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1

Madison's Balancing Act

The further the American Revolution recedes into history, the easier it is to miss just how close the United States of America came to being a divided collection of competing colonies under the punishing heel of an angry Britain. The nation's founders had first dared to declare their king a despot and then to challenge the most powerful army in the world to a war over turf. The odds of success seemed impossibly small, even if the red coats of the British troops made them conspicuous targets on the battlefield. A seven-year campaign, much bravery, a bit of luck, and the timely help of the French produced an unlikely victory. In September 1783, the promise of the Declaration finally led to the reality of independence.

But along with the triumph came a wrenching setback: the new nation's original plan to govern itself, the Articles of Confederation, simply failed to work. The states had been determined to prevent the new national sovereign from trampling on their liberty—having defeated the king, the last thing they wanted was another one—so the Articles intentionally created a very weak government. In their eagerness to prevent tyranny, its drafters overdid it. They created a United States of America not united enough to protect itself or its commerce. If the republic was to endure, this collection of divided states needed to be rescued from the fatal flaws of the Articles.

So, in 1787, the nation's leaders gathered in Independence Hall in Philadelphia to draft a new governing constitution. It was the same building

where many of them had boldly voted to declare independence from Britain in 1776 and where they had drafted the Articles of Confederation in 1781. This time they knew they needed a more detailed constitution and a stronger national government. And they also knew they needed all the help they could get.

The founders struggled with a dilemma, one that has repeated itself many times since. The leaders of the states jealously guarded the separate identities that had emerged through the colonial times. They were proud, of course, of the new nation, but many were even prouder of the rich traditions of their own states. After all, the nation's short eleven-year history was a brief blip compared with the century and a half during which many of the colonies had prospered—and none of the proud states wanted to surrender their own interests to a new national identity. The agriculturally oriented South fiercely opposed having Northern merchants dictate policy, and the settlers who pushed west didn't want the big cities controlling their lives. Residents of small towns were always fearful of the reach of the large cities. The Articles of Confederation were so weak because the states were so strong, and state leaders wanted to keep it that way.

But the devotion to state power almost immediately clashed with the requirements of the new country. European powers coveted the vast, untapped wealth of the new continent. Tensions among the states threatened budding commerce, and the new nation lacked the most basic structures for making decisions. Even before Maryland became the last state to ratify the Articles in 1781, the document was obsolete.

So when the founders returned to Philadelphia in 1787 to draft the new constitution, they faced a profound dilemma. They needed to build a stronger national government without interfering with the states' expectations that they would keep their identities and their power. No other new nation had ever attempted to have its constituent parts create a strong national government without those parts deconstituting themselves in the process. The solution they came up with was federalism, American style. It had the great virtue of winning political support from the states, by maintaining their identity. It had the great challenge of creating a new ship of state, which had to navigate especially fierce and opposing

currents. American federalism, in fact, has always been much less a fixed structure than a set of rules of combat. In the centuries since, the underlying tension between national unity and state power has never gone away. Neither have the great political battles that federalism precipitates.

That challenge has become both what defines the operating reality of American government and what differentiates American government from governments in the rest of the world. It is the field of battle on which the most important American political struggles have been fought. Through the years, these struggles have sometimes threatened the very principles that brought the founders to Philadelphia the first time to declare independence from the king.

When the founders met in 1787 to write the new constitution, James Madison led the debate. He was much younger than most of his colleagues, and he had a true genius for finding the bridge between opposing factions. As Joseph J. Ellis put it, Madison was “the acknowledged master of the inoffensive argument that just happened, time after time, to prove decisive.” Madison “lived in the details,” Ellis explained, “and worked his magic . . . with a more deft tactical proficiency than anyone else.”¹

His tactical brilliance, in fact, helped him cobble together the two greatest institutional inventions of the founders: separation of powers between executive, legislative, and judicial branches, which prevented the country's new president from becoming too kinglike; and federalism, which delicately balanced the powers of the national government with those of the states. Madison is perhaps best known for the first invention, but his second invention was the truly essential one, for without a plan to deal with the power of the states, the country could well have become fatally fragmented—and easy pickings for British, French, and Spanish governments eager to expand their power in the Americas. The invention of federalism allocated power between the federal government and the states in a way that gave the federal government enough strength to keep the country intact and accomplish national goals without making it so strong as to interfere with the self-government of the state and local governments. That was no mean feat.

