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# **FOOT VOTING, FEDERALISM, AND POLITICAL FREEDOM**

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James Fleming and Jacob Levy**

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# Foot Voting, Federalism, and Political Freedom

Ilya Somin<sup>\*</sup>

## Introduction

The idea of “voting with your feet” has been an important element in debates over federalism for several decades.<sup>1</sup> Economists, legal scholars, and others have debated its efficiency and equity. But foot voting is still underrated as a tool for enhancing political freedom: the ability of the people to choose the political regime under which they wish to live.

Part I of this article explains some key ways in which foot voting in a federal system is often superior to ballot box voting as a method of political choice. A crucial difference between the two is that foot voting enables the individual to make a decision that has a high likelihood of actually affecting the outcome. By contrast, the odds of casting a meaningful ballot box vote are vanishingly small. This reality both enhances the individual’s degree of political freedom and incentivizes him or her to make better-informed and more rational decisions. In addition, foot voting in a federal system will often enable the individual to choose from a wider range of options, thereby further increasing political freedom.

Obviously, this does not mean that all decisions should be made by foot voting rather than at the ballot box, or that all political power should be decentralized. Many other issues must

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<sup>1</sup>The seminal article is Charles Tiebout, “A Pure Theory of Local Expenditures,” *Journal of Political Economy* 64 (1956): 516-24.

be considered in determining how centralized a political system should be. But the enhancement of political choice is a crucial advantage that is often overlooked. It justifies greater political decentralization than might exist otherwise.

Part II considers some possible limitations of foot voting in a federal system as a tool for enhancing political freedom. These include moving costs, the possibility of “races to the bottom,” and the problem of oppression of minority groups by subnational governments. Each of these sometimes poses a genuine constraint on effective foot voting. But none are as severe a limitation as critics claim.

Part III argues that the case for foot voting under federalism should be expanded “all the way down” to local governments and private communities, and “all the way up” to freer international migration. It builds on a growing recent literature that advocates granting greater autonomy to local governments relative to regions.<sup>2</sup> Foot voting between localities creates greater choice with lower moving costs than does foot voting between large regions. This is even more true of foot voting between private planned communities.

Just as foot voting can be expanded all the way down to the local level, there is also a strong case for extending it “all the way up” to the international level. The potential gains from freer international foot voting in some respects dwarf those that can be achieved domestically.<sup>3</sup> Moreover, for people living under authoritarian regimes, foot voting through international migration is often their only means of exercising political choice.

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<sup>2</sup> See, e.g., Heather K. Gerken, “Foreword: Federalism All the Way Down,” *Harvard Law Review* 124 (2010): 6-83; Richard C. Schragger, “Cities as Constitutional Actors: The Case of Same-Sex Marriage,” *Journal of Law and Politics* 21 (2005): 105-44.

<sup>3</sup> I have previously advanced this case in Ilya Somin, “Tiebout Goes Global: International Migration as a Tool for Voting With Your Feet,” *Missouri Law Review* 73 (2008): 1247-64 (symposium on Federalism and International Law). That earlier article did not tie in the case for international foot voting as to the domestic case as fully as I do here.

## I. Foot Voting and Political Choice.

A variety of political theories emphasize that government should be freely chosen by the governed. Some argue that such political freedom has inherent value.<sup>4</sup> As the Declaration of Independence puts it, governments “Governments.... derive[e] their just powers from the consent of the governed.”<sup>5</sup> Individuals who lack the ability to choose their governments are not fully free.<sup>6</sup> Others primarily emphasize the instrumental benefits of political choice. When people are able to choose their governments, political leaders have stronger incentives to adopt policies that benefit the people, or at least avoid harming them.<sup>7</sup> And the people themselves are able to select the policies they prefer.

In modern states, the ballot box is the main mechanism for popular political choice. If the public disapproves of government policy, they can vote to “throw the bastards” out and elect a new set of bastards who will, hopefully, do better. There is no doubt that the ballot box does indeed enhance political choice. Most importantly, it effectively incentivizes political leaders to avoid large and obvious disasters. It is, significant, for example, that no modern democracy has ever had a mass famine within its territory,<sup>8</sup> even though such famines are all too common in

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<sup>4</sup> See, e.g., A. John Simmons, *Moral Principles and Political Obligations*, (Princeton: Princeton University Press, 1979); Carole Pateman, *Participation and Democratic Theory*, (New York: Cambridge University Press, 1976). Simmons is a leading writer emphasizing the importance of individual consent, while Pateman emphasizes the value of collective democratic control of government.

<sup>5</sup> Declaration of Independence (1776).

<sup>6</sup> See, eg., Simmons, *Moral Principles and Political Obligations*.

<sup>7</sup> For some leading examples of such instrumental theories, see, e.g., Robert Dahl, *A Preface to Democratic Theory*, (Chicago: University of Chicago Press, 1956); Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper Perennial, 1950, 3d ed.); Richard A. Posner, *Law, Pragmatism, and Democracy*, (Cambridge: Harvard University Press, 2003).

<sup>8</sup> Amartya Sen, *Development as Freedom*, (Norwell: Anchor Press, 1999), 178.

dictatorships. Democratic electorates also have some success in forcing government policy to conform to majority public opinion.<sup>9</sup>

Ballot box voting understandably has a central place in modern theories of political freedom. It is a major improvement over the traditional alternatives of dictatorship and oligarchy, to say nothing of totalitarian one-party states. But its very real benefits coexist with severe limitations. The right to vote at the ballot box is an important aspect of political freedom. But it is not enough. Ballot box voting has systematic weaknesses that can be at least partially offset by allowing a greater role for foot voting.

As Albert Hirschman famously recognized, people dissatisfied with a political regime can use either “voice” or “exit” to address the situation.<sup>10</sup> Exit in the form of foot voting has some important advantages over voice in the form of ballot box voting that are often ignored.

## **A. Limitations of the Ballot Box.**

But ballot box voting also has significant limitations as an expression of political freedom. The most significant are the extremely low likelihood that any one vote will make a difference, voters’ inability to exercise choice over the basic structure of the political system, and the presence of widespread rational political ignorance, which ensures that many ballot box decisions will be poorly informed. Ballot box voters also have poor incentives to make rational use of the political information they do know.

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<sup>9</sup> For various studies documenting this, see, e.g., James L. Stimson, *Tides of Consent: How Public Opinion Shapes American Politics*, (New York: Cambridge University Press, 2006); Lawrence R. Jacobs, *The Health of Nations: Public Opinion and the Making of American and British Health Policy* (Ithaca: Cornell University Press, 1993); Benjamin Page and Robert Shapiro, *The Rational Public*, (Chicago: University of Chicago Press, 1992).

<sup>10</sup> See Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge: Harvard University Press, 1970).

### *Low Probability of Decisiveness*

In all but the very smallest elections, the individual voter has only a vanishingly small chance of making a difference to the outcome. In an American presidential election, the probability of casting a decisive vote is roughly 1 in 60 million.<sup>11</sup> The odds are better in elections with smaller numbers of voters, but are still extremely low.

The low probability of decisiveness surely diminishes the extent to which ballot box voting is a meaningful exercise of political freedom. This may seem a counterintuitive conclusion, since citizens of democratic states have long been taught to view voting as an important exercise of individual freedom. We implicitly assume that the individual enjoys political freedom if he or she can effectively influence the government as part of a much larger group.

But in most other contexts, we would not say that a person is truly free to make a particular decision if he or she in fact has only a miniscule chance of actually determining the outcome. For example, a person who has only a 1 in 60 million chance of being able to decide what to say has only a very attenuated degree of freedom of speech. A person with only a 1 in 60 million chance of being able to decide what religion to practice surely lacks meaningful freedom of religion. A worker who has only a 1 in 60 million chance of being able to decide whether to quit her job is not a free laborer, but a serf. In each of these cases, the person would not be considered truly free merely because they could say what they want, practice their religion

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<sup>11</sup> Andrew Gelman, Nate Silver, and Aaron Edlin, "What is the Probability that Your Vote Will Make a Difference?" *Economic Inquiry* 50 (2012): 321-26. There is considerable variation between states, with the odds rising to 1 in 10 million in a few smaller swing states. Ibid. 322-24.

freely, or change jobs if they first persuade a majority of a much larger group to give them permission. The same can be said for most if not all other valuable freedoms. Similarly, a person with only a miniscule chance of affecting the nature of the government they live under has only a very attenuated degree of political freedom.

The point is not to suggest that the low probability of decisiveness makes ballot box voting worthless as an exercise of political freedom. It surely has at least some value. I merely insist on the less sweeping point that this low probability significantly diminishes the degree of political freedom that ballot box voters enjoy.

