

Speaker's Task Force on Intergovernmental Affairs

Rob Bishop, Chairman

Hearing Memo

October 12, 2017

To: All Task Force on Intergovernmental Affairs Members

From: Task Force Staff – Adam Stewart
Rep. Rob Bishop's Office (x5-0453)

Hearing: *Are We "Federalizing" Federalism? A Primer on Federalism, State and Local Government and Interrelations with the Federal Government*
October 12, 2017 at 2:00 PM; The Capitol H-313

Overview:

On May 18, 2017, House Speaker Paul Ryan and Democrat Leader Nancy Pelosi announced the creation of the Speaker's Task Force on Intergovernmental Affairs, a bipartisan group of lawmakers focused on balancing interests between federal, state, tribal, and local governments.

The stated mission of the Task Force:

1. Partner with states, tribes, and local governments to balance the interests of governments
2. Provide a forum for states, cities, and counties to showcase their innovation and creativity in solving public policy problems
3. Examine the effects of federal rules and regulations on state and local partners
4. Develop proposals to partner with and empower states, tribes, local governments, private institutions, families and individuals
5. Examine the extent to which the burdens shared among states, tribes and local governments may be re-allocated to improve the quality of life in all communities

Task Force membership is comprised of a diverse, bipartisan group of House members: Speaker's Designee and Chairman Rep. Rob Bishop (R-UT), Rep. Gary Palmer (R-AL), Rep. Luke Messer (R-IN), Rep. Mark Walker (R-NC), Rep. John Culberson (R-TX), Rep. Lee Zeldin (R-NY), Rep. Jenniffer González-Colón (R-PR), Rep. Richard Neal (D-MA), Rep. Raúl Grijalva (D-AZ), Rep. Gerry Connolly (D-VA), Rep. Norma Torres (D-CA), Rep. Anthony Brown (D-MD), and Rep. Charlie Crist (D-FL).

The Task Force is also assisted in its mission by an Advisory Council, made up of non-partisan or bipartisan organizations active in public policy affecting federal, state, tribal, and local governments.

On October 12, 2017, the Speaker's Task Force on Intergovernmental Affairs will hold its second hearing for the 115th Congress. Constitutional law and governance scholars will provide an overview of the history and evolution of federalism. Special emphasis will be placed on how

the economic, political and policy conditions that influence federalism have changed, as well as the role of the judiciary in shaping the boundaries of federalism.

Invited Witnesses

Ms. Heather Gerken
Dean, Yale Law School

Mr. Tim Conlan
Professor, George Mason University

Mr. Matthew Spalding
Dean, Hillsdale College

Background:

**Testimony of Professor Heather K. Gerken
Dean and Sol & Lillian Goldman Professor of Law
Yale Law School
Submitted to the Speaker's Task Force on Intergovernmental Affairs
September 27, 2017**

Opening Statement

Chairman Bishop and Members of the Taskforce on Intergovernmental Affairs:

Thank you for inviting me to speak today about federalism and the state of intergovernmental relations. It is an honor to be here alongside two leading scholars in the field.

I am the Dean of Yale Law School and an expert on federalism and election law. My federalism work has been united by a simple aim – to show that federalism is for everyone.

The question that frames this hearing is whether federalism is becoming federalized. Answering that question requires us to understand what federalism is in the 21st century.

Traditionally, those who study federalism have divided into camps. The pro-federalism camp emphasizes the importance of state power, distinct regulatory spheres, and the ability of states to regulate free from federal interference. On the other side are the nationalists. Their focus is on national power, national norms, and national democracy. They are often skeptical of state power and cast the federal government as liberty's ultimate protector.

Neither camp has it right. Our federalism is not our father's federalism, and yet we continue to war over those outdated understandings. *Today's* federalism does not match either's side dreams, nor does it resemble either side's nightmares. Instead, today's federalism represents a middle ground between the two camps.

In order to understand what these camps get wrong, it's helpful to examine their understanding of state-federal relations. Members of the federalism camp think government power involves a government presiding over its own empires and regulating free from interference. Their aim is to increase the power states wield. The nationalists have the same conception of governmental power in their minds, but they prefer for the federal government to hold sway.

The trouble is that state-federal relations look nothing like the picture I've just described. Instead, as I've written elsewhere, the "states and the federal government govern shoulder to shoulder, sometimes leaning on one another and sometimes jostling each other. When one moves, the other moves with it."¹ If you recognize that state-federal relations are marked by political and regulatory integration and a high level of interdependence, you'll see that today's federalism is quite different from the state of affairs either camp envisions. Put differently, these days "neither the state nor the federal government presides over its own empire."²

For those who care about state power, the states are still powerful. But their power does not depend on rigid jurisdictional boundaries or idyllic conceptions of sovereignty. Instead, today's federalism is sheared of sovereignty. Despite the best efforts of the Rehnquist and Roberts Court, if the federal government wants to regulate, it can. For every rule the Court has devised to protect state autonomy, there is almost always a ready workaround.

That's why state power has as much to do with politics as law. States are powerful because the federal government needs them to get things done. The federal government's heavy dependence on states to implement federal programs means that states are not shielded from national policy, but they also have the power to shape it. Look no further than issues of immigration, marijuana, and health care to see the evidence.

If you are nationalist, today's federalism is also different from the scenarios that the nationalist have lauded and feared. Nationalists have long worried about a system where here states are shielded from national norms or national regulations, and with good reason. You need only consult this country's ugly race-relations history to understand why. In today's federalism, however, states and localities are not shielded from national norms, but they do help forge them. Just think about what happened with the same-sex marriage movement. Change began in San Francisco and Massachusetts, not Washington, and it spread from state to state before reaching national policymaking circles. Nationalists were right to recognize that national policies can protect racial minorities and dissenters. But they failed to realize that those policies are often born and invigorated at the local level.

What we see today, then, is a federalism that neither camp imagined. Today's federalism does not shield states from national norms, but instead employs states in the construction of national norms. State power does not depend on clearly demarcated lines of state power and autonomy, but on mutual dependence. States are still important, but not in the way some expected—their strength comes from their status as agents, not principals; servants, not sovereigns.

¹ Heather K. Gerken, *Federalism 3.0*, 106 CAL. L. REV. ____, draft at 110 (forthcoming 2017).

² *Id.*

Once we recognize the crucial differences between real-world federalism and the federalism described by some academics, the debate changes. It becomes possible to be a nationalist who believes in federalism. It becomes possible to be a progressive who favors federalism. On this view, the national government should have the power to exercise the national supremacy trump card when it matters. But federalism plays a crucial role in fostering debate and promoting change. Devolution, in short, can serve nationalist ends.

If I may also speak to my brethren in the federalism camp, in today's federalism state power does not depend on court-crafted conceptions of sovereignty, which often trade on blurry, hard-to-defend lines. Instead, state power depends on smart politicking, savvy negotiating, and strategic implementation. States exert control from within the national scheme, not apart from it. And while states can't block the federal government from invading their turf, they are also licensed to invade the federal terrain.

This is all to say, Chairman Bishop and Members of the taskforce, that today's federalism supplies grounds for compromise and agreement between these two, long-warring camps. We would all do well—Democrats and Republicans, progressives and conservatives—to recognize the importance and value of state and local power. Federalism does not have a political valence. The mutual dependence between states and the federal government is integral in producing the debate, compromise, and dialogue necessary to sustain a well-functioning democracy. And that, of course, is what federalism's aim should be.

Specific Questions Raised by the Taskforce

A. First, what is federalism? Is it the same as intergovernmental relations? What is the philosophy behind it?

In our democratic system, federalism is an account of why state and local structures promote a well-functioning democracy. The term should not be limited to states alone. Instead, it encompasses the many decentralized institutions that constitute our system. As I wrote in a piece in the Yale Law Journal:

The system I describe is not one confined to states, but 'federalism all the way down,' which includes substate, local, and sublocal institutions. Imagine a majority-black city council, a town that favors same-sex marriage, a zoning commission dominated by Greens, a jury that contains nine Latinos instead of two, or a school board controlled by Darwin skeptics.³

The relationship between these state and local actors on the one hand, and the federal government on the other, has evolved during the last century. Traditional accounts of federalism squeezed the debate into a narrow binary. One camp exalted state power and autonomy; the other pined for central control. But as I noted in my opening statement, neither of the traditional accounts is quite right. States do have power, but it comes from their role *within* national democratic and regulatory structures, from the power they derive by serving as federal government's agent. Meanwhile, though nationalists were correct to

³ Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1963-64 (2014).

recognize that national policies can protect political and racial minorities, they failed to recognize that localism and federalism offer unique opportunities to enhance minority power and push forward debates about rights.

B. How have the economic, political and policy conditions that influence federalism changed, and do they require a reset in intergovernmental relations?

