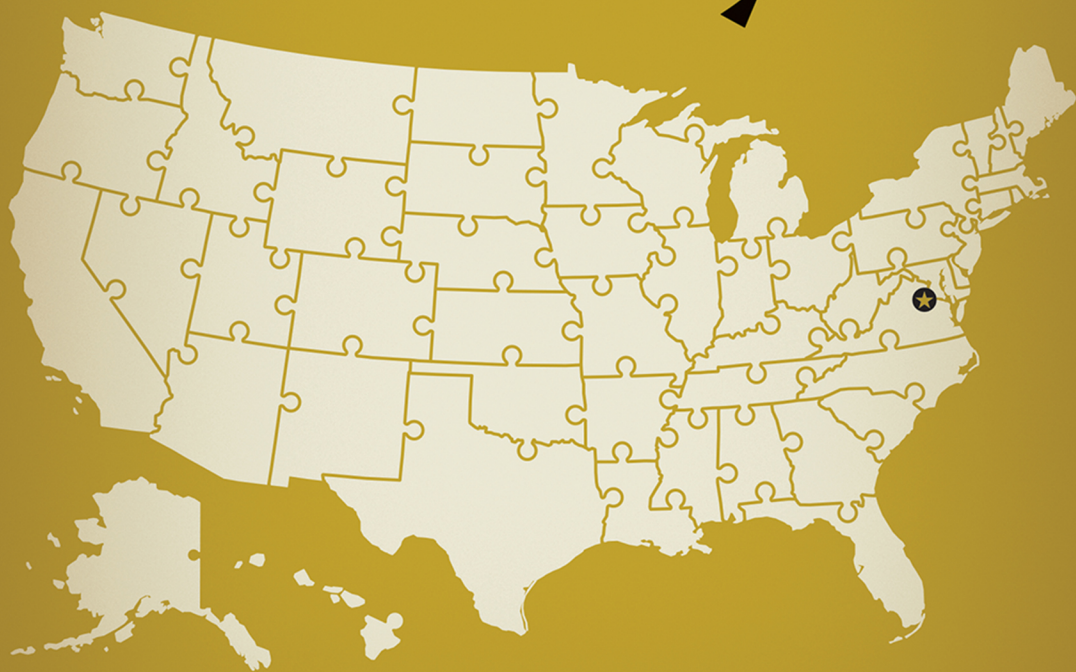


Perspectives on Political and Economic Governance

# American Federalism Today



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### 3

## The Phases and Faces of Federalism

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A word about the title of my paper. It departs rather substantially from the assigned title (“What Ever Happened to Previous Calls for a ‘New Federalism?’”), as well as the prior assumptions with which I began work on this project. That original title fitted comfortably with what might be called a standard historical approach: review past incidents of change, whether proposed or actuated, and chronicle the evolution of the principle, practice, or institution in question. With respect to federalism, a version of the conventional historical wisdom long conformed to that formulation, assessing American federalism as a story of successive phases that added up to a cumulative advance of central at the expense of peripheral power. The path to that destination was usually signposted as Civil War, Progressive Era, World War I, New Deal, World War II, Great Society.

But on closer consideration, it seemed that the character of America’s federal experiment, with some partial exceptions noted below, was less a matter of evolution than it was of stasis—or, perhaps more accurately, cyclicity. The historical record reveals stubbornly persistent confusion and argument about the legitimacy, logic, value, and very meaning of *imperium in imperio* and endless, repeated, Groundhog Day–like contestation and frequent reversal of positions both ideological and pragmatic about its actual operation. Indeed, the rationale for this Hoover Institution project testifies to the continuing lack of agreement on federalism’s nature in either theory or practice.

The Founders themselves had difficulty specifying the precise meaning of federalism. The term does not appear in the Constitution, though all the framers understood that they were building a political edifice in which power, authority, and loyalties were somehow to be shared between the central and state governments. Yet they differed sharply over the nature of that relationship, about the precise valence of those competing claims in the larger

scheme of “checks and balances” that characterize the Constitution’s overall architecture.

