



FREEDOM AND  
FEDERALISM  
MORLEY

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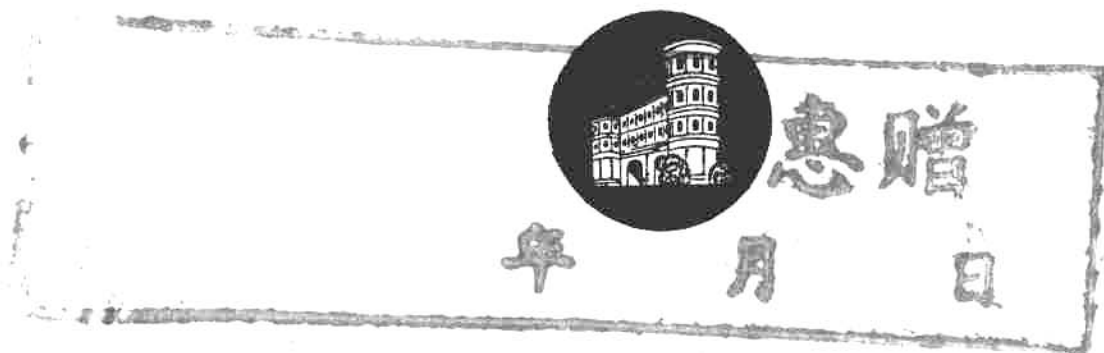
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# Freedom *and* Federalism

BY FELIX MORLEY



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# 1

Freedom  
*and*  
Federalism

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BY FELIX MORLEY

Unemployment Relief in Great Britain (1924)

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Gumption Island (1956)

Freedom and Federalism (1959)

*"The error . . . seems to owe its rise and prevalence chiefly to the confounding of a republic with a democracy. . . . A democracy . . . will be confined to a small spot. A republic may be extended over a large region."*

JAMES MADISON

## *Foreword*

This book is a conscientious attempt to repay a part of the heavy debt I owe, to my country and to the State of which I am a citizen; therefore a personal note of introduction is permissible.

Brought up in the United States as the child of English-born parents, in a border city with deeply divided opinions on the then sharply remembered Civil War, I early developed an appreciation of the great variety of means by which mankind seeks to attain the objective of stable government. This interest in political theory was steadily strengthened by academic study of governmental forms, both past and present, and enlivened by many years of political reporting, locally, from Washington, and from other national capitals.

Gradually I learned that the art of government, in all times and for all sorts of societies, may be reduced to very simple elements. It is at bottom nothing more than the reconciliation of two conditions—one essential for cooperative achievement, the other necessary for individual fulfillment. The social condition is Order, without which men cannot work together effectively. The more personal condition is Freedom, without which some men cannot work either happily or at their best.

I further came to realize that the outstanding

virtue of federalism, which is the distinctively American contribution to political art, is its facility in combining these naturally antagonistic conditions. Since the reconciliation of freedom and order is anything but easy a federal system requires both complicated governmental machinery and a high degree of interest and understanding among its citizens. These factors make federalism a distinctly experimental system, especially vulnerable in periods of upheaval.

The survival of federalism in the United States was first seriously called in question not by the Civil War, in which both sides favored the system, but during the period immediately following the fall of the Confederacy. No serious consideration of whether it is likely to continue or disappear in this country is therefore possible without examination of historical background. The approaching centennial of the outbreak of the War Between the States would therefore itself be an appropriate time to consider the probable longevity of this Republic, as conceived by its founders. And such a study is made more timely, if not imperative, by man's sudden achievement of mastery both over the atom and over the force of gravity—though not, unfortunately, over his own passion and prejudice.

These scientific achievements have overnight revolutionized military problems and procedures. What is not so obvious, though certain to be profound, is their effect on the political arrangements of mankind. The purpose of this book is to consider that issue, with particular reference to the impact on individual liberty as centralized government takes more and more authority into its hands.

There is a *prima facie* case for thinking that our federal system, having at least survived the enormous changes since its establishment in 1787, will continue to serve for a future now unusually unpredictable. If so, it could be that federalism, under American leadership, will be the device whereby men everywhere will bring their political institutions in line with the urgent necessity of peaceful co-existence on a compact and shrunken planet. Indications to that effect will be examined in the following pages.