The conditions that influence federalism have changed dramatically. Our federalism is not our father's federalism, and it's certainly not our grandfather's federalism. And yet many theories are still geared around these past debates. As I've written elsewhere:

Two great 20th century debates over federal-state relations have shaped how constitutional theory treats what the Court once called "Our Federalism." The first battle was over the legacy of the New Deal—call it Federalism 1.0. The second concerned the civil rights movement—Federalism 2.0. Whether you are a nationalist or one of federalism's stalwarts, the intellectual frames we now use to understand "Our Federalism" were largely forged during those battles. In effect, they created the operating system that has served as our interface between practice and theory. . . . The problem is that our operating system is outdated. It no longer matches on-the-ground realities, which means it can't help us negotiate the controversies that matter today.⁴

The touchstone for what I've termed "Federalism 1.0" -- the understanding of federalism that emerged from the New Deal debates -- is a particular conception of governmental power as the ability to preside over one's own empire. That conception of governmental power no longer holds true:

During the first half of the 20th century, the stubborn facts of modernization shifted federalism debates away from the separate spheres approach, which depicts states and the federal government as dual sovereigns confined to their own regulatory empires. Indeed, sovereignty has been declared "dead" so many times that one starts to believe in the doctrinal equivalent of reincarnation. . . . Note, then, that while the New Deal "deal" changed federalism theory, it didn't change how either camp thinks about power. . . . The nationalist camp celebrates that shift. The federalism camp accepts it begrudgingly, urging us to leave some regulatory terrain to the states. . . . Put differently, each side assumes that whichever side wins out will be . . . sovereign. The New Deal debate may have shifted our idea of where federal power begins and ends, but it didn't change how we think about power itself.⁵

The problem with both positions is that they are painfully difficult to square with today's regulatory realities. The evidence abounds in environmental law, health care, telecommunications, and financial regulation. We see strong evidence in areas thought to be largely in the state's control, including education, crime, family law,

⁴ Gerken, *Federalism 3.0*, *supra* note 1, at 102-03.

⁵ *Id.* at 106-08.

and even a place as unlikely as land use law. These days, neither the state nor the federal government presides over its own empire.⁶

Just as the understanding that emerged from the New Deal debates is outdated, so too is the view that equates federalism with the oppression of racial minorities and dissenters. That vision of federalism – which I have tagged as “Federalism 2.0” – is a relic the Civil Rights Era. During that period, states’ rights were invoked to strip individuals of their rights. But *our* federalism has long moved past this debate:

The Civil Rights Era was one of federalism’s ugliest moments, with states’ rights routinely invoked to deprive individuals of their rights. Federalism 2.0 thus grew out of the intuition that, as William Riker put it, “if . . . one disapproves of racism, one should disapprove of federalism.” Unsurprisingly given the treatment of civil rights protestors, religious minorities, and other dissenters in the Deep South, racism isn’t the only “ism” linked to federalism and localism. We also associate these institutional arrangements with other dreaded “isms,” like parochialism and cronyism. And thus Federalism 2.0 was born.⁷

[But a]s with the shared assumptions undergirding Federalism 1.0, the intuitions behind Federalism 2.0 are hard to square with modern realities. They rely on an outdated view of decentralization and a wrongheaded understanding of how equality norms work. As to the first, . . . [t]oday’s federalism is sheared of sovereignty. . . . That means that states cannot shield their discrimination from national norms, as they did during the days of Jim Crow, but they can help fuel the process by which those norms are constructed.⁸

Because these federalism paradigms have become antiquated, we ought to move in the direction of what I have termed Federalism 3.0. I’m not sure whether one should call it a “reset” in intergovernmental relations, or whether it is merely demands a reconceptualization of them. We must recognize that although states retain continue to play a powerful and important role in our democracy, they do so not in the manner once thought. As I recently wrote,

If we abandon the mistaken assumptions of the New Deal (that state and national power should be conceived of in sovereignty-like terms) and the civil rights movement (that decentralization is properly cast in opposition to the interests of dissenters and racial minorities), [we will realized that] it is time to dispense with the camps that have been at the bedrock of constitutional theory for decades. . . . Federalism 3.0 has undermined what everyone takes to be the *nondebatable* part of the nationalism/federalism divide. That’s because devolution can serve nationalist aims.

⁶ *Id.* at 109-10.

⁷ *Id.* at 126.

⁸ *Id.* at 128-29.

. . . One of the primary reasons nationalists should care about states and localities has to do with a distinctive set of democratic goods, which I’ve termed “the discursive benefits of structure.” Federalism and localism don’t just matter to racial minorities and dissenters as they push for change, as I described earlier in this essay. These structural arrangements also help us accommodate partisan competition and tee up national debates.⁹

. . . Federalism 3.0 is a different reality than either side anticipated, but it’s also a different reality than either camp feared. And it’s one that should provide ample grounds for compromise between the camps going forward. . . . If you care about state power, the states are still powerful. While states can’t block the federal government from invading their turf, they are also licensed to invade the federal terrain. They may not preside over their own empires, but they hold sway over large swaths of the federal empire. That means that state and local officials play an important role in shaping not just state law, but federal law. They can engage in cooperative federalism and uncooperative federalism. They aren’t outsiders to the behemoth we call the Fourth Branch, but powerful insiders on whom the federal government is often heavily dependent.¹⁰

C. How has the judiciary shaped the boundaries of federalism?

The Court has occasionally imposed limits on federal power: consider, for example, *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995). Yet these decisions rest on shaky ground. The lines drawn seem arbitrary and are easily circumvented.¹¹ I described these workarounds in the *Harvard Law Review*:

[T]he Court has made precious little headway in curbing federal power. Congress has a ready-made workaround to bypass the anticommandeering doctrine, it can usually write in a jurisdictional element to satisfy *United States v. Lopez*, it can borrow a page from Justice O’Connor’s “drafting guide” to fit its regulations within the ambit of *Gonzales v. Raich*, it can turn to its taxing power when the Commerce Clause won’t do, and it will presumably have no trouble evading the dictates of *NFIB* (unless the Court lends some oomph to its Spending Clause ruling). The nationalists have lost battles, to be sure—*Shelby County v. Holder* being the most heartbreaking defeat—but they are undoubtedly winning the war.¹²

D. Does/should federalism belong to a certain political party or ideology?

⁹ *Id.* at 146-48.

¹⁰ *Id.* at 151-52.

¹¹ Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 997, 1026 n.118 (2015).

¹² Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 90-91 (2014).

Federalism doesn't (and shouldn't) have a political valence. Instead, federalism can be an extraordinarily powerful tool for both the left and the right. More importantly, it can be a source for compromise and change between the left and the right.

As I wrote in *Vox*, there are numerous "important ways progressives can take a chapter from the conservatives' playbook and use their control over state and local governments to influence the national agenda, shape policy results, and encourage political compromise."¹³ Although my *Vox* piece is a progressive user's guide to federalism,¹⁴ that same guide could, work just as well for conservatives should they lose the presidency in 2020. That's precisely the point.

The call for progressives to embrace federalism is not a new one. In 2004, Duke law professor Ernie Young invited liberals to come to the "Dark Side" and embrace the power of the states.¹⁵ Professor Young was right: It's time progressives recognized that our federalism isn't just for conservatives. As I've written elsewhere:

We forget that [states] create many opportunities for what Jessica Bulman-Pozen and I have called "uncooperative federalism." Progressives at the state and local level can influence policy simply by refusing to partner with the federal government. By doing so, they force issues onto the national agenda, foregrounding debates that the Republicans would rather avoid. More importantly, defeating state or local opposition costs fiscal resources and political capital the federal government would rather employ elsewhere.¹⁶

While federalism can be a powerful tool for both sides, let me emphasize that federalism is bipartisan in a more fundamental way. Federal dependence on states and localities creates an enormous incentive for moderation and compromise at the national level.

Often the only way for a national program to succeed is to have a national consensus behind it. Just ask President Obama, who had to compromise a great deal to bring Obamacare to the red states, offering individual red states waivers and incentives to convince them to join. Trump may not have to cooperate with Democrats on the Hill, but he's going to need the support of blue states and cities if he wants to get things done. A federal program that doesn't touch California, New York, or Illinois won't affect a large swath of the American economy. That should create a healthy incentive for moderation going forward.¹⁷

¹³ Heather K. Gerken, *We're About To See States' Rights Used Defensively Against Trump*, VOX (Jan. 20, 2017), <https://www.vox.com/the-big-idea/2016/12/12/13915990/federalism-trump-progressive-uncooperative> [hereinafter *States' Rights*].

¹⁴ Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User's Guide*, 44 DEMOCRACY J. (Spring 2017), <http://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/>.
Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOKLYN L. REV. 1277 (2004)

¹⁶ Gerken & Revesz, *supra* note 16.

¹⁷ Gerken, *States' Rights*, *supra* note 15.

In sum, the dialogue that federalism creates ensures a healthy amount of debate and disagreement, one of the keys to the success of our democracy. And that dialogue created by decentralization does not break along party lines. As I wrote in the *Democracy Journal* a few years ago,

Decentralization gives political outliers one of the most important powers a dissenter can enjoy—the power to force the majority to engage. It thus helps generate the deliberative froth needed to prevent national politics from becoming ossified or frozen by political elites uninterested in debating the hard questions that matter most to everyday voters.

