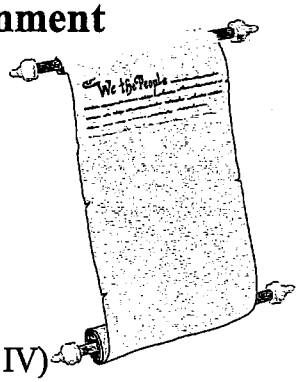
Advanced Placement American Government
Unit III: The Federal System



Wednesday	9/23	Evaluating sample AP essay questions. (Group Activity)
Thursday	9/24	***Quiz over Ch3 pp. 49-60*** (Outline sections I - IV) Practice Essay for AP Exam - Start in class, finish for homework (27 points applied to test/quiz Category).
Friday	9/25	Collect practice essay question. **Video: DNA and the Death Penalty**
Monday	9/28	Answers due for questions over ***Federalist #10*** (Reading in Wilson pp. A20-A24, questions in unit packet). **Seminar discussion** of the ideas of ***Federalist #10*** and how they compare to de Tocqueville's ideas in the ***Omnipotence of the Majority***.
Tuesday	9/29	***Quiz over Ch3 pp. 60-71*** (Outline sections V - VII) **Video: *Faith, Politics, and the Christian Right***
Wednesday	9/30	Critical Review due on ***The Federal System***, by Grodzins (in packet). **Class discussion and food opportunity** (you figure it out)!
Thursday	10/01	Answers due for questions over ***Federalist #39*** (Ciglar/Loomis p. 38, questions in unit packet) Class discussion of ***Federalist #39***.
Friday	10/02	Short Answers due for **H.G. Nicholas "The Price of Federalism" Questions at end of reading.** **Distribute essay questions for first AP style test.** No notes or other help allowed during test. ***This will only be done once***!
Monday	10/05	**AP Multiple Choice Test** - 60 questions - 45 minutes – Chapters 1, 2, 3 and 4. **(Wilson textbook only)**

Tuesday 10/05 **AP Format Free Response Test**–2 Questions-45 Minutes.
Optional I.D. Cards due-**3** pts bonus for terms only
5 pts bonus for terms and brief article synopses-**Yes I read them** ☺

3

Federalism

I. Reviewing the Chapter

A. Chapter Focus

The central purpose of the chapter is to introduce you to some of the complexities of government in the United States caused by the adoption of a federal system—that is, one in which both the national and state governments have powers independent of one another. You should also note how the nature and the effects of American federalism have changed throughout American history and continue to change to this day. After reading and reviewing the material in this chapter, you should be able to do each of the following:

1. Explain the difference between federal and centralized systems of government, and give examples of each.
2. Show how competing political interests at the Constitutional Convention led to the adoption of a federal system, but one that was not clearly defined.
3. Outline the ways in which the courts interpreted national and state powers and how the doctrine of dual federalism came to be moot.
4. State why federal grants-in-aid to the states have been politically popular, and cite what have proved to be the pitfalls of such grants.
5. Distinguish between categorical grants and block grants or general revenue sharing.
6. Explain why, despite repeated attempts to reverse the trend, categorical grants have continued to grow more rapidly than block grants.
7. Distinguish between mandates and conditions of aid with respect to federal grant programs to states and localities.
8. Discuss whether or to what extent federal grants to the states have succeeded in creating uniform national policies comparable to those of centralized governments.

B. Study Outline

I. Governmental structure
   A. Federalism: good or bad?
      1. Definition: political system with local government units, in addition to national one, that can make final decisions
      2. Examples of federal governments: Canada, India, Germany
      3. Examples of unitary governments: France, Britain, Italy
      4. Special protection of subnational governments in federal system is the result of
         a. Constitution of country
         b. Habits, preferences, and dispositions of citizens
         c. Distribution of political power in society
      5. National government largely does not govern individuals directly but gets states to do so in keeping with national policy

6. Negative views: block progress and protect powerful local interests
    a. Laski: states "poisonous and parasitic"
    b. Riker: perpetuation of racism
7. Positive view
    a. Elazar: strength, flexibility, liberty
8. Federalism makes good and bad effects possible
    a. Different political groups with different political purposes come to power in different places
    b. *Federalist* No. 10: small political units dominated by single political faction

B. Increased political activity
1. Most obvious effect of federalism: facilitates mobilization of political activity
2. Federalism lowers the cost of political organization at the local level

II. The Founding
A. A bold, new plan to protect personal liberty
1. Founders believed that neither national nor state government would have authority over the other because power derives from people, who shift their support
2. New plan had no historical precedent
3. Tenth Amendment was added as an afterthought, to define power of states

B. Elastic language in Article I: necessary and proper
1. Precise definitions of powers politically impossible because of competing interests, such as commerce
2. Hence vague language—"necessary and proper"
3. Hamilton's view: national supremacy because Constitution supreme law
4. Jefferson's view: states' rights with people ultimate sovereign

III. The debate on the meaning of federalism
A. The Supreme Court speaks
1. Hamiltonian position espoused by Marshall
2. *McCulloch* v. *Maryland* settled two questions
    a. Could Congress charter a national bank? (yes, because "necessary and proper")
    b. Could states tax such a bank? (no, because national powers supreme)
3. Later battles
    a. Federal government cannot tax state bank
    b. Nullification doctrine led to Civil War: states void federal laws they deem in conflict with Constitution

B. Dual federalism
1. Both national and state governments supreme in their own spheres
2. Hence interstate versus intrastate commerce
    a. Early product-based distinction difficult
    b. "Original package" also unsatisfactory
    c. Today dual federalism virtually extinct

IV. Federal-state relations
A. Grants-in-aid
1. Grants show how political realities modify legal authority
2. Began before Constitution with "land grant colleges," various cash grants to states
3. Dramatically increased in scope in twentieth century
4. Were attractive for various reasons
    a. Federal budget surpluses (nineteenth century)
    b. Federal income tax became flexible tool
    c. Federal control of money supply meant national government could print more money
    d. "Free" money for state officials
5. Required broad congressional coalitions

B. Meeting national needs

1. 1960s shift in grants-in-aid
    a. From what states demanded . . .
    b. . . . To what federal officials found important as national needs

C. The intergovernmental lobby
1. Hundreds of state, local officials lobby in Washington
2. Purpose: to get more federal money with fewer strings

D. Categorical grants versus revenue sharing
1. Categorical grants for specific purposes; often require local matching funds
2. Block grants devoted to general purposes with few restrictions
3. Revenue sharing requires no matching funds and provides freedom in how to spend
    a. Distributed by statistical formula
    b. Ended in 1986
4. Neither block grants nor revenue sharing achieved goal of giving states more freedom in spending

V. The slowdown in "free" money

A. Block grants grow more slowly than categorical
1. No single interest group has a vital stake in multipurpose block grants, revenue sharing
2. Categorical grants are matters of life or death for various agencies
3. Revenue sharing was wasteful and lacked a constituency

B. Rivalry among the states
1. Increased competition a result of increased dependency
2. Snowbelt (Frostbelt) versus Sunbelt states
3. Actual difficulty telling *where* funds spent
4. Census takes on monumental importance

VI. Federal aid and federal control

A. Mandates
1. Federal rules states or localities must obey, whether receiving aid or not
    a. Antidiscrimination rules
    b. Pollution-control laws
2. Administrative and financial problems often result
3. Most controversial mandates result from court decisions
    a. Easier now for citizens to sue localities

B. Conditions of aid
1. Attached to grants states receive voluntarily
2. Conditions range from specific to general
3. Divergent views of states and federal government on costs, benefits
    a. Example: Rehabilitation Act of 1973
4. Failed presidential attempts to reverse trend
    a. Example: Nixon's New Federalism creating revenue sharing
5. Reagan's attempt to consolidate categorical grants; Congress's cooperation in name only

C. The states respond
1. Experiments with new ways of delivering services
    a. Encouraged by federal laws such as Federal Support Act
    b. Discouraged by federal rules but still some innovation
    c. Examples: child care, welfare, education (Minnesota, Rhode Island, Maryland)

D. Sorting things out
1. One view
    a. Federal government pays for national programs
    b. States pay for local programs
2. Eisenhower's attempt (1957)
3. Reagan's "swap" (1981)
    a. Failed because Constitution purposely left responsibilities vague

VII. Federalism and public policy
   A. Nation still far from wholly centralized
      1. Members of Congress still *local* representatives
      2. Members of Congress represent different constituencies from the same localities
      3. Link to local political groups eroded
      4. No single national policy in most policy areas
         a. Example: welfare
      5. Increasing difficulty of managing programs
         a. Example: Oakland aircraft hangar
      6. Differences of opinion over which level of government works best

C. Key Terms Match

Match the following terms and descriptions. (Note: One of the descriptions should be matched with two terms.)

a. AFDC
b. block grants
c. categorical grants
d. conditions of aid
e. confederation or confederal system
f. dual federalism
g. Economic Development Administration
h. federal system
i. federal republic
j. grants-in-aid
k. intergovernmental lobby
l. interstate commerce
m. intrastate commerce
n. land grant colleges
o. Madison, James
p. *McCulloch* v. *Maryland*
q. mandates
r. Model Cities
s. national interests
t. necessary-and-proper clause
u. New Federalism
v. nullification
w. revenue sharing

1. ____ Governmental concerns considered to be primarily the responsibility of the central government
2. ____ Governmental concerns considered to be primarily the responsibility of the state governments
3. ____ Supreme or ultimate political authority
4. ____ A system in which sovereignty is wholly in the hands of the national government
5. ____ A system in which the state governments are sovereign and the national government may do only what the states permit
6. ____ A system in which sovereignty is shared between the national and the state governments
7. ____ The Founders' term for a federation
8. ____ The clause that stipulates that powers not delegated to the United States are reserved to the states or to the people
9. ____ A Supreme Court decision embodying the principle of implied powers of the national government
10. ____ The term used by the Supreme Court to create the category of "implied powers" of the national government
11. ____ The doctrine espoused by Calhoun that states could hold certain national government policies invalid within their boundaries
12. ____ The doctrine that both state and national governments are supreme in their respective spheres
13. ____ Business that is conducted in more than one state
14. ____ Business that is conducted entirely within one state
15. ____ Federal funds provided to states and localities
16. ____ State educational institutions built with the benefit of federally donated lands
17. ____ A program proposed in the 1960s to give federal funds to a small number of large cities with acute problems

