

# PANEL III: LIBERTY AND CONSTITUTIONAL ARCHITECTURE

## LIBERTY AND CONSTITUTIONAL ARCHITECTURE

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The average American equates his liberties with the first ten amendments to the Constitution, and gives little, if any, thought to the Constitution's architecture. The Constitution that is discussed in *The Federalist Papers*, of course, had yet to be amended, and however majestic an affirmation of fundamental values, the Bill of Rights was nonetheless a constitutional afterthought. Although the promise of the Bill of Rights proved critical to the ratification of the Constitution, the Founders recognized the importance of protecting individual liberty and state sovereignty in the original document as well.<sup>1</sup>

The fact is that the Constitution's authors believed that our liberties would ultimately depend on their ability to structure a government in ways that would maintain a check on the exercise, and therefore on the abuse, of power. It would never be enough, in their estimation, to rely on the ballot box. As James Madison eloquently stated in *The Federalist Number 51*, "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind of the necessity of auxiliary precautions."<sup>2</sup> Thus, the Founders endeavored to frame a government that would be effective within its assigned bounds, but would not threaten individual liberty or state sovereignty. The grand design, the "auxiliary precautions" that emerged from the constitutional debates, proved to be a brilliant answer to the challenge Madison posed: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."<sup>3</sup>

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1. See, e.g., THE FEDERALIST No. 84, at 515 (Alexander Hamilton)(Clinton Rossiter ed., 1961)("The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.").

2. THE FEDERALIST No. 51, at 322 (James Madison)(Clinton Rossiter ed., 1961).

3. *Id.*

The Framers met Madison's challenge in three ways. First, they divided the powers delegated to the new government among three separate but equal branches.<sup>4</sup> Second, the Framers established checks and balances on the exercise of those powers,<sup>5</sup> including internal checks and balances on the powers accorded Congress.<sup>6</sup> Third, they reserved to the sovereign States all the authority not delegated to the national government.<sup>7</sup>

It was this last element of our constitutional design, the principle of federalism, that commanded the admiration of the famous British historian, Lord Acton. In a lecture on the American Revolution in which he catalogued what he believed to be the Constitution's significant shortcomings, Lord Acton nevertheless concluded that "by the development of the principle of Federalism, it has produced a community more powerful, more prosperous, more intelligent, and more free than any other which the world has seen."<sup>8</sup>

Two centuries have elapsed. During this time, the legislative and executive branches of the federal government have competed for supremacy within a system of coordinate branches.<sup>9</sup> They have been constrained, however, by the doctrines of separation of powers and checks and balances which remain integral parts of our governmental system. On the other hand, the three branches of the federal government have gradually stripped the States of their constitutional prerogatives to the point where today there is virtually no governmental responsibility that the Supreme Court would find beyond the reach of

4. U.S. CONST. art. I (legislative); art. II (executive); art. III (judicial).

5. See, e.g., U.S. CONST. art. I, § 1 (granting power to legislate statutes to Congress); U.S. CONST. art. I, § 7, cl. 2 (granting the president the power to veto bills); U.S. CONST. art. II, § 2, cl. 2 (granting the president the power to appoint Supreme Court justices); U.S. CONST. art. III, § 1 (vesting judicial power in Supreme Court which, after *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), allows the Supreme Court to invalidate unconstitutional statutes); U.S. CONST. art. II, § 2, cl. 2 (granting the Senate power to disapprove the president's nominees to the Supreme Court).

6. U.S. CONST. art. I, § 5, cl. 2 (granting each congressional house the power to expel a member for violation of the rules of that house).

7. U.S. CONST. amend. X.

8. John E.E. Dalberg-Acton, *The American Revolution*, in LECTURES ON MODERN HISTORY 305, 314 (John N. Figgis & Reginald V. Laurence eds., 1952).

9. See, e.g., *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (holding the legislative veto unconstitutional); *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that Congress could invest the Federal Election Commission with rule-making and enforcement powers claimed by the executive branch); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding the President's seizure of steel mills during the Korean War unconstitutional).

federal authority.<sup>10</sup>

According to the Supreme Court, we need not worry about this federal encroachment on state sovereignty. In *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>11</sup> the Supreme Court assured us that because members of the House and Senate are elected from the states, they can be relied on to protect the interests of the states. This conclusion emerged despite the fact that these same individuals have enacted the laws that threaten state sovereignty.<sup>12</sup>

Whatever the fate of federalism, the basic structure of our national government has remained essentially unchanged for more than 200 years. That, of course, has not prevented some of its powers from being used in ways that would have astounded the original architects, with consequences that may or may not have advanced the liberties and well-being of the American people. The following articles will illuminate the grand constitutional design and its relationship to our liberty.

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10. *See, e.g.,* *South Dakota v. Dole*, 483 U.S. 203 (1987)(affirming the power of Congress to withhold highway funds from states that did not enact laws raising their drinking age to 21, even if Congress could not impose a national minimum drinking age directly). *But see* *New York v. United States*, 112 S. Ct. 2408 (1992)(invalidating on federalism grounds a congressional statute that forced the States either to pass certain legislation or to take possession of hazardous waste).

11. 469 U.S. 528 (1985).

12. *See id.* at 552 (“[T]he Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”). *But cf. id.* at 565 n.9 (Powell, J., dissenting)(“ [A] variety of structural and political changes occurring in this century have combined to make Congress particularly *insensitive* to state and local values.’ The adoption of the Seventeenth Amendment (providing for direct election of Senators), the weakening of political parties on the local level, and the rise of national media, among other things, have made Congress increasingly less representative of state and local interests, and more likely to be responsive to the demands of various national constituencies.” (quoting ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS (ACIR), REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT AND REFORM 50 (1984)(emphasis in original))).

