

A Study in Sovereignty:
Federalism, Political Culture, and the Future of Conservatism

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Abstract

This thesis confronts symptoms of an issue which is eroding at the principles of conservative advocacy, specifically those dealing with federalism. It contrasts modern definitions of federalism with those which existed in the late 1700s, and then attempts to determine the cause of the change. Concluding that the change was caused by a shift in American political identity, the author argues that the conservative movement must begin a conversation on how best to adapt to the change to prevent further drifting away from conservative principles.

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On January 29, 2018, the United States Senate held a cloture vote to end a filibuster of S. 2311, also known as the Pain-Capable Unborn Child Protection Act. The act, sponsored by Senator Lindsey Graham, would prohibited almost all abortions after the 20th week of pregnancy; the bill failed to reach the 60-vote threshold necessary to end the filibuster.¹ In a matter of days, a storm of outrage howled across social media. “Resistance is Appalling and Indefensible,” exclaimed the *National Review*, calling opposition to the bill “another indication of how radical today’s Democratic party has become on abortion.”^{2,3} A Catholic priest called for excommunications of the 14 Catholic-denomination Senators who voted against the legislation.⁴ Senator Ted Cruz accused Democrats of “neglecting their moral responsibility,” and stated that the legislation was “crucial in the fight for human dignity.”⁵ Even Senator Rand Paul, known

¹ Pain-Capable Unborn Child Protection Act, S. 2311, 115th Cong., 2nd sess., Congressional Record, Vol. 164, daily ed. (Jan. 16, 2018): S187.

² Kathryn Jean Lopez, “20 Week Abortion Ban – Resistance is Appalling and Indefensible,” *National Review*, February 5, 2018, accessed February 6, 2018, <http://www.nationalreview.com/article/456096/abortion-20-week-ban-resistance-appalling-indefensible>.

³ Alexandra DeSanctis, “Senate Fails to Pass 20-Week Abortion Ban,” *National Review*, January 29, 2018, accessed February 6, 2018, <http://www.nationalreview.com/corner/455883/abortion-ban-senate-vote-fails-pass-pain-capable-unborn-child-protection-act>.

⁴ Lisa Bourne, “Priest Calls for Excommunication of 14 Catholic Senators Who Voted Against Late-Term Abortion Ban,” *LifeSite*, February 5, 2018, accessed February 6, 2018, <https://www.lifesitenews.com/news/priest-calls-for-excommunication-of-14-catholic-senators-who-voted-against>.

⁵ “Sen. Cruz Issues Statement on Senate Democrats’ Filibuster of the Pain-Capable Unborn Child Protection Act,” January 29, 2018, accessed February 6, 2018, https://www.cruz.senate.gov/?p=press_release&id=3611.

for his incredibly libertarian views, condemned those who voted against the bill, stating on Twitter that “I believe there will be a time when we are judged by whether or not we stood up for life.”⁶

Of course, there’s just one minor problem. Nowhere does the Constitution give the national government jurisdiction to outlaw and/or punish abortion, murder, or any other related crime. Of course, that hasn’t stopped Congress from prohibiting drugs, and workplace harassment, and a whole host of other law enforcement items that they have no power to regulate. Usually there is an argument based on the Commerce Clause, the General Welfare Clause, or some other constitutional provision.

In most of those situations, there are political advocates who call the national government out on its abuse of power. More often than not, those advocates are conservative or libertarian. Even more frequently, they fall into the “strict constructionist” camp of conservatism. But amid the outcry over S. 2311, a major question was passed over. Why did Senators Cruz and Paul, both so outspokenly dedicated to restraining the government within its Constitutional boundaries, become so vehement in declaring a “moral responsibility” to overstep those very same Constitutional boundaries? This points to a change in the way that all persons in the United States approach the idea of Constitutional federalism—a shift that has altered every man’s belief about distributing power between the States and the national government. It has affected even the staunchest of strict constructionists, undermining

⁶ Rand Paul, Twitter post, January 30, 2018 (5:50 a.m.), accessed February 6, 2018, <https://twitter.com/RandPaul>.

both the message and the means of conservative advocacy and activism. Unaddressed, this change will finish eroding conservative principles entirely. However, by tracing the substance and cause of the change, a path forward may yet be discovered. Conservatism may not be able to look exactly as it did forty years ago. However, if the appropriate action is taken, the core values of conservatism may still be preserved for the decades to come.

Part I: Federalism

What is meant by the term *federalism*? Modern political philosophers disagree over the specifics details, but there is a common general concept of layered government. Different theories diverge when they look at the specifics of those layers—specifics ranging from the practical application of the theory to the historical purpose behind creating it. To even begin unravelling the tangled debate surrounding federalism, there are at least three major questions that must be answered. How was federalism understood in 1787? What is meant by the term now? What has changed—and, most importantly, why?

Foundations of Federalism

The theory of federalism has its historical origins in debates over sovereignty. This is not entirely surprising, as the very nature of federalism is concerned with sovereignty. For over 200 years, the word “sovereignty” has referred to “supreme controlling power...absolute and independent authority.”⁷ There are two prongs to this

⁷ Oxford English Dictionary Online, s.v. “sovereignty,” accessed February 6, 2018, [http://www.oed.com/view/Entry/185343?.](http://www.oed.com/view/Entry/185343?)

definition—*absoluteness* and *independence*. If either of those is lacking, then the government is not truly supreme—and, therefore, not truly sovereign. Under the historical English common law, this “supreme authority” was given to Parliament—constrained, of course, by boundaries set forth by the law of God, who was sovereign over all. Thus, while Parliament was considered the absolute authority in England, it could not just pass a law condemning a specific innocent man to death. On the other hand, though, it was not enough for a sovereign power to be absolute. It must also be *independent*—i.e., free of *any* sort of interference in its own affairs. This criterion refers to what the great jurist William Blackstone referred to as *Imperium in Imperio*—loosely translated as “dominion within dominion.” Developed to explain why the Pope could not claim civil authority within England, this concept dictated that one distinct governing body within another was practically impossible. As one writer explains, “Multiple sources of authority could not share the same political space. Where multiple authorities did appear to exist...one of the seeming authorities actually derived its entire power from the other and therefore was neither independent nor...genuine.”⁸ Of course, this interlinkage between sovereignty and federalism has multiple implications. Most notably, it distinguishes federalism from decentralization. A federal government is often decentralized; however, decentralization does not create federalism.⁹

⁸ Alison LaCroix, *The Ideological Origins of American Federalism* (Cambridge, MA: Harvard University Press, 2010), 14.

