Coercive, Cooperative, and Collaborative Federalism in Context of Intergovernmental Relations
Different Concepts of Federalism

- Dual Federalism
- Cooperative Federalism
- Marble Cake Federalism
- New Federalism and “New” New Federalism
- Coercive Federalism
- Collaborative Federalism
Federalism

“The question of the relation of the states to the federal government is the cardinal question of our constitutional system. It cannot be settled by the opinion of one generation, because it is a question of growth, and each successive stage of our political and economic development gives it a new aspect, makes it a new question.”

President Woodrow Wilson
Current Issues in Federalism

- Immigration reform: Can states pass laws designed to dissuade illegal immigrants? (Carrying documents, punishing landlords, etc.)

- “Individual mandate”: Can the federal government require people to purchase health insurance?

- Voter ID laws and other voting registration requirements—Do state requirements for photo identification interfere with the constitutional right to vote? What of proof-of-citizenship requirements? What’s the operative principle? Or principles?
Federalism is a system in which the national government shares power with state/local governments.

The federal government is not all-powerful, despite the apparently inexorable growth in the federal government’s size, scope, and power. State governments have the authority to make final decisions over many governmental actions.
Federalism explains many of the government actions that affect our everyday lives:

- How much we pay in taxes.
- How fast we can drive.
- Drinking age.
- How “successful” our schools are.
- Whether children are covered by health insurance.
- Punishments for crimes (death penalty)
- What school cafeterias offer for lunch.
Why Federalism Matters

• A federal system is rare in the world. Unitary systems are much more common.
• U.S. states maintain a high degree of independence from the national government.
• By dint of political history and culture American people are committed to idea of local self-government.
• Members of Congress are elected by and responsive to local constituencies. That explains why members of the House “Tea Party Caucus” continue to vote and obstruct government as they do; they are playing to very partisan constituencies and sharply gerrymandered districts.
Power centralized.
State or regional governments derive authority from central government. Examples: United Kingdom, France.
CONFEDERATED AUTHORITY

CONFEDERAL SYSTEM
(or CONFEDERATION)

Central government

State or local government

Citizens

Power held by independent states. Central government is a creature of the constituent governments. Example: United States under the Articles of Confederation.
AUTHORITY IN A FEDERAL SYSTEM OF GOVERNMENT

FEDERAL SYSTEM

Central government

State or local government

Citizens

Power divided between central and state or local governments. Both the government and constituent governments act directly upon the citizens. Both must agree to constitutional change. Examples: Canada, United States since adoption of Constitution.
The Founding

• Radical new plan: No precedent for a “federal republic”
• Framers envisioned people shifting their support between levels of government to keep the two balanced, so that neither level would have undue authority over the other. This is what’s meant by ‘checks and balances.’
The Founding

The Constitution uses **elastic language** (expansive, at times ambiguous language) because precise definitions of power are politically impossible due to competing interests. Consequently, the founding document states that Congress shall have the power to “**make all laws which shall be necessary and proper for carrying into execution the foregoing powers**.” (Article I). This is the so-called “Elastic Clause.”
Implied Federal Powers; Reserved State Power

Relies on interpretation of the elastic clause and the Tenth Amendment

- **Elastic Clause:** the last clause in Section 8 of Article I of the Constitution, which gives Congress the means to execute its enumerated powers; this clause is the basis of Congress’s implied powers (also called the *necessary and proper clause*)

- **Tenth Amendment:** reserves for the states or the people “powers” not given to the national government or denied to the states by the Constitution
Chief Justice John Marshall supported a vision of a strong national government (the Federalist faction—Hamiltonians).

