

# **Federalism and Republican Government**

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**July, 1997**

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The greatest achievement of modern government was the expansion of popular sovereignty. From popular government came the requisite constitutional tools that expand and protect fundamental individual liberties. Republicanism is the constitutional expression of popular government that assumes elections; elected governments act with the permission of the people to apply the rule of law and protect the private and public rights of individuals.

Federalism is a compromise of sovereignty between single a authority and the several regional authorities. The structure of federalism that would emerge in the United States Constitution of 1787 broadly fits this definition. The federalism of 1787 demonstrated the inherent strife of the term; by federating rather than consolidating the states attempted to retain the sovereignty they have heretofore enjoyed; yet, as this paper will explore, is impossible. Ultimate state sovereignty must lie in one place. While ambiguous in its definition, federalism is useful; it has served us well.

An essential of human existence lies in the dichotomy of our diversity and sameness. As government is the greatest reflection of human nature, so too are its internal conflicts. Conflicts (both human and political), always boil down to the application of power of one part to the other, one person to another. Democracies and republics encourage our tendency toward this factionalism. Representative government encouraged the divisive side of human nature in its dealing within the polity. Republican government mirrors our individuality; federalism emphasizes our commonality.

Republican government as practiced in the states during the Confederation Period needed discipline. A new conception of federalism would emerge to fill the role of a checking the excesses of republican government. The definition of federalism that emerged from the constitutional convention was a tenuous reconciliation of the two competing principles.

A crisis caused by the collapsing constitutional structure required a rewriting of the Articles of Confederation at the Constitutional Convention of 1787. The Constitution of 1787 was born from the structural inadequacies of the Articles of Confederation. Many persons argued that no crisis existed,

that the structure of government was good. These proponents of the Articles argued that a constitution without the power to intrude on local sovereignty is a good thing. They viewed the intense state republicanism expressed in the Articles as the best hope for the protection of individual liberty. Madison disagreed; he would see the Articles as a threat to the ideals of the revolution; that is the maintenance of individual liberty and the attainment of the common good.

The Articles could not attain the common welfare of the union without significant structural adjustments. The structural flaws created a crisis in unionism; ultimately affecting the economic realm to the point that the constitutional crisis of the Articles had economic ramifications for a diverse set of interests. Republican government in the states was out of control; almost begging for a disciplinary device to restrain the intense localism at the expense of the common welfare of the Union.

The Constitution of 1787 forged compromises that restrained the state governments. The want of restraint on republicanism was the structural change needed to end the constitutional crisis. Once the response to the constitutional and economic crisis set in play at the Constitutional Convention, the outcome depended more on random chance and reason than it did on objectives or divine inspiration. A result based in the application of constitutional principle, yet dependent on reason to modes of application.

### **The Declaration - Expression of unity, republican government and sovereignty**

The Declaration of Independence was an essential identification with the long-standing American experience of multiple levels of government. Donald Lutz writes in The Origins of American Constitutionalism, “The Declaration in a sense contains implicitly the first statement of Americans’ dual citizenship.” (116). The official title of the Declaration expresses the solidarity of Americans, “The unanimous Declaration of the thirteen united States of America”; and “When in the course of human events it becomes necessary for one People ...” The union of all the states is clearly stated.

Lutz pointed out the sovereign nature of the “thirteen state peoples” recognized in the Declaration he said, “... the mention of ‘Free and Independent States’ and the plural reference to states in the list of grievances, among other items point to the Declaration as a compact among the states.” (116). The thirteen state republics could unite, under two governments (their state and the Continental Congress) toward a common goal of independence.

The Declaration speaks most clearly on the nature of republican government. Governments of popular consent best secure natural rights. Elections were the voice of the people, the voice of the majority. Republican government, the means of popular consent, was the essential ideal of the Revolution. This essential ideal, republican government as the guardian of liberty, would be the source of the structural damage to the strength of union sought by the time of the constitutional convention.

