Federalism: USA Style

RICHARD B. MORRIS

This conference of distinguished scholars attests to the enduring values of federalism, that distinctive governmental structure erected for the United Provinces in this historic city four hundred years ago. Indeed, this conference is a tribute to federalism's multifaceted approaches, to its enduring claims upon statesmen, and to the complex problems that its implementation poses in an age which finds intense nationalism competing with equally intense localism, and when fiscal disarray and threats to political stability summon forth the power and instant decision-making capacity of the centralized State.

To regard federalism as a success story is not to deny that it has failed perhaps as many times as it has demonstrated its effectiveness. Indeed, in Canada it is presently facing a supreme challenge. However, despite failures and shortcomings, federalism is still viewed by many as offering a political structure for the future. Witness various post-World War II State constitutions, whether in West Germany or Nigeria or most recently in Spain, all of which have drawn upon the federal model to unite their respective nation-States in the face of persistent regional or ethnic differences and traditional localisms. It is even being seriously proposed by an Irish opposition party as a solution for a united Ireland, and the upcoming elections for a European Parliament bear testimony to the widespread recognition of the fact that in the governance of a populous continent composed of many nations whose populations differ in tradition, language, and religion, a supra-national authority must of necessity be shaped in federalist terms.

Today I propose to treat a distinctive system of dual sovereignty, one which, despite its contemporary problems, still serves as a model for many new and emerging nations. Indeed, of the very large States, the USA still serves as the most successful, certainly the most enduring modern example of the governance of a vast extent of territory under its original federal constitution. Its beneficent political, economic, and cultural implications have indubitably provided one important model for the European Economic Community and the audacious notion of a European Parliament. It is almost two hundred years since American federalism was formally established by a constitution whose bicentennial the people of

the United States are now preparing to commemorate, hopefully not by genuflection alone but by submitting the document to rigorous review and critical analysis. Nor is it too much to add that in these critical times the performance of the American system of government is a matter of profound concern to the entire Free World and, I need hardly add, of very special concern to students of federalism. It is this system of federalism, USA style, that I propose to consider with you today.

First, let me point out that it is the paradox of the American constitutional structure that so much that has been written about American federalism has quickly become obsolete. Writing in 1939, Harold Laski found American federalism to be an anachronism. It lacked the power to control big capitalism, as he viewed it, and was a system 'suited only to the negative or limited State'. To Laski, only a centralized system could effectively confront the new problems of this age.[1] A dozen years later Karl Lowenstein saw an integral nexus between federalism and the free economy. To him, economic planning was 'the DDT of federalism'.[2] Even while these scholars were writing, the American federal government was stepping up its intervention in the economy to support or limit prices, to control the money supply, to stimulate competition, to deal with unemployment, and to provide economic security - and doing so on a continental scale. Nor is the end of such intervention in sight. Yet, while DDT is prohibited in America today, federalism is still a functioning system, despite the attacks from the right, the center, and the left, all of whom would seem to agree, as Tom Hayden has put it, that 'there's no glue holding the country together'.[3]

How federalism came into being in the United States, what its distinctive stamp has been, how it has evolved and fares, and what its present prospects are comprise central questions to which this paper is addressed.

To begin, let us go back to the egg, or the chicken - the union of the States - whichever fancy decides as having come first.

The Americans - it need hardly be pointed out in this learned company - did not invent federalism. The Greeks, the Swiss, the Dutch, the Hansa, and even the Holy Roman Empire provided examples which the American Founding Fathers, men trained in the classics and steeped in history, made a point of studying and citing in their Convention debates.[4] There was, however, a distinctly indigenous

1. Harold J. Laski, 'The Obsolescence of Federalism', *The New Republic*, May 3, 1939.
2. Karl Lowenstein, 'Reflections on the Value of the Constitution in Our Revolutionary Age', in: Arnold Zurcher, ed., *Constitutions and Constitutional Trends Since World War II* (New York, 1951) 211-12.
3. *The New York Times*, November 12, 1978.
4. For a most recent comment, see Henry Steele Commager, *The Empire of Reason* (New York, 1977) 191.

cast to American federalism, for its seeds were sown in colonial times. In the seventeenth century a confederation of New England colonies set up what was in effect a military league organized for defense against the Indians and the Dutch, a confederation which served its purposes effectively for some twenty years. Then, a hundred years later, confronted by the military crisis of an oncoming intercolonial war, which widened into a world conflict known as the Seven Years' War, the British ministry sought to spur military co-operation by calling a conference of colonies at Albany, New York. That conference accepted a plan drawn up by Benjamin Franklin, which set up on paper a Grand Council composed of delegates selected by the colonial assemblies and a president-general appointed by the king. This central government would be empowered to make war and peace, to levy taxes, to raise military and naval forces, and to regulate trade with the Indians. In an early demonstration of States' rights, the colonies voted the plan down on the ground that it conferred too much power on the federal government. In turn, the Crown was cold to the plan, viewing it as conferring too much self-determination upon a portion of the empire. For the old British empire Franklin's style of federalism was far ahead of its time.[5]