### *Lack of Choice over Basic Political Structure*

A second and at least equally fundamental limitation of ballot box voting is that the voters are unable to choose the basic structure of the regime they live under. Democracy cannot be democratic all the way down. Before one can make any decisions at the ballot box, there must be a prior decision on such questions as what the voting rules will be, who gets to be part of the electorate, and what the powers of the government will be.<sup>12</sup> Of necessity, these decisions will have to be made by some procedure other than ballot box voting itself, since the voting system itself cannot function until they have been addressed.

This problem can be partially alleviated by means of a constitutional amendment process. For example, voters in the United States can change the basic structure of the political system if they can muster a supermajority large enough to pass a Constitutional amendment under the procedures set out in Article V of the Constitution. But, obviously, the rules for constitutional amendments are themselves part of the basic structure of the political system, and an amendment

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<sup>12</sup> As Robert Dahl puts it, a democracy cannot be established until we have decided “what persons have a rightful claim to be included in the demos,” and “[w]hat rightful limits are there on the control of a demos.” Robert A. Dahl, *Democracy and its Critics*, (New Haven: Yale University Press, 1989), 119.



process that requires a supermajority to effect fundamental change is itself an important potential constraint on political choice. Thus, the existence of an amendment process merely pushes the problem of political freedom one step back; it brings to light the public's lack of freedom to select the rules for the amendment process itself.

Moreover, in practice, the vast majority of people in democratic societies are born into relatively stable, well-established political systems that they have little hope of fundamentally altering. Short of emigration, they have little or no meaningful choice over basic political structures.

### *Rational Ignorance*

Finally, political choice under ballot box voting is undermined by the problem of rational political ignorance.<sup>13</sup> Because of the low probability that any one vote will make a difference, ballot box voters have little incentive to acquire political information. It is actually rational for them to remain ignorant about the decisions they are making.<sup>14</sup> No matter how well-informed a voter is, the chance that his knowledge will actually make a difference in improving the quality of government is vanishingly small. Thus, it makes sense for most citizens to devote their time and energy to other activities, which have a higher expected payoff than acquiring political information.

Even highly intelligent and rational citizens could choose to devote little or no effort to the acquisition of political knowledge. The theory of rational ignorance suggests that most people will acquire little or no political knowledge and also that they will often make poor use of

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<sup>13</sup> The ideas discussed in this and the next subsection were developed more fully in Somin, "Foot Voting, Political Ignorance, and Constitutional Design," 204-211. The analysis of political ignorance presented here is based on the one I advanced in that earlier article.

<sup>14</sup> The idea of rational political ignorance was first introduced in Anthony Downs, *An Economic Theory of Democracy*, (New York: Harper & Row, 1957), ch. 13.

the information that they do learn. Both political knowledge acquisition and the rational evaluation of that information are classic collective action problems, in which individual citizens have incentives to “free ride” on the efforts of others.<sup>15</sup>

This point applies to altruistic, civic-minded people as much as to rationally self-interested ones. A rational altruist will devote most of her time and effort to activities that are more likely to succeed in benefiting others than spending time on the acquisition of political knowledge.<sup>16</sup>

Decades of survey research show that most citizens do in fact acquire very little political information, just as the theory of rational ignorance predicts.<sup>17</sup> In the immediate aftermath of the 2010 election, in which Republicans made record gains, only 42% of Americans realized that the outcome of the vote was that the Republicans had taken control of the House of Representatives, but not the Senate.<sup>18</sup> A 2009 survey showed that only 24% of Americans realized that the “cap and trade” proposal then recently passed by the House of Representatives as an effort to combat global warming realize that this initiative addresses “environmental issues.”<sup>19</sup> About 46% said that it was either a “health care reform” or a “regulatory reform for Wall Street.”<sup>20</sup> A 2006 Zogby poll found that only 42% of Americans could even name the three branches of the federal government.<sup>21</sup> Hundreds of other examples of ignorance could be used to illustrate the point.<sup>22</sup>

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<sup>15</sup> Mancur Olson, *The Logic of Collective Action* (Cambridge: Harvard University Press, Rev. ed. 1971).

<sup>16</sup> I discuss this point in greater detail in Ilya Somin, *Democracy and Political Ignorance* (Stanford, CA: Stanford University Press, forthcoming), ch. 4.

<sup>17</sup> For a detailed survey of the evidence, see *ibid.*, ch. 2. See also Michael X. Delli Carpini and Scott Keeter, *What Americans Know About Politics and Why it Matters* (New Haven: Yale University Press, 1996); Richard Shenkman, *Just How Stupid Are We? Facing the Truth About the American Voter*, (New York: Basic Books, 2008); Scott Althaus, *Collective Preferences in Democratic Politics* (New York: Cambridge University Press, 2003); Ilya Somin, “Voter Ignorance and the Democratic Ideal,” *Critical Review* 12 (1998): 413-58.

<sup>18</sup> *Ibid.*

<sup>19</sup> Rasmussen Poll, May 7-8, 2009, available at [http://www.rasmussenreports.com/public\\_content/politics/toplines/pt\\_survey\\_toplines/may\\_2009/toplines\\_cap\\_trade\\_i\\_may\\_7\\_8\\_2009](http://www.rasmussenreports.com/public_content/politics/toplines/pt_survey_toplines/may_2009/toplines_cap_trade_i_may_7_8_2009).

<sup>20</sup> *Ibid.*

<sup>21</sup> Zogby Poll, July 21-27, 2006, available at <http://www.zogby.com/wf-AOL%20National.pdf>.

Moreover, widespread ignorance is not of recent origin, but stretches as far back as we have survey data to measure it.<sup>23</sup>

### *Rational Irrationality*

Not only do rational ballot box voters usually acquire little political information, they also often make poor use of the information they do possess. Rational ignorance does not imply that voters will learn nothing at all about politics. Rather it predicts that they will acquire little or no information *for purposes of voting*. Many, however, will learn political information for other reasons, such as that they find politics interesting.<sup>24</sup> In much the same way, dedicated sports fans acquire knowledge about their favorite teams, even though they know they have little chance of influencing the outcomes of games. People with a strong interest in politics often act as “political fans.”<sup>25</sup> They evaluate information in a highly biased manner that overvalues any evidence that supports their preexisting views, while ignoring or discounting that which cuts against them. Various studies find that this is exactly how those with a strong interest in politics actually do respond to new political information.<sup>26</sup>

Such bias is perfectly rational if the goal is not to get at the “truth” of a given issue in order to be a better voter, but to enjoy the psychic benefits of being a political “fan.”<sup>27</sup> As Bryan

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<sup>22</sup> See Somin, *Democracy and Political Ignorance*, ch. 2.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid, ch. 4.

<sup>25</sup> Ibid., See also Ilya Somin, “Knowledge About Ignorance: New Directions in the Study of Political Information,” *Critical Review* 18 (2006): 255-78, 260-62.

<sup>26</sup> See, e.g., Charles Lord, Lee Ross, and Mark R. Lepper, “Biased Assimilation and Attitude Polarization: The effects of Prior Theories on Subsequently Considered Evidence,” *Journal of Personality and Social Psychology* 37 (1979): 2098-2109; Charles S. Taber and Milton R. Lodge, “Motivated Skepticism in the Evaluation of Political Beliefs,” *American Journal of Political Science* 50 (2006): 755-69. Edward Glaeser and Cass R. Sunstein, “Extremism and Social Learning,” *Journal of Legal Analysis* 1 (2009): 1-62.

<sup>27</sup> For a detailed discussion, including analysis of possible objections, see Somin, *Democracy and Political Ignorance*, ch. 4.

Caplan puts it, this is a case of “rational irrationality.”<sup>28</sup> A person can rationally choose to limit the amount of effort they devote to logically evaluating the information they possess, and instead allow themselves to give in to emotionally driven, illogical reactions.

One can argue that rational ignorance and irrationality are not genuine constraints on the exercise of political choice through voting. After all, rationally ignorant voters choose not to acquire more information than they do. But this argument ignores the reality that rational ignorance is part of a collective action problem, in which individually rational action leads to results that none of the individuals involved might actually want. Moreover, voting decisions influenced by ignorance end up imposing policies not only on the ignorant voters themselves, but also on the rest of society. For this reason, ignorance constrains not only ignorant voters themselves, but others as well.<sup>29</sup>

Some scholars argue that political ignorance and irrationality are of little importance because voters can offset their effects by relying on various “information shortcuts.” I have addressed these claims in great detail elsewhere.<sup>30</sup> Here, I would only suggest that shortcuts are unlikely to even come close to fully offsetting widespread ignorance of fairly basic political information, even though the shortcuts do have some utility.

Building on a well-known argument by Albert Hirschman, one might contend that the ready availability of foot voting might reduce voters’ incentives to invest in political knowledge. Hirschman contended that the availability of an easy exit option diminishes the incentive to invest in political voice,<sup>31</sup> possibly including political knowledge. But political ignorance is

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<sup>28</sup> Bryan Caplan, *The Myth of the Rational Voter*. (Princeton: Princeton University Press, 2007); Caplan, “Rational Irrationality,” *Kyklos* 54 (2001): 5

<sup>29</sup> For an extensive discussion of the latter issue, see Jason Brennan, *The Ethics of Voting*, (Princeton: Princeton University Press, 2011).

