

# The Three Shades Of American Federalism

## Abstract

*Donald Trump is a transgressive president elected by a minority of voters but elevated to the White House by a quintessential institution of American federalism, the Electoral College. However, the federal system otherwise poses significant barriers to transgressive behaviour because it is a complex mix of dualism, intergovernmental cooperation, and national coercion. The system's constitutional dualism allows space for autonomous state policy-making. The system's rule-bound and bureaucratic structures of intergovernmental policy implementation limit the ability of one president to substantially alter this cooperative dimension of the system. The long-run trend, though, is toward greater centralization and federal government coercion of state and local governments.*

## Introduction

Descriptions of American federalism are like the blind men and the elephant. There is a failure to link the pieces into a coherent picture, in part because American federalism has evolved into a complex system of compatible and seemingly incompatible elements. Also, characteristics of one facet of the system are often generalized to the whole system. Thus, Stewart (1984) compiled 497 descriptors of American federalism, among the most famous of which is Grodzins' (1966) "layer cake" versus "marble cake" federalism.

The three key elements of American federalism today are dualism, cooperation, and coercion. These elements are usually treated as sequential historical phases, with dual federalism being the first phase displaced by another (Corwin, 1950), but this is mistaken because the institutionalization of any phase creates a path dependence that prevents another phase from displacing it entirely. Historical phases can be identified by their predominant characteristics, but a new phase arrives incrementally, although with an eventual critical juncture augmenting it, while the old phase still functions alongside and in the interstices of the new phase. Each phase, moreover, has particular impacts on federalism and intergovernmental policy-making and administration.

## Dual Federalism

Scholars often note that despite the post-1960s growth of coercive federal power, states still exercise considerable policy autonomy, such as legalizing medical and recreational marijuana (which are illegal under federal law) and physician-assisted suicide, and pursuing climate-change initiatives, school choice, abortion rules, consumer protection, occupational licensing, and autonomous-vehicle regulation. States also pioneer policies, such as same-sex marriage, that are later adopted by the federal government and imposed on the rest of the states.

The U.S. Constitution is dualist. Limited powers are delegated to the federal government; all other powers are reserved to the states. The Constitution is silent about such matters as consumer protection, education, environmental protection, health care, corporation charters, and local government. Additionally, the federal government and each state government is complete under its own constitution.

The U.S. Supreme Court has affirmed dualism. In *Sturges v. Crowninshield* (1819), the court held that states can exercise powers delegated exclusively to Congress so long as Congress does not pre-empt them or the court does not find them in violation of interstate commerce. In *Prigg v. Pennsylvania* (1842), the court said state officials were not required to enforce the U.S. Fugitive Slave Act of 1793. Non-slave states could pass "personal liberty" laws prohibiting state officials from apprehending runaway slaves. *Prigg* laid the foundation for the court's anti-commandeering doctrine articulated in *Printz v. United States* (1997), for state legalizations of marijuana despite its federal illegality, and for sanctuary cities and states that refuse to cooperate with federal immigration authorities. In *Michigan v. Long* (1983), the court ruled that state high-court rulings that increase individual-rights protections above standards set by the U.S. Supreme Court under the U.S. Bill of Rights cannot be reviewed by the Supreme Court when based solely on "adequate and independent" state constitutional grounds (Collins et al., 1986).

Without the persistence of dual federalism's dual sovereignty, the system would not be truly federal. Thus, states still have realms of policy autonomy, albeit shrinking realms. However, the rise of partisan polarization since the late 1960s and, today, Donald Trump's presence in the White House have injected new energy into dual federalism as states increasingly use their autonomy to counteract or weaken federal policies they disdain and to act in the absence of federal action (as many states have done on climate change). All 50 states have enormous socioeconomic policy-making capacity. California has the world's fifth largest GDP. Even the poorest state, Mississippi, has the world's 24th highest GDP per capita.

## Cooperative Federalism

Cooperative federalism is often said to have originated in the 1930s (Clark, 1938), but intergovernmental cooperation has been present since 1789 (Elazar, 1962). For example, Congress deferred to state concerns in the Judiciary Act of 1789 by creating federal district-courts wholly within state boundaries. Nineteenth-century cooperation also included land grants, pork-barrel expenditures, loans and loan forgiveness, federal-property transfers, cash grants, technical assistance, and research and information sharing. “The right of the federal government to give to the states land from the federal domain and money from the federal treasury has never seriously been questioned” (Macdonald, 1928, p. 1).

Cooperative federalism entails the willingness of the federal government to negotiate and bargain with state and local officials over the formulation of federal policy and the implementation of federal policies by states and localities.

