

The Imperial Roots of American Federalism

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"This government is so new, it wants a name." Thus complained Patrick Henry, one of the most articulate, prominent, and formidable opponents of the new Constitution in June 1788 during the Virginia ratifying convention. Scholars have since argued over whether the government formed under the Constitution was democratic. But virtually all of them-of whatever ideological hues or methodological orientations-have agreed that Henry was correct, that the new federal political system created by the Constitution was an entirely new, even quite a radical, departure in political institutions.

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Mislabeled by its opponents as *aconsolidated* government, it was, in response to hostile critics like Henry, called by its supporters first a *confederal* and then a *federal* government, a name that has stuck with it ever since. Whether this creation was in fact entirely new and, if so, whence it derived and what precisely was new about it are the principal questions that will be taken up in this article.

Precedents We can perhaps best begin this discussion with a brief definition of the term *federalism*. Federalism is a political arrangement in which the basic powers of sovereignty are distributed among several governments, each of which has its own distinct share of those powers. A federal state differs from a *unitary*, or *consolidated* or *centralized*, state such as those that have existed throughout most of western Europe since the Renaissance. A unitary state concentrates sovereign authority in a single government.

A federal system can be further distinguished from a *confederation*, like the Holy Roman Empire or the United States between 1776 and 1788. Merely an association or league of sovereign governments organized for some designated purposes of mutual interest, a confederation places ultimate authority in the several member states, which delegate a few carefully limited powers to the general government. Whether a government is unitary, confederal, or federal depends primarily on the location of the basic powers of sovereignty.

Opponents of the Constitution in 1787-88 charged, and its supporters freely admitted, that there were no other examples in the contemporary world of a federal state. As James Madison pointed out in *The Federalist*, numbers 19 and 20, those few European states that were not unitary in structure-Poland, the Swiss Cantons, and the Netherlands-were all loose confederations.

The ancient world also included several non-unitary polities that were familiar to the men who framed the United States Constitution. The "most considerable" of these, Madison wrote in *The Federalist* No. 18, was "that of the Grecian republics, associated under the Amphictyonic council." According to "the best accounts transmitted of this celebrated institution," it bore "a very instructive analogy" to the Articles of Confederation, the government the Philadelphia Convention was proposing to replace. But it in no sense corresponded to the new federal scheme of government devised by the convention.

By contrast, two other unions of Grecian republics, the Archaen League and the Lycian Confederacy, seem to have resembled the American federal government somewhat more closely. In each, Madison noted in *The Federalist*, "it is probable that the federal head had a degree and species of power, which gave it a considerable likeness to the government framed" at Philadelphia. As Madison admitted, however, "such imperfect monuments" remained of

those "curious political fabric[s]" that they there, much less "light . on the science of federal government" than the founding fathers would have liked.

As the great American constitutional historian Andrew C. McLaughlin pointed out over fifty years ago, however, another precedent existed much closer to home and much more familiar to the framers of the American constitution. That precedent was to be found in the structure of the British Empire as it had functioned in fact, if not in theory, over much of the period from its founding in 1607 until its partial dissolution as a result of the American Revolution.

"Anyone even slightly familiar with the American constitutional system," wrote McLaughlin, "will see at once the similarity between the general scheme of the old empire and the American political system of federalism." In theory, the central, or metropolitan, government in Britain had unqualified authority. In practice, however, power was distributed between the metropolitan government and the several colonial governments. Each colonist, McLaughlin noted, obviously lived "under two governments." One was imperial in scope and exercised full authority over foreign affairs, war, peace, and intercolonial and foreign trade. The other was a colonial government that exercised *de facto* and virtually exclusive jurisdiction over almost all matters of local concern. Far from being "a thoroughly consolidated and centralized" political entity, the early British Empire thus actually embodied the most basic principles of federalism.