<sup>30</sup> See Somin, *Democracy and Political Ignorance*, ch. 5; Somin, “Voter Ignorance and the Democratic Ideal,” *Critical Review* 12 (1998): 413-58.

<sup>31</sup> Hirschman, *Exit, Voice, and Loyalty*, ch. 4.

severe even in cases where exit is very difficult, as in the case of national politics.<sup>32</sup> Even where exit is hard, the incentive to invest in political information is minimal, because the low probability of influencing political outcomes ensures that there is little gain from such investments. Thus, foot voting is unlikely to be more than a minor contributor to the problem of ignorance. It could even make voice more effective, in so far as knowledge of government policy acquired for the purposes of foot voting is sometimes also useful for ballot box voting.<sup>33</sup>

## **B. Advantages of Foot Voting.**

Foot voting has important advantages over ballot box voting on all three of the dimensions considered here. Foot voting is usually decisive, it allows for a greater degree of choice over basic structure, and it creates superior incentives to acquire and rationally evaluate information.

Individual decisiveness is the most obvious advantage of foot voting over ballot box voting. A person who chooses which jurisdiction to live in usually has an extremely high probability of being able to implement her decision. In many cases, of course, the individual might be constrained by the desires of a spouse or other family members. But even in these situations, he generally has a much higher probability of influencing the final result than does a ballot box voter. One vote out of, say, ten, in a large family is far more likely to be influential than one vote out of ten million or even one vote out of ten thousand in an election.

Foot voting in a federal system also allows greater choice over basic structure. A person who can choose between multiple state and local governments can potentially choose between

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<sup>32</sup> See works cited in note \_\_\_\_.

<sup>33</sup> Hirschman's argument has other limitations as well. For example, it only applies in a narrow range of circumstances. See Ilya Somin, "Revitalizing Consent," *Harvard Journal of Law and Public Policy* 23 (2000): 753-805, 795-97.

jurisdictions with very different systems of governance. For example, they might have divergent state constitutions, electoral systems, basic social welfare policies, and so on. Obviously, the range of choice here is far from unlimited. The choices are limited to those available in the given federal system.<sup>34</sup> Moreover, foot voters generally are unable to control the basic structure of the federal system itself, such as the determination of how many different jurisdictions will exist, and what their boundaries will be. Nonetheless, especially in a sizable nation with many different jurisdictions, the range of choice is likely to be substantially greater than that available through ballot box voting in a unitary state.

Finally, foot voting also creates much better incentives than ballot box voting for acquiring and rationally evaluating relevant information.<sup>35</sup> Since foot voting choices are individually decisive, decision-makers have strong incentives to acquire good information and evaluate it in a relatively unbiased way. Historical evidence suggests that even foot voters with very low education levels and significant barriers to acquiring new information nevertheless often successfully overcome them. For example, millions of poor African-Americans in the early twentieth century Jim Crow-era American South managed to acquire enough information to realize that conditions were better in the northern states, and migrated accordingly. They did so despite the fact that most had very low education levels, and southern state governments often deliberately sought to keep them ignorant.<sup>36</sup> This is in sharp contrast to the widespread ignorance of basic facts among ballot box voters, including many who are much better-educated and face lower information costs.

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<sup>34</sup> In Part III, I consider the expansion of these choices that arises from allowing greater scope for international migration, and from allocating a greater role to private institutions.

<sup>35</sup> I analyze this point in much greater detail in Ilya Somin, "Foot Voting, Political Ignorance, and Constitutional Design," *Social Philosophy and Policy* 28 (2011): 202-27.

<sup>36</sup> *Ibid.*, pp. 215-21.

Obviously, foot voters face information problems of their own. The more issues are left up to the private sector or to lower-level political jurisdictions, the more information foot voters potentially have to learn. But an increasing number of issues raises information costs regardless of whether the political system is federal or unitary, and regardless of whether foot voting is a viable option or not. The great advantage of foot voting over ballot box voting is not that it eliminates the need for information, but that it gives participants stronger incentives to seek out the necessary knowledge and rationally evaluate it. In some cases, moreover, foot voters actually need *less* in the way of detailed knowledge than ballot box voters do. For example, they sometimes do not need to know whether superior conditions in one jurisdiction relative to another are caused by government policy or not.<sup>37</sup> If conditions are better in region X than Y and likely to remain that way, that is often sufficient for a good foot voting decision. By contrast, rewarding or punishing political leaders at the polls for outcomes they did not cause is often dangerous and self-defeating for ballot box voters.<sup>38</sup>

Obviously, we should not assume that foot voters are perfectly informed or perfectly rational. No one ever has complete information, and people sometimes make irrational decisions in many different aspects of their lives.<sup>39</sup> The advantage of foot voting over ballot box voting is not that it avoids ignorance and irrationality entirely, but that it gives us stronger incentives to reduce them. Irrational cognitive biases are most likely to influence our decisions when we don't make a conscious effort to make good decisions and act rationally.<sup>40</sup> And people are less likely

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<sup>37</sup> Somin, "Foot Voting, Political Ignorance, and Constitutional Design," 211.

<sup>38</sup> See Somin, *Democracy and Political Ignorance*, ch. 5.

<sup>39</sup> See, e.g., Daniel Kahneman, *Thinking Fast and Slow*, (New York; Farrar, Straus, and Giroux, 2011); Dan Ariely, *Predictably Irrational*, (New York: Harper Collins, 2009). For a recent critique of the empirical evidence underlying claims of widespread irrationality in market and other foot-voting setting, see Joshua Wright and Douglas H. Ginsburg, "Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty," *Northwestern University Law Review* 106 (2012), pp. 9-20.

<sup>40</sup> Kahneman, *Thinking Fast and Slow*, 31-38, 41-48.

to do the hard work needed to overcome ignorance and irrationality when there is little incentive to do so.<sup>41</sup>

### **C. Implications for Federalism.**

The advantages of foot voting described here justify greater political decentralization than might otherwise be desirable. The more decentralized political power is, the more issues citizens will be able to decide through foot voting as opposed to ballot box voting. The more decisions, therefore, will be made by processes where individuals make choices that are individually decisive, have greater leverage over basic political structure, and are subject to better incentives for the acquisition and use of knowledge.

The benefits of foot voting are enhanced when jurisdictions compete for potential migrants by offering the most attractive possible package of public services and taxes.<sup>42</sup> In such a situation, the number and quality of choices open to foot voters is likely to increase. But effective foot voting does not necessarily *require* competition. Even if jurisdictions choose their policies at random or solely for the purpose of catering to the desires of current residents, foot voters can take advantage of the resulting policy diversity to select options that best fit their preferences. They are still likely to have a wider range of choices than in a unitary state.<sup>43</sup>

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<sup>41</sup> This point is developed in more detail in Caplan, *Myth of the Rational Voter*, 114-37.

<sup>42</sup> See, e.g., Thomas Dye, *American Federalism: Competition Among Governments* (New York: John Wiley, 1990), 1-33; Barry Weingast, "The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development," *Journal of Law, Economics, and Organization* 11 (1995):1-31; Weingast, See Barry Weingast, "Second Generation Fiscal Federalism: Implications for Decentralized Democratic Governance and Economic Development," unpublished paper, (2007).

<sup>43</sup> It is worth noting that Charles Tiebout's original classic article outlining the potential benefits of foot voting did not assume any attempts at competition between jurisdictions. See Tiebout, "A Pure Theory of Local Expenditures."



In theory, these benefits could potentially be achieved through decentralization without “federalism,” as defined by Malcolm Feeley and Edward Rubin and some earlier writers.<sup>44</sup> A unitary central government, they contend, can choose to transfer power to local or regional authorities without giving the latter any genuine political autonomy, defined as a guarantee against interference from the center.

In my view, this definition of “federalism” is too narrow. A federal system can potentially exist in any society where there are multiple separate levels of government, even if the lower levels are not legally immune from interference by the higher levels. So long as overruling the lower level government requires a costly affirmative act by the center,<sup>45</sup> such as a legislative vote, the lower level government retains a measure of real power. At the very least, it can exist so long as the leaders of territorially based lower-level governments are selected by processes that are not under the central governments’ control.<sup>46</sup> In any event, legal autonomy is a continuous variable, not a binary one. Lower-level governments can be- and usually are – legally autonomous on some issues, while subject to central government override on others.