⁹ Edward Rubin and Malcolm Feeley, “Federalism and Interpretation,” *Publius*, Vol. 38, No. 2 (Spring, 2008): p 171-172, accessed August 9, 2017, <http://www.jstor.org/stable/20184965>.

The other implication is that the question of federalism is ultimately one of sovereignty. If federalism consists of “layers of government,” and sovereignty can only exist in one governing body, then where does it exist in America? Alexander Hamilton seemed to alternate between placing it in the central government in general and the courts in particular. Some have placed it in the Constitution, citing the Supremacy Clause. Samuel Rubin laid it in the hands of the people as a national democracy, while John C. Calhoun declared that it was in the hands of the individual States. Each of these would follow his belief in sovereignty and arrive at a different theory of federalism. If sovereignty cannot be divided, then *where is it?*

The answer for that was first articulated in America by the Massachusetts Executive Council in response to Governor Thomas Hutchinson in 1773. Hutchinson had earlier addressed the Council and argued that Parliament was the sovereign government and the colonies were subordinate governments. The Council responded that the treatment of the subordinate government as a separate entity implied that there were areas over which Parliament was *not* sovereign. “If the subordinate power were not independently constituted, then it would not need to be denominated a subordinate power; instead it would be a subset of the supreme power.”¹⁰ The Council concluded by arguing that, within the colonial system, sovereignty was not determined by territory. Rather, it was defined by subject matter. “The two Powers are not incompatible, and do subsist together, each restraining its Acts to their Constitutional Objects.”¹¹ This was the

¹⁰ LaCroix, *Origins*, 94.

¹¹ *Ibid.*, 94-95.

first glimpse of a federalist system—a system that actually did divide sovereignty. Now it remains to be seen if that concept has remained true throughout the life of this Country.

Federalism in 1787

Political thinkers are conflicted about the meaning of federalism even today—how much more so do they disagree about what it meant over two centuries ago! However, most of these thinkers and historians do tend to share one thing in common—there is a tendency to impose current definitions of federalism upon the historical backdrop of the debates. Of these, there are two views which are incredibly popular, and a third which seems to be the most accurate. Ultimately, the difference between each of them is where sovereignty is placed.

The first view is referred to by Constitutional scholar Samuel H. Beer as *compact* federalism. This federalism places sovereignty within the governments of the individual states, and was supported by John C. Calhoun, a Senator from South Carolina who later served as Andrew Jackson's vice president.^{12,13} Calhoun supported South Carolina during the famous "Nullification Crisis" of Jackson's first term, during which South Carolina threatened to nullify a federal tariff bill and Jackson threatened military action if the state did not comply. In part because of this, Calhoun became known as an ardent supporter of States' rights. This theory is not merely supported by the Anti-Federalists, however; there have been multiple authors in more recent days that Beer has accused of agreeing with

¹² Samuel H. Beer, "Federalism, Nationalism, and Democracy in America," *The American Political Science Review*, Vol. 72, No. 1 (Mar. 1978), p. 12, accessed August 9, 2017. <http://www.jstor.org/stable/1953596>.

¹³ Samuel H. Beer, "Responses to Rubin and Feeley," *Publius*, Vol. 38, No. 2 (Spring, 2008): p. 196, accessed August 9, 2017, <http://www.jstor.org/stable/20184966>.

it.¹⁴ The problem with this theory is that if all sovereign power is given to the individual states, then there is nothing left for the national government to wield sovereignty over.

Beer himself is a proponent of the second major theory, which he calls *national* federalism. As the cornerstone of his argument, Beer quotes Abraham Lincoln's address to Congress on July 4, 1861. "Originally some dependent colonies made the Union, and, in turn...the Union made them States...The Union is older than any of the States, and, in fact, it created them as States."¹⁵ Sovereignty, according to Beer, existed at neither the state nor the national levels under the Constitution—rather, it rested in the people themselves as a nation.¹⁶ As a result, he argues, the Founders instituted federalism as "an instrument of national democracy."¹⁷ Ironically, this itself has far more in common with the Anti-federalists than it does with the Federalist point of view.¹⁸ One major issue with Beer's theory is that he refuses to distinguish between a *federal* government and a *decentralized* one. He states that the definition of American federalism is that "decentralization is constitutional, not merely statutory."¹⁹ The implication is that if people wish to abolish federalism, then they are perfectly free to do so, and there is no absolute legal or moral reason for them *not* to do so. Of course, there is one other

¹⁴ Ibid.

¹⁵ Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* (Cambridge, MA: Belknap Press, 1993), 13.

¹⁶ Beer, "Democracy in America," 12.

¹⁷ Ibid., 9.

¹⁸ Richard J. Ellis, *American Political Cultures* (New York: Oxford University Press, 1993), 63-65.

¹⁹ Beer, *To Make a Nation*, 23.

disturbing implication. If sovereignty is invested in the people as a nation, then the nation as a whole has the authority to single out one state and dictate how that state can govern any one of its own affairs, notwithstanding all constitutional and legal provisions to the contrary—a state of affairs which goes against the very nature of our system.

