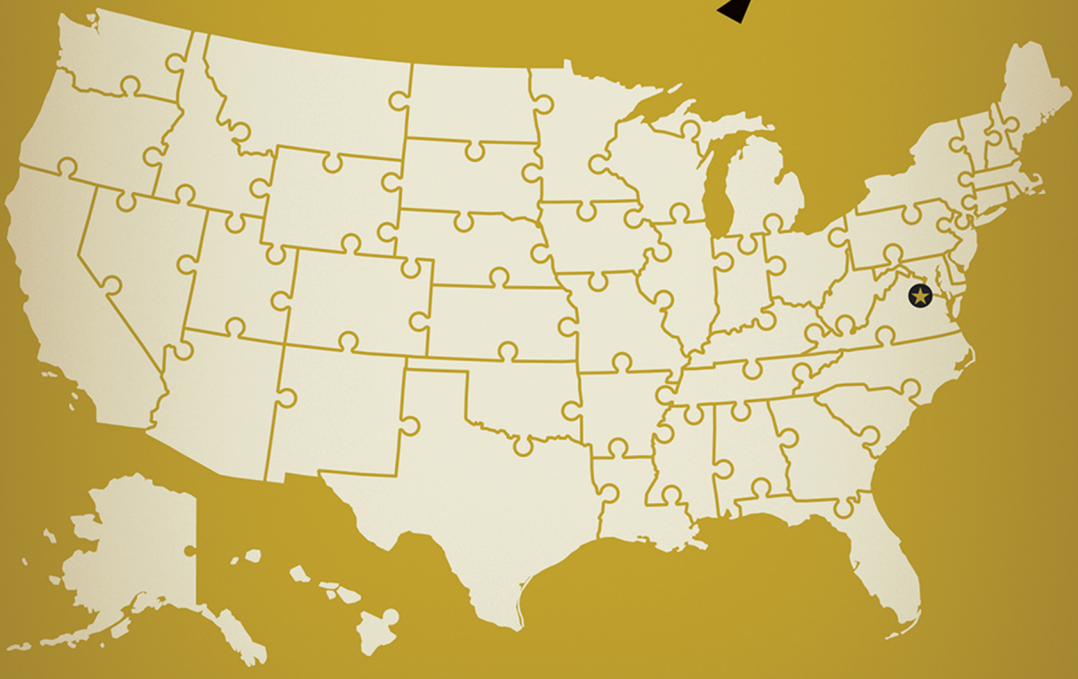
Perspectives on Political and Economic Governance

American Federalism Today



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Why States Rather Than a Single Consolidated Nation? The Framers' View

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When the delegates to the Constitutional Convention gathered in Philadelphia in the summer of 1787, they faced three broad choices regarding the relation of the states to the Union. First, they could create a single consolidated nation along the lines of England or France—perhaps preserving existing state governments as administrative units, perhaps breaking them up and drawing new boundaries of more equal dimensions. Only a few delegates openly supported this approach, most notably Alexander Hamilton and George Read of Delaware, though Anti-Federalists typically claimed that the Constitution came as close to a consolidated nation-state as the delegates dared.

Second, they could stick with a confederation, in which states are the primary units of government. States would each send delegates to a central congress, which would have authority only over issues of national concern, such as foreign affairs, war, and international and foreign commerce—and even then would depend on the states to enforce national decisions. This was the system that prevailed under the Articles of Confederation and had been recommended by the sage Montesquieu. A strong minority of the delegates wished to preserve the basic structure of the Articles government, while giving the union additional powers and a potent executive branch. The New Jersey Plan was the most explicit attempt to follow this model.

The delegates devised a third option, described by James Madison as "partly national, partly federal." This contemplated a genuinely national government, with representation from the people (and not just the states) and power to enforce its own laws through a vigorous executive and an independent judiciary, but the states would retain political autonomy and authority over the issues most significant to ordinary life. The powers of this national

government would be confined to certain enumerated objects, primarily foreign affairs and interstate commerce. This was an innovation; there were no precedents in world history for such a mixed system. As Madison described it 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 State.[1]

The fierce struggle over ratification centered on these questions, forcing both supporters and opponents of the proposed Constitution to think more deeply than ever before about what federalism is for. As Madison pointedly inquired in *Federalist* 45:

> If . . . the Union be essential to the happiness of the people of America, is it not preposterous to urge as an objection . . . that such a government may derogate from the importance of the governments of the individual States? Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty?[2]

Madison's question was directed to "adversaries to the plan of the convention."[3] It might as aptly be directed to the adversaries of our present centralized government: Why forego national measures, thought to promote the well-being of the people, merely because they intrude upon the "certain extent of power" traditionally reserved to the governments of the individual States? Why do we care about federalism?

The "natural attachment" of the people in 1787 to their States was powerful—far more so than today. But the framers of the federalist system were not content to rest on natural attachments alone. They offered practical and theoretical arguments about how the new system of dual sovereignty would promote three complementary objectives: (1) "to secure the public good," (2) to protect "private rights," and (3) "to preserve the spirit and form of popular government." Achievement of these ends, according to Madison, was the "great object" of the Constitution.[4] To understand the founders' design we must look again at those arguments—not just in the mouths of the Federalists, who prevailed, but of the Anti-Federalists, too. As the people of the twenty-first century, we must evaluate these arguments in light of modern experience and knowledge about political decision making. Many of the arguments of 1787 stand up remarkably well, but others do not.

To "Secure the Public Good"

Rejecting both pure confederation and consolidation, the "Federal Farmer" (a particularly able and influential Anti-Federalist pamphleteer) argued that a "partial consolidation" is the only system "that can secure the freedom and happiness of this people." He reasoned that "one government and general legislation alone, never can extend equal benefits to all parts of the United States: Different laws, customs, and opinions exist in the different states, which by a uniform system of laws would be unreasonably invaded."[5] Three important advantages of decentralized decision making emerge from an examination of the founders' arguments and the modern literature. First, decentralized decision making is better able to reflect the diversity of interests and preferences of individuals in different parts of the nation. Second, allocation of decision making authority to a level of government no larger than necessary will prevent mutually disadvantageous attempts by communities to take advantage of their neighbors. And third, decentralization allows for innovation and competition in government.

