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From *The Price of Federalism*

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In this concise overview of American federalism, Paul Peterson argues that both the early and more modern system of shared sovereignty between the national government and the states have had their disadvantages. From the early period of "dual federalism" to the more modern system of a dominant national government, the battle over national and state government jurisdiction and power has led to bloodshed and war; the denial of political, social, and economic rights; and regional inequalities among the states.

Nevertheless, Peterson argues, there are advantages to federalism. Federalism has also facilitated capital growth and development, the creation of infrastructures, and social programs that greatly improved the quality of life for millions of Americans. Once the national government took responsibility for guaranteeing civil rights and civil liberties, the states "became the engines of economic development." Not all states are equally wealthy, but the national government has gradually diminished some of these differences by financing many social and economic programs. One battle over the proper form of federal relations involved welfare policy in the 1990s. Republicans in Congress wanted to give back to states the power to devise their own programs, whereas most Democrats and President Clinton initially wanted to retain a larger degree of federal government control. However, President Clinton eventually agreed to end welfare as an entitlement and return substantial control over the program to the states. The long-term verdict on this landmark legislation is still an open question. There is considerable debate over the proper balance between federal and state funding for the state-level welfare programs.

These same debates have cropped up in more recent years in homeland security policy. Ideally, this policy would be run at the national level, and resources would be allocated to parts of the country that pose the greatest security risks. However, every state wants its share of the federal pie, so resources are not always allocated in the most efficient manner. Federalism also poses challenges for coordinating policy for "first responders" in a time of crisis: Who is responsible for coming to the aid of people in distress: local, state, or national agencies?

The Price of Early Federalism

As a principle of government, federalism has had a dubious history. It remains on the margins of political respectability even today. I was recently invited to give a presentation on metropolitan government before

a United Nations conference. When I offered to discuss how the federal principle could be used to help metropolitan areas govern themselves more effectively, my sponsors politely advised me that this topic would be poorly received. The vast majority of UN members had a unified form of government, I was told, and they saw little of value in federalism. We reached a satisfactory compromise. I replaced "federal" with "two-tier form of government."

Thomas Hobbes, the founder of modern political thought, would have blessed the compromise, for he, too, had little room for federalism in his understanding of the best form of government. Hobbes said that people agreed to have a government over them only because they realized that in a state of nature, that is, when there is no government, life becomes a war of all against all. If no government exists to put malefactors in jail, everyone must become a criminal simply to avoid being a victim. Life becomes "nasty, brutish and short." To avoid the violent state of nature, people need and want rule by a single sovereign. Division of power among multiple sovereigns encourages bickering among them. Conflicts become inevitable, as each sovereign tries to expand its power (if for no other reason than to avoid becoming the prey of competing sovereigns). Government degenerates into anarchy and the world returns to the bitter state of nature from which government originally emerged.

The authors of *The Federalist* papers defended dual sovereignty by turning Hobbes's argument in favor of single sovereignty on its head. While Hobbes said that anything less than a single sovereign would lead to war of all against all, *The Federalist* argued that the best way of preserving liberty was to divide power. If power is concentrated in any one place, it can be used to crush individual liberty. Even in a democracy there can be the tyranny of the majority, the worst kind of tyranny because it is so stifling and complete. A division of power between the national and state governments reduces the possibility that any single majority will be able to control all centers of governmental power. The national government, by defending the country against foreign aggression, prevents external threats to liberty. The state governments, by denying power to any single dictator, reduce threats to liberty from within. As James Madison said in his defense of the Constitution, written on the eve of its ratification,

> The power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among 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. [*The Federalist*, No. 51]

Early federalism was built on the principle of dual sovereignty. The Constitution divided sovereignty between state and nation, each in control of its own sphere. Some even interpreted the Constitution to mean

that state legislatures could nullify federal laws. Early federalism also gave both levels of government their own military capacity. Congress was given the power to raise an army and wage war, but states were allowed to maintain their own militia.

The major contribution of early federalism to American liberties took place within a dozen years after the signing of the Constitution. Liberty is never established in a new nation until those in authority have peacefully ceded power to a rival political faction. Those who wrote the Constitution and secured its ratification, known as the Federalists, initially captured control of the main institutions of the national government: Congress, the presidency, and the Supreme Court. Those opposed to the new constitutional order, the antifederalists, had to content themselves with an opposition role in Congress and control over a number of state governments, most notably Virginia's.

The political issues dividing the two parties were serious. The Federalist party favored a strong central government, a powerful central bank that could facilitate economic and industrial development, and a strong, independent executive branch. Federalists had also become increasingly disturbed by the direction the French Revolution had taken. They were alarmed by the execution of thousands, the confiscation of private property, and the movement of French troops across Europe. They called for the creation of a national army and reestablished close ties with Britain.

