

8. Federalism and National Supremacy



Virginia Department of Conservation and Development, Richmond

THE GOVERNMENT of the United States is a federal union. That is to say, it consists of a central authority endowed with great yet limited powers to enact and execute laws regulating matters of general interest throughout its whole area; then, this area is made up of forty-eight States, each of which is in a sense subordinate to the central authority but possesses important powers of its own right. A federal union in terms of the relationship between the central authority and the State or provincial governments contrasts on the one hand with a unitary government, such as that of Great Britain or of an American State, and on the other hand with a confederation, such as the government of the United States under the Articles. In a unitary government the central authorities may have only limited powers; but the

subordinate governing units, such as the British counties and the American cities, have no powers of their own right, but only those conferred upon them by the central government. In a confederation the central authority has only those powers with which the smaller units invest it; the smaller units alone have power of their own right.

DISTRIBUTION OF FEDERAL POWERS

Exclusive and concurrent powers

The distribution of powers in the federal union, as devised in 1787, has undergone great modification. Under the Constitution the national government alone enjoys certain powers, such as those of declaring war and negotiating peace; the States alone enjoy certain other powers, such as creating local governments and enacting codes of criminal law. These powers are termed *exclusive*. At the same time the national and State governments together share certain powers. Each level may assess taxes; each may support a police force; each may create a judicial system. These powers are called *concurrent*. Questions regarding the exercise of concurrent powers are so important that the same political party may be divided on the national and the State levels over them. The concurrent powers have contributed much to that distinctive American situation that finds party organizations of the same "national" party working not only independently of one another but even for opposing ends. For example, the national party organization may work for the construction of a federal dam across a river to produce hydroelectric power; at the same time the party organization of the State concerned may urge State or even private exploitation of these water resources.

The Constitution draws no sharp line between the national and the State exercise of the concurrent powers. In fact, since it would be impossible to enumerate all political powers, it would also be impossible to draw a strict boundary between the areas of national and State jurisdiction. Hence there is a wide belt of political territory that is in dispute between national and State authorities. The contests over this disputed territory provide the chief material for the constitutional history of the United States.

Supremacy of national law

It must be noted, however, that in the area of concurrent power, federal legislation always takes precedence over State legislation. That is, once federal action is taken, a State law may not overturn the federal law, or lessen its effectiveness. Moreover, the federal government is ultimately supreme over State governments. This federal supremacy is established by the Constitution, which states that "The Constitution, and the laws of the United States, which shall be made in pursuance thereof, and all

Capitol of the State of Virginia, at Richmond. The Maison Carrée, a little Roman temple at Nîmes, France, was Thomas Jefferson's inspiration for the central section of the Virginia Capitol, begun in 1785 and completed in 1788. Here meets the oldest representative legislative assembly in the new world.

treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. . . ." (Art. VI, cl. 2).

Tools of national supremacy

The Supreme Court is the umpire in any instance in which it is alleged that a State law contravenes a federal law or the Constitution: the Judiciary Act of 1789 established the procedures whereby it should hear any case of this nature. In these hearings the federal Supreme Court has tended to favor the national government, an understandable tendency when one reflects that the Supreme Court is an arm of the national government. Actually, as will be seen below, there have been tremendous pressures upon the national government to exploit this supremacy. In fact, granted the taxing powers that the federal government has under the Constitution as amended, it is difficult to see how with its great financial resources it could be other than supreme over the States. At the same time this constitutional clause legalizes the supremacy and sets aside any need for national compulsion of the States.

Inherent and delegated powers

Before advancing toward an analysis of how the federal structure of the American government has developed, it would be well to note another means of classifying the types of political power under the national Constitution. According to this scheme of classification, powers are either *inherent* or *delegated*. An inherent power may be defined as a power which a government is authorized to employ simply because the power rightfully belongs to that government, and because the government concerned has the strength to exercise that power. Thus the presence or absence of inherent powers depends upon an accepted doctrine about the sources of a specific government's authority, and upon that government's aggressiveness in seeking powers.