Responsiveness to Diverse Interests and Preferences

The first, and most axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and tastes, while a national government must take a uniform approach. One size does not fit all. So long as preferences for government policies are unevenly distributed among the various localities, more people can be satisfied by decentralized decision making

than by a single national authority. This was well understood by the founding generation. A noted pamphleteer, "The Impartial Examiner," put the point this way: "For being different societies, though blended together in legislation, and having as different interests; no uniform rule for the whole seems to be practicable."[6]

For simplicity's sake, let us imagine a hypothetical model of two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of State B, wish to ban sports betting. The others are opposed. If the decision is made on a national basis by a majority rule, sports betting will be banned; 110 people will be pleased and 90 displeased. If a separate decision is made by majorities in each state, the rule will be different in the two states; 130 will be pleased and only 70 displeased. By allocating decision-making discretion to the local level, we increase social satisfaction. The level of satisfaction will be still greater if some gamblers in State A decide to move to State B, and some antigamblers in State B decide to move to State A.[7] In the absence of economies of scale in government services,[8] significant externalities,[9] or compelling arguments from justice, this is a powerful reason to prefer decentralized government. States are preferable governing units to the federal government, and local government to states. Modern public choice theory provides strong support for the framers' insight on this point.

Destructive Competition for the Benefits of Government

A second consideration in designing a federal structure is more equivocal. The unit of decision making must be large enough so that decisions reflect the full costs and benefits, but small enough that destructive competition for the benefits of central government action is minimized. In economic language, this is the problem of externalities.[10]

Externalities present the principal argument for centralized government: If the costs of government action are borne by the citizens of State C, but the benefits are shared by the citizens of States D, E, and F, State C will be unwilling to expend the level of resources commensurate with the full social benefit of the action.[11] This was the argument in *Federalist* 25 for national control of defense.[12] Because a Minuteman III missile in Pennsylvania will deter a Russian or Chinese attack on Connecticut and North Carolina as well as Pennsylvania, optimal levels of investment in Minutemans require national decisions and national taxes. Similarly, because expenditures on water pollution reduction in Kentucky will benefit riparian zones all the way to New Orleans, it makes sense to regionalize or nationalize decisions about water

pollution regulation and treatment. Thus, as James Wilson explained to the Pennsylvania ratifying convention, "Whatever the object of government extends, in its operation, *beyond the bounds* of a particular state, should be considered as belonging to the government of the United States."[13]

That significant external effects of this sort provide justification for national decisions is well understood—hence federal funding of defense, interstate highways, national parks, and medical research; and federal regulation of interstate commerce, pollution, and national labor markets. It is less well understood that nationalizing decisions where the impact is predominantly local has an opposite effect. If states can obtain federal funding for projects of predominantly local benefit, they will not care if total cost exceeds total benefit; the cost is borne by others. The result is a "tragedy of the commons" for Treasury funds.[14] The framers' awareness that ill consequences flow as much from excessive as from insufficient centralization is fundamental to their insistence on enumerating and thus limiting the powers of the federal government. Hence, the other half of Wilson's explanation: "Whatever object of government is confined in its operation and effect, *within the bounds* of a particular State, should be considered as belonging to the government of that State."[15] This stands in marked contrast to the modern tendency to resolve doubts in favor of federal control. Washington provided about $3.5 billion in seed money for California's ill-fated high-speed rail project, an entirely intrastate project, which Californians eagerly accepted. Now that cost estimates have soared above $128 billion, all or most to come from state revenues, Californians have soured on the project.[16] If the federal government continued to foot the bill, no doubt the state would happily continue it, no matter what the cost.

Nobel laureate James Buchanan demonstrated that centralized decision making about projects of localized impact will result in excessive spending—excessive meaning more than any of the communities involved would freely choose if they bore both costs and benefits.[17] Each community would be better off if they could agree in advance (as they thought they did in the Constitution) to confine federal attention to issues of predominantly interstate consequence.

Article I, § 8, clause 1 of the Constitution grants Congress the power "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." The meaning of this provision was the subject of a significant debate between Madison and Hamilton. Madison argued that spending for the

"general welfare" is confined to spending for purposes elsewhere enumerated in the Constitution.[18] Hamilton articulated a more functionally valuable interpretation: "The object to which an appropriation of money is . . . made [must] be *General* and not *local*; its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot."[19] This construction is a persuasive reading of the term "general welfare" (the word "general" is frequently used in the debates to signify "national"[20]), and it guards against precisely the fiscal tragedy of the commons discussed above. Early debates in Congress, such as that over a proposal to provide $15,000 for the relief of survivors of a fire in Savannah, Georgia, support Hamilton's view that the constitutional line was understood to be drawn between objects of a predominantly local, as opposed to a general or national, impact.[21]

The point is general. It applies to lawmaking and regulation no less than to taxing and spending. A major effect of regulation is to shift burdens from one region or locality to another. Consider California's ban on the sale of pork from pigs raised in conditions thought (by Californians) to be inhumane.[22] Californians get to bask in the glow of their own superior morality, while farmers and consumers in other states bear the vast majority of the cost. This is an example of one state effectively regulating a national market. More common is the example of the federal government regulating local markets in ways that shift costs and benefits among regions. Consider the federal government's decision to combat air pollution by requiring coal-burning plants to use the best available technology rather than by directly regulating the amount of sulfur-oxide emissions. The effect was to favor eastern producers of "dirty coal" over western producers of lower sulfur-oxide coal, shifting costs from East to West and making pollution reduction more expensive for everyone.[23] Federal milk marketing orders, in the name of protecting "orderly markets," increase the price of milk to consumers for the benefit of higher-cost producers outside of the Midwest.[24]

Taxation, too, can produce a scramble by representatives of politically powerful states to find ways to inflict the tax burden to taxpayers of other states. As one Anti-Federalist writer noted, a single national mode of taxation will result in each state endeavoring "to raise a revenue by such means, as may appear least injurious to its own interest."[25] To give one example: Congress's decision, recently largely reversed, to allow taxpayers to deduct state and local taxes from their income for purposes of federal income benefited not just wealthy taxpayers but those from high-taxing states, mostly controlled

by Democrats. Nearly a third of the benefit flowed to voters in California and New York.[26] Tariffs are notoriously manipulable in these ways.

