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Federalism: The Grand Design

It is at all times necessary . . . that we frequently refresh our patriotism by reference to first principles. It is by tracing things to their origins that we learn to understand them; and it is by keeping that line and origin always in view that we never forget them.

—Thomas Paine, *Dissertation on First Principles of Government* (1775)

THINGS WERE NOT supposed to turn out as they have, with mushrooming government and concomitant abuses of individual liberty at every level. Our constitutional system was established to prevent accretions of power, and excesses in the exercise of power, at every level of government. The system was intended to restrain growth at the federal level, and—though some find the fact surprising—to restrain abuses of state and local power. That it has failed in the former is painfully clear; the extent to which it has failed in the latter grows clearer (and more painful) with each day. To determine how best to vindicate the framers’ goal of a government that in its totality and all its permutations respects individual liberties

requires a careful analysis of what was intended in the first place, and what mechanisms were erected to constrain the growth and power of government.

Years ago during the Reagan administration, when I was working in the U.S. Department of Justice, I encountered a female colleague while riding the Metro to work. She noticed I was wearing a tie with an Adam Smith insignia—a tell-tale sartorial sign of the ideological true believers within the administration.

My colleague asked if I was a conservative. Not wanting to get into the fine distinctions between libertarians and conservatives, I said yes.

To which she replied, “I dated a conservative once.” Wrinkling her nose disdainfully, she added, “All he wanted to do was talk about federalism.”

So it is with some trepidation, and at the risk of ruining dating prospects for future generations of conservatives, that I embark upon a discussion of federalism. For better or worse, it is central to the context within which the local leviathan has emerged. And it is equally critical to resolving the conundrum presented by big government at the local level. It is an issue over which liberals and conservatives tenaciously disagree—and yet an issue on which both liberals and conservatives, for the most part, are wrong. All of which makes it, once one delves beneath the surface, a surprisingly interesting topic.¹

Federalism, wrote Felix Morley in 1959, is “the distinctively American contribution to political art.”² But what exactly is federalism? The term evokes so much confusion that one scholar of federalism has identified 267 different but overlapping definitions of the term.³ But despite the confusion and controversy, any serious inquiry into the history and principles of American federalism will reveal, as Daniel J. Elazar has observed, that “the central interest of true federalism

in all its species is liberty.”⁴ Any discussion of federalism that is bereft of concern for liberty divorces the vehicle from its destination.

Federalism was part of the constitutional tapestry designed by our Constitution’s framers to create an effective national government while protecting liberty. First, they invested the national government with limited and specifically prescribed powers—only those powers essential for effective governance. They also established specific constraints on government power and recognized specific rights in the Bill of Rights.

They also, as Robert Bork has described it, pursued a “deliberate strategy to create competing centers of power in order to avoid tyranny.”⁵ Some key elements of this strategy were the separation of powers and the system of checks and balances among the three branches of national government, designed so that each branch could curb the excesses of the others. But perhaps the most significant was the adoption of federalism as the organizational structure of American government. To say the least, it has not always turned out as intended. But, when properly understood and implemented, federalism retains vast potential to operate as a mighty bulwark for liberty.

Federalism at the Founding

When the framers set about the job of creating a federal constitution, they faced a daunting task. Under the Articles of Incorporation, the government seemed incapable of managing the country’s affairs. The loose confederation structure had encouraged 13 highly independent states to think of themselves as sovereign entities and not as part of a unified nation. The challenge was to transform this cacophony into

harmony without sacrificing the principles over which the American Revolution had been fought.

That entailed three seemingly irreconcilable tasks: to create a national government with sufficient powers to govern effectively, to convince the states to surrender the portion of their autonomy necessary to accomplish that goal, and to achieve all that while vigorously protecting individual liberty.⁶

Fresh from the experience of monarchical oppression, the framers were united in their distrust of a strong central government, and they viewed the states as essential to the preservation of freedom. Edward S. Corwin observes that colonial experience had demonstrated that “the best protection of the rights of the individual was to be found in the hard-won prerogatives of the colonial legislatures against the royal governors.”⁷ Indeed, most state constitutions contained express protections of individual liberty.

