

—TYRANNY WRIT SMALL? FEDERALISM, DEVOLUTION, AND LIBERTY—

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A field that has been so often and sedulously plowed leaves few if any new facts to be gleaned; instead controversy revolves around interpretations of the available facts.

Raoul Berger, *Federalism: The Founders' Design*

Since its inception, American federalism has been dynamic. Both the scope of governmental powers and their distribution amongst national, state, and local governments have been on the move, responsive to both opportunism and necessity. The most visible and consequential trend of this complex dynamism has been the gradual (though not constant) centralization of growing institutional powers in the national, federal government. Yet during the 1980s and 1990s the trend of centralization slowed and began to reverse, animated and articulated by political and legal ideologies that counseled a return to the ‘original’ model of federalism that had been displaced by decades of growing federal power.<sup>1</sup> With the Rehnquist Court’s landmark federalism decisions in *New York v. United States* (1992) and *United States v. Lopez* (1995), both striking down major pieces of federal legislation at least in part on grounds of federalism, it appeared that a ‘federalism revolution’ was underway in the American constitutional system. The ideal of the Court’s so-called ‘new federalism’ was devolution of governmental powers to the states and localities (where, it was argued, they properly belong in our constitutional system).<sup>2</sup> Although many arguments and principles have been offered in the past several decades to justify this readjustment, one of the commonest and most broadly appealing notions (to

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<sup>1</sup> Although not strictly reducible to one another, devolutionary federalism and constitutional originalism emerged contemporaneously amongst predominately conservative judges, politicians, and legal scholars. E.g., Raoul Berger, *Federalism: The Founder's Design* (Norman: The University of Oklahoma Press, 1987); Robert Bork, *The Tempting of America: the Political Seduction of the Law* (New York: The Free Press, 1990); Martin Diamond, “What the Framers Meant by Federalism,” in *A Nation of States: Essays on the American Federal System*, ed. Robert A. Goldwin (Chicago: Rand McNally, 1963), 24-41.

<sup>2</sup> Christopher P. Banks and John C. Blakeman, *The U.S. Supreme Court and New Federalism: From the Rehnquist to the Roberts Court* (Lanham: Rowman & Littlefield, 2012); Timothy Conlan, *From New Federalism to Devolution: Twenty-five Years of Intergovernmental Reform* (Washington: Brookings Institution Press, 1998).

scholars, policy-makers, and ordinary citizens alike) is that devolution of substantial governmental powers and functions protects and enhances individual liberty, and not simply the sovereignty of states. My purpose in this essay is to explore the reasoning and ultimately to challenge the felicity of this notion.

Although advocates of devolutionary federalism differ substantially in their practical agendas, draw upon different methods and literatures, and often leave important theoretical commitments unstated, they can be workably collected under a broad conception. As I shall employ the term, devolutionary federalism maintains: 1) that the powers and functions of government ought to reside at the smallest and most local unit of government at which they can be best exercised and controlled; and 2) that most governmental powers and functions are best exercised and controlled at the level of the states and localities, whether as a matter of endogenous constitutional principle (e.g., the Tenth Amendment) or principles exogenous to the Constitution (e.g., drawn from democratic or economic theory).<sup>3</sup> Devolutionary federalism thus combines a normative claim about the ideal structure of government<sup>4</sup> with an empirical claim about the activities of governing. Although the contemporary devolutionary view can trace its lineage to the Articles of Confederation and the Anti-Federalists<sup>5</sup>, and resembles what has been called dual federalism and states' rights, it signifies something unique to the late 20<sup>th</sup> and early 21<sup>st</sup> centuries. Beyond its exploration and defense in academic contexts, devolutionary federalism figures prominently in the jurisprudence of the Rehnquist and Roberts Courts,<sup>6</sup> as well as in popular and elite political rhetoric at federal, state, and local levels.

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<sup>3</sup> As devolutionary federalism emphasizes meaningful control of governmental power by states and localities, rather than the mere delegation of functions to them by the national government, devolution is distinct from administrative decentralization. See Steven G. Calabresi, "'A Government of Limited and Enumerated Powers': In Defense of *United States v. Lopez*," *Michigan Law Review* 94 (December 1995): 752-831; 786-787, Malcolm M. Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (Ann Arbor: The University of Michigan Press, 2008), 20-29, Robert A. Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* (Chicago: The University of Chicago Press, 2009), 77-78, and Kyle Scott, *Federalism: A Normative Theory and Its Practical Relevance* (New York: Continuum, 2011), 67.

<sup>4</sup> As I have characterized it, the normative claim is fundamentally subsidiarist, although certainly not all devolutionists would embrace the full scope and reasoning of subsidiarity as a theory of human community more broadly. Vocal devolutionists who do include Steven G. Calabresi and Lucy D. Bickford, "Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law," in *NOMOS LV: Federalism and Subsidiarity*, ed. James E. Fleming and Jacob T. Levy (New York: New York University Press, 2014), 123-189 and Kyle Scott (see note 3 above). For a more general discussion of subsidiarity see Andreas Føllesdal, "Competing Conceptions of Subsidiarity," in *NOMOS LV: Federalism and Subsidiarity*, 214-230.

<sup>5</sup> Herbert J. Storing, *What the Anti-Federalists Were For* (Chicago, IL: The University of Chicago Press, 1981), 15.

<sup>6</sup> For discussions of this trend see Banks and Blakeman, *The U.S. Supreme Court and New Federalism* and Erwin Chemerinsky, "Have the Rehnquist Court's Federalism Decisions Increased Liberty?," *Human Rights* 29 (Fall 2002): 3-5; 8-9.

Yet despite its prevalence in contemporary federalism discourse, the claim that devolution correlates positively with individual liberty rests upon a dubious and rarely considered foundation. Devolutionists, from the local editorial pages to the United States Supreme Court, rarely articulate what they mean by ‘liberty.’ Indeed, arguments on both sides of the federalism debate follow in the long-standing American tradition of treating the meaning of liberty as self-evidently clear and amenable to one’s own side in the dispute.<sup>7</sup> What has subsequently emerged in the past three decades is a devolutionary federalism literature that trades extensively upon claims regarding liberty without reflecting explicitly or seriously upon what this term means. In the absence of such reflection, devolutionary claims become hollow and circular—devolution is desirable because it protects and enhance liberty, and liberty is a catch-all term for whatever supposed goods devolution promotes. Fortunately, modern moral and political philosophy has devoted a great deal of attention to the meaning and conditions of liberty, sparked by Isaiah Berlin’s seminal 1958 essay “Two Concepts of Liberty” and its popularization of an analytic and practical distinction between so-called negative and positive liberty. Although Berlin’s binary scheme has been criticized and complicated since its first articulation, it provides a straightforward and rigorous basis upon which to investigate and challenge the contemporary linkage between devolution and individual liberty. Utilizing Berlin’s pluralistic conception of liberty, I mean to show that common devolutionary claims are doubly suspect. When the meaning of liberty is left undefined and malleable, not only is the causal link between devolution and liberty often doubtful and incoherent, it is impossible to make meaningful comparisons between devolution and centralization in respect of their effects upon individual liberty. While I do not believe that Berlin’s negative/positive conceptual framework is without its flaws, or that it is either possible or desirable to refute the devolutionary vision by an exercise in conceptual definition, I do suppose that taking the concept of liberty more seriously is a necessary step towards making contemporary federalism debates more than an intellectual shell game. Furthermore, I believe that careful consideration of the meaning of liberty shows that there is no necessary or systematic connection between individual liberty and devolutionary (or perhaps any form of) federalism.<sup>8</sup> Whatever case can be made for devolution, it ought to be made on grounds other than a salutary relationship to liberty.

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<sup>7</sup> Sotirios Barber, *The Fallacies of States’ Rights* (Cambridge, MA: Harvard University Press 2013), 8-11; Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985), 10.

<sup>8</sup> Many of defenses of devolution appear to have the effect, intended or unintended, of “mask[ing] the advocacy of particular substantive goals that in themselves do not flow from federalism at all.” Feeley and Rubin, *Federalism: Political Identity and Tragic Compromise*, 2.

