The Failure of Dual Sovereignty

The British Empire and the United States

Kevin Carson

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SUMMARY:

In the dominant school of American constitutional history, the issues of the Revolution are usually described along these lines:

1. *The traditional Whig idea of sovereignty described it as the supreme, uncontrollable power of legislation in a state. Sovereignty was indivisable; should there be two independent legislatures in a single state, per impossibile the result would be a solecism in theory as in practice, an imperium in imperio.*

2. *The British empire, however, presented a novel form of federal state to which the traditional Whig notions of sovereignty were irrelevant. To apply the doctrine of indivisible sovereignty to the constitution of the empire was akin to putting new wine in old bottles.*

2. *What was needed instead was a new theory of divided sovereignty, in which power was divided between Parliament and the colonial legislatures, each supreme and independent within its own sphere of activity. From the 1760s on, colonial pamphleteers, most notably Dickinson and Dulany, atempted to formulate such a theory and to make a clear line of demarcation between the powers of Parliament and the other legislatures.*

4. *In the face of reality, however, the advocates of absolute Parliamentary sovereignty continued to insist on their fossilized ideology. Either Parliament was the supreme and unlimited sovereign legislature of the empire, they argued, or the colonies were entirely independent of its authority. No middle ground was logically defensible.*

5. *In the face of this polemical onslaught, the Americans increasingly accepted the alternatives as defined by Parliament's advocates, and from about 1770 onward, they denied Parliamentary authority over the colonies altogether. Their model of the empire was a collection of mutually independent realms, each with its own supreme legislature, united only by a common crown.*

6. *Thus, Parliament's rigid insistence on an outmoded doctrine of sovereignty escalated the conflict, and forced a mutual hardening of positions, until any realistic compromise was unacceptable to both sides. The old Empire collapsed as a result of the dogmatic refusal of the*

contending parties to divide sovereignty between the component parts of a federal state. Although the voices of reason became increasingly irrelevant to the struggle with Great Britain, they were vindicated by, and in some way served as a precedent for, the later system of dual sovereignty under the U.S. Constitution.

This, put as briefly as the nature of the subject allows, is the dominant constitutional view of the Revolution. Besides this basic outline portrayal of the facts, the adherents of this view carry some weighty emotional bagage in which, to borrow Richard Weaver's expression, the god-terms are pragmatism and realism, and the devil-terms are legalism, pedantry, and logic.

The central purpose of this article is to demonstrate, in the face of the dominant view: 1) that the traditional notion of indivisible sovereignty is valid; 2) that the attempts by Dickinson and others to divide sovereignty were not only logically untenable, but as a result were failures in practice; 3) that British polemicists were quite correct in denying any viable middle ground between the supremacy of Parliament and the independence of the colonies; 4) that the independence of the colonies as sovereign realms was quite consistent with the practical operation of the empire; and 5) that Dickinson's doctrine of divided sovereignty, far from serving as a prototype of the present federal system, was equally inadequate to explain either the federal organization of the Constitution or that of the Empire.

I will also attempt, in passing, to restore the honor of logic by demonstrating, against the spirit of the age, that things logically self-contradictory are also failures in the "real world," and to uphold "legalism" in the sense of a normative standard of legality, as opposed to a codification of the de facto balance of power.

To accomplish this, I will take Andrew C. McLaughlin's article "The Background of American Federalism"[1] as a representative specimen of the dominant school, and analyze his claims in the light of history.

Professor McLaughlin was an authority who is still respected and influential among constitutional historians, and well placed in the main current of scholarship. He had the distinction of being a writer on constitutional history who seems inpatient with even the most basic constitutional arguments. He was unwilling to obey the first rule of intellectual history: to follow a writer's arguments, step by step, from his premises, and to examine them in the light of logic and of evidence. He made no attempt to refute constitutional arguments which were based on the Whig theory of sovereignty; he simply paraphrased them, characterized them as "pedantic" or "legalistic," and then dismissed them with contempt. The only refutation he found necessary was the *fait accompli* of history; but whether the facts of history refute the traditional doctrine of indivisible sovereignty, or, as this article contends, bear them out, depends on a serious consideration of the legal arguments–and such consideration was beneath Professor McLaughlin's dignity.

McLaughlin was not coy about his sentiments. "*Any amount of argument over the theoretical right to exercise sovereignty in the empire does not get one very far. There is no great practical value in trying to determine whether the colonies by the principles of English law were subject to taxation by Parliament.*"[2] McLaughlin was actually *astonished* that a political conflict was fought over

[1] *American Political Science Review* 12 (1918): 215–240.

[2] Ibid. 220.

abstract rights: "*...to an amazing extent the conflict was over the existence or nonexistence of an abstract right.*"[3]

In his analysis of the revolutionary period, McLaughlin saw two opposing currents of thought. The first, which he characterized as a "*groping after the idea of classification of powers,*"[4] was clearly on the side of the angels. Among the representatives of this tendency were Samuel Delany and John Dickinson, two of the most notable proponents of divided sovereignty in the middle and late 1760s. The second, more atavistic current consisted of an "*emphatic declaration that to deny to a government the right to make any particular law or any special kind of laws is to deny all power and authority–government must have full sovereign powers or none.*"[5] This latter doctrine was the traditional Whig view of sovereignty, consistently argued by Parliament's apologists, and after 1768 or so, increasingly adopted by writers for the American cause.

James Otis was notable as an early objector to Parliamentary taxation of the colonies.[6] He objected, however, on grounds of natural justice rather than of positive law, and in no way attempted to limit Parliament's sovereign power. He relied on the wisdom and good will of Parliament alone to nullify the Stamp Act. Therefore, Otis cannot properly be cited as an attempt to distribute sovereign power within the empire.

