

HARRY N. SCHEIBER (San Diego)

Centralization of Power and Development of the American Federal System, 1789 - 1979

The American federal system was not created by the framers of the 1787 Constitution to accommodate as citizens in one nation, federally organized, the culturally distinctive elements of the North American population. The American Indian nations were recognized as sovereign — as the subject of treaty powers — in the 1787 Constitution; and the black slave population was treated as property only, albeit property of a sort that affected representation in the national Congress¹. Rather than being a federal system designed to afford expression to such distinctive cultural interests, territorially based or otherwise, within the nation, the Constitution was a document for the organization of power affecting the white, Euro-American population as it had already organized its government in thirteen states with individual constitutional and political identities dating from the original charters under the British colonial and imperial system. To be sure, the thirteen constituent states had some distinctive interests; above all, there was the division between the plantation-agriculture, slave-owning states and the New England and Middle Atlantic states in which agriculture was not plantation-based and slave ownership was minimal. For purposes of comparison with numerous other federal states, either of the 19th century or the contemporary world, the United States *did not* face the intractable problems of giving political expression and assuring elements of autonomy to authentically distinctive cultural or ethnic subgroups². (It is, of course,

¹ U.S. Constitution, Art. I, Sect. 2 (iii); and Art. I, Sect. 8 (iii). Cf. D. Robinson, *Slavery in the Structure of American Politics, 1765 - 1820* (rev. edn., New York, 1979), chaps. 5 - 6.

² The importance of this distinction is suggested afresh in the outline statement for the Bucharest 1980 conference prepared by Prof. J. Bardach, from a preliminary conference at Nieborów in 1978, „Schéma théorique de l'exposé sur les Etats fédéraux et le principe fédératif”.

This distinction stands, in my view, despite recent use of the terminology of

one of the ironies of U.S. history that from origins thus free of the invariably difficult problem of accommodating pluralism, the nation was plunged into a bloody Civil War 70 years later).

Given this historical circumstance, and given their predilections as political men, the framers of the U.S. Constitution were primarily concerned in 1787 with the problem of *diffusion of power*³. Both in the great debates in the states concerning ratification and in subsequent political development, this great question of diffusion of power — how much power should be vested in the central (national) government and how much left with the constituent states — provided the basic framework of ideological and doctrinal controversy. To be sure, such controversy was often only a single aspect of a larger confrontation of interests in the society and in politics; still, the constitutional issues of centralized *versus* diffused power channelled and shaped the confrontation of larger forces⁴.

A leading analyst of the American political system has written that "Despite its long history, [...] [American] federalism remains what it was at the beginning: something of a mystery"⁵. The interpretive problems that scholars are confronting, in the probing of this "mystery" of American federalism, are several in number. *First*, there is continuing interest in precisely how the framers in 1787 and how political leadership in the early Republic (especially during 1790 - 1828) perceived of the Constitution's formal allocation of powers⁶. *Second*, there is scholarly controversy with regard to the historical development of the federal government as a working system from its founding to the present

distinctive "political cultures" in the colonies. Better is the formulation that recognizes distinctive "political communities", as in Jack Greene's use of that term (despite "political culture" in the title of his piece!) in "Society, Ideology and Politics: An Analysis of the Political Culture of Mid-18th Century Virginia". *Society, Freedom, and Conscience: The Coming of the Revolution in Virginia, Massachusetts, and New York*, ed. R. M. Jellison (New York, 1976). Cf. "Federalism and Community", ed. S. Schechter, symposium issue of *Publius*, 5 (Spring 1975 issue).

³ Cf. H. N. Scheiber, "Federalism and the Constitution: The Original Understanding", *American Law and the Constitutional Order*, ed. Scheiber and L. Friedman (Cambridge, Mass., 1978); S. R. Davis, *The Federal Principle: A Journey Through Time in Quest of a Meaning* (Berkeley, Calif., 1978), pp. 74 - 120; S. Beer, "Federalism, Nationalism and Democracy in America", *American Political Science Review*, 72 (1978).

⁴ H. N. Scheiber, "American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives", in Symposium Issue: Federalism, *University of Toledo Law Review*, 9 (1978), pp. 619 - 680.

⁵ G. McConnell, *Private Power and American Democracy* (New York, 1966), p. 227.

⁶ See n. 3, *supra*; also, A. T. Mason, "The Federalist: A Split Personality", *American Historical Review*, 57 (1951), pp. 625 - 643; symposium issue "Dialogues on Decentralization", *Publius: The Journal of Federalism*, 6 (1976).

— controversy as to the basic issue of whether there has been fundamental change at all in power-centralization versus power-diffusion, and controversy over the timing and degree of change if such has occurred⁷. And *third*, there is continuing academic debate with regard to contemporary American federalism, again focusing on the matter of centralized *versus* diffused power; some analysts subscribe to the theory that the system is “noncentralized” or genuinely decentralized, others to the view that the contemporary system is actually highly centralized as the result of historic change dating at least from 1933⁸. Each of these issues will be explored in this paper, as in the extended conference paper to be prepared for the 1980 Bucarest meeting of the International Congress of Historical Sciences.

1. “Measurement” of centralization

If, as I have suggested is appropriate, we place the problem of centralization and diffusion of power at the focus of our analysis, then some “measure” of centralization is necessary. Measurement need not, and in most respects cannot, be purely quantitative; indeed, even in fiscal matters measurement of power is not simply a matter of counting revenues. What follows is a set of related suggestions bearing on the theoretical problem of measurement.

First, not all powers of government are of equal importance; and analysis of centralization in a federal system must differentiate governmental power that impinges in potentially transforming ways on the lives of citizens and groups from power that has only a trivial impact even when exercised to its fullest extent. Many studies of contemporary and historical American federalism fail to differentiate types of power. Admittedly the task is difficult and in ways profoundly subjective; nonetheless, to equate virtually all governmental power and activity (as is sometimes done) is to obscure altogether the evidence we need to examine to determine degree of centralization⁹.

⁷ W. H. Bennett, *American Theories of Federalism* (University, Alabama, 1974), passim; M. Grodzins, *The American System*, ed. D. Elazar (Chicago, 1966); E. S. Corwin, “The Passing of Dual Federalism”, *Virginia Law Review*, 36 (1950); H. N. Scheiber, *The Condition of American Federalism: An Historian’s View* (U.S. Senate, Committee on Government Operations, 89th Congress, 2nd Sess., 1966, committee print); C. Friedrich, *Trends of Federalism in Theory and Practice* (New York 1968), p. 8.

⁸ Cf. W. Riker, *Democracy in the United States* (2nd edn., New York and London, 1965); and D. Elazar, *American Federalism: A View from the States* (New York, 1966); R. Davis, *Federal Principle*, o.c., chaps. 5 - 6.

⁹ The failure to make this distinction was the subject of my critique of the work, for example, of Morton Grodzins and Daniel Elazar, some years ago (see my *Condition of American Federalism*, cited n. 7 supra). Cf. C. E. Gilbert, “The Shaping of Public Policy”, *The Annals*, 425 (1976), pp. 116, 121 - 122.

Second, a distinction must be made between what I have termed "formal authority", on the one hand, and "real power", on the other¹⁰. (Recently the distinction in question has been termed one of constitutional authority versus governmental behavior)¹¹. *Formal authority* refers to allocations of constitutional power to take action. In the American federal system, the national Supreme Court is in theory the final arbiter of constitutional authority, giving or withholding the formal authority to act, and directing its decisions at both national and state governments. But at any given moment in time, the constituent state government and their constitutional courts are making their own claims of formal authority to act; the process of juridical challenge and constitutional adjudication is typically protracted, is not infrequently ambiguous or tentative, and is always subject to reconsideration¹².

