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## CONSTITUTIONAL ASPECTS OF AMERICAN FEDERALISM

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The function of the constitutional system of federalism in the United States — though by no means its design — has been to insure political liberty by protecting and providing scope for the expression of the country's peculiar form of cultural pluralism. The purpose of this paper is to demonstrate and elaborate that proposition. Doing so involves, at the outset, recognizing that it is really three propositions, not one: first, that the United States does in fact have a peculiar form of cultural pluralism; second, that the federal system, as established by the Constitution, was a product of something other than design; and third, that the system actually performs that function.

In one essential way, cultural pluralism in the United States is structurally different from that of European countries and of Canada. In Europe, subcultures — by which I mean groups of persons having common "givens," those complexes of unspoken and largely unconscious assumptions upon which thought and acts are based — are by and large identifiable as ethnic groups located in specific places. Thus, for example, modern Spain is made up of Andalusians (located on the southern coast), Basques (located in the northern mountains), Catalonians (located in the northeast), Castillians (located in the central highlands), and so on; and similar patterns prevail in Italy, Germany, France, and England. In Canada, for reasons related to timing and technology, a variation of the same system developed, so that it is possible to point to a map of Canada and say, the French are over there, the Scots are there, the Ukrainians are there, the WASPS (White Anglo-Saxon Protestants) are there and there.

In the United States, again for reasons related to timing and technology, it did not work out that way. A long succession of immigrant groups came; after the original English and an assortment of lesser groups, they came in great waves, first of Scots-Irish, then of Irish, then Germans, Scandinavians, Poles, Orientals, Austro-Hungarians, Italians, Russian Jews, and finally (for they must really be considered as such) the Negroes. Each of these groups, along with the French and Spanish Americans who were picked up through territorial expansion, tended to settle in clusters, as they did in Canada, but in the United States they settled in a dozen or so widely scattered clusters, rather than one cluster, for each group. Scattering made assimilation

easier, and so each group was largely assimilated — though not completely, and some more than others.

Scattering also had another important effect: it meant that the immigrant groups were assimilated into different pre-existing sub-cultures, not into a general American culture. In the 1760's and in the 1860's — as in the 1960's — a newcomer into various parts of the United States would find that the "givens" of the inhabitants varied greatly from place to place. The inhabitants of, say, the swamp country of eastern South Carolina, the prairie plains of Northern Illinois, and the Green Mountains of Vermont are and historically have been as different in outlook and habits as are the Andalusians and the Castillians.

The result is that each section, each locale, and even each person in America is a part of two different kinds of cultural complexes, one depending upon his ethnic origin, the other depending on his place of residence. Thus, for example, a Polish Catholic and his Russian-Jewish neighbor in Cleveland, Ohio, are very different; but they have at least as much in common with one another as they do with their ethno-religious counterparts in Houston, Texas.

My second proposition is that the constitutional system of federalism in the United States is a product of accident rather than of design — by which I mean that it was an unintentional by-product of something else, namely the political exigencies of the moment of its creation. Elucidation of this point requires a brief resume of the history of the creation of the system.

When, in 1776, Richard Henry Lee introduced his celebrated motion that the thirteen British colonies in North America should declare their independence from the mother country, he included a motion that the Continental Congress should draw up a plan of permanent confederation. A committee of Congress was appointed for each purpose; and less than two weeks after the Declaration of Independence was adopted, the confederation committee, headed by John Dickinson, had completed a draft of a plan for a union and a strong national government. As it happened, however, it was twelve years before the permanent American "federation" was finally established.

Dickinson's 1776 Articles of Confederation were shuffled in and out of committees for more than a year. When they were finally approved by Congress in October, 1777, they were but a shadow of the original draft. The Union had been expressly reduced to a "league of friendship"; Dickinson's article granting broad powers to Congress had been replaced by one explicitly reserving sovereignty and independence to the several states. The central authority — residing entirely in a unicameral Congress in which each state had one vote — was vested with great responsibilities, particularly in the conduct of foreign affairs, but

it was given no powers with which to fulfill these responsibilities. To become effective, the Articles and future amendments to them had to be ratified by each state legislature. The process of ratification was not completed until 1781, by which time the war was almost over. Meantime, each state established its own permanent government — eleven by promulgating constitutions, the other two by modifying colonial charters.

Between 1781 and 1787 various attempts were made to amend the Articles of Confederation, particularly so as to vest Congress with power to raise a revenue on its own authority rather than through requisitions on the several states. All such efforts failed. Then, in the summer of 1787, a convention met in Philadelphia and drew up the present United States Constitution, which was adopted by specially elected ratifying conventions in each state over the course of the next year or so.