*McCulloch v. Maryland* (1819) settled two questions:

- Can the federal government do things not explicitly stated in the Constitution? (Yes. A federally-chartered bank was necessary for the federal government to accomplish its economic and fiscal functions expressly given in the Constitution)
- Is the federal government supreme over against the states? (Yes)
Another key case, *Marbury v. Madison* (1803), involved the issue of the Presidential appointment power: It also established that the Supreme Court could decide that acts of Congress and of the Executive were unconstitutional—the single biggest advance in SC power in its history. Facts: Marbury was a last minute appointment by John Adams, the outgoing President, as Justice of the Peace in the District of Columbia. The incoming president, Jefferson, told his Secretary of State, Madison, to ignore the appointment. Using a law passed by a Federalist congress, Marbury tried to get the Supreme Court to issue a *Writ of Mandamus* against Madison. His petition was reviewed by the Supreme Court, which was then led by Federalist and Adams appointee, Chief Justice John Marshall.
Jefferson thought that he had trapped Marshall, since if he decided against Marbury, it would make Adams look bad, while if he decided against Jefferson, it would look like a purely political decision. Marshall, however, won the battle. He issued an opinion against Marbury, yet also sternly lectured Jefferson on *his* misconduct. Even more important, however, was the basis for Marshall’s decision. He argued that the Federalist Congress had acted *unconstitutionally* in giving the Supreme Court the power to issue a writ of mandamus, as a Court of original jurisdiction, contrary to the Constitution. In doing so, he actually increased the Court’s power, by establishing for it the power of Judicial Review—the power to declare acts of Congress unconstitutional. The Court thereby went from being the weakest of the three branches to, sometimes (when exercising such review) the strongest.
History of Federalism

DOCTRINE OF NULLIFICATION

• Before the Civil War, if a state believed a federal law violated the Constitution, it could declare the law null and void.
• Used by southern states to push back against northern efforts to end slavery.
• Question settled by Civil War. States cannot nullify federal laws.
Hurricane Katrina: case study in the breakdown of federalism, IGR.

Confusion, bickering among government agencies and leaders at different levels made the disaster worse.

President Bush’s approval ratings dropped after Katrina and never recovered to the same level.

Only certain individual agencies (e.g., Coast Guard) never faltered.

The movement toward devolution slowed after Katrina, with a return to a trend toward centralization of power in the Federal government.
Dual Federalism, 1800-1932

✓ Defined by two separate governments.
✓ Each has its own sphere of responsibility.
✓ Characterized as layer-cake federalism.
✓ Federal government grows and changes after Civil War.
Cooperative Federalism, 1932-80

Cooperative Federalism characterized by compliance with and increasing acquiescence in federally-defined and funded, coproduced programs; state and local governments in effect subsumed by an increasingly overweening federal government, though levels of government were also more and more interdependent in the implementation of policy and programs. Sometimes characterized as a “supportive” intergovernmental relationship. Also characterized as marble-cake federalism.

Result of New Deal recovery efforts of the 1930s, also seen in Great Society programs of the 1960s, with the increased use of categorical grants.
Metaphors for Federalism

Dual Federalism: The Layer-Cake Metaphor
Citizens cutting into the political system will find clear differences between state and national powers, functions, and responsibilities.

Cooperative Federalism: The Marble-Cake Metaphor
Citizens cutting into the political system at any point will find national and state powers, functions, and responsibilities mixed and mingled.
New Federalism, 1969-1980

✓ New Federalism defined by return to state power.

✓ Nixon: bring back more authority to states
  ▪ Use of less restrictive block grants
  ▪ Revenue sharing proposals
    (never implemented)

✓ Reagan: give more authority to states but reduce all levels of government, size & reach of government:

✓ Also seen in 1990s Republican Revolution (Gingrich’s “Contract with America”).

✓ President George W. Bush departs from this trend, prompted by 9/11 and the increased use of preemption.

• President Obama’s Administration is sometimes characterized as espousing a new form of IGR under “collaborative federalism,” that is, an effort toward partnership with the states—for instance in changes to the NCLB statute, through the encouragement of state waiver requests.
Types of Federal Grants

• Categorical grants – for specific purposes
• Project grants – a certain sum to applicants
• Block grants – broad grants to states with only a few strings

Purposes of Federal Grants

• Supply state and local governments with revenue (federal government much better at generating tax revenue than are the states)
• Establish minimum national standards
• Equalize resources among the states
• Attack national problems but minimize growth of federal agencies
Politics of Federal Grants; Policymaking

What level of government should control funding, policymaking, policy and program implementation?