This view of states as guardians of individual liberty provided one of the baseline premises of American federalism. As James Madison declared, even “the greatest opponents to a Federal Government admit the State Legislatures to be sure guardians of the people’s liberty.”⁸ But the framers also recognized that the states themselves were capable of tyranny. After all, they were governments too. “The smaller the society,” remarked Madison, the perceptive political scientist, “the smaller the number of individuals composing a majority, and . . . the more easily they will concert and execute their plans of oppression.”⁹ Indeed, one of the principal motivations for drawing up the Constitution was the common practice—allowed under the Articles of Confederation—of state governments to erect protectionist trade barriers, thwarting free trade among the states.¹⁰ “The great and radical vice in the construction of the existing Confederation,” charged Alexander Hamilton, “is in the principle of legislation for

states and governments, in their corporate or collective capacities, as contradistinguished from the individuals of which they consist.”¹¹

Hence in the new constitution, not only would states act as guarantors of liberty, but the national government would operate as a check against tyrannical impulses by state governments. As Professor John Yoo explains, “By allowing, or even encouraging, the federal and state governments to check each other, the Framers’ Constitution seeks to create an area of liberty that cannot be regulated by either government.”¹² For the framers, the goal of federalism was not to glorify one level of government over another, but to effectuate the surest possible safeguards for freedom. The core value was liberty; the seminal threat to that value was government in all its forms.

Some commentators, such as Robert Bork, perceive federalism as a mechanism to effectuate majority will. To the contrary, the framers understood that the greatest threat to liberty was the people themselves. As Madison warned in a letter to Thomas Jefferson,

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.¹³

Consequently, checks and balances among governments were insufficient to protect liberty; substantive protections were necessary as well. “The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies,” urged Madison. “But this is not found in either the Executive or Legislative departments of government, but in the

body of the people, operating by the majority against the minority.”¹⁴

Such instances of majoritarian tyranny would be advanced through the emergence of the “faction,” which Madison defined in his magnificent *Federalist* No. 10 as “a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”¹⁵ To preserve liberty, Madison warned, factions “must be rendered . . . unable to concert and carry into effect schemes of oppression.”¹⁶

Thus, for Madison, “To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit of popular government” were the “great object” of republican government.¹⁷ To that end, observed Felix Morley, the founders “devised a balanced political structure, designed to protect minorities against the majority, right down to that minority of one, the individual.”¹⁸ Though it’s often pressed into service by apologists of oppression, as Yale law professor Akhil Reed Amar explains, “the Constitution’s political structure of federalism and sovereignty is designed to protect, not defeat, its legal substance of individual rights.”¹⁹ Federalism, which balances the power of the national government against that of the states and limits the powers of both, is an integral part of the overall constitutional structure calculated to maximize individual liberty within the framework of effective government.

Federalism in the Original Design

One conundrum the framers faced in constructing the new national constitution was the question of sovereignty. Under the Articles of Confederation, the states were sovereign; and

this presented the biggest obstacle to effective national union. To make the national government sovereign would require states to sacrifice powers they were reluctant to surrender. But to maintain state sovereignty would deprive the national government of the power it needed to achieve the framers' objectives.

The framers solved the dilemma through a truly revolutionary innovation: Sovereignty, they determined, resided in neither the national nor state governments, but in the people. The founder credited with the solution, Robert Wilson, declared that the concept of popular sovereignty was so central that without it "we shall never be able to understand the principle on which this system was constructed."²⁰ Madison likewise argued that debate over national versus state sovereignty missed the point entirely. "These gentlemen must here be reminded of their error," Madison remarked. "They must be told that the ultimate authority . . . resides in the people alone."²¹

Grounded in the concept of popular sovereignty, the Constitution took the form of a social contract, whereby the people surrendered only so much of their autonomy as was necessary to create a government of carefully delimited powers. In that system, Madison explained, the "Federal and State governments are in fact but different agents and trustees of the people," and both are subject to a "common superior" — the people.²²

Hence, the people delegated to the national government specific powers, such as the powers to regulate commerce among the states and to declare war. Moreover, the framers erected obstacles to the accretion of national government power, such as the separation of powers among the three branches of government, and the election of U.S. senators by state legislatures. This division of powers was intended to

protect individual liberty. As Justice Anthony Kennedy has observed, “The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”²³

