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# DEMOCRACY *Papers*

## Federalism & Democracy

*By David J. Bodenhamer*

**"The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes."**

-- **James Madison**

*The Federalist, No. 46*

The 2000 presidential contest was one of the most closely divided -- and confusing -- elections in American history. Not until a month after voters cast their ballots did it become certain that Republican candidate George W. Bush would claim the title of the nation's 43rd president. In the interim, the world watched as the fight for votes in Florida repeatedly bounced from local to state to federal courts and back again, before a U.S. Supreme Court decision settled the matter. What many foreign observers found puzzling was how voting standards could vary so much from place to place or how local officials could play such an important role in a national election.

American citizens also may have been surprised by the differences in voting procedures from state to state, but the interplay of local, state, and national governments could scarcely have seemed unusual. Few days pass when ordinary people in the United States do not encounter the laws or actions of all three levels of government. Zoning, traffic control, sanitation, educational administration, street repair, and a hundred other services are all managed primarily by local officials, acting under a grant of authority from the state. State government controls much educational policy, criminal justice, business and professional regulation, public health, among a variety of other important areas. And the acts of national government -- from defense and foreign affairs to economic and monetary policy to welfare reform -- are staples of the daily news



everywhere because of their wide impact.

Although few people recognized it at the time, both the drama of the last presidential election and countless lesser dramas of everyday life are acted out on a stage erected by the framers of the U.S. Constitution over 200 years earlier. As colonists, the Founding Fathers had chafed under the authority imposed by the distant British imperial government and had come to view centralized power as a threat to their rights and liberties. As a result, the major problem facing the Constitutional Convention in Philadelphia in 1787 was how to restrict the power of the central government, yet provide it with sufficient power to protect the national interest. Dividing power between two levels of government -- national and state -- was one of the solutions to this problem. This system of divided power, federalism, is widely acknowledged not only to be a unique American contribution to the theory of government but part of the genius of the American constitutional system itself.

### **Defining federalism**

Federalism is a system of shared power between two or more governments with authority over the same people and geographical area. Unitary systems of government, by far the most common form around the world, have only one source of power, the central or national government. Although democracy can flourish under either system, the differences between the two types of governments are real and significant. Great Britain, for example, has a unitary government. Its Parliament has ultimate authority over all things that occur within the United Kingdom. Even if it delegates power over local matters, Parliament can require its towns or counties to do whatever it deems appropriate; it can even abolish them or change their boundaries if it chooses to do so.

In the United States, the situation is quite different. Laws of the national government, located in Washington, D.C., apply to any individual who lives within the national boundaries, while laws in each of the 50 states apply to residents of those states alone. Under the U.S. Constitution, Congress does not have the power to abolish a state nor can a state assume a power intended for the national government alone. Under American federalism, in fact, the U. S. Constitution is the source of authority for both national and state governments. This document, in turn, reflects the will of the American people, the ultimate power in a democracy.

In a federal nation, the central government has defined powers, with full sovereignty over external affairs. The exercise of authority in domestic affairs is more complicated. Under the Constitution, the U. S. government has exclusive power to regulate interstate and foreign commerce, coin money, provide for the naturalization of immigrants, and maintain an army or navy, among other things. The United States guarantees to every state a republican form of government, thus ensuring that no state can create, say, a monarchy. These areas are ones in which national interests clearly supersede state interests and are properly reserved for the national government. The national government also has judicial authority to resolve controversies between

two or more states and between the citizens of different states.

In other areas of domestic policy, however, the central and state governments may have parallel or overlapping interests or needs. Here, power may be exercised simultaneously by both state and national governments; chief among these concurrent powers is the power to tax. And in areas where the Constitution is silent regarding national authority, states may act provided they do not conflict with powers the central government may legally exercise. On large and important subjects that affect citizens in their daily lives -- education, crime and punishment, health and safety -- the Constitution fails to assign direct responsibility. According to the republican principles that guided the founding generation, especially the theories of John Locke, the people reserved these powers, which they delegated to the states through the various state constitutions.

The framers of the Constitution recognized the potential for conflict between and among the two levels of government, especially in the use of concurrent powers, and they adopted several strategies to avoid it. First, the U.S. Constitution was made supreme over state constitutions, a condition made enforceable through federal courts. It included a clause that declared the actions of the national government supreme whenever its constitutional use of power clashed with the legitimate actions of the states. The document also explicitly prohibited states from exercising certain powers that were granted to the central government. And as part of the campaign to win ratification of the Constitution, the framers agreed to support a Bill of Rights, the first ten amendments, to restrain the national government from interfering with individual liberties. The Constitution laid the ground rules for relationships among states by listing the reciprocal obligations the states owed each other, and it made any newly admitted state equal with the original states. Finally, the states were represented in the national government itself by equal representation in the U.S. Senate, the upper house of Congress. In all of these ways, the Founding Fathers sought to mitigate conflict among the several governments in the United States.