. . . Decentralization will produce policies that progressives adore, and it will produce policies that they loathe. The same, of course, is true of a national system. Progressives have to make their case to the American people, just like everyone else.¹⁸

E. Is federalism the same as “states’ rights?”

Federalism is not the same as “states’ rights.” That view is a vestige of another era. Our father’s federalism rested on the idea that the federal government could not intervene in some areas that were solely states’ prerogatives. States’ rights were a trump card that was too often invoked to shield instances of local oppression. That’s just not true anymore. As I noted above, these days, if the national government wants to regulate it can. If you worry about protecting dissenters and minorities, the problem isn’t an absence of national power; it’s an absence of national will.

The fact that states lack “rights” doesn’t mean that they lack power. Today, states play a vibrant and robust role in today’s regulatory regimes. Their power comes not from being separate or autonomous sovereigns but key parts of an integrated and interconnected regime. As I’ve written elsewhere, there is:

a quite different form of state power, one that rests on neither sovereignty nor autonomy. I call it the “power of the servant” to emphasize that it stems from what amounts, formally or informally, to a principal-agent relationship. . . . I don’t intend the “power of the servant” to suggest that states lack any form of autonomy or discretion. . . . States are powerful in large part because they are supported by a separate power base and answer to a state polity, not just a federal one. But they are not wielding power as sovereigns, ruling separate and apart from the national government and able to regulate entirely as they see fit. Instead, they are embedded inside a larger, national regime in which they do not hold a regulatory trump card.¹⁹

¹⁸ Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY J. (Spring 2012), <http://democracyjournal.org/magazine/24/a-new-progressive-federalism/>.

¹⁹ Gerken, *Détente*, *supra* note 13, 1010 (2015).

Testimony of Timothy J. Conlan before the
Speaker's Task Force on Intergovernmental Affairs
September 28, 2017

My name is Timothy Conlan, and I am Professor of Government at the Schar School of Policy and Government at George Mason University. I have also served in the past as a Policy Analyst with the U.S. Advisory Commission on Intergovernmental Relations and as Assistant Staff Director of the former Senate Subcommittee on Intergovernmental Relations. I am a fellow of the National Academy of Public Administration and hold a PhD in Government from Harvard University.

As panelists, we have been asked to provide a “primer” on federalism and intergovernmental relations. Therefore, I want to focus my remarks on the nature of American federalism and intergovernmental relations, the evolution of the federal system and some of the factors that have influenced that evolution over time, and, finally, what these changes may suggest for possible reforms of the U.S. federal system.

Federalism was the most original and important contribution made by our founding fathers to the art and science of government. It has been adopted in various forms by 25 countries, and an estimated 40 percent of the world's population now lives in countries with a federal system of government, including Canada, Australia, India, Germany, Spain, Brazil, and South Africa.

Today, we think of federalism as occupying the middle ground between a confederation of sovereign states (as under our original Articles of Confederation) and a unitary system with a sovereign national government.¹ To the Framers of the U.S. Constitution, however, the new government they created was viewed as more of a compound than a middle ground—a

complex “composition” of both confederal and national elements. This complexity and newness sowed a degree of ambiguity and confusion about the nature of the federal design. Indeed, in describing the new composite government in Federalist 46, Madison used the term “federal” to mean what we would call “confederal” today. This ambiguity led to significant differences of opinion among the framers themselves, and in successive generations, about critical aspects of our federal system: whether our system of government originated as a compact between existing states or, as Madison and Lincoln claimed, as the product of a single people who constructed different levels of government for different purposes; about the scope of the national government’s enumerated powers; about the permissible degree and proper instruments of federal, state and local cooperation; and even about the meaning of sovereignty under the new Constitution. Can sovereignty be divided among different governments and still retain its meaning as a singular source of authority, or does sovereignty reside in the people, for whom the national government and the states are but two separate instruments of self government?

Disagreements about such issues arose very early in our Republic, and they continue to this day. But we also have developed a clearer understanding of the essential elements of what a federal system entails. Federalism is a system of government in which power is divided between two or more levels of government, each with a significant degree of authority and heightened legal recognition, and each accountable to and capable of interacting directly with the people.² Federalism may entail a clear division of functions or responsibilities between the different levels of government, but it does not require it.

In contrast, intergovernmental relations can be defined as the interactions and interrelationships between multiple levels and units of government.³ Intergovernmental relations are not unique to federations. All governmental systems with more than a single unit of government have some degree of intergovernmental relations. But the American federal system, with its fifty states, over 90,000 separate local governments, and additional commonwealths, territories, and Native American tribal governments—along with its multitude of state and federal grant in aid programs and intergovernmental regulations--has more extensive and complex intergovernmental relations than most other systems.

Change in American Federalism

American federalism has changed significantly over time, and such changes have accelerated over the past one hundred years. Over time, the federal government has become more deeply involved in many fields of domestic policy once left largely to the states, including welfare assistance, social services, environmental protection, and law enforcement.⁴ There are now over one thousand separate federal grant programs to state and local governments, as well as dozens of federal statutes that regulate some aspect of state and local government, and hundreds of federal laws that preempt some element of state and local regulation or taxation.

Many of these changes have occurred in sudden bursts or punctuations, while others have developed incrementally over time.⁵ The first abrupt punctuation occurred in the 1860s, during and immediately after the Civil War. Even while the War was in progress, Congress enacted a sweeping agenda of new national policy initiatives, including the Morrill Land Grant College Act, the Homestead Act, the Pacific Railroad Acts, and the first progressive income tax. Congress also established new federal departments of Agriculture and, for a brief time,

Education. Most importantly, between 1865 and 1870, Congress adopted and the states ratified the 13th, 14th, and 15th amendments to the Constitution, outlawing slavery, preventing the denial of voting rights to African Americans, and preventing states from denying any person equal protection of and due process under law.

The next important shift occurred in the 1930s as the national government responded to the Great Depression. The number of federal grant programs doubled from 1929 to 1939 and the amount of aid increased almost thirty-fold to \$2.9 billion. Federal aid grew from 1.6% to 9.8% of state and local own source general revenues, and the federal share of total own source governmental revenues rose from 17% to 47%. The federal regulatory state was also deepened and expanded.⁶

A third major expansion of federal activity occurred in the 1960s and 1970s. Important intergovernmental changes ushered in by the so-called “Great Society” included an increase in federal government involvement in traditional state functions like education and in new public functions such as health insurance and environmental protection. Federal grant programs tripled, from 132 to 370, as did the amount of federal aid sent to state and local governments. Federal aid increased from 17% of state and local own-source revenues in 1960 to 23% in 1970, and the number of state agencies receiving federal aid grew substantially.⁷

During this same period, increased federal aid was accompanied by an increased federal regulatory presence. Intergovernmental regulations range from direct orders imposed on state and local governments by federal statute—which are rare but permissible in limited cases—to less direct actions that encourage state and local policy compliance at the risk of lost funding or regulatory preemption. According to the Advisory Commission on Intergovernmental Relations,

the number of new intergovernmental regulatory programs increased more than ten fold during the period from 1960-1980.

Following the 1960s, there were a number of efforts to scale back this expanded system of intergovernmental transfers and regulations, but none had a permanent effect. Presidents Richard Nixon and Ronald Reagan in the 1970s and 1980s, and the Congress in the 1990s, all made reform and reductions in the federal aid system a major policy priority, and each enjoyed a degree of success. Both Presidents Nixon and Reagan succeeded in consolidating many narrow and often small categorical aid programs into larger and more flexible block grants that gave states more discretion in the use of federal funds. President Reagan and the 104th Congress also succeeded in temporarily reducing federal aid levels to state and local governments, both in constant dollars and as a percentage of total federal outlays. However, the broad contours of the federal aid system—and the concomitant degree of fiscal interdependence, remained little changed.

