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## FEDERALISM IN CURRENT PERSPECTIVE

Griffin B. Bell\*

### I

IN 1682 William Penn wrote the following in his *Frame of Government of Pennsylvania*: "Governments, like clocks, go from the motion men give them; and as governments are made and moved by men, so by them they are ruined too. Wherefore governments rather depend upon men than men upon governments."<sup>1</sup> It followed from such thoughts that no man or group of men in government, no matter the level or position, should have unfettered discretion in any matter. The founders structured a government to make certain of this. We refer to it generally as our system of federalism.

Much is being said about federalism. President Johnson speaks of dynamic federalism; Secretary Gardner of the Department of Health, Education and Welfare speaks of creative federalism; and David Lawrence speaks of destructive federalism. Students of the Supreme Court will know that federalism is a subject of prime concern there. Several recent decisions are directed toward maintaining the balance required in such a system of government.<sup>2</sup>

This brings us to the first inquiry: What is Federalism? Federalism is the idea or concept of government by which a sovereign people, for the purposes of enlightened government, yield a portion of their sovereignty to a political system that has more than one center of power and responsibility. The Constitution is expressly based on two centers of power—federal and state, but local government, which exists by virtue of a delegation of state authority, is a third such center. Whatever else may be said of it, federalism is the idea of shared power, with those holding the power to be at all times responsive to the will of the people in whom sovereignty ultimately resides.<sup>3</sup> It is the opposite of a nationalistic form in which the government is sovereign as distinguished from the people. Federalism is also the opposite of a centralized government where there is no sharing of power between levels of government.

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<sup>1</sup> PERRY & COOPER, *SOURCES OF OUR LIBERTIES* 210 (American Bar Foundation, 1952).

<sup>2</sup> See *Giles v. Maryland*, 386 U.S. 66 (1967); *Fortson v. Morris*, 385 U.S. 231 (1966); *Adderly v. Florida*, 385 U.S. 39 (1966); *City of Greenwood v. Peacock*, 384 U.S. 808 (1966); *Case v. Nebraska*, 381 U.S. 336 (1965); *Jankovich v. Indiana Toll Rd. Comm'n*, 379 U.S. 487 (1965).

<sup>3</sup> See *FUTURE OF FEDERALISM, GODKIN LECTURES 86-87* (1963).

This discussion of federalism and the recent Supreme Court decisions reflects an effort to make our government, and thus our federalism, more effective. We know that a democracy such as ours will remain viable only with improvements commensurate with changing conditions. This fact indicates, and perhaps even dictates, the necessity for frequent examination of our structure of government, and for refurbishment when needed. We cannot rule out the necessity of periodic re-evaluation of the overall structure in the light of national goals. It may be that we have reached such a juncture in our history.

This poses the question: What do we expect of a system of government? The answer is a system based on a foundation of freedom and order so as to afford liberty, peace, dignity, and prosperity to the individual. This means a structure constituted within a framework of law. There must be diversity within unity. This will insure the solution of social, economic, and political problems, varying as they will in the expanse of a nation with large geographical area and indigenous problems. Such a system should allow for many beliefs, many initiatives, much inventiveness and leadership. It should produce a maximum of liberty based on a balance which prevents excesses.<sup>4</sup> In short, it should permit and guarantee a free society and this has been the end product of our system of federalism to date.

## II

Federalism in America was born of a problem and its solution. The problem was simple. Confederation as a form of government was not working. There were problems waiting for solution and these were problems requiring uniformity of solution, so that federal rather than state action was required. A letter written by James Madison to Governor Randolph of Virginia is indicative of the situation:

Our situation is becoming every day more and more critical. No money comes into the federal treasury; no respect is paid to the federal authority; and people of reflection unanimously agree that the existing Confederacy is tottering to its foundation.<sup>5</sup>

In addition, change was dictated by what delegate to the Constitutional Convention Richard Henry Lee termed, "the injustice, folly, and wickedness of the state legislatures, so the people in general seem

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<sup>4</sup> See, e.g., Calhoun's doctrine of the concurrent majority on the question of eliminating governmental excesses among people with diverse views. CURRENT, JOHN C. CALHOUN (1966).

<sup>5</sup> DONOVAN, MR. MADISON'S CONSTITUTION 8 (1965).

ready for anything."<sup>6</sup> Thus not only was the Confederation incapable of handling problems national in scope such as the coining of money and defense, but the states were apparently not handling their own local problems. The general welfare of the people was at stake—government was in the balance. No form of government whether it be a confederation, a federation or a unitary one exists as an end in itself. As James Madison so aptly said:

It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object.<sup>7</sup>

With Confederation a failure, what would replace it? Was the solution to be a federation or a unitary government—federalism or nationalism?

