

THE ECLIPSE OF DUAL FEDERALISM BY ONE-WAY COOPERATIVE FEDERALISM

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INTRODUCTION

Numerous and powerful political forces have vested interests in the contemporary idea of cooperative federalism, which prioritizes an obligation of states to cooperate with federal policy initiatives in a system that is essentially prefectorial administration.¹ These forces make impossible any construction or reconstruction of dual federalism wherein states exercise substantial sovereignty.² Even if the U.S. Supreme Court rendered more state-friendly rulings, those rulings would negligibly affect the balance of state-federal power.

State and local cooperation with federal policy objectives is fostered by certain systemic factors, including the U.S. Constitution's reservation of most domestic powers to the states, historical path dependence, public antipathy to centralization, federal tax savings, grants-in-aid as bridges across dual federalism, the multi-jurisdictional character of some policy matters, and policy interdependence and interaction. The federal government has eight key tools to induce one-way state and local cooperation: (1) grants-in-aid, (2) deficit spending, (3) minimum national-standards schemes, (4) waivers of federal law, (5) compliance-deadline extensions, (6) federal forbearance, (7) court orders and consent decrees, and (8) statutory and regulatory penalties. In turn, there are six important advocates of state and local cooperation with federal policies: (1) nongovernmental organizations, (2) state and local administrator lobbyists, (3) public sector union lobbyists and litigators, (4) interest-group lobbyists, (5) citizen lawsuits, and (6) congressional oversight. In turn, six social and political forces facilitate state and local administrative cooperation with federal policies: (1) professional norms,

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1. Daniel J. Elazar, *Is Federalism Compatible with Prefectorial Administration?*, 11 PUBLIUS 3, 3 (1981).

2. *But see* John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 35 (1998) (advocating dual federalism).

(2) administrator socialization, (3) public support for federal policies, (4) moral approbation, (5) territorially dispersed diversity, and (6) partisan congruence and bipartisan ratchets.

I. RECIPROCAL COOPERATION UNDER DUAL FEDERALISM

Cooperative federalism in various forms has deep roots in U.S. history.³ In 1790, the federal government assumed the states' Revolutionary War debts.⁴ Alexander Hamilton advocated assumption in order to make all creditors of the federal and state governments dependent on the federal government and "avoid having the states and the federal government competing for the available sources of tax revenue."⁵ Nevertheless, the dualistic structure of the federal system and the endurance of a strong states' rights region, the South, long inhibited the formation of interests able to demolish dualism.

Dual federalism in the United States can be taken to mean a system of divided sovereignty whereby the federal government exercises delegated powers independently of the states and state governments exercise reserved powers independently of the federal government. Edward S. Corwin defined dual federalism with four postulates:

1. The national government is one of enumerated powers only;
2. Also the purposes which it may constitutionally promote are few;
3. Within their respective spheres the two centers of government are 'sovereign' and hence 'equal';
4. The relation of the two centers with each other is one of tension rather than collaboration.⁶

Corwin was a nationalist⁷ and an aspiring U.S. Supreme Court justice who had a political interest in characterizing dual federalism negatively. One can quibble with all four postulates, but the last one is incorrect.

Dual federalism does not necessarily engender federal-state tension, which Corwin termed "the competitive theory of Federalism."⁸ Any federal system will occasion tensions between the general and constituent governments, but dual federalism can accommodate concurrency, collaboration, cooperation, and even collusion because the two orders of government cannot practically operate in separate watertight compartments.

3. DANIEL J. ELAZAR, *THE AMERICAN PARTNERSHIP* 1 (1962).

4. Funding Act of 1790, ch. 34, § 1, 1 Stat. 138, 138–39 (1790).

5. STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 118 (1993).

6. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

7. See EDWARD S. CORWIN, *NATIONAL SUPREMACY* 301–02 (1913).

8. Corwin, *supra* note 6, at 19.

Further, neither the Congress nor, quite frequently, the U.S. Supreme Court prevented states from enacting laws, such as bankruptcy laws, that fell within the Congress's enumerated powers so long as the Congress did not preempt state action.⁹

The dual structure of American federalism, moreover, does not obligate states to administer federal programs. Unlike integrated federal systems, such as Germany's cooperative federalism,¹⁰ there is no constitutional expectation that states implement framework legislation enacted by the federal government. The federal government is expected to implement its own policies. However, the federal government relies predominantly on state and local bureaucrats, rather than on federal bureaucrats, to administer the lion's share of its domestic policies. Despite the enormous expansion of federal policy-making since the mid-1960s, the federal government has only 537 elected constitutional officials while state and local governments have more than 500,000.¹¹ There are 2.8 million full- and part-time federal civilian employees compared to 5.1 million state employees and 14.4 million local government employees.¹² In turn, the states largely willingly implement an enormous range of federal policies, including 1,099 grants-in-aid,¹³ and they normally comply with federal regulations cooperatively. Although former Texas Attorney General Greg Abbott boasted, "I go into the office, I sue the federal government and I go home,"¹⁴ his forty-two suits against the federal government from 2009 to 2015¹⁵ hardly disturbed the state's compliant intergovernmental routines.

Although state-federal conflicts occur in federal policy implementation, cooperation has been an important feature of state-federal relations since the

9. *Sturges v. Crowninshield*, 17 U.S. 122, 149–50 (1819).

10. Jutta Kramer, *Federal Republic of Germany*, in *CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES* 143, 144 (John Kincaid & G. Alan Tarr eds., 2005).

11. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULARLY ELECTED OFFICIALS, at vi, 1 (1992), https://www.census.gov/prod/2/gov/gc/gc92_1_2.pdf.

12. *Data Retrieval: Employment, Hours, and Earnings (CES)*, BUREAU OF LABOR STAT., <https://www.bls.gov/webapps/legacy/cesbtab1.htm> (select box corresponding to one level of government, then click "Retrieve data") (last modified Feb. 5, 2016).

13. ROBERT JAY DILGER, CONG. RESEARCH SERV., R40638, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 10 (2014), https://digital.library.unt.edu/ark:/67531/metadc503336/m1/1/high_res_d/R40638_2015Mar05.pdf.

14. Sue Owen, *Greg Abbott Says He Has Sued Obama Administration 25 Times*, POLITIFACT (May 10, 2013), <http://www.politifact.com/texas/statements/2013/may/10/greg-abbott/greg-abbott-says-he-has-sued-obama-administration/>.

15. Neena Satija et. al., *Texas vs. the Feds—A Look at the Lawsuits*, TEX. TRIB. (July 27, 2016), <https://therivardreport.com/texas-vs-the-feds-a-look-at-the-lawsuits/>. As of July 2016, the state had won seven cases, lost twelve, withdrew nine, and had fourteen pending. *Id.*

republic's founding, and many forms of intergovernmental cooperation occurred during the era commonly dubbed dual federalism.¹⁶ The U.S. Supreme Court opined in 1883:

Undoubtedly it was the purpose of the [C]onstitution to establish a general government independent of . . . the state governments—one which could enforce its own laws through its own officers and tribunals. . . . That government can create all the officers and tribunals required for the execution of its powers. . . . Yet from the time of its establishment that government has been in the habit of using, with the consent of the states, their officers, tribunals, and institutions as its agents. Their use has not been deemed violative of any principle or as in any manner derogating from the sovereign authority of the federal government; but as a matter of convenience and as tending to a great saving of expense. . . . At different times various duties have been imposed by acts of [C]ongress on state tribunals; they have been invested with jurisdiction in civil suits, and over complaints and prosecutions for fines, penalties, and forfeitures arising under laws of the United States. And though the jurisdiction thus conferred could not be enforced against the consent of the states, yet, when its exercise was not incompatible with state duties, and the states made no objection to it, the decisions rendered by the state tribunals were upheld.¹⁷

A telling phrase in this opinion is “with the consent of the states.” From 1789 to the 1930s, intergovernmental cooperation was substantially mutual and reciprocal.¹⁸ There were comparatively limited federal intrusions into state powers and limited forms of intergovernmental cooperation, such as land grants and pork-barrel projects, because the federal government exercised limited powers and accounted for less than one-third of all own-source government spending.¹⁹ Additionally, the confederated party system enabled elected state and local officials to influence federal policy-making in ways that substantially protected state powers.²⁰ The federal role during this

16. JANE PERRY CLARK, *THE RISE OF A NEW FEDERALISM* 4–5 (1938); ELAZAR, *supra* note 3, at 11.

17. *United States v. Jones*, 109 U.S. 513, 519–20 (1883) (citations omitted).