Most authors seem to hold to either one or the other of these theories. While either of them might describe a *modern* theory of federalism, neither of them satisfactorily explains the mindset of the Founders. However, historian Alison LaCroix offered a third theory—specifically, she contends that the theory of federalism advanced by the Massachusetts Executive Council was refined and then adopted by the Founders in the Constitution. Rather than federalism being just layers of *autonomy*, LaCroix uses historical documentation—and the history of federalist thought in America—to argue that the Founders actually defined federalism as layers of *sovereignty*. Federalism was the result of a dialogue spanning more than a decade, in which various persons proffered theories on how to divide sovereignty.²⁰ Eventually, a language of *external vs. internal* powers began to develop. Essentially, the Founders divided government jurisdictions according to subject matter—some things were internal, concerning only the states themselves; others were external, and affected all the states collectively.

The truth of this theory can be drawn out as well from an examination of the debates surrounding the adoption and ratification of the Constitution itself. During the Constitutional Convention, there were three proposed plans, none of which matched this original confederation idea. The New York Plan, proposed by Alexander Hamilton,

²⁰ LaCroix, *Origins*, 59-64.

favored a single national legislature with complete sovereignty and authority.²¹ The New Jersey Plan, on the other hand, sought to preserve as much of the original Articles of Confederation as possible, and envisioned a system where the states retained ultimate sovereignty, but granted tightly limited revenue-collecting abilities to a coordinating authority.²² In between these two lay the Virginia Plan, which granted a vast and extremely diverse array of powers to the central government.²³ Under the Virginia Plan, “the several states would have been converted into little more than provinces directed by a central government.”²⁴ The end product was a middle ground between the New Jersey and Virginia Plans.²⁵

We know from the results of the Convention that, at least in the 1780s, federalism did not mean a unified government like Hamilton proposed. We also, however, know that it did not mean a government similar to the Articles of Confederation. Nevertheless, if Samuel Beer was correct and federalism was in fact a “vehicle for national democracy,” then the influence of the New Jersey plan remains unexplained. At the same time, States did not give up their identity when the Constitution was ratified. One the few occasions when the “United States” are referred to using a pronoun in the Constitution, it is with the

²¹ James McClellan, *Liberty, Order, and Justice*, 3rd ed. (Indianapolis, IN: Liberty Fund, 2000), 259-260.

²² *Ibid.*, 262-263.

²³ *Ibid.*, 257-259.

²⁴ *Ibid.*, 258-259.

²⁵ *Ibid.*, 263-265.

plural pronoun “they.”^{26, 27, 28} “We the People” did not re-write the meaning of statehood when the Constitution was ratified. As a result, there was no “nation” that somehow re-constituted the states. The question, then, is whether the states drew their power from the national Constitution or their own state documents.

When examining the historical record, it becomes clear that this was not the case. One of the common misconceptions surrounding the ratification debate is that the Anti-Federalists supported a small central government while the Federalists favored a large central government. The truth, however, is that the debate was never about *how much* coercive authority the central government should have. Instead, it was about whether a central government should have *any* coercive authority at all. In other words, it was a question of whether sovereignty was to remain with the States or be divided between the state and the national government. The Federalists argued that the national level need some measure of sovereignty to force cooperation between the states. At the same time, though, they agreed that this power ought only to exist for those few things that the states could not accomplish on their own. Madison writes in the Federalist No. 14, “Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all those other subjects...will

²⁶ US Constitution, art. 1, sec. 9, cl. 8.

²⁷ US Constitution, art. 2, sec. 1, cl. 8. (This passage is particularly insightful because it contrasts “the United States” with “any [one] of them.”)

²⁸ US Constitution, art. 3, sec. 3, cl. 1.

retain their due authority and activity.”²⁹ Even the Anti-federalists acknowledged this. In the 17th Anti-federalist paper, “Brutus” acknowledged, “It is true this government is limited to certain objects, or to speak more properly, some small degree of power is still left to the States.”³⁰ In reality, as one modern scholar writes, the potential elasticity of the Constitution, while “by no means the only objection raised by opponents...was clearly one of their primary concerns.”³¹ The Anti-federalist objection was not that the Constitution granted *too much* power in the *present*. Rather, the Anti-federalists argued, the Constitution could be twisted to grant *more* power in the *future*.

At the end of Federalist No. 39, Madison lists the ways in which the government was national and the ways in which it was federal. In only one way was it not federal: namely, in the operation of its powers. In other words, it did not rely upon the states to enforce its mandates. In every other way, Madison points out, the government did not draw its power from the people directly, but from the people as organized by States.³² This cuts against both the compact and national theories of federalism. Because the power rises from the States, it cannot come from simply a “national democracy,” nor

²⁹ James Madison, “The Federalist No. 14,” *Federalist Papers* (Great Neck Publishing) (January 5, 2009), *Academic Search Complete*, EBSCOhost (accessed August 9, 2017).

³⁰ Brutus, “Antifederalist Paper 17,” The Federalist Papers Project, accessed August 9, 2017, <http://thefederalistpapers.org/antifederalist-paper-17>.

³¹ Andrew C. Lenner, “John Taylor and the Origins of American Federalism,” *Journal of the Early Republic* 17, no. 3 (Fall, 1997): 402.

³² James Madison, “The Federalist No. 39,” *Federalist Papers* (Great Neck Publishing) (January 5, 2009), *Academic Search Complete*, EBSCOhost (accessed August 9, 2017).

could state autonomy be “granted” by a central authority.^{33,34} Federalism, as envisioned by the Founders, was a layered form of government. However, as Madison stated, a federal government leaves all jurisdictions subject to the authority of the separate parts, except for “certain enumerated objects, which concern all the members of the republic.”³⁵ From this, then, a final definition can be drawn—the overriding principle that made federalism unique among governments. Federalism is a layered government formed by sovereign political entities. These entities grant limited sovereign jurisdiction to a central authority, but only over those areas which cannot be effectively governed by the individual entities themselves. In other words, it grants sovereignty over external affairs to the central government, while retaining sovereignty over internal affairs for the States. This is the same definition that LaCroix arrived at, drawn froth from the primary source documents themselves.