Thomas Jefferson, for example, thought that “it is not by the consolidation, or concentration of powers, but by their distribution, that good government is affected. Were not this country already divided into states, that division must be made, that each might do for itself what concerns itself directly, and what it can so much better do than a distant authority.”<sup>1</sup>

That’s about as concise a case for the virtues of federalism as could be imagined. Yet as on so many matters, Alexander Hamilton strenuously disagreed:

Who can seriously doubt, that if these States should either be wholly disunited, or only united in partial confederacies, the subdivisions into which they might be thrown would have frequent and violent contests with each other. To presume a want of motives for such contests, as an argument against their existence, would be to forget that men are ambitious, vindictive and rapacious . . . [and to anticipate that we would be] splitting ourselves into an infinity of *little, jealous, clashing, tumultuous commonwealths, the wretched nurseries of unceasing discord* and the miserable objects of universal pity or contempt.<sup>2</sup>

That, in turn, is among the most trenchant cases for the superiority of central power. And of course—and by no means incidentally—Hamilton asserted not only the supremacy of the national or central government, but the paramountcy of the executive branch within it: “A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution: And a government ill executed, whatever it may be in theory, must be in practice a bad government.”<sup>3</sup>

Even James Madison, arguably the most astute and thoughtful of the framers, was uncharacteristically obscure when he turned to the subject in *The Federalist*, No. 39:

The proposed Constitution, therefore, is, in strictness, *neither a national nor a federal Constitution*, but a composition of both. In its foundation it is *federal, not national*; in the sources from which the ordinary powers of the government are drawn, it is *partly federal and partly national*; in the operation of these powers, it is *national, not federal*; in the extent of them, again, it is *federal, not national*; and, finally, in the authoritative mode of introducing amendments, it is *neither wholly federal nor wholly national*.<sup>4</sup>

Whatever else might be said about that tortured definition, it could not be described as a model of clarity—or a practical guide as to how the concept of federalism might take on institutional and operational consistency. Madison himself was conspicuously inconsistent. A nationalist at Philadelphia in 1787, he was a states' righter in 1798 when he authored the Virginia Resolution opposing the federal Alien and Sedition Acts: "In case of a deliberate, palpable, and dangerous exercise of other powers [the states] have the right, and are in duty bound, to interpose for arresting the progress of evil."<sup>5</sup> As Jack Rakove has summarily noted, "Whether the framers of the Constitution anticipated a progressive widening in the effective scope of federal action thus remains one of the most elusive of the many questions asked about their intentions."<sup>6</sup>

A half century after the birth of the republic, yet another uncommonly insightful political analyst—Alexis de Tocqueville—registered a similarly incongruous, even self-contradictory, appraisal of American federalism: "No one can appreciate the advantages of a federal system more than I," he wrote in *Democracy in America*. "I hold it to be one of the most powerful combinations favoring human prosperity and freedom. I envy the lot of the nations that have been allowed to adopt it. . . . [But]," he added, "clearly we have here not a federal government but an *incomplete national government*."<sup>7</sup>

"States' rights," infamously and inextricably entangled with the "peculiar institution" of slavery, agitated American politics for decades until at last submitting to the arbitrament of arms in the Civil War. The war and the three Reconstruction amendments that followed supposedly settled the question of where ultimate authority lay. But the incompleteness of the national government that Tocqueville remarked on was vividly in evidence in the decades following Appomattox. Though it became commonplace to say that before 1861 the United States *were*, and after 1865 the United States *was*, reality made a mockery of that tidy formulation. Despite the Union's conclusive military victory, the Jim Crow system that emerged in the postwar years demonstrated the southern states' considerable residual power to constrict the political, economic, and social circumstances of their black citizens, often in open and unapologetic defiance of federal statutes as well as constitutional mandates. Jim Crow endured for a century. Its gross and often violent transgressions gave the concept of "states' rights" a bad name from which it has yet to recover.