(continued)

x. sovereignty

y. states' rights

z. Tenth Amendment

aa. unitary system

18. ____ A federal grant for a specific purpose, often with accompanying conditions and/or requiring a local match

19. ____ A federal grant that could be used for a variety of purposes, usually with few accompanying restrictions

20. ____ Federal rules that states must follow, whether they receive federal grants or not

21. ____ Federal rules that states must follow if they choose to receive the federal grants with which the rules are associated

22. ____ Nixon's attempt in the 1970s to reduce federal restrictions on grants-in-aid

23. ____ An interest group made up of mayors, governors, and other state and local officials who depend on federal funds

24. ____ The *Federalist* author who said that both state and federal governments "are in fact but different agents and trustees of the people, constituted with different powers"

25. ____ A federally funded program to distribute welfare benefits

26. ____ A part of the U.S. Department of Commerce

D. Did You Think That . . . ?

Below are listed a number of misconceptions. You should be able to refute each statement in the space provided, referring to information or argumentation contained in this chapter. Sample answers appear at the end of the Handbook.

1. "The Constitution clearly established the powers of the national and state governments."

2. "Most governments in the world today have both national and state governments, as in the United States."

3. "Our national government spends most of its time governing individual citizens."

4. "The complexity of federalism tends to discourage citizen participation in government."

AP GOVERNMENT

QUESTIONS FEDERALIST # 10

1. WHAT IS A FACTION?

2. ACCORDING TO JAMES MADISON, WHAT IS THE PRINCIPLE CAUSE OF FACTIONS IN SOCIETY?

3. HOW WOULD YOU CHARACTERIZE MADISON'S VIEWS ON FACTIONS? HOW DO YOU ACCOUNT FOR HIS BELIEFS?

4. HOW DOES MADISON PROPOSE TO DEAL WITH FACTIONS?

5. WHAT SPECIFIC PROVISIONS ARE INCORPORATED INTO THE CONSTITUTION WHICH RESTRAIN FACTIONS FROM GAINING CONTROL OVER THE ENTIRE GOVERNMENT?

6. IS IT POSSIBLE FOR ONE FACTION TO GAIN CONTROL OF THE ENTIRE GOVERNMENT? IF YES, UNDER WHAT CIRCUMSTANCES?

7. CONSIDERING THE GROWTH OF POLITICAL ACTION COMMITTEES (PAC'S) AND OTHER SINGLE ISSUE GROUPS, DO WE NEED TO PLACE NEW CHECKS ON THESE *FACTION* S IN ORDER TO PRESERVE DEMOCRACY?

The Federalist No. 10

November 22, 1787

James Madison

TO THE PEOPLE OF THE STATE OF NEW YORK.

Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments, never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail therefore to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice and confusion introduced into the public councils, have in truth been the mortal diseases under which popular governments have every where perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American Constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this side as was wished and expected. Complaints are every where heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty; that our governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and over-bearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true. It will be found indeed, on a candid review of our situation, that some of the distresses under which we labor, have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice, with which a factious spirit has tainted our public administrations.

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it is worse than the disease. Liberty is to faction, what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable, as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of Government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results: and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them every where brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning Government and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have in turn divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to cooperate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts. But the most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern Legislation, and involves the spirit of party and faction in the necessary and ordinary operations of Government.

No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men, are unfit to be both judges and parties, at the same time; yet, what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens, and what are the different classes of legislators, but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side, and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are and must be themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes; and

probably by neither, with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property, is an act which seems to require the most exact impartiality; yet, there is perhaps no legislative act in which greater opportunity and temptation are given to a predominant party, to trample on the rules of justice. Every shilling with which they over-burden the inferior number, is a shilling saved to their own pockets.

It is in vain to say, that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm: Nor, in many cases, can such an adjustment be made at all, without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another, or the good of the whole.

The inference to which we are brought, is, that the *causes* of faction cannot be removed; and that relief is only to be sought in the means of controlling its *effects*.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote: It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government on the other hand enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our enquiries are directed: Let me add that it is the great desideratum, by which alone this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time, must be prevented; or the majority, having such co-existent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together; that is, in proportion as their efficacy becomes needful.

From this view of the subject, it may be concluded, that a pure Democracy, by which I mean, a Society, consisting of a small number of citizens, who assemble and administer the Government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths. Theoretic politicians, who have patronized this species of Government, have erroneously supposed, that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking.

Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the union.

The two great points of difference, between a democracy and a republic, are, first, the delegation of the government, in the latter, to a small number of citizens, elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen, that the public voice, pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves, convened for the purpose. On the other hand the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interest of the people. The question resulting is, whether small or extensive republics are most favorable to the election of proper guardians of the public weal, and it is clearly decided in favor of the latter by two obvious considerations.

In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the constituents, and being proportionally greatest in the small republic, it follows, that if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each Representative will be chosen by a greater number of citizens in the large than in the small Republic, it will be more difficult for unworthy candidates to practise with success the vicious arts, by which elections are too often carried; and the suffrages of the people being more free, will be more likely to center on men who possess the most attractive merit, and the most diffusive and established characters.

It must be confessed, that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representatives too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The Federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular, to the state legislatures.

The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of Republican, than of Democratic Government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former, than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties

and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked, that where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust, in proportion to the number whose concurrence is necessary.

Hence it clearly appears, that the same advantage, which a Republic has over a Democracy, in controlling the effects of factions, is enjoyed by a large over a small Republic—is enjoyed by the Union over the States composing it. Does this advantage consist in the substitution of Representatives, whose enlightened views and virtuous sentiments render them superior to local prejudices, and to schemes of injustice? It will not be denied, that the Representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties, comprised within the Union, increase this security? Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here, again, the extent of the Union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States: a religious sect, may degenerate into a political faction in a part of the Confederacy but the variety of sects dispersed over the entire face of it, must secure the national Councils against any danger from that source: a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union, than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.

In the extent and proper structure of the Union, therefore, we behold a Republican remedy for the diseases most incident to Republican Government. And according to the degree of pleasure and pride, we feel in being Republicans, ought to be our zeal in cherishing the spirit, and supporting the character of Federalists.

PUBLIUS

national standards. President Reagan's New Federalism proposed the merging of grant-in-aid programs into block grants to the states leading eventually to a reduced federal role in financing state and local governments. The continuing conflict between the themes and realities of centralization and decentralization are examined in the following selection.

10

Morton Grodzins
THE FEDERAL SYSTEM

Federalism is a device for dividing decisions and functions of government. As the constitutional fathers well understood, the federal structure is a means, not an end. The pages that follow are therefore not concerned with an exposition of American federalism as a formal, legal set of relationships. The focus, rather, is on the purpose of federalism, that is to say, on the distribution of power between central and peripheral units of government.

I. THE SHARING OF FUNCTIONS

The American form of government is often, but erroneously, symbolized by a three-layer cake. A far more accurate image is the rainbow or marble cake, characterized by an inseparable mingling of differently colored ingredients, the colors appearing in vertical and diagonal strands and unexpected whirls. As colors are mixed in the marble cake, so functions are mixed in the American federal system. Consider the health officer, styled "sanitarian," of a rural county in a border state. He embodies the whole idea of the marble cake of government.

The sanitarian is appointed by the state under merit standards established by the federal government. His base salary comes jointly from state and federal funds, the county provides him with an office and office amenities and pays a portion of his expenses, and the largest city in the county also contributes to his salary and office by virtue of his appointment as a city plumbing inspector. It is impossible from moment to moment to tell under which governmental hat the sanitarian operates. His work of inspecting the purity of food is carried out under federal standards; but he is enforcing state laws when inspecting commodities that have not been in

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From Morton Grodzins, ed., *Goals for Americans: The Report of the President's Commission on National Goals* (New York: The American Assembly), pp. 265–282. Reprinted by permission.

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Report of the President's Commission on
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interstate commerce; and somewhat perversely he also acts under state authority when inspecting milk coming into the county from producing areas across the state border. He is a federal officer when impounding impure drugs shipped from a neighboring state; a federal-state officer when distributing typhoid immunization serum; a state officer when enforcing standards of industrial hygiene; a state-local officer when inspecting the city's water supply; and (to complete the circle), a local officer when insisting that the city butchers adopt more hygienic methods of handling their garbage. But he cannot and does not think of himself as acting in these separate capacities. All business in the county that concerns public health and sanitation he considers his business. Paid largely from federal funds, he does not find it strange to attend meetings of the city council to give expert advice on matters ranging from rotten apples to rabies control. He is even deputized as a member of both the city and county police forces.

The sanitarian is an extreme case, but he accurately represents an important aspect of the whole range of governmental activities in the United States. Functions are not neatly parceled out among the many governments. They are shared functions. It is difficult to find any governmental activity which does not involve all three of the so-called "levels" of the federal system. In the most local of local functions—law enforcement or education, for example—the federal and state governments play important roles. In what, a priori, may be considered the purest central government activities—the conduct of foreign affairs, for example—the state and local governments have considerable responsibilities, directly and indirectly.

The federal grant programs are only the most obvious example of shared functions. They also most clearly exhibit how sharing serves to disperse governmental powers. The grants utilize the greater wealth-gathering abilities of the central government and establish nationwide standards, yet they are "in aid" of functions carried out under state law, with considerable state and local discretion. The national supervision of such programs is largely a process of mutual accommodation. Leading state and local officials, acting through their professional organizations, are in considerable part responsible for the very standards that national officers try to persuade all state and local officers to accept.