Federalism in the Modern Era

To determine what has changed since 1787, it is necessary to examine what is meant by federalism *now*. Once again, the two main theories differ principally in where the full sovereignty is placed. The first theory places more of an emphasis on the role of the central government, while the second places all sovereignty in the hands of the people as a third party supervising the branches of government.

³³ Samuel H. Beer, “Federalism, Nationalism, and Democracy in America,” *The American Political Science Review*, Vol. 72, No. 1 (Mar. 1978), p. 9, accessed August 9, 2017. <http://www.jstor.org/stable/1953596>.

³⁴ Rubin and Feeley, “Federalism and Interpretation,” 177.

³⁵ Madison, “Federalist No. 39.”

The first theory was elaborated upon by Edward Rubin and Malcolm Feeley in 2008. Arguing that federalism was derived from a “dual political identity” that exists at both the national and state levels, Rubin and Feeley define federalism as “a mode of organizing a political entity that grants partial autonomy to geographically defined subdivisions of the polity.”³⁶ It is worth noting that this definition, although claiming to be an exhaustive “general theory of federalism,” does not claim to be federalism as the Founders used the term. Rather, Rubin and Feeley state, it is federalism “as the term is used in [current] political science and legal scholarship.”³⁷ They do, however, make clear that a federal state “lies somewhere between a fully unitary state...that is governed by a single central government... [and] an alliance that precludes conflict...but leaves all other decisions under the control of the separate entities.”³⁸ This theory is somewhat similar to LaCroix’s description of the Founders’ federalism, but it does not quite reach the whole way. A federalist state is not a government with layered sovereignty; rather, it is a “single political entity with partially autonomous regions.”³⁹

While Samuel Beer agreed with their account of “modern federalism,” he argued that it was nowhere near the federalism that was implemented in America. He writes:

My fundamental disagreement...is with [their] definition of federalism...What I am thinking of is the concept of federalism which,

³⁶ Rubin and Feeley, “Federalism and Interpretation,” 170.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

although not without serious competitors, dominated the foundation and development of the USA...I lay out the national theory of federalism...that both the levels of government, federal and state, owe their authority to and were created by the ultimate sovereign power, the People of the United States.⁴⁰

Beer contends that federalism arose as a national movement, and that the People gave rise to the states and the national government simultaneously. In support of this, he quotes Abraham Lincoln, “The Union is older than any of the States, and, in fact, it created them as States.”⁴¹ In Samuel Beer’s “national” theory of federalism, the Founders never intended for any sort of state autonomy or sovereignty at all. This becomes clear when he claims that Rubin and Feeley’s conception of federalism is fundamentally like “the formal rhetoric of the Articles [of confederation].”⁴² Calling this the “compact theory” of federalism, he states, “In competition with the national theory, the compact theory was championed by the anti-federalists...Rejecting the preamble, they claimed it should read ‘We, the States...’ not ‘We, the People.’”⁴³

The truth is, however, that there is very little that Rubin and Feeley have in common with the Anti-federalists, who rejected entirely the idea of a central government at all. On the contrary, their assertion is that the autonomy of various geographical

⁴⁰ Beer, “Responses,” 195.

⁴¹ *Ibid.*, 196.

⁴² *Ibid.*

⁴³ *Ibid.*

subdivision is only partial, and that they are still subordinate to the central government.⁴⁴ They also go to great lengths to differentiate federalism from decentralization. The difference, they argue, is not so much the concept of layered government. Rather, it is that “in a federal regime, there are some decisions that the center cannot override, although, depending on specific circumstances, it may be able to influence the decision by threat or by inducement.”⁴⁵ Beer has no such qualms about combining the two concepts, even going so far as to call federalism constitutional decentralization.⁴⁶ In the end, however, regardless of their disagreements, both theories agree on one thing. Autonomy is partial, its limits are defined by the will of a people or sovereign power rather than by an overarching legal principle, and the “subordinate” governments are not granted true independence from the central authority.

Part II: Changes in Federalism

Just by comparing Rubin, Feeley, and Beer’s theories with the paradigm advanced by LaCroix, it is apparent that something has changed in how academia looks at federalism. More importantly, the fact that this appears to be accepted in the mainstream almost without opposition implies that something else is at work as well, influencing a shift in how people think of the nation. By examining both what changed and why it shifted, it should be possible to determine the implications of the shift.

A Change in Political Systems

⁴⁴ Rubin and Feeley, “Federalism and Interpretation,” 170.

⁴⁵ *Ibid.*, 172.

⁴⁶ Beer, *To Make a Nation*, 23.

Although Rubin, Feeley, and Beer have done a decent job of summarizing modern views of federalism, their descriptions only drive home the fact that today's government is not federal—it is only decentralized. Rubin and Feeley are fairly close to the mark of the early United States as presented by LaCroix. At the same time, however, the most enlightening portion of their discussion is the section contrasting federalism with decentralization. They write that federalism may be highly decentralized, “decentralization does not necessarily lead to federalism.”⁴⁷ Their rationale is that a decentralized state may, by an act of legislation, become centralized again. This, ironically, roughly equates what Beer's definition of federalism as decentralization that is constitutional instead of statutory. Ultimately, their disagreement with Beer is rooted in the fact that they believe federalism can arise in a collection of states which do not already consider themselves a nation. Beer disagrees, and instead argues that it was a decision by the people as a nation to reconstitute themselves as a federal government with multiple layers of power. The real difference between federalism and decentralization lies in how each system treats sovereignty. Federalism divides sovereignty between the states and the central government. Under decentralization, however, all sovereignty is given to the central government (or, in Beer's case, the nation of people); that government then decides which level should possess which authority. The rebranding of the “central government” to a “national democracy” is a shell game, made obvious when Beer replaces a “statute” with a “constitution.” Other than the method of passage, there is but little difference.

