

Federalism: An Overview

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Daniel J. Elazar

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Foreword

The theory and application of federalism has been widely debated since the establishment of a democratic South Africa. Before the normalization of the political process in 1990, very little scientific or political attention had been given to federalism and its variety of applications around the world. Although federalism was considered at the National Convention in 1990, the subject has been largely neglected since then. The South African experience of various forms of federalism has been fairly negative -ranging from British imperialism to apartheid, separate development and the tricameral constitution.

The multiparty negotiation process which was aimed at the drafting of a non-racial democratic constitution for South Africa, was characterized by numerous misunderstandings of the theory of federation and federalism, as well as the practical implementation thereof, and a strong suspicion of any notion that had a “federal” connotation.

A striking aspect of the federal debate was the “case study hunt” on which all the political parties, groupings and advisors embarked. They were searching for the “ideal” case study which would justify their particular viewpoints and interpretation of what federalism really meant. This led to numerous cases where the federal experience of different countries was presented in a skewed manner, with only selected successes or failures receiving attention.

Since its inception in 1990, the Centre for Constitutional Analysis (HSRC) has contributed to the debate on federalism, regionalism and decentralization through numerous publications, workshops and submissions. Its inputs have been based on a study of federalism in various countries, with adaptations to suit South African circumstances.

The series *Federalism: theory and practice* is intended to afford mainly South African, but also international scholars and practitioners, insight into federal developments in a variety of countries by giving them access to the views of eminent scholars from the relevant countries. The series may also provide more clarity to decision makers in Africa on some federal concepts and their practical applications. It is in no way aimed at “federalizing” South Africa, as if federalism in itself provides a magic wand for peace and stability. On the contrary. The strong and weak points of federalism are discussed by the different authors. We trust that by providing an original and unbiased discussion of each case study, understanding of the theory and practice of federalism will be enhanced.

Federalism: theory and practice is a series of monographs which will be published over a period of 18 months by the HSRC. The first monograph, by Prof. Daniel Elazar, gives readers some insight into the origins and theory of federalism by a world-renowned scholar of federalism. In the following monographs a range of federal-type dispensations will be discussed — from those in highly developed countries to those in developing countries.

This series is the result of sustained teamwork in sometimes trying circumstances. I should like to express my sincere appreciation and gratitude to the following persons who have contributed so closely and enthusiastically to the realization of the project: my international friends and colleagues for sharing their perspectives on their respective case studies with us, Rina du Toit and Tim Steward for their editorial assistance, Claudia Davidson from HSRC Publishers for publishing the series and to the HSRC Executive for the financial support that made the series possible.

Bertus de Villiers
Series Editor

Contents

1. Introduction	1
1.1 Definitions	1
1.2 Forms of Federalism	2
2. Fundamental Forms and Principles of Federalism	13
2.1 Federal Democracy	13
2.2 Noncentralization	13
2.3 Checks and Balances	14
2.4 Open Bargaining	14
2.5 Constitutionalism	14
2.6 Fixed Units	15
2.7 Territorial and Non-Territorial Arrangements	17
3. History of Federalism	19
3.1 Earliest Federal Arrangements	19
3.2 Medieval Federal Arrangements	20
3.3 Political Federalism in the Reformation	21
3.4 Federalism and Modern Statism	23
3.5 The Federalist's Theory of Federalism	24
3.6 Modern European Federal Theory	25
3.7 Federalism After World War II	27
4. Federalism Today	28
4.1 Maintaining Union	28
4.2 Maintaining Noncentralization	29
4.3 Elements maintaining the Federal Principle	34

5. United States: An Example of Constitutionalized Noncentralization	37
5.1 Federalism as Compact and Partnership	37
5.2 The Elements of American Federalism	41
5.3 The Requisites of National Federalism	47
5.4 Changing Patterns of American Federalism	48
5.5 The Constitutional Basis of American Federalism	49
5.6 Perceptions of the Federal system	53
5.7 The Future of the Federal System	54
Notes	62
Bibliography	64

List of Tables

1.	Federations	3
2.	Confederations	4
3.	Associated States, Federacies and Condominiums	4
4.	Political Systems with Federal Arrangements	5
5.	Models of Foundings/Regimes	11
6.	Varieties of Federal Arrangements (with selected examples)	16
7.	A Typology of Intergovernmental Political Relationships	46

List of Figures

1.	The matrix model	8
2.	The power pyramid	9
3.	The center-periphery model	9

1 Introduction

1.1 Definitions

Federalism is the mode of political association and organization that unites separate polities within a more comprehensive political system in such a way as to allow each to maintain its own fundamental political integrity. Federal systems do this by requiring that basic policies be made and implemented through negotiation in some form, so that all the members can share in making and executing decisions. The political principles that animate federal systems emphasize the primacy of bargaining and negotiated cooperation among several power centers; they stress the virtues of dispersed power centers as a means for safeguarding individual and local liberties. The starting point of any discussion of federalism is to be found in the derivation of the term itself from the Latin *foedus*, meaning covenant. By definition, federal relationships emphasize partnership between individuals, groups and governments, cooperative relationships that make the partnership real, and negotiation among the partners as the basis for sharing power. The entire history of the covenant idea in any of its several forms has emphasized these three elements.

The very terminology of federalism is characterized by a revealing ambiguity. The verb “federalize” is used to describe the unification of separate states into a federal polity and also the permanent diffusion of authority and power within a nation between general and

constituent governments. In this ambiguity lies the essence of the federal principle: the perpetuation of both union and noncentralization. Federalism is more than simply a structural arrangement; it is a special mode of political and social behavior as well, involving a commitment to partnership and to active cooperation on the part of individuals and institutions that at the same time take pride in preserving their own respective integrities.

1.2 Forms of Federalism

Federal political systems are those in which a general government is constituted by a group of two or more constituent governments which have very substantial reserved or protected powers within the common whole. That, indeed, is the definition of modern federation. It is more appropriate to understand federalism as constitutionalized power-sharing through systems that combine self-rule and shared rule, including federations (Table 1), confederations (Table 2), federacies (Table 3), and other similar forms of political or organizational relationships (Table 4).¹ Federalism must be considered a “mother” form of democracy like parliamentary democracy or direct democracy.²

Table 1: Federations

Name (Constituent Units)
Argentine Republic (23 provinces + 5 regions + 1 national territory + 1 federal district)
Commonwealth of Australia (6 states + 4 administered territories + 2 territories + 1 capital territory)
Federal Republic of Austria (9 <i>lander</i>)
Belgium (3 regions + 3 cultural communities)
Brazil (26 states + 1 federal capital district)
Canada (10 provinces + 2 territories)
The Federal and Islamic Republic of the Comoros (3 islands)
Ethiopia (9 provinces)
Federal Republic of Germany (16 <i>lander</i>)
Republic of India (25 states + 7 union territories + 1 federacy + 1 associated state)
Malaysia (13 states)
United Mexican States (31 states + 1 federal district)
Federal Republic of Nigeria (30 states + 1 federal capital territory)
Islamic Republic of Pakistan (4 provinces + 6 tribal areas + 1 federal capital)
Russian Federation (89 republics and regions)
Spain (17 autonomous regions)
Swiss Confederation (26 cantons)
United Arab Emirates (7 emirates)
United States of America (50 states + 2 federacies + 3 associated states + 3 local home-rule territories + 3 unincorporated territories + Indian tribes)
Republic of Venezuela (20 states + 2 territories + 1 federal district + 2 federal dependencies + 72 islands)
Federal Republic of Yugoslavia (2 republics)

Table 2: Confederations

Caribbean Community (14 member states + 2 associate members + 6 observers)
Commonwealth of Independent States (12 member states)
European Union (15 member states)

Table 3: Associated States, Federacies, and Condominiums

Name (Form)	Federated Power
Aaland Islands (federacy)	Finland
Andorra (condominium)	France and Spain
Azores Islands (federacy)	Portugal
Bhutan (associated state)	India
Cook Islands (associated state)	New Zealand
Faroe Islands (federacy)	Denmark
Federated States of Micronesia (associated state)	United States
Greenland (federacy)	Denmark
Gurnsey (federacy)	United Kingdom
Isle of Man (federacy)	United Kingdom
Jammu and Kashmir (federacy)	India
Jersey (federacy)	United Kingdom
Liechtenstein (associated state)	Switzerland
Macao (associated state)	Portugal
Madeira Islands (federacy)	Portugal
Marshall Islands (associated state)	United States
Monaco (associated state)	France
Netherlands Antilles (associated state)	Netherlands
Nieu Islands (associated state)	New Zealand
Northern Marianas (federacy)	United States
Puerto Rico (federacy)	United States
Republic of Palau (associated state)	United States
San Marino (associated state)	Italy

Table 4: Political Systems with Federal Arrangements

Name (Number of Constituent Units)
Antigua and Barbuda (2 islands)
People's Republic of China (22 provinces + 5 autonomous regions + 3 municipalities)
Colombia (23 departments + 4 intendencias + 3 commissaries)
Fiji Islands (consociation of 2 ethnic communities)
Ghana (10 regions)
Georgia (2 autonomous regions)
Italy (15 ordinary regions + 5 special status regions)
Japan (47 <i>to-do-fu-ken</i> /prefectures)
Lebanon
Myanmar/Burma (7 states, 7 divisions)
Namibia (14 regions)
Netherlands (11 provinces + 1 associated state)
Papua New Guinea (19 provinces + 1 capital district)
Portugal (state with 2 autonomous overseas regions)
Solomon Islands (4 districts)
South Africa (9 provinces)
Sudan (6 regions + 1 federally administered province)
Tanzania (2 constituent units)
United Kingdom of Great Britain and Northern Ireland (4 countries + 5 self-governing islands)
Ukraine (1 autonomous region)
Vanuatu (constitutionally regionalized islands)

Today federalism is one of the most widespread forms of political organization. Federal systems were at least formally established and/or nominally operative in twenty countries in 1995, and at least twenty-one others utilize federal principles to incorporate a measure of constitutionalized decentralization into their systems of government. In addition, there are three supranational confederations and twenty-three federacies and associated states. Federalism is, in every case, a means of organizing power and the relationships that flow from it. Conceived in the broadest sense, federalism looks to the linkage of people and institutions in lasting yet limited union by mutual consent, without the sacrifice of their respective integrities.