A decade later the Stamp Act, Parliament's first direct tax on the colonies, provoked the calling of another congress in New York - this one without permission of the Crown, but the fourteen resolves that it adopted, including the claim to the rights and liberties of Englishmen, proposed no new constitutional plan along federal lines. It remained for the First Continental Congress which convened in Philadelphia in September, 1774, and the Second Congress which foliowed in the spring of 1775, to establish in effect the federal union, a union which embodied the principle of popular sovereignty. Significantly, the delegates from the States to the Congress were elected largely outside the regular colonial legislative bodies - by revolutionary committees, by polling freeholders, or by elections by illegal assemblies and revolutionary conventions.[6]

It was the Second Continental Congress that remained in existence until the establishment of the national government in 1789 that filled a power vacuum by assuming the initiative in establishing revolutionary governments in the colonies and ultimately transforming them into States. Not only did the Congress turn to the people to set up a continental-wide revolutionary machinery, but it also took the lead in issuing a call to the people of the colonies to organized State governments.[7] In adopting the Declaration of Independence, an act of paramount sov-

5. Richard B. Morris, 'Benjamin Franklin's Grand Design', in Allan Nevins, ed., *Times of Trial* (New York, 1958) 23-40.
6. Richard B. Morris, 'The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty Over Seabeds', *Columbia Law Review*, LXXIV (1974) Appendix at pp. 1091-93.
7. Worthington C. Ford, *et. al.*, eds., *Journals of the Continental Congress, 1774-1789* (34 vols.; Washington, 1904-37).

ereign authority, Congress acted for the people rather than for the thirteen separate States, since only four State governments, three of them provisional, had been formed prior to its passage. In short, in the period of Congressional government, running from September 1774 to March 1, 1781, when the Articles of Confederation went into effect, the Congress, as the United States Suprème Court later correctly perceived, exercised powers drawn from the people, expressly confirmed through the medium of State conventions or legislatures, and impliedly ratified 'by the acquiescence and obedience of the people'.[8]

To sum up then, Congress in this initially creative period of federalism, was constituted by the people in collectivity rather than by the individual States, and it was Congress alone that possessed those attributes of external sovereignty which entitled it to be called a State in the international sense, while the separate States, exercising a limited or internal sovereignty, may rightly be considered creations of the Congress, which preceded them and brought them into being.[9]

What we had, then, between 1775 and 1781, was a system of dual sovereignty, with the Congress conducting the war on both military and diplomatic fronts, and the States, under their own constitutions, governing their internal affairs, but also maintaining their own State militia and navies. The substance of that federal relationship was modified by the Articles of Confederation, which set limits to the power of the central government. By Article 2, adopted without serious debate, each State retained its 'sovereignty, freedom and independence, and every power, jurisdiction, and right' that was not 'expressly' delegated to 'the United States in Congress assembled'. The inclusion of the word *expressly* left little room for maneuver on the part of Congress or for certain implied powers that the national government was able to assert under a constitution, which by the 10th Amendment contained a similar restraint, but omitted 'expressly', an omission that must have been deliberate and certainly proved significant. The two most important powers that the Articles failed to delegate to Congress were the powers to levy and collect taxes and to regulate commerce. On the other hand, the State delegates were chosen by the State legislatures, their salaries paid from State treasuries, and they voted in Congress by States, each State having one vote. The Articles paid further obeisance to States' rights by requiring an affirmative vote of nine out of the original thirteen States for the adoption of measures of the first importance.[10] One might, perhaps, compare the American States in the Confederation to the league of Swiss cantons associated

8. *Ware* v. *Hylton*, 3 U.S. (3 Dallas) 199, 232 (1796), per Chase.
9. Richard B. Morris, 'We the People of the United States: The Bicentennial of a People's Revolution', *American Historical Review*, LXXXII (1977) 14.
10. See Merrill Jensen, *The Articles of Confederation: An Interpretation of the Socio-Constitutional History of the American Revolution, 1774-1781* (Madison, 1940) 263.

for external defense, but in fact elements of cultural unity provided a cement for later union in the United States, in contrast to the heterogeneity present in cantonal Switzerland.[11] In fact, it was this very cultural homogeneity which made possible the extraordinarily rapid transformation of a Confederation into a tight federal union in a matter of a half dozen years.

Whether the years of the Confederation were as 'critical' as contemporary leaders thought and Tocqueville and other later commentators denominated it, and whether or not the Founding Fathers were correct in their fears of the nation's premature death,[12] Congressional power and prestige precipitously deteriorated in those years, and the decline of the central government's authority was accompanied by a severe economic depression, by threats to the security of the borders which has been established by the treaty with Great Britain which ended the American Revolution, and by the inability of the central government to achieve a breakthrough in foreign policy - to resolve outstanding differences with England over trade and with Spain over the navigation of the Mississippi. To the nationalists, men like Washington, Jay, Hamilton, and Madison, the solution lay in building a national character, in drastically reducing the power of the separate States and in infusing the central government with energy. This was what they meant when they spoke of 'federalism'. What men like Madison wanted was a Consolidated government, while Hamilton and Jay would have reduced the States to geographical subdivisions of the new nation.[13]

While it was the nationalists who triumphed at the Philadelphia Convention of 1787, they were unable to attach to the central government all the powers they had sought for it. Instead, they had to settle for federalism, and this meant that they had to compromise. The equality of the States in the Senate, the upper house of the national legislature, was conceded in the so-called Connecticut Compromise. In order to conciliate anti-federalist opponents, they had to agree also to the adoption of the Bill of Rights, or the First Ten Amendments, adopted shortly after the Constitution was ratified. This further concession was deemed necessary to reassure troubled anti-federalists that the leviathan State would neither destroy the separate States nor crush the people's liberties. Of these ten amendments it is the last two that are especially relevant to federalism. The Ninth Amendment reads: 'The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people'. The Tenth Amendment:

11. See R.R. Palmer, *The Age of the Democratic Revolution* (2 vols.; Princeton, 1964) II, 395-98.
12. For an analysis of the historiography of the Confederation years, see Richard B. Morris, *The American Revolution Reconsidered* (New York, 1967) 127-67; Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Williamsburg, 1967)424.
13. Richard B. Morris, *John Jay, the Nation, and the Court* (Boston, 1967) 26.

