

**Deterioration of the Tenth Amendment: Why Federalism's
Hierarchy Must be Restored**

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The year 2020 plagued the nation with unprecedented controversy. Across the country, citizens were faced with the question of whether public comfort is worth a lessening of personal liberties. At the administrative level, state and local governments had to appease the growing number of public demands with an exponentially dwindling budget and gridlocked federal support. Besides the impossible task of traversing through the everchanging COVID-19 policy, the states were also expected to execute a presidential election cycle while the entire nation was sedated by stay-at-home orders. Perhaps the most troubling undertaking for states and localities was accomplishing their normal duties under the heaviest federal imposition, comparably seen only fractionally in war-time behaviors.

The challenges experienced by states and their localities throughout the COVID-19 pandemic exposed a long-standing deficiency in the strength of the federalism in America. The founding ideal of a nation comprising of fifty unique cultures has been overshadowed by a monstrous federal government advocating for freedom, but only in uniformity. This has resulted in insufficient local funds, unrealistic expectations for local communities, and has left citizens feeling unrepresented by their closest form of government. In order to revitalize the spirit of federalism in America, the federal government must allow localities and state governments to exercise their reserved powers devoid of the burden from unfunded mandates and bureaucratic red tape from Washington D.C. Increased autonomy by localities and a larger dialogue between the federal and local government will restore republicanism and allow the needs of citizens to be heard far before cries turn to amicus briefs and Senate hearings.

The essence of federalism existed far before the ratification of the Tenth Amendment. The founding colonies exuberated a similar diversification that is now associated with the fifty states. The most glaring commonality shared amongst the settlements was the Crown under which all the colonies obeyed. Despite this, the colonies ran independently of each other, even during each colony's establishment period. The colonial experience varied greatly depending on which territory was being settled. The Plymouth colony focused heavily on the 'city upon a hill' mentality set by the Puritans. The Pennsylvania colonists were faced with the question of how to execute religious liberty when it meant

protecting opposing ideologies.¹ Virginia's founding, however, reflected stronger economic motivations than religious influence. The colonists of the Jamestown and later settlements focused their efforts on agricultural success in order to grow an economically robust community.

Along with the unique circumstances of their founding, "each colony constituted an almost wholly separate political environment" with "virtually no common political life."² Before the whisperings of revolution, the thirteen colonies established themselves as quasi-nations, exercising autonomy in culture, political structures, and economic development. While external constructions of the colonies may have appeared contrasting, an invisible thread of liberty flowed between the thirteen autonomous societies. The values that intertwined the thirteen colonies would later be consummated in the Tenth Amendment, where liberty is strengthened through diversification.

The evolution of the colonies was a marvel to the world at the time of its formation. While charters were given and royal governors were appointed, "early colonists found themselves separated from their sovereign's authority and protection by a vast ocean and from their fellow colonists by a vast geographic expanse."³ Consequently, the various settlers had to quickly learn how to ally together into a functioning community fit for survival. The internal liberty presented to the new colonies is seen mostly translated to states most prominently in the local sense. As Alexis de Tocqueville illustrated, "in America, [you] can say that the town was organized before the county; the county, before the state; the state, before the Union."⁴ It was through this early local organizing that the Americans learned the importance of political virtues like republicanism, egalitarianism, and federalism.

Alexis De Tocqueville, a Frenchman, recognized the uniqueness of America's colonial history. In 1831, Tocqueville ventured across the Atlantic to

¹ Abbott, Philip. 2010. *Political Thought in America: Conversations and Debates*. Long Grove, Illinois: Waveland Press, Inc.

² Squire, Peverill. *The Evolution of American Legislatures, Colonies, Territories, and States, 1619-2009*. Ann Arbor: University of Michigan Press, 2012.

³ Lee Rosenthal and Gregory Joseph, "Foundations of U.S. Federalism," judicature.duke.edu (Bolch Judicial Institute, March 29, 2021), <https://judicature.duke.edu/articles/foundations-of-u-s-federalism/>.

