

HOW FEDERALISM PROMOTES UNITY THROUGH DIVERSITY

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Does federalism promote unity? In one obvious sense, the answer is surely “no.” Federalism necessarily reduces unity because it leads to divergence on at least some policy areas. If there were no significant policy differences between the various state and local governments, then there would be little point in having federalism in the first place.

But the diversity federalism creates can also help promote unity, by reducing the conflict that arises when the federal government has the power to impose one-size-fits-all policies throughout the country. Decentralizing authority can mitigate that conflict. It can also empower people to make better choices by “voting with their feet.” As a result, more people can live under policies that they prefer, and the choices they make are likely to be better-informed. There are some limitations to the idea that federalism can promote unity and better decision-making through diversity. But it has tremendous value, nonetheless.

First things first. Federalism *does* have a disunifying element. States pursue widely divergent policies on issues like education, economic regulation, antidiscrimination law,

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abortion, environmental concerns, and much else. A society where that happens is less unified—in the sense of having uniform national policies—than one where more issues are handled by the central government.

But, when different jurisdictions have divergent policies, that very diversity can help promote unity in the sense of reducing political conflict. That is because unity is harder to achieve if you have to agree on a wider range of issues. Obviously, in the present era of American politics, we have severe polarization between the left and the right, Democrats and Republicans.¹ Some have even compared the relationship between the red and the blue states to a “failing marriage.”² The obvious remedy for a failing marriage is divorce, in this case through secession or a break-up of the union.³ But a less drastic, more realistic remedy is for the troubled couple to do fewer things together and spend more time apart.

One reason why our polarization has become so bad is that the federal government is so powerful that there is a fear that if the other side takes control of federal institutions, they can thereby also control vast areas of our lives and many aspects of society. Today, federal spending accounts for some 25% of GDP,⁴ and federal regulation reaches almost every area of

1. For overviews, see, for example, EZRA KLEIN, *WHY WE’RE POLARIZED* (2020); NOLAN MCCARTY, *POLARIZATION: WHAT EVERYONE NEEDS TO KNOW* (2019).

2. See, e.g., Megan McArdle, *Can This Political Union Be Saved?*, BLOOMBERG (Dec. 30, 2016), <https://www.bloomberg.com/view/articles/2016-12-30/can-this-political-union-be-saved> [<https://perma.cc/VJA2-QW73>].

3. For a defense of this approach, see CHRISTOPHER ZURN, *SPLITSVILLE USA: A DEMOCRATIC ARGUMENT FOR BREAKING UP THE UNITED STATES* (2023). For my critique of it, see Ilya Somin, Book Review, *PUBLIUS: J. FEDERALISM* (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4657377 [<https://perma.cc/GGB3-TK77>] (reviewing CHRISTOPHER F. ZURN, *SPLITSVILLE, USA: A DEMOCRATIC ARGUMENT FOR BREAKING UP THE UNITED STATES* (2023)).

4. *Federal Net Outlays as Percent of Gross Domestic Product*, FED. RESERVE BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/FYONGDA188S> [<https://perma.cc/4Z22-42EF>].

human activity, including even such things as the faucets, dishwashers, and other household appliances in our homes.⁵

If the feds had less power and controlled fewer aspects of our lives, the danger of domination by one party over the other would be less, and it would be easier to reconcile ourselves to having the “wrong” party in control of the White House or Congress. As an extra bonus, it might reduce voters’ tolerance for politicians—most obviously, Donald Trump—who deny election results when they lose, and attempt to retain power by force and fraud. It is psychologically easier to admit that your party lost if the consequences of defeat are less drastic.