At least equally possible is the alternative that federal theory will be discarded, even without war, by the voluntary actions of Americans themselves, in favor of that highly centralized, managerial form of government which to many now seems demanded by the complexities of modern civilization. Somewhat paradoxically it is argued that dictatorship, the simplest form of government, is best suited for highly diversified societies, although it does seem psychologically desirable to call such dictatorship "democracy." Indications that the era of the American Republic is in this manner drawing to its close are also closely considered here.

This judicial method of examination obviously requires a critical, even iconoclastic, attitude towards political dogma of every kind, our own especially. But it may be that such close analysis, though liable to arouse emotional resentments, will by its very objectivity help to disclose the advantages of the political system under which so many Americans have so long had the opportunity to live full and fruitful lives.

In preliminary form, much of what follows has

been presented to political science discussion groups at Buck Hill Falls, Pa.; Princeton, N. J.; Chapel Hill, N. C., and Claremont, Calif. Portions of a few chapters have also been printed in *Modern Age*, *Nation's Business*, and *Barron's Weekly*, to the editors of which thanks are due for permission to reprint. Mr. Walter Leckrone, editor of the Indianapolis *Times*, has graciously permitted me to excerpt an article of his therefrom.

Unquestionably the content of this book has been greatly improved by the forthright criticism it has received during its slow development. Gratitude for this is owing to so many that only a blanket acknowledgment is possible. I must, however, express something of my debt to Edith Hamilton, and to Roscoe Pound. Both have read the manuscript critically and carefully, making many helpful comments. With characteristic generosity the former Dean of the Harvard Law School has labored to save me from false steps when I have ventured in the intricate field of jurisprudence. Where conclusions remain open to reasonable criticism at any point, responsibility is mine alone.

FELIX MORLEY

*Gibson Island, Md.*

*July 4, 1959*

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## ONE

### *Our Federal Republic*

The United States of America was not the first, but has unquestionably been the most successful, attempt to reconcile the presumable desideratum of general freedom with the necessity of social discipline.

Even if this unusually experimental form of government is doomed to eventual failure, the record of its tangible accomplishment will have proved unprecedented. During its lifetime, now approaching two centuries, the political system of this representative Republic has done more for its people as a whole than any other ever devised. The reason lies in a simple paradox. By the adoption of arrangements strongly negative towards the power of government, the Republic has so far permitted and encouraged its citizens to act affirmatively in their own interests. Many Americans do not realize that when first attempted this political plan was extraordinary, indeed revolutionary in the full sense of the word.

The United States, as the name implies, are a union of sovereign States, federal in nature. Certain characteristics, herewith enumerated, are common to all federations. First and foremost, federalism involves dispersion of political power. There will, of course, be some delegation of overriding authority

to the general or central government. This requires the establishment of a national capital, the presence of which itself distinguishes a federation from a mere league or alliance of independent sovereignties. The seating of the central government is the material reflection of the process of federation, whereby the component parts—while reserving certain powers to themselves—have permanently surrendered some prerogatives of sovereignty to a common national pool.

This division of sovereignty between the central government and the constituent states must be defined. In consequence, a constitution is prerequisite to any federation, and it is in practice necessary that this should be a written contract so that both the state and central governments may have reasonably precise understanding of their respective functions and authority. Even when this division of governmental authority is meticulously set forth there will be disputes as to the allocation, especially if economic or social development seems to require uniform national regulation. This certainty of changing circumstance gives rise to two other essential features of a federation. The written constitution must, as a practical matter, be subject to amendment by some prescribed process. And there must be a supreme court, empowered to decide just where the division of sovereignty lies in any contested case, at any particular time.

Flexibility is an outstanding asset of the federal form of government. By the device of keeping certain governmental powers under strictly local control, people with great diversities may be encouraged to unite under one flag. Thus the Swiss Confedera-

tion has successfully joined together German-speaking, French-speaking and Italian-speaking cantons. In Canada federation has united communities which are distinctively English and French in their linguistic, religious and cultural backgrounds. The German Empire, from 1871 to 1918, was a federation of monarchies. A mixed federation, of both republics and monarchies, could now conceivably be developed by those Western European nations which have subscribed to both the Common Market and Euratom treaties. Of the six states attempting to pool their sovereignty in these respects, two (Belgium and Holland) are kingdoms, one (Luxembourg) is a grand duchy, three (France, Italy and Western Germany) are republics, and one of these (Western Germany) is itself federal in form.

