

## **MAJOR TRENDS IN AMERICAN FEDERALISM: A STUDY OF PRE-CIVIL WAR PERIOD**

The study analyzes and evaluates the nature and major trends of the federal system in the United States (US) in the early stage of its history. The underlying assumption is that the historical experiences and dynamics of the political system have a profound impact on the working of present day federal system in the US.

Federalism aims at creating a system of diverse political and economic management by a conscious decision to achieve shared political objectives. The federation provides for the division of authority of state between a federal government and smaller administrative units. It establishes a mechanism for creating a shared authority but at the same time regional authorities function within their defined parameters. It combines two diverse political trends – the desire to preserve socio-political and ethnic identity and exclusive domain of independent action and an urge for cooperation and collaboration to achieve mutually agreed and shared objectives. It is best suited to heterogeneous societies.

The major trend of federalism during this period adhered mainly to the postulates of dual federalism constitutionally and politically. The two sets of government with their respective domains worked independently but the federal government's activities were very limited in states. Nevertheless, there was some overlapping in certain fields and it generated conflicts and issues. There were also some examples of collaboration and cooperation between two sets of authorities which suggested that a watertight compartmentalization of functions did not exist. The role of judiciary was very significant in evolving the nature and pattern of intergovernmental relationship. It contributed a lot to establish the federal traditions in America in the age when no other federal model existed as precedent. The following discussion is an attempt to analyze the trends of American federalism in its formative phase.

### **Working of Confederation**

The thirteen American states that signed the Declaration of Independence in July 1776 joined together to establish a national government under the Articles of Confederation in 1781. A Confederation was established, declaring that 'the states enter into a firm league of friendship with each other; .... each state retains every power, jurisdiction and right not expressly granted to the United States, in Congress assembled' (Article I). The confederation formula underscored the states' sense of individuality and the crisis based awareness of the need for a union (in the background of struggle for independence against Britain). Hence, the Confederation was viewed not an end in itself but as a mechanism advancing a united front in the war against the Britain. After the war with the British troops came to an end, the inability of the national government to meet the needs of the union became evident. The dilemma led to the demands for reconsideration of Articles.

For all practical purposes, the Articles of Confederation established a very weak national government. The union was more a league of sovereign states joined together in accordance of the principles of an international treaty rather than the rules of nation state. The states had the supreme status in the Confederation. They were perceived as the creator of national government.<sup>1</sup>

The national government under the Articles of Confederation could make decisions but had no power to enforce them. Most of its functions remained dependent on the good will of states. The national government had many institutional and functional constraints; the most noteworthy that made it ineffective was: firstly the national government had no separate executive and judicial branches; secondly, the national government lacked the powers of taxation; and finally, it had no authority to regulate the commerce.

In the absence of separate executive and judicial body, the national government was unable to operate and control and had to depend on the good will of states. Consequently, the confederation proved to be powerless and real authority remained with states. The states continued to coin money, regulate the trade activities and impose taxes. The government was even unable to curb trade wars among the various states due to individual states policies.

The national government's inability to collect revenue from direct taxation caused immense difficulties. It was unable to fulfill its obligations. It could only request money from states. The states did not generally comply with its requests, leaving it short of funds. The major problems it faced in the fiscal area included the 'difficulties in collecting the state revenue allotments, in paying war veterans, in paying its debts, internally as well as externally, in executing the proper measures for security of western territories'.<sup>2</sup>

Although the national government had the authority to enter into commercial treaty with foreign powers, the treaty also required the approval from the states. In the circumstances the Congress' disability to guarantee the states' compliance virtually prohibited it from entering into commercial pacts with foreign powers. Its fiscal dependence on the states' willingness was revealed largely by its inability to enforce provision of existing treaties. It gave the message of 'new regime's frailties' to the outer world. Consequently, America suffered a low international stature at the time; it was regarded as an incompatible country that was unable to pay its debts.<sup>3</sup> The situation was reflected in the socio-economic conditions of America. The agricultural and commercial depression which America experienced under the confederation was largely due to states' practice of coining money and locally oriented commercial regulations; it produced business chaos and impeded the post-war recovery. No amendment in the charter to improve the conditions could be possible because it required unanimous vote to be ratified by all the states. It proved an up-hill task. The initial moves to amend the Articles of Confederation stemmed from dissatisfaction of the pattern of economic distribution. Twice under the Articles, amendments were sought to allow the Congress to impose duties on imports, but it failed as the unanimous vote for ratification could not be secured.<sup>4</sup>

Nevertheless, there were some sporadic examples of collaboration between the states and national government. The Land Ordinance of 1785 passed

by the Confederation Congress established the general land survey and ownership provisions, used through later American expansion with admitting new states to the federation.<sup>5</sup> The national policy of grants in aid first executed on the western lands under the North West Ordinances which was passed by the Confederation Congress in 1787. The Ordinance provided for an agreement among the original American States (thirteen American states that fought the war of independence) to give up their claims on western lands which cleared the way for admission of new states.<sup>6</sup> In 1784 the Confederation Congress chartered the Bank of North America (semi-federal) which provided the basis of fiscal collaboration between the centre and states. Moreover, the general reliance of Confederation Congress on the states officials for the execution of its policies brought the governmental machinery at both levels closer to each other. However, the collaboration policies were over-dependent on the states, hence, often failed to produce the desired results.<sup>7</sup>