Leaving more issues to the state or local level, or to the private sector, can help accomplish this. It reduces the need for nationwide agreement or consensus on issues. It also reduces the opportunities for a narrow percent to impose their will on the minority by using the power of the federal government.⁶

To return to the marriage analogy: Greater decentralization of power can help the troubled couple take some time apart without resorting to the extreme remedy of divorce. And more of the time they spend together can be devoted to issues they agree on, or at least don’t differ on as fundamentally as they do on some other things. There are some functions of the federal government on which there is considerable agreement, such as the need for an effective national defense or for a federal role in building some types of national infrastructure. The more we can confine federal authority to these relatively unifying issues, the lower the potential for conflict.

5. See, e.g., Christian Britschgi, *How Federal Energy Regulations Make Dishwashers Worse*, REASON (Nov. 2022), <https://reason.com/2022/10/17/use-that-dishwasher/> [<https://perma.cc/VT9L-8LVR>].

6. For a more detailed discussion of how decentralization can reduce conflict, see Ilya Somin, *Voting with Our Feet*, NAT’L AFFS. (Sept. 20, 2021), <https://nationalaffairs.com/publications/detail/voting-with-our-feet> [<https://perma.cc/F6CG-PXRM>].

Even purely static federalism, where people rarely or never move between jurisdictions, can help mitigate conflict. It can achieve this to some extent because there is variation in policy based on the preferences of local majorities. As a result, people have less reason to fear the federal government, and more can live under policies they prefer.

But enabling people to vote with their feet by moving between different states and localities can empower them even more. If you dislike the policies of your state, but foot voting is relatively easy, you have the option of choosing from 49 others (plus several territories and Washington, DC), some of which might be more congenial. To the extent that power is decentralized to local governments, you might potentially have thousands of options,⁷ and moving costs will often be lower than is the case with interstate moves. Moving from one locality to another in the same region is likely easier and cheaper than moving farther away to another state. The range of alternatives for foot voters is far wider than what you get by choosing among the Democrats and Republicans at the federal level.

While moving costs can make it difficult for some to take advantage of these opportunities, much can be done to mitigate that problem, including decentralization to the local level and to the private sector. Such devolution can greatly reduce the cost of mobility.⁸

Political decentralization combined with foot voting obviously cannot eliminate all sources of conflict. Among other things, many people may care about the policies in other

7. There are some 89,000 local government jurisdictions in the United States. See ILYA SOMIN, *FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM* 45 (Oxford Univ. Press rev. ed. 2022).

8. For more detailed discussion of how to address moving cost issues in foot voting, see *id.* at 49–53.

states for moral or ideological reasons, even if those policies have little effect on themselves and their families. For example, many pro-choice and pro-life advocates obviously care about abortion policy in states other than their own. But decentralization and foot voting can partly mitigate even these kinds of conflicts, because they can eliminate the chance that one's opponents can impose their preferences nationwide in one fell swoop. Moreover, many women in states with abortion restrictions can still access abortion by traveling to pro-choice blue states to have the procedure done.⁹ This is itself a kind of foot voting, albeit less far-reaching (and also less difficult) than moving to another state permanently.¹⁰

In addition to reducing conflict and giving people a wider range of options, foot voting in a federal system has two other important advantages over conventional ballot-box voting at the federal level. One is the greater odds of being able to make a decisive choice. When you vote at the ballot box, the chance that your vote will make a difference to the outcome is infinitesimally small. In a presidential election, it's about 1 in 60 million, though varying somewhat by state.¹¹ Even in a state or local election, it is still very low.

9. Early data suggests that such trips have offset a large fraction, perhaps as much as 75%, of the decline in abortions in states that have enacted restrictive regulations since the Supreme Court overturned the right to abortion in *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022). See Amelia Thomson-DeVeaux and Humera Lodhi, *The Dobbs Divide*, FIVETHIRTYEIGHT (June 15, 2023), <https://fivethirtyeight.com/features/abortion-trend-after-dobbs/> [<https://perma.cc/YM84-SS6H>] (noting that, since *Dobbs*, the number of abortions has gone down by about 92,000 in states with newly instituted or enforced restrictions, but gone up by about 69,000 in pro-choice states).