To use a biological analogy, federalism is a genus of which there are several species. Modern federation is the best known species. Federation is a national union whose constitution is the supreme law of the land but in which authority and power are divided and shared by a general and constituent governments. It was invented by the founders of the United States who authored the Constitution of 1787. Prior to that the accepted definition of federalism was that which today we refer to as confederation, a situation in which two or more polities come together to establish a limited-purpose general government that functions through the constituent states, which retain their position as the primary political communities, retaining ultimate sovereignty within the overall polity.

The other species of federalism each have their own particular characteristics. Nevertheless, federation and confederation remain the best known species of the genus of federalism, with federation combining elements of federalism and unitary government, while confederation combines elements of federalism and a league of polities.

Federative and confederative arrangements are widely used outside the governmental realm to unify or integrate religious, labor, commercial, and cultural organizations. Federative organization is particularly common in the Calvinist and Reformed churches, ranging from the fully federal Presbyterians to the loosely confederated Baptists. Labor unions and business groups are frequently functional federations. Liberal democracy, with its emphasis on pluralism, is highly conducive to such arrangements.

In modern democratic theory, the argument between federalists and pluralists has frequently revolved around the respective values of areal and functional diffusions of power. Those who have argued the obsolescence of federalism while endorsing its values have generally based their case on the argument that the areal division of powers is unnecessary to preserve liberty and, indeed, may interfere with its protection. Proponents of the federal-areal division argue that the deficiencies of territorial democracy are greatly outweighed by the advantages of a guaranteed power base for each group in the political system, arguing further that any other system devised for giving them power has proved unable to cope with the complexities and changes of a dynamic age.

Federalism involves a matrix of polities functioning in a manner similar to a cybernetic system (Figure 1). It stands in opposition to a hierarchical power pyramid where power and authority are inevitably concentrated in or gravitate toward an apex and all other power centers are “levels” subordinated to that apex (Figure 2). Indeed, in such a model the people themselves are to be found underneath the power pyramid, making it difficult to achieve fully democratic government within it.

By the same token, federalism is not like the organic model with a center and a periphery, whereby elites are formed by or gravitate to the center with greater or lesser ties to those on the periphery (Figure 3). Those elites govern in the name of the polity with greater or lesser regard for the concerns of those on the peripheries. If the elites are more closely connected with the peripheries, the voices of the latter can be better heard; if not, then not. But in any case the center-periphery model presents problems for democracy. The federal matrix with its constitutional and noncentralization has its own problems, to which friends of federal democracy should be mindful, but they are of a different order and are more easily resolved.

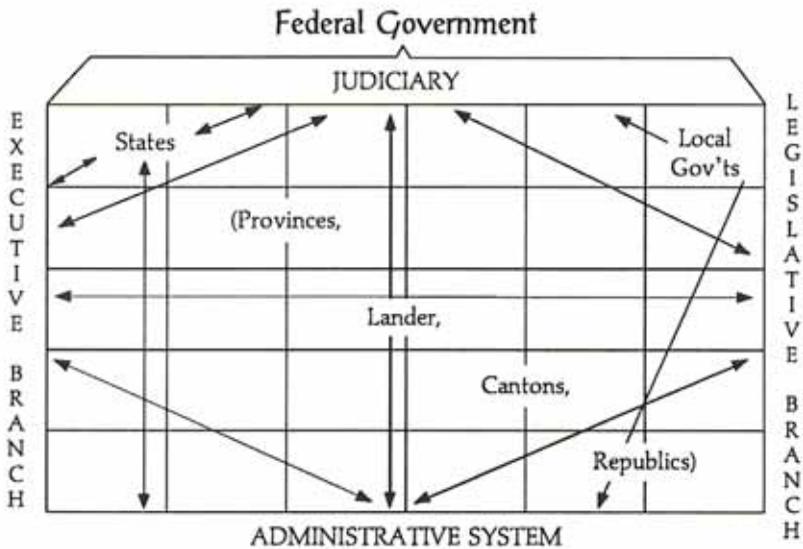


Figure 1: The matrix model

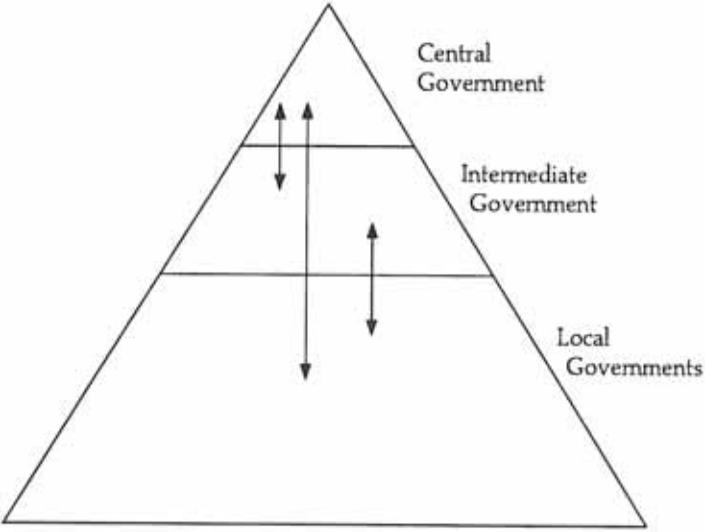


Figure 2: The power pyramid

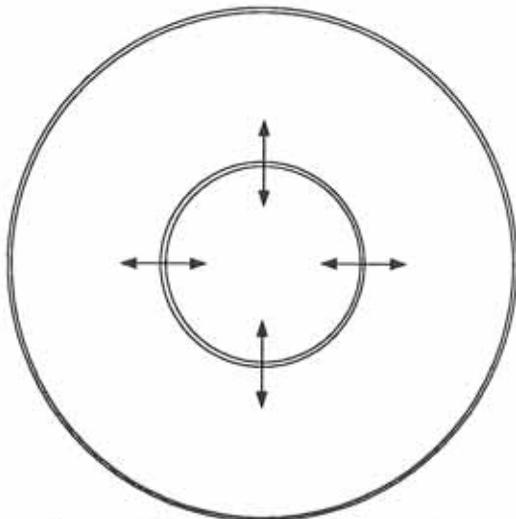


Figure 3: The center-periphery model

The contrast between hierarchical, center-periphery, and matrix models is clear and instructive (Table 5). Look, for example, at the origins of the three models of polity. Hierarchical polities generally originated in conquests, either military conquests of a territory, internal revolutions, or coups d'etat, or in the case of economic regimes, conquest of a market by a major entrepreneur. The result is leadership from the top with the leader maintaining close control even where he has to delegate. In the organic model, the body politic develops incrementally on an ad hoc basis on the basis of experiences, circumstances, and the environment, leading to a seemingly "natural" division of the polity into a political elite that dominates the political center and a periphery of those outside of the elite.

In the federal model, polities are established by equals who come together to do so by design in such a way as to protect the respective integrities of the founders or partners even while they join together to form a new body politic. Rule is the rule of equals by equals and is designed to maintain that basic principle. *The Federalist*, the great American work of political theory devoted to explaining the idea of federalism and the federal system introduced by the U.S. Constitution of 1787, describes the three models as reflecting the three basic choices for regime building among humans since the beginning of time, labelling them "force," "accident," and "reflection and choice."

Table 5: Models of Foundings / Regimes

Hierarchical	Organic	Federal
Force (conquest)	Accident	Reflection and Choice
Pyramid	Circle	Matrix
Hierarchy	Center-Periphery	Frame and Cells
Administration-top down bureaucracy	Politics - club - oligarchy	Constitution-written
Politics-court	Administration - center outward	Politics - open with factions
Constitution-charter	Constitution-tradition	Administration - divided
Apotheosis-army	Apotheosis - Westminster system	Apotheosis - federal system
Excess-totalitarian dictatorship	Excess - Jacobin state	Excess - anarchy

In the hierarchical model the most important aspect of governance is in its administration by a top-down bureaucracy responsible to the ruler at the top of the pyramid. The politics that exists is the politics of administration topped by court politics as “courtiers” seek to improve their positions vis-a-vis the ruler. The constitution is the least important element since rule leans towards the personal, but where such a regime has been constitutionalized it has been done by charter, i.e., by a grant from the ruler.

In the organic model, politics is supreme, but it is the politics of a club or clubs, oligarchical in nature. Administration is designed to do

the bidding of politics so it moves from the center outward, while the constitution essentially consists of the traditions of the polity which have been codified into law.

In the federal model, the constitution must come first since it establishes the rules of the game for all to know and whose openness enables all in the polity to play. That openness leads to a politics that strives to be maximally open and is conducted through the competition of groups and factions with decisions made accordingly. Administration exists only where necessary and it is divided among the different cells in the matrix with each cell primarily responsible for administering its arena.

