We hear a lot today about federalism, the doctrine that emphasizes the rights and powers of the states versus those of the federal government. The political Right expresses alarm at the dramatic expansion in central government power that began under George W. Bush during the 2008 financial crisis and that continued during Barack Obama’s first eighteen months in office, first through the government’s bailouts of financial institutions and the auto industry and then through the passage of the landmark national health care bill. Liberal groups, on the other hand, have turned to federalism in response to the perceived failure of the federal government during the Bush years to address major economic, social, and ecological challenges. Progressive Californians, for example, have been pushing ecologically friendly bills in their state, given the obstructions such legislation has faced in Congress. Massachusetts enacted its own government health care bill in response to a long period of federal inaction on the issue. Many gay marriage and marijuana legalization advocates now believe that they can accomplish more in state rather than national arenas. These advocates want to “free” their states from the grasp of federal authority on the issues that matter most to them. In this essay I explore the historical background to the current interest in federalism and argue that the powers possessed by state governments throughout the nineteenth and early twentieth centuries were more capacious, influential, and resilient than we customarily recognize them to have been. The durability of the states as a force in economic, social, and cultural affairs can only be understood by reference to an expansive and constitutionally sanctioned doctrine of police power. Police power endowed state governments (but not the federal government) with broad authority over civil society for at least the first 150 years of the nation’s existence. The Civil War posed a sharp challenge to this doctrine, and, for a time, it seemed as though Reconstruction would inter it. But in the late nineteenth century, state legislatures, backed by the federal courts, rehabilitated this doctrine to attack and, in many cases, to reverse the centralization of power in the federal government that the Civil War seemed to have done so much to advance. Federalism finally did weaken in the 1930s and 1940s, but not until the 1960s and 1970s can we say that the central government had superseded the states as the premier center of political authority in America. Federalism’s demise, then, is still a relatively recent phenomenon, a fact that fuels the hopes of those who want to see it revived.

In the first half of the nineteenth century, state governments’ involvement in economic affairs exceeded that of the federal government, both in terms of total funds expended and the variety of projects undertaken. Antebellum state governments, for example, spent far more on internal improvements ($300 million) than did local governments ($125 million) or the federal government ($7 million). They were more directly involved than was the federal government in the organization and direction of internal improvement initiatives. The outstanding example of this tendency was the Erie Canal, built by New York State in the 1820s. Although Pennsylvania had no one project of comparable size and importance, it did expend, from the 1820s through the 1840s, more than $100 million on a comprehensive...
internal improvement program of railroads, canals, and roads.

More common were mixed enterprises, in which the state joined with a private bank, transportation company, or manufacturing enterprise, with both partners sitting on a project’s board of directors, equally responsible for investing money, hiring workers, and managing the project. By the early 1840s, Pennsylvania had invested over $6 million in more than 150 such enterprises.

Until the right of incorporation became generally available in the 1840s and 1850s, state governments sometimes used their chartering rights to direct and control private investment. Entrepreneurs had to petition state governments for the privilege of incorporating themselves, and state governments often attached conditions to the charters they granted: through which cities, for example, a transportation company had to build its railroad; to what private ventures a bank was required to lend or grant its money; what standards manufacturers had to meet in producing their goods. Finally, some state governments passed laws limiting the liabilities and punishment of debtors and regulating the conditions of workers by curtailing child labor and limiting the hours of adult labor.

But considering only states’ economic power underestimates the true scope of state activity: the power that states exercised in noneconomic areas such as public health and safety, moral behavior, marriage, and immigration. State governments possessed a staggering freedom of action when compared to the carefully circumscribed orbit of federal government power. This freedom rested on a doctrine of “police power” that was rooted in both Anglo-American common law and continental European jurisprudence and was reinforced by the U.S. Constitution.

In the words of nineteenth-century Massachusetts Supreme Court Chief Justice Lemuel Shaw, police power was the “power vested in the [state] legislature to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances...not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth.” The crucial phrase in Shaw’s definition is the last, “for the good and welfare of the Commonwealth,” which reveals a definition of police power that exceeds our modern, commonsense notion of what it is that police do. The “good and welfare of the Commonwealth” certainly encompassed the customary tasks that we associate with policing: the protection of life, property, and public order. But, in nineteenth-century legal terms, it also included such tasks as the direction of internal transportation improvements; controls on capital and labor; the building of schools, libraries, and other educational facilities; identification and regulation of proper moral behavior; town planning; and public health. As long as an activity could be associated with the public welfare and did not violate the Constitution, a state legislature could pursue it through social policy.