18. ELAZAR, *supra* note 3, at 11.

19. See MORTON GRODZINS, *THE AMERICAN SYSTEM* 51 (Daniel J. Elazar ed., Transaction 1984) (1966). This assessment excludes Reconstruction, which was an asymmetric and extraordinary policy.

20. John S. Jackson III, *The Party-as-Organization: Party Elites and Party Reforms in Presidential Nominations and Conventions*, in *CHALLENGES TO PARTY GOVERNMENT* 63, 63 (John Kenneth White & Jerome M. Mileur eds., 1992).

era was mostly one of backstopping the states and helping states pursue their own policy objectives.

In 1803, for example, the federal government granted residents of Portsmouth, New Hampshire, a temporary waiver from tariffs after a fire destroyed much of the city.²¹ Congress made more than 100 ad hoc disaster-relief appropriations during the nineteenth century.²² In 1808, the Congress began appropriating \$200,000 per year for state militias.²³ Not until 1866, when the Congress increased the appropriation to \$400,000, did it impose a condition, namely, that states enroll 100 militiamen for each of their senators and representatives.²⁴

After President James Monroe rejected President James Madison's restrictive view of federal support for internal improvements, "applications for aid from the treasury," noted President James K. Polk, "virtually to make harbors as well as improve them, clear out rivers, cut canals, and construct roads, poured into Congress in torrents, until arrested by the veto of President Jackson."²⁵ President James Buchanan complained:

The representatives of the States and of the people, feeling a more immediate interest in obtaining money to lighten the burdens of their constituents than for the promotion of the more distant objects intrusted to the Federal Government, will naturally incline to obtain means from the Federal Government for State purposes.²⁶

By the twentieth century, presidents deemed insufficiently responsive to natural disasters, for example, were vulnerable to criticism. When President Calvin Coolidge sent commerce secretary Herbert Hoover to manage relief for victims of the Great Mississippi Flood of 1927, Coolidge was criticized for responding too slowly.²⁷ Will Rogers quipped that Coolidge was hoping

21. JEFFREY B. BUMGARNER, *EMERGENCY MANAGEMENT 2* (2008).

22. Patrick S. Roberts, *Our Responder in Chief*, NAT'L AFF., Fall 2010, at 76, 82, <https://www.nationalaffairs.com/publications/detail/our-responder-in-chief>.

23. GRODZINS, *supra* note 19, at 37.

24. *Id.*

25. Veto Message from James K. Polk, President of the U.S., to the U.S. House of Representatives (Dec. 15, 1847), <http://www.presidency.ucsb.edu/ws/?pid=67965>.

26. Veto Message from James Buchanan, President of the U.S., to the U.S. House of Representatives (Feb. 24, 1859), in *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897*, at 3074, 3076 (James D. Richardson ed., 1897), <https://archive.org/stream/compilationofmes00v7unit#page/3075/mode/2up/search/will+naturall+y+incline>.

27. Tevi Troy, *How Presidents Can Blow It with Disasters*, WALL ST. J. (Aug. 27, 2016), <https://www.hudson.org/research/12780-how-presidents-can-blow-it-during-a-national-disaster>.

“that those needing relief will perhaps have conveniently died in the meantime.”²⁸

The establishment of modern cash grants-in-aid in 1879, and later expansions of such aid during the New Deal, laid the foundations for the contemporary era of dense intergovernmental cooperation.²⁹ The Social Security Act (1935) especially set a precedent by expecting states to administer federal programs in order to achieve national policy objectives rather than state objectives per se. The act gave money to the states for senior-citizen assistance (Title I), unemployment insurance (Title III), Aid to Dependent Children (Title IV), Maternal and Child Welfare (Title V), public health services (Title VI), and aid to the blind (Title X).³⁰ Such legislation embodied what became the modern doctrine of cooperative federalism that “under firm and forward-looking national leadership, state and local governments . . . do their work much better” and that the “cooperation of all three levels is needed if goals are to be attained.”³¹

However, the power of state and local party leaders (or “bosses”) in the confederated party system exacted substantial concessions to state and local prerogatives in most intergovernmental legislation enacted from 1879 to the mid-1960s.³² Despite unprecedented expansions of federal economic regulation during the New Deal, federal laws altered but did not abolish dual federal and state banking,³³ permitted dual regulation of various sectors of the economy such as securities and telephony, and retained state regulation of insurance.³⁴ When Herbert Wechsler lauded the political safeguards of federalism in 1954, he was not far from the mark.³⁵

28. *Id.*

29. See DILGER, *supra* note 13, at 16; James Patterson, *The New Deal and the States*, 73 AM. HIST. REV. 70, 70–73 (1967).

30. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended at 42 U.S.C. § 301–1397 (2012)).

31. WILLIAM ANDERSON, *THE NATION AND THE STATES, RIVALS OR PARTNERS?* 243–44 (1957).

32. See ALLEN F. DAVIS, *SPEARHEADS FOR REFORM*, at x (1984); Richard M. Flanagan, *Roosevelt, Mayors, and the New Deal Regime: The Origins of Intergovernmental Lobbying and Administration*, 31 POLITY 415, 416 (1999).

33. Eugene Nelson White, *The Political Economy of Banking Regulation*, 42 J. ECON. HIST. 33, 39 (1982).

34. Sandra B. McCray, *Federal Preemption of State Regulation of Insurance: End of a 200-Year Era?* 23 PUBLIUS 33, 36–37 (1993) (explaining the successful push to maintain state insurance regulation during the New Deal period).

35. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558–60 (1954).

If the Fair Labor Standards Act (FLSA) of 1938 can be seen as the canary in the federalism coal mine, the act notably did not cover employees of state and local governments. The party leaders of that day, such as E.H. Crump of Memphis and Frank Hague of Jersey City, would not have tolerated federal intrusion into their sovereign prerogatives as public employers.³⁶ Only in 1974 was the FLSA extended to almost all employees of state and local governments.³⁷ What changed? Among other things, the state and local party bosses had passed from the scene, along with most of the political safeguards of federalism. The insurgent 1968 Democratic National Convention delegates frontally assaulted traditional boss rule when they approved a Commission on Party Structure and Delegate Selection to replace a nominating system dominated by big-city bosses, such as Chicago Mayor Richard J. Daley, and state party chairman with primaries and caucuses benefitting the new activists.³⁸ George McGovern and Donald M. Fraser headed the commission.

II. ONE-WAY COOPERATION UNDER COERCIVE FEDERALISM

American federalism took a decisively coercive turn during the 1960s as the federal government increasingly formulated policy independently of state and local government officials and promulgated policies through unprecedented increases in conditions attached to federal aid, mandates imposed on state and local governments, preemptions of state powers, and court rulings and orders aimed at reforming state and local governments.³⁹

36. See G. Wayne Dowdy, "A Business Government by a Business Man": E.H. Crump as a Progressive Mayor, 1910–1915, 60 TENN. HIST. Q. 162, 165–70 (2001); John Kincaid, *Frank Hague and Franklin Roosevelt: The Hudson Dictator and the Country Democrat*, in FRANKLIN D. ROOSEVELT: THE MAN, THE MYTH, THE ERA, 1882–1945, at 13, 13–39 (eds. Herbert D. Rosenbaum and Elizabeth Bartelme eds., 1987); Dayton David McKean, *Political Machines and National Elections*, 259 ANNALS AM. ACAD. POL. SOC. SCI. 46, 51–52 (1948).

37. Fair Labor Standards Act, Pub. L. 93–259, § 6(a)(1), 88 Stat. 55, 58 (1974) (codified at 29 U.S.C. § 203(d) (2012)) (defining "employer" to include "a public agency" under 1974 amendments). Employees of state hospitals, elementary and secondary schools, and institutions of higher education were covered for the first time by 1966 amendments of the FLSA. See 1966 U.S.C.C.A.N. 3003, 3008.

38. DEMOCRATIC NAT'L COMM., MANDATE FOR REFORM: A REPORT OF THE COMMISSION ON PARTY STRUCTURE AND DELEGATE SELECTION TO THE DEMOCRATIC NATIONAL COMMITTEE 53 (1970); Judith A. Center, 1972 Democratic Convention Reforms and Party Democracy, 89 POL. SCI. Q. 325, 328, 333, (1974); George McGovern, *The Lessons of 1968*, HARPER'S MAG., Jan. 1970, at 43, 44–45.

39. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FEDERALLY INDUCED COSTS AFFECTING STATE, AND LOCAL GOVERNMENTS 3–4, 15 (1994).

The federal system was reconceptualized as a hierarchy of “levels” of government. Under coercive federalism

(1) the federal government is the dominant policymaker; (2) the federal government is able to assert its policy will unilaterally over the state and local governments; (3) elected state and local officials are more often lobbyists than partners in intergovernmental policy-making; (4) interactions between federal officials and elected state and local officials are more often consultations than negotiations; (5) there are few constitutional limits on the exercise of federal power; (6) cooperative policy-making, when it occurs, is most often due to the influence of interest groups operating outside the intergovernmental system than to state and local officials operating inside the intergovernmental system; and (7) all important arenas of state and local decision-making are infused with federal rules.⁴⁰

Many forces contributed to this change, including social movements demanding coercive federal intervention into state and local affairs to protect rights, especially racial desegregation, and to remedy negative externalities, such as pollution;⁴¹ the spread of television news reporting; the collapse of the confederated party system induced partly by the U.S. Supreme Court’s “one, person, one vote” rulings⁴² that demolished the parties’ county foundations; party reforms after the 1968 elections that substituted primary elections for smoke-filled rooms,⁴³ re-oriented representation toward identity groups,⁴⁴ and drove the bosses out; the U.S. Supreme Court’s selective incorporation of the U.S. Bill of Rights, which reached its apogee during the 1960s;⁴⁵ the rise of public sector unions;⁴⁶ the rise of institutional lobbying in

40. John Kincaid, *The Rise of Social Welfare and Onward March of Coercive Federalism*, in NETWORKED GOVERNANCE: THE FUTURE OF INTERGOVERNMENTAL MANAGEMENT 8, 13 (Jack W. Meek & Kurt Thurmaier eds., 2011).

41. See John Kincaid, *From Cooperative to Coercive Federalism*, 509 ANNALS AM. ACAD. POL. SOC. SCI. 139, 143–144 (1990).

42. *Reynolds v. Sims*, 377 U.S. 533, 550 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

43. Kincaid, *supra* note 40, at 23.

44. See John Kincaid, *Constitutional Federalism: Labor’s Role in Displacing Places to Benefit Persons*, 26 PS 172, 172 (1993).

45. Kincaid, *supra* note 40, at 23.

46. Kincaid, *supra* note 44, at 174.

Washington, D.C.;⁴⁷ and the decline of the South as a states' rights force in Congress and national politics.⁴⁸

Aware of the autonomy sensitivities of states and localities, advocates of the new federalism promoted the change under the palatable rubric of cooperative federalism by redefining cooperation to mean an obligation of state and local governments to cooperate with federal policy initiatives.

Prior to the 1960s, cooperative federalism had two facets: (1) participation by elected state and local government officials in formulating federal policies affecting states through their congressional delegations and direct lobbying and (2) cooperation among federal, state, and local officials in implementing federal intergovernmental policies in ways that accommodated federal and state objectives. This conception recognized "that governments must cooperate, that is, work and function together."⁴⁹ Morton Grodzins contended that "national supervision" of intergovernmental programs was "largely a process of mutual accommodation"⁵⁰ in a mildly chaotic, non-centralized system that lacked a command center and gave citizens multiple access points. Even the U.S. Supreme Court "allowed far more federal-state collaboration than it blocked"⁵¹ from 1800 until 1937 when the court ceased employing the Constitution as a barrier to centralization.

The centrist redefinition of cooperation was advanced by Corwin, among others, who defined cooperative federalism as a system in which "the National Government and the States are mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government."⁵² This is now the prevailing view. Cooperative federalism, it is said, "situates uniformity and finality for first-order norms at the national level, while allowing dialogue and plurality at the

47. JENNIFER M. JENSEN, *THE GOVERNORS' LOBBYISTS: FEDERAL-STATE RELATIONS OFFICES AND GOVERNORS ASSOCIATIONS IN WASHINGTON* 34–35 (2016).

48. John Kincaid, *From Cooperation to Coercion in American Federalism: Housing, Fragmentation, and Preemption, 1780–1992*, 9 J.L. & POL. 333, 339–40 (1993); John Kincaid, *The Rise of Coercive Federalism in the United States: Dynamic Change with Little Formal Reform*, in *THE FUTURE OF AUSTRALIAN FEDERALISM* 157, 172 (Gabrielle Appleby et al. eds., 2012).

49. Daniel J. Elazar, *Cooperative Federalism*, in *COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM* 65, 69 (Daphne A. Kenyon & John Kincaid eds., 1991).

50. Morton Grodzins, *The Federal System*, in *GOALS FOR AMERICANS* 265, 266 (Am. Assembly ed., 1960).

51. *Id.* at 269–70.

52. Corwin, *supra* note 6, at 19.

level of state implementation of those norms.”⁵³ The U.S. Supreme Court endorsed this view even before Corwin when it held that a state unemployment statute had not been

coerced by the adoption of the Social Security Act. . . . The United States and the State of Alabama are not alien governments. They coexist within the same territory. Unemployment within it is their common concern. Together the two statutes now before us embody a cooperative legislative effort by state and national governments for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other. The Constitution does not prohibit such cooperation.⁵⁴

To facilitate this cooperative federalism and compensate for the loss of voice by state and local governments, the number of federal grants-in-aid were increased from 132 in 1960 to 385 in 1968 and to 492 in 1978.⁵⁵ Federal aid in real dollars increased from \$51.5 billion in 1960 to \$126.3 billion in 1969 (a 145% increase) and from \$141.8 billion in 1970 to \$270.0 billion in 1979 (a 90% increase).⁵⁶ At the same time, conditions of aid, mandates, preemptions, and federal court orders experienced unprecedented increases.⁵⁷ Consequently, state and local governments took on the mantle of administrative arms of the federal government. “Many state workers function as de facto federal bureaucrats.”⁵⁸ The nationalist school of federalism celebrates this development as “[t]he power states enjoy as national government’s agents”⁵⁹ as though states should be grateful they were not wiped off the map.

Constitutionally, the states can disengage from many of these intergovernmental programs, but they don’t. Why?

53. Christopher K. Bader, *A Dynamic Defense of Cooperative Federalism*, 35 WHITTIER L. REV. 161, 164 (2014); see also Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1696 (2001).

54. *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 525–26 (1937).

55. DILGER, *supra* note 13, at 10.

56. OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES 1, 268–69 tbl.12.1 (2016), <https://whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/hist.pdf> [hereinafter HISTORICAL TABLES].

57. U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, A-121, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY, AND ISSUES 6 (1992); U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, A-95, REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT, AND REFORM 247 (1984).

58. John J. Dilulio, Jr., *Against Federal “Leviathan by Proxy” and for a Bigger, Better Full-Time Federal Workforce*, 76 PUB. ADMIN. REV. 535, 535 (2016).

59. Heather Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1893 (2014).

III. SYSTEMATIC FACTORS IN STATE AND LOCAL ADMINISTRATIVE COOPERATION

At least seven features of the federal system helped facilitate institutionalization of one-way intergovernmental cooperation.

First, the Constitution's reservation of most domestic powers to the states virtually requires them to be the principal implementers of federal domestic policies. Having had almost sole responsibility for domestic governance for some 175 years, they had experience in most of the policy fields facing federal intervention during the twentieth century.⁶⁰ The path of least resistance for the federal government was to recruit the states as administrative agents. From the start, Alexander Hamilton saw the need to cooperate with the states and use their agents to effectuate certain federal policies.⁶¹ Being unable simply to commandeer the states, the federal government resorted to grants-in-aid. In the regulatory sphere, the federal government often encourages states to enact laws substantially equivalent to federal laws, such as fair housing laws, and then 'devolves' authority for them to enforce federal objectives through state laws.⁶² These arrangements often allow federal officials to blame state and local officials for policy failures.⁶³

Second, historical path dependence arising from some 175 years of cooperation created a strong inertia for sustaining state and local cooperation in administering modern federal programs. Most state and local officials had long welcomed federal aid, and they could be eased into the new federalism by operationalizing the redefinition of cooperation incrementally over several decades. Theodore Roosevelt had presaged this strategy when he assured Americans, "I do not ask for overcentralization."⁶⁴

Third, the traditional American antipathy to centralization contributed to the willingness of federal officials to rely on state and local government administration as a politically palatable alternative to constructing a federal administrative leviathan or contracting out functions to the private sector.

