Chapter 3
Federalism:
States and Nation

The Founders & Federalism
• Federalism refers to the division of power between the national government and the states.
• The Founders had believed that England’s national Parliament had too much power even for an elected body.
• Each colony had been governed independently for more than 100 years at the signing of the Constitution.
• The English Parliament, based in London, made laws for all of the United Kingdom, that is England, Ireland, Wales and Scotland.
• Benjamin Franklin had toured Ireland before the American Revolution and saw the poverty and injustice there.
• The Founders believed that the Parliament played a role in the conditions endured by the Irish and the Scottish.
• They believed that if it were left to the English the conditions in the North American colonies would be as bad as those seen in Ireland and Scotland.

The Articles vs. The Constitution
• The initial constitution, The Articles of Confederation, had left all real authority with the individual states.
• The Constitution is declared as the supreme law of the land.
• The Rule of Law becomes the governing premise not the rule of Kings.
• It was this interpretation of the rights of states which led to the Civil War.
• It is no coincidence that the term “confederate” and “confederacy” are applied to the Southern states.
• It was an indication of their philosophical connection to the principles set forth in the Articles of Confederation.
• It was also the premise by which Southern states resisted the federal government’s mandates to end all forms of segregation and discrimination against African Americans.
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Liberal vs. Conservative

• Defining federalism is a work in progress
• One of the real and consistent differences between the two competing ideologies has to do with issues of federalism
• Conservatives lean toward favoring state and local control—except military issues
• Liberals tend to favor national or federal control
• The administration of Bush II has not adhered to this basic maxim of American conservatism.
• The entire No Child Left Behind program in education the federal government mandates testing. The federal government mandating testing for education, which is traditionally the jurisdiction of the individual states, is an egregious violation of conservative philosophy.
• The Bush v. Gore (2000) decision of the Supreme Court was also a violation of conservative ideology of the primacy of the states. The U.S. Supreme Court’s conservative majority overruled the Florida Supreme Court in an interpretation of Florida election statutes.
• The oft quoted saying of Prime Minister Winston Churchill actually referred to proper nouns (and in the quote below should be capitalized as proper nouns), that is, the Liberal political party and the Conservative party of England.
• These were the two primary political parties of 19th and early 20th century England.
• "If you're not a liberal at 20, you have no heart, and if you're not a conservative at 40, you have no head."-- Winston Churchill
• The two parties did not then represent the same political ideologies as do the contemporary American political philosophies/ideologies with the same names.

The locus of sovereignty

• Jefferson initially feared a strong national government as existed in Great Britain.
• Jefferson believed America would become a nation of mostly small farms and a few larger trading centers
• This is what existed in his time
• Hamilton, a Federalist, favored a strong national government because he didn’t trust local governments
• Ironically, by today’s standards Jefferson is considered a liberal and Hamilton is considered a conservative.
• Part of this perspective is based on the belief that Jefferson fundamentally trusted the common people while Hamilton sought to keep political power with an elite class in the centralized power of a federal government.
The Problem

- In 2000, and throughout the last half of the 20th Century, a greater percentage of voters voted in federal elections (that is, federal election years) than voted in non-federal election years.
- The federal elections are more democratic than state and local elections.
- This is the political fact which is a fundamental contradiction of the ideologically-based political philosophies.
- It sounds democratic and populist to insist that it is best for political decisions to be made on the state and local level.
- If political participation was either equal or increased as one moved to the local political environment this might be true.
- The reality is that the more local the election is the smaller percentage of the electorate which votes and therefore permits an active and organized group (sometimes an elite, sometimes an interest group) to control the political environment.

Federal Power Increases

- Federal review of state’s laws.
- The Supreme Court fills a logical void.
- The supremacy clause (Article VI) declares the Constitution as the supreme law of the land.
- Judicial Review mentioned nowhere in the Constitution.
- In 1789, the Congress of the United States passed the Judiciary Act, which gave federal courts the power of judicial review over acts of state government. This power was used for the first time by the U.S. Supreme Court in Hylton v. Virginia (1796).
- Most of the original thirteen states had some provision of judicial review of the laws passed by their legislatures by their respective courts.