Despite some positive features the national government created under the Articles of Confederation failed to meet even the minimum needs of the union. The weakness of new system soon became evident. By the mid 1780s the Confederation was threatened to be divided into three areas: New England, Middle-Atlantic and Southern.<sup>8</sup> The deteriorated economic and political conditions and contempt from the European nations led to the demands for reconsideration of the confederal arrangements. The demands for constitutional changes derived impetus from post-revolutionary war depression, state tariff issues and Confederation's inability to meet domestic and foreign debts. It was intensified by a rebellion in Massachusetts among debt ridden former soldiers, led by Daniel Shays. These events forced the American leaders to work out an agreement on the resolution of these issues. Consequently, a group that later called. Federalists managed to seek support for a strong central authority and called for constitutional convention in 1787. The convention produced the federal constitution for the United States which became operative in 1789 after ratification by the states.

### **The Performance of Federalism under the 1789 Constitution**

The American federation was established in 1789 and the Federalist era (1789-1801) began which takes its name from the ruling party of the time which was an advocate of the strong federal government. The prominent leaders of this party were George Washington, Alexander Hamilton and John Adams. The opposition party was known as Democratic Republican (Anti-federalist). Thomas Jefferson was the most vocal leader of this party, who argued against the strong central authority and supported for states' rights. The debate between these two groups on the issue remained focused on federal politics. It was in this background that in 1791 the first ten amendments – known as the Bill of Rights were added to the constitution which emphasized the concept of dual federalism and states' rights. The Bill of Rights provided for the concept of states' rights, limited federal government and dual spheres of authority at two levels of government. The American federal politics under two parties continued to revolve around the question of the nature of federal union.

The nineteenth century American federalism had been generally termed as dual in nature in which the states and the federal government pursued independent

course of action. Dual federalism as defined by the Chief Justice Roger B. Taney in *Ableman v. Booth* case in 1858, stated:

*The power of the general government and of the state, although exist and are exercised within the same territorial limits are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.*<sup>9</sup>

Edward S. Corwin was the first person who used this term – dual federalism in American perspective.<sup>10</sup> Describing the American system he argued that till the civil war, the general pattern of American federal relations fell under the dual federalism, in which federal government and states' government had little to do with each other in the conduct of public affairs, except in the field of militia. The administrative system at both levels was autonomous and each was complete in itself.<sup>11</sup>

An analysis of working of American federalism in the period reveals that for the most part, the dualism was upheld constitutionally and politically. But the actual power relationship between the two levels of authority came in conflict when these overlapped, hence the arrangement did not adhere to the notion of dual federalism at the operational level strictly.

Administratively, a separate federal governmental structure including federal bureaucracy came into being with establishment of the federation. The speculations that the new government might use the state's agencies to discharge its duties were discarded with the establishment of various departments of federal government. For example, the Treasury and War departments were established in 1789; the Navy in 1798. The post of Attorney General was created through an Act in 1789, and assumed the cabinet rank in 1870. The interior department was established in 1849. The post office gained the status of 'permanent' in 1794 but accorded the cabinet rank in 1829.

The administrative size of these departments was quite small at the time. The federal departments started from approximately 1000 civilian employees and 1300 military personnel. Their functions were related to 'delegate powers' of the federal government. In terms of fiscal relations, a clear division was also maintained. The main source of revenue for the federal government remained custom duties and receipts from the sales of western lands. The states on the other hand relied heavily on excise duties.<sup>12</sup>

The first and formative job of federal government in the early years was to consolidate itself. The constitution did dictate that both levels of government should be strictly or rigidly separated from each other. Therefore, in the initial years, the role of the federal government in the states affairs generally remained very limited. Many factors contributed to it. Firstly, the regional or state's ties remained strong as compared to national identity. Secondly, poorly developed means of communication made it hard for the federal government to act swiftly and vigorously. And finally, the business of government generally by today's standards was quite inexpensive and simple. Therefore, it is not hard to imagine that during initial years many practices remained similar to those in the days of Confederation. Some of the states continued to coin money, issue bills of credit.

States like Massachusetts and Georgia continued to tax the imports from other states; Virginia, Rhode Island and Pennsylvania, even continued to have relations with foreign powers for some period.<sup>13</sup>

However, as the time progressed, certain issues regarding the domain of powers of both governments surfaced but the policy of direct confrontation on the part of both authorities – federal and states—was not adopted. Both governments attempted to perform their constitutional duties towards each other. The state legislatures, during the period, made enactments to give effect to the constitutional obligations. It was most evident especially in the areas of admiralty; Indian affairs and enjoining their officials to comply with the federal legislation made by the Congress. In addition to it, various state governments joined together in administering federal elections, trials and law enforcement. The Congress also made it a point that the copies of its legislations be sent to the state authorities regularly.<sup>14</sup>

In the initial years, the federal and state governments generally came into direct contact on two matters: ‘the administration of the state militias and of the federal courts’. Although, on the call of federal government to suppress Whiskey Rebellion in 1794, the state authorities responded by sending their militia without any delay, the Congress efforts to implement the uniform rules and standard for separate states’ militia met with little success as the states largely ignored them. Nevertheless, in the arena of judicial matters, there was peaceful cooperation; the state court generally tried cases that involved the federal issues with certain judicial services in harmony.<sup>15</sup>

### **Conflict and Dualism**

Clearly, there were, in this era, two separate spheres of powers, each roughly independent in its domain of authority. These were, however, certain areas where their powers overlapped. It produced conflicts which marked the continuous debate on two questions: firstly what is the nature of American union? Secondly, what powers were granted to the federal government and what were reserved to states under the constitution?

