

# Updating Theories of American Federalism

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Modern federalism was born in America. Arguably, this was out of political necessity. It was not a bold new invention out of whole cloth so much as what James Madison called a “composition,” taking into account the existence of 13 colonies (now states) which were unlikely to look kindly at their abolition and replacement with a national government.<sup>1</sup> We cannot know what the Founders motives were. Perhaps they liked this new blend whereby citizens are citizens of two governments, national and state. We can be pretty sure, however, that James Madison and Alexander Hamilton were more interested in unification than preservation — that is, more interested in the establishment of a national government than in the preservation of the powers and perquisites of the colonial governments, some of which (Virginia most of all) had a vast expanse and a strong standing army while others were small and sparsely populated. Later, Madison turned against his own invention when in 1798 authored the Virginia Resolutions arguing for the right to secede from the new union because he was outraged by John Adams’ Alien and Sedition laws.

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<sup>1</sup> James Madison, Federalist Paper No. 39, in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, The New American Library 1961, p. 246.

The earliest justifications for the federal form were grounded in the premise of James Madison (although not original) about the need for countervailing mechanisms to prevent the rise of overreaching power holders, surely a worthy concern. The Federalist Papers, which he wrote with Alexander Hamilton and John Jay (essentially like modern op-ed articles) to advance the ratification of the U.S. Constitution, emphasized the idea that horizontally the three branches of the national government and vertically the division of power between it and the states would prevent excesses. States, among other power centers, would check and balance national authority. Samuel H. Beer has added, as have others, that the representational citizenry-building effects of having multiple governmental centers of action is intrinsic to the American governmental form, a condition heightened in the age of the Internet.

## **Checks and Balances Under the Microscope**

“Checks and balances” is the concept under the microscope in this paper. The thesis advanced is that U.S. federalism balances the nation’s political system; however, as the years have gone by, it has become less of a checking instrument. It was generally true in the nineteenth century that the conventional textbook idea of checking power was operative. The theory of dual federalism that there is a division of responsibilities between the national government and the states was strongly manifest, for example, in presidential actions (vetoes in some instances and a lack of initiatives in others) and in Supreme Court decisions that prohibited national government incursions into certain (mostly domestic) policy domains on the grounds

that such actions would invade state sovereignty.<sup>2</sup> John Tyler was the first President to use the veto for the purpose “of maintaining the structural division of authority between the states and the federal government. He vetoed two national bank bills (1841) and two provisional tariff bills (1842), which Tyler believed would produce a chain reaction that would obscure the line between state and federal power; he also vetoed a bill to appropriate \$340,000 for improvements to eastern harbors (1844), which Tyler viewed as outside the bounds of the congressional commerce power and thus a threat to state sovereignty.”<sup>3</sup> But that was then. What about now?

In the twentieth century, the lines became blurred. Indeed it is not unreasonable to say that the lines between what is a national and what is a state power disappeared. Law and practice, as well as theories of American federalism, moved from the earlier concept of dualism to a dynamic view, dramatized by Morton Grodzins’ metaphor contrasting layer cake federalism with what he called “marble cake federalism.” Writing in the 1960s, British political scientist K.C. Wheare said, “The test which I apply for federal government is simply this. Does a system of government embody predominantly a division of powers between general

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<sup>2</sup> K.C. Wheare, *Federal Government*, 4<sup>th</sup> ed. (New York: Oxford University Press, 1964) p. 62. See also Richard H. Leach, *American Federalism* (New York: W. W. Norton and Co., 1970), p. 1, and Arthur W. MacMahon, “The Problem of Federalism: Survey,” in Arthur W. MacMahon, ed., *Federalism Mature and Emergent* (Garden City, NY: Doubleday, 1955), p. 4.

<sup>3</sup> J. Richard Broughton, “Rethinking the Presidential Veto,” *Harvard Journal on Legislation*, Vol. 42, No. 1, Winter 2005, pp. 123-124, [http://www.law.harvard.edu/students/orgs/jol/vol42\\_1/broughton.php](http://www.law.harvard.edu/students/orgs/jol/vol42_1/broughton.php) Accessed on March 2, 2006.

and regional authorities, each of which, in its own sphere, is co-ordinate with the others and independent of them?”<sup>4</sup> This is a far cry from Grodzin’s theory.

Wherever you slice through it you reveal an inseparable mixture of different colored ingredients. There is no neat horizontal stratification. Vertical and diagonal lines almost obliterate the horizontal ones, and in some places there are unexpected whirls and an imperceptible merging of colors, so that it is difficult to tell where one ends and the other begins.<sup>5</sup>

At present, and indeed going back to the middle of the 20<sup>th</sup> century, the national government and the states do not so much check each other as they balance each other out by constant interaction to assert power in the swirling marble cake. Local governments are in the game too as discussed below. There is a good analogy in the influential writing of Richard Neustadt on the horizontal dimension of American government. He portrayed the structure of the national government, with its three branches, as not based so much on the separation of powers as separate institutions sharing power<sup>6</sup>.