## The Plurality of Liberty

For my purposes, Isaiah Berlin's chief insight was that in both its ordinary and technical (or philosophical) uses liberty<sup>9</sup> is a pluralistic concept, possessed of different and sometimes conflicting senses. In "Two Concepts of Liberty," Berlin sorted centuries of reflection and rhetoric about liberty into a binary system of classification meant to both illustrate the multivalence of the concept and explain, at least in part, why so many claims about liberty seem to contradict or talk past one another.<sup>10</sup>

The first sense, *negative liberty*, responds to the question: "What is the area within which the subject—a person or group of persons—is or should be left to do or be what he is able to do or be, without interferences from other persons?"<sup>11</sup> Negative liberty thus denotes the absence of certain conditions which would impede or frustrate an individual's choices and pursuits. Charles Taylor has called this inflection of liberty an "opportunity-concept," signifying a sphere of potential action uncluttered by locked doors or restrictive laws.<sup>12</sup> An individual is free, in this negative sense, insofar as she is both unimpeded and uncoerced by the actions of other agents, including the laws enforced upon her by the state. The second sense, which Berlin terms *positive liberty*, responds to the conceptually and practically distinct question: "What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?"<sup>13</sup> To enjoy positive liberty is to be meaningfully self-directed in a sense that is distinguishable from the presence or absence of external obstacles to action. Theories of individual autonomy or self-realization and of collective self-government articulate varieties of this conception. In Taylor's terms, positive liberty (individual or collective) is an "exercise-concept," which emphasizes the source of control or guidance in action. This sense of liberty allows both for the possibility that one could be outwardly unimpeded in doing what one immediately desires and yet be unfree because the inner motive upon which one acts is not properly within one's control (e.g., one is being manipulated), and for the possibility that one could

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<sup>9</sup> Although I will follow Berlin in using 'liberty' and 'freedom' interchangeably, thoughtful cases have been made for keeping them distinct. E.g., Felix Morley, *Freedom and Federalism* (Chicago: Henry Regnery Company, 1959), 228 and Hanna Fenichel Pitkin, "Are Freedom and Liberty Twins?," *Political Theory* 16 (November 1988): 523-552.

<sup>10</sup> Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 118-172.

<sup>11</sup> Berlin, "Two Concepts of Liberty," 121-122.

<sup>12</sup> Charles Taylor, "What's Wrong with Negative Liberty," in *Philosophical Papers, Vol 2: Philosophy and the Human Sciences* (Cambridge, UK: Cambridge University Press, 1985), 211-229. Taylor criticizes this conception, in part, on the grounds that it is indifferent to *how* or even *whether* such opportunity is used.

<sup>13</sup> Berlin, "Two Concepts of Liberty," 122.

be obstructed from doing what one immediately desires and yet be free because one has in some way chosen or assented to that obstacle (e.g., the obstacle is a law one recognizes as valid).

Berlin gives this distinction an overtly political inflection, which is particularly appropriate to the contemporary landscape of federalism and questions of centralization and devolution. Theories of positive liberty generally privilege considerations of *who* governs, judging an individual free in proportion to her membership and participation in an effectively self-governing community. Theories of negative liberty, however, tend to privilege considerations of *how much* or *how far* one is governed, judging an individual free in proportion to how much or how far she is left to choose and pursue her own way of life without external restrictions or meddling by other persons, public or private. As Berlin explains, although these two dimensions—who governs and how much—may be circumstantially related in theory or practice, they are essentially distinct.<sup>14</sup> Positive liberty could be enjoyed in the relative absence of negative liberty; to govern oneself individually or with others is in principle compatible with near total restriction of one’s available options for action.<sup>15</sup> Political theories of positive liberty locate an individual’s liberty in the process of collective deliberation and decision-making in which members (are at least eligible to) participate, rather than in the outcomes of such processes and their effects upon the opportunities for individual action. Whether the individual finds herself in the majority or the minority of a self-governing community, she is thus free because her voice counted. Jean-Jacques Rousseau presented the most fundamental logic of this notion of freedom: being restrained or forced by the law is compatible with one’s freedom so long as one is an equal, participating member of the community that collectively wills the imposition of those laws.<sup>16</sup> Negative liberty, however, is logically incompatible with such coercion, regardless of its source and whether the imposition of legal restraints gives the individual what she in some respect wants. Berlin’s distinction, and its application to life in political society, thus illustrates at least two distinct senses in which an individual living under government and law might be considered free or unfree.

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<sup>14</sup> Berlin, “Two Concepts of Liberty,” 129-130.

<sup>15</sup> As the Stoics posited, even a slave could be free in this positive sense, ruling herself *internally* though the outside world dominates her. Hannah Arendt, *The Life of the Mind, Volume Two: Willing* (New York: Harvest, Inc., 1978), 73-84.

<sup>16</sup> Jean-Jacques Rousseau, *On the Social Contract* in *Basic Political Writings*, trans. and ed. Donald A. Cress (Indianapolis: Hackett Publishing, 2012), 167. As Berlin characterizes this element of positive conceptions of liberty, they trade upon the idea that “A man who is self-chained is not a prisoner[...]self-control is not control. Self-control is freedom.” Isaiah Berlin, “Rousseau,” in *Freedom and Its Betrayal: Six Enemies of Human Liberty*, ed. Henry Hardy (Princeton: Princeton University Press, 2002), 43-44.

Although the lines between aspects or views of liberty are not often as clear as Berlin strove to render them, both of these senses are enshrined in American political culture and constitutional order. Negative liberty is at the heart of much of the Bill of Rights and the Fourteenth Amendment, insofar as these protect individual rights and liberties by limiting government,<sup>17</sup> whereas positive liberty is arguably a primary object of the Guaranty Clause, the suffrage expanding amendments, and the Tenth Amendment.<sup>18</sup> What is more, these two views of liberty find emphasis in distinct yet venerable traditions of Anglo-American political thought. Negative liberty has been championed by the liberal, libertarian, and individualist strains of American political thought, while positive liberty enjoys pride of place in the republican and democratic strains. Thus the Berlinian scheme roughly yet undeniably maps onto currents of American political thought, aspiration, and contestation stretching from the late 18<sup>th</sup> century to the present, of which federalism is a particularly salient nexus.

Berlin's now classic distinction has been the subject of substantial dispute, though many critics nonetheless acknowledge that liberty is a plural concept.<sup>19</sup> Taylor's critique charges Berlin with a narrow, straw-person characterization of positive liberty and articulates in its place a more robust vision of positive liberty and its priority to its negative counterpart. Philip Pettit posits a third kind of liberty, understood as "non-domination," which he maintains is irreducible to negative or positive liberty.<sup>20</sup> Hanna Pitkin rejects Berlin's distinction between two kinds of liberty in favor of a substantive distinction between liberty and freedom indebted to Hannah Arendt, according to which liberty is essentially negative and non-political while freedom is essentially positive and exclusively political.<sup>21</sup> Quentin Skinner and Eric Nelson accept that liberty is a plural concept yet they each criticize Berlin's specific characterization of negativity and positivity, while David Miller cites Berlin's failure to

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<sup>17</sup> This is not the only plausible interpretation, even if it is the most common. For an interpretation of the same provisions as protecting positive liberties related to self-government, see Akhil Reed Amar, "The Bill of Rights as a Constitution," *Yale Law Journal* 100 (March 1991): 1131-1210, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), and George W. Carey and Willmoore Kendall, *The Basic Symbols of the American Political Tradition*, Revised Edition (Washington: The Catholic University of America Press, 1995).

<sup>18</sup> For a survey of such views, see Clint Bolick, *Grassroots Tyranny: The Limits of Federalism* (Washington: Cato Institute, 1993), 18-26.

<sup>19</sup> Critics who question the negative-positive dichotomy generally define liberty in negative terms and suggest that positive liberty is a euphemism for various other values to which (negative) liberty is either instrumentally related or opposed. See for instance, Richard E. Flathman, *The Philosophy and Politics of Freedom* (Chicago: The University of Chicago Press, 1987) and Christopher Megone, "One Concept of Liberty," *Political Studies* XXXV (1987): 611-622.

<sup>20</sup> Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997).

<sup>21</sup> Pitkin, "Are Freedom and Liberty Twins?," 524-528.

systematize his overt recognition that positive liberty can likewise be given numerous inflections.<sup>22</sup> The prevailing drift of these critiques has thus been to fault Berlin, not for distinguishing between aspects or inflections of liberty, but for specific the terms in which he analyzes and characterizes them. At the same time, these critiques grant Berlin's underlying premise that the different aspects of liberty are at least partly incommensurable and ultimately irreducible to one another. Hence the meaning of liberty is not self-evident, not even within a single political culture, and invocations of liberty stand in need of careful qualification.

