

# Madison 2.0—Applying the Constitution’s Taxing and Spending Clause to Revitalize American Federalism

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#### INTRODUCTION

Living during yet another wave of COVID-19 contagion and watching the tragic events surrounding the Russian invasion of Ukraine, I am struck by the fact that America has largely lost the benefits of Madisonian federalism.<sup>1</sup> The federal government has resuscitated domestic demand through several rounds of fiscal, monetary, and regulatory stimuli,<sup>2</sup> and has been instrumental in procuring, approving, and distributing vaccines that are highly effective at protecting against the most harmful effects of COVID-19.<sup>3</sup> By contrast, outside of crude mandatory closures, state governments have proven themselves altogether incapable or unwilling to address the COVID-19 pandemic's effects, especially on socioeconomically marginalized households affected by economic dislocation.<sup>4</sup> Indeed, the lack of state fiscal capacity contextualizes the inordinate pressure placed on state governments to authorize the irresponsible reopening of businesses and schools in May

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1. It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representatives too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

THE FEDERALIST NO. 10 (James Madison).

2. *Fact Sheet: President Biden's New Executive Actions Deliver Economic Relief for American Families and Businesses Amid the COVID-19 Crises*, THE WHITE HOUSE (Jan. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/22/fact-sheet-president-bidens-new-executive-actions-deliver-economic-relief-for-american-families-and-businesses-amid-the-covid-19-crises/> [<https://perma.cc/7SDD-23NX>].

3. *National COVID-19 Preparedness Plan*, THE WHITE HOUSE, <https://www.whitehouse.gov/covidplan/> [<https://perma.cc/SLS5-GG4P>].

4. See Claudia Deane, Kim Parker & John Gramlich, *A Year of U.S. Public Opinion on the Coronavirus Pandemic*, PEW RSCH. CTR., <https://www.pewresearch.org/2021/03/05/a-year-of-u-s-public-opinion-on-the-coronavirus-pandemic/> [<https://perma.cc/P77T-KRVB>].

2020,<sup>5</sup> a full seven months before the Food and Drug Administration (FDA) gave emergency approval to administer COVID-19 vaccinations.<sup>6</sup> To the degree some state governments have sought to take on a larger role, it has been one of recalcitrance and irresponsibility, as evidenced by many state governments banning mandatory vaccination requirements or mask mandates by state agencies, including public colleges and universities.<sup>7</sup>

The COVID-19 pandemic is evidence that state governments are not the muscular laboratories of democracy we imagine them to be. Rather, they tend to be cash-strapped jurisdictions that are more akin to governments in developing countries than those of rich and mature democracies. While state and local governments have sufficient resources to undermine their inhabitants' human development by regressively allocating education, health, infrastructure, and criminal justice resources, they lack sufficient resources to remediate the nationwide problem of socioeconomic stagnation. This is highly problematic because much of the authoritarianism and democratic retrogression evidenced in the U.S. today is fed by the electorate's socioeconomic immobility. Recent examples of government dysfunction and political hyper-polarization during the Obama, Trump, and Biden administrations, as well as current polling evidence, portend both the executive and legislative branches of government being subject to authoritarian control.<sup>8</sup> It cannot be forgotten that the nation's forty-fifth president exploited the COVID-19 pandemic to worsen partisan divisions,<sup>9</sup> repeatedly made false claims of election fraud to undermine the legitimacy of the popular and Electoral College vote count favoring his opponent, Joe Biden, and incited a large mob to storm the U.S. Capitol in an effort to prevent the House of Representatives from finalizing the Electoral College vote.<sup>10</sup> Although this led to President Trump's subsequent impeachment by the House of Representatives for

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5. See Map: *Where Were Schools Required to Be Open for the 2020-21 School Year?*, EDUC. WK. (June 14, 2021), <https://www.edweek.org/leadership/map-where-are-schools-closed/2020/07> [<https://perma.cc/E8BJ-PMHM>].

6. Fourth Amendment to the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19 and Republication of the Declaration, 85 Fed. Reg. 79190–98 (Dec. 9, 2020).

7. Elliott Davis, Jr., *States Are Banning COVID-19 Vaccine Requirements*, U.S. NEWS (Apr. 30, 2021), <https://www.usnews.com/news/best-states/articles/2021-04-30/these-states-are-banning-covid-19-vaccine-requirements>.

8. Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1684–87 (2015).

9. Karen J. Greenberg, *6 Ways Trump Is Exploiting this Pandemic for Political Gain*, THE NATION (Apr. 8, 2020), <https://www.thenation.com/article/politics/coronavirus-trump-immigration-election/> [<https://perma.cc/L85B-CEQU>].

10. Matt Viser, *For Anti-Trump Americans, Calamity Spurs Sense of Vindication*, WASH. POST (Jan. 10, 2021), [https://www.washingtonpost.com/politics/capitol-riot—vindication-trump/2021/01/09/4195a966-5216-11eb-bda4-615aaefd0555\\_story.html](https://www.washingtonpost.com/politics/capitol-riot—vindication-trump/2021/01/09/4195a966-5216-11eb-bda4-615aaefd0555_story.html) [<https://perma.cc/QQ9T-5Z5B>].

Incitement of Insurrection,<sup>11</sup> his partisan acquittal by the U.S. Senate<sup>12</sup> and subsequent events, including his continued popularity with Republicans, and House Republicans' blanket refusal to cooperate with and participate in the House of Representatives' investigation into the events of January 6, 2021, exhibits the extent of the nation's authoritarian temptation.<sup>13</sup>

My proposal is for an enlightened federal government to enact legislation—using its broad ability to tax and spend for the general welfare—to revitalize, as opposed to undermine, American federalism. This is dramatically different from the federal government's historical use of the Spending Clause, which has been used to grow the federal government and undermine areas of historical state competency, such as pensions, education funding, prohibition of controlled substances, and health care regulation and provision.<sup>14</sup>

The proposal would have the federal government fund a dramatic expansion of state fiscal capacity by way of direct money transfers to state governments so that states can finally achieve their intended role in American federalism as police power jurisdictions that improve their inhabitants' living standards. This proposal is intended to be a loosely supervised conditional fiscal transfer payment system that would provide direct federal financial assistance to the states, in an amount based on the number of inhabitants in each state living in poverty, with the specific purpose of encouraging states to enact policies to both engender socioeconomic mobility and improve living standards. The federal government would give states broad discretion over the allocated federal funds insofar as that states can undertake heterodox policies to further human development based on local conditions.

This proposal, however, anticipates that states might reject the federal funds or prove manifestly incapable of using them effectively, especially in light of local political culture and social hierarchies that historically include antipathy towards the poor. In such a situation, the most vulnerable citizens are not to be punished, as was the case in states

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11. Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors, H.R. Res. 24, 117th Cong. art. 1 (2021).

12. *Roll Call Vote 117th Congress—1st Session*, U.S. SENATE, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=117&session=1&vote=00059](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=117&session=1&vote=00059) [<https://perma.cc/7RLY-QEZQ>] (The results were: fifty-seven voted guilty, which included all Democratic senators and five Republicans. Those who voted not guilty were forty-three senators, which failed the two-thirds majority required to pass the resolution.).

13. Ed Pilkington, “*US Democracy Will Not Survive for Long*”: *How January 6 Hearings Plot a Roadmap to Autocracy*, THE GUARDIAN (July 24, 2022), <https://www.theguardian.com/us-news/2022/jul/23/january-6-hearings-us-democracy-roadmap-autocracy> [<https://perma.cc/5PHK-TYAC>].

14. See generally *Nat'l Fed'n Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *South Dakota v. Dole*, 483 U.S. 203 (1987); *Gonzales v. Raich*, 545 U.S. 1 (2005).

such as my home state of Tennessee, which rejected the Affordable Care Act’s (ACA) Medicaid expansion.<sup>15</sup> Rather, when states reject the funds or manifestly fail to use them effectively, the federal government is to instead make direct payments to households living in poverty to ensure that no household within the state lives below the federal poverty level. In this sense, the proposal’s contingency plan is somewhat akin to the family assistance plan (FAP) first proposed by the Nixon Administration and approved by the U.S. House of Representatives in April 1970 before failing in the U.S. Senate.<sup>16</sup> However, unlike the extreme costs associated with Nixon’s FAP, or the plan recently mooted by former presidential candidate Andrew Yang—both of which would annually cost an estimated \$3 trillion<sup>17</sup>—my proposal would be far less costly because it would have the IRS make cash payments solely to bring households living in poverty up to the federal poverty line.<sup>18</sup> It would also likely be more politically feasible than a reconstituted FAP because it would not be characterized as a costly means of undermining work, but rather as a proper safeguard to revitalize Madisonian federalism, which has been undermined by the dynamics of American history. I call this proposal Madison 2.0.

#### I. AMERICAN FEDERALISM TODAY—THE NEED FOR AN UPDATED APPROACH

Madisonian federalism is premised on the idea that better public policy results when power is delineated between the federal and constituent state governments, with each state given broad police power jurisdiction to act as what Justice Brandeis referred to as “muscular”

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15. “[Tennessee Governor] Haslam announced Wednesday that he would not call for expanding TennCare, the Medicaid program that covers nearly one in five Tennesseans, in next year’s budget.” *Haslam Takes Gamble with TennCare Choice*, THE TENNESSEAN, Mar. 28, 2013, at A1; see also Rachana Pradhan, *Tennessee Turns Down Obamacare Medicaid Expansion*, POLITICO (Feb. 4, 2015), <https://www.politico.com/story/2015/02/tennessee-bill-haslam-medicaid-expansion-obamacare-114918> [<https://perma.cc/8VV8-QZFK>].

16. See F.E. Guerra-Pujol, *Guaranteed Income: Chronicle of a Political Death Foretold*, 23 CHAP. L. REV. 99, 110–116 (2020) (citing The Family Assistance Act of 1970, H.R. 16311, 91st Cong. (1970)).

17. See Dan Cooney, *How Would Andrew Yang Give Americans \$1,000 Per Month? With this Tax*, PBS (Sept. 9, 2019), <https://www.pbs.org/newshour/politics/how-would-andrew-yang-give-americans-1000-per-month-with-this-tax> [<https://perma.cc/5PZR-TZG6>]; see also Abby Vesoulis & Abigail Abrams, *Inside the Nation’s Largest Guaranteed Income Experiment*, TIME (Sept. 16, 2021), <https://time.com/6097523/compton-universal-basic-income/#:~:text=A%20UBI%20providing%20every%20American,collected%20in%20revenue%20last%20year> [<https://perma.cc/ZUX8-LLG4>].

18. See Cooney, *supra* note 17; see also OFF. OF THE ASSISTANT SEC’Y FOR PLAN. & EVALUATION, HHS POVERTY GUIDELINES FOR 2022, <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines> [<https://perma.cc/9AGZ-A5PB>].

laboratories of democracy.<sup>19</sup> Ideally, each constituent state would experiment with public policy alternatives, learn from neighboring states, and over time, arrive at laws and fiscal policies that are best suited to their inhabitants' needs.<sup>20</sup> These ostensible benefits never manifested for racial minorities, especially African American slaves, who were denied citizenship rights and the freedom of movement that Madisonian federalism is premised upon.<sup>21</sup> The resulting Civil War, which was based on the South's refusal to acknowledge the crime of slavery, forever altered the Madisonian framework by precluding secession and fundamentally altering the balance of power between the federal and state governments.<sup>22</sup> This realignment in the federal government's favor was furthered when the U.S. became the world's sole superpower after World War II and, as Steve G. Calabresi and Nicholas Terrell have written, the number of states, at fifty, has grown so large since the country's founding that power has inexorably drifted towards the federal government.<sup>23</sup> My proposal is premised on the idea that the fifty states cannot act as effective police power jurisdictions without Washington providing them with greater fiscal autonomy. This, in turn, requires the federal government to acknowledge the problem of authoritarianism and partisan gridlock in Washington and act as an enlightened hegemon that seeks to supplement the power of state governments by way of fiscal transfers.

#### *A. American Government Today—Dysfunction and Incapacity*

Today, the U.S. federal government is a victim of the dysfunction that characterizes today's Washington.<sup>24</sup> The chaos of the current political environment is caused by the political culture's increasing illiberalism and authoritarianism, including its hostility towards migrants and indifference

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19. Maeva Marcus, *Louis D. Brandeis and the Laboratories of Democracy*, in *FEDERALISM AND THE JUDICIAL MIND: ESSAYS ON AMERICAN CONSTITUTIONAL LAW AND POLITICS* 75–91 (Harry N. Scheiber, Amy Turo & Robert Lloyd Kelley eds., 1992).

20. *Id.*

21. See, e.g., David R. Upham, *The Meanings of Privilege and Immunities of Citizens on the Eve of the Civil War*, 91 *NOTRE DAME L. REV.* 1117, 1149 (2016). See generally *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (concluding that Black persons cannot be U.S. citizens and cannot sue for their freedom in non-slave states); *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (concluding that the Fugitive Slave Act of 1793 precluded slaves becoming free persons by relocating to free states).

22. Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 *FLA. L. REV.* 1, 22–23 (2011).

23. *Id.* at 23.