The antifederalists, who became known as Democratic-Republicans, favored keeping most governmental power in the hands of state governments. They were opposed to a national bank, a strong presidency, and industrial government. They thought the United States would remain a free country only if it remained a land of independent farmers. They bitterly opposed the creation of a national army for fear it would be used to repress political opposition. Impressed by the French Revolution's commitment to the rights of man, they excused its excesses. The greater danger, they thought, was the reassertion of British power, and they denounced the Federalists for seeming to acquiesce in the seizure of U.S. seamen by the British navy.

The conflict between the two sides intensified after George Washington retired to his home in Mount Vernon. In 1800 Thomas Jefferson, founder of the Democratic-Republican party, waged an all-out campaign to defeat Washington's Federalist successor, John Adams. In retrospect, the central issue of the election was democracy itself. Could an opposition party drive a government out of power? Would political leaders accept their defeat?

So bitter was the feud between the two parties that Representative Matthew Lyon, a Democratic-Republican, spit in the face of a Federalist on the floor of Congress. Outside the Congress, pro-French propagandists relentlessly criticized Adams. To silence the opposition, Congress, controlled by the Federalists, passed the Alien and Sedition Acts. One of the

Alien Acts gave President Adams the power to deport any foreigners "concerned in any treasonable or secret machinations against the government." The Sedition Act made it illegal to "write, print, utter, or publish . . . any false, scandalous and malicious writing . . . against . . . the Congress of the United States, or the President."

The targets of the Sedition Acts soon became clear. Newspaper editors supporting the Democratic-Republicans were quickly indicted, and ten were brought to trial and convicted by juries under the influence of Federalist judges. Matthew Lyon was sentenced to a four-month jail term for claiming, presumably falsely, that President Adams had an "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice." Even George Washington lent his support to this political repression.

Federalism undoubtedly helped the fledgling American democracy survive this first constitutional test. When the Federalists passed the Alien and Sedition Acts, Democratic-Republicans in the Virginia and Kentucky state legislatures passed resolutions nullifying the laws. When it looked as if Jefferson's victory in the election of 1800 might be stripped away by a Federalist-controlled House of Representatives, both sides realized that the Virginia state militia was at least as strong as the remnants of the Continental Army. Lacking the national army they had tried to establish, the Federalists chose not to fight. They acquiesced in their political defeat in part because their opponents had military as well as political power, and because they themselves could retreat to their own regional base of power, the state and local governments of New England and the mid-Atlantic states.

Jefferson claimed his victory was a revolution every bit as comprehensive as the one fought in 1776. The Alien and Sedition Acts were discarded, nullified not by a state legislature but by the results of a national election. President Adams returned to private life without suffering imprisonment or exile. Many years later, he and Jefferson reconciled their differences and developed through correspondence a close friendship. They died on the same day, the fiftieth anniversary of the Declaration of Independence. To both, federalism and liberty seemed closely intertwined.

The price to be paid for early federalism became more evident with the passage of time. To achieve the blessings of liberty, early federalism divided sovereign power. When Virginia and Kentucky nullified the Alien and Sedition Acts, they preserved liberties only by threatening national unity. With the election of Jefferson, the issue was temporarily rendered moot, but the doctrine remained available for use when southerners once again felt threatened by encroaching national power.

The doctrine of nullification was revived in 1830 by John C. Calhoun, sometime senator from South Carolina, who objected to high tariffs that protected northern industry at the expense of southern cotton producers. When Congress raised the tariff, South Carolina's legislature threatened

to declare the law null and void. Calhoun, then serving as Andrew Jackson's vice president, argued that liberties could be trampled by national majorities unless states could nullify tyrannical acts. Andrew Jackson, though elected on a state's rights ticket, remained committed to national supremacy. At the annual Democratic banquet honoring the memory of Thomas Jefferson, Calhoun supporters sought to trap Jackson into endorsing the doctrine. But Jackson, aware of the scheme, raised his glass in a dramatic toast to "Our federal union: it must be preserved!" Not to be outdone, Calhoun replied in kind: "The union, next to our liberty, most dear!"

A compromise was found to the overt issue, the tariff, but it was not so easy to resolve the underlying issue of slavery. In the infamous Dred Scott decision, the Supreme Court interpreted federalism to mean that boundaries could not be placed on the movements of masters and slaves. Northern territories could not free slaves that came within their boundaries; to do so deprived masters of their Fifth Amendment right not to be deprived of their property without due process of law. The decision spurred northern states to elect Abraham Lincoln president, which convinced southern whites that their liberties, most dear, were more important than federal union.