Even in the absence of joint financing, federal-state-local collaboration is the characteristic mode of action. Federal expertise is available to aid in the building of a local jail (which may later be used to house federal prisoners), to improve a local water purification system, to step up building inspections, to provide standards for state and local personnel in protecting housewives against dishonest butchers' scales, to prevent gas explosions, or to produce a land use plan. States and localities, on the other hand, take important formal responsibilities in the development of national programs for atomic energy, civil defense, the regulation of commerce, and the protection of purity in foods and drugs; local political weight is always a factor in the operation of even a post office or a military establishment. From abattoirs and accounting through zoning and zoo administration, any governmental activity is almost certain to involve the influence, if not the formal administration, of all three planes of the federal system.

II. ATTEMPTS TO UNWIND THE FEDERAL SYSTEM

[From 1947 to 1960] there [were] four major attempts to reform or reorganize the federal system: the first (1947–49) and second (1953–55) Hoover Commissions on Executive Organization; the Kestnbaum Commission on Intergovernmental Relations (1953–55); and the Joint Federal-State Action Committee (1957–59). All four of these groups . . . aimed to minimize federal activities. None of them . . . recognized the sharing of functions as the characteristic way American governments do things. Even when making recommendations for joint action, these official commissions [took] the view (as expressed in the Kestnbaum report) that "the main tradition of American federalism [is] the tradition of separateness." All four . . . in varying degrees, worked to separate functions and tax sources.

The history of the Joint Federal-State Action Committee is especially instructive. The committee was established at the suggestion of President Eisenhower, who charged it, first of all, "to designate functions which the States are ready and willing to assume and finance that are now performed or financed wholly or in part by the Federal Government." He also gave the committee the task of recommending "Federal and State revenue adjustments required to enable the States to assume such functions."[1]

The committee subsequently established seemed most favorably situated to accomplish the task of functional separation. It was composed of distinguished and able men, including among its personnel three leading members of the President's Cabinet, the director of the Bureau of the Budget, and ten state governors. It had the full support of the President at every point, and it worked hard and conscientiously. Excellent staff studies were supplied by the Bureau of the Budget, the White House, the Treasury Department, and, from the state side, the Council of State Governments. It had available to it a large mass of research data, including the sixteen recently completed volumes of the Kestnbaum Commission. There existed no disagreements on party lines within the committee and, of course, no constitutional impediments to its mission. The President, his Cabinet members, and all the governors (with one possible exception) on the committee completely agreed on the desirability of decentralization-via-separation-of-functions-and-taxes. They were unanimous in wanting to justify the committee's name and to produce action, not just another report.

The committee worked for more than two years. It found exactly two programs to recommend for transfer from federal to state hands. One was the federal grant program for vocational education (including practical-nurse training and aid to

[1]The President's third suggestion was that the committee "identify functions and responsibilities likely to require state or federal attention in the future and . . . recommend the level of state effort, or federal effort, or both, that will be needed to assure effective action." The committee initially devoted little attention to this problem. Upon discovering the difficulty of making separatist recommendations, i.e., for turning over federal functions and taxes to the states, it developed a series of proposals looking to greater effectiveness in intergovernmental collaboration. The committee was succeeded by a legislatively based, 26-member Advisory Commission on Intergovernmental Relations, established September 29, 1959.

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fishery trades); the other was federal grants for municipal waste treatment plants. The programs together cost the federal government less than $80 million in 1957, slightly more than two percent of the total federal grants for that year. To allow the states to pay for these programs, the committee recommended that they be allowed a credit against the federal tax on local telephone calls. Calculations showed that this offset device, plus an equalizing factor, would give every state at least 40 percent more from the tax than it received from the federal government in vocational education and sewage disposal grants. Some states were "equalized" to receive twice as much.

The recommendations were modest enough, and the generous financing feature seemed calculated to gain state support. The President recommended to Congress that all points of the program be legislated. None of them was, none has been since, and none is likely to be.

III. A POINT OF HISTORY

The American federal system has never been a system of separated governmental activities. There has never been a time when it was possible to put neat labels on discrete "federal," "state," and "local" functions. Even before the Constitution, a statute of 1785, reinforced by the Northwest Ordinance of 1787, gave grants-in-land to the states for public schools. Thus the national government was a prime force in making possible what is now taken to be the most local function of all, primary and secondary education. More important, the nation, before it was fully organized, established by this action a first principle of American federalism: the national government would use its superior resources to initiate and support national programs, principally administered by the states and localities.

The essential unity of state and federal financial systems was again recognized in the earliest constitutional days with the assumption by the federal government of the Revolutionary War debts of the states. Other points of federal-state collaboration during the Federalist period concerned the militia, law enforcement, court practices, the administration of elections, public health measures, pilot laws, and many other matters.

The nineteenth century is widely believed to have been the preeminent period of duality in the American system. Lord Bryce at the end of the century described (in *The American Commonwealth*) the federal and state governments as "distinct and separate in their action." The system, he said, was "like a great factory wherein two sets of machinery are at work, their revolving wheels apparently intermixed, their bands crossing one another, yet each set doing its own work without touching or hampering the other." Great works may contain gross errors. Bryce was wrong. The nineteenth century, like the early days of the republic, was a period principally characterized by intergovernmental collaboration.

. . . Decisions of the Supreme Court are often cited as evidence of nineteenth-century duality. In the early part of the century the Court, heavily weighted with Federalists, was intent upon enlarging the sphere of national authority; in the later years (and to the 1930s) its actions were in the direction of paring down national

powers and indeed all governmental authority. Decisions referred to "areas of exclusive competence" exercised by the federal government and the states; to their powers being "separated and distinct"; and to neither being able "to intrude within the jurisdiction of the other."

Judicial rhetoric is not always consistent with judicial action, and the Court did not always adhere to separatist doctrine. Indeed, its rhetoric sometimes indicated a positive view of cooperation. In any case, the Court was rarely, if ever, directly confronted with the issue of cooperation versus separation as such. Rather it was concerned with defining permissible areas of action for the central government and the states; or with saying with respect to a point at issue whether any government could take action. The Marshall Court contributed to intergovernmental cooperation by the very act of permitting federal operations where they had not existed before. Furthermore, even Marshall was willing to allow interstate commerce to be affected by the states in their use of the police power. Later courts also upheld state laws that had an impact on interstate commerce, just as they approved the expansion of the national commerce power, as in statutes providing for the control of telegraphic communication or prohibiting the interstate transportation of lotteries, impure foods and drugs, and prostitutes. Similar room for cooperation was found outside the commerce field, notably in the Court's refusal to interfere with federal grants-in-land or cash to the states. Although research to clinch the point has not been completed, it is probably true that the Supreme Court from 1800 to 1936 allowed far more federal-state collaboration than it blocked.

Political behavior and administrative action of the nineteenth century provide positive evidence that, throughout the entire era of so-called dual federalism, the many governments in the American federal system continued the close administrative and fiscal collaboration of the earlier period. Governmental activities were not extensive. But relative to what governments did, intergovernmental cooperation during the last century was comparable with that existing today.

Occasional presidential vetoes (from Madison to Buchanan) of cash and land grants are evidence of constitutional and ideological apprehensions about the extensive expansion of federal activities which produced widespread intergovernmental collaboration. In perspective, however, the vetoes are a more important evidence of the continuous search, not least by state officials, for ways and means to involve the central government in a wide variety of joint programs. The search was successful.

Grants-in-land and grants-in-services from the national government were of first importance in virtually all the principal functions undertaken by the states and their local subsidies. Land grants were made to the states for, among other purposes, elementary schools, colleges, and special educational institutions; roads, canals, rivers, harbors, and railroads; reclamation of desert and swamp lands; and veterans' welfare. In fact whatever was at the focus of state attention became the recipient of national grants. (Then, as today, national grants established state emphasis as well as followed it.) If Connecticut wished to establish a program for the care and education of deaf and dumb, federal money in the form of a land grant

was found to aid that program. If higher education relating to agriculture became a pressing need, Congress could dip into the public domain and make appropriate grants to states. If the need for swamp drainage and flood control appeared, the federal government could supply both grants-in-land and, from the Army's Corps of Engineers, the services of the only trained engineers then available.

Aid also went in the other direction. The federal government, theoretically in exclusive control of the Indian population, relied continuously (and not always wisely) on the experience and resources of state and local governments. State militias were an all-important ingredient in the nation's armed forces. State governments became unofficial but real partners in federal programs for homesteading, reclamation, tree culture, law enforcement, inland waterways, the nation's internal communications system (including highway and railroad routes), and veterans' aid of various sorts. Administrative contacts were voluminous, and the whole process of interaction was lubricated, then as today, by constituent-conscious members of Congress.

The essential continuity of the collaborative system is best demonstrated by the history of the grants. The land grant tended to become a cash grant based on the calculated disposable value of the land, and the cash grant tended to become an annual grant based upon the national government's superior tax powers. In 1887, only three years before the frontier was officially closed, thus signalizing the end of the disposable public domain, Congress enacted the first continuing cash grants.

A long, extensive, and continuous experience is therefore the foundation of the present system of shared functions characteristic of the American federal system, what we have called the marble cake of government. It is a misjudgment of our history and our present situation to believe that a neat separation of governmental functions could take place without drastic alterations in our society and system of government.

IV. DYNAMICS OF SHARING: THE POLITICS OF THE FEDERAL SYSTEM

Many causes contribute to dispersed power in the federal system. One is the simple historical fact that the states existed before the nation. A second is in the form of creed, the traditional opinion of Americans that expresses distrust of centralized power and places great value in the strength and vitality of local units of government. Another is pride in locality and state, nurtured by the nation's size and by variations of regional and state history. Still a fourth cause of decentralization is the sheer wealth of the nation. It allows all groups, including state and local governments, to partake of the central government's largesse, supplies room for experimentation and even waste, and makes unnecessary the tight organization of political power that must follow when the support of one program necessarily means the deprivation of another.

