Enduring Features

It is a commonplace of scholarship that American federalism constantly changes. And it is a commonplace of contemporary comment that the states are enjoying a renaissance. Their historic role as laboratories of experiment is acknowledged with praise. Their executives and legislatures are increasingly active, seizing issues, such as economic development, that the federal government has failed to come to grips with. State courts are staking out positions on individual rights in advance of those defined by the U.S. Supreme Court, while state attorneys general pursue consumer protection and antitrust cases that federal agencies have ignored. The states’ share of government revenue has gained slightly on that of the federal government in the 1980s, and considerably surpasses that of local governments, contrary to a pattern that prevailed until the 1960s. The states’ standing with the public and with prospective employees has improved. The governors are getting their share of good press and, what may be almost as important, of presidential nominations. As a result, state governments are perceived to have improved their position in the federal system.

Yet it is worth recalling how different the impression was but a short time ago, and how little has changed in some respects. Early in 1984 the Advisory Commission on Intergovernmental Relations published a much-noticed report, *Regulatory Federalism*, detailing a wide range of new or

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expanded federal controls over state governments. In 1985, in the case of *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court declined to protect the state governments from congressional regulation under the Constitution’s commerce clause and seemed to wash its hands of this crucial federalism question. In the spring of 1988 the court removed the constitutional prohibition on federal taxation of income from interest on state and local government bonds (*South Carolina v. Baker*).

Certain regulatory excesses of the federal government vis-à-vis the states have been modified in the past several years; rules regarding transportation of the disabled and bilingual education are two examples. Yet not even under Ronald Reagan did the federal government step back from the new constitutional frontiers mapped out in the 1960s and 1970s, such as the Clean Air Act of 1970, which addresses the states with the language of outright command ("Each state shall . . ."). The president’s executive order of October 1987 on federalism may be interpreted as an attempt to draw back, with its rhetorical statement of federalism principles and its instructions to executive agencies to refrain from using their discretion to preempt state action. But to read it is to be reminded of how little unilateral power the president has. The drawing back can succeed only to the extent the national legislature and courts concur. Nor did the Reagan administration consistently adhere to its professed principles. Substantive policy goals often were in tension with discretion for the states; the Reagan administration could be counted on to opt for discretion only when that tactic was consistent with its pursuit of a freer market and lower federal spending.

American federalism is a very large elephant indeed, and it is hard for a lone observer to grasp the properties of the whole beast. One needs to be abreast of constitutional doctrines; of legislative, judicial, and administrative practices over the whole range of government activities, from taxation to protection of civil liberties to pollution control; of the development or disintegration of political parties (are they decaying at the grass roots? at the center? both? neither?); of the volume and locus of interest group activity; of trends in public opinion and public employment, and more. To understand the condition of federalism, one needs to comprehend the functioning of the whole polity.

Granting that the federal system is always in flux, it is harder than one might suppose even to detect the dominant tendencies. While most academic analysts probably would assert that centralization is the secular trend, such distinguished scholars as political scientist Richard P. Nathan and historian Morton Keller have argued that centralization is not inex-

orable and that the evolution of American federalism follows a cyclical pattern, with the federal government and the states alternately dominating. Fighting the customary temptation to concentrate on change, I want to try to identify some elemental and enduring truths of American federalism. I want to map the features of the terrain, a metaphor that may be in fact apt. Our federalism is much like a piece of earth that is subject to constant redevelopment. It can be bulldozed and built up, flattened and regraded, virtually beyond recognition. Yet certain elemental properties of it, the bedrock and the composition of the soil, endure. I will start with propositions that I take to be purely factual and then proceed to others that are more analytical and normative, hence debatable.

The states are governments in their own right. They have constitutions that derive from the people and guarantee specific rights. They have elected legislatures that make laws, elected executives that enforce laws, and courts that interpret them—and not incidentally interpret the laws of the United States as well. State governments levy taxes. Their territorial integrity is protected by the U.S. Constitution, which also guarantees them equal representation in the Senate and a republican form of government. These creatures that walk like ducks and squawk like ducks must be ducks.

Nevertheless, the states are inferior governments. In our pond, they are the weaker ducks. The stubbornly persistent mythology that governments in the American federal system are coordinate should not obscure that fact. The two levels of government are not coordinate and equal, nor did the winning side in 1787 intend them to be. One cannot deny the existence of the Constitution’s supremacy clause and the prescription that state officers take an oath to uphold the Constitution of the United States, or the fact that the Framers of the Constitution fully expected an instrumentality of the federal government, the Supreme Court, to settle jurisdictional issues in the “compound republic,” as James Madison called it. See *Federalist* No. 39, in which Madison makes a feeble, unsuccessful attempt to deny that the court’s having this function gives the federal government a crucial advantage.