> 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.

Note again that the adverb 'expressly' no longer modifies 'delegated'. The omission opened up a whole frontier for 'inherent' or 'implied' powers to be exercised by the federal government.

Apart from the Bill of Rights, the great advocates of the Constitution, Hamilton, Madison, and Jay, collaborated in writing a series of letters of the newspapers under the pseudonym 'Publius'. What particularly distinguishes those *Federalist* letters, aside from their penetration and prescience, is the care which the writers took to define 'federalism' and to reassure both the States and the people of their reserved rights. Thus, Madison, the fervent nationalist, is at great pains in *Federalist,* no. 39 to reassure his readers that the Constitution not only provides for a republican system of government but that it preserves 'the *federal* form'. The House of Representatives, Madison points out, receives its power from the people, the Senate from the States. As Madison describes it, the government presents 'at least as many federal as national features'. In the operation of its powers directly upon the people, the new government is *national,* Madison concedes, but as regards powers, it possesses *only* those that are *enumerated,* leaving to the States 'a residuary and inviolable sovereignty over all other objects'. This is also true of the amending process, where the requirements for adoption are computed by the States and not by citizens. In short, Madison sums up,

> the proposed Constitution... is in strictness neither a national nor a federal constitution; but a composition of both. In its foundation, it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal, and partly national; in the operation of these powers, it is national, not federal: In the extent of them again, it is federal, not national: And finally, in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national.

Nowhere else will we find a more lucid and succinct discussion of what constitutes the distinctive system of federalism, USA style.

Madison put his finger at once on the feature that distinguishes American federalism from earlier and loose confederations. These latter presided over communities, whereas the American union exercises its power directly on the *individual.* To start with, the method of ratification was by separate conventions in each of the States chosen by the people, *not* by the State legislatures; Gouverneur Morris' Preamble to the Constitution anticipates this when it states, 'We, the people of the United States... do ordain and establish this Constitution of the United States of America'. In addition to its exercise of power over individuals, the federal

government's superior authority was buttressed by the so-called supremacy clause (Article VI), which reads:

> This Constitution, and the Laws of the United States which have been made in the Pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary Notwithstanding.

Under the supremacy clause not only would the judges of the State courts be required to uphold the federal constitution against the legislatures of their own States, but, by implication, the Supreme Court would have authority to review State court decisions, involving the federal relationship. Indeed, the Judiciary Act of 1789 expressly invested the court with such authority, which it did not hesitate to exercise. Thus, it might be argued that in the structure of judicial power after 1789 the United States was as much a unitary as a federal State, whereas State legislatures and governors kept a greater degree of independence from the federal government than did their court systems. And even critics of judicial review recognize that under a federal system like that of the United States the federal courts have a duty to police State courts and legislatures, or, as Justice Holmes pithily remarked

> I do not think that the United States would come to an end if we lost the power to declare an act of Congress void. I do think that the Union would be imperilled if we would not make that declaration as to the laws of the several States.[14]

The Constitution embodied other checks upon the States. It delegates certain powers expressly to the federal government, and expressly denies them to the States, powers such as the coinage of money, or prohibitions against States enacting laws impairing the 'obligation of contracts'. It requires the States to give full faith and credit to the public acts, records, and judicial proceedings of other States. It grants to citizens of each State all the privileges and immunities of citizens in the several States, and provides for the extradition by a State of persons convicted of crimes in another State. The States are forbidden to enact bills of attainder or *ex post facto* laws, and, perhaps more important, they may not, except with the consent of Congress, collect duties on exports or imposts.

A like prohibition against taxing exports was also laid upon Congress, which was further forbidden to give preference to the ports of one State over those of

14. Oliver Wendell Holmes, *Collected Legal Papers* (New York, 1952) 295-96. See also W.W. Crosskey, *Politics and the Constitution in the History of the United States* (2 vols.; Chicago, 1953) II, 984-1002, 1006.

another. By conferring upon the federal government the exclusive power to impose 'duties and imposts', by forbidding State preferences, and denying to the States the power to levy duties on goods coming in from other States, the Constitution had created an instant common market, which served as the prototype of the *Zollverein,* and in extent and performance was unmatched throughout the world until the recent creation of a European customs union.