Theory and Practice in the Early Modern British Empire But if such a *de facto* division of power characterized the early modern British Empire, it certainly had no firm *de jure* status. Indeed, the question of how authority was distributed between the metropolitan government at the center and the several colonial governments in the periphery of the empire in America was the principal source of political contention within the old empire. As the debate over this question gradually took shape during the last four decades of the seventeenth century, the central underlying issue was to what extent-and in what cases-the authority of the metropolitan government in London limited the scope of the powers of the colonial legislatures.

Colonial assemblies could neither pass laws nor, in most colonies, even meet without the consent of the governor. Like the British monarch, governors continued to play an influential role in the legislative process. Nevertheless, the assemblies early claimed full legislative authority over their respective jurisdictions. They based these claims upon two foundations. First, they stood upon the inherited right of their constituents not to be subject to any laws passed without the consent of their representatives, a right that for most colonies seemed to have been confirmed by their early charters from the Crown. Second, they relied upon precedent. By the middle of the eighteenth century, they had actually exercised such authority for many decades and in some cases for well over a century.

Even though they had been so long in possession of such extensive authority over local affairs, the colonial assemblies never managed to persuade the metropolitan government to admit in theory what they had achieved in fact. As a result, their authority in relation to that of the Crown and Parliament in London remained in an extremely uncertain state. To have eliminated that uncertainty would have required, as the English economic writer Charles Davenant recognized as early as the 1690s, a clear delineation of the "bounds between the chief power [in Britain] and the people" in the colonies in a way acceptable to both. No matter how much power they actually exerted within their respective spheres, in the absence of such an arrangement, the colonial legislatures could never be entirely secure from the overwhelming might of the metropolitan government. They could never be sure that their constituents would enjoy the same degree of protection of their liberties and properties as did their fellow Englishmen in Britain.

Before the 1760s, the recurrent debates over this subject focused on whether Crown orders to colonial governors-they were called royal instructions-actually had the force of law within the colonies. In 1757, Lord Granville, president of the King's Privy Council, elaborated the official

metropolitan view during an interview with Benjamin Franklin. Because the royal instructions were drawn up by the Privy Council and because the "King in Council is THE LEGISLATOR of the Colonies," Granville insisted, such instructions constituted "the LAW OF THE LAND" in the colonies "and as such *ought to be* OBEYED."

In reply, Franklin admitted that the colonial legislatures could not "make permanent laws" without the King's consent: all legislation in most colonies required the royal approval. But, he argued, instructions were not laws because both charters and longstanding custom, colonial "laws were to be made by [the colonial] . Assemblies," and the King could not "make a law for [the colonists] without" their consent.

Although the subject was never fully explored and certainly never resolved, the fundamental issue in this debate was the location of the basic powers of sovereignty within the British Empire. According to the logic of Granville's position, those powers were concentrated solely in the King-in-Council which had total authority over the colonies. By contrast, Franklin's reply assumed that at the time of initial settlement the King had delegated some of that authority to the colonial governments and could not subsequently act in the areas so delegated without the consent of the colonial legislatures.

This running dispute elicited almost no discussion of the role of Parliament in relation to the colonies, the issue that would eventually stir so much controversy during the 1760s and 1770s. Prior to the 1760s, Parliament exerted its legislative authority over the colonies only in very limited spheres, primarily involving defense, trade, and other matters of strategic and economic concern to the empire as a whole. Nevertheless, to the extent that they considered Parliament's relationship to the colonies at all, people on both sides of the Atlantic seem to have regarded its authority as being unlimited.

The many contemporary references to Parliament as the ultimate protector of colonial, as well as metropolitan, rights and privileges strongly suggest that the colonists did not yet think of Parliament as a threat to the authority of their own legislatures. "There was no Doubt," Franklin wrote in 1756, "but the Parliament understand the Rights of Government" and, he implied could be trusted to protect them the colonies quite as much Britain itself.

Everybody knew of instances in which Crown officials, acting in their executive capacity, had, through either ignorance or malice, taken oppressive measures against the colonists. But no one could trace a single such action to Parliament. Indeed, when the Crown's ministers in 1744 and 1749 had proposed that Parliament pass a statute "to make the King's instructions laws in the colonies," Parliament voted it down, an action, Franklin later recalled, "for which we adored them as our friends and [as] friends of liberty."