One common but somewhat misleading way to think about these changes has been to view the federal system in a series of developmental stages. Nineteenth century American federalism has often been viewed as an era of “dual federalism,” in which there was a clear differentiation of the powers of the national government and the states and very little overlap.^{viii} Each level had its assigned responsibilities, enumerated for Congress and implied for the states, and each level of government was deemed “supreme within its sphere.”^{ix}

Following the expansion of federal policy initiatives during the New Deal and the proliferation of new federal grant in aid programs to state and local governments, a new model of federalism emerged: cooperative federalism. Cooperative federalism came to represent a model of intergovernmental relations in which all levels of government participated in most domestic functions, generally in a pragmatic exercise of collective problem solving. Metaphorically, cooperative federalism was likened to a “marble cake,” in which public functions are swirled among the different levels of government, in contrast to the distinct and clearly separate levels of a layer cake.^x Finally, in the wake of the expansion of intergovernmental regulations in the 1960s, 1970s, and 1980s, some scholars began to characterize contemporary IGR in terms of coercive federalism, in which the coercive elements of federal mandates and regulations overwhelmed the cooperative dimensions of intergovernmental partnerships.^{xi}

While this conception of stages has value, particularly from the standpoint of judicial interpretation, it is overly simplistic in a number of ways. First, there was a strong dimension of intergovernmental cooperation throughout the 19th century, and especially after 1860. Though he overstated the case, Daniel Elazar presented considerable evidence that: “The traditional

picture of nineteenth century federalism is unreal . . . in practice if not in theory. . . .Virtually all the activities of government in the nineteenth century were shared activities involving federal, state, and local governments in their planning, financing, and execution.”^{xii} From its earliest days, the national government sought to encourage education in the territories and the newly settled states. The northwest ordinances of the 1780s laid out plans for supporting education in the territories while declaring that “schools and the means of education shall forever be encouraged.”^{xiii} Federal grants of land in support of education were provided to Ohio in the Enabling Act of 1802, and subsequent states were supported in similar fashion. The Morrill Land Grant College Act provided resources for the states to establish institutions of higher education in the “agricultural and mechanic arts,” and laid the foundation for the land grant university system. As the availability of desirable lands declined in the later 19th century, the national government subsequently turned to cash grants to support agricultural research and agricultural extension programs, federal aid highways, and vocational education.^{xiv} The end result of such support for education, infrastructure, and social services was substantial. By one estimate, the state of Minnesota received a larger share of its state budget from federal support in the 1880s than it did in the 1980s or the 2000s.^{xv}

Such cases illustrate that the growth of the federal government was not a zero sum game vis a vis the states. In many areas, such as highways, public health and social services, both levels of government have evolved together, in mutually beneficial ways. In others, there has been conflict due to federal overreaching or to opportunistic behavior by the states. Unfunded federal mandates have created both fiscal and administrative problems for the states, while fiscal gaming by the states, such as schemes that seek to improperly shift Medicaid

expenses to the federal government, has sometimes undermined national policy goals.

Nevertheless, such behaviors tend to be the exception in most fields. Even in the midst of more coercive and opportunistic federal and state behaviors, a broad fabric of cooperative federalism remains prevalent in areas as diverse as public health, transportation, economic development, and social services.

The contemporary federal system represents a mixture of both centralization and continued cooperation and state vitality. On the one hand, federal grants as a percentage of state-local expenditures grew from roughly 10% in 1960 to about 25% in 2016.^{xvi} Similarly, federal preemptions of state and local authority grew dramatically over roughly this same period. According to Joseph Zimmerman, two thirds of all federal preemption statutes (348 of 513) enacted by Congress between 1790 and 2004 were adopted after 1965.^{xvii} Another systematic empirical analysis of federal legislation and executive orders over the post-World War II era also found a general pattern of centralization despite year-to-year volatility.^{xviii} Moreover, the national trend of centralization was mirrored at the state level. The most widely known index of state-local centralization rose from 17.8 to 57.0 between 1902 and 2002, as localities ceded relative power and resources to their respective states.^{xix}

At the same time, the U.S. federal system remains among the most decentralized in the world. Substantial decentralization remains grounded in the structure of the Constitution, the preferences of American citizens, and in the national government's deep dependence on state and local governments for program implementation and service delivery. States and, at their discretion, local governments enjoy substantial authority over broad realms of public policy, from taxing and spending, marriage and birth, business formation and regulation, and public

health and safety. Policy innovation remains alive and well at the state and local levels, as does policy diversity that reflects the varying preferences of citizens in different states.

Drivers of Intergovernmental Change

A variety of interrelated factors have contributed to changing relationships in the American federal system over time. Among the most important have been economic and technological change, changes in the political and party systems, expanding concepts of citizenship and civil rights, and formal changes in the Constitution and its interpretation. Overall, most of these trends have tended to promote centralization in the U.S. federal system, although some have underscored the limitations of excessive centralization.

Economic and technological forces have fostered a variety of changes in American federalism. The evolution from an agricultural, to a predominantly industrial, to a globalized and post-industrial economy inevitably put pressure on a system grounded in territorially defined units of subnational government. The scale of economic activity flowing beyond state borders and affecting interstate commerce was far smaller in the predominantly agricultural society of 18th and 19th century America. That economy was characterized by localized trade and large measures of individual self-sufficiency.^{xx} This was in stark contrast to the much larger, nationally integrated economy of the 20th century, and the deeply globalized economy of today. Advanced economic development pushed many more sectors of the economy into the realm of interstate and international commerce subject to regulation by Congress rather than by the states, and it made traditional state boundaries inadequate for capturing and regulating the effects of negative externalities, such as environmental pollution.^{xxi} At the same time, technological advancements have created entire new industries—such as nuclear power and

other forms of advanced energy production, modern medicine, electronics, and communications--that create demands for more advanced education, research, and transportation. All have implications for expanding the role of government in the economy, as well as for the relative responsibilities of federal, state, and local governments.

Changes in the political system have also contributed to changes in the federal system. Historically, American political parties were highly decentralized organizations which reinforced the decentralized character of the federal system itself.^{xxii} American parties were organized primarily at the state and local levels, where they governed the nomination of candidates for Congress, the financing of legislative elections, and voter mobilization and turnout. In contrast, the national parties historically were loose confederations of state parties whose primary function was to nominate a presidential candidate every four years. Thus, as recently as the 1960s, scholars such as Morton Grodzins could write that “states and localities, working through the parties . . . are more influential in federal affairs than the federal government is in theirs.”^{xxiii}

This political relationship has changed since the 1960s, as state and local parties have diminished and the national parties have gotten much stronger. Many state and local party organizations lost influence as professional civil service systems replaced patronage politics and as primary elections and greater citizen involvement altered party nomination processes. These trends accelerated in the 1970s with changes in party rules and national campaign finance laws.^{xxiv} In contrast, the national party organizations have grown much stronger, raising large sums of money, expanding staff and capacity, and recruiting, training, and providing a range of campaign services to candidates for both national and state office.^{xxv}

The result has been a transformation from a decentralized party system to a more nationalized political system, with consequences for public policy. The willingness of Congress to enact federal mandates and preemptions that restrict the flexibility of state and local governments correlated with the declining power of state and local party organizations in the 1960s and 1970s.^{xxvi} As politics and political communications have become more nationalized, more federal policies have affected traditional areas of state and local responsibility, including education, law enforcement, and emergency management.

To be sure, the relationship between political nationalization and policy making is neither simple nor one dimensional. There are still vast areas of state and local government authority, and states and local governments have retained their role as laboratories of policy innovation. But the structure of American politics has shifted toward nationalization rather than decentralization, with long run implications for public policy and federalism.^{xxvii}

Finally, changes in Constitutional law and interpretation have also had important implications for the structure and functioning of American federalism. Public expectations of government have evolved along with our changing economy and politics, and in many cases these changed expectations have been reflected in the Constitution itself, through a number of formal amendments. Expansion of voting rights through the 15th, 19th and 26th amendments are among the most obvious. But, from a federalism perspective, the 14th amendment was particularly important, as it created a new more nationalized Constitution. It was aimed directly at limiting the power of the states, by forbidding states from denying any person “life, liberty or property, without due process of law,” or the “equal protection of the laws.” These provisions have been particularly important in expanding legal protections in state courts, in

desegregating schools, and in assuring more equal treatment under a host of state laws. In addition, the amendment granted Congress explicit authority to enforce the amendment's protections, although the Courts have tended to read this authority rather narrowly.

Other formal changes to the Constitution have had important implications for federalism as well. Adoption of the 13th Amendment legalized the federal income tax, and thereby powered the national government's ability to shape intergovernmental relations through the grant in aid system. At the same time, the direct election of Senators authorized by the 17th Amendment altered the Framers' original design of state legislative election of Senators. This removed one of the formal instruments of checks and balances in the federal system, strengthening the popular legitimacy of Congress while weakening the political safeguards originally granted to the states.

The overall effect of these changes has been to strengthen the power of the national government at the expense of the states. Thus, wholly apart from changes in constitutional interpretation that have tended to expand the formal and implied powers of the national government, the basic document itself has evolved in a nationalist direction. Regardless of what the Framers themselves may have meant by federalism, the Constitution under which we are governed today is itself a quite different document than the one originally proposed and ratified.

Challenges and Recommendations

The US federal system today is a complicated mixture of intergovernmental cooperation, conflict, complexity, and confusion. Although it has adapted successfully to many daunting challenges of social and economic change, the intergovernmental system suffers from problems, as well. Its increasingly complex mixture of governmental responsibilities is poorly understood by citizens, often frustrating for elected officials, and difficult for civil servants to administer. Intergovernmental regulations often cause excessive conflict and create incentives for opportunistic behavior. And, in an era of growing polarization, the system may have become too centralized for effective national policy making and implementation by increasingly diverse and divided states.^{xxviii}

Even the most bipartisan and broadly supported intergovernmental efforts to address national policy problems can benefit from rethinking and reform. Take, for example, the effort to create a more effective intergovernmental partnership in homeland security. Here, as elsewhere, the proliferation of federal aid programs can create confusion and inefficiencies at all levels of government. At one point, the U.S. Government Accountability Office reported that there were 21 separate grant programs assisting first responders in homeland security. While each provided support for varying combinations of equipment, training, planning, and exercises, many of these grants had differing funding formulas and approaches, eligibility requirements, maintenance of effort requirements, and performance standards. Such complexity is repeated across the spectrum of federal policy, with scores of federal programs for education, energy, health care, and social welfare.