In any event, formal authority is one component, albeit a vital one if action is to be legitimate, of the *real power* of government at both levels (national and state) in a federal system. Once formal authority is claimed or affirmed, then other elements of competence come into play. They are:

(a) the congruity or incongruity of areal jurisdiction and function. The areal jurisdiction of a constituent government must be sufficiently large to permit effective action in a given matter of policy. Thus, historically the state governments in the U.S.A. effectively regulated corporations and commercial practices in the early 19th century, when most business was conducted by small firms in localized markets and — in even in the case of extensive interstate or international businesses — by large firms based entirely within a single state as to ownership and facilities. But by the late 19th century, the corporate sector had outgrown the areal jurisdiction of individual states, so far as potential for effective public regulation of private interests was concerned¹³;

(b) the command of fiscal resources, governmental personnel, and technical expertise sufficient to undertake effective action in the policy area in question;

(c) a political situation that permits effective action in the policy area in question. By "effective action", one can refer to action responsive to narrowly based, aggressive private interests, and not alone to refer

¹⁰ H. N. Scheiber, "Federalism and the American Economic Order, 1789 - 1910", *Law & Society Review*, 10 (1975 - 76), pp. 57 - 118.

¹¹ J. Jaskiernia, „Model prawno-ustrojowy i model behaviorystyczny a teorie rozwoju federalizmu w USA”, *Prace z Nauk Politycznych* z. 12 (Zeszyty Naukowe Uniw. Jagiellońskiego) (1979), *passim*.

¹² H. J. Abraham, *The Judicial Process* (3rd edn., New York and London, 1975), pp. 169 - 242.

¹³ See, *inter alia*, Lawrence M. Friedman, *A History of American Law* (New York, 1973); and W. Hurst, *The Legitimacy of the Business Corporation in the Law of the United States* (Charlottesville, Va., 1970).

to action responsive to broader interests or a "public interest". Indeed, the reservation of important powers to constituent governments, in the allocation of authority, can easily permit a strong interest group within a single state to dominate policy there to its own advantage¹⁴.

Third, a decentralized federal system is one in which the constituent state governments have not only formal authority but also real power to act. As a corollary, the measurement of centralized and diffused power requires analysis of both constitutional doctrines and the actual behavior of government at both levels within the system. Analysis of change in the degree of centralization over the course of time requires attention to such matters as the *range*, *content*, *intensity*, and *effectiveness* (impact on citizens, groups, institutions, and patterns of social-economic change) of governmental policies at both the national and state levels.

Fourth, one must distinguish concentration of power in the political system, as a distinctive phenomenon, from centralization of power in the federal governmental system. In this paper, the public sector — the governmental system — is the subject of attention. Still, any assessment of governmental power must take account of the private sector — especially the historical problem of changing relationships between the two sectors, as to relative strength and types of influence and interaction between them, over time¹⁵.

Fifth, in assessing the degree and significance of power-diffusion in the federal system, one must consider evidences of policy diversity within the system. Does the "mix" of laws and administrative policies (compounded by differences in constitutional structure mandated by state constitutions) in any particular state vary significantly from the "mix" in other states? Do the differences, either in particular areas of policy or in overall legal and policy "mix", among the states, touch the vital interests of their respective populations? To be sure, a unitary state can, in theory, devolve a wide range of such highly significant powers, touching vital local or provincial interests, on subordinate governments and so produce (and then tolerate) diversity of policy. In a federal state, however, (a) the constituent states are likely to press their claims to control over matters of vital interest as a matter of constitutional right, not merely of policy; (b) the national government can assert claims to authority and can exercise real power in such controversial matters, but

¹⁴ Thus, Madison in *The Federalist* essay No. 10 and elsewhere contended for extending the size of the republic and adopting the federal form. G. McConnell, *Private Power*, elaborates this theme in a modern context.

¹⁵ Poul Meyer has used the terms differently, applying both the centralization (decentralization and the concentration) deconcentration dichotomies to political and administrative organization, in Meyer, *Administrative Organization* (Copenhagen, 1956), p. 56.

characteristically it does so at the risk of provoking a serious crisis concerning the basis of federal union itself; and, finally, (c) the fundamental terms of a federal arrangement, giving the constituent states permanent standing and a measure of guaranteed autonomy in one or more significant policy areas, strongly encourages efforts by the constituent states to enlarge their claims on formal authority and to defend their established areas of autonomy. (As Livingston has written, in the United States case numerous states were added to the Union, in the process of national expansion and conquest of new territory after 1790, but these states were not truly diverse as to economic or social characteristics. Nonetheless, the new states „rapidly acquired such consciousness of individuality that they [were] unwilling to part with the instrumentalities that permit the expression of that individuality [...]. The Constitution, which endows the states with the characteristics of diversity, treats them indiscriminately and thus tends to create diversity where none previously existed")¹⁶.

If in a federal system we discover a very wide range of policies in the hands of the constituent states, and they are diverse as to intent, policy content, and impact, then it is evidence of decentralized power as a matter of „real power". If there is a significant reduction of the number of significant policy areas controlled by the states, and as a corollary a reduction in the policy diversity within the system, then we confront an historical movement that is correctly termed "centralization": diffusion of power gives way to centralized direction, uniform national standards, and administration from the center.

Sixth, even in a situation of centralization over time, within a federal system, it is possible that basic policy responsibilities (both reflected in formal authority and expressed in policy action) and determination to impose uniform national standards may become centralized *without* completely bypassing, superceding, or necessarily even modifying the structure of the administrative apparatus of the constituent states. In the U.S., state bureaucracies are given a role in administration of many programs for which most or all of funding, basic decision-making as to policy content, auditing and final supervision, and, withal, uniform national standards are in the hands of the central (national) government. This use of the apparatus of the constituent state governments to administer such programs — the essence of what is termed modern "Co-operative Federalism" in the U.S., prevailing since the 1930s — is termed "sharing"¹⁷. As will be seen in the discussion that follows, however,

¹⁶ W. S. Livingston, "A Note on the Nature of Federalism", *Political Science Quarterly*, 67 (1952), reprinted in Aaron Wildavsky, ed., *American Federalism in Perspective* (Boston, 1967), p. 32.

¹⁷ J. P. Clark, *The Rise of a New Federalism: Federal-State Cooperation in the United States* (New York, 1938). Cf. D. Wright, "Intergovernmental Relations: An Analytic Overview", *The Annals*, 416 (1974), pp. 1-7.

analysts are sharply divided as to how to assess the meaning of such „sharing” in the modern federal system. Some scholars stress that such sharing represents a very significant retention of power in the hands of the states¹⁸; others, including the present author, contend instead that the role of the state governments is largely transformed under such sharing arrangements, with decision-making at the center and the states playing a subordinate role responsive to commands from the national government in virtually all essential respects¹⁹. For purposes of understanding the historical stages, or epochs, of U.S. federalism, it is necessary to examine closely the evidences of “sharing” not only in the post — 1933 period but also in earlier periods of the system’s development. The history of “sharing” is viewed by some scholars as evidence for the theory that basic *continuity* has marked the history of U.S. federalism; by other scholars, including the present author, the history of “sharing” is interpreted as still further evidence of basic *discontinuity*²⁰.

Seventh, any theoretical structure that seeks to provide for measurement (however rough it may be) of centralization in a federal system must take account of the nation’s party structure. In the study of historic American federalism, analysis of the party system in its several phases or stages has an important bearing on analysis of centralization²¹. In his general analysis of federalism, for example, Riker has contended that the organization of parties is a critical variable determining the degree of centralized power. “The federal relationship”, he contends, “is centralized according to the degree to which the parties organized to operate the central government control the parties organized to operate the constituent governments. This amounts to the assertion that the proximate cause of variations in the degree of centralization (or peripheralization) in the constitutional structure of a federalism is the variation in degree of party centralization”²². The party system, Riker states, “may be regarded as the main variable intervening between the background social conditions and the specific nature of the federal bargain”²³.

¹⁸ Thus Elazar contends in the contemporary American federal system „there is no central governmental with absolute authority over the states [...]. Authority and power are shared, constitutionally and practically”. *American Federalism: A View from the States* (New York, 1966), pp. 3 - 4.

¹⁹ H. N. Scheiber, “Federalism and the Diffusion of Power”, cited n. 4 above, at pp. 657ff.

²⁰ See discussion of continuity and discontinuity, below.

²¹ Cf. D. B. Truman, “Federalism and the Party System”, *Federalism, Mature and Emergent*, ed. A. W. Macmahon (New York, 1955), pp. 115 - 136.

²² W. Riker, *Federalism: Origin, Operation, Significance* (Boston, 1964), p. 129.

²³ Ibidem, 136. See critical discussion in M. Stein, “Federal Political Systems and Federal Societies”, *World Politics*, Oct. 1963, pp. 722 - 747.

