

The Social
and Political
Foundations of
Constitutions

(Mis)Understanding American Federalism: On constitutions, collective action, competition, and quiescence

Lisa L. Miller

Policy Brief

FLJS

www.fljs.org

The Foundation for Law, Justice and Society

in association with **the Centre for Socio-Legal Studies**
and **Wolfson College, University of Oxford**

The Foundation for Law, Justice and Society

The Social and Political Foundations of Constitutions

Constitutions take various forms in different societies, but essentially determine how policy issues, often of fundamental social importance, are to be decided and implemented. Constitutions and constitutionalism are usually studied either doctrinally, as the source of fundamental legal doctrine, or conceptually, as the subject of philosophical methods of analysis. The approach of this programme offers a third way: the study of constitutions and constitutionalism in their social context, emphasizing their social character and role, their social goals, and their links to other parts of society, especially economic and political aspects.

Drawing on the research and literature of politics, economics, and sociology, the programme examines the concept and practice of representation, the legislative process and the character of modern administrative government, and the role of the judiciary in shaping constitutional instruments such as bills of rights.

This policy brief is based on a paper presented at the workshop, 'The Promise and Pitfalls of Federalism: Constitutional Development for the Twenty-First Century', organized by the Foundation for Law, Justice and Society, in association with the Centre for Socio-Legal Studies. The author thanks the Foundation and the Centre for support of the workshop, Desmond King for his insightful review, and all participants for their comments.

Executive Summary

- American federalism is often lauded for promoting democratic participation and accountability. In this view, US-style federalism is a democracy-enhancing political system because it increases the capacity for popular control over government while simultaneously limiting the ability of any one particular group to control outcomes.
- These claims pose two challenges to scholars interested in democracy and American politics, neither of which is much explored in the literature. First, how does American federalism work, in practice, to structure political activity? And second, what definitions of democracy and democratic participation are at work here?
- Here, I embrace the roots of the democratic impulse that seeks to force the power and authority of the few to respond to the demands of the many. I propose a framework for evaluating the responsiveness of American federalism to the demands of the many through the exploration of three oft-overlooked core elements of democratic politics that can be directly shaped by constitutional design: the ability of mass publics to engage in *collective action*; the capacity of such publics to offer credible *competition* to elite power; and the ability to require governmental decision-makers to overcome *quiescence* and legislate on collective goods.
- In our eagerness to laud American federalism, we have been insufficiently attentive to the ways in which it actually structures day-to-day political activity. Drawing on the concept of *federalization* of law and policy, an aspect of the American political system that is quite distinct from routine understandings of American federalism, I illustrate how lawmaking has proliferated across legal and legislative venues, particularly in the post-WWII period. This process has resulted in the *overlapping, uncoordinated, and simultaneous* crafting of independent rules and public policy across all of the many and varied local, state, and national legislative landscapes.
- What are the practical implications of federalization for the democratic elements described above? Contrary to conventional wisdom, I suggest that the federalization of law and policy undermines the capacity of the public to act collectively, limits the ability of large groups of ordinary people to mount credible challenges to the status quo, and, as a matter of routine policy, imposes obstacles to popular sovereignty over national lawmaking.

(Mis)Understanding American Federalism: On constitutions, collective action, competition, and quiescence

Constitutions and democracy

The capacity to organize is widely recognized as a central feature of democratic governance, particularly with respect to the masses of ordinary people whose economic and social location places them in a position of political disadvantage. Democracy provides a primary — if not the only — organizational framework for mass publics to engage in political combat on a more level playing field with powerful elites.

And yet, constitutional scholarship generally — and American federalism literature, specifically — has had little to say about how the structure of political institutions affects the ability of ordinary people to coalesce into groups and mount credible and sustained counter-pressures to dominant elites. In fact, contemporary constitutional scholarship has deep connections with philosophical notions of pre-commitment that express more concern for the capacity of constitutional forms to constrain mass publics, than to enable them. This is not a new development — the ancients were famously sceptical, even hostile, towards the passionate and emotive masses — and Enlightenment thinkers were hardly proponents of universal suffrage and mass political capacity. Nonetheless, the desire to see the power of the very few checked by the power of the more (if not, the many) — that is, to keep small groups from dominating the political process — is a theme that runs through constitutional writing even in its earlier forms.