(A quick aside: There's often much confusion around the terms "federal" and "federalism." In a formal sense, "federal" refers to a system of government in which power is allocated between the national government and its components, like the states. But in the United States, by long tradition, the national government is also referred to as the "federal government," so to keep with common usage, I'll use "federal" throughout the book to refer to the government run from the national capital. "Federalism" will refer to the American strategy for dividing power between the national government and the states.)

After they had drafted the Constitution, the founders knew just how fragile a system they had cobbled together. As they left Independence Hall on the last day of the constitutional deliberations, a lady is reputed to have asked Benjamin Franklin, "Well, Doctor, what have we got—a Republic or a Monarchy?" Franklin's reply: "A Republic, if you can keep it."² Keeping it ultimately depended on whether Madison's two great inventions worked. For more than two centuries, they did, if sometimes only barely, surviving partisan conflict, a civil war, and the rise and fall of multiple political parties. In the twenty-first century, however, the two institutions have become increasingly rickety, and so did the challenge of keeping the Constitution.

Madison made Congress the nation's first branch by putting it in Article I of the Constitution. But hyperpartisanship increasingly made Congress "the broken branch," as Thomas Mann and Norman Ornstein put it in 2006. Six years later, after congressional norms had broken down, budget stalemates had become routine, and Congress increasingly found it difficult to pass any legislation, they sadly concluded that "it's even worse than it looks."³ Frictions between Congress and the presidency became deeply rooted, and writers began referring to the partisan split of what had been designed as a nonpartisan Supreme Court. All of these tensions fed a growing polarization that increased divisions in the nation. Madison's first great institution was in trouble.

His second great invention was in even worse shape, drifting into a deepening crisis that received relatively little attention. Tensions among the states over slavery had erupted in a civil war that almost ripped the nation apart, but in keeping it intact, the North's victory scarcely ended

the battles over states' rights. The Supreme Court's 1954 decision in *Brown v. Education* launched a generation-long assault on segregation. A decade later, Lyndon B. Johnson's Great Society programs created the sweeping War on Poverty. There were, to be sure, large pockets of rearguard rebellion, but by the end of the 1960s there seemed to be an emerging national consensus on the importance of a strong national government focused squarely on reducing inequality among the nation's citizens—and among its states. The moment seemed to mark a profound truth about federalism: taking steps to reduce inequality in the United States relied on increasing federal power; putting more power into the hands of the states tended to increase inequality. That theme, in fact, has repeated itself constantly across the broad sweep of American history.

By *inequality*, I mean big differences among the states in policy outcomes that matter. We often look at inequality in income and wealth at the individual and family levels, and one of the biggest social and economic issues of American policy since the 1960s has been the growing concentration of wealth at the top of the income scale. But one of the most important drivers of this trend is the increasing inequality among the states. Some states are much wealthier than others, and their growing wealth makes it possible for them to provide better education, infrastructure, and health care to their citizens. Some states are far more aggressive in regulating the quality of the air and water, and that produces big differences in the quality of life among their citizens. Federalism was designed, of course, to allow—even encourage—policy differences among the states. But as we will see in the pages that follow, these differences, in creating growing inequality among the states, have made this a nation where the government that citizens get depends increasingly on where they live. That, in turn, is fueling political polarization in an already divided nation. There's profound irony here: the great invention that made it possible for the states to become united has ultimately become a sharp instrument for driving them apart.

In any system where different players make decisions, of course, they will inevitably make different decisions. That is inescapable—even desirable in fact, because citizens deeply value the right to set their own course and expect their decisions to be different from decisions made by

other citizens elsewhere. At some point, however, deep, profound differences in the United States have created corrosive frictions, many stemming from issues of fairness: Is it fair that some citizens have much higher incomes than others? That some kids have much better schools than others? That some communities have much cleaner environments than others? How much equality is desirable—or possible—is, of course, a matter of political values. But the story of American federalism, especially since the 1970s, is a story of a growing divide among the states that has unleashed truly deep frictions among them. Do strong pollution controls in one state hurt its competitiveness with others? Does the poorer educational performance of some states make it harder for them to fuel economic growth? And perhaps most important, do the deep divisions among the states about the power of the federal government create very different patterns of health care, which profoundly affect the quality of life of their citizens?