Whether by benign neglect or deliberate intention the Framers failed in some areas to draw the line with precision between State and federal authority. For example, Congress is authorized to establish 'uniform laws on the subject of bankruptcies throughout the United States'. Was this power intended to be exclusive, or, in the absence of congressional action, could the States enact bankruptcy legislation? The courts decided the latter to be the case, and, as a result, in some areas such as bankruptcy the States share with the federal government a coordinate authority. Given dual sovereignty, State immunity from federal taxation seemed to follow as a matter of course, else the federal government's taxing power could cripple, if not defeat, the taxing power of the separate States. Thus, the Constitution, as the Supreme Court interpreted it, attempted to accommodate the competing demands for national revenue, on the one hand, and allow reasonable scope for the independence of State action, on the other.[15]

A linchpin of American federalism is the doctrine of the equality of the States in the union, a principle which embodies the spirit of anticolonialism which had animated the American Revolution. Having resented the status of being considered colonies, Americans were in no mood to create subordinate political entities of their own. A congressional resolve of 1780 provided that the unappropriated lands that might be ceded by the States to the United States should be

> disposed of for the common benefit of the United States, and be settled and formed into distinct republican States, which should become members of the Federal Union, and shall have the same rights of sovereignty, freedom, and independence, as the other States...[16]

The justly celebrated Ordinance of 1787 set up the machinery for admission of territories to statehood on the basis of absolute equality. This innovating concept assured prospective settlers that, regardless of where they settled on the Continental domain, theirs was not to be a status of permanent colonial subordination; they could look forward to participating in the union of the States on equal terms with the original thirteen. Indubitably, this fair and even generous guarantee

15. Collector v. Day, 78 U.S. (11 Wall.) 113, 125 (1871).
16. *Journals of the Continental Congress,* XVIII, 915.

contributed to a climate that proved hospitable to western settlement.[17] The mechanism of federalism has since that date provided for the admission of thirty-seven States to the original union of the thirteen, two of them, Alaska and Hawaii, separated by vast distances from the rest of the continental domain under the American flag, and both numbering a majority of nonwhite inhabitants. The federal capital, the District of Columbia, is now impatiently waiting in the wings to secure a special status not unlike that of a State, with representation both in the House and in the Senate, where under a pending proposed amendment it would be allotted two senators just as though it were a State, while important segments of the population on the islands of Puerto Rico and Guam are pressing for statehood.

On paper at least the Founding Fathers had in 1787 established a system of limited government, with delegated powers, checks and balances, division of powers, and a co-ordinate authority shared by the national government and the separate States. To determine how the parchment Constitution achieved its original purposes, we must take into account the 'living Constitution' - a series of glosses on the original document, derived from judicial and executive precedents, legislative actions, as well as the ultimate role of history as arbiter. Under the 'living Constitution' the federal government has, if not consistently, but rather by spasmodic moves, vastly enlarged its powers at the expense of the States.

In the first place, history clarified the beclouded wording of the union's permanence. The old Articles of Confederation, although weak as they proved to be, were entitled 'Articles of Confederation and Perpetual Union between the States' and Article XIII explicitly states that 'the Union shall be perpetual'. The Northwest Territory Ordinance of 1787 termed itself a 'perpetual compact', but the word 'perpetual' was curiously omitted from the federal Constitution. Its preamble speaks of the goal of forming 'a more perfect Union', nor was it so imprudent as to incorporate language to provide for its own dissolution. The question quickly arose: could States resist federal authority, by interposition, nullification, or even secession? Nobody could have been quite sure in 1787. In his Farewell Address (1796) Washington called upon the people 'indignantly' to frown

> upon the first dawning of every attempt to alienate any portion of our country from the rest or to enfeeble the sacred ties which now bind together the various parts.

But in 1832 John C. Calhoun argued for the right of the individual State under its reserved sovereignty to determine for itself the powers of the federal government.

17. Francis S. Philbrick, *The Rise of the West, 1754-1830* (New York, 1965) 125-33; Richard B. Morris, *The Emerging Nations and the American Revolution* (New York, 1970) 19.

Secession, he argued, was the State's remedy of last resort. Nationalist statesmen were quick to counter that view. In, his Proclamation to the People of South Carolina in 1832, President Andrew Jackson declared the Union to be indestructible.[18] In his justly celebrated 7th of March Speech in 1850, Daniel Webster spoke eloquently for the preservation of the Union,[19] and Abraham Lincoln, in his First Inaugural Address in1861, in holding that the Union was 'older than the Constitution', insisted that 'the Union of these States is perpetual'. The Civil War decided the issue on Lincoln's terms, and without destroying the federal basis of American constitutionalism. Just after the war the relation of the States to the Union was defined precisely by Chief Justice Salmon P. Chase: 'The Constitution, in all its provisions' he declared, 'looks to an indestructible Union, composed of indestructible States'.[20] Thus, with secession resolved, American federalism fortunately does not have that clouded ambivalence which one finds in today's Canada, with one province (or a significant party therein) seeking independence, or at least sovereignty-association while maintaining its economic ties to a Canadian union.