But modern constitutional scholarship has become virtually synonymous with limiting or restraining the capacity of mass publics to force government to act in their interests, focusing instead on what constitutions should allow or prohibit. There has been little recent constitutional scholarship that seeks to expose how different constitutional structures might lead to more or less capacity for mass publics to govern — not just to win elections, though the capacity to do that is essential — that is, to organize around issues of collective interest, to know where the locus of responsibility for political outcomes lies, to mount credible opposition to prevailing power, and to hold governments accountable for acting in their interests.

This omission is particularly puzzling since modern democracies are widely regarded by scholars as plagued more by the dominance of wealthy and politically powerful elites than by masses of ordinary people. My claim here is simply that constitution scholars evaluate political systems as much in terms of *how they help a people, writ large, to flourish*, as in terms of how well they leave people alone.

I suggest three elements of constitutional design that seem necessary (though probably not sufficient) for a polity to exercise popular sovereignty:

- 1) **Collective action:** The foundation of popular self-governance is the capacity of the many to act collectively in their interests. Which constitutional designs help mass publics overcome classic collective action problems?
- 2) **Competition:** The needs of the many must be able to pose credible challenges to the tendency of the few to dominate the exercise of power. How well do constitutional designs facilitate competitive political processes that include the demands of the many and/or challenges to the status quo?
- 3) **Quiescence:** One of the most effective forms of political power in service of the status quo is simply the power to do nothing. Democratic politics must enable governments to act. How do constitutional designs overcome the problem of legislative inaction on issues of broad collective goods?

Federalism and federalization

Legal scholars have developed a robust normative defence of the virtues of 'our federalism', which are laid out cogently by former Associate Justice of the Supreme Court, Sandra Day O'Connor in *Gregory v. Ashcroft* (1991):

[The] federal structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in the democratic process; it allows for more innovation and experimentation in government; and it makes Government more responsive by putting the states in competition for a mobile citizenry. Perhaps the principle benefit of the federalist system is a check on abuses of government power. (501 U.S. 452)

In this view, by dividing power across national and state contexts, the benefits of American federalism are threefold: a limited central government with enumerated powers reduces the likelihood, as James Madison noted, of oppressive fractious majorities; the preservation of state police powers serves as a countervailing loci of authority that can both challenge threats to liberty emanating from the centre as well as promote innovation and experimentation; and multiple political venues maximize the capacity for democratic participation and voice, providing further opportunities to challenge overbearing majorities.

It is worth reflecting for a moment on the origins of the constitutional design at work here because it has implications for how federalism functions today. While James Madison is often cited as a great promoter and defender of a delicate balance between power at the centre (Congress) and at the periphery (states), careful readings of the Constitutional Convention suggest that Madison came to Philadelphia to propose a much stronger national government than the one that emerged.¹ While the political wrangling over this issue and other aspects of congressional power are well beyond the scope of this brief, what is important is that the constitutional structure that emerged

willfully blurred the boundaries between national and state powers and ensured that the choice of jurisdictional authority would be a political struggle, which each side of the many and varied factions hoped (believed?) they could win.

What is often overlooked, however, is that the jurisdictional struggles have not been a zero-sum game but, rather, have been additive. The result is the federalization of law and policy, in which policymaking has not simply shifted from one level to another; rather, remnants of activity remain on the levels at which they originated even as issues have migrated across levels. Crime, education, the environment, health care, and even immigration and national security, are all issues that have proliferated across all three legislative agendas.²

Federalization, in contrast to federalism, implies the *overlapping, uncoordinated, and simultaneous* crafting of (usually) legally independent rules and public policy across the many and varied local, state, and national legislative landscapes.