60. Elisabeth Clemens, *Lineages of the Rube Goldberg State: Building and Blurring Public Programs, 1900–1940*, in *RETHINKING POLITICAL INSTITUTIONS: THE ART OF THE STATE* 187, 189 (Ian Shapiro et al. eds., 2006).

61. John Kincaid, *The Federalist and V. Ostrom on Concurrent Taxation and Federalism*, 44 *PUBLIUS* 275, 284 (2014).

62. See Charles M. Lamb & Eric M. Wilk, *Civil Rights, Federalism, and Administrative Process: Favorable Outcomes by Federal, State, and Local Agencies in Housing Discrimination Complaints*, 70 *PUB. ADMIN. REV.* 412, 413 (2010).

63. R. DANIEL KELEMAN, *THE RULES OF FEDERALISM: INSTITUTIONS AND REGULATORY POLITICS IN THE EU AND BEYOND* 15 (2004).

64. Theodore Roosevelt, *The New Nationalism*, Campaign Speech in Osawatomie, Kansas (Aug. 31, 1910), in *LIVE FROM THE CAMPAIGN TRAIL* 47, 51 (Michael A. Cohen ed., 2008).

State and local governments were already democratically legitimate service delivery venues.⁶⁵

Fourth, the federal government avoided levying the direct taxes that would have been needed to build a vast administrative apparatus. From 1789 to 1913, federal cash assistance to states was derived mostly from indirect revenue, such as customs duties and land sales, the weights of which were not felt directly by residents.⁶⁶ Enactment of the federal income tax in 1913 was the first sustained direct taxation of residents but, except for the World War II era, the burden has been comparatively light for most people because upper income residents pay most of the tax.⁶⁷ In 2014, the top 4.2% of taxpayers accounted for 57.5% of all federal income tax revenue.⁶⁸ The most burdensome federal earned income taxes for most residents are the payroll taxes, but they do not fund intergovernmental programs. They are framed as federal insurance benefit taxes. The new cooperative federalism also is partly funded through deficit spending, which is not felt directly by taxpayers. The unprecedented federal deficits of fifty-one of the past fifty-seven years are partly a price of the new federalism.⁶⁹ Otherwise, construction of a huge federal administration would have required perhaps politically prohibitive increases in direct taxes that also would have placed considerable competitive pressure on state and local tax bases.

Funneling federal domestic policy through grants-in-aid having matching requirements was politically and fiscally more cost effective for federal officials.⁷⁰ State and local implementation of federal policies also enables the Congress to offload some costs onto state and local governments through unfunded and underfunded mandates, the fiscal illusions of which benefit federal officials. On the coercive side of cooperative federalism, federal courts require compliance with their orders regardless of cost, and even require state and local governments to levy taxes and enjoin state laws

65. EDWIN AMENTA, *BOLD RELIEF: INSTITUTIONAL POLITICS AND THE ORIGINS OF MODERN AMERICAN SOCIAL POLICY* 26 (1998).

66. See Thomas R. Eddlem, *Before the Income Tax*, NEW AM. (Jan. 18, 2013), <https://www.thenewamerican.com/culture/history/item/14268-before-the-income-tax>.

67. See Ellen Terrell, *History of the US Income Tax*, LIBR. CONGRESS, https://www.loc.gov/rr/business/hottopic/irs_history.html (last updated July 7, 2017).

68. See Drew Desilver, *High-Income Americans Pay Most Income Taxes, but Enough to be 'Fair'?*, PEW RES. CTR. (Apr. 13, 2016), <http://www.pewresearch.org/fact-tank/2016/04/13/high-income-americans-pay-most-income-taxes-but-enough-to-be-fair/>.

69. See HISTORICAL TABLES, *supra* note 56, at 24–26 tbl.1.1 (indicating that the United States had massive budget deficits in fifty-one of the past fifty-seven years).

70. See Bryant Putney, *Federal-State Relations Under Grants-in-Aid*, 2 EDITORIAL RES. REP. 1940, at 33 (1940), <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1940073000>.

blocking such levies.⁷¹ The U.S. Supreme Court sees one-way cooperative federalism as compatible with state integrity: “[a]uthorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems.”⁷²

Fifth, grants-in-aid help overcome a key constitutional feature of dual federalism, namely, the lack of federal authority to enter many domestic policy fields directly. Grants enticed states to voluntarily invite federal participation in exclusive or predominantly state domains. Once grants became legitimized and fiscally consequential, they also became vehicles for the Congress to virtually mandate outcomes in state policy domains outside of its constitutional ambit, as with the alcoholic beverage purchase age, blood alcohol level, and other conditions attached to federal highway aid.⁷³

Sixth, the multi-jurisdictional nature of some public issues, such as environmental protection, requires joint federal, state, and local implementation, although not necessarily one-way cooperation. The Delaware River Basin Commission, for example, is an interstate compact in which the federal government is a partner.⁷⁴ The commission was established in 1961 before the enactments of today’s cooperative-federalism environmental regulatory programs such as the Clean Water Act of 1972.⁷⁵

Seventh, joint federal, state, and local action is often required by policy interdependence and interaction, such as crossovers among infrastructure, historic preservation, environmental protection, and civil rights policies. Policy advocates have long emphasized a need to break down policy silos.

IV. FEDERAL TOOLS TO STIMULATE STATE AND LOCAL ADMINISTRATIVE COOPERATION

The federal government has roughly eight tools to induce one-way state and local cooperation.

71. *See Missouri v. Jenkins*, 495 U.S. 33, 55 (1990).

72. *Id.* at 51.

73. *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (holding that the minimum drinking age condition attached to highway aid does not violate Tenth Amendment because states voluntarily accept federal aid).

74. *About DRBC*, DEL. RIVER BASIN COMMISSION, <http://www.nj.gov/drbc/about/> (last modified Aug. 3, 2017).

75. Clean Water Act of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1388 (2012)); *About DRBC*, *supra* note 74.

A. Federal-Aid Carrots and Sticks

The carrots and sticks of federal aid stimulate state cooperation because federal revenue has accounted for variable but often sizable portions of state budgets since the late 1960s.⁷⁶ Despite numerous conditions attached to federal aid, state and local governments embrace most grants-in-aid. All fifty states, for example, complied with the federal drinking age condition attached to surface transportation aid in 1984 because no state could afford to lose the funds, and states could not recover their loss by withholding the then nine-cent federal gasoline tax collected within their borders.⁷⁷ There is no mechanism in federal law for states to capture federal gas-tax revenue in compensation for withheld federal highway aid.

State and local officials welcome most federal money because it allows increased spending without extracting revenue from their voters. The flypaper effect, moreover, means that federal grants increase the level of the state or local recipient's public spending more than would an equivalent increase in the recipient's own income.⁷⁸ It is possible that grants also push tax increases onto future officials. One study estimates that future state taxes "rise by between 31 and 40 cents for every dollar in federal grants states received today, while local taxes will rise by between 23 and 46 cents for every dollar in federal (or state) grants received today."⁷⁹

Additionally, the salaries of many state and local government employees and resources for the programs they administer rest in part on direct or indirect federal monies. From 1978 to 2004, the proportion of state agencies receiving and managing federal aid ranged from 69% in 1988 to 79% in 2004.⁸⁰ Even if only a small percent of an employee's salary or program

76. See ROBERT JAY DILGER, CONG. RESEARCH SERV., R40638, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 7 (2017), <https://fas.org/sgp/crs/misc/R40638.pdf>.

77. National Minimum Drinking Age Act of 1984, Pub. L. No. 98-363, 98 Stat. 435 (codified as amended at 23 U.S.C. § 158 (2012)) (stating that the Secretary may withhold funding from states that do not raise the minimum drinking age); JAMES M. BICKLEY, CONG. RESEARCH SERV., RL30304, THE FEDERAL EXCISE TAX ON GASOLINE AND THE HIGHWAY TRUST FUND: A SHORT HISTORY 5 (2012), <https://fas.org/sgp/crs/misc/RL30304.pdf>.

78. Paul N. Courant, Edward M. Gramlich & Daniel L. Rubinfeld, *The Stimulative Effects of Intergovernmental Grants: Or Why Money Sticks Where It Hits*, in FISCAL FEDERALISM AND GRANTS-IN-AID 5, 5–6 (Peter Mieszkowski & William H. Oakland eds., 1979), https://www.law.berkeley.edu/files/stimulative_effects.pdf.

79. Russell S. Sobel & George R. Crowley, *Do Intergovernmental Grants Create Ratchets in State and Local Taxes?*, 158 PUB. CHOICE 167, 184 (2014).