⁴⁷ Rubin and Feeley, “Federalism and Interpretation,” 172.

It is evident based off LaCroix's work, combined with original sources, that there was no "national democracy" in 1787. There was no decision to "reconstitute" the States. If anything, it was *assumed* that the states should and would continue to exist under the new Constitution as they ever had—as governments wielding sovereign powers. When examining Madison's notes on the Convention, there is a rather telling detail. When Hamilton's New York plan was debated and then rejected, there is a distinct lack of elaboration on *why* getting rid of the states was bad. Opponents simply stated that it abolished the states in favor of a British-style monarchy, and left it at that.⁴⁸

Nor was there any dual identity, save perhaps that which was created by the Constitution itself. Of course, perhaps there was some lingering sense of commonality that made the colonists willing to work with each other in some fashion, forged by the common empire they had been a part of and fought together to leave. However, the ultimate problem with the Articles of Confederation was that no State would abide by their obligation—a problem that would have been less prevalent if some sort of national identity had co-existed with the state identity.⁴⁹ The federal system was necessary because *cooperation* was necessary, but had not been attained. For that same reason, we know that there was no sense of "national democracy." Perhaps there was such a sense unvoiced among the Anti-Federalists, although that seems unlikely given their opposition to a national government of any stripe. Among the Federalists, there was never such a

⁴⁸ James Madison, *Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America*, ed. Gaillard Hunt and James Scott (New York: Oxford University Press, 1920), 111-120, 139.

⁴⁹ Andrew C. McLaughlin, *The Foundations of American Constitutionalism*, 1932, Reprint (Union, NJ: The Lawbook Exchange, 2002), 151.

murmur. Certainly, the Virginia Plan had originally proposed an incredibly strong central government. However, the document which emerged from the Constitutional Convention, with its distinct undemocratic nature, belies Beer's assertion that it was meant as a statement of nationality. If anything, it concentrated an overly large amount of power in the states—and the necessity for a bicameral legislature to protect small states from large ones, and vice versa, does little to help his case.

The truth is that Samuel Beer does a very excellent job of describing today's American government, and the way that most people believe it works. Unfortunately, the truth is also that said American government is no longer a Federalist government. It is, as Beer states, a “constitutionally decentralized” government.⁵⁰ If federalism is ultimately a system of divided sovereignty, then it only exists if there is a system of strictly divided sovereign jurisdictions—jurisdictions that are, by definition, completely *independent* of each other. There is no reliance by the states upon the national government to accomplish their duties. Instead, there is now a constant interlinkage of authorities.⁵¹ It is almost impossible to avoid interacting with both state and federal regulations on any subject issue. Rubin and Feeley also demonstrate the failure of their definition to measure up when they declare that in a federal government, the central branch could attempt to influence the actions of certain autonomous branches.⁵² Such a government is not made up of independent sovereign authorities. Thus, while it may be decentralized, it is no

⁵⁰ Beer, *To Make a Nation*, 23.

⁵¹ Morton Grodzins, “The Sharing of Functions,” in *The Politics of American Federalism*, ed. Daniel Elazar (Lexington, MA, 1969), 11-12.

⁵² Rubin and Feeley, “Federalism and Interpretation,” 172.

longer federal. All sovereignty, either in name or in fact, has been placed in the hands of a national government.

This change has major implications. The changed definition of federalism has caused confusion, both in terms of what the Constitution means now and what it meant then. Additionally, if the definition of federalism was altered in this manner, it would result—and indeed, has resulted—in an increasing blurring of the lines between state and national authority. Where such blurring occurs, it is almost inevitable that the national government, with its vastly superior resources, would end up on the better end of the exchange. A change in the definition does not happen in a vacuum, however; and the cause of change has its own implications to consider. These implications include (but are not limited to) dictating both why a response is necessary, and what form that response ought to take. To discern the answers to those questions, some elaboration on the cause of change is required.

A Change in Political Culture

Ultimately, all signs point to a change in political culture as the guilty culprit in causing the alteration in federal concepts. The link between culture and federalism was suggested by Rubin and Feely, but they were hardly the first ones to suggest that a progression in cultural identity was influential. By examining the political culture of the colonial period and comparing it to the culture of today, parallels begin to emerge. At the very least there is correlation; the leap from correlation to causation is not a very difficult one to make.

Political identity in 1787. In the days of the early Constitution, political identities were very much wrapped up in the notion of Statehood. One need only look at the rhetoric of Patrick Henry to see a prime example of the suspicion that existed between the different states. Of course, one could allege that the famous Virginian statesman was an outlier; however, the strife between large and small states at the Constitutional Convention is also very suggestive. If there was actually interest in a nation, then why was New York hesitant to give small states equal representation? And why were small states afraid that larger states would use a populous House of Representatives to outvote New Jersey interests?⁵³ Political identities were also evident in the attitude of various statesmen towards the concept of state sovereignty. That the existence of the individual states within the union was a good thing was hardly ever called into question. In fact, even though the Federalists did believe that vesting force in the hands of the central government was necessary, it was taken for granted by many that the central government should be one of limited jurisdiction.⁵⁴

This had a direct bearing on the adoption of federalism. Essentially, a collection of nation-states agreed to become a nation of states, and divided sovereignty strictly according to internal and external powers. This was, in many ways, necessitated by the fact that people identified as members of their state first, and as members of the nation only second. If government action was morally necessary, there was a sense in most places that such action ought to take place at the state level.

⁵³ McClellan, *Liberty*, 164.

⁵⁴ Madison, "Federalist No. 39."