⁴ Tocqueville, *Democracy in America*, 65.

experience firsthand the American federalist experiment. His later work, *Democracy in America*, articulates Tocqueville's fascination with the American spirit persevering through the remains of former English settlements. He famously observed that "all the English colonies, at the time of their birth, shared a great family resemblance. All, from their beginning, seemed destined to present the development of liberty, not the aristocratic liberty of their mother country, but the bourgeois and democratic liberty of which the history of the world did not yet offer a complete model."⁵ Tocqueville's observations would offer the initial documentation of what later would be described as America's 'melting pot' nature. While the former colonies, turned states, operated in estrangement, a unifying hunger for liberty and republicanism conjoined the American citizenry.

The heterogeneity of the various towns foreshadowed a key advantage of state autonomy within a system of federalism: policy experimentation at the local level. The smaller scale of population within colonial towns and counties allowed for an extended grace period when settlers began to test which systems and niches of government best suited their needs and protected their personal liberties. The Plymouth colony in the late 1600s discovered the significance of open dialogue within a community through town meetings open to the entire town population. In Pennsylvania, the Quaker community learned the devastating effects of political life while navigating what religious liberty looks like within a multicultural environment. Virginia uncovered the economic stability that would arise from a regularly established General Assembly.⁶ These political experiments granted the colonists an opportunity to experience the 'utopian' government they never could attempt under direct English rule. Religious liberty, the right to civilian militia, direct democracy, etc., were attempted and modified to fit within an operating societal context. The American colonial venture domiciliated the foundation of federalism. Through the settlement of copious diverse towns, early Americans understood the value of interconnected experiences. Once the Revolutionary War brought the colonies into one Union, many colonists had already come to learn from their early pitfalls of self-governance and were able to combine their learned experiences into a more informed, and newly independent, country.

⁵ Tocqueville, Alexis de, Harvey C. Mansfield, and Delba Winthrop. *Democracy in America*. Chicago: University of Chicago Press, 2000.

⁶ Squire, The Evolution of American Legislatures, 11.

As expected, when transferring a government system from small towns to thirteen vast states, there were some growing pains, also known as the Articles of Confederation. Once the colonies successfully separated from England and developed into their own sovereign nation, the new Americans had to create a functional government that adhered to the needs England's monarchy could not. A deep sense of distrust for centralized authority was apparent across the nation.⁷ This cynicism was reflected in the verbiage of the country's first official constitution. Articulations which declare that "each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled," illustrate the priority of state sovereignty over collective efficiency.⁸ To paraphrase the Framers' intentions, the States had an existing framework of governance that should be left alone even with the addition of a national Congress. This methodology, however, would teach the early Americans a valuable lesson on the functionality of federalism.

Fixation on State autonomy proved fatal when national governance was required. States, even within their sovereignty, squabbled amongst each other by refusing to pay debts and even solely engaging in foreign trades with Europe.⁹ States refused to fund Congressional initiatives and ignored obligations to participate in meetings of all the States. Nationally, major issues, especially foreign, were largely ignored because Congress did not have the power to exercise sufficient authority in contentious matters. It resulted in a dangerously loose confederation of competing States with no national authority to settle disputes. While the Articles of Confederation are looked upon now as a failure, it personified to America the wisdom Lord Acton would articulate years later that "power tends to corrupt and absolute power corrupts absolutely".¹⁰ Even though the States were not a centralized power, they still became epicenters of

⁷ DePaul, 2021, pg. 7.

⁸ U.S. Congress. United States Code: Articles of Confederation -1952. 1952. Periodical. <https://www.loc.gov/item/uscode1952-001000005/>.

⁹ Council on Foreign Relations. "Lessons Learned: The Articles of Confederation." YouTube, February 28, 2012. <https://www.youtube.com/watch?v=1lj2UpUVqzE>.

¹⁰ Acton, Lord. "Lord Acton Writes to Bishop Creighton." oll.libertyfund.org. Liberty Fund, n.d. <https://oll.libertyfund.org/quote/lord-acton-writes-to-bishop-creighton-that-the-same-moral-standards-should-be-applied-to-all-men-political-and-religious-leaders-included-especially-since-power-tends-to-corrupt-and-absolute-power-corrupts-absolutely-1887>.

government corruption, tyranny, greed, and inefficiency without constraints placed on them.

