



FEDERALISM AND THE CONSTITUTION: COMPETITION VERSUS CARTELS

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Now as at all crucial junctures of American history, federalism questions are at the heart of intensely controversial policy debates, on issues ranging from the Affordable Care Act to immigration, from same-sex marriage to drug policy, from labor law and pensions to environmental protection. Alongside those engagements, the federal structure itself has reemerged as a subject of public debate. From education to disaster relief to health care and insurance, federal arrangements have ceased to work. Bloated intergovernmental bureaucracies appear to defy any serious reform effort. Governments at all levels suffer from high levels of debt. These debilities loom especially large in times of economic stress and widespread public disaffection.

In a [new essay](#) published by the Mercatus Center at George Mason University, [Michael S. Greve](#), professor of law at George Mason University School of Law, examines the sources and the alarming scope of contemporary federalism's failures. Building on his previous scholarly work on the subject (including *The Upside-Down Constitution*, 2012) he provides a trenchant, constitutionally grounded analysis with profound implications for a wide range of current policy debates.

FEDERALISM'S FORMS

According to a widely held view, federalism requires a healthy balance between Washington and the states. Conservatives and libertarians believe that the balance has been lost. The New Deal threw it out of whack, and we have been on a relentless march toward centralization ever since. An overbearing, distant government in Washington, DC, has aggrandized itself and trampled state and local governments underfoot. To restore fiscal sanity and a more democratic government, the thinking goes, we should return power to the states and bring government closer to the people.

While this conventional view has considerable plausibility, it misses both the perils and perhaps the potential of our federalism. Foremost, it overlooks powerful evidence of progressive *decentralization* over the past decades. For example, national business enterprises are subject to regulation and litigation not only by federal agencies, but also by regulators, attorneys general, and plaintiffs' lawyers in fifty states. Similarly, our federalism suffers from an alarming fiscal imbalance: state and federal

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governments spend in excess of \$600 billion in federal money per year. In some states, federal transfers now account for over 40 percent of revenues. Excessive centralization has gone hand-in-hand with excessive decentralization. Both trends have produced bigger, more sprawling government.

In this light, federalism is not a question of federal-state “balance” but a question of *structure*. Federalism comes in different forms—some conducive to fiscal discipline and economic growth, others to government bloat, systemic policy failure, and fiscal irresponsibility. Good and bad effects can occur at almost any level of decentralization. Thus, the central question is not, *how much* federalism? Rather, it is, *what kind* of federalism?

The crucial distinction is between competitive federalism and cartel federalism.

Competitive federalism compels states to compete for the talents, assets, and affections of a mobile citizenry. It thereby disciplines government at all levels, and it enhances political accountability and transparency. Competitive federalism was the federalism of the nineteenth and early twentieth century. By all accounts, it fostered the stupendous growth of the US economy over that time.

Cartel federalism, in diametrical contrast, allows state governments and political elites to *suppress* economic and political competition among states, with the active assistance of the central government. Cartel federalism promotes the growth of government at all levels, creates impenetrable intergovernmental bureaucracies and a torrent of transfer payments, and destroys political accountability. In its more extreme forms (such as Argentina’s), cartel federalism spells the ruin of nations. To a dismaying extent, it has become our federalism.

THE CONSTITUTION AND THE NEW DEAL

The contest between “balance” and “structure” is as old as the Republic, and it has a prominent constitutional dimension. The “balance” perspective was the Anti-Federalists’, who insisted on protecting state prerogatives. The Federalists, in contrast, resolutely rejected that position. They insisted that federalism—the “compound republic”—had to serve the interests of *citizens*, not the states’ political institutions and elites. That objective, to the Founders’ minds, required federalism arrangements that would establish effective government institutions and, at the same time, discipline those institutions. The Founders had no full-blown theory of *competitive* federalism, as we now understand it. However, they did have a well-developed theory of the federal structure. Remarkably each piece of that structure is a vital component of what we now call “competitive federalism.”

The structure lasted for well over a century. In the course of the twentieth century, it was largely lost—not, as the conventional view has it, as a result of centralization but, in the wake of the New Deal, in an inversion of competitive federalism into cartel federalism. The hallmarks of cartel federalism are: concurrent federal and state powers over practically the full range of domestic affairs; high levels of federal transfer payments to states; and sprawling intergovernmental bureaucracies to administer “cooperative” programs.

The post–New Deal view of cartel federalism as a salutary innovation has faded, as more experts now view it as an engine of government failure and as a principal source of excessive regulation, overspending, public debt, and state gambles on federal bailouts. However, cartel federalism has

powerful self-reinforcing tendencies. It has resisted any reform effort and instead lurched to ever-higher levels of bureaucratic entrenchment, systemic policy failure, and overspending. Cartel federalism's most extreme embodiment to date is the Patient Protection and Affordable Care Act. Far from nationalizing health care and insurance, the act's key programs—a vast expansion of Medicaid and the establishment of state or federal health care exchanges—extend cartel federalism to the breaking point: wholly unworkable programs, financed through debt.

CRISIS AND REFORM

American federalism has come very far down the cartelization road and may be beyond reform. Still, present conditions may permit a reconstruction of a more sensible, constitutional federalism. Foremost, cartel federalism has reached the outer limits of affordability and political plausibility. The Affordable Care Act has met with unprecedented state resistance, and the same pattern of deep state divisions and opposition to federal initiatives marks debates over environmental policy, energy, and labor regulation. In this context, the task is not to restore an elusive “balance” by helping state governments but rather to rehabilitate federalism's constitutionally envisioned *competitive* structure. Steps in that direction might include decentralizing measures, such as termination of entire federal funding programs; or they might also include centralizing measures, such as full federal responsibility for jointly funded and administered programs. Either way, the key objective is to disentangle government programs, to restore political accountability, and to discipline government actors.