Whether the federal government has always been superior in fact can certainly be debated. At various times and places its writ did not run very strong. The full impact on federalism of the post–Civil War amendments on civil rights was long delayed. Only recently has the South ceased to have a deviant social system. But on the whole, the federal government has won the crucial conflicts. Surely its ascendancy is not currently in dispute. Not
only are the states treated as its administrative agents; they accept such
treatment as a fact of life. Not since Brown v. Board of Education (1954) and
Baker v. Carr (1962) have truly strenuous protests been heard from the
states against their palpably inferior status.8

THE STATES' STATUS AS GOVERNMENTS, EVEN THOUGH INFERIOR
ONES, GIVES CONGRESS A RANGE OF CHOICE IN DEALING WITH THEM.
It may choose deference, displacement, or interdependence. In domestic
affairs Congress always has the option of doing nothing, knowing that the
states can act whether or not it does. Sometimes Congress consciously
defers to the states, judging that the subject properly "belongs" to them.
Perhaps just as often, Congress today is not deliberately deferential but fails
to act for lack of time or the ability to reach agreement. It defaults. The area
of congressional inaction, be it through deference or default, is reliably
quite large. It normally includes new issues, such as AIDS or equal pay.
States remain on the front lines of domestic policy, the first to deal with
newly perceived problems. Congress tends to defer or default on particularly
difficult issues, such as the amount of support to be given to needy
single mothers with children.

Congress rarely employs its second option, complete displacement,
although explicit invocations of it, using the term preemption, are more fre-
cquent now than they used to be. The third option, interdependence, is very
common, I would think predominant. Through some combination of
inducements, sanctions, or contractual agreements, Congress enters into
collaborative arrangements with the states in the pursuit of national ends.
The most common techniques are conditional grants-in-aid, which are
characteristic of programs for income support and infrastructure develop-
ment, and qualified preemptions, which are typical of the "new" regulation,
including environmental protection and occupational health and safety.
Congress sets standards but tells states that if they meet or exceed the
national standards, they may retain the function, including administration.

THE VIGOR AND COMPETENCE WITH WHICH STATE GOVERNMENTS
PERFORM FUNCTIONS LEFT TO THEM DOES NOT PROTECT THEM
AGAINST CONGRESSIONAL INCursions. Here I mean to challenge one of
the leading canards of American federalism. Whenever Congress takes
domestic action, that action is rationalized as a response to the failures of
the states. Congress has had to step in, it is said, because states were not
doing the job. The only thing one can safely say about the origins of nation-
alizing acts is that they are responses to the power of nationalizing coal-
tions.7 When Congress acts, in other words, it is not necessarily because

states have failed; it is because advocates of national action have succeeded
in mustering enough political force to get their way. State inaction may
constitute part of their case, but state actions that are offensive to their
interests may do so as well. Pathbreaking states have often demonstrated
what can be done.

Congress's usual choice, moreover, is to cooperate with the states, not
displace them, and in the relationships of mutual dependence that result, it
is a nice question just whose deficiencies are being compensated for. The
federal government typically contributes uniform standards and maybe
money. The states typically do the work of carrying out the function. The
more they do and the better they do it, the more they are likely to be asked
or ordered by Congress to do.

IN COOPERATING WITH THE STATES, CONGRESS AGAIN HAS A CHOICE.
It can emphasize their status as governments, or it can emphasize their
inferiority as such. Our ambiguous constitutional system enables
Congress to view the states as equals or as agents. Congress gradually has
abandoned the former view in favor of the latter. In making this change,
at critical stages it has had the acquiescence of the Supreme Court, which
once tried to defend "dual federalism"—that is, the notion that the states
were sovereign, separate, and equal—but abandoned that doctrine during
the New Deal.9 And Congress does not indulge its agents. Ask any federal
bureau chief. Congress is very poor at balancing the ends and means of
action. All major federal executive agencies—the Environmental
Protection Agency, the Social Security Administration, the Immigration
and Naturalization Service, to cite just a few—are laboring under a bur-
den of excessive obligation.