The first conflict erupted in the fiscal area when the federal government undertook the levying of exercise-manufacturing-taxes. The states resented it. But the federal government’s assumption of the responsibility for war debt (1790) and its sympathetic and understanding attitude towards the states’ needs and requirements prevented a serious crisis. Moreover, the federal government succeeded in determining its authority both in import and excise taxes, as it quickly moved to assume the direct responsibility of national defense, federal judiciary and the postal services.<sup>16</sup>

Again in 1791, when the Congress chartered the first Bank of the United States, a protracted debate over the constitutionality of the Bank by pro- and anti-bank factions was ensued. In fact establishment of the bank was main issue of American federal politics in the first decade. The federal government planned to establish a bank which could act as sole depository of government funds. It argued that the bank would help to stabilize the currency and provide a ready source of public credit.<sup>17</sup> However, the concept of central banking was severely criticized by

the Anti-federalist elements. They viewed the concept of federal banking as an attack on the states' sovereignty. They argued that it was beyond powers of the Congress. They argued that the constitution granted no such powers to the federal government in writing and the Congress must be confined to the enumerated powers and to those means of implementing these powers which were absolutely indispensable in their execution. Behind their legal arguments, however, were their apprehensions that the Bank of the United States might be too formidable a competitor to state banks. The federalists, on the other hand, were convinced that establishment of the bank was in accordance with the 'necessary and proper' clause of Article I of the constitution.<sup>18</sup> The constitutionality of the charter was never questioned in the courts at this stage and the President George Washington, despite criticism from opponents, approved the bill.

Nevertheless, in the year to come, the controversy of Federal Banking system remained central in the debate concerning the powers of federal government. It led to the defeat of efforts to renew the Bank Charter in 1811 and Bank was abolished. In 1816, the Congress again chartered the second Bank of the United States.

The Congress enactment for the charter of the second US Bank came now under the government of James Madison who once opposed the establishment of Federal Banking on the pretext of states' rights. A number of states' rights advocates supported the second federal bank as an aid to states and federal government to stabilize the currency. However, the second Bank had its critics too and became an object of mistrust with the states rights champions. Some state legislatures passed laws restricting its activities. Consequently, the constitutionality of the Congress' authority to charter a Federal bank was this time tested in the courts. In *McCulloch v. Maryland* (1819), the Supreme Court upheld the Congress' authority to charter the Federal Bank. The case involved authority of state governments to restrict the activities of the federal institutions. However, before addressing this question, the Court had to determine the constitutionality of the Bank. The Court acknowledged that the constitution did not provide for Federal Banking in writing through enumerated powers. But, referring to the 'necessary and proper' clause of Article I, section 8, which granted the Congress power to make laws proper for carrying into execution the foregoing power, the Chief Justice construed that the Congress had the power to devise means instrumental or pass laws 'necessary and proper' to perform its duties and carry out powers expressed in the constitution. Though the establishment of a Federal Bank was not explicitly sanctioned by the constitution, the Supreme Court viewed its establishment as appropriate under the doctrine of implied powers which allowed the federal government to devise means to carry out its obligations or authority such as levying and collecting taxes, issuing currencies, and borrowing money.<sup>19</sup> The Bank continued to be un-popular with Democratic Republicans. They viewed the Federal Banking system against the spirit of dualism. They objected to the policies of the US bank which forced states' banks to adopt more conservative approach in their policies. They felt that the bank was expanding at the expense of states banks. Consequently, the president Jackson vetoed the bill for renewal of bank charter in 1832 and its charter expired in 1836. Afterwards, in

1840s independent federal depositaries were established and finally the National Banking Act was passed in 1863 that heralded a new era in federal fiscal area.<sup>20</sup>

The issue of federal regulation of interstate commerce which was addressed in *Gibbons v. Ogden* case (1824) also produced tension between states and the federal government. The case enlarged the scope of the Congress authority under the commerce clause. (Article I). The case involved the use of River Hudson. The New York state government granted the exclusive navigation rights to a company which came in conflict with the Congress' granting navigation license to another company. The Supreme Court acknowledged the right of Congress under the commerce clause of Article I to regulate commercial activities and commerce and prohibited states from taking any action that could interfere with the Congress authority for the free use of rivers and harbors for the regulation of commerce.<sup>21</sup>

Nevertheless, *McCulloch v. Maryland* and *Gibbons v. Ogden* cases provided judicial endorsement to the clause of national supremacy. The doctrine of implied powers incorporated with the commerce and taxing powers of the Congress was meant to act within the context of 'permissive constitution'. These powers established the fiscal supremacy of the federal government over states at the time.