To Lincoln, as to Jackson, the union was to be preserved at all costs. Secession meant war. War meant the loss of 1 million lives, the destruction of the southern economy, the emancipation of African Americans from slavery, the demise of the doctrine of nullification, and the end to early federalism. Early federalism, with its doctrine of dual sovereignty, may have initially helped to preserve liberty, but it did so at a terrible price. As Hobbes feared, the price of dual sovereignty was war.

Since the termination of the Civil War, Americans have concluded that they can no longer trust their liberties to federalism. Sovereignty must be concentrated in the hands of the national government. Quite apart from the dangers of civil war, the powers of state and local governments have been used too often by a tyrannical majority to trample the rights of religious, racial, and political minorities. The courts now seem a more reliable institutional shelter for the nation's liberties.

But if federalism is no longer necessary or even conducive to the preservation of liberty, then what is its purpose? Is it merely a relic of an outdated past? Are the majority of the members of the United Nations correct in objecting to the very use of the word?

The Rise of Modern Federalism

The answers to these questions have been gradually articulated in the 130 years following the end of the Civil War. Although the states lost their sovereignty, they remained integral to the workings of American government. Modern federalism no longer meant dual sovereignty and shared

military capacity. Modern federalism instead meant only that each level of government had its own independently elected political leaders and its own separate taxing and spending capacity. Equipped with these tools of quasi-sovereignty, each level of government could take all but the most violent of steps to defend its turf.

Although sovereignty and military capacity now rested firmly in the hands of the national government, modern federalism became more complex rather than less so. Power was no longer simply divided between the nation and its states. Cities, counties, towns, school districts, special districts, and a host of additional governmental entities, each with its own elected leaders and taxing authority, assumed new burdens and responsibilities.

Just as the blessings bestowed by early federalism were evident from its inception, so the advantages of modern federalism were clear from the onset. If states and localities were no longer the guarantors of liberty, they became the engines of economic development. By giving state and local governments the autonomy to act independently, the federal system facilitated the rapid growth of an industrial economy that eventually surpassed its European competitors. Canals and railroads were constructed, highways and sewage systems built, schools opened, parks designed, and public safety protected by cities and villages eager to make their locality a boomtown.

The price to be paid for modern federalism did not become evident until government attempted to grapple with the adverse side effects of a burgeoning capitalist economy. Out of a respect for federalism's constitutional status and political durability, social reformers first worked with and through existing components of the federal system, concentrating much of their reform effort on state and local governments. Only gradually did it become clear that state and local governments, for all their ability to work with business leaders to enhance community prosperity, had difficulty meeting the needs of the poor and the needy.

It was ultimately up to the courts to find ways of keeping the price of modern federalism within bounds. Although dual sovereignty no longer meant nullification and secession, much remained to be determined about the respective areas of responsibility of the national and state governments. At first the courts retained remnants of the doctrine of dual sovereignty in order to protect processes of industrialization from governmental intrusion. But with the advent of the New Deal, the constitutional power of the national government expanded so dramatically that the doctrine of dual sovereignty virtually lost all meaning. Court interpretations of the constitutional clauses on commerce and spending have proved to be the most significant.

According to dual sovereignty theory, article 1 of the Constitution gives Congress the power to regulate commerce "among the states," but the regulation of intrastate commerce was to be left to the states. So, for

example, in 1895 the Supreme Court said that Congress could not break up a sugar monopoly that had a nationwide impact on the price of sugar, because the monopoly refined its sugar within the state of Pennsylvania. The mere fact that the sugar was to be sold nationwide was only "incidental" to its production. As late as 1935, the Supreme Court, in a 6-to-3 decision, said that Congress could not regulate the sale of poultry because the regulation took effect after the chickens arrived within the state of Illinois, not while they were in transit.

Known as the "sick chicken" case, this decision was one of a series in which the Supreme Court declared unconstitutional legislation passed in the early days of President Franklin Roosevelt's efforts to establish his New Deal programs. Seven of the "nine old men" on the Court had been appointed by Roosevelt's conservative Republican predecessors. By declaring many New Deal programs in violation of the commerce clause, the Supreme Court seemed to be substituting its political views for those of elected officials. In a case denying the federal government the right to protect workers trying to organize a union in the coal industry, the Republican views of the Court seemed to lie just barely below the surface of a technical discussion of the commerce clause. Justice George Sutherland declared, "The relation of employer and employee is a local relation . . . over which the federal government has no legislative control."

The Roosevelt Democrats were furious at decisions that seemed to deny the country's elected officials the right to govern. Not since Dred Scott* had judicial review been in such disrepute. Roosevelt decided to "pack the court" by adding six new judges over and above the nine already on the Court. Although Roosevelt's court-packing scheme did not survive the political uproar on Capitol Hill, its effect on the Supreme Court was noticeable. In the midst of the court-packing debate, Justices Charles Hughes and Owen Roberts, who had agreed with Sutherland's opinion in the coal case, changed their mind and voted to uphold the Wagner Act, a new law designed to facilitate the formation of unions. In his opinion, Hughes did not explicitly overturn the coal miner decision (for which he had voted), but he did say: "When industries organize themselves on a national scale, . . . how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter?" Relations between employers and their workers, once said to be local, suddenly became part of interstate commerce.