One approach to dealing with this complexity is structural in nature. Grand designs to sort out federal and state roles more clearly go back to the Eisenhower Administration. This involves reducing the federal government's role in some areas, increasing it in areas of national priority, and eliminating or consolidating many federal programs in the process. The final goal would be to recreate a clearer division of responsibilities between the different levels of government and to reduce areas of complicated intergovernmental collaboration.

Although the abstract goal has many adherents, the devil is deeply embedded in the details. The parties, the public, and politicians representing diverse states and communities have always disagreed about which programs and policies constitute national priorities and where intergovernmental cooperation is most necessary to solve problems and serve the public. President Eisenhower's effort to sort out functions went nowhere. Efforts by Presidents Nixon and Reagan had some success in consolidating separate categorical programs into fewer, broader block grants, but those successes were short lived. The system remains more complex today than it was then. The approach may remain worth consideration, but its prospects remain quite dim.^{xxix}

An alternative approach, though one which can also be complementary, builds upon the model of intergovernmental consultation represented by the Speaker's Task Force on Intergovernmental Affairs. Most federal systems have an institutionalized form of intergovernmental consultation. These have proved very helpful for designing practical solutions for specific intergovernmental problems, as well as for developing the intellectual infrastructure necessary for more extensive reforms.

This approach was also tested and developed in the Eisenhower administration—first in the form of the Commission on Intergovernmental Relations (the Kestnbaum Commission) and then the permanent U.S. Advisory Commission on Intergovernmental Relations (ACIR).^{xxx} With a membership composed of cabinet secretaries, members of Congress, governors, and local government officials, as well as a small research staff, the ACIR provided a useful forum for consultation on pressing intergovernmental issues, and it developed a number of concepts and proposals that led to significant reforms in the federal system, including block grants, property tax “circuit breakers,” the unfunded mandates reform act, improved metropolitan planning organizations, revenue sharing, and local enterprise zones.^{xxxi} Over time, the ACIR was joined by a network of institutions that promoted intergovernmental reform and consultation, including House and Senate Subcommittees on Intergovernmental Relations, offices in the U.S. Treasury Department and OMB, and in the Government Accountability Office.

Funding for the ACIR was eliminated in 1996, and since that time all of the other intergovernmental offices listed above have either been disbanded or greatly diminished. This has left a serious vacuum in the intergovernmental and policy making worlds. Effective consultation has been reduced, vital research is no longer conducted, and the infrastructure for effective federalism reform has been weakened. The Speaker’s Task Force constitutes an important recognition of that vacuum. I believe that its mission would be enhanced by reconstituting an institutional presence for intergovernmental consultation in the Executive Branch. Because the legislation establishing the ACIR remains on the books, it would be simple to accomplish.^{xxxii} A congressional appropriation and renewed appointments by the President

and Congressional leadership would begin the restoration of a critical venue for improving intergovernmental relations.

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CONGRESSIONAL TESTIMONY

**Federalism,
Constitutional Government,
and the Challenge of Centralized Rule**

**Testimony before the
Speaker's Task Force on Intergovernmental Affairs
United States House of Representatives**

October 12, 2017

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Thank you, Chairman Bishop.

I commend House Speaker Paul Ryan and Democrat Leader Nancy Pelosi for the creation of the Speaker’s Task Force on Intergovernmental Affairs, made up of Republicans and Democrats and operating with a broad advisory council of governors and state legislatures, counties, cities, mayors and towns. It is a healthy reminder that not all government is national, and that it is local institutions that place liberty within the people’s reach.

As the bipartisan nature of this task force makes clear, all parties can, do, and should embrace the idea of federalism. This isn’t to say that there are no disagreements between the parties on many policy issues and even on particular questions about the proper scope of the federal and state governments. But both conservatives and liberals should recognize that federalism is not just a “tool” or “weapon” that can be used to enact or thwart particular policies. Nor is it a temporary convenience or momentary arrangement to seek partisan advantage. Federalism is about *how to govern*, not about which particular policies should or should not be enacted. It is not about helping or hindering government, but about making government more representative and responsive to popular consent.

The real value of federalism is not just that cities can enact more progressive environmental legislation or that states could enact more business friendly tax policy, but rather that federalism is a foundational support for our republican form of government, allowing and encouraging a wide diversity of opinion and self-government in light of common principles and under the rule of law.

The Foundations of Federalism

The rule of law is the general concept that government as well as the governed are subject to the law as promulgated by legitimate authorities and that all are to be equally protected by the law. Its roots can be found in classical antiquity. The vast difference between the rule of law as opposed to that of individual rulers or an oligarchic few is a central theme in the writings of political philosophers from the beginning. In the works of Plato and as developed in Aristotle’s writings, it implies obedience to positive law as well as rudimentary checks on rulers and magistrates.

Throughout most of human history, the rules by which life was governed were usually determined by force or fraud: Those who had the power—whether military strength or political dominance—made the rules. The command of the absolute monarch or tyrannical despot was the rule, and had the coercive force of the law. Rulers made up false stories of inheritance and rationalizations such as “divine right” to convince their subjects to accept their rule without

question. This is still the case in many parts of the world, where the arbitrary rulings of government are wrongly associated with the rule of law.

One only need read Shakespeare to see that a millennium of Anglo-American history is replete with the often violent back and forth between despotic rule and the slowly developing concept of the rule of law. Impatient English kings regularly sought to evade the rudimentary process of law by exercising the prerogative power and enforcing their commands through various institutions such as the King's Council, the Star Chamber, or the High Commission. It was Magna Carta in 1215 that first challenged this absolutism and forced the monarch to abide by the mechanisms of law. The idea that the law is superior to human rulers is the cornerstone of English constitutional thought and directly informed the American Constitution.

The Glorious Revolution of 1688 established legislative supremacy over the monarch, a crucial step in the development of political liberty. But the idea of Parliamentary supremacy was taken too far. Acts of parliament came to be synonymous with the rule of law itself and there was no longer any higher, fundamental law to which the legislature was subject and against which its legislation could be judged and held accountable. This became more apparent in the decades leading up to the American Revolution. In the Declaratory Act of 1766, Parliament declared it "had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the Crown of Great Britain, in all cases whatsoever." That marked another break with the older principle that the rule of law is above all forms of government whether monarchic and or representative.^{xxxii}

The idea of the rule of law was transferred to the American colonies through numerous writers and jurists, and can be seen expressed throughout colonial pamphlets and political writings. In his bestselling work *Common Sense*, Thomas Paine reflected: "For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other. But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is." The classic American expression of the idea comes from the pen of John Adams when he wrote the Massachusetts Constitution in 1780, in which the powers of the commonwealth are divided in the document "to the end it may be a government of laws, not of men."

Lawmaking and the American Founding

The full implications of the constitutional development of the rule of law first appear in the principles and institutions of the American Founding. Virtually every government at the time was based on a claim to rule without popular consent. Their objective was to break free of old

despotisms, characterized by the arbitrary will of the stronger and to establish the rule of law and limited constitutional government based on consent. They held that man, though fallible and full of passions, is capable of governing himself and that no one was so much better than others as to be entitled to rule them without their consent. ^{xxxii}

Marking a key turn in constitutional thinking, the Declaration of Independence proclaimed that inalienable rights belonging to each person by “the Laws of Nature and Nature’s God” form the moral ground of government. This idea had been previously discussed in theory in the writings of John Locke and other political philosophers, but it was the American colonists who gradually developed the idea of self-government based on popular consent in practice. Hence, after more than a century of experiencing self-government, the Massachusetts Constitution of 1780 could confidently declare: “The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people.” The Declaration of Independence more elegantly posits “that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”

Consent also provides guidance concerning the processes by which legitimate government ought to operate. Among the charges lodged against the king in the Declaration of Independence are that he assented to Parliament’s “imposing Taxes on us without our Consent” and that he “has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.” Indeed, the first six charges against the king address interference with local legislation and legislatures, violating “the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.”

Consent does not necessarily mean pure democratic rule, but it does require a process of popular agreement with lawmaking and governance. In America, this was understood to mean a popular form of representative government. Only a government that derived its power from “the great body of the people,” according to *The Federalist*, No. 39, was compatible with the “genius of the American people,” “the fundamental principles of the revolution,” and a determination to “rest all our political experiments on the capacity of mankind for self-government.” ^{xxxiii}

Constitutional Structure

The very form of the Constitution separates the branches in accordance with distinct powers stemming from the primary functions of governing: to make and enforce laws and to adjudicate disputes arising under the law. The Constitution creates three branches of government of equal

rank in relation to each other. No branch controls the others and each is vested with independent authority and unique powers that cannot be delegated to others.

The order in which these branches are mentioned in the Constitution – legislative, executive, judicial – is important, moving from the most to the least “democratic.” Congress is the preeminent branch both because it is the most closely connected to the people and because it exercises the central power of governing—namely lawmaking.