In that day citizenship was related to the states and not to a nation. In almost every meeting throughout the Constitutional Convention, amendments were recommended to guard against the abuse of power—lest liberty be lost. The Founding Fathers were familiar with the recent British abuse of power. The people wanted solutions to their problems—yet, there was a fear of centralization. Thus, it was the fear of centralized power and the tradition of statehood, wedded with the notion of compromise which would produce a federation rather than a unitary form of government.

Compromise, then as now, seemed to be the essence of democratic government. It has been said of the Constitution that:

It was a bundle of compromises designed to placate extremists at both ends; the little states and big ones, the nationalists and state's righters, the creditors and the debtors, the merchants and the farmers, the conservatives and the radicals, the North and the South.<sup>8</sup>

The theme at the Constitutional Convention was Federalists versus the Grumbletonians or Anti-Federalists. One Anti-Federalist poet, much opposed to a union, wrote:

<sup>6</sup> RUTLAND, *THE ORDEAL OF THE CONSTITUTION* 18 (1965).

<sup>7</sup> MACMAHON, *FEDERALISM, MATURE AND EMERGENT* 51 (1965).

<sup>8</sup> DONOVAN, *op. cit. supra* note 5, at 2.

When thirteen states are moulded into one your rights are vanish'd  
and your honor gone; The form of Freedom shall alone remain,  
As Rome had Senators when she hug'd the chain.<sup>9</sup>

The citizens of New Hampshire were reported to be alarmed by visions of a Federal City with walls in the fashion of the walls of Jericho.<sup>10</sup> On the other side were the words of Madison, predicting what was to come. Federalism might be enough today, but tomorrow the states might have to be relegated to a lesser role. A unitary or national government was foreseen. He stated, ". . . as far as the sovereignty of the states cannot be reconciled to the happiness of the people, the voice of every good citizen must be, lest the former be sacrificed to the latter."<sup>11</sup>

The issue is no different today: If a form of government is not an end in itself; if it exists for the welfare and happiness of the people and only derives value as it secures these ends, then is federalism a useful concept of government in 1967? Or, was James Madison a seer? The answer to these questions requires that additional questions be answered. Has federalism faltered? If so, wherein lies the fault? Having discovered fault, should the system be refurbished and revitalized? Is there a feasible alternative?

### III

The examination and evaluation necessary to our consideration may be made in the context of only one national problem: Urbanization.<sup>12</sup> This is not to overlook other pressing domestic problems, or difficulties in foreign affairs. It is simply that the problem of urbanization alone suffices to point up the shortcomings in our system of federalism. It also proves that the system has faltered.

In the short span of thirty years we have seen the nation change from a rural to a predominantly urban society. First, there was the exodus from the farm during the Great Depression. The rapid industrialization required by World War II made urban dwellers out of many more rural families. Mechanization of the farm following World War II continued the trend and by the 1950's our country found itself with all of the problems of a new urban society. Many of the newcomers were totally unprepared by culture or skill for urban life. There was little

<sup>9</sup> RUTLAND, *op. cit. supra* note 6, at 29.

<sup>10</sup> RUTLAND, *op. cit. supra* note 6, at 31.

<sup>11</sup> MACMAHON, *op. cit. supra* note 7, at 51.

<sup>12</sup> For an in-depth study of the problems of urbanization, see Atlanta Commission on Crime and Juvenile Delinquency, *Opportunity for Urban Excellence* (1966).

for them in an age of automation without rehabilitation but rehabilitation was not available. Society was as ill-equipped for them as they were for the changed environment.

This process of urbanization created new problems and emphasized old ones. The poverty syndrome became a fact of American life. Poor housing, an inadequate system of education, low income, the broken family, and increased crime are its hallmarks. Often discrimination based on race and socio-economic status are the hand maidens of these hallmarks, if not underlying causes. Escape from the poverty syndrome is difficult; the totality of its various elements holds the victims sometimes to the second and third generation. Moreover, the numbers occupying such status increase. Unless the trend is checked, the minority may well become the majority. A substantial portion of our population is estranged from normal society.

The singular lack of success in adapting or accommodating urbanization to our system of federalism has put the system itself in issue. We must concede the problems; the focus must be on solution and the methods to be used in the solution. What methods are indicated? Do the problems exceed the capacity of the system or will the methods correlate into a government structured on federalism?

#### IV

These questions are of the utmost magnitude. The free society which our system has produced is endangered.

We start with the fundamentals. First, the genius of our government is that every citizen may participate in it. Second, every citizen may enjoy the benefits of the free society which functions under the aegis of our system of government. Then we can say too, that all men are equal before the law under that system. But these fundamentals are only the basics. More—much more—is involved. We long ago left any such laissez-faire approach to human problems. We recognize that all men are not born equal from the standpoint of either environment or ability. Therefore our rule is that all men are entitled to a fair chance to share in the responsibilities and benefits of a free society. This fair chance is mainly to be afforded by the government for it is the government, on some level, that is charged with the responsibility of education, public housing, slum clearance, health, welfare, and rehabilitation services, and law and order. These are the forces which provide the fair chance, and from whence come the ingredients to master or humanize urbanization.