I turn to Berlin's account of liberty not because it is without flaws, but because it presents in familiar (if contestable) terms a set of distinctions that illustrate how two different claims about liberty might ultimately be claims about two meaningfully different things. What is necessary in such instances is not so much the determination of which circumstantial claim about liberty is true and which is false, but clarification regarding the content of these claims, and how the invoked values stand to one another. Such conceptual sensitivity is especially needful with regards to American federalism because advocates on all sides—centralist as well as devolutionist—claim the banner of liberty. For all their rhetorical sophistication and appeal, devolutionary theories of federalism too often elide meaningful distinctions between aspects or inflections of liberty, and between the distinct and distinguishable matters of how much one is governed and who does the governing. Insofar as the term liberty is used in ways insensitive to the distinctions between its different meanings, theoretical and practical discussions of federalism will thus far be simplified and exaggerated. In order to achieve a clearer and more plausible assessment of devolution, we must begin with and apply a more nuanced understanding of liberty itself.

### **Devolutionary Federalism and Individual Liberty**

According to Daniel Elazar, “[t]he central interest of true federalism in all its species is liberty,” adding that although the system of federalism established by the American Constitution recognizes “state liberties” (e.g., the Tenth Amendment), its real aim is the preservation of individual liberty.<sup>23</sup> Elazar's

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<sup>22</sup> Quentin Skinner, “A Third Concept of Liberty,” *Proceedings of the British Academy* 117 (2001): 237-268; Eric Nelson, “Liberty: One Concept Too Many?,” *Political Theory* 33 (February 2005): 58-78; David Miller, “Introduction,” in *Liberty*, ed. David Miller (Oxford: Oxford University Press, 1991), 1-20; especially 9-10.

<sup>23</sup> Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987), 91; 95. Elazar suggests that the emphasis upon individual liberties is a feature peculiar to American federalism, whereas “for much of the world, group rights—variously defined as national, local, or ethnic liberties—are of the essence.” (p. 95) It is not uncommon to find bolder, less qualified claims to the effect that, when suitably devolutionary in character, “[f]ederalism is freedom.” Charles J. Cooper, “The Demise of Federalism,” *The Urban Lawyer* 20 (1988): 239-283; 281.

view is by no means unusual. This is among the commonest tropes in federalism literature, employed to underscore or complement a variety of arguments about the proper distribution of powers between the national and state governments.<sup>24</sup> Yet Elazar's claim is emblematic of a certain tendency towards conceptual myopia, especially among advocates of devolution. Although individual liberty is regularly distinguished from the liberties, powers, or sovereignty of the states, individual liberty itself is treated as an internally singular and unproblematic concept. This is not to deny that advocates of devolution recognize distinctions and even conflicts between different exercises of liberty (such as one individual's liberty to convey a religious message versus another's liberty to go about one's life undisturbed by unwanted messages) or categories of liberty (such as economic liberties versus political liberties). Yet all too often such different exercises and categories are treated as so many expressions of some fundamental and singular value that is never meaningfully in tension with itself.

Such conceptual simplicity is often desirable, especially when liberty is adduced to claims about federalism as a supplement or rhetorical trump. This is merely to suggest that advocates of devolution tend to use the concept of liberty in the way that most Americans do: earnestly yet imprecisely. However, when the concept of liberty is used imprecisely it may be difficult to determine whether two claims about liberty are the same, distinct, or even opposed. Speaking of liberty *full stop* does little to articulate or advance coherent ideologies or policy positions, and risks confounding political deliberation and legal practice. Such broad, undefined usages might serve the purposes of politicians in garnering public support, but they do little to advance public understanding or prudent institutional reform. Berlin's analysis of liberty illustrates the wisdom and utility of seeking greater precision in what we say about liberty, at least when the concept is essential to the content or rhetorical styling of a claim, as is often the case with the case for devolution. What follows is an analysis of some common devolutionary claims in light of a Berlinian understanding of liberty as a plural concept, admitting at least two distinct senses.

### *Experimentation and Competition*

The common denominator of devolutionary theories of federalism is that they would return greater policy making roles and governing powers to states and localities, on the grounds that such functions and powers are better or more legitimately exercised at these levels. Some devolutionists have adopted

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<sup>24</sup> Even critics of state and local government readily commend properly-balanced federalism as "a bulwark of liberty." Bolick, *Grassroots Tyranny*, 9.



the concepts and methods of economics to defend the superiority of the polycentric system of government they envision. Insofar as government provides public goods and public services, individual units of government in a federal system may be understood as firms operating in a public policy market. Each participant in this market crafts policy offerings in order to meet the perceived preferences of the consumers of those policies. Devolutionary federalism thus implements two related principles. On the one hand, dismantling the centralization of policy and returning significant powers and functions to states and localities would effectively de-regulate the policy market, enabling greater experimentation and innovation in the formulation and delivery of goods and services. On the other hand, a devolutionary system prevents the monopolization of policy-making and facilitates competition between market participants. Although individual liberty is one of many values that might be affected by governmental policies, devolutionary theorists regularly invoke favorable connections between experimentation, competition, and liberty in a devolved federal system. Yet in this connection liberty is often treated as a simple, singular good—like national wealth—that admits of significant quantitative variation but little qualitative variation.

Although experimentation and competition are distinct, they are related and often connected in devolutionist literature. First, insofar as devolution places real power to make and implement policy in multiple, distinct centers, it facilitates policy experimentation in response to conditions that vary from jurisdiction to jurisdiction. In the early 20<sup>th</sup> century, Justice Louis Brandeis offered the now classic imagery of the states as laboratories of democracy in which policy experiments could be attempted without nationalizing the costs, while at the same time permitting imitation and adaptation of successes by other jurisdictions.<sup>25</sup> By the late 20<sup>th</sup> century this view became increasingly orthodox, especially in the federalism jurisprudence of the Rehnquist Court. As the argument goes, devolution enables states and localities to experiment in the production and provision of public goods and services, spurring innovation in the policy market<sup>26</sup>; thus devolution enables states and localities to find new ways to maximize individual liberty that might not garner majority support at the national level but that better track local tastes or conditions.<sup>27</sup> The greater the number of innovators in the policy market, the more liberty-maximizing policies will be crafted and, when proven successful,

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<sup>25</sup> *New State Ice Co. v. Liebman* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>26</sup> Yet there is no guaranty that states and localities will in fact embrace this opportunity—indeed there are political and institutional incentives for jurisdictions not to experiment and rather to wait to see the outcomes and attendant costs in other jurisdictions. Feeley and Rubin, *Federalism: Political Identity and Tragic Compromise*, 27.

<sup>27</sup> Michael W. McConnell, “Federalism: Evaluating the Founders’ Design,” *University of Chicago Law Review* 54 (Fall 1987): 1484-1512; 1493-1499; Calabresi, “A Government of Limited and Enumerated Powers,” 777.

adopted by other jurisdictions. Any resulting cross-jurisdiction uniformity will ideally be characterized by the greater enjoyment of liberty.

Second, insofar as there exist multiple jurisdictions and mobile citizens capable of exercising an exit option from any particular jurisdiction, devolution creates a competitive market in policy.<sup>28</sup> In Charles Tiebout's formulation of this view,

[t]he consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods. This is a major difference between central and local provision of public goods. [...] The greater the number of communities and the greater the variance among them, the closer the consumer will come to fully realizing his preference position.<sup>29</sup>

This model illustrates the affinity between experimentation and competition: in a devolved system a multitude of jurisdictions compete by way of policy experimentation. Although the exact content of any bundle of social goods could vary greatly, liberty is frequently invoked as one of the goods that devolutionary competition would produce and deliver better than more centralized institutional arrangements. As Steven Calabresi has put it,

If I dislike the laws of my home state enough and feel tyrannized by them enough, I always can preserve my freedom by moving to a different state with less tyrannous laws [...] The protection of [individual] liberties through jurisdictional competition is a great and additional benefit of federalism [...] Competition leads inexorably to innovation and improvement.<sup>30</sup>

Devolution introduces an anti-trust principle into the policy market, "ensur[ing] that certain decisions must be made on a state-by-state basis, with the attendant benefits of choice, innovation, and competition."<sup>31</sup> Whereas centralization of the functions and powers of government tends to produce a regulated or even monopolistic market in policies affecting liberty, experimentation and competition create diversification (at least) and races to the top between jurisdictions (at best). Genuinely polycentric federalism is thus said to "enhanc[e] both individual freedom and public policy" directly,

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<sup>28</sup> James M. Buchanan, "Federalism as an Ideal Political Order and an Objective for Constitutional Reform," in *Collected Works, Vol. 18: Federalism, Liberty, and the Law* (Indianapolis: Liberty Fund, 2001), 67-78.