Federalization is both an old and new phenomenon in American politics. Though early Supreme Court cases, such as *Marbury v. Madison* (1803), *McCullough v. Maryland* (1819), and *Gibbons v. Ogden* (1824), are frequently cited as reflecting the consolidation of national authority, none of these cases settled these jurisdictional questions, nor were they zero-sum games, either by *de jure* or *de facto* assessments.³ That is, clarifying or affirming the scope of national powers in a particular domain rarely removed that domain from state, or sometimes local, political authority.

Federalization grows over time in both gradual and sudden ways. Major ruptures to the constitutional system, such as the Civil War, the Great Depression, and the two World Wars serve to concentrate some power at the centre, but virtually none of the parallel powers at the state are removed entirely. While a series of twentieth-century conflicts and confrontations result in the federal courts validating previously unrecognized congressional power to regulate a wide range of social and economic policies, including minimum wage, pensions and old age insurance, working conditions, the environment, civil rights, and so on, the states retain the power to make policy in all of these arenas as well, so long as

state laws do not run afoul of specific congressional rules. None of this even begins to touch the role of local governments, which are empowered largely by state constitutions but which, in practice, pre-date those constitutional legitimating statutes and have lively and varied legislative agendas.

My point here is not to declare which level of government might better promote the collective action of mass publics in a democracy or supply particular collective goods. Rather, it is to simply take note of how American federalism functions as a constitutional practice. At the level of cities, states, and Congress, issues of central importance to mass publics — from education and crime to the environment and community development, from immigration and national security to energy and transportation — are not simply being discussed but are addressed and acted upon in a simultaneous, overlapping but uncoordinated way. *Legislative agendas, under the federalized US system, know no boundaries.*

‘So much the better,’ defenders of ‘our federalism’ might respond. Such is the uniquely positive contribution of American federalism to global constitutionalism. The proliferation of law and policy in this fashion simply means more of the goodies that federalism promises in the first place: more checks on centralized power, more venues for participation, more opportunities for innovation, and more protection for minorities against majority tyranny.

How do such claims fare when processed through the core elements of democratic politics described above? What is the relationship between federalization and the capacity to facilitate mass collective action, to compete for public goods and resources, and the ability of mass publics to overcome the quiescence of elites in addressing broad social needs?

Federalization and democratic politics

Collective action: flank attacks and rearguard actions

While there is widespread understanding amongst politics scholars that American federalism’s fragmented system can stymie efforts to address major social policy problems, there is a general tendency to accept, nonetheless, that one of federalism’s virtues is that it can enhance democracy

by providing many points of access to politics for ordinary people. A closer inspection of how federalization actually functions under normal conditions, however, undermines this claim.

Federalization expands the number of venues where large numbers of people must engage in sustained collective action efforts because real law and policy is considered and enacted at those levels on a regular basis. Given the challenges to collective action for large groups that economists have so cogently noted, we might wonder how, as simply a *prima facie* matter, multiple legislative venues engaged in overlapping but uncoordinated policymaking could *enhance* the capacity of the mass publics to gain control of government decision-making.⁴ Federalization seems more likely to stymie the ability of mass publics to act in their collective interest when they must sustain the collective activity of ordinary people with few resources, gain and maintain the attention of lawmakers across many venues, and distribute scarce resources in different jurisdictions where victory in one is likely to have no bearing on the battle elsewhere. Drawing together and sustaining these efforts where benefits are diffuse and abstract (e.g., higher minimum wage, better schools, more effective policing, energy efficiency), as opposed to concentrated and material (e.g., lower taxes) is likely to be difficult. By contrast, powerful elites with wealth and extant political power can more readily sustain such activities.

Some would argue that such stymying of collective action on the part of mass publics is precisely the purpose of American federalism, in order to keep majorities from ‘tyrannizing’ minorities. This may be so, but such a position requires a defence of why, in a democratic system, majorities should be thwarted in such a way as a *matter of routine policymaking*, rather than under specific and limited conditions. Federalization creates a political context in which people have to sustain political attention and action in many places at once. Such activity is far easier for powerful elites than ordinary people with ordinary resources.

