

# Socialism vs. the American Constitutional Structure: The Advantages of Decentralization and Federalism



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I.

Socialism is finally getting the American honeymoon it never got in the last century. But American federalism's division of power between a national government and fifty sovereign states makes difficult, if not impossible, the unified economic planning necessary to supplant capitalism. Decentralization of power, the Constitution's Framers hoped, would not just promote government effectiveness but would also protect individual liberty by encouraging Washington and the states to check each other.

Our Constitution's fundamental decentralization of power does not prevent many Americans from wishing for socialism anyway. A 2019 Gallup poll found that 43 percent of adults believed socialism to be "a good thing" and 47 percent even reported that they could vote for a socialist candidate for president.<sup>1</sup> While a bare majority still opposes socialism, that view loses popularity among younger Americans. Since 2010, their attitude toward capitalism has deteriorated to the point that millennials view both capitalism and socialism with equal favor at about 50 percent. That contrasts with baby boomers, who support capitalism over socialism by 68–32 percent, and Gen Xers, whose support is 61–39 percent.<sup>2</sup>

Socialism may be finding new popularity because of its ambiguity. The same Gallup poll reported that 6 percent supported socialism because they believed the concept meant being "social," as in being friendly and talkative. An even larger proportion (83 percent) of the millennials told pollsters that they held a positive view of "free enterprise," though 46 percent disliked "big business." Younger Americans went through the Great Recession of 2008–09 and the massive corporate bailout—and are witnessing even worse today, as the COVID-19 epidemic wreaks havoc on the economy. They may simply equate "capitalism" with "big business." Others seem to believe that "socialism" means a desire for social justice or equality.

The near majority of all Americans who view socialism positively may associate it with the welfare state, a safety net, or even environmental protection. They may believe it means the generous welfare systems of the Scandinavian nations, where public sector spending reaches about half of GDP, compared with about one-third for the United States (which also has a much larger defense budget). Or many may

believe that socialism just refers to support for "economic and human rights," as Senator Bernie Sanders defined it last year. Among those rights were not life, liberty, and the pursuit of happiness but instead "a decent job, affordable housing, health care, education, and, by the way, a clean environment." Socialism seemed to include nothing more than the welfare state combined with democracy.

By defining his platform this way, Sanders rendered democratic socialism more appealing. He came close to winning the Democratic presidential primary twice. But by describing socialism as a series of positive rights, to be provided by the public, rather than as negative limits on government as our Constitution does, Sanders gives the game away. He supported a Green New Deal, in which the federal government would seek to end certain sectors of the economy such as airlines or oil and gas production, and would promote other, more environmentally conscious, forms of economic activity. He proposed a Medicare-for-All program that would have done away with all private insurance and made the government the sole payer for health care in the nation.

The massive government intervention necessary to carry out federal management of all energy production and health care in the national economy reveals the nature of socialism. As Peter Berkowitz wrote in an earlier paper in this series, "top-down management of economic life" is "the hallmark of socialism."<sup>3</sup> Under socialism "the state makes the major decisions about production, distribution, and consumption." It also "retains a direct say about who gets what property and how it is employed." Under capitalism, by contrast, "private individuals make the major decisions about production, distribution, and consumption." With a rule of law, the government "protects a far-reaching right to private property." In a capitalist system, private individuals own most capital; under socialism, it is owned mostly by the state.

The large governments needed to successfully operate socialism have led to its many twentieth-century failures. As Friedrich Hayek famously argued in *The Road to Serfdom*, government bureaucracies did not have the intelligence, computational power, or information to decide exactly how much to produce to satisfy the desires of a population. But that did not prevent nations from Russia and China to even the United Kingdom, France, and Italy from trying. The socialist experiment, as Niall Ferguson reminds us in his contribution to this series,

did not produce utopia but instead “generally delivered hell on earth.”<sup>4</sup> As Ferguson observes, communism cost the lives of between 85 and 100 million people in the twentieth century as a whole. Communist regimes could not even show higher living standards or economic progress as the result of all this tragedy; their centralization produced agricultural and industrial disasters. Government planners produced rigid, ossified, state-run economies that created perverse incentives that destroyed the economies of China, Russia, and Eastern Europe. Socialism today need not run hand in hand with brutal dictatorships, as the Scandinavian nations show. But the authoritarian governments reflected the extremes of state power upon which socialism depends.