24. See Amber Phillips, *Why Is Washington So Dysfunctional?*, *WASH. POST* (Sept. 30, 2021), <https://www.washingtonpost.com/politics/2021/09/30/why-is-washington-so-dysfunctional> [<https://perma.cc/WG2Y-H6Y9>]; see also William A. Galston & Elaine Kamarck, *Is Democracy Failing and Putting Our Economic System at Risk?*, *BROOKINGS* (Jan. 4, 2022), <https://www.brookings.edu/research/is-democracy-failing-and-putting-our-economic-system-at-risk/> [<https://perma.cc/M24V-ULRX>].

towards America's leadership role in the international system.<sup>25</sup> This illiberalism is caused by many factors: socio-economic and demographic insecurity, ineffective and overwhelmed public schools, unaffordable housing, higher education, health insurance, and the perception that democratic institutions are hostage to special interests that preclude reform.<sup>26</sup> The journalist and public intellectual, George Packer, has named this phenomenon the "unwinding" of American institutions, in that the U.S. government is increasingly incapable of addressing its people's problems and concerns.<sup>27</sup>

In his book *Political Order and Political Decay*, the highly regarded political scientist Francis Fukuyama effectively explains that while the U.S. dominates the global economy and international system, it is increasingly illiberal and authoritarian.<sup>28</sup> Fukuyama's thesis is that political order in liberal democracies like the U.S. rest on three pillars: political accountability, a strong effective state, and the rule of law.<sup>29</sup> Accountability involves making rulers responsive to electorates, which means not only free and fair multiparty elections but, according to Fukuyama, institutions of accountability supplemented by a central government that can get things done with rules and regulations that apply equally to everyone.<sup>30</sup> According to Fukuyama, U.S. political development has gone into reverse because it has become weaker, less efficient, and more corrupt.<sup>31</sup> One cause is growing economic inequality and the geographic concentration of wealth, which has allowed elites to purchase immense political power and manipulate the system to further their own interests.<sup>32</sup> Another cause is the permeability of American political institutions to interest groups, allowing an array of factions that "are collectively unrepresentative of the public as a whole" to exercise disproportionate influence and, in effect, control the government.<sup>33</sup> The result, according to Fukuyama, is a vicious cycle whereby the government

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25. See George Packer, *How America Fractured Into Four Parts*, ATL. (July/Aug. 2021), <https://www.theatlantic.com/magazine/archive/2021/07/george-packer-four-americas/619012/> [https://perma.cc/VJ9V-JWMS]; see also DALIBOR ROHAC, LIZ KENNEDY & VIKRAM SINGH, CTR. FOR AM. PROGRESS, DRIVERS OF AUTHORITARIAN POPULISM IN THE UNITED STATES: A PRIMER (2018) <https://www.americanprogress.org/article/drivers-authoritarian-populism-united-states/> [https://perma.cc/93LE-6Z2H].

26. See *id.*

27. GEORGE PARKER, *THE UNWINDING: AN INNER HISTORY OF THE NEW AMERICA* (Farrar, Straus & Giroux, reprint ed. 2014).

28. FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* (Farrar, Straus & Giroux, reprint ed. 2015).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

is rendered incapable or unwilling to deal with national problems in a way that breeds a cynicism in the electorate that, in turn, leads to the state being starved of resources and authority, resulting in even poorer performance.<sup>34</sup> Fukuyama's thesis is that although liberal democracy is the best form of government, it is, absent continuous reform, susceptible institutional decay and incapacity. Examples include the hyper-partisan paradigm that characterizes today's Washington, the systematic inability of Congress to enact substantive legislation to address public needs, and the executive branch's tendency to compensate for legislative immobility by means of Presidential Executive Orders and proclamations that are constitutionally dubious.<sup>35</sup>

This is all relevant to my proposal to revitalize federalism by way of direct federal subsidies to state governments because the chaos that characterizes today's politics is due to broader trends in the U.S. economy and society that destabilize American households in ways the federal government cannot comprehensively address on its own. Better public policy outcomes require the input of all levels of American government, including jurisdictions closest to the people and not just the federal government. However, because state governments currently lack the fiscal resources to be viable laboratories of democracy, my proposal would be for the federal government to use its taxing and spending power to directly allocate funds to each state government in an amount sufficient to end poverty statewide. States, however, would be given broad discretion to use these funds and, only in the event the funding is entirely rejected or manifestly misused by the state government, it would be replaced by direct cash payments to households in poverty. This proposal, if implemented, would reboot American federalism, improve living standards, and over time, protect against authoritarianism and democratic retrogression.

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34. *Id.*

35. For example, President Obama's DACA and DAPA Executive Orders and President Trump's attempts to rescind DACA and threat to build a border wall. *See* Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order No. 13,769, 3 C.F.R. 272 (2017) (President Trump's Immigration Ban); *see also* Protecting Worker Health and Safety, Exec. Order No. 13,999, 3 C.F.R. 455 (2022) (President Biden's OSHA Executive Order); Classes of Aliens Authorized to Accept Employment, 8 C.F.R. § 274a.12(c)(14) (2012) ("An alien who has been granted deferred action, an act of administrative convenience to the government which gives some case lower priority, if the alien establishes an economic necessity for employment."); Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the U.S. as Children to David Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs. & John Morton, Dir., U.S. Immigr. & Customs Enf't. 1 (June 15, 2012) (the "DACA Memo"); Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., on Pol'ys for the Apprehension, Det. & Removal of Undocumented Immigrants to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't., R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot., Leon Rodriguez, Dir., U.S. Citizenship & Immigr. Servs. & Alan D. Bersin, Acting Assistant Sec'y for Pol'y 3-4 (Nov. 20, 2014).



*B. The Need for a Targeted Safety Net that  
Is Implemented by the States*

For the U.S. to continue as the world's leading democracy and sustain itself as a heterogeneous and unified post-information age country, improved living conditions and socioeconomic mobility through an updated safety net is required and should be a top priority. When one advocates for an updated safety net, one must acknowledge that growth of the American welfare state has, since the New Deal, largely come from Washington, which has used the federal government's spending power to either directly provide assistance to households as is the case with Social Security and Medicare, or, impose conditions on the receipt of federal funds by state governments in areas such as healthcare and education.<sup>36</sup>

The federal government's hegemonic role in social service provision has come at a cost. As is evident during the COVID-19 pandemic, the federal government's position in taking an outsized role in vaccine provision and fiscal stimulus can polarize attitudes and, at times, undermines the political legitimacy of the endeavor.<sup>37</sup> It also makes achievement of the objective more elusive, cumbersome, and expensive because the federal government typically can only take a one-size-fits-none approach when providing or paying for services in a continent-sized country.<sup>38</sup> The fact that the Biden Administration's fiscal agenda stalled in Congress confirms that political polarization may also limit the federal government's ability to act decisively going forward.<sup>39</sup> Indeed, the outsized federal role in safety net provisions and crisis response deepens political fissures by elevating the importance of federal elections and the presidency. An enlightened approach to an updated social safety net would recognize that states need greater fiscal capacity to improve their inhabitants' living standards. Before getting there, the need for a targeted safety net must first be made. It is to this subject that the paper turns.

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36. See *South Dakota v. Dole*, 483 U.S. 203 (1987); see also Title IX interpretations by the Department of Education, 34 C.F.R. § 106.41 (2021).

37. Philip Bump, *The Sharply Polarized Vote on the Coronavirus Relief Package, Visualized*, WASH. POST (Mar. 10, 2021), <https://www.washingtonpost.com/politics/2021/03/10/sharply-polarized-vote-coronavirus-relief-package-visualized/> [https://perma.cc/B3TP-B266].

38. See Lorie Konish, *How Effective Were Those Stimulus Checks? Some Argue the Money May Have Fueled Inflation*, CNBC (June 11, 2022), <https://www.cnbc.com/2022/06/11/the-pandemic-stimulus-checks-were-a-big-experiment-did-it-work.html> [https://perma.cc/JU55-LTDF]; see also Chris Edwards, *Restoring Responsible Government by Cutting Federal Aid to the States*, CATO INST. (May 20, 2019), <https://www.cato.org/policy-analysis/restoring-responsible-government-cutting-federal-aid-states> [https://perma.cc/BXP3-ZDGJ].

39. See Adrian Morrow, *How Joe Biden's Agenda Stalled Out, and What He Can Do About It*, GLOBE & MAIL (July 22, 2022), <https://www.theglobeandmail.com/world/us-politics/article-biden-agenda-manchin-sinema/> [https://perma.cc/9Y5G-ZPSU].

## II. DYSFUNCTION AND INCAPACITY APPLIED—THE GOVERNMENT’S RESPONSE TO THE COVID-19 PANDEMIC

After the pronounced risk of COVID-19 to public health became evident in March 2020, countermeasures were immediately implemented by state and local governments to minimize the likelihood of COVID-19 transmission, including state-mandated business closures and locally-instituted mask mandates.<sup>40</sup> The initial response was largely apolitical, with both blue and red state governors issuing closure orders through their executive powers.<sup>41</sup> However, as detailed below, the federal government’s response to COVID was bloated, wasteful, and polarizing, while that of state governments was defined by their incapacity.

### A. *The Federal Government’s Polarizing Response to COVID-19*

The first fiscal measure undertaken by Congress was the Coronavirus Preparedness and Responses Supplemental Appropriations Act of 2020, which was enacted in two phases.<sup>42</sup> The initial phase, measuring \$8.3 billion, provided emergency federal funding for Coronavirus vaccine research and development.<sup>43</sup> The second phase provided \$104 billion in federal funds for emergency sick leave, paid family leave, unemployment benefits, the expansion of food assistance and free Coronavirus testing.<sup>44</sup> However, because state-mandated closures resulted in a dramatic reduction in economic and social activity, including a 31.4 percent gross domestic product (GDP) economic contraction in the second quarter of 2020, former President Trump signed into law the \$2.3 trillion Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020,<sup>45</sup> which included the following:

a. Paycheck Protection Program<sup>46</sup> that provided \$349 billion in forgivable small business relief for small businesses via the federal

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40. See *States’ COVID-19 Public Health Emergency Declarations and Mask Requirements*, NAT’L ACAD. FOR STATE HEALTH POL’Y (July 26, 2022), <https://www.nashp.org/governors-prioritize-health-for-all/> [<https://perma.cc/U3AE-UQ9N>]; see also Jenny Rough & Andy Markowitz, *List of Coronavirus-Related Restrictions in Every State*, AARP (Aug. 8, 2022), <https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html> [<https://perma.cc/CH4A-S8WL>].

41. *Coronavirus State Actions*, NAT’L GOVERNORS ASS’N, <https://www.nga.org/coronavirus-state-actions-all/> [<https://perma.cc/3YTE-UL8A>].

42. Pub. L. No. 116-123, 124 Stat. 146.

43. *Id.*

44. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020).

45. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

46. Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, 134 Stat. 620.

- Small Business Administration<sup>47</sup> to help them retain workers while being forcibly closed;
- b. One-time tax rebates to individuals in the amount of \$293 billion,<sup>48</sup> with most single adults receiving one-time payments of \$1,200 and families with children receiving more;
  - c. Federal supplements to unemployment in the amount of \$268 billion
  - d. Money for a food safety net in the amount of \$25 billion;
  - e. Funds to prevent corporate bankruptcy by providing loans and facilitating emergency lending to companies by the Federal Reserve under Section 13(3) of the Federal Reserve Act in the amount of \$510 billion;
  - f. Funding for hospitals in the amount of \$100 billion;
  - g. Transfers to state and local governments in the amount of \$150 billion; and
  - h. An extra \$49.9 billion for international assistance.<sup>49</sup>

At a GDP cost of over ten percent, the CARES Act was, at the time, the largest fiscal stimulus in U.S. history.

The sheer size of the government response, in conjunction with the harmful economic and social consequences of forced shutdowns, soon led to political polarization on the issue of COVID-19 mitigation measures that manifested in May 2020, when states began implementing the phased reopenings that resulted in a dramatic uptick in COVID-19 infections and deaths.<sup>50</sup> Republican-leaning states followed former President Trump's lead in emphasizing the economic and social cost of continued closures while Democratic-leaning states implemented strict attendance restrictions in certain businesses as well as guidelines for social distancing and mask mandates.<sup>51</sup> Trump's approach to the pandemic most likely stemmed from his fear that the economic dislocation caused by strict COVID-19

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47. ROBERT JAY DILGER & BRUCE R. LINDSAY, CONG. RSCH. SERV., R46284, COVID-19 RELIEF ASSISTANCE TO SMALL BUSINESSES: ISSUES AND POLICY OPTIONS (2022).

48. CARES Act, 134 Stat. 281.

49. *Id.*; see also Paycheck Protection Program Flexibility Act of 2020, 134 Stat. 620.

50. *E.g.*, Tenn. Exec. Order No. 36 (May 12, 2020), <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee36.pdf> [<https://perma.cc/FHP3-LM6J>] ("An Order Suspending Provisions of Certain Statutes and Rules and Taking Other Necessary Measures in Order to Facilitate the Treatment and Containment of COVID-19.").

51. C. DOMINIK GUESS, LAUREN BOYD, KELLY PERNICIARO & MA. TERESA TUASON, RSCH. SQUARE, THE POLITICS OF COVID-19: DIFFERENCES BETWEEN BLUE, PURPLE, AND RED STATES IN COVID-19 CASES, DEATHS, AND REGULATIONS 3 (2022).

mitigation measures would harm his reelection chances.<sup>52</sup> In the end, it is hard to definitively say whether the pandemic hurt or helped former President Trump politically, but the election result was an Electoral College loss of 232 to 306 against former Vice President Biden based on Biden winning the key swing states of Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin by very narrow margins.<sup>53</sup> A mere month after election day 2020, the Food and Drug Administration (FDA) granted provisional approval to administer the Pfizer-BioNTech COVID-19 vaccination.<sup>54</sup> Emergency approval for the Moderna<sup>55</sup> and Johnson & Johnson<sup>56</sup> COVID-19 vaccines soon followed.

Prior to his departure from office, President Trump, on December 27, 2020, signed into law the \$2.3 billion Consolidated Appropriations Act of 2021. The Act included the following:

- a. An additional \$900 billion to further COVID-related relief;
- b. An additional \$325 billion for small businesses;
- c. An additional \$166 billion indirect financial assistance to households via \$600 stimulus checks for the bulk of American households and an extension of federal unemployment relief in the amount of an additional \$300 per week per beneficiary until March 14, 2021;
- d. \$69 billion for vaccines, testing, and health providers;
- e. \$10 billion for the U.S. Postal Service;
- f. \$10 billion block grant relief to states for childcare;

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52. Ed Yong, *America Is About to Choose How Bad the Pandemic Will Get*, ATLANTIC (Oct. 28, 2020), <https://www.theatlantic.com/health/archive/2020/10/coronavirus-election/616884/> [<https://perma.cc/4K5D-42KB>].

53. Biden did win the nationwide popular vote 51.3% to 46.9%. David Wasserman, Sophie Andrews, Leo Saenger, Lev Cohen, Ally Flinn & Griff Tatarsky, *2020 National Popular Vote Tracker*, COOK POL. REP., <https://www.cookpolitical.com/2020-national-popular-vote-tracker> [<https://perma.cc/3WKJ-NPJM>].