These are just a few examples of the deleterious consequences that predictably occur when there is a mismatch between the locus of costs and benefits.

Innovation and Competition in Government

A final reason why federalism may advance the public good is that state and local governmental units will have greater opportunity and incentive to pioneer useful changes.[27] Justice Louis Brandeis put the point most famously: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[28] A consolidated national government has all the drawbacks of a monopoly: it stifles choice and lacks the goad of competition.

Lower levels of government are more likely to depart from established consensus simply because they are smaller and more numerous. Elementary statistical theory holds that a greater number of independent observations will produce more instances of deviation from the mean. It follows that a smaller unit of government is more likely to have a population with preferences that depart from that of the national majority. If innovation is desirable, it follows that decentralization is desirable.[29]

Perhaps more important is that smaller units of government have an incentive, beyond the mere political process, to adopt popular policies. If a community can attract additional taxpayers, each citizen's share of the overhead costs of government is proportionately reduced. Since people are better able to move among states or communities than to emigrate from the United States, competition among governments for taxpayers will be far stronger at the state and local than at the federal level. Since most people are taxpayers, this means that there is a powerful incentive for decentralized governments to make things better for most people. In particular, the desire to attract taxpayers and jobs will promote policies of economic growth and expansion. This observation is most closely associated with the economist Charles Tiebout, and is usually called "the Tiebout effect."[30]

To be sure, the results of competition among states and localities will not always be salutary. State-by-state determination of the laws of incorporation likely results in the most efficient forms of corporate organization,[31] but state-by-state determination of the law of products liability seems to have created a liability monster. This is because each state can benefit

in-state plaintiffs by more generous liability rules, the costs being exported to largely out-of-state defendants; while no state can do much to protect its in-state manufacturers from suits by plaintiffs in the other states. Thus, competition among the states in this arena leads to one-sidedly pro-plaintiff rules of law.[32]

The most important example of this phenomenon is the effect of state-by-state competition on welfare and other redistributive policies. In most cases, immigration of investment and of middle-to-upper-income persons is perceived as desirable, while immigration of persons dependent on public assistance is viewed as a drain on a community's finances. Yet generous welfare benefits paid by higher taxes will lead the rich to leave and the poor to come. This creates an incentive, other things being equal, against redistributive policies. Indeed, it can be shown that the level of redistribution in a decentralized system is likely to be lower even if there is virtually unanimous agreement among the citizens that higher levels would be desirable.[33] This is an instance of the free rider problem: even if every member of the community would be willing to vote for higher welfare benefits, it would be in the interest of each to leave the burden of paying for the program to others. Presumably, that is why advocates of a more generous social safety net tend to push for expansion of federal programs, while advocates of the opposite policy tend to favor state-oriented solutions.

Thus, the competition among states has an uncertain effect: often salutary but sometimes destructive. There are races to the bottom as well as races to the top. And it is often impossible to know which is which; this will depend on substantive policy preferences.

To Protect "Private Rights"

At the time of the founding, defenders of state sovereignty most commonly stressed a second argument: that state and local governments are better protectors of liberty. Patrick Henry went to the heart of the matter when he told the Virginia ratifying convention:

> You are not to inquire how your trade may be increased, nor how you are to become a great and powerful people, but how your liberties can be secured; for liberty ought to be the direct end of your Government.[34]

The most eloquent of the opponents of the Constitution, Henry declared that in the "alarming transition, from a Confederacy to a consolidated

Government," the "rights and privileges" of Americans were "endangered."[35] He was far from alone in this fear.[36]

Madison's most enduring intellectual contribution to the debate over ratification is his challenging argument that individual liberties, such as property rights and freedom of religion, are better protected at the national than the state level. The argument, presented principally in *Federalist* 10,[37] is familiar to all:

> If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.[38]

Madison's argument, greatly simplified, is that the most serious threat to individual liberty is the tyranny of a majority faction. Since any given faction is more likely to be concentrated in a particular locality, and to be no more than a small minority in the nation as a whole, it follows that factional tyranny is more likely in the state legislatures than in the Congress of the United States. This argument is supplemented by others, based on the "proper structure of the Union"[39]—deliberative representation, separation of powers, and checks and balances—that also suggest that the federal government is a superior protector of rights. Here I shall concentrate on the argument from the "extent . . . of the Union." Madison's argument blunted the Anti-Federalists' appeal to state sovereignty as the guarantor of liberty. It was, however, only partially successful. Why?

Madison's theory gains support from robust modern social science evidence that homogeneous groups will tend to adopt policies more radical than those that individual members of the groups previously supported. Anyone who has been in a one-sided political gathering (such as a faculty meeting) will recognize the phenomenon. The best empirical evidence comes from studies of three-member courts. Courts with three members of the same party will reach more radical results; even a single member from the opposing party mutes this effect.[40] One-party states tend to go to unreasonable extremes. Certain states (California, Mississippi) are overwhelmingly

dominated by one political party. The United States as a whole is very closely divided. Hence, the enduring plausibility of Madison's thesis. If we are concerned about the rights of politically unpopular minorities, we should locate rights protection at the national level.

Public choice theory has, however, cast some doubt on elements of Madison's theory. In particular, Madison's assumption that the possibility of minority tyranny is neutralized by majority vote requirements and that minority factions are inherently vulnerable to majority tyranny is undermined by studies showing that a small, cohesive faction intensely interested in a particular outcome can exercise disproportionate influence in the political arena.[41] If these theories are correct, Madison underestimated both the dangers of minority rule and the defensive resources of minority groups.

Moreover, some observers have suggested that the conditions of modern federal politics—especially the balkanized, issue-oriented conjunction of bureaucratic agencies and committee staffs—is especially susceptible to factional politics. Political scientist Keith Whittington thus argues that decentralization may be preferred because federal politicians are too responsive to special interest groups—the modern equivalent of Madison's "factions."[42]

But even taking Madison's fundamental insight as correct—and surely it has much to commend it—the argument on its own terms cautions against total centralization of authority in Washington. It points instead to a hybrid system in which states retain a major role in the protection of individual liberties. There are three basic reasons.