In one important respect, the Constitution no longer operates to impede centralized government. The Supreme Court since 1937 has given Congress a

relatively free hand. The federal government can build substantive programs in many areas on the taxation and commerce powers. Limitations of such central programs based on the argument, "it's unconstitutional," are no longer possible as long as Congress (in the Court's view) acts reasonably in the interest of the whole nation. The Court is unlikely to reverse this permissive view in the foreseeable future.

Nevertheless, some constitutional restraints on centralization continue to operate. The strong constitutional position of the states—for example, the assignment of two Senators to each state, the role given the states in administering even national elections, and the relatively few limitations on their lawmaking powers—establishes the geographical units as natural centers of administrative and political strength. Many clauses of the Constitution are not subject to the same latitude of interpretation as the commerce and tax clauses. The simple, clearly stated, unambiguous phrases—for example, the President "shall hold his office during the term of four years"—are subject to change only through the formal amendment process. Similar provisions exist with respect to the terms of Senators and Congressmen and the amendment process. All of them have the effect of retarding or restraining centralizing action of the federal government. The fixed terms of the President and members of Congress, for example, greatly impede the development of nationwide, disciplined political parties that almost certainly would have to precede continuous large-scale expansion of federal functions.

The constitutional restraints on the expansion of national authority are less important and less direct today than they were in 1879 or 1936. But to say that they are less important is not to say that they are unimportant.

The nation's politics reflect these decentralizing causes and add some of their own. The political parties of the United States are unique. They seldom perform the function that parties traditionally perform in other countries, the function of gathering together diverse strands of power and welding them into one. Except during the period of nominating and electing a President and for the essential but nonsubstantive business of organizing the houses of Congress, the American parties rarely coalesce power at all. Characteristically they do the reverse, serving as a canopy under which special and local interests are represented with little regard for anything that can be called a party program. National leaders are elected on a party ticket, but in Congress they must seek cross-party support if their leadership is to be effective. It is a rare President during rare periods who can produce legislation without facing the defection of substantial numbers of his own party. (Wilson could do this in the first session of the Sixty-Third Congress; but Franklin D. Roosevelt could not, even during the famous hundred days of 1933.) Presidents whose parties form the majority of the Congressional houses must still count heavily on support from the other party.

The parties provide the pivot on which the entire governmental system swings. Party operations, first of all, produce in legislation the basic division of functions between the federal government, on the one hand, and state and local governments, on the other. The Supreme Court's permissiveness with respect to the expansion of national powers has not in fact produced any considerable

extension of exclusive federal functions. The body of federal law in all fields has remained, in the words of Henry M. Hart, Jr., and Herbert Wechsler, "interstitial in its nature," limited in objective and resting upon the principal body of legal relationships defined by state law. It is difficult to find any area of federal legislation that is not significantly affected by state law.

In areas of new or enlarged federal activity, legislation characteristically provides important roles for state and local governments. This is as true of Democratic as of Republican administrations and true even of functions for which arguments of efficiency would produce exclusive federal responsibility. Thus the unemployment compensation program of the New Deal and the airport program of President Truman's administration both provided important responsibilities for state governments. In both cases attempts to eliminate state participation were defeated by a cross-party coalition of pro-state votes and influence. A large fraction of the Senate is usually made up of ex-governors, and the membership of both houses is composed of men who know that their reelection depends less upon national leaders or national party organization than upon support from their home constituencies. State and local officials are key members of these constituencies, often central figures in selecting candidates and in turning out the vote. Under such circumstances, national legislation taking state and local views heavily into account is inevitable.

Second, the undisciplined parties affect the character of the federal system as a result of Senatorial and Congressional interference in federal administrative programs on behalf of local interests. Many aspects of the legislative involvement in administrative affairs are formalized. The Legislative Reorganization Act of 1946, to take only one example, provided that each of the standing committees "shall exercise continuous watchfulness" over administration of laws within its jurisdiction. But the formal system of controls, extensive as it is, does not compare in importance with the informal and extralegal network of relationships in producing continuous legislative involvement in administrative affairs.

Senators and Congressmen spend a major fraction of their time representing problems of their constituents before administrative agencies. An even larger fraction of Congressional staff time is devoted to the same task. The total magnitude of such "case work" operations is great. In one five-month period of 1943 the Office of Price Administration received a weekly average of 842 letters from members of Congress. If phone calls and personal contacts are added, each member of Congress on the average presented the OPA with a problem involving one of his constituents twice a day in each five-day work week. Data for less vulnerable agencies during less intensive periods are also impressive. In 1958, to take only one example, the Department of Agriculture estimated (and underestimated) that it received an average of 159 Congressional letters per working day. Special Congressional liaison staffs have been created to service this mass of business, though all higher officials meet it in one form or another. The Air Force in 1958 had, under the command of a major general, 137 people (55 officers and 82 civilians) working it its liaison office.

The widespread, consistent, and in many ways unpredictable character of

legislative interference in administrative affairs has many consequences for the tone and character of American administrative behavior. From the perspective of this paper, the important consequence is the comprehensive, day-to-day, even hour-by-hour, impact of local views on national programs. No point of substance or procedure is immune from Congressional scrutiny. A substantial portion of the entire weight of this impact is on behalf of the state and local governments. It is a weight that can alter procedures for screening immigration applications, divert the course of a national highway, change the tone of an international negotiation, and amend a social security law to accommodate local practices or fulfill local desires.

The party system compels administrators to take a political role. This is a third way in which the parties function to decentralize the American system. The administrator must play politics for the same reason that the politician is able to play in administration: the parties are without program and without discipline.

In response to the unprotected position in which the party situation places him, the administrator is forced to seek support where he can find it. One ever-present task is to nurse the Congress of the United States, that crucial constituency which ultimately controls his agency's budget and program. From the administrator's view, a sympathetic consideration of Congressional requests (if not downright submission to them) is the surest way to build the political support without which the administrative job could not continue. Even the completely task-oriented administrator must be sensitive to the need for Congressional support and to the relationship between case work requests, on one side, and budgetary and legislative support, on the other. "You do a good job handling the personal problems and requests of a Congressman," a White House officer said, "and you have an easier time convincing him to back your program." Thus there is an important link between the nursing of Congressional requests, requests that largely concern local matters, and the most comprehensive national programs. The administrator must accommodate to the former as a price of gaining support for the latter.

One result of administrative politics is that the administrative agency may become the captive of the nationwide interest group it serves or presumably regulates. In such cases no government may come out with effective authority: the winners are the interest groups themselves. But in a very large number of cases, states and localities also win influence. The politics of administration is a process of making peace with legislators who for the most part consider themselves the guardians of local interests. The political role of administrators therefore contributes to the power of states and localities in national programs.

Finally, the way the party system operates gives American politics their overall distinctive tone. The lack of party discipline produces an openness in the system that allows individuals, groups, and institutions (including state and local governments) to attempt to influence national policy at every step of the legislative-administrative process. This is the "multiple-crack" attribute of the American government. "Crack" has two meanings. It means not only many fissures or access points; it also means, less statically, opportunities for wallops or smacks at government.

If the parties were more disciplined, the result would not be a cessation of the process by which individuals and groups impinge themselves upon the central government. But the present state of the parties clearly allows for a far greater operation of the multiple crack than would be possible under the conditions of centralized party control. American interest groups exploit literally uncountable access points in the legislative-administrative process. If legislative lobbying, from committee stages to the conference committee, does not produce results, a Cabinet secretary is called. His immediate associates are petitioned. Bureau chiefs and their aides are hit. Field officers are put under pressure. Campaigns are instituted by which friends of the agency apply a secondary influence on behalf of the interested party. A conference with the President may be urged.

To these multiple points for bringing influence must be added the multiple voices of the influencers. Consider, for example, those in a small town who wish to have a federal action taken. The easy merging of public and private interest at the local level means that the influence attempt is made in the name of the whole community, thus removing it from political partisanship. The Rotary Club as well as the City Council, the Chamber of Commerce and the mayor, eminent citizens and political bosses—all are readily enlisted. If a conference in a Senator's office will expedite matters, someone on the local scene can be found to make such a conference possible and effective. If technical information is needed, technicians will supply it. State or national professional organizations of local officials, individual Congressmen and Senators, and not infrequently whole state delegations will make the local cause their own. Federal field officers, who service localities, often assume local views. So may elected and appointed state officers. Friendships are exploited, and political mortgages called due. Under these circumstances, national policies are molded by local action.

In summary, then, the party system functions to devolve power. The American parties, unlike any other, are highly responsive when directives move from the bottom to the top, highly unresponsive from top to bottom. Congressmen and Senators can rarely ignore concerted demands from their home constituencies; but no party leader can expect the same kind of response from those below, whether he be a President asking for Congressional support or a Congressman seeking aid from local or state leaders.

Any tightening of the party apparatus would have the effect of strengthening the central government. The four characteristics of the system, discussed above, would become less important. If control from the top were strictly applied, these hallmarks of American decentralization might entirely disappear. To be specific, if disciplined and program-oriented parties were achieved: (1) It would make far less likely legislation that takes heavily into account the desires and prejudices of the highly decentralized power groups and institutions of the country, including the state and local governments. (2) It would to a large extent prevent legislators, individually and collectively, from intruding themselves on behalf of non-national interests in national administrative programs. (3) It would put an end to the administrator's search for his own political support, a search that often results in fostering state, local, and other non-national powers. (4) It would dampen the

process by which individuals and groups, including state and local political leaders, take advantage of multiple cracks to steer national legislation and administration in ways congenial to them and the institutions they represent.