Competition: a war of attrition on collective goods

If federalization stymies collective action of mass publics, perhaps it at least provides greater

opportunity for competition over law and policy. In this view, the fractured and decentralized nature of American federalism, and the overlapping nature of federalization, increase competition for policy ideas because different states and localities can experiment and innovate on a manageable scale.

Considered in the context of mass publics seeking to influence government policy, however, the realities of federalization belie these assumptions. If federalization exacerbates the problems of ordinary people to act together, it further disadvantages majorities seeking to act collectively because the proliferation of legislative venues provides opportunities for the few to shield their policy preferences from alternative, credible, and competing policy narratives that might benefit the many. This occurs in part, per the previous section, because of the dilution of the preferences of large groups that happens when policy issues are debated and enacted across so many forums, thus rendering it difficult to sustain consistent and credible counter-narratives.

But it also occurs because active and highly resourced groups representing narrow interests can migrate around and hide within the many pockets and layers of the federalized landscape in ways that shield their preferences from a frontal assault. This kind of migratory behaviour is much harder for large groups of ordinary people but is more readily available to those with the resources of capital or political power, who seek exclusive collective goods, or worse, mere private ones. In the war of attrition for government attention and authority, elite interests are advantaged over those of ordinary people under a system that makes it difficult for the interests of the many to come into direct competition with those of the few.

Quiescence: holding lawmakers accountable

A final and crucial consequence of federalization is that it permits the national government to ignore, through passive neglect, a great many issues of public concern and to cherry-pick the policy issues they pursue. As we saw earlier, the growth of congressional policymaking has been additive, alongside the persistence of state and local political capacity, on issues of day-to-day importance to most Americans. As a result, if Congress does not pass immigration legislation, change the minimum

wage, create a comprehensive health care programme, address concentrated poverty and income inequality, generate functional policies to address high rates of violence, and so forth, the burden will fall on state and local governments to address the inevitable demands of citizens for redress of these problems. If state and local venues were unable to legislate in these areas of crucial public concern, it is difficult to imagine a passive American public cheerfully chanting incantations about the virtues of a limited central government.

Of course, once again, defenders of 'our federalism' might chime in to say, 'precisely!' Those are the issues that belong with state and local governments and Americans are, at best, ambivalent about the national government addressing them. But the jurisdictional fluidity of American federalism is not only deeply contested (and always has been), Americans appear to have few fixed preferences about jurisdictional boundaries. Survey questions asked by the national survey of voters in the US (American National Election Studies [ANES]) about whether the national government is too powerful, show a striking percentage of respondents who say they don't know or aren't interested (from a low of 29% in 1964 to a high of 47% in 1988). Other indicators also support the view that Americans support national policymaking on a wide range of policy issues. The American Enterprise Institute, for example, conducted surveys in the 1990s asking whether particular policy domains are 'definitely' the responsibility of the federal government, 'desirable but not expected,' or 'beyond what the federal government should do'. Over ninety per cent of respondents chose 'definitely' or 'desirable' for a wide range of social policy areas, including educating young people, protecting the environment, providing health care for all citizens, housing for the homeless, among others (AEI Public Opinion Study, 'Attitudes Towards the Federal Government', June 2008).

But perhaps the best way of assessing whether Americans are satisfied with the quiescence of their governments on major social policy issues is to look less at what they say and more at what they do. It seems that Americans advocate for policy change across jurisdictional boundaries with, what might fairly be called, reckless abandon, in order to press lawmakers to address a wide range of issues at every level of government. It is difficult to square the

active legislative work being done across venues with the notion that mass publics have strong views that the national government should not try to solve certain social problems.

The fact that state governments can and do enjoy sufficient sovereignty to enact legislation on health care, education, energy, transportation, employment, and even immigration creates opportunities for Congress to simply avoid the electoral minefields of doing so. After all, their quiescence does not mean that any of these arenas are likely to collapse entirely because state (and sometimes local) political actors have to confront whatever set of needs and priorities knocks at the legislative door. Rather, it seems that mass public concern and political action about a wide range of social problems bubble up all over the multiple venues of American federalism. It is the very nature of federalization, however, that diffuses and Balkanizes those concerns, rendering them well-nigh invisible and making it difficult for them to coalesce into the type of organization-like structure that can effectively challenge elite power and the concentration of wealth and privilege of the few. Quiescence at the centre (Congress) generates less public protest than we might expect, in part, because of the issues of collective action and competition described above but also because federalization obscures political authority, rendering accountability far more difficult.