Under the system of dual sovereignty embodied in the United States Constitution, the federal government exercises undisputed external sovereignty and authority over war and peace and foreign affairs, with the States maintaining internal sovereignty, including their police powers. Thus, it has long been established that the powers of the federal government over foreign affairs are not limited to those which are delegated to it by the Constitution. There are *inherent* powers which the federal union exercised long before the Constitution came into being,[21] powers which are vested in the national government exclusively.[22] For instance, the Constitution is silent on the acquisition of territory, but the right of annexation has been upheld by the courts,[23] as well as the authority of Congress to exclude or deport aliens.[24]

During the past half century gigantic steps have been taken in the United States in the direction of centralization and at the expense of traditional federalism. These steps may be considered as responses to the rationalization of industry,

18. *Idem, Great Presidential Decisions* (4th ed.; New York, 1967) 130-51.
19. For the great debates over the Compromise of 1850, see David M. Potter, *The Impending Crisis, 1818-1861* (New York, 1976) 97 ff.
20. *Texas* v. *White,* 7 Wallace (1869).
21. Justice Sutherland in *U.S.* v. *Curtiss-Wright Export Corporation,* 299 U.S. 304 (1936) 315-19, where the Court upheld a presidential embargo on the sale of arms to the Chaco, relying on the nation's plenary power over foreign affairs to justify an exception to the rule of non-delegability of legislative power.
22. *U.S.* v. *Pink,* 315 U.S. 203, 233 (1942).
23. *Jones* v. *U.S.,* 137 U.S. 202 (1890).
24. *Fong Yue Ting* v. *U.S.,* 149 U.S. 698 (1893).

commerce, and finance, to the rapidly changing character of American society, and to the growing recognition of the need to protect the environment and natural resources from over-exploitation, contamination, and pollution. In explaining the transformation of federalism it should be borne in mind that in the years since 1932, the United States has been tested by a series of unprecedented emergencies - the Great Depression, the advent of World War II, the assumption of responsibilities to the free world embraced in the Marshall Plan and other aids and grants abroad, sustaining its role in NATO, the Cold War, the Korean and Vietnam wars, the war against discrimination at home, the deterioration of the cities, and, most recently, the spectre of runaway inflation. Each crisis has found a constitutional response with a consequent impact on federalism. All have combined to sustain a huge national budget and an activist role for the federal government, with a corresponding shrinkage of power on the part of the fifty States. To these crises must be added the impact of electronic Communications, notably television, with its elimination of factors of time and distance, immense regional shifts of industrial power, and a vast and continuing internal migration of the American people. These in combination have contributed to the decline of the traditional State loyalties, so deeply-rooted in 1787.

The needs of a rapidly expanding nation were indeed anticipated two centuries ago by Alexander Hamilton, who, along with Chief Justice Marshall, provided the main original thrust toward centralization. Hamilton's fiscal program injected confidence and even buoyancy into the business community. It was Hamilton who blazed the path for the Supreme Court by broadly expanding the powers of the federal government on the basis of three clauses of the Constitution - the *necessary-and-proper* clause, the *general welfare* clause, and the *commerce* clause. As Hamilton boldly interpreted them, these three clauses have provided the constitutional underpinnings for most of the activity of the federal government in the fields of taxation, finance, business regulation, and social welfare, federal activities undreamed of when the nation was in its infancy.[25] It was John Marshall who spelled out Hamilton's broad interpretation of the Constitution in the path-making case of *McCulloch* v. *Maryland* (1819), wherein he held 'that the government of the Union, though limited in its powers, is supreme within its sphere of action'.[26] In retrospect, these limits on federal powers seem to have been more procedural than substantive. Thus, Congress may tax and spend for the general welfare, but not legislate on housing, agriculture, education, etc. Instead, it may appropriate money for these welfare purposes, in addition to other grants it votes for education, highways, slum clearance, environmental

25. Richard B. Morris, ed., *Alexander Hamilton and the Founding of the Nation* (New York, 1957) xii, 263-68.
26. 4 Wheat. 316 (1819).

protection, etc. But if the power to tax is the power to destroy, then the power to withhold taxable dollars is the power to create, shape, modify or terminate projects which States or localities in theory control.

Of the drastic changes in the direction of centralization that have occurred since the American Civil War and especially since the inauguration of the New Deal, perhaps the most notable have been consequential upon the *nationalization of the Bill of Rights.* The first ten amendments, as has been mentioned earlier, were imposed as curbs on the federal government. They did not restrain the States from setting up or maintaining an established Church, for example, or from violating the civil rights of individuals - actions which the federal government was enjoined from taking. Only State constitutions protected persons from State violations of their rights, and these rights were variously and not uniformly guaranteed and variously interpreted.[27]

The American Civil War dramatically altered the federal relationship. The Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution ended slavery and forbade the States from taking life, liberty or property without due process of law, or from denying anyone the equal protection of the laws. Up to the middle of the last century the 'due process' clause of the Fifth Amendment had been interpreted procedurally - that is, it had been regarded as a check not on what the government could do, but on the process it had employed in order to do it. Thereafter, the pressure from important property interests and big business gave a 'substantive' character to the due process clause of the Fourteenth Amendment, and by a zig-zag course the Supreme Court came to assert a supervisory power over the substance of State legislation, such as rate-fixing or regulating the hours of women and children. Gradually the Supreme Court extended the due process clause of the Fourteenth Amendment to include most of the safeguards of the federal Bill of Rights and to hold, for example, that the First Amendment rights of free speech and free press, or the protections against unlawful search and seizure of the Fourth Amendment, or the right of counsel of the Sixth Amendment[28] were binding upon the States as well as the federal government.

The most sweeping changes in the Federal-State relationship took place under the chief justiceship of Earl Warren, a period when judicial activism became the main channel of social change, absent support for civil rights and desegregation in other areas, State or federal. In fact, the leading Warren cases all involved judicial review of State rather than federal law, and the judicial process made the United States an extraordinary testing ground for equality, the implementation

27. Marshall, C.J., in *Barton* v. *Baltimore,* 7 Pet. 243 (1833).
28. See, *e.g., Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

of which principle now bore heavily upon the sovereign States.[29] As a consequence the federal system is being reshaped in the direction of equality, both of color and sex, of voting rights, of education, of civil rights, and employment.