54. Press Release, U.S. Food & Drug Admin., FDA Approves First COVID-19 Vaccine: Approval Signifies Key Achievement for Public Health (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine> [<https://perma.cc/B9VA-2PYT>].

55. Press Release, U.S. Food & Drug Admin., Coronavirus (COVID-19) Update: FDA Takes Key Action by Approving Second COVID-19 Vaccine (Jan. 31, 2022), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-takes-key-action-approving-second-covid-19-vaccine> [<https://perma.cc/P3DJ-WATQ>].

56. Press Release, U.S. Food & Drug Admin., Joint CDC and FDA Statement on Johnson & Johnson COVID-19 Vaccine (Apr. 13, 2021), <https://www.fda.gov/news-events/press-announcements/joint-cdc-and-fda-statement-johnson-johnson-covid-19-vaccine> [<https://perma.cc/F6E7-AA39>].

- g. \$25 billion in aid to state and local government for rental assistance programs; and
- h. An extension of the CDC-imposed eviction moratorium for tenants with annual incomes of less than \$99,000 through January 2021.<sup>57</sup>

It must, however, be recalled that Trump's decision to sign this measure into law was close-run. Trump equivocated when he signed a measure that narrowly obtained the then-Republican controlled Senate's approval because the January 2021 Georgia election to determine control of the U.S. Senate was still in play.<sup>58</sup> Then Majority Leader McConnell and the Republican Senate caucus feared losing control of the Senate if the measure was not enacted.

In March 2021, the Biden Administration implemented the \$1.84 trillion stimulus known as the American Rescue Plan Act of 2021, which provided further stimulus and safety net protection as follows:<sup>59</sup>

- a. Another round of stimulus checks, this time in the amount of \$1,400 per person to include children, with a phaseout for households earning above an annual \$150,000;<sup>60</sup>
- b. Extended federal unemployment assistance in the amount of \$300 per week per beneficiary through September 6, 2021;
- c. Direct assistance in the amount of \$350 billion to states, local governments, territories, and Indian tribes, which included \$20 billion in aid for local governments to provide rental assistance for low-income tenants;<sup>61</sup>
- d. An expansion of the child tax credit from the previous \$2,000 per child to \$3,600 for each child under six and \$3,000 for each child between the ages of six and eighteen;<sup>62</sup>
- e. One hundred and twenty-five billion dollars for K-12 public schools;
- f. Funding to increase access to the ACA's *Healthcare.gov* insurance plans for two years, such that households earning more than the previous statutory cap of 400% of the federal poverty line—\$51,000

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57. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182.

58. *Id.*; see, e.g., ADAM TOOZE, SHUTDOWN: HOW COVID SHOOK THE WORLD'S ECONOMY (2021).

59. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

60. Tami Luhby & Katie Lobosco, *Here's What's in the Covid Relief Package*, CNN (Mar. 10, 2021), <https://www.cnn.com/2021/03/10/politics/whats-in-the-covid-relief-bill/index.html> [<https://perma.cc/GWH6-PXL9>].

61. *Id.*

62. *Id.*

for individuals and \$104,000 for households of four—could still access the plans at subsidized rates;<sup>63</sup>

g. Increased subsidies to states to for two-years to further subsidize the ACA's Medicaid expansion<sup>64</sup> The Act also provided \$14 billion for researching, administering, and marketing vaccines; \$47.8 billion toward testing, contact tracing, and COVID-19 mitigation measures; \$7.7 billion to hire public health workers; \$8.5 billion to struggling rural hospitals and health care providers; and \$50 billion to the Federal Emergency Management Agency (FEMA).<sup>65</sup>

This means that the U.S. federal government has spent more than \$5 trillion in COVID-19-related expenses and fiscal stimuli since the onset of the pandemic.<sup>66</sup> As of January 2023, the Biden Administration signed into law an additional \$1.2 trillion infrastructure plan, officially known as the Inflation Reduction Act, and has purported to implement a partial student loan forgiveness program that would cost an additional \$400 and provide additional stimulus to an economy that is already manifesting a marked uptick in consumer price inflation.<sup>67</sup>

Beyond fiscal stimulus, the Federal Reserve (Fed) has engaged in continued monetary stimulus that has been paradigmatic since the most recent financial crisis and Great Recession.<sup>68</sup> The Fed Funds rate was reduced 150 basis points in March 2020 from 0 to 0.25 basis points.<sup>69</sup> The Fed also expanded overnight and term bond Repurchase Agreements (Repos); lowered the cost of discount window lending; reduced the cost of existing swap lines with major central banks; and extended the maturity of

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63. *Id.*

64. *Id.*

65. *Id.*

66. Alicia Parlapiano, Deborah B. Solomon, Madeleine Ngo & Stacy Cowley, *Where \$5 Trillion in Pandemic Stimulus Money Went*, N.Y. TIMES (Mar. 11, 2022), <https://www.nytimes.com/interactive/2022/03/11/us/how-covid-stimulus-money-was-spent.html?searchResultPosition=1> [<https://perma.cc/47XF-VMUE>].

67. See Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818; Public Service Loan Forgiveness Program, 34 C.F.R. § 685.219 (2022); *Consumer Price Index—March 2022 News Release*, BUREAU OF LAB. STAT. (Apr. 12, 2022), [https://www.bls.gov/news.release/archives/cpi\\_04122022.htm#](https://www.bls.gov/news.release/archives/cpi_04122022.htm#) [<https://perma.cc/V4S5-RB5Y>].

68. The most recent financial crisis saw the Federal Reserve provide an economic backstop to save the financial system, dramatically reduce short term interest rates and engage in open-market activities, including what is called quantitative easing to manipulate long-term interest rates downwards and capitalize banks as a means of monetary stimulus. See Christopher Leonard, *If You Must Point Fingers on Inflation, Here's Where to Point Them*, N.Y. TIMES (June 11, 2022), <https://www.nytimes.com/2022/06/11/opinion/fed-federal-reserve-inflation-democrats.html> [<https://perma.cc/8UGT-EVQN>].

69. Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Federal Reserve Actions to Support the Flow of Credit to Households and Businesses (Mar. 15, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200315b.htm> [<https://perma.cc/PMA8-CSFV>] [hereinafter Bd. of Governors Press Release].

foreign exchange operations.<sup>70</sup> Most importantly, the Fed expanded its policy of substantial quantitative easing to stimulate economic activity; it purchased government and corporate debt on the secondary market to expand the money supply and artificially reduce long-term interest rates to stimulate economic activity.<sup>71</sup> As of this writing, the Fed reports approximately \$8.5 trillion in assets on its balance sheets.<sup>72</sup>

The result of the federal government's fiscal and monetary policies under two Congresses and presidential administrations has been equivocal. On the one hand, it has successfully prevented Depression-era hunger and misery that might otherwise have been the result from such a severe economic contraction. This is a noteworthy result that should not be discounted too readily, especially because the economic impact on household net worth that followed the Great Recession proved far more traumatic notwithstanding a far less dramatic economic downturn.<sup>73</sup>

This acknowledgement, however, does not require complete blindness as to the negatives. First and foremost, the COVID-19 stimuli—at well over \$5 trillion in a \$22 trillion economy—cost more in relative terms than the fiscal stimuli implemented by other mature democracies like Canada, the U.K., France, and Germany to stave off economic collapse.<sup>74</sup> The evidence demonstrates that the U.S. strategy to provide nationwide unemployment assistance was both more costly and more inflationary; providing nationwide unemployment to laid off workers, regardless of area cost-of-living, lead to a greater collapse in labor force

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70. *Id.*; see also Joshua Aizenman, Hiro Ito & Gurnain Kaur Pasricha, *Central Bank Swap Arrangements in the COVID-19 Crisis* 9–11 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28585, 2021).

71. See William B. English & Donald Kohn, *What if the Federal Reserve Books Losses Because of Its Quantitative Easing?*, BROOKINGS (June 1, 2022), <https://www.brookings.edu/blog/up-front/2022/06/01/what-if-the-federal-reserve-books-losses-because-of-its-quantitative-easing/> [<https://perma.cc/CN5W-QSWY>]; William D. Cohan, *The Fed Cannot Control Its Easy-Money Monster*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2021/06/15/opinion/inflation-federal-reserve-powell-biden.html>.

72. See *Total Assets of the Federal Reserve, Recent Balance Sheet Trends*, FED. RSRV. (Aug. 10, 2022) [https://www.federalreserve.gov/monetarypolicy/bst\\_recenttrends.htm](https://www.federalreserve.gov/monetarypolicy/bst_recenttrends.htm) [<https://perma.cc/AGQ2-94X5>].

73. Mitchell Barnes, Wendy Edelberg, Sara Estep & Moriah Macklin, *Bolstered Balance Sheets: Assessing Household Finances Since 2019*, BROOKINGS (Mar. 22, 2022), <https://www.brookings.edu/research/bolstered-balance-sheets-assessing-household-finances-since-2019/> [<https://perma.cc/4KPE-R8UT>]; see also *The Fiscal Response to the Economic Fallout From the Coronavirus*, BRUEGEL (June 16, 2022), <https://www.bruegel.org/dataset/fiscal-response-economic-fallout-coronavirus> [<https://perma.cc/CXF6-F78Z>]; Bd. of Governors Press Release, *supra* note 69.

74. Alex Durante, *U.S. Fiscal Response to COVID-19 Among Largest of Industrialized Countries*, TAX FOUND. (Jan. 4, 2022), <https://taxfoundation.org/us-covid19-fiscal-response/> [<https://perma.cc/8M6Q-LG6B>]; see Delphine Strauss, *End of Covid Job Schemes Still Leaves US, EU and UK Short of Workers*, FIN. TIMES (Sept. 27, 2021), <https://www.ft.com/content/f6da4a8d-0b93-495b-8dcd-0c988a52c066>.

participation, and been more inflationary than relief measures enacted by EU countries, Canada, and the U.K.<sup>75</sup>

In a country that, to paraphrase former President Kennedy, has systematically failed to “fix the roof when the sun was shining,” the costly COVID-19 relief packages, in conjunction with the deficits accumulated since the end of the Clinton Administration, may have crippled the federal government’s ability to affordably address the next crisis.<sup>76</sup> This is because the U.S. national debt, as of June 2022, stands at nearly \$30.5 trillion (127% of GDP) and is growing due to continual massive annual budget deficits, including an all-time high deficit of \$3.13 trillion or 13.4% of GDP in 2020.<sup>77</sup> Should the federal government fail to address this colossal debt—and all the evidence is that the Biden Administration’s main priority is further deficit-financed spending as opposed to fiscal retrenchment—it is very likely that the next economic downturn will be much harder to affordably address, and may, due to the burden imposed by accumulated debt, correspond with a sharp collapse in the bond market as well as concomitant increases in interest rates. This would force the country to undertake harmful and regressive spending cuts, which disproportionately harm the poor.

The fact that the fiscal responses to COVID-19 have come almost exclusively from the federal government also explains the political polarization surrounding the legitimacy of the endeavor. Many conservatives perceive the federal government’s fiscal response to be a Democratic Party attempt to transform the U.S. into a European social democracy.<sup>78</sup> More critically, the federal government’s stimulus evidenced a complete inability to tailor the response to local conditions or needs. To illustrate, the federal government issued several stimulus payments to the bulk of households over several iterations—first \$1,200 per person in March 2020,<sup>79</sup> then \$600 per person under President Trump

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75. See Durante, *supra* note 74; see also Strauss, *supra* note 74.

76. During the 1962 State of the Union Address, President John F. Kennedy declared that “[t]he [best] time to repair the roof is when the sun is shining[.]” Annual Message to the Congress on the State of the Union, 1962 PUB. PAPERS 5 (Jan. 11, 1962).

77. Martin Crutsinger, *US Budget Deficit Hits \$2.77 Trillion in 2021, 2nd Highest*, U.S. NEWS (Oct. 22, 2021), <https://www.usnews.com/news/business/articles/2021-10-22/us-budget-deficit-hits-277-trillion-in-2021-2nd-highest>; see also *Federal Debt: Total Public Debt as Percent of Gross Domestic Product (Jan. 1, 1966–Oct. 1, 2021)*, FED. RSRV. BANK OF ST. LOUIS: FEDERAL RESERVE ECONOMIC DATA (FRED) (June 29, 2022), <https://fred.stlouisfed.org/series/GFDEGDQ188S> [<https://perma.cc/3Y4Y-N6LJ>].

78. Charles P. Pierce, *The COVID Relief Bill Signals the End of 30 Years of Democratic Policy*, ESQUIRE (Mar. 10, 2021), <https://www.esquire.com/news-politics/politics/a35799950/covid-relief-bill-democrats-big-government/> [<https://perma.cc/J6SX-2R6Q>].

79. Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, 134 Stat. 620.



in December 2020,<sup>80</sup> followed by \$1,400 per person under President Biden in March 2021<sup>81</sup>—without any manifestation that the payments were necessary and without ever tailoring the check amounts to local economic conditions like the area cost-of-living.

It is altogether inexplicable that Congress enacted the same fiscal relief measures a full year into the crisis when limitations with the policy were clearly manifested. It made little sense to continue with nationwide per person stimulus checks and the same \$300 per person per week unemployment benefits, regardless of local economic conditions,<sup>82</sup> especially because the fiscal 2021 budget deficit and national debt had grown to immense proportions.<sup>83</sup> As of today, the federal government is spending roughly \$2 for every \$1 it raises in revenue, which explains the \$3.1 trillion fiscal 2020 deficit.<sup>84</sup>

With respect to the Federal Reserve and its monetary stimulus and bond-buying program known as quantitative easing, the result has been a dramatic uptick in consumer price inflation and a marked appreciation of the stock market and house prices.<sup>85</sup> This destabilizing and polarized rapid asset appreciation will typically worsen wealth inequality, undermine access to affordable housing, and often portend the next financial crisis. In short, while the federal COVID-19 response has prevented an economic collapse, it has also been highly expensive, undermined socioeconomic mobility, and anticipates a dystopian future of government incapacity

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80. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

81. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4; Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182.

82. Lisa Rowan, *The States with the Best and Worst Unemployment Benefits—And Why They're So Different*, FORBES (Mar. 17, 2022), <https://www.forbes.com/advisor/personal-finance/best-and-worst-states-for-unemployment/> [https://perma.cc/MG84-T4SJ].