### **The Doctrine of Nullification**

The concept of national supremacy, however, continued to be challenged from the advocates of states' rights in the period under study. It has been associated with terms of 'nullification' or 'interposition' in the history of American federalism. The proponents of nullification claimed that the states were sovereign entities. Accordingly, any state could suspend within its boundaries the operation or implementation of any federal law it deemed to be unconstitutional.

The debate first surfaced in 1798 when the Congress passed some Acts in an attempt to silence the Democratic Republicans critics against the war with France. In response, the Kentucky and Virginia governments (where Democratic Republicans were in power) passed resolutions which supported the concept of states sovereignty and nullifying the Congress Acts as unconstitutional in 1799. This notion later received its articulate formulation in the writing of John C. Calhoun in the 19<sup>th</sup> century; first in opposition to a Tariff Act passed by the Congress in 1828 and then with regard to certain federal policies relating to slavery. The Calhoun theory which was published as the 'South Carolina Exposition' was used by the Southern states in their efforts to maintain the institution of slavery. The proponents of the theory argued that the federal government was the creation of the states and hence, should act as an agent only. The federal government did not have the authority to give verdict on the validity of actions of the Congress. The theory gave the states authority to declare a federal law null and void within the premises of states unless, three fourth of them (states) ratified the amendment made in the constitution in effect to grant powers to the Congress to legislate. A state that challenged the amendment could either abide by it or secede.<sup>22</sup>

In January 1830, the debate found its way in the Senate when Senator Robert Y. Haynes of South Carolina and Daniel Webster of Massachusetts debated the issue of state sovereignty in response to a recent Tariff Act passed by the Congress. Senator Robert argued that 'liberty first and union afterwards', hence, the states had the right to refuse a federal law under the doctrine of 'Nullification'. Senator Webster responded by arguing that the US constitution was creation of people of the United States of America, not the states and 'liberty and union now and forever, one and inseparable'.<sup>23</sup>

In 1832, the South Carolina called the state convention which passed an ordinance of Nullification to prohibit the Federal Tariff Acts of 1828 and 1832 under the doctrine of nullification. In response, the federal government introduced a force bill in the Senate in 1833 which empowered the President to use force if necessary, to enforce the federal Acts in states. However, the President Andrew Jackson sympathetic to Southern States' demands tried to reach a compromise with the Southern States and a new Tariff Act was passed by the Congress in the same year. The South Carolina Convention responding to the compromised Tariff Act reassembled and rescinded nullifying the Tariff Acts. It also adopted a new Ordinance nullifying the 'force bill'. However, the issue was not passed until the doctrine of secession came to forefront as a prelude to civil war.<sup>24</sup>

Under the doctrine of 'states rights', some Northern States (Indiana in 1824 and Connecticut in 1828) also passed the 'personal liberty' laws in an attempt to protect free blacks and fugitive slaves. These laws were challenged in the federal court and the Supreme Court in *Prigg v. Pennsylvania* – 1842, ruled that such laws were in conflict with the Fugitive Slave Act passed by the Congress in 1793 and therefore violated the supremacy clause of the constitution, hence were null and void.<sup>25</sup>

### **Role of the Judiciary**

Tracing the historical development of American federalism, one finds that the U.S. Supreme Court has played an important role in the development of the federal system, especially in determining the boundaries of federal government's powers in relation to the reserved powers of states. There was a constant strife over the issue of defining powers between the federal government and the states in the pre-civil war period. The significance of some agency, having last word to a stable federal system cannot be over emphasized. The role of Supreme Court of America has been very significant in the development of federalism. Without its active involvement, the system might have been disrupted by various conflicting interpretations of American constitutional law. In the initial years, the Supreme Court of America adhered to dual concept of federalism. Nevertheless, some of its historical decisions upheld the federal power viz-a-viz states which according to states' rights champions were not in accordance to the spirit of dual federalism which demanded the clear demarcation of functions and powers of both sets of government, each sovereign in its realm. Regardless of this view, Supreme Court has interpreted the constitution both to expand and contract the authority of federal government, creating a space for mutual existence in collaboration for both authorities.



A significant decision from the federal judiciary was pronounced in 1793 which for the first time came into conflict with notion of state sovereignty and dual federalism. It resulted in the introduction of the eleventh amendment (1798) that protected states from being sued in federal courts by citizens of other states. In 1793, the Supreme Court gave the permission of suing the state of Georgia to a private citizen named Chisholm. Article III of the constitution extended the powers of federal judiciary to the conflicts 'between a state and citizens of another state ...' When Chisholm, moved to pursue the case against the state of Georgia, all the states became so indignant that the Congress had to pass the eleventh amendment swiftly to save the 'dignity of the states'. The amendment maintained the federal principle of 'respecting the states in the federal union'.<sup>26</sup>

Afterward, the Supreme Court, under Chief Justice John Marshall (1801-1835), interpreted the constitution most often in favour of the federal government. During its tenure under Chief Justice Marshall, it upheld two doctrines: the doctrine of implied powers and the doctrine of supremacy of federal laws. Firstly, in *McCulloch v. Maryland* case (1819), the issue whether the Congress had the authority to charter the United States Bank and if the Congress had this power, could the 'state' restrict its activities was settled in favour of federal government by the Supreme Court. By utilizing the commerce and supremacy clauses of the constitution, the Court maintained the federal authority over the states and endorsed the doctrines of implied powers and supremacy of the federal government.