The American invention of federalism rested on a new conception of sovereignty, the ultimate power to rule. In English and European political theory, sovereignty was unitary and indivisible. Yet throughout the imperial crisis that preceded the American break with Great Britain in 1776, the colonists had argued that while the English Parliament controlled all matters relating to the empire as a whole, in practice the colonial legislatures made law for their respective colonies. Even so, the early American governments of the Revolutionary War era operated under an older theory of undivided sovereignty. Under the Articles of Confederation (1783), the nation's first constitution, each state or former colony was supreme; the states only cooperated in a "league of friendship" to address national issues. However, experience with the confederation form of government proved unsatisfactory and, to some minds, dangerous. Not only did states act to deny liberties to some of their own citizens, they too often pursued their self-interest to the detriment of the nation at large. Widespread dissatisfaction with the Articles of Confederation led in 1787 to the convening of delegates to

draw up a new constitution.

The document that resulted begins with the famous words, "We the People of the United States..." thus indicating the source of sovereignty in the new nation. Created by the people, the Constitution denied sovereignty to both the national and state governments. What had once appeared illogical, a government within a government, was now possible because both national and state power came from a grant of authority from the sovereign people. This grant of power was expressed through a written constitution that assigned different roles to the separate levels of government. State and national power could operate concurrently over the same territory and the same population because they focused on different things -- the states on local matters, the national government on more general concerns. The American experiment in government allowed both states and national governments to coexist as separate and independent units, each with a separate sphere of authority, because both exist to serve the people.

### **A study in evolution**

How has federalism worked in the United States? There is no simple answer to this question. Federalism in fact has been a dynamic framework for government, a characteristic that fits well the changing nature of American society itself. Over its 200-year history, the division of power under American federalism has shifted numerous times in law and practice. The U.S. Constitution is a flexible document, meant to allow the nation to respond to changing circumstances. At times, amendments to the Constitution have given a different role to the central and state governments than originally intended; at other times, courts have provided different interpretations of these roles. The proper balance between national and state powers is continually at issue in American politics. It cannot be settled, President Woodrow Wilson (1913-20) observed, "by the opinion of any one generation." Social and economic changes, shifts in political values, the role of the nation in the world -- all these things, he continued, have required each generation to treat federalism as "a new question."

Even a casual reading of the Constitution leaves the impression that the central government has responsibility for only a small number of the functions that affect the conduct of everyday affairs. Certainly, this was true for the first century of nationhood. States took almost all of the governmental decisions that affected the lives of their citizens. They defined all crimes and punishments, established the laws of contract, regulated public health and safety, and set the legal standards for education, welfare, and morality.

Despite the importance of the states in daily life, the most pressing public policy questions prior to the American Civil War (1861-65) involved debates over the scope of national power, with most people believing it should remain limited. But a number of pressures kept pushing federalism to the center of political debates. The legacy of the Revolution, with its fears of centralized power, was a strong influence, as was the ambiguity that remained from the constitutional convention and the ratification debates. The language of the Constitution was

general, and did not explicitly address whether or not states retained any residual sovereignty in the powers assigned to the national government. Complicating the problem was the fact that states, as a practical matter, were far more competent in performing governmental functions satisfactorily than they would be in later eras when problems increasingly required multi-state solutions.

The Civil War, fought over the question of slavery, settled the dispute about the nature of the union and the supremacy of the national government in it. It did not answer all the questions about the proper division of responsibility between central and state governments, even though the 14th Amendment, ratified in 1868, contained language that permitted the legitimate expansion of national power. But the context for the debate had changed. During the last half of the 19th century, the United States became a manufacturing colossus, a development accompanied by a corresponding rise of a vast domestic market, large cities, great concentrations of wealth, and serious social problems. The rise of corporate monopolies of goods and services in the late 19th and early 20th century raised the specter of uncontrolled economic power, which to most Americans was as threatening as uncontrolled governmental power.

No state or combination of states could effectively set the conditions both to spur and control this growth of commerce and its consequences. So the central government, now increasingly called the federal government, began to assume this responsibility, at first under the "interstate commerce" clause. Among the powers given to Congress in the Constitution is the power "to regulate Commerce with foreign Nations, and among the several States...." By 1887, national legislation emerged to regulate monopolies under the interstate commerce power. Within two decades, Congress had passed a host of laws governing everything from national lotteries to the liquor trade to the food and drug industry.