The apotheosis of the hierarchical model is an army and its excess is totalitarian dictatorship. The apotheosis of the organic model is the Westminster parliamentary system, designed as a club, and its excess is the Jacobin state whereby a revolutionary cadre controls the center in the name of what is good for the people on the peripheries. The apotheosis of the federal model is a federal system and its excess is anarchy.

Fundamental Forms and Principles of Federalism³

2.1 Federal Democracy

Thus, in the last analysis, federalism has a strong predisposition toward democracy. Some would even argue that to be truly federal a system must be democratic since it must involve public and constitutional choice in every arena. It also means that federal democracy is built on a somewhat different set of premises than democracy based upon the two other models of the polity. Westminster democracy (where parliament is supreme with the government exercising power as long as it is supported by a majority in the parliament) and consociational democracy, one of the current forms of democratic government that needs to be properly understood on its own terms. In those other two models democracy stands in tension with political reality while in the federal democratic model, while it can be perverted, it stands in basic harmony with the model itself.

2.2 Noncentralization

Often federations are considered systems of decentralized government and- perhaps in the case of certain federations that is an appropriate description of them. However, federalism as such is based on noncentralization, that is to say, a political framework which has no single center but rather multiple centers framed by a

shared fundamental law, appropriate governmental institutions, and communications network.

2.3 Checks and Balances

Federal democracy requires that the polity be constructed to provide for appropriate checks and balances, so that every institution is checked and balanced by other institutions which are constitutionally authoritative and practically sufficiently autonomous to sustain themselves politically and socially; in the words of *Federalist 51*, “ambition must be made to counteract ambition.”

2.4 Open Bargaining

Bargaining must not only take place among institutions and their representatives, but be done in the open as a legitimate part of the federal political process. In fact, bargaining takes place in every political system, even in the most centralized or hierarchical ones, by the very nature of human relationships. Federalism, however, is the only system that makes bargaining an integral and required part of the system, subject only to the requirement that it be generally open and accessible. A major part of the politics of federal systems is to maintain the openness of bargaining both in terms of the bargaining itself and access to the bargaining table.

2.5 Constitutionalism

The complexities of making noncentralization, checks and balances, and bargaining work, not to speak of authority and powers divided and shared among the constituent polities and the common (linking,

framing, or overarching) one, represent a powerful impetus for developing clear-cut, mutually agreed upon fundamental rules for ordering these arrangements and others, embodied in written constitutions, that is to say, constitutional documents. In a few cases they are embodied in constitutions where the writing comes piecemeal after consensus has formed around the interpretations. The best examples of the first are the constitution of the United States and its states, and the best example of the second is the constitution of Great Britain.

Federalism, it seems, requires written constitutions, that is to say, agreed-upon constitutional documents embodying the fundamental rules agreed to *a priori* in order to bring the federal system into existence and to give all parties to it a sufficiently common understanding of the system they have erected or joined. In both cases, however, over time these constitutions come to include both the written document or documents and an accepted interpretation, most frequently provided by a supreme or constitutional court for the whole. The legislative and executive branches of government also have a certain role in interpreting the constitution, albeit in different ways and usually to a lesser degree. The weight of constitutional tradition also comes into play in interpretation.

2.6 Fixed Units

Federalism can be either territorial or consociational or both but the demarcations must be fixed constitutionally. Table 6 shows the various species of federation and how they are either one or the other or combine both.

Table 6: Varieties of Federal Arrangements (with selected examples)
Basis – TERRITORIAL

Antigua-Barbuda Japan Solomon Islands Vanuatu	Argentina Australia Brazil Comoros Germany Malaysia Mexico UAE United States Venezuela	Caribbean Community	Denmark-Faeroes Indian-Kashmir Portugal- Azores Portugal-Madeira UK-Guernsey UK-Jersey UK-Man	France-Monaco Italy-San Marino Switzerland- Liechtenstein		ASEAN Benelux NATO Nordic League
Italy Sudan Tanzania United Kingdom	Austria Canada India Nigeria Pakistan Russia Spain Switzerland Yugoslavia	Commonwealth of Independent States European Union	Netherlands-Curacao Denmark-Greenland	Netherlands- Netherlands Antilles India-Bhutan	Andorra-France and Spain	
FORM: UNION	FEDERATION	CONFEDERATION	FEDERACY	ASSOCIATED STATEHOOD	CONDOMINIUM	LEAGUE
Burma China Columbia Equatorial Guinea Netherlands Papau/ New Guinea South Africa	Belgium Ethiopia		Finland-Aaland US-Puerto Rico US-Northern Marianas	New Zealand- Cook Islands New Zealand- Nieu Islands US-Marshall Islands US-Micronesia US-Palau		
Lebanon						

CONSOCIATIONAL

2.7 Territorial and Non-Territorial Arrangements

While in theory the constituent units of a federal system can be nonterritorial, in fact it is the areal division of power which is the most common and successful form of federalism. Apparently only a territorial division can accommodate the two forms of the division of power necessary for a successful polity: 1) a division designed to recognize preexisting groups Belgium, for example, divided between Flemings and Walloons, and 2) a more neutral division based upon who occupies a particular territory at any given time Australia, for example. In the case of the first, if the groups are harmonious, then they can come together in some form of federal system, but if they are not, if they emphasize their separateness as in the case of ethnic nationalism, they are likely to create separatist problems that are not likely to be overcome, robbing the federal system of the needed will to federate on the part of its constituents. Federal systems have been more successful over the long run when there has been a healthy dose of the second, namely, the division of the overall population along neutral territorial lines so that whatever set of interests occupies a particular territory at a given time can find expression through the institutions of that territory, both locally and in the federal whole.

The Puritan colonists of the United States sought to build New England along lines of the first model, dividing the states among different Protestant sects or on the basis of doctrinal differences within the same sect. Their arrangement persisted in modified ways for many years after American independence, but finally under the U.S. Constitution of 1787, in the 1960s the Supreme Court of the United States made the second form of division the required norm as it is today. So, for example, a state like Michigan could be a Yankee stronghold of

farmers and small manufacturers with a strongly moralistic political culture in the nineteenth century, then be transformed into a mix of Yankees, Scandinavians, and Dutch Calvinists that perpetuated the earlier model, plus eastern and southern European ethnic groups with different expectations. When they were joined by Southern American whites and Afro-Americans who came to the state in massive numbers to work in the automobile industry, Michigan changed its political and social expressions without any constitutional change necessary.

Canada, on the other hand, has sought to combine both with Quebec reflecting the first face of territorial democracy and the rest of Canada the second. To date, this arrangement has worked despite many frights and tensions.

History of Federalism



3.1 Earliest Federal Arrangements

While modern federation, originated in 1787 in the United States, is often accepted as the first federal system, federalism has a much more ancient history. The first documented federal system was that of the ancient Israelite tribes that came into being in the thirteenth century before the Common Era or over 3200 years ago. It is a matter of historical dispute whether it was analogous to a federation or a confederation under today's definitions. It is described in the Bible as having elements of both a common constitution (the Torah of Moses) binding on all and a great deal of noncentralization, with most governing powers resting with the individual tribes and the locus of power of daily governance in the townships within each tribe.

The Israelite federal system lasted close to 700 years with various regime modifications such as the introduction of kingship; a division of the kingdom into two separate polities, one consisting of ten tribes and the other of two or possibly three; and the subsequent destruction first of the ten-tribe polity and then, 150 years later, the other one. While that tribal federal system was not restored even after the restoration of the Jews in the Land of Israel, some variant of its constitution became the Utopian blueprint presented in the Talmud for the ultimate coming of the messianic era.⁴ It is likely that there were many tribal "confederations" before, during, and after,

including Bedouin tribes until today and the Native American confederacies in North America but the Israelite Federation was, in all likelihood, the first to have a written constitution in all its detail or a written history.

The early leagues of the Hellenic city-states in what is today Greece proper and in Asia Minor were by today's definitions confederations, that is to say, ultimate authority and even sovereignty were lodged with the constituent units while the leagues governed through them to pursue those common purposes for which they were formed.⁵ Both the Israelite and Greek federal systems were designed to aggregate what were essentially communal democracies to gain certain benefits of scale, usually in the realm of defense. Both disappeared when conquered by larger imperial aggressors, in the case of the Greeks, first by Alexander the Great of Macedonia and then by Rome.

The Roman Republic, at least formally, established yet a third form of federalism, what we now call federacy, an asymmetrical arrangement whereby Rome became the federate power and weaker cities that it conquered or otherwise embraced were attached to it as federal partners, preserving local autonomy and in return not gaining the full political rights of Roman citizens. Later, under the empire, Rome consolidated and, while preserving the forms of federalism on paper, actually became a centralized empire.⁶

3.2 Medieval Federal Arrangements

The next wave of federal developments came in medieval Europe in two ways, both associated with democratic republicanism. Where self-governing cities developed, as in northern Italy or Germany, especially the former, leagues of cities were established as loose

confederations. Those leagues survived as long as it was in the interests of the cities' rulers for them to do so. In the more rural areas of the continent, especially in the mountains and on the European periphery, small republics confined to a particular mountain valley or a piece of a coastal swamp came together first in confederal and then federal arrangements. This was in the case of the Helvetic Confederation (*Coniuratio*) of 1291 which was transformed into the modern Swiss federation in 1848 and in 1991 celebrated the 700th anniversary of its founding, still as a federal system.⁷

The provinces of the Netherlands, both urban and rural, had substantial local autonomy under the Holy Roman Empire (which itself has been considered by some as a federal arrangement), and became an independent confederation in the late sixteenth century after revolting against Spain whose king had become the hereditary Holy Roman emperor. The United Provinces of the Netherlands survived until the Napoleonic conquest. After Napoleon's fall, the Dutch adopted a constitution which preserved the provinces but made them part of a "unitary, decentralized monarchy" which continues to exist as such. After World War II, the Netherlands and their former colonies in the Caribbean reconstituted themselves as the Kingdom of the Netherlands, formally a federal system that provides for special asymmetrical relations between its several parts.