John Adams offers a slightly different view of a republic in his 1776 essay, "Thoughts on Government." Adams views the end of republic government as the rule of law. He says, "there is no good government but what is Republican ...because the very definition of a Republic, is 'an Empire of Laws, and not of men.' " (Kurland 108). The rule of law is the best protector of private rights and public good. Through the republican principle the rule of law was legitimized and exercised. Although expressed differently, Adams and Jefferson reached the same conclusion.

### **The states' constitutions -- republican experiments**

The state constitutions written between 1776 and 1783 demonstrated the search for a balance between the competing principles of republican government and governmental centralization as well as an embodiment of the ideals of the Revolution. The state constitutions were the reconciliation of the competing ends of popular control and ordered government. The state constitutions written in this period incorporated the republican principle as the fundamental tool of popular government. Lutz stated that in this search for balance that, "The willingness to experiment with new institutions in the service of old, well-established political goals and principles was impressive." (97).

When it came time to evaluate the state constitutions and the Union under the Articles, A transformation of the ideals Madison held during the Revolution resulted. He had assumed that the majority of the people "were the safest guardian both of the public good and of private rights." His experience with the Articles showed that this revolutionary maxim was imperfect. (Banning 128). For Madison, the people of the states need a constitutional mechanism to save "...those small republics from themselves." (Banning 130) Popular consent and the protection of liberty, the key elements of government collided so often in the realm of the state republics that the conflict threatened to destroy the Union. Ironically, it would be the redefinition of federalism, through enlargement of the republic, would balance these constitutional principles. Looking around, Madison could see the problems caused by democracy in the states and the conservative backlash that usually resulted.

The Pennsylvania constitution of 1776 is the clearest example of republican government with strong democratic tendencies. The unicameral legislature, one year terms of office, a weak executive all demonstrate the liberal application republicanism. For the conservatives and nationalists the Pennsylvania constitution of 1776 became the embodiment of tyranny of the majority. It was not long before a counter constitution would emerge and subvert the 1776 constitution. The 1790 Pennsylvania constitution emerged with several layers filtering the public voice.

It was the example set by Pennsylvania and other states that gave James Madison his original impetus to challenge the excesses of republican government with federal forms. As Banning points out, “Throughout America he (Madison) was beginning to conclude, the ‘multiplicity,’ the ‘mutability and the ‘injustice’ of provincial laws were calling into question the fundamental principle of republican government, that the majority who rule in such governments were the safest guardians both of public good and of private rights.” (99). Majorities can be wrong however, and in such a case republicanism could be the tool that a tyrannical majority used to justify itself; ultimately subverting the common welfare of the Union.

### **The Articles of disunion**

Madison’s development as a proponent of the federal republic lies in his analysis of both the state constitutions and the Articles. The governments of the states and the union could not act jointly on the attainment of the common good. Sovereignty under the Articles lay clearly with the states. The Confederation held no ultimate sovereignty; no means by which to coerce or discipline states that acted in their local interest at the sake of the union. Thirteen sovereign states could not give the government of the United States the means by which the states could unite. Where is the location of the sovereignty? Either thirteen states followed thirteen sovereign courses or one national state held sovereignty and would lead the others.

Madison points out this problem of sovereignty in his “Vices” article when he discusses the “multiplicity” and “mutability” of state laws. Banning wrote of Madison's disdain for the repetitive and unjust laws of the states, “Not only did his ordered mind rebel against these constant fluctuations, but he also sensed that constant changes, like repeated interference with private contracts, undermined the certainty and trust that bond societies together.” (101). “Certainty and trust” in government can only occur when the people can pinpoint where to direct their sovereignty.

James Madison took the steps toward a check on the republican spirit that would eventually lead to a new definition of federalism. A definition that he would originally reject, then accept. In writing "Vices ..." Madison articulated the problems and the exigencies caused by the government under the Articles and the state constitutions. This would definitively put sovereignty in the national government.