The wisdom of the colonial experience, the virtues established in rebellion against the English Crown, and the trials of the Articles of Confederation accumulated into the synthesis of the genius of federalism. The Tenth amendment, by reserving powers to the States while enumerating powers for the national Congress, preserves the unique internal character of each State while allowing for an active Congress to oversee national policies. In Federalist 46, James Madison observes that “many considerations, besides those suggested on a former occasion, seem to place it beyond doubt, that the first and most natural attachment of the people will be to the governments of their respective states.”¹¹ Thus, it was assumed that “all the more domestic and personal interests of the people will be regulated and provided for” by the state governments, the entity most loyal to the people and vice versa.¹²

Due to this devotion to state governments, Anti-Federalists were appalled by the lack of State autonomy within the first meetings of the Constitutional Convention. They felt as insecure about the lack of protections for their individual liberties as they did regarding protection of state power. To Anti-Federalists, representation through local government was as much of a safeguard against tyranny as the explicit enumeration of individual liberties. With this in mind, it is no surprise that the Tenth Amendment was included within the Bill of Rights and contributed to the compromise to ratify the new constitution. The reserved powers, found within the text of the Tenth Amendment, clarify that “the states are assumed to have powers that are not given away, and the federal government has only the powers it receives and that are enumerated, or listed, in the Constitution.”¹³ The Framers saw this articulation to be enforcement enough of the federal system. Since, as James Madison poignantly explained, citizens felt such a deep connection to their state governments, it was much more likely to assume that if any sect of the government was to become greedy with power, it would be the states at the disgruntlement of the federal level. More recent times,

¹¹ “Founders Online: The Federalist Number 46.” founders.archives.gov. National Archives, January 29, 1788. <https://founders.archives.gov/documents/Madison/01-10-02-0261>.

¹² Ibid.

¹³ “The Genius of the Constitution,” The Heritage Foundation, 2019, <https://www.heritage.org/the-essential-constitution/the-genius-the-constitution>.

however, have proven this assumption false; as more modern controversies have arisen, the American citizenry has placed instant gratification for results over the safeguarding of the virtues fought so desperately for by the Founders and their colleagues. American federalism was an instrument of liberty that embodied the needs of a new country with the deep philosophies of Cicero, Aristotle, and ancient Western thought. If its deterioration of modern times is yet to be rectified, however, the genius of the Framers and America's exceptional virtue of freedom will wither into a fading memory.

The COVID-19 pandemic exposed the broken nature between local needs and federal help (or more suitably stated, federal imposition). While “the Constitution puts primary responsibility for public health with the states, cities and counties,” the nationwide transmission of the pandemic led many to call for decisive national direction.¹⁴ It was apparent in this rapid policy formulation that jurisdictional lines have become blurred. “Major weaknesses in the federalist system of public health governance, which divides powers among the federal, state and local governments,” were uncovered as local ordinances, state policies, and federal laws fought for authority.¹⁵ When cases began to build in March 2020, localities began issuing ‘stay-at-home orders’ to “stop the spread.” In April of the same year, The CDC, along with President Trump, ordered a nationwide lockdown to prevent further spread across the country. As the year went on and two-week lockdowns turned to yearlong solitude, states had enough. By May, many red states had repealed their lockdown orders while blue states kept strict restrictions; “Federalism may have facilitated this divergence, but its cause lay in the failure of public health officials to articulate and defend a coherent strategy”.¹⁶ Even now, in 2022, states are still juggling the desires of their constituents with the demands of the federal government. It was only the revelation of record-high unemployment, high suicide rates, and lackluster results from virtual education that states realized the harm the federal government's imposition had done.¹⁷ This constitutional crisis reveals the reality that the hierarchy of federalism is no longer

¹⁴ Stanford Law School, “Federalism Meets the COVID-19 Pandemic: Thinking Globally, Acting Locally,” Stanford Law School, April 6, 2020, <https://law.stanford.edu/2020/04/06/federalism-meets-the-covid-19-pandemic-thinking-globally-acting-locally/>.

