the regional governments, may result in an uneconomical overlapping of functional responsibilities and divisive conflicts between the two planes of government. Such conflicts are especially apparent in times of rapid economic and social changes when jurisdictional conflicts may delay or prevent effective action by either the national government or regional governments or failure of the two planes of government to integrate their policies. Concentration of authority in one government as in a unitary state would result in greater effectiveness and efficiency during a period of rapid change in contrast to a federal system.

Third, serious problems may be caused by lack of uniformity in important functional areas—including banking, highway safety, insurance, and mental illness—as laws and regulations governing these areas may vary widely among regional governments. Furthermore, problems may be created by the failure of one or more regional government(s) to recognize the public acts and records, such as contracts and divorces, of another regional government.

Fourth, an English socialist, Harold J. Laski, wrote in 1939 that federalism in the United States was obsolete and could not cope with the problems generated by the Great Depression, and declared nine years later “the States are provinces of which the sovereignty has never since 1789 been real.”¹³

Theories of American Federalism

Two theories—dual federalism and cooperative federalism—are prominent in the literature. Most students of federalism today find relatively little

explanatory value in the dual federalism theory, but find greater validity in the cooperative theory. Neither theory, however, explains congressional use of coercive preemption powers to remove completely or partially regulatory powers from state and local governments, or relates to interstate relations and state-local relations. Chapter 9 reviews these theories and offers a dynamic kaleidoscopic theory of national-state relations that can be expanded to include interstate relations and state-local relations in states with a constitution establishing an *Imperium in Imperio* by devolving powers to general-purpose local governments.

DUAL FEDERALISM

Edward S. Corwin in 1950 utilized the following postulates to define dual federalism:

1. The national government is one of enumerated powers only;
2. Also the purposes which it may constitutionally promote are few;
3. Within their respective spheres, the two centers of government are “sovereign” and hence equal;
4. The relation of the two centers with each other is one of tension rather than collaboration.¹⁴

A fifth postulate could be added: One plane of government does not employ coercive powers against the other plane.

The U.S. Constitution suggests this theory. Section 8 of Article I delegates specific powers to Congress and the Tenth Amendment stipulates “the 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.” In addition, the Fourteenth Amendment provides for dual citizenship by stipulating “all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”

Dual federalism sometimes is described as a layer cake, thereby suggesting the national government and a state each possesses sovereign powers and may determine and implement policies within their respective competences unimpeded by the other plane. The dual federation theory incorporates a simplistic and static model of national-state relations by explaining changes in such relations can be accomplished only by formal amendment of the U.S. Constitution. John C. Calhoun of South Carolina early in the nineteenth century promoted this viewpoint that was popular in the southern states.¹⁵

COOPERATIVE FEDERALISM

James Madison of Virginia, considered by many to be the father of the U.S. Constitution, made clear in 1799 there was no intent to establish a system of dual federalism. In an address prepared on behalf of the Virginia Assembly, he wrote the national government “can not be maintained without the co-operation of the States.”¹⁶

Elazar demonstrated conclusively a rigid dual system of federalism never existed in the United States and cooperation has been a hallmark of national-state relations since the early years of the nineteenth century to 1913.¹⁷ Cooperative federalism implies the existence of two planes of government which is the essential feature of dual federalism, but differs from it in terms of extensive interplane cooperation. Whereas a number of the examples of such cooperation cited by Elazar during the early decades of the federal system were relatively minor, cooperation became extensive in the twentieth century, particularly in the period after World War II. In large measure, the cooperation was recognition of the fact most major multifaceted governmental problems no longer are exclusively national problems, or state problems, or local problems. In addition, cooperation was the product of the Congress’s offer of pecuniary inducements to the states to execute national policies, a subject analyzed in detail in chapter 6. The theory of cooperative federalism is based in part on the postulate that one plane of government does not coerce or encroach on the sphere of the other plane.