Because they regarded Parliament as a potential ally in the efforts of their legislatures to hold on to their authority over local affairs, colonial political thinkers made no systematic attempt prior to the 1760s to argue that Parliament's colonial authority had any. Nevertheless, in response to proposals in the early 1750s that Parliament might tax the colonies for defense, some colonists did suggest that, because "the Colonies have no Representatives in Parliament" and because it was "supposed an undoubted Right of Englishmen not to be taxed but by their Consent given through their [own] Representatives, " Parliament had no authority to tax the colonies.

Again, this suggestion implied that, far from being concentrated entirely in the metropolitan government, the essential powers of sovereignty were distributed between it and the several colonial governments and that each colonial government had exclusive power to tax the inhabitants in the area for which it had responsibility. Meanwhile, notwithstanding the absence of theoretical agreement about the distribution of power within the empire, the empire continued to function in practice with a rather clear demarcation of authority; the colonial governments handled virtually all internal matters and the metropolitan government in London oversaw most external affairs.

Searching for a Principle

Parliament's explicit effort to impose taxes on the colonies in the mid-1760s, in particular through the Stamp Act of 1765, prompted a fuller exploration of the distribution of power within the British Empire. In response to that measure, the colonists took the position that they could not be taxed except by their own legislatures and that Parliament had no authority to tax them for revenue. This position implied that Parliament could legislate for the colonies and levy duties for purposes of regulating trade as opposed to raising a revenue.

But in a significant number of instances, colonists denied not only Parliament's authority to tax but also its right to pass laws relating to the "internal polity" of the colonies. Thus did the Virginia Assembly in a petition to the King in December 1764 protesting against the proposed Stamp Act claim for Virginians the "ancient and inestimable Right of being governed by such Laws respecting their internal Polity and Taxation as are derived from their own Consent." The Virginia House of Burgesses reiterated this claim in resolutions in May 1765, and the legislatures of Rhode Island, Maryland, and Connecticut repeated it in one form or another later that year.

To discover precisely what Virginians and others were claiming in 1764-66 when they denied Parliament's right to pass laws respecting the internal polity of the colonies, we can turn to the writings of the Virginia lawyer and antiquarian Richard Bland. In two pamphlets, *The Colonel Dismounted*, published in 1764 just a few weeks before the Virginia legislature prepared the petition to the King referred to above, and *An Inquiry Into the Rights of the British Colonies*, published early in 1766 after Parliament had enacted the Stamp Act, Bland claimed for the colonists the "right . of directing their *internal* government by laws made with their own consent." In addition, he argued that each colony was "a distinct State, independent, as to their *internal* Government, of the original Kingdom, but united with her, as to their *external* Polity, in the closest and most intimate LEAGUE AND AMITY, under the same Allegiance, and enjoying the Benefits of a reciprocal intercourse."

Bland did not make clear exactly what specific matters were subsumed under the term *internal* and what under *external* . But he clearly implied that Parliament's authority over the colonies stopped somewhere short of the Atlantic coast and did not extend over any affairs relating exclusively to their internal life. Although he acknowledged that the colonies were subordinate to Parliament, he denied that they were "absolutely so." He contended that Parliament could not constitutionally pass tax measures or any other laws that violated the colonists' essential rights as Englishmen, especially their right to be governed in their internal affairs by laws made with their own consent as expressed through their elected representatives.

Most of the colonial protests against the Stamp Act, especially the official protests of the Stamp Act Congress in the fall of 1765, did not go so far as the Virginians in excluding Parliament from all jurisdiction over the internal affairs of the colonies. Rather, they mostly tended to exclude Parliament only from any authority to tax the colonies for revenue. Probably, as Edmund S. Morgan has remarked, because "the issue of the day was taxation" and "Parliament at this time was not attempting to interfere" with other aspects of the internal affairs of the colonies, few saw the need to consider explicitly the larger question of the general limits of Parliament's colonial authority. But the Virginia protests suggest the existence of a strong impulse in the colonies to deny Parliament's jurisdiction over all internal colonial matters.