The Fourteenth Amendment may have lain dormant for generations, but it eventually proved a potent weapon against racism and discrimination—and by its very nature that weapon was owned and operated by the federal

government, which has been the great, if sometimes sputtering, engine of our national ideal of equality. Yet even the achievements of the “Second Reconstruction” in the 1960s, notably including the Civil and Voting Rights Acts, which asserted federal authority at long and overdue last over basic political and social rights, did not once and for all settle the matter, as demonstrated in the 2013 Supreme Court decision in *Shelby County v. Holder*.<sup>8</sup>

On the other hand, in the larger economic realm, the postbellum Gilded Age saw repeated instances of the feebleness of individual states’ capacities in the face of national and even international concentrations of corporate power—until the 1886 *Wabash* case reasserted federal supremacy over interstate transportation, commerce, and other economic activities.<sup>9</sup> *Wabash* effectively submerged the states’ rights rock on which previous federal efforts to regulate the economy had repeatedly foundered. An early consequence was the Interstate Commerce Commission, created in 1887 as the first federal regulatory agency.

It was the patent obsolescence of states’ capacities in the new industrial order that gave rise to further early- and mid-twentieth-century federal initiatives that eventually transformed the nation’s economic landscape. In almost all cases, the states came begging for federal assistance; they did not have it roughly shoved down their throats. *Wabash* reaffirmed Justice John Marshall’s 1824 pronationalist ruling in *Gibbons v. Ogden*, but shifted its logic in the different historical context of the late nineteenth century.<sup>10</sup> It was no longer sufficient to check state control over commerce and replace it with nothing. The dominant concern now was not how to release entrepreneurial energies but how to tame the formidable energies concentrated in behemoth corporations. Here is one instance where the historian can in fact see the fairly consistent evolution of a reality-reckoning sort in favor of the growth of national over state power.

Theodore Roosevelt can stand as the most articulate champion of that development, as he explained in his 1912 presidential campaign:

There once was a time in history when the limitation of governmental power meant increasing liberty for the people. In the present day the limitation of governmental power . . . means the enslavement of the people by the great corporations who can only be held in check through the *extension* of governmental power. . . . The people of the United States have but one instrument which they can efficiently use against the colossal combinations of business—and that is the Government of the United States.<sup>11</sup>



For much of the remainder of the twentieth century the Commerce Clause underwrote that Rooseveltian assertion of federal supremacy. But even that apparently settled constitutional doctrine was sharply challenged in 1995 when the Supreme Court struck down a federal gun control statute in *United States v. Alfonso D. Lopez, Jr.*<sup>12</sup>

Here it should be added that Roosevelt, like Hamilton, asserted not only the supremacy of the central government, but an expanded concept of presidential power within it—as did Roosevelt’s nemesis, Woodrow Wilson, who notoriously asserted that “the President is at liberty, both in law and conscience, to be as big a man as he can.”<sup>13</sup> (It’s worth noting that in the same treatise Wilson declared that “the *question* of the relation of the states to the federal government is the cardinal *question* of our constitutional systems.” Note the repetition of the word *question*, one more among the countless reminders that federalism remains an ever-contested proposition without a fixed definition.)

The related preferences for central over state authority and for greater presidential power evince alike the chronic yearning for more efficient, orderly, uniform, and consistent governance than is easily achieved in America’s purpose-built constitutional contraption conceived in the peculiar circumstances of the postrevolutionary late eighteenth century. As Henry Adams once observed about that formative moment: “The great object of terror and suspicion to the people of the thirteen provinces was power; not merely power in the hands of a president or a prince, of one assembly or several, of many citizens or few, but power in the abstract, wherever it existed and under whatever form it was known.”<sup>14</sup>

With Adams’s keen insight in mind, it is appropriate to note that federalism American style, with its dispersal of authority and chronic disputation over the precise relation of *imperium* to *imperio*, is a luxury, a labile, malleable arrangement affordable only in circumstances of guaranteed national security, abundant economic resources, and assured social peace. When all—or any—of those conditions are absent, pressure arises, like a law of nature, for unitary leadership from the center. As Tocqueville knew, this is what had happened in the French revolutionary era, when foreign invasion, economic disruption, and the prospect of protracted civil war compelled the concentration of power even in the midst of a democratic revolution.