Liberty through Mobility

Madison's argument demonstrates that factional oppression is more likely to occur in the smaller, more homogeneous jurisdictions of individual states. But it does not deny that oppression at the federal level, when it occurs, is more dangerous. The lesser likelihood must be balanced against the greater magnitude of the danger. The main reason oppression at the federal level is more dangerous is that it is more difficult to escape. If a single state chooses, for example, to prohibit marijuana, a person wishing to indulge a taste for marijuana could move to other states where his or her desires can be fulfilled. Similarly, a person with an aversion to the culture of marijuana can move the other direction. It is harder to escape laws at the federal level because international migration is harder and more costly than interstate.[43] We are seeing this effect in the case of abortion after the Supreme Court's decision in *Dobbs*, returning legislative authority over the divisive issue of abortion to the

states. (Unlike most such examples, the abortion example only goes one way because fetuses in pro-abortion states are unable to flee to more protective jurisdictions.)

Recognition of this feature of decentralized decision making does not depend on any particular ideological understanding of the content of "liberty." All it takes is policy diversity, which America has in spades. Some may move to avoid high taxes, some to avoid anti-transgender laws, some to escape coercion to join a union, some to be eligible for welfare, some to be able to carry guns, some to get protection from crime, some to live under more sensible pandemic regulations (whatever those may be), some to find freedom to express themselves, some to get an abortion. If a particular policy matters enough, people will migrate to states that they find more congenial. The liberty that is protected by federalism is not the liberty of the apodictic solution, but the liberty that comes from diversity coupled with mobility. If these policies were set at the national level, there would be nowhere to move. Except maybe Australia.

Self-Interested Government

Madison pointed out that there are two different and distinct dangers inherent in republican government: the "oppression of [the] . . . rulers" and the "injustice" of "one part of the society against . . . the other part."[44] The first concern is that government officials will rule in their own interests instead of the interests of the people. The second is that some persons, organized in factions, will use the governmental powers to oppress others. Significantly, while Madison argued that the danger of factions is best met at the federal level (for the reasons familiar from *Federalist* 10), he conceded that the danger of self-interested representation is best tackled at the state level. "As in too small a sphere oppressive combinations may be too easily formed against the weaker party; so in too extensive a one, a defensive concert may be rendered too difficult against the oppression of those entrusted with the administration."[45] Consequently, while powers most likely to be abused for factional advantage ought to be vested in the federal government, powers that are most likely to be abused by self-aggrandizing officials should be left in the states, where direct popular control is ostensibly stronger.

This insight strikes this author as more questionable. As an abstract proposition, it is hard to know where the danger of entrenched, unrepresentative rule is worst. The idea of a "deep state" is likely exaggerated and to a degree paranoid, but it is hard to deny that the federal bureaucracy has its own interests

and commitments, which are persistent over time and largely impervious to elections. On the other hand, most big cities have been in the grip of one-party rule for decades. Local journalism, and with it the likelihood of popular accountability for city governments, has atrophied. Particular ideological and economic factions seem to dominate at both levels. Which are worse? (It is possible that states are the sweet spot: large enough to have diverse interests, but small enough to be responsive to voters. State governors tend to be the most popular elected officials.)

Diffusion of Power

Madison himself did not view his argument as establishing the superiority of a consolidated national government; rather he presented his famous arguments about the tyranny of factions in favor of the intermediate, federalist solution of dual sovereignty. In *Federalist* 51, he underscored that "the rights of the people" are best protected in a system in which "two distinct governments," federal and state, "will control each other."[46] The diffusion of power, in and of itself, is protective of liberty. In Alexis de Tocqueville's evocative words, "Municipal bodies and county administrations are like so many hidden reefs retarding or dividing the flood of the popular will."[47]

That the framers and ratifiers of the Constitution were not wholly persuaded that individual liberties are safer in the hands of the central government is evident from their provision of explicit protections for certain cherished liberties in the Bill of Rights—freedom of speech and religion, the right of compensation for takings of property, due process of law, criminal procedure protections, and so forth. For example, if Madison's theory of factions is correct, it suggests that governmental authority over religion is more safely lodged in the federal government, where the multiplicity of religious sects will guarantee against oppression, than in the states, where a single religious denomination often enjoys majority support. Indeed, Madison used the example of religious sects to demonstrate his point in *Federalist* 10 and 51.[48]

The actual treatment of individual rights in the Constitution is, however, the opposite. State authority over basic liberties, including freedom of religion, was left intact. Madison proposed an amendment that "No State shall violate the equal right of conscience,"[49] even commenting that this (along with speech, press, and jury trial rights against the states) was "the most valuable" of his proposed amendments to the Constitution.[50] Notwithstanding his plea, the proposal was rejected by the Senate.[51] By contrast, the federal government

was forbidden to pass any law "*respecting* an establishment of religion"—that is, either establishing or disestablishing a religion—or prohibiting the "free exercise thereof."[52] The same was true of the other rights listed in the Bill of Rights. The founders thus opted for a "states' rights" approach to individual liberty; it left decisions "respecting" the establishment of religion and other freedoms almost wholly to the states.[53]

This decision was understandable, even if contrary to Madisonian theory. While it was more likely that individual states would erect a religious establishment (indeed, at that time, six of the thirteen states had an establishment of some sort), a national establishment would have been far more threatening to religious liberty. Religious dissenters were free to travel to more tolerant states, and did; moreover, the example of the more tolerant states generated pressure on the more restrictive states to modify their policies. By 1834, the last state establishment had been repealed. A national establishment would have been far more difficult to eradicate. Moreover, religious minorities are more likely to have influence in an individual state where they are concentrated, and thus more likely to have their rights respected, than at the national level. As "Philadelphiensis" said of Quakers who feared the loss of their religious exemption from compulsory military service if control over the military were vested in Congress instead of the state legislature: "Their influence in the state of Pennsylvania is fully sufficient to save them from suffering very materially on this account; but in the great vortex of the whole continent it can have no weight."[54]

The religious freedom example illustrates that, right or wrong, the framers of the Constitution and Bill of Rights believed that state governments were, in some vital respects, safer repositories of power over individual liberties than the federal government. It is thus no accident that the police power—the protection of public health, safety, welfare, and morals—was left to the states, with the federal government entrusted with less sensitive powers like those over interstate and foreign commerce. Given the diversity of views about issues of morality, and the potential for oppression, it is natural that lovers of liberty would be inclined toward decentralized decision making.