Elsewhere, I have suggested that decentralization without legal autonomy is unlikely to be a stable equilibrium; the central government is likely to have strong incentives to override local decision-making when national political majorities or powerful interest groups want it to do

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<sup>44</sup> For the distinction between the two, see Malcolm Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise*, (Ann Arbor: University of Michigan Press, 2008). Feeley and Rubin argue that most of the advantages ascribed to federalism can be achieved through mere decentralization. Ibid. For an earlier influential definition of federalism similar to theirs, see Ronald L. Watts, “Federalism, Federal Political Systems, and Federations,” *Annual Review of Political Science* 1 (1998): 117-37, 120-21.

<sup>45</sup> Alternatively, one can argue that the requirement of an affirmative act to override itself creates a kind of sphere of juridical autonomy for the lower level government. It can govern certain issue areas so long as it is not affirmatively overridden.

<sup>46</sup> For a definition of federalism similar to this, see e.g., Jenna Bednar, *The Robust Federation: Principles of Design*, (New York: Cambridge University Press, 2009). 18-19. Bednar also argues that each level of government must be sovereign in “at least one policy realm.” But it is not clear whether lower-level governments’ sovereignty is compatible with an override power by the national government.

so.<sup>47</sup> If this is correct, a high degree of decentralization probably cannot persist for very long without some kind of constitutional protection for federalism.

But the distinction between the two is not crucial to the argument advanced here. In order to achieve the enhancement of political freedom promised by foot voting, some substantial degree of decentralization is necessary. Whether that decentralization requires “federalism” as defined by Feeley and Rubin, is a question that I do not attempt to resolve here. It does, however, require federalism in the broader sense of having multiple levels of government, and a significant sphere of autonomy for regional authorities.

## **II. Potential Limitations of Foot Voting as a Tool for Political Choice**

While foot voting has some important advantages over ballot box voting, critics argue that it also has severe limitations as a mechanism for political choice. Among the most important are moving costs, the danger of a “race to the bottom,” and the plight of unpopular racial and ethnic minorities. Each of these pose genuine challenges for foot voting. But the problems are not as severe as critics claim.

### **A. Moving Costs.<sup>48</sup>**

The most obvious shortcoming of foot voting is the problem of moving costs. Moving from one jurisdiction to another can be costly in several ways. Potential migrants must pay the

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<sup>47</sup> See generally in John McGinnis and Ilya Somin, “Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System,” *Northwestern University Law Review* 99 (2004): 89-130.

<sup>48</sup> Some of the material in this section is based on Somin, *Democracy and Political Ignorance*, chapt. 6.

direct costs of moving themselves and their possessions. But often, these direct moving costs are outweighed by much greater indirect costs, such as the cost of parting with employment opportunities, family members who stay behind, and social networks. Where moving costs are high, the choices created by foot voting may be illusory, since many will not be able to take advantage of them.

Moving costs can indeed undermine the freedom of choice of potential foot voters. But they are not as prohibitively high as is sometimes supposed. Modern technology has made it cheaper and easier to move from one jurisdiction to another than ever before. And, in a relatively large federal structure such as the United States or the European Union, the existence of numerous different jurisdictions with a wide range of job opportunities reduces the extent to which people in most professions are limited to just one part of the country.

Interstate and other moves are actually extremely common, which suggests that moving costs are often quite manageable. A 2008 Pew Research Center study showed that 63% of Americans have moved at least once in their lives, and 43% have made at least one interstate move.<sup>49</sup> Interstate migration driven by variation in public policy is also commonplace. In the small state of New Hampshire, which has the lowest taxes and nearly the lowest levels of economic regulation in the country,<sup>50</sup> some 57 percent of the population now consists of out of state migrants, many of them drawn by the state's economic policies.<sup>51</sup>

In Western Europe, freedom of migration between the member states has also led to extensive foot voting-based migration. Hundreds of thousands of French citizens have moved to

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<sup>49</sup>Pew Research Center, *Who Moves? Who Stays Put? Where's Home?* (Washington, DC: Pew Research Center, December 2008), pp. 8, 13.

<sup>50</sup> See William P. Ruger and Jason Sorens, *Freedom in the Fifty States: An Index of Personal and Economic Freedom*, Arlington, VA: Mercatus Center, George Mason University, 2009), 34.

<sup>51</sup> Kenneth Johnson, *The Changing Faces of New Hampshire: Recent Demographic Trends in the Granite State*, (Durham, NH: Carsey Institute, University of New Hampshire, 2007).

Britain in large part because that country has lower taxes and more open labor markets, enabling them to pursue economic opportunities.<sup>52</sup> During the 2007 French presidential election, the winning candidate, Nicolas Sarkozy, even campaigned in London in order to seek the support of French expatriates there.<sup>53</sup> Tens of thousands of Germans have moved to Switzerland for similar reasons, to the extent that some Swiss even complain of a German “invasion.”<sup>54</sup>

Contrary to claims that foot voting is usually a realistic option only for the relatively affluent, census data finds that households with an income under \$5000 per year are actually twice as likely to make interstate moves as the population as a whole.<sup>55</sup> The poor often actually face lower effective moving costs than more affluent households, because they own much less in the way of immobile assets, such as property in land.

Some scholars suggest that foot voting over public policy is rare because survey show that most moves are motivated by job-related considerations, rather than by direct calculations of the quality of public services.<sup>56</sup> If so, this might suggest that moving costs are too high to make foot voting worthwhile. However, these arguments ignore the fact that employment prospects are heavily influenced by local and state public policy on taxation, regulation, and other issues. Ignoring job-related moves is consistent with Charles’ Tiebout’s classic 1956 foot voting model, which assumes such moves away, because it focused purely on the provision of local public

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<sup>52</sup> Mark Deen and Alan Katz, “London’s French Foreign Legion Shuns Sarkozy Plea to Come Home,” *Bloomberg News*, Jan. 17, 2008, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=acDlozxr7iE>

<sup>53</sup> Ibid.

<sup>54</sup> Tony Paterson, “German ‘Brain Drain’ At Highest Level Since 1940s,” *The Independent*, June 1, 2007.

<sup>55</sup> Ilya Somin, “Political Ignorance and the Countermajoritarian Difficulty,” *Iowa Law Review* 89 (2004): 1287-1371, pg. 1351.

<sup>56</sup> See, e.g., Robert C. Ellickson, “Legal Sources of Residential Lock-Ins: Why French Households Move Half as Often as US Households,” *University of Illinois Law Review* (2012): 373-404, 395-97; Paul W. Rhode & Koleman S. Strumpf, “Assessing the Importance of Tiebout Sorting: Local Heterogeneity from 1885 to 1990,” *American Economic Review* 93 (2003): 1648-77, 1649. Ellickson cites survey data showing that 16% of American and 26% of French movers switch locations because of jobs. Rhode and Strumpf cite an earlier and differently worded survey in which only 5% move because of public services (education) and 50% due to family or job considerations.

goods.<sup>57</sup> But it is not appropriate for a broader discussion of policy-motivated foot voting, which incorporates government policy affecting private good as well. Moreover, some local public goods might affect employment prospects as well. For example, a well-run legal system or a clean environment might attract some categories of businesses.<sup>58</sup>

The fact that someone is making a move based on employment opportunities does not mean that their choice was unrelated to variations in public policy. Moreover, the surveys in question either completely neglect to ask movers whether public policy factors played a role in their decisions,<sup>59</sup> or included only a few possible policy influences.<sup>60</sup>

I do not mean to suggest that job-related moves are necessarily policy-related moves, merely that they should not be assumed as necessarily *non*-policy based. It may well be that one of the things people care most about when exercising political freedom is how a jurisdiction's policies affect their economic prospects, just as polls often show that the economy is voters' top policy concern in ballot box elections. A foot voter who prioritizes economic concerns in choosing which government to live under is still exercising political choice.

A well-known critique of Tiebout's foot-voting model claims that it is at least partly falsified by empirical evidence, because the data does not show that the policy heterogeneity of American communities increased as moving costs fell during the late nineteenth and twentieth centuries.<sup>61</sup> But Tiebout's and other models of foot voting don't necessarily predict greater heterogeneity as transportation costs fall. They do so only if preference heterogeneity remains constant or increases. But it is quietly possible that preference heterogeneity of preferences

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<sup>57</sup> Tiebout, "A Pure Theory of Local Expenditure."

<sup>58</sup> See the discussion of the environmental point in Section II.B of this article.

<sup>59</sup> Ellickson, "Legal Sources of Residential Lock-Ins," 395-96.

<sup>60</sup> Rhode and Strumpf relied on surveys that asked whether people move in order to take advantage of better public education systems, but did not ask whether they were motivated by differences in tax rates, regulatory policies, environmental quality, or numerous other policies that might potentially attract migrants. Rhode and Strumpf, "Assessing the Importance of Tiebout Sorting," 1649.

<sup>61</sup> See *ibid*.

decreased during the course of the twentieth century as immigrants became more assimilated, the United States developed more of an integrated national culture, and more was learned about the effectiveness or lack thereof of different kinds of local policies.