<sup>29</sup> Charles M. Tiebout, "A Pure Theory of Local Expenditures," *Journal of Political Economy* 64 (October 1956): 416-424; 418.

<sup>30</sup> Calabresi, "'A Government of Limited and Enumerated Powers,'" 776-777. Here 'liberty' seems to be used in its negative sense. Akhil Reed Amar offers a similar perspective in terms less indebted to the language of economics and more to that of popular sovereignty. See Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96 (June 1987): 1425-1520.

<sup>31</sup> Schapiro, *Polyphonic Federalism*, 76. See also Martin A. Feigenbaum, "The Preservation of Individual Liberty through the Separation of Powers and Federalism: Reflections on the Shaping of Constitutional Immortality," *Emory Law Journal* 37 (Summer 1988): 613-626; 622 and Richard B. Stewart, "Federalism and Rights," *Georgia Law Review* 19 (Summer 1985): 917-980; 918.

while also protecting “the freedom that comes from having choices” between policies and the jurisdictions that offer them.<sup>32</sup> Thus, from the first standpoint, devolution serves liberty by facilitating policy innovations that better preserve it, while from the second, compatible standpoint devolution serves liberty by affording individuals a meaningful exit option and by creating a race to the top among experimenting jurisdictions.

Yet a more complex view of liberty as a political and legal concept demands reassessment of such congratulatory claims. When liberty is conceived as a univalent value, admitting primarily quantitative variation (such as rates of taxation might vary between states) devolutionary claims about experimentation and competition have great intuitive appeal because considerations of liberty are reduced to matters of relative efficiency in the provision of liberty-enhancing policies.<sup>33</sup> If liberty is a singular, univalent good, then its enjoyment might be best served by innovation amongst competing providers. Yet if one introduces the Berlinian distinction between at least two kinds or aspects of liberty that can vary independently of, and ultimately conflict with, one another, then such arguments in favor of devolution become more difficult to sustain.

Incorporating Berlin’s distinction, experimentation and competition can be recast in two different ways: on the one hand, as exercises of liberty in themselves and, on the other hand, as ways of enacting policies that protect and enhance liberty. As Brandeis suggested long ago, and devolutionists continue to claim today, experimentation in the states and localities is an expression of democracy, and competition between innovating jurisdictions forms a complex pattern of practices of self-government. Insofar as devolution facilitates self-government at state and local levels, and self-government is an exercise of positive liberty, it would appear that devolution *pro tanto* protects and enhances individuals liberties, cultivating fora in which citizens can participate in processes of policy-making. I shall consider these claims separately in the following section, and for now shall focus on the output of experimentation and competition.

When liberty is understood to include both negative and positive aspects, which are not simply reducible or translatable to one another, the claim that devolutionary experimentation and competition on balance foster greater individual liberty becomes dubious. Granting for the sake of argument that

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<sup>32</sup> David Lewis Schaefer, “The Antifederalists and Tocqueville on Federalism: Lessons for Today,” in *The Ashgate Research Companion to Federalism*, eds. Ann Ward and Lee Ward (Burlington: Ashgate Publishing, 2009), 193-208; 206; Michael S. Greve, *Real Federalism: Why It Matters, How It Could Happen* (Washington: The AEI Press, 1999), 6.

<sup>33</sup> E.g., G. Patrick Lynch, “Protecting Individual Rights through a Federal System: James Buchanan's View of Federalism,” *Publius* 34 (Autumn 2004): 153-167 157-160.

states and localities would in fact experiment with how to protect and enhance liberty (which devolution empowers them to choose not to do<sup>34</sup>), there are both empirical and conceptual grounds for such doubt. First, even when there is policy innovation and competition among multiple units of government, the drift of policy need be neither unidirectional nor favorable to individual liberties of any particular kind. New policies might be mixed in their outcomes, for example favoring negative liberties (e.g., through lower property tax rates) at the expense of positive liberties (e.g., thereby hindering the abilities of local school boards to enact policies favored by their constituents). In such cases, the devolution of governmental powers and functions cannot simply be said to promote liberty as such, since both kinds of liberty and instances of those kinds might stand in tension with one another. What is more, devolution may generate “races to the bottom as well as races to the top.”<sup>35</sup> Liberty is one value among many that governmental policies might promote, and thus it is possible in both principle and practice for a competitive market in innovative policies to yield outcomes unfavorable to individual liberties, negative or positive.<sup>36</sup> This is not to suggest that a centralized system would necessarily fare any better; a national policy framework would likely entail similar trade-offs, and could be unfavorable to individual liberties in any number of ways. What is required, ultimately, is an empirical analysis of which liberties are in fact fostered or hindered by specific policies in specific jurisdictions. Blanket claims that experimentation and competition favor liberty and/or are comparatively superior to centralization are both theoretically irresponsible and empirically naïve.

Second, the argument for competition regards an individual’s option to exit any jurisdiction as the ultimate guarantor of an efficient political market that will, on the whole, protect and enhance liberty better than centralization.<sup>37</sup> Yet devolutionary theories often trivialize the costs involved in moving from one jurisdiction to another. Even in an ideally innovative and competitive policy market, exercising an exit option might require trading the negative liberties enjoyed in a jurisdiction with fewer regulations upon private conduct for the positive liberties enjoyed in a jurisdiction with greater

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<sup>34</sup> E.g., Feeley and Rubin, *Federalism: Political Identity and Tragic Compromise*, 26.

<sup>35</sup> McConnell, “Evaluating the Founders’ Design,” 1500.

<sup>36</sup> This may be especially prevalent when “officials in control of each jurisdiction [...] seek short term political benefits” by enacting policies that may erode one or more dimension of liberty over the long term. Feeley and Rubin, *Federalism: Political Identity and Tragic Compromise*, 84. See also Bolick, *Grassroots Tyranny*, 95-174. New developments, including the substantial influence of quasi-interest groups such as the American Legislative Exchange Council, further demonstrate the potential for state and local innovation and competition to result in policies that infringe upon individual liberties, especially positive liberties to public services and equal suffrage. E.g., Ellen Dannin, “Privatizing Government Services in the Era of ALEC and the Great Recession,” *The University of Toledo Law Review* 43 (Spring 2012): 503-531

<sup>37</sup> Buchanan, “Federalism as an Ideal Political Order and an Objective for Constitutional Reform,” 68-70; Calabresi, “A Government of Limited and Enumerated Powers,” 776-777.

opportunities for political participation. Other things being equal, emigration might require substantial trade-offs between kinds of liberties. Furthermore, exit costs might come in the form of trades between liberties of a single general kind. Apart from the financial and other personal costs involved in moving from one state to another, in choosing between a state which affords greater negative civil liberties (in the form of less restrictive laws regarding alcohol or abortion) yet fewer negative economic liberties (in the form of a higher tax burden) and a state whose policies are effectively the converse (affording more of the same economic liberties and fewer civil), an individual is required to choose between complex bundles of liberties that may vary and be valued independently. Thus, rather than occasioning simple choices between more and less liberty, the availability of an exit option in a competitive policy market is likely to occasion difficult choices between complex bundles of goods, none of which are clearly superior to one another, and none of which are without cost. In itself, this does not suggest that devolution serves liberty worse than centralization, but it does suggest that if one adopts a multivalent view of liberty, then even genuinely innovative and competitive devolutionary federalism does not simply or necessarily promote liberty.