At this point, an important qualification is in order. The arguments from the "public good" and from "private rights" make sense only if one presupposes that the decision in question is appropriate to democratic decision making at *some* level, be it state or federal. Some issues are so fundamental to basic justice that they must be taken out of majoritarian control altogether. This is why both state and federal governments are prohibited, for example,

from passing ex post facto laws and bills of attainder.[55] These issues are thus subject to a single national rule; the reason, however, has nothing to do with federalism. Federalism is a system for allocation of democratic decision making power. For those few but important matters on which democracy itself cannot be trusted, neither the public good nor the private rights argument for state autonomy can hold sway.

Even as to compelling matters of justice, however, federalism remains important as a tactical consideration, at least until a just national consensus emerges. Prior to a national majority against slavery, abolitionists would prefer state-by-state decision making, since there would be at least some free states. Upon emergence of an anti-slavery national majority, abolitionists would prefer national legislative power. Once a substantial national consensus developed on the ashes of the Civil War—manifested in two-thirds of both Houses of Congress and three-quarters of the states—it became time to move all authority over the issue to the national level. These judgments would not be principled decisions about federalism; they would be tactical judgments about abolitionism.

To Preserve "the Spirit and Form of Popular Government"

It was an article of faith among many framers that republicanism could survive only in a small jurisdiction. As stated by the prominent Anti-Federalist essayist, Brutus, "a free republic cannot succeed over a country of such immense extent, containing such a number of inhabitants, and these increasing in such rapid progression as that of the whole United States."[56] They believed consolidated national government would lead to oligarchic or despotic rule. Their reasons may be reduced to three major themes: (1) enforcement of laws, (2) nature of representation, and (3) cultivation of public spiritedness.

Enforcement of Laws

Obedience to the law can arise from two different sources: fear of punishment and voluntary compliance. A republican government, which has a minimal coercive apparatus, must rely predominantly upon the latter. As Brutus explained, in a free republic "the government must rest for its support upon the confidence and respect which the people have for their government and laws."[57] To the advocates of decentralized government, this necessarily implied that the units of government must be small and close to the people. "The confidence which the people have in their rulers, in a free republic," according to Brutus, "arises from their knowing them, from their

being responsible to them for their conduct, and from the power they have of displacing them when they misbehave."[58] This confidence, he said, is impossible in a country the size of the United States:

> The different parts of so extensive a country could not possibly be made acquainted with the conduct of their representatives, nor be informed of the reasons upon which measures were founded. The consequence will be, they will have no confidence in their legislature, suspect them of ambitious views, be jealous of every measure they adopt, and will not support the laws they pass.[59]

This proposition seems consistent with public choice theory, since in a smaller setting it is more likely that a strategy of cooperation will overcome the "prisoner's dilemma," which in this context holds that the optimal strategy for each citizen is to violate the law while all others abide by it. In a smaller jurisdiction, there is greater likelihood of monitoring and of stigmatization or retaliation, hence greater incentive to abide by legal and other ethical norms.[60]

It is not clear, however, that states or even metropolitan areas are small enough for this kind of direct popular accountability to exist. Moreover, the consolidation of media markets and the advent of national social media as principal venues for debate over political issues may have rendered much of Brutus's argument obsolete. Unfortunately, the new reality is probably not that popular accountability has shifted from one level of government to another, but that popular accountability has ceased to be operative in any genuine sense at any level. Republicanism suffers when citizens cannot monitor what their government is doing, with the ensuing loss of trust in the fairness and wisdom of governing institutions.

Nature of Representation

One of the principal arguments for substantial state autonomy was that representatives in a smaller unit of government will be closer to the people. Patrick Henry, for example, warned in the Virginia ratifying convention that "throwing the country into large districts . . . will destroy that connection that ought to subsist between the electors and the elected."[61] Assuming representative bodies of roughly the same number, any given representative will have fewer constituents and a smaller district at the state or local level. Each citizen's influence on his representative, therefore, will be proportionately greater, and

geographically concentrated minorities are more likely to achieve representation. For this reason, some reformers today advocate a substantial increase in the size of the House of Representatives, which would entail a substantial reduction in the size of most districts.[62] This marks a return to a debate among delegates to the Constitutional Convention in 1787. Indeed, the last change to the Constitution, on the last day of the Convention, was to increase the size of the House.[63]

Because federal electoral districts must of necessity be larger and more populous than state legislative districts, representation is likely to be skewed in favor of the well-known few.[64] The Federal Farmer argued that increasing the number of representatives would make the nation "more democratical and secure, strengthen the confidence of the people in it, and thereby render it more nervous and energetic."[65] However, the sheer size of the United States makes it impossible to increase the number of representatives sufficiently without turning the Congress into what Madison called "the confusion of a multitude."[66]

Moreover, if representatives to the national government are required to spend much of their time at the distant national capital, they are likely to lose touch with the sentiments of their constituents, and instead come to identify themselves with the interests of the central government.[67] Even Madison realized that "within a small sphere, this voice of the people could be most easily collected, and the public affairs most accurately managed."[68]

Cultivation of Public Spiritedness

Critics of governmental centralization warned that public spiritedness—then called "public virtue"[69]—could be cultivated only in a republic of small dimensions. Republicanism, it was thought, depended to an extraordinary degree on the willingness of citizens to submerge their own passions and interests for the common good.[70] The only substitute for public virtue was an unacceptable degree of coercion, compatible only with nonrepublican forms of government.