Madison viewed two institutions as essential in protecting individual rights against national power: the federal courts and the state legislatures. The federal courts, Madison declared, would serve as “the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislature or executive; [and] they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.”²⁴ Likewise, Madison predicted that “the State Legislatures will jealously and closely watch the operations of [national] government, and be able to resist with more effect every assumption of power.”²⁵

But, as Madison argued at the Constitutional Convention, the national government also has to possess sufficient powers to protect “the rights of the minority,” which are placed at risk “in all cases where a majority are united by a common interest or passion.”²⁶ Hence the Constitution invested the national government with certain powers to protect against violations of individual liberty by state governments. Foremost among them was the power given to Congress to regulate interstate commerce. As Robert Bork has observed, “one of the major reasons for holding the Philadelphia Convention was the states’ interference with national trade.”²⁷ States had erected parochial trade barriers to protect local industries, and it was painfully clear that the states could not police themselves. As a result, the commerce clause was created to ensure free trade among the states.

Moreover, the Constitution established several express

limitations on state power. Article IV, for instance, established that the “Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Article I, section 10, created additional limitations. As Madison described them, “Bills of attainder, *ex-post-facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact.” Their express prohibition in the Constitution, he remarked, provides a “constitutional bulwark in favor of personal security and private rights.”²⁸

The dual allocation of powers to the national and state governments provided the principal protection for individual liberty in the original constitution. As Alexander Hamilton argued, “This balance between the national and State governments . . . is of utmost importance. It forms a double security for the people.”²⁹ That theme was further explained in *The Federalist*:

In a single republic, all power surrendered by the people is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments. In the compound government of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among the distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.³⁰

As Madison summarized it, within this compound government with its balance and division of powers, each level of government would have the ability “to resist and frustrate the measures of each other.”³¹ Not exactly a recipe for efficient

government, but a necessity given the framers' overarching concern about oppressive government.

From this basic original constitutional structure and from the framers' original intent, it is clear that no effort was made to elevate one level of government over another. To the national government were delegated specifically enumerated and limited powers, with the states retaining the remainder of the legitimate powers of government. But the central value animating the design was individual liberty, which necessitated express limits on the power of national and state governments alike. Those protections for liberty were strengthened with subsequent modifications to the original constitution, first in the Bill of Rights and a century later with the ratification of the 14th Amendment.

The Bill of Rights

The framers' original design was amplified in the first ten amendments to the original constitution, upon which ratification of the document was conditioned. The central argument of the libertarian "anti-federalists" was that the proposed constitution contained inadequate safeguards for individual rights. George Mason warned that the "laws of the general government being paramount to the laws and constitutions of the several States, the declarations of rights in the separate States are no security."³²

The gist of the anti-federalist objection was the absence of a bill of rights, to protect individuals not as citizens of their respective states but as Americans. Madison initially opposed a bill of rights, fearing that to enumerate specific rights would be to undermine the existence and protection of rights not expressly enumerated. But eventually he acquiesced and a bill of rights was appended to the original constitution.

The first eight amendments set forth specific rights and explicitly restrained the power of the national government to violate them. The more general Ninth and Tenth Amendments, by contrast, created a hierarchy of rights and government power. The Ninth Amendment was intended to answer Madison's concern by making it clear that the first eight amendments were not a complete catalogue of individual liberties. It reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People." As Randy Barnett explains, "only a handful of the many rights proposed by state ratification conventions were eventually incorporated into the Bill of Rights. The Ninth Amendment was offered precisely to 'compensate' . . . critics for the absence of an extended list of rights."³³

The framers' understanding of individual rights was informed largely by British common law. As Barnett argues, "The freedom to act within the boundaries provided by one's common law rights may be viewed as a central background presumption of the Constitution—a presumption that is reflected in the Ninth Amendment."³⁴

In the same fashion, the scope of permissible government authority was circumscribed for the framers by the common law concept of the "police power"—expressed in the preamble to the Constitution as the power to "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The relative apportionment of powers between the national and state governments was expressed in the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In other words, the national government was delegated only those

express powers enumerated in the Constitution, while all other legitimate powers of government were retained by the states. But the Tenth Amendment also made clear that the ultimate source of government power was the people themselves. As constitutional scholar Ronald D. Rotunda has put it, “The Framers created federalism not so much to protect the states but to protect the people.”³⁵