Political identity in the mid-1800s. By the time of the Civil War, this attitude was beginning to shift. Daniel Webster and Abraham Lincoln, for instance, saw the Union as a nation, rather than a federal system. Lincoln was technically correct when he stated that the Union created the States—provided that he was referring to their official status “States” rather than “Territories” or “governments.” However, under the Northwest Ordinance, a functioning constitution drafted by the citizens of that state was a prerequisite for statehood.⁵⁵ The Congress did not prescribe the powers of each state—the state prescribed its powers for itself. This, too, speaks to the way that people identified by state.

Of course, one challenge to the aforementioned view of Lincoln (i.e., the belief that he was very much a nationalist) was his beliefs on the issue of slavery. Even though Lincoln did believe (and articulated quite frequently during his debates with Stephen Douglas) that a moral imperative existed against slavery, he did not believe that the national government had the authority to invoke that imperative. On September 17, 1859, Lincoln told his audience that “I think Slavery is wrong, morally, and politically. I desire that it should be no further spread in these United States, and I should not object if it should gradually terminate in the whole Union...[but] I say that we must not interfere with the institution of slavery in the states where it exists, because the constitution forbids it.”⁵⁶ The Emancipation Proclamation did not contradict that belief—it was a wartime

⁵⁵ “An Ordinance for the Government of the Territory of the United States North-West of the River Ohio,” in *Documents Illustrative of the Formation of the Union of American States*, ed. Charles Tansill (Washington, D.C.: Government Printing Office, 1927), 54.

⁵⁶ Abraham Lincoln, *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler, vol. 3, 1809-1865 (New Brunswick, NJ: Rutgers University Press, 1953), 440, 460.

proclamation which only affected rebellious states, and thus technically was an exertion of external authority. Even when the 13th Amendment was passed and ratified, it was ratified *by States* and applied *by States*. There was action on a national scale; however, that action was applied in and through the States.

Political identity in the early 1900s. American political identity had most definitely completed its change by the early 1900s, with the arrival of the Progressive Reform movement. Perhaps the greatest example of the change in political identity was the success of the Prohibition movement, which abolished alcohol—an exertion over purely internal matters—on a national scale *on moral grounds*. The use of moral arguments is key, as a moral argument for government action is grounded on identifying with that government. A moral argument for action by the national government only succeeds if a person believes that national government is morally obligated to act. The national government is only morally obligated to act on an *internal* matter if, for some reason, a person has ceased to think in terms of *internal* and *external* authority. Under such conditions, everything is now internal because everything is now one nation by *identity*, and no longer just by law.

Cultural changes impacting political identity. One last portion of the inquiry remains, and that is to ask what the cause of the cultural change was. There are several possible answers, and yet only a handful are convincing. In the end, the change is most likely due to technological advancements such as the railroad, the telegraph, and the telephone—advancements which drove Americans to see themselves as part of a larger world

There is, perhaps, some possibility that the Civil War was responsible for the shift in cultural identity. After all, was not the entire war about “preserving the Union”? However, a war cannot *cause* a shift in cultural thinking; it can at best perhaps accelerate an already existing idea. The fact that people were willing to fight in the Civil War indicates that the change may have *started* by then, but the War itself could not have been the cause of it.

It might also be argued that the massive immigration waves of the late 1800s were to blame. There are two diverging but similar arguments that bear some potential here. The first theory would claim that the immigrants themselves brought with them a different view of the United States. After all, the “Land of Promise” for immigrants was not “New York.” It was “America.” They came to the nation of America, and that was how they identified politically. There are two issues with this theory. The first issue is that while most immigrants may have come to *America*, that in and of itself may not be the decisive factor in their political identity. The second (and even more substantial) issue is that the Progressive Reform movement was decisively anti-immigrant, and therefore it seems unlikely that its followers would have been influenced by immigrant cultural and/or political identities. The second theory also argues that the waves of immigrants spurred the formation of a national identity, but reasons that (ironically) are precisely the opposite of the first theory. Essentially, by causing an anti-immigrant reaction by the Populist movement, it is distinctly possible that the immigration wave caused a wave of American nationalism as a reactionary force. This possibility seems to have some merit at

least, as the Progressive Reform movement certainly reacted to immigration.⁵⁷ A wave of “foreigners” may very well have helped consolidate many current residents into embracing an identity as “current Americans” by encouraging an “us-versus-them” mentality.

The third cultural phenomenon responsible for the shift was the “shrinking” of the world. One historian wrote in 1932, “[American] nationalism is the product of the railroad, the telegraph, the telephone, and all other instruments by which men are...merged into a common mass.”⁵⁸ Additionally, this process began slightly before the Civil War, and was in full swing during the post-war period; thus, the time necessary for the change in mindset to accrue would certainly be sufficient to explain such a drastic shift from a state-centered identity to a national identity. The immigration wave may have proved a final straw prompting the Progressive Reform movement to be bold in proclaiming a national identity; however, Americans had discovered they were part of a larger world prior to that. Theodore Roosevelt’s “White Fleet” and his role as a peace-broker between Russia and Japan were simply examples of America beginning to move about on the world stage. As Americans began looking beyond their neighborhood fences to see the world around them, they would begin to find more common ground with their fellow Americans—and, as a result, they started embracing an “American” identity. This

⁵⁷ “Progressivism,” in *Encyclopedia of U.S. Political History*, ed. Andrew W. Robertson (Washington, DC: CQ Press, 2010), 1500-1505, accessed February 7, 2018, doi: 10.4135/9781608712380.n413.

⁵⁸ McLaughlin, 146.

identity would both encourage and be encouraged by an “us-versus-them” reaction to the immigration waves of the 1890s and beyond.

There is a definite correlation between the shift in culture, the shift of political identity, and the shift in the meaning of federalism. Even as the progressive reform movement began arguing for moral reform, the lines between state and national jurisdictions began to blur. The 14th Amendment, which expanded the potential for national interference in areas of previously independent state sovereignty, is one indication of changing attitudes. The Federal Reserve Act of 1913, which allowed to government to begin regulating banking activities that did not involve interstate commerce, is yet another. The argument for causation is also furthered by the fact that if government’s power comes from consent of the governed, then a change from state to national political identities on a large scale would ultimately change the way that people expect their government to function. In the same way that people of 1787 expected their government to maintain state sovereignty, people of 1913 expected the national government to step in.