The urban plight stems directly from the economic forces which brought it about, but indirectly from the failure of government on the local and state levels. The responsibility to solve the problems produced in the process of urbanization fell on the states, mainly through their cities and counties. These problems were not of the kind originally delegated to the federal level of government. Nevertheless, in view of their enormity, federal assistance has been made available in virtually the entire spectrum of state and local government activity.

The federal assistance programs have usually been provided on a matching basis, or at least with local or state government management subject to federal minimum standards. These programs have served to alleviate, or to some extent check the decay in our society but it continues in large degree. Whether the fault lies in lack of imagination, or in poor planning, or in inadequate funds, or in the sheer weight of the problems, it is clear that all levels of government have had a hand in the various curative facets.

This conclusion suggests fault but it is difficult to place the fault. Although local and state government have the prime responsibility of solution, there is no evidence that the federal government alone can bring about the solution.

The current thought is that the fault lies in the ineffectiveness of state and local governments. At the same time the difficulty of centralized management is recognized. For example, Secretary Gardner has recently stated that programs of the Great Society cannot be managed and administered successfully from Washington. He has pointed to the present waste of resources which are the result of unmanageable local governments and uncoordinated federal programs.<sup>13</sup> One writer, versed in the science of government, has said that the basic problem is to preserve the moral and spiritual values of our democratic institutions, and at the same time be able to govern our new technological society which is attended by the population explosion and urbanization. This writer has questioned the ability of Congress and the state governments to cope with the problem.<sup>14</sup>

The alternative to a system of federalism is a unitary or central government with regional offices supplanting state functions, and with state control over local government being superseded by national control. It is not clear from the available facts that such an alternative

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<sup>13</sup> Walter Lippman, *Atlanta Constitution*, Jan. 14, 1967, p. 4; *Time Magazine*, Feb. 20, 1967, p. 21.

<sup>14</sup> Walter Lippman, *Atlanta Constitution*, March 8, 1967, p. 4.

would be an improvement, even in a modified form, or if effected in a gradual or creeping manner. Rather, the facts teach the contrary; that the present system should be refurbished and revitalized.

## V

Every level and branch of government can assist in the refurbishment, each in its own sphere. Much is being done to this end. The Constitution contains its own self-revitalization provisions. A corollary benefit to federalism has come from the use by the Supreme Court of one such provision, the Fourteenth Amendment, in the area of individual rights.<sup>15</sup>

We may assume, at least *arguendo*, that one weak link in federalism is at the state level. The Fourteenth Amendment, through expanded due process and equal protection concepts, has proven to be a source of restoration and new strength for the states. A few examples will demonstrate this fact. For instance, *Baker v. Carr*<sup>16</sup> and its progeny have caused legislative power to be transferred from the representatives of the minority to the representatives of the majority. This, in turn, has made it possible for the legislative process to deal with the problems of the majority which, more often than not, include problems of urbanization. The response to *Baker v. Carr* has been in the form of the reapportionment of most state legislatures. The future portends of local government reapportionment: cities, counties, school boards, and local government will be thus strengthened.

Recent Supreme Court decisions are bringing about a considerable refurbishment in the administration of state criminal justice. These decisions have been the result of the application of the Fourth, Fifth, and Sixth Amendments to the states through the Fourteenth Amendment. A familiar example is the case of *Gideon v. Wainwright*,<sup>17</sup> where the Sixth Amendment was construed to require counsel for indigent persons in state felony cases. This simply meant that the states were to come up to what had been the federal standard since 1938.<sup>18</sup> The majority of the states were already following such a standard. Many, including Georgia, had such standards which preceded the federal standard. The right of an indigent to counsel under the Sixth Amendment

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<sup>15</sup> The benefits to federalism derived in this manner are to be distinguished from those cases where the Supreme Court, as arbiter, determines questions of power and responsibility as between the federal and state levels. See note 2, *supra*.

<sup>16</sup> 369 U.S. 186 (1962).

<sup>17</sup> 372 U.S. 335 (1963).

<sup>18</sup> *Johnson v. Zerbst*, 304 U.S. 458 (1938).



is in the process of being extended to misdemeanor cases.<sup>19</sup> In another area, the court has required more care in the admission of confessions in state criminal cases.<sup>20</sup> These decisions are in the direction of uniform standards in the administration of criminal justice. The same may be said of the new safeguards in the area of search and seizure.<sup>21</sup> All in all, these decisions have brought stability and balance to the law through the imposition of minimum standards of conduct on the part of police and prosecutors and courts.