Many of the members of the Philadelphia Convention were well versed in the political theory of the Enlightenment, but the dominant voices in it were those of hard-boiled practical businessmen and politicians who cavalierly dismissed the whole idea of the Age of Reason. "Experience must be our only guide," said Dickinson, for "Reason may mislead us," and most of the delegates agreed. Most also agreed with Hamilton's proposition that "A great source of error... is the judging of events by abstract calculations, which though geometrically true are false as they relate to the concerns of being governed more by passion and prejudice than by an enlightened sense of their interests." And virtually all agreed with Gouverneur Morris' analysis of the significance of what they were doing. The "grand question," as Morris put it, was not what kind of national government should be created, but "shall there be a national government or not?"

To the delegates in the convention, the form of the government was important primarily if not exclusively in terms of what would be most palatable to the voters who would have to ratify the Constitution. Most matters of form were decided on that basis. When nothing could be devised that was generally satisfactory — as was the case with the judicial branch — the delegates simply skipped it and left it up to Congress to fill in the details.

As to the "principle" of the separation of powers, it was only by chance that any such feature was in the Constitution at all. The draft of the Constitution that the delegates had agreed upon as late as September 4, 1787 — only ten days before the practical end of the four-month convention — would have established a Congressional government, not drastically different from modern parliamentary systems. On that day a catch-all committee came up with a half-baked compromise to a vexing immediate political issue inside the convention, and thereby contributed what was the only real governmental innovation devised by

the convention. This was the electoral college system — an awkward scheme, irrational almost to the point of absurdity, and so greeted by most of the delegates — but a handful of dissidents in the convention had aroused considerable dissention by objecting to each of the various means that had been proposed for having Congress choose the president, and as the delegates argued about the electoral college it became increasingly clear that it would overcome the objections that had been raised to every other method. And so, just to get the matter settled one way or the other, they adopted the proposal. But when they did so, the government became a mixed one, for in rendering the presidency independent of Congress, the delegates gave the judiciary a measure of independence also, for the judges were to be appointed by the president.

And now to the basic proposition: how it is that the constitutional system preserves and expresses America's dual pluralism — if I may use such a bizarre term. The answer lies in what the Constitution is: It is not, as we sometimes tend to think, a statement of what power is to be exercised by government, but a definition of the *means* by which political power is to be exercised. Inside the Anglo-Saxon scheme of things, the sum total of governmental power that was regarded as legitimate was virtually boundless, being subject to only two significant limitations. One was the contract, public or private. The other was tradition, largely as embodied in the common law, which was in essence a set of personal rights in the form of procedures that governed the exercise of power. Together these placed life, liberty, and property morally beyond the *caprice* of kings, lords, or popular majorities. But these two theoretically unbreakable limitations were the only restrictions on otherwise unlimited power.

There was, however, one other controlling "given": that power was not only divisible but, in fact, always divided between the multitudes of agencies that, taken together, constituted government. The perpetual question was not "What power is legitimate?" (the answer to which was unchanging), but "Where are the suitable repositories of power?" (the answer to which was continually changing). The great disputes during the last days of the empire and all great political event of the era since 1763 — resistance to the Stamp Act and other measures of Parliament, the Declaration of Independence, the Articles of Confederation, the proposed amendments to the Articles, and the Constitution itself — turned on that point.

The Declaration of Independence, almost everyone agreed, amounted to some kind of reversion to first principles; as a result of it, all power had reverted to its ultimate source, whatever that might be. As to where, in practice many different stances had been taken. Some held that sovereignty, the whole power, devolved upon Congress, others that it devolved upon the states, still others that it devolved upon the whole

people, the people of the states, and even the people of the towns. State governments had been created on a motley collection of these theories, and the question, until 1787, was not specifically answered. By direct implication, the promulgation of the Constitution gave a firm answer to this question.

In an ultimate sense, the Constitution confirmed the proposition that original power resided in the people — not however, in the people as a whole, but in them as people of the several states. In 1787 the people were so divided because, having created or acquiesced in the creation of state governments, they were bound by prior contracts. The same contracts defined who, state by state, the “people” were. The people thus defined could therefore create more local or more general governments, but only by agreeing, in their capacity as people of the several states, to relocate power previously lodged with the state governments. All powers not thus relocated, and not reserved by the people in explicit state constitutional limitations, remained in the state governments. In short, national or local governments, being the creatures of the states, could exercise only those powers explicitly or implicitly given them by the states; each state government could exercise all powers unless it was forbidden from doing so by the people of the state. But in the Constitution, the states went a step further and expressly denied to themselves the exercise of certain powers, such as those of impairing the obligations of private contracts, passing *ex post facto* laws, and refusing to honor the laws of the other states. This is the first premise of the American federal system: the division of power along a vertical axis by removing some of it from the central originating point, the states, and shifting some of it up and some of it down the axis.

The second premise is that, at the same time that the Constitution was providing for the creation of a national government by shifting powers upwards on the vertical axis, it also provided that the powers so shifted should be further divided on a horizontal axis. That is, the national government’s powers would be distributed in accordance with the three traditional aspects of government, legislation, execution, and adjudication.