While the Old World struggled through two world wars, a Great Depression, and the socialist disasters that followed, the United States enjoyed significant immunity. Admittedly, the federal government greatly expanded its size and reach during the New Deal of the 1930s and the Great Society of the late 1960s. The United States, however, never experienced a competitive socialist political party (Eugene Debs set the high watermark with 6 percent of the vote for president in 1912) or the widespread nationalization of industry that occurred in Western Europe. The size of the federal government in terms of the number of employees or as a percentage of the economy still pales in comparison to that of European governments. The United States still enjoys a significant decentralization among federal, state, and local governments, which are further cabined by the strong institutions of private civil society (such as schools, churches, charities, and civic groups), compared to our advanced industrial peers.

The failure of socialism throughout American history has given rise to a cottage industry of debate over, as German sociologist Werner Sombart asked as early as 1906, “Why Is There No Socialism in the United States?”<sup>5</sup> Marx and Engels, as Ferguson reminds us, expected communist revolutions to break out in the advanced industrial countries, not the economically backward nations of Imperial Russia and Qing dynasty in China. Socialism, with its prediction of ever greater concentrations of economic power in capital and declining wages for a vast proletariat, should have found a home in the United States at the turn of the twentieth century. But it did not.

Answers for American exceptionalism in this regard have run the gamut. In his classic *Democracy in America*, Alexis de Tocqueville suggested that the United States would not fall prey to the same political upheavals of Europe because America never carried the Old World’s baggage of feudalism, aristocracy, and an oppressive state. Louis Hartz offered perhaps the most famous version of this thesis. He noted that Americans have an individualistic society and culture, rooted in a Lockean understanding of the world, that resists the power

of the state.<sup>6</sup> Another important school of thought argues that socialism failed in the United States because capitalism offered greater wages, thanks to increasing productivity, and a general level of affluence for the average American that rendered socialism unattractive and revolution unlikely. Others argue that America’s very diversity makes the class solidarity required for socialism impossible. Americans identify less by economic class than by ethnic, cultural, geographic, religious, and social differences. As Seymour Martin Lipset summarized in 2000, these factors made Americans “born conservatives” who enjoyed economic prosperity and social mobility in a land without an aristocratic, centralized state.<sup>7</sup>

What these explanations overlook, however, is another unique element of the American experiment: its constitutional structure. The United States Constitution originally established a radically decentralized system of government. Dividing power between a single federal government and, now, fifty state governments makes it difficult to achieve the unified economic planning required by socialism. Unlike some European nations such as France, the fifty state governments are not just convenient administrative subdivisions of the national government. Instead, as we will see, the states retain significant aspects of sovereignty in both their operations and their regulatory reach. The massive government intervention required by socialism would have to overcome not just this division of authority but also the possibility that the states would provide a political forum for opposition to any centralization of power in Washington, DC. The next section will discuss the original Constitution’s understanding of federalism and why it adopts a decentralized approach to government power in the United States.

## II.

As the historical evidence from the Constitutional Convention and the ratification debates demonstrates, the Founders recognized that states would remain a permanent feature of the national political system. As Chief Justice Salmon Chase would declare after the Civil War in *Texas v. White*, the United States is “an indestructible Union, composed of indestructible States.”<sup>8</sup> States existed not just out of political convenience, however, but to implement the will of the people and to protect their lives, liberty, and property. As James Madison wrote in *Federalist* 46, “The federal and state governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.”<sup>9</sup>

In creating this federal system, with two levels of sovereigns, the Founders explicitly chose decentralization as the guiding principle of government. They created a national government of limited, enumerated powers, and reserved authority over all other matters to the states. As Madison wrote in *Federalist* 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.”<sup>10</sup> Two years later, the Framers enshrined this principle in the Bill of Rights. As the Tenth Amendment declares: “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.” The Tenth Amendment merely clarifies the principle behind the Constitution’s grant of limited, specialized powers to the federal government, which creates a strong decentralization of authority among the states over every other subject.