In the case of *Gibbons v. Ogden*, the Supreme Court's decision undid state promotional activity on behalf of state based enterprises and gave the Congress authority to overrule state legislation in the area of interstate commerce. *Brown v. Maryland* added a further judicial barrier to state taxation and economic regulation.<sup>27</sup> At the same time, adhering to dualism, the Court recognized several commerce related actions under the states' police powers as legitimate and beyond the authority of federal government. It also contended that in the absence of federal laws, the state could regulate commerce and navigation. The Court also upheld the states bankruptcy laws. It also denied that "state's tax power could be presumed to have been surrendered by granting of corporate charter."<sup>28</sup>

In the fifteen years under Chief Justice Marshall, the Supreme Court not only consolidated the federal government but also placed its authority on a 'broad and permanent constitutional footing'. In this era, the Supreme Court made the constitution support the 'great national interests'. However, it revealed that the Court upheld the position under the concept of dualism that acknowledged the authority of both centers of powers in their domains as interpreted from the constitution.<sup>29</sup> The Court clearly acknowledged that the federal government's powers were by no means 'plenary'. According to the Chief Justice Marshall, the states were "for some purpose sovereign, and for some purpose subordinate."<sup>30</sup>

The Supreme Court, under Chief Justice Taney (1835-63), generally remained more sympathetic towards states rights and its adherence to the doctrine of dual federalism was more pronounced. In a string of cases that involved the commerce clause of the constitution, the Court also strengthened the concept of 'concurrent powers', which strengthened states' position. For example, in *Briscoe*

v. Bank of the Commonwealth of Kentucky (1837), the Court allowed the states to establish a state-owned and controlled bank that could issue notes for public circulation.<sup>31</sup> In the famous Charles River Bridge case (1837), the Court attempted to define the powers of states as 'the powers necessary to accomplish its (state) creation'. In other cases, the Court defined these powers as necessary to provide 'for the public health, safety and good order'. The Court upheld that these powers were granted to states by the tenth amendment of the constitution. Some critics of Chief Justice Taney felt that the Court's verdicts in the period were against the spirit of supremacy clause of the constitution. Whereas, some contended that the Court under Taney did not try to prove itself as the 'radical champion of state sovereignty', rather, it was the developer of doctrine of limited- 'concurrent state power over commerce', since more commerce activities were in the control of states, than under the national government's regulation at the time.<sup>32</sup>

Nevertheless, in some instances, the Supreme Court upheld the federal powers in the context of dual federalism. In a case, *Prigg v. Pennsylvania*, decided in 1842, Justice Storey upheld the exclusive federal jurisdiction over the fugitive slaves, denying the right to Pennsylvania or any other state to legislate that fell in the jurisdiction of the federal government. Therefore, confirming the ideals of dual federalism.<sup>33</sup> In 1858, Chief Justice Roger B. Taney, stated in *Ableman v. Booth* case that: 'the power of General government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres'.<sup>34</sup> However, the federal principle regarding the independent judiciary, having the authority of constitutional interpretations was vigorously held in both periods.<sup>35</sup>

### **Dual Federalism with Elements of Cooperation**

Since the establishment of the American federation the doctrine of dual federalism as discussed earlier was generally upheld politically and constitutionally. Generally, when the powers of both authorities overlapped, they caused conflict. But the close examining of American federalism revealed that even in the formative phase of the working of federation, which marked the tension between states and federal authorities over the question of powers in the union, the traditions of sharing and cooperation were established. Therefore, federalism was not strictly a dual federalism with no seeds of cooperation not at least in practice. The roots of cooperation were in fact entwined in the first 'federalist theory' that developed during colonial period. It envisaged a dual government structure with certain cooperative programmers and administrative instruments for intergovernmental collaboration.<sup>36</sup> Even the national government, under the Articles of Confederation with the passage of the North West Ordinance, provided the basis for the 'grants in aid' in the following years.

In the period, the three main problems which had to be dealt by the governments at both levels to manage the affairs of the country effectively were 'the development of the system of intercommunication that could connect various parts of the union; the establishment of a stable but flexible fiscal system; and finally the establishment of an education system that could serve the needs of young American people'.<sup>37</sup> The federal government and states moved in these

directions simultaneously, thus some sort of collaboration had to be done. Accordingly, when states moved towards the establishment of boards of internal improvement, the federal government established the United States Board of Internal improvement to coordinate the states' efforts. But firstly the Congress approved the establishment of Army Corps Engineer in 1802, with an understanding that it could be used in military as well as civil matters. The first Federal Master Plan for internal improvement was finalized in 1808.