Keeping the powers of government divided in distinct branches is “admitted on all hands to be essential to the preservation of liberty,” Madison notes in *The Federalist*, No. 47. Here the founders were following the writings of Montesquieu, made a strong case for such a division. “The accumulation of all powers,” Madison continues, “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.”

But it was not enough to divide power and hope that it remained nicely confined within the written barriers of the Constitution. This was especially the case with the legislature: The “parchment barriers” of early state constitutions had proven an inadequate defense against a legislative proclivity toward “everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.” It is with this proclivity in mind that the Constitution grants powers to three separate and distinct branches of government, yielding the concept of the separation of powers. Each branch has only those powers granted to it and can do only what its particular grant of power authorizes it to do.

The full meaning of the separation of powers goes beyond this parchment distinction. “In framing a government which is to be administered by men over men, the great difficulty lies in this,” Madison wrote in *The Federalist*, No. 51. “You must first enable the government to control the governed; and in the next place oblige it to controul itself.” That meant, in addition to performing its proper constitutional functions (lawmaking, executing and adjudicating the law), there needed to be an internal check to further limit the powers of government. Rather than create another coercive authority for that purpose (a dubious proposition to say the least), the Founders not only divided the government into separate branches, but also set each against the others. This separation of powers, along with further provisions for checks and balances, is the defining structural mechanism of the Constitution and creates a dynamism within the workings of government that harnesses the interests and incentives of those in government to enforce constitutional limits beyond their mere statement.

By structuring government such that “its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places,” as Madison explained in

The Federalist, No. 51, the Founders devised a system that recognized and took advantage of man's natural political motivations to use power for the common good and to keep power within constitutional boundaries. Or as Madison put it, the "interest of the man [becomes] connected with the constitutional rights of the place."

The separation of powers and the introduction of legislative checks and balances, according to Hamilton in *The Federalist*, No. 9, are "means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided." They discourage the concentration of power and frustrate tyranny. At the same time, they require the branches of government to collaborate and cooperate in doing their work, limiting conflict and strengthening consensus. These means also have the powerful effect of focusing individual actors on protecting their constitutional powers and carrying out their constitutional duties and functions. Hence the separation of powers is not a mere negative concept but rather a positive and important contributor to limited government and constitutional fidelity.

Federalism: A Nation of States

While everyone knows that this is a nation of states, few seem to think that this division is more than a quirk of history. Yet federalism is a crucial component of our system of government and part of the very infrastructure that makes our political liberty possible.

At the Constitutional Convention, despite a clear recognition of the need for additional national authority in the wake of the Articles of Confederation, there was great concern that an overreaction might produce an all-powerful national government. While they harbored no doctrinaire aversion to government, the Founders remained wary of creating a centralized national government that resembled the British rule they had revolted against. The solution was a unique American innovation: a federal government with strong but limited national powers that respected and protected the vitality of states. Half a century later, Alexis de Tocqueville would attribute the success of American democracy to the vibrant political life nurtured by this decentralized structure.

Keep in mind that the United States Constitution is but one aspect of constitutional government in the United States. Each of our fifty state governments, with their own constitutions, are key components of our "compound republic." Although national powers were clearly enhanced by the Constitution, the federal government was not supposed to hold all, or even most, power. It is supposed to exercise only certain delegated powers, the remainder being reserved to the people or the states as defined in their constitutions.

The balance between national and state government is reinforced throughout the Constitution. For example, the national legislature is made up of a House that is apportioned by population

and a Senate in which each state is equally represented (a balance permanently guaranteed in Article V). The executive is the most national of the branches, yet the electoral college process by which the president is elected is based on states. It is striking that in this powerful national government, there is not a single official chosen by a national constituency. The process by which the Constitution is amended is ultimately based on state approval. The document was ratified by the states.

Moreover, the powers given to the national government are limited to those which serve certain national functions. “Since its jurisdiction extends to certain enumerated objects only,” Madison explains, it “leaves to the several States a residuary and inviolable sovereignty over all other objects.” Here is how Madison described this arrangement in *The Federalist*, No. 45:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the States.

In the same way that the separation of powers works within the federal and state constitutions, federalism is the basic operational structure of American constitutional government as a whole and provides the process by which the two levels of government check each other. “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,” wrote Madison in *The Federalist*, No. 51. “The different governments will control each other; at the same time that each will be controlled by itself.” Whereas the separation of powers and checks and balances might be considered a “horizontal” limitation on government across the government’s institutions (executive, legislative and judicial) federalism created a tension between the national and state governments—a vertical separation of powers—that would keep national power in check as states seek to assert their own authority. “This balance between the National and State governments ought to be dwelt on with peculiar attention, as it is of the utmost importance,” Hamilton argued at the New York state ratifying convention. “It forms a double security to the people. If one encroaches on their rights they will find a powerful protection in the other. Indeed, they will both be prevented from overpassing their constitutional limits by a certain rivalry, which will ever subsist between them.”^{xxxii}

Although federalism was a practical invention of the Constitutional Convention, the idea of maintaining strong state governments was nothing new. The general notion that political authority and decision making should be kept as decentralized and close to home as possible was a well-established theme of the Anti-Federalists. Those who doubted the political efficacy of the new Constitution argued that popular government depends as much, if not more, upon civic or public virtue as on a set of institutional devices designed to check the selfish impulses of the majority. But the supporters of the Constitution noted that federalism is more than an “auxiliary precaution”—it promotes the development of civic virtue and citizen engagement in local affairs by protecting a sphere of state autonomy and local self-government.

Writing years later about *Democracy in America*, Alexis de Tocqueville picked up on the strategy that had been so skillfully employed by the advocates for the new national government.

The human mind invents things more easily than words: hence comes the use of so many improper terms and incomplete expressions. [Suppose that] several nations form a permanent league and establish a supreme authority that, without taking action on plain citizens as a national government could do, nevertheless takes action on each of the confederated peoples taken as a body. That government, so different from all the others, receives the name federal. Next, one discovers a form of society in which several peoples really meld into one only with regard to certain common interests, and remain separated and only confederated for all others. Here the central power acts without an intermediary on the governed, administers them and judges them by itself, as national governments do, but it acts this way only in a restricted sphere. Evidentially that is no longer a federal government; it is an incomplete national government. So one has found a form of government that is neither precisely national nor federal; but one stops there, and the new word that ought to express the new thing still does not exist. ^{xxxii}

In short, the Constitution had succeeded in perfecting the arrangement between the national and state governments such that each would best serve the people. State governments would maintain the power to control those affairs most closely connected to the daily lives of citizens while the national government not only had been made safe through prudent limits on its powers but at the same time strengthened to manage national affairs effectively.

Do States Have Rights?

The history of federalism is particularly susceptible to distortion due to the fact that many of the nation’s most difficult challenges seem related, at least in part, to debates over national versus state authority. From the earliest years of the Republic, controversies over delineating the line of authority between the states and the national government shaped much of the

history of the nation and defined much of its politics. The whole concept of dual sovereignty was a preoccupation in public affairs. Determining the geography of state and national sovereignty became the principle task of governing. The most obvious of these was the Civil War. While it is something of an overstatement to say that the war was about state sovereignty as opposed to national power, it is equally simplistic to assert that slavery was the only issue that drove events.

One lingering legacy of the Civil War has been the lasting confusion surrounding the language of federalism. Even today, discussions of federalism have been laced with references to “states’ rights.” There is some reason for this, as it was the South’s embrace of states’ rights that, in the end, propelled the nation to war. But it is useful to wade into this linguistic and political quagmire in order to understand better what distinguishes constitutional federalism from states’ rights.

Despite the popular term “states’ rights,” no government (federal, state, county, or local) actually possesses any rights at all. Recall from the Declaration of Independence that persons are endowed with unalienable rights. Governments only possess powers, which in legitimate governments are derived from the consent of the governed. In particular, governments only have those powers that are given (or delegated) to them by the people. Individuals, who possess rights by nature, hold those powers and may grant some of them to the government. This point is implicit throughout the Constitution, but was later stated explicitly in the Tenth Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” As the debate over the sovereignty of the states versus the authority of the national government developed in the early years of the Republic, the attempt to assert state authority took on many forms. With the advancement of the Kentucky and Virginia Resolutions, the ideas of nullification and interposition, and then secession itself, the rhetoric employed by advocates for the states sought incorrectly to analogize the plight of the states to that of an individual caught in a contract or compact that he no longer wants to honor. Just as that individual might want to assert a right to break away from the agreement when he feels its terms have been broken by the other party, so might a state want to exercise that “right” when the national government, in its estimation, has violated the compact. “States’ rights” became a battle cry every bit as much as a political position.

After the Civil War, states’ rights remained the rhetorical device employed by those interested in maintaining the culture and mores of the segregated South, in spite of changes in law, government, and politics. It was invoked by southern political leadership eager to protect a segregated society when told by the Supreme Court and then Congress that such a society was

at odds with the Constitution. It is still invoked by those whose devotion to a lost cause and lost way of life overrides any regard for constitutional principle or moral authority.