83. CONG. BUDGET OFF., MONTHLY BUDGET REVIEW: SUMMARY FOR FISCAL YEAR 2021, <https://www.cbo.gov/system/files/2021-11/57539-MBR.pdf> [https://perma.cc/H3RM-YDAD].

84. Alan Rappaport, *U.S. Budget Deficit Hit \$3.1 Trillion Amid Virus Spending Surge*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/live/2020/10/16/business/us-economy-coronavirus#:~:text=The%20federal%20budget%20deficit%20soared,businesses%20struggled%20with%20economic%20shutdowns.>

85. As of October 19, 2021, the S&P 500 stands at 4,517.99 as compared to 2,652.39 on March 1, 2020, which translates into an appreciation of 41.3 percent in approximately 1.5 years or an annual 27.5 percent. See *S&P 500*, YCHARTS (2022), [https://ycharts.com/indicators/sp\\_500](https://ycharts.com/indicators/sp_500) [https://perma.cc/A5R7-36VL]. With respect to housing, the statistics demonstrate that home prices have appreciated at an annual rate of 18.6 percent since the COVID-19 pandemic. *U.S. Home Price Appreciation Increases Again*, Radian Home Price Index Reports, BUS. WIRE (Aug. 26, 2021), <https://www.businesswire.com/news/home/20210826005669/en/U.S.-Home-Price-Appreciation-Increases-Again-Radian-Home-Price-Index-Reports> [https://perma.cc/B5LP-R6UD].

based on the conjunction of political polarization and crippling levels of debt.<sup>86</sup>

Relying monographically on the federal government to provide proper crisis response is risky. It is also precarious in view of the risk of electing unqualified and illiberal members of Congress and presidential administrations. This is in addition to the obvious difficulty in overcoming the hurdles Congress always faces in enacting fiscal relief packages that are narrowly tailored to avoid needless debt accumulation while still achieving bicameralism and presentment. In view of the federal government's precarious finances, a bearish bond market will most likely preclude affordable debt accumulation in the future. The need for economically revitalized states is apparent.

### *B. The Lack of an Effective State Response to COVID-19*

As detailed above, the federal government spent more than \$5 trillion on COVID-19 relief.<sup>87</sup> Problematically, however, federalism's potential advantages did not manifest during the COVID-19 pandemic because the states have largely failed to effectively supplement the federal government's pandemic response and have instead left the lion's share of the pandemic response to the federal government. Indeed, notwithstanding the federal government's provision of \$745 billion directly to state and local governments, states still slashed thousands of public sector jobs in response to the crisis.<sup>88</sup> This is in spite of the fact that state governments have run artificially large budget surpluses because federal fiscal stimuli have led to "sugar highs" that have resulted in large budget surpluses for many state governments.<sup>89</sup> Political polarization on the issue of COVID mitigation measures, including vaccines, has led Republican state governors and legislatures to take a recalcitrant approach to the risk of pandemic spread by enacting measures to disallow mask mandates or vaccination requirements. Political polarization on the issue of COVID relief led many red state governors to prematurely terminate federal unemployment subsidies and direct state agencies, including public colleges and universities, to disallow either mask mandates or vaccination requirements after reopening.

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86. See Mohamed A. Faizer, *Seven Steps to Truly Reform the Tax Code and Engender Socio-Economic Mobility*, 82 ALB. L. REV. 601, 607 (2018).

87. *Here's Everything the Federal Government Has Done to Respond to the Coronavirus So Far*, PETER G. PETERSON FOUND. (Mar. 15, 2021), <https://www.pgpf.org/blog/2021/03/heres-everything-congress-has-done-to-respond-to-the-coronavirus-so-far> [https://perma.cc/GSU2-4E4A].

88. *Id.*

89. See, e.g., *How the COVID-19 Pandemic Is Transforming State Budgets*, URB. INST. (July 7, 2022) <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-fiscal-pages-covid-edition> [https://perma.cc/Q34J-BF38].

*C. Reasons for the Ineffective State Response—Fierce Competition Among Fifty States and the Lack of Direct Funding from Washington*

The dynamics of U.S. federalism has unfolded in such a way that states have gone from being Madisonian laboratories of democracy in theory, to, at best, pass-throughs and receptacles of federal largesse that are either incapable or unwilling to address issues of socioeconomic immobility. While the U.S. President and the federal government that he leads as the chief executive remain the leader of the world's mature democracies, state governments are more akin to developing countries that are too resource-poor to substantially improve their inhabitants' lives but sufficiently strong and inclined, at times, to oppress their most vulnerable citizens. Most states lack sufficient resources to improve public schools, provide greater access to affordable housing, expand the provision of quality child-care, enhance infrastructure and address the lack of socioeconomic mobility at the local level. They do, however, like authoritarian states in the developing world, engage in regressive policies that undermine ballot access and voting rights of historically oppressed racial minorities, incarcerate an increasingly higher proportion of their populations based on spurious crimes, and provide crippling poor schools in distressed communities, not to mention regressive access to both health care and higher education.<sup>90</sup> The question is, why have state governments become more like developing world governments as opposed to muscular laboratories of democracy?

Part of the problem undoubtedly stems from the fact that the U.S.'s emergence as a global superpower has highlighted the importance of the federal government and the White House, in particular, in domestic politics and international security. This means that the bulk of elite and mass public opinion has shifted in the last century from a framework whereby, to paraphrase former House Speaker Tip O'Neill, all politics are local politics,<sup>91</sup> to an inordinate focus on the national government, with state and local jurisdictions becoming the means of electing presidents and congresspersons. The federal government has also taken power away from the states by way of federal courts' broad interpretation of Congress's power to tax and spend for the general welfare, regulate interstate commerce, and effectuate Congress's enumerated powers by way of the

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90. *See generally* STEVEN WOOLF, CTR. FOR AM. PROGRESS, SOCIAL AND ECONOMIC POLICIES CAN HELP REVERSE AMERICANS' DECLINING HEALTH (2021), <https://www.americanprogress.org/article/social-economic-policies-can-help-reverse-americans-declining-health/> [<https://perma.cc/9E8Y-H8K3>].

91. *See* TIP O'NEILL & GARY HYMEL, ALL POLITICS IS LOCAL, AND OTHER RULES OF THE GAME (1994).

Necessary and Proper Clause.<sup>92</sup> This has, of course, been facilitated by the popular election of U.S. Senators since Seventeenth Amendment's enactment.<sup>93</sup>

Unlike the states, which constantly have to worry about losing inhabitants and investment, the federal government, which has jurisdiction over a continent-sized superpower, can tax and regulate individuals and companies without significant fear of expatriation; it can borrow on far more favorable terms due to the global economy's almost limitless appetite for U.S. Treasuries; and, unlike the states, the Federal Reserve enables it to create economic activity by way of an expansionary monetary policy.<sup>94</sup> The states, by contrast, have become relative pygmies. Calabresi and Terrell conclude this has to do with the fact that, at fifty, the number of states has grown so large since the country's founding that power has inexorably drifted towards the federal government.<sup>95</sup> The reasons why a nation of fifty states makes federalism hard to implement include collective action problems that often preclude the states from taking a coherent approach on an issue, the obvious benefits of free and relatively unregulated trade that can be better coordinated and protected by the federal government under both the Commerce and Dormant Commerce Clauses; the problem of externalities such as cross-border pollution and crime that the federal government is best situated to address; and, economies of scale in a continental sized country with 333 million inhabitants with a GDP of \$22 trillion.<sup>96</sup> Calabresi and Terrell, however, conclude that the current number of states does not forever foreclose federalism's benefits.<sup>97</sup> This is because the current number allows for varying tastes, conditions, and preferences to be implemented at the local level.<sup>98</sup> Analogizing democratic experimentation with antitrust law, Calabresi and Terrell conclude that the current fifty-state framework allows for greater competition and experimentation among states so they can potentially become true laboratories of democracy positioned to

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92. See U.S. CONST. art. 1, § 8.

93. Calabresi & Terrell, *supra* note 22, at 18–22.

94. To illustrate, ten-year U.S. Treasuries are currently offered at interest rates of 1.78 percent (11/3/2021), notwithstanding a relatively high inflation (4.5% as compared to one year ago in 11/2021) and very high debt environment (\$29 trillion). See Yun Li & Vicky McKeever, *10-Year Treasury Yield Tops 2% for the First Time Since 2019 After Hot Inflation*, CNBC, <https://www.cnbc.com/2022/02/10/us-bonds-treasury-yields-climb-ahead-of-inflation-data.html> [https://perma.cc/96L9-SAU7].

95. Calabresi & Terrell, *supra* note 22, at 22–23.

96. *Id.*; see also *U.S. and World Population Clock*, U.S. CENSUS (Apr. 25, 2022), <https://www.census.gov/popclock/> [https://perma.cc/XJ54-YZ4D].

97. Calabresi & Terrell, *supra* note 22, at 5.

98. *Id.* at 37. Think of heterodox issues such as highway speed limits and abortion policy. See generally *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

improve living standards through better governance.<sup>99</sup> Finally, an increased number of states can facilitate better governance because, as with the European Union, federations with numerous subparts experience lower monitoring and enforcement costs than federations with fewer subparts.<sup>100</sup>

#### *D. The Canadian Example*

Fifty states, however, make it much harder to protect state power from federal encroachment than comparable federations with fewer subparts like Canada, which has only ten provinces over a much larger (though less inhabitable) territorial landmass; or Australia, which has six states; or Germany, which has sixteen *laander*; or even Switzerland, which has twenty-six cantons.<sup>101</sup> Indeed, Calabresi and Terrell conclude that the reason that more relative power resides with the provincial governments in Canadian federalism as compared to the U.S. states is because the far lower number of provinces gives them more relative power when confronting the federal government in Ottawa.<sup>102</sup> In conjunction with the dynamics of Canadian history and the linguistic divides between English and French-speaking Canada, it explains the relative power of Canada's provinces when compared with the U.S.'s states.<sup>103</sup> This is even though the British North America Act of 1867, which created Canada from British North America, was designed to protect against provincial secessionism by reversing the Madisonian framework and granting the Canadian federal parliament residual powers to act in the interests of "peace, order and good government" with the provinces granted enumerated powers only.<sup>104</sup> The relative power of Canada's provinces can also be explained by Canada being a medium-sized mature democracy and not a superpower like the U.S., thereby limiting its federal government's capacity to issue debt on such advantageous terms, and that an overwhelming majority of French-Canadians reside in the Province of Quebec, which has a strong separatist movement and has come close to voting for separation on two occasions, and where there remains strong support Quebec independence.<sup>105</sup> This is unlike the U.S., where the Civil War conclusively precluded separatism as

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99. Calabresi & Terrell, *supra* note 22, at 37.

100. *Id.* at 39.

101. *Id.* at 24.

102. *Id.* at 25.

103. *Id.* at 25.

104. See Constitution Act, 1867, § 91, 30 & 31 Vict., c 3 (U.K.), reprinted in R.S.C. 1985, app II, no 5 (Can.).

105. In 1980, the referendum result was 58–42 in favor of remaining in Canada while in 1995 the vote was a much closer 50.6% to 49.4%. 1995 *Quebec Referendum*, WIKIPEDIA, [https://en.wikipedia.org/wiki/1995\\_Quebec\\_referendum](https://en.wikipedia.org/wiki/1995_Quebec_referendum) [https://perma.cc/2KZT-QVDU].

an option by constituent states. Another obvious factor explaining American federalism's demise is the fact that slavery and the subsequent state-based attempts to maintain a racial hierarchy, delegitimized state sovereignty in the view of many Americans, especially racially minorities and progressives. Finally, the courts have altered the center/periphery balance in both countries. Canada's court of last resort was, until 1949, the Judicial Committee of the Privy Council in London, which narrowly interpreted the Canadian federal government's powers as compared to the provinces.<sup>106</sup> By contrast, the U.S. federal courts have, over time, broadly interpreted the U.S. federal government's enumerated powers at the expense of the states.<sup>107</sup> A similar argument could be made about the relative power of the Australian federal government as compared to its six states, although, unlike Canada, Australia lacks Canada's linguistic divide.

An arguable consequence of stronger and better resourced provinces in Canada, as compared to the U.S., is higher Canadian living standards, notwithstanding lower per capita income.<sup>108</sup> One aspect of this is that Canadian provinces provide universal cradle to grave health care for all residents.<sup>109</sup> In the U.S., by contrast, the states that have not expanded their Medicaid programs per the ACA's terms, such as my home state of Tennessee, provide very meagre health coverage for the indigent that typically excludes the working poor.<sup>110</sup> Going further, responsibility for public schooling and higher education, which in aggregate tends to be of higher quality than that found in the U.S., rests with the provinces that provide the bulk of funding for Canadian universities and issue bursaries and loans for lower wealth students.<sup>111</sup> Although responsibility for

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106. Andrew McIntosh, *Judicial Committee of the Privy Council*, CAN. ENCYCLOPEDIA (May 1, 2020), <https://www.thecanadianencyclopedia.ca/en/article/judicial-committee-of-the-privy-council> [https://perma.cc/39AN-Y25E]; Act to Amend the Supreme Court Act, 13 George VI (U.K.), reprinted in R.S.C. 1949, c. 37, s. 3. (Can.).

107. Calabresi & Terrell, *supra* note 22, at 20.

108. Canada typically ranks higher than the U.S. under the United Nations Human Development Index measuring life expectancy, average incomes, and education rates, although per capita income in the U.S. is typically twenty percent or so higher than its northern neighbor. See U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT INDEX (HDI) (2022), <https://hdr.undp.org/en/content/human-development-index-hdi> [https://perma.cc/9P35-LN7D] [hereinafter HDI REPORT].

109. See SARA ALLIN, GREG MARCHILDON & ALLIE PECKHAM, COMMONWEALTH FUND INTERNATIONAL HEALTH CARE SYSTEM PROFILES: CANADA, (2020), <https://www.commonwealthfund.org/international-health-policy-center/countries/canada> [https://perma.cc/6LQA-TQJF].