Third, even when competition provides a generally effective exit option, subjecting individuals to the vicissitudes of devolutionary experimentation may infringe upon their liberties in a more fundamental way. The real subjects of such experimentation are not policies but individuals, and even when individuals have a viable exit option “they may have certain rights against experimentation that cannot be satisfied by an emigration strategy.”<sup>38</sup> This is especially true under the American system of constitutionally protected rights, many of which (such as 4<sup>th</sup> Amendment limits on searches and seizures, or the constitutional principle of one person, one vote) *prima facie* guarantee negative freedom from policy experimentation, however innovative or efficient it may be.

To the extent that devolutionary federalism spurs experimentation and competition it *can* foster policies that protect and enhance liberty, but claims to this effect are most compelling when liberty is defined in implausibly simplistic ways. Incorporating a more complex conception of liberty illuminates that there is more likely an at best probabilistic association between policy experimentation, inter-jurisdictional competition, and liberty. Serious arguments for experimentation and competition must account for the variety of forms liberty might take.

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<sup>38</sup> Schapiro, *Polyphonic Federalism*, 77; see also Akhil Reed Amar, “Five Views of Federalism: ‘Converse-1983’ in Context,” *Vanderbilt Law Review* 47 (October 1994): 1229-1249; 1235-1236.

## *Localism and Self-Government*

A more venerable view of devolutionary federalism as a vehicle for liberty is to be found in the republican tradition of political thought that animated Anti-Federalist opposition to the Constitution and has enjoyed resurgence in the past several decades. Michael McConnell captured this republican spirit, saying that “it is natural that lovers of liberty would be inclined towards decentralized decision making.”<sup>39</sup> The notion that practices and institutions of self-government in the states and localities are better protectors of liberty can be divided into two distinct claims. Situating the powers and functions of government nearer to the governed 1) fosters policy outcomes that are more favorable to liberty and 2) ensures a more active, participatory process of governing. Considering these in turn again illustrates the complexities and conflation of different kinds of liberty in devolutionary arguments.

The ‘closeness’ of government under devolutionary federalism is frequently taken to guarantee greater individual liberty in the form of effective self-government. Underlying this association is the premise that, other things being equal (e.g., electoral procedures, the powers vested in government), “voice is more effective in small than large political units” insofar as “it is easier for one person or small group to organize a potentially winning political coalition in the localized community than in a large and complex polity.”<sup>40</sup> Thus the “happiness and freedom” of citizens depends upon their proximity to their government.<sup>41</sup> Policies imposed by a distant, national government are less likely to reflect the conditions and preferences of states and localities, whereas closer government is supposed to generate policies that better reflect local tastes.<sup>42</sup> Even if such policies restrict some dimensions of liberty (e.g., blue laws or restrictions on access to abortion), locally governed individuals are freer insofar as these restrictions better track their preferences. Rather than muster empirical evidence of such convergence between state policies and local tastes, devolutionists often treat this claim as

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<sup>39</sup> McConnell, “Federalism: Evaluating the Founders’ Design,” 1506.

<sup>40</sup> James M. Buchanan, “Federalism and Individual Sovereignty,” in *Federalism, Liberty, and the Law*, 79-89; 83. See also Lino A. Graglia, “Lopez, Morrison, and Raich: Federalism in the Rehnquist Court,” *Harvard Journal of Law & Public Policy* 31 (Spring, 2008): 761-793; 761.

<sup>41</sup> This view was articulated by numerous Anti-Federalists, and is echoed by contemporary devolutionists. “Letters from the Federal Farmer, I,” in *The Anti-Federalist Writings of the Melancton Smith Circle*, eds. Michael P. Zuckert and Derek A. Webb (Indianapolis: Liberty Fund, 2009), 19-27; 26-27; Storing, *What the Anti-Federalists Were For*, 16-18; Berger, *The Founders’ Design*, 57-58; Calabresi, “A Government of Limited and Enumerated Powers,” 775; Steven G. Calabresi, “Federalism and the Rehnquist Court: A Normative Defense,” *Annals of the American Academy of Political and Social Science* 574 (March 2001): 24-36; 27-28; Jacques Leboeuf, “The Economics of Federalism and the Proper Scope of the Federal Commerce Power,” *San Diego Law Review* 31 (Summer 1994): 555-616; 558-559.

<sup>42</sup> McConnell, “Federalism: Evaluating the Founders’ Design,” 1509.

axiomatic. Yet even if there is an empirical gap between individual preferences and state policies, the closeness of government may have a reinforcing psychological dimension. The closer government is to the people, the more likely that they will internalize and identify with the policies of that government.<sup>43</sup> Under such conditions liberty is ostensibly enhanced through a change in how its potential impediment or interference is perceived.

Devolutionists also often suppose that closeness enhances liberty by making government more accountable to or controllable by the governed. This notion traces its lineage in American debates about federalism to the Anti-Federalists, with the pseudonymous ‘Agrippa’ citing the republican ideal of devolved government as “the principle which preserved our freedom.”<sup>44</sup> Contemporary advocates argue that devolution “keeps government nearer the people, where it can be watched more closely and where it is more likely to have good information about popular preferences as to good policy.”<sup>45</sup> Local government is thus both more efficient (as it minimizes the institutional costs of good policy-making) and more conducive to liberty (as its policies are more responsive and responsible to the governed). The liberties favored by local constituencies would be more fully enjoyed and protected than under a more distant, centralized system of government.

Yet devolution is also said to foster practices of self-government that are the bulwark of liberty. Here the association hinges less upon the content of the laws and policies enacted by state and local government than upon the process of their authorship and the substantive condition enjoyed in respect of it. As Justice Sandra Day O’Connor has put it, devolution “enhances the opportunity of all citizens to participate in representative government [which] is a cornerstone of American democracy.”<sup>46</sup> This view again echoes the tropes of the Anti-Federalists who saw the “small republic [...] as a school of citizenship as much as a scheme of government.”<sup>47</sup> Devolved government is not merely understood to produce policies conducive to liberty, but itself constitutes a practice of liberty

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<sup>43</sup> Ibid., 1508. This could be interpreted strongly, in a Rousseauist sense, as individuals coming to personally identify with the general will of their community, or it could be interpreted weakly as a special case of preference adaptation in which greater identification with the locus of government fosters greater identification with its policies over time.

<sup>44</sup> “Letters of Agrippa, IV,” in *The Anti-Federalists*, ed. Cecelia M. Kenyon (Boston: Northeastern University Press, 1985), 132-134; 133.

<sup>45</sup> Calabresi, “Federalism and the Rehnquist Court: A Normative Defense,” 27. See also Berger, *Federalism: The Founders’ Design*, 57 and Calabresi, “A Government of Limited and Enumerated Powers,” 777-779.

<sup>46</sup> *Federal Energy Regulatory Commission v. Mississippi* 456 U.S. 742; 789 (1982) (O’Connor, J., concurring and dissenting in part).

<sup>47</sup> Storing, *What the Anti-Federalists Were For*, 21.

in the form of republican self-government.<sup>48</sup> Although it is not the only way to facilitate greater local political participation,<sup>49</sup> devolution ideally “promotes republican values by providing citizens greater opportunities to participate in public and political life and collectively to deliberate and define the character of their community.”<sup>50</sup> Furthermore, multiplying the sites at which effective participation can take place enhances the political rights of individuals in ways that appear to dovetail with the advantages of closeness. Local practices of self-government are themselves practices of liberty (i.e., choosing the rules by which one and one’s community will live) and they are likely to better protect liberties both in terms of the policies they produce and the sense of identification they cultivate.<sup>51</sup>

The apparent strength of the devolutionary case for local self-government derives in no small part from its appeal to republican ideals that are deeply rooted in the American constitutional tradition. Yet the republican case for devolution trades on understandings of liberty that are often simplistic and imprecise. In both 18<sup>th</sup> century and contemporary arguments for federalism as a vehicle of self-government, the liberty protected or expressed by local self-government is rarely defined or distinguished from other kinds, and subsequently liberty is overwhelmingly treated as a singular, monovalent value which devolution simply preserves and centralization simply erodes. By foregrounding the plurality of liberty itself, the Berlinian model equips us to identify the assumptions and suppressions upon which the case for local self-government ultimately depends.

