

Lead, Gather, Trust

Our Challenge: Sustaining American Unity & Self-Government in the 21st Century

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September 2025

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Federalism's objective is unity and self-government. It achieves these by protecting local and individual liberty, checking authoritarianism, promoting innovation, and encouraging synergy between governments to address common problems. America's federal system has a few hard constraints but is largely dynamic and adaptable. The current federal system, however, is unsustainable. The national-state relationship needs to be reworked to address 21st century problems. If we do nothing crisis, and conflict will be the likely result.¹

From their colonial origins to the Constitution and beyond, Americans have found ways to unite. The nature of our union is, however, unique. It is not a totalizing or consummate union, like the sovereign European monarchies of the 17th to 20th centuries that ruled the people as subjects. Rather, American unity formed around agreements, approved by the people, that granted governments limited powers and responsibilities, and preserved valuable local independence and autonomy. For almost 170 years, from the Mayflower Compact in 1620 to the Constitution in 1787, Americans experimented with this form of unity. The Constitution is the culmination of this idea with its "compound republic," or federal system of government.



Fig. 1: "JOIN, or Die" is America's original political meme. Created by Benjamin Franklin in 1754 and repeatedly resurrected through various crises, it conveys the challenge of joining diverse states who hold discordant ideas. At each crisis, the differences have been sufficiently overcome to unite a diverse and fragmented people into a limited union united for collective action while preserving local liberties and autonomy.

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Though not specifically mentioned in the Constitution, federalism is inherent in the constitution's division of powers and responsibilities between the national and state governments. The Tenth Amendment confirms that the states are not subjects of the national government but have their own sovereign jurisdiction. However, the ambiguity created by constitutional provisions like the commerce clause and the necessary and proper clause means that American federalism is not a rigid separation of powers but a dynamic system operating within some hard constraints.

Today, nearly 40% of the world's population lives under a federal form of government. Yet, federalism in the United States is commonly misunderstood and maligned. Some people equate federalism with racism, segregation, and slavery. Others think federalism means states' rights. Neither is accurate. Federalism's core purpose is to protect and preserve the foundational American value of self-government.ⁱⁱ It does this by, among other things, establishing a strong national government that can provide security and a common market, protecting minority rights, and local liberties. Federalism is not political; federalism is a structural cornerstone of the Constitution.ⁱⁱⁱ

Federalism emerges from the desire to be both united for some things and autonomous for others. It is a compromise between contrasting desires to be big enough to fulfill a common interest (such as to deter outside aggressors or create a common market) and the desire to preserve the liberties that come from being small, local, and autonomous. Sustaining that tension is difficult because the "natural tendency of any political community, whether large or small, is to completeness, to the perfection of its autonomy."^{iv} In other words, the natural tendency is towards either centralization or complete separation. Sustaining a federal union requires recognizing and valuing both unity and multiplicity.

Today, some falsely think multiplicity causes disunity. Unity need not mean uniform, unanimous, or even agreement. Unity can form over commitments to address common problems by following established procedures or to let each be if certain rules and values are respected. This form of unity is created by the Constitution which creates a structure and processes for resolving common problems that do not require standardization or uniformity but respect and value differences and diversity.^v

As our history and growing scholarship demonstrates, unity and good governance do not require a uniform, centralized approach, but rather a limited union united by a few common values and institutions while respecting local liberty and the diversity and divergence it produces.

Our unity, however, is threatened by an affective partisanship that increasingly wants all to think one way, by growing and unsustainable debts that will require reworking current commitments,^{vi} and by a national-state relationship that no longer reflects contemporary realities. The way forward will likely require restoring

appreciation for the values and benefits of a federal system, and reworking the national-state relationship to restore shared-rule (as a nation) and self-rule (as states, local communities, families, and individuals).^{vii}

Federalism's Values & Benefits

The Constitution's purpose is "to create a more perfect union." Federalism contributes to that in many ways including the following: fostering peace and security, promoting prosperity with a national common market, increasing local and individual liberty by bringing government closer to the people and providing rights beyond those listed in the Constitution, checking authoritarianism, promoting innovation, and facilitating synergy between governments to address common problems.^{viii}

Federalism protects liberty by creating fundamental checks and balances between the national and state governments. For example, the national government may check tyranny within the states, or states may stand against authoritarianism at the national level. If action is slow to happen, a federalism structure may confine dangerous movements to within a state until the movement burns itself out or broader action can be taken.