In the past, Congress regularly deferred to the states, as in an 1866 act funding state quarantine enforcement but instructing the treasury secretary not to “add to, modify or supersede any state regulation” (Maxey, 1908, p. 622). This approach changed in the twentieth century when Congress increasingly directed and regulated states through cash grants-in-aid. President Franklin D. Roosevelt’s New Deal marked a critical juncture institutionalizing cooperative federalism. From 1930 to 1940, the number of grants increased by 107 percent (Dilger, 2017), and federal spending for grants increased by 2,006 percent (Maxwell, 1952).

However, cooperation was gradually redefined, especially during the 1960s, as the willingness of state and local governments to cooperate with the federal government increased—not vice versa. This conception was driven partly by belief that the federal government possessed superior expertise. Thus, contemporary ‘cooperative federalism’ is said to situate “uniformity and finality for first-order norms at the national level, while allowing dialogue and plurality at the level of state implementation of those norms” (Bader, 2014, p. 164). The nationalist school of federalism celebrates this development as “the power states enjoy as national government’s agents” (Gerken, 2014, p. 1626). Hence, the most federalist dimension of cooperative federalism—the willingness of elected federal officials to treat elected state and local officials as partners in federal policy formulation—has atrophied such that intergovernmental cooperation in the implementation of federal policies, especially through grants, is dominated by bargaining among federal, state, and local bureaucrats—all of whom have strong incentives to maintain a mostly cooperative and even collusive system.

## Coercive Federalism

Coercive (Kincaid, 1990) or regulatory federalism (U.S. Advisory, 1984), which emerged in the 1960s under President Lyndon B. Johnson’s “creative federalism,” describes an era in which the federal government can assert its policy will unilaterally over state and local governments. There are few constitutional or political limits on exercises of federal power, elected state and local officials are no longer policy-making partners with federal officials, and federal rules affect most state and local policies (Kincaid, 2011). Coercive federalism is characterized by unprecedented levels of regulations attached to federal grants, federal mandates on states, federal pre-emptions of state policies, and federal court orders altering state institutions and policies.

Coercive federalism emerged as the dominant contemporary element mainly as a national political response to social movements demanding deep federal interventions into state and local polities in order to protect individual rights, the environment, and other social goods and also mitigate negative externalities (e.g., air pollution) while fiscally enticing states into redistributive programs despite redistribution being more properly a federal function (Musgrave, 1959).

Changes in the party system enhanced coercive federalism and cemented its bipartisan endurance by muting the intergovernmental voices of elected state and local leaders. The Supreme Court’s “one person, one vote” rulings in the

mid-1960s eviscerated the parties' county and municipal power bases, which were crucial electoral links between local and federal elected officials. The Democrats' 1968 national presidential convention marked a critical juncture as insurgents revolted against the party's bosses, more national party rules were imposed on state parties, and the weight of convention-delegate representation shifted towards identity groups (e.g., minorities and women).

Republicans soon followed suit. The post-1968 proliferation of primary elections further weakened state and local party leaders; encouraged candidate-centred campaigns financed by individuals, big donors, and national interests; and fostered polarization as party and issue activists often determined primary outcomes. What occurred was a de-coupling of the electoral fortunes of members of Congress and presidents from the influence of elected state and local officials who had controlled much of the party machinery since the federal republic's early days.

Two other factors further fostered coercive federalism. Public employee unions played a major role by agitating for substantial federal interventions to benefit their interests (Kincaid 1993), as reflected in the most momentous twentieth-century federalism ruling, *Garcia v. San Antonio Metropolitan Transit Authority* (1985), which directed states to rely on the national political process rather than on the Constitution's Tenth Amendment to protect their powers.

Coercive federalism also was facilitated by the marked decline during the 1960s of the Democratic South as a powerful force in Congress. Southern representatives had played a key role in protecting state and local government prerogatives from federal coercion (Gibson, 2012).

## Conclusion

Although policy alterations from one presidential administration to another are common in today's era of polarization, there continues to be more continuity than discontinuity in the federal system because the coexisting elements of the system are highly institutionalized and path dependent. Dual federalism, while less robust than in the past, still permits healthy state innovation and counteracts Trump's transgressive presidency. The bureaucratized system of cooperative federalism ensures that the system's 1,319 grant programs function relatively free of gross congressional and presidential interference. Hence, for example, Trump has been unable to cut off grant funds to sanctuary jurisdictions. Coercive federalism, however problematic, ensures many uniform protections of individual rights and social equity nationwide. Nevertheless, the system's long-term future may be dysfunctional because heightened centralization is eroding the system's dualism and the coercive phase is eliminating the federalist dimension of cooperative federalism, thereby reducing cooperative federalism to the idea that the legitimate position of state and local governments is to be mere agents of the federal government.

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