3.3 Political Federalism in the Reformation

The sixteenth century not only secured the survival of the Helvetic Confederation into the modern epoch as Switzerland but also the formation of the Netherlands confederation. Both were political products of the Reformation which also led to the first major burst of

explicitly federal theory. The Bible does provide the elements of a federal theory, but because its purpose was moral education, it does not dwell upon any political teaching except insofar as it needs to for its moral purposes. Theoretical consideration of the principles of federalism was generally ignored by the Greek political philosophers because their theoretical models were not federal and their political philosophers carried through the principles of an organic society resting on the center-peripheral model and rather rejected federalism, which to them was a deformity. In Roman times the hierarchical principles that emerged with imperial rule also had no place for federal theory.

There were some early sprouts of federal theory in connection with the medieval experimentation, especially with regard to the councilor movement which has to be looked upon as one of the sources of the idea of subsidiarity, later to become prominent in the Catholic Church and most recently in the European Union. Overall, however, there was no explicit systematic theory before the Reformation.

The political thought of Reformed Protestantism was founded on the same principles of covenant that were found in the Bible and animated the federalism of ancient Israel. Building on covenant ideas, Reformed Protestantism developed a federal theology (so named explicitly) to explain the relationship between man and God. Their theologians and political philosophers applied that theology to the relationship between human rulers and ruled, to denounce tyranny as a violation of God's ordinances, and to authorize the people under their legitimate leaders to take decisive action to remove tyrants. In the process of doing both, the Reformed theologians had to begin to articulate a political theory of federalism

which was developed in full-blown fashion by Johannes Althusius in his *Politica Methodice Digesta*, the first comprehensive published theory of federalism. This political theory emphasized the self-organization and self-government of normatively homogeneous commonwealths.

3.4 Federalism and Modern Statism

Soon after the publication of the third edition of Althusius's *Politica* in 1614, the world took a turn away from federalism toward modern statism. In the seventeenth century, comprehensive federal theories were replaced by efforts on the part of German theorists to provide a grounding for a restored and modernized Holy Roman Empire and English theorists who sought to develop interstate comity in the sphere of international relations.

The most important developments took place on the ground. The founding of the British settlements in North America, especially in New England, often was based on federal arrangements growing out of Reformed Protestantism. They were the first successful models of modern federalism.⁸ Thus Connecticut and Rhode Island were federations of towns from the first, as was Massachusetts for all intents and purposes. Moreover, the four colonies of Plymouth, Massachusetts, Connecticut, and New Haven formed the New England Confederation in the seventeenth century for security purposes.

3.5 The Federalist's Theory of Federalism

In the eighteenth century there was a rediscovery of federal theory with elaborations on the theory of confederation in secularized form by Montesquieu and Rousseau, culminating in the invention both of modern confederation and federation by the founders of the United States of America. Their principal theoretical work was *The federalist*, a collection of essays explicating on and propagandizing for the adoption of the Constitution of 1787.⁹ It was in *The federalist* that those in favor of federation expropriated the term federalism, labelling their opponents, those who preferred a reformed confederation “anti-federalists,” terms which stuck in the United States and ultimately became more or less universally accepted even beyond U.S. borders.

Federal theory in the United States has since 1788 unfolded almost exclusively in relation to the American situation. Such figures as John C. Calhoun argued a confederalist position.¹⁰ Orestes Brownson argued a federationist one, as did Daniel Webster.¹¹ Abraham Lincoln, who is often overlooked in the federalist debate, not only led the Union during the Civil War to preserve it but developed a revised covenantal theory of federalism to respond to Calhoun and justify the Union position.¹² Woodrow Wilson, while claiming to be a supporter of federalism, essentially rejected it in favor of the center-periphery model.¹³ Confederalist theory disappeared from the American scene as a vital part of the national debate as a result of the Civil War. Alexander H. Stevens, former vice president of the Confederate States of America, published the last major work presenting the confederalist viewpoint in his *The War Between the States* to defend the Southern perspective.

Meanwhile, a debate developed between the national organicists, originally adapted to the American scene by Francis Lieber, a German refugee of 1848 who became the first professor of political science in the United States, and the federalists. It continued into the twentieth century. The former increasingly came to represent the major stream in political science following the path set out by Woodrow Wilson, or in its hierarchical form by Max Weber, while a minority, who often drew more public attention than their colleagues, continued the line of federal theory, albeit modified by the other influences. These included figures such as Andrew McLaughlin, Edward Corwin, and William Anderson.¹⁴

3.6 Modern European Federal Theory

Meanwhile, in nineteenth century Europe, four schools of federal theory arose. One, exemplified by the work of Alexis de Tocqueville, tried to understand the strengths and weaknesses of the American experience.¹⁵ The second, developed principally by the German language political theorists who were concerned about the possibilities and problems of federalism in the Germanic countries, developed rather ponderous Germanic expositions of the difference between *bundesstaat* and *staatenbund*.

A third group, exemplified by Pierre-Joseph Proudhon and anchored in the French tradition, advocated a broader federal theory that included a strong social as well as a political dimension and was more utopian in character, seeking to rebuild the world with greater harmony along more cooperative lines that would replace the various basic political conflicts that emerged in society during the nineteenth century.¹⁶ The most extreme manifestations of this thought, usually

found among Russians, were the anarchists who wanted to eliminate all coercive authority by eliminating government altogether and relying upon the decent instincts of humanity, which they saw as truly natural but suppressed by organized society, to enable humans to live cooperatively.

A fourth group arose within the British empire who presented theories of imperial federalism or how to achieve the more limited goal of transforming the British empire into a worldwide federal system. Indeed, many of the new federations of the nineteenth century such as Canada and later Australia drew upon that tradition, albeit in more limited ways. In Ireland, on the other hand, they were rejected in favor of independence from the hated British, while in New Zealand they were rejected in favor of dominion status that asked for nothing other than to replicate the British system domestically and accept the British lead in foreign affairs. They also had an impact in South Africa, first in leading the British to go to war with and conquer the Boer republics and then to establish South Africa as a union that soon came to be dominated politically by the Afrikaners while a dominion within the British empire.

Latin American federalism was unique in explicitly linking federalism and liberalism in a simple, democratic package. As part of its imitation of U.S. federalism, its leaders saw the connection between liberal doctrine and federal practice, so they more formally linked the two, although in fact Latin American federalism suffered from the problems of hierarchy, authoritarianism, and instability which plagued that continent through much of the nineteenth century.

3.7 Federalism After World War II

Most of these theories were overwhelmed by the events of the twentieth century though echoes of all of them except the last persist. On the European continent theories of federation were rejected after World War II in favor of “functionalist” theories which opened the door to the establishment of new forms of confederation.

Meanwhile, new federations were founded or restored in central and eastern Europe (Germany, Austria, Czechoslovakia, Yugoslavia), Africa (Nigeria, Comoros, Ghana, Kenya, Uganda, Tanzania), and Asia (India, Malaysia, Pakistan, United Arab Emirates, United Arab Republic). Many were short-lived since neither the political culture nor the political climate were conducive to their survival. Others became quite firmly anchored in time.

Germany and Austria, where federalism had been restored after nazism, flourished as federal systems and were joined in time by Belgium and Spain. Czechoslovakia and Yugoslavia, on the other hand, like the USSR, had Communist-style federalism imposed on them so it never took root. Both were broken up once they threw off their Communist yoke. In Africa, only Nigeria, the Comoros, and Tanzania remained federal in any way, in all three cases with a federalism more formal than real although their commitment to federal arrangements was real enough. In Asia, where federalism followed along its animating principles, it was deepened and even entrenched. Elsewhere, where it was a cover for authoritarian rule, it disappeared.

Federalism Today

Other supportive elements supplement the three basic ones. They can be grouped according to their primary impact on the systems they serve.

4.1 Maintaining Union

Modern federations generally provide direct lines of communication between the citizenry and all the governments that serve them. The people may and usually do elect representatives to all the governments, and all of them may and usually do administer programs that directly serve the individual citizen. The existence of those direct lines of communication is one of the features distinguishing federations from confederations. It is usually based on a sense of common nationality binding the constituent polities and people together. In some countries this sense of nationality has been inherited, as in Germany, while in the United States, Argentina, and Australia it had to be at least partly invented. Canada and Switzerland have had to evolve this sense in order to hold together strongly divergent nationality groups. Yugoslavia failed to do so. In the more recently formed federations of India, Malaysia, and Nigeria, the future of federalism is endangered by the absence of such a common national sense.

Geographic necessity has played a part in promoting the maintenance of union within federal systems. The Mississippi Valley in the United States, the Alps in Switzerland, the island character of the Australian continent, the mountains and jungles surrounding Brazil have all been influences promoting unity; so have the pressures for Canadian union arising from that country's position bordering the American colossus to the south and the pressures upon the German states generated by their neighbors to the east and west. In this connection, the necessity for a common defense against common enemies has stimulated federal union in the first place and acted to maintain it. In contemporary confederal arrangements, economic needs are of primary importance for far-reaching union, having replaced security needs under the conditions of the postmodern epoch.

4.2 Maintaining Noncentralization

The constituent polities in a federal system must be fairly equal in population and wealth or else balanced geographically or numerically in their inequalities. In the United States, each geographic section includes both large and small states. In Canada, the ethnic differences between the two largest and richest provinces have prevented them from combining against the others. Swiss federalism has been supported by the existence of groups of cantons of different size categories and religio-linguistic backgrounds. Similar distributions exist in every other successful federal system.