80. Jeffrey L. Brudney & Deil S. Wright, *The "Revolt in Dullsville" Revisited: Lessons for Theory, Practice, and Research from the American State Administrators Project, 1964–2008*, 70 PUB. ADMIN. REV. 26, 32 (2010).

resources comes from federal aid, loss of that portion can result in a job loss or program cutback.⁸¹

The conditions attached to federal aid require state and local government compliance.⁸² The U.S. Supreme Court has only once found an aid condition unconstitutionally coercive⁸³ and is unlikely to do so again. Ordinarily, conditions in ongoing programs, including block grants, are ratcheted up incrementally in an almost bait-and-switch manner.⁸⁴

B. Fiscal Illusions of Deficit Spending

The era of coercive federalism has been marked by continual deficit spending since 1969, except for fiscal years 1998 to 2001.⁸⁵ Just as grants create the illusion of free money for state and local taxpayers, federal deficit spending encourages state and local officials to try to shift costs to the federal government because it appears to be costless and because state and local officials face comparatively hard budget constraints in the forms of constitutional or statutory tax, expenditure, and borrowing limits.⁸⁶ Deficit spending can also enhance public support for federal policies because current voters are not asked to pay for those policies.

C. Minimum National-Standards Schemes

Partial preemption greases one-way cooperation by creating room for state and local governments to exceed federal regulatory floors in some policy

81. Bruce Casino, *Federal Grants-in-Aid: Evolution, Crisis and Future*, 20 URB. LAW. 25, 46–51 (1988).

82. See, e.g., Helen Ingram, *Policy Implementation Through Bargaining: The Case of Federal Grants-in-Aid*, 25 PUB. POL'Y 499, 501 (1977), https://www.researchgate.net/publication/12992363_Policy_Implementation_Through_Bargaining_The_Case_of_Federal_Grants-In-Aid.

83. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012).

84. Sobel & Crowley, *supra* note 79, at 168.

85. HISTORICAL TABLES, *supra* note 56, at 25–26 tbl.1.1 (2017). See generally OFFICE OF MGMT. & BUDGET, A NEW FOUNDATION FOR AMERICAN GREATNESS (2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/budget.pdf>.

86. RICHARD W. TRESCH, PUBLIC FINANCE: A NORMATIVE THEORY 483 (3d ed. 2014); see CONG. BUDGET OFFICE, PUB. NO. 4212, REDUCING THE DEFICIT: SPENDING AND REVENUE OPTIONS 17 (2011), <http://www.cbo.gov/sites/default/files/03-10-reducingthedeficit.pdf>; Neil H. Buchanan, *Good Deficits: Protecting the Public Interest from Deficit Hysteria*, 31 VA. TAX REV. 75, 84–86 (2011).

fields, as with many federal environmental statutes.⁸⁷ Likewise, state legislatures and courts can establish individual-rights standards that are higher or stricter than those recognized under the U.S. Bill of Rights.⁸⁸ These schemes are still one-way cooperation, though, because state and local governments can only go above federal floors. This safety valve helps to sustain the system by allowing states desiring stricter standards to exceed the federal floor rather than bucking the system and creating instability. Partial preemption also helps the Congress to expand one-way cooperative programs by ensuring proponents or opponents of no preemption or occupy-the-field preemptions that state and local governments will have space for independent action. Further, these schemes do not prevent the Congress or U.S. Supreme Court from later increasing federal minimum standards.

D. Waivers of Federal Law

Waivers are a more recent one-way tool. Waivers have been occasioned by presidential desires to circumvent congressional opposition and by program complexity, public pressure to allow more state discretion to improve outcomes, skyrocketing costs in some programs, such as Medicaid, and partisan polarization that makes it difficult for state and local officials to obtain more discretion, such as block grants, through the Congress.⁸⁹ Waivers issued by executive agencies allow individual states to depart from program rules so as to experiment with ways to improve achievement of federal program objectives.⁹⁰ Waivers are not issued for reasons of federalism; they are issued for reasons of program flexibility and development.⁹¹ State officials must apply for each waiver, and federal agencies do not grant waivers unless they further the incumbent president's objectives.⁹² Although waivers permit only federally sanctioned discretion and, arguably, violate the

87. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, A-121, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY 16–18 (1992), <http://www.library.unt.edu/gpo/acir/Reports/policy/a-121.pdf>; Joseph F. Zimmerman, *Federal Preemption Under Reagan's New Federalism*, 21 PUBLIUS 7, 10 (1991).

88. John Kincaid, *State Court Protections of Individual Rights Under State Constitutions: The New Judicial Federalism*, 61 J. ST. GOV'T 163, 163–64 (1988).

89. John Kincaid, *The State of U.S. Federalism, 2000–2001: Continuity in Crisis*, 31 PUBLIUS 1, 21–22 (2001).

90. *Id.*

91. Bruce P. Frohnen, *Waivers, Federalism, and the Rule of Law*, 45 PERSP. ON POL. SCI. 59, 64 (2016).

92. *Id.*

rule of law,⁹³ they relieve pressure for restive states to buck the system. For example, 33% of federal funding for Medicaid, which accounts for almost half of all federal aid to state and local governments, supported states' waiver programs in 2015.⁹⁴

E. Extensions of Compliance Deadlines

Federal agencies often extend compliance deadlines for all or some state and local governments, again relieving pressure in the system.⁹⁵ Because many states have resisted the U.S. REAL ID Act of 2005,⁹⁶ the U.S. Department of Homeland Security (DHS) extended compliance deadlines several times, with full enforcement now set for 2018–20.⁹⁷ As of mid-June 2017, twenty-five states were not compliant.⁹⁸ The extensions, though, did not stem solely from federal-agency cooperation; they also reflected President Barack Obama's dislike of REAL ID and resistance by both conservative and liberal interest groups concerned about government surveillance and citizen privacy. Absent these allies, DHS would likely have required state compliance earlier.

F. Federal Forbearance

Pressure against one-way cooperative federalism also is mitigated by the states' abilities to enact some policies that deviate from federal standards. States opposed to abortion have found novel ways to restrict abortion through regulation.⁹⁹ The U.S. Supreme Court has struck down some state

93. *Id.* at 65–66.

94. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-312, MEDICAID DEMONSTRATIONS: FEDERAL ACTION NEEDED TO IMPROVE OVERSIGHT OF SPENDING 8 (2017), <http://www.gao.gov/assets/690/683888.pdf>.

95. *See, e.g.*, 6 C.F.R. § 37.63 (2017) (providing initial and subsequent extensions for state compliance with REAL ID Act of 2005).

96. REAL ID Act of 2005, Pub. L. No. 109-13, § 201–02, 119 Stat. 302, 311–314 (codified at 49 U.S.C. §§ 30301–30302 (2012)) (requiring states to produce driver's licenses that comply with federal security rules).

97. *REAL ID Federal Enforcement*, U.S. DEP'T HOMELAND SEC., <https://www.dhs.gov/federal-enforcement> (last updated Aug. 1, 2017).

98. *Current Status of States/Territories*, U.S. DEP'T HOMELAND SEC., <https://www.dhs.gov/current-status-states-territories> (last updated Sept. 8, 2017).

99. *State Laws and Policies: An Overview of Abortion Laws*, GUTTMACHER INST. (June 1, 2017), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>.

regulations¹⁰⁰ but also upheld many,¹⁰¹ while retaining ultimate authority over what is permissible. In 2003, Massachusetts became the first state to legalize same-sex marriage.¹⁰² Seventeen other states did the same before the U.S. Supreme Court mandated same-sex marriage nationwide in 2015.¹⁰³ As of mid-2017, seven states had legalized recreational marijuana and twenty-nine had legalized medical marijuana.¹⁰⁴ These state laws survive because of federal forbearance occasioned by strong public support for marijuana legalization, which crossed the 50% threshold in 2011,¹⁰⁵ and a Democratic administration (i.e., Barack Obama) friendly to legalization.

100. See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319–20 (2016); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 331–32 (2006); *Stenberg v. Carhart*, 530 U.S. 914, 945–46 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 901 (1992); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986); *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 433, 451–52 (1983); *Bellotti v. Baird*, 443 U.S. 622, 651 (1979); *Colautti v. Franklin*, 439 U.S. 379, 401 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 84 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975).