This theory retains greater explanatory value than the theory of dual federalism as numerous national-state relations, including ones structured by national preemption statutes, are cooperative in nature. The national government provides many services free of charge to state and local governments, including the Federal Bureau of Investigation’s fingerprint service and specialized training programs conducted by various national departments and agencies.

President Lyndon B. Johnson in the 1960s employed the term creative federalism to describe an aspect of his “Great Society” programs involving the mobilization of local government and private resources, along with national and state resources, to solve public problems on a cooperative basis.

The theory of cooperative federalism is helpful in promoting an understanding of the system, yet fails to explain congressional structuring of national-state relations by the coercive use of formal preemption powers, cross-cutting sanctions, cross-over sanctions, and tax sanctions explained in chapters 4 and 6.

THE EVOLVING FEDERAL SYSTEM

The 1788 campaign on ratification of the proposed U.S. Constitution centered on the question of whether an all-powerful Congress would be estab-

lished that would be a threat to the civil liberties of citizens, a subject examined in chapter 2. The price for ratification in several states was the promise by proponents that the first order of business of the new Congress would be the proposal of a bill of rights as amendments to the constitution. Only a small number of opponents of the proposed fundamental document expressed fear that the delegated powers of Congress would be a threat to the states by encroaching on their sphere of powers and regulating them as polities. The proliferation of preemption statutes in the 1970s and 1980s led to a major debate relative to the original intent of the constitution's framers, a topic reviewed in chapter 5.

The ratified Bill of Rights has been effective in preventing congressional abridgement of the civil rights of citizens, but the Tenth Amendment—designed to prevent congressional abridgement of the states' reserved powers—generally proved to be ineffective in the 1970s and 1980s, as documented in chapter 5. Ratification of the Fourteenth Amendment led to judicial incorporation of most of the civil liberties provisions of the Bill of Rights into the amendment in the twentieth century, thereby protecting these liberties from abridgement by states and their political subdivisions.

The unamended constitution implied, without expressly stipulating, the existence of dual sovereignty and the Tenth Amendment was drafted and ratified to incorporate dual sovereignty expressly into the constitution. Under this constitutional conception, Congress and national courts would be powerless to regulate the states and local governments in their capacities as polities.

The Tenth Amendment, however, did not freeze national-state relations. Ratification of the Fourteenth and Fifteenth Amendments and the U.S. Supreme Court's generally broad interpretation of the scope of Congress's delegated powers enable Congress to encroach on many of the traditional reserved powers of the states as explained in chapters 4 and 5.

In 1988, Justice William J. Brennan of the U.S. Supreme Court in *South Carolina v. Baker* opined: "Any federal regulation demands compliance. That a State wishing to engage in [a] certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect."¹⁸

In terms of its nature, the federal system has evolved from one exhibiting chiefly dual federalism features in 1789 to a system with a number of characteristics of a unitary system with Congress acting as a central government exercising nearly plenary regulatory powers in several traditional areas of state and local government responsibility. To a degree, cooperative federalism appears to have been a transitional phase between an essentially dual federalism phase and today's more coercive phase.

Conflict between the national plane and the subnational plane is inherent in a federal system. Conflict, of course, does not have to involve coercion of one plane by the other plane, but a mechanism other than the court system is essential if a permanent solution to a conflict is to be found. Arthur N. Holcombe in 1955 wrote:

The coercion of States, which are members of a federal system by the government of the system in order that they may perform the obligations of membership in a satisfactory manner, presents one of the most difficult problems of federal politics. For a principal purpose of a federation is to secure peace and freedom from forcible constraint for the federated States, and the coercion of a State by its own federal government seems to be incompatible with the nature of a well-ordered federal union.¹⁹

Although Congress enacted 164 complete and partial preemption statutes removing regulatory powers from subnational governments between 1790 and 1964, these statutes did not regulate states as polities. A revolution in national-subnational relations commenced in 1965 when Congress enacted the first minimum standards preemption statute—*Water Quality Act of 1965*—that is described in greater detail in chapter 4.²⁰ Minimum standards statutes regulate private and subnational governmental activities and provide a state will lose completely authority to regulate the preempted functional area if the state fails to develop a regulatory program with standards at least as stringent as the national standards in each preempted area and an adequate enforcement plan. The number of preemption statutes reached 589 by March 1, 2008.