A major reason for the failure of federal systems often has been a lack of balance among the constituent polities. In the German federal empire of the late nineteenth century, Prussia was so dominant that the other states had little opportunity to provide national leadership

or even a reasonably strong alternative to the policy of the Prussian king and government, who also served as the government of the federation. In the Soviet Union, the existence of the Russian Soviet Federated Socialist Republic occupying three-fourths of the area and containing three-fifths of the population would have severely limited the possibility of authentic federal relationships in that country even if the Communist system had not.

Successful federal systems have also been characterized by the permanence of their internal boundaries. Boundary changes may occur, but such changes are made only with the consent of the polities involved and are avoided except in extreme situations. The United States divided Virginia during its Civil War, Canada enlarged the boundaries of its provinces, and Switzerland has divided cantons but these have been exceptions rather than the rule, and in every case the formal consent of the constituent polities was given. Even in Latin America, state boundaries have tended to remain relatively secure; one of the major bulwarks of Latin American federalism has been the coincidence of state boundaries with major social and economic interests or ethno-cultural groups.

In a few very important cases, noncentralization is given support through the constitutionally guaranteed existence of different systems of law in the constituent polities. In the United States, each state's legal system stems directly and to a certain extent uniquely from English (and, in the case of Louisiana, French) law, while federal law occupies only an interstitial position binding the systems of the 50 states together. The resulting mixture of laws keeps the administration of justice substantially noncentralized even in federal courts. In Canada, the existence of common-law and civil-law

systems side by side has contributed to French-Canadian cultural survival. Noncentralized legal systems are a particularly Anglo-American device, based as they are on traditional common law. Other federal systems more often provide for modification of national legal codes by the constituent governments to meet special local needs, as in Switzerland.

The point has often been made that in a truly federal system the constituent polities must have substantial influence over the constitutional amendment process. With regard to the formal process, incorporation of a federal procedure into the constitution normally provides that, but since constitutional changes are often made without formal constitutional amendment, the power position of the constituent polities must be such that serious changes in the political order can be made only by the decision of dispersed majorities that reflect the federal division of powers. Federal theorists have argued that this is important for popular government as well as for federalism.

Noncentralization is also strengthened by giving the constituent polities guaranteed representation in the general (national) legislature and often by giving them a guaranteed role in the general (national) political process. The latter is guaranteed in the written constitutions of the United States and Switzerland. In other systems, such as those of Canada and Latin America, the constituent polities have acquired certain powers of participation, and these have become part of the unwritten constitution.

Perhaps the most important single element in the maintenance of federal noncentralization is the existence of a noncentralized party

system. Noncentralized parties initially develop out of the constitutional arrangements of the federal compact, but once they have come into existence they tend to be self-perpetuating and to function as decentralizing forces in their own right. The United States and Canada provide examples of the forms that a noncentralized party system may take.

In the separation of powers/two-party system of the United States, historically the parties are actually coalitions of the state parties (which may in turn be dominated by specific local party organizations) and function as national units only for the quadrennial presidential elections or for purposes of organizing the national congress. Party financing and decision making are dispersed either among the state organizations or among widely divergent nationwide factions. Since executives are directly elected and do not hold office by virtue of the confidence of the legislature, much less party discipline is necessary for parties to gain power. Thus, there is a great deal more fragmentation even within the states. In recent decades the court-generated expansion of the idea of open parties has meant that almost anyone may file for candidacy in party primaries in which almost anyone may vote, thus doubly weakening party organizations and making party discipline, state or national, far more difficult.

In Canada, on the other hand, the parliamentary form of government with its requirements of party responsibility, means that on the national plane considerably more party cohesiveness must be maintained simply in order to gain and hold power. There has been fragmentation of the parties along regional or provincial lines. The one or two parties that function on a nationwide basis are subject to

great shifts in popular support from one election to another. They are also divided internally along provincial lines, each provincial organization being more or less autonomous; as the same time, individual provinces are frequently dominated by smaller parties that send only a few representatives to the national legislature. The party victorious in national elections is likely to be the one able to expand its provincial electoral basis temporarily to national proportions.

Federal polities with less developed party systems frequently gain some of the same decentralizing effects through what the Latin Americans call *caudillismo* in which power is diffused among strong local leaders operating in the constituent polities. Caudillistic noncentralization apparently exists also in Nigeria and Malaysia.

Ultimately, however, noncentralization is maintained through respect for the federal principle. Such respect requires recognition by the decision-making publics that the preservation of the constituent polities is as important as the preservation of the nation as a whole. As the American Chief Justice Salmon P. Chase said, federalism looks to “an indestructible Union, composed of indestructible States” (*Texas v. White* [1869]). This recognition may spring from loyalty to particular polities or from an understanding of the way federalism functions. Those who value a politics of conciliation and local autonomy are most likely to have respect for the federal principle.

The historical record indicates that federal systems have arisen out of the dual purpose implied in Chase’s dictum at least as often as from a desire for political unification. The Canadian confederation was formed not only to unite the British North American colonies but also to give Ontario and Quebec autonomous political systems.

Similarly, a guiding purpose in the evolution of the Swiss confederation has been to preserve the independence of the cantons both from outside encroachment and from revolutionary centralism. A good case can be made that similar motivations also played a part in the creation of most other federal systems.

4.3 Elements Maintaining the Federal Principle

Several of the devices commonly found in federal systems serve to maintain the federal principle itself. Two of these are of particular importance.

The maintenance of federalism requires that the general government and its constituent polities each have substantially complete governing institutions of their own, with the right to modify those instructions unilaterally within the limits set by the compact. Both separate legislate and separate administrative institutions are necessary. This does not require that all governmental activities be carried out by separate institutions on each plane. The agencies of one government may serve as agents of the other by mutual agreement. But each government must have enough of its own institutions to function in the areas of its authority wherewithal to cooperate freely with the other's counterpart agencies.

The contractual sharing of public responsibilities by all governments in the system appears to be a central characteristic of federalism. Sharing, broadly conceived, includes common involvement in policy making, financing, and administration. Sharing maybe formal or informal; in federal systems, it is usually contractual. The contract is used as a legal device to enable government to engage in joint action

while remaining independent entities. Even where there is no formal arrangement, the spirit of federalism tends to infuse a sense of contractual obligation.

There are likely to be continued tensions in any federal system between the federal government and the constituent polities over the years, with different balances between them at different times. The existence of these tensions is an integral part of the federal relationship. The questions of intergovernmental relations that they produce are perennially a matter of public concern, because they are reflected in virtually every political issue that arises. This is particularly true of those issues that affect the very fabric of society. The race question in the United States, for example, was a problem of federal-state relations until the late 1960s, as is the cultural question in Canada and the linguistic question in India.

The more noncentralized a federal system is, the more likely it is to rely upon collegiality as a means of decision-making, whereby all the constituent units are represented more or less equally in a common collegial decision-making body. This is particularly true of confederations, as in the case of the Council of Ministers and the European Commission of the European Union, but it is also true of federations like Canada where the First Ministers Conference and its parallels play a major role in governance.

Federal systems or systems strongly influenced by federal principles have been among the most stable and long lasting of polities. But the successful operation of federal systems requires a particular kind of political environment, one that is conducive to popular government and has the requisite traditions of political cooperation and self-

restraint. Beyond this, federal systems operate best in societies with sufficient homogeneity of fundamental interests to allow a great deal of latitude to local government and to permit reliance upon voluntary collaboration. The use of force to maintain domestic order is even more inimical to the successful maintenance of federal patterns of government than to other forms of popular government. Federal systems are most successful in societies that have the human resources to fill many public offices competently and the material resources to afford a measure of economic waste as part of the price of liberty.

5 United States:

An example of constitutionalized noncentralization

After the foregoing review of general principles, forms and expressions of federalism, for the purposes at hand it is wise to turn to examine the workings of a national federation, a union of states sharing a common national identity and whose people have determined that the federal dispersion of power and the conduct of government on a noncentralized basis is vital to the purposes of government which they pursue. The best example of such a federation for our purposes is that of the United States of America, the first federation and still the classic model. The United States includes all the components that students of federalism need for studying a modern federation, both positive and negative, and is considered by many people as worthy of emulation.

5.1 Federalism as Compact and Partnership

The roots of the American understanding of federalism lie in the covenant idea. For Americans that means looking at its biblical origins through the prism of the Puritan adaptation of their federal theology for political purposes on one hand, and the secular political adaptations of covenant by the western European mostly British compact theorists, especially Hobbes and Locke; Harrington and

Sidney; and the philosophers of the eighteenth century Scottish Enlightenment, all of whom had their roots in one variation or another of the covenant tradition. Their ideas matched the realities of American political life in the colonial and Revolutionary periods. Many, if not most, of the colonial foundings in the seventeenth century, as well as the national founding in the eighteenth century, involved covenanting and/or compacting among people who saw themselves as equal partners from a political and theological standpoint, embarked on a common errand into the wilderness which required the development of new institutions for survival and for building a city upon a hill.¹⁷

The realities of American life led to the indigenous development of political theories of covenant and compact before Hobbes and Locke the ones put into practice in various ways from the Mayflower Compact (1620) to the New England Confederation (1643), to the organization of Vermont just before the American Revolution. The result was that the United States was born with federal principles, practices, and political culture already pervasive, including a strong commitment to maintaining the diverse integrities of the various constituents of the union, constitutional forms for doing so, and the habit of working together to achieve common ends.