Riker's view is not without its problems. (Measuring "centralization" of parties has all the pitfalls of measuring centralization of the governmental structure; there is disagreement among scholars as to whether the U.S. parties, today or in specific periods in the past, should be viewed as federal congeries of state-based parties or instead as hierarchical organizations directed from the center; etc.). Whether or not one accepts Riker's contention, however, his view alerts us to the need to view party structure and politics as an extraconstitutional subsystem that can profoundly effect the mobilization of economic, social, and cultural interests; that can impose ideological constraints on political debate; that can tend to remove potentially divisive issues of the most intense kind from national politics, leaving those issues for resolution at the state level, or, contrariwise, can intensify divisiveness and potentially cataclysmic cleavages at the national level, posing a threat to survival of the federal arrangement itself.

2. Character of the "original intent"

The federal system designed by the Framers in 1787 was "a novelty and a compound", James Madison declared; the men at the convention lacked for "technical terms or phrases appropriate" to describe the system they had framed²⁴. The essence of the system, according to James Wilson of Pennsylvania — who declared it "a perfect confederation of independent states" — was the allocation of some functions to the national government and others to the states: "Whatever object was confined in its nature and operation to a particular State ought to be subject to the separate government of the States; but whatever in its nature and operation extended beyond a particular State, ought to be comprehended within the federal [national] jurisdiction"²⁵.

There seems no doubt that the champions of the 1787 Constitution, in the course of the ratification debates, articulated and gave legitimacy to the doctrine that came to be known as "Dual Federalism" — the doctrine that has been described as follows, in terms of four basic axioms²⁶:

1. The national government is one of enumerated powers only.
2. Also, the purposes which it may constitutionally promote are few.

²⁴ Madison to N. P. Trist, Dec. 1831, in M. Farrand, ed., *Records of the Federal Convention of 1787* (reprinted 1966), III, p. 517.

²⁵ Wilson speech, Nov. 1787, reprinted in M. Jensen, ed., *Documentary History of the Ratification of the Constitution, II* (Madison, Wisconsin, 1966), pp. 339, 344.

²⁶ E. S. Corwin, "The Passing of Dual Federalism", *Virginia Law Review*, 36 (1950).

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.

Only a few scholars would deny that these axioms may fairly be derived from the major arguments for the Constitution in 1787-89²⁷. To be sure, some of the pro-constitutional faction, most notably Alexander Hamilton, were more disposed than others to acknowledge that the states would have "residuary" authority and to emphasize the need for national supremacy; yet even they included in "residuary" categories such policy fields as agriculture and local government. Moreover, they argued that the state governments would continue to be stronger in terms of bureaucratic size, finances, and ability to hold political loyalties in event of conflict than would the new central government²⁸. Thus it was commonplace to speak of the "inviolable sovereignty" of the states, as it was to insist that the new central government's "jurisdiction is limited to certain enumerated objects [. . .]"²⁹.

This faith in Dual Federalism was one foundation-stone of the effort in 1787 to provide for effective diffusion of power, even while important elements of political power were being potentially centralized. Another element in the diffusion of power through constitutional structure was, of course, the "separation of powers" — the balance achieved through interplay of executive, judicial, and legislative power. Still another was to be found in the system of representation in the national government, which Madison contended would assure "dependence of the general on the local authorities", with the Senate representing the states and the House of Representatives the people³⁰.

Almost the first act of the new government, once organized, moreover, was the adoption of a series of amendments protective of individual liberty of citizens — the so-called Bill of Rights amendments, ratified in the early years by the states. Here again we have evidence of the profound concern for limitation of governmental power³¹. It is important

²⁷ Most notable among the dissenters is William Crosskey. In this late scholar's work the Constitution was interpreted as a nationalist charter for virtually a unitary state.

²⁸ *The Federalist*, ed. Jay Cooke (Middletown, 1961), No. 39. Cf. A. T. Mason, "The Federalist: A Split Personality", *American Historical Review*, 57 (1951), 625-643.

²⁹ Madison, in *The Federalist*, No. 14.

³⁰ Madison to Jefferson, Oct. 24, 1787, in Farrand, ed., *Records of the Federal Convention*, IV, 131ff.

³¹ B. Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* (New York, 1977), passim; cf. Robert Rutland, *The Birth of the Bill of Rights* (1955).

to recognize that these explicit limitations on the reach of governmental authority were seen as augmenting the operational effects of Dual Federalism.

Professor Beer recently has written that the framers of the Constitution, while they granted that the "sentiments, habits, and customs" of the states were diverse, in fact did not argue for the federal system on grounds it would recognize the claims of territorially based diversity. "Even the most ardent champions of greater powers for the states", Beer notes, "gave little or no weight to the argument from territorial diversity". Rather, they argued from a base in political theory that placed the problem of representation at its center: they saw representation as the key to liberty ³².

This interesting contention bids fair to become as controversial and as productive of new scholarship as Beard's economic interpretation, three quarters of a century ago. At the least, it reopens on new terms the basic question that Beard raised concerning the interplay of political ideas and real socio-economic interests, territorially based or otherwise, in the movement for a new constitution. There is not room here for complete review of this interpretive question, but at least the following considerations are worth pondering. First, we have it on no less an authority than James Madison that sectional differences — the North versus the South — lay behind most of the divisions in the Congress under the Articles of Confederation: "[P]rincipally from their having or not having slaves" were the states divided, he said ³³. Even more bluntly was it put by a southern delegate at the Convention in 1787: „South Carolina and Georgia cannot do without slaves" ³⁴. Second, there was a continuous history throughout the 1780s, under the Articles of Confederation, of organized efforts by an elite faction dedicated to stronger central authority, to reform the government and institute policies based upon "the mercantile capitalist formula of economic change" ³⁵. The functional interest groups whose concerns impelled this movement were important actors in 1787 - 89 as well. "The relationship of economic goals to constitutional revision", Ferguson has written, "was neither fabricated nor foisted on the country by interested men; it was organic" ³⁶. And, lastly, appraisal of Beer's interpretation must also confront

³² S. Beer, "Federalism, Nationalism and Democracy", cited note 3 above, at p. 15.

³³ Debates, June 29 - 30, in Farrand, I, 486, 476.

³⁴ Quoted in Robinson, p. 210. Cf. Butler, in Debates, July 13, Farrand, I, 605; "The security the Southern States want is that their negroes may not be taken from them...".

³⁵ E. J. Ferguson, "The Nationalists of 1781 - 82 and the Economic Interpretation of the Constitution", *Journal of American History*, 56 (1969), 269, 251.

³⁶ Ibidem. Cf. C. P. Nettels, *The Emergence of a National Economy: 1775 - 1815* (New York, 1962) pp. 89 - 108.

the evidence, given great weight by Jensen and other scholars, that Madison and other framers in 1787 were motivated by a concern to turn back the democratic attack on "men of property and standing" ³⁷.

Whatever the truth as to ultimate motivation and the principal bases of political division in 1787-89, however, we are still left with the doctrine of Dual Federalism as the main juridical legacy of the founders. In subsequent years, not only in the courts but also in commonplace political discussion and decision-making, the axioms of Dual Federalism imposed a unique constitutional configuration on political controversies and on policy.

3. Historic stages of federalism: (I) Dual Federalism and Rivalistic State Mercantilism, 1789 - 1861

Prior to 1861, both federal-state relations and the overall operation of the federal system conformed well to the juridical model of Dual Federalism. That is to say, the functions of the national government and the states were in most significant respects separate. Also, the states enjoyed autonomy in many realms of policy that would later become objects of the national government's attention. Finally, with respect to "sharing", except in the land-grant programs there was only the most superficial sort of cooperation in administration.

With regard to *formal authority*, despite the nationalizing (centralizing) decisions of the Supreme Court in the chief justiceship of John Marshall, to 1836, the doctrines of Dual Federalism were given wide play. On the one hand, there was ambiguity in even some of the most nationalistic decisions of the Marshall Court; on the other, under Chief Justice Taney, from 1836 to the Civil War, the Court repeatedly protected the formal authority of the states in regard to control of commerce, corporation law, eminent domain and property law, and exercise of the police and taxation powers ³⁸.