110. See Louise Norris, *Tennessee and the ACA's Medicaid Expansion*, HEALTHINSURANCE.ORG (Apr. 18, 2022), <https://www.healthinsurance.org/medicaid/tennessee> [https://perma.cc/H5CY-UXGL].

111. Cameron Yee, *Financial Aid Guide for University and College Students in Canada*, MONEYSENSE (Dec. 2, 2020), <https://www.moneysense.ca/save/financial-aid-guide-for-university-and-college-students-in-canada/#:~:text=In%20Ontario%2C%20British%20Columbia%2C%20>

schooling and higher education lies primarily with U.S. states, U.S. colleges and universities are increasingly dependent on federal funding and federal loans for their operation, an entirely regressive framework.<sup>112</sup> A consequence of this is that the mean Canadian education rates are higher than the U.S., which, in turn may explain higher middle class living standards and household wealth.<sup>113</sup>

The U.S. social safety net is threadbare and state government spending tends to reinforce socioeconomic divides. For example, no state adequately funds public schooling at the state level to effectively counteract the regressivity of socioeconomic advantage.<sup>114</sup> Schapiro notes that the U.S. federal government subsidy is insufficiently generous and regressively increases with state spending, which strongly correlates with per capita income.<sup>115</sup> The result is that wealthy states that spend more on public schooling such as Massachusetts receive larger federal education subsidies than poor states such as Mississippi, which has a higher proportion of its citizens living in poverty.<sup>116</sup> Indeed, although school funding litigation at the state level has reduced funding discrepancies within states, it does not reduce funding gaps between states, which are far larger and correspond with state fiscal capacity as opposed to effort.<sup>117</sup> To illustrate, the highest education spending state, Vermont, spends roughly three times as much per pupil as Utah, which spends the least.<sup>118</sup> The same holds true for states and Medicaid funding, especially for those states that implemented the ACA's Medicaid expansion.<sup>119</sup>

Canada and other rich federal states, by contrast, fund high poverty schools more generously to improve the learning environment for socioeconomically disadvantaged children.<sup>120</sup> With respect to higher education at public research universities, U.S. state public universities

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Saskatchewan,the%20federal%20and%20provincial%20governments [https://perma.cc/L79X-M7EE].

112. Mohamed A. Faizer, *Revitalizing American Democracy through Education Reform*, 52 U. MEM. L. REV. 95, 139 (2021).

113. See Ian Austen, *Are Middle-Class Canadians Still the World's Richest*, N.T. TIMES (Apr. 26, 2019), <https://www.nytimes.com/2019/04/26/world/canada/middle-class-income-wealth.html>; see also HDI REPORT, *supra* note 108.

114. Faizer, *supra* note 112, at 122–26.

115. Robert A. Schapiro, *States of Inequality: Fiscal Federalism, Unequal States, and Unequal People*, 108 CALIF. L. REV. 1531, 1561 (2020).

116. *See id.*

117. *Id.*

118. *Id.* at 1558.

119. *Id.* at 1578.

120. FRANCISCO BENAVIDES, PAULINE MUSSET, ANNA PONS VILASECA & BEATRIZ PONT, ORG. FOR ECON. COOP. & DEV., EQUITY AND QUALITY IN EDUCATION: SUPPORTING DISADVANTAGED STUDENTS AND SCHOOLS (2012), <https://www.oecd.org/education/school/50293148.pdf> [https://perma.cc/JL23-E8WG].

regressively award scholarships and tuition discounts based on test scores and entrance credentials to improve or maintain their position in the national rankings.<sup>121</sup> Canadian public research universities do not focus as much on regressive standardized tests in the admissions process and tend to admit the vast bulk of students according to similar terms.<sup>122</sup> This is unlike the non-dischargeable students loans in the U.S. that are offered by the federal government such that state governments, unlike provincial governments in Canada, are not incentivized to require state public universities to control tuition and room and board inflation.<sup>123</sup> The result is that the U.S. is seeing increasingly higher tuition and fees in a framework of reduced state subsidies.<sup>124</sup> This, in turn, largely explains why more than half of the U.S.'s nearly 11 million college and university students attend inexpensive and low-quality state community colleges that award two-year associate's degrees.<sup>125</sup> This comparison explains much of the socioeconomic stagnation in the U.S. as compared to Canada.<sup>126</sup>

The Canadian Medicare program, which Canadian provinces fund, coupled with the help of federal equalization and health and social service transfers, covers all Canadians throughout the nation and ensures comparable levels of care regardless of provincial residency.<sup>127</sup> This provides for greater socioeconomic mobility than the U.S. framework of private insurance in conjunction with federally provided Medicare for seniors and federally-subsidized Medicaid for the indigent, which provides health insurance only to those who satisfy the twin requirements of financial eligibility as well as the more vague requirement of being "deserving poor."<sup>128</sup> Pre-ACA, this led to varied and confusing eligibility requirements in all states and, post-ACA, continued confusion in those states that have rejected the federally subsidized Medicaid expansion. The problem for Americans is that states struggle to adequately fund and implement Medicaid, even though the majority of the program costs are funded by the federal government.<sup>129</sup> Canadian Medicare, by contrast, is

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121. Faizer, *supra* note 112, at 138.

122. *Id.* at 139; see Zoë Miller, *12 of the Biggest Differences Between Attending a University in the US and in Canada*, INSIDER (Nov. 30, 2018), <https://www.insider.com/college-canada-us-differences-2018-11> [<https://perma.cc/Z68F-JFTG>].

123. Faizer, *supra* note 112, at 138.

124. *Id.* at 143.

125. *Id.* at 137.

126. Richard V. Reeves & Pete Rodrigue, *Has the American Dream Moved to Canada?*, BROOKINGS (July 1, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/07/01/has-the-american-dream-moved-to-canada/> [<https://perma.cc/BC7Q-GUMU>].

127. Michaela Brook Bantilan, *Lessons from Canada's Equalization Regime: Examining America's Intergovernmental Efforts to Achieve Accessible Health Care Coverage Through Medicaid*, 21 ANNALS HEALTH L. ADVANCE DIRECTIVE 139, 143 (2012).

128. *Id.* at 143–45.

129. *Id.* at 149.



fully funded by Canada's provinces, which furthers human development in view of the positive correlation between health and wealth.<sup>130</sup>

The ability of Canadian provinces to engender socioeconomic mobility through social services is facilitated by the fact that more taxing power and responsibility resides with Canadian provinces as compared to U.S. states. This, as detailed above, is based on the dynamics of both countries' histories and the fact that there are far fewer provinces in Canada as compared to U.S. states. Additionally, the relative power of Canadian provinces is explained by the fact that Canada's French speaking minority is geographically concentrated and constitutes a sizeable population majority in the Province of Quebec where there has always been significant support for Quebec independence from the rest of Canada.<sup>131</sup> This, however, still leaves open the question as to how Canadian provinces are able to afford far superior social services compared to U.S. states. After all, elected officials from liberal states that are arguably to the left of conservative Canadian provinces such as Alberta and, at times, British Columbia, would argue that they lack the fiscal resources of Canadian provinces to implement more progressive social welfare policies. It is to this subject that the paper turns.

#### *E. Differences in Capacity, Tax and Revenue Structures Between the Canadian Provinces and U.S. States*

Although both Canadian provinces and U.S. states have dramatically unequal levels of economic development, Canadian provinces are better able to disentangle the human development of their inhabitants from local economic conditions due to direct fiscal transfers from Ottawa, known as transfer payments. The lack of a comparable U.S. program that directly transfers from Washington to state governments is most likely attributable to the far higher number of states in the U.S. as compared to Canadian provinces.<sup>132</sup> Like all other federations, U.S. states have greatly divergent fiscal capacities based on their relative economic conditions.<sup>133</sup> Because some states have higher per capita incomes than others, this means that

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130. *Canada is One of the Most Socially Mobile Countries in the World. Here's Why*, MACLEAN'S (Aug. 14, 2018), <https://www.macleans.ca/opinion/canada-is-one-of-the-most-socially-mobile-countries-in-the-world-heres-why/> [<https://perma.cc/CR8S-26G3>].

131. One of Quebec's two major political parties, the Parti Quebecois, supports Quebec independence and one of the four major political parties represented in the Canadian federal parliament is the Quebec independence supporting Bloc Quebecois. See Giuseppe Valiante, *Quebec's 1995 Referendum Far from Last Grasp for Sovereignty Hopes*, CBC (Oct. 28, 2015), <https://www.cbc.ca/news/canada/montreal/quebec-1995-referendum-look-back-1.3292214> [<https://perma.cc/KG5D-FAPW>].

132. See, e.g., Calabresi & Terrell, *supra* note 22, at 2.

133. Schapiro, *supra* note 115, at 1580–83.

they are able to raise more money with lower effective tax rates than other states. Some states have larger tax bases such as that they can raise more money with lower effective tax than others because of their inhabitant's income, business development, natural resources, and other factors. For example, in the case of New York, and to a lesser degree Connecticut and New Jersey, per capita incomes are increased because New York City is the world's leading financial center. Similarly, per capita incomes in Maryland and Virginia are increased because these states are home to well-paid federal government employees and contractors.<sup>134</sup> As Schapiro has written, this leads states to spend dramatically different amounts on social welfare programs including education and health care.<sup>135</sup> Presently, the wealthiest jurisdictions in the U.S. are the District of Columbia, Connecticut, and New York, with adjusted per capita total taxable resources (TTR) of \$92,759, \$86,480 and \$83,465 respectively.<sup>136</sup> The three poorest jurisdictions are Maine, Arizona, and Mississippi, with per capita TTRs of \$50,617, \$50,553 and \$48,129, respectively, when adjusted for cost of living.<sup>137</sup> Excluding the District of Columbia, this means that the overall wealthiest state (unadjusted for cost of living), Connecticut, has nearly twice the available per capita resources as Mississippi and one-third more than Colorado, which is the median state in terms of TTR per capita.<sup>138</sup> Notwithstanding exceptions such as North Dakota, which, in recent years, grew dramatically wealthier due to natural resource extraction, wealth disparities between states has remained remarkably stable during the past thirty years.<sup>139</sup> Federal transfers worsen this inequality because federal funding formulae are designed to match state funding levels such that states that already spend more on health care and education because they have the most resources, tend to receive the largest federal grants.<sup>140</sup> According to Schapiro, the discrepancy in social service provisions between states is explained more by taxing capacity and less by political culture or racial bias.<sup>141</sup> This, in turn, undermines federalism's promise by precluding equal participation by citizens because citizens of poorer states, having fewer resources, have less political power than their wealthy state counterparts.<sup>142</sup> The resulting political inequality also undermines responsive government, political participation, and the

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134. *Id.* at 1539–41.

135. *Id.* at 1554.

136. *Id.* at 1539.

137. *Id.* at 1541.

138. *Id.* at 1540–41.

139. *Id.* at 1539–40, 1543.

140. *Id.* at 1544–47.

141. *Id.* at 1595.

142. *Id.* at 1580–81.

guarantee of fundamental rights because all three require government resources and political responsiveness.<sup>143</sup> According to Schapiro, because budgetary control is a central aspect of self-government, the lack of resources at the local level undermines the incentive and ability for citizens to exercise meaningful political authority over their own well-being.<sup>144</sup>

#### *F. The Case for Direct Fiscal Transfers to States*

My recommendation is for the federal government to revitalize federalism by making annual transfers of money to state governments, with greater amounts given to states with higher poverty rates, to help states improve their inhabitants' living standards. Ideally, states will accept the federal funds and use them progressively. However, to address the legitimate concerns of progressives and others that states will either reject the funds or misuse them to advance the interests of their wealthier inhabitants at the expense of the poor, my proposal empowers the federal government to withhold funds from recalcitrant states and replace them with direct cash benefits to households living below the poverty line.

The U.S. federal government currently makes no provision directly to state governments to equalize resources based on limited state fiscal capacity.<sup>145</sup> Applying a Canadian-style equalization framework to the U.S would, according to a 2010 measure, cost \$109 billion.<sup>146</sup> Although this number is sufficiently large to make it infeasible to Schapiro, the cost is certainly manageable in a country with an annual GDP of \$26 trillion that has recently spent a staggering \$5.3 trillion on COVID-relief bills<sup>147</sup> and currently spends an astounding \$778 billion per annum on the Pentagon.<sup>148</sup> Furthering state capacity by way of transfers would alleviate an obvious concern that states have when considering raising revenue to improve social welfare programs. This concern is that increasing taxes will lead individuals and businesses to relocate to lower tax jurisdictions, a predicament worsened by the fact that there are fifty relatively geographically compact states.<sup>149</sup>

A direct fiscal transfer to states deals with this problem because it gives governments financial resources to improve the living standards of

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143. *Id.*

144. *Id.*

145. *Id.* at 1583.

146. *Id.* at 1587.

147. *Id.*; see also *Gross Domestic Product*, FED. RSRV. BANK OF ST. LOUIS, <https://fed.stlouisfed.org/series/GDP>.

148. See *U.S. Defense Spending Compared to Other Countries*, PETER G. PETERSON FOUND. (May 11, 2022), [https://www.pgpf.org/chart-archive/0053\\_defense-comparison](https://www.pgpf.org/chart-archive/0053_defense-comparison) [<https://perma.cc/B4R6-7MXY>].

149. See Calabresi & Terrell, *supra* note 22, at 2.

their inhabitants. More importantly, direct fiscal transfers are less polarizing and more cost-effective than direct federal assistance to individuals because state governments tend to be seen as more legitimate and better at social welfare provisioning. This is because state governments are police-power jurisdictions that are closer to their inhabitants and are therefore better positioned to be responsive to local needs in a manner that is attuned to the local political culture. This will ideally facilitate human development in a continent-sized country with about twenty to thirty regional economies.<sup>150</sup> The advantage of a localized approach, as demonstrated by the COVID-19 relief packages, is that nationwide fiscal relief tends to be wasteful and, over time, fiscally crippling. A far better approach would be for the federal government to assist state governments in providing tailored relief consistent with household need. In my home state of Tennessee, greater state capacity would have enabled the state to provide better tailored and more cost-effective COVID relief packages. Furthermore, it would have enabled the state to provide stepped up unemployment benefits for those made redundant by COVID-related closures and rent assistance to landlords whose tenants would otherwise have been evicted for failure to pay rent. Although this certainly is beyond Tennessee and other states' current fiscal capacity, direct federal subvention to enhance state capacity would facilitate a more active role for states in crisis mitigation. My hope is that a direct fiscal transfer would reverse the current trajectory and resurrect the states' role in American federalism. As things currently stand, states that lack sufficient fiscal resources either reflexively oppose measures that would improve human development, including civil and political rights to historically marginalized communities, or should they be progressive-minded, bemoan their inability to substantively improve living standards.