Some severely criticize federalism for allowing racism, segregation, lynchings and other heinous violations of rights. It is true that the federal bargain at the 1787 Constitutional Convention in Philadelphia left the decision to be free or slave to the states. While some chose to abolish slavery, others did not. But the national government's record on protecting rights is also not stellar. In 1832, despite a Supreme Court ruling to do so, the national government failed to protect the Cherokees, and later many other Indigenous Americans. In the corrupt bargain of 1877 and the 1896 Supreme Court decision in *Plessy v. Ferguson*, national institutions turned away from protecting the individual rights guaranteed by the 14th Amendment, thus paving the way for Jim Crow and segregation. In World War II, the national government interred US citizens of Japanese ancestry without due process of law. At various times in America's history, the national and state governments have both acted as tyrannies and bulwarks of liberty. There is no permanent protection to be found by sheltering under just one. The division of powers between the federal and state governments is a guarantee of security.

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. 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.

- James Madison, Federalist #51 -

Federalism fosters democratic values by bringing popular government power closer to the people where they have greater

influence to shape the policies according to their values and where they can better monitor the government and policies that govern their lives. That is, federal structures sustain democracy and diversity, but their continuance requires valuing real diversity to tolerate other polities that may be governed by values different from our own.

Policy innovation is more likely to come from within the more than 90,000 governments in the United States than from one supreme national government.^{xxxii} Though some criticize the resulting intergovernmental competition as creating a "race to the bottom," studies have found, however, that such races are rare and are much more likely to create a "race to the top."^{ix} Innovation and improvement in our public policies and services is essential in our modern age when the problems are complex and wicked and less likely to be solved by a central, standardized set of policies.

Federalism promotes problem-solving synergy between states and the national government. States are not subordinate actors but partners in the federal agreement. The nation's law and regulations are supreme only when they are consistent with the powers delegated to the national government. Many powers are reserved to the states. Consequently, states may go-it-alone or they may pool their resources and collaborate in multiple ways to address common problems with other states and with the national government.

The Federal Tension

These fundamental federalism values exist in a tension with each other that prevents the perfection of any one value and requires a tradeoff between them. For example, local autonomy may fail to protect individual liberty; centralized authority to address collective action problems (e.g., protecting individual liberties) may undermine checks and balances that prevent authoritarianism. Emphasizing one value, consequently, may result in deemphasizing another.^x The value of federalism is that it creates a balance between these competing values to achieve each well enough. As our history demonstrates, however, that balance has not always been maintained and some would sacrifice it altogether for the fulfillment of one or a narrower set of values.

The abolishment of federalism would not result in a golden era of individual rights or progress. It would result in the elimination of the valuable benefits federalism provides, such as checking tyranny and authoritarianism, bringing government closer to the people, and fostering innovation.

The Dynamic Constitution

While the Constitution never specifically mentions federalism, federalism is inherent in the structures and processes created by the Constitution. For example, the Constitution grants limited and enumerated powers to the national government and affirms that other powers are reserved to the states. States are guaranteed

a “republican form of government;” they may not be divided without their consent, they are responsible for elections, and they play a fundamental role in structure of the Senate, election of the president, and passage of constitutional amendments. The supremacy clause ensures that in conflicts between national and state laws the national laws prevail only if those laws are consistent with the Constitution. In short, federalism is a fundamental feature or cornerstone of the Constitution.