BECAUSE STATES ARE GOVERNMENTS, THEY MAY BARGAIN WITH
CONGRESS. Bargaining is the usual mode of intergovernmental relations.
State governments, even when treated by Congress as administrative
agents, are agents with a difference. Unlike federal executive agencies, they
are not Congress's creatures. Therefore they can talk back to it. They can
influence the terms of cooperation.

THIS BARGAINING BETWEEN LEVELS OF GOVERNMENT IS GOOD,
DEPENDING ON HOW THE STATES USE IT. Here again I mean to challenge
what I take to be a conventional view. Fragmentation of authority in the
federal system is ordinarily portrayed, at least in academic literature, as a
severe handicap to the federal government's pursuit of its goals. The federal
government would be more effective, it is commonly said, if it did not have
to rely so heavily on other governments. I believe, to the contrary, that the
federal government needs a great deal of help, of a kind that can best—perhaps only—he be supplied by governments. It needs help with all aspects of governing, that is, with all the functions that legislatures, courts, and executives perform. Beyond that, it needs a great deal of help quite specifically in adjusting its goals to social and economic realities and to the capacities of administrative organizations.

Madison may be cited in support of this view—not the famous passage in *Federalist* No. 51 that one might anticipate, in which he argues that "the different governments will control each other, at the same time that each will be controlled by itself," but a passage less remarked, yet perhaps more prescient, in No. 62. In this essay on the Senate, Madison wrote:

A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained. Some governments are deficient in both these qualities; most governments are deficient in the first. I scruple not to assert, that in American governments too little attention has been paid to the last.11

The deficiency in our attention to the means of government is glaring. All institutions of the federal government—Congress, presidency, courts—have far more to do than they can do, but the executive agencies as the instruments of government action are arguably the most overburdened of all. Through most of the post–World War II period, the federal government has also had a shortfall of fiscal capacity. It has had financial obligations in excess of its willingness or ability to meet them.

State governments help fill the federal government’s performance gaps. They do much of the work of governing, as Madison anticipated. Even as an ardent nationalist, at the time of the Constitutional Convention, he held to the view that the national government would not be suited to the entire task of governing "so great an extent of country, and over so great a variety of objects." But if the states help fill the federal government’s implementation gaps, they also are very much at risk of being victimized by them. Congress will try to close the distance between what it wants and what the federal government is able to do independently by ordering the states to do it.

The states are entitled to talk back. As governments in their own right, they have an independent responsibility to set priorities and balance means against ends. Because they are closer to the practical realities of domestic problems and because they lack the power to respond to deficits by printing money, state governments are in a superior position to do that balancing.

This appeal to the states to talk back is not a call to defiance, but a call to engage federal officials in a policy dialogue—and, having done so, to address those officials with language suitable to governments. If states habitually present themselves as supplicants for assistance—like any other interest group—they will inevitably contribute to the erosion of their own status.

I believe that the states are increasingly using the language of governments, rather than supplicants, in their dialogue with the federal government. The enactment in 1988 of welfare reform legislation, which a working group of the National Governors Association helped to shape, is an example. The governors drew on the state governments’ experience with welfare programs to fashion changes that would be both politically and administratively feasible, besides containing improved assurances of federal funding for welfare.

There are numerous explanations for the new, more authoritative voice of the states. One is that individually the states have heightened competence and self-confidence as governments, whatever the range among them. Another is that the decline of federal aid under Presidents Carter and Reagan compelled greater independence. A third is that self-consciousness and cohesion of the states as a class of governments have increased, as indicated by the development of organized, well-staffed mechanisms of cooperation. Their shared status as agents of Congress and objects of its influence has caused the states to cooperate with one another today to a degree unprecedented in history, even if they remain intensely competitive in some respects, such as the pursuit of economic development.

I have concentrated on relations between the states and Congress to keep the subject focused and relatively simple. But the federal judiciary rivals the legislature as a framer of federal-state relations. Federal courts, like Congress, can choose to emphasize the states’ standing as governments or their inferiority as such. Like Congress, over time the courts have come more and more to embrace the latter choice, so that states have been routinely commanded to implement the detailed policy decisions of national courts as well as the national legislature.

For the states, it is one thing to talk back to Congress, quite another and much harder thing to talk back to the federal courts. Yet here as well, they have been trying to find ways to talk back more effectively. The National Association of Attorneys General and the State and Local Legal Center, both with offices in Washington, now offer advice and assistance to state and local governments involved in litigation before the Supreme Court. Such governments in the past have often suffered from a lack of expert counsel.