In the United States, the State governments possess inherent powers, by general consent of scholars, judges, and leaders. These powers are, according to their doctrine, subject to the limitations imposed by the national Constitution and the constitution of the given State. In other terms, a State government may enact and carry out laws in any field not barred to it by the federal Constitution or its own constitution. The inherent powers of the States are sometimes called *reserved* powers, for the Tenth Amendment to the Constitution asserts that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Meanwhile the federal government possesses the inherent power of conducting its relations with foreign governments. That is, in declaring war, making peace, or negotiating treaties, the national government need seek no constitutional authorization for its activity; for it is held that the conduct of foreign affairs is an inherent power of any national government. The only constitutional questions that arise concern the problem of which branch of the government is empowered to act. However, it should be noted

that this is practically the only sphere of action in which there is general consent to the doctrine that the national government has inherent powers.

A delegated power, by contrast, is a named power that has been conferred upon a government from some external source, which, following various political concepts, may be another government, one or more non-governmental institutions, the people as a whole, or God. For example, under the Articles of Confederation the national government possessed delegated powers which had been conferred by the States. Under the present Constitution, modern American doctrine holds that the national government has delegated powers which were conferred by the people. In other words, the national government may do only what is authorized by the Constitution and its Amendments, so far as domestic affairs are concerned. Hence the national government is also said to have *enumerated* powers, that is, powers that are enumerated in the Constitution.

To sum up, acts justified in the name of inherent powers come almost entirely from the State governments; the national government almost always resorts to acts justified by delegated powers. A reading of the national and the State constitutions will highlight the difference. The national Constitution is composed largely of affirmative statements declaring the various powers of the national government. State constitutions, on the other hand, contain many negative statements, the prohibitions on the exercise of powers that the State governments might otherwise enjoy as inherent powers. In any event, the powers of both the national and the State governments are limited by accepted doctrine—all by the national Constitution, and those of the State governments by their own constitutions as well. The adjoining diagram (Figure 18) points out the principal parts of the doctrine of American federal powers.

THE DEVELOPMENT OF NATIONAL POWER

The doctrines of the sources of power of the nation and States have not changed much in an absolute sense. Through later Amendments (from the Thirteenth to the Twenty-first) and some new ideas (for example, the inherent powers of the nation in foreign affairs), some reallocation of powers has occurred within the framework of the delegated and inherent powers doctrine. But the powers themselves have been increasingly used. Since the adoption of the national Constitution, the powers-in-use of the national government have greatly expanded. During the same era the powers-in-use of the State governments have not diminished; rather, they too have greatly expanded, but not to the degree that the national powers have. It is essential to investigate why and how this expansion in national power has taken place, and what its effects have been upon federal-State relations.

Causes for the expansion

The principal material causes for the expansion in the powers of the federal government appear to be economic and technological. In addition,

there were psychological causes as well—the mushrooming of nationalism in America as in the rest of the world, and the idea of collective responsibility for problems that were once considered personal or local, to name only two. At the time the Constitution was adopted, businesses in the main were so small that they could be policed by local authorities; hence there were few significant pressures upon the national government to undertake their supervision. (But recall that just such exceptional pressures were