After Otis, colonial writers sought in earnest for some system of classifying legislative powers, with a view to those proper to Great Britain and to the colonies respectively. Among the earliest such attempts were those of Richard Bland in Virginia, and Governor Stephen Hopkins in Rhode Island.[7]

The first disctinction to attract serious attention from Parliament was that of Benjamin Franklin, between internal and external taxation. Franklin, who represented Pennsylvania (and some other colonies on the side) in London, appeared in the House of Commons in February 1766 to enlighten the knights and burgesses on the colonial view of the Stamp Act. Franklin represented the colonists' ire as directed at internal taxation.[8] The colonists, he said, had always allowed Parliament's legislative authority in all matters save internal taxation.[9] McLaughlin considered Franklin's distinction between internal and external taxation to be an unfortunate one (and indeed it was–the Townsend duties were enacted with explicit reference to Franklin's acceptance of external taxation); but he nevertheless honored Franklin with the highest terms of encomium in his vocabulary, referring to the "*opportunistic and nonlegalistic*" nature of this statesmenship.[10]

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[3] Ibid. 230.

[4] Ibid. 222.

[5] Ibid. 222–23.

[6] *The Rights of the British Colonies Asserted and Proved* (Boston: Edes and Gill, 1764), in Bernard Bailyn, ed., *Pamphlets of the American Revolution* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1965-) Volume 1 (1750–1765): 419–82.

[7] Richard Bland, *The Colonel Dismounted: Or tthe Rector Vindicated* (Williamsburg: Joseph Royle, 1764) in *Pamphlets* 1: 502–22.

[8] "The Examination of Doctor Benjamin Franklin &c, in the British House of Commons, Relative to the Repeal of the American Stamp Act, in 1766," in *the Writings of Benjamin Franklin*, Albert Henry Smyth, ed. 10 vols. (New York: MacMillan, 1905–07) 4: 421–22.

[9] Ibid. 4: 419.

[10] McLaughlin 224.

For Samuel Delany and John Dickinson,[11] however, McLaughlin's admiration was virtually unqualified. Their attempt to classify legislative powers inot categories and divide them between Parliament and the colonies, he argued, was much more tenable in practice than Franklin's, and lacked the defects of the latter's scheme which provoked the Townsend program. Dulany, who wrote before the Townsend duties were enacted, made a heroic attempt to demonstrate that sovereign power could be divided among the component parts of the empire, without impairing the superintending authority of Parliament in matters relating to the unity of the empire. The "*supreme authority*" of Parliament "*may justly be exercised to secure or preserve their* [the colonies'] *dependence*," he wrote. But that supremacy did not give her absolute disposal of the colonists' property. Colonial subordination did not imply their "*absolute vassalage and slavery.*" Although Parliament was the supreme legislature of the empire, sovereign power admitted of degrees. "*In what the superior may rightfully control or compel, and in what the inferior ought to be at liberty to act without control or compulsion, depends on the nature of the dependence and the degree of subordination.*"[12] The specific line Dulany attempted between the powers of Parliament and the colonies was a problematic one. Parliament had no right to tax the King's American subjects without their consent; yet it had "*a right to regulate their trade without their consent,*" which regulation might include "[t]*he imposition of a duty...*" Dulany denied Parliament the right of taxation *per se*, including external taxation, but admitted the right to levy trade duties if their primary purpose was regulation rather than revenue.[13]

To describe McLaughlin as sympathetic to Dulany's view would be an understatement. "*He thus clearly points to the possibility of an empire managed in the large by a central authority but in which the outlying parts are possessed of indefeasible authority on subjects belonging of right to them, subjects which do not contravene the general superintending power lodged in the central authority.*" He described Dulany's pamphlet as "*a statesmanlike production,* [which] *contained at least the foundations for a conception of federalism.*"[14]

John Dickinson's classification of powers was similar to that of Dulany; and unlike the latter, he wrote in direct response to the difficulties raised by the Townsend duties. Parliament was the supreme legislature of the empire. "*We are but parts of a whole; and therefore there must exist a power somewhere, to preside and to preserve the connection in due order. This power is lodged in the parliament; and we are as much dependent on Great Britain, as a perfectly free people can be on another.*"[15] This power of Parliament extended to every form of regulation needed to keep the empire functioning smoothly, and the parts in proper subordination to the whole. This authority went as far as trade duties intended for regulatory purposes. Like Dulany, he drew the line at taxation. Taxation, for Dickinson's purposes, included trade duties aimed at raising revenues.[16]

If McLaughlin was enthusiastic in his praise of Dulany, his reaction to Dickinson approached ecstasy:

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[11] Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies for the Purpose of Raising Revenue by Act of Parliament* (Annapolis, 1765), in *Pamphlets* 1: 610–58.; John Dickinson, *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies* (Philadelphia, 1768), in Forrest McDonald, ed., *Empire and Nation* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1962).

[12] Dulany in *Pamphlets* 1: 619.

[13] Ibid. 1: 638.

[14] McLaughlin 223–24.

[15] Dickinson 7.

[16] Ibid. 21, 23.

> *The thinking of Dickinson was plain, straightforward, and able... Dickinson spoke as an imperialist, as one who saw and felt the empire; he is hardly less emphatic in his declaration concerning the imperial power of Parliament and the existence of a real whole of which the colonies are parts, than in defending the indefeasible share of empire which the colonies possessed... He saw an empire, composite and not simple or centralized, with a Parliament possessed of indubitable power to maintain the whole and chiefly to look after the interests of the whole by the regulation of trade.*[17]

Dickinson's attempt to divide sovereignty led to insurmountable problems. The advocates of Parliamentary supremacy lost no time in exploiting the difficulties of his argument. Assuming that sovereign power was apportioned to the various "subordinate" parts of the empire, who was to decide which matters were "internal" and which were "external"? In case of a conflict of jurisdictions, there had to be some judge of last resort. If the colonies could determine for themselves the line between their power and that of Parliament, they were independent; if Parliament were the judge, her sovereignty was absolute. The propagandists of British power presented these as the only two alternatives: the total sovereignty of Parliament, or the total independence of the colonies. There was no viable middle road between the two. William Knox was the most able of these writers in the '60s. Sovereignty was indivisible. Every attempt by the colonists to set bounds to Parliament's sovereignty, he pointed out, led to some practical difficulty, followed by a shift of ground by the American writers. When their denial only of internal taxation failed, they proceeded to distinguish between external taxation for the purpose of revenue and external taxation for purely regulatory purposes.[18] Neither distinction had any basis in logic. More specifically, the distinction between duties for revenue and those for regulation would not work in practice.[19]

And, Knox argued, if Parliament's legislative authority were not supreme in any one instance, it was supreme in none.