The debates have been wide—and often wild. They have generated vast differences in how different states have approached national problems. These differences, in turn, have often created wide gaps in the outcomes of government. Madison's great invention of federalism, designed to bring the country together, has become one of the strongest forces driving it apart. In fact, when it comes to inequality in the United States, the federal government has been the great leveler and the state governments have been the great dividers. Federalism has always been a balancing act, but where the balance is found has constantly shifted. The debate about federalism is therefore a debate about how best to balance the respective roles of the federal and state governments. The result, as John Donahue points out, has been a remarkably "ambiguous division of authority" at the core of American federalism. Indeed, he reminds us, "the framers left ample room" for the nation's founding principles "to take effect in different ways to meet different conditions. And they inaugurated a permanent American argument over what version of federalism—at each particular time, in each particular set of circumstances—would be truest to the nation's bedrock values."⁴ Federalism is about balancing authority, and one of the fundamental masterpieces of the American system is that the balance rests on such hazy laws and fuzzy values.

These differences multiply the sense that government is increasingly breaking the deal that citizens have with their government: they pay taxes and subject themselves to government's power in exchange for having the government produce the goods and services they want. But if they see some people seeming to get more from government than they deserve, that undermines their confidence in the basic social contract. Americans say that they like differences and want to live in diverse communities, but their behavior suggests otherwise: Americans increasingly prefer to live with people like themselves. That shift has aggravated the very tensions that Madison worried about.⁵ In fact, one of Madison's biggest worries, as he explained in *Federalist 10*—one in the great collection of op-eds that made the case for the US Constitution—was that factions might pull the nation apart. The inescapable irony is that one of his greatest inventions, federalism, has helped to do just that.

Federalism has rich, textured roots in the country's first generations, but attention by scholars, analysts, and politicians to its central and important role in American political life has waned in the decades since the 1960s. In fact, federalism's biggest problems began increasing just as attention to it was shrinking. Johnson's Great Society programs in the 1960s promised a vigorous assault on inequality, and an emerging national consensus suggested that many of the deep, pernicious divides in the country had begun to heal. The Nixon administration in the 1970s had its own New Federalism programs, but they were designed to give state and local governments more flexibility in determining how best to accomplish the Great Society's aims. Civil rights seemed increasingly a universal principle, even though it was painfully obvious that, for many Americans, the problem was scarcely solved. But as an important driver of national debate, federalism drifted away from the center of attention. In fact, many opinion writers began speculating that federalism had died—that the debate over fixing the balance of state and federal power had largely ended with the rise of the federal government's power.⁶

As Mark Twain quipped about reports of his own passing, however, the report of federalism's death is grossly exaggerated. Federalism is far from dead, but like Madison's separation of powers, it has drifted into deep crisis. Unlike the separation of powers, however, its crisis has not

been the subject of intense ongoing debate. Indeed, the more we have ignored federalism, the more it has drifted into crisis—perhaps *because* we have ignored it. Why have we ignored federalism? Because our attention has also drifted away from the big problem for which Madison’s federalism was the uneasy, short-term, tactical solution: slavery and inequality.

Federalism, Slavery, and Inequality

Madison’s biggest problem in 1787 was convincing the states to give up enough power to build a central government. There was growing realization across the states that this needed to be done, but when the war ended, so did the states’ sense of urgency and unity. State leaders were proud people who cherished their traditions and differences, none of which they wanted to surrender in the interest of creating the federal government. They were wary of putting power in the federal government, and they didn’t trust one another in making the decision about how to do it. The Southern states, in particular, anguished over whether the Northern states, with their larger population and commercial wealth, would enforce antislavery views on the South, at the cost of the region’s traditions and economy.

Among the founders, Madison in fact was among the largest slave-owners, and unlike some other founders, he never freed the slaves he owned. He was, however, deeply torn on the issue. In an 1820 letter to Lafayette, he frankly acknowledged “the dreadful fruitfulness of the original sin of the African trade.”⁷ Even in recognizing “the evil, moral, political, and economical,” of the practice, he also saw slavery as an important part of the country’s economy, and that, he still maintained some years later, made it necessary to “yield to the necessity.”⁸ Madison was certainly a leader of deeply held principle, but he was even more fundamentally a pragmatist. It was the pragmatist in him that cobbled together federalism, finding a balance of federal and state power. It was also the pragmatist in him that found room in federalism to accommodate slavery.