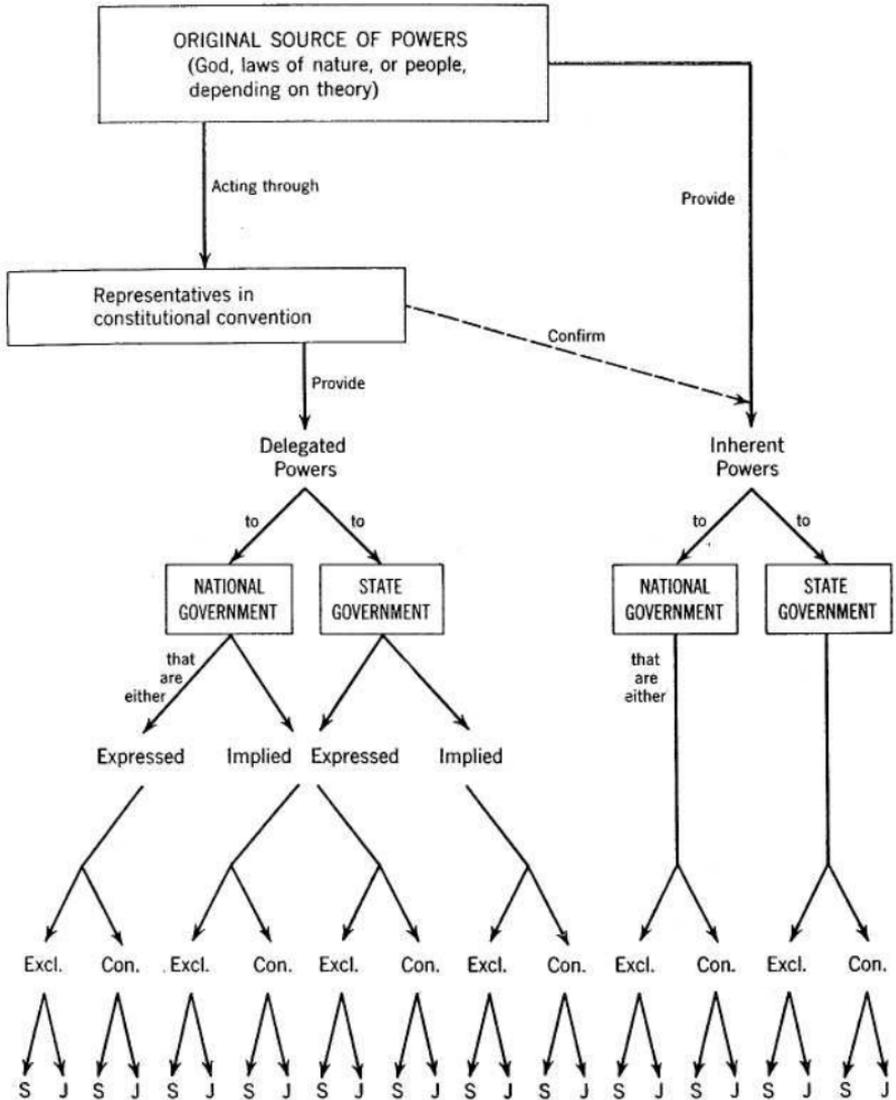


Figure 18. The Doctrine of the Powers of American Government. American constitutional and legal doctrine maintains that every act of the government can and must be justified as to its *source*, its *original form* (delegated or inherent), its *principal* (national or state government), its *form of expression* (expressed or implied), its *exclusiveness* or *concurrency* to the federal or state government or both, and its *mode of administration* (separate or joint). In the diagram, Excl. means exclusive; Con. means concurrent; S means separately administered; and J means jointly administered.

behind the drive for the Constitution.) On the other hand, since the War between the States there has emerged an economy based on aggregations of industry, commerce, and finance, whose operations extend across the borders of several States or even across the nation, and whose resources, annual budgets, and payrolls in some cases surpass those of any State in the country. Later there developed nation-wide unions of workingmen to deal with these business aggregations. Soon various interests were calling for governmental regulation or governmental promotion of these aggregations and unions. It was impossible for the States to control such bodies, especially since the federal government has exclusive power to legislate with regard to interstate commerce. Indeed, more than a suspicion arose that some large corporations and syndicates controlled several States. Hence the federal government alone could shoulder the burden of regulation and promotion which was demanded.

Other important factors leading to the expansion of national power have been the depression of the 1930's and the two world wars of the twentieth century. During the depression the responsibility of caring for the unemployed and the aged was frequently greater than many States could or would assume. Two world wars exacted an amount of unity and direction unknown in peacetime. Only the federal government could impose that unity. Hence the national government has overseen the distribution of raw materials, the maintenance of production levels, the allocation of manpower, and a host of other activities relative to the production of armaments and the other necessities of war. These national powers are not "emergency powers"; they are based upon the authority given Congress by the Constitution "To raise and support armies, . . ." "To provide and maintain a navy," and "To make rules for the government and regulation of the land and naval forces" (Art. I, sec. 8, cls. 12-14). Often at the end of a war the statutes are not repealed; they are simply no longer administered. Hence World War II was fought to a considerable degree on World War I laws, and the Korean conflict on statutes of both world wars. Moreover, some of these wartime laws could be invoked even if no war existed, providing there was no clause in them confining their validity to wartime; however, the Supreme Court may then reexamine them for their constitutionality in peacetime.

Means of achieving the expansion

The Principle of Implied Powers: The chief means whereby the powers of the national government have been expanded has been through constitutionally *implied* powers. An implied power is a power which, although not expressly conferred by the Constitution, is so closely related to, or similar to, one or more of the delegated powers that its constitutionality may be assumed. The first use of implied powers came shortly after the adoption of the Constitution, when Secretary of the Treasury Alexander Hamilton sought to have Congress charter a Bank of the United States. Hamilton held that the national government was empowered to charter a bank because of its delegated authority to regulate currency and because

of the power conferred upon Congress "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof" (Art. I, sec. 8, cl. 18). In spite of the opposition of Secretary of State Thomas Jefferson, who maintained that the "necessary and proper" clause was not sufficient authorization, Congress chartered the bank.