One reason power balancing, insofar as it involves governmental activism, has become more pronounced since the middle of the 20<sup>th</sup> century is attributable to what Martha Derthick calls “the end of southern exceptionalism.” The diffusion nationally of the civil rights revolution reduced long-standing skepticism on the part of liberals about the worthiness of state governments.

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<sup>4</sup> K.C. Wheare, *Federal Government*, p. 33. Arthur W. MacMahon’s writing also typifies this view. He described federalism as a political system that “distributes power between a common and constituent governments under an arrangement that cannot be changed by the ordinary process of central legislation.” Arthur W. MacMahon, “The Problem of Federalism Survey,” p. 4.

<sup>5</sup> Morton Grodzins, “The Federal System,; in *Goals for Americans: The Report of the President’s Commission on National Goals* (New York: Columbia University Press, 1960), p. 265.

<sup>6</sup> Richard E. Neustadt, “*Presidential Power and the Modern President: The Politics of Leadership from Roosevelt to Reagan*,” (New York, NY: Free Press, 1990). I am indebted to my teacher, Samuel H. Beer for suggesting this point.

**Governmental competence and perceptions of it aside, all discussions of American federalism must henceforth be altered by what is arguably the most important new social and political datum of our times: the end to Southern exceptionalism. Until now, arguments favoring the states' side in any dispute over federalism suffered fatally from the burden of the South's deviant social system. Whether or not blacks have been successfully integrated into American society (a separate question), there can be little doubt that the South as a region has been integrated. That change, even if achieved very largely by the instrumentalities of the federal government, holds the possibility that the case for the states can at last begin to be discussed on its merits.<sup>7</sup>**

## **Cycles of Activism Promote Governmental Growth**

**The American brand of pluralism with multiple points of access and maneuver, both horizontally and vertically, has produced cycles of activism alternating between the national government and the states, depending on conditions and values in the society. The overall effect of these oscillations over time has been to enhance the roles and responsibilities of government in the society and the economy as a whole. This is not to say that the United States is alone among western democracies in the twentieth century for the rising role of government. Indeed, many industrial democracies of the West became “mixed societies” in the twentieth century, with an intermingling of the roles and powers of the public and private sectors, a reflection of expanding technical complexity and industrialization. The end result is that citizens have become less independent (self-reliant farmers no more) and more dependent on laws and public institutions for providing collective goods — defense and homeland security, transportation, the control of traffic and**

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<sup>7</sup> Martha Derthick, “American Federalism: Madison’s middle ground in the 1980s,” *Public Administration Review*, Vol. 47, No.1, p.72.

the movement of people and goods, public education, public health, parks and recreation, environmental protection, poor relief — and regulatory controls.

Interpreters of American history have used the metaphor of policy cycles, often associated with the Schlesingers, Arthur senior and junior.<sup>8</sup> What is distinctive in this analysis of American federalism is the emphasis on the upward momentum of policy cycles. In the twentieth century, the federalism dynamic has exercised a steady and inexorable expansionist/liberal influence. In periods when such influences were on the wane in Washington, the existence of state-level counterforces kept the pressure on. Innovations in progressive states were tested and refined and eventually diffused in the country. The picture is one of federalism impelling the growth of governmental power in domestic public affairs, which otherwise would not have occurred in the individualistic political culture of America.

Evidence to prove this is hard to come by. My argument is grounded on the alternation in the development of public programs through state incubation later manifest in national replication. Data on state and local revenue in relation to gross domestic product provide some substantiation. For example, the proportion of state and local revenue in the national income and product accounts rose in the Reagan-Bush period (1980 – 1992) at the time when national domestic policy and spending became restrictive. State receipts as a share of gross domestic product increased from 12.6 percent in 1985 to level out at 13.7 per cent in the aftermath of Reagan-Bush. There have been laggard states and state anti-tax and anti- spending

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<sup>8</sup> Arthur M. Schlesinger, Sr., *Paths to the Present* (New York: McMillan, 1949), and Arthur M. Schlesinger, Jr., *The Cycles of American History* (Boston: Houghton Mifflin, 1986).