Federalism was Madison's most important invention because slavery was the biggest problem he had to solve. It had nearly derailed Jefferson's Declaration. In his original draft, Jefferson indicted George III for his complicity in the slave trade:

[H]e has waged cruel war against human nature itself, violating it's most sacred rights of life & liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. . . . [D]etermined to keep open a market where MEN should be bought & sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce.⁹

Of course, there was profound irony in the harsh denunciation of a king who had not personally bought or sold slaves on the North American continent, in a document whose author had. Jefferson's arguments against slavery seemed heartfelt, but in the end it did not matter. South Carolina and Georgia refused to vote for independence unless the clause was removed. Years later, Jefferson suspected that the Northern shipping industry had also been quietly complicit in the pressure to remove the slavery clause from the Declaration because, he said, its leaders did not want to lose their piece of the molasses-to-rum-to-slaves business.¹⁰ Whether or not Jefferson was right about the role of the Northern merchants in scuttling the antislavery language in the Declaration, he was right in pointing out that the economic interests around slavery were not limited just to Southern planters.

Jefferson faced a stark choice: remove the slavery clause or lose the vote for independence. He and his colleagues saw independence as the higher good, and they reasoned that they could return to the issue of slavery later, after winning the war—which was anything but a safe bet. For the proslavery members, it was a triumph of their own economic and political values. For the antislavery contingent in the Continental Congress, it was a sacrifice of one principle for another—of long-term values for a near-term necessity.

These battles resurfaced as soon as the founders debated the Constitution in Philadelphia, not so much as a matter of human rights but as a question of political balance. How was the Congress, created in Article I, to be organized? The larger states refused to accept the pattern set in the Articles of Confederation, which gave one vote to each state. The smaller states would not allow their voice to be diluted to apportion the Congress by population. This was one of Madison's biggest problems as he struggled with his draft.

Roger Sherman and Oliver Ellsworth from Connecticut suggested a compromise: unlike the government of the Articles, with just one house, Congress would have two, with two completely different plans for apportioning seats. Seats in the House of Representatives would be allocated by population, favoring the larger states, while each state would have two seats in the Senate, creating a counterbalance that favored the smaller states. But this neat solution created a second problem. If seats in the House of Representatives were allocated simply on the basis of population, that would favor the Southern states, given their large slave populations. These states surely would not allow the slaves to vote, and that would even further enhance the power of the slave-owners.

To crack the impasse, the members of the Constitutional Convention reached for the infamous compromise: slaves would count, but only as three-fifths of a person. This peculiar formulation produced a balance of seats in the House between the Northern and Southern states that each could accept, and it removed one of the biggest barriers to ratifying the Constitution. But just as with the amendments to the Declaration of Independence, political pragmatism came at the price of the nation's original sin of slavery. In *Federalist 54*, Madison frankly acknowledged the problem, but he argued that it was the best available solution to a problem that had otherwise stymied the founders.¹¹

The compromise worked, but at the cost of a very long and dark shadow over the country's history. In a stunning 1987 speech, Supreme Court Justice Thurgood Marshall pointed back to the founders' fateful decision. At an event meant to celebrate the bicentennial of the US Constitution, Marshall, rather than deliver paeans to the nation's founders, made a blistering attack on them. He told his audience that he did not

“find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary,” he argued, “the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today.”¹² The compromise made possible the short-term deal the founders needed, but the deeper problem ate like a cancer at the nation’s soul.

Even this compromise was not enough to ensure the ratification of the Constitution. When state legislatures took up the question, the underlying issue of their power resurfaced. The Constitution was relatively explicit about the federal government’s power and very clear about the limits on the state governments’ power, leading the states to worry that they would be marginalized in this newly united country. The Articles of Confederation had demonstrated the risks that came with a state-centered government, but even with the painful evidence from the country’s first decade, the states were unwilling to approve the federal government’s new role without being much surer about their own.

That question frames one of the most fundamental debates about federalism. Is it a political convenience designed to allow the country’s original sin to continue as the price of American democracy? If so, does that make the case for state power, because reducing it would have been politically impossible? Or are the states the best agents for restraining the federal government’s size and promoting liberty? Is federalism, in short, a fig leaf to cover the nation’s inability to deal with inequality, or a core principle to promote liberty? In these terms, federalism is anything but dead, because that question has been at the core of virtually every big domestic policy battle throughout American history, from the nation’s first days to the present.

