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Question from live audience

Jeffrey

You briefly commented tonight about the role of Calvinist thought and the Mayflower Compact in the development of American constitutional notions of federalism, and this is consonant with similar ideas I've heard through theological education (Adam as humanity's federal head in sin, Christ as the federal head of his redeemed).

Q1-Are there any particular texts to which you could refer me that explore this idea?

Ellis Sandoz:

A Government of Laws: Political Theory, Religion and the American Founding (LSU, pb. 1991; 2nd ed., U. Mo. Press, 2001);

Political Sermons of the American Founding Era, 1730 to 1805 (Liberty Press, 1991; 2d ed., 2 vols., 1998).

Republicanism, Religion and the Soul of America; and Vol. 34 of Collected Works, Autobiographical Reflections (rev'd edn),

Glossary of Terms, Cumulative Index, ed. with introductions by Sandoz (both U. Mo. Press, 2006).

Q2-Can it be found with comparable (or greater) validity in any other "representative democracies" in history (e.g., the Roman Republic)?

The Holy Roman Republic has strong religious influence, and a type of "democracies" in the sense that the kings' authority came from God through the people to him. But that is a subject for further discussion.

THE FEDERALIST #47

1. Objection that Constitution violates the principle of Separation of Powers

I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts. One of the principal objections inculcated by the more respectable adversaries to the constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments, ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favour of liberty. The several departments of power are distributed and blended in such a manner, as at once to destroy all symmetry and beauty of form: and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.

2.Improper mixture of powers would be tyranny.

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.

3. Montesquieu and British Constitution, where powers not completely separate

The oracle who is always consulted and cited on this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavour, in the first place, to ascertain his meaning on this point.

The British constitution was to Montesquieu, what Homer has been to the didactic writers on epic poetry.

....

On the slightest view of the British constitution, we must perceive, that the legislative, executive, and judiciary departments, are by no means totally separate and distinct from each other.

4. Montesquieu allows a department to have partial agency in another.

From these facts, by which Montesquieu was guided, it may clearly be inferred, that in saying, “there can be no liberty, where the legislative and executive powers are united in the same person, or body of magistrates;” or, “if the power of judging, be not separated from the legislative and executive powers,” he did not mean that these departments ought to have no partial agency in, or no control over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.

5.No state keeps departments completely separate.

If we look into the constitutions of the several states, we find that, notwithstanding the emphatical, and in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. New Hampshire, whose constitution was the last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments; and has qualified the doctrine by declaring, “that the legislative, executive, and judiciary powers, ought to be kept as separate from, and independent of each other, as the nature of a free government will admit; or as is consistent with that chain of connexion, that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.”

6. The Constitution consistent with Montesquieu and Massachusetts constitution.

The constitution of Massachusetts has observed a sufficient, though less pointed caution, in expressing this fundamental article of liberty. It declares, “that the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them.” This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department.

THE FEDERALIST #48

So is the solution to be found in Checks and Balances?

“Many American patriots became disillusioned with the idea of checks and balances by reading a single, grand polemical tract, Thomas Paine’s *Common Sense*. ... After Paine’s onslaught Americans tended, by and large, to embrace the doctrine of separation of powers rather than the idea of checks and balances.”

Forrest McDonald, *Novus Ordo Seclorum*, at 83-84

But what about “gridlock.”

7. Separation of Powers, in practice, requires some blending of powers.

It was shown in the last paper, that the political apothegm there examined, does not require that the legislative, executive, and judiciary departments, should be wholly unconnected with each other. I shall undertake in the next place to show, that unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.

8. The practical difficulty: preventing one department from invading others.

It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments. It is equally evident, that neither of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next, and most difficult task, is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved.

9. Parchment barriers do not work.

Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defence is indispensably necessary for the more feeble, against the more powerful members of the government. The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.

10. The danger from the legislative branch.

The founders of our republics have so much merit for the wisdom which they have displayed, that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark, that they seem never for a moment to have turned their eyes from the danger to liberty, from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.

11. Different dangers from democracy than in a monarchy.

In a government where numerous and extensive prerogatives are placed in the hands of a hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favourable emergency, to start up in the same quarter.

12. The legislature is the great danger in a republican government.

But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy, and exhaust all their precautions.

13. The reasons the legislative is the most powerful in a republican government.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature; and the judiciary being described by land-marks, still less uncertain, projects of usurpation by either of these departments, would immediately betray and defeat themselves.

14. The power of the purse.

Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all, a prevailing influence over the pecuniary rewards of those who fill the other departments; a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

15. Experience of the states shows parchment barriers are not sufficient

The first example is that of Virginia, a state which, as we have seen, has expressly declared in its constitution, that the three great departments ought not to be intermixed...*But no barrier was provided between these several powers.* The judiciary and executive members were left dependent on the legislative for their subsistence in office, and some of them for their continuance in it.

16. Jefferson on elective despotism.

“All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands, is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it, turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.

17. Pennsylvania passed bills without printing them in advance for consideration by the public.

The other state which I shall take for an example, is Pennsylvania; and the other authority the council of censors which assembled in the years 1783 and 1784....

A great number of laws had been passed violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the constitution against improper acts of the legislature.

18. The conclusion: parchment barriers not a sufficient protection.

The conclusion which I am warranted in drawing from these observations is, that a mere demarkation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

THE FEDERALIST #51

19. Internal rather than external restraints.

To what expedient then shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.

20. Each department must have a will of its own.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which, to a certain extent, is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted, that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies, should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another.