In the following years, the Virginia assembly approved the policy for the development of internal improvement plan in conjunction with the federal government. In 1816, partly as the result of federal government's activities, Virginia state created a Virginia Board of Public Works.<sup>38</sup> After the Virginia took initiative, other states followed suit and the Congress formalized the existing internal improvement program of the Corps of Engineers by establishing a National board of Internal Improvement in 1824, to provide the assistance and coordination to the states' activities.<sup>39</sup> The Act of General Survey (1824) authorized the President of the US 'to cause the necessary surveys, plans and estimates to be made of the routes of such roads and canals as he may deem of national importance, in a commercial or military point of view, or necessary for the transportation of the public mail'.<sup>40</sup>

The major vehicles of inter governmental collaboration and cooperation of this era were joint stock organizations in which both states and the federal government jointly invested to undertake long term projects especially in the realm of 'internal improvements'. During the first decade, most of the states did not have many federal landed properties in their specific areas. Therefore, the most cooperative projects were designed without public lands, i.e., survey and planning the internal improvement projects. The internal improvement projects varied from state to state depending upon the needs and conditions of the state. The major internal improvement programs were about the improving the transport system; the maintenance of stable nationwide fiscal system; providing of appropriate educational facilities and provision for public welfare.

### **Transportation**

The major example of cooperation in the field of internal improvement was the up-gradation of transport system which included water transportation, primarily through canals and overland transportation via wagon roads. The most significant example of federal – state collaboration in this area was the opening of Dismal Swamp Canal (1808-1828), which connected Norfolk, Virginia with Albemarle Sound in North Carolina. The project developed informal cooperation between the states and the federal government. The federal assistance in the project involved surveys by the qualified federal engineers and planning assistance. The federal government also contributed required funds to complete the project. The project involved the highest administrative levels of both federal and state. In 1826, the Congress approved \$150,000 to invest in the project and acquired 600 out of total 1240 shares.<sup>41</sup>

### **Fiscal Co-operation**

Collaboration between states and the federal government in the fiscal matters began with the federal government's assumption of the states' revolutionary war debts in 1790. During the 1790s, the federal reimbursements of states were made in this regard. It enabled the states to allocate more funds to their obligations without worrying about the payment of their war debts. The next major step was levying of a direct tax among states based on constitutional formula. The whole procedure of collecting the revenues involved the collaboration of governmental departments at both levels. The third step was the inauguration of Federal Banking system through the chartering of first US Bank in 1791. The Bank served as a manager to federal deposits and aid to federal programs. The bank dominated in American fiscal matters prior to 1800. The significant cooperative and collaborative activities between states and the federal government developed under the auspices of the Bank, as a number of branches of the Bank were opened in various states that provided the multiple opportunities to both levels of government for interaction and cooperation. The bank soon began to operate as a clearing house and source of capital to many states' banks. However, it also produced certain controversies, as it was taken as 'undesired threat' by some state banks. Largely, because of growing opposition generated by coalition of extreme states' rightists, the charter of the Bank was not renewed when it expired in 1811.<sup>42</sup> Nevertheless, the Congress reversed its decision owing to difficulties the nation had to face in the absence of Federal Banking system and the second US Bank was approved by the Congress in 1816. The second Bank was the continuation of the first one and till 1836 the same banking system served the country. However, in 1828, again conflicts erupted between states and the federal government over the banking affairs which resulted in the defeat of efforts to renew the charter of second Bank which expired in 1836. Afterward, in 1840s with the establishment of independent federal depositaries and finally with the passage of National Banking Act in 1863, a new era of cooperation in the federal fiscal relations was inaugurated.<sup>43</sup>

## **Education**

In the field of education during the early years, the federal assistance was less direct. However, federal reimbursement of war expenditures enabled the states to spend large amount of revenue for use in providing education facilities to the people. Nevertheless, with the growth of social welfare programs, the federal assistance was made available to states. A significant example in this respect was Hartford Asylum for the deaf and dumb project which was first established in the private sector in 1817 but later in 1819 was transformed into public institution with the help of federal land grant and cooperative arrangements with the six New England states. It stimulated a chain of such welfare projects in other states too.<sup>44</sup> The first actual transfer of federal lands to the states began in 1802 when Ohio received the status of statehood. It received the federal grant under the terms of Northwest Ordinance 1787 for the establishment of public schools. Ohio also received the first land grant for the purpose of Higher Education and internal improvement projects. However, it is worthy to mention here that grants were never a gift from the federal government to states. They always came with certain conditions and obligations attached with them. But the objective was always the general welfare of the people of America.<sup>45</sup> There were three categories for the

land distribution programs during the period under study. Firstly, the federal grants were made to the states' governments directly to help them for the implementation of their programs of public services, i.e. education, health, river and harbor improvements, public buildings and public institution etc. Secondly, there was a system of providing land grants through the states to private companies, primarily for the construction of roads, canals and railroads. Thirdly, there were the programs that did not involve directly the states authorities to dispose of the public domain. They mainly included project like tree culture acts, grants to certain western rail roads and minerals.<sup>46</sup> These programs involving federal aid stimulated matching state contribution. In some cases there was formal requirement of state's contribution. For example, the first Morrill Act required the states to appropriate the funds for the construction of agricultural colleges to retain the federal aid.<sup>47</sup>