Overall, the evidence does not show that moving costs generally preclude foot voting, even if foot voting would be more effective if they were lower. Moving costs are, however, particularly severe in the case of policies that target immobile assets, such as property in land. Here, moving is not just potentially expensive, but literally impossible. This is a genuine and to some extent irremediable shortcoming of foot voting under federalism. Thus, effective protection for immobile assets will usually have to be provided by other means, probably including centrally enforced limits on the powers of regional governments.<sup>62</sup> Foot voting can, potentially, help address such problems if more issues are handled by private sector organizations, or if people can choose to reject the jurisdiction of a particular government without physically migrating.<sup>63</sup>

But it may not be possible to make foot voting a fully effective mechanism for protecting immobile assets and people. For policies that target primarily mobile assets, however, foot voting often provides an effective mechanism of political choice even in spite of moving costs.

## **B. The Race to the Bottom.**

The “race to the bottom” argument is one of the best-known longstanding criticisms of federalism.<sup>64</sup> Because of a desire to attract taxpaying business interests, it is argued, state and

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<sup>62</sup> For a detailed discussion of this issue, see Ilya Somin, “Federalism and Property Rights,” *University of Chicago Legal Forum* (2011): 55-88.

<sup>63</sup> I consider these possibilities in Part III.

<sup>64</sup> For a helpful summary and defense of the race to the bottom theory, see Kirsten H. Engel, “State Environmental Standard-Setting: Is there a “Race” and is it “to the Bottom?” *Hastings Law Journal* 48 (1997): 274-369. For other modern defenses, see, e.g., Kirsten Engel and Scott R. Saleska, “Facts are Stubborn Things: An Empirical Reality

local governments are likely to lower environmental and safety regulations below reasonable minimums, thereby inflicting great harm on consumers, workers, and the general public. Such “destructive competition” could make the choices available to foot voters illusory. Effectively, they could end up choosing between jurisdictions that have all been forced to sell out to narrow business interests in order to keep up tax revenue.

In a series of influential articles in the 1990s, Richard Revesz significantly undermined the theoretical rationale for the race to the bottom argument in the field of environmental policy – an area where the argument was traditionally thought to be at its strongest.<sup>65</sup> Revesz points out that states compete with each other on more than one dimension, and that an attractive and healthy environment is one of the factors that is likely to attract relatively affluent taxpayers and some businesses. Thus, there is no reason to expect that state and local governments will systematically sacrifice environmental concerns to the needs of polluting businesses.<sup>66</sup> Indeed, higher-income citizens of the type most valuable to states as taxpayers generally assign a higher priority to environmental protection than do lower-income groups.<sup>67</sup> Local governments also have other forms of leverage against mobile business interests that reduce the extent to which the latter can expect to capture the lion’s share of the gains from interjurisdictional competition.<sup>68</sup> The empirical record to a large extent supports Revesz’s predictions. State governments

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Check in the Theoretical Debate over State Environmental Rate-Setting, *Cornell Journal of Law and Public Policy* 8 (1998): 55-88; and Joshua D. Sarnoff, “The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection,” *Duke Environmental Law and Policy Forum* 7 (1997): 225-54.

<sup>65</sup> Richard Revesz, “Rehabilitating Interstate Competition: Rethinking the “Race to the Bottom”

Rationale for Federal Environmental Regulation,” *NYU Law Review* 67 (1992): 1210-54; Revesz, “The Race to the Bottom and Federal Environmental Regulation: A Response To Critics,” *Minnesota Law Review* 82 (1997): 535-64.

<sup>66</sup> Revesz, “Rehabilitating Interstate Competition.”

<sup>67</sup> For a summary of the evidence on this point, see Ilya Somin and Jonathan H. Adler, “The Green Costs of *Kelo*: Economic Development Takings and Environmental Protection,” *Washington Law Review* 84 (2006): 623-666, 663-64.

<sup>68</sup> See generally Richard C. Schragger, “Mobile Capital, Local Economic Regulation, and the Disciplining City,” *Harvard Law Review* 123 (2009): 483-540.

pioneered many forms of environmental protection long before the federal government required them to do so.<sup>69</sup>

In addition to environmental protection, the other iconic example of a dangerous race to the bottom is the Supreme Court's 1918 decision in *Hammer v. Dagenhart*, which invalidated federal child labor laws as beyond the scope of congressional authority.<sup>70</sup> However, all but five states had already enacted child labor bans of their own by 1910 (though some were less strict than the federal law),<sup>71</sup> and industrial child labor disappeared almost completely by 1930, just twelve years after *Hammer*.<sup>72</sup> By the time *Hammer* was reversed by the Supreme Court in the late 1930s, the majority of states had laws comparable to the federal one the Supreme Court invalidated.<sup>73</sup>

None of this suggests that genuine races to the bottom never happen. They can occur in various situations, particularly where state or local governments seek to attract a mobile asset by means that exploit an immobile one, such as property rights in land. By placing the burden on the immobile asset, states can potentially impose the costs of attracting the mobile factor on people who have no effective exit option. This may, for example, explain cases where states use

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<sup>69</sup> See, e.g., Jonathan H. Adler, "Judicial Federalism and the Future of Federal Environmental Regulation," *Iowa Law Review* 90 (2005): 377-474; Adler, "Interstate Competition and the Race to the Top," *Harvard Journal of Law and Public Policy* 35 (2012): 89-99.

<sup>70</sup> 247 U.S. 251 (1918).

<sup>71</sup> See Carolyn Moehling, "State Child Labor Laws and the Decline of Child Labor," *Explorations in Economic History* 36 (1999): 72-106, Table 1, pp. 76-77.

<sup>72</sup> Michael S. Greve, *The Upside-Down Constitution*, (Cambridge: Harvard University Press, 2012), 187-88. See also Moehling, "State Child Labor Laws and the Decline of Child Labor," 94-95. The 1918 federal law did not ban agricultural child labor, which remains legal to this day. Moehling argues that child labor laws had little effect on the decline in industrial child labor, which mostly followed preexisting trends. But if this is true, it is far from clear that federal laws would have had any greater effect. National child-labor restrictions in Britain had little effect in reducing child labor there. See Clark Nardinelli, "Child Labor and the Factory Acts," *Journal of Economic History* 40 (1980): 739-55.

<sup>73</sup> For a discussion and summary of state laws, see Carolyn Moehling, "State Child Labor Laws and the Decline of Child Labor," *Explorations in Economic History* 36 (1999): 72-106.



“economic development” takings to transfer property from politically weak local owners to potentially mobile firms such as General Motors.<sup>74</sup>

But while races to the bottom can and do happen, they are less likely than critics claim. Even in environmental policy and labor policy, two fields where the problem has traditionally been thought to be especially severe, races to the bottom turn out to be far less prevalent than previously believed.

### C. The Problem of Minority Rights.

No issue has done as much to discredit federalism in the United States as its association with the oppression of racial and ethnic minorities. The conventional wisdom holds that federalism was largely a disaster for African-Americans and other minorities, while the growth of federal power greatly alleviated their plight.<sup>75</sup> As the leading political scientist William Riker put it in 1964, “[t]he main beneficiary [of federalism] throughout American history has been the Southern Whites, who have been given the freedom to oppress Negroes..... [I]f in the United States one approves of Southern white racists, then one should approve of American federalism.”<sup>76</sup>

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<sup>74</sup> See Somin, “Federalism and Property Rights,” 60-64. The most famous case of this type was the 1981 *Poletown* condemnation, in which the city of Detroit condemned over 4000 peoples’ homes, and much other property in order to transfer it to General Motors to build a new factory. See Ilya Somin, “Overcoming *Poletown*: *County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use,” *Michigan State Law Review* (2004): 1005-39.

<sup>75</sup> For a good recent summary of this conventional wisdom, see Douglas Laycock, “Protecting Liberty in a Federal System: The US Experience,” In *Patterns of Regionalism and Federalism: Lessons for the UK*, Jorg Fedtke and B.S. Markesinis, eds. (London: Hart, 2006), 121-45.

<sup>76</sup> William H. Riker, *Federalism: Origin, Operation, Significance*, (Boston: Little, Brown, 1964), 152-53, 55; Riker later developed a less negative view of American federalism. See William H. Riker, *The Development of American Federalism*, (Boston: Kluwer Academic Publishers, 1987), xii-xiii. But Riker’s earlier position remained his most influential work on federalism. See Craig Volden, “Origin, Operation, Significance: The Federalism of William H. Riker,” *Publius* 34 (2004):89-107.

There is no doubt that American state and local governments have in fact oppressed minority groups on many occasions, and that federal intervention sometimes played a key role in diminishing that oppression – as with the abolition of slavery in 1865 and Jim Crow segregation in the 1960s. If federalism is generally inimical to the interests of racial and ethnic minorities, this undermines the utility of foot voting in a federal system as a mechanism for political choice, at least when it comes to unpopular minorities. The choices available to these groups would be very poor ones indeed.