Throughout the antebellum period (to 1861), moreover, the highest courts of the individual states consistently gave their support to their legislatures' assertion of power — in resistance to the claims of nationalists as to the censorial authority of the central government or the exclusive authority of the national legislature. Indeed, it was not only the slaveholding southern states, or the supporters of slavery, that resorted frequently to "states rights" as an axiom of Dual Federalism. The

³⁷ M. Jensen, "The American People and the American Revolution", *Journal of American History*, 57 (1970), 27 - 35.

³⁸ A standard work on doctrinal development is Alfred H. Kelly and W. Harbison, *The American Constitution: Its Origins and Development* (5th edition, New York, 1976).

states rights doctrine was equally available to both sides on many issues: even on the slavery question, for example, in the 1850s it was the opponents of slavery who mobilized states-rights legal arguments in defense of their resistance to the Fugitive Slave Law (a national law for return of slaves who had escaped to the Northern states)³⁹.

As to *real power*, the period 1789 - 1861 was one in which clearly the areal jurisdiction of the states was congruent with policy-making in numerous matters that in a later period of economic and social change would transcend the reach of state jurisdictions. Even transportation, for example, remained largely a subject of state initiative and action⁴⁰.

Moreover, Congress did not exercise the full measure of formal authority that the national Supreme Court had assigned to it. The result was that the states were left free to exercise nearly exclusive jurisdiction in many vital policy fields, including criminal and family law, education, conservation and resource use, property rights, business organization, and the like. The entire field of labor relations, including slavery, of course, was left exclusively to the states⁴¹. Not only were interventions by the central government very few, but when national authority was imposed the government seldom resorted to policies that required a large bureaucracy or large expenditures. Thus even in the 1850s the federal civilian bureaucracy was only some 50,000 workers (there was only a tiny standing army), and national government expenditures were only at a level of 2 per cent of national income⁴².

The political parties were decentralized, and the dualism of loyalty to state and nation was accentuated by party structure⁴³.

Setting the period 1789 - 1861 apart from later stages in the development of American federalism were the following:

(a) Secession and disunion were plausible political threats. Not until the Civil War had settled the issue did this most extreme claim of state sovereignty cease to be within the legitimate range or spectrum of political positions⁴⁴;

³⁹ H. N. Scheiber, "Federalism", *Law & Soc. R.*, cited note 10 above; R. F. Nichols, *American Leviathan* (New York, 1963), *passim*.

⁴⁰ G. R. Taylor, *The Transportation Revolution, 1815 - 1860* (New York, 1950), *passim*; H. N. Scheiber, H. Vatter, and H. Faulkner, *American Economic History* (New York, 1976), pp. 99 - 112, 144 - 151.

⁴¹ C. W. Riker, *Federalism*, p. 83.

⁴² P. Trescott, "Federal-State Financial Relations, 1790 - 1860", *Journal of Economic History*, 15 (1955), 227; P. Trescott, "The U.S. Government and National Income, 1790 - 1860", *Trends in the American Economy in the 19th Century* (Princeton, National Bureau of Economic Research, 1960).

⁴³ See, *inter alia*, W. N. Chambers and W. D. Burnham, *The American Party System: Stages of Political Development* (2nd edition, New York, 1975).

⁴⁴ W. H. Bennet, *American Theories of Federalism* (University, Alabama, 1964), chaps. 4 - 6.

(b) Not only was there significant power exercised exclusively by the states, but there was diversity of policy on nearly all counts among the states. Furthermore, there was intense rivalry among the states for capital, for measures that would give an advantage in the quest for economic growth, and for power and wealth within the federal system itself. In transport promotion and other important areas, indeed, the policies may correctly be viewed, it can be said, as evidence of a pervasive, rivalistic state mercantilism⁴⁵;

In all states, moreover, the adoption of legislation for strict regulation of private business was difficult because the states competed in a single national market. Here a "federal effect" came into play: each state feared to impose regulations more stringent (hence costly to its private sector) than were imposed by other states;

(c) "Sharing", and intergovernmental (federal-state) relations generally, were basically different from what has prevailed in the U.S. in modern times. Some scholars⁴⁶ have contended that intergovernmental programs and sharing were basically the same in 1789-1861 as in the contemporary U.S.; but in fact auditing and supervision by national authorities was absent, policy initiatives remained almost entirely in the hands of the states, and only a small proportion of total state revenues was represented by federal aid. Thus we reject here the contention that there was fundamental continuity in intergovernmental relations. Dual Federalism was, in sum, not only the prevailing constitutional doctrine but also an accurate characterization of the federal system⁴⁷;

(d) Tragically, the system originally championed because it provided for liberty through decentralization and diffusion served above all to perpetuate human slavery. States rights worked most effectively for a repressive purpose; the principles of federalism guaranteed a privileged legal enclave, in each slave state, within which an entire ethnic element (in some states, a numerical majority) could be held in bondage. Even freed blacks enjoyed but limited civil rights⁴⁸.

⁴⁵ I have provided an argument in extenso for my use of this term, in Scheiber, *Federalism*, *Law & S. R.*, cited note 10 above, at pp. 72-100.

⁴⁶ In particular the late Morton Grodzins and Prof. Daniel Elazar.

⁴⁷ H. N. Scheiber, *Condition of American Federalism*, pp. 2-4. Beer has also rejected the Grodzins-Elazar view that Cooperative Federalism has characterized the working political system from the early 19th century to the present. S. Beer, "The Modernization of American Federalism", *Publius*, 3 (1973), 69. A recent scholarly study by the staff of the U. S. Advisory Commission on Intergovernmental Relations ("Theoretical Perspectives on Federalism", manuscript, 1979) entirely accepts the view of the present author and of Beer.

⁴⁸ Cf. A. Pekelis, *Law and Social Action*, ed. Konvitz (Ithaca, New York, 1950), 127, on the paradox that "the defenders of local liberties", in the American debates on federalism, "have so often been the exponents of social reaction".

4. Historic stages: (II) Transitional Federalism, 1861 - 1890

Although it cannot be said that Dual Federalism suddenly was ended with the outbreak of war in 1861, certainly the Civil War period witnessed a very significant centralizing of power in the governmental system. The 1861 - 1890 period was "transitional" in the sense that while constitutional doctrine did not move in one direction continuously, there was a major centralizing effect from the Civil War-Reconstruction amendments abolishing slavery and requiring "equal protection of the laws"; there was a dramatic expansion in the range of policy responsibilities assumed by the national government; and there was a gradual shift in the size and activity of government at all levels, along with a major change in taxation policy. Throughout this transitional period, the force of localism continued from the era of Dual Federalism and Rivalistic State Mercantilism: the states pressed against the boundaries of power defined by the national Supreme Court, and they sought maximum autonomy in areas of policy important to them.

Transforming change came about, first of all, through amendment of the Constitution (through the 13th, 14th, and 15th amendments), on the one hand, and new laws that vastly expanded the jurisdiction of the federal courts, on the other⁴⁹. Meanwhile Congress was centralizing real power by assuming new policy responsibilities — shifting the locus of policy innovation and regulatory power in areas vital to the economy and society. These statutory measures included national charters and aid to transcontinental railroad corporations; the institution of a national banking system, giving the country for the first time a uniform national currency and greatly reducing state power in regard to control of banking; and, not least important, the passage of federal civil rights acts and appropriation of funds in aid of the newly freed blacks — laws that, ironically, the federal Supreme Court would later invalidate⁵⁰.

The Civil War period also witnessed Congress's imposition of an unprecedented income tax and its enactment of new internal revenue taxes. These taxes quickly exceeded land-sales and tariffs as the major source of federal revenue; after the war, the more progressive income tax was discontinued, the regressive internal-revenue taxes perpetuated — with redistributive effects probably conducive to private capital formation⁵¹. Meanwhile there was gradual growth and professionalization in the central government, which by the late 1880s was taking someth-

⁴⁹ See H. Belz, *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era* (New York, 1978), 108 - 40.

⁵⁰ See, inter alia, H. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York, 1973).

⁵¹ H. N. Scheiber, "Economic Change in the Civil War Era", *Civil War History*, 11 (1965), 407 - 9.

ing less than 5 per cent of national income (although civilian employment relative to population did not change significantly).