Nevertheless, whole process of the establishment of the institutions and functions of coordination and collaboration was not without the debate between the people who believed in the strict notion of dual federalism and those who argued about the flexible concept of dual federalism.<sup>48</sup> The presidential vetoes were also used by the American Presidents who believed in the strict notion of dual federalism. Upholding the dual concept of American federalism the President James Madison vetoed the legislation (1817) passed by the Congress to involve directly federal government in financing and constructing national improvements. He emphasized that the constitution of America did not allow the federal government to directly intervene in the matters that were not assigned to it and the success of the constitution did depend on the division of the powers.<sup>49</sup> Again on May 4, 1822, James Monroe vetoed a bill passed by the Congress that apportioned the funds for the preservation and repair of Cumberland Road. He also forwarded the same arguments and set forth the theory of dual federalism.<sup>50</sup> The bill for the renewal of the charter for the second US Bank was also vetoed by the President Andrew Jackson in 1832 on the same grounds. Hence, the efforts to establish the traditions of cooperation did not go without opposition and difficulties but the need for cooperation prevailed and the traditions for coordination in the American federalism were established even in the era of dual federalism.

### **Crisis of the Union**

The US faced a serious internal crisis in the 1850s. The issue of slavery lay at the root of it. Although, the Congress abolished external slave trade institution through an Act in 1807, it continued through smuggling. In 1820, eleven states recognized slavery as a legal practice. Their number rose to fifteen in 1861.<sup>51</sup> In 1820, through an agreement known as the Missouri Compromise, the slavery was abolished in Missouri. At the outbreak of Mexican war (1846-48), a bill calling for the exclusion of slavery from the territories acquired as a result of the war, was introduced in the House of Representatives. The bill was approved in the House but defeated in the senate. At this stage, the Congress passed the Fugitive Slave Act in an effort to reach a compromise. It was known as the 1850 compromise. Accordingly, the opponent of slavery got California admitted as Free State, so that there was to be much tougher Fugitive Slave Law. It also provided for the prohibition of slave trade in the capital. The advocates of slavery got concession with regard to slaveholding in Texas. The federal enactment for the

implementation of these two compromises recognized the federal government's right to prevent the expansion of slavery. In 1854, it was questioned by the Southern States by invoking the doctrine of 'popular sovereignty,' that was to say, that inhabitants of states had the authority to decide whether or not to recognize the slavery.<sup>52</sup> In 1854, the Wisconsin Supreme Court declared the Fugitive Slave Act of 1850 as unconstitutional; however, the Supreme Court of America overturned the state Supreme Court decision. Later in 1857, in another case the US Supreme Court (*Scott v. Sanford*) declared the Fugitive Slave Act constitutional. The Chief Justice Tanny observed that: 'the slaves were species of property, and under the fifth Amendment, no one might be deprived of his property without due process of law'.<sup>53</sup>

The elections of 1860 brought all divisions to a head. President Lincoln who was elected with comfortable majority in the Electoral College, won only 38% popular votes and not a single vote in ten Southern States, where, even his name was missing from the ballot. His election indicated how sharply Southern and Northern states were divided on the issue of slavery. Immediately after the election results, seven Southern States announced their secession from the union with South Carolina taking the lead. A convention elected for this purpose issued the secession ordinance on December 20, 1860. Following the precedent of Declaration of Independence, the convention also published the 'Declaration of causes which induce and justify the secession'. The secession brought the continuance of the federal union into question.

The constitutional right of states to secede from the union was debated at length. Many argued in its favour, quoting the tenth amendment. Certain attempts were made to reach a compromise but in vain and issue had to be settled in the four years war.<sup>54</sup> The American civil war secured the union without destroying the constitution; however, bitterness cast a long shadow over the history.

## **Conclusion**

Above discussion showed that the concept of dual federalism prevailed largely in the period 1789-1860. Although, the complete separation of power between two governments, especially in fiscal matters could not be secured; the greater tendency of administrative decentralization was managed. In the initial years, the activities of federal government were very limited. With the passage of time there was a significant growth in federal government's authority, activities, policies and programs. The federal supremacy in the monetary and banking was established in the first decade but the federal government lost its supremacy in 1830s. Nevertheless, the role that the federal government carved out for itself to regulate the national economic system contributed significantly in consolidating the federal government powers and sowed the seeds of fiscal cooperation. However, many critics described these developments as against the spirit of dual federalism. Despite the controversies, the efforts of the federal government in the field of economic development, national resources conservation, education and social welfare brought the federal and state governments closer and promoted greater cooperation.

However, the states were not eclipsed by these developments. In fact, the federal government was merely responding to ‘the new dimensions of business enterprises and commerce problems of an increasingly urbanized American society’. It did not intend to make undue interventions in states affairs. At the same time, the increasing growth of public works left much in the hand of state authority: primary and secondary education, public welfare, public health, police and many more.<sup>55</sup> But at the same time, the federation had to grapple with the controversies and conflicts regarding the distribution of power between two sets of government. The controversy ultimately led to the question of right of states’ secession from the union which was finally settled in the civil war. The civil war addressed two major questions which continued to be debated during the pre-civil war period: firstly the role of the federal government in the federation and secondly, the nature of union. The role of the federal government in the pre-civil war period was mostly characterized by decentralization. Administratively, states were autonomous. In the fiscal area, the supremacy of federal government was established through National Banking system but federal government lost it during 1830s with abolition of National Banking system. But during war, state militia was replaced by federal conscription and soon afterward the federal government reclaimed its supremacy over fiscal matters. The Supreme Court played a very significant role in evolving the federalism in the period. It was actively involved in the interpretation of the constitution and determined the domains of federal and states authorities by giving historic decisions in various cases. Therefore, it guarded the federal principle of independent judiciary as the interpreter of the federal constitution.