The federal architecture peculiar to the United States has not only historically impeded efforts to secure commercial uniformity and financial stability, and underwritten flagrant violations of rights supposedly guaranteed in the

Constitution—it has also facilitated outright evasion of responsible engagement with issues of great moral and ethical consequence by deliberately scattering decision making and accountability to several jurisdictions. Stephen Douglas’s notoriously futile effort to elide the slavery problem with the doctrine of “popular sovereignty,” as embodied in the Kansas-Nebraska Act of 1854, is a prominent example.

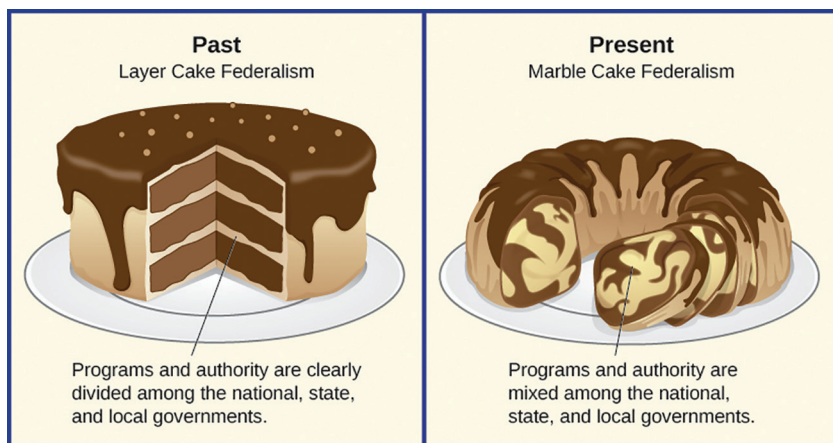
In an entirely different setting, US Army Provost Marshal Enoch Crowder somewhat cynically captured the essence of Douglas’s logic with respect to the local draft boards set up by the Selective Service System in World War I: “They became the buffers between the individual citizen and the Federal Government, and thus they attracted and diverted, like local grounding wires in an electric coil, such resentment or discontent as might have proved a serious obstacle . . . had it been focused on the central authorities. Its diversion and grounding at 5,000 local points dissipated its force.”<sup>15</sup>

In short, even while it has assuredly allowed experimentation and accommodation to American society’s manifest diversity (respecting such matters as religion, education, environmental quality, and lifestyle choices concerning recreational drugs, assisted death, and so on), federalism has also often allowed Americans to avoid coming to grips with some vexedly weighty issues. Some may call this a safety valve; others will deem it an escape hatch. The current fifty-state controversy over abortion rights, occasioned by the Supreme Court’s 2022 *Dobbs* decision, is a case in point, a twenty-first-century replay of Stephen Douglas’s approach to slavery, with perhaps predictably similar results.<sup>16</sup>

As with so many things, so too with federalism, where you stand depends on where you sit. When one party or ideology dominates in Washington, DC, the minority seeks refuge or scope for initiative at the state level. And when the situation reverses, so do the players’ preferences and tactics. The liberal embrace of federalism in states like California in the environmental and welfare sectors in response to conservative federal dominance in the late twentieth century is a case in point, as richly documented in Richard Nathan’s informative 2006 article, “There Will Always Be a New Federalism.”<sup>17</sup>

A concluding observation: Something remains of that venerable assessment that the long-term history of federalism is a tale of federal aggrandizement—but with an important qualification, best captured in Morton Grodzins’s distinction between “layer cake” and “marble cake” federalism (figure 3.1).<sup>18</sup>

As Grodzins and others have argued, I believe correctly, the real cumulative effect of federalism in practice over more than two centuries has not been