> *...if the authority of the legislative be not in one instance equally supreme over the Colonies as it is over the people of England, then are not the Colonies of the seme community with the people of England. All distinctions destroy this union; and if it can be shewn in any particular to be dissolved, it must be in all instances whatever. There is no alternative; either the Colonies are a part of the community of Great-Britain, or they are in a state of nature with respect to her, and in no case can be subject to the jurisdiction of that legislative power which represents her community, which is the British parliament.*
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> *However faint any line of partition may be attempted to be drawn between the people in England and the people in the Colonies, it is not to be endured, if we would preserve the union between them as one community, and the supremacy of parliament over all as the representative of that community.*[20]

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[17] McLaughlin 224–225.

[18] *The Controversy Between Great Britain and Her Colonies Reviewed* (Boston: Mein and Fleeming, 1796), No. 11305 in Clifford K. Shipton, ed., Early American Imprints 1639–1780 (Worcester, Mass.: American Antiquarian Society) 15.

[19] Ibid. 16–19.

[20] Ibid. 21–22.

McLaughlin nowhere attempted to refute these arguments. For him it was enough to deride them as "legalistic" Knox's difficulties with Dickinson's division of power were mere logic-chopping, irrelevant to the real world. McLaughlin failed to consider that the opposite of logic is not practice, but *illogic*–and illogic in theory has repurcussoins in the world of action. The difficulties *in practice* of Dickinson's distinction between duties for regulation and duties for revenue are a case in point. McLaughlin held Knox in contempt for rejecting, as he wrote with scathing sarcasm, "*the folly of distinguishing between taxation and the regulation of commerce.*" Knox held up the practical difficulties with this distinction as a prime example of the impossibility of dividing sovereignty. "*Nothing*," McLaughli sneered, "*could more fully discredit legalism when dealing with a practical problem of statesmanship.*"[21] McLaughlin considered it remarkable, not that Dickinson would distinguish between taxation and regulation, but "*that men at all experienced with actual practices of the empire and familiar with mercantilistic doctrine should not readily have accepted it.*"[22]

This is a key example of McLaughlin's failure to see the very real practical difficulties of the various attempts to set bounds to Parliament's authority, and the centrality of the concept of sovereignty to resolving them. In fact, what Knox objected to was not the distinction between regulation and taxation. The difficulty, rather, lay in distinguishing which *trade duties* were primarily for one purpose or the other. It is hard to imagine a questtion more subjective than the purpose of a trade duty. Given a task so subjective as assigning the duties to one category or another, the question of who was to judge was hardly academic.

Dickinson himself anticipated objections along these lines, but failed to answer them adequately. We referred to the alleged difficulty "*for any persons, but the makers of the laws, to determine, which of them are made for the regulating of trade, and which for raising a revenue...*" This, he wrote, was not an issue, because Parliament in the Townsend duties expressly named the intention of raising revenue. And had Parliament attempted to conceal this design, it would not be so great a difficulty as the hypothetical objector imagines. It was true that Parliament might pass off a tax for revenue as a trade regulation. "*But names will not change the nature of things. Indeed, we ought firmly to believe... that UNLESS THE MOST WATCHFUL ATTENTION BE EXERTED, A NEW SERVITUDE MAY BE SLIPPED UPON US, UNDER THE SANCTION OF USUAL AND RESPECTABLE TERMS...*" Apparently unaware that these arguments might be seen as weakening his own case, Dickinson proceeded to give examples from history of attempts to establish tyranny through legislation attributed to other motives. Therefore, a free people should be vigilant in resisting any embryonic attempt to alter the form of the new constitution.[23] And how did all this apply to the question of trade duties? "*The nature of any impositions laid by parliament on these colonies, must determine the design in laying them.*"[24]

So we are left at our starting place: who was to *judge* of the nature of the impositions? It would hardly conduce to imperial unity for every dominion to judge for itself whether a trade duty was legitimacy for regulatory purposes. Neither the colonies nor Parliament was altogether trustworthy in judging a matter so close to their own interests. And the difficulties were hardly limited to trade duties. Every line the colonies tried to draw could potentially be used against them, as they were coming to learn by experience. If Parliament could legislate to preserve

[21] McLaughlin 228.
[22] Ibid. 226.
[23] Dickinson, *Letters from a Farmer in Pennsylvania* 34–36.
[24] Ibid. 37.

unity, what objective *legal* rule could one formulate to preclude the Quartering Act, or Governor Colden's suspension of the New York assembly?

It was on these *practical* issues that Knox based his argument for the indivisibility of sovereignty; and, as we shall see, it was a *recognition* of these practical difficulties that led the colonists increasingly to accept Knox's alternatives of all or none. In denouncing this as "legalism," McLaughlin resembles a man who disdains the "legalism" of arithmetic as a hindrance to the "practical" matter of balancing one's checkbook. Blackstone's famous dictum on divided sovereignty is redundant. A solecism in "theory" usually *is* a solecism in practice.

McLaughlin blamed the British insistence on Knox's reasoning for the growing impasse with the colonies. This legalistic pettifoggery prevented cooler heads on both sides from reaching a realistic compromise. In "*this discusstion after 1768,*" the English propagandists "*were victims of certain dogmas of political science, curiously similar to the doctirne of indivisible sovereignty.*"[25] They lacked the understanding of the real empire so necessary to save it: "*Men that could not comprehend federalism, who denied the possibility of its existence, were capable of dealing with a crisis of an imperial system in which federalism already existed.*"[26] McLaughlin repeatedly praised Burke, who stood alone among the Parliamentary ideologues, for his realism (a clear sign, when taken with his scorn for theory and "legalism," that we are dealing with an unreconstructed historicist). "*Beyond Burke's speeches little needs to be cited to show the essentially legalistic character of the whole discussion.*"[27] "*...Burke, rejecting legalism, still displayed statesmanship of the highest order...*"[28] As a prophet, Burke stood out as another Samuel in warning Parlliament of the disasters its legalism would bring upon it, if they "*sophisticate and poison the very source of government by urging subtle deductions and consequences odious to those you govern for the unlimited and illimitable nature of sovereignty...*"[29]