Of course, the Founders ultimately replaced the Articles of Confederation because it had become too decentralized for effective government. It is important to understand which powers they sought to place at the national level. Under the Articles, Congress had lacked the power to effectively conduct diplomacy, live up to treaties, and protect the national security. Social scientists would say that the states during this critical period could not solve collective action problems. National defense is the textbook example why the central government must provide a public good to solve such problems. National defense is nonrivalrous, in that each state benefits equally from it without reducing its availability to others, and it is nonexclusive, in that no state could exclude the others from it and thus force them to pay their fair share.

As a result, the Constitution granted the national government exclusive authority over foreign relations and national security. The Constitution vests the president with the commander-in-chief role and Congress with the power to declare war and raise the military. It grants the president, with the advice and consent of the Senate, the authority to make treaties. It allows Congress to impose economic sanctions on foreign countries and implicitly assumes that the president will conduct diplomacy. And the Constitution specifically prohibits states from engaging in armed conflicts and making agreements with foreign nations. We can view many of the other powers granted to the federal government, most notably the Commerce Clause, as solutions to other collective action problems.<sup>11</sup>

The states retained primary jurisdiction over almost all other domestic matters, such as taxation, law and order, property and contracts, and most social and moral legislation. Anti-Federalists had attacked the Constitution on the grounds that the Necessary and Proper Clause gave the central government unlimited powers. Madison replied that federal powers “will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce.”<sup>12</sup> In contrast, state power would “extend to all 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.” Alexander Hamilton chimed in that the “administration

of private justice between the citizens of the same State, the supervision of agriculture, and of other concerns of a similar nature” would remain outside federal power.<sup>13</sup> During the ratification debates, other Federalists declared that the federal government could not invade state authority to establish the common-law rules governing property, contracts, trusts and estates, criminal law, and other local matters.

Scholars have argued that this division of authority bears several consequential benefits for public policy. First, states serve as the “laboratories of democracy,” as Justice Louis Brandeis wrote during the New Deal.<sup>14</sup> They allow the nation to experiment with a variety of policies to solve pressing national problems, which limits the bad effects of poor choices to a single state and prompts good ideas to spread. In the 1970s and 1980s, the United States experienced rising levels of violent crime. Federalism allowed states to experiment with a variety of anticrime strategies. Under Mayors Rudy Giuliani and Mike Bloomberg, New York City applied policing methods that produced extraordinary reductions in murder and other crime. If New York’s policies had failed, the harmful effects would have remained in New York. If New York City’s methods worked, as they did, other cities and states could borrow and adapt them.

Second, federalism allows for the tailoring of government programs to local conditions and different communities.<sup>15</sup> Environmental policy need not impose the same mandates in a state that does not suffer from certain weather conditions as it does in another state. Air pollution standards, for example, should not be the same for a dense, car-centric culture such as California as for a low-population, prairie state such as Nebraska.

Third, smaller governments may better handle certain subjects—such as crime and family policy—both to promote responsive government closer to the people and to divide authority efficiently between the nation and the states. Economists have found that, under certain conditions, smaller governments can provide a more efficient allocation of resources that maximizes the well-being of their citizens.

Fourth, federalism promotes competition between states. States can offer packages of regulation and taxes that strike different trade-offs of policy. California, for example, can tilt in favor of strict environmental protection but at the cost of regulations that retard industrial growth. It can impose high income taxes in exchange for generous public welfare and spending policies. Texas, of course, can do the exact opposite. Much as the market creates efficiency by forcing producers to compete to win the business of consumers, federalism forces states to compete using public policy. Individuals benefit because they can choose to live in the states that match their preferences.

Fifth, federalism creates a risk-averse approach to government. It assumes that human knowledge does not necessarily give us the means to quickly and perfectly solve public policy problems. If we do not have confidence that we can devise solutions, federalism creates a dispersed system for policy that allows for trial and error before the nation as a whole need adopt a solution. If the national government errs in crime policy, for example, the states can adopt a different approach. If the states fail to handle a public health outbreak, Washington, DC, can step in with personnel, money and resources, and technical expertise. Decentralization enhances resilience in government such that paralysis or failure at one level does not incapacitate the nation as a whole from acting.