The federal Supreme Court is the final arbiter as to the constitutionality of an implied power. In the case of *McCulloch versus Maryland* (1819), a case in which the constitutionality of the Bank of the United States was challenged, Chief Justice John Marshall gave general authorization to the principle of implied powers in his ruling that "... Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted toward that end, which are not prohibited but consist with the letter and spirit of the constitution, are constitutional." Marshall himself was an advocate of a strong central government; and the Supreme Court under his leadership laid the foundation for a powerful national authority. The expansion of this national authority has been based primarily upon new implied powers; and the Supreme Court has more often upheld than overthrown these novel assumptions of power.

Strict Constructionists versus Broad Constructionists: The dispute between those who make a strict construction of the Constitution and those who make a broad construction is the dispute between those who would limit the powers of the national government and those who would expand them. The strict constructionists are mostly also supporters of States' rights; the broad constructionists are the proponents of a strong central government. The first great instance of such a dispute after the adoption of the Constitution was the contest between Jefferson and Hamilton respecting the establishment of the Bank of the United States. Since that time similar disputes have arisen virtually every time that the national government has assumed some new power. The position of the strict constructionists is simply that the national government may do no more than is specifically provided in the Constitution. The position of the broad constructionists is paraphrased in John Marshall's ruling in the case of *McCulloch versus Maryland*.

In general it may also be said that the proponents of a broad construction are those who at the moment are in command of the national government; and that those who uphold a strict construction are those who are out of power. Hamilton was a Federalist, one of the group that was in power from 1789 until 1801; Jefferson was an Antifederalist, or a Republican, one of the group then out of power. When the Antifederalists came to power in 1801 with the election of Jefferson to the presidency, they soon adopted a broad construction of the Constitution; they were compelled to in order to justify such an act as the Louisiana Purchase, which is certainly not referred to in any way in the Constitution. Their opponents, the Federalists, who were now out of power, soon expressed the strict-constructionist point

of view, carrying it to the extreme of threatening secession during the War of 1812; for they felt that the war was being fought for the benefit of the Republican West at the expense of Federalist New England.

Another illustration of the connection between political control and the attitude toward the construction of the Constitution occurred when Abraham Lincoln was elected President in 1860. His party, the Republican—not to be confused with Jefferson's group—revealed itself to be a partisan of a strong central government; and elements of the Democratic Party—the successor to Jefferson's group—as adherents of States' rights, went to the point of leading the South, which they controlled, into secession from the Union. Later, after Franklin D. Roosevelt was elected as Democratic candidate for the presidency in 1932, the national Democratic Party urged the need for a strong central regime whereas the Republicans argued in behalf of States' rights.

These seeming contradictions concerning a broad or a strict construction among proponents of a strong central government and supporters of States' rights have an explanation. A partial solution concerns interest groups. Behind every major party candidate for the presidency stands a combination of interests that want something from the government. After his election, the successful candidate normally will attempt to satisfy at least some of the wants of his supporters. Often in his attempt he will take recourse to certain new implied powers; this is especially true of those Presidents who have been backed by groups that before his election were not in power, as in the cases of Jefferson, Lincoln, and F. D. Roosevelt. The Louisiana Purchase aided the agrarian groups behind Jefferson; the National Bank Act of 1862, the financial groups behind Lincoln; and the Social Security Act of 1935, the labor organizations behind Roosevelt.

At the same time, in satisfying the wants of his supporters, the President, along with Congress, almost inevitably wreaks some injury upon those interest groups out of power; for example, the Louisiana Purchase, by increasing the size of the United States and thereby making possible the future election of agrarian-minded congressmen from the new States of the area, menaced the power of the New England financial and commercial interests in Congress. Hence the groups that are out of power will tend to support a strict-construction, States'-rights point of view, in which they will argue that the actions taken by the national government have been unconstitutional, since beyond the proper scope of its authority. Thus these groups are acting in defense of their interests, which they feel are being injured by the measures of the national government.

COOPERATIVE FEDERALISM

As the national powers have expanded, more of them have been administered in conjunction with the State governments. For more than a century after the adoption of the Constitution, the State and national governments were assumed to be solely competitors. The then popular

theory of the relationship between the two levels of government may be termed *separatist federalism*. This position is illustrated by a portion of the Supreme Court ruling in *Tarble's Case* in 1871: ". . . there are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective sphere. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other."