However, the conventional wisdom on the relationship between federalism and Jim Crow is at the very least overstated. Although state and local governments often oppressed African-Americans and other minorities, the same can be said of the federal government throughout much of American history. And in many cases, oppressed minorities would have been even worse off with a unitary state than they were under federalism.

During much of American history, a unified national policy on racial issues might well have led to greater oppression for minorities rather than less. At the time the Constitution was drafted in 1787, all but one state (Massachusetts still had slavery, though a few others had enacted gradual emancipation laws.<sup>77</sup> New York and Pennsylvania, two of the largest and most politically powerful northern states, did not enact emancipation laws until 1799 and 1804, respectively.<sup>78</sup> A unitary policy on slavery at that time would likely have resulted in a nationwide law legalizing the institution. Moreover, it would have deprived antislavery forces of the example effect of states without slavery, which turned out to be more economically successful

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<sup>77</sup> See Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago: University of Chicago Press, 1967); Joanne Pope Melish, *Disowning Slavery: Gradual Emancipation and 'Race' in New England 1780-1860*, (Ithaca: Cornell University Press, 1998). The state of Vermont had abolished slavery even before it became a state in 1791. Melish, *Disowning Slavery*, 64.

<sup>78</sup> Ibid.

than southern slave states did. During the antebellum period, many opponents seized on this fact as a justification for abolition or at least for limiting the spread of slavery to new territory.<sup>79</sup>

During much of the antebellum period, Congress and the presidency were controlled by pro-slavery forces, which succeeded in enacting such measures as the Fugitive Slave Acts of 1793 and 1850.<sup>80</sup> During this period, too, a unitary state might well have had a more pro-slavery policy than that which actually existed under federalism. The District of Columbia, the one part of the United States under complete federal control, had legalized slavery until 1862, when it was abolished in large part because most slave state representatives had left Congress as a result of the secession of southern slave states that triggered the Civil War.<sup>81</sup> Overall, the federal government flexed its muscles in support of slavery much more often than against it.<sup>82</sup> As Henry Adams put it in 1898, “[b]etween the slave power and states' rights there was no necessary connection. The slave power, when in control, was a centralizing influence, and all the most considerable encroachments on states' rights were its acts... [W]henever a question arose of protecting or extending slavery, the slaveholders became friends of centralized power, and used that dangerous weapon with a kind of frenzy.”<sup>83</sup>

After the 1870s, a long period set in during which the white South was far more committed to maintaining segregation than most white Northerners were to eliminating it. It is difficult to say with certainty that a unitary United States would have repressed African-Americans even more than state governments did during this period of actual history. But it is at

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<sup>79</sup> See, e.g., Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War*, (New York: Oxford University Press, 1970), chaps. 1-2.

<sup>80</sup> Some northern states and abolitionists even resisted the Fugitive Slave Acts on “states’ rights” grounds. See Robert Kaczorowski, “The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and Freedom,” *University of Kansas Law Review* 45 (1997): 1015-61, 1034-40.

<sup>81</sup> James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (Oxford University Press, 1988), 497.

<sup>82</sup> For a brief review of the record, see Lynn Baker and Ernest Young, “Federalism and the Double Standard of Judicial Review,” *Duke Law Journal* 51 (2001): 75-162, 143-47.

<sup>83</sup> Henry Adams, *John Randolph*, (Boston: Houghton Mifflin, 1898), 270-71.

least quite likely that a unitary national policy would have been more repressive than that of the northern states, even if not as much so as that of the South. The District of Columbia, during this period too, was striking in being as much segregated as most of the South. Other federally-controlled institutions were also highly segregated, such as the armed forces and the federal civil service.<sup>84</sup>

In addition to its role in promoting slavery and segregation of American-Americans for much of American history, the federal government also took the lead in a number of other notorious episodes of persecution of minority groups. For example, it interned over 100,000 Japanese-Americans in concentration camps during World War II, and extensively persecuted the Mormons during the nineteenth century.<sup>85</sup>

Finally, foot voting between rival state jurisdictions played a key role in preventing the plight of African-Americans and other minorities from being even worse than it was. Between 1880 and 1920, some 1 million blacks left the South for less oppressive states in the North and West. This greatly improved the lives of the migrants themselves, and to a lesser extent even some of those blacks who stayed in the South.<sup>86</sup> Without variation in policies created by federalism, things would likely have been worse for minority groups than they were. In more recent years, other unpopular minorities – notably gays and lesbians – have also benefited from foot voting and federalism. Sympathetic state and local governments enacted pro-gay policies

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<sup>84</sup> For an overview of segregationist federal policies during this period, see Desmond King, *Separate And Unequal: African-Americans and the US Federal Government*, (New York: Oxford University Press, rev. ed. 2007).

<sup>85</sup> See Roger Daniels, *Concentration Camps, USA: The Japanese Americans and World War II*, (New York: Holt, Rinehart & Wilson, 1971); Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America*, (Chapel Hill: University of North Carolina Press, 2002).

<sup>86</sup> For a summary of the evidence, see Somin, “Foot Voting, Political Ignorance, and Constitutional Design,” pp. 215-21.

such as gay marriage at a time when the federal government was at best indifferent and at worst actually hostile.<sup>87</sup>

In a democracy where public opinion was as much contaminated by racism as it was in the nineteenth and early twentieth century United States, racial minorities were likely to experience extensive oppression regardless of whether the government was federal or unitary. Foot voting facilitated by federalism certainly was not a panacea for this tragic situation. But, for a long time, it made the situation substantially less bad than it might have been without it.

Foot voting under federalism can also be of great benefit to minorities in a situation where some local or state governments are controlled by the minority group in question, or at least substantially influenced by it. In such a scenario, pro-minority jurisdictions can serve as a valuable exit option for minority group members facing adverse policies elsewhere; such jurisdictions are also likely to be more favorable to the minority group than is the majority-dominated central government. This is widely recognized in federal systems outside the United States, where the existence of national minorities that are regional majorities is one of the main justifications for the establishment of a federal system in the first place.<sup>88</sup>

In the United States, such majority-minority jurisdictions have historically been rare, with Mormon-dominated Utah an unusual and oft-ignored exception. As a result, state and local governments are usually seen as the enemies of minority groups rather than their friends. In recent years, however, a variety of minority groups have gained greater leverage at the state and local level, which suggests that the US situation may become less anomalous in the future.<sup>89</sup>

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<sup>87</sup> See generally Stephen Clark, "Progressive Federalism? A Gay Liberationist Perspective," *Albany Law Review* 66 (2003): 719-57.

<sup>88</sup> For an overview covering many such cases, see Luis Moreno and César Colino, eds., *Diversity and Unity in Federal Countries*. (Montreal & Kingston: McGill-Queen's University Press, 2010); see also Dawn Brancati, *Peace By Design: Managing Intrastate Conflict through Decentralization*, (New York: Oxford University Press, 2009).

<sup>89</sup> See Heather K. Gerken, "A New Progressive Federalism," *Democracy* (Spring 2012), available at <http://www.democracyjournal.org/24/a-new-progressive-federalism.php?page=1>.

None of this suggests that federalism is always a net positive for minority groups. In situations where the national majority strongly supports protection for a minority group, while a regional majority supports discrimination against them, concentration of power in the federal government may well be the most advantageous political structure for the minority in question. This, of course, is exactly what happened in the case of African-Americans during the civil rights revolution of the 1960s. But such a configuration of opinion is far from a universal rule and it is risky to design a political system on the assumption that this unusual configuration of political forces will be the norm.

Federalism is not always a boon for unpopular minority groups, and sometimes centralization can serve their interests better. Yet foot voting in a decentralized political system is often at least as valuable for minority groups as for the majority, and in particularly oppressive situations, even more so.

Foot voting may have less to offer minority groups in the many federal systems where they are actually the majority in a few regions, but widely despised elsewhere. For example, an Iraqi Kurd moving into a majority Arab province might reasonably fear violence or at least discrimination. Even in the absence of overt hostility, such minority groups might face painful cultural and linguistic adjustments if they move out of their home areas. A French Canadian who moves from Quebec to Alberta or Ontario is unlikely to face ethnic violence or even perhaps much in the way of discrimination. But moving to a majority Anglophone area might still be a difficult transition, creating substantial additional moving costs, even if nonmonetary in nature.

Yet foot-voting is still potentially useful in such conditions. The federal system in question can and often should include multiple majority-minority districts. For example, the French-speaking minority in Switzerland can choose between multiple majority-French cantons.

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Iraq has three majority-Kurdish provinces. French Canadians would enjoy a broader array of foot voting options if Quebec were divided into several smaller provinces rather than one big one. I do not suggest that either Quebec or any other large majority-minority jurisdiction must necessarily be broken up in order to facilitate foot-voting. Other considerations would have to be weighed as well before reaching that conclusion in any given case. But the foot-voting benefits of such partitions should not be neglected.