So far, nothing new. Such a division was but a formalization of the theory and practice of government in England and its adaptation in British North America. And though such practice had been “discovered,” as Dickinson phrased it, through experience and not through reason, it had, by the late eighteenth century, a thorough-going rationalization. That rationalization was that the very definition of tyranny was the unchecked expression of the will of the sovereign; the only way to prevent such tyranny was through a mixed government. A mixed government meant one in which power was so distributed that no particular person, faction, class, group, or segment of the population, no matter what its numbers,

could ever gain control of all the parts of the multi-faceted government. "Give all power to the many," said Hamilton, and "they will oppress the few. Give all power to the few, they will oppress the many."

There was, however, one cardinal difference between Britain and America which made a mere copying of the British system unfeasible. England had a hereditary monarchy and a hereditary nobility, each of which, along with the people, prevented the other from an unchecked expression of its will; and the two combined checked the people. In America, which lacked these hereditary institutions, it was necessary to devise some kind of structural substitute. This did not mean creating an artificial monarch and an aristocracy of wealth or education, as was proposed by some of the delegates, notably Hamilton and Gouverneur Morris; but building upon what already existed, by dividing the people into various aspects or capacities of themselves — much as, in fact, they already were and would ever remain divided.

In other words, "the people" were not, in any part of the multi-level government, allowed to act as the whole people. Instead, for purposes of expressing their will they were separated from themselves both in space and in time. This was accomplished by separating the people, both in space and in time, from those they elected.

The national government would have four parts: House of Representatives, Senate, Presidency, and Court. The House was the "democratic" branch, all its members being elected directly by the people every two years — not, however, by the people as a whole, but by the people as citizens of subdivisions of states. The Senate was elected by the legislatures of the several states, and was therefore chosen by the people indirectly through their directly elected representatives, and represented the people not as residents of districts, but of states. Senators were removed further from the people by a time barrier, one-third of them being elected for six-year terms every two years. The chief executive was chosen by electors who were chosen by the state legislatures (or by the people in districts or in states, as the legislatures should direct); his term was four years, intermediate between that of the two houses of Congress. The fourth part of the national government, the Court, was chosen by the president (who was chosen by electors chosen by the legislatures chosen by the people), with the approval of the Senate (chosen by legislatures chosen by the people), and for life. And in state and local governments comparably cumbersome arrangements would continue to prevail.

The result of this jerry-built structure was that government in the United States would be *of* (that is, *from*) the people; hopefully, it would be *for* the people; but by no means would it be *by* the people. The people had no instrumentality through which to exercise "the general will" immediately, and they could express it directly only by achieving

a fantastic unanimity and sustaining that unanimity for fifteen or twenty years.

The division of every voter into many artificial parts of himself was one of the three aspects of the genius of the American constitutional system. The second stemmed from the fact that the division and definition of power, on both axes, was neither static nor precise. The executive and legislative branches, though separate, each had a foot in the door of the other; many powers were ambiguously stated; the court structure was only outlined, leaving it to Congress to fill in the details and even permitting Congress to incorporate state courts as part of the national court system. This very fact — that power was ill-defined and free to shift from one place to another, as time and circumstance should dictate — made the system viable. It could live through wars and revolutions and the most profound economic, social, and technological changes the world had ever seen, and be amended more than twenty times, and still its essence would remain the same.

The third aspect concerned the actuating principle of the governmental system. Montesquieu had taught that the proper actuating principle of a republic was virtue. The Founding Fathers, being skeptical of man's virtue, produced a republic whose actuating principle would be quite different. The untidiness of the system necessitated that the operation of American government would ever recapitulate its process of birth. That is, the system was born of compromises — some arrived at openly and some under the table, some arrived at through "respectable" means and others through "corrupt" deals — and it could be made to work only through similar methods. So cumbersome and inefficient was the system that the whole people, however virtuous or wicked, could not activate it. It could be activated through deals and deceit, through bargains and bribery, through logrolling and lobbying and trickery and trading, the tactics that go with the pursuit of narrow local or ethnic group ends, and with man's baser attributes, most notably his greed and his love of power. And yet, in the broad range and on the average, these private tactics and motivations could operate effectively only when they were compatible with the public good, for they were braked by the massive inertia of society as a whole.

We the people of the United States, despite our two-way cultural differences, are a people with certain attributes in common. Among these, the chiefest are all dangerous to individuality and to freedom, for we of all the world's peoples are materialistic and vulgar and undisciplined, and demand most in the way of conformity. Our only real restraining force is our constitution, defined both ways: the framework in which political power can be exercised, and the parallel framework of our society. Alteration of the latter, the framework of our society, may or may not be accomplished by time and television. Alteration of the former,

the constitutional framework in which political power can be exercised, is impossible: for change can be accomplished only within the framework itself. Every time we have amended the Constitution we have, if anything, left it just the way it was, only more so. We are stuck with it. We are, despite ourselves, doomed forever to be free.