Constitutional Constraints

- 10th Amendment states that powers not given to the federal government are those of the people and the states.
- Each state is required to give full faith and credit to the acts, records, and judicial proceedings of other states.
• The battle between the English monarch and the Parliament as to which institution had what powers worked on the principle that what powers Parliament did not possess still resided with the monarch.
• This Amendment to the Constitution was to address that issue, stating that all powers not specifically given to the federal government still resided with either the states and if not declared by the individual states, remained with the people.
• Unlike England’s legal tradition which left what powers were unstated resided with the monarch.

From Theory to Practice
• The issue of slavery will alter the notion of state vs. federal powers.
• The federal government will have to intervene on behalf of African-Americans in a variety of issues.
• Because the federal government is faced with addressing the abuses of a minority of states it has reduced (infringed) the authority of all states.
• The whole concept of the individual state’s authority exceeding that of the federal government when interpretations of law did not agree would grow out of the South’s desire to protect slavery in the 19th Century and later to deny the descendants of slaves their civil and voting rights.
• Those states which sought to maintain slavery, and later segregation, sought to resurrect the relationship between state and federal authority which existed under the Articles of Confederation.

The World Has Changed Greatly
• Did the Founders anticipate flight?
• Did the Founders anticipate mobility motor vehicles afford the public?
• Did they think about traveling from one ocean to another in six hours?
• Did they anticipate radio waves
• Did they anticipate a world where toxic emissions would spread with wind & water.
• Literal (and/or strict) interpretations of the Constitution become problematic.
• At the writing of the Constitution notions of psychology and neurology were primitive at best.
• Does someone who has a psychological condition have the same rights as other people?
• Does someone have the right to own any weapon they chose in the 21st Century when the most powerful firearm available at the time of the writing of the Constitution was a single shot rifle with a range of 50 yards– about 20 yard for the handgun.
National Concerns without National Standards

• Should we have national educational standards?
• All of the 11 countries who are better in education than the U.S. administer it on a national level
• New Deal acknowledges national dimension to problems.
  • The world has gotten smaller in that technology has either made interaction easy or travel more efficient.
  • Corporations have become international entities.
  • Education has traditionally been the jurisdiction of the states.
  • In some states racial segregation in schools was accepted as late as the 1970s.
  • There are still great disparities in education among the states.
  • What each state spends per student varies greatly among the states and also within the states.

The Constitution on National Standards

• 14th Amendment imposes national standards
• The amendment sought to remove inequities in due process
• *Bush v. Gore* majority relied on this concept
  • Historically, the federal government has intervened when the abuses were most egregious.
  • The 14th Amendment sought to force Southern states to apply their laws equally to people of African as they did to those of European descent.
  • Despite the fact that three of the most conservative members of the U.S. Supreme Court insisted in earlier rulings that the 14th Amendment only applied to racial inequities, they allowed it to be the fundamental premise by which they ruled in favor of Governor Bush in *Bush v. Gore* (2000).

Present-Day Impasse

• States violate or don’t enforce non-discrimination mandates.
• States don’t enforce stringent pollution standards
• States can be more innovative in solutions.
• Reagan and Democrats agree to pass federal standards but not to fund them.
• The once clear distinction between conservative and liberal ideologies with regard to the role of the federal government in relationship to the authority of the individual states has been blurred by the administration of Bush II.
• Time and again the administration of Bush II has abandoned basic conservative ideology in favor of imposing “conservative” positions on non-defense issues via a strong federal government.
• The whole issue of Gay marriage under basic Conservative views of government should be a state or local issue.
• Conservatives who once opposed the federal government’s involvement in advocating for civil rights for African Americans are taking the exact opposite view with regards to Gay marriage.
• Liberals who support Gay marriage are doing the reverse.

A Problem of Federalism

• If smaller and smaller proportions of the voters participate the more local the election, where best is the will of the people reflected?
• As the proportion of voters get smaller what voters continue to vote?
• What is the impact of not voting on the democracy?
• What is impact is on the non-voter?
• Depending on the political party which dominates the federal government, and the political party which dominates each individual state, what constitutes federalism is in a constant state of flux.
• This state of flux is compounded by various administrations, various respective branches of the federal government, and the branches of government of the individual states each deviate from any constant interpretation as to what constitutes both the philosophy and the practical functioning of federalism.