Conclusion

American federalism is regarded, largely by Americans, as playing an important role in promoting democratic politics in the US. This poses two challenges for researchers studying democracy and American politics. First, how does American federalism structure day-to-day politics in the US and second, what measure of democratic politics is deployed in such

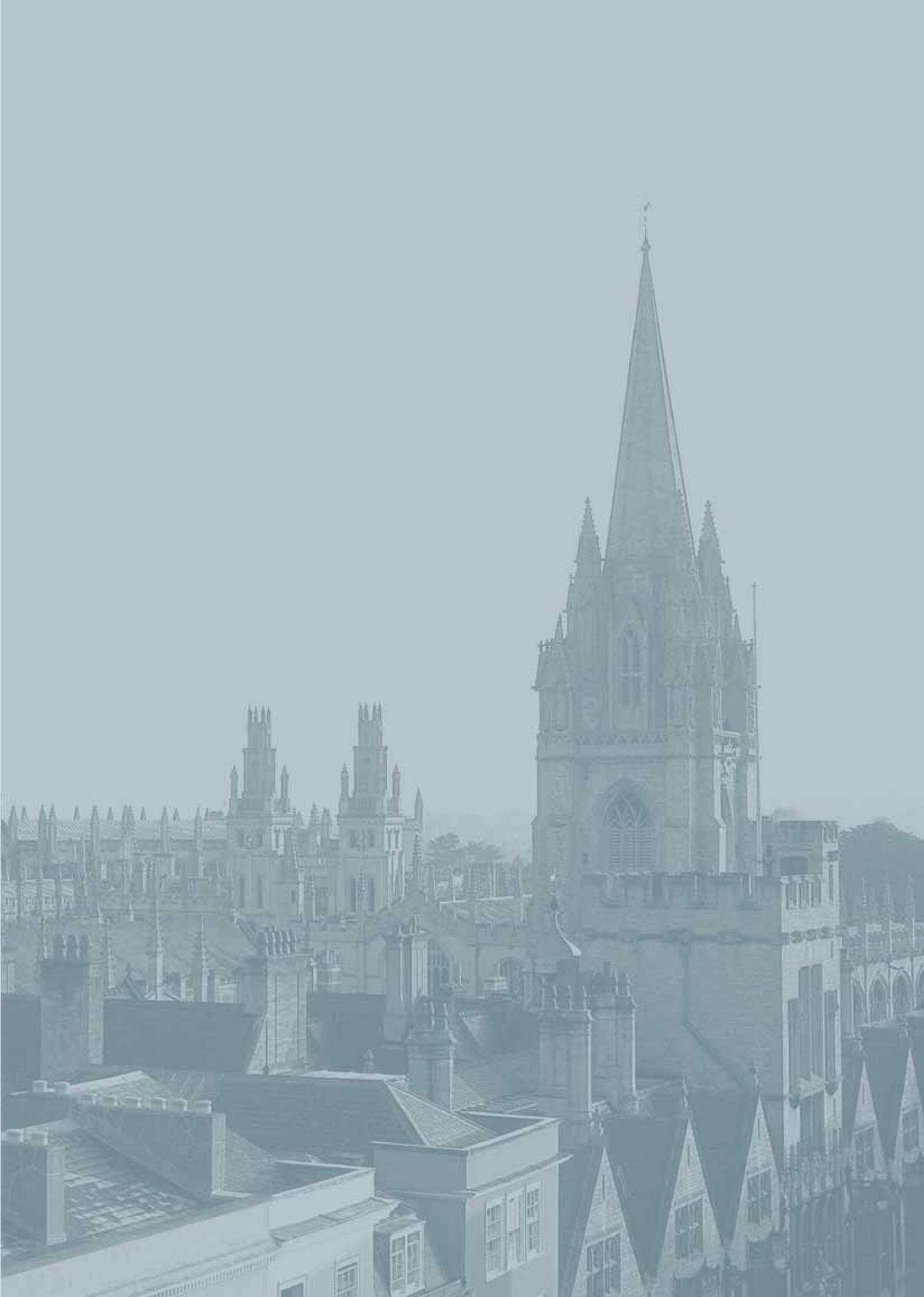
claims? I have suggested here that the capacity of mass publics to check the power of elites is a necessary element of modern democracies and sought to assess claims about 'our federalism' in this context. The federalization of law and policy exacerbates already formidable collective action problems, limits the competition for political responsiveness to public needs, and facilitates a quiescent Congress, despite major social problems in need of redress on the national level.