There were two reasons many founders believed that a centralized government would undermine republican virtue. First, public spiritedness is a product of participation in deliberation over the public good. If the citizens are actively engaged in the public debate, they will have more of a stake in the community. The federal government is too distant and its compass too vast to permit extensive participation by ordinary citizens in its policy formulations. By necessity, decision making will be delegated to agents. But as they are cut

off from active participation in the commonwealth, the citizens will become less attached to it and more inclined to attend to their private affairs.

Second, the natural sentiment of benevolence,[71] which lies at the heart of public spiritedness, is weaker as the distance grows between the individual and the objects of benevolence. Individuals are most likely to sacrifice their private interests for the good of their family, and then for their neighbors and, by extension, their community. They are unlikely to place great weight upon the well-being of strangers hundreds of miles away. It is unlikely, therefore, that citizens of a nation as large as the United States will assume an attitude of republican virtue toward national affairs.

Do these arguments still hold weight? It is a matter of contention. Are smaller towns places of public virtue and political accountability, as the Anti-Federalists thought, or of narrow-mindedness and prejudice, as Madison's theory might suggest? We are still debating this—as the popular country song by Jason Aldean, "Try That in a Small Town," illustrates.[72] These debates will not be resolved by consensus. They are opposite sides of the same coin. The very features that make smaller units of government closer to the people are also the features that make minorities within those communities uncomfortable. We can have effective, responsive, majoritarian democracy or we can have maximal latitude for minority deviation from majority norms, but we cannot have both—except, perhaps, by the device of lodging power at one level for one kind of decision and another level for other decisions.

Conclusion

The argument for substantial state and local autonomy was powerful at the time of the founding and remains so. Even though some Supreme Court decisions over the last generation evince a greater respect for the constitutional principles of federalism—marking a modest recovery from an all-time low[73]—it is unclear the extent of their purchase. But there continues to be a revival of interest, across the political spectrum, in devolution of governing authority to state, city, and community levels. Due to a combination of political paralysis in the national legislature and the sorting of citizens into more homogeneous "red states" and "blue states," the locus of policy debate seems to be moving in a stateward direction.

Consideration of the reasons for decentralized political decision making strengthens the case for why we may wish to retain or return to the founders' political design. But a thorough analysis of federalism today would require, as well, a more systematic appraisal of the arguments for a centralized national

authority. Moreover, if these historical contentions are to have any practical effect, much more thinking needs to be done about the appropriate role of the judiciary, the Congress, and the states themselves. The vision that the Supreme Court, having been informed of the founders' intentions, now has it in its power to restore the original constitutional scheme, is fanciful, and would not necessarily be desirable even if it were less so. The Constitution is everyone's responsibility, and not just the Supreme Court's. Restoration of the constitutional order requires more than a history lesson directed to the Court. It requires a renewed sense by the people of the relation of state sovereignty to the public good, individual liberty, and popular government.

Whatever our chosen theory of interpretation, it is good to cast our minds back to the time of the founding, when popular attention was directed, uniquely in our history, to the issues of self-government. It is the only way to recall, and perhaps recapture, what we may have lost.

The author wishes to thank Charles Edward Power for valuable research assistance.

Notes

1. The Federalist No. 45, at 292–93 (Madison) (C. Rossiter ed., 1961).
2. The Federalist No. 45 (James Madison), *supra* note 1, at 288–89.
3. *Id.* at 288.
4. The Federalist No. 10 (James Madison), *supra* note 1, at 80.
5. The Complete Anti-Federalist (Herbert Storing ed., 1981), Vol. 2, at 2.8.13–14.
6. 5 The Complete Anti-Federalist, *supra* note 5, at 5.14.6. *See also* Alexis de Tocqueville, Democracy in America 161 (J.P. Mayer ed., 1969), at 161 ("In large centralized nations the lawgiver is bound to give the laws a uniform character which does not fit the diversity of places and of mores.").
7. Under certain extreme assumptions, a sufficiently decentralized regime with full mobility could perfectly satisfy each person's preferences even with no voting at all. *See* Robert P. Inman & Daniel L. Rubinfeld, Democratic Federalism: The Economics, Politics, and Law of Federal Governance 37–75 (2020); Dennis C. Mueller, Public Choice III 182–206 (2003); David L. Shapiro, Federalism: A Dialogue 76–106 (1995); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956).
8. H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 Minn. L. Rev. 73, 141 (1997) (arguing decentralization is undesirable if it frustrates efforts to achieve economies of scale). Economies of scale may not be a major issue in actual practice. Small units of government are able to contract with one another or with private service providers so as to achieve economies of scale without sacrificing decision-making autonomy. *See* Jens Blom-Hansen, Kurt Houlberg, &

Søren Serritzlew, *Size, Democracy, and the Economic Costs of Running the Political System*, 58 Am. J. Pol. Sci. 790, 797–801 (2014) (discussing the effects of scale in government efficiency). *Compare* Gordon Tullock, *Federalism: Problems of Scale*, 6 Pub. Choice 19, 21 (Spring 1969), *with* Jerome Rothenberg, *Local Decentralization and the Theory of Optimal Government*, *in* The Analysis of Public Output 31, 33 (Julius Margolis ed., 1970).

9. *See* Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 San Diego L. Rev. 555, 565–74 (1994).

10. *See generally* Richard A. Posner, Economic Analysis of Law § 27.1 (9th ed. 2014); Robert P. Inman & Daniel L. Rubinfeld, *The Political Economy of Federalism*, *in* Perspectives on Public Choice: A Handbook 73–105 (Dennis C. Mueller ed., 1997).

11. *See* The Practice of Fiscal Federalism: Comparative Perspectives 8 (Anwar Shah ed., 2007); Mancur Olson, Jr., *The Principle of "Fiscal Equivalence": The Division of Responsibilities among Different Levels of Government*, 59 Am. Econ. Rev. 479, 482 (1969).

12. The Federalist No. 25 (Alexander Hamilton), *supra* note 1, at 163.

13. James Wilson, Speech to the Pennsylvania Convention (Nov. 24, 1787). *See also* Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 Fla. L. Rev. 1, 6–7 (1997) ("Interstate compacts, with larger and more flexible jurisdictions, are better equipped to counter externalities than an individual state's laws, particularly given the general assumption that externalities are a constantly diminishing function."); *cf.* William Anderson, The Nation and the States, Rivals or Partners? 149 (1955) (stating that, "on grounds of greater efficiency," one level of government may be better suited than another to perform a given function).

14. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968); *see also* Brett M. Frischmann, Alain Marciano, & Giovanni Battista Ramello, *Retrospectives: Tragedy of the Commons after 50 Years*, 33 J. Econ. Perspectives 211 (2019).

15. Wilson, *supra* note 13. Wilson's formulation was widely echoed in the debates of the period. *See, e.g.*, 3 The Complete Anti-Federalist, *supra* note 5, at 3.14.8 (essays of "A [Pennsylvania] Farmer"). According to Tocqueville, a similar model was employed for the allocation of power between states and townships. *See* Tocqueville, *supra* note 6, at 67 ("In all that concerns themselves alone the townships remain independent bodies, and I do not think one could find a single inhabitant of New England who would recognize the right of the government of the state to control matters of purely municipal interest.").

16. *See* California High-Speed Rail Authority, *Capital Costs and Funding*, https://hsr.ca.gov/about/capital-costs-funding/.

17. James M. Buchanan & Gordon Tullock, The Calculus of Consent 135–40 (1962). *See also* Olson, *supra* note 11, at 482–83; Gordon Tullock, *Comment*, *in* The Analysis of Public Output 65 (Julius Margolis ed., 1970).

18. A close look at the language of Article I, § 8, clause 1 suggests that it does not empower Congress to spend, but only to tax for certain purposes. Spending, according to this Madisonian view, is permitted only as "necessary and proper" to the other enumerated objects of Article I, § 8.

19. 10 The Papers of Alexander Hamilton 303 (Harold C. Syrett ed., 1966).

20. *See, e.g.*, 2 The Complete Anti-Federalist, *supra* note 5, at 2.8.78 (letters from the "Federal Farmer") ("In a federal system we must not only balance the parts of the same government, as that of the state, or that of the union; but we must find a balancing influence between the general and local governments.").

21. 6 Annals of Cong. 1712–27 (Joseph Gales ed., 1834) (Dec. 28, 1796).

22. National Pork Producers Council v. Ross, 143 S. Ct. 1142, 1144 (2023).

23. *See* Bruce Ackerman & William Hassler, Clean Coal/Dirty Air, or How the Clean Air Act Became a Multibillion-Dollar Bail-Out for High-Sulfur Coal Producers (1981).

24. Haley H. Chouinard, David E. Davis, Jeffrey T. LaFrance, & Jeffrey M. Perloff, *Milk Marketing Order Winners and Losers*, 32 Applied Economic Perspectives and Policy 59–76 (2010).

25. *See* 5 The Complete Anti-Federalist, *supra* note 5, at 5.14.6 (the "Impartial Examiner").

26. *See* Jared Walczak, *The State and Local Tax Deduction: A Primer* (2017), https://taxfoundation.org/research/all/state/state-and-local-tax-deduction-primer/.

27. *See* Craig Volden, *States as Policy Laboratories: Emulating Success in the Children's Health Insurance Program*, 50 Am. J. Pol. Sci. 294, 294–95 (2006) (finding that more successful state children's health insurance programs tend to be emulated); Brett M. Frishmann & Mark A. Lemley, *Spillovers*, 107 Colum. L. Rev. 257, 269 (2007) (imposing uniform federal standards may have undesirable effects because it impedes the "virtuous cycle" of state copycat innovation). *But see* William Magnuson, *The Race to the Middle*, 95 Notre Dame L. Rev. 1183, 1186, 1213 (2020) (arguing that federalism dynamics spark a "race to the middle" that leads to states trying not to "distinguish[] themselves from the crowd" but rather to fit into it).

28. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The irony is that Brandeis's dissent favored a particularly stupid piece of local special-interest regulation.

29. There is also the separate argument that federalism incentivizes beneficial competition between the states and federal government. *See* Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 Vand. L. Rev. 329, 333 (2003) ("With two separate governments vying to win their trust, the Framers reasoned, the people would be free continually to assess the sovereigns' conduct.").

30. *See* Tiebout, *supra* note 7, at 416.

31. *See* Jonathan H. Adler, *Interstate Competition and the Race to the Top*, 35 Harv. J.L. & Pub. Pol'y 89, 89 (2012) (arguing that "robust interjurisdictional competition facilitates the enactment of better public policy at the state level" for corporate

law); Judge Ralph Winter, *Private Goals and Competition among State Legal Systems*, 6 Harv. J.L. & Pub. Pol'y 127 (1982). *But see* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 Stan. L. Rev. 679, 685 (2002); Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 Harv. L. Rev. 1435 (1992).

32. *See* Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, 37 Proc. Acad. Pol. Sci. 90 (1988).

33. Posner, *supra* note 10; Wallace E. Oates, Fiscal Federalism 6–8 (1972); *see also* Paul E. Peterson, City Limits (1981).

34. 5 The Complete Anti-Federalist, *supra* note 5, at 5.16.2.

35. *Id.*

36. *See, e.g.*, 1 Federal Convention, *supra* note 63, at 340–41 (Luther Martin); 2 The Complete Anti-Federalist, *supra* note 5, at 2.3.7 (Robert Yates and John Lansing, Jr.); *id.* at 2.9.22 (Brutus). Compare Tocqueville's analysis: "Local institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government, but it has not got the spirit of liberty." Tocqueville, *supra* note 6, at 63.

37. Madison put the argument forward earlier in an essay entitled "Notes on the Confederacy," written in April 1787. *See* 1 Letters and Other Writings of James Madison 325–28.

38. The Federalist No. 10 (James Madison), *supra* note 1, at 80.

39. *Id.* at 84.

40. Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301, 306 (2004); Thomas J. Miles, *The Law's Delay: A Test of the Mechanisms of Judicial Peer Effects*, 4 J. Legal Analysis 301, 302 (2012); Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. Pa. L. Rev. 1319, 1323–24 (2009).