¹⁵ Ibid.

¹⁶ Doug Badger and Robert Moffit, “COVID-19 and Federalism: Public Officials’ Accountability and Comparative Performance” (Heritage Foundation, July 26, 2021), <https://www.heritage.org/sites/default/files/2021-07/BG3638.pdf>.

¹⁷ Ibid, 20.

being followed. The Tenth Amendment reserves the right of healthcare to the states who then may pass it onto localities. The immediate surrender of local jurisdiction to federal bureaucrats at the beginning of the pandemic illustrates the weakness of local government against the monstrous federal government.

The question of the state of federalism today is contrasting depending on who is being asked. The current discussion of federalism focuses heavily on the ‘competence of federal bureaucrats’ and ‘unifying federal initiatives.’ To gain a more genuine understanding of the condition of federalism, however, it is best to ask those being affected most: the local governments themselves. In an interview study with local officials from both Pennsylvania and Virginia, each was asked the same questions to ensure a standard of content. The series of questions consisted of inquiries into the standing structure of federalism and the direct impact the system has on the efficiency of local government. To gain a more accurate portrayal of federalism from the local perspective, three local administrators were asked “what does federalism look like from a locality’s perspective—do you believe you are given enough autonomy to handle local concerns that are addressed to you?” Dean Rodgers, the manager of Amherst County, replied no, elaborating that his county “spends so much money chasing federal dollars—every federal comes with a mile of red tape and strings and administrative costs.”¹⁸ Sara Carter, town manager of Amherst, Virginia, expounded that “we have a federal government ruling down to every state that is going to cost every taxpayer who does not necessarily understand the actual needs of the local government they are ruling over.”¹⁹ Donald Delamater, township manager of Towamencin, Pennsylvania answered the initial question by saying he believed he has enough autonomy but agreed that regulation is burdensome to the efficiency of his office.²⁰ The administrators concurred that federal regulation is felt through the state’s heavy hand and it is one of, if not, the most difficult aspects of policy to handle locally. The overwhelming consensus within these interviews was that the federal government’s imposition is a burden more often than it is a benefit.

¹⁸ Dean Rodgers, Discussion on Locality Perspective of Federalism, interview by Giana DePaul, January 26, 2022.

¹⁹ Sara Carter, Discussion on Locality Perspective of Federalism, interview by Giana DePaul, January 27, 2022.

²⁰ Donald Delamater, Discussion on Locality Perspective of Federalism, interview by Giana DePaul, January 28, 2022.

When asked “what area of local government is the federal government imposing itself most into,” every administrator immediately had an answer and a situational example in mind. Sara Carter illustrated the relationship between heavy environmental regulation and the short supply of homes. As Carter articulated, the “housing affordability problem has as much to do with the cost of regulation as material price.”²¹ The problem with these policies is not the regulation itself; the problem is the federal government imposing itself into local concerns that it does not understand.

To comprehend more clearly how to control the uninformed impact of the federal government, the three local officials were asked “how can the federal government better understand your needs within your local role?” Each local official had a different answer to this question and their responses highlight the need for local autonomy within the federal system. Delamater believed that the federal government must be more receptive to local needs as they are presented through state representatives. He explained that these representatives have an obligation to understand the local cultures of their district and the federal and state government should lean upon that expertise before enacting regulation.²² Carter discussed the necessity of the federal government to evaluate the impacts of their regulation. A major concern of federal imposition is that federal officials “spend so much time saying... “this is a good thing because...—they only ever look at the positive side of regulation” and do not ever spend the time to assess the true cost that policies place on local budgets and local lives.²³ She believes that local governments must hold the federal government accountable for unproductive policy and should be given a direct forum to do so. County Manager, Dean Rodgers, offered a frank answer; he simply replied, “it doesn’t need to.” He explained further that “[the federal government] doesn’t need to understand my problems, it has a limited role and if it would just do its job...they would not be reaching down to the local level.”²⁴

These responses showcase the dire local need for distance from the federal government’s heavy hand. Almost daily, copious regulations are being passed to local governments with little to no deliberation on their potential consequences. And, as these officials explained, it is not even just federal regulation; it is the overlapping of federal policies combined with state regulation that make a simple

²¹ Sara Carter, January 27, 2022.