Direct transfers will also encourage the federal government to be far more consultative with state and local governments than is currently the case. This also might improve living standards because state and local governments are closer to the people and are better placed to enact social welfare measures tailored to local needs.<sup>151</sup>

Perhaps the best argument for having the states take a larger role in the implementation of social welfare policy is the precautionary principal. It is far more likely that the federal government succumbs to authoritarianism and democratic retrogression than all fifty states. As evidenced during the Trump and Biden Administrations, the federal

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150. See generally *Regional Economic Accounts*, U.S. BUREAU OF ECON. ANALYSIS (May. 17, 2022), <https://www.bea.gov/data/economic-accounts/regional> [<https://perma.cc/7SKA-JKQM>].

151. JULIE M. LAWHORN, CONG. RSRCH. SERV., R40638, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 23 (2019).

government is increasingly the victim of institutional atrophy that precludes effectiveness. For example, the House of Representatives, with only 435 members for a country with nearly 340 million inhabitants, provides an inordinately low-rate democratic representation at the national level as compared to citizens of other mature democracies.<sup>152</sup> To illustrate, mature democracies such as Canada, France, Germany, and the United Kingdom typically provide citizens with one elected representative for every 100–150,000 persons in the legislature.<sup>153</sup> Americans, by contrast, are awarded one member of the House of Representatives for every 750,000 or so inhabitants. To make things worse, the U.S.'s continued reliance on single-member plurality districting also undermines democratic responsiveness by way of legislative gerrymanders that exacerbate partisan cleavages.<sup>154</sup> Likewise, the requirement of bicameralism and the U.S. Senate, which allows only two members for each state per the Seventeenth Amendment, results in grossly unequal representation per inhabitant, with Californians being provided one-sixty-sixth the representation rate of Wyomingites.<sup>155</sup> This problem is compounded by the upper chamber's manipulation and exploitation of anti-majoritarian measures, such as the Senate filibuster, which worsen the problems of institutional sclerosis. Furthermore, as evidenced by the Biden Administration's inability to enact voting rights legislation, it also exacerbates government non-responsiveness.<sup>156</sup> In addition, the policies of the U.S. government do not reflect nationwide public opinion. For example, in both 2000 and 2016, the Electoral College elected two nationwide popular-vote losers, and nearly did so again in 2004 and 2020. This shows that the current framework facilitates policies that are either unreflective of nationwide public support or preclude those with overwhelming public support.<sup>157</sup> The Trump Administration's parlous

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152. Mohamed A. Faizer, *Resurrecting Congress to Reduce Administrative Chaos*, 14 TENN. JOURNAL L. & POL. 19, 23 (2019).

153. *Id.* at 33–34.

154. *Id.* at 23.

155. Adam Liptak, *Smaller States Find Outsize Clout Growing in Senate*, N.Y. TIMES (Mar. 10, 2013), [http://archive.nytimes.com/www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html?\\_r%25E2%2580%25B0=%25E2%2580%25B00#/#smallstate](http://archive.nytimes.com/www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html?_r%25E2%2580%25B0=%25E2%2580%25B00#/#smallstate).

156. Ian Millhiser, *Build Back Better Is the Latest Victim of America's Anti-Democratic Senate*, VOX (Dec. 20, 2021), <https://www.vox.com/2021/12/20/22846504/senate-joe-manchin-build-back-better-democrats-republicans-43-million> [<https://perma.cc/YBY9-P57Z>].

157. In 2000, George W. Bush defeated Al. Gore, Jr. in the Electoral College, and in 2016, Donald Trump defeated Hillary Clinton in the Electoral College, notwithstanding the fact that in both cases they lost the nationwide popular vote. Al From, *The Challenge to Democracy—Overcoming the Small State Bias*, BROOKINGS (July 6, 2022), <https://www.brookings.edu/blog/fixgov/2022/07/06/the-challenge-to-democracy-overcoming-the-small-state-bias/> [<https://perma.cc/HTY7-C8Y7>]. Similarly, in 2004, John Kerry nearly defeated Bush in the Electoral College despite losing the popular vote. *Id.* And in 2020, Trump was nearly reelected despite losing the popular vote by 4.5% to Joe Biden. *Id.*

performance in office demonstrates how U.S. government policy can be distorted and undermined by the illiberal and authoritarian inclinations of a temperamentally unqualified minority chief executive and his cabal of supporters. It also shows the risks of having the federal government take an outsized role in American government and life.<sup>158</sup> The Biden Administration's legislative agenda can, in turn, be characterized by the appropriation of massive amounts of wasteful, inflationary, and debt-financed spending, as well as a pronounced failure to redress the lamentable political polarization that surrounds the issue of COVID vaccination and governmental relief packages. Biden's difficulty in cohering thin majorities in both Houses of Congress confirms that the federal government's incapacity is the fault of both parties, and that reliance on a federal crisis response can be precarious and polarizing. As was the case with both the COVID relief measures and the government stimuli enacted to combat the Great Recession, federal intervention to resuscitate economic demand tends to be problematic and undermines the federal government's institutional legitimacy. This, in turn, debilitates the government and, over time, worsens the problem of authoritarianism and democratic retrogression.

Progressives' inordinate belief in the federal government as a vehicle to bypass the states and address crises is both risky and shortsighted in view of increasing dysfunction and polarization, which renders it increasingly incapable of addressing public needs in a cost-effective and timely manner. American democracy needs state governments to take more responsibility for public welfare and crisis remediation. Indeed, much of the regressivity of state enactments, in both conservative and liberal states stems from a lack of resources and taxing capacity in a continent-sized country with fifty states that guarantees business and individuals' freedom to relocate. Even progressive states such as California tend to underspend on public goods such as education because the 50 states are in fierce competition to keep and attract business and. To add injury to the wound, these states' fiscal capacity is worsened by regressive, pro-cyclical balanced budget requirements.<sup>159</sup> The need for federal assistance in the form of direct payments to state governments to help them advance living standards is apparent. However, because many states have a history of disregarding the needs of vulnerable inhabitants, states will have to satisfy very loose conditions as to human development in using the funds. In situations where states either reject these very loose

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158. Unlike tyranny at the federal level, which potentially victimizes the entire population, state tyranny still allows for laboratories of democracy to work for those inclined to relocate.

159. See, e.g., Robert Ward Shaw, *The States, Balanced Budgets, and Fundamental Shifts in Federalism*, 82 N.C. L. REV. 1195 (2004).

conditions or prove incapable of acting progressively, the federal government is to take back the money from recalcitrant state governments and make direct cash payments to households in the state that are living in poverty.

### III. A PROPOSAL TO REVITALIZE AMERICAN FEDERALISM THROUGH THE SPENDING CLAUSE

The federal government should use its broad power to tax and spend for the general welfare, including to fiscally revitalize state governments so they can achieve their intended goal of being muscular laboratories. I make this recommendation because the federal government's hegemonic place in American federalism, in conjunction with partisan gridlock in Washington, and the risk that authoritarians could soon control both the executive and legislative branches, means that the current framework poses an extreme risk to living standards, especially for the historically marginalized. It also deprives Americans of federalism's benefits because the states are no longer laboratories of democracy that can experiment and learn from each other. As discussed above, this is largely due to the dynamics of American history, which has seen the abuses of states' rights, the growth in the number of states to fifty, and the federal government's dramatic growth in the previous century. I therefore recommend that the federal government provide considerable fiscal assistance directly to the states for the purpose of enabling them to revitalize themselves to be laboratories of democracy, and, over time, improve their inhabitants' living standards. Ideally, this will solve the dual problems of government incapacity and socioeconomic stagnation that explain the growing problem of illiberal authoritarianism, exemplified by the Trump Presidency and his supporters' capturing of the Republican Party.

My proposal is to use the U.S. Constitution's Taxing and Spending Clause to advance the general welfare by resuscitating the power of state governments by funding them directly with few strings attached. This is unlike previous uses of the Taxing and Spending Clause to assist states, where the federal government has either taken away a traditional area of state competency, or effectively dictated terms to the states as a condition for federal funding.<sup>160</sup> The proposal would require Congress to enact legislation requiring the U.S. Treasury to remit money annually to state

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160. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (concluding that the federal government could require states to set the legal drinking age at twenty-one as a condition of federal funding); *Endrew F. ex. rel. Joseph F. v. Douglas Cnty Sch. Dist.* RE-1, 137 S.Ct. 988, 1000 (2017) (requiring states to largely fund and provide a free and appropriate public education and implement the federal Individuals with Disabilities in Education Act as a requirement for federal education funding).

governments, in an amount based on an estimate of how much money would be needed to raise the incomes of all individual households in the state living below the poverty line to an income level that is above the poverty threshold. The information needed to calculate the amount can be taken from the Census Bureau, which uses a set of money income thresholds to determine who is in poverty within each jurisdiction, subject to inclusion of government programs and funds designed to assist low income families and individuals that are not included in the official poverty measure.<sup>161</sup> As of 2019, the number of individuals living in poverty in the U.S. was 34 million, or roughly 11.7 percent of the population, which, at the time, was an all-time low since poverty estimates were first published in 1959.<sup>162</sup> The poverty rate, though, varies greatly based on race, ethnicity, and jurisdiction.<sup>163</sup> To illustrate, states such as Mississippi, at 19.6%, have dramatically higher poverty rates than New Hampshire, which, at 7.3%, has the nation's lowest poverty rate.<sup>164</sup> No doubt this is because of Mississippi's history and culture of racial hierarchy, in conjunction with the fact it has, at 37.8%, the largest proportion of African Americans of any state.<sup>165</sup> Under my proposal, Washington would provide Jackson with enough funds to lift up out of poverty 19.6% of Mississippi's residents living below federal poverty guidelines.<sup>166</sup> This is roughly one-fifth of Mississippi's population lifted up from the federal poverty line. In total, this means that Washington would send an annual amount of \$1.5 billion, i.e., \$10,000 multiplied by 150,000 households of four persons.<sup>167</sup> This is because the federal poverty line for a household of four was roughly \$25,926 in 2020; based on that census data, we can assume that is one-fifth of Mississippi's population had a household income of roughly \$15,000.<sup>168</sup> Although some might balk

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161. *How the Census Bureau Measures Poverty*, U.S. CENSUS BUREAU (Nov. 22, 2021), <https://www.census.gov/topics/income-poverty/poverty/guidance/poverty-measures.html> [<https://perma.cc/4K6C-KZ75>].

162. JESSICA SEMEGA, MELISSA KOLLAR, EMILY A. SHRIDER & JOHN CREAMER, U.S. CENSUS BUREAU, *INCOME AND POVERTY IN THE UNITED STATES: 2019 REP. NO. P60-270*, at 12 (2020), <https://www.census.gov/library/publications/2020/demo/p60-270.html> [<https://perma.cc/FU4G-CSQ7>]; see also LIANA FOX, U.S. CENSUS BUREAU, *THE SUPPLEMENTAL POVERTY MEASURE: 2019*, at 1 fig.1 (2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-272.pdf> [<https://perma.cc/FQ42-WVJX>].

163. See SEMEGA, KOLLAR, SHRIDER & CREAMER, *supra* note 162, at 13.

164. *Id.*

165. *Quick Facts: Mississippi*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/MS> [<https://perma.cc/PZ5N-B5N9>].

166. *Id.*

167. *Id.*

168. KATHRYN CRONQUIST, U.S. DEP'T OF AGRIC., *CHARACTERISTICS OF SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM HOUSEHOLDS: FISCAL YEAR 2018*, REPORT NO. SNAP-19-CHAR,



at yet another federal expense, it would provide Jackson with an additional \$1.5 billion in annual revenue to supplement its current \$27 billion annual budget.<sup>169</sup> In short, Jackson would see its annual budget grow by 15.6% to, over time, facilitate socio-economic mobility.

Jackson is to be given broad discretion as to how it uses the federal funds, with the only condition being that they be used progressively. This means that Jackson will be able to use the funds to address problems such as racially polarized and underfunded majority-minority public schools, job training to improve access to living wage jobs, the lack of affordable housing, child-care, and health care for low- to middle-income households. They will also be able to use funds to address the lack of adequate infrastructure and public transportation, as well as a host of other issues related to poverty and social exclusion within Mississippi. The key is that Mississippi, like all states, is to be given discretion in implementation such that it can be a genuine laboratory of democracy; the only requirement is that the funds be used progressively to advance socioeconomic mobility, without constraining the definition of “progressive” to be ideologically monographic. Instead, all approaches to advancing human development, including conservative, liberal, social democratic and libertarian approaches, would all satisfy the proposal.

Ideally, states will implement different policies to improve living standards based on each state’s local political culture and conditions. This, in turn, will enable states and their inhabitants to learn from neighboring and ideologically similar states to improve public policy outcomes to advance living standards.

To those who may believe my proposal is naive, the European Union already provides structural adjustment funds to its members states, while in other federal systems, including Australia, Canada, and Germany, the federal government makes direct fiscal transfers to their constituent state and provincial governments. Canada, the country most akin to the U.S., provides what are called equalization payments directly to poorer provinces. Compared to the American system, these payments result in less variation in Canadian social service provision.<sup>170</sup> Under the Canadian transfer payment system, the Canadian federal government collects tax

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at 84, <https://fns-prod.azureedge.us/sites/default/files/resource-files/Characteristics2018.pdf> [<https://perma.cc/3XFU-7F86>].

169. *Mississippi*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-fiscal-briefs/mississippi> [<https://perma.cc/ZC99-D8VS>].

170. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORTS: UNITED STATES (2020), <http://hdr.undp.org/en/countries/profiles/USA> [<https://perma.cc/BRY3-42WU>]. According to the World Bank, per capita income in the U.S. is \$66,080 whereas in Canada it is \$50,810.

revenues and then “transfers” collected revenue directly to provincial and territorial governments.<sup>171</sup> The rationale behind this system is to enable poorer or “have not” provinces—the largest being Quebec—to provide public services similar to those of richer provinces such as Alberta, British Columbia and Ontario, applying similar taxation rates.<sup>172</sup> Under the Canadian framework, the federal government transfers the money directly to their provincial counterparts, which have broad discretion to spend the money, but typically use it to improve their health care, education and welfare systems.<sup>173</sup> This plausibly explains why living standards are both higher and the discrepancies between the Canadian provinces are not as stark as compared to the U.S.<sup>174</sup> Though these are positives, the Canadian transfer payment system is altogether incomplete because it fails to account for cost-of-living differentials between Canadian provinces. It also ignores the cost of integrating domestic and international migrants., is disproportionately placed on high cost-of-living cities within richer and more expensive provinces that receive no transfer payment assistance.<sup>175</sup> Finally, and perhaps most relevant to the U.S., the Canadian transfer payment system unconditionally gives money to provinces and territories. This is poorly suited to the U.S. where, unlike Canada, U.S. localism and decentralization is often at odds with the protection of historically marginalized groups such as racial minorities, indigenous Americans, immigrants, and the poor. This is why I do not recommend implementation of a Canadian transfer payment system, notwithstanding the fact that implementation costs, at only \$109 billion per year is less costly than my proposal.<sup>176</sup>

Instead, the federal government should transfer money to all states with a goal of helping states improve their inhabitants’ living standards. This model will encourage all states to value all their inhabitants, not merely their net taxpayers. Furthermore, this model recognizes that all states, not just poor states, struggle with socioeconomic immobility. Finally, making payment to all states and not just the poor states

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171. See generally Kirk J. Stark, *Rich States, Poor States: Assessing the Design and Effect of a U.S. Equalization Regime*, 63 TAX L. REV. 957 (2010).

172. Stark, *supra* note 171, at 974; see also *Equalization Program*, DEP’T OF FIN. OF CAN. (Dec. 19, 2011), <https://www.canada.ca/en/department-finance/programs/federal-transfers/equalization.html> [<https://perma.cc/YZ4K-2YT3>].

173. *Id.*

174. See Schapiro, *supra* note 115, at 1583.

175. *Foreign-Born Population*, ORG. FOR ECON. COOP. & DEV.: DATA (Apr. 26, 2022), <https://data.oecd.org/migration/foreign-born-population.htm> [<https://perma.cc/RNT5-XNNP>]; *Canada’s Top Five Immigration Destinations*, IMMIGR. DIRECT <https://www.immigrationdirect.ca/immigration-articles/canadas-top-five-immigration-destinations/index.html> [<https://perma.cc/8E6K-YBAV>].

176. Stark, *supra* note 171, at 1002.

recognizes that wealthier states often have dramatically higher costs of living and are often the destination for low wealth international and domestic migrants. As detailed below, this is to be done via legislation under the Taxing and Spending Clause.

#### *A. Implementation Through the Spending Clause*

The federal government's power to tax and spend for the general welfare comes from Article I, Section 8 of the U.S. Constitution. It provides that "Congress shall have the power To Lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."<sup>177</sup> This provision, known as the Taxing and Spending Clause, has been interpreted by the federal courts to be the broadest source of Congressional power and authorizes use of payroll taxes to fund the Social Security and Medicare entitlement programs.<sup>178</sup> It also authorizes the federal government to intrude upon typical state prerogatives such as education, health care, transport, housing. In addition, when providing grants to states, Congress can place conditions on states in their use of federal funds.<sup>179</sup> One recent example where Congress used the Taxing and Spending Clause was the ACA's individual mandate, which penalized individuals who remain uninsured with a tax or penalty payment requirement.<sup>180</sup> The Supreme Court has concluded that the only power the federal government lacks under the Taxing and Spending Clause is coercing state governments to implement a federal regulatory program or commandeer state executive officials into enforcing a federal regulatory program. The Court has reasoned that these are state prerogatives protected by the Tenth Amendment.<sup>181</sup>

Accordingly, Congress has definite power to implement the proposal based on its broad power to tax and spend for the general welfare. In this

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177. 20 U.S.C. § 1001.

178. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 15 (1981).

179. *Id.* at 23–24; *see also* *Grove City Coll. v. Bell*, 687 F.2d 684, 701 (3d Cir. 1982); *Sabri v. United States*, 541 U.S. 600 (2004); *South Dakota v. Dole*, 483 U.S. 203 (1987).

180. *See Nat'l Fed'd of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

181. *Id.*; *see also* *New York v. United States*, 505 U.S. 144 (1992) (holding that the federal government's Low-Level Radioactive Waste Act improperly coerced New York's legislative process by forcing it to take title to waste, which effectively is a liability to be absorbed by the state); *Printz v. United States*, 521 U.S. 898 (1997) (concluding that requiring state Chief Law Enforcement Officers to implement a federal regulatory program without their consent improperly commandeered state executive officials in violation of the Tenth Amendment); *Nat'l Fed'd of Indep. Bus.*, 567 U.S. at 519 (concluding that threatening states with loss of the entirety of their federal Medicaid subsidies for refusing to undertake the ACA's Medicaid expansion constituted a "gun to the head" of state legislatures and violated the Tenth Amendment).

case, it would be the power to condition the receipt of federal funds on state governments using the funds progressively. States that fail to do so are to lose the money and have the federal government instead remit money directly to households in poverty as measured by federal poverty guidelines.

Under the proposal, the federal government would appropriate an annual amount sufficient to eliminate poverty in each state if direct payments were to be made to households. California having the highest absolute number of residents living in poverty, would receive the most funds of any state.<sup>182</sup> Mississippi, having the highest poverty rate of any state, would receive the most funds on a per capita basis.<sup>183</sup>

Additionally, under the proposal if all states participate in the federal program Congress would need to require the Department of Commerce's Census Bureau to calculate the proper amount to be disbursed by the Treasury to each state based on data it collects as to the absolute number of households living in each state below the federal poverty line and the amount of money that would be needed to take these households out of poverty. Because there are an estimated 38 million inhabitants living in poverty nationwide,<sup>184</sup> and my estimate is that it would cost an average of roughly \$5,000 to supplement those individuals' incomes to raise them above the poverty threshold, the program, if agreed to by all states, would cost the federal government approximately \$175 billion.<sup>185</sup> Although this sounds expensive, it is relatively modest compared to the \$6.8 trillion annual federal budget; the amounts spent on COVID-19 relief; the current appropriations for Medicare, Medicaid; the amount spent on the Pentagon; and the interest on the federal government's accumulated debt.<sup>186</sup> Therefore, Congress could easily pay for the program by raising the marginal income tax on high income earners or implementing a modest national sales tax.<sup>187</sup>

Under the program, Congress also is to require rulemaking by relevant federal executive branch agencies, including the U.S. Departments of Agriculture; Health and Human Services; Education; Transportation; Housing and Urban Development; Interior; and Justice.

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182. *Quick Facts: California*, U. S. CENSUS BUREAU, <https://www.census.gov/quickfacts/CA> [<https://perma.cc/9SSW-V7AE>].

183. *Quick Facts: Mississippi*, *supra* note 165.

184. See text accompanying *supra* note 161; see also JOHN CREAMER, EMILY A. SHRIDER, KALEE BURNS & FRANCES CHEN, U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES: 2021, <https://www.census.gov/library/publications/2022/demo/p60-277.html> [<https://perma.cc/S5QE-3UV5>].

185. CRONQUIST, *supra* note 168, at 84.

186. *Monthly Budget Review: Summary of Fiscal Year 2021*, CONGRESSIONAL BUDGET OFF. (Nov. 8, 2021), <https://www.cbo.gov/publication/57539> [<https://perma.cc/AM3M-QNAV>].

187. Faizer, *supra* note 86, at 602–03.

The new administrative rules would address how the federal funds can be used to progressively improve living standards and reduce socioeconomic disparities within each jurisdiction. For example, the Department of Health and Human Services would issue rules addressing how health care funds may be allocated to further human development for each state. For instance, in my home state of Tennessee, that would mean potentially providing more funds for rural hospitals, expanding access to Tennessee's Medicaid program (known as TennCare), and improving access to recreation and nutritious food. Should Tennessee decide to use a portion of its federal funds for purposes of public health, it would have discretion to do so based on HHS's broad rulemaking. With respect to the Justice Department, the DOJ might propose rules as to means of using federal funds to progressively reform state criminal justice systems to protect against over-incarceration, while still providing adequate public safety. The U.S. Department of Education, in turn, might develop rules as to how states might reconfigure public school attendance zones to provide greater educational opportunity to a broader segment of the population. The rulemaking would be conducted based on Administrative Procedure Act 553, which means that agencies would issue tentative rules that would be subject to notice and comment by interested parties, including state governments, industry, and the broader public before finalization.<sup>188</sup> Availability of notice and comment is very important for the states because it would provide them an opportunity to raise their concerns with the agencies' proposed rules that would have to be adequately addressed before implementation. Participating states would then receive grants from the U.S. Treasury with broad discretion to use the funds, with only limit being guidance issued by the federal administrative agencies through rulemaking. For example, California could use the funds to enact programs for high-speed rail as part of a plan to improve public transport and infrastructure, with the goal of expanding the geographic footprint of neighborhoods that allow for social connectivity and access to affordable housing. Mississippi, by contrast, might emphasize policies geared at improving public schooling and reducing racial polarization and social exclusion. Both approaches to using the funds are consistent with the program and will, over time, improve living standards; engender socioeconomic mobility; and, in the end, engender continued support for democracy and the rule of law by demonstrating that American democracy can address public needs to revitalize living standards.

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188. The rulemaking, which would be conducted with notice and comment under 5 U.S.C. § 553, will allow for detailed feedback by each of the affected states, civil society, and the broader public prior to finalization.

Funds are then to be disbursed to participating state governments, which will have broad discretion to use the money to address public need. Each individual state would then remit a detailed analysis, on a biennial basis, as to how its use of federal funds complies with the detailed alternatives provided in the regulations issued by the relevant federal agencies. This report would then be reviewed by the White House Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) Director, who would evaluate the states' reports to verify state compliance or disobedience with the agency rules. In addition, the OIRA Director would also provide a detailed analysis to Congress identifying all states that are using the funds progressively based on the broad contours set forth in the final administrative rules. In the event of a state's failure to comply, OIRA would make a recommendation to the Treasury as to whether it should claw-back all or a percentage of the funds for the next fiscal year and replace the withdrawn funds with direct payment to households living in poverty. Because the program's intent is not to punish, but instead encourage recalcitrant states to comply, broad leeway would also need to be given to allow them to reapply for direct federal funding. As such, if a state demonstrates a definite plan to use the federal funds consistent with agency regulations, OIRA would reauthorize the plan, and the U.S. Treasury would redirect funds directly to state governments once again.

Making each state only loosely accountable to OIRA will not infantilize state governments or undermine their sovereignty, which is currently what tends to happen when Congress uses its power under the Tax and Spending Clause. Rather, it will be a means for state governments to prove their public spending efficacy and demonstrate how they would further human development consistent with the state's political culture. The OIRA reports, which are to be made fully public to facilitate transparency and accountability, will also enable state governments to learn from each other as to how to best use federal funds for human development purposes. This way, for example, Tennessee's government could review OIRA's report on other state governments—including its bordering states of Alabama, Arkansas, Georgia, Kentucky, Missouri, North Carolina, Virginia, and West Virginia—to verify how its use of federal funds can be improved. The policy would ideally revitalize states as muscular laboratories of democracy by enabling each state to learn from neighboring states to improve their legislative approaches to public policy dilemmas. However, the lack of a single federal agency devoted to evaluating social welfare development at the state level complicates the policy proposal and explains why this article recommends that state compliance be evaluated not by a single federal agency, but by OIRA,

which is the only entity in Washington specializing in inter-agency review. It is to this subject of OIRA and how it is to evaluate state implementation that the paper turns.

*B. OIRA: How It Operates and How It Will  
Evaluate State Implementation*

One problematic part of my proposal is the lack of a single federal agency that could evaluate state implementation of a broad fiscal program. Without such agency, it would be harder to direct federal funds to the states for purposes of enhancing federalism, improving living standards and protecting the rule of law. Although states would be given broad discretion to implement the program, federal verification is still necessary to protect historically marginalized groups from a manifestly regressive use of federal funds. Congress to mandate that the funds be used progressively such that more than an intelligible principle is given to the relevant administrative agencies as to how rulemaking should proceed. To illustrate, while the Department of Health and Human Services or the Department of Education can evaluate local compliance with Medicaid or Title IX, respectively, neither agency has the capacity to evaluate state compliance with federal housing, transport, or labor regulations because those subjects are outside their jurisdiction. Therefore, OIRA, the sole entity within the federal government that has the capacity to engage in interagency review, should effectuate enforcement after the federal agencies issue rules enunciating permissible uses of the federal funds. OIRA rationalizes regulations coming from different federal agencies to ensure consistency with the administrative goals of the presidential administration.<sup>189</sup> This is done by paying careful consideration to the costs and benefits for each proposed regulatory endeavor.<sup>190</sup> The OIRA Administrator is therefore often described as the nation's regulatory czar.<sup>191</sup>

Executive Order No. 12,866, signed by President Clinton, empowered OIRA to review all rules issued by agencies to verify whether the benefits of the proposed new rule are greater than the implementation costs.<sup>192</sup> Federal agencies must both (a) develop a plan to assess the economic consequences of proposed regulations and (b) re-evaluate prior regulations to eliminate those that have a significant negative economic

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189. Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 38 ADMIN. & REG. L. NEWS 8, 8–11 (2013).