101. See, e.g., *Mazurek v. Armstrong*, 520 U.S. 968, 975–76 (1997) (upholding law requiring licensed physicians to perform abortions); *Leavitt v. Jane L.*, 518 U.S. 137, 142 (1996) (permitting restrictions on abortions past twenty weeks); *Casey*, 505 U.S. at 899 (allowing mandatory counseling and parental consent); *Hodgson v. Minnesota*, 497 U.S. 417, 457–58 (1990) (explaining that two-parent notification for minor's abortion is constitutional if judicial bypass is available); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 519–21 (1989) (allowing ban on use of public employees and facilities to perform abortions and twenty-four-week fetal viability test); *Akron*, 462 U.S. at 440–41 (upholding one-parent notice requirement with judicial bypass); *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983) (states can require second-trimester abortions to be done in licensed facilities); *H. L. v. Matheson*, 450 U.S. 398, 413 (1981) (states may require physician to inform adolescent's parents before performing an abortion or face criminal penalty); *Williams v. Zbaraz*, 448 U.S. 358, 369 (1980) (states can limit Medicaid payments to life-saving abortions); *Maher v. Roe*, 432 U.S. 464, 480 (1977) (states can prefer childbirth over abortion through funding allocations); *Poelker v. Doe*, 432 U.S. 519, 521–22 (1977) (city can ban abortions in city-owned hospitals); *Danforth*, 428 U.S. at 65, 67 (allowing informed consent and fetal viability definition); *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (allowing ban on non-physician abortionists).

102. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948–49 (Mass. 2003).

103. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

104. *State Medical Marijuana Laws*, NAT'L CONF. ST. LEGISLATURES (Aug. 30, 2017), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

105. Art Swift, *Support for Legal Marijuana Up to 60% in U.S.*, GALLUP (Oct. 19, 2016), <http://www.gallup.com/poll/196550/support-legal-marijuana.aspx>.

G. Federal Court Orders and Consent Decrees

There has been a vast increase since the early 1950s in federal court orders and consent decrees governing state and local affairs.¹⁰⁶ Following the massive resistance by many southern state and local governments to the federal courts in the 1950s and 1960s, state and local officials became more cooperative with judicial decisions.¹⁰⁷ The federal courts stand as potential hammers to compel compliance, giving state and local officials further incentives to cooperate with federal officials. Federal court orders affect nearly all facets of state and local government.¹⁰⁸ Numerous federal consent decrees of long standing, which often emanated from citizen lawsuits, also govern many aspects of administration in all states and perhaps most local governments. In 2016, for example, a federal judge accused New York City's police department of "near systemic violations"¹⁰⁹ of guidelines set forth in the Handschu consent decree of 1985¹¹⁰ and rejected a settlement reached by the mayor and Muslim groups.¹¹¹ Federal officials, in seeking to foster compliance, ordinarily negotiate with state and local officials before invoking judicial intervention, but the prospect of judicial intervention helps induce state and local cooperation.¹¹²

H. Federal Statutory and Regulatory Penalties

Some cooperative federalism statutes contain civil or criminal penalties aimed at uncooperative state and local officials along with private parties.¹¹³ Many federal statutes also enable citizens to sue state and local officials for insufficient or discriminatory compliance with federal laws, and many

106. Jason Parkin, *Aging Injunctions and the History of Institutional Reform Litigation*, 70 VAND. L. REV. 167, 176–79 (2017).

107. See Neal Devins, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1246 (1984).

108. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 430 (2d ed. 2008).

109. Bill McGurn, *Cops and Islamists*, WALL ST. J. (Nov. 3, 2016), <https://www.wsj.com/articles/cops-and-islamists-1478127653>.

110. *Handschu v. Special Servs. Div.*, 605 F. Supp. 1384, 1420–24 (S.D.N.Y. 1985), *aff'd* 787 F.2d 828 (2d Cir. 1986).

111. Matt Apuzzo & Adam Goldman, *Judge Rejects Settlement Over Surveillance of Muslims by New York Police Department*, N.Y. TIMES (Oct. 31, 2016), <https://www.nytimes.com/2016/11/01/nyregion/nypd-muslim-lawsuit-settlement.html>.

112. Erica Goode, *Some Chiefs Chafing as Justice Department Keeps Closer Eye on Policing*, N.Y. TIMES (July 27, 2013), <http://www.nytimes.com/2013/07/28/us/some-chiefs-chafing-as-justice-department-keeps-closer-eye-on-policing.html>.

113. See, e.g., *New York v. United States*, 505 U.S. 144, 145 (1992).

provide for withdrawal of federal funds. Although federal officials usually invoke penalties as a last resort, the possibility can be persuasive. An illustration of the fear of penalties and adverse publicity accompanying penalties could be seen when, with more than 100 institutions under federal investigation, many public and private higher-education administrators were in a panic to comply with federal Title IX¹¹⁴ rules issued in 2011 in a nineteen-page “Dear Colleague” letter and other communications from the U.S. Department of Education¹¹⁵ on how to manage accusations of sexual assaults on campuses even though letters of guidance lack the force of law. Federal agencies have increasingly used guidance mechanisms not subject to the notice-and-comment rules of the federal Administrative Procedure Act.¹¹⁶

V. ADVOCATES OF STATE AND LOCAL ADMINISTRATIVE COOPERATION

At least six categories of entities function as advocates of one-way cooperative federalism.

A. Nongovernmental Organizations

Thousands of nongovernmental organizations participate in the administration of most cooperative intergovernmental programs, and their employees depend on federal funds often delivered to them via state and local treasuries.¹¹⁷ Some nongovernmental organizations also have nongovernmental income, but many rely substantially on government funds.

This kind of collaboration was developed in the early nineteenth century and increased after the Civil War. A portion of Madison Square occupied by a U.S. arsenal was given by the federal government to the Society for the Prevention of Pauperism and Crime in 1824 to construct the New-York

114. Title IX of the Education Amendments Act of 1972 codified that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.” See Pub. L. No. 92-318, tit. IX, § 901, 86 Stat. 304, 304–12 (codified as 20 U.S.C. § 1681(a) (2012)); see also Stephane J. Kirven, *A Rush to Judgment and a Denial of Due Process*, 3 J. CRIM. JUST. & LEGAL ISSUES 6 (2015); Allie Grasgreen, *Tide Shifts on Title IX*, INSIDE HIGHER ED (Apr. 24, 2012), <https://www.insidehighered.com/news/2012/04/24/ocr-dear-colleague-letter-prompts-big-change-sexual-assault-hearings-unc>.

115. U.S. Dep’t of Educ., Office of Civil Rights, Dear Colleague Letter (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

116. Administrative Procedure Act, 5 U.S.C. §§ 551–59 (2012 & Supp. 2016).

117. See ROBERT AGRANOFF, CROSSING BOUNDARIES FOR INTERGOVERNMENTAL MANAGEMENT 3 (2017).

House of Refuge for juvenile delinquents.¹¹⁸ The first National Asylum for Disabled Volunteer Soldiers established in Milwaukee in 1867 was co-funded by the federal government and the Lady Managers of the Home Society, which also managed the asylum.¹¹⁹ However, President Lyndon B. Johnson's 'creative federalism' vastly expanded the roles of nongovernmental organizations through public-private partnerships and direct federal aid, partly out of mistrust of state and local governments and to circumvent state capitols and city halls.¹²⁰ Such nongovernmental organizations—both nonprofits and for-profits—proliferate around every intergovernmental program and also ally nationwide to lobby for more federal money and regulations to expand and maintain their programs.

B. Administrator Lobbyists

State and local administrators frequently advocate expansive public policy-making and higher spending in their field and, thus, often welcome federal intervention. For example, the 1916 Federal Aid Road Act¹²¹ consisted almost entirely of language drafted by the American Association of State Highway Officials. As a condition of aid, states had to establish a dedicated highway agency staffed by professional engineers.¹²² Such advocacy is sometimes used to circumvent or undercut elected state and local officials opposed to increased federal funding or policy-making. State and local environmental officials, for example, tend to welcome federal rules that set stricter environmental standards and require more state and local spending on environmental protection.¹²³ It is not uncommon for state and local bureaucrats to lobby for federal policies that are opposed by state and local elected officials who can be punished at the ballot box for implementing unpopular federal policies or raising taxes in order to pay for state or local implementation of those policies. Even in the 1940s, Albert Deutsch noted

118. *Our City Charities: The New-York House of Refuge for Juvenile Delinquents*, N.Y. TIMES (Jan. 23, 1860), <http://www.nytimes.com/1860/01/23/news/our-city-charities-the-new-york-house-of-refuge-for-juvenile-delinquents.html?pagewanted=all>.