All of these elements have continued to inform the American federal system. They, in turn, led to the idea of partnership or constitutional noncentralization, whereby power was to be diffused among many centers and that diffusion constitutionally entrenched and protected. One need look no further than the term “pardner,” the archetypical cowboy salutation, in the American mystique to get a proper sense of what is involved in constitutional noncentralization.

The American system is a federal-state-local-public nongovernmental-private partnership, a complex of institutions and actors that combine in different ways in connection with different “games” conducted within the framework of the American constitutional system. The way they share or divide responsibility in connection with those games is the essence of American federalism. In part that way is determined by constitutional arrangements and in part by pragmatic considerations.¹⁸

Noncentralization differs from decentralization in that decentralization requires a center where decisions are made determining what is to be decentralized and he who can decentralize can recentralize. Noncentralization requires that there be no single center but, rather, a dispersal of power among many centers that must coordinate with one another to make the body politic work. This reality requires us to consider what models are proper for describing federalism and which are not.

The U.S. political system is solidly rooted in the matrix model (see Figure 1) and reflects a polity compounded of arenas within arenas.

The interorganizational relationships within each develop accordingly. At the same time, it is in the nature of politics that various groups, parties and interests interact with each other to give the system life. The interaction between them and the shared institutional framework among them represents the substance of the political process.

The federal government provides the frame uniting the cells or constituent units, each of which has its own governing institutions. In the matrix model there can be cells within cells, reflecting the

various arenas of political and governmental organization. The matrix model reflects the way in which federalism is based on the premise that there are no higher or lower arenas of government, only larger or smaller ones; also, that good fences make good neighbors, and at the same time the premise that there must be interaction among the cells if the system is to work. That interaction is what we refer to as cooperative federalism.

To the extent that those involved in American governance have come to conceive of the American federal system as a pyramid with federal, state and local “levels,” in the twentieth century, they have opened the door to the transformation of cooperative federalism into coercive federalism based upon a hierarchy of levels. In any hierarchy, the top is expected to have more authority and power than the middle or the bottom, which contradicts the basic principles of federalism. By the same token, a proper understanding of the theory and practice of cooperative federalism requires an understanding of the authentic theory of federalism, not the center-periphery model characteristic of parliamentary systems or the hierarchical-pyramidal model characteristic of bureaucratic structures.

In measuring the differences in the character of cooperative federalism in different epochs in American history, one needs to look at the strength of the fences within the matrix, how permeable the boundaries between the cells are, and the character of the communications between and among them. The matrix model lends itself to a cybernetic understanding of federalism which, as Martin Landau has argued, is far more accurate than any other in describing how a federal system works. In a cybernetic model, what counts are the channels of communication which link the cells. In sum, the federal system is a matrix, not a marble cake; there is real separation

between the cells or arenas but, because the smaller cells are within the larger ones, there also is permeation and intermixture.¹⁹

5.2 The Elements of American Federalism

Cooperative federalism additionally rests upon the idea that within the American federal system more interests are shared than not. A dynamic society such as that of the United States generates shared public demands. In seeking governmental action, people do not easily distinguish among governmental arenas. Moreover, the nature of the American division of powers almost inevitably requires shared governmental responses if anything is to be done. The alternative would be unilateral action by one arena of government or another. Experience tells us that the arena likely to assert itself most vigorously is the federal government. For a whole host of reasons, were federalism not cooperative, the states and localities would have little defense against federal seizure of their powers. That this has not happened any more than this is because cooperative federalism has been the norm.

Also central to the idea of cooperative federalism is the idea that cooperation is negotiated. If there is not negotiated cooperation, it becomes either coercive or antagonistic. Negotiated cooperation has two dimensions sharing and bargaining. The sharing dimension reflects the assumption that intergovernmental cooperation is a good thing and, in many cases, public-private cooperation is as well. It also assumes that sharing should be patterned and not random. The way to achieve proper patterns of sharing is through bargaining.

In other words, cooperative federalism introduces into a system of government, which like all governments ultimately rests on its ability to resort to the exercise of coercive powers, a marketplace dimension which functions to minimize the amount of coercion exercised and, through negotiation, maximize the degree of consent. Under such circumstances, the establishment of intergovernmental programs and their funding through intergovernmental transfers are bases, almost licenses, for bargaining. Viewing the American federal system as the game of games, it is possible to determine how each governmental arena pays the price of admission to participate in the game. The federal government uses its superior resources and better ability to attract public attention, the states use their constitutional position as the keystones in the governmental arch, and local governments use their ability to exist as constituted governments, normally with taxing powers, and their direct connections with the citizenry. Once having paid the price of admission, these governments have the right and the duty to bargain over what is to be shared and how. They are, in essence, “licensed” and expected to do so.

A further word may be helpful here on the role of local governments and nongovernmental interests. Much governmental business in the United States is conducted on a public-private continuum what we might call a complex linking governments, public non-governmental bodies, and even private bodies to a point. Locally these are united through the “civil community,” the bundle of institutions and actors organized to promote and defend the local value system. Local civil communities function within and parallel to the state and federal civil societies.²⁰

In describing the relationship between all these elements, another metaphor is useful. For the citizen, the system is one of “multiple cracks” in the two senses of fissures and of blows which open access to the system in addition to as well as representation is a vital part of the formal as well as informal process. The American federal system has many “cracks” points of access and entry. All political systems, even the most hierarchical and rigid, have some room for negotiation and bargaining, even if only through “court politics.” (The differences are graphically portrayed in Table 5). A key aspect of the American system is that negotiation and bargaining are accepted as legitimate and put on the table out in the open to increase equality of access to the maximum.

The drawback here is that through sharing and bargaining, cooperative federalism can become cartelistic. Governments working together on a continuing basis try to establish monopolies or oligopolies in different games. In reality, these cartels are limited by the existence of the multiple crack which continually opens new doors for access and influence, frequent elections that change the people involved, and the formal “fences” of separation of powers and arenas.

That pervasiveness of sharing as provided by the constitutional framework is striking, with its emphasis on concurrent or cooperative functions the former open to sharing and the latter requiring it. So pervasive is sharing that even so-called exclusive functions have become shared functions.

Sharing is accomplished through politics, through professionalization, and through proximity, as well as by design. While observers tend to focus on the last, the formal intergovernmental programs, as

the most visible form of sharing, the other three are at least equally important. Today, sharing by design is probably the safest form with regard to the health of the federal system. It is where politics, professionalization and proximity are involved that coercive elements sometimes come, precisely because less attention is paid to the necessity to systematize and constitutionalize the sharing that takes place in those areas.²¹

Politics, especially Congressional politics, has been a major arena for shaping the character of American federalism. Until the 1960s, the political influence of the states meant that Congress would favor and protect them in any federal legislation, even in seemingly unilateral federal programs. Subsequently, the political power of local, especially big city and private bodies in Congress, led to a weakening of the states' position in this respect. Lately there seems to have been a reversal in the state-local-private balance, but it is accompanied by a Congress that is more assertive of federal powers (e.g., federal mandates and regulations) because members of Congress are less likely to come out of state-oriented political environments and have experience in state government and politics prior to entering Congress. Thus sharing through politics has undergone possibly substantial changes in the past generation. On the other hand, one way or another the cooperative system has reinforced intergovernmental sharing within politics. Thus if the state political parties have lost power in choosing presidents through the primary and caucus system, the people as citizens of their states have become very influential.

Sharing through professionalization was particularly important during the days of governmental expansion beginning with the New

Freedom (1913-17) and accelerated with the New Deal (1933- 41). In recent years it has become more routine, but remains an extremely important dimension of cooperative federalism as professionals in various fields share experiences and standards regardless of the governments they serve, or whether they serve in governmental, public non-governmental, or even private frameworks.

Sharing through proximity ranges from the simplest kind of sharing of services by adjacent governments (e.g., fire fighting equipment and services) to state involvement in foreign affairs. Thus the states became involved with foreign economic activity because in their efforts to maintain jobs and strengthen their economies, they found themselves willy-nilly in proximity to Washington in dealing with foreign trade and investment issues. The federal government has recognized this and encouraged further state involvement.²²

With regard to the varieties of sharing we now have several typologies which help us to refine our understanding of cooperative federalism. The simplest division is simply to examine forms of cooperation as informal collaboration (e.g., conferences and consultations), channels for simple sharing (e.g., crop reports), interchange of personnel (e.g., police), interdependent activities (e.g., regulation of elections), transfers of payments, grants-in-aid, tax offsets, and shared revenues. On a different level we have the typology of intergovernmental political relationships developed by Fritschler and Segal as shown in Table 7.²³

Table 7: A Typology of Intergovernmental Political Relationships

Type of Political Relationships	Attitudes of Actors	Actors and Levels of Decision-making	Scope of Participation	Nature of Bargaining	Nature of Administrative Guidelines
Joint Policy-making	Cordial and friendly	Bureaus	Functional hierarchies	Routine	Understood and accepted by all parties
Mutual Accommodation	Competitive	Bureaus, special interest groups. congressional sub-committees. aid coordinators	Subsystems	Negotiated Bargaining	Flexible
Innovative Conflict	Manipulative - Defensive	Department heads. special interest groups, congressional subcommittees and non-committee members, aid coordinators. White House staff	Subsystems with "outside" Interventions	Non-negotiated Bargaining followed by Negotiated Bargaining	Less flexible
Disintegrative Conflict	Hostile	Department heads, special interest groups, congressional committees and delegations. local political actors, courts	Macro (System- wide)	Non-negotiated bargaining	Inflexible

Source: A. Lee Fritschler and Morley Segal "intergovernmental Relations and Contemporary Political Science," *Publius: The journal of federalism* 1 (Winter 1971):95-122.