But federalism does more than enhance efficiency in the execution of public policy. It also protects individual liberty. Decentralization does this in several ways. First, federalism protects freedom by dispersing public power. Creating fifty sovereign governments makes it more difficult for any group to implement oppressive policies throughout the land. The Framers clearly anticipated the possibility that organized factions would seek to use the legislative process to the detriment of the public good. In his famous *Federalist* 10 essay, James Madison responded to Montesquieu's claim, repeated by the Anti-Federalists, that democracy could survive only in a small nation and that larger territories would eventually collapse into tyranny. Madison argued that the great threat to liberty came from factions. To Madison, "the most common and durable source of factions has been the various and unequal distribution of property," which itself was due to the "diversity in the faculties of men."<sup>16</sup>

Madison's solution, set out in *Federalist* 10, was not to reject a national government in favor of small, fully autonomous sovereign states—in other words, the Articles of Confederation. Instead, Madison argued that liberty would be protected best in a large republic, where "clashing interests" would cancel each other out. The larger the nation, the more factions that would arise. The larger the nation, the more difficult for these many interests to combine and turn government away from the public interest. Multifarious interests would prevent each other from capturing the legislative process. Because the states would retain jurisdiction over most areas of everyday life, any interest that wished to infringe on individual liberty would have to persuade many state legislatures to agree—a difficult task, which is why groups often lobby Washington, DC, to impose a single national rule instead.

Second, states exert a check on a national government that the Framers worried could become despotic. Today, we think of individual rights as being protected by written constitutional guarantees enforced by courts. If the government violates a protester's right to freedom of speech, he can go to federal court for an order blocking official action. But the original

Constitution did not grant to the courts the exclusive protection of liberty. Rather, the Framers included structural limitations on government throughout the document. They wrote the Bill of Rights itself as negative restrictions on the federal government, for example, rather than as positive definitions of individual liberty. Only upon the ratification of the Fourteenth Amendment in the wake of the Civil War did the Bill of Rights become individual liberties applicable to the federal and state governments. Its protection for privileges or immunities of citizens, for equal protection of the laws, and for due process allowed the Supreme Court to apply the Bill of Rights to the states.

The original understanding of the Bill of Rights sought to preserve mediating institutions as much as, or perhaps more than, individual rights. The First Amendment does not itself define a freedom of speech and religion but instead says that "Congress shall make no law respecting" speech and religion. The Free Exercise and Establishment Clauses preserve religious groups, which themselves can check government. Thus, the Second Amendment protects "the right of the people to keep and bear Arms," not just the right of an individual to own a firearm. It protects the existence of the militia, another institution of eighteenth-century self-governance. The Fourth Amendment again protects the "right of the people," not of an individual, to be free from "unreasonable searches and seizures." The Sixth and Seventh Amendments preserve juries, which could check overzealous law enforcement.

The Bill of Rights, in fact, often uses rights of "the people" rather than a "person," because the first ten amendments sought just as much to protect the majority from an oppressive federal government as to protect the individual from majority. The Ninth and Tenth Amendments, in particular, expressly limit the government rather than define any rights at all. The Ninth Amendment declares that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Tenth Amendment states that "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." Even the Constitution's greatest advancement of individual rights, the Bill of Rights, devotes much effort toward preserving decentralized government.

Liberty would depend on decentralized states as one of the critical means of protection. We assume today that courts have a unique responsibility to protect individual rights. The Framers, however, would not have made that assumption because they would not have immediately agreed that courts had the power of judicial review at all. The power of courts to set aside federal legislation appears nowhere in the constitutional text, and it is only from fine traces left behind in the document, and the greater structure it creates, that

John Marshall could deduce the power of judicial review in *Marbury v. Madison*. Instead of just the courts, the original design expected other institutions—primarily the states—to protect individual liberty. James Madison made this clear when he introduced his draft of the Bill of Rights in the first federal Congress. “Individual tribunals of justice will consider themselves in a peculiar manner the guardian of those rights,” Madison began. “Besides this security, there is a great probability that such a declaration in the federal system would be enforced; because the State Legislatures will jealously and closely watch the operations in this Government.” States, Madison predicted, will “be able to resist with more effect every assumption of power, than any other power on earth can do; and the greatest opponents to a Federal Government admit the State Legislatures to be sure guardians of the people’s liberty.”<sup>17</sup>