The powers the Constitution granted to the states were vague and virtually unlimited. As the critical Tenth Amendment declared, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the people.” The very refusal to name the powers of state governments meant that the potential power to be exercised by these institutions was vast. State governments could undertake any activity not specifically reserved for the federal government or proscribed by the Constitution.

State and local governments did not just take upon themselves the power to regulate commerce, manufacturing, and labor relations. They also made private (and non-economic) behavior—drinking, gambling, theater-going, prostitution, vagrancy, the flying of kites—matters of public welfare and regulation. Much of the justification for this moral regulation rested on an old common law “nuisance” doctrine that allowed public authorities to act against anybody who was thought to offend public order or comity. In the early nineteenth century, the concept of nuisance expanded from addressing those problems that virtually anyone would agree presented a hazard to the community—a cow carcass rotting in the street, a ship full of diseased sailors—to acts that depended more on one’s interpretation of proper moral behavior: drinking, gambling, theater-going, prostitution, vagrancy.

The Constitution permitted slavery, but the
decision about the legitimacy of the institution was left for each state to decide for itself. The Southern states were convinced that a well-regulated society and one that served the “people’s welfare” had to be one grounded in the enslavement of their resident African populations. Because they had stripped Africans of their humanity, white Southerners had little difficulty excluding them from the definitions of the “people” and the “people’s welfare.” The extraordinary power vested by common law and the Constitution in the hands of state governments became “states’ rights”: a doctrine that white Southerners were willing to—and did—defend with their lives.

The Civil War is often thought to mark a transition in the history of the American government, with the victory of the North ensuring both the triumph of federal over state authority and the transformation in conceptions of the scope and uses of federal power. The Thirteenth and Fourteenth Amendments directly challenged prevailing conceptions of states’ rights: the former did so through the emancipation of the slaves, which stripped tens of thousands of white Southerners of human property hitherto protected by the laws of their states; the latter did so by transferring the power to grant citizenship and enforce its rights from the states to the federal government.

Yet the end of Reconstruction in 1877 should caution us against drawing too straight a line of influence to the federal-state centralizing tendencies of the Progressive Era and New Deal. Indeed, in what legal scholars regard as one of the key constitutional developments of the late nineteenth century, the Supreme Court, in the 1870s and 1880s, restored to the states expansive notions of police power that Reconstruction, and the Thirteenth and Fourteenth Amendments in particular, had taken away.

From the late nineteenth century through the first quarter of the twentieth, many states exercised what in other societies would be regarded as sweeping forms of control over individual behavior: prohibition of the sale and consumption of alcohol; forced separation of the colored and white populations; and the banning of polygamy, prostitution, contraception, and interracial marriage. The federal government participated in and encouraged this regulatory regime—outlawing polygamy in 1862, banning birth control materials from the U.S. mail in 1873, and prohibiting the transport of women across state lines for sexual purposes in 1911. But even as the federal government expanded its control during this time, the power to legislate moral life remained largely within the province of the states, part of the authority they derived from their police powers. And the Supreme Court repeatedly upheld the states in their rights to exercise their police powers in this way.

Thus, in a series of civil rights cases culminating in the notorious Plessy v. Ferguson (1896), the Supreme Court ruled that the police power doctrine entitled state governments, acting on behalf of the “people’s welfare,” to separate the black race from the white and to deny African Americans freedom of movement, assembly, and participation in institutions designated as white. The courts upheld the legitimacy of such separation even in the face of claims by corporations (such as railroads) that these segregationist practices interfered with the principle of laissez-faire, which they understood to be their constitutionally guaranteed freedom to do business and make money as they pleased.

The resurgence in the states’ police power can be discerned equally well in matters pertaining to interracial marriage. The regulation of marriage had always been regarded as lying within the authority of the states. In the early- to mid-nineteenth century, movements arose to enhance the freedom of individuals to choose their marriage partners, which meant treating marriage as a contract freely undertaken by two individuals and not as a civic act in which government, on behalf of the people of that state, took an interest. This tendency marked the increasing sway of laissez-faire in personal life. But a reaction against this liberal approach gathered force in the last third of the nineteenth century amid growing fears that emancipation, urbanization, and immigration were creating general social disorder and too many worrisome sexual and marital unions. Nowhere was this reaction more apparent than in the strengthening of state laws outlawing miscegenation. Emancipation and Reconstruction had temporarily created a
favorable climate for legalizing interracial romance and marriage, but by 1882, the U.S. Supreme Court declared that “the higher interests of society and government” permitted a state to exercise its police power to regulate both sexuality and marriage as it saw fit.