Important though the landmark desegregation decision of *Brown* v. *Board of Education of Topeka*[30] was, its impact on federalism was less direct than the decisions of the Supreme Court mandating equality of representation in both the lower and upper houses of the States, even when a malapportionment was supported by a State constitution,[31] and reapportioning election districts more equitably.[32] One may argue that by its rigid one-man-one-vote rulings the Supreme Court has in effect invalidated the very accommodation of majoritarianism and territorial power that the Framers had settled upon for the federal government. Indeed, one scholar has even argued that the United States has begun to replace representative government with the Platonic elitism of a 'guardian democracy'.[33] These majoritarian trends toward equality of representation have been spurred by two amendments to the Constitution - the Seventeenth, by which State legislatures no longer could choose United States Senators, and the Twenty-fourth, abolishing the poll tax, a device by which certain States, notably in the South, maintained control by vested interests. In addition, as a result of federal court actions, election districts have now been more equitably reapportioned.[34] As a result of these developments the States have lost that considerable political leverage in Congress which they long exercised to counter centralization.[35]

Further contributing to the retreat of dual sovereignty has been the sweeping expansion of the commerce power on the part of the federal government to comprehend not only commerce as originally defined by Chief Justice Marshall in the classic case of *Gibbons* v. *Ogden*,[36] but the products of manufacturing and mining.[37] The Great Depression had conclusively demonstrated the interdependence of economic factors, and the need for sweeping economic powers crossing State lines.

29. See J.R. Pole, *The Pursuit of Equality in American History* (Berkeley, 1978); Laurence H. Tribe, *American Constitutional Law* (Mineola, N. Y., 1978) 991-1136.
30. 347 U.S 483 (1954).
31. *Baker* v. *Carr*, 369 U.S. 286 (1962); *Reynolds* v. *Sims*, 377 U.S. 533 (1964).
32. *Westberry* v. *Sanders*, 376 U.S. 1 (1964).
33. See Ward E. Y. Elliott, *The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845-1969* (Cambridge, Mass., 1973) 1-33.
34. *Westberry* v. *Sanders*.
35. See Herbert Wechsler, 'The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government', *Columbia Law Review*, LIV (1954) 543, 547-52; Tribe, *American Constitutional Law*, 238-42, 301-08.
36. 22 U.S. (9 Wheat.), (1824).
37. Thus, cf., *U.S.* v. *E.C. Knight Co.*, 156 U.S. (1895) with *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); also *U.S.* v. *Darby*, 312 U.S. 100, 114 (1941), overruling *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918).

However, it is perhaps in the area of fiscal independence that the separate States have seen their sovereignty most substantially diminished. More and more have they had to look to the federal government for fiscal relief, as the States' share of the taxes generated nationwide has rapidly declined, especially since the adoption of the federal Income Tax Amendment in 1913. In 1968, for example, the federal government collected 62.2 per cent of all tax revenues in the United States. To sustain State solvency, in actuality to sustain the federal structure, Congress enacted in 1972 a Revenue Sharing program to distribute some $ 30 billion of federal tax revenues to State and local governments as supplements to their own revenues, to use generally as they saw fit. So redistributed, the federal tax revenue provided a degree of fiscal relief to the States, not near enough for certain urban areas like New York City, Newark, and Cleveland, which for some years have been teetering on the brink of bankruptcy.

Has federal fiscal relief restored the balance of power in the federal structure? Probably the contrary has been the case. New York City only received Treasury subventions and guarantees af ter agreeing to the rigid fiscal controls imposed by the Secretary of the Treasury. Significantly, the federal government, in granting fiscal supports to cities, in effect bypasses the States, dealing directly with subordinate State units, which in the past had looked to the State capitols not to Washington for sustenance. Indeed, the revenue-sharing grants, which are now facing drastic cuts by Congress, are the exception to traditional federal subventions. Normally the federal government provides funding to localities or individuals for approved objectives, and does so through such agencies as the National Science Foundation and the National Endowment for the Arts and the Humanities. Not only do these grants help determine the kind of research and creative expression of the grantees, but through the device of requiring the grantee to secure matching funds, from other sources, among them private foundations, the federal government can effectually direct the stream of such private funding, exercising a leverage on the freedom of choice of private granting institutions. Furthermore, in its grants to educational institutions, for example, the Department of Health, Education, and Welfare requires the recipients, whether public bodies like cities or private institutions, to pursue affirmative action guidelines, under threats to withhold funding for noncompliance. In effect, Washington is employing the granting authority to enforce legislation and court decisions that otherwise could not be enforced within the States. Other federal departments can now withhold defense contracts with business firms found not in compliance with the new wage and price guidelines, a policy whose constitutionality the AFL-CIO, the great American labour organization, is presently testing in the courts.

In sum, he who pays the piper calls the tune, and the grants, subsidies, loans, and contracts awarded by the federal government have served further to dilute

the impact of the States not only on the economy, but in social and cultural areas as well. The totality of grants, subsidies, loans, and government contracts have enhanced national powers and prestige at the expense of traditional federalism. Americans need no longer be frightened by the spectre that disturbed Alexander Hamilton, of 'a nation without a national government'; rather do we face the prospect of an unbalanced system, with the leviathan central government assuming more and more power.