In 1887 Congress moved toward further centralization of power by imposing national controls in the transport sector for the first time (also inaugurating the "regulatory state" with the first commission of its kind), with establishment of the Interstate Commerce Commission. Centralization went forward another step with adoption of a national corporations policy with the Sherman Act of 1890 — a law that in subsequent years would be used to curb the practices of certain large corporations ("trusts") but which in the long run did only a little to modify the trend toward large-scale corporate concentration in the private sector generally and the industrial sector in particular ⁵².

Withal, a basic revision of the American political economy was under way, and the distribution of real power as well as formal authority reflected the change. The Supreme Court generally validated all major accretions of power in the national government — including currency control, the charter of telegraph and railroad corporations, and national regulatory powers — although property-minded judicial conservatism was also evident, especially in decisions affecting the railroad corporations' rate structures. By adopting rules of "general jurisprudence" — rules of its own making, not founded on specific terms of the Constitution, and applied to censor state legislation — the national Supreme Court greatly increased its own role as a conservative overseer of state legislation ⁵³.

Meanwhile, there was substantial survival of decentralized power in the states, whose own regulatory functions expanded greatly in this period. Even transport policy remained largely a matter of state authority, at least with respect to charters and intrastate rates (on freight not crossing state lines). In addition, the states enjoyed final authority in property law, labor law (except with regard to rare intervention by federal authorities, in 1877 and after), family law, commercial law, and control of local government. Criminal law and law-enforcement remained almost entirely state matters. Besides, there was in discriminatory tax laws and other areas of policy substantial evidence of continuing rivalistic state mercantilism ⁵⁴.

⁵² These trends are considered in S. Fine, *Laissez Faire and the General-Welfare State* (Ann Arbor, 1959).

⁵³ H. N. Scheiber, "The Road to Munn", in D. Fleming and B. Bailyn, eds., *Law in American History* (Boston, 1972), pp. 391 - 395.

⁵⁴ Detailed analysis is given in Scheiber, "Federalism and the American Economic Order", cited note 10 above. The remaining sections of this study that bear on periodization (stages) of development rest on detailed documentation in *ibid.*, and in Scheiber, "American Federalism and the Diffusion of Power", cited note 4 above.

After circa 1890, this mixed picture gave way to a distinct trend toward accelerating centralization.

5. Historic stages: (III) Accelerating centralization, 1890 - 1933

Gradually the old model of Dual Federalism was deviated from, so far as actual working of the governmental system was concerned. During the period 1890 - 1933 further augmentations of power at the center occurred; nonetheless, there was also retention of formal authority and real power by the states in many vital policy areas, including social welfare.

Many responsibilities that formerly had been exclusively state powers became subject to action by the national government after 1890. Most important, the regulatory model of the Interstate Commerce Commission was emulated in major respects by establishment of the Federal Reserve System, to control banking and currency, in 1913. As was true of the antitrust policy (itself strengthened by the Clayton Act), the new banking policy did not significantly threaten the private basis of ownership, but it did introduce national power and displace the role of the states⁵⁵. During the administrations of Theodore Roosevelt, William H. Taft, and Woodrow Wilson, Congress also initiated federal regulatory policies affecting merchant seamen, the production of food and drugs, and interstate commerce in commodities illegal under state laws. Farm credit was provided by the central government for the first time, and national legislation on railroad labor went into effect. Moreover, as the work of Professor Leuchtenberg and others has shown, the sweeping and comprehensive controls exercised to control the economy during World War I became a model for what might be done, in any future emergency, and ultimately would provide a model founded in historical experience that inspired planners, reformers, and businessmen themselves — a model for control of the economy on a highly centralized basis⁵⁶. Also during this period, the central government undertook prohibition on production of alcoholic beverages (generating one of the most difficult episodes in law enforcement in American history); national legislation on child labor; and imposition once again, following passage of a constitutional amendment, of a progressive income tax.

Persistent elements of decentralization must also be recognized. First, although the national government did take over regulation of railroads and later banking and corporations, this centralization of policy

⁵⁵ A. S. Link, *Woodrow Wilson and the Progressive Era, 1910 - 1917* (New York, 1954), passim.

⁵⁶ W. E. Leuchtenberg, "The New Deal and the Analogue of War", *Change and Continuity in 20th-Century America*, ed. J. Braeman et al. (1964).

making came late; until it occurred, and even afterward, states took the initiative. Clearly state jurisdictions were incongruent with the function: regulation could not be wholly effective if decentralized. But still, the states did act ahead of the national government. Second, the states also continued to maintain policies — in taxation, granting of subsidies to special economic interests, insurance regulation — which were explicitly designed to favor their own business interests at the expense of competing firms based in other states. The states also retained control of resource-use and property law, both of which were used to subsidize local interests in the primary industries. Third, as a result of such activities in legislation, the states remained important to business interests that dominated their economies; hence the phenomenon of what I have termed *enclave effects*, the “captive state” dominated by a giant firm or a single industry, such as DuPont in Delaware or the Southern Pacific Railroad in California⁵⁷.

The federal system permitted what may be termed “lateral escape” from the effects of a state’s regulatory policies deemed unfavorable to a business interest: a firm or industry that came under regulation could move to another state, in many instances. The judicial system also provided “upward escape”, in the sense that business interests adversely affected by a state’s regulatory laws could seek redress in the national courts. In addition, they could (and did) seek national legislation that would provide uniformity of law and be administered more benignly than state regulation. By the same token, these features of the federal structure of government also provided consumer groups or other “reform” organizations with recourse to the national government. This happened, for example, with child-labor reform and with national pipeline regulation, when states proved resistant to reform efforts⁵⁸.

Along with these changes came the beginnings of modern “sharing” in intergovernmental relations. Programs of cash grants were inaugurated, with five operating in 1902 and contributing \$3 million to the states, and by 1911 the policy of matching-fund requirements had been adopted. By 1920, some eleven programs paid \$30 million annually to the states (comprising 2.5 per cent of state revenues). The 1916 Highways Act, providing national aid for roads, required the states to organize highway departments deemed acceptable as to structure and quality, and required them to submit planning documents to federal officials

⁵⁷ H. N. Scheiber, “Federalism”, cited n. 10 above, 112 - 113.

⁵⁸ G. Kolko, *The Triumph of Conservatism* (New York, 1963); S. B. Wood, *Constitutional Politics in the Progressive Era: Child Labor and the Law* (Chicago, 1968). Another “route” for dealing with problems needing reform, or, alternatively, for dealing with the problems reform posed to business interests, was the uniform state code of laws. Prof. William Graebner has in progress a major work on this subject.

for approval. This administrative innovation would become a model for expanded aid programs in later years. Also a model for modern Co-operative Federalism was the Newlands Act of 1902, which set an important precedent by establishing a "revolving fund" (or trust fund) for aid to the states in resource conservation⁵⁹.

The national Supreme Court centralized real power with its application of the Fourteenth Amendment and its "liberty of contract" doctrine to strike down state reform legislation. In 1894-95, the Court validated use of the injunctive powers to imprison Eugene Debs and break the railroad strike, but it interpreted narrowly the terms of the Sherman Antitrust Act, and it invalidated the recently enacted income tax (requiring passage of a constitutional amendment). The general tendency in the Court's decisions, however, was in favor of centralization. Not least important, in the realm of changing formal authority, was the Court's approval as constitutional of the one new program of significance to be organized on a grant-in-aid basis in the 1920s: the maternity-aid program for infant care and medical aid for mothers. In 1923, the Court ruled that grants-in-aid were not coercive, and so they did not invade the area of protected state powers⁶⁰. This ruling was of crucial importance for the future, as it provided a firm constitutional foundation for the vast expansion of grant-in-aid programs that would occur a decade later.

More generally, the Court continued to adhere to centralizing doctrines in the 1920s. It maintained its practice of passing judgement on state regulatory measures by distinguishing types of business, deeming certain types "affected with a public interest" (hence regulable) and others not so (hence immune); it upheld the national government's powers in the labor-relations field; and it began to construe the Fourteenth Amendment as "incorporating" elements of the Bill of Rights, so that certain political liberties would thereafter be given national protection against violation by state and local authorities⁶¹.

This was also a period when formal authority shifted at the substate level, as many municipal governments won rights of "home rule" and so obtained greater control over their own financial affairs and governance. At the same time, there was rising professionalization of government at all levels. This was a central element of the "moder-

⁵⁹ Statistics from U. S. Bureau of the Census, *Census of Governments, 1972*, Vol. VI, No. 4. On the programs discussed, see W. B. Graves, *American Intergovernmental Relations: Their Origins, Historical Development, and Current Status* (New York, 1964), 14-15.