Another interesting, though unacceptable, illustration is the Union of Soviet Socialist Republics. This is nominally a federal union and indeed was able on that assumption to obtain separate membership for two of its constituent units (Byelorussia and Ukraine) in the United Nations. All Soviet republics, however, are subjected to a centralized, socialistic regimentation which in practice confines their autonomy to cultural matters and makes the claim to federal form extremely shadowy. Moreover, the first article of the Constitution of the U. S. S. R. defines this union as "a socialist state." Socialism and federalism are necessarily political opposites, because the former demands that centralized concentration of power which the latter by definition denies.<sup>1</sup>

The federal form of government has certain obvious deficiencies. The preservation of a multiplicity

of relatively powerful local governments, within the union, creates a complicated and legalistic system. It makes the conduct of foreign policy, necessarily entrusted to the central government, unusually difficult for a true federation, since actions taken in regard to other sovereign powers are always likely to react on the domestic balance. In times of unusual strain, whether foreign or domestic, the central government is likely either to evade its constitutional limitations, or be frustrated by them. There is no question that a unitary state—where all significant governmental power is centered in the national capital—is in a better position to act promptly and decisively than is a federation. This explains the tendency of federations to alter their character, in the direction of strongly centralized government, during periods of stress. Once underway, that centralizing process is difficult to reverse, largely because of the vested interest in power which every governmental agency quickly establishes for itself unless continuously checked by those who pay for its support.

The great overriding advantage of the federal system is that it operates to avert the dangers inherent in government by remote control. The essence of federalism is reservation of control over local affairs to the localities themselves, the argument for which becomes stronger if the federation embraces a large area, with strong climatic or cultural differences among the various states therein. One justifying assumption for such a loose-knit system is that citizens as a body are both interested in, and for the most part competent to handle, local problems. When that assumption is valid there is little doubt that federal-

ism, despite its disadvantages, serves admirably to foster freedom without the sacrifice of order.

What has been said applies to federations in general. That of the United States has certain special characteristics which make it the most interesting, as well as the most complicated, illustration of this type of political union. As De Tocqueville wrote: "In examining the Constitution of the United States, which is the most perfect federal constitution that ever existed, one is startled at the variety of information and the amount of discernment that it presupposes in the people whom it is meant to govern." And he further predicted that if this discernment should languish, as it certainly is languishing today, Americans would eventually "fall beneath the yoke of a centralized administration."<sup>2</sup>

The outstanding feature of the American form of federalism is that it carries the doctrine of the separation of powers a great deal farther than is required by the mere structure of federalism—a great deal farther than Canada, for instance, has attempted. In addition to the allocation as between Washington and each of the State capitals, such as Albany, Little Rock or Sacramento, there is a further specified division of power among the three branches of government within each of these capitals.

Both the Constitution of the Federal Union, and those of each of the 50 States that now together compose it, separate the legislative, executive and judicial powers, and balance the one against the others. This has been a uniform interpretation of that rather vague clause in the Federal Constitution which says (Art. 4, Sect. 4): "The United States shall guarantee to every State in this Union a Repub-

lican Form of Government." Republican, as contrasted with monarchical or democratic, meant to the founding fathers the division, as opposed to the concentration, of governmental power.<sup>3</sup> The Republic, while launched in revolt against the personal tyranny of a king, was most carefully designed to prevent any recurrence of monopolistic power, not merely by its federal form but also by establishing check and balance within the machinery of federalism.

The theory of check and balance, as superimposed on our federal structure, was derived from the writings of the French philosopher Montesquieu and has no relation whatever to the English political tradition. From the latter has evolved the wholly different, though widely adopted, system known as responsible parliamentary government. The Prime Minister, who is the leader of the party that controls the legislature, holds his executive office as long, but only as long, as he retains majority support in the House of Commons. By gradual steps, over a long period of political evolution, he has been made wholly responsible to this majority. If defeated in a "vote of confidence" this Premier must resign and is succeeded by the leader of the Opposition. In the United States there is no such device as a vote of confidence, neither in the national nor in any of the State legislatures. While President and Governors are customarily party leaders they hold office for fixed terms, during which they cannot be ousted, except by death, disability or successful impeachment.

This executive independence is but one of the extraordinary features of the American form of gov-