States would play two roles in protecting liberty. First, states would bear responsibility for defining and enforcing individual rights. The Framers did not expect the Bill of Rights to exhaust the list of individual rights; indeed, in the Ninth Amendment, they specifically said as much. “The powers reserved to the several States will extend to all the objects,” Madison reminded the delegates to the state ratifying conventions, “which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people.”<sup>18</sup> Justice William J. Brennan similarly believed that states should play a creative role in defining individual rights more broadly than the federal government.<sup>19</sup>

Second, states would defend those rights when the federal government exceeded its powers. “[T]he state Legislature,” Hamilton predicted in *Federalist* 26, “will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens, against Encroachments from the federal government.”<sup>20</sup> States could limit national invasions of individual rights by exercising their influence over the federal government through the Senate, their House delegations, or even the Electoral College. This method uses the same theory as the political safeguards of federalism; if the states could protect themselves from federal expansions of power, they could use their same internal influence over the national government to protect individual rights as well. As I have argued elsewhere, the Constitution seeks to protect the states themselves from the federal government, because it expects a certain amount of power in the former to protect individual rights from the latter.<sup>21</sup> If national authorities continued to infringe liberty, the Framers would have looked to the states to organize external resistance. States perform this function not only by acting as a trip wire to detect illegal federal action but also by acting as the loci and organizers of resistance. Hamilton argued in *Federalist* 28 that states “can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each

other in the different states; and unite their common forces for the protection of their common liberty.”<sup>22</sup>

The Framers believed that the chief role for federalism would be the protection of the people’s liberty. Although limiting the power of the federal government might produce inefficiencies, this cost was necessary in order to guard against potential tyranny by a federal government filled with self-interested, ambitious politicians. Federalism brought important advantages not solely by diffusing power. To be sure, creating different power centers and merely decentralizing authority are not the same thing. We might attribute many of the instrumental benefits of federalism to decentralization of power, which would occur if states had no sovereignty but served only as convenient administrative divisions. But as separate political units, states can oppose the exercise of power by the national government, even if the national government and the people believe that the centralization of power at that moment is good public policy.

By allowing, or even encouraging, the federal and state governments to check each other, the Framers’ Constitution seeks to create an area of liberty that cannot be regulated by either government. Dividing political power between the two levels of government appears even more effective in light of the presence of a separation of powers in both governments. As James Madison wrote in *Federalist* 51, “In the compound republic of America, the power surrendered by the people, is first divided between two distinct and separate departments,” here the federal and state governments, “and then the portion allotted to each, subdivided among distinct and separate departments,” in other words, the legislative, executive, and judicial branches. “Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.”<sup>23</sup> Competition between the federal and state governments to advance the rights of their citizens was not the only way that federalism would protect liberty. Freedom also would arise from the inefficiencies that the Framers built into the federal system itself. The nation’s governments simply would not be able to regulate all the issues of life because, even if they could overcome the internal checks created by their separation of powers, their external powers would come into conflict and cancel each other out. This conclusion is at odds with an instrumental approach to federalism, which seeks to maximize social welfare through efficiency in the making and enforcement of policy. Federalism at times can prevent Washington, DC, from enacting policies that produce nationwide benefits. The Framers believed this deliberate inefficiency to be necessary in order to protect liberty.

As the Framers understood it, the Constitution raises several barriers to today’s renewed interest in socialism. It creates a decentralized system of government in which the fifty states

bear the primary responsibility for regulating most areas of life while Washington supplies public goods that the states cannot collectively provide. This division of authority inhibits the concentration of public power necessary for the unified economic planning demanded by socialism. The Constitution's division of power establishes a checking dynamic between the federal and state governments. They will compete for the support of their citizens by opposing the excesses of the other. This balancing act would create a space—an absence of government power—where individual freedom could continue to flourish. The next section will review the fate of federalism in the courts.

### III.

American history shows that federalism initially went too far in its protection of states. Slavery made plain the most obvious flaw in the Constitution's original design—it failed to provide a minimum protection for individual rights against states as well as the federal government. Slavery deprived a specific race, brought to the United States from Africa, of the same rights enjoyed by the majority of Americans. The Constitution gave slave states a political advantage with the rule that slaves counted as three-fifths of a person for purposes of allocating House seats. The Civil War brought slavery to an end, and the Fourteenth Amendment's guarantee of privileges and immunities, equal protection, and due process against the states sought to end the discrimination upon which slavery was built.