Prominent scholars studying the field have long been deeply split on the issue. On one side, the political scientist William Riker saw federalism in the 1960s as an unpleasant political bargain, created at the nation’s founding to tiptoe around slavery without having to resolve it. Federalism, he said, was aimed at solving the founding’s biggest short-term problems: keeping the union from fragmenting and protecting it from

foreign attack. It was not, he believed, a core American democratic institution created to promote liberty by restraining the impulses of a powerful central government. Federalism, Riker argued, “may actually promote tyranny by its constant frustration of majorities” and “is an impediment to freedom.” In fact, he contended in 1964, “if in the United States one disapproves of racism, one should disapprove of federalism.”¹³ He was truly worried about its pernicious effects, but he found one consolation: as an institution, federalism “does not have much effect on political life.”¹⁴ For Riker, federalism was an expedient tool to get the nation started, at the cost of feeding slavery. It was a tool, he concluded, for a time when the federal government needed to be stronger, but that time had long since passed.

At about the same time, Martha Derthick extensively championed federalism. A congenital Madisonian, she admitted that federalism—in allowing the resolution of disputes to be “left often to political and judicial dispute”—was both “complicated and unstable.” Throughout her long career, however, she argued for leaving as many decisions as possible in local hands, because that created an important bulwark against an overreaching federal government. Federalism, Derthick believed, might be an uneasy foundation on which to base the quest for freedom in American democracy, but it was far better, she argued, than strengthening the federal government at the cost of local decisions, which she believed were far more likely to be responsive to citizens’ views and much more likely to be managed effectively. Despite her many differences with Riker, Derthick did agree with him on one thing: that federalism had “undeniably atrophied over time.”¹⁵ But for Derthick, it nevertheless was a tool that provided a strong foundation for adapting broad goals to local norms, a tool that remained as lively and vital as it had been for Madison.

Derthick found comfort in Madison’s search for the uneasy, pragmatic middle ground between those who sought to unify the country under a powerful federal government and those content to allow the states to spin it in many different directions. It was that search for a middle ground that Riker found unacceptable, because he feared that it paved the road to inequality, but Derthick found unavoidable; the alternative, she

worried, would sacrifice liberty. What mattered, as Derthick pointed out, was that

[f]ederalism both presumes and facilitates differences among the states. Assuming that the states are granted more freedom, will policy differences among them widen, or will their policies tend to converge? And if they grow farther apart, will this be tolerated, or will it be seen as *prima facie* evidence of injustice, requiring a national remedy and thus recentralization?¹⁶

Riker, in contrast, believed that federalism remained little more than a pretense that had justified the nation's original sin of slavery but that had evolved into an ongoing strategy that prevented the country from absolving it effectively.

The fundamental irony here is that, just as some writers were declaring federalism dead, it had become ever more important. Just as the vinegar and passion seemed to leak out of the battles over federalism, its stakes were growing: the focus on reducing inequality became more important than ever, on a far broader array of fronts. Just as academic attention to federalism diminished—every major university once had a course in federalism, but that is no longer the case—its implications for American democracy became far greater. That left journalists, analysts, and political scientists to concentrate on Madison's other great invention, the separation of powers, where the big issues have seemed anything but settled and fierce politics have threatened to shred governance at the national level. So as federalism became more important, there were few observers to chart its remarkable transformation or growing impact. Given federalism's vastly more complicated role, that intellectual irony is a political tragedy.

The Inescapable Tensions of Inequality

It became tempting to push federalism aside because, for much of its history, it had been closely identified with slavery and civil rights. But it would also become far more enmeshed in a far broader collection of issues.

First, consider the increase in inequality. The federal government waged the War on Poverty, but it scarcely won the campaign to reduce the country's vast divide between the rich and the poor. In the generation after the launch of the War on Poverty, income inequality in the United States increased substantially. In 1967, the top 5 percent of households received 17.2 percent of the nation's income. Fifty years later, in 2017, that share was 22.3 percent—more than the bottom 40 percent of households combined.¹⁷ During that period, the states were occupied by a wide collection of issues that helped to feed this trend.

Second, income inequality across time got worse in *every* state, from 1969 to 2014. In some states, income inequality only got a bit worse: in Alaska and the two Dakotas, for instance, inequality increased at less than half of the national average. In contrast, inequality became much worse in five states—Rhode Island, Nevada, New Jersey, California, and Connecticut—where it increased at 50 percent more than the national average.¹⁸ The states' own policies helped to increase the divides among them.

