



Center for
**CONSTITUTIONAL
STUDIES**

UTAH VALLEY UNIVERSITY

Why Federalism Matters by Randy E. Barnett



Why Federalism Matters by Randy E. Barnett

Some people are “fair weather federalists” who only assert the virtues of federalism when they lack the votes in Congress for the national policies they prefer. I think this is a mistake. The federalism of our constitutional order has yielded some enormous advantages for protecting the rights retained by the people. Let’s see why.

Federalism Leaves Most Legal Issues to the States

If the federal government only has the power to provide for the common defense as well as to protect the free flow of commerce between states, along with a few other specific tasks, most of the laws affecting the liberties of the people will be made at the state level. This would include the regulation of most economic activity as well as what are today called “social issues.”

In the 1824 case of *Gibbons v. Ogden*, Chief Justice John Marshall referred to these reserved state powers as “that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government; all which can be most advantageously exercised by the States themselves.” For example, “inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.”

Marshall then affirmed that “no direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes.” But he immediately made clear that by “national purpose” he meant “it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given.”

Federalism Makes Regulatory Diversity Possible

Given widespread disagreement about both economic and social policies, lodging this “immense mass of legislation” in the states enables a diversity of approaches to develop. Sometimes states are characterized as “laboratories of experimentation,” a paraphrase of a dissenting opinion by Justice Louis Brandeis in the 1932 case of *New State Ice Co. v. Liebmann*. In his dissent, Brandeis described how a “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.”

When it comes to economic regulation, so long as they remain within the proper scope of their power to protect the rights, health and safety of the public, fifty states can experiment with different regimes of legal regulation so the results can be witnessed and judged rather than endlessly speculated about. States will be somewhat inhibited in imposing restrictions on businesses by the threat of regulatory competition. Other states will be induced to offer more receptive “business climates” to entice businesses to

relocate. Businesses small and large can decide to relocate if they deem a particular scheme of regulation to be too onerous.

Critics of this competitive dynamic disparage this as a “race to the bottom” in which states are prevented from enacting beneficial regulations. Of course, it is possible that some states may enact “inferior” regulations to attract business seeking to lower their costs of production. But it is far more likely that local electorates will demand the sorts of “reasonable regulations” they witness other states successfully implementing at a reasonable cost.

Foot Voting Empowers the Sovereign Individual Citizen

When it comes to liberty, the competition provided by federalism empowers the sovereign individual. Because one’s vote in an election is swamped by the ballots of millions of others, it is simply irrational for most persons to invest too heavily in the time and resources to learn what it takes to vote wisely. Not only is it next to impossible to influence any particular policy by casting one’s individual ballot, it is also impossible to separate that policy from others in the “package” offered by one of the two contending political parties.

By contrast, as Ilya Somin explains, when voting with one’s feet by moving to another city or state, one has far greater control over the results. See Ilya Somin, *Democracy and Political Ignorance* 119-54 (2013). Each person can individually control the state in which they live by selecting from among fifty choices, not just two. And they can witness the economic opportunities that result from different state policies. In a federal system, people are then free to move to another state for a better job, or for a cleaner and safer environment. Because their decisions will have tangible effects on their lives, it is far more rational for individuals to investigate the difference between states than it is the difference between political candidates.

In short, what prevents a legislative “race to the bottom” in a federal system is the freedom of sovereign individuals to race to the states with a better package of results. This dynamic is much less powerful at the national level, because individuals are much more reluctant to leave their country than their state.

The Importance of Keeping Social Issues Local

When it comes to social policy, the preferences of individuals loom even larger than with economic policies. Not only is it difficult to identify the objectively “correct” social policy, it is not clear that such policies even exist. Different people subjectively prefer to live in different types of communities, not only due to differing opinions about morality, but simply as a matter of taste. Given that, by their nature, communities must be one type or another, it is best to have as many different communities from which to choose as possible to satisfy the range of individual tastes, preferences, and moral commitments.

A rich diversity of preferred lifestyles can only be achieved at the local level. As with economic policy, sub-national competition between social policies in a federal system

imposes a salutary constraint on state governments by threatening an exodus of dissenting citizens to other states. On the positive side, with fifty states to choose from, it is far more likely that a person can find a state or municipality with a social environment in which they are more comfortable than if one social policy is imposed on the United States as a whole.

The cost of exiting one state for another is far lower than exiting the United States when one disagrees with a national policy. Consequently under a federal system the citizen's enhanced power of exit not only provides a comparatively greater constraint on legislative power that is reserved to the states, it empowers individuals to achieve their own purposes far more effectively than relying on their ability to influence national policy by their vote, or by leaving the country of their birth.

In all these ways, liberty is more robustly protected by confining lawmaking to the state and local levels in a federal system, than moving all such decisions to the national level.

Federalism Avoids a Political War of All Against All

There is another, and potentially even more powerful, way that federalism protects the individual sovereignty of the people. When any issue is moved to the national level, it creates a set of winners and a set of losers. Because the losers will have to either live under the winners' regime or leave the country, everyone will fight much harder to achieve their result or, failing that, to block the other side from achieving its goal.

Consequently, the more issues that are elevated to the national level, the more contentiousness, bitterness, and "gridlock" develops as people fight ever harder not to lose. The result is a political version of what Thomas Hobbes called a "war of all against all."

We can avoid this by ensuring that as many issues as possible are handled at the personal level of the individual person, which is why individual liberty is the ultimate means to the pursuit of happiness for people living in society with others. Because of the competitive processes I have already described, reinforced by federal checks on state power, such individual liberty is far better protected at the more local level than at the national.

Again, it is not that the social and economic policy issues protected by a diversity of state regulations are less important than those handled at the national level. To the contrary, the more important the issue, the more likely it will engender a political war-of-all-against-all to avoid having another's social policy imposed on you. So, the more important the issue, the less is it fit to be decided at the national level.

For all these reasons, the United States has been a far more prosperous and contented country because of its federal system.

Further Reading:

I explain the individualist conception of “We the People” and popular sovereignty in Randy E. Barnett, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People* (2016).