Although the intent of much of this legislation was to prevent states from interfering with the growth of industry, the result was an extension of national power into an arena, the protection of health and welfare in an era of rapid industrialization, previously viewed as a state responsibility. Progressives at the turn of the century, led by President Theodore Roosevelt (1901-09), were unapologetic about this intrusion, arguing that the states need federal help to fulfill state goals. Although the Supreme Court, which by now was recognized as the final arbiter of constitutional interpretation, accepted and promoted this aim, it still attempted to keep federal power in check. Nonetheless, the general trend was clear: Federal authority grew in concert with national needs, and state power diminished correspondingly.

In the 1930s, President Franklin Roosevelt's New Deal economic programs further challenged this somewhat conservative balancing of state and federal interests by claiming a broad national authority to respond to the economic crisis of the Great Depression. Congressional measures paved the way for national management of welfare (creation of the Social Security system), agriculture, minimum wages, and labor relations, with other laws establishing federal regulation of such vital

areas as transportation, communications, and banking and finance. Taken together with the relief programs and a variety of social experiments, the New Deal created a national administrative state that the emergencies of World War II and the Cold War only strengthened. It was a constitutional revolution of the first order: The U.S. government now exercised powers -- over labor law or banking regulation, for example -- that previously the states had exercised almost exclusively.

The role of the central government within the federal system continued to expand during the last half of the 20th century. The Supreme Court reversed the prevailing interpretation of the 14th Amendment that narrowly defined the scope of national power, and extended federal oversight in areas of crime and punishment, social welfare, race relations, and equal protection of the laws. By the end of the century scarcely an area existed that national power did not reach. The effect was perhaps most apparent in the words most people chose when asked to identify their citizenship. Throughout most of the nation's history, a significant number of citizens identified their primary allegiance with a state; by the end of the 20th century, national citizenship was prized more often.

The revolution in federalism did not end debates about the proper distribution of power between the states and the national government. Disagreements about the proper role of national and state governments within the federal system continue to be an important part of American politics. Virtually no domestic issue is untouched by conflict over what level of government has authority to shape or implement policies relating to it. No longer is it easy to distinguish between the functions of state and national governments, because the current federal system tends to blend responsibilities and blur distinctions in response to complex social and economic issues.

### **The virtues of power division**

Today, power and policy assignments are shared in what scholars label cooperative federalism. This feature of American life is so well established that it occurs even when the two levels of government are in conflict, as happened in the 1960s when Southern states cooperated on building the interstate highway system while resisting federally mandated racial integration. What makes cooperative federalism possible are several operating procedures, including shared costs, federal guidelines, and shared administration. Congress agrees to pay part of the costs for programs that are in the national interest but benefit primarily the inhabitants of a single state or region. Among these programs are highways, sewage treatment plants, airports, and other improvements to state or local infrastructure. The federal grant comes with a set of guidelines that states must adopt and enforce in order to receive the money. Concerned about drunken driving, for instance, Congress recently made the receipt of federal highway dollars contingent upon a state's enacting a lower blood alcohol limit as part of its traffic laws. Finally, state and local officials implement federal policies, but under programs of their own design and through their own bureaucracy. Job retraining is one such program, with each state developing and administering a program funded by federal dollars to

meet the specific needs of its citizens.

What lessons does the American experience with federalism offer to democratic governments elsewhere? Federal governments are not common -- most nations adopt a unitary government in which power is centralized -- nor is federalism essential to democracy, as the experience of parliamentary governments demonstrates. But the principles of federalism are important for democratic government anywhere. Foremost among these principles are the division and separation of power and the decentralization of policies and politics.

Americans have long believed that centralized power threatens liberty, and they traditionally have feared most the use of power by a distant national government. Vesting power in two levels of government, dividing it by making each level supreme in its separate sphere, was one solution to the problem of how to grant necessary authority to government without creating such concentrated power that liberty would suffer. The states, the level of government closest to the people, in effect serve to check the power of the national government. This innovation made sense to the founding generation; in fact, the American theory of representation requires a direct geographical connection between the representative and the represented. Localism continues to appeal to modern minds because, as one scholar has noted, it satisfies a natural "preference for the near and familiar and a suspicion of the remote and abstract." "States' rights," as the powers assigned the states are often called, rest on an assumption that localism is important and that people are willing to trust government that they can control. State governments intuitively satisfy this requirement more than a national government does. This belief explains why most Americans continue to want local control of the institutions that affect their everyday lives -- police, schools, and hospitals, for example -- while also insisting that the rights of citizens should be national and not vary from state to state. In theory and practice, federalism addresses both local and national needs within a framework of limited power.