Third, income inequality *between* the states has worsened as well. According to 2017 data, income inequality was lowest in Utah, Alaska, Wyoming, and Iowa, with Utah 12 percent better than the national average. Illinois and Tennessee were at the national average. Meanwhile, New York, Louisiana, Connecticut, and California had the most unequal distribution of income, with New York 7 percent worse than the national average.¹⁹ The states found themselves ill equipped to narrow these gaps.

Income inequality plagues every nation.²⁰ The United States, however, has the highest level of inequality among the world's leading industrialized nations. The country is getting richer, its average income is dropping, and more wealth is being held in fewer hands.²¹ This part of the story is well known. However, much less well known but far more important is that income inequality *among* the states is growing. It is less well known because most analyses focus on the broad—and vital—national trends, and it is more important because the states are where an ever more important collection of policymakers and policy intermediaries both shape and implement national policy. It was one thing to allow the states

flexibility to protect their pride, their traditions, and their values. But since the 1960s, their policy role has increasingly injected more inequality into the nation's policy system. That, in turn, has created more polarization and more friction, and it has made the United States a collection of states divided. This trend is vitally important to American democracy but has been largely hidden from view.

One result is that we have been getting much of the story wrong about the true balance of power in the United States. Federalism is scarcely dead; indeed, it has become ever more vital and consequential in far more unexpected ways. The states are becoming more important, not less so. They are increasingly going their own way, and their policy differences are increasingly driving the country apart. Madison's tactical genius prevented the union from disintegrating at the very start, but he also laid the foundation for deep divisions that have since come to plague the country's politics. The battle over the Obama administration's Affordable Care Act, for example, was largely portrayed as based in Washington. The important policy battles, however, have been fought within the states—in the decisions about whether to build their own health insurance exchanges, whether to expand the Medicaid coverage of their lower-income citizens, how to regulate health insurance, and what health insurance coverage ought to be provided to citizens. With so many important decisions at play, federalism is surely not dead, and it certainly has not atrophied. But the debate between Riker and Derthick over how best to pursue liberty was a very different one from today's struggle over how to define federalism.

Mann and Ornstein worried that the breakdown of the separation-of-powers invention at the federal level is “a formula for willful obstruction and policy irresolution.”²² But in many ways, the strains on Madison's other great tactical invention—federalism—are even worse. Federalism not only has corroded the separation of powers, as we shall see, but has also fed inequality in the nation, and that inequality has eroded trust in government. The grand American experiment might be able to survive a disease in one of Madison's inventions. It may well not be able to survive a cancer in them both.

The Roots of Inequality

To the extent that most people think about federalism at all, they assume that it is a relatively dry and outmoded concept, invented by the founders to explain the role of the states. In fact, however, it is remarkably vibrant, lively, and dynamic. As figure 1.1 shows, American federalism has advanced in American history through a series of generations, with each generation defined by a pendulum movement seeking balance: between some periods shaped primarily by a focus on boundaries, other periods defined by a search for legal standards, and still others characterized by bargaining. (The great political scientist Deil Wright identified the rising role of bargaining in his classic book on intergovernmental relations.²³)

In the First Generation of Federalism, the focus was on drawing a clear line between federal and state power and fixing that line in law. As we will see in the next chapter, the founders had a lively, sometimes raucous battle over drafting the Constitution, and creating that boundary was the last, big issue that they resolved, in the last amendment in the Bill of Rights; the Tenth Amendment explicitly gave to the states all powers not otherwise given to the federal government. That amendment created a line that favored the states, founded in law, and that is the source of what most people remember about federalism.

The apparent simplicity and clarity of the Tenth Amendment, however, began to dissolve as soon as the government began to govern. Pressures built up over just how far the states' power could stretch, especially over the issue of slavery. The clarity of law gave way to constant bargaining over the balance between the federal government and the states.

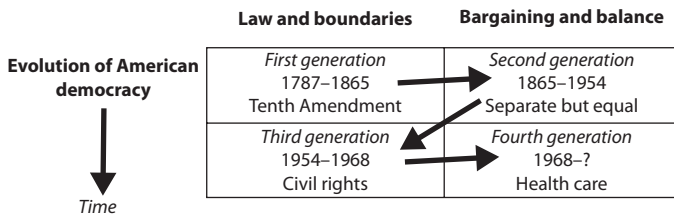


FIGURE 1.1. American federalism has been a constant search for balance.