²² Donald Delamater, January 28, 2022.

²³ Sara Carter, January 27, 2022.

²⁴ Dean Rodgers, January 26, 2022.

task nearly impossible. Rodgers even mentioned that the process of obtaining and utilizing federal money is so complex that this budget cycle Amherst County is spending its own local budget to hire a grant coordinator. Rather than spending their time focusing on their localities' needs, local officials' time is consumed by chasing federal dollars for superfluous projects their community might not even want.

The final questions asked of these local officials aimed at finding solutions to restore federalism and grasping their vision for the future of local government and the status of federalism. The interviewees were asked specifically about their thoughts on a revival of a structure similar to the former Advisory Commission on Intergovernmental Relations (ACIR). This nonpartisan body, consisting of private citizens, local community leaders, and various state and federal officials, aimed to discuss the local impact of unfunded mandates in the late 1950s until 1996. Only Sara Carter was intrigued by the idea of a government body focused on hearing the complaints of local governments. "My need," from the federal perspective, Carter explains, "is for someone to speak to the impact of what [federal] regulation is doing to harm my community."²⁵ She believed a body like the ACIR would allow local governments to share complaints more directly to federal agencies and provide for a more communicative relationship between federal and local government. Delamater and Rodgers, however, disagreed with the idea of the ACIR. Delamater believed the best way for localities to express concerns about regulation is to lean upon their state representatives. Those representatives are then better suited to confront state policies or communicate with higher state leadership to bring awareness on the federal level. In this way, Delamater explains, the federalism hierarchy will be practiced more accordingly.

Dean Rodgers, however, did not believe any federal structure would restore federalism; in fact, he argued the opposite. Rodgers illustrates that "the higher up you go [in government], the slower it should be and the more protective it should be of local government, of people's rights to affect their local community, but now [federal bureaucrats] themselves want to take it upon themselves to find solutions for your locality." Rodgers concluded that local concerns regarding federal regulation will never be solved with more federal regulation; "passing laws does not fix problems...the only thing that will fix the problem [with federalism] is a culture shift."²⁶ The culture shift Mr. Rodgers refers to is the undisputed need expressed by all three local officials to restore

²⁵ Sara Carter, January 27, 2022.

²⁶ Dean Rodgers, January 26, 2022.

federalism: education on local government. The ignorance of the public to the structure, ability, and power of local government by lack of education is sanctioning the triumph of federal power. Civics education, by only focusing on the national structure of government, indoctrinates children into believing the federal branch is the only form of government of any importance. Many citizens do not know what the roles of Ms. Carter or Mr. Rogers entail, let alone what their roles mean for the community-at-large. It is in this local illiteracy that the public incorrectly assumes that federal government is the where the rubber meets the road. If the public understood the proper roles of government under the system of federalism, they would be much more inclined to participate in their local government and utilize more of its services. The erasure of misconceptions relating to local government through thorough education would bring about a cultural shift and empowerment to the people.

The overwhelming conclusion is that localities must be encouraged and supported as the most responsive arm of government. A restoration of federalism requires a revitalization of the power of the people in government. Civic participation in townhalls, similar to the colonial roots of Quaker meetinghouses, is where true federalism thrives. As Tocqueville wrote, “the health of a democratic society may be measured by the quality of functions performed by private citizens.”²⁷ Federalism will not be saved through the almighty federal government; it will be saved through the efforts of the people to restore their most responsive form of representation: their own voice within their own community. The spirit of federalism was fascinating to the rest of the world because for the first time, power centralized in the bottom of the political structure with the people themselves. COVID-19 awoke the nation to the power they have lost locally. For the first time since before the American Revolution, the American people are coming to understand what it feels like be ruled rather than be governed. The restoration of federalism will only come when communities are woken up to the power of local associations and come to understand that a reliance on their fellow citizen effectuates more change than the federal government ever could.

²⁷ Tocqueville, *Democracy in America*, 67.

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