Some would argue that federalism has served its day and is an anachronism, that State boundaries no longer accord with economic realities, that State loyalties are no longer so pervasive. Others would suggest that greater attention be paid to the potentialities of regionalism to meet the needs of resource and population aggregations, to examples like the Tennessee Valley Authority and other types of grass-roots regionalism, to inter-State compacts creating power and port authorities, of which the Port Authority of New York and New Jersey and the Upper Colorado Basin compact are noteworthy examples. Still others would point to the failure of the States to co-operate in national law enforcement. Only recently, to cite one example, the Wyoming legislature proposed to raise the speed limit above the fifty-five mile maximum imposed for conservation reasons by the federal government under penalty of forfeiting federal highway subventions. Such a breakdown is also apparent in the difficulty in enforcing State sales taxes on cigarettes, liquor, and gasoline when it is so easy for a motorist to cross the unbarricaded State lines. The system's weaknesses are evidenced by the diversity of rules for corporate charters, by the unseemly competition between the States in offering business free factory sites, tax-free revenue bonds for industrial enterprises, an anti-labour climate, tax exemptions, and other advantages. In addition, unseemly conflicts have broken out in recent years between the States and the federal government over the environment, notably over establishing safety standards for nuclear power plants, conflicts which inordinately postpone urgently-needed conservation and energy programs.

Federal-State relations are not entirely a one-way street, however. Countering charges of ineffective law enforcement and conflicting State laws, one might point to the effective work of the National Conference on Uniform State Laws, to the some one hundred and fifty uniform or model acts which have been drafted and submitted to the States.[38] Furthermore, there are still many who believe that over-centralization in Washington is a hazard to democracy,[39] and who deplore the trend toward big central government, with its disarray and inefficiency. A former Secretary of Health, Education, and Welfare has discovered

38. Daniel J. Elezar, *American Federalism: A View From the States* (2d ed.; New York, 1972) 177.
39. David E. Lilienthal, *This I Do Believe* (New York, 1949).

a tendency 'for the federal government to export its own chaos down the line'.[40] Disaffection with centralized trends, coupled with dismay over taxes and spiraling inflation have been brought into national focus in several recent moves. In 1978 the voters of California adopted a referendum known as Proposition 13, rolling back property taxes. The movement has snow-balled, sending shock waves throughout the federal system. A second shock wave comes from the right-to-life movement, which seeks to amend the federal Constitution to repudiate federal court decisions legalizing abortion. The third and greatest seismic disturbance is the current movement for a constitutional convention to consider an amendment to the federal Constitution requiring the national government to have a balanced budget. The last poses perhaps the greatest threat of the three because rigid checks imposed in the Constitution on taxes and expenditures could cripple the operation of the federal government in crisis times. No one knows how any legislature can confidently guarantee that its budget for the year ahead will be in balance unless it possesses the prescience of an economic oracle. Obviously, even a conservative fiscal budget could be thrown into disarray by unexpectedly low tax revenues owing to the unanticipated severity of a recession, for example.

Since the Founding Fathers concluded their business in September, 1787, the United States has never had a second constitutional convention. Everyone remembers that the first one was called to amend the Articles of Confederation and proceeded at once to scrap that inadequate document. Hence, no one is sure whether a new constitutional convention can be limited to the purposes for which it is summoned, say to provide for a balanced budget amendment. It might easily become a runaway convention, and there is considerable constitutional opinion that suggests that a constitutional convention, once convened, cannot be limited. Under the federal Constitution, two-thirds of the State legislatures can petition Congress to call a convention. Already thirty-one States have done so. Must Congress act when the magic number is reached? If it does, presumably the delegates would be elected by the people, not by the State legislatures, and the amendment they proposed would have to be ratified by three-fourths of the State legislatures.

Countering this growing move to check the powers of the central government is the proposed amendment introduced by Senator Birch Bayh to abolish the electoral college, an antique device by which the President is technically chosen, and to substitute direct election of the chief executive. Until now the electoral college has given the smaller States a feeling of power and importance out of all relation to their population or wealth. Substituting direct democracy may make more

40. *The New York Times*, November 12, 1978.

sense in our times, but its effect would be to eliminate the States as a factor in presidential polling and encourage the candidates to concentrate their campaigning on heavily populated States like California and New York, while ignoring States much smaller in population, States like New Hampshire, Wyoming, or Alaska. Much the reverse takes place in election campaigning, where a State like New Hampshire is a principal target for those seeking early leads in the presidential primaries.