Federalism's roots are much deeper and more profound than states' rights and stretch back, as we have seen, to the formative years of the Republic. To equate any assertion of state authority as a resort to states' rights is to cheapen a constitutional principle that was at the very heart of the creation of the Constitution and the nation. The two terms need to be distinguished. All too often, states' rights is employed today in an attempt to dredge up old passions or to conjure up images associated with racism and discrimination. But an argument for federalism should be rightly understood as an assertion of an important constitutional and political principle and should be given the prominence and attention intended by the Framers of the Constitution.

The New Science of Politics

The more fundamental change in America's form of rule that has transformed our system of government and with it federalism as a key component of that constitutional order is the rise of bureaucratic administration. This development and its "new science of politics" can be traced to the likes of the French philosophes and continental utopians of the 18th century who were deeply enamored with the endless promises of reason and modern science to solve all aspects of the human condition. Just as science brought technological changes and new methods of study to the physical world, so it would bring great change and continuous improvement to society and man.

The late-19th-century Progressives took this argument, combined it with ideas from German idealism and historicism, and Americanized it to reshape the old constitutional rule of law model—which was seen as obsolete, inefficient, and designed to stifle change—into a new, more efficient form of egalitarian government. This view of scientific rationalism questioned the very idea of self-governing citizenship: Liberty is no longer a condition consistent with human nature and the exercise of God-given natural rights, but an evolving, socially constructed concept.^{xxxii}

Given its new goal, government by definition must itself be unlimited. How could it be otherwise? Denying that "any limit can be set to governmental activity," the prominent progressive reformer Charles Merriam wrote:

The exigencies of modern industrial and urban life have forced the state to intervene at so many points where an immediate individual interest is difficult to show, that the old doctrine has been given up for the theory that the state acts for the general welfare. It is not admitted that there are no limits to the action of the state, but on the other hand it

is fully conceded that there are no natural rights which bar the way. The question is now one of expediency rather than of principle.^{xxxii}

There was no longer any principle—whether natural rights or constitutional government derived from those rights—that limited the action of the state. There was consequently less need for government institutions (such as Congress) to limit the scope of those actions. While ostensibly advocating more democracy, the first progressives — under a Republican president, Theodore Roosevelt, and then a Democratic one, Woodrow Wilson — pursued the opposite in practice. To encourage democratic change while directing and controlling it, progressives posited a sharp distinction between politics and what they called “administration.” Politics would remain the realm of expressing opinions – hence the continued relevance of Congress to provide rough guidelines of policies – but the real decisions and details of governing would be handled by trained administrators, supposedly separate and immune from the influence of politics.

These administrators would be in charge of running a new form of government, designed to keep up with the expanding ends of government, called “the administrative state.” Where the Founders went to great lengths to preserve consent (and check human nature) through republican institutions and the separation of powers the progressives held that the barriers erected by the Founders had to be removed or circumvented and government unified and expanded.

The particulars of accomplishing the broad objectives of reform—the details of regulation and many rule-making functions previously left to legislatures—were to be given over to a new class of professionals who would reside in the recesses of agencies like the FCC (Federal Communications Commission), the SEC (Securities and Exchange Commission), the CPSC (Consumer Product Safety Commission), or OSHA (Occupational Safety and Health Administration). They would often create rules without the prompting or input of Congress, shielded from the standard checks and balances of lawmaking. As “objective” and “neutral” experts not susceptible to human nature, so the theory went, these administrators would act above petty partisanship and faction, making decisions mostly unseen and beyond public scrutiny to accomplish the broad objectives of policy.

For some time, the states continued to exercise broad authority in a host of areas. But gradually they were overcome by a larger federal presence. The national government became engaged in providing grants to states for agricultural and irrigation projects in the West. With the Pure Food and Drug Act it became more actively engaged in the police powers, traditionally left to the states. The Federal Reserve Act and the Clayton Anti-Trust Act greatly extended the

national government's reach into the financial, economic and business regulatory arena. Moreover, the mobilization of the nation to fight a world war served to accelerate the centralizing tendencies already underway. And while the federal courts would keep the centralizing tendency of the administrative state in check until confronted with an economic crisis that could not be ignored, the national government's reach extended to every citizen and each state.

In 1913, the Sixteenth Amendment provided the national government with the authority to establish a national income tax. The income tax established forever the political advantage the national government would have over the states. By employing its ability to make grants to the states to promote and implement national programs and priorities, Congress has been able to transform the states into administrative machines for the national government. And by attaching all sorts of conditions and regulations to the receipt of federal funds, the national government has been able to get even the most recalcitrant states to go along with its priorities.

That same year the Seventeenth Amendment established the direct election of the United States Senate. Originally, senators were selected by state legislatures to represent the interests of their states, as a recognition of the basic sovereignty each state possessed and guaranteeing the permanent institutional role states played in America's constitutional system. Over time, this process had taken on the character of political favoritism and deal-making. Reflecting the growing democratic sentiment of the American people, the Seventeenth Amendment transformed Congress into a popular, democratic, and national institution with both chambers elected directly by the people. In doing so it changed the purpose and character of the Senate: an institution designed to reflect the needs and interests of each state and of the Union—to provide for the “cool and deliberate sense of the community”—was transformed into an institution reflecting the immediate sentiments of popular opinion.

After some initial hesitation, the Supreme Court also began to broaden its understanding of the Fourteenth Amendment, limiting some state actions it had previously embraced. Gradually, the Court applied some of the protections of the Bill of Rights to the states through the Fourteenth Amendment. But these judicial interpretations, in my opinion, were less influential than the underlying change in the nature of the federal relationship. With the income tax and increased national treasury were sown the seeds that would produce the modern dynamic of intergovernmental relations.^{xxxii}

The modern state came into full flower under New Deal initiatives aimed at getting the various sectors of the economy under national regulatory control. Proposals to regulate agriculture,

manufacturing, labor, transportation, banking, securities and areas traditionally under state authority were to become subject to national regulation. The Supreme Court eventually affirmed the New Deal and the nationalization of the economy. The centralization of governmental authority has continued ever since. Through the doctrine of incorporation, the reach of the protections in the Bill of Rights has been expanded. Expansive interpretations of the Commerce Clause have enabled Congress to regulate state activity. The scope of the national government's authority to manage issues relating to civil rights has been extended over most local issues. And the ability of states to determine the contours and character of their own governmental institutions has been limited.

The progressive movement provided the intellectual foundation for the transformation of the constitutional order. The Great Depression and the New Deal provided the economic and political impetus to see the transformation through. But a more significant shift and expansion occurred more recently, under the Great Society and its progeny. Indeed, centralization of administration was a chief objective of the Great Society. Whereas initial regulations dealt with targeted commercial activity – such as railroads, trucking, aviation, banking – when the federal government assumed responsibility for the well-being of every American, it set out creating programs (and reforming old ones) to manage the whole range of socioeconomic policy, from employment, civil rights, welfare, and healthcare to the environment and elections. The expansion of regulatory activities on a society-wide scale in the 1960s and 1970s led to vast new centralizing authority in the federal government and a vast expansion of federal regulatory authority. This centralization of power brought with it what we conventionally mean by big government: huge government workforces, massive government expenditures, and insurmountable government (which is to say, public) debt.

In its current phase, everything — from financial restructuring to environmental regulation to immigration reform — must be dealt with comprehensively, meaning centrally, uniformly, and systemically by an administrative apparatus that is more complicated and more expansive than ever. Indeed, we have come to the point that the primary function of modern government is to regulate. When Congress writes legislation, for instance, it uses very broad language that turns extensive power over to agencies, which are also given the authority of executing and usually adjudicating violations of their regulations in particular cases. The result is that most of the actual decisions of lawmaking and public policy—decisions previously the constitutional responsibility of elected legislators—are delegated to bureaucrats whose “rules” there is no doubt have the full force and effect of laws passed by Congress. The rise of the new imperial presidency—acting by discretion, creative interpretation, and executive orders more than legislative direction—should not be that surprising given the overwhelming and tempting amount of authority that has been delegated to decision-making actors and bodies largely

under executive control. As Congress expanded the bureaucracy—creating innumerable agencies, delegating its lawmaking authority, losing control of the details of budgeting, and focusing on post hoc checks—the executive has grown to new levels of authority.^{xxxii}

Against this backdrop, contemporary federalism bears little resemblance to the principle that first appeared during the summer of 1787. With the consolidation, centralization, and expansion of the national government during the 20th century, the American government philosophy shifted to embrace government as a vehicle to correct economic, social, moral, and political problems. A government of limited powers was transformed into a government of almost unlimited scope. Thus the idea of federalism, so central to the original constitutional arrangement, was turned on its head. The states took on the role of administrators for national programs enacted in Washington, underwritten by national tax dollars, and implemented at the state and local level.