Alterations of this sort could only accompany basic changes in the organization and style of politics which, in turn, presuppose fundamental changes at the parties' social base. The sharing of functions is, in fact, the sharing of power. To end this sharing process would mean the destruction of whatever measure of decentralization exists in the United States today.

V. GOALS FOR THE SYSTEM OF SHARING

The Goal of Understanding

Our structure of government is complex, and the politics operating that structure are mildly chaotic. Circumstances are ever-changing. Old institutions mask intricate procedures. The nation's history can be read with alternative glosses, and what is nearest at hand may be furthest from comprehension. Simply to understand the federal system is therefore a difficult task. Yet without understanding there is little possibility of producing desired changes in the system. Social structures and processes are relatively impervious to purposeful change. They also exhibit intricate interrelationships so that change induced at point "A" often produces unanticipated results at point "Z." Changes introduced into an imperfectly understood system are as likely to produce reverse consequences as the desired ones.

This is counsel of neither futility nor conservatism for those who seek to make our government a better servant of the people. It is only to say that the first goal for those setting goals with respect to the federal system is that of understanding it.

Two Kinds of Decentralization

The recent major efforts to reform the federal system have in large part been aimed at separating functions and tax sources, at dividing them between the federal government and the states. All of these attempts have failed. We can now add that their success would be undesirable.

It is easy to specify the conditions under which an ordered separation of functions could take place. What is principally needed is a majority political party, under firm leadership, in control of both Presidency and Congress, and, ideally but not necessarily, also in control of a number of states. The political discontinuities, or the absence of party links, (1) between the governors and their state legislatures, (2) between the President and the governors, and (3) between the President and Congress clearly account for both the picayune recommendations of the Federal-State Action Committee and for the failure of even those recommendations in Congress. If the President had been in control of Congress (that is, consistently able to direct a majority of House and Senate votes), this alone would have made possible some genuine separation and devolution of functions. The failure to

decentralize by order is a measure of the decentralization of power in the political parties.

Stated positively, party centralization must precede governmental decentralization by order. But this is a slender reed on which to hang decentralization. It implies the power to centralize. A majority party powerful enough to bring about ordered decentralization is far more likely to choose in favor of ordered centralization. And a society that produced centralized national parties would, by that very fact, be a society prepared to accept centralized government.

Decentralization by order must be contrasted with the different kind of decentralization that exists in the United States. It may be called the decentralization of mild chaos. It exists because of the existence of dispersed power centers. This form of decentralization is less visible and less neat. It rests on no discretion of central authorities. It produces at times specific acts that many citizens may consider undesirable or evil. But power sometimes wielded even for evil ends may be desirable power. To those who find value in the dispersion of power, decentralization by mild chaos is infinitely more desirable than decentralization by order. The preservation of mild chaos is an important goal for the American federal system.

Oiling the Squeak Points

In a governmental system of genuinely shared responsibilities, disagreements inevitably occur. Opinions clash over proximate ends; particular ways of doing things become the subject of public debate, innovations are contested. These are not basic defects in the system. Rather, they are the system's energy-reflecting life blood. There can be no permanent "solutions" short of changing the system itself by elevating one partner to absolute supremacy. What can be done is to attempt to produce conditions in which conflict will not fester but be turned to constructive solutions of particular problems.

A long list of specific points of difficulty in the federal system can be easily identified. No adequate congressional or administrative mechanism exists to review the patchwork of grants in terms of national needs. There is no procedure by which to judge, for example, whether the national government is justified in spending so much more for highways than for education. The working force in some states is inadequate for the effective performance of some nationwide programs, while honest and not-so-honest graft frustrates efficiency in others. Some federal aid programs distort state budgets, and some are so closely supervised as to impede state action in meeting local needs. Grants are given for programs too narrowly defined, and overall programs at the state level consequently suffer. Administrative, accounting, and auditing difficulties are the consequence of the multiplicity of grant programs. City officials complain that the states are intrusive fifth wheels in housing, urban redevelopment, and airport building programs.

Some differences are so basic that only a demonstration of strength on one side or another can solve them. School desegregation illustrates such an issue. It also illustrates the correct solution (although not the most desirable method of

reaching it): in policy conflicts of fundamental importance, touching the nature of democracy itself, the view of the whole nation must prevail. Such basic ends, however, are rarely at issue, and sides are rarely taken with such passion that loggerheads are reached. Modes of settlement can usually be found to lubricate the squeak points of the system.

A pressing and permanent state problem, general in its impact, is the difficulty of raising sufficient revenue without putting local industries at a competitive disadvantage or without an expansion of sales taxes that press hardest on the least wealthy. A possible way of meeting this problem is to establish a state-levied income tax that could be used as an offset for federal taxes. The maximum level of the tax which could be offset would be fixed by federal law. When levied by a state, the state collection would be deducted from federal taxes. But if a state did not levy the tax, the federal government would. An additional fraction of the total tax imposed by the states would be collected directly by the federal government and used as an equalization fund, that is, distributed among the less wealthy states. Such a tax would almost certainly be imposed by all states since not to levy it would give neither political advantage to its public leaders nor financial advantage to its citizens. The net effect would be an increase in the total personal and corporate income tax.

The offset has great promise for strengthening state governments. It would help produce a more economic distribution of industry. It would have obvious financial advantages for the vast majority of states. Since a large fraction of all state income is used to aid political subdivisions, the local governments would also profit, though not equally as long as cities are underrepresented in state legislatures. On the other hand, such a scheme will appear disadvantageous to some low-tax states which profit from the in-migration of industry (though it would by no means end all state-by-state tax differentials). It will probably excite the opposition of those concerned over governmental centralization, and they will not be assuaged by methods that suggest themselves for making both state and central governments bear the psychological impact of the tax. Although the offset would probably produce an across-the-board tax increase, wealthier persons, who are affected more by an income tax than by other levies, can be expected to join forces with those whose fear is centralization. (This is a common alliance and, in the nature of things, the philosophical issue rather than financial advantage is kept foremost.)

Those opposing such a tax would gain additional ammunition from the certain knowledge that federal participation in the scheme would lead to some federal standards governing the use of the funds. Yet the political strength of the states would keep these from becoming onerous. Indeed, inauguration of the tax offset as a means of providing funds to the states might be an occasion for dropping some of the specifications for existing federal grants. One federal standard, however, might be possible because of the greater representation of urban areas in the constituency of Congress and the President than in the constituency of state legislatures: Congress might make a state's participation in the offset scheme dependent upon a periodic reapportionment of state legislatures.

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The income tax offset is only one of many ideas that can be generated to meet serious problems of closely meshed governments. The fate of all such schemes ultimately rests, as it should, with the politics of a free people. But much can be done if the primary technical effort of those concerned with improving the federal system were directed not at separating its interrelated parts but at making them work together more effectively. Temporary commissions are relatively inefficient in this effort, though they may be useful for making general assessments and for generating new ideas. The professional organizations of government workers do part of the job of continuously scrutinizing programs and ways and means of improving them. A permanent staff, established in the President's office and working closely with state and local officials, could also perform a useful and perhaps important role.

The Strength of the Parts

Whatever governmental "strength" or "vitality" may be, it does not consist of independent decision-making in legislation and administration. Federal-state interpenetration here is extensive. Indeed, a judgment of the relative domestic strength of the two planes must take heavily into account the influence of one on the other's decisions. In such an analysis the strength of the states (and localities) does not weigh lightly. The nature of the nation's politics makes federal functions more vulnerable to state influence than state offices are to federal influence. Many states, as the Kestnbaum Commission noted, live with "self-imposed constitutional limitations" that make it difficult for them to "perform all of the services that their citizens require." If this has the result of adding to federal responsibilities, the states' importance in shaping and administering federal programs eliminates much of the sting.

The geography of state boundaries, as well as many aspects of state internal organization, are the products of history and cannot be justified on any grounds of rational efficiency. Who, today, would create major governmental subdivisions the size of Maryland, Delaware, New Jersey, or Rhode Island? Who would write into Oklahoma's fundamental law an absolute state debt limit of $500,000? Who would design (to cite only the most extreme cases) Georgia's and Florida's gross underrepresentation of urban areas in both houses of the legislature?

A complete catalogue of state political and administrative horrors would fill a sizeable volume. Yet exhortations to erase them have roughly the same effect as similar exhortations to erase sin. Some of the worst inanities—for example, the boundaries of the states, themselves—are fixed in the national constitution and defy alteration for all foreseeable time. Others, such as urban underrepresentation in state legislatures, serve the overrepresented groups, including some urban ones, and the effective political organization of the deprived groups must precede reform.

Despite deficiencies of politics and organizations that are unchangeable or slowly changing, it is an error to look at the states as static anachronisms. Some of them—New York, Minnesota, and California, to take three examples spanning the country—have administrative organizations that compare favorably in many

ways with the national establishment. Many more in recent years have moved rapidly towards integrated administrative departments, statewide budgeting, and central leadership. The others have models-in-existence to follow, and active professional organizations (led by the Council of State Governments) promoting their development. Slow as this change may be, the states move in the direction of greater internal effectiveness.

The pace toward more effective performance at the state level is likely to increase. Urban leaders, who generally feel themselves disadvantaged in state affairs, and suburban and rural spokesmen, who are most concerned about national centralization, have a common interest in this task. The urban dwellers want greater equality in state affairs, including a more equitable share of state financial aid; nonurban dwellers are concerned that city dissatisfactions should not be met by exclusive federal, or federal-local, programs. Antagonistic, rather than amiable, cooperation may be the consequence. But it is a cooperation that can be turned to politically effective measures for a desirable upgrading of state institutions.