Any assessment of the case for devolution shall depend, in the final analysis, upon empirical detail that is not my present concern. The actual outcomes and practices of self-government, like the actual outcomes of policy experimentation and interjurisdictional competition, will dramatically shape the ways in which and extent to which devolutionary federalism affects liberty. There is, therefore, an inevitable probabilism to both cases for devolution and any critiques that may be made of them. However there are certain conceptual features of both liberty and devolution that should hold true

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<sup>48</sup> See Martin Diamond, “What the Framers Meant by Federalism,” 35; Graglia, “*Lopez, Morrison, and Raich: Federalism in the Rehnquist Court*,” 762; Schapiro, *Polyphonic Federalism*, 78; David L. Shapiro, *Federalism: A Dialogue* (Evanston, IL: Northwestern University Press, 1995), 91-92.

<sup>49</sup> For participatory models that are not devolutionary see Bruce Ackerman and James S. Fishkin, *Deliberation Day* (New Haven: Yale University Press, 2004) and Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press, 1984).

<sup>50</sup> Stewart, “Federalism and Rights,” 918.

<sup>51</sup> Buchanan effectively summarizes this intersection in saying that “voice is more than a vote [...] Neither the set of alternatives among which political choices are made nor the preferences of citizen-voters are exogenous to the processes of political discussion. And it is self-evident that the influence of any person in a discussion process varies inversely with the size of the group.” Buchanan, “Federalism and Individual Sovereignty,” 83.



regardless of the vicissitudes of politics and policy, and that counsel careful reconsideration of arguments about localism and self-government.

Localist arguments about responsiveness to local tastes and the accountability of government rely upon an essentially positive sense of liberty. Responsiveness and accountability are merely two different ways of denominating a correspondence between the desires of the governed and the policies of their government. Closeness, then, signifies an identity of interest between government and citizen such that the government to which one is subjected is merely an extension of oneself. What Berlin and others have realized, however, is that positive liberty (enjoyed when the question ‘who governs me?’ is answered with ‘the community with which I identify’) is conceptually independent of negative liberty (enjoyed when the question ‘how much am I governed?’ is answered with ‘less rather than more’). Significant degrees of governmental responsiveness to local tastes or accountability to local constituencies may entail significant degrees of positive liberty, but there is no necessary connection between such institutional conditions and negative liberty. The fundamental aim of self-government is not negative liberty at all, as the former could be robustly enjoyed while the latter is severely curtailed. Rather, the animating purpose of self-government (all the more apparent when combined with devolutionary localism) is “the actual achievement of a particular condition of life” that may be defined in terms antithetical to negative liberty.<sup>52</sup> The effective conversion of local tastes into policy protects and enhances negative liberty (e.g., freedom of speech) only if this is what local tastes demand. Devolution thus entails choices and trade-offs that its advocates rarely if ever explicitly consider. Government that is near to the people might better mirror the preferences of the people than would a more distant government<sup>53</sup>, but those preferences themselves may be antagonistic to conditions that deserve to be classified as liberty (positive as well as negative, since this can mean more than simply political participation). As Clint Bolick has observed, devolutionary federalism’s agenda of self-government “does not mean individual liberty, but majoritarianism,”<sup>54</sup> especially at state and local levels. Greater responsiveness to mobilized political majorities at state and local levels guarantees positive liberty (convergence between governmental policy and individual preferences) only if one is

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<sup>52</sup> Nelson, “Liberty: One Concept Too Many?,” 60.

<sup>53</sup> Though this is by no means self-evidently true. See Bolick, *Grassroots Tyranny*, 8; Clint Bolick, *Leviathan: The Growth of Local Government and the Erosion of Liberty* (Stanford: Hoover Institution Press, 2004); Feeley and Rubin, *Federalism: Political Identity and Tragic Compromise*, 23; and Cass R. Sunstein, “Naked Preferences and the Constitution,” *Columbia Law Review* 84 (November 1984): 1689-1732; 1730.

<sup>54</sup> Bolick, *Grassroots Tyranny*, 22.

in the winning faction, and does not by itself guarantee negative liberty (fewer obstacles and less coercion) at all.<sup>55</sup>

The American federal system is arguably designed to mitigate precisely the kind of local responsiveness that devolutionary theorists champion. As James Madison put it in *Federalist* 10: “The smaller the society, the fewer probably will be the distinct parties and interests composing it, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily they will concert and execute their plans of oppression.”<sup>56</sup> One of the reasons for replacing the system of government that prevailed under the Articles of Confederation with a more centralized system was to hinder the formation and effective political mobilization of such factions. Devolutionary federalism, if it remains insensitive to distinctions between kinds of liberty, is liable to present the positive liberty of factions as if it were liberty as such.<sup>57</sup>

The devolutionary case for active political participation likewise trades upon a conflation of distinct kinds of liberty. Although Madison maintained a careful distinction between a democratic form of government (in which political power was exercised directly by the people) and a republican form (in which institutions of representation mediated the people’s influence upon government), both classical and contemporary devolutionists rely upon the distinction between a republican form (in which local government is animated by citizen participation and preferences) and a centralized form (in which local government is subjected to the will of a distant, unrepresentative national authority).<sup>58</sup> My purpose is not to adjudicate between these substantive visions of good government or constitutional order, but merely to challenge the equation of local self-government to freedom as such. Madison was keenly aware that the choice between constitutional regimes (e.g., democratic and republican) entailed complex and even agonizing trade-offs between kinds and practices of liberty,

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<sup>55</sup> See also William H. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown and Company, 1964), 145.

<sup>56</sup> James Madison, “The *Federalist* Essay 10,” in *The Essential Federalist and Anti-Federalist Papers*, ed. David Wooton (Indianapolis: Hackett Publishing, 2003), 167-174; 173. Such factions are, of course, capable of infringing upon both the negative and the positive liberties of minority groups. State and local laws restricting private sexual conduct exemplify the former, while state and local laws restricting access to the electoral process (e.g., voter identification laws) exemplify the latter.

<sup>57</sup> See Erwin Chemerinsky, *Enhancing Government: Federalism for the 21<sup>st</sup> Century* (Stanford: Stanford University Press, 2008), 102-103; Diamond, “What the Framers Meant by Federalism,” 37; and McConnell, “Federalism: Evaluating the Founders’ Design,” 1501-1502.

<sup>58</sup> Devolutionists generally hold out little faith for Congress to represent the interests of states. Calabresi, “Federalism and the Rehnquist Court: A Normative Defense,” 30; Russell Kirk, *The Politics of Prudence* (Wilmington: Intercollegiate Studies Institute, 1993), 223-238.

and not merely between expected quantities. His defense of the Constitution's mediated, centralized system of government not on the grounds that it would promote liberty as such, but on the grounds that it would achieve a more favorable and sustainable balance between individual liberties *from* government and liberties *to participate in* government.<sup>59</sup> It is possible that the gradual centralization of political power during the 20<sup>th</sup> century has marked a departure from the Madisonian vision of deliberately mediated self-government, but as the perennial choice in American constitutional politics is always between kinds and degrees of liberty rather than between liberty and its absence or opposite, devolutionary rhetoric tends to simplify and confound real, complex choices between centralization and devolution.

There is also reason to doubt whether devolution would really deliver the positive liberty to participate effectively in government that is often touted by its advocates. On the one hand, the pay-off of devolution may depend significantly upon what one counts as participation in self-government. Closer proximity to government, as well as more numerous points of access to it, may fail to translate into genuine self-government (and thus positive liberty) from the standpoint of the individual citizen whose voice is not heard or not effectively translated into policy.<sup>60</sup> What is more, twentieth century American political experience has demonstrated that "maximum citizen participation may be combined with maximum control in the hands of a minority."<sup>61</sup> Empowering smaller and more numerous constituencies to govern themselves may in fact facilitate capture of localities by minority groups and "sub-constituencies" who frustrate genuine self-government by the community.<sup>62</sup> This is one face of the problem of faction that Madison wished to mitigate, and that Berlin thought was masked by conflation of positive and negative liberty which lead us too readily to assume that when 'we' all equally govern, 'we' are all equally free.

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<sup>59</sup> Indeed, at the time of the Constitution's drafting and ratification, state governments were widely regarded to be unrepresentative of the people and unfriendly to their natural and common law liberties. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1997), 29-30; Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (Oxford: Oxford University Press, 2009), 16-18.