It would take, however, another century for the civil rights movement to force the United States to live up to the promise of the Reconstruction Amendments. Eventually, Congress would pass the 1964 Civil Rights Act, which prohibited racial discrimination in employment and education, and the 1965 Voting Rights Act, which barred racial discrimination in elections, to end the era of Jim Crow. These civil rights acts greatly extended the reach of federal power at the expense of the states. States could no longer use their police powers to engage in discrimination on the basis of race. But they also furthered federalism's original purpose in forcing the national and state governments to compete to expand individual liberty. In the area of economic regulation, however, the national government so expanded its power that it undermined the decentralizing elements of federalism. Unlike the end of slavery, the broadening of federal power did not produce any corresponding expansion in individual freedoms. It was the Great Depression, in which the economy contracted by about 27 percent and unemployment reached a quarter of the workforce, that prompted the United States to experiment with socialist-type government. Upon the inauguration of Franklin D. Roosevelt in 1933, Congress enacted a series of laws—the National Industrial Recovery Act (NIRA) and the Agricultural Adjustment Act (AAA) chief among them—that

granted the president extraordinary powers to manage the economy. Under the NIRA, for example, federal agencies issued industry-wide codes of conduct to govern production and employment levels. The AAA gave the administration the power to dictate the crops that farmers could plant. Using these laws, the Roosevelt administration sought to reverse falling prices by setting prices, limiting production, and reducing competition.

Initially, the Supreme Court sought to maintain the historical limits on national power. It invalidated the first New Deal as beyond Congress's powers under the Commerce Clause, which gives Congress the power to “regulate Commerce . . . among the several States.” Federal laws controlling all aspects of economic production violated Supreme Court precedents that held that the Commerce Clause could not reach manufacturing or agriculture that occurred within a single state.<sup>24</sup> The court matched these limits on the reach of federal regulatory power with a robust protection for economic rights. Until the Great Depression, the court had held that neither the federal nor state governments could override contracts or regulate business in a way that infringed on the rights of free labor—under *Lochner v. New York*, the court generally struck down minimum wage and maximum hour laws.<sup>25</sup> Following these precedents, the court greeted the early New Deal laws with suspicion and struck the NIRA and the AAA down.<sup>26</sup>

President Franklin D. Roosevelt's subsequent threat to add six additional justices to the Supreme Court eliminated the judiciary's resistance to the New Deal and opened the floodgates to federal control of the economy. In *West Coast Hotel Co. v. Parrish* (1937), a 5–4 court upheld a state minimum wage law.<sup>27</sup> In *NLRB v. Jones & Laughlin Steel Corp.* (1937), the same 5–4 majority upheld the National Labor Relations Act's regulation of unions throughout the country.<sup>28</sup> After this “switch in time that saved nine,” the Supreme Court would not invalidate a federal law as beyond the reach of the Commerce Clause for the next six decades. Perhaps the ultimate expression of federal control of the economy came in *Wickard v. Filburn* (1942), in which a now unanimous court of FDR appointees upheld a federal law that barred a farmer from growing wheat on his own farm for his own personal consumption.<sup>29</sup>

With virtually no limit on the Commerce Clause, Congress used its economic regulatory power to steadily concentrate power in Washington, DC. It enacted a series of laws governing workplace conditions, employment terms, and labor-management relations. It created regulatory agencies to govern entire industries, such as the Federal Communications Commission, or entire markets, such as the Securities and Exchange Commission. But Congress did not stop at economic regulation. In the 1960s and 1970s, it turned the Commerce

Clause to social regulation. It enacted a host of civil rights laws, federal crimes, and protections for the environment. By the end of the twentieth century, the court would suggest that the Commerce Clause could not justify the control of purely noncommercial activity, such as violent crime. But in 2005, it still turned away a challenge to the federal prohibition on the sale of marijuana, even when grown in a backyard and given as a gift between friends.<sup>30</sup>

Despite the far reach of the Commerce Clause, Congress has shied away from direct control of many traditional local matters, such as education and welfare. States still enjoy primary authority over the laws that regulate most matters of everyday life, such as the rules of property and contract, accidents, family, and crime. State governments still operate their own independent executive, legislative, and judicial branches, and they collectively far outstrip the federal government in numbers of law enforcement officers and resources. The New York Police Department, for example, has more sworn officers than the Federal Bureau of Investigation has employees. Even when the federal government has exclusive authority over a subject, such as immigration, it must depend on the cooperation of state officials to fully execute national policy.