If one looks closely, there is scant evidence for the fear of the federal octopus, the fear that expansion of central programs and influence threatens to reduce the states and localities to compliant administrative arms of the central government. In fact, state and local governments are touching a larger proportion of the people in more ways than ever before; and they are spending a higher fraction of the total national product than ever before. Federal programs have increased, rather than diminished, the importance of the governors; stimulated professionalism in state agencies; increased citizen interest and participation in government; and, generally, enlarged and made more effective the scope of state action.[2] It may no longer be true in any significant sense that the states and localities are "closer" than the federal government to the people. It is true that the smaller governments remain active and powerful members of the federal system.

Central Leadership: The Need for Balance

The chaos of party processes makes difficult the task of presidential leadership. It deprives the President of ready-made Congressional majorities. It may produce, as in the chairmen of legislative committees, power-holders relatively hidden from public scrutiny and relatively protected from presidential direction. It allows the growth of administrative agencies which sometimes escape control by central officials. These are prices paid for a wide dispersion of political power. The cost is tolerable because the total results of dispersed power are themselves desirable and because, where clear national supremacy is essential, in foreign policy and military affairs, it is easiest to secure.

Moreover, in the balance of strength between the central and peripheral governments, the central government has on its side the whole secular drift towards the concentration of power. It has on its side technical developments that

[2]See the valuable report, *The Impact of Federal Grants-in-Aid on the Structure and Functions of State and Local Governments*, submitted to the Commission on Intergovernmental Relations by the Governmental Affairs Institute (Washington, 1955).

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make central decisions easy and sometimes mandatory. It has on its side potent purse powers, the result of superior tax-gathering resources. It has potentially on its side the national leadership capacities of the presidential office. The last factor is the controlling one, and national strength in the federal system has shifted with the leadership desires and capacities of the Chief Executive. As these have varied, so there has been an almost rhythmic pattern: periods of central strength put to use alternating with periods of central strength dormant.

Following a high point of federal influence during the early and middle years of the New Deal, the postwar years have been, in the weighing of central-peripheral strength, a period of light federal activity. Excepting the Supreme Court's action in favor of school desegregation, national influence by design or default has not been strong in domestic affairs. The danger now is that the central government is doing too little rather than too much. National deficiencies in education and health require the renewed attention of the national government. Steepening population and urbanization trend lines have produced metropolitan area problems that can be effectively attacked only with the aid of federal resources. New definitions of old programs in housing and urban redevelopment, and new programs to deal with air pollution, water supply, and mass transportation are necessary. The federal government's essential role in the federal system is that of organizing, and helping to finance, such nationwide programs.

The American federal system exhibits many evidences of the dispersion of power not only because of formal federalism but more importantly because our politics reflect and reinforce the nation's diversities-within-unity. Those who value the virtues of decentralization, which writ large are virtues of freedom, need not scruple at recognizing the defects of those virtues. The defects are principally the danger that parochial and private interests may not coincide with, or give way to, the nation's interest. The necessary cure for these defects is effective national leadership.

The centrifugal force of domestic politics needs to be balanced by the centripetal force of strong presidential leadership. Simultaneous strength at center and periphery exhibits the American system at its best, if also at its noisiest. The interests of both find effective spokesmen. States and localities (and private interest groups) do not lose their influence opportunities, but national policy becomes more than the simple consequence of successful, momentary concentrations of non-national pressures: it is guided by national leaders.

❖❖ Morton Grodzins's classic essay on American federalism points out: "The American federal system has never been a system of separated governmental activities. There has never been a time when it was possible to put neat labels on discrete 'federal,' 'state,' and 'local' functions." In one way or another the national government, directly or indirectly, has always had a strong impact upon state and local governments. From the Constitutional

QUESTIONS FOR FEDERALIST #39

Answer on separate paper.

1. Why, according to Madison, is it altogether necessary that the new government be republican in nature?

2. On what grounds does he reject the "republican" label when used to describe certain other governments of his day?

3. What would be the difference, in his thinking, between a "federal" and a "national" government?

4. Using this distinction from answer #3, how does Madison describe:

   a. the proposed act of establishing a Constitution?

   b. the composition of Congress and the executive branch?

   c. the actual operation of governmental powers?

   d. the extent of those governmental powers?

   e. the process of amending the Constitution?

5. Madison concludes that the proposed Constitution is neither federal nor national, but a mixture. How do you think that the Constitution might have differed if the authors had decided simply on a:

   a. national government?

   b. federal government?

- From the Wilson text workbook

2.1

The Federalist, No. 39

James Madison

At the time of the framing of the Constitution, the founders were aware of two basic forms of government: a national government, with total central domination, and a confederation, a loose alliance of states in which the central government has virtually no power. When the Constitution and *The Federalist* were written, a "federal" government and a "confederation" were synonymous. The governmental form that has come to be called *federalism*, in which authority is divided between two independent levels, was the invention of the founders, though the label came later.

Critics of the Constitution believed the document gave so much power to the central government that it was in fact "national" in character. In *The Federalist*, No. 39, James Madison refutes this charge and asserts that the new government is "neither a national nor a federal Constitution, but a composition of both." Being a politician, Madison took great pains to point out that the national government's powers are strictly limited to those enumerated in the Constitution and that the residual sovereignty of the states is greater than that of the national government. The first part of this paper can also be regarded as an elegant statement of what Madison meant by the term *republic.*

To the People of the State of New York: The first question that offers itself is, whether the general form and aspect of the government be strictly republican?* It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the revolution; or with that honorable determination, which animates every votary [devotee] of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the Convention therefore be found to depart from the republican character, its advocates must abandon it as no longer defensible.

* A *republican* form of government is one in which power resides in the people but is formally exercised by their elected representatives.

What then are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitutions of different States, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people, is exercised in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch only, combined with a hereditary aristocracy and monarchy, has with equal impropriety been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions.

If we resort for a criterion, to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is *sufficient* for such a government, that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character. According to the Constitution of every State in the Union, some or other of the officers of government are appointed indirectly only by the people. According to most of them the chief magistrate himself is so appointed. And according to one, this mode of appointment is extended to one of the coordinate branches of the legislature. According to all the Constitutions also, the tenure of the highest offices is extended to a definite period, and in many instances, both within the legislative and executive departments, to a period of years. According to the provisions of most of the constitutions, again, as well as according to the most respectable and received opinions on the subject, the members of the judiciary department are to retain their offices by the firm tenure of good behaviour.

On comparing the Constitution planned by the Convention, with the standard here fixed, we perceive at once that it is in the most rigid sense conformable to it. The House of Representatives, like that of one branch at least of all the State

Legislatures, is elected immediately by the great body of the people. The Senate, like the present Congress, and the Senate of Maryland, derives its appointment indirectly from the people.* The President is indirectly derived from the choice of the people, according to the example in most of the States. Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves. The duration of the appointments is equally conformable to the republican standard, and to the model of the State Constitutions. The House of Representatives is periodically elective as in all the States: and for the period of two years as in the State of South-Carolina. The Senate is elective for the period of six years; which is but one year more than the period of the Senate of Maryland; and but two more than that of the Senates of New-York and Virginia. The President is to continue in office for the period of four years; as in New-York and Delaware, the chief magistrate is elected for three years, and in South-Carolina for two years. In the other States the election is annual. In several of the States however, no constitutional provision is made for the impeachment of the Chief Magistrate. And in Delaware and Virginia, he is not impeachable till out of office. The President of the United States is impeachable at any time during his continuance in office. The tenure by which the Judges are to hold their places, is, as it unquestionably ought to be, that of good behaviour. The tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case, and the example of the State Constitutions.

Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the Federal and the State Governments; and in its express guarantee of the republican form to each of the latter.

But it was not sufficient, say the adversaries of the proposed Constitution, for the Convention to adhere to the republican form. They ought, with equal care, to have preserved the *federal* form, which regards the union as a *confederacy* of sovereign States; instead of which, they have framed a *national* government, which regards the union as a *consolidation* of the States. And it is asked by what authority this bold and radical innovation was undertaken. The handle which has been made of this objection requires, that it should be examined with some precision.

Without enquiring into the accuracy of the distinction on which the objection is founded, it will be necessary to a just estimate of its force, first to ascertain the real character of the government in question; secondly, to enquire how far the Convention were authorised to propose such a government; and thirdly, how far the duty they owed to their country, could supply any defect of regular authority.

* The Seventeenth Amendment, adopted in 1913, changed the election procedure for senators from indirect election by state legislatures to direct election by the people of each state.

First. In order to ascertain the real character of the government it may be considered in relation to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.

On examining the first relation, it appears on one hand that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation; but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves. The act therefore establishing the Constitution, will not be a *national* but a *federal* act.

That it will be a federal and not a national act, as these terms are understood by the objectors, the act of the people as forming so many independent States, not as forming one aggregate nation, is obvious from this single consideration that it is to result neither from the decision of a *majority* of the people of the Union, nor from that of a *majority* of the States. It must result from the *unanimous* assent of the several States that are parties to it, differing no other wise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority; in the same manner as the majority in each State must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes; or by considering the will of a majority of the States, as evidence of the will of a majority of the people of the United States. Neither of these rules has been adopted. Each State in ratifying the Constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act. In this relation then the new Constitution will, if established, be a *federal* and not a *national* Constitution.

The next relation is to the sources from which the ordinary powers of government are to be derived. The house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the Legislature of a particular State. So far the Government is *national* not *federal*. The Senate on the other hand will derive its powers from the States, as political and co-equal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is *federal*, not *national*. The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct

and co-equal societies; partly as unequal members of the same society. The eventual election again is to be made by that branch of the Legislature which consists of the national representatives; but in this particular act, they are to be thrown into the form of individual delegations from so many distinct and co-equal bodies politic. From this aspect of the Government, it appears to be of a mixed character presenting at least as many *federal* as *national* features.