10. On this point, see Ilya Somin, *Abortion and Foot Voting in a Post-Dobbs America*, AUSTRALIAN OUTLOOK (Mar. 24, 2023), <https://www.internationalaffairs.org.au/australianoutlook/abortion-and-foot-voting-in-a-post-dobbs-america/> [<https://perma.cc/9PHP-VDBD>] (explaining how traveling out-of-state to get an abortion can be a kind of relatively low-cost foot voting).

11. For discussion of differing estimates, see ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER 75–76 & n.7 (Stanford Univ. Press rev. ed. 2016).

It is hard to argue that people have meaningful political choice when the odds of their decision making a difference to policy outcomes are so small. We certainly would not say you have meaningful freedom of speech if you have only a 1 in 60 million chance of determining what views you will express, or meaningful freedom of religion if you have only a 1 in 60 million chance of determining what faith you wish to practice (or if you want to practice one at all). The same goes for political choice: a 1 in 60 million chance of deciding which policies you wish to live under is barely a meaningful choice at all.¹²

But if you can vote with your feet, that's a choice that really will make a big difference in terms of the policies you live under. You have a high chance of making a difference if you can move from one state or locality to another.

That circumstance leads to the second major advantage of foot voting over ballot box voting: It creates much stronger incentives to make an informed choice. Most ballot box voters are what economists call "rationally ignorant."¹³ They have very little incentive to learn about the issues at stake because there is so little chance it'll make a difference.

As a result, extensive evidence, including some that I have gathered in my own work,¹⁴ shows that most voters know very little about what they're voting on. Only about a third of Americans can even name the three branches of our federal government—the executive, the legislative, and the judicial—and they know even less about the details of policy.¹⁵

12. See SOMIN, *supra* note 7, at 16–44 (discussing the ramifications of inability to make a decisive choice for political freedom).

13. The idea of rational ignorance was first developed by ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 244–46 (1957). For an overview of the concept and its implications, see Ilya Somin, *Rational Ignorance*, in *ROUTLEDGE INTERNATIONAL HANDBOOK OF IGNORANCE STUDIES* 274 (Matthias Gross & Linsey J. McGoey eds., 2nd ed. 2022).

14. See SOMIN, *supra* note 11, at 17–46.

15. *Id.*

When people vote with their feet, they get better information. They seek out more of it.¹⁶ They also do a better job of evaluating what they learn.¹⁷ If you are like most people, you probably spent more time and effort seeking out information the last time you decided what television set to buy than the last time you decided who to back for president or governor or any other political office.

That is not because the TV is more complicated or deals with more important issues than the president does. It's that you know that the TV you pick is probably the one that will actually end up in your living room. But when you turn it on and you have the misfortune of seeing the president or some other powerful government official, your chance of affecting who that is or what policies they will pursue is infinitesimally small. Therefore, you most likely don't spend more than minimal time on that.

Empowering people to vote with their feet can further reduce conflict in a federal system, as well. It enables still more people to be in a situation where they at least generally like the policies that they're living under, and therefore, they have less need to fear their fellow citizens, including even those citizens who are on the other side politically.

There are some who worry that if we have too much foot voting, it will lead to a "big sort."¹⁸ All the conservatives end up in red states, all the liberals in blue states, and we'll be even more polarized and even more divided. In that event, political conflict might actually increase.

Such fears are overblown because people's foot voting choices often do not track crude left-right differences. It turns

16. *Id.* at 138–43.

17. *Id.* at 143–45.

18. See BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 8 (2008).

out, for instance, people like to foot-vote for places with relatively more job opportunities and lower taxes, which usually means red areas.¹⁹ But they also like places that are more diverse and more tolerant, which are more likely to be blue. And if you look at a state like Texas, which is one of the states that has gained the most in migration from other states in recent years, the people moving to Texas during that time are about equally divided between Democrats and Republicans.²⁰ So it is simply not true that foot voting will necessarily result in all Republicans going to one place, all the Democrats to another, or anything close to it.