McLaughlin did not reserve his criticisms for the British. He blamed the colonies equally for their failure to grasp the nature of federalism. He attributed "*considerable justice*" to the claim that the coloniest also were "*incapable... of understanding the nature of a composite empire.*" He cited Franklin's remarks in the aftermath of the Albany Plan's failure: "*Everybody cries, a Union is absolutely necessary, but when they come to the Manner and Form of the Union, their weak noddles are perfectly distracted.*"[30] In a footnote, McLaughlin described Franklin as "*at a loss,*" after reading Dickinson's *Farmer's Letters*; as evidence he quoted his letter to William Franklin:

> *I know not what the Boston people mean by the 'subordination' they acknowledge in their Assembly to Parliament, while they deny its powers to make laws for them, nor what bounds the Farmer sets to the power he acknowledges in Parliament to 'regulate the trade of the colonies' it being difficult to draw lines between duties for regulation and those for revenue; and if the Parliament is to be the judge, it seems to me that establishing such principles of distinction will amount to little.*[31]

[25] McLaughlin 231.
[26] Ibid. 221.
[27] Ibid. 231.
[28] Ibid. 221n.
[29] Ibid. 231n.
[30] Ibid. 221.
[31] Ibid. 221n.

It was certainly misleading for McLaughlin to use this quote as evidence of befuddlement on Franklin's part with the complexities of Dickinson's argument. Franklin was far from being "at a loss" in understanding the issues.

Indeed, Franklin is an excellent case study in the colonists' progressive acceptance of Knox's doctine of indivisible sovereignty. By March of 1768, the date of the letter cited above by McLaughlin, Franklin was hardly "at a loss" to formulate his own solution to the issues raised by Dickinson and Knox. His letter itself makes this clear, if we continue it beyond the point where McLaughlin left off quoting:

> *The more I have thought and read on the subject, the more I find myself confirmed in opinion, that no middle doctrine can be well maintained, I mean not clearly with intelligible arguments. Something might be made of either of the extremes; that Parliament has a power to make all laws for us, or that it has a power to make no laws for us, and I think the arguments for the latter more numerous and weighty, than those for the former. Supposing that doctrine established, the colonies would then be so many separate states, only subject to the same king, as England and Scotland were before the union.*[32]

Franklin was befuddled only because a historian's selective quotation deprived him of the power of coherent speech. As Reagan would say, "where's the rest of me?"

If it was not so already, Franklin's "*ignorance*" of where to draw the line was rapidly becoming a Socratic pose. By 1770, he explicitly affirmed the "supposition" of the last sentence quoted. The colonies *were* in fact "*...so many separate states...*" In his letter of June 8, 1770 to Samuel Cooper, he wrote:

> *That the colonies were constituted distinct States, and intended to be constituted such, is clear to me from a thorough consideration of their original Charters, and the whole Conduct of the Crown and Nation towards them until the Restoration. Since that Period, the Parliament here has usurped an Authority of making laws for them, which before it had not. We have for some time submitted to that usurpation, partly through Ignorance and Inattention, and partly from our Weakness and Inability to contend: I hope, when our Rights are better understood here, we shall, by prudent and proper Conduct, be able to obtain from the Equity of this Nation a Restoration of them. And in the mean time, I could wish, that such Expressions as the Supreme Authority of Parliament, the Subordinacy of our Assemblies to the Parliament, and the like, ...were no more seen in our publick Pieces. They are too strong for Compliment, and to confirm a Claim of Subjects in one Part of the King's Dominions to be Sovereign over their Fellow Subjects in another Part of his Dominions, when in truth they have no such Right, ...the several States having equal Rights and Liberties, and being only connected, as England and Scotland were before the Union, by having one common Sovereign, the King.*[33]

McLaughlin attributed the position of Franklin and those of like mind to little more, it would seem, than thoughtlessness, or even a mere fit of pique:

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[32] *Works* 5: 260.

[33] Ibid. 5: 260.

> *Even before 1770, many American opponents of parliamentary taxation had been hurried along to the position in which they denied that Parliament possessed any power over them. It would appear, however, that the more sober-minded did not as yet openly go so far; it was easy for the thoughtless to resent Bristish assertions of authority by the simple denial of all authority.*[34]

If any one passage can illustrate the gulf that separates McLaughlin from those who argue from any principle besides *Realpolitik*, this is it. The arguments of Wilson, Jefferson, and Adams from 1770 on may be described in many ways, but "thoughtless" is not one of them.

While we are on the subject of thoughtlessness, we may as well mention in passing McLaughlin's criticism of both sides' arguments for their "*insularity.*" They were "*based on the constitution of the island and not that of the empire.*"[35] Instead of referring to the "*unwritten constitution of the empire,*"[36] and the real existing arrangement of power, they chose "*to take refuge in insular (i.e., English) law...*"[37] By framing the alternatives thus, McLaughlin eliminated from consideration the whole body of legal precedents–the learned opinions of English jurists on the status of Ireland in relation to Parliament, the nature of England's ties to Scotland before the union (most notably Coke's opinion in *Calvin's Case*), and the issue of the Channel Islands–which had evolved to cope with the problems raised by new dominions outside the English realm. He specifically referred to Adams' monumental work on this subject, *Novanglus*, as "*pedantic.*" If anyone can be justly accused of a "thoughtless" reaction, it is McLaughlin.

From this point on, therefore, we must leave McLaughlin behind. He was willing to quote Knox and Franklin as foils to the arguments of Dickinson; but after the colonists' final apostasy from the pure doctine of Dickinson and Dulany, McLaughlin had little to say of them, even in derision. He was content to await the "reformation" of Messrs. Justices Marshall and Story, who resurrected the notion of dual sovereignty and set all things right. From 1770 on, we will consider the constitutional arguments of those who held the colonies to be separate realms; and we will see how those arguments, despite McLaughlin's sneers, evolved in response to *practical* issues in the *real world*; but McLaughlin stands aloof from the debate henceforth.