The change of heart by Hughes and Roberts has been called "the switch in time that saved nine." The New Deal majority that emerged on the court was soon augmented by judges appointed by Roosevelt. Since the New Deal, the definition of interstate commerce has continued to expand. In 1942 a farmer raising twenty-three acres of wheat, all of which might

*In *Dred Scott v. Sanford* (1857), the Court declared the antislavery provision of the Missouri Compromise of 1820 to be unconstitutional [*Editors*].

be fed to his own livestock, was said to be in violation of the crop quotas imposed by the Agricultural Adjustment Act of 1938. Since he was feeding his cows himself, he was not buying grain on the open market, thereby depressing the worldwide price of grain. With such a definition of interstate commerce, nothing was local.

The expansion of the meaning of the commerce clause is a well-known part of American political history. The importance to federalism of court interpretations of the "spending clause" is less well known. The constitutional clause in question says that Congress has the power to collect taxes to "provide for the . . . general welfare." But how about Congress's power to collect taxes for the welfare of specific individuals or groups?

The question first arose in a 1923 case, when a childless woman said she could not be asked to pay taxes in order to finance federal grants to states for programs that helped pregnant women. Since she received no benefit from the program, she sued for return of the taxes she had paid to cover its costs. In a decision that has never been reversed, the Supreme Court said that she had suffered no measurable injury and therefore had no right to sue the government. Her taxes were being used for a wide variety of purposes. The amount being spent for this program was too small to be significant. The court's decision to leave spending issues to Congress was restated a decade later when the social security program was also challenged on the grounds that monies were being directed to the elderly, not for the general welfare. Said Justice Benjamin N. Cardozo for a court majority: "The conception of the spending power . . . [must find a point somewhere] between particular and general. . . . There is a middle ground . . . in which discretion is large. The discretion, however, is not confided to the Court. The discretion belongs to Congress, unless the choice is clearly wrong."

The courts have ever since refused to review Congress's power to spend money. They have also conceded to Congress the right to attach any regulations to any aid Congress provides. In 1987 Congress provided a grant to state governments for the maintenance of their highways, but conditioned 5 percent of the funds on state willingness to raise the drinking age from eighteen to twenty-one. The connection between the appropriation and the regulation was based on the assumption that youths under the age of twenty-one are more likely to drive after drinking than those over twenty-one. Presumably, building more roads would only encourage more inebriated young people to drive on them. Despite the fact that the connection between the appropriation and the regulation was problematic, the Supreme Court ruled that Congress could attach any reasonable conditions to its grants to the states. State sovereignty was not violated, because any state could choose not to accept the money.

In short, the courts have virtually given up the doctrine of judicial review when it comes to matters on which Congress can spend money. As a consequence, most national efforts to influence state governments come

in the form of federal grants. Federal aid can also be used to influence local governments, such as counties, cities, towns, villages, and school districts. These local governments, from a constitutional point of view, are mere creatures of the state of which they are part. They have no independent sovereignty.

The Contemporary Price of Federalism

If constitutional doctrine has evolved to the point that dual sovereign theory has been put to rest, this does not mean that federalism has come to an end. Although ultimate sovereignty resides with the national government, state and local governments still have certain characteristics and capabilities that make them constituent components of a federal system. * * * Two characteristics of federalism are fundamental. First, citizens elect officials of their choice for each level of government. Unless the authority of each level of government rests in the people, it will become the agent of the other. Second, each level of government raises money through taxation from the citizens residing in the area for which it is responsible. It is hard to see how a system could be regarded as federal unless each level of government can levy taxes on its residents. Unless each level of government can raise its own fiscal resources, it cannot act independently.

Although the constitutional authority of the national government has steadily expanded, state and local governments remain of great practical significance. Almost half of all government spending for domestic (as distinct from foreign and military) purposes is paid for out of taxes raised by state and local governments.

The sharing of control over domestic policy among levels of government has many benefits, but federalism still exacts its price. It can lead to great regional inequalities. Also, the need for establishing cooperative relationships among governments can contribute to great inefficiency in the administration of government programs.

DISCUSSION QUESTIONS

1. What is the constitutional basis for federalism?
2. How has the relationship between state governments and the national government changed since the early years of the Republic?
3. Does a federal system serve our needs today? Does the federal government have too much power relative to the states? What would be the advantages and disadvantages of a reduced federal presence in state matters?