<sup>60</sup> The reasons for this deficit may be cultural as well as institutional. As Herbert Storing observed in the early 1960s, at a time when cultural cohesion within and difference between the states was arguably greater than it is today: "That the states are not in any fundamental sense the small intimate communities of self-governing men, beloved of the heirs of Jeffersonian democracy, is surely even clearer today than it was when Hamilton pointed it out. It is difficult to see in the state governments of Tennessee or New York or Michigan much of those qualities of 'local liberty,' 'self-government,' and 'democracy' with which, in the lore of federalism, the states are supposed to be associated." ("The Problem of Big Government," in *A Nation of States: Essays on the American Federal System*, 65-87; 77.)

<sup>61</sup> Morton Grodzins, "Centralization and Decentralization in the American Federal System," in *A Nation of States: Essays on the American Federal System*, 1-23; 13.

<sup>62</sup> *Ibid.*, 13-15; Benjamin G. Bishin, *Tyranny of the Minority: The Subconstituency Politics Theory of Representation* (Philadelphia: Temple University Press, 2009).

On the other hand, devolution of governmental functions and powers to states and localities does not, in itself, enhance individual liberty to participate in government. Devolution of powers from a central unit of government to multiple, more local units is distinct from popular participation of individuals in the operation of any unit of government. As Malcolm Feeley and Edward Rubin have argued, “[o]nce federalism is distinguished from democracy [...] the argument that it is needed to secure liberty does not seem particularly compelling [because] federalism, unlike democracy, is a mechanism that grants power to regional governments, not to individuals.”<sup>63</sup> Not only might *how much* one is governed vary independently of *who* governs, but devolutionary empowerment of states and localities need not empower individuals any more than centralization of power in the national government would. Some jurisdictions may be inclined to afford greater opportunities for active participation in and control of local self-government, but this, ultimately, an issue distinct from and not settled by devolution.<sup>64</sup>

### *Limiting Government*

The final claim I shall consider is that devolution protects and enhances individual liberties by diffusing and limiting government power more effectively than centralized alternatives.<sup>65</sup> In the words of Justice O’Connor (one of the 20<sup>th</sup> century’s most theoretically and practically influential devolutionists), in addition to the advantages of experimentation, competition, and self-government “[p]erhaps the principal benefit of the federalist system is a check on abuses of government power,” which “ensure[s] the protection of ‘our fundamental liberties.’”<sup>66</sup> This broad view manifests in several different devolutionary contexts.

First, contemporary devolutionists often echo Madison’s claim that under the American federal system “[t]he different governments will control each other [and] the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority.”<sup>67</sup> The excesses of self-government (both national and local) would be checked by the strategic game that the Constitution structures between vertically and horizontally separate and competing jurisdictions. According to

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<sup>63</sup> Feeley and Rubin, *Federalism: Political Identity and Tragic Compromise*, 36; see 30-37 more generally.

<sup>64</sup> *ibid.*, 22.

<sup>65</sup> E.g., Amar, “Of Sovereignty and Federalism;” Samuel Beer, *To Make a Nation: The Rediscovery of American Federalism* (Cambridge, MA: Belknap, 1993), 295-301; 386-388.

<sup>66</sup> *Gregory v. Ashcroft*, 501 U.S. 452; 458 (1991). (O’Connor, J.)

<sup>67</sup> James Madison, “The *Federalist* No. 51,” in *The Essential Federalist and Anti-Federalist Papers* 245-250, 248.

O'Connor "the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" <sup>68</sup> In part, this is merely a restatement of the case for self-government. Devolutionary federalism is touted as "temper[ing] the excesses of democracy" better than a more centralized system, enabling national minorities to perhaps garner majorities in smaller jurisdictions or at least be better heard by government closer to home. <sup>69</sup> Yet O'Connor's view also endorses a pair of more fundamental principles: that division of power between distinct and (at least partly) autonomous governmental units inherently limits that power, and that where government is limited individual liberty flourishes. O'Connor thus defends the structural features of devolution on somewhat paradoxical grounds of both positive and negative liberty, as both empowering local government and limiting all government.

Second, one of the legacies of the Rehnquist Court has been "a substantial expansion of state sovereign immunity" <sup>70</sup> and some devolutionists claim that such return of sovereignty to the states empowers them to resist the national government and thus check abuses of its power. On its face, the doctrine of sovereign immunity protects states from being sued by private parties without their consent in federal court, and thus appears to have more to do with the rights of the states vis-à-vis the national government than with individual liberties. However, devolutionists have drawn two connections between state sovereign immunity and individual liberty. On the one hand, sovereign immunity has been linked to the Madisonian principle of protecting liberty through the limitation of government. Insofar as the enforcement of private suits against the states by federal courts expands the reach of the national government, limiting such suits limits the national government. <sup>71</sup> If every limitation on (national) government correspondingly enhances individual liberty, then more aggressive policing of state sovereign immunity fosters greater liberty. On the other hand, by restraining the power of the national government (the judiciary directly, Congress indirectly) state sovereign immunity preserves state and local political autonomy. <sup>72</sup> Hence the enforcement of sovereign immunity could be considered an instrument to the project O'Connor describes: preserving liberty by both limiting national government and empowering state and local government.

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<sup>68</sup> *New York v. United States* 505 U.S. 144 (1992); 181. (O'Connor, J.)

<sup>69</sup> Calabresi, "A Government of Limited and Enumerated Powers," 763.

<sup>70</sup> Chemerinsky, "Have the Rehnquist Court's Federalism Decisions Increased Liberty?," 5.

<sup>71</sup> Greve, *Real Federalism*, 69-70.

<sup>72</sup> *Ibid.*, 76-78.

Third, devolutionary federalism provides dual structural protections of liberty. On the one hand, devolution would ensure that the states “will always have the political capacity to function as alternative sources of authority and to resist incursion from without (and especially from above).”<sup>73</sup> Justice William Brennan exemplified this view when he suggested that state constitutions and courts could serve to enhance individual liberties over and above the baseline set by the federal Constitution.<sup>74</sup> On the other hand, devolution would provide political and legal means with which citizens can police their own freedom. Vibrant multi-tiered federalism enables individuals to “play each level off against the other,” using the voting booths, laws, and courts of one level of government to restrain or balance the activities of other levels.<sup>75</sup> Here the Madisonian structure appears to mesh with republican arguments about self-government. Not only does devolutionary federalism provide an institutional architecture favorable to liberty, it serves to “rally citizens to the cause of freedom,” releasing their political energies so as to better restrain all levels of government.<sup>76</sup>

The structural case for devolution as a vehicle for liberty is, in some ways, the strongest of those I have considered. Insofar as at least some liberties, most obviously negative, thrive in “the silence of the law”<sup>77</sup> structural limitations upon government *pro tanto* serve to enhance liberty in some form. One might even suggest that limitations upon government serve positive liberty understood as individual autonomy, distinct from the collective autonomy of local self-government. More limits upon government might translate to more meaningful self-direction in our individual lives. Yet even here devolutionary federalism trades upon conceptual conflation that emboldens advocates to claim the banner of liberty at every turn. Closer consideration of the American constitutional design of limited government, with a more robust understanding of liberty in hand, counsels a different conclusion regarding devolution.

The complex division of powers between horizontally and vertically distinct governmental units that is the heart of the Madisonian design, and to which O’Connor and other devolutionists

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<sup>73</sup> Shapiro, *Federalism: A Dialogue*, 115.

<sup>74</sup> William J. Brennan, Jr., “State Constitutions and the Protection of Individual Rights,” *Harvard Law Review* 90 (January 1977): 489-504. For a more recent and expansive analysis, see Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America’s Positive Rights* (Princeton: Princeton University Press, 2013). Yet in both Brennan’s and Zackin’s accounts, rights (claims/entitlements) and liberties (abilities/opportunities) tend to blur in ways that complicate the analysis of their claims in the context of federalism and liberty.

<sup>75</sup> Calabresi, “A Government of Limited and Enumerated Powers,” 785. See also Amar, “Five Views of Federalism.”

<sup>76</sup> Calabresi, “A Government of Limited and Enumerated Powers,” 786; see also *United States v. Lopez*, 514 U.S. 549, 576 (Kennedy, J., concurring).