119. H.R. MISC. DOC. NO. 45, at 9 (1867).

120. DAVID GREENSTONE & PAUL PETERSON, RACE AND AUTHORITY IN URBAN POLITICS: A STUDY OF THE WAR ON POVERTY 1–4 (1973).

121. Federal Aid Road Act of 1916, Pub. L. No. 156, 39 Stat. 355.

122. Richard F. Weingroff, *Federal Aid Road Act of 1916: Building the Foundation*, PUB. ROADS, Summer 1996, at 2, 5–6.

123. See Dan Carden, *Indiana House Wants Feds to Set Environment Standards*, N.W. IND. TIMES (Feb. 6, 2016), http://www.nwitimes.com/news/local/govt-and-politics/indiana-house-wants-feds-to-set-environment-standards/article_27091fe7-bf64-5815-952c-a9dd59e8371f.html.

that state mental-hospital administrators often welcomed him to photograph and expose institutional conditions so as to induce elected officials to increase state and federal funding and regulation.¹²⁴ “The State Administrators Project found over the decades that federal aid and regulations promoted constant, consequential, and pervasive state agency autonomy from gubernatorial and legislative oversight.”¹²⁵

C. *Public Sector Union Lobbyists and Litigators*

Public sector unions, which blossomed in the 1960s, often advocate increased federal policy-making and state and local cooperation with federal policy objectives that benefit their members.¹²⁶ Federal, state, and local public employee organizations have similar goals; they support federal program implementation; they sometimes oppose the policy preferences of their elected employers; and they serve as additional forums for intergovernmental communication and cooperation. State and local public employee organizations usually welcome increased federal money and friendly regulation.

The American Federation of State, County and Municipal Employees (AFSCME), an outgrowth of the American Federation of Government Employees formed in 1934, fosters unionization, lobbies the federal government for favorable policies, and is one of the country’s biggest contributors to political campaigns.¹²⁷ The National Education Association and American Federation of Teachers are among the most influential lobbyists in states and Washington, D.C.¹²⁸

State and local public sector workers trigger considerable federalism litigation,¹²⁹ including some of the U.S. Supreme Court’s most important

124. ALBERT DEUTSCH, *THE SHAME OF STATES* 11–12 (1948).

125. John Kincaid, *Policy Coercion and Administrative Cooperation in American Federalism*, in *FEDERALISM AS DECISION-MAKING: CHANGES IN STRUCTURES, PROCEDURES AND POLICIES* 62, 73 (Francesco Palermo & Elisabeth Alber eds., 2015).

126. Daniel Disalvo, *The Trouble with Public Sector Unions*, NAT’L AFF., Fall 2010, at 3, 10–12, <https://www.nationalaffairs.com/publications/detail/the-trouble-with-public-sector-unions>.

127. *Id.*; see also *American Federation of State, County, and Municipal Employees (AFSCME)*, FACTCHECK.ORG (Aug. 9, 2010), <http://www.factcheck.org/2010/08/american-federation-of-state-county-and-municipal-employees-afscme/>.

128. Jason Hart, *National Education Association Spends \$35 Million on Politics*, WATCHDOG.ORG (Dec. 1, 2014), <http://watchdog.org/184881/nea-political-spending/>; Jason Hart, *Teachers Squeezed for \$27 Million in Union Political Spending*, WATCHDOG.ORG (Oct. 27, 2014), <http://watchdog.org/178693/teachers-union-politics/>.

129. Kincaid, *supra* note 44, at 174–75.

federalism rulings, such as *National League of Cities v. Usery*¹³⁰ and *Garcia v. San Antonio Metropolitan Transit Authority*.¹³¹ In these cases, organizations of elected state and local officials opposed application of the FSLA to state and local public employees.¹³²

D. Interest-Group Lobbyists

After achieving a federal intergovernmental policy objective, national, state, and local interest groups pressure state and local governments to cooperate in implementing that objective. There has been tremendous growth in interest-group activity within the states since the late 1960s.¹³³ One cause of growth has been the need for interest groups to induce cooperative state and local compliance with national policy objectives supported by interest groups. Policy advocates do not hesitate to lobby, protest, and sue state and local governments for noncompliance. From 2014 to 2017, for example, citizen protests in numerous cities of police shootings of black men triggered federal interventions to secure local police compliance with federal policing rules.¹³⁴

E. Citizen Lawsuits

Citizen lawsuits pursuant to federal statutes—such as Section 1983,¹³⁵ environmental laws, the Americans with Disabilities Act,¹³⁶ and the Fair Housing Amendments Act of 1988¹³⁷—are a regular feature of state and local governance and a common tool for inducing or sustaining cooperative state and local government implementation of federal policies.

130. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

131. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

132. *Garcia*, 469 U.S. at 534; *Nat'l League of Cities*, 426 U.S. at 839.

133. VIRGINIA GRAY & DAVID LOWERY, *THE POPULATION ECOLOGY OF INTEREST REPRESENTATION: LOBBYING IN THE AMERICAN STATES* 93–95 (1996).

134. Janell Ross, *How Black Lives Matter Moved from a Hashtag to a Real Political Force*, WASH. POST: THE FIX (Aug. 19, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/08/19/how-black-lives-matter-moved-from-a-hashtag-to-a-real-political-force/?utm_term=.67bb14705140.

135. 42 U.S.C. § 1983 (2012).

136. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012 & Supp. 2013).

137. Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3610–3614 (2012).

F. Congressional Oversight

Members of Congress encourage state and local cooperation with federal program objectives that enhance their re-election chances. Congressional interference with federal bureaucrats is another stimulus for cooperative federalism. “Administrative contacts [are] voluminous, and the whole process of interaction [is] lubricated . . . by constituent-conscious members of Congress.”¹³⁸

Congressional casework still influences the intergovernmental attitudes and actions of federal administrators, although it is doubtful that it has the same effects as observed by Grodzins.¹³⁹ Interest groups play bigger roles in federal programs than they did in the early 1960s. Consequently, the proportion of congressional casework conducted on behalf of state and local governments as opposed to interest groups is smaller today. Although pork-barrel spending dates back to the nation’s founding, the rise of contemporary earmarking by members of Congress produces outcomes that often ignore or conflict with the preferences of state and local officials. As a Colorado transportation official remarked: “Why do we spend 18 months at public hearings, meetings and planning sessions to put together our statewide plan if Congress is going to earmark projects that displace our priorities?”¹⁴⁰ Grodzins’ evidence dealt overwhelmingly with place-focused programs, such as highways and other infrastructure (e.g., airport development), agriculture, and education.¹⁴¹ Since then, the federal government has enacted massive social-welfare programs, where intergovernmental spending has skyrocketed.

As a proportion of all federal aid to state and local governments, social welfare increased from 35% in 1960 to 75% in 2017.¹⁴² In constant dollars, intergovernmental social-welfare aid increased by 2,934% from 1960 to 2017, while aid for programs that preoccupied Grodzins increased by only 302%.¹⁴³ Hence, the policy content of the intergovernmental fiscal landscape is vastly different from 1960. The dominance of social-welfare programs has not only created millions of direct beneficiaries of one-way cooperative federalism but also generated fears among many that decentralization or devolution would induce a race to the bottom of welfare provision among the

138. Grodzins, *supra* note 50, at 270.

139. Kincaid, *supra* note 125, at 73.

140. Brody Mullins, *As Earmarked Funding Swells, Some Recipients Don’t Want It*, WALL ST. J. (Dec. 26, 2006), <https://www.wsj.com/articles/SB116710120694259358>.

141. Grodzins, *supra* note 50, at 270–71.

142. DILGER, *supra* note 76, at 7.

143. HISTORICAL TABLES, *supra* note 56, at 268 tbl.12.1.

states. For example, most Democrats stoutly oppose Republican proposals to block-grant Medicaid.¹⁴⁴

VI. SOCIAL AND POLITICAL FACILITATORS OF STATE AND LOCAL ADMINISTRATIVE COOPERATION

At least six social and political factors facilitate cooperative state and local implementation of federal policies.