With this sanction from on high, twenty states and territories, between the 1880s and the 1920s, strengthened their bans on interracial sex and marriage or added new ones. These laws appeared not only in Southern states but in Northern and Western ones as well. Many states extended the prohibition on intermarriage from whites and blacks to whites and Asians and whites and Native Americans.

The federal courts eventually did carve out a sphere of individual rights that no government, state or federal, could abrogate. The elaboration of these protections was part of a long “incorporation” process through which the federal government compelled the states to recognize the primacy of individual rights set forth in the Constitution, the Bill of Rights, and subsequent amendments. In the process, the federal government diminished the police powers of the states. But what impresses one about this story is how long it took to create that sphere and how resistant state governments and the federal courts were to its claims. Only the civil rights revolution of the 1960s dislodged the police power doctrine from its exalted perch.

This resistance to recognizing individual rights as primary occurred in a society that has always thought of itself as granting individuals inalienable rights to life, liberty, happiness, and property. But under the police power doctrine, state governments could regulate, even obliterate, many of these rights, and did so for almost two hundred years. They did so even in moments, such as the New Deal era, that we regard as laying the groundwork for the mid-twentieth-century “rights revolution.”

Thus, during the New Deal, no state government had to worry that its right to sustain Jim Crow or anti-miscegenation law was imperiled. The repeal of Prohibition in 1933 actually triggered a strengthening of the police powers of the states in regards to “sexual deviants,” whom state agencies began sweeping from city streets, bars, and other public places. These state regimes of moral regulation did not always work as well in fact as they were designed to on paper because it was difficult to achieve the kind of uniformity across states that successful enforcement required. State governments always suffered from a key weakness: they could not control the movement of people in and out of their territory. Because states were often in competition with each other for laborers, industry, investment, immigrants, and settlers, some were always seeking to attract the desired people and commodities by instituting what they understood to be attractive, and liberal, laws. New Jersey and Delaware long sought to draw industry by making public incorporation easier in their states than in any others. A number of states, beginning with Connecticut in the nineteenth century and reaching Nevada in the twentieth, always made it much easier than in most other states for unhappy couples to secure a divorce. Today, some homosexual couples wanting to marry think about moving to Vermont, Massachusetts, and other states that have legalized same-sex civil unions and/or marriage.

The New Deal did create a new federal state, one that was ready, even eager, to interfere with the rights of capital and property to achieve its ends. In the process, it secured, through the commerce clause, a surrogate police power that finally allowed it to assume powers to protect the people’s welfare that had hitherto been reserved to the states. That Franklin Roosevelt, in 1937, attempted to “pack” the Supreme Court with liberal judges in order to generate majorities that would uphold the constitutionality of key New Deal legislation testifies to the far-reaching nature of the changes in federal governance he and his supporters had introduced.

And yet the New Deal, too, had to adapt to traditional patterns of governance. New Dealers proved solicitous of state governments. In distributing relief and welfare, they found themselves partnering with the states. The Federal Emergency Relief Administration (FERA) turned to state agencies to distribute direct grants and established a system of matching grants that required states to put up three dollars for every one dollar of federal relief largesse. A similar system prevailed in the Social Security Administration. Although old-
age insurance was a purely federal program, unemployment insurance and other so-called “categorical” forms of assistance—subsidies for the needy, aged, blind, and dependent children—were not. States were expected to fund their own unemployment insurance programs in return for federal tax relief. This system gave individual states the autonomy to choose the scale and beneficiaries of welfare expenditures in their polities and produced, not surprisingly, many little, disparate welfare states rather than one big, uniform one.

The surprising resilience of state governments during the New Deal can be explained by several factors: the lack of bureaucratic and administrative capacity at the federal level and the impossibility, given the imperative of responding quickly to the economic crisis, of waiting patiently for it to develop; the New Dealers’ need to win, in Congress, the support of those, especially Southern Democrats, who feared establishing too centralized and bureaucratic a federal state; and the desire to write legislation that would pass constitutional muster.

The national welfare and relief legislation enacted by New Dealers in the 1930s, then, diminished but did not extinguish the power of state governments; the tradition of state governance was simply too old, too honored, and too strong. A new system had to be built on the structure of the old, which often led to patterns apparent in the New Deal and beyond: political compromises and governing arrangements that sometimes tied the federal government up in knots and made efficacious social policy difficult to deliver.