<sup>77</sup> Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett Publishing, 1994), Ch. XXI, p. 143.

appeal, is in an important sense indifferent to the devolutionary cause. A foundational proposition of the Madisonian view articulated in *Federalist* No. 51 is that limits upon government protect liberty—the less we are governed, the freer we are, in both a negative sense and an individualistically-inflected positive sense. Federalism is merely one element of a larger scheme of *constitutionalism* which protects individual liberty by institutionalizing a distrust of all governmental power while recognizing its prudential necessity in certain contexts;<sup>78</sup> an incorporated Bill of Rights vigorously enforced against all levels of government is another element of such a scheme.<sup>79</sup> Yet *where* power is situated may change independently of *how much* power is ultimately vested. Devolutionary theories advocate (*de facto* if not *de jure*) re-empowerment of states and localities, presuming that the change of where power is located and who wields it effects a reduction in the power of government overall. Yet, both Berlin and Alexander Hamilton recognized, one’s neighbors are just as capable of infringing upon one’s liberties (both negative and positive) as are distant politicians and bureaucrats. There is, at least, no necessary connection between the concentration of greater powers in the hands of the local town council or the state legislature and the enjoyment of greater individual liberties than under a system where the same powers are concentrated in the hands of Congress. Calls for devolution thus may obscure more salient issues: the constitutional protections of individual liberties that limit all government, and the political agendas of those who govern.<sup>80</sup>

Appeals to sovereign immunity may likewise distort the relationship between devolution and liberty. By “disabl[ing] individuals (wholly or partially) from seeking relief from a governmental entity for unlawful harm done or threatened” the practice of sovereign immunity compromises the liberties of individuals, partly by denying an immediate remedy to an infringement of liberty by states and localities, and partly by failing to hold government accountable to the rule of law (and thus eroding the limits of government).<sup>81</sup> Sovereign immunity might enhance the positive liberty that is enjoyed in

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<sup>78</sup> Donald L. Doernberg, *Sovereign Immunity or the Rule of Law: The New Federalism’s Choice* (Durham: Carolina Academic Press, 2008), 177; Feeley and Rubin, *Federalism: Political Identity and Tragic Compromise*, 36-37; George Kateb, *The Inner Ocean: Individualism and Democratic Culture* (Ithaca: Cornell University Press, 1992), 1; Walter F. Murphy, “Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter,” *The Review of Politics* 48 (Summer 1986): 401-423; 408.

<sup>79</sup> For an interpretation of the Bill of Rights as protecting primarily negative liberties see Justice Robert Jackson’s majority opinion in *West Virginia Board of Education v. Barnette*. (319 U.S. 624 [1943]) For an interpretation that emphasizes positive liberties of self-government see Akhil Reed Amar, “The Bill of Rights as a Constitution.”

<sup>80</sup> According to some critics of devolution, such obscurantism is far from accidental. E.g., Bolick, *Grassroots Tyranny*, 18-26; Bolick, *Leviathan*, 43-65; Chemerinsky, “Have the Rehnquist Court’s Federalism Decisions Increased Liberty?,” 8-9.

<sup>81</sup> Doernberg, *Sovereign Immunity or the Rule of Law*, 79; see also Chemerinsky, *Enhancing Government*, 124-136; Chemerinsky, “Have the Rehnquist Court’s Federalism Decisions Increased Liberty?,” 5; John Noonan, *Narrowing the Nation’s Power: The Supreme Court Sides with the States* (Berkeley: University of California Press, 2002), 1-14, 138-156; Schapiro, *Polyphonic Federalism*, 156-158.

collective practices of self-government, by protecting the autonomy of one unit of government in a larger system. However, this entails a trade between a positive liberty that can only be exercised in concert with others and both positive and negative liberties that can be exercised alone.

Finally, devolutionary federalism may stand on its soundest footing when regarded as a way to establish a more balanced constitutional system which provides multiple, competing institutional layers capable of vindicating individual liberties. As Madison was keenly aware, the states could serve to check national power, but they too were threats to liberty and needed to be checked in turn.<sup>82</sup> Federalism (in the broadest sense) might serve to protect a balance between individual liberty and governmental power by giving individuals the tools with which to assert their rights and liberties against all levels of government by playing one jurisdiction against another.<sup>83</sup> However, such checking and balancing can just as easily erode liberty as promote it. Governmental actions and policies serve liberty in at least two distinct ways: by not infringing upon liberties (e.g., leaving individual unrestrained, or enforcing so-called negative rights) and by supplying conditions that enable the effective enjoyment and exercise of liberties (e.g., enforcing voluntary contracts, or enforcing so-called positive rights). While playing state government against federal government might enhance liberty broadly, it could just as easily create zero-sum or even minus-sum tradeoffs. Thus even the ostensibly strongest link between devolution and liberty—the better limitation of government—must be carefully qualified, both in terms of what we mean by liberty and how the actions of government might impair or vindicate the kind(s) of liberty we espouse.

What is more, even at its most successful, the argument from limited government does not establish more than a probable connection between devolution and individual liberty. Where governmental power is totally centralized (or nearly so), devolution might promote the interests of liberty by more evenly dividing power between different units and by equipping citizens to utilize and protect their liberties. Yet centralization and devolution admit of variations of both degree and of kind. Some liberties (e.g., regarding property use) might be better served when different jurisdictions enjoy relative autonomy to do things their own ways, catering to local preferences, conditions, and ways of life. Yet other liberties (e.g., to vote or to enter into a legally recognized marriage) are more likely compromised when their recognition and protection can vary substantially from one jurisdiction

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<sup>82</sup> George W. Carey, *The Federalist: Design for a Constitutional Republic* (Urbana: University of Illinois Press, 1989), 122; Rakove, *Original Meanings*, 34.

<sup>83</sup> This approach is developed extensively by Akhil Amar. See “Of Sovereignty and Federalism” and “Five Views of Federalism.”



to another. In cases such as these, centralization is likely structurally more capable of securing individual liberties than is devolution, if the central government adopts a nationwide policy that is favorable to some set of liberties. One might still claim that states and localities ought to be the primary policy-makers regarding, say, electoral access or marriage, but this is not an argument about devolution and liberty. Rather, it is an appeal to some notion of a substantive social and political good for which federalism and liberty are means or components.<sup>84</sup>

### **Delinking Devolution from Liberty**

[N]othing is gained by a confusion of terms[.] Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience.

Isaiah Berlin, “Two Concepts of Liberty”

Values can seem straightforward and sturdy in theory, but they tend to be ambiguous and fragile in practice. The Declaration of Independence asserted a radical and absolute notion of equality yet American political experience records the elusiveness, ambiguities, and contradictions of what appeared to be the simplest and most precise of ideals. We find much the same at work in devolutionary federalist claims about liberty: what seems self-evident in abstract theory (that we are free when we govern ourselves, or that competition between jurisdictions creates a liberty-promoting race to the top) becomes fraught and evanescent in the real world of law and politics.

None of the above arguments conclusively refute the devolutionary case for liberty, and doing so has not been my intention. Rather, my aim has been to introduce a modest element of conceptual complexity to the debate, which even at first glance illustrates the casual, attenuated, and sometimes merely careless associations of devolution and liberty that have prevailed in the last three decades of American political and legal rhetoric. If one takes liberty seriously, then claims that any federalism doctrine or institutional arrangement promotes liberty *simpliciter* shall tend to undermine themselves. The categorical claim that devolution promotes liberty is akin to the categorical claim that “[c]ompetition leads inexorably to innovation and improvement,”<sup>85</sup> or that wealth brings happiness. Sometimes this is so, yet both reason and experience amply demonstrate that these associations are contingent and are specious and misleading when stated unqualifiedly. Devolution may indeed serve

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<sup>84</sup> For a theory of federalism that aspires to provide a blueprint for a good society, beyond merely the American context, see Scott, *Federalism: A Normative Theory and Its Practical Relevance*.

<sup>85</sup> Calabresi, “A Government of Limited and Enumerated Powers,” 777.

some forms of liberty for some persons under some circumstances, yet it might also sacrifice one variety of liberty for the sake of another, or the liberties of one person or group for those of another, or trade liberty for altogether different values or goods. A state prohibition of same-sex marriage (of the sort devolutionary federalism supports in principle, on grounds of states' rights) might vindicate the positive liberties of the local faction and supporting interests that favored the policy, but it surely does so at the expense of both the positive and negative liberties of the faction that opposed it. Federalism inevitably affects individual liberty, but liberty is inexorably plural. Thus, sweeping statements about devolution and liberty not only misrepresent tangible realities of American constitutional government, they impoverish debate about contentious, salient issues at the heart of our political culture.