Today's federalism augments the all-but-unquestioned supremacy of the national government in almost every aspect of the nation's life. While retaining governing authority over a host of issues within their borders, modern federalism looks to the states for the administration of government policy emanating from Washington more than from the state capital. Today's federalism too often has reduced governors to supplicants seeking relief at the hands of Washington. It is a federalism composed of an intricate web of policies and procedures, rules and regulations, and billions of dollars flowing back and forth from Washington to each state. It is a federalism reflective of and contributing to the modern American administrative state. Nowadays states themselves are just as often as guilty of expanding and imposing bureaucratic rule as the federal government. Federal overreach and regulatory expansion has gone hand-in-hand with state regulatory overreach and expanded activity. Indeed, the general pattern for some time has not been state resistance to federal activity but a demand for federal intervention. It is frequently the case that states want federal regulation to establish standards as a base for their own state regulatory program. Federal regulatory policies and transfer programs dampen state competition and create a virtual cartel among states that in turn lobby for more federal regulations and programs as long as they agree with the regulatory scheme and control the dispersal of the benefits.^{xxxii}

The Danger of Bureaucratic Centralization

The danger of the shift away from constitutional federalism to administrative rule is more than simply doctrinal. While it is perhaps impossible to definitively isolate and measure the effect of this trend, I would like to draw attention to four tangible drawbacks of the rise of bureaucratic centralization.

First, bureaucratic centralization seems to be contributing to decreasing democratic engagement and growing cynicism about our political system. Evidence of the corrosion of democratic engagement can be seen in the historically low rates of American voter participation. Since the 1970s, turnout in presidential elections has fluctuated below 60% of the voting age population^{xxxii} while turnout in the 2014 midterm elections reached a historic low of only 36.4%.^{xxxii} And whereas Tocqueville had once marveled at the American public's eager participation in local government, voter turnout for mayoral elections in half of America's largest cities has fallen below 20%.^{xxxii} A more worrisome sign is the relentlessly decreasing percentage of Americans who profess trust in the American government. Indeed, despite the fact that a greater portion of the government is run by non-partisan "experts" than ever before, the Pew Research institute has found that only "two-in-ten Americans say they can trust the government in Washington to do what is right 'just about always' (4%) or 'most of the time' (16%)," whereas over 70% did so in the 1950s.^{xxxii}

Bureaucratic centralization is not, of course, the only cause of the public's apathy and cynicism towards government. Yet the more that policy is controlled by unelected bureaucrats and distant government officials, the less ordinary citizens are motivated to participate in local politics to benefit their community. The byzantine system of regulations that necessarily results from bureaucratic government makes citizens disengaged because there are simply too many pages of rules for citizens to pay attention to what government does. Consider that while the 114th Congress enacted 329 laws and passed 708 resolutions throughout 2015 *and* 2016,^{xxxii} federal departments and agencies issued 3,378 final rules and proposed an additional 2,334 rules, amounting to over 80,000 pages in the Federal Register in just 2015 alone.^{xxxii} Perhaps more insidiously, these bureaucratic rules have become so complicated that many citizens have stopped thinking of politics as something they *can* and *should* do and have begun thinking of it as something belonging to lawyers and lobbyists.

A second problem is that bureaucratic centralization has increased the stakes of partisan politics. Issues like education and health care are made more partisan in Congress because the fruits of "winning" a battle at a national level are much greater than at a local level. Bills like the Affordable Care Act and No Child Left Behind effect nearly everyone throughout the nation. Moreover, the stakes of these modern bills is even greater than first meets the eye because they contain numerous provisions that allow unelected bureaucrats to promulgate major new rules long into the future. The more that the modern legislative process comes to influence every segment of society, the more interested parties have been compelled to pour more and more money and influence into national politics. It is not difficult to see how this influx of money and influence has increased partisan divisions. As the reach of the federal government expands to ever more segments of society, ever-increasing numbers of interest groups marshal

vast resources to fan the flames of partisan hatred in order to achieve legislative victories. And whereas local politics often involve neighbors working with neighbors to create commonsense rules for the benefit of the community, national politics increasingly is dominated by major interest groups with high paid lobbyists mobilizing mass constituencies on their behalf.

Thirdly, bureaucratic centralization inevitably results in a cronyism that undermines both liberal and conservative policies. Observers of administrative politics have long recognized the insidious phenomenon of “regulatory capture” whereby the very agencies tasked to police regulated industries become allies of industry insiders and frequently encourage and abet the worst practices of the industry.^{xxxii} Consider, for example, how many of the worst excesses of banks and mortgage lenders during the 2008 financial crisis were tacitly or actively encouraged by ratings agencies and financial regulators.^{xxxii} The very nature of the bureaucratic process has meant that everything from health care, to environmental regulation, to tax policy, and beyond is rife with byzantine exceptions, special privileges, and backroom deals that undercut the original purpose of regulation.

The threat of the cronyism that results from bureaucratic centralization is not just that government regulation is ineffective and biased in favor of the politically connected, but also that it makes the American public even more cynical about the political process. Whereas state and local governments are able to quickly respond to public movements, the energy of citizen activism is often dispersed and extinguished at a federal level by the long, expensive, and esoteric process required to create administrative rules to address even relatively minor problems. Moreover, citizen anger at the corruption resulting from bureaucratic cronyism has little effect because there is no one for the people to hold accountable. Hence the American populace is becoming increasingly angry and distrustful of government in general and experts in particular.

Finally, bureaucratic centralization has rendered the government less capable of responding to the needs of communities. The need to create omnibus solutions to policy issues makes it both harder to pass any new legislation and less likely that new legislation will be effective. Consider, for example, that both parties now largely agree that the No Child Left Behind’s comprehensive approach to education reform has been an expensive failure. But not only do these centralized, comprehensive legislative solutions often fail to live up to their promises, but they also deprive states and local governments of many opportunities to pursue innovative solutions to the problems of their communities. Bureaucratic centralization is, in short, depriving Americans of what Justice Louis Brandeis once described the chief virtue of America’s system of federalism—namely that states could serve as “laboratories of democracy” where innovative approaches to pressing problems could be developed and tested.^{xxxii}

In this context, then, the question is not simply the “balance” between the federal government and the state governments. Why advocate “devolution” if it merely means shifting power from a distant bureaucratic government to a state-based administrative bureaucracy? The proper question is what *kind* of federalism we want to defend, strengthen, and advance. Here I suggest we return for guidance to the Constitution and to its great advocate, James Madison, who (like the American founders generally) never used the term federalism in the modern sense just described. Instead, Madison referred to a “compound republic” organized such that federal powers are limited and enumerated, but national in operation. Tocqueville meant something similar when he spoke of centralized government (dealing with general or national interests) and decentralized administration (proper to personal or parochial interests). The governing system we should favor is Madisonian federalism, of limited federal powers, national in operation, but that do not prevent states properly administering policies that differ region to region, state to state, and locality to locality. In this sense, federalism is a constitutional institution that fosters and allows competition, leading to better policies and more self-government.

Conclusion

Despite the many changes in American politics since the Founding era, the Constitution still provides the best guide for how to preserve a system of federalism that arranges power between a strong national government capable of providing for the nation’s security and well-being, and state governments that are more engaged with and responsive to the people. The Constitution wisely delegates those powers to the national government that either cannot effectively be utilized by the states or which would undermine national security if not exercised in a uniform manner. It is imperative, for example, that the federal government control national defense and immigration policy. Some powers, such as the power to raise taxes or the power to charter a bank, are available to both the state and federal governments.^{xxxii} The Constitution also explicitly prohibits states from exercising some powers (such as the power to enter into treaties with foreign powers) that would undermine the security of the nation. But as emphasized (not established) by the Tenth Amendment, those powers not delegated to the federal government ought to remain the province of the states and of the people. This system of federalism may seem like a quaint relic of the past in an era of massive national entitlement programs and large government agencies that regulate nearly every aspect of society. But we should not be too quick to discard what remains a central element of the constitutional system of government that has enabled the United States to remain a prosperous and exceptional nation.

While there will certainly be disagreements about how best to preserve federalism, I would suggest that members of both parties could benefit from looking to the unique advantages

offered by our system of federalism. Federalism may allow for more effective solutions to some of the most difficult policy problems America faces today. It allows many complicated policies to be broken down into smaller components, some of which are better managed at the state and local level and some of which truly should be carried out by the federal government. Health care, for example, has thus far eluded an effective national solution. Perhaps it would be better if states manage most parts of the health care system while the federal government focused its efforts on a few. And where bureaucratic centralization leads primarily to back room deals and partisan cronyism, federalism allows for innovation and experimentation well suited to the needs of local communities and well suited to uncover the better policy solutions that naturally result from state competition.

When Alexis de Tocqueville visited the United States in 1831 and traveled widely throughout this young country, he concluded that America's federal system had allowed the nation to be "free and happy like a small nation, glorious and strong like a great one." Federalism allowed both for the vibrant and innovative democracy of the New England Township and the strength of the U.S. navy which allowed the new nation to "make[] its flag respected to the ends of the seas."^{xxxii}

Recognizing and strengthening our governing system today, still partly federal and partly national, would go a long way towards reviving and restoring American democracy and self-government.

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