Only in the 1960s did political protest and central government pressure finally break this formidable pattern and undermine the concept of states’ police powers that lay at its core. The civil rights movement triggered this change. The association between white supremacy and federalism, or “states’ rights,” ran so deep that a frontal assault on one was bound to generate an assault on the other. It quickly became clear that dismantling Jim Crow in the South required the central government to assert its power over that of the states. Specifically, this meant that the central government had to insist on its constitutional obligation to ensure that every American be able to exercise his/her inalienable rights even if that meant nullifying the police powers long exercised by the various states.

Thus, in the 1960s the federal government crossed lines in its relations with the states that it had declined to traverse in previous eras of liberal reform. Title VI of the 1964 Civil Rights Act made that act the first federal law specifically to prohibit the use by states of racially discriminatory criteria in distributing federal grants-in-aid monies. The 1965 Voting Rights Act gave the federal government authority to reform electoral rules that had long been regarded as the exclusive domain of state and local governments. The 1965 Medicaid program expanded the power of the federal government by requiring individual states to provide certain kinds of medical assistance to the poor; unlike the welfare programs of the 1930s, Medicaid’s provisions prohibited states from deciding on their own whether or not they wanted to participate in this federal program. By the late 1960s, too, the federal government was determining eligibility requirements for AFDC to an unprecedented degree. In undertaking these actions, the federal government was curtailing the autonomy of the states to determine the kind of public welfare that would exist within the latter’s borders.

The federal courts participated in this assault on federalism, not only by upholding the constitutionality of legislation discussed above but through “judicial legislation” that they fashioned out of lawsuits that individual Americans were bringing before the federal bench. *Baker v. Carr* (1962) asserted the federal government’s power to oversee electoral redistricting, a process that had belonged to the states. *Miranda v. Arizona* (1965), which insisted that individuals being arrested possessed rights that law enforcement had to respect, placed local police under the strictest federal scrutiny they had known. *Loving v. Virginia* (1967) inserted the Constitution into another area of law, marriage, regarded as the province of the states.

The comprehensive shift in power from the states to the federal government occasioned by the assault on Jim Crow made possible the greatest advances in racial equality in a century. It also triggered a “rights revolution,” as indi-
individuals of all kinds now came forward to insist on fundamental constitutional rights that no government in America could touch. These included the right to marry a person of one’s own choosing; the right to privacy; the right to an abortion; and the right to equal opportunity irrespective of one’s gender, sexuality, religion, or race.

Of course states did not disappear. They never will. The American polity continues to comprise tens-of-thousands of distinct jurisdictional units—more than 89,000 in 2008—including not just the states themselves but all the counties, towns, special districts, and schools that fall under state control. Employment in state and local government grew enormously in the Great Society years and beyond. The federal government’s imposing its will on this densely populated government landscape was not an easy thing to do; the possibility for federal policy failure or cooptation due to jurisdictional fragmentation, incompetence, or self-interestedness was ever present, and it still is. But the changes of the 1960s eviscerated the foundation on which states had built and accumulated their authority: the police power doctrine.

That the 1960s period of change was different from earlier ones becomes clearer if we compare it to the shift in federal-state relations that occurred during the Civil War and Reconstruction. In both periods there were basic shifts of power from the states to the central government, followed by concerted efforts to restore to the states the powers that had been taken away. During the Nixon administration, Republican conservatives rolled out a “New Federalism” to restore states’ rights. This became a central ambition of Supreme Court Justice William Rehnquist and the conservatives who sat on his court from 1986 to 2005. Rehnquist achieved some notable successes in restoring rights to the states, especially during cases decided in the late 1990s. But overall the achievements of this federalist resurgence have been rather modest in comparison to those of the Supreme Court of the 1880s and 1890s. Rehnquist long believed that the Supreme Court’s decision in Brown v. Board was wrong and that the Court should have used the opportunity presented by Brown to reaffirm its 1896 Plessy v. Ferguson ruling (to allow states to decide whether or not to enact segregationist policies).

But Rehnquist never dared, in his long tenure as chief justice, to associate his name with a case of Plessy-like content and magnitude.

The weakening of federalism went hand in hand with the central government’s determination to make itself the guarantor of the individual rights of all Americans—black and white, minority and majority, female and male, homosexual and heterosexual. In this respect, the decline of federalism made possible the advance of egalitarianism.

The relationship of federalism’s decline to the pursuit of economic or class equality in America is a more complex matter. We can find many cases in American history of state and local elites using federalist structures to enrich and empower themselves, impoverishing and immobilizing poorer Americans in the process. But state and local governments were hardly the only portals through which private power influenced American democracy. Anyone who has looked carefully at the last quarter century of economic-government relations has noticed that private interests can penetrate central governing institutions as thoroughly as they have at the state and local levels.