- Cyclical: federal control → demands for devolution of more power to state and local governments → loss of consistency, responsiveness → demand for closer federal supervision, redress for state/local programs → increased federal control
- States innovate when the federal government doesn’t or can’t, and vice versa.
- States lost control over civil rights laws and policies with Civil Rights Act of 1964, Voting Rights Act, etc. Why?
Federal Mandates

• Getting less federal money does not mean less federal control:

• Unfunded Mandates: Gives states responsibility to carry out federal law but not the funding
  ▫ Unfunded Mandates relief Act of 1995
    • Limits on only one type of mandate: Direct orders

• Preemptions: federal laws override state laws, sometimes costing more money
Types of Mandates: Federal Coercion?

- **Direct Orders** (covered by Unfunded Mandates Relief Act) – few
- **Cross-cutting requirements**— extend conditions to all in order to get funding:
  - No Child Left Behind: a state must enforce all of its regulations to get any federal education funds.
- **Crossover sanctions**—fed. funds used in one program influences state and local policy in another— Highway Funds tied to state drinking age
- **Total Preemption**—Federal govt. preempts state and local laws in conflict with federal laws:
  - Civil Rights Act of 1964, Voting Rights Act of 1965
  - **Partial Preemption:** preempt state enforcement of standards, but states can implement their own standards if they are at least equal to federal ones, whether relating as a base to the Civil Rights Act, the Clean Air Act, OSHA standards, or any other federal law or regulation.
In Theory

Liberals supposedly fear state autonomy, want uniform national laws to ensure justice and equality, for example in the introduction and nationalization of civil rights laws, while Conservatives purportedly want state autonomy for sake of more liberty (Reagan’s New Federalism, Devolution).

- Not that simple in reality, but rather instances of the two principal parties having their preferences as to what policies and laws should be national and which ones should be determined by the states. Example of the Defense of Marriage Act, federal legislation supported by most Republicans, with Democrats (including President Obama) supporting state-by-state determination of marriage equality, civil partnership provisions. Recently New York became the seventh state to legalize same-sex marriage, led by Democratic Governor Cuomo. DOMA is under review right now by the US Supreme Court.
Relations Among the States, also known as *Horizontal Federalism*

- States must give **full faith and credit** to other states.
- **Privileges and immunities clause** guarantees equality among the states.
- States are required to **extradite** criminals.
- States work together through **interstate compacts, regional clusters**.
Intergovernmental Relations

- What Federalism is called when it is not just National-State Relations – Local governments are included in IGR: Municipal, County, Special Districts (85,000 subnational governments in U.S.). IGR are the dynamics of interjurisdictional and political relationships among levels of government within the structural framework of Federalism.
- Local Governments are not part of Federalism because they are subordinate to states, and not sovereign. Miller & Cox cite Justice Dillon (1868): “that local governments are ‘mere tenants at will of their respective state legislatures’ and ‘could be eliminated by the legislature with a “stroke of the pen.”’ For more than 140 years it has been settled law that the states establish the purpose and nature of local governments within their boundaries. As little more than ‘mere tenants at will’ local governments are subject to the dictates and views of the various legislatures.” Not straightforwardly so, but nonetheless the prevailing legal-constitutional framework as held by the courts.
Centralizing--Nationalizing Forces

- National and global economy, “great recession”
- War on Terror; war generally
- Pressures toward federalization and militarization of disaster response
- Shifting nature of political incentives—looking toward Washington
- Growth of more competitive national media—Katrina coverage
- Interest group activism
- Collapsing constraints on the federal role
- Chronic federal fiscal pressures—federal bailout of state and local governments
- Eclipse of federalism as a primary value in itself
- Other factors?
# Grant Type Examples