Part III: The Implications for Modern Conservatism

How ought conservatism to react to these changes? The movement cannot simply sit by idly and do what it has always done. Organizations look back with nostalgia at the 1780s and the separation of powers that went along with it. Can that separation be regained apart from the cultural divisions between states? Should it be?

These questions, when answered, will help determine how conservatism ought to respond—and the truth is, respond it must! The movement cannot afford to ignore this

change as if it was of no consequence, for it has had an impact upon conservative political thought at its core. When the strictest of constitutional constructionists call for an overstepping of constitutional authority as Senators Cruz and Paul did on January 29, 2018, there can be little question that the political identities of conservatives have changed along with the rest of the country. A person's political identity matters because it impacts core assumptions regarding the moral obligations of government. Ordinarily, if a government has a moral obligation to act, there is little question of whether it should act.

However, a unique dilemma exists in a federal system. At what level does that obligation to act exist? When considering this question explicitly in a forum, a thoughtful conservative may *perhaps* be able to remember that all powers not delegated to the national government exist at the state level. Unfortunately, most of the time when it matters the most this question will never be explicitly discussed. Instead, it exists only as a presupposition; worse, where such a presupposition exists, the answer is not provided by intellect or logic. Instead, it is provided by that sense of political identity which in 1787 caused the Founders to assume that the existence of the states was a non-negotiable. This has resulted in a tendency to seek national solutions to problems, even within the conservative movement. Attempts to pass a national "marriage amendment" is one such example; the recent "Pain-Capable Unborn Child Act" is another. Conservatives everywhere were outraged that the Senate refused to protect the lives of the unborn from murder. However, under the Constitution, murder is *not* a national offense. It is a purely internal matter. Of course, overturning *Roe v. Wade* is something that must be done. However, the solution is not, and never could be, national legislation which *prohibits*

abortion—only legislation which repeals that flawed Court decision and allows the *states* to prohibit it. This is merely one example of how a national political identity has altered the conservative movement—and why the conservative movement must do *something* to address it. We have lost the concept of divided *sovereignty*; we have blindly replaced it with a decentralized nation and called it federalism. Some response is desperately required.

There are, in the end, three general categories into which a response to this changed identity could take. Conservatism can either attempt to reverse the national political identity, adapt to accommodate it while still remaining true to federalist principles, or embrace it.

There is no question that embracing the change would mean, at the very least, embracing Samuel Beer's theory of national federalism. The conservative movement is dangerously close to his already. Although Beer himself might be considered a liberal, his explanation of federalism as constitutional decentralization (with the national people as the ultimate sovereign power) is nevertheless incredibly prevalent. This is, in fact, most likely a fair description of federalism as it is perceived today, even among conservatives. Of course, however, it does mean casting aside the idea of sovereignty existing at either the national or the state level. It means that the lines between the state and national levels can be redrawn by the sovereign populace, with no prior legal principles dictating where they ought to be located. This does not seem like a place where conservatism should go.

Reversing the change in identity seems like an unfeasible solution as well. The development of a national American identity was a natural result of the progression of technology. That being the case, it is incredibly doubtful whether such a cultural phenomenon could be reversed at all. After all, if human nature caused Americans to draw together as a nation, then any attempt to reverse that change would have to fight against the nature of mankind itself—a feat that, if not impossible, would be at least supremely difficult. Even if it were possible, however, to fracture the culture of the United States along geographical boundaries once again, such an outcome would be detrimental at best. It was the irreconcilable differences between State cultures that caused the Civil War in the first place; splintering American culture once again would risk causing a similar result. Additionally, a unified culture has enabled America to act and adapt to international developments in a way that would have been impossible in the absence of a national identity.

The only recourse left is for conservatism to adapt to this new “national” political identity. Of course, this adaptation could take any number of different forms. Perhaps it would entail educating conservatives on the factors affecting their presuppositions. Perhaps, however, it involves something else. Samuel Beer’s error, in part, was in resting his constitutional decentralization on nothing but the “sovereign will of the people.” The Founders drew a line between “internal” and “external” powers, using principles of legal reasoning rooted in prior law. Perhaps it is time to reevaluate where the line should be drawn.

Conclusion

American culture has changed. The political identities of Americans have changed along with it. The political system of a nation is inextricably linked with those identities; when they change, the precise mechanics of the system of government are inclined to change with them. However, the underlying principles of that system ought never to change. The conservative movement has not recognized the change in its own political identity. As a result, it has remained blind to the change within itself—a change that has moved conservatism away from the very legal and philosophical battles it attempts to fight. As a result, persisting in its current path will eventually cause conservatism to destroy the very thing it wishes to protect.

That is not to say that conservatism is doomed. Once made aware of the changes, it is now possible for conservatism to react to them. The nature and causes of change suggest that the movement's best hope is not to abandon its principles by wholeheartedly embracing the change. Nor is it to waste precious resources in a likely futile attempt to completely rewind American political identity by over 150 years. Instead, it is time for a conversation to start. Conservatism needs to discover what the underlying legal principles are that dictate where the lines should be drawn between state and national authority. As a matter of law, the Constitution stands supreme. As a matter of philosophy, we ought to know what the Constitution ought to stand. The authors of the Constitution thought they figured out what was needed in a federal government in 1787. It is time for modern conservatives to do the same for our time, or else get swallowed up fighting a war that ended a long time ago.