The Articles of Confederation was the first true national and codified expression of federalism. The contemporary usage for the word "federalism" could be characterized as one of thirteen solo comets, almost wandering in space in their wide orbits around the sun. The redefinition of federalism would order the system so that the thirteen units would become as a solar system of planets held in by the gravity of the all powerful (sovereign) sun; yet each unique in its properties and orbit.

Some form of coercion is necessary to make a claim of sovereignty. During the summer of 1781 Madison served on committees of the Confederation Congress looking for ways to strengthen the Articles. He went so far as to suggest that required coercion was to "employ the force of the United States to compel delinquent states to fulfill their 'federal obligations.'" (Banning 21). As the definition of federalism would evolve through the 1787 convention, coercion by military force (most undesirable) was replaced by other constitutional measures such as supremacy clause, interstate commerce clause, and others.

Rufus King writing to Elbridge Gerry in April of 1786 characterized the low esteem the states held toward the government of the Articles. He described the inattention of the states toward the Confederate Congress when he said, "It is a mere farce to remain here as we have done since last October. Foreigners know our situations and the friends of free government throughout the world must regret it." (Kurland 162). The governments of the states attended to their attainment of their own particular definition of the common good. Republican government of the states was subverting republican government of the Union. In the same letter King goes on to state, "Where, my dear friend, will the evils consequent to this inattention in the states terminate? The people of the States do not know their dangerous situation; this torpor and inactivity should alarm the Guardians of the People; but indeed the Legislatures seem the least attentive." (Kurland 162). Non-interest, as expressed by the states' inattention to the business of the Confederation was evidence of the structural crisis under the Articles.

Washington makes the same point in a letter to John Jay of August 1, 1786 where he wrote,

“Your sentiments, that our affairs were drawing rapidly to a crisis, accord with my own. What the event will be, is also beyond the reach of my foresight. We have errors to correct; we have probably had too good an opinion of human nature in forming our confederation. Experience has taught us, that men will not adopt and carry into execution measures calculated for their own good, without the intervention of coercive power. I do not conceive we can exist long as a nation without having lodged some where a power, which will pervade the whole Union in as energetic manner, as the authority of the State Governments extends over the several states.” (Kurland 162).

With these words Washington articulated the duality of virtue within sovereignty. American people were virtuous people; civic virtue leads us to seek the common good. Common good under whose definition and to whose benefit? Citizens direct their virtuous behavior toward where sovereignty lies in a state. With sovereignty in the states, the common good directed itself to the ends of state government. Washington suggested that sovereignty (coercion) be replanted in the Union of the several states. Herein lies the reconciliation of two fundamental principles; federalism would emerge to redirect the republican power. A “Republican corrective for republican excesses.” (Banning 77).

Whigs and Federalists saw the application of civic virtue in the body politic differently. Lutz writes of this variation,

“Whigs believed that a virtuous people had moral abilities and a sense of community that led them, when necessary, to abandon self-interest for the sake of the common good. Federalists thought that a virtuous people were able to assess interests accurately and would then seek and reach agreements or accommodations with others that advanced these interests. Out of the many accommodations would come something similar to what later would be called the greatest good for the greatest number. Both Whigs and Federalists saw a virtuous people as the basis for self-government, but they define virtue in different ways.” (Lutz 156).

From this difference of opinion came the triumph of the Federalists’ view of republican government and civic virtue in the Constitution of 1787. A redefinition of federalism was the tool that implemented a check on republican excesses in the state governments.