Because the Framers hardwired decentralization into the constitutional system, the federal government has had to resort to financial enticement to expand its influence into these areas of state control. Perhaps one of the greatest threats to federalism has been the Spending Clause, which gives Congress the power “to provide for the common Defence and general Welfare of the United States.” Thanks to the great financial resources made available by the Sixteenth Amendment creating the income tax, Congress can offer states large sums of money—but with strings attached. The federal government offers states matching health care funds, but only if states follow the Medicare and Medicaid guidelines; it makes education grants to schools, but only if they obey federal mandates; it supports state welfare programs, but only those that comply with federal regulations. Although the Constitution’s decentralized framework remains, the federal government has sought to overcome it with the “sinews of power”—money.

These expansions of the national federal government through direct regulation under the Commerce Clause or by the indirect influence of federal dollars threaten a concentration of power that could make socialism possible. Such vast federal expansion discards the benefits of local, decentralized government and undermines the checking function of the states. This makes the recent effort of the Supreme Court to stop the Affordable Care Act, popularly known as Obamacare, of particular interest. Obamacare took a major step toward the socialization of health care, which accounts for more than

18 percent of the American economy, with Medicare and Medicaid constituting about 40 percent of the total. Critics challenged several elements of the law, such as its requirement that all adults purchase health insurance or pay a penalty, and its denial of Medicaid funds to states that refused to expand their health care programs in line with Obamacare requirements. In *Sebelius v. NFIB* (2012), the court held that the Commerce Clause did not give the government the power to force unwilling individuals to purchase products.<sup>31</sup> It also found that the federal government could not offer so much funding that the states were “coerced” into participating in federal programs. But it also found that the federal government could use its power of taxation to sanction individuals who refused to purchase insurance.

*Sebelius*, when combined with other, less prominent cases shoring up the sovereignty of state governments, shows that the Supreme Court seems intent on restoring some balance to federalism. As legal scholars have argued, other elements of the federal government share this interest in defending state interests, most obviously the Senate with its equal representation by state.<sup>32</sup> But even other, more popular elements of the federal government will pay due attention to federalism. The Electoral College process for selecting the president gives a slight advantage to federalism by giving each state electoral votes equal to its number of senators and members of the House rather than using direct popular election. As the 2000 and 2016 elections demonstrated, the state practice of awarding all electoral votes to the winner of its election gives presidential candidates the political incentive to assemble a coalition of states, rather than just campaign in the most populous cities. The Constitution even creates the most popularly accountable branch of the federal government, the House of Representatives, by awarding seats by state, rather than proportionally by national political party support. These developments show that the United States of 2020 does not enjoy the decentralized government envisioned in 1788. Centralization may have become inevitable with the nationalization of the economy, the rise of the United States in world affairs, and subsequent globalization. But we can still see the benefits of decentralization in federalism’s instrumental advantages of experimentation, diversity, and competition in government. Decentralization still remains in the independent existence of the state governments and their advantages in resources and closeness to the people. What may suffer, as the Commerce and Spending Clauses steadily advance, is the dynamic between the national and state governments. That system of mutual checks and balances, the Framers believed, would constrain the state and result in freedom and liberty. History does not suggest that the further centralization of government power would benefit the American people or their experiment in self-government.

<sup>1</sup> Mohamed Younis, “Four in 10 Americans Embrace Some Form of Socialism,” Gallup, May 20, 2019, <https://news.gallup.com/poll/257639/four-americans-embrace-form-socialism.aspx>.

<sup>2</sup> Lydia Saad, “Socialism as Popular as Capitalism Among Young Adults in the U.S.,” Gallup, November 25, 2019, <https://news.gallup.com/poll/268766/socialism-popular-capitalism-among-young-adults.aspx>.

<sup>3</sup> Peter Berkowitz, “Capitalism, Socialism, and Freedom,” in *Socialism and Free-Market Capitalism: The Human Prosperity Project*, eds. Scott W. Atlas and Edward P. Lazear, Hoover Institution website, February 24, 2020, <https://www.hoover.org/research/capitalism-socialism-freedom>.