Yet, there is considerable ambiguity in the boundaries between the national and state governments. Constitutional phrases like the commerce clause and the necessary and proper clause mean that American federalism is not built on an absolute and rigid separation of powers between the national and state governments. The Constitutional Convention in 1787 rejected many proposals to limit national power including an effort to prohibit any constitutional amendment that would limit states’ police powers. In the congressional debates over the Bill of Rights, an amendment to limit the national government’s powers to those “expressly” delegated was rejected. Many founders, including James Madison and Roger Sherman, a strong advocate for states, acknowledged that drawing a clear line between national and state powers and responsibilities is nearly impossible.^{xxxiii}

The imprecise boundary between national and state government powers and responsibilities often leads to the question, “Who decides?”^{xxi} While the Supreme Court may police the borders of federalism, the final arbiters in our system are often the people who decide by who they elect to office in national, state, and local elections.^{xiii} The result is a limited but dynamic federal system. This means each generation of Americans is able to evaluate and rework the national-state relationship.

The American federal system, in short, is based on an essential and unalterable core, but it is not limited to the nineteenth century institutions that attempted to rigidly separate national and state powers. Rather the American federal system is dynamic and adaptable, hence, capable of multiple permutations within its broad outlines.^{xiii}

The dynamic nature of American federalism led historian Wilfred McClay to describe it as less an immutable institution or set of relations and more an idea.^{xiv} Recognizing this, Alexis de Tocqueville in the early 19th century praised America’s federal system of government but cautioned that preserving local liberties will be difficult because the natural tendency will be for energetic leaders to push for centralization so they might operate the levers of power.^{xv}

The Three (Crumbling) Pillars of Modern American Federalism

Since its inception at the Constitutional Convention in 1787, America’s federal system of government has taken many forms. In the last century, significant powers were centralized in the

national government based on a belief that experts should decide policy, good government could be scaled, and centralized authority would create a national democratic union and national unity.

After nearly a century of growing nationalization, the justification for that centralization is suspect. Excessive executive power, James Madison perspicuously warned, would result from placing too much responsibility on the national government. Madison reasoned that Congress would become deadlocked if asked to do too much. It would thus defer decision-making authority to the executive, which was designed to act with dispatch. The result is what we see today, each party advances its partisan preferences as far as possible when it controls the executive via executive orders and emergency measures.^{xxxix}

In addition, the rise of national preemptions, unfunded mandates, conditional grants, and unsustainable national debt has led some to decry an increasingly powerful and coercive national government.^{xvi} The policy decisions during the Covid epidemic,^{xvii} declining K-12 students’ test scores, almost insurmountable obstructions to growth,^{xviii} and political polarization are strong indicators that nationalization is not the solution.

At the center of the problems is a growing debt crisis. In 2008, Alice Rivlin, Director of the Office of Management and Budget during the Clinton Administration, wrote, “The grim outlook for the federal budget makes it inevitable that in the near future strains between the federal government and the states over funding domestic programs will escalate into a crisis. . . Federal decisionmakers will be forced to choose among extremely unpopular options—raising taxes, renegeing on promises to the elderly, and drastic cuts in other spending, including money for state and local governments. . . Responding adequately to these widely felt needs will take constant attention to improving the functioning of our federal system”^{xix}. The solution, Director Rivlin recognized, will not come from more centralization but a restoration of a functioning federalism.

The compound republic created by the Constitution has slowly been displaced by national rule that entangles the national and state governments in labyrinthian jumbles that impair good governance and undermine American’s fundamental faith in, and ability to exercise, self-government. This system, however, is unsustainable.

For the last century, America’s federal system has rested upon three pillars, each of which is constitutionally suspect and crumbling. The pillars are the intergovernmental grant system, a bipartisan agreement favoring national control, and Supreme Court deference to national administrative agencies’ decisions.

1. The Intergovernmental Grant System

The intergovernmental grant system has grown rapidly since the 1950s (see Figure 2 below). One study found that federal

spending to state and local governments grew from 1% of GDP in the 1950s to 5.6% of GDP in 2021.^{xx} Another study examining the same period found it grew from 2% of GDP in 1950 to 14% in 2019.^{xxi} The significant discrepancy between those two studies indicates how complicated and difficult the intergovernmental grant system is to fully understand. Yet, there is broad agreement on the following: (a) the national government has taken on broad new responsibilities since the 1950s; (b) the federal government has passed on to the states significant responsibility to fund many of those programs; and (c) the federal grant system and the debt it creates is unsustainable.