Both the Ninth and Tenth Amendments, Barnett argues, “can be viewed as establishing a general constitutional presumption of individual liberty.”³⁶ By its plain meaning, the Ninth Amendment suggests that if the Constitution does not expressly grant a power to the national government, the government does not possess that power. At the same time, the Tenth Amendment implies a preference for decentralized governmental powers, residing either in the states or the people themselves. Sadly, both presumptions are largely reversed today, as we shall see.

Still, the provisions of the original constitution, buttressed by the Bill of Rights, created the initial machinery of federalism that was intended not to create a protective shield for abuses of individual rights by state governments, but as a means to protect individual rights against all domestic governments. This concept of federalism established a hierarchy of values, with liberty first and foremost. Within that constitutional system, states were seen as a means to an end rather than an end in themselves: States were viewed as the natural guardians of the individual rights of the citizens, with the national government stepping in only in limited instances (such as interstate commerce and the sanctity of contracts) where the states could not be relied upon to restrain themselves.

The presumption that states would protect rather than violate individual rights proved, of course, horribly errone-

ous. So, less than a century after its ratification, the Constitution was brought in for a repair job that would correct a gaping flaw in the original document, complete the machinery of federalism, and provide greater and more enduring safeguards for the protection of individual liberty against governmental despotism.

Perfecting the Design: The 14th Amendment

Four basic premises regarding individual liberty supported the original construct of federalism: that the national and state governments would each effectively balance and restrain the power of the other; that the federal courts would strike down invasions of individual liberty; that state legislatures and constitutions would provide an effective bulwark for individual freedom; and that the Bill of Rights would provide security for individual liberty. To the contrary, clashes between national and state power were a constant feature of the period leading up to the Civil War, and the national and state governments were not up to the task of restraining one another's excesses. Federal courts abetted rather than prevented abuses of individual rights. State constitutions proved to be of little force against deprivations of rights. And the Bill of Rights provided no constraint against abuses by state and local governments.

The starkest example of the deprivation of liberty, of course, was the institution of human slavery, whose legality was implicitly sanctioned by the original constitution even as it violated every principle upon which that document was based. But the seeds of national abdication of the protection of individual rights were sown in a different context. In *Baron v. Mayor and City Council of Baltimore* in 1833, a resident challenged in federal court the city's actions that resulted in

the destruction of the value of a wharf, claiming a violation of the Fifth Amendment. The Bill of Rights, ruled Chief Justice John Marshall, provided “security against the apprehended encroachments of the general government—not against those of local governments.”³⁷ The federal courts would provide no recourse against violations of basic civil rights by state or local governments, thereby repudiating the notion implicit in the Constitution that individuals were vested with a broad range of natural rights and that all governments were circumscribed in their power to invade those rights.

By reinforcing the concept of state sovereignty with regard to the recognition and protection of individual rights, the *Barron* decision fueled arguments made by pro-slavery activists that attempts to restrain slavery trenched against “states’ rights.” The leading pro-slavery advocate, John C. Calhoun, “denied generally the doctrine of natural rights in the traditional context, and converted the principle of states’ rights into an instrumentality . . . , with the protection of slavery foremost in his consideration,” recounts historian Robert J. Harris. “In so doing he extracted from states’ rights principles most of the vestiges of revolutionary and natural rights philosophy.”³⁸ In this formulation, states were transformed from guardians of individual liberty into guardians of human slavery, and state power as an end in itself became a mantra. The federal constitution and the courts trusted with its enforcement were helpless to intercede. And any action that interfered with states’ rights could be “nullified,” because in the federal system, states (rather than individuals) were sovereign. Through this logic, the entire construct of federalism was twisted beyond recognition, and the battle lines were drawn.

By implicitly embracing Calhoun’s revisionist principles in *Barron*, the Supreme Court laid the groundwork for its subsequent infamous *Dred Scott* decision, in which an emanci-

pated black man sought to invoke federal jurisdiction for the protection of his civil rights. The Court rejected the claim, ruling that blacks had “no rights or privileges but such as those who held the power and the government might choose to grant them.”³⁹ The federal judicial abdication was complete.