⁶⁰ *Massachusetts v. Mellon*, 262 U. S. 447 (1923); cf. H. Kelly and W. Harrison, *American Constitution*, 645-74.

⁶¹ P. Murphy, *The Constitution in Crisis Times, 1918-1969* (New York, 1972), *passim*.

nization" of government, with rising proportions of bureaucratic personnel being technically trained or being given career tenure, or both. Functional bureaucracies, made up of similarly trained professionals with a sense of common collective identity, cutting across local-state-federal agency boundaries, began to emerge ⁶².

The doctrine and practice of states rights — evidence of the continuing vitality of federal division of powers — spelled tragedy for the nation's black minority. During the 1890s formal disfranchisement of blacks was completed in most of the South; Jim Crow laws were tightened; there was a notable relaxation of pressure from the federal government for civil rights; and, more generally, the consequences of racial discrimination became intensified for many blacks. Even lynching was a crime insulated from national action by the doctrines of state rights and the realities of a political-party system that offered little protection to blacks suffering discrimination and even violence ⁶³. The old doctrine of the framers, in 1787, that federalism was a bulwark of personal liberties, seemed a mockery in the light of such harsh realities.

6. Historic stages: (IV) The New Deal, Cooperative Federalism, and Intensive Centralization, 1933 - 41

MacMahon has defined the essential features of a federal system as including a division of constitutional powers between the central government and the constituent states "that cannot be changed by ordinary legislation" ⁶⁴. How well did the American federal system conform to this formulation as it changed in the 1930s, during the New Deal period from Franklin Roosevelt's election in 1932 to America's entry into the war in 1941? Was there a basic change in the division of powers by dint of "ordinary legislation", rather than formal constitutional amendment? Or was there, instead, as some scholars have contended, basic continuity?

So far as constitutional doctrine is concerned, it is for good reason that we speak commonly of "the New Deal revolution" in constitution-

⁶² See, e.g., J. M. Gaus and L. O. Wolcott, *Public Administration and the U.S. Department of Agriculture* (New York, 1940).

⁶³ H. Friedman and H. N. Scheiber, eds., *American Law*, cited note 3, at pp. 315-342; G. Tindall, *The Emergence of the New South, 1913-1945* (Baton Rouge, 1967), *passim*.

⁶⁴ A. W. MacMahon, *Administering Federalism in a Democracy* (New York, 1972), p. 9. Other features include (1) that powers of the constituent governments "must be considerable, not trivial"; (2) that there is "legal equality of the member states"; and (3) that each state must have autonomy in deciding on the form and procedures of its own government, within broad bounds (*ibidem*, 9-10).

nal law: the structure of formal authority changed decisively in this period. In effect, the Supreme Court — after first resisting change — capitulated and finally validated a staggering series of Congressional and Presidential policy initiatives that had a massive, centralizing effect on the federal system⁶⁵.

We will not dwell here upon the well-known decisions of the Supreme Court that declared the national government's power to regulate economic affairs under to Commerce Clause to be "as broad as the economic needs of the nation"⁶⁶, or those that set aside the doctrine of "business affected with a public interest" and the related one of "economic due process" as constitutional barriers to regulatory activity⁶⁷. It is acknowledged by all who study this period that the change in formal authority was extraordinary in its range and content. Rather, we will consider here the effects of the Congressional and Presidential initiatives to which such new doctrines were a response.

From the beginning, in 1933, the New Deal was characterized by a decisive shift toward centralization of power in numerous policy areas formerly left entirely to the states or else formerly the subject of only mild national-government intervention. Thus agriculture was made a managed sector; manufacturing was brought under market controls and wage codes, going to the price nexus, at the heart of the capitalist system, to regulate the private sector; and banking, securities marketing, and transportation were all brought under stronger federal control. The Tennessee Valley Authority introduced federal power into regional planning and economic development; the Wagner Act of 1935 and the Wages and Hours legislation of 1938 placed industrial-labor relations under federal control on an entirely new basis; and the relief, welfare, and Social Security programs by 1935 not only represented unprecedented intervention measured by level of national expenditures but also unprecedented initiatives for the national government. Not least important, the sheer magnitude of national-government spending — together with expansion of the progressive income tax and estate taxation — linked with compensatory-spending principles served to transform the relationship of governmental operations to the processes of socio-economic change⁶⁸.

⁶⁵ Cf. C. B. Swisher, *Growth of Constitutional Power in the United States* (Chicago, 1964), chaps. 6. For a full analysis of New Deal legislation and political change in the 1930s, see W. E. Leuchtenberg, *Franklin D. Roosevelt and the New Deal* (New York, 1963).

⁶⁶ *American Power & Light Co. v. Securities & Exchange Commission*, 328 U.S. 90, 141 (1946).

⁶⁷ *Erie Railroad C. v. Tompkins*, 304 U.S. 64 (1938); *Nebbia v. New York*, 291 U.S. 502 (1934); cf. P. Murphy, cited n. 61, above, *passim*.

⁶⁸ *Ibidem*, *passim*. In 1933, GNP was \$55.6 billion, federal purchases of goods and services \$2.0 billion, and state and local government purchases \$6.0 billion.

To revert to MacMahon's formulation, the division of constitutional power was changed radically, as a matter of formal authority, by the Supreme Court as the result of a steady march of „ordinary legislation” enacted under emergency (depression) conditions.

Centralization of policy was one of the two main features of the new, transformed federal system. The other feature was the design and funding of new intergovernmental („shared”) programs on cooperative lines. These programs involved Congressional grants-in-aid of funds to the states and substate units, for administration by them and delivery of public goods or services to recipients citizens or units. Among the subjects of legislation that Congress decided to attack through the instrumentality of grants-in-aid were the following: old age assistance and aid to dependent children, Social Security insurance, distribution of surplus farm products to the needy and of free public-school lunches, expansion of maternal and children's health services, highway-aid funding on an expanded basis, extensive emergency-relief construction and other work, expansion of fish wildlife conservation programs, sponsorship of public housing projects, and expansion of health services⁶⁹. It was a formidable list. Of signal importance is that one of its components, emergency relief, involved grants-in-aid that comprised 80 per cent of the overall increase in intergovernmental financing⁷⁰.

Thus, on the one hand Congress had occupied a vast range of new policy areas formerly left largely untouched by the federal government. And, on the other hand, governmental structure and intergovernmental relations had been transformed by what Willard Hurst has called „an array of presidential, departmental, and independent-agency power of such unprecedented sweep as to put into question Congress's capacity to determine national public policy”⁷¹. (That is to say, administrative discretion given the new agencies was so great that centralization in

In 1939, GNP was \$90.5 billion, federal purchases \$5.1 billion, and state and local purchases \$8.2 billion. (*Economic Report of the President*, 1969.)

⁶⁹ U.S. Advisory Commission on Intergovernmental Relations, *Fiscal Balance in the American Federal System* (1967), I, 140.

⁷⁰ Federal grants-in-aid to state and local governments were as follows:

| | |
|----------|---------------|
| 1933 — — | \$193 million |
| 1936 — — | 1,842 million |
| 1938 — — | 2,175 million |
| 1940 — — | 2,395 million |

These data include so-called „emergency” grants (for welfare and relief) that are omitted from data now routinely published as series for the 1930s by the Bureau of the Census. My actual data are from Advisory Commission on Intergovernmental Relations, *Periodical Assessment of Federal Grants-in-aid* (Report A-8, June 1961), p. 12.

⁷¹ W. Hurst, *Law and Social Order in the United States* (Ithaca, New York, 1977), p. 147.

the national government was accompanied by fractionating or fragmenting of power at that level among many new administrative agencies.) As part of the new system, the principal elements of what we term Cooperative Federalism — that is to say, modern intergovernmental relations, or IGR, as this is known — came into form. These elements were ⁷²:

(a) Enlargement of the discretion of centralized administration, at the expense of state autonomy and traditional “states rights” ⁷³;

(b) Attachment of specific conditions to federal grants to the states. They included: requirement of matching funds, submission of planning documents, commitments to specific administrative structures and reforms, auditing and inspection;

(c) Occasional use of project or *demonstration grants*, which rather than being made to states or communities on a formula (based on population or some other measure) were made on a discretionary basis;

(d) Creation of new structures, the most important being the Tennessee Valley Authority and a congeries of district organizations such as grazing districts or reclamation districts, as well as plebiscitary organization in the agricultural program, that involved direct relationships between the national government and citizens or groups — bypassing the states in large measure;

(e) Changes in informal power relationships, associated with the grant-in-aid programs, especially the apparent fragmentation of power: program planning and administration became dependent upon action by several agencies, and also upon action at two or more levels of government in the federal system. In turn, this fostered still another development;

(f) Growth of professional “communities” that cut across governmental-level lines and that created close ties with “clientele” groups in the society.