Those who would become the anti-federalist disagreed. They saw no need to redefine government structure under the Articles; no reconciliation was necessary. Republican principle was the essence of government, federalism was a side benefit for the common defense only (An argument made today in 1997 by the Libertarian Party). To the Anti-Federalists (Whigs?) the true benefit of a constitution was its degree to which it protected natural rights, not ameliorated factions, democracy, or

the national common welfare. Patrick Henry was one who saw great dangers in the “consolidated government.” He said at the Virginia ratifying convention for the constitution,

“That this is a consolidated government is demonstrably clear, and the danger of such a government, is, in my mind very striking...what right do they have to say *We, the People*? Who authorizes them to speak the language of, *We the People*, instead of *We the States*? States are the characteristics, and the soul of a confederation. If the states be not the agents of this compact, it must be one of great consolidated National Government of the people of all the States.” (Kurland 288-89)

It was Henry’s thinking that the republics of the states gave authority to the national government, for Madison, this problem become a crisis. Madison recognized that the states’ individual characters must be retained in a “new system.” He wrote to Washington in April of 1787 that,

“Conceiving that an individual independence of the states is utterly irreconcilable with their aggregate sovereignty; and that a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable, I have sought some middle ground, which may at once support the supremacy of the national authority, and not exclude the local authorities whenever they can be subordinately useful.” (Kurland 250).

The Articles had ended in purpose. Madison’s sole objective was the complete overhaul of the confederated system. Banning identifies that Madison was eager to get to the “essential point” of the Article's problems, “...no additions to the positive responsibilities of the existing central government could possibly suffice.” (116). Sovereignty was about to shift from the states to the “general” government. The shift sovereignty would follow the peoples’ consent to a government of a national, “extended” republicanism.

### **The Constitution -- coercion by nationalism**

The Constitutional convention would institute means by which the states could be coerced to reconcile the competing goals of federalism and republican government. The coercion would be through the application of national power over the states, not as Madison had once feared of a different, perhaps military sort. The new constitution would become a social contract with the people of the states united, rather than of united states (Belz). From the fundamental difference of whom the constitution represented came the resolution for the competing interests of federalism and republicanism. The constitution, and the federalism it defined, would be an agreement with the people of the states; it would therefore shift ultimate sovereignty from the states to the people of the states.

This shift in consent enabled the national government to redirect the search for a common good from a state direction to a mostly national direction. The question remained, would this shift and expansion of republicanism do harm to the other great promise of republican government, the protection of individual liberty?

Madison's great contribution to the reconciliation of these principles was in the idea of an "extended republic." It seems irrational that if factionalism was the cause of the disintegration of the government under the Articles that the expansion of republicanism would be one of the cures to the "excesses of democracy." How could the government prevent the tyranny of the majority from becoming national? (Lutz 154). The expansion of the republic would prevent "a natural majority" from forming and would give the opportunity for many diverse minorities to join together. This diversity would still require a majority, but now a diverse majority up of many different factions. (Lutz 154). To demonstrate the reconciliation of federalism and republicanism, Lutz discussed the requirement of federalism and republicanism to exist in the system he wrote, "The extended republic was not possible without federalism, both in terms of it being extended and its being republican." (155).

The features of the "new" federalism that emerged from the Convention caused the sovereignty shift. The House of Representatives, elected directly from the people (within the states) nationalized the legislative and moved partial legislative sovereignty to the national government are features of the new power the national government obtained. The supremacy clause (Article VI sec. 2) clearly limits the states sovereignty, making sovereignty national. The federal veto developed through the supremacy clause and the judiciary is not what Madison desired in the way of a federal veto, but it has been effective as such. The enumerated powers of Congress; especially the necessary and proper clause, effectively moved sovereignty from the states to the national government.

Each of the new constitutional provisions that shifted sovereignty from the states to the national government created a filter on the republicanism in the states. While the states as entities would be represented in the government, most of the shift in power went from the states to the representatives of the people in the states. The constitutional means by which federalism balanced republicanism was the practical means by which these two principles reconciled. What is truly amazing is that the debate on this reconciliation debate continues.

Works cited other than the assigned course reading

Belz, Herman. Lecture 7/18/97, Madison Foundation Institute on the Foundations of American Constitutionalism.

Kurland, Philip and Lerner, Ralph, The Founders' Constitution, The University of Chicago Press, 1987.