190. *Id.*

191. *Id.*

192. ANDREW R. POPPER, GWENDOLYN M. MCKEE, ANTHONY E. VARONA, MARK C. NILES & FRANK A. PASQUALE, *ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH* 565 (3d ed. 2016).

impact, particularly on small businesses.<sup>193</sup> President George W. Bush also directed OIRA to evaluate non-final agency guidance comments and rulemaking, which increased OIRA's ability to review agency actions.<sup>194</sup> This change was in response to increased agency use of "guidances" as a way to avoid judicial review and implement regulatory policy without the costly notice and comment process required under the APA for rulemaking.<sup>195</sup> President Bush then issued Executive Order 13,422, which required all regulatory initiatives that had an economic effect of more than \$100 million to be cleared by a political appointee within a federal agency.<sup>196</sup> It further required that regulations be issued only when there had been a market failure, and it imposed the same cost/benefit test required by President Clinton's Executive Order.<sup>197</sup> Executive Order 13,422 was replaced by President Obama's Executive Order 13,563, which was designed to build upon Executive Order 12,866.<sup>198</sup> In particular, Executive Order 13,563 provides that each agency shall periodically review its significant regulations to make the agency's regulatory program more effective (or less burdensome) in view of the regulatory objective.<sup>199</sup>

According to President Obama's OIRA Director Cass Sunstein, OIRA's main goal is to collect widely dispersed information that is held throughout the executive branch and meant to benefit the public as a whole.<sup>200</sup> The OIRA process enables the perspectives from different agencies, and it allows specialized information held by diverse people to be brought to bear on proposed rules.<sup>201</sup> OIRA also works with agencies to ensure that when rules are proposed, important issues and alternatives are clearly and explicitly identified for public comment.<sup>202</sup> It makes sure that public comments are addressed in the final rules, typically by modifying relevant provisions in the proposed rules that were submitted for public comment under APA 553.<sup>203</sup> Sunstein claims that the central function of OIRA is to operate as the guardian of a well-functioning administrative process, which enhances government accountability and

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193. *See id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *See* Exec. Order No. 13,563, 3 C.F.R. 215 (2012); *see also* STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN, ADRIAN VERMEULE & MICHAEL HERZ, *ADMINISTRATIVE LAW & REGULATORY POLICY* 144–153 (7th ed. 2017).

199. 3 C.F.R. 215.

200. POPPER, MCKEE, VARONA, NILES & PASQUALE, *supra* note 192, at 568.

201. *Id.*

202. *Id.*

203. *Id.* at 568–69.



efficacy. Sunstein claims OIRA does this by overseeing a genuine interagency process to arrive at a consensus that addresses interagency concerns, promotes the receipt and consideration of public comment and help resolve questions of law, including administrative procedure.<sup>204</sup> Finally, OIRA ensures careful consideration of highly technical issues presented by federal agencies by clarifying issues that involve technical expertise and specialization.<sup>205</sup>

Though designed to rationalize the implementation of regulations, OIRA is better situated than any individual agency to evaluate state compliance with the broad discretion given to the states to progressively use federal funds. Utilizing OIRA's expertise is consistent with the President's constitutional power to "take Care that the Laws be faithfully executed," which authorizes the president to supervise and guide executive officers to secure uniformity and accountability in the execution of the laws.<sup>206</sup> This is why the proposal recommends that each state that receives federal funding provide detailed reports to OIRA as to how the funds are being spent and how this corresponds with the broad goals of the program. Applying a very deferential approach to evaluating state legislative choices, OIRA is to verify whether state implementation is consistent with improving human development. In situations where this is clearly not the case, federal funds are to be clawed back and reconstituted to directly benefit households living in poverty within the non-complying state.

#### IV. CLAWING BACK FUNDS IN SITUATIONS OF STATE RECALCITRANCE AND REPLACING THOSE FUNDS WITH A BASIC INCOME

My proposal is not naïve, and it recognizes that states have a history of abusing their police powers. Jim Crow, racially imbalanced schools, and regressive criminal justice systems are obvious examples of malfeasance at the state level. Broad discretion does not mean that states are to be given unbridled power to use the funds regressively. Should a state either reject the funds outright or use federal largesse to surreptitiously implement regressive fiscal policies such as a reduction in property tax assessments, Washington should claw back the funds as punishment. The poor, however, should not suffer the consequences of their state government's bad faith. Rather, if a state fails to comply, the subsidy should be repurposed to eliminate absolute poverty within the state by way of a guaranteed income. A guaranteed income designed to

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204. *Id.* at 569.

205. *Id.*

206. See Proposed Executive Order Entitled "Federal Regulation", 5 Op. O.L.C. 59, 59 (1981); see also Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282 (2006).

eliminate poverty nationwide was attempted by the Nixon Administration in 1969 when it proposed the implementation of a Family Assistance Plan (FAP) by way of a nationwide negative income tax that would provide a universal basic income of approximately \$12,000 per person in 2022 dollars for every person in the United States. This FAP endeavor failed, most likely because Republicans and conservative Democrats balked at the cost of the endeavor (approximately \$3 trillion in 2022 dollars) and their concern that implementation of a FAP would undermine work.<sup>207</sup> More detail as to the FAP and why it failed follows.

*A. Family Assistance Plan Post-Mortem and the Political Plausibility of a Spending Plan Designed to Revitalize Federalism*

As Guerra-Pujol has written, opposition to Nixon's FAP stemmed from a coalition of forces. For example, Russell Long, a conservative Democrat and Chairman of the Senate Finance Committee, perceived the measure as being too generous to the poor and therefore a disincentive to work.<sup>208</sup> In contrast, some members of the liberal wing believed the benefits were too low to support it. Democrats were also not inclined to see Nixon achieve a legislative victory.<sup>209</sup> Opposition to the FAP was also facilitated by "movement" conservatives such as William F. Buckley, who reversed their initial support for a guaranteed income on the grounds that it would lead to an irrevocable bloating of the welfare state.<sup>210</sup> The plan was also undermined by political partisanship and a fear amongst both conservative Democrats and Republicans that the UBI would undermine the incentive to work.<sup>211</sup> This, of course, corresponded with a concern to preserve a racial hierarchy favoring whites over Blacks that was relied upon in much of the country, especially in the Democratic Party-controlled South.<sup>212</sup>

In the end, the FAP was killed in Committee by Senator Long, whose skilled delay tactics effectively ran out the clock in the 91st Congress.<sup>213</sup> According to Pujol, the FAP died in Committee because its opponents were successfully able to characterize the measure as an expensive disincentive to work.<sup>214</sup> This is indeed the greatest political problem with implementing a UBI.

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207. See Guerra-Pujol, *supra* note 16, at 109.

208. See *id.*

209. See *id.*

210. See *id.* at 117.

211. See *id.* at 122.

212. See *id.*

213. *Id.* at 119, 121–22.

214. See *id.* at 122.

President Nixon's proposal was for a family of four to receive an annual \$1,600 or roughly \$12,000 in today's inflation-adjusted dollars.<sup>215</sup> Former presidential candidate Andrew Yang proposed the enactment of a similar plan during the 2020 Democratic primaries, which would have cost an annual \$2.8 trillion.<sup>216</sup> Recently, Ayres and van den Bergh proposed a federal disbursement at just above the federal poverty level for all 130 million U.S. households.<sup>217</sup> The plan included crediting households of four with roughly \$27,000 per year to protect against poverty.<sup>218</sup> If this were implemented as a negative income tax, it would cost Washington an annual \$3.5 trillion, although this amount could be dramatically reduced to an annual \$1.25 trillion with an implausible reversal of the Reagan, Bush and Trump tax cuts, as well as cost savings by reducing welfare spending at the national and local levels.<sup>219</sup> These costs are so staggering that implementation of a nationwide UBI would make it the most expensive budget item for the world's richest country.<sup>220</sup> As Guerra-Pujol has eloquently written, the leading lesson of the Nixon Administration's failure to enact the UBI in 1970 was its failure to appreciate the almost "impossible political test" for its enactment, which is the difficulty in providing meaningful income to the poor "without distorting work incentives and without breaking the bank, so to speak."<sup>221</sup>

The country's growing income and wealth inequality has resulted in democratic retrogression demonstrated by the hyper-polarization that characterizes today's Washington politics and increased support in the electorate for authoritarian leadership over the rule of law.<sup>222</sup> A basic income for all might have been a useful means of protecting living standards and preventing democratic erosion. However, the reason I am

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215. *See id.* at 103.

216. Catherine Clifford, *This Free Cash Plan Would Pay You \$1,320 Per Month and Wouldn't Cost the Government a Cent*, MAKE IT (Jan. 15, 2020), <https://www.cnbc.com/2020/01/14/budget-neutral-universal-basic-income-plan-would-pay-1320-per-month.html> [<https://perma.cc/QS87-BUA6>].

217. Robert U. Ayres & Jeroen van den Bergh, *Why Universal Basic Income Should Be President Biden's Top Priority*, INSEAD KNOWLEDGE (Jan. 19, 2021), <https://knowledge.insead.edu/blog/insead-blog/why-universal-basic-income-should-be-president-bidens-top-priority-15926> [<https://perma.cc/FXP4-75E2>].

218. *Id.*

219. *Id.*

220. *Gross Domestic Product 1947–2021*, FED. RESERVE BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/GDP> [<https://perma.cc/EP5G-L63V>].

221. Guerra-Pujol, *supra* note 16, at 122.

222. *See generally* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 U.C.L.A. L. REV. 78 (2018); DALIBOR ROHAC, LIZ KENNEDY & VIKRAM SINGH, CTR. FOR AM. PROGRESS, DRIVERS OF AUTHORITARIAN POPULISM IN THE UNITED STATES (2018), <https://www.americanprogress.org/article/drivers-authoritarian-populism-united-states/> [<https://perma.cc/H3UG-MVB3>].

not recommending implementation of a UBI is that it would, on its own, be an extremely expensive and infeasible work disincentive, and it would most likely fail in Congress. It would also be a one-size fits *none* approach to poverty alleviation that, like the COVID-19 federal unemployment benefits, be insufficiently generous to engender socioeconomic mobility in high cost-of-living jurisdictions and undermining of labor markets in the rest of the country. It is for this reason that I instead recommend revitalizing state governments with direct financial assistance in the first instance and direct payments to the poor as an alternative. Such an approach will not only strengthen American federalism but be politically more feasible because it will be seen as a measure furthering state power as opposed to a measure undermining work.

*B. A Viable Proposal to Revitalize Federalism with a Basic Income As a Necessary Alternative*

Unlike the Nixon Administration's failed FAP, my proposal is not for a UBI for all; instead, it would be a guaranteed income paid directly to individuals and households living in poverty in states that have failed to either accept or effectively use federal transfers to further human development. While state governments would obviously object to any loss of federal funds, the advantage of using this stick is to encourage states to use federal funds effectively, and should they systematically fail to do so, the first victims of state failure would not be the poor. The proposal deals with Guerra-Pujol's impossibility problem because direct income support to the poor only becomes a reality after state governments fail to successfully implement a proposal designed to update federalism. As such, the proposal can effectively become a necessary concomitant of federalism, as opposed to a measure designed to disincentivize work and undermine labor force participation.

Support for a guaranteed income has failed to gain traction within the Biden Administration, which has seen opposition to his Administration's fiscal stimuli, COVID-19 relief and student loan forgiveness measures grow increasingly vociferous. Indeed, centrist Democratic opposition to the Biden Administration's fiscal program is akin to that from conservative and moderate opponents to the FAP in 1970, in the sense that the COVID relief and student loan forgiveness measures are seen by moderates as expensive and inflationary measures that create the wrong incentives.

This is why the key component of my proposal is the provision of federal funds directly to state governments to improve their inhabitants' living standards.

## CONCLUSION

Living during the COVID-19 pandemic and watching—albeit from afar—the tragic Russian invasion of Ukraine, Americans are constantly reminded that the U.S., which has been the key guarantor of global security since World War II, is struggling to maintain the living standards of its inhabitants, as well as its leadership role in the international system. These failures can be linked to authoritarianism and democratic retrogression, which are problems explained by the electorate’s concern with the American government’s performance, and a nationwide sense of socioeconomic stagnation. Recognizing that Americans still have, by international standards, enviable living standards, something must be done to revitalize the American system of government. My proposal is to do so by recognizing that the sheer number of states and the dynamics of American history have constricted Madisonian federalism; as a result, it has turned states into resource-starved governments that are more akin to developing countries from the Global South than constituent members of the world’s richest country. The consequence is poorer performance by governments, which ultimately worsens living standards by denying Americans the benefits of federalism.

We need to update federalism by providing much needed federal funds to fifty fiercely competitive states by incentivizing them to undertake social welfare initiatives that will improve living standards—and, as a consequence, further the rule of law in a world and country teetering on the brink of authoritarianism.

Directly funding state governments to improve living standards will have four additional and non-trivial benefits. First, because the funds would be spent by state governments with broad discretion and very limited federal oversight, the risk of a conservative backlash on federalism grounds would be minimized. Second, because the program is to be driven by state governments and not by federal administrators, the program will result in state experimentation with the idea that states, acting as laboratories of democracy, will learn from each other, and, over time, arrive at the right policies to improve living standards free from federal overreach. Third, having the fifty states take the initiative to improve living standards also protects against the manifest risk to living standards of an unqualified presidential administration, especially in the context of a contested election that divides the country. Finally, should individual state governments prove manifestly unwilling or incapable of using the federal funds in good faith, the consequence will not be as severe to the most vulnerable state inhabitants because all funds would be repurposed to fund a statewide guaranteed basic income to eliminate poverty.

This last point explains why, unlike the Nixon Administration's failed FAP, my recommendation cannot easily be caricatured as undermining work incentives. Because it will only be implemented in situations where state governments prove incapable or unwilling to progressively use federal funds, providing a basic income to households living in poverty will likely be seen as a means to improve living standards consistent with federalism because OIRA, which is tasked with evaluating state implementation, will seek to cooperate and work closely with state governments and defer to state governments in evaluating their implementation plans.

As the country watches the first major international war in Europe since World War II, it is worth remembering that our forty-fifth President, who remains the favorite to win the Republican nomination for the presidency in 2024,<sup>223</sup> attempted to prevent the lawful transition of power to his successor in 2021 and refused to protect the country from Russian election interference in our elections. Both the precautionary principle and the need to protect our democracy require a revitalization of American federalism. Mine is a modest proposal to do so.

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223. See Aaron Blake, *The Top 10 Republican Presidential Candidates for 2024, Ranked*, WASH. POST (Aug. 20, 2022), <https://www.washingtonpost.com/politics/2022/08/20/top-ten-republican-2024-candidates/> [<https://perma.cc/W9MM-7WFS>].