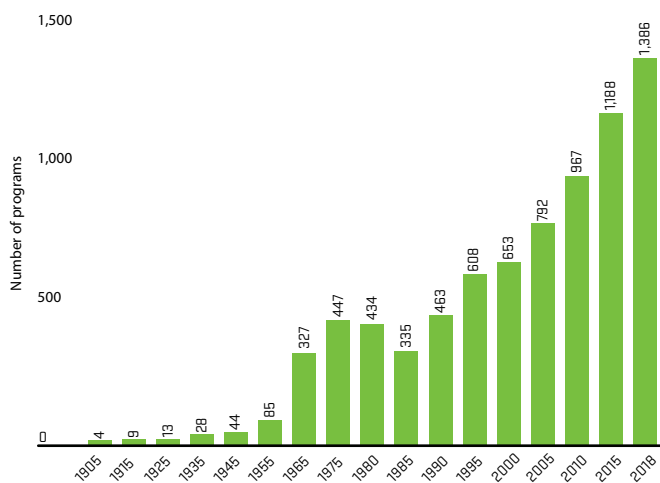


Figure 2: Growth of Federal Grants to States

2. Bipartisan Support for National Control

Since the end of World War II, the balance of power has shifted toward the national government and away from state and local governments.^{xxiii} This centralization of power in the national government was the result of bipartisan agreements. State governments accepted the grants and attached requirements with little more than pro forma complaints. Republican efforts to return power to the states, from Eisenhower’s Kestenbaum Commission to Nixon and Reagan’s New Federalism, were top-down driven and selective proposals that favored realigning the national governments’ priorities rather than reducing the national government’s power.^{xxiv}

National policy, consequently, prevails in nearly every policy field. “[T]here is no significant aspect of national life,” Daniel Patrick Moynihan proclaimed, “about which there is not likely to be a rather significant national policy. It may be a hidden policy. . . . But it is policy withal.”^{xxv} The objective may not have been national policy on nearly everything but that is the ultimate result. The bipartisan consensus that once existed for top-down, centralized governance is now gone. The consequence is a government

run by dueling sets of executive orders that give states “whiplash,” and leave them trapped in the middle, holding the bag.^{xxvi}

3. Supreme Court Deference to Executive Agencies

The modern federal administrative state is distinct from what existed before the New Deal. Its key feature is rules and regulations created by administrative agencies that closely resembles legislative action but by unelected officials. Under the Chevron Doctrine, established in 1984, the federal courts deferred to agencies’ rulemaking. From 1975 until 2019, the total page count of national regulations grew 161 percent.^{xxvii} That is 19 regulations issued by federal agencies per law enacted by Congress.^{xxviii} Once adopted, federal agency rules were hard to challenge in court because of the difficulty in establishing standing to challenge the rules, judicial permissiveness of agency rules under the Chevron Doctrine, and the relative weakness of common judicial remedies.^{xxix} This led one major study on the evolution of American federalism to conclude, “[W]e are moving toward ‘indirect federal administration’ . . . a system in which states are increasingly administrative agents for the national government.”^{xxx}

In 2024, however, the Supreme Court struck down the Chevron Doctrine that favored judicial deference to administrative rules and regulations. The basis for the Court’s decision was what Chief Justice John Roberts called the “federal canon,” which “presumes federal statutes do not preempt state laws because of the sovereignty States enjoy under the Constitution.”^{xxxi} What comes next is not clear.

In sum, the three pillars that have supported the current federal system since the New Deal are constitutionally suspect and crumbling. What will replace them and how the federal system will be structured in the coming decades is yet to be determined.

Conclusion

It is increasingly clear that our current federal system cannot sustain the existing stresses. Fortunately, our constitutional federal system is dynamic enough to be reworked to meet 21st century needs. Doing that will require the political will to put structure over politics. And it will force us to address other issues, such as: Can we sustain the federal tension of not being wholly complete nor completely autonomous? Do we possess the tolerance required to allow the differences and diversity that arise naturally within a federal polity? Can we reform the national-state relationship to meet contemporary problems or will we do nothing and resign ourselves to crisis and conflict?

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