**Figure 3.1** “Layer cake” federalism and “marble cake” federalism

Source: Glen Krutz and Sylvie Waskiewicz, *American Government 3e* (Houston: OpenStax, 2021), <https://openstax.org/books/american-government-3e/pages/3-2-the-evolution-of-american-federalism>. Textbook content produced by OpenStax is licensed under a Creative Commons Attribution License.

simply the steady aggrandizement of central power and the relentless diminution of state power, but the coevolution of the two that has amplified the overall presence of governments (plural) in many sectors of American life. Indeed, federal power has often been the factor driving the scope and scale of state governments. Prominent examples include Title III (unemployment insurance) of the 1935 Social Security Act; the Interstate Highway System; and Medicaid. As Nathan puts it summarily: “The dominant effect of U.S. federalism is to expand the scope and spending of the domestic public social sector.”<sup>19</sup>

Yet within that framework, controversy continues—and in all probability forever will. Thus it’s more appropriate to speak not of several distinct historical *phases* of federalism, but of its several enduring though constantly mutating *faces*, persistent features of our living constitutional system—and of our endlessly contentious society.

## Notes

1. Thomas Jefferson, *Autobiography* (1821) Works 1:120–22. In *The Works of Thomas Jefferson*, collected and edited by Paul Leicester Ford, Federal Edition, 12 vols. (New York and London: G. P. Putnam’s Sons, 1904–5), text available at <https://press-pubs.uchicago.edu/founders/documents/v1ch8s44.html>.



2. Alexander Hamilton, *The Federalist*, nos. 6 and 9, in *The Federalist Papers* (New York: New American Library, 2003), ed. Clinton Rossiter, intro. and notes by Charles R. Kesler. Emphasis added.

3. *The Federalist*, no. 70.

4. *The Federalist*, no. 39. Emphasis added.

5. James Madison, “Virginia Resolution” (1798), text available at the Bill of Rights Institute, <https://billofrightsinstitute.org/primary-sources/virginia-and-kentucky-resolutions>.

6. Jack Rakove, “The Legacy of the Articles of Confederation,” *Publius* 12 (Fall 1982): 62.

7. See Ralph C. Hancock, “Tocqueville on the Good of American Federalism,” *Publius* 20 (Spring 1990): 89–108. Emphasis added.

8. *Shelby County v. Holder* 570 U.S. 529 (2013).

9. *Wabash, St. Louis & Pacific Railway Company v. Illinois*, 118 U.S. 557 (1886).

10. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

11. Theodore Roosevelt, Address at the Coliseum, San Francisco, September 14, 1912, text available at The Ohio State University, <https://ehistory.osu.edu/exhibitions/1912/1912documents/LimitationofGovernment>. Contrast that Hamiltonian vision with Ronald Reagan’s unqualifiedly Jeffersonian (and constitutionally arguable) assertion in his first inaugural address: “It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people. All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government.” Inaugural address, January 20, 1981, text available at Ronald Reagan Presidential Library & Museum, <https://www.reaganlibrary.gov/archives/speech/inaugural-address-1981>.

12. *United States v. Alfonso D. Lopez, Jr.*, 514 U.S. 549 (1995).

13. Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), 66. Wilson’s claim was quoted approvingly by John F. Kennedy at the National Press Club, Washington, DC, January 14, 1960, during his presidential campaign. Text available at John F. Kennedy Presidential Library and Museum, <https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/presidency-in-1960-19600114>.

14. Henry Brooks Adams, “The Session,” *North American Review* 111, no. 228 (July 1870): 29–62.

15. Enoch H. Crowder, *The Spirit of Selective Service* (New York: Century, 1920), 78–84.

16. *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392, 597 U.S. 215 (2022).

17. Richard Nathan, “There Will Always Be a New Federalism,” *Journal of Public Administration Research and Theory* 16, no. 4 (October 2006): 499–510.

18. American Assembly, *Goals for Americans: Programs for Action in the Sixties* (Englewood Cliffs, NJ: Prentice Hall, 1960).

19. Nathan, “New Federalism,” 505.