Franklin's final position seemed to solve (as Alexander "solved" the Gordian knot) the problem of dividing power between Parliament and the colonies; this solution, however, raised a new problem. His reference to "*distinct states*" with "*one common sovereign*" seemed to imply a single imperial Crown, with the colonies owing allegiance to the King of Great Britain in his political capacity. But since the British Crown was a component of the supreme legislative authority of Great Britain, it followed that an allegiance to the Crown on the part of the colonies required obedience to Parliament. After all, England and Scotland before the Union (which Franklin held up as a model) did *not* share a common crown; their two crowns were merely held by the same natural person–a fact reflected in the Stuart practice of numbering their reigns separately in the two kingdoms (e.g. James I of England and VI of Scotland).

The British did not hesitate to seize on this difficulty. The new issue first came out in Governor Hutchinson's debates with the Massachusetts General Assembly in 1773. The debates got off to a slow start, however. In opening the debate, His Excellency rehashed the old argument of Knox:

[34] McLaughlin 229.
[35] Ibid. 220.
[36] Ibid. 220.
[37] Ibid. 227.

there was no tenable line between the total supremacy of Parliament and the total independence of the colonies; "*for although there may be one Head, the King, yet the two Legislative Bodies will make two Governments as distinct as the Kingdoms of England and Scotland before the Union.*"[38] The timid Council failed to seize this gauntlet and to affirm Franklin's doctrine. Rather, they lamely repeated Dickinson' s arguments for divisible sovereignty.[39] From this point on, Hutchinson treated the Council's arguments with the contempt they deserved, and concentrated his real effort on the House of Representatives. It was in that House, where Samuel Adams articulated doctrines fed to him by his cousin John, that the cutting edge of colonial constitutional argument was formulated.

The House, in response to the Governor's challenge, openly espoused Franklin's mature doctrine. The colonies were "*settled as Foreign Territory, not annexed to the Realm of England and therefore at the absolute Disposal of the Crown.*"[40] The colonial Charters of that time demonstrated that this was the contemporary understanding of the Crown's prerogatives. The Charters created the colonies as "*free and distinct States.*"[41] Any Parliamentary authority over the Colonies, in such circumstances, "*would necessarily induce that Solecism in Politics Imperium in Imperio.*"[42] And if the colonies were not annexed to the realm by these charters, "*they could never be afterwards, without their own special Consent…*"[43] Finally, they gladly admitted the Governor's assertion that two legislatures implied two distinct states: "*Very true, may it please your Excellency; and if they interfere not with each other, what hinders but that being united in one Head and common Sovereign, they may live happily in that connection, and mutually support and protect each other.*"[44]

So far the debate had reached only the mark set by Dr. Franklin. But Hutchinson deftly exposed the logical difficulties in an empire of distinct states all united by a single Crown. He began by denying any prerogative of the Kings of England, as such, "*to alienate such Territories from the Crown, or to constitute a Number of new Governments altogether independent of the Sovereign Legislative Authority of the English Empire…*"[45] The colonial charters were granted on the authority, "*not of the King but of the Crown of England, that being a Dominion of the Crown of England, we are consequently subject to the Supreme Authority of England…*"[46]

It was in response to this challenge that the Americans formulated the final state of their constitutional argument. The House of Representatives denied any allegiance to the Crown of England *as such*:

> *We apprehend with Submission, your Excellency is Mistaken in supposing that our Allegiance is due to the Crown of England. Every man swears Allegiance for himself to his own King in his Natural Person. "Every Subject is presumed by law to be Sworn to*

[38] Speech of Governor Hutchinson to Both Houses of the Massachusetts General Court, January 6, 1773, in *The Briefs of the American Revolution: Constitutional Arguments Between Thomas Hutchinson, Governor of Massachusetts Bay, and James Bowdoin for the Council and John Adams for the House of Representatives.* John Phillip Reid, ed. (New York and London: New York University Press, 1981) 20.

[39] Reply of the Massachusetts Council to Governor Hutchinson's Speech, January 25, 1773, in Ibid. 32–44.

[40] Reply of the Massachusetts House of Representatives to Governor Hutchinson's Speech, January 26, 1773, in Ibid. 55.

[41] Ibid. 57–58.

[42] Ibid. 58.

[43] Ibid. 59.

[44] Ibid. 71–72.

[45] The Governor's Second Speech in Reply to the General Court, February 16, 1773, in Ibid. 88.

[46] Ibid. 101.

> *the King, which is to his Natural Person," says Lord Coke. Rep. on Calvin's Case. "The Allegiance is due to his Natural Body."... If then the Homage and Allegiance is not to the Body politic of the King, then it is not to him as the Head or any Part of that Legislative Authority, which your Excellency says "is equally extensive with the Authority of the Crown throughout every Part of the Dominion;" and your Excellency's Observations must fail.*[47]

One possible objection to this argument was that the colonies had tacitly consented to the legislative authority of Parliament in 1688–89 by accepting, on the authority of Parliament, William and Mary as joint monarchs. But the House denied that Massachusetts had in any way accepted the Prince of Orange on Parliament's authority. Either the Kings of England, *by the terms of the Charter*, were ipso facto Kings of Massachusetts; or Massachusetts, on her own authority, had deposed James and given the throne to William and Mary, without any mediation by Westminster.

> *We do not know that it has ever been a Point in dispute whether the Kings of England were ipso facto Kings in and over this Colony or Province. The Compact was made between King Charles the First, his Heirs and Successors. It is easy upon this Principle to account for the Acknowledgement of and Submission to King William and Queen Mary as Successors to Charles the First, in the Room of King James: Besides it is to be considered, that the People in the Colony as well as in England had suffered under the TYRANT James, by which he had alike forfeited his Right to reign over both. There had been a Revolution here as well as in England... And if they were not proclaimed here "by virtue of an Act of the Colony", it was... with the general or universal Consent of the People as apparently as if "such Act had passed."*

And in fact, the people of several colonies took it upon themselves to rise up against the local royal governments, before any word had reached them of the success of William's invasion in England. This especially true in the Dominion of New England, where Andros was overthrown and the original charters restored.[48]

John Adams, the spirit behind the Massachusetts House's arguments, refined his doctrine to a much higher level in *Novanglus*. That tract was written in response to a series of essays under the pen-name Massachusettensis, which appeared from December 1774 to April 1775. The first exchanges between Massachusettensis and Novanglus merely recapitulated, albeit most incisively, the previous arguments by Knox and Hutchinson and their opponents.