Donald Rosenthal has suggested yet another way to look at bargaining relationships within cooperative federalism by examining the values inhibiting bargaining, the distributive and regulatory aspects of bargaining, the existence and influence of zones of indifference, the indeterminacy problem, and the floating actor as a factor.²⁴

5.3 The Requisites of National Federalism

Federalism in the United States is national; that is to say, the United States is one federal nation, not a confederation of nations. National federalism is based upon four principal requisites:

- a) There must be a federalist *theory* of government. It must emphasize a noncentralized approach to governance that combines national supremacy with broad national legislative and appropriation powers and maximum local control.
- b) There must exist a dualistic governmental *structure* with separate government institutions for each plane, sufficiently comprehensive so that the states as well as the federal government can be complete governments in their own right. These must be reinforced by a noncentralized, non-disciplined party system which strengthens the noncentralized distribution of power and prevents the de facto concentration of power in a de facto center. Finally the states and localities must be the primary managers of domestic programs, whether intergovernmental or not.
- c) Federalism must be manifested through specific cooperative *programs* developed through a system of contractual relations. In the United States this has led to a smorgasbord of specific

cooperative programs that is, in many respects, distinctly American. Other federal systems are able to maintain cooperative relationships through general revenue sharing devices. These have not worked in the United States. Rather they have led to greater centralization as Congress has utilized the opportunity provided by grants of general fiscal assistance to set general conditions binding on state and local governments beyond the specific conditions required for specific programs. It is the smorgasbord of programs so often criticized by those who would reform the system that gives American cooperative federalism its flexibility.

- d) Finally, the system rests on a set of administrative *techniques* for collaboration, including regular intergovernmental consultation and negotiation, routinized legislative “interference” in program administration, and the development of new or revised programs on a cooperative basis.

It is the combination of these four requisites that makes federalism viable in the United States.

5.4 Changing Patterns of American Federalism

While cooperative federalism has been a constant, the character of the federal system has shifted at various times in American history. Any proper theory of cooperative federalism must have a dynamic dimension, in other words it must be able to track the sources of change in the system. Four basic internal sources of change can be identified:

- 1) increases or decreases in the velocity of government;

- 2) the growing complexity and interconnectedness of government activities;
- 3) the progressive routinization of administrative procedures; and
- 4) shifts in the character of recruitment into political life.

Taken together, the foregoing shape the relative importance of the seven planes of government at any given time.

The basis for determining the character of federalism in any particular time is through an examination of the basic trends in American political life and how they find expression in the forms and fields of intergovernmental collaboration. With this general formula we can identify four principal periods, each two generations in length: the formative period (1789-1848); the era of national infrastructure development (1848-1913); the period of apologetic federal intervention (1913-1977); and a new period beginning in 1977 which has, paradoxically, emphasized both federal preemption and renewed state initiatives, whose definitive character is not yet clear. Each responded to the basic economic, social, political, and intellectual trends in American life at the time, especially as shaped by the then-dominant frontier of development. Each developed its own forms of and devices for intergovernmental collaboration. Each emphasized certain specific fields of cooperative activity as principally important.

5.5 The Constitutional Basis of American Federalism

So far I have not emphasized the constitutional basis of American federalism, not because it is not important. On the contrary, one of the principal characteristics of the American system is its emphasis

on constitutional design. One of the virtues of cooperative federalism as a theory is that it goes beyond simple concern with constitutional law to treat larger issues of constitutionalism and constitutional design. A proper theory of federal constitutionalism rests on the understanding that any full blown constitution has three components:

- 1) the frame of government dealing with the governmental and political structure and component institutions;
- 2) the socio-economic distribution of power as reflected in the system of “games” in the polity and “complexes” of interests and actors surrounding each game;
- 3) the moral basis of the constitution as reflected in the political culture and norms that shape the people’s conception of justice and the rules of the game.

With this in mind, the theory addresses the problem of constitutionalism in a dynamic system, including the role of institutions and structures as related to political behavior, the problem of measuring constitutional change, and the differences between perception and reality. American federal theory understands that the American constitution consists of the federal and state constitutions together, that the federal constitution is incomplete without the state constitutions upon which it rests, and the latter are incomplete without the former.

The sources of American constitutionalism are to be found in the colonial charters, covenants and constitutions and the early state constitutions adopted at the time of the Revolution, as well as the Articles of Confederation which established the principle that the

United States of America came into existence with independence and reflects the permanent federal linkage of the states. In the case of both the Articles and the Constitution of 1787, the motives of national constitution-making were to establish a more perfect federal union. Both reflected the founders' understanding of this as coming about through necessary intergovernmental collaboration. The Articles of Confederation required such collaboration to function at all since the Confederation government could only operate through the states. To the extent that the Constitution of 1787 deliberately provided for direct connections between the federal government and the citizens of the United States, it introduced a dimension of dual federalism absent in the Articles. But since it provided that so many powers were to be cooperative or concurrent, that dual federalism should not be exaggerated.²⁵

With regard to constitutional interpretation, federal theory notes several dimensions. In many cases the various branches of government simply apply the plain text, as for example, in the conduct of regular elections as specified in the U.S. and state constitutions which require no interpretation. Much of the Constitution is interpreted through the statutes enacted to translate constitutional provisions into ordinary law. While statutes can and are challenged by the courts, most legislation is not, and even where such challenges are made, they usually relate to some small part of the legislation at hand.

Most widely noted is judicial review or interpretation by the United States and state supreme courts. Here it can be said that in most cases affecting federalism, the courts address the federalism issue only marginally, emphasizing instead other constitutional issues.

Moreover, court opinions tend to reflect abstract principles of law rather than accepted realities. That is both their strength and their weakness. Courts other than the United States Supreme Court are also involved in constitutional interpretation state supreme courts certainly, especially in recent years. Third in line are federal appellate courts that bear much of the responsibility for giving tone to U.S. Supreme Court decisions.

Another source of constitutional development is through administrative interpretation. These ordinarily include presidential actions and executive orders, administrative rules and regulations. Most important are the ideas and actions of those whom I have elsewhere termed the architects of American federalism men like Albert Gallatin, John Marshall, John C. Calhoun, Abraham Lincoln, Franklin D. Roosevelt, Lyndon B. Johnson, William Brennan, and Sandra Day O'Connor, who set long-term patterns for shaping American federalism and intergovernmental administration.

Finally there is interpretation through popular understanding. Here we would include the struggle in intellectual circles between federalist and Jacobin understandings of the nature of democracy and popular government. Within the federalist camp, there is the struggle between Marshallian and Jeffersonian views of the proper role of the federal government. Every generation has its struggle between "strict constructionists" and "reformers." All of these have contributed to the development of what may be called "legitimate constitutional heresies" widely held understandings that never have been give the force of constitutional legitimacy. These include nullification and interposition, on one side, and civil disobedience and protest, on the other.

5.6 Perceptions of the Federal System

Any proper theory of federalism must also reckon with the perceptions of the system on the part of the general public, political and civic leaders, and disciplined observers. In the case of each of these groups, perceptions come in both abstract and concrete forms and the two are often contradictory. Thus, among the general public there is an abstract perception of what Li'l Abner used to call "the gummint" out there, without distinction as to plane or arena. On the other hand there are concrete perceptions derived from political interest which are almost invariably developed under conditions of conflict. This leads to a perception of the system principally through a conflict model whereby individual governments may appear principally as separate entities striving for power or autonomy, or blocking some worthy governmental activity.

The abstract perceptions of political and civic leaders tend to be more sophisticated but at any given time, to be drawn from the currently conventional model. Thus in the days of dual federalism they perceived the system as one in which the federal and state governments each functioned within their own spheres with a minimum of contact and overlapping. Once the cooperative federalist model became the norm, they began to view the system as a marble cake in which there were no separations between the federal and state governments. When their concrete interests are involved, their perception tends to shift to one of intergovernmental interaction to a greater or lesser extent, depending on the nature of the issue and the degree and character of the interaction affecting it. Their involvement enables them to see this and also to see that the system has elements of both cooperation and conflict.

The disciplined observers were once drawn almost entirely from selected political leaders whose special abilities or interests led them to develop disciplined views of the federal system, such as Madison, Gallatin, and Calhoun. Today this group generally consists of academics, quasi-academics such as the staff of the Advisory Commission on Intergovernmental Relations, and a handful of journalists who specialize in the subject. They tend to perceive the system as it is in light of their detached observations but these observations often rest on a conception of what the system ought to be, based on some normative theory explicit or implicit. Sometimes they confuse the two. Nor is there any guarantee that they accurately see the system as it is.

5.7 The Future of the Federal System

Were American federalism to rest upon the simplistic theory its critics make it out to be, they would certainly be correct in suggesting that the theory is inadequate to explain the workings of a federal system. The more sophisticated understanding of federalism presented here, on the other hand, should not suffer from that problem since it is a dynamic theory that can take into account changes in the situation and resultant changes in political and administrative behavior and constitutional interpretation. Any appropriate theory must be able to deal with the current problems in the preservation of the system's integrity which are exacerbated by the fact that most decisions affecting its integrity do not make federalism their primary concern.

These current problems include:

- 1) a pattern of constitutional interpretation by the U.S. Supreme Court that treats federalism as secondary to most other issues;
- 2) legislative actions by the U-S. Congress, as in the case of federal statutory preemption of fields in which powers are otherwise concurrent;
- 3) administrative actions by the federal executive, particularly in the form of administrative regulations restricting state and local activity;
- 4) intrusive judicial action, principally in the form of judicial intervention into state governmental procedures and functions;
- 5) fiscal problems such as the removal of federal exemption of state and local municipal bonds;
- 6) legal issues such as the expansion of federal jurisdiction, thereby transforming federal law from being interstitial to being dominant in an increasing number of areas.