However, about the time of World War I this position came to be supplanted by one that may be called *cooperative federalism*. Under cooperative federalism the State and national governments began consciously collaborating toward certain ends. Rather than remaining as separate as possible, they began to consider the potentialities of mutual aid. Some of the new cooperation occurred in the area of concurrent powers (for instance, highways) and some in areas reserved to the States, especially among the so-called *police powers*—that is, the power to legislate with respect to public health, morals, welfare, and safety. In reference to the police powers, the workings of cooperative federalism brought about a considerable extension in the powers and functioning of the national government.

The system of grants-in-aid

Probably the chief instrument whereby the national government has penetrated fields once limited to the States has been the grant-in-aid. The system of grants-in-aid has been especially prominent since 1933; however, it existed on a narrower basis for many years before. The provision of the Land Ordinance of 1785 that in the new western States the federal government should give each State government one section out of every township for the maintenance of public schools was one of the first grants-in-aid. Today, however, the principal form of such grants is money, for such broad purposes as social welfare, education, veterans' services, agriculture, public works, natural resources conservation, public housing, and the National Guard. Table 2 presents a chart showing the total sums of these grants expended on different functions in 1955.

Conditions for Grants: Today these grants are usually made on a conditional basis alone, by which the national government fixes a number of standards which the State governments must meet in order to qualify for the grants. Normally the State governments must themselves appropriate money for the undertaking, up to an amount equal to the contribution of the national government. The projects must use bookkeeping and accounting methods prescribed by the national government. Workers on the projects ordinarily must be employed according to some measure of ability, without partisan considerations—a requirement that has stimulated the rise of State civil service systems based upon merit. The funds must be expended only for specified activities that have been planned in collabora-

TABLE 2. FEDERAL GRANTS TO THE STATES FOR VARIOUS FUNCTIONS¹

(Figures in millions of dollars)

State	ALL GRANTS	Old-age Assist- ance	Aid to Dependent Children	Education	High- ways	Health, Hospitals
All States	2,762.4	921.5	376.2	299.2	592.5	80.1
Alabama	59.2	17.5	6.7	5.9	16.9	3.2
Arizona	22.0	5.6	3.6	1.7	7.0	0.4
Arkansas	45.5	15.9	4.2	4.8	11.1	2.3
California	317.8	112.7	42.8	76.3	38.2	4.3
Colorado	46.9	19.4	4.2	3.3	9.1	0.6
Connecticut	20.8	7.0	3.5	1.8	2.6	0.6
Delaware	7.7	0.5	0.7	0.9	3.8	0.5
Florida	63.6	25.5	11.2	5.3	12.7	2.5
Georgia	80.4	32.0	9.5	7.6	14.5	4.9
Idaho	20.8	3.2	1.3	1.1	10.8	0.6
Illinois	114.3	39.2	16.8	12.3	27.0	3.0
Indiana	43.9	12.6	6.4	7.7	9.9	1.2
Iowa	48.6	16.0	4.7	7.6	14.5	1.1
Kansas	42.2	13.9	3.3	3.5	16.1	0.7
Kentucky	50.7	17.2	11.0	3.9	9.2	2.4
Louisiana	89.0	48.0	11.3	5.4	9.6	2.8
Maine	17.0	4.8	3.0	0.9	4.4	0.5
Maryland	25.0	3.9	5.0	3.9	4.2	1.1
Massachusetts	82.4	38.9	10.2	3.7	10.9	1.2
Michigan	99.1	29.1	14.2	15.3	22.0	2.0
Minnesota	56.3	19.3	5.5	8.2	14.6	1.5
Mississippi	49.3	18.2	4.2	6.0	10.3	3.2
Missouri	102.6	52.7	13.3	5.0	17.1	1.3
Montana	21.6	3.5	1.5	1.9	9.7	0.3
Nebraska	23.1	6.3	1.7	2.4	9.6	0.6
Nevada	9.8	1.1	...	0.6	5.0	0.5
New Hampshire	8.8	2.4	0.8	0.7	2.8	0.2
New Jersey	37.6	8.2	4.0	4.1	6.6	1.9
New Mexico	29.5	4.2	4.5	3.6	8.9	1.0
New York	210.2	47.0	45.2	10.6	45.8	3.2
North Carolina	65.8	14.8	11.3	8.5	13.4	3.4
North Dakota	14.0	3.1	1.1	1.1	5.9	0.3
Ohio	105.4	42.3	11.3	6.5	24.8	2.0
Oklahoma	72.0	37.6	9.5	3.8	11.4	1.6
Oregon	35.5	7.8	3.1	2.7	9.3	0.5
Pennsylvania	117.7	19.0	20.6	12.5	32.0	2.1
Rhode Island	13.6	3.3	2.6	1.0	2.2	0.4
South Carolina	39.4	12.7	4.0	3.4	7.7	3.1
South Dakota	17.1	4.0	2.0	1.4	7.1	0.4
Tennessee	63.7	20.8	12.9	5.0	11.8	3.4
Texas	149.5	73.0	11.8	12.4	30.7	6.0
Utah	20.5	3.7	2.3	3.1	6.0	0.9
Vermont	8.2	2.5	0.8	0.6	2.4	0.2
Virginia	33.2	4.4	5.1	5.2	10.9	1.4
Washington	59.0	23.2	6.3	6.0	9.2	1.2
West Virginia	35.6	6.7	11.3	2.9	6.0	1.6
Wisconsin	47.3	15.2	5.7	6.4	11.6	1.2
Wyoming	19.4	1.6	0.4	1.0	5.1	0.7