The difference between a federal and national Government as it relates to the *operation of the Government* is supposed to consist in this, that in the former, the powers operate on the political bodies composing the confederacy, in their political capacities: In the latter, on the individual citizens, composing the nation, in their individual capacities. On trying the Constitution by this criterion, it falls under the *national*, not the *federal* character; though perhaps not so compleatly, as has been understood. In several cases and particularly in the trial of controversies to which States may be parties, they must be viewed and proceeded against in their collective and political capacities only. So far the national countenance of the Government on this side seems to be disfigured by a few federal features. But this blemish is perhaps unavoidable in any plan; and the operation of the Government on the people in their individual capacities, in its ordinary and most essential proceedings, may on the whole designate it in this relation a *national* Government.

But if the Government be national with regard to the *operation* of its powers, it changes its aspect again when we contemplate it in relation to the *extent* of its powers. The idea of a national Government involves in it, not only an authority over the individual citizens; but an indefinite supremacy over all persons and things, so far as they are objects of lawful Government. Among a people consolidated into one nation, this supremacy is compleatly vested in the national Legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal Legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controuled, directed or abolished by it at pleasure. In the latter the local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them, within its own sphere. In this relation then the proposed Government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general Government.* But this does not change the principle of the case. The decision is to be impartially made, accord-

* The tribunal to resolve boundary disputes became the Supreme Court (see *McCulloch v. Maryland*, which follows this selection).

ing to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general rather than under the local Governments; or to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.

If we try the Constitution by its last relation, to the authority by which amendments are to be made, we find it neither wholly *national*, nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established Government. Were it wholly federal on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the Convention is not founded on either of these principles. In requiring more than a majority, and particularly, in computing the proportion by *States*, not by *citizens*, it departs from the *national*, and advances towards the *federal* character: In rendering the concurrence of less than the whole number of States sufficient, it loses again the *federal*, and partakes of the *national* character.

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

Summary Questions

1. According to Madison, why was the new U.S. Constitution neither a "national" nor a "federal" document? Which of its features were designed to curb the national government's domination of the states?
2. Madison believed the Constitution set up a republican rather than a democratic form of government. What features of the document were designed to give the people an indirect rather than a direct influence on public policy?

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void. . . .

Summary Questions

1. Why did the Court believe that the national government possessed powers beyond those enumerated in the Constitution?
2. Does Marshall's view in this case seem consistent with the view of national-state relations expressed by James Madison in *The Federalist*, No. 39?

The Price of Federalism

H. G. Nicholas

Federalism can encourage great diversity. States have preceded the national government in passing legislation to extend civil rights, develop welfare programs, improve social conditions, and protect the environment. But federalism carries costs as well. In this article H. G. Nicholas, a British observer of American politics, discusses some of the disadvantages of a federal structure that encourages "extreme complexity." The division of power among national, state, and local authorities makes government liable to contradictions and confusions. According to Nicholas, a U.S. citizen is faced with "an awful lot of government," and the frequency of elections, the number of offices to be filled, and the range of issues submitted for consideration are so great that many citizens are overwhelmed.

Nicholas further argues that a dual system of courts and the proliferation of laws creates an excess of legalism while contributing to confusion, and ultimately to lawlessness. Other costs of excessive legalism include time, expense, and an elevated status for lawyers in society.

H. G. Nicholas is a former Rhodes Professor of American History and Institutions at Oxford University.

"The Federal system," says Tocqueville, "was created with the intention of combining the different advantages which result from the greater and lesser extent of nations; and a single glance over the United States of America suffices to discover advantages which they have derived from its adoption." "A single glance"—even now the observer needs hardly more. The unique advantage of federalism is that it makes the United States possible. This great invention of the Founding Fathers squarely confronts the two greatest difficulties we have been examining—size and diversity—and, to a degree totally without precedent in history, provides a mechanism by which they can be accommodated within the framework of a single democratic government. The success of the device lay not only in the sensible and elastic division of powers between central and provincial governments, but even more in the provision that both the central and the provincial governments, each within its delimited sphere, should operate directly on the individual citizen. This feature, so novel at the time, is now so familiar as to require no exposition here. Yet without it there would have been no United States; instead, there would have been the balkanization of a continent.

Yet in politics, as in the rest of life, nothing is free, and even the greatest of advances exacts its price. Taking the indispensability of federalism for granted, our object here is to ask what price the United States has had to pay for it. Our enquiry will reveal that many of what at first sight appear to be wanton defects in American government are no more than the inescapable consequences of the federal system. . . .

The most obvious characteristic of a system embracing . . . diversities is its extreme *complexity*. There have to be harmonized at the very least two sovereignties—that of any individual state and that of the federal government—and at the worst fifty-one—all of the states' and the federal government's. The mere idea of harmonized sovereignties is a difficult one to grasp, even when it is not totally repugnant. The facile absolutism of Virginia's John Randolph of Roanoke has immediate appeal: "Asking one of the states to surrender part of her sovereignty is like asking a lady to surrender part of her chastity."* Yet the American system of government asks its citizens not only to accept this central paradox but also to work it. The Constitution which prescribes the system is indeed a model of lucidity and compactness, yet, as Tocqueville remarked, "in examining it . . . one is startled at the variety of information and the amount of discernment that it presupposes in the people whom it is meant to govern." Historically there has been one great and tragic occasion on which the citizens failed to muster the qualities of heart and mind necessary to enable it to function. Yet the example is as notable for its uniqueness as for its enormity and in the main one can certainly

* John Randolph, an ardent states'-rights advocate, was a famous orator with a reputation for sarcasm. He was elected to the House of Representatives in 1799, and later to the U.S. Senate. He once fought a duel, in which no one was hurt, with Henry Clay because of his insulting language in the Senate over Clay's appointment as secretary of state.

concur with Tocqueville's tribute: "I have never been more struck by the good sense and the practical judgement of the Americans than in the manner in which they elude the numberless difficulties resulting from their federal constitution."

For the ordinary citizen the most obvious consequence of this complexity is that he is faced by an awful lot of government. For everyone there are three tiers of rule—local, state, and federal. This means three lots of representatives (to say nothing of executives) to elect, three judicial and police jurisdictions to respect, three levels of taxes to pay, three sets of laws or ordinances to observe, three rings of the political circus to watch. (Indeed for most citizens there is a fourth layer of government as well, where a county inserts itself between a municipal and a state government—to say nothing of the various semi-autonomous administrative bodies, such as school boards, which are a feature of American local government.) For a great many people this is simply too much to do. The frequency of elections, the number of offices to be filled, the range of issues submitted for consideration, produce one simple consequence—relatively few people vote. (If it were not for the merciful, extra-constitutional device of the two-party system even fewer would do so.) The three tiers of government compete erratically for the harassed newspaper reader's time—and even more erratically for the television viewer's attention—with now one, now another ring of the political circus stealing the spotlight from the rest. The diversities of the tax system raise tax-dodging—and tax-chasing—to the level of a competitive sport. The police systems, though sometimes co-operating, are often engaged in professional rivalry against a criminal underworld which knows nothing of state lines but a great deal about how to play off competing jurisdictions one against the other.

As far as courts and judges are concerned a similar tripartism prevails. States could, of course, use their powers to co-ordinate the work and jurisdictions of local and state-wide courts, and there are many that do. But unity in judicial organization remains the exception rather than the rule and jurisdiction is often so fragmented that a litigant may have to go to more than one court to get a decision on a single case. As between the state and federal levels the principles of federalism dictate a necessary separation—separate courts, separate appointing or electing agents, separate jurisdictions. The United States, as a truly federal government, can and does accommodate a considerable diversity of state laws, even the civil law of Louisiana with its heavy dependence upon the Code Napoléon.* It has been said with justice that "American law," as such, does not exist. Where differences result in conflict and a decision is required the federal courts, of course, exist to provide it. And of course the Constitution debars the states altogether from legislating in certain areas. But it gives the federal government very little power to oblige the states to take positive action when they have

* Louisiana is the only state in which the legal system is based on civil law (laws passed by the state legislature) rather than on common law (laws based on court decisions). In France all the civil laws are combined into a single code, and the French influence in the settlement of Louisiana is reflected in that state's legal procedures.

a mind not to. The overwhelming mass of American law is state-originated and state-enforced without interference by the agencies of federal government. . . .

Behind the fact of federal diversities, but linked with it, lies a paradox at the heart of the American attitude to law itself. It is remarkably and profoundly revered. Of all the marble temples in Washington wherein the spirit of the Republic dwells there is none more splendid, more dazzling, more marbled than that which houses the Supreme Court of the United States. ("We ought to ride in on elephants," Mr. Justice Stone is reported to have said.) Of all the documents enshrined in the National Archives none is so much—or so often—revered by the out-of-town pilgrim as the Constitution of the United States. Nor is it revered as a piece of paper alone; veneration has grown with every year for the Constitution as the central dogma and in the creed of Americanism. And this veneration has the most practical and direct results; it is what enables the people to accept, with a readiness which no other democracy can parallel, the right, even the obligation, of a Supreme Court to nullify the acts of the people's representatives on the grounds that they are unconstitutional. A sentiment which operates to such an end cannot be dismissed as formal or superficial.

Yet along with this sincere regard for constitutionalism goes a serious, recurrent, and surprisingly pervasive lawlessness. The pages of American history bear eloquent testimony to this phenomenon. The institutionalized violence of slavery persisted longer in America than anywhere else in the western world and required the institutionalized violence of civil war to bring it to an end, while the Ku Klux Klan preserved many of its repressive features down to a later day. The history of westward expansion is studded with violence in its most colourful and popularized and frequently successful forms. The legends of the Vigilantes of "the law west of the Pecos," of Jesse James, Billy the Kid, "Wild Bill" Hickok, et al., testify to the blend of odium and admiration which such inextricably mingled symbols of law and lawlessness continue to evoke. . . . The incidence of assassination as the ultimate political weapon has been and continues to be heavy in American public life.