There is also a long and rich history of state governments using their police powers to corral private economic power for the public good. In the antebellum years, state governments often inserted public obligations into the charters that they granted private corporations. In the Gilded Age, states passed a blizzard of laws to regulate corporate behavior in the public interest. In the Progressive Era, the states were in the vanguard of reform efforts to assert the priority of the “people” over the “interests.” They passed laws to regulate workplaces, to provide welfare for citizens unable to care for themselves, to limit the influence of corrupt private interests on politics, and to increase the direct influence of people on politics by embracing the initiative, referendum, and recall.

Liberal scholars have often criticized these efforts as futile because the power of corporations has grown too great for any one state to control. Only the central government, they have argued, has possessed the necessary muscle to subdue corporate power. This criticism is fair, but not complete (and the
argument about scale has gotten more complicated in light of the fact that corporations are now global and have extended their reach beyond the point where central governments can enforce their sovereign power). State-level efforts failed as well because the federal courts increasingly exempted corporations from the control of state legislatures. One of the strangest stories of American history is how nineteenth-century courts began to identify corporations as “individuals” whose constitutional rights no government could touch. (The strangeness of this story lies both in the willingness of the courts to transmute corporate bodies into individuals and in the fact that the courts extended these rights to few other groups of individuals until the 1960s). Treating corporations in this way allowed the federal courts to protect incorporated institutions from the police power of the states in which they did business. By the time of the New Deal, it was axiomatic in reform circles that the states could not regulate corporations and that only a dramatic expansion in the power of the national government could accomplish this task.

Liberals and the courts acted on this axiom—and responded to the capitalist crisis caused by the Great Depression—by elevating the Constitution’s commerce clause into a surrogate police power doctrine that empowered the federal government to regulate the private economy in the public interest and thus enabling it to succeed where the states had failed. A dramatic growth in the size and effectiveness of the central regulatory state ensued across the next forty years.

But in addressing the legacy of New Deal, we have to ask whether the egalitarian gains of the centralized regulatory state and of substituting a national police power doctrine for that of the states endured. It is remarkable that the Second Gilded Age of the late twentieth century (1980s–1990s) generated so little collective protest about economic inequality, especially when compared to the scale and intensity of these sorts of protests that erupted during the First Gilded Age of the late nineteenth century.

Is it possible that the weakening of federalism that began in the 1930s and that was dramatically accelerated by the rights revolution of the 1960s stripped Americans of one of their most important languages for asserting, as Theodore Roosevelt did in 1910, that “every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it”? What if the concept of police power as deployed at the federal level cannot be (except at moments of emergency such as depression and war) a robust vehicle for asserting the priority of the commonwealth over private interests? What if the rights revolution of the 1960s has so prioritized individual equality that collective equality has become much harder to attain?

If the answers to any of these questions turn out to be yes, then there may be good reason to encourage progressive forms of federalism to develop. These federalisms would stress the capacious power of government that resides in the states, would call on states to act in the public interest, and would seek to turn state governments into what the liberal jurist Louis Brandeis once celebrated as “laboratories of democracy.” These “government labs” would, in the best-case scenario, develop creative, local, and diverse solutions to economic and social problems that America confronts, with the most successful ones being adopted by the federal state and adapted to problems that are national in scope. Such a process, too, might even resuscitate a popular belief in the capacity of active governments at all levels to expand opportunity and promote equality. It may be that the government’s evolving commitment to public health care, beginning in Massachusetts and then adopted and adapted by the federal state for the nation as a whole, will one day be understood in these terms. Perhaps California will forge a similarly pioneering role in stimulating or compelling a federal engagement with climate control.

This approach to federalism should not be confused with what right-wing federalists have in mind: dismantling the central government as we know it. Such a dismantling entails eliminating fundamental federal government programs, including Social Security, the Civil Rights Act of 1964, Medicare and Medicaid, and even the Internal Revenue Service. We’ve already experienced one such counterrevolution against federal power—that which occurred in the nineteenth century, in the aftermath of the Civil War and Reconstruction.
To undertake another one now would require a level of disruption far greater than what Americans experienced in the late nineteenth century: the density of federal programs is much thicker than it was then, and the jurisprudence supporting it has become far more woven into both legal and social life. A seismic rollback is, of course, precisely what archconservatives desire. But it is not what most Americans, not even a majority of Republicans, desire. Nor would it be good for America. A progressive version of federalism seeks something else: public policy experimentation that triggers a revival in the possibilities of state action at all levels of government.

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