<sup>4</sup> Niall Ferguson, “Capitalism, Socialism, and Nationalism: Lessons from History,” in *Socialism and Free-Market Capitalism: The Human Prosperity Project*, eds. Scott W. Atlas and Edward P. Lazear, Hoover Institution website, February 24, 2020, <https://www.hoover.org/research/capitalism-socialism-and-nationalism-lessons-history>.

<sup>5</sup> The question was first posed in Werner Sombart, *Why is There No Socialism in the United States?*, which was republished in John Laslett & Seymour Martin Lipset, eds., *Failure of a Dream?: Essays in the History of American Socialism* (Garden City, NY: Doubleday, 1974).

<sup>6</sup> Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (New York: Harcourt, Brace, 1955).

<sup>7</sup> Gary Marks and Seymour Martin Lipset, *It Didn't Happen Here: Why Socialism Failed in the United States* (New York: W. W. Norton, 2000).

<sup>8</sup> 74 U.S. (7 Wall.) 700 (1868).

<sup>9</sup> Federalist No. 46, at 243 (James Madison), in George W. Carey and James McClellan, *The Federalist (The Gideon Edition)* (Indianapolis: Liberty Fund, 2001).

<sup>10</sup> Federalist No. 45, at 241 (James Madison), in Carey and McClellan, *The Federalist*.

<sup>11</sup> See Robert D. Cooter and Neil S. Siegel, “Collective Action Federalism,” *Stanford Law Review* 63, no. 1 (2010): 115.

<sup>12</sup> Federalist no. 45, at 241 (James Madison), in Carey and McClellan, *The Federalist*.

<sup>13</sup> Federalist no. 17, at 80–81 (Alexander Hamilton), in Carey and McClellan, *The Federalist*.

<sup>14</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

<sup>15</sup> See Michael W. McConnell, “Federalism: Evaluating the Founders’ Design,” *University of Chicago Law Review* 54, no. 4 (1987): 1484, 1493–1500.

<sup>16</sup> Federalist no. 10, at 43–44 (James Madison), in Carey and McClellan, *The Federalist*.

<sup>17</sup> James Madison, Remarks to the House of Representatives (June 8, 1789), in Bernard Schwartz, *The Bill of Rights: A Documentary History*, vol. 2 (New York: Chelsea House Publishers with McGraw-Hill, 1971): 1031–32. (1971).

<sup>18</sup> Federalist no. 45, at 241 (James Madison), in Carey and McClellan, *The Federalist*.

<sup>19</sup> William J. Brennan Jr., “State Constitutions and the Protection of Individual Rights,” *Harvard Law Review* 90, no. 3 (1977): 489.

<sup>20</sup> Federalist no. 26, at 130 (Alexander Hamilton), in Carey and McClellan, *The Federalist*.

<sup>21</sup> John Yoo, “The Judicial Safeguards of Federalism,” *Southern California Law Review* 70 (1997): 1311.

<sup>22</sup> Federalist no. 28, at 139 (Alexander Hamilton), in Carey and McClellan, *The Federalist*.

<sup>23</sup> Federalist no. 51, at 270 (James Madison), in Carey and McClellan, *The Federalist*.

<sup>24</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>25</sup> 198 U.S. 45 (1905).

<sup>26</sup> See, for example, *A.L.A. Schechter Poultry Corp. v. United States*, 293 U.S. 495 (1935).

<sup>27</sup> 300 U.S. 379 (1937).

<sup>28</sup> 301 U.S. 1 (1937).

<sup>29</sup> 317 U.S. 111 (1942).

<sup>30</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>31</sup> 567 U.S. 519 (2012).

<sup>32</sup> Herbert Wechsler, “The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,” *Columbia Law Review* 54, no. 4 (1954): 543; Jesse H. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980).

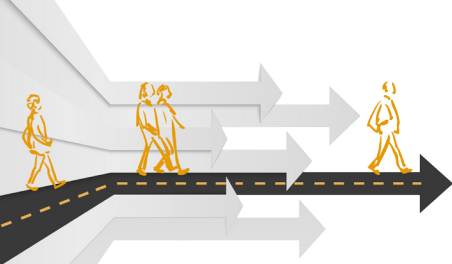


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# SOCIALISM AND FREE-MARKET CAPITALISM: THE HUMAN PROSPERITY PROJECT

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