Curiously enough, after cooperative federalism became the dominant theory, the question of separate and concurrent powers took a new turn, leading to a new kind of dual federalism through full federal preemption of fields previously deemed to be concurrent and through the limitation of reciprocal tax immunity.

Where does this leave the United States with regard to the contemporary distribution of the great constitutional powers? In matters of commerce, the U.S. Supreme Court has abjured any role in determining the boundaries between the federal government and the states. Under present Court doctrine, Congress has plenary

powers in matters of interstate commerce which have been so extended as to include essentially all commerce. More problematic, it has in many cases become a preemptive policy, preempting fields for the federal government even where Congress has not indicated any indication to do so, in a clear and undesirable shift from the policies that were dominant from the New Deal to the Great Society, thus moving to a new kind of dual federalism. On the other hand, the changing situation of the United States on the world scene has led the states to become increasingly involved in matters of foreign commerce in barely anticipated ways. To sum up, there seem to be few if any barriers to federal intervention in state affairs in matters of interstate commerce and there are progressively fewer limitations on state involvement in foreign commerce and economic development.

In the field of individual rights in the 1950s, the Warren Court inaugurated a period of protection of individual rights against all governments, grounded on a doctrine that closely resembled the substantive due process doctrine of the Fuller court in matters of commerce. That absolutist position has been somewhat eroded in the past two decades but, by and large, the court still stands behind the restriction of all governments in matters interfering with individual freedom, even to the point of preventing the adoption of certain otherwise useful social policies on a collective basis. In this respect, one might say that neither the federal nor the state governments have the powers they once had, since those powers have flowed to the courts, particularly the United States Supreme Court.

With regard to the general welfare, after a generation and a half of federal dominance, a redistribution has been taking place in favour of the states as the federal government has lost the initiative. In part this

was by public choice, reflecting a strong sense that federal initiatives had been wasteful and unsuccessful and in part through the more focused and deliberate efforts of President Reagan and his administration in the 1980s. While this could simply be a cyclical matter (the late 1970s and 1980s were parallel in the cycle of American politics to the late 1940s and 1950s when state and local activity was more important than federal activity in meeting new challenges), there are signs that it may be more far-reaching, that with the growth in the size and resources of the states and the excessive size of the federal government, that the former may simply be more capable of responding to new challenges than the latter, provided they are not shackled and prevented from doing so. This indeed would be a sea-change in American government. Whatever will happen in that regard, what seems to be inevitable is that the basic federal-state-local relationship will continue to be cooperative. Ronald Reagan did his best to reintroduce dual federalism of the kind he perceived (often incorrectly) as operative in the towns of northwestern Illinois in his youth, when the historical nineteenth century was giving way to the twentieth. While he did succeed in reducing many of the coercive elements introduced by his immediate predecessors, the end result was to restore a more truly cooperative federalism than to separate functions as he had intended. This was no mean achievement. On the contrary, it has given new life to American federalism. It has also demonstrated the basic truth of the theory of cooperative federalism.

Today American federalism is somewhat more like it was intended to be — namely a means for encouraging nationwide efforts to meet particular problems without national government dominance, the use of the federal government as a backstop for state efforts rather than

making the states as administrative arms of a dominant Washington. These indeed are the two great operative principles of a properly cooperative federalism.²⁶ As such they should be encouraged since the choice of dual federalism does not seem to be one possible of achievement except in limited ways, ultimately detrimental to federalism itself.

Americans need to develop a more sophisticated understanding of cooperative federalism, one that does not allow the call for cooperation to justify concentration of power in Washington or the employment of coercive measures by the federal government against states and localities. While empirically we can describe that as antagonistic or coerced cooperation, in normative terms it is not cooperation. Here we enter the realm of normative theory.

It has already been stated that one can hold and develop a theory of cooperative federalism as a description of empirical reality while normatively endorsing something else. While that approach does not eliminate normative theory, it is different from a normative approach. On the other hand, one can accept cooperative federalism on normative grounds and build normative rules for intergovernmental collaboration.

These rules would include the maintenance of the four-fold elements of theory, structure, programs and techniques; the two principles of state initiative and federal backstopping; and perhaps most of all, the principle of federal self-restraint, especially where constitutional barriers have been lifted or substantially reduced by the courts. This includes presidential self-restraint in the face of the perennial demand for a presidential politics of activism, Congressional self-

restraint in the competition for program control, and, above all, judicial self-restraint in the face of the tendency toward positivistic jurisprudence whereby judges believe that since people make laws to suit their interests, courts should make laws on the basis of the principles they fancy. It is this lack of comity which most threatens federalism in the United States.

Beyond that, a proper theory of cooperative federalism which can be used for normative as well as descriptive purposes must recognize the problem of diversity in a nationalizing society and the social forces which shape political life. If the mass communications media are centralized, then it is very difficult to get public attention focused away from Washington, indeed away from the White House (except for the never-ending presidential campaigns). If the tendency in education, religion, commerce and industry is toward consolidation, then the states may become even more important bulwarks against the concentration of power than in the past, but harder to maintain as such. These factors contributed greatly to bringing about the centralization of the first two generations of the twentieth century.²⁷

In the third generation, however, there seems to be a reversal or a shifting of all these trends, a deconcentration of power, and a growing pluralism in every one of these areas. That pluralism, however, is less territorially based than it was in the eighteenth and nineteenth centuries. It consists more of layers upon layers or circles adjacent or overlapping with other circles within the same, more densely populated territory.

In some cases it is clear that what is happening is reinforcing federalist diversity based on a sense of state identity and world in

most, if not all, states. Thus, for example, the state of Vermont is no longer dominated by rock-ribbed Republican independents who used state government to maintain their own way of life. They have been replaced by equally independent left-liberals who find Vermont congenial for the same political purpose, even if they desire a very different way of life. Certain states California, Minnesota, Texas and Virginia come to mind seem to have that quality of a widespread sense of state worth and to maintain it for generations on end. Others such as North Carolina and even New Jersey may have acquired it more recently. In each case these states have made their peace with the new pluralism and have provided an environment for fostering and encouraging it. As such they have become leading forces in shaping the governmental response to contemporary situations, all within a cooperative federalistic framework.

Along with the new pluralism is a new participation, a new desire on the part of the activist stratum in society to be involved in governmental decision-making in every arena. This new participation has led to everything from more active involvement in local affairs to an expansion of the use of constitutional choice mechanisms in state affairs. These activists prefer to hold things in their hands, which probably is another force favoring present trends, especially since involvement in presidential politics has becoming the parallel form of national activism, but it is increasingly confined to a narrow segment of those just about to become voters or in their first decade of voting life, after which they are burned out.

All of this has led to a new academic and governmental interest in theories of public and constitutional choice to support new participation. Not surprisingly there has been a growing integration

of theories of federalism with those of public and constitutional choice for the mutual benefit of both. The emerging synthesis is giving federalism a theoretical foundation and philosophic justification that it has never had in quite the same way.

Notes

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2. *Ibid.*; see also Michael Burgess and Alain Gagnon, *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Toronto: University of Toronto Press, 1993).
3. Adapted from Daniel J. Elazar, *Exploring Federalism*, (Tuscaloosa, AL: University of Alabama Press, 1987).
4. Daniel J. Elazar, *Covenant and Polity in Biblical Israel* (New Brunswick, NJ: Transaction Press, 1994); Johannes Althusius, *The Politics of Johannes Althusius*, translated with introduction by Frederick S. Carney (London: Eyre and Spottiswoode, 1965); Benedict Spinoza, *Tractatus Theologico-Politicus*, translated by Samuel Shirley (Leiden: Brill, 1991).
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8. Henry M. Ward, *The United Colonies of New England, 1643-90* (New York: Vintage Press, 1961); Elazar, *Covenant and Polity in Biblical Israel*, *op. cit.*
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17. Daniel J. Elazar, "Our Thoroughly Federal Constitution," in *How Federal is the Constitution?*, Robert Goldwin and William Schambra, eds. (Washington, D.C.: America Enterprise Institute, 1987).
18. Daniel J. Elazar, *American Federalism: A View from the States*, 3rd ed. (New York: Harper & Row, 1984).
19. On the matrix model, see Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987), where the model is also contrasted with two other models. See also Martin Landau, "On the Use of Metaphor in Political Analysis," *Social Research* 38 (Autumn 1961):331-353 and "Federalism, Redundancy, and System Reliability," *Publius: The Journal of Federalism* 3 (Fall 1973):173-196; Vincent Ostrom, "Operational Federalism: Organization for the Provision of Public Services in the American Federal System," *Public Choice* 6 (Spring 1969):1-17; "Can Federalism Make a Difference?" *Publius: The Journal of Federalism* 3 (Winter 1974):197-238; and *The Political Theory of a Compound Republic: Designing the American Experiment* (Lincoln, NE: University of Nebraska Press, 1987); and Elinor Ostrom, "Size and Performance in a Federal System," *Publius: The Journal of Federalism* 6 (Summer 1976):33-74.
20. Daniel J. Elazar, *American Federalism: A View from the States*, 3rd ed. (New York, NY: Harper & Row, 1984).
21. Morton Grodzins deals with this in great detail in *The American System*, ed. by Daniel J. Elazar (Chicago: Rand McNally, 1966). Although his research is now 30+ years old, the picture he paints still stands, except in the case of the political

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