Such arrangements allow even regionally concentrated minorities a degree of choice through foot voting. That range of choice can be greatly expanded if more power is devolved to local governments and private organizations, as suggested in Part III.<sup>90</sup> The area where a given ethnic group is in the majority may only be large enough to contain a small number of regional governments. But it could have many more localities and private communities.

### **III. All the Way Up and All the Way Down.**

The crucial role of federalism in promoting political choice through foot voting suggests two important extensions of the idea. Foot voting can be extended “all the way down” to encompass a greater role for private organizations, such as private planned communities, and “all the way up” to allow greater migration across international boundaries. Both reforms can help extend the scope and effectiveness of foot voting, while alleviating some of its weaknesses. In some cases, the potential gains are even greater than those available through more conventional foot voting within a single federal system.

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<sup>90</sup> See Section III.A.

## A. All the Way Down: Local Governments and Private Communities.

In recent years, prominent scholars such as Heather Gerken and Richard Schragger have advocated extending federalism “all the way down” by allocating greater authority to local governments, as opposed to states.<sup>91</sup> This important new literature has outlined several possible advantages of empowering more local governments. But it has largely ignored the ways in which it could make foot voting more effective.

### *Local Governments*

Devolution of greater authority to local government can increase the range of choices available to foot voters, while also reducing the problem of moving costs. There are obviously more local governments to choose from than state or regional ones. In the United States, there are only fifty states, but thousands of local jurisdictions.<sup>92</sup> The same is true in most other federal systems. Other things equal, more local governments means a wider range of options for foot voters. Devolution to local governments can also help alleviate concerns that federal units are too large and inflexible for optimal foot-voting.<sup>93</sup> Local governments can exhibit greater variation in size and more flexibility in adjusting boundaries than states or provinces.

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<sup>91</sup> See, e.g., Heather K. Gerken, “Foreword: Federalism All the Way Down,” *Harvard Law Review* 124 (2010): 6-83; Richard C. Schragger, “Cities as Constitutional Actors: The Case of Same-Sex Marriage,” *Journal of Law and Politics* 21 (2005): 105-44. For a brief overview, see Daniel Halberstam, “Federalism: Theory, Policy, Law,” in Michel Rosenfeld and Andras Sajó, ed., *Oxford Handbook of Comparative Constitutional Law*, (New York: Oxford University Press, 2012), 604-605.

<sup>92</sup> As of 2007, the latest date for which data has been released, the Census Bureau counted some 19,402 municipal governments in the US, 3033 county governments, and 16,519 townships. US Census Bureau, Statistical Abstract of the United States, (Washington, D.C.: Government Printing Office, 2012), 267.

<sup>93</sup> See, e.g., Jacob Levy, “Federalism, Liberalism, and the Separation of Loyalties,” *American Political Science Review* 101 (2007): 459-77, 460-62.



Perhaps even more importantly, moving costs are often much lower for those migrating between local governments than between states.<sup>94</sup> Within most large metropolitan areas, there are dozens or even hundreds of local governments to choose from. This enables foot voters to change their local government without having to disrupt their employment arrangements and social networks nearly as much as is often the case with interstate moves. Obviously, however, foot voting between local governments is likely to be more effective the greater the range of issues subject to those governments' control.

Decentralization to local governments also helps to alleviate another potential obstacle to foot voting: agglomeration effects. In some cases, economic efficiency is increased by concentrating many different enterprises in a single area. In industries where agglomeration effects are significant, they make it more difficult for foot voters to choose jurisdictions based on their government policies.<sup>95</sup> With greater decentralization, however, foot voters can have often have their agglomeration cake and eat it too. Within a given large metropolitan area, there can be dozens or even hundreds of different local governments. Foot voters can choose the one they prefer, while still remaining in the same general metropolitan area, and thereby continuing to capture the benefits of agglomeration.

### *Private Communities*

The foot voting benefits of devolution to local governments can be expanded even further by allowing a greater role for private planned communities and other nongovernmental organizations. These organizations potentially offer foot voters an even wider range of options

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<sup>94</sup> See the discussion of moving costs as an important constraint on foot voting in Section II.A above.

<sup>95</sup> For a survey and discussion of the relevant literature on agglomeration and its effects on foot voting, see David Schleicher, "The City as a Law and Economic Subject," *University of Illinois Law Review* (2010): 1507-64, pp. 1509-11, 1515-29, 1533-40.

and lower moving costs than local governments do. Obviously, a given area can potentially support a much larger number of private communities and contractors than local governments. This both widens the potential range of choice and reduces moving costs and agglomeration constraints still further. The same goes for concerns about optimal size and flexibility,<sup>96</sup> since private communities can alter their size and boundaries more easily than governments.

Unlike moves between local governments, foot voting in the private sector can potentially provide protection for immobile assets as well as mobile ones.<sup>97</sup> In the private sector, owners of immobile property can switch service providers and governance institutions without physically moving. For example, they could contract with a different security firm to provide protection, a different trash removal firm to deal with waste, or even a different agency to manage their private planned community.

As with local governments, private planned communities can better facilitate foot-voting if they are allowed to address a wider range of issues. Obviously, not all functions of local and state government can be carried out by private entities. But many potentially could be. By 2004, over 52 million Americans lived in private planned communities such as condominium associations.<sup>98</sup> These organizations often provide security, trash removal, environmental protection, local zoning rules, and other services that are traditionally controlled by local government.<sup>99</sup> Similar organizations have proven popular in Europe, Latin America, and parts of Asia.<sup>100</sup> The widespread popularity of these organizations despite the fact that residents

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<sup>96</sup> See, e.g., Levy, "Federalism, Liberalism, and Loyalty." 460-62.

<sup>97</sup> For the weaknesses of foot voting between government jurisdictions with respect to immobile assets, see Somin, "Federalism and Property Rights," and Section II.A above.

<sup>98</sup> Robert Nelson, *Private Neighborhoods and the Transformation of Local Government* (Washington, D.C.: Urban Institute, 2005), xiii.

<sup>99</sup> Ibid.

<sup>100</sup> See generally, Georg Glasze, Chris Webster, and Klaus Frantz eds., *Private Cities: Global and Local Perspectives*, (New York: Routledge, 2006).

effectively end up paying two sets of property taxes (one to the local government and one to the private community) is a testament to the generally high quality of the services they provide.<sup>101</sup>

Closely related to the idea of increasing the range of issues addressed by the private sector is Swiss economist Bruno Frey's proposal for non-territorially bound governments.<sup>102</sup> Frey contends that various government agencies providing different kinds of services could have overlapping jurisdictions, and that individual citizens can change government service-providers without a physical move. Something along these lines already exists in the field of commercial transactions in the US, where businesses and others are often able to choose for themselves which state's law will govern their dealings with each other, even if they do not actually reside in the state in question.<sup>103</sup> Abraham Bell and Gideon Parchomovsky have proposed a similar regime for property law, allowing landowners to choose to have their property governed by the laws of other jurisdictions with respect to various issues.<sup>104</sup> If these theories turn out to be viable, they could facilitate foot-voting in the public sector comparable to that which exists in the private.

In theory, devolution of greater authority to either local governments or private planned communities need not involve "federalism" in the sense of a legally enforceable sphere of autonomy that higher-level governments are forbidden to intrude upon. It might only require federalism in the more limited sense of multiple jurisdictions.<sup>105</sup> A higher-level government might retain the right to override local communities or private organizations, but rarely or never

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<sup>101</sup> This point is well articulated by Robert H. Nelson, "The Puzzle of Local Double Taxation: Why do Private Community Associations Exist?" *Independent Review* 13 (2009): 345-65.

<sup>102</sup> See Bruno Frey, "A Utopia? Government Without Territorial Monopoly," *Independent Review* 6 (2001), pp. 99-112; Bruno Frey, *Happiness: A Revolution in Economics* (Cambridge: MIT Press, 2008), 189-97; Bruno S. Frey and Reiner Eichenberger, *The New Democratic Federalism for Europe: Functional, Overlapping, and Competing Jurisdictions*, (London: Edward Elgar, new ed. 2004).

<sup>103</sup> See Erin O'Hara and Larry Ribstein, *The Law Market*, (New York: Oxford University Press, 2009).

<sup>104</sup> Abraham Bell and Gideon Parchomovsky, "Of Property and Federalism," *Yale Law Journal* 115 (2005): 72-115, 101-13.

<sup>105</sup> See discussion in Section I.C.

exercise it. In practice, effective devolution often does require a sphere of juridical autonomy for lower-level governments and private communities.<sup>106</sup> But the extent of this dependence need not be resolved here. What is crucial for present purposes is that devolution of power “all the way down” can increase the value of foot voting.