Massachusettensis began by reiterating Knox's arguments against a division of sovereignty within the Empire:

> *Two supreme or independent authorities cannot exist in the same state. It would be what is called imperium in imperio, the height of political absurdity... Two independent authorities in a state would be like two distinct principles of volition and action in the human body, dissenting, opposing, and destroying each other. If, then, we are a part of*

[47] The Reply of the House of Representatives to Hutchinson's Second Speech, March 2, 1773, in Ibid. 132–33.
[48] Ibid; David S. Lovejoy, *The Glorious Revolution in America* (Harper & Row, 1972).

> *the British empire, we must be subject to the supreme power of the state, which is vested in the estates of parliament.*[49]

Massachusettensis was familiar with the debates between Governor Hutchinson and the General Court, and the final argument of the House. If the colonies were not subject to Parliament, he wrote, then "*Great Britain and the colonies must be distinct states, as completely so, as England and Scotland were before the Union, or as Great Britain and Hanover are now.*"[50]

So far, the writer was merely paraphrasing the argument of the Massachusetts House itself. He then went on to stipulate, for the sake of argument, that the realms of the Empire were united only by fealty to the natural person of the King, and proceeded to point out the difficulties in such a scheme of imperial organization:

> *…suppose all allegiance due from the colonies to the person of the king of Great Britain. He then appears in a new capacity, of king of America, or rather in several new capacities, of king of Massachusetts, king of Rhode-Island, king of Connecticut, &c. &c. For if our connections with Great Britain by the Parliament be dissolved, we shall have none among ourselves, but each colony become as distinct from the others, as England was from Scotland before the union. Some have supposed that each state, having one and the same person for its king, is a sufficient connection. Were he an absolute monarch, it might be; but in a mixed government, it is no connection at all. For as the king must govern each state, by its parliament, those several parliaments would pursue the particular interest of its own state… If the king of Great Britain has really these new capacities, they ought to be added to his titles; and another difficulty will arise, the prerogatives of these new crowns have never been defined or limited.*[51]

Adams, as Novanglus, made quick work of the argument from indivisible sovereignty: "*I agree, that 'two supreme and independent authorities cannot exist in the same state,' any more than two supreme beings in one universe. And therefore I contend, that our provincial legislatures are the only supreme authorities in our colonies.*"[52] He then went on, from his great store of learning, to present a lawyer's brief of evidence that the colonies had been settled as independent realms. Adams was not cowed in the least by Massachusettensis' facetious reference to a "king of Massachusetts," etc.:

> *If it follows from thence, that he appears king of the Massachusetts, king of Rhode-Island, king of Connecticut, &c. this is no absurdity at all. He will appear in this light, and does appear so, whether parliament has authority over us or not… As to giving his majesty those titles, I have no objection at all: I wish he would be graciously pleased to assume them.*[53]

Adams went much further as Novanglus, than he had in the debates with Hutchinson, in explaining the nature of the colonies' ties to the King, and of the relation between the various

[49] *Massachusettensis*, in *Novanglus and Massachusettensis: or Political Essays, published in the years 1774 and 1775* (Boston: Hews & Goss, 1819) 170.

[50] Ibid. 170.

[51] Ibid. 170–71.

[52] *Novanglus*, in *Novanglus and Massachusettensis* 83.

[53] Ibid. 80.

crowns of the colonies and Great Britain. He backpedaled somewhat from his arguments of 1773. Although the colonies were separate realms, their crowns were not related precisely as were those of England and Scotland before the Union (i.e., in the sense that they merely happened to be held by the same natural person). Rather, the thirteen colonies were related to the realm of Great Britain in the same way that the realms of Wales and England were related, before the Statute of Wales under Edward I. The princes of Wales, up to Llewellyn, "*did homage to the crown of England, as their feudal sovereign, in the same manner as the prince of one independent state in Europe frequently did to the sovereign of another.*"[54] Subjection was to the King's crown, "*and in this case subjection was due, to whatsoever person or family wore that crown.., and would follow it, whatever revolutions it went.*"[55]

This mature doctrine of Adams, we must make clear, did not subject the colonies to the king in his political capacity as a component of the British parliament. The colonies' homage to the Crown resulted from independent compacts between the settlers and the kings who granted the various charters. The King of Great Britain was ipso facto King of Massachusetts; not on the authority of Parliament, but on that of the colonial charter. Massachusetts had accepted William and Mary on the basis of principle, enshrined in her charter, that whoever happened to be King of England would also be the King of Massachusetts. The doctrine was not that England and Massachusetts had one crown between them, but that there were two crowns; and by the constitution of *Massachusetts*, whoever held England's crown was identified as the holder of that of Massachusetts. The English crown served merely to identify the natural person to whom Massachusetts' allegiance was due:

> *The fealty and allegiance of Americans then is undoubtedly due to the person of king George the third, whom God long preserve and prosper. It is due to him, in his natural person, as that natural person is intituled to the crown, the kingly office, the royal dignity of the realm of England. And it becomes due to his natural person because he is intituled to that office. And because by the charters, and other express and implied contracts made between the Americans and the kings of England, they have bound themselves to fealty and allegiance to the natural person of that prince, who shall rightfully hold the kingly office in England, and no otherwise.*[56]

That this doctrine was complex and relied on many legal abstractions is true; likewise, one must admit that it came very late in the constitutional dispute with Great Britain. Neither of these facts is sufficient to open Adams to McLaughlin's charges of pedantry and legalism. Although quite abstruse, the arguments of the Massachusetts House and of Novanglus were not fabricated whole cloth. Adams' mature doctrines were logical deductions from the history of the Empire and from English law.