Therefore, it must be conceded that a major new element of “sharing” entered into federalism as a working system in the 1930s. But sharing tended to be administrative; decisions were made at the center, as to policy and funding; many conditions and qualifications were attached to the grants. The central government must be seen as the cornucopia — the source of funding. The central government was the chief administrator, the monitor of lower-level administration, the coordina-

⁷² J. P. Clark, *Rise of a New Federalism*, ch. 6 et passim; H. N. Scheiber, *Condition of American Federalism*, pp. 10 - 12; W. B. Graves, *American Intergovernmental Relations*, passim.

⁷³ This was true especially of the emergency programs and their administration (particularly by Harry Hopkins), on which cf. J. Patterson, *The New Deal and the States: Federalism in Transition* (Princeton, 1969) passim.

tor, the evaluator. Finally, the mechanisms and characteristics of Cooperative Federalism were, we argue here, *fundamentally different* from those of "shared" arrangements of the pre-1890 period and, indeed, largely of the pre-1933 period. In sum, we here reject the view that basic continuity prevailed ⁷⁴.

Discontinuity, and not continuity, has marked the history of American federalism; and the New Deal period, following Roosevelt's election in 1932, was the watershed of basic change. We accept, in sum, the view of Theodore Lowi: "Among the large nation-states of the 20th century". Lowi declares ⁷⁵, "the United States is the oldest constitutional republic and has the youngest consolidated national government. The modern, positive national state in the U.S. is a product of the years since 1933. . . . The New Deal is significant far beyond its contributions to the size and scale of the national government, measured in budgetary terms [...] (and) the factor of far greater significance is the change during the New Deal in the *functions* of the federal government".

7. Historic stages: (V) Since the New Deal: Modern Centralized Federalism

Since World War II, the major components of modern Cooperative Federalism — including the strong element of centralization that appeared in the 1930s — have continued to operate in the American governmental system. It is thus correct, I think, to speak of "contemporary federalism" as dating substantially from the New Deal. There is not space here to give full attention to specific changes since 1945, except in broad and general terms; more detail will be provided at the Bucarest conference, in the author's full paper. What follows here is intended only to suggest the major changes, in general form.

Continuing centralization of policy responsibilities and initiatives is main theme of continuity since 1945. Most dramatically, this has occurred in the area of civil rights: the central government, both through decisions of the Supreme Court and through actions, since 1964, of Congress in civil rights legislation, has placed new constraints and requirements on the states in the name of equal rights for all citizens. To be sure, progress has been slow in many respects; and there has been resistance, much of it in the 1950s in the name of states rights. The long-term record, however, is one of increasing national-governmental po-

⁷⁴ The view of D. Elazar, for example, in "Federal-State Collaboration in the 19th-Century U.S.", *Political Science Quarterly*, 79 (1964), 243 - 281.

⁷⁵ T. Lowi and A. Stone, *Nationalizing Government: Public Policies in America* (Beverly Hills, Calif., 1978), pp. 15 - 17.

wer as the commitment to equal rights has become interwoven into the fabric of American law ⁷⁶.

Civil rights is only one major area of policy and constitutional law in which centralized power has become stronger since 1945. For in fact, centralization has occurred as well in regard to educational policy, resource conservation and environmental control, welfare policy, health policy, and other vital areas of legislation. In sum, the national government — alike under Democratic and Republican control, in different periods — has continued to expand the number and impact of its functions. In the New Deal period, as Sundquist has written, "the American federal system entered a new phase" as Congress asserted national power in numerous areas that "until then had been the province, exclusively or predominantly, of state and local governments". The continuing expansion of national power and functions since 1945, and to the present day, represents "the final burial, perhaps, of traditional doctrines of [pre-1933] American federalism" ⁷⁷. This centralization is evident, for example, in federal social welfare expenditures, which have risen from \$37.7 billion in 1965 to \$77.4 billion in 1970, and to \$196.3 billion in 1976. In the regulatory area, national legislation continued to bring more and more activities under centralized control, even during the years of Nixon's presidency. As the energy crisis continues to dominate policy discussion, moreover, there is every likelihood that the goal of "uniform national policy" will cause severe abridgement of state and local regulation of environmental problems and resources; at the same time, even the traditional local-government stronghold of land-use control has come to be abridged by such new federal legislation as the act for protection of coastal zones ⁷⁸.

Another major trend of the post-1945 period is the tendency of the national government to forge administrative relationships and organize programs to deal directly with municipal (city) governments, or with special-district governments or regional program units, at the expense of traditional federal-state relations. This tendency was intensified, by Presidential design, when President Johnson proposed his poverty program, regional development policy, and job-training program in the 1960s. At one point, Johnson coined the term Creative Federalism to describe "the cooperation of the State and the city, and of business and of labor, and of private institutions and of private individuals" ⁷⁹. The re-

⁷⁶ L. H. Tribe, *American Constitutional Law* (Mineola, New York, 1978), chp. 16 et passim.

⁷⁷ J. L. Sundquist, *Making Federalism Work: A Study of Program Coordination at the Community Level* (Washington, 1969), pp. 1, 6.

⁷⁸ T. Lowi and A. Stone, cited n. 75 above, chap. 1.

⁷⁹ L. B. Johnson, *Public Papers 1963 - 64* (Washington 1964), pp. 1350 - 1351, 706, 958, 1094 - 1096, 1131.

sultant program designs often lacked coherence, and the corporatist ideal of consensus through such extension of working federalism proved to be a false hope⁸⁰.

The Johnson Presidency witnessed a vast proliferation of grant-in-aid programs. The number grew from 40 major grant programs operating in 1959 (prior to Kennedy's election), to some 160 in 1969. By the end of the 1960s decade, some 20 per cent of national spending for domestic purposes was in grants-in-aid to state and local governments. Two thirds of these programs in 1962, and some three fourths in 1966, were of the "project grant" variety; that is, they provided for administrative discretion at the center. This new largess, in sum, was distributed not as a matter of state and local "right" but as a matter of federal choice. Although nearly 75 per cent of grants measured in dollars were formula grants, still the project grants were a significant proportion of total dollars spent⁸¹.

The 1960s and 1970s thus produced a new level of complexity in the administration of grants-in-aid. Much attention was given in Congress and public debate to the problems of coordination, administration, and fragmentation. And so, under Nixon, the pendulum swung back toward large grants free from such heavy administrative control by the federal authorities; the result was initiative of what is known as Revenue Sharing, viz., the grant of large sums (\$ 30 billion, 1972 - 7) to the state and local governments for general-purpose governmental uses⁸². From 1967 to 1977, there was an average annual increase of 14 per cent in federal grants to the states and local governments; by 1977, total grants were over \$ 60 billion (21% of federal outlays for domestic programs, and 23% of state and local governmental receipts); in 1977, Revenue Sharing funds were 12% of all grants⁸³.

The political debate and division that accompanied the passage of the Revenue Sharing program highlighted another feature of modern federalism, stressed in the recent scholarly work of S. Beer: the development of "professionalized or technocratic federalism"⁸⁴. By this last phrase, Beer refers to a growing "near-monopolization of innovation by the central government", as professionals within government bureaus and agencies (together with technicians and administrators closely

⁸⁰ J. L. Sundquist, *Politics and Policy: The Eisenhower, Kennedy and Johnson Years* (Washington, 1968), passim; T. Lowi and A. Stone, cited n. 75, passim.

⁸¹ ACIR, *Fiscal Balance*, cited n. 69 above, I, 145; M. Reagan, *The New Federalism* (New York, 1973), pp. 54 - 88; U.S. 83rd Congress, 1st Sess., Senate Government Operations Committee, Hearings: *A New Federalism* (1973), passim.