Whether they drew the lines between taxation and legislation or between internal and external spheres of government, *all* colonial protests displayed a common concern to specify the jurisdictional boundaries between Parliament and the colonial assemblies. The concern clearly implied a conception of empire in which the essential powers of sovereignty were not, as most metropolitan political writers and officials maintained, concentrated in Parliament but were distributed among several distinct polities within the empire, much in the manner of the

American federal system contrived in 1787. This concern also underlined the fact that in practice the essential powers of sovereignty were already distributed among those polities and pointed to the need for some explicit definition of exactly how and by what underlying principles those powers were distributed.

The metropolitan response to colonial protests against the Stamp Act revealed that no one in Britain shared the colonial conception of empire, except for a few Americans like Benjamin Franklin. Although a few British political leaders accepted the colonial claim of no taxation without representation and denied Parliament's right to tax the colonies for revenue, Sir William Blackstone, the eminent professor of English law at Oxford, sounded the predominant opinion.

In his influential *Commentaries on the Laws of England*, the first volume of which was published in 1765 during the Stamp Act crisis, Blackstone argued that the King-in-Parliament had absolute and indivisible authority over all matters relating to all Britons everywhere. "What the Parliament doth" with reference to any of the British dominions, he declared, "no authority upon earth can undo." The colonies were perforce subject to its jurisdiction. In the British view, the basic powers of sovereignty were not distributed among the metropolitan and colonial governments but were concentrated in the hands of the King-in-Parliament.

To most Britons in the home lands, in fact, the colonial position appeared incomprehensible because it seemed to suggest the existence of more than one sovereign power in a single political entity. Sovereignty, they believed in common with virtually all contemporary political thinkers in Britain and Europe, could not be divided. *Imperium in imperio*, a sovereign authority within a sovereign authority, seemed to them a contradiction in terms. The colonies were either part of the British Empire and therefore under the sovereign authority of the King-in-Parliament or entirely separate states, each of which was sovereign over its own territory and inhabitants. According to British theory and in total disregard of the experience of a century and a half of imperial governance, no half-way ground between these two positions could exist.

For the next eight years, the controversy over the question of the respective jurisdictions of Parliament and the colonial legislatures, what McLaughlin has referred to as "the problem of imperial organization," lay at the heart of the deepening conflict between Britain and the colonies. While British political and constitutional theorists continued to deny that "powers could be distinguished one from the other" and to assert that Parliament either had "all powers or none," a long line of colonial thinkers persisted in their efforts to try to draw a line between the jurisdiction of Parliament and that of the colonial legislatures.

As writers such as John Dickinson followed out the logic of the line drawn by the Stamp Act Congress, most colonists from 1767 to 1774 seem to have held that Parliament could legislate for the colonies but could not tax them for revenue. But an increasing number of Americans, looking at the problem with a more penetrating eye, began to view it in terms closer to those of Bland and the Virginia legislature. For instance, as early as 1766 Franklin had begun to think of the colonies as "so many separate little States, subject to the same Prince, but each with its own Parliament." "The Sovereignty of the King is therefore easily understood," he wrote the Scottish philosopher Lord Kames from London in early 1767. But, he complained, "nothing is more common here than to talk of the *Sovereignty of Parliament*, and the *Sovereignty of this Nation* over the Colonies," and these kinds of sovereignties he found difficult to reconcile with the *de facto* situation of government as it had existed within the empire for the previous century. Franklin did admit, however, that it seemed "necessary for the common Good of the Empire, that a Power be lodg'd somewhere to regulate its general Commerce" and other matters of broad concern.

Over the next several years, one thinker after another came to similar conclusions. Two lawyers, James Wilson of Pennsylvania and Thomas Jefferson of Virginia, both published pamphlets in 1774 in which they argued that the colonies were distinct and independent

governments bound to Britain only through their mutual allegiance to a common monarch, that the British had no authority to exercise any jurisdiction over them, so put it, that "the only dependency, which [the colonists] ought to acknowledge, is a dependency on the Crown."