Meanwhile, Southern states aggressively enacted laws restricting freedom of speech and press in an effort to suppress antislavery agitation. States also passed laws requiring local postmasters to intercept abolitionist propaganda, and local governments refused to provide police protection to abolitionists against mob violence.⁴⁰ Plainly, states were becoming agents of wide-ranging oppression, rather than serving their constitutional role of protecting individual liberty.

But those who used state and local government for oppression were sowing the seeds of their own demise. Statesmen who remained true to natural-rights principles began questioning the premise that states were adequate guardians of individual rights. As commentator Harold M. Hyman observes, “The antislavery champions perceived correctly that injustices were overwhelmingly local and state, that federal justice had been irrelevant as a remedy, and that dual federalism had failed” in its mission of protecting liberty.⁴¹ The struggle over slavery convinced Northerners that “it was the states, and not the federal government, that presented the greatest threat to individual liberties.”⁴²

By withdrawing from the Union, the South repudiated a constitutional system dedicated to individual liberty and embraced an ideology that glorified state over individual rights. In the aftermath of the Civil War, the victors were determined to correct the constitutional inadequacies that had allowed states to run roughshod over individual liberties.

Ultimately, as J. M. Balkin recounts, this “new way of thinking” about states as violators rather than guardians of individual liberty manifested itself in the 14th Amendment, which “drastically altered the balance of power between the states and the federal government.”⁴³

The Reconstruction Congress was unlike any other, before or since. Because the Southern states were excluded for a time, Congress was overwhelmingly dominated by a single party, a clear and coherent vision of natural rights, and a goal of constitutional revision in accord with those principles. As legal historian Michael Kent Curtis remarks, “perhaps the most common Republican refrain in the Congress was that life, liberty, and property of American citizens must be protected against denial by the states.”⁴⁴

The concern was not a hypothetical one. As soon as the war ended, Southern legislatures reacted to the end of slavery by enacting “black codes,” designed to prevent newly emancipated blacks from enforcing contracts, owning property, and pursuing trades and professions. Congress responded with the Civil Rights Act of 1866, whose goal, in the words of Sen. Lyman Trumbull, was to ensure for all persons “the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness.”⁴⁵ President Andrew Johnson questioned congressional authority to limit the power of the states, which led Congress to “constitutionalize” the provisions of the Civil Rights Act of 1866 in the 14th Amendment. Ratified in 1868, the amendment provides in relevant part:

no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws.

Congress followed up with the Civil Rights Act of 1871, which provided a private cause of action for those who had been deprived of their federally protected rights “under color of [state law].”

Congress recognized that it was embarking upon a radical remaking of national and state powers, designed to create a more effective safeguard for individual rights. As Rep. William Lawrence expressed it, the new national protections of individual rights were “scarcely less to the people of this country than the Magna Charta was to the people of England.”⁴⁶ Whereas the original constitution assigned to states the primary role of protecting fundamental individual rights, a co-equal role now was assigned to the national government. Under the Tenth Amendment, states were still empowered to provide greater protections of individual rights than the national government might provide; but under the 14th Amendment, the national government obtained for the first time the clear power to curb state abuses of rights. And within that scheme, the federal courts were assigned critical new powers.

The Fourteenth Amendment was intended to put the finishing touches on the constitutional framework for federalism. The provisions of the Ninth, Tenth, and Fourteenth Amendments demonstrate a clear preference for leaving decision-making with local government—as long as that doesn’t result in threats to individual autonomy. Each level of government is empowered to check the other whenever that other exceeds the boundaries of its power and infringes on individual rights.

The object of federalism, properly understood, is liberty. The framers both of the original constitution and of the 14th Amendment had a firm grasp on that understanding. In the 20th century, a great deal of confusion about federalism

emerged, among both the ideological right and the ideological left, as the next chapter will illustrate. That confusion created an environment in which grassroots tyranny has flourished. For this reason, it is imperative that, in the 21st century, we rediscover and reclaim the original principles of federalism, and invoke it as a powerful doctrine on behalf of individual liberty, rather than as a justification for local tyranny.