¹ U.S. Department of Commerce, Bureau of the Census, *Compendium of State Government Finances in 1955* (Washington, D.C.: United States Government Printing Office, 1955), 14-15.

tion with federal authorities. Finally, the federal government is free to withdraw the grant whenever it discovers that a State is not complying with the stipulated conditions.

Cooperation without grants

The national and State governments cooperate in numerous other ways which do not involve the transfer of funds. Some of the more important include collaboration among national, State, and local officials, and the exchange of information among different levels of government. For example, in criminal investigations, State and local police officers often work with agents of the Federal Bureau of Investigation and the Treasury Department. Data from the criminal files of the FBI are available to all cooperating law agencies. At one time law enforcement officials of the States were greatly hampered by their inability to cross State lines to arrest criminals who had moved out of the State, sometimes taking their loot with them. Today, however, drawing authority from its warrant to regulate interstate commerce, the national government has made it a federal offense to cross a State line in an effort to evade prosecution for crime, or to transport stolen goods across a State line.

THE STATES UNDER THE CONSTITUTION

However limited the relations between the States and the national government may have once been, the Constitution from the outset provided certain major bonds between the two. The national government plays an important part in the creation of new States; it has certain fundamental obligations to the States; and at the same time the Constitution prohibits certain actions to the States.

Creation of new States

The chief task of Congress in the creation of new States is that of admitting them to the Union; for presumably the residents of the area themselves create the State and its governing machinery. When the people of a given area seek admission as a State they petition Congress to declare under what conditions they may be admitted. If Congress is willing that the area enter the Union, it passes an enabling act, under which the people of the area summon a convention to draft a constitution. If Congress finds the proposed constitution satisfactory, it may then by joint resolution admit the State. Congress may establish requirements that must be satisfied in the constitution; for example, it demanded that Oklahoma include a pledge to keep the State capital at Guthrie until 1913. However, Oklahoma promptly violated this provision after being admitted; and in 1911 the Supreme Court held this violation justifiable, inasmuch as by requiring such a pledge the national government might make some States unequal to others (*Coyle versus Smith*).

The admission of States may be complicated by political considerations. Serious consideration has been given in the 1950's to the admission of

Hawaii as a State. However, the project has been blocked in part by some southern Democrats who profess to fear the racial admixture of the Hawaiian people, in part by other Democrats who feel certain that Hawaii will elect two Republican Senators, and in part by congressmen of both parties who suspect that the Communist Party dominates the Hawaiian waterfront. Some Democrats have insisted that in spite of its slender population Alaska should be admitted to the Union at the same time; for it appears that Alaska will elect two Democratic Senators, so that neither party will gain an advantage from these admissions.

Duties of the national government to the States

The national government has several important duties with respect to the States. The most notable of these duties are: the guarantee of a republican form of government in the States; the assurance of the territorial integrity of the States; and the protection of the States from foreign invasion and domestic disorder. All these duties are prescribed by the Constitution. However, even if the Constitution had not provided them, the first and last would probably have been assumed by the national government for its own security.