It is worth noting a contemporary example. Despite large national majorities favouring national health care legislation and multiple efforts to enact such legislation by both parties over five decades, such legislation has been repeatedly thwarted. When it finally arrived, in the form of the Patient Protection and Affordable Care Act in 2010 (Public Law 111-148), the legislation perpetuated federalization by providing mechanisms through which states can opt out of various provisions and enact alternatives (or not) through state legislatures. On its face, such arrangements appear to fulfill the promise of 'our federalism' to provide highly responsive, localized democratic participation and possibility. In reality, however, for the reasons discussed above, they more often provide veto points for highly organized, opportunistic interests reflecting small groups, than empowerment points for mass publics. Federalization of this sort also continues to make it difficult for ordinary citizens to know whom to hold accountable for what. If a state opts out of various provisions of the health care bill and provides something less than full coverage to its citizens, will angry voters reject state incumbents or national ones? Who's to blame?

American federalism may have many virtues, but it is not clear that providing a framework through which large majorities of citizens can force elite lawmakers to enact policy in their interests is one of them.

Notes

- 1 See Robertson, David Brian (2005) 'Madison's Opponents and Constitutional Design', *American Political Science Review* 99(2): 225-43.
- 2 In the legal academy, the term federalization is used to refer to the growing capacity of national lawmaking, particularly at it pertains to a variety of traditionally state and local policy issues, such as crime and education. For students of politics, this is more accurately referred to as nationalization, while the term federalization is more meaningful as defined above. See Miller, L.L. (2008) *The Perils of Federalism: Race, Poverty and the Politics of Crime Control*. New York: Oxford University Press.
- 3 Case citations: 1 Cranch 137; 17 U.S. 316; 22 U.S. 1, respectively.
- 4 Olson, Mancur (1965) *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge, MA: Harvard University Press.



The Foundation

The mission of the Foundation is to study, reflect on, and promote an understanding of the role that law plays in society. This is achieved by identifying and analysing issues of contemporary interest and importance. In doing so, it draws on the work of scholars and researchers, and aims to make its work easily accessible to practitioners and professionals, whether in government, business, or the law.

Lisa L. Miller is Associate Professor of Political Science at Rutgers University where she specializes in US law and politics, American federalism, racial inequality, and crime and punishment. She is the author of *The Perils of Federalism: Race, Poverty and the Politics of Crime Control* (Oxford University Press, 2008), and her work has appeared in *Law and Society Review*, *Perspectives on Politics*, *Criminology*, *Law and Social Inquiry*, *British Journal of Criminology*, among others. During the 2011-2012 academic year, she has held a Visiting Fellowship at All Souls College at the University of Oxford and she will hold a Law and Public Affairs Fellowship at Princeton University for 2012-2013.

For further information please visit
our website at www.fljs.org
or contact us at:

The Foundation for **Law, Justice and Society**

Wolfson College
Linton Road
Oxford OX2 6UD

T · +44 (0)1865 284433

F · +44 (0)1865 284434

E · info@fljs.org

W · www.fljs.org

The logo for the Foundation for Law, Justice and Society (FLJS). It features the letters 'FLJS' in a large, light-colored, serif font. A small '+' sign is positioned between the 'J' and 'S'.

www.fljs.org