I admit the vision I have laid out does have some constraints and limitations. One critical one is that we still need to block states and localities from adopting policies that make it difficult or impossible for people to move.²¹ The biggest and most significant of these is exclusionary zoning, which makes it difficult in many places or even impossible to build new housing in response to demand.²² There's also the problem of immobile assets, such as property in land. We need centralized constitutional protection for them because they can't be moved out of jurisdictions that might oppress these kinds of interest.²³

19. This paragraph summarizes my more detailed discussion of this issue in SOMIN, *FREE TO MOVE*, *supra* note 7, at 162–64. *See also* SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE*, *supra* note 11, at 172–76.

20. Ilya Somin, *Who's Voting with their Feet for Texas and Why*, REASON (Dec. 21, 2021), <https://reason.com/volokh/2021/12/21/whos-voting-with-their-feet-for-texas-and-why/> [<https://perma.cc/GQ8A-CPYH>]; Tom Foster, *The Newest Texans Are Not Who You Think They Are*, TEX. MONTHLY (Dec. 2021), <https://www.texasmonthly.com/news-politics/newest-texans-who-are-they/> [<https://perma.cc/X588-7L4S>].

21. For a more detailed discussion of this issue, see SOMIN, *supra* note 7, at 152–64.

22. *See id.* at 52–53.

23. I have covered this issue in detail in Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53 (2011) (Symposium on Governance and Power).

Federal enforcement of certain kinds of individual rights can facilitate both foot voting between states and foot voting in the private sector between private institutions.²⁴ The latter can sometimes be even more effective than foot voting between states because people often do not even have to physically move.²⁵ If, for instance, there is a school choice program where you can send your kids to either public or private schools as you wish, then you have much wider foot-voting options without even having to physically move to another jurisdiction.

Centralized enforcement of some types of individual rights can facilitate that kind of foot voting in various ways. For example, enforcement of freedom of religion and parental rights can empower people to vote with their feet for their preferred religious institutions, schools,²⁶ and child-raising arrangements. Judicial protection of constitutional property rights can facilitate freedom of movement and foot voting by enabling the construction of new housing and blocking the use of eminent domain to expel people from the communities where they wish to live.²⁷

I also admit that foot voting is not the only consideration that should be a factor when we decide how centralized our polity should be, and which powers should be in the hands of the federal government as opposed to states or localities. Other factors are relevant as well. For example, there may be some issues which are so large-scale that they can only be

24. For an overview of how federal judicial enforcement of individual rights can facilitate various types of foot voting, see Ilya Somin, *How Judicial Review Can Help Empower People to Vote with their Feet*, 29 GEO. MASON L. REV. 509 (2022) (Symposium on “Does the Will of the People Exist?”).

25. See SOMIN, *supra* note 7, at 81–90 (discussing this issue in more detail).

26. Cf. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that parents have a right to send their children to private school).

27. See Somin, *supra* note 24, at 525–28.

effectively dealt with by the federal government or even only by international agreement. Climate change is an obvious example of the latter.

But the vast majority of political issues are not like that. If you believe that countries like Denmark, Switzerland or New Zealand can have their own health care policies, their own pension policies, their own education policies, and so forth, then the same is true of American states and, in some cases, also American cities, which are roughly the same size or even larger than these small countries. Most of the issues on our political agenda are not so large-scale that only the federal government can effectively deal with them.

We can decentralize a lot to the local or state level and therefore achieve greater unity through diversity and empower people to vote with their feet. And in some cases, we can empower them even further by devolving all the way to the level of the private sector where there is even more room for competition and choice. Federalism combined with foot voting cannot solve all our political problems. But it can reduce the incidence of dangerous conflict, while simultaneously enabling us to make better and more empowering choices about the policies we wish to live under.