⁸² Cf. M. Reagan, passim.

⁸³ *Special Analyses: Budget of the U.S. Government, Fiscal Year 1977*, pp. 255 - 275.

⁸⁴ S. Beer, "The Modernization of American Federalism", *Publius*, 3 (1973), 74ff.

affiliated with these professionals, through associations of expertise) come to generate a rising proportion of the programmatic ideas in government. Beer concludes that there is a "shift in initiative from society to government — a new type of primary centralization..."⁸⁵. Rather than the citizenry playing the key role in the policy debate and initiation process, government agencies play that role.

Professor Beer's analysis is intriguing and requires close examination. This is not attempted in this paper, but one may observe that Beer might well dichotomize too neatly "government" and "the electorate" (the citizenry) when he claims that public agents and not society or the electorate initiate programs and become the principal actors in political divisions. For in the view of many other commentators, both those dealing in theory (e.g. Miliband) and those dealing in empirical research on the U.S. case (e.g. McConnell or A. S. Miller, or indeed the late C. Wright Mills), government today in the United States often responds with great sensitivity to the pressures of the private sector: the public agencies in the process Beer describes may often act, in effect, as an extension of powerful private interests⁸⁶. One's perspective and conclusions on this point depend greatly on one's perception of the political process and the distribution of private power within the system⁸⁷.

8. Aspects of centralization and power-diffusion in the contemporary American federal system

Even one who fully agrees with Lowi's view that "a large, positive, interventionist national state is finally [...] the central feature of the American system"⁸⁸ must concede the existence of certain elements of power-diffusion as the result of federal structure. This concession must be made whether one is concerned to map formal authority or instead is dealing with real power. What remains in question is whether the evidence of such persistent elements of power-diffusion is in any important respect controlling of American politics, society, or economy.

⁸⁵ Ibidem, 75.

⁸⁶ G. McConnell, *Private Power*; Miller, *The Modern Corporate State* (Westport, Conn., 1976), 29, 200ff.; R. Miliband, *The State in Capitalist Society* (London 1969), passim; Mills, *The Power Elite* (New York, 1956), passim.

⁸⁷ Thus almost uniformly, the political scientists who subscribe to the view that power in the U.S. federal system is "noncentralized" rest that view on a conceptual foundation that portrays private power as diffused, nonconcentrated, and pluralistic. An example of this approach is D. Elazar, *American Federalism: A View from the States*.

⁸⁸ T. Lowi and A. Stone, *Nationalizing Government*, p. 25.

So far as formal authority is concerned, not since 1937 has the Supreme Court invoked state rights or defined the Commerce Clause in ways that significantly curb the power of the national government to regulate economic affairs⁸⁹. Regional planning, organization of governmental units that transcend state lines, imposition of wage and price controls, and a vast range of emergency economic measures, expansion of welfare programs, and the like have not been successfully challenged in the courts. The major exception that is commonly cited is the case of *National League of Cities v. Usery*⁹⁰, in which the Supreme Court struck down the power of Congress to control wage minima for state and municipal employees; the Court said this was an invasion of legitimate monopoly by the states over activities integral to their internal operations. Despite the attention given to his decision, however, one may argue that it is of very slight moment in comparison with rulings of the Court which have continued to apply principles formulated in the 1960s for apportionment of election districts proportional to population; with rulings that have continued to apply maxims of the 1950s concerning mandatory desegregation of schools; and with rulings that have maintained federal supremacy in other basic respects⁹¹.

The vitality of federalism in formal constitutional law is not to be found in a deviational decision such as *Usery*, I think, as much as in the tendency in some of the state supreme courts to go farther than the U.S. Supreme Court in formulating civil rights and liberties. The leading example is the California state court, which has maintained liberty (especially in cases regarding arrest and regarding search and seizure) beyond the limits required by the national Court. In some states, legislation has gone in the same direction⁹². Thus while Chief Justice Burger has said of *Usery* that the Court there "took steps to arrest the denigration of states to a role comparable to the departments of France, governed entirely out of the national capital"⁹³, it is in the willingness of certain state courts to pursue an independent course that federalism operates most dramatically.

The residual vitality of federalism may also be seen in continuing "rivalistic" policies that are in some respects comparable to the state

⁸⁹ Cf. J. L. Sundquist, *Making Federalism Work*, p. 11; P. Murphy, *The Constitution in Crisis Times*, passim.

⁹⁰ 95 Sup. Ct. 2465 (1976), also 426 U.S. 833. Cf. Jaskiernia, "Model prawno-ustrojowy . . .," cited n. 11, supra.

⁹¹ Cf. L. H. Tribe, *American Constitutional Law*, ch. 6 et passim.

⁹² H. N. Scheiber, "American Federalism", cited n. 4 above, pp. 655 - 657.

⁹³ Quoted in Miller, "The Court Turns Back the Clock", *The Progressive*, 40, #10 (Oct. 1976), p. 26. Cf. W. Brennan, "State Constitutions and the Protection of Individual Rights", *Harvard Law Review*, 90 (1977), 489ff.

mercantilism of a century ago. For example, in corporation law, the states are rivals in some instances (competing, to attract investment by benign policies); and there is great diversity (with other states adopting stringent regulatory policies). Similarly, many states offer special tax advantages and other concessions in their rivalistic quest to attract new business investment. A few also take advantage of room in the national labor laws to maintain a policy not especially friendly to labor organization; and several maintain policies severely exploitative of farm labor⁹⁴.

In politics as well, there is evidence of continuing rivalry and diversity, known as "Snowbelt *versus* Sunbelt" in recent years: older northern industrial states competing for federal largess, and contending over issues such as energy-resource distribution, with the states of the South and Southwest that have grown more quickly in the period since World War II⁹⁵. Most recently, moreover, the financial plight of New York led the national government to guarantee city debt and play a role in local affairs virtually without formal precedent⁹⁶. More generally, the special economic interests and social composition of particular states continue to exert an influence on legislators that can prove stronger than party discipline; an example was the coalition of western states that quickly formed across party lines when President Carter sought to eliminate great numbers of public works in those states during his first year in office. Much the same sort of particularism and regionalism has emerged in the debates over energy-resource development and conservation⁹⁷.

Despite all such evidences of continuing rivalry, diversity, and particularism, one must recognize that Congress — even though it is structured and organized in a way that maximizes the force of state particularism — has over the long run tended to increase the number

⁹⁴ Cf., e.g., W. Cary, "Federalism and Corporate Law", *Yale Law Journal*, 83 (1974); A. W. Mac Mahon, *Administering Federalism in a Democracy* (New York, 1972), pp. 59 - 63.

⁹⁵ For an extreme view, based on the presumption "that regionalism, separatism, fragmentation, and rampant ethnicity" are gaining dominance in the American polity, see K. Phillips, "The Balkanization of America", *Harper's* 256 (May 1978), p. 38. Cf. *National Journal*, 8 (June 26, 1976).

⁹⁶ *New York City Financial Aid* (U. S. Senate, 95th Cong., 2nd Sess., Committee on Banking, Housing, and Urban Affairs, Hearings, June 1978), passim.

⁹⁷ "Carter vs. Congress: At War over Water", *Congress. Quar. Weekly Report*, 35 (March 19, 1977), 481; L. J. Carter, "Water Projects Dispute", *Science*, 196 (June 1977), 1303 - 1305. Cf. J. Tripp, "Tensions and Conflicts in Federal Pollution Control and Water Resource Policy", *Harvard Journal of Legislation*, 14 (Feb. 1977), 225 - 280; G. R. Lamm, "Some Reflections on the Balkanization of America", MS. (address, 8th Annual Vail Symposium, Vail, Colorado, Aug. 18, 1978); and Special Report, "The Second War Between the States", *Business Week*, No. 2432 (May 17, 1976).

of policy areas in which the national government dominates: it has authorized proliferation of federal supervisory functions, vis-a-vis "sharing" with state government; and it has maintained the central government's dominant position in controlling the most flexible source of revenue, the income tax. In sum, the integration of the modern national economy in the age of high technology, the advent of welfare-state ideas and their acceptance to a large extent by both major parties, the effects on the American polity of two protracted world wars involving massive mobilization, and the interventionist mode of the modern Positive State, all have transformed American federalism.