State government officers have protested strongly against the use of preemption powers by Congress and have filed suits challenging the constitutionality of several major preemption statutes. In general, the U.S. Supreme Court has upheld the constitutionality of such statutes (see chapter 5). Justice Harry A. Blackman in 1985 in *Garcia v. San Antonio Metropolitan Transit Authority* suggested states should utilize the political process, rather than the courts, to seek the amendment or repeal of preemption statutes. State officers accepted his advice and increased their lobbying activities in Congress seeking enactment of preemption relief statutes, a subject examined in greater detail in chapter 4.

There would be no confusion relative to the respective responsibility of Congress and the states if the dual federalism theory served as the basis for the federal system. In general, there was relatively little confusion concerning the responsibilities of the two planes of government until Congress developed seventeen types of complete preemption statutes and eleven types

of partial preemption statutes (See chapters 4–5).²¹ Enactment of these statutes has blurred the responsibility for a number of regulatory activities since both planes may share responsibility or shift responsibility from one plane to the other plane. The confused responsibility problem is examined in chapter 4 and the referee role of the U.S. Supreme Court in terms of national-state power conflicts is highlighted in chapter 5.

AN OVERVIEW

Chapter 2 focuses on experience with the Articles of Confederation and Perpetual union; the first national governance document; the Philadelphia constitutional convention of 1787, which was called to revise the defects in the articles revealed by experience; and the campaign to convince at least nine of the thirteen states to ratify the proposed U.S. Constitution.

The U.S. Constitution is examined relative to the division of powers between Congress and the states in chapter 3. Powers are classified as enumerated congressional powers, reserved or residual state powers, concurrent powers exercisable by Congress and the states, and prohibited powers. The chapter also describes national guarantees to the states, national dependence on the states, admission of new states by Congress to the Union, expansion of national powers, and national government assistance to states and their political subdivisions.

The subject of chapter 4 is congressional preemption of the regulatory authority of the states, one of the three principal methods by which power has become more centralized in the national government. The chapter examines the major reasons for the sharp increase in the number of preemption statutes since 1965, preemption relief statutes, the confused responsibility problem, national powers delegated to governors of the states, and costs that the states and local governments must finance because of national mandates and restraints incorporated in preemption statutes.

Chapter 5 is devoted to an explanation of the dual judicial system, the exclusive and concurrent jurisdictions of national and state courts, congressional intent to preempt state and local government laws, and major federalism court decisions.

Intergovernmental fiscal relations is the subject of chapter 6 that describes the respective taxing powers of Congress and state legislatures, governmental tax immunity, state taxation of the income of nonresidents and multijurisdictional corporations, national direct and indirect financial assistance to subnational governments, and coercion of these governments by Congress.

Inherent in a federal system are relations between the states. Chapter 7 explains the provisions in the U.S. Constitution relative to suits by one state against another state(s); interstate compacts that can provide for centralization of political power at the regional level; the requirement that each state extend full faith and credit to the statutes, final court decisions, and official records of other states; privileges and immunities of citizens while visiting another state; interstate rendition of fugitives from justice, interstate trade barriers and their removal; and the excise tax rate differential problem involving particularly alcoholic beverages and tobacco products.

Legal and financial relations between a state and its political subdivisions are described in chapter 8 that notes the legal relationship is based on in the unitary principle in some states and on the federal principle in other states. Particular emphasis is placed on state financial assistance to local governments and the state mandate problem.

Chapter 9, the concluding chapter, reviews the accretion of political power at the national level in the United States in the light of the alleged advantages and disadvantages of a federal system outlined in chapter 1, focuses on dynamic metamorphic national-state relations and the current powers of the states, and concludes with an outline of the key postulates of a general theory of American federalism.