**campaigns in the post-Reagan years. Still, the inexorable interest-powered rise in domestic programs since mid-20th century buttresses the theory that American federalism is a growth machine for governments.**

**Writing in the 1960s, James L. Sundquist presented a similar view. “Repeatedly”, he said, the electorate “turned to the activist party to speed up the tempo of the government in its handling of national problems.”<sup>9</sup> I have described this cyclical process for American federalism in other places, referring to the way progressive states in conservative periods developed domestic public services that morphed into national policy when the national mood shifted to a more liberal stance.<sup>10</sup> This was true in the progressive period under Theodore Roosevelt and in the New Deal years under his cousin Franklin Roosevelt. The excerpt below is drawn from an earlier paper.**

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<sup>9</sup> James L. Sundquist, *Politics and Policy: The Eisenhower, Kennedy, and Johnson Years* (Washington: The Brookings Institution, 1968), p. 503.

<sup>10</sup> Richard P. Nathan, “Federalism—The Great ‘Composition’,” in *The New American Political System*, Anthony King, ed., 2<sup>nd</sup> ed. (Washington: American Enterprise Institute, 1990), pp. 241-245. See also, Richard P. Nathan, “There Will Always Be a New Federalism,” *Journal of Public Administration Research and Theory*, 10.1093/jopart/muj011, February 16, 2006.

### Federalism Cycles<sup>11</sup>

*Going back to the 19<sup>th</sup> century and the first part of the 20<sup>th</sup> century, the states — not all the states, but some states — have been the sources of expansion of the public sector in conservative periods. When conservative coalitions controlled national offices, programs that were incubated, tested, and debugged in liberal states became the basis for later national action. In such periods, client and provider groups also played a strong role in protecting existing programs, making retrenchment harder to achieve than otherwise would have been the case.*

*A surge of liberal state initiatives in domestic affairs characterized the conservative Republican period in the 1880s. Allan Nevins and Henry Steele Commager wrote that “the first great battles of the reform movement were fought out in the states.”<sup>12</sup> Compulsory school attendance and vaccination laws and the creation of state boards of education, reforms of political processes, a growing role for state boards of charity, child labor laws, and state regulatory policies in licensing and zoning are examples of state initiatives in areas of domestic policy at the turn of the century that were later expanded and nationalized in the Progressive Movement.<sup>13</sup>*

*Likewise in the 1920s, when the country was “Keeping Cool with Coolidge,” states were the source of progressive initiatives like unemployment insurance, public assistance, and workman’s compensation. James T. Patterson said the states “preceded the federal government in regulating large corporations, establishing minimum labor standards, and stimulating economic development.”<sup>14</sup> He added that “the most remarkable development in state government in the 1920s was the increase in spending.”<sup>15</sup> State initiatives planted the seeds of Franklin D. Roosevelt’s New Deal.*

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<sup>11</sup> Richard P. Nathan, “There Will Always Be a New Federalism.” Available on the Rockefeller Institute website, [www.rockinst.org.](http://www.rockinst.org/), and on the *Journal of Public Administration Research and Theory* website, <http://jpart.oxfordjournals.org/>, pp. 7-8.

<sup>7</sup>Allan Nevins and Henry Steele Commager, *A Pocket History of the United States* (New York: Washington Square Press, 1981), p. 346 ff.

<sup>13</sup> Richard P. Nathan, “Federalism: The Great ‘Composition’” in A. King, ed., *The New American Political System* (Washington: The AEI Press, 1990), pp. 241-242.

<sup>14</sup> James T. Patterson, *The New Deal and the States: Federalism in Transition* (Princeton: Princeton University Press, 1969), p. 4.

<sup>15</sup> *Ibid.*, p. 7.

*In the 1980s, when the pendulum of social policy nationally swung toward conservatism, there was a similar spurt in state activism in response to President Reagan's domestic policies to cut domestic spending. States reshaped programs to reflect their priorities, increased the funding of programs in areas in which the federal government had become less active, and assumed more control over the activities of local governments and nonprofit organizations. In these ways and others, states expanded their influence vis-à-vis the federal government and in their relationships with local governments and nonprofit organizations.<sup>16</sup>*

## **The “New New Federalism”**

The observations here about cycles in American federalism are strengthened by tying them to recent writings from both the political left and right that are consistent with this pro-growth theory about the ratcheting-up effect of federalism. This is not to argue about whether this is good or bad, simply to suggest that this interpretation reflects the point that over time the balancing function of American federalism has become more powerful than its checking function. Textbooks that continue to give emphasis to the latter interpretation may be misleading. In the current federalism cycle, it is liberals who are on the march at the state level. Following is their “New New Federalism,” again quoting from an earlier paper.

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<sup>16</sup> Richard P. Nathan and Fred C. Doolittle, “The Untold Story of Reagan’s New Federalism,” *The Public Interest*, no. 77 (1984), pp. 96-106. See also Richard P. Nathan, Fred C. Doolittle, et al., *Reagan and the States* (Princeton: Princeton University Press, 1