That bargaining bent federalism until it nearly broke in the Civil War. The war, in turn, seemed to settle the issue of where the boundaries would be drawn—and who would draw them. But the North's apparently clear-cut victory, reinforced by the Fourteenth Amendment's guarantee of "equal protection of the laws," led instead to a new round of bargaining, dominated by the states. This Second Generation of Federalism became dominated by state-based actions to create "separate but equal" practices. Skating within a narrow interpretation of the law, these actions in fact reset the balance in favor of the states, some of which insisted on flaunting the protections that the Civil War seemed to have promised.

That ended with the Supreme Court's 1954 decision in *Brown v. Board of Education*, which led to the Third Generation of Federalism. That generation pulled policymaking back from the states into federal hands, through clear instruments of law that outlawed the discrimination and inequality that some states had advanced. President Lyndon B. Johnson's Great Society programs expanded *Brown* in a sweeping legislative campaign, with new legal guarantees of equal rights in voting, housing, and the workplace, along with the expansion of federal programs to deal with the legacy of segregation through the War on Poverty.

This Third Generation seemed to be the capstone of the long fight to end the inequality that had plagued American democracy since its beginning. In his famous "I Have a Dream" speech at the Lincoln Memorial in 1963, Martin Luther King Jr. had proclaimed, "Free at last, free at last, thank God almighty we are free at last." And indeed, for the first time in American history there seemed to be at least a general consensus about the quest for equality, the law's importance in defining it, and the federal government's preeminent role in promoting it and securing it. The balance seemed to have shifted, firmly and permanently, in favor of federal power.

But directly in the shadow of this Third Generation, a Fourth Generation emerged. Even though the federal government aggressively promoted equality through law, it also increasingly relied on the states as administrative agents for federal policies and reinforced their role as independent decision-makers. As the states exercised this power, the balance in the system shifted yet again, this time in favor of the states.

That shift, in turn, set the stage for federalism's important but often surreptitious role in driving the growing inequality in American life. As the states became more involved as administrative agents in more national policies, from the environment to education, health, and infrastructure, the scope of federalism broadened significantly. Over time federalism became interwoven in virtually every piece of domestic policy in the United States—and in many international issues like immigration as well. Not only did the scope of federalism increase, but big differences among the states also began emerging, slowly and often imperceptibly, as they gradually began moving down different roads, especially in health care. The result over time was a widening gap between the states in the policies they pursued, with the balance of power increasingly maintained by complex bargaining within an ever more complex intergovernmental system. As a result, the government that citizens got depended increasingly on where they lived.

Where does this lead? As the book's conclusion points out, the country could go down one of two roads, defined by the great traditions of ideas about federalism. Derthick's path would look to the power of the states to pull the country out of its accelerating drift toward ever-greater inequality. There is little in the country's history, however, to suggest that empowering the states would narrow the gulfs between them. On the other hand, the country could go down Riker's path, pushing federalism aside and relying more on the federal government. But there's little in US politics to suggest that the country is now ready—or is likely ever to be ready—to push the states aside as the price of greater federal power. Neither of these paths is likely to counter the increasingly dangerous trends toward greater inequality that the Fourth Generation of Federalism has helped feed.

What we need instead, as I argue at the book's conclusion, is a more fundamental rebalancing of federal and state power. American federalism is largely a Madisonian creation. What we most need is a more Hamiltonian strategy for making federalism work, a strategy focused far less on the boundaries of the states and far more on empowering them as agents of a broad, effective federal policy aimed squarely at reducing inequality. If the states' actions continue to feed inequality, they are likely to erode democracy and its institutions in a way that would undermine the very system

that Madison worked so hard to create. If the states were enlisted by the federal government as instruments of coherent national actions devoted to reducing the inequality between and within the states—a Hamiltonian solution to the Madisonian dilemma—the prospects would improve. There could be no worse outcome than for the very inventions that helped build the nation to become the forces undermining it. On the other hand, there could be no better testimony to the founders' genius than to continue the process of reinvention that they so bravely began. A rebalancing in favor of Hamiltonian strategies is most likely to lead the way out of the problems of the Fourth Generation of Federalism.

Hamilton's Solution?