There were numerous cases in British history of one King holding crowns in more than one realm, in different political capacities. From the time of James I to Anne, England and Scotland had two separate crowns, held by the same natural person. In Ireland, from Strongbow's invasion of Leinster to the reign of Henry VIII, the King was recognized only as Dominus. It was only by an act of the Irish parliament that Henry VIII acquired the title King of Ireland. The King

[54] Ibid. 103.
[55] Ibid. 109–110.
[56] Ibid. 114.

ruled the Channel Isles of Jersey, Guernsey, Alderney and Sark only in his capacity as Dux, on the grounds that those islands were the remnant of the Duchy of Normandy, never incorporated into the realm of England. Adams, aided by the doctrine of *Calvin's Case* that allegiance is to the natural person, and the polital capacity follows the natural person, applied these historical examples by analogy to the colonies.

That the *Novanglus* doctrine emerged late is natural. Constitutional arguments, like the doctrine of the Church, are defined only in response to heresy. Every time a doctrine is called into question, it must be defined more elaborately to clear up the confusion. But Adams' position, arguably, was implicit in the argument of Franklin; and like every new stage of the colonial argument from James Otis on, it was a logical response to the challenges of British polemicists.

The colonists fell ack on the doctrine of indivisible sovereignty, but not because British "legalism" and "pedantry" somehow mesmerized them into abandoning the "practical" position of Dickinson. They did so because of the difficulties in *practice* resulting from an attempt to divide sovereignty. The constitutional struggles from 1763 to 1776 followed a recurring pattern: the colonists would draw a line between the sovereignty of Parliament and that of the colonial assemblies; Parliament would stipulate to the line and act on it; and the colonists, not satisfied with the result, would draw a new line. Massachusettensis, with an instinct for the jugular, pointed this out:

> *When the stamp-act was made, the authority of parliament to impose internal taxes was denied; but their right to impose external ones... was admitted. When the act was made imposing duteis upon tea, &c., a new distinction was set up. that the parliament had a right to lay duties upon merchandize for the purpose of regulating trade, but not for the purpose of raising a revenue... Having got thus far safe, it was only taking one step more to extricate ourselves entirely from their fangs, and become independent states, that our patriots most heroically resolved upon, and flatly denied that parliament has a right to make any laws whatever, that should be binding on the colonies. There is no possible medium between absolute independence, and absolute subjection to the authority of parliament.*[57]

Governor Hutchinson, writing after the fact, made it clear that he had understood the practical results of dividing sovereignty, and had tried to use the inherent self-contradiction of such a position to drive his opponents to the wall. Unfortunately for him, the colonists grasped the wrong horn of Hutchinson's dilemma.

> *The house saw the difficulty they should be involved in by admitting two supreme powers, for if there be no umpire to judge when one or the other exceeded its just limits, contests must soon arise, and one or other would soon become the sole power... And if an umpire be admitted, the umpire would be supreme, and the other two subordinate. In order to maintain their own authority, they found it necessary to exclude all others.*[58]

In writing this, Hutchinson paid his erstwhile adversaries a (perhaps unwitting) compliment. Their position, like his, was at least consistent.

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[57] *Massachusettensis* 173–74.

[58] *The History of the Colony and Province of Massachusetts Bay.* 3 volumes. Edited by Lawrence Shaw Mayo. 1936. 3: 274. In Reid, ed., 147n.

This is as good a place as any to point out that the doctrine of undivided sovereignty did not hamper, in any serious way, the practical funtioning the Empire. McLaughlin admitted as much himself, albeit in a backhanded way:

> *The discussions in the Continental Congress of 1774 show us the trouble that the colonists had in reaching a satisfactory theory. By that time, many had come to the conclusion that Parliament possessed no power to pass laws governing the colonies. But the situation and the experience were too plain, and Congress "from the necessities of the case" announced that parliamentary regulation of trade would be accepted, but not taxation external or internal. They proposed as a working basis for the whole system–perhaps no longer to be termed an empire if there was no legislature with any imperial power legally speaking–the distinction between taxation and regulation of commerce, and they really put themselves back, as far as practice was concerned, nearly if not quite in the position of eleven years before.* 60]

Yes; the colonists did, by concession, grant Parliament virtually the powers it had had before the Stamp Act–but they did so on a solid and legitimate legal basis, with no danger of conflicts of jurisdiction. This admission of McLaughlin's in effect blew his claims–that a theory of indivisible sovereignty was a hindrance to a working federal empire–out of the water. Once the location of supreme sovereign power was determined–in Parliament or in the colonies–the practical distrubution of powers could be accomplished through delegation or a concession of grace by the sovereign. The nineteenth century dominions and the contemporary commonwealth system were based on the assumption of total Parliamentary supremacy. The overseas dominions of Great Britain were granted increasing degrees of legislative autonomy, as a concession from Parliament, until they achieved total legislative independence under the Crown. The American colonies in the Eighteenth Century, however, took the opposite tack: Parliamentary exercise of necessary regulatory powers over trade was a concession of sovereign grace from the colonies.

The various realms of the empire would be still more closely united by the fact that all their crowns were held by one man. The royal veto, exercised through colonial governors, and disallowance of royal acts by the King in Council, would prevent the worst conflicts between the laws of the various parts of the Empire. As an alliance of kingdoms, the Empire could unify its efforts in wartime under a common command, so long as each colony retained the right of consent to the introduction of foreign troops on its soil. *Every single power* exercised by McLaughlin's "de facto" Empire could have been exercised just as well legally, on the basis of compact, once sovereign authority had been settled.

Finally, McLaughlin considered Dickinson's theory of divided sovereignty, although it went dormant for a time under the onslaught of legalism from Knox and Hutchinson, to have been resurrected in the "dual federalism" of the United States Constitution.

> [Hutchinson] *was prepared to use an undeniable principle of political science; he believed he could silence his enemies with its mere pronouncement: "It is impossible there should be two independent legislatures in the same state." Despite all the discussion that had gone on, despite the fact that Britain had been practicing federalism, Hutchinson could see nothing but the theory of centralized legislative omnipotence and could not conceive of distribution of power between two mutually independent legislative bodies.*

> *And yet this undeniable axiom of political science was to be proved untrue in the course of fifteen years by the establishment of fourteen independent legislatures in the single federal state, the United States of America.*[59]

But simple reflection makes it clear that, if the legislatures are to be in a "single federal state," they cannot be the judges of their own powers; they cannot be truly "independent." If there is some higher authority which apportions the powers of the legislatures, then they exercise only delegated powers as municipal corporations, like the counties of England. If the legislatures are truly independent, however, then they do not exist in a "single federal state."