41. *See generally* Mancur Olson Jr., The Logic of Collective Action (1965); James Q. Wilson, Political Organizations (1973); Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985); John M. de Figueiredo & Brian Kelleher Richter, *Advancing the Empirical Research on Lobbying*, 17 Ann. Rev. Pol. Sci. 163 (2014) (discussing the current state of empirical research on lobbying's effects).

42. Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 Hastings Const. L.Q. 483, 508–10 (1998); *see also* Richard B. Stewart, *Madison's Nightmare*, 57 U. Chi. L. Rev. 335 (1990).

43. *See, e.g.*, Richard A. Epstein, *Exit Rights under Federalism*, 55 L. & Contemp. Probs. 47 (1992); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (observing that federalism "makes government more responsive by putting the States in competition for a mobile citizenry"); Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States 16–17, 34 (1970) (explaining that dissatisfied consumers often have "exit options" and "voice options";

that economists tend to believe exit is the most powerful means of expressing unhappiness; and that, when exit is not a viable alternative, "voice must carry the entire burden of alerting management to its failings."); Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 Duke L.J. 1349 (2013) (reprising Hirschman's classic work).

44. The Federalist No. 51 (James Madison), *supra* note 1, at 323; *see also* 1 Letters and Other Writings of James Madison at 325–28.

45. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 The Papers of James Madison 214 (Robert A. Rutland et al. eds., 1973).

46. The Federalist No. 51 (James Madison), *supra* note 1, at 323.

47. *See* Tocqueville, *supra* note 6, at 263. *Compare* Andrzej Rapaczyski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Sup. Ct. Rev. 341, 389, *with* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1429–1519 (1987); *see also* Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & Pol. 187, 187–88 (2005).

48. The Federalist No. 10 (James Madison), *supra* note 1, at 84; The Federalist No. 51 (James Madison), *supra* note 1, at 324.

49. 1 Annals of Cong., *supra* note 21, at 452 (June 8, 1789).

50. *Id.* at 458.

51. *Id.* at 86 (Sept. 21, 1789).

52. U.S. Const. amend. I.

53. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2109 (2003); *see also* Wilbur G. Katz, Religion and American Constitutions 8–11 (1964); William W. Van Alstyne, *What Is "An Establishment of Religion?,"* 65 N.C. L. Rev. 909 (1987).

54. 3 The Complete Anti-Federalist, *supra* note 5, at 3.9.12.

55. U.S. Const. art. I, § 9, cl. 3; *id.*, § 10, cl. 1.

56. 2 The Complete Anti-Federalist, *supra* note 5, at 2.9.11.

57. *Id.* at 2.9.18. *See also* Gordon S. Wood, The Creation of the American Republic: 1776–1787 66 (1969).

58. 2 The Complete Anti-Federalist, *supra* note 5, at 2.9.18.

59. *Id.*

60. *See* Robert Axelrod, The Evolution of Cooperation 1 (1984); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. Cal. L. Rev. 1448, 1449 (1995).

61. 5 The Complete Anti-Federalist, *supra* note 5, at 5.16.27. The Federal Farmer argued, similarly, that "a small representation can never be well informed as to the circumstances of the people, the members of it must be too far removed from the people, in general, to sympathize with them, and too few to communicate with them." *Id.* at 2.8.99.

62. *See* Lee Drutman et al., *The Case for Enlarging the House of Representatives* (Amer. Acad. of Arts and Sciences 2021), https://www.amacad.org/ourcommonpurpose/enlarging-the-house.

63. 2 Max Farrand, The Records of the Federal Convention 644 (Sept. 17, 1787) (1911).

64. *See, e.g.*, 5 The Complete Anti-Federalist, *supra* note 5, at 5.6.2 (Patrick Henry); *id.* at 2.8.158 (Federal Farmer); *id.* at 6.12.16 (Melancton Smith).

65. *Id.* at 2.8.158.

66. The Federalist No. 10 (James Madison), *supra* note 1, at 82. For a modern discussion, see Alberto Alesina & Enrico Spolaore, The Size of Nations (2005); and Robert A. Dahl & Edward R. Tufte, Size and Democracy (1973).

67. *Compare* 2 The Complete Anti-Federalist, *supra* note 5, at 2.6.27 (Letters of Cato), *with* Tullock, *supra* note 8, at 25 ("The longer the chain of officials that runs between the voter making the choice and the actual provision of the product, the more noise is introduced into the process by the individual bureaucrats who have their own preference functions and by the problems of information transmission.").

68. 10 The Papers of James Madison, *supra* note 45, at 212. *See also* Jeffrey M. Berry, The Rebirth of Urban Democracy 49 (1993) (describing the relationship between size and effectiveness of neighborhood self-government); Sidney Verba, Participation and Political Equality: A Seven-Nation Comparison 269–85 (1978) (finding lower rates of political participation in urban than in rural areas); Robert A. Dahl & Edward R. Tufte, Size and Democracy 73–88 (1973) (suggesting the ability of officials elected from smaller constituencies to make contact with constituents and generate voter satisfaction).

69. *See* Wood, *supra* note 57, at 68.

70. For the connection between this doctrine of public virtue and the framers' conception of religious liberty, see Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 14–22; and The Complete Anti-Federalist, *supra* note 5, at 22–23.

71. *See* Adam Smith, The Theory of Moral Sentiments (D. D. Raphael ed., 1976).

72. *See, e.g.*, Emily Olson, *How Jason Aldean's "Try That in a Small Town" Became a Political Controversy*, NPR (July 20, 2023), https://www.npr.org/2023/07/20/1188966935/jason-aldean-try-that-in-a-small-town-song-video.

73. FERC v. Mississippi, 456 U.S. 742 (1982); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); South Dakota v. Dole, 483 U.S. 203 (1987).

DISCUSSION

Paul E. Peterson: There was one thing you didn't mention at the beginning, and that was the effort to make sure that we would have a common market, which I think was, the states couldn't interfere with trade. I think that was an incredibly important thing that was done at the convention.

Although states have autonomy within the American federal system, they cannot erect trade barriers that prevent a large common market. The Constitution struck down the barriers that had arisen under the Articles of Confederation. Europeans are still struggling to achieve a common market that Americans take for granted.