Bibliography

- Bailyn, B. *The debate on the Constitution: Federalist and Antifederalist speeches, articles, and letters during the struggle over ratification*. New York: Library of America, 2009.
- Beer, Samuel H. "Federalism, Nationalism, and Democracy in America." *The American Political Science Review*, Vol. 72, No. 1 (Mar., 1978), pp. 9-21. Accessed August 9, 2017. <http://www.jstor.org/stable/1953596>.
- Beer, Samuel H. "Responses to Rubin and Feeley." *Publius*, Vol. 38, No. 2 (Spring, 2008): pp. 192-197. Accessed August 9, 2017. <http://www.jstor.org/stable/20184966>.
- Beer, Samuel H. *To make a nation: the rediscovery of American federalism*. Cambridge, Mass: The Belknap Press of Harvard University Press, 1993.
- Ben-Atar, D. S., & Oberg, B. B. *Federalists Reconsidered*. Charlottesville: University Press of Virginia, 1998.
- Bourne, Lisa. "Priest Calls For Excommunication of 14 Catholic Senators Who Voted Against Late-Term Abortion Ban." LifeSite. February 5, 2018. <https://www.lifesitenews.com/news/priest-calls-for-excommunication-of-14-catholic-senators-who-voted-against>. Accessed February 6, 2018.
- Bridges, T. *The culture of citizenship: inventing postmodern civic culture*. Albany, NY: State University of New York Press, 1994.
- Brutus. "Antifederalist Paper 17." The Federalist Papers Project. Accessed August 9, 2017. <http://thefederalistpapers.org/antifederalist-paper-17>.
- Connelly, W. F. *James Madison rules America: the constitutional origins of congressional partisanship*. Lanham, MD: Rowman & Littlefield, 2010.
- Cruz, Ted. "Sen. Cruz Issues Statement on Senate Democrats' Filibuster of the Pain-Capable Unborn Child Protection Act." January 29, 2018. https://www.cruz.senate.gov/?p=press_release&id=3611. Accessed February 6, 2018.
- DeSanctis, Alexandra. "Senate Fails to Pass 20-Week Abortion Ban." National Review. January 29, 2018. <http://www.nationalreview.com/corner/455883/abortion-ban-senate-vote-fails-pass-pain-capable-unborn-child-protection-act>. Accessed February 6, 2018.
- Elazar, D. J. *The Politics of American Federalism*. Lexington: D.C. Heath and Cie, 1969.

- Elkins, S. M., & McKittrick, E. L. *The age of federalism*. New York: Oxford University Press, 1995.
- Elliot, J., & Madison, J. *The debates in the several State conventions on the adoption of the Federal Constitution as recommended by the General Convention at Philadelphia in 1787: together with the journal of the Federal Convention, Luther Martin's letter, Yates's minutes, Congressional opinions, Virginia and Kentucky resolutions of '98-'99, and other illustrations of the Constitution*. Philadelphia: Lippincott, 1941.
- Ellis, R. J. *American political cultures*. New York: Oxford University Press, 1993.
- Farrand, M., Matteson, D. M., & Hutson, J. H. *The records of the Federal Convention of 1787*. New Haven: Yale University Press, 1966.
- Feeley, M. M. The Political Theory of Federalism. *Flinders Journal of History and Politics*, 28 (2012), 2-15.
- Hamilton, A., Madison, J., Jay, J., & Shapiro, I. *The Federalist papers: Alexander Hamilton, James Madison, John Jay*. New Haven, CT: Yale University Press, 2009.
- Keller, M. *America's Three Regimes: A New Political History*. Oxford: Oxford University Press, 2007.
- LaCroix, Alison. *The ideological origins of American federalism*. Cambridge, MA: Harvard University Press, 2010.
- Lenner, Andrew C. "John Taylor and the Origins of American Federalism." *Journal of the Early Republic* 17, no. 3 (Fall, 1997): 399-423. Accessed August 9, 2017. <http://ezproxy.liberty.edu/login?url=https://search-proquest-com.ezproxy.liberty.edu/docview/220958643?accountid=12085>.
- Lincoln, Abraham. "Speech at Cincinnati, Ohio." In *Collected Works of Abraham Lincoln* 1809-1865, vol. 3, edited by Roy P. Basler, 438-462. New Brunswick, NJ: Rutgers University Press, 1953.
- Lopez, Kathryn Jean. "20 Week Abortion Ban – Resistance is Appalling and Indefensible." *National Review*. February 5, 2018. <http://www.nationalreview.com/article/456096/abortion-20-week-ban-resistance-appalling-indefensible>. Accessed February 6, 2018.
- McClellan, James. *Liberty, Order, and Justice*. 3rd ed. Indianapolis, IN: Liberty Fund, 2000.
- McLaughlin, Andrew. *The foundations of American constitutionalism*. 1932. Reprint. Union, NJ: Lawbook Exchange., 2002.

- Peacock, A. A. *How to read The Federalist papers: with a selection of useful quotations*. Washington, DC: Heritage Foundation, 2010.
- Robertson, Andrew W., ed. "Progressivism." In *Encyclopedia of U.S. Political History, 1500-1505*. Washington, DC: CQ Press, 2010. doi: 10.4135/9781608712380.n413.
- Rubin, Edward, and Malcolm Feeley. "Federalism and Interpretation." *Publius*, Vol. 38, No. 2 (Spring, 2008): pp. 167-191. Accessed August 9, 2017. <http://www.jstor.org/stable/20184965>.
- Tansil, Charles, ed. "An Ordinance for the Government of the Territory of the United States North-West of the River Ohio." In *Documents Illustrative of the Formation of the Union of American States*, 47-54. Washington, DC: Government Printing Office, 1927.
- U.S. Department of State: Bureau of Public Affairs. *The Great Seal of the United States*. July 2003. <https://www.state.gov/documents/organization/27807.pdf>.
- Welch, S. *The theory of political culture*. Corby: Oxford University Press, 2013.
- Zackin, E. (2011). What's Happened to American Federalism? *Polity*, 43(3), 388-403. doi:10.1057/pol.2011.4