21. Need to deviate from direct source in the people, particularly as to the judiciary.

Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle; first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

22. The executive and judiciary need financial independence from Congress.

It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other, would be merely nominal.

23. To resist other departments, each needs means and motives, namely ambition.

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place.

24. Probably the most-quoted statement from *The Federalist*.

It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. 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. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

25. Conflict and competition among departments: a policy based on prudence.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is, to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual may be a centinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state.

26. In republican government, the legislative branch is the strongest; therefore divide it.

But it is not possible to give to each department an equal power of self-defence. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is, to divide the legislature into different branches; and to render them, by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit. It may even be necessary to guard against dangerous encroachments by still further precautions.

27. The advantages of a qualified veto, linking the interests of the President to the Senate.

As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature, appears, at first view, to be the natural defence with which the executive magistrate should be armed. But perhaps it would be neither altogether safe, nor alone sufficient. On ordinary occasions, it might not be exerted with the requisite firmness; and on extraordinary occasions, it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connexion between this weaker department, and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department?

28. First of two interesting considerations about this federal system.

There are moreover two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view.

First. In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and the usurpations are guarded against, by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.

29. Guarding society not only against government, but also against a majority.

Second. It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one, by creating a will in the community independent of the majority, that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole very improbable, if not impracticable.

30. The choice: an authority independent of society or pluralism.

The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from, and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.

31. Security for civil and religious rights must be the same.

In a free government, the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.

32. Justice through a properly formed federal system.

This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government: since it shows, that in exact proportion as the territory of the union may be formed into more circumscribed confederacies, or states, oppressive combinations of a majority will be facilitated; the best security under the republican form, for the rights of every class of citizens, will be diminished; and consequently, the stability and independence of some member of the government, the only other security, must be proportionally increased. Justice is the end of government. It is the end of civil society. It ever has been, and ever will be, pursued, until it be obtained, or until liberty be lost in the pursuit.

33. Protecting all factions.

In a society, under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature, where the weaker individual is not secured against the violence of the stronger: and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak, as well as themselves: so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.

34. The extended republic will cause coalitions to produce justice

In the extended republic of the United States, and among the great variety of interests, parties, and sects, which it embraces, a coalition of a majority of the whole society could seldom take place upon any other principles, than those of justice and the general good: whilst there being thus less danger to a minor from the will of the major party, there must be less pretext also, to provide for the security of the former, by introducing into the government a will not dependent on the latter: or, in other words, a will independent of the society itself.

35. The large republic is more capable of self government.

It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self-government. And happily for the republican cause, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the federal principle.

AN OUTLINE OF *THE FEDERALIST*

The Purpose of Government: to Protect Liberty (Federalist #1 and 51)

1. The Problem with Republicanism: Liberty produces factions, which then threaten Liberty (Federalist #10)

A. Factions are rooted in the passions inherent in human nature.

B. The Solution: Controlling the effects, not the causes, of factions.

C. The Means to the end of controlling the effects of factions.

1) Dispersing political powers by

a). Multiplying factions in order to prevent one faction from oppressing others, i.e., creating a culture of pluralism in all areas of social and economic life (Fed. #10 and #51);

b). Spreading the population over an extended, commercial, federal republic in order to prevent a single majority. (Fed. #9, #10, #39, and #51).

2). Structuring government to divide, separate and check their powers. (Fed. #9, #47, #48, and #51).

2. The Structure of American Constitutionalism, Federal and State.

A. FEDERALISM: We the People of The United States, acting as Sovereigns in state ratifying conventions, have assigned some of our powers to a new federal government and have left other powers to the people of each state to assign to their governments through state constitutions. The Constitution creates neither a national, nor a federal government; but a “compound republic.” (Fed. # 23 at p.114 and #39).

1) A government must act directly on individuals and not on the state governments. (Fed. #15)

2), The limited number of powers given to the federal government are the means necessary, without limit, to achieve the principal purposes of the Union. (Fed. # 23, #33, and #45).

2. The Structure of American Constitutionalism, Federal and State.

B. SEPARATION OF POWERS:

1). Tyranny necessarily follows if governments fail to separate the legislative, executive, and judicial powers. (Fed. #47).

2) Experience has proven that for the principle of Separation of Powers to function in practice requires more than separation on paper. (Fed. #48).

(a) The three branches are not naturally equal in a republic; the legislative is naturally the strongest.

(b) Bicameralism, with the two branches are organized on different principles, is necessary in order to weaken the Congress. (Fed. #48),

(c) The Executive must be strengthened through its unity, its independence from Congress and its veto power over legislation (Federalist #70, 71, 73, and 74).

(d) The Judiciary must be strengthened through its tenure in office, its independence, and its power to rule on the constitutionality of congressional legislation (Federalist #78 – #84).

3. Constitutional Controls: Factions, Federalism, Separation of Powers, and Rights.

A. Federal and state governments check each other (Fed. #51)

(a) by making the states part of the federal government through representation in the US Senate (Fed. #62, since changed by the 17th Amendment); and

(b) by enforcing the Constitution as the Supreme Law of the Land through the federal courts (Fed. #78), rather than through force (Fed. #27 at pp. 134-35).

B. Courts protect rights by adhering to the Constitution's text; no authority for courts to interpret according to "the spirit" of the Constitution (Fed. #81);

C. Courts are to be controlled by Congress's power to impeach and the ability of the Executive not to enforce court orders. (Fed. #78, p. 402.)