Guarantee of a Republican Form of Government: According to the Constitution, "The United States shall guarantee to every State . . . a republican form of government. . . ." (Art. IV, sec. 4.) However, the Constitution does not define "republican form of government," nor does it indicate which branch of the national government shall judge when a State does not have such a government. In the terminology of 1787, "republican" was probably construed to mean that the government should be composed of elected officials, with great leeway as to form. The term does not mean exclusively "representative"; in 1912, certain citizens of Oregon asserted in court that the direct initiative and referendum in their State deprived them of a republican form of government; the Supreme Court ruled that the matter was beyond its jurisdiction; Congress meanwhile continued to seat Representatives and Senators from Oregon. Hence it may be assumed that the national government has found direct public participation in the legislative process to be consonant with a republican form of government.

The Oregon dispute followed the usual pattern in the determination of whether a State has a republican form of government. The federal Supreme Court has refused to rule in such cases, holding that they are political rather than legal matters. Hence the onus of decision has fallen upon the President and Congress. The prime criterion lies in the position adopted by Congress with respect to Senators and Representatives from the State or States concerned. After the Civil War, for example, Congress while controlled by the extremist Republicans refused to accept members from the southern States until those States had ratified the Fourteenth and Fifteenth Amendments and had made certain changes in their political structures; otherwise, it was alleged, those States would not have a republican form of government. Considering the general powers of Congress,

such as the one permitting it to withhold federal funds from a State, it appears that the judgment of Congress can be final and compulsory.

The Assurance of Territorial Integrity: The Constitution provides that “. . . no new States shall be formed or erected within the jurisdiction of any other State; nor shall any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of Congress” (Art. IV, sec. 3, cl. 1). Part of the logic underlying this provision has been suggested above. It should also be noted that if there were no obligation to consult the State legislatures before redrawing the boundaries of a State, the party in power in the national government might change these boundaries in such a way as to make its Senate majority almost unassailable; for example, a Democratic majority might divide Democratic Texas into five States while consolidating several normally Republican midwestern States into one State.

One of the chief consequences of this provision today is that there is no easy way of making more equal the representation of such population giants as California and such population midgets as Nevada. Moreover, it thwarts the proposals of some planners who argue that such interstate metropolitan areas as New York City, Chicago, Philadelphia, St. Louis, Kansas City, and Cincinnati should be established as separate States. The State legislatures would almost certainly oppose these projects, if only because of the tax receipts and power the State governments would lose.

Protection from Foreign Invasion and Domestic Violence: The Constitution provides that the national government “. . . shall protect each [State] . . . against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence” (Art. VI, sec. 4). Of course, invasion of a State would be an invasion of the United States, so that a guarantee of this sort is rather needless. Ordinarily a State is expected to cope with local disorders by means of its own police forces and its militia. If a State cannot do so, however, and if either the governor or the State assembly applies for federal assistance, the national government will probably intervene. If the disorders destroy property of the federal government or interfere with some federal function, the national government may intercede without any request for aid from the State government (see, for example, the lead illustration to Chapter 21).

Prohibitions on the States

The Constitution imposes a number of prohibitions on the States, in that it forbids them to carry on any of a number of types of actions. Several of these prohibitions cover fields in which the federal government is presumed to have exclusive powers; they are fields in which State activity would severely contract the power of the national government to enact and execute laws dealing with all the American people. Other prohibitions are designed to secure the people in their persons and their property; they are similar to limitations which the Constitution sets for the national government as well. These prohibitions on State activity are discussed at length in the

various chapters dealing with the functioning of the national government; but it would be well to enumerate the principal prohibitions on the States at this point. These prohibitions forbid the States to negotiate treaties or alliances with foreign powers; maintain armed forces; tax federal property; levy import or export duties; regulate interstate commerce; coin money; make anything but gold or silver legal tender; impair contracts; deny a citizen of another State the privileges and immunities of American citizenship; deny any person the equal protection of the laws; or deny any person due process of law.

INTERSTATE RELATIONS

Interstate obligations

The federal Constitution sets certain obligations that the States must respect in their relations with one another. These obligations will be discussed more fully in the chapters dealing with governmental functioning. Briefly, States must give "full faith and credit" to the public acts and records of all other States; and they must guarantee citizens of other States all the "privileges and immunities" of an American citizen.