Other countermoves in the direction of reinforcing federalism have been initiated by the judiciary. Récently the federal courts have begun to show concern for the rights of the States in the federal system, to limit the almost uninhibited congressional regulation of commerce, where such regulation is directed not against private citizens but the States as States.[41] Such decisions would seek to protect the role of the State as an employer and provider of services. Furthermore, State regulations seemingly aimed at furthering public health or safety, or restraining fraudulent or otherwise unfair trade practices or conserving local services are less likely in the present judicial climate to be perceived as 'undue burdens on interstate commerce' than are State regulations seeking to maximize the profits of local business.[42] In addition, the courts have taken a more tolerant position than in the past toward State taxes imposed on interstate commerce,[43] as well as toward the power of the States to tax foreign commerce, in the latter instance reversing a longstanding ruling that all State taxes were void if imposed on foreign imports before the package in which the goods arrived was broken or before actual sale or use, whichever occurred first.[44]

In conclusion, the present era still finds the two-hundred-year-old federal Constitution commanding high prestige, while the system of federalism which it sets forth is in the process of being reshaped, showing survival powers despite trends toward national over-centralization and operational inefficiencies on both the federal and State levels. The two-party system, upon which the government was structured within a decade after the ratification of the Constitution (which, by the way, says nothing about parties) has been largely supplanted by political movements around single issues, by a quantum jump in lobbying and campaign contributions, by television which makes nationwide or statewide exposure possible for a candidate lacking the support of party regulars, and by a decline in the

41. *National League of Cities* v. *Usery,* 426 U.S. 833 (1976).
42. See, *e.g., Bibb* v. *Navajo Freight Lines, Inc.,* 359 U.S. 520 (1959); *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.,* 340 U.S. 179 (1950).
43. Tribe, *American Constitutional Law,* 344-54.
44. Compare *Brown* v. *Maryland,* 25 U.S. (12 Wheat.), 419, 441-42 (1827), and *Low* v. *Austin,* 80 U.S. (13 Wall.) 29 (1872), with *Michelin Tire Corp.* v. *Wages,* 423 U.S. 276 (1976), for which see also Richard B. Morris, 'Law from the Perspective of History', in Bernard Schwartz, ed., *American Law: The Third Century* (South Hackensack, N.J., 1976) 294-96.

moral authority of government officials. Sheer bigness, combined with the mounting cost of government, have disenchanted the public and compelled the country to take a hard look at how the federal system is functioning and at what point in time it was derailed. At the same time there is a quiet realization that the system must not be permitted to fail, that federalism is the glue that has held the country together, that it draws its strength from tradition, from a common language, from a common market, from privileges and immunities shared by all its citizens, and from an unmatched capacity to provide for the general welfare.

Shortly after the Constitutional Convention had completed its work in Philadelphia, old Benjamin Franklin sent a copy of the federal Constitution to a good friend in France, with this comment on the prospects of its ratification:

> If it succeeds, I do not see why you might not in Europe carry the project of good Henry the 4th into Execution, by forming a Federal Union and One Grand Republick of all its different States and Kingdoms, by means of a like Convention, for we had many Interests to reconcile.[45]

Indubitably, Franklin, were he alive today, would have been excited about the prospects of the new European Parliament to be elected by a hundred and eighty million people. How it will change the substance and structure of national politics in Europe, whether in the direction of a supranational State, of a loose confederation, or of something more closely approximating American federalism only time and the effective performance of federal systems like that of the USA may determine.

45. Benjamin Franklin to Ferdinand Grand, October 22, 1787, in A.H. Smyth, ed., *The Writings of Benjamin Franklin* (10 vols.; New York, 1905-07) IX, 619.

Essai de synthese de l'évolution de la réforme de 1'état en Belgique de 1961 à 1979

JAN VAN ROMPAEY

LA PROBLEMATIQUE EN GENERAL DEPUIS 1830

Il est assez connu que la constitution belge de 1831 était une oeuvre remarquable par sa clarté, sa précision et sa simplicité. En rédigeant seulement 131 articles, les auteurs de cette constitution ont réussi à donner au nouvel Etat des institutions à la fois modernes et démocratiques. S'il était nécessaire de conserver la monarchie pour que la Belgique puisse être reconnue par les grandes puissances, la constitution de 1831 a limité le pouvoir royal au strict minimum et a établi un régime de gouvernement constitutionnel, donc démocratique pour le temps, puisque à cette époque la democratie politique se confondait avec les interêts de la bourgeoisie. Mais dans cette bourgeoisie belge de 1831, la dualité ethnique du pays ne se révélait pas du tout, le ciment qui unissait la bourgeoisie flamande et la bourgeoisie wallonne étant 1'emploi exclusif de la langue française. IL était donc tout à fait normal que 1'Etat nouveau fût de conception unitaire et que le français devint la seule langue officielle du pays. Il paraît même qu'un des fondateurs de la Belgique et notamment Charles Rogier l'ait dit clairement: La Belgique sera latine ou elle ne sera pas.

La Belgique bourgeoise et unitaire du dix-neuvième siècle convenait de manière excellente aux interêts de la bourgeoisie wallonne, parce qu'en fait elle dominait le pays. Les Wallons ont toujours été et sont encore minoritaires en Belgique quant à leur nombre, mais politiquement les Wallons ont toujours joué un rôle de premier plan en Belgique et donc aussi dans la période dite bourgeoise du dix-neuvième siècle où 1'on comptait plus de Wallons que de Flamands dans l'administration centrale du pays. Il n'était pas rare de trouver en Flandre des juges, des fonctionnaires wallons de toute sorte, par exemple des directeurs d'école: cette situation illustrative de la domination wallonne en Belgique était rendue possible par 1'emploi exclusif du français dans toute la vie officielle du pays. Quand à la fin du dix-neuvième siècle et sous la pression du Mouvement flamand naissant, une première série de lois linguistiques venait d'être votée par le parlement belge, les Wallons commençaient à s'inquiéter lentement, car ils comprenaient bien