For much of this there are perfectly good reasons which have nothing to do with federalism (and not always even, or exclusively, with the United States). But behind it lies an attitude to law which, if not exclusively American, is recognizably so and is in part at any rate the by-product of the character and complexity of American law itself. Aristotle thought that respect for the law as such was so valuable that even if you might improve a law by changing it it was probable that the harm of the change would outweigh the benefits of the revision. Nothing could be less American. The American polity was formed in an age of almost universal belief in Natural Law,* as a moral code of universal validity. To this the Constitution was deemed to conform and from this it derived much of its binding

* In Natural Law, rights are God-given or inherent in the individual; therefore, no government can legitimately take the rights away.

force. But if such moral timbers could be used to underpin fundamental law, they could equally provide a battering ram against ordinary legislative enactments which were deemed less than ideal. Each citizen felt free to judge for himself, on moral grounds, the applicability of any piece of legislation, to determine whether it was "just" or "unjust" and, if "unjust," to disobey it.

Brought up on the spectacle of the mutability and diversity of the laws, the man in the street develops a natural disposition to regard law-abidingness as, at best, a highly conditional virtue. This is a country in which, under the Constitution, all laws are *not* equal. The citizen knows that if he cannot divorce his wife satisfactorily in New York he can in Reno, that if he incorporates his business in New Jersey he will escape many of the onerous requirements that would obtain in New York. When a mere motor drive will bring him under a different legal dispensation is it surprising that he acquires a somewhat relativist attitude to law? He may not go as far as Huey Long with his claim that Louisiana had "the best laws money can buy," but he may rely on doing the next best thing, hiring the best lawyers money can buy. For this is a setting in which the lawyer who can steer through the complexities and make play with the diversities comes into his own. Thus, by a paradox, out of lawlessness emerges the next item on the price list of federalism, *legalism*.

"Federalism is legalism" . . . or, more crudely, "a government of lawyers, not of men." The citizen of a federation contemplating a proposed piece of legislation always has to ask himself two questions:

(a) Is it desirable?

(b) Is it constitutional?

The first point he can answer for himself; for the second he needs a lawyer. Similarly the opponents of a proposal which cannot be defeated merely on political grounds, whose popularity cannot be denied, will always be tempted to fall back on constitutional objections, whether valid or not. Thus the history of American politics is also, at almost every point, a constitutional history and, as often as not, the constitutional conflicts are not the real ones, but the smokescreen behind which the real political differences are being thrashed out.

This often introduces an element of unreality, not to say casuistry and play-acting, into the arguments of American politics. The great slavery debate was seldom joined about the merits of slavery as such, much less about the relations of black and white, but rather about whether or not Congress had the right to legislate slavery into or out of the territories. The great and continuing struggle between *laissez-faire* and public control was—and is still—fought in the largely outworn language of states' rights and what the Founding Fathers meant by terms like "general welfare." Historicism enters in—the appeal to history as an arbiter for present-day conflicts. Since it is a document of 1789 that is appealed to there is perpetual harking back to what its authors meant and thought. During the bitter controversies about the constitutionality of the New Deal this was a constant refrain. While the bench explored the constitutional debates of 1787,

the magazines were carrying articles and titles like "Madison in America Now" ("He would be alarmed for the future of the Republic"), while partisan groups crusaded under historically evocative labels such as "Jeffersonian Democrats."

This is not altogether a bad thing. It helps to unify by emphasizing the elements of continuity and tradition in the national heritage. It can be to politics what the classics are to education, especially since the Founding Fathers were unusually sagacious, representative, and expressive men. . . .

Another consequence of legalism is expense and delay. Federalism's complexity and the frequent conflicts of laws cost a lot of money to resolve. Delay may be thought good or bad according as one's interest lies in hastening or retarding change. But the uncertainty that accompanies delay is seldom in the public interest, while the cost of litigation hits everyone except the lawyers. They thrive. The United States, with four times the population of the U.K. has ten times as many lawyers. . . .

Twenty-eight of the thirty-nine Presidents have been lawyers by training or practice. ("The profession I chose was politics," wrote Woodrow Wilson. "The profession I entered was the law. I entered the one because I thought it would lead to the other.") Over half of the state governors since the Civil War have been lawyers. Congress pretty consistently runs to over 50 per cent lawyers and these constitute, as Bryce put it, "the better-educated half of the professional politicians." What holds true at the elected level is even more true at the appointed one, where a degree from a law school is the preferred qualification for any serious post in the federal service.

The peculiar cast which this gives to American government is more easily sensed than defined. It matches perfectly another characteristic of American public life, the disposition to move in and out of government employment as circumstances or politics dictate. The lawyer with his permanent licence to practise law for himself, is especially equipped to operate in this way. Abraham Lincoln indeed maintained his law partnership while he was President. No one could do that today, but the lawyer in government, though not a servant of two masters, is, in a useful sense, a master of two servants; and if one, the public service, does not please him he can switch back to the other, his private practice. In this way the law materially assists at that infusion of new blood which is such a marked characteristic of each new Washington administration.

But if the law brings new men and new ideas into government it also brings its own way of doing the work of governing. To the lawyer it is natural to see administration not as a continuous operation to be maintained or conducted throughout successive changes of party, but as a series of problems to be solved, or malpractices to be corrected—in fact as something very like a succession of legal cases to be fought and won (or at least settled in the judge's chambers). This inevitably involves concentration of effort on what he considers to be crucial areas; it put a premium on the immediately realizable; it sets little store by continuity; it breaks up the unity of administration, the seamless web of government, into manageable, discontinuous, not infrequently conflicting segments.

This approach to administration, when combined with the peculiar problems created by the framework of a written federal constitution and judicial review, encourages the lawyer in his professional addiction to ingenious solutions and especially to those which proceed by indirection. *Indirection* is indeed another, almost inescapable, characteristic of federal government. The adjustments in a fixed constitution necessary to keep it abreast of changing requirements can only occasionally be made by formal revision. For most day-to-day purposes they must be made by exploiting the possibilities for evading and circumventing the rigidities of the master plan.

Consider a classic example. Migratory birds are notoriously indifferent to territorial jurisdictions. Thus state legislation for their protection can never be adequate. Consequently in 1913 the U.S. Congress made it a federal offence to slaughter them. The Supreme Court of the period, however, could find no authority in the Constitution such as would permit Congress to legislate in such an area. Conservation-minded lawyers were not to be frustrated. On their advice the President negotiated and the Senate approved a treaty with the United Kingdom (acting at that time, under the British North America Act) by which the USA and Canada agreed to provide the necessary legal protection. Congress then was obligated to pass appropriate legislation to put this into effect and such legislation was judged indubitably constitutional because (Article VI) "All treaties made . . . under the authority of the United States are the supreme law of the land." So an essentially domestic problem was provided with a solution through powers conferred for the regulation of foreign relations.

For different reasons criminals may evade the short arm of justice at the level at which most U.S. criminal law enforcement occurs, the state. Thus Al Capone was able to pursue his career of murder and larceny unchecked in the Chicago of the Prohibition era because murder and extortion are not *per se* federal offences. Fortunately for justice, however, Capone was careless with his federal tax returns; as a result the federal government was able to do what Chicago and Illinois could not, and put him behind bars, if not for his major crimes, at any rate for his income-tax evasion. . . .

There are limits to what indirection can achieve. No one who is a genuine believer in federal government—and most Americans are—will resort to extreme devices of indirection save where no alternative seems available. The normal working of federal government will not depend on them. But, without term, that government will have to reconcile itself to a certain slowness, a deliberation in its movements which reflects the complexity and frequent contradictoriness of its parts. In many spheres, if not all, the pace of a federal government is the speed of its slowest component. It is not merely that the government of a federation is confined to certain fields. It is that even within those fields its action is deliberately retarded and circumscribed. This is most obvious, of course, in foreign relations. Not only does the President's treaty-making require the consent of two-thirds of the Senate. The Senate itself is tilted towards over-representation of the minority. Alaska's half-million residents have the same number of senators

as California's 23 million. Again, the system of presidential selection and election, pivoting as it may on the capture of a few key states, can give a minority in such states a disproportionate influence on a candidate's chances of victory or defeat.

These considerations carry through even to the internal organization of the federal legislature. The committee system breaks down the straight-forward operation of the majority principle in both chambers, and within each committee a disproportionate power has flowed into the hands of each chairman; to pursue this in the context of foreign policy one has only to recall the potency of the Idaho senator, Borah, who for so many years dominated the Foreign Relations Committee of the Senate. A less predictable but comparably potent weapon is the filibuster, similarly if more eccentrically designed to heighten the veto power of a minority.* Finally, when all other hurdles have been cleared, a popular measure can still fail as a result of a disagreement between the two houses or between both houses and the President—clashes which the Constitution has, ultimately, no powers to resolve.

The Constitution stops short of carrying this principle of minority veto into the internal organization of the executive branch itself. The President is not told how his administration should embody the federal idea. But no President can reach the White House without realizing that his administration must reflect the elements that elected him and that in a vast and federal country most of these elements will have a territorial base. Consequently, though he is not obliged, like the Senate or the House, to find room for representatives of every state, he will be bound to pay attention, in forming his administration, to the claims of each region. His Cabinet must reflect what the United Nations has learnt to call "equitable geographical representation." In filling vacancies in the federal courts he must note which part of the country feels under-represented. In the major administrative and diplomatic appointments he must take care that all the plums do not go to any one section. This, after all, whatever unifying factors are at work, remains a continental government which must reflect the real individualities of its regions across an area larger than Europe.

Summary Questions

COMPLETE THESE.

1. According to Nicholas, what is the price of federalism? How would a defender of federalism refute Nicholas's arguments?
2. Why are attorneys so influential in American society? What is the relationship between legalism and lawlessness, according to Nicholas? Do you agree?

* The Senate has an unlimited debate rule, and only in extraordinary circumstances are senators prevented from speaking as long as they wish. Through a filibuster, senators delay action on a piece of legislation by extended speaking, often on topics unrelated to the business at hand.