<table>
<thead>
<tr>
<th>Categorical Grants</th>
<th>Block Grants</th>
<th>General Assistance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Program</td>
<td>Program</td>
<td>Program</td>
</tr>
<tr>
<td>Medicaid</td>
<td>Temporary Assistance for Needy Families</td>
<td>Jobs &amp; Growth Tax Relief Reconciliation Act</td>
</tr>
<tr>
<td>No Child Left Behind</td>
<td>Community Development</td>
<td></td>
</tr>
<tr>
<td>Adoption Assistance</td>
<td>Maternal &amp; Child Health</td>
<td></td>
</tr>
<tr>
<td>Foster Care</td>
<td>Social Services</td>
<td></td>
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<tr>
<td>School Lunch</td>
<td>Surface Transportation</td>
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Federal First Responder Grant Programs

Department of Homeland Security
- Border and Transportation Security (ODP)
- Emergency Preparedness And Response (FEMA)

Department of Justice
- Office of Justice Programs
- Office of Community Policing Services

Department of Health and Human Services
- Center for Disease Control and Prevention
- Health Resources And Services Administration

State

City/County
- Law Enforcement
- Fire
- Emergency Medical Service
- Public Health/Hospitals
Trends in Federal Grants to State and Local Governments (constant dollars)—shift to aid to individuals (cf. Kincaid)
IG Performance Accountability

- **Tool selection** – are performance accountability tools selected to reinforce each other or do they work at cross purposes?
- **Tool design** – are incentives built in to encourage ownership and accountability by third parties?
- **Third party networks** – are the incentives and interests aligned? Problems of accountability, possibilities of gaming the system if not outright corruption
- **Oversight** – do federal agencies have the capacity and authority to effectively oversee the exploding use of third parties?
- **Public Transparency** – Are roles and responsibilities clearly delineated?
Strategies: Tool Design

Multiple roles in grant accountability strengthen movement toward federal *policy and program preemption*

- Grantors (political leaders and administrators) as regulators
- Grantees as regulated entity—compliance, quality assurance
- Sanctions, incentives and rules
- Managerial features
  - Auditing and internal control mandates
  - Performance goals and indicators
  - Program evaluation
  - Reporting requirements (outputs or outcomes)
Concerns with IGR System in Transition

- Mismatch in assignment of responsibilities across government boundaries and across sectors; horizontal inequities across governments; capacity gaps across governmental and third-party actors
- Centralization of priorities and strategies, and policymaking, together with fragmentation and inefficiency in delivery, and confused and conflicted accountability; lack of consistency in policy and program implementation
- Multiplication of constituencies and power imbalances undermine ‘consensus structures.’ Larger local jurisdictions tend toward better, more responsive, more professional, and more accountable service delivery.
- Is professionalism a larger factor than governmental capacity, intergovernmentally? Whatever its problems, the Richardson administration professionalized state government in significant ways, lifting and evening out agency capacity in the Executive Branch.
Shift in emphasis from Government to Governance, from Structure to Process

• Shared policy and programmatic goals should be formulated concertedly by national, state, and local governments, (but not necessarily backed up by unequivocal governmental authority, which tends to mean increased federal power)

• Increasingly, informal rules coordinate action (networks)

• Still “coercive” because of the extent to which policy remains or is increasingly the province of the federal government—for example, healthcare reform. Also accretion of policies, court interpretations and rulings, etc., over time, across Democratic & Republican administrations, also control over funding

• Policy implementation by public and private actors, across sectors, so that authority and accountability become dispersed. Nongovernmental actors become accountable and responsible in theory, though seldom sufficiently so in fact.
Governmentality focus

Draws attention to:

• how state and society get entangled in particular regimes of governing, e.g. in governance and policy/program implementation networks

• away from the state (“hollowing out of the state” and governmentalization of nonstate actors)

• increased complexity of problems and societal responses

Policymakers do not go for optimal solutions

• No time to seek them, reactivity, difficulty, unpredictability

• Acceptability is the focus instead, as defined by their constituency (or constituencies)

• Hence: accountability issues