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## Notes

- <sup>1</sup> Peter Woll, *American Government-reading and cases* (Illinois: Scot, Foresman and company, 1987), 56.
- <sup>2</sup> David B. Walker, *The Rebirth of Federalism* (New Yourk: Chatham House, 1995), 43-45
- <sup>3</sup> Ibid.
- <sup>4</sup> Martin D. Irish and James W. Prothro, *The Politics of American Democracy* (New Jersey: Prentice Hal, Inc., 1968), 100-101.
- <sup>5</sup> [www.jmu.edu/Madison/main\\_pages](http://www.jmu.edu/Madison/main_pages)
- <sup>6</sup> Ibid.
- <sup>7</sup> Daniel J. Elazar, R. Bruce Carroll, E. Lester Levine and Douglas St. Angelo, (eds.) *Cooperation and Conflict –Reading in American Federalism* (Illinois: F.E Peacock Publishers, 1969), 85.
- <sup>8</sup> C. McGrath, Elamer E. Cornwell and Jay S. Goodman, *The American Democracy* (London: Macmillan Company, 1969), 56-57.
- <sup>9</sup> Daniel J. Elazar and others, *Cooperation and Conflict*, 84.
- <sup>10</sup> Daniel J. Elazar, *The American Partnership – Intergovernmental Cooperation In The Nineteenth Century United States* (Chicago: the University of Chicago Press, 1962), 11.
- <sup>11</sup> Ibid., 12-13.
- <sup>12</sup> David B. Walker, *The Rebirth of Federalism*, 68-69.
- <sup>13</sup> Ibid., 96.
- <sup>14</sup> C. McGrath and others, *American Democracy*, 96-97.
- <sup>15</sup> Ibid.
- <sup>16</sup> Ibid., 97.
- <sup>17</sup> Ibid., 77.
- <sup>18</sup> Ibid.
- <sup>19</sup> mhtml:file:///\\bodim\SIR\94\MY Files\American federalism, 1776 to 1997 Significa  
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- <sup>20</sup> Daniel J. Elazar, *American Partnership*, 93-94.
- <sup>21</sup> mhtml:file:///\\bodiam\SIR94 .....
- <sup>22</sup> Ibid.
- <sup>23</sup> Ibid
- <sup>24</sup> <http://www.infoplease.com/ce6/history>
- <sup>25</sup> [www.britannica.com/eb/article](http://www.britannica.com/eb/article)
- <sup>26</sup> Martin D. Irish and James W. Prothro, *Politics of American Democracy*, 128-129.
- <sup>27</sup> Ibid., 63.
- <sup>28</sup> David B. Walker, *Rebirth of Federalism*, 66.
- <sup>29</sup> R. Kent Newmyer, *The Supreme Court under Marshall and Taney* (Illinois: Harlan Davidson, Inc., 1968), 19.
- <sup>30</sup> David B. Walker, *Rebirth of Federalism*, 66.
- <sup>31</sup> David B. Walker, *Towards a Functioning of Federalism* (Boston: Little, Brown & Company, 1981), 50.
- <sup>32</sup> Ibid.
- <sup>33</sup> Daniel J. Elazar, *American Partnership*, 20.
- <sup>34</sup> Ibid.
- <sup>35</sup> Ibid., 50.



- <sup>36</sup> Daniel J. Elazar, *Cooperation and Conflict*, 85.  
<sup>37</sup> Daniel J. Elazar, *American Partnership*, 25.  
<sup>38</sup> *Ibid.*, 26.  
<sup>39</sup> *Ibid.*  
<sup>40</sup> *Ibid.*, 28-29.  
<sup>41</sup> Daniel J. Elazar, *Cooperation and Conflict*, 89.  
<sup>42</sup> *Ibid.*, 91-92.  
<sup>43</sup> *Ibid.*, 93-94.  
<sup>44</sup> *Ibid.*, 96.  
<sup>45</sup> *Ibid.*, 98-99.  
<sup>46</sup> *Ibid.*  
<sup>47</sup> *Ibid.*, 100.  
<sup>48</sup> For details see, Daniel J. Elazar, *American Partnership*, 27-28.  
<sup>49</sup> *Ibid.*, 15.  
<sup>50</sup> *Ibid.*, 16.  
<sup>51</sup> William Simpson, *Vision & Reality: The Evolution of American Government* (London: Fletcher & Son, 1978), 75.  
<sup>52</sup> *Ibid.*, 76.  
<sup>53</sup> *Ibid.*, 77.  
<sup>54</sup> *Ibid.*, 80-81.  
<sup>55</sup> David B. Walker, *Towards a Functioning Federalism*, 63.