### *Downsides of Decentralization*

Obviously, the advantages of “all the way down” decentralization for foot voting do not mean that all functions of government should be decentralized as much as possible or transferred to the private sector. A variety of other considerations must be weighed in determining the appropriate degree of centralization and privatization in a political system. For example, local governments and private sector actors often cannot effectively handle large-scale externalities, such as pollution that crosses multiple jurisdictional lines.<sup>107</sup> The fact that devolution of power to local governments facilitates foot voting does not mean they are capable of handling a global externality such as global warming. Some scholars also contend that subnational governments cannot effectively engage in redistribution to the poor, for fear of becoming “welfare magnets” that attract migrants who consume more in welfare services than they pay in taxes.<sup>108</sup>

Externalities, redistribution, and various other issues must be considered in any comprehensive theory of federalism. The key point here is that devolution “all the way down” can augment the effectiveness of foot voting as a tool for exercising political freedom. This

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<sup>106</sup> See, e.g., McGinnis and Somin, “Federalism vs. States’ Rights.”

<sup>107</sup> See Richard Revesz, “Federalism and Interstate Environmental Externalities,” *University of Pennsylvania Law Review* 144 (1996): 2341-2402. Many smaller-scale externalities, however, can be handled by negotiation between local governments. See Thomas W. Merrill, “Golden Rules for Transboundary Pollution,” *Duke Law Journal* 46 (1997): 931-1019.

<sup>108</sup> See, e.g., Paul Peterson, *The Price of Federalism*, (Washington, D.C: Brookings Institution, 1995). For a critique of the conventional wisdom on this issue, see Frank H. Buckley and Margaret Brinig, “Welfare Magnets: The Race for the Top,” *Supreme Court Economic Review* 5 (1997): 141-77.

consideration should be an important factor in the discussion over federalism, one that is currently often neglected.

## **B. All the Way Up: Foot Voting Across International Boundaries.**<sup>109</sup>

The potential foot voting gains from free international migration are even greater than those possible through foot voting within a single state. The variation in policy and quality of government between nations dwarfs that between subnational jurisdictions within any one nation. No American state, for example, is as poor or corrupt as Mexico, to say nothing of far worse off Third World Nations. A Mexican who migrates to the United States stands to increase his or her wages by two to six fold, and this does not even take into noneconomic benefits of migration.<sup>110</sup> A migrant from a repressive authoritarian state to a liberal democracy enjoys a quantum increase in individual freedom, greater than any that is likely to be achieved through internal migration alone.

In addition, for much of the world's population, international migration is virtually their only chance of exercising any political freedom at all. Almost 2.5 billion people live in the 48 countries designated as "not free" in Freedom House's most recent annual survey of political freedom.<sup>111</sup> In "not free" states, "basic political rights are absent, and basic civil liberties are widely and systematically denied."<sup>112</sup> In these countries, there is little if any democratic control of government. Another 1.5 billion people live in the 60 "partly free" countries, where political

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<sup>109</sup> I have explored some of the issues considered in this section, in more detail in Somin, "Tiebout Goes Global: International Migration as a Tool for Voting with Your Feet," and Ilya Somin, "Immigration and Political Freedom," *International Affairs Forum* (Fall 2010): 38-43.

<sup>110</sup> Somin, "Tiebout Goes Global," 1259. Similar gains are realized by other migrants from poor nations to wealthy ones. See Lant Pritchett, *Let Their People Come: Breaking the Gridlock on Global Labor Mobility*, (Washington, D.C.: Center for Global Development, 2006).

<sup>111</sup> Freedom House, *Freedom in the World 2012*, (New York: Freedom House, 2012), 3-4.

<sup>112</sup> *Ibid.*, 4.

rights and democracy are still very limited.<sup>113</sup> For the vast majority of people living in “not free” societies and many of those in “partly free” ones, international migration is probably the only way for them to have any say in deciding what kind of government they wish to live under, short of violent revolution. That greatly differentiates their condition from that of internal migrants within a federal system in liberal democracies.

Unfortunately, most citizens of poor and oppressive nations are severely limited in their emigration options, because advanced liberal democracies greatly restrict migration options. Even for refugees from highly oppressive governments, gaining admission to advanced democratic states is often difficult or impossible.<sup>114</sup> As a result hundreds of millions are denied their only possible opportunity for political freedom, as well as their best chance of escaping other forms of oppression and rising out of poverty.

For these reasons, there is a strong case for liberalizing immigration law in liberal democracies, especially for migrants from authoritarian states where the population lacks even minimal political rights. If political freedom is ever a morally significant concern in public policy, it should be here.

The most intuitively obvious response to this kind of case for migration rights is that Western nations are not responsible for the political oppression experienced by citizens of dictatorships, and is not required to affirmatively aid these victims of the wrongdoing of others. But Western nations that severely restrict immigration are not mere passive observers of political oppression. Their governments are actively using force and the threat of force to compel would-be migrants to stay in their own countries or depart from the West if they have entered

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<sup>113</sup> Ibid., 3-4.

<sup>114</sup> See Somin, “Tiebout Goes Global,” 1260-61.

illegally.<sup>115</sup> Even when these migrants seek only to obtain jobs from employers voluntarily willing to hire them, Western governments still use the threat of force to deport them. While the United States and other liberal democracies may not be responsible for the oppression of authoritarian regimes, they *are* responsible for their own use of the threat of force to deny political freedom to migrants seeking to escape from these countries.

A regime of relatively free international migration would replicate on the international stage many of the benefits of foot voting in a domestic federal system. Unfortunately, the presence of much higher moving costs would make it difficult for many to take full advantage of these potential benefits. International migrants not only often have to travel greater distances than domestic ones; they also often face more difficult cultural and linguistic adjustments in their new homes. But these “natural” barriers to movement should at least not be reinforced by the artificial ones imposed by migration restrictions.

A regime of much greater freedom of movement across international boundaries would not necessarily result in a federal system in a traditional sense, in so far as the latter requires a single, unitary sovereign.<sup>116</sup> But it would replicate partially domestic federalism in so far as there would be multiple competing sovereigns that are economically interconnected, and that individuals can choose between. One can easily imagine quasi-federal international arrangements that fall well short of imposing a single global sovereign.<sup>117</sup> In any event, even if free international migration does not necessarily lead to the creation of any truly “federal”

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<sup>115</sup> This point is effectively developed in Michael Huemer, “Is There a Right to Immigrate?”, *Social Theory and Practice* 36 (2010): 429-61.

<sup>116</sup> This is the more common sense in which some political theorists propose extending federalism “all the way up”: some sort of global federal state. See Halberstam, “Federalism,” pp. 605-07. For a recent defense of world government, see Craig Campbell, “The Resurgent Idea of World Government,” *Ethics and International Affairs*, (2008), available at [http://www.cceia.org/resources/journal/22\\_2/essay/001.html](http://www.cceia.org/resources/journal/22_2/essay/001.html)

<sup>117</sup> Ibid., 606.

system, its costs and benefits have much in common of those of domestic migration under federalism, and can usefully be considered in tandem.

The enormous potential benefits of free international foot voting do not necessarily prove that the United States and other advanced democracies must adopt a complete “open borders” policy. Political freedom and other arguments for liberalizing immigration could potentially be outweighed by other values in particular cases. For example, critics of immigration argue that free migration might undermine recipient nations’ economies, create a dysfunctional class of welfare dependents, or undermine the host nations’ culture. However, the denial of political freedom through foot voting to hundreds of millions of the world’s most oppressed people is an extremely important moral issue, even if it does not always outweigh competing considerations. So far, unfortunately, it has received little consideration in the ongoing political debate over immigration policy in the United States and Western Europe.

Moreover, to the extent that competing considerations are present, we should consider whether they can be addressed by measures less harsh than expelling would-be migrants and returning them to a life of poverty and denial of political freedom. For example, the possible burden that migrants impose on welfare state programs can be mitigated by requiring recent immigrants to pay extra taxes.<sup>118</sup>

There may indeed be extreme cases where migration restrictions really are the only way to prevent some great harm.<sup>119</sup> But we should carefully consider less draconian alternatives before accepting such a conclusion.

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<sup>118</sup> For this and other less-coercive alternatives to migration restrictions, see Bryan Caplan, “Why Should We Restrict Immigration?” *Cato Journal* 32 (2012): 5-24. Neither Caplan nor I necessarily endorse these ideas as first-best policies. But they are usually less bad than denial of migration rights.

<sup>119</sup> For some possible scenarios, see Somin, “Tiebout Goes Global,” 1263.



## Conclusion

Foot voting under federalism is an important dimension of political freedom. To realize its benefits as fully as possible, political power should be decentralized to a greater extent than might otherwise be optimal. At the same time, migration should be as free as possible across both domestic and international boundaries.

Foot voting is not the only worthwhile element of political freedom, and it is certainly not the only factor that must be considered in the design of federal systems. But it is an important consideration whose value is too often ignored.