If Madison was a master tactician, Alexander Hamilton was the country's first great strategist. Like all the founders, he recognized the need for compromise, although he was so famously stiff-necked that compromise came much harder for him than for many of the other founders. His hard-headed approach to most things, in fact, led to the duel with Aaron Burr that cost him his life. When he did compromise, it was to sacrifice short-term goals (like the location of the nation's capital in a new town along the Potomac) in exchange for longer-term principles (like the federal government's assumption of the debt accumulated by the states during the Revolution). He always had his eyes on the long-term prize.

As Hamilton surveyed the gradual evolution of the newly semi-united states under the Articles of Confederation, he was gravely worried that competition among the states would pull the country apart. New York had created a tough duty on goods imported from the West Indies. The goods ended up in nearby Connecticut and New Jersey, but New York collected the income from the tariffs. Connecticut and New Jersey were furious that products sold in their states would enrich New Yorkers. Hamilton worried that this was just one example of the temptations that would lead the states to go their own ways, not only at one another's expense but also at the cost of the young nation's unity. If the states continued to create their own trade policies, they would not only erode their ability truly to be united but also become more and more unwilling to

sacrifice for the nation's common good.²⁴ And Hamilton wanted the United States to be great.

Near the end of the Revolutionary War, Washington had laid out four principles that he believed would be required for the United States to achieve greatness: a strong federal government, which would bring the states together; repayment of the states' debts, which would establish the financial foundation of the new country; a strong army and navy, which would allow the country to defend itself; and harmony among the people, which would allow the country to find its common good. Though the list was Washington's, Hamilton, according to his biographer Ron Chernow, "would have written the identical list."²⁵ As the political analyst Michael Lind put it, "the United States was, and always should remain, a nation-state in which the states are clearly subordinated to a strong but not oppressive federal government."²⁶ Debate has raged for centuries over just how strongly opposed to states' rights—and the abolition of slavery—Hamilton was in practice.²⁷ But Hamilton was a leader of the abolitionist cause in New York and pushed the antislavery cause to the point of intense friction with many of his fellow founders. Addressing inequality, Hamilton believed, required a federal government strong enough to deal with the centripetal forces of the states.

Hamilton might have been "more adept at meeting financial crises than mending political fences," as the historian Jacob Cooke put it, but there was no doubt that he had a powerful long-term vision for the country as a truly united collection of states.²⁸ He had no interest in creating institutions so powerful as to infringe on individual liberty—his essays in *The Federalist Papers* made that point—but neither did Hamilton want to license each state to push its own views down very different, conflicting roads.

In short, Hamilton would not have been surprised by today's rising inequality in the United States, or by the fact that the states had become the main drivers of it. That possibility was precisely what worried him most in the years after the Revolution. His instinct was to intervene to prevent such an outcome by rebalancing the powers of federalism toward the federal government and strengthening the role of the executive branch. That, of course, raises the familiar questions that have beset the country since its very start. Just how much federal intervention in state

affairs are we willing to tolerate? And what would the cost be if the federal government chose not to intervene?

As we will see in the pages that follow, the balance between the federal government and the states—and between the states—has shifted over time. The inequalities that have crept into the American system are large and growing—and increasingly costly. We might not want to encourage more centralized power, but we might not be willing—or able—to tolerate substantially more inequality either. Madison and Hamilton—Derthick and Riker—have staked out the basic issues of the debate. We'll analyze these issues in the coming chapters and, even more important, explore ways to deal with the increasing problems of inequality that are growing out of the very system Madison designed to promote good government and enhance the power of America's citizens.

Federalism was thus *the* essential invention of the founders. The separation of powers set out to define how muscle would be exercised in the new country. But the invention of federalism was indispensable for determining whether there was even going to *be* a country—or whether the new states would melt into a ragged, unruly, and unworkable confederation that invited foreign invasion. Madison's biggest worry, as he explained in *Federalist 10*, was that "mischiefs of faction" would fester, shredding the sprawling new country's effort at unity before it could establish itself. Federalism was thus not only a plan to allow the states to keep their identity while creating a sense of national purpose. It was also the institution that the founders invented to safely vent the nation's perpetually simmering tensions before those frictions had a chance to destroy it.

The story of this book, however, is that deep fault lines of growing division have erupted in the very institution—federalism—that the founders had created to release the pressures of factions. Even though there seemed to be an emerging policy consensus in the 1960s for the federal government to guide the country toward greater equality, the fault lines of federalism have led since to growing pressures, increased polarization, and more inequality in the American polity. Not only is federalism not working as the founders had planned. It's also fueling the very forces that had caused them the greatest concern.

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