A. Professional Norms

Due to similar civil-service rules and shared professional norms, most federal, state, and local administrators dull the sharp edges of partisanship so as to focus on cooperative task execution under existing rules and budgets. Additionally, federal, state, and local administrators within policy fields often share the same education and training pedigrees and interact with each other in the same national and regional professional associations, which are usually more important to them than party affiliations. Federal, state, and local law-enforcement officials, for example, have similar and sometimes common training and professional backgrounds, as well as a camaraderie, that foster cooperation.¹⁴⁵

B. Socialization

Socialization has occurred as well. The dominance of the federal government in so many policy fields for the past fifty-some years of coercive federalism became an unquestioned fact of administrative life, and schools of public administration, many of which offer courses on intergovernmental relations and management,¹⁴⁶ convey the tenets of cooperative federalism. Further, many of today's senior federal, state, and local administrators entered public service in the late 1960s and 1970s with a passion for the policies promulgated via cooperative federalism. Also, for rank-and-file

144. John K. Inglehart, *Medicaid at a Crossroads*, NEW ENG. J. MED. (Apr. 28, 2011), <http://www.nejm.org/doi/full/10.1056/NEJMp1103305#t=article>.

145. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 249784, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2013, at 3–8 (2016), <https://www.bjs.gov/content/pub/pdf/slleta13.pdf>.

146. John Kincaid & Richard L. Cole, *Is the Teaching of Federalism and Intergovernmental Relations Dead or Alive in American Public Administration?*, 22 J. PUB. AFF. EDUC. 515, 520 (2016).

administrators, the origins of their work dictates are less important to them than their preoccupation with how to implement those dictates.

C. Public Support

Popular support for most federal social-welfare and social-regulation and civil-rights policies is an incentive for elected state and local officials to cooperate with, or at least not openly resist, most federal programs. The current refusal of some Republican governors to expand Medicaid is unusual, though not wholly exceptional because none have seriously tried to exit Medicaid.¹⁴⁷ Similarly, proposals to repeal the highly intergovernmental Affordable Care Act¹⁴⁸ are almost always accompanied by a pledge to replace it with a differently structured intergovernmental social-welfare policy.

D. Moral Approbation

Many federal social-welfare and social-regulation programs and civil-rights policies enjoy considerable moral approbation. A fundamental obstacle to reviving dual federalism is its historic association with racism, sexism, and other reactionary themes. This association was vividly displayed during the 2016 presidential race when Republican Donald Trump pledged to appoint U.S. Supreme Court Justices who would overturn *Roe v. Wade*¹⁴⁹ and restore abortion policy-making to the states while Democrat Hillary Clinton vowed to defend *Roe v. Wade* and defeat abortion-restricting state laws.¹⁵⁰

147. Charles Barrilleaux & Carlisle Rainey, *The Politics of Need: Examining Governors' Decisions to Oppose the "Obamacare" Medicaid Expansion*, 14 ST. POL. & POL'Y Q. 437, 439 (2014).

148. Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2012).

149. *Roe v. Wade*, 410 U.S. 113 (1973); Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016), <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>.

150. *Fact Check and Full Transcript of the Final 2016 Presidential Debate*, NPR (Oct. 19, 2016, 8:42 PM), <http://www.npr.org/2016/10/19/498293478/fact-check-trump-and-clinton-s-final-presidential-debate>.

E. Territorially Dispersed Diversity

Since the fall of massive resistance to desegregation in the South, no cultural, ethnic, religious, or linguistic region (akin to Quebec or Scotland)¹⁵¹ has had strong incentives to thwart intergovernmental administrative cooperation. The South lost its privileged veto position in Congress during the 1960s, and its contemporary conservatism is unreliably federalist.

F. Partisan Congruence and Bipartisan Ratchets

Contemporary cooperative federalism is bipartisan, and it began when polarization was at its lowest point in the Congress.¹⁵² Both parties expand federal power to advance their national policy objectives. Since the New Deal, many Republicans have been dual federalists rhetorically and cooperative federalists operationally. Federal aid increased (in real dollars) by 103% during President Dwight D. Eisenhower's years,¹⁵³ and he signed into law, for example, the National Interstate and Defense Highways Act¹⁵⁴ and National Defense Education Act.¹⁵⁵ Federal aid increased by 52% during Richard M. Nixon's years,¹⁵⁶ and Nixon presided over major expansions of cooperative federal regulatory schemes such as the National Environmental Policy Act¹⁵⁷ and Clean Water Act.¹⁵⁸ Federal aid declined overall by 13% under Ronald Reagan,¹⁵⁹ but Mothers Against Drunk Driving prevailed on him to sign the National Minimum Drinking Age Act.¹⁶⁰ Reagan obtained seventy-seven categorical-grant consolidations into nine block grants while

151. NICOLA MCEWEN, BETTINA PETERSOHN & COREE BROWN SWAN, CTR. ON CONSTITUTIONAL CHANGE, INTERGOVERNMENTAL RELATIONS & PARLIAMENTARY SCRUTINY 7, 13 (2015), http://www.parliament.scot/2015.09.30_IGR_External_Research_Report_FINAL.pdf.

152. Christopher Hare, Keith T. Poole & Howard Rosenthal, *Polarization in Congress Has Risen Sharply. Where Is It Going Next?*, WASH. POST (Feb. 13, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/13/polarization-in-congress-has-risen-sharply-where-is-it-going-next/>.

153. See HISTORICAL TABLES, *supra* note 56, at 268 tbl.12.1.

154. Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374 (1956).

155. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958).

156. See HISTORICAL TABLES, *supra* note 56, at 268 tbl.12.1.

157. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

158. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972).

159. See HISTORICAL TABLES, *supra* note 56, at 268 tbl.12.1.

160. National Minimum Drinking Age Act, Pub. L. No. 98-363, § 102, 98 Stat. 435, 437 (1984).

terminating sixty-two categorical grants.¹⁶¹ He also issued Executive Order 12612 in 1987, which sought to reduce regulatory interventions into state and local affairs by federal agencies.¹⁶² The order had little impact on federal-agency behavior. The federal intergovernmental regulatory reach expanded under Reagan.¹⁶³ Since Reagan, no president or presidential candidate has proposed a new federalism or otherwise made federalism a campaign issue.

Ordinarily, Democratic state and local officials support the policies of Democrats in the Congress and White House, and Republican state and local officials do the same for their federal compatriots. Consequently, nationalizing policies pursued by either party often enjoy support from like-minded state and local officials. Once in place, the policies resist dislodgement.

Otherwise, partisanship plays a minor role in intergovernmental administration. In the political arena, there may be partisan conflict over intergovernmental programs, such as Medicaid and surface transportation, and over costly mandates, such as environmental regulations, but once federal policies on these matters are enacted into law, rank-and-file bureaucrats have incentives to cooperate across regional and party lines on program administration. Furthermore, virtually all of the nongovernmental collaborators in policy implementation purport to be nonpartisan, and most of the nonprofit participants are legally required to be nonpartisan, although many are covertly partisan.

CONCLUSION

The web of one-way intergovernmental cooperation woven since the mid-1960s has eclipsed traditional notions of both dual and cooperative federalism, produced potent forces unfriendly to dual federalist restoration, and made it impossible to sort out functions into watertight federal, state, and local compartments. Consequently, federalism is a non-issue in American national politics. Despite offering many proposals having significant federalism implications, no 2016 presidential aspirant mentioned a new federalism in the primary debates or general-election campaign. Only former

161. TIMOTHY CONLAN, *NEW FEDERALISM* 116, 162 (1988).

162. Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987), *revoked by* Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

163. *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *FEDERAL REGULATION OF STATE AND LOCAL GOVERNMENTS* 11–12 (1993); *see also* Timothy J. Conlan, *And the Beat Goes on: Intergovernmental Mandates and Preemption in an Era of Deregulation*, 21 *PUBLIUS* 43, 50–54 (1991).

Republican governors Jeb Bush and John Kasich posted short federalism platforms on their websites.¹⁶⁴

It might be that “[c]ooperative federalism undermines political transparency and accountability, thereby heightening civic disaffection and cynicism; diminishes policy competition among the states; and erodes self-government and liberty.”¹⁶⁵ It is difficult to sort out the tangled roots of the current distemper. One possibility, however, is that the rise of the new cooperative federalism, which corresponds with the rise of polarization since the late 1960s, is the root cause of polarization because it has nationalized so many issues, especially sensitive social and cultural issues such as abortion and education that were previously diffused across the fifty state political arenas. The cooperative federalism advanced by the nationalist school of federalism requires a national consensus on such issues, but there is no consensus. Requiring state electorates to implement sometimes hotly contested national policies appears to have considerably exacerbated national conflict in ways that threaten the institutional fiber of the republic.

164. John Kincaid, *State-Federal Relations: Lost on the Campaign Trail*, in 48 THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 23, 24 (2016).

165. Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 559 (2000).