The First Continental Congress endorsed this position in its Declaration and Resolves in October 1774. In that document, Congress explicitly denied that Parliament had any authority to legislate for the colonies, albeit it did commit the colonists to abide by such Parliamentary statutes for regulating the external commerce of the colonies as were genuinely designed to secure "the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members." But this offer, Congress emphasized, did not constitute an admission of Parliament's right to institute such regulations but was made only because of "the necessity of the case."

Congress thus drew a line very similar both to existing practice within the empire and to the boundary suggested by Bland and the Virginia legislature at the very beginning of the great constitutional debate over the problem of imperial organization. According to Congress, the colonial governments, acting in conjunction with the King, had clear title to all of the essential powers of sovereignty relating to matters concerning the internal affairs of the colonies, just as the King-in-Parliament had similar title for those matters relating to the internal affairs of Britain. That much now seemed obvious, at least to the leaders of American resistance.

But other areas did not obviously belong within the jurisdiction of any one of the several governments within the British Empire. Constitutionally, it was not clear that those areas belonged to the government of any one of the individual states any more than to that of one of the others. But because the metropolitan government had conventionally exercised such authority for the whole empire, the colonies agreed, for the time being, to obey all Parliamentary measures that seemed to them to be for the general welfare of the whole.

The First Continental Congress thus not only asserted the possibility of distinguishing among various categories of the essential powers of sovereignty in a political association of distinct states like, according to their conception, the British Empire. It also specified the crucial line of demarcation between those powers relating to the purely internal and local affairs of each member state and those concerning matters in which all of the states had some common interest.

More important, perhaps, in terms of the history of the development of the idea of federalism, Congress had identified--without clearly recognizing that it had done so--the need within such an association for one central authority with the power to deal with all matters of mutual concern. This need could not be constitutionally met within the existing structure of the empire.

The Principle Defined

In many respects, much of the constitutional history of the next twelve years, from the Declaration and Resolves of the First Continental Congress in 1774 to the Federal Convention in 1787, revolved around the search for some way to meet the need for a central authority without destroying the sovereignty of the individual states. The new United States had, in a sense, merely inherited the problem of imperial organization from the British Empire.

Though it scarcely articulated the problem so succinctly, one of the main questions of the first decade of independence was, in the words of McLaughlin, "whether federalism was possible as a theory of political organization." The early modern British Empire might indeed have been characterized by a *de facto* distribution rather than by a concentration of authority. But could

the founders devise any theory or set of constitutional principles by which to divide the essential powers of sovereignty?

The Articles of Confederation, the first national government, obviously did not solve this problem. The Articles clearly distinguished those powers that should belong to the national government from those that should be left to the states. In general, it drew the line precisely where the First Continental Congress had decided it had been drawn in the empire: between matters of purely local concern, which remained entirely in the hands of the states, and matters of common concern to all the states, which came within the jurisdiction of the Confederation Congress.

In effect, however, the Articles of Confederation established no more than a league of sovereign states, each of which had agreed that the general government should have authority over certain concerns of general interest, including war, peace, and disputes among states. But the Articles did not provide the general government with power sufficient to carry its authority into existence. As John Adams remarked, Congress under the Articles was "not a legislative assembly, nor a representative assembly, but only a diplomatic assembly." All of the essential powers of sovereignty remained in the hands of the states. They did not relinquish any of them because they had not yet devised a theory that would permit them to resolve the problem that had brought the empire to grief, the problem of whether the essential powers of sovereignty could be divided. Prior to 1787, no one had yet found a way to disprove Blackstone's maxim that sovereignty, "the Summa imperii," was indivisible.

By 1787, the weakness of the national government under the Articles of Confederation had caused many to fear for the future of the American union. Called together for the explicit purpose of strengthening the national government, the Philadelphia Convention of that year quickly found itself confronted with the old problem, as McLaughlin has phrased it, of imperial order, the problem of how to create a strong "national government without destroying the states as integral, and, in many respects, autonomous parts of" the political system.