McLaughlin's confusion resulted from an inability to distinguish between sovereignty, as the source of delegated power, and the exercise of the specific sovereign powers which are delegated. Sovereign functions may be distributed among governments, without in any way impairing the unity of the sovereign will which delegates them. A subtle distinction, to be sure; but subtle distinctions are the bread and butter of constitutional history.

"Dual federalism," whether in the British Empire or in the United States, has never borne much looking into. When it is subjected to rational analysis, one is left with two mutually exclusive alternatives: either the member states are sovereign, and the central government exercises delegated powers with their sufferance; or the large polity collectively sovereign, and the local legislatures exercise delegated administrative powers. Both positions are internally consistent; choosing between them is a matter of historical evidence rather than logic. But there is no tenable middle ground between them.

In the case of the Constitution, once we eliminate the muddled middle ground of "dual federalism," we are left with two clear alternatives: either the people of the nation as a whole are sovereign, and the States are mere municipal corporations like the English shires; or the peoples of the several States are sovereign, and the national government exercises only their delegated powers. Both positions are internally consistent; both entail indivisible sovereignty; one must turn to the evidence of history to decide between them.

James Madison was clearly uncomfortable with the concept of sovereignty; and, because he had not yet fully assimilated the contemporary shift in theory from legislative to popular sovereignty, he was sometimes sloppy in his talk of "dividing" sovereignty. But if, by sovereignty, we mean the authority by which the Constitution was "ordained and established," and by which it continues in force, he was quite clear on the matter. In the Federal Convention on August 13, 1787, he asked, "*Who are to form the new Constitution…? Are not the States the Agents? Will they not be the members of it? Did they not appoint this Convention? Are not they to ratify its proceedings? Will not the new Constitution be their Act?*"[60]

In the thirty-ninth number of *The Federalist*, he was much more explicit in attributing sovereignty to the people of the several States:

> *It is to be the assent and ratification of the several States, derived from the supreme authority in each State–the authority of the people themselves. The act, therefore, establishing the Constitution will not be a national but a federal act.*

[59] Ibid. 234–35.

[60] *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (New York and London: W.W. Norton & Company, 1966, 1987) 440.

> *That it will be a federal and not a national act, as the terms are understood by the objectors–the act of the people, as forming so many independent States, not as forming one aggregate nation–is obvious from this single consideration: that it is to result neither from the decision of a majority of the people of the Union, nor from that of a majority of the States. It must result from the unanimous assent of the several States that are parties to it… Each State, in ratifying the Constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act.*[61]

He reiterated this argument on June 6, 1788 in the Virginia ratifying convention. The parties to the Constitution were "*the people as composing thirteen sovereignties.*" The Constitution, if adopted by all the States, "[would] *be then a government established by the thirteen states of America, not through the intervention of the legislatures, but by the people at large.*"[62]

And we need consider only the implication of the word "delegation," along with the talk of reserved powers, so central to the federalist campaign, to understand that the States did not, in ratifying the Constitution, alienate their sovereignty. Delegation implies an authority in the *delegator* superior to that of the *delegatee*, with the understanding that the *delegator* is the principal, and the *delegatee* merely the agent. When the kingdoms of England and Scotland ratified the Act of Union, they in effect annihilated their sovereignty and erected a new sovereign on the ashes. There is no reference in that Act to a "delegation" of power, or to a reservation by Scotland. But in the United States, as St. George Tucker so lucidly put it,

> *it's* [the federal government's] *councils, it's engagements, it's authority are theirs, modified and united. It's sovereignty is an emanation from theirs, not a flame by which they have been consumed, nor a vortex in which they have been swallowed up. Each is still a perfect state, still sovereign, still independent, and still capable, should the occasion require it, to resume the exercise of it's functions, as such, in the most unlimited extent.*[63]

As the above evidence implies, every American State is an independent, sovereign republic, whose supreme and indivisible authority inheres in the people of that State alone. In ratifying the Constitution, as a sovereign act, the people of a State in effect say (to paraphrase the able Confederate apologist Albert Taylor Bledsoe)[64]: "We will enter into a compact with you, the other republics, to allow a national government to exercise on our soil the powers specified in Article I, Section 8, provided you do the same; and we will voluntarily refrain from exercising the powers specified in Article I Section 10, likewise provided that you do the same." Within each independent State, the sovereign people consented to allow two public corporations, or governments, to operate on their own soil: a State government and a national government. Both

[61] Alexander Hamilton, James Madison, John Jay *The Federalist Papers* (New York and Scarborough, Ont.: Mentor Books, 1961) 243–44.

[62] "The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution," in *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787.* Edited by Jonathan Elliot. 5 vols. (Philadelphia: J.B. Lippincott Company, 1901) III: 94.

[63] *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia.* Edited by St. George Tucker. 5 vols. (Philadelphia: William Young Birch and Abraham Small, 1803) Appendix, Note D, "Of the Constitution of the United States" 1: 143.

[64] *Was Davis a Traitor? Or Was Secession a Constitutional Right Previous to the War of 1861?* (Richmond, Va.: The Hermitage Press, 1866, 1907) 98.

operate only with the consent of that State; and that State may, by secession, revoke the national government's right to operate on its soil.

If this lengthy survey has accomplished anything, it has demonstrated that logical consistency is not a luxury. When an argument, whether that of Dickinson or of Webster and Story, is not based on a proper conceptual foundation, it is vulnerable to anyone, like Hutchinson or Calhoun, who possesses any critical faculty at all. The doctrine of dual federalism is exposed in all its fuzzyheadedness, and dispelled like a fog by strong sunlight. And it fails for the simple reason that, for an idea to "work," it must adequately explain reality–despite those who, like McLaughlin, when they hear the word "logic," immediately reach for their guns. A constitutional theory of federalism, like a house, must be built on a solid foundation. A theory of federalism which treats conceptual clarity as a luxury, like a house built on sand, must fall. A precise understanding of the nature and location of sovereignty is not an impediment to a working federal system; it is its *sine qua non.*

Kevin Carson
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