A necessary component to these new standards has been the availability of the remedy of federal habeas corpus.<sup>22</sup> Few states had post conviction remedies available in the scope needed to accord these new federal constitutional rights to state prisoners. Accordingly, in recent years the federal courts have been active in the area of state prisoners rights. It is encouraging to note that the states have moved with dispatch to recover this responsibility from the federal courts and to that end many states have adopted new and adequate post conviction remedies by court rule, or by statute.<sup>23</sup> Georgia is the latest state to join this group.<sup>24</sup> This is the best example to date of the interaction of federalism through a division of responsibility and power between the central and state governments. The Constitution is the shelter over both; when the states were unable to act, the federal government acted through its courts, but the states may and are reclaiming this right and responsibility.

Discrimination based on race has been an over-all source of weakness in our federalism. The Supreme Court took the first remedial action when it discarded the separate but equal doctrine in *Brown v. Board of Education of Topeka*.<sup>25</sup> Congress has added its help in this direction through the several Civil Rights Acts, as have many of the states. We are, however, still far from being that type of pluralistic or multi-racial society, based on freedom and tolerance, where all citizens are viewed simply as people—not White or Negro,—Protestant or Catholic or Jewish—but as Americans.

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<sup>19</sup> *Winters v. Beck*, 385 U.S. 907 (1966) (dissenting opinion); *McDonald v. Moore*, 353 F.2d 106 (5th Cir. 1965); *Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965).

<sup>20</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966); *Jackson v. Denno*, 378 U.S. 368 (1964).

<sup>21</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>22</sup> See *Fay v. Noia*, 372 U.S. 391 (1963).

<sup>23</sup> See *Case v. Nebraska*, 381 U.S. 336 (1965); 24 FLA. STAT. ANN. § 924 (1965).

<sup>24</sup> Ga. Laws 1967, 835.

<sup>25</sup> 347 U.S. 483 (1954).

## VI

Effective government is imperative whether we speak in terms of federal, state, or local government, or in combination. The enormous problems of today will hardly be solved by one level alone; there must be a combination with each carrying the share which is commensurate with its power and responsibility.

There can be no effective federal-state, state-local or federal-local government relationship absent a clear delineation of responsibility and a division or sharing of power to the extent dictated by a desired result. It may be that power must be ceded from the federal to the state and local level, and from the state and local level to the federal level, depending on who should assume the varying responsibilities. Power in most instances depends on the purse, and the purse must go with the responsibility.

Two recent reports reflect the proliferation taking place around the problem of government. It was discovered in Oakland, California that there were no less than 140 separate federal programs with a federal investment of \$87,000,000 functioning in that one city.<sup>26</sup> The other is the report that there are 400 federal domestic programs for states and cities. They are administered by one hundred and twenty-five separate federal agencies for the fifty states and 4500 units of local government.<sup>27</sup>

On the local level, the Atlanta area points up the difficulty in rendering government services on a metropolitan basis where the units of government are far too numerous. The one and one quarter million citizens of the Atlanta metropolitan area reside in six counties and some fifty municipalities. They are served by twenty six sewer systems, forty water systems, ten school districts, and several authorities. Services on a regional basis are sorely needed to solve such problems as water and air pollution, traffic, and crime. Some progress is being made through the Council of Governments, Metropol, and the Atlanta Region Metropolitan Planning Commission.<sup>28</sup> Solution can only come through a consolidation of units of government or some of the services of local government, and through the rendition of regional services by a multi-purpose regional authority. There must also be a fair allocation of taxing sources to provide the wherewithal for local responsibility.

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<sup>26</sup> David Lawrence, *Atlanta Journal*, March 24, 1967, p. 20.

<sup>27</sup> *Time Magazine*, March 31, 1967, pp. 19, 20; *Atlanta Constitution*, March 29, 1967, p. 2.

<sup>28</sup> Letter from Executive Director of Atlanta Region Metropolitan Planning Comm'n to Judge Griffin B. Bell, April 18, 1967.

These matters will entail imagination and fair play on the state level.

This maze of activity or the multitudinous problems do not prove that federalism is not a useful system. It has served us well for many years. Its apparent weakness in today's problem context should be eliminated. There is no feasible alternative. In the end we must again turn to the original proposition: a sharing of power or powers. The attainment of this end should be a national goal of the highest order.

In Federalist Paper No. 46, Madison pointed out that the people would have the right to become more partial to the federal than state governments if there were manifest proof that a better administration would result. But, said Madison:

. . . even in that case the State Governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered.

Experience has shown that these were prophetic words. No level of government is perfect; a balance must be achieved. The need for a more perfect federalism merits the earnest consideration of all Americans. As it was in the beginning; so it is now. There is work to be done; the day is upon us.