The members of the Convention soon, in McLaughlin's words, "found themselves engaged in the task of constructing a new kind of body politic," one that was "neither a centralized system on the one hand nor a league or confederation on the other." They had relatively little difficulty in allocating powers between the national and the state governments. Their experience with both the empire and the Articles of Confederation provided clear guidance in that. But they confronted a vastly more difficult task in devising a system through which the basic powers of sovereignty could not only be divided between the national and state governments but divided in such a way as to keep one level of government from encroaching upon the other.

The old and as yet unresolved question of by what principles the essential powers of sovereignty could be distributed still constituted the main difficulty in this enterprise. As McLaughlin has said, the Convention's solution to this question was both its "signal contribution to the political life of the modern world" and the most important American contribution to political theory and practice. So original was the Convention's solution that its members did not fully understand what they had done until after the Constitution had been completed and they had—in the crucible of debate—to explain the principles behind the new government and how it would operate.

As Gordon S. Wood has shown in *The Creation of the American Republic*, a crucial intellectual breakthrough made the contrivance of an acceptable federal system possible: the idea that sovereignty lay not in governments (and hence not in the governments of individual states) but in the people themselves. If, as the new Constitution assumed, sovereignty resided in the people, the "state governments could never lose their sovereignty because they had never possessed it." In addition, the sovereign people could delegate the basic powers of sovereignty to any government or governments they wished, and they could divide up those powers in any

way they saw fit, delegating some to one level of government and others to another, while retaining still others in their own hands.

Thus, as Madison wrote in *The Federalist*, both the state governments and the national government were equally creatures of the people: "both [were] possessed of our equal confidence-both [were] chosen in the same manner, and [both were] equally responsible to us." "The federal and state governments," said Madison, "are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes." Although the Supremacy clause in Article VI of the Constitution ensured that federal laws would take precedence over state laws whenever the two came into conflict, both the national government and the state governments were to have full authority within their respective spheres.

The Framers had thus fashioned a government that was neither a consolidated government nor a mere confederation of sovereign states. In the words of Alexander Hamilton in *The Federalist*, the former implied "an entire consolidation of the States into one complete national sovereignty with an entire subordination of the parts" to that national sovereignty, while the latter suggested simply "an association of two or more states" into one polity with all sovereignty remaining in the states. The new federal government was something in between. It aimed, said Alexander Hamilton in *The Federalist* No. 32, "only at a partial consolidation" in which the states clearly retained all those rights of sovereignty that they had traditionally exercised, except for those that through the Constitution had been reallocated by the people to the federal government.

Something Old and Something New

As McLaughlin argued, the American federal state was indeed "the child of the old British empire." In contriving the Constitution, the framers clearly drew, if in many ways only half consciously, upon the experience and precedents of the empire. Like the empire, the American federal system did not concentrate power in a single government but distributed it among different levels of government. It thus "gave legal and institutional reality to the principle of diversification of powers and . . . crystalized a system much like that un, which the colonists had grown to maturity."

But if the American federal system was not so radical in form, it was fundamentally so in principle. By locating sovereignty in the people rather than in the government or in some branch thereof, the framers of the Constitution had contrived a radical new scheme of governance whereby the basic powers of sovereignty could be divided without dividing sovereignty itself. This intellectual-and political-invention not only finally made possible the solution of the imperial problem of the relationship between local and national authority in its American context. It also provided a structure that was--and, in principle, still is--capable of a variety of permutations and combinations as sovereign groups of people seek to work out forms peculiarly appropriate for governing themselves.

Suggested Additional Readings: Bernard Bailyn, *Ideological Origins of the American Revolution* (1967)

Jack P. Greene, *The Quest for Power: the Lower Houses of the Assembly, 1689-1776* (1963)

Andrew C. McLaughlin, *The Foundations of American Constitutionalism* (1932)

Edward S. Morgan and Helen M. Morgan, *The Stamp Act Crisis: Prologue to Revolution* (1953)

Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (1979).

Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969)

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