Federalism's ability to accommodate local issues also contributes to democracy by decentralizing policies and politics. The United States is a geographically large and complex nation. It is also a nation of immigrants, with each ethnic, national, and religious group bringing different cultural and moral values to social, economic, and political issues. Governing such a nation as a democracy would be much more difficult if these differences could not be expressed and accommodated easily. States can adopt widely varying policies on the same problem, thereby providing the means for citizens to live in a state where the policy suits their moral or cultural values. Consider an issue such as gambling. Some states permit it; others do not. Each state's policy suits the needs, experiences, and values of a majority of its citizens, as expressed through state law. In this example, the variation in state practice is beneficial because a national consensus does not exist to support a uniform policy on this issue.

Of course, a diversity of approaches to public policy is not an unalloyed virtue. It should never compromise the fundamental rights and privileges of citizens. The right to a trial by jury, for instance, should not

depend upon a circumstance of geography. Diversity in practice can also lead to unequal treatment, such as when a poorer state is unable to fund a basic program, say, education, as well as a wealthy state can. But with the exception of basic rights, the ability to experiment with different solutions is a prized characteristic of a federal system.

Often the states are called laboratories of democracy, and for good reason. Innovative programs and policies from welfare and educational reform to health and safety regulation repeatedly have come first from state governments. Long before the national government acted, a number of states abolished slavery, extended the right to vote to women, African-Americans, and 18-year-olds, and provided for the direct election of U.S. senators, among other reforms. These state actions expanded the promise of democracy at a time when none of these measures commanded a national consensus. In this sense, states serve as both political reformers and mediators, testing new ideas and helping to hammer out acceptable compromises among state and national majorities.

A federal system also expands participation in politics and government. The more levels of government, the greater the opportunity to vote and hold office. State and local governments elect thousands of office holders, compared to the two officials-president and vice president-elected by the nation at large. (Legally, neither national office is elected by the nation's voters but rather by the votes of designated electors chosen by voters in each state, though the election is truly national.) Many of these offices are training grounds for future national leadership. Among the nation's last five presidents, for example, only one, George Bush (1989-93), did not gain experience in a state office. Presidents Carter, Reagan, Clinton, and George W. Bush all first held elected state offices. Although most state or local office-holders do not move to national positions, they each learn valuable lessons about the role of government in a democratic society, lessons that ultimately strengthen the relationship between government and citizens. Society also benefits because the pool of individuals qualified for higher office is larger than it would be otherwise.

Additional levels of government also increase access to decision-making in ways other than office holding. Interest groups blocked from influence at one level of government may find a better reception of their ideas at another level. During the 1950s and 1960s, civil rights advocates faced strong opposition from Southern states that opposed racial integration, but they found support in the national government for their efforts to achieve racial equality. Early in the 20th century, supporters of labor and environmental regulation often succeeded in passing state legislation but were stymied at the national level. A federal system, therefore, has the potential to make government more responsive to the different -- and at times competing -- economic and social interests of the various states. In this fashion, it encourages and helps to manage a healthy democratic pluralism within a large republic. James Madison, among other framers of the Constitution, valued the multiplication of interest groups because it prevented the formation of a permanent majority with the potential to trample on minority rights.



Finally, federalism enhances democracy by providing a platform for effective criticism and opposition to governmental policies and practices. A political party out of power nationally still may capture state and local offices that allow it to challenge national priorities or decisions. While some of this opposition may be strictly partisan, much of it undoubtedly expresses serious reservations about the wisdom of a particular policy or course of action. A federal system thus protects the freedom of citizens to oppose national policy they view as misguided, and by this means it promotes the effective and necessary criticism of government that leads to the strengthening of democracy itself.

### **Creative tension**

For more than 200 years, federalism has provided the framework for the development of American democracy. The claims of the federal government and the claims of state governments have always existed in tension with each other. They still do. Resolving this tension requires constant attention to the role of government and continual reassessment concerning the proper distribution of power between the two levels of government. This shifting balance, more often creative than not, rests on the principle of popular sovereignty, so the disputes surrounding federalism are about which government, state or national, best expresses the people's will. They are also about which values will prevail in the marketplace of political ideas. There will never be final answers to these questions, and the tension inherent in federalism will never disappear.

In the tension between governments, messy as it might be in practice, Americans have discovered perhaps their best guarantee of liberty, second only to their own vigilance and guardianship. Certainly this was the hope of the founding generation. "Should this improvement on the theory of free government not be marred in the execution," James Madison wrote in 1792, "it may prove to be the best legacy ever left by the lawgivers to their country, and the best lesson ever given to the world by its benefactors." Among nations searching for a form of government that best promotes liberty, the federal legacy offers an example worth considering.

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