"Full Faith and Credit": If the States were independent powers, as foreign states are to one another, any person might escape the laws and court judgments of his home State by moving to another State (unless the two States had a treaty governing such cases). For example, if he owed money in Alabama, he might not be held liable for the debt if he went to Arkansas. However, the "full faith and credit" clause of the Constitution resembles a universal treaty binding all the States to regard each other's laws as their own laws. A business that secures a charter of incorporation (a legal document) from one State may operate in another State so long as it obeys the laws that most States have enacted to regulate "foreign" corporations. If a court in New York decides that a man must pay a debt, and the man flees to California, his creditor can, without having to try the case over again, get the California courts to enforce the decree of the New York court. There is one area in which recently the "full faith and credit" clause has faltered: divorces. Some court decisions in the past few years have cast doubts on the validity of Nevada divorces in other States. Despite the tendency of the States to have many different laws, this clause binds them together and makes business and personal affairs much more stable than they would otherwise be.

"Privileges and Immunities": In another important way, the Constitution acts as a super-treaty among the States. It prevents any State from discriminating against a citizen of any other State. For instance, a State cannot block a resident of another State from using its courts and police on equal terms with its own citizens. It cannot keep other Americans from freely entering its territory. Its recreational parks, its roads, its harbors, and its other public facilities are open to all Americans without distinction. If someone from another State wishes to sell products or perform work in the

State, he is entitled to do so with only such restrictions as are imposed upon citizens resident in the State.

However, some limits to the grant of all privileges and immunities exist. Minor burdens can be placed upon non-residents to compensate the State for the difficulty of administering to non-residents. For example, an extra fee may be charged a non-resident applicant for a license to do business, on the ground that it costs more to investigate his application. Of greater importance are limitations upon non-residents that are justified on the ground that experience in the State is essential to the activity the non-resident wishes to engage in. For instance, the States require a term of residence as a condition to granting a newcomer the right to vote. Also, doctors, lawyers, and other professional people moving into a State may find it unusually difficult to practice their callings; they may feel that their qualifications are superior to those demanded of local residents. However, the federal courts have agreed with the States that special local conditions in these occupations permit unusual burdens to be placed upon non-residents or new residents. Naturally, the State organizations of the members of these professions encourage the imposition of such burdens so as to reduce the likelihood of competition from members of these professions immigrating from other States, and bring pressure upon their State government to enact appropriate laws.

Interstate agreements

One means whereby the States have attempted to solve problems related to more than one State without the intercession of the national government has been the interstate agreement or compact. The Constitution provides that a State may enter such a compact only with the consent of Congress (Art. I, sec. 10, cl. 3). However, the federal courts have consistently ruled that such a compact is permissible even without federal consent provided that it does not conflict with the political power of the national government, nor infringe upon its supremacy. For instance, an interstate agreement determining the allocation of water in an area in which the national government has its own irrigation project would be overthrown by the federal courts.

The States have negotiated over one hundred of such compacts, most of them in the twentieth century. A large number of the recent compacts deal with the allocation and conservation of natural resources; for example, seven western States in 1922 agreed to the Colorado River Compact distributing rights to the waters of that river among the States concerned. One of the most important compacts was that between New York State and New Jersey establishing the Port of New York Authority, which administers the harbor facilities in the two States that comprise the Port of New York—New York and New Jersey. The type of enforcement agency for administering the compact varies greatly. Often the States erect a commission for administrative purposes; but in the long run there is no superior authority to compel the States to abide by these compacts.

QUESTIONS AND PROBLEMS

1. The "supremacy clause" (Art. VI, cl. 2) is of great importance to the federal structure of the United States. What function did it serve and what forces operated afterward to make these few words more than a mere gesture of intent to create federal supremacy?

2. Define and contrast briefly the following doctrines: delegated and inherent powers; expressed and implied powers; exclusive and concurrent powers; strict and broad constructionism.

3. What are the possibilities, in your opinion, that the *inherent powers* doctrine might subvert the Constitution?

4. Opponents of the grants-in-aid programs have alleged that the States are selling their birthrights for a mess of pottage. Criticize this assertion in its three phases: *selling*; *birthrights*; and *mess of pottage*.

5. Suppose that Congress wished to admit the constitutional and democratic kingdom of Belgium to the Union as a State. The allegation is made that the action is unconstitutional. Compose a legal argument favoring the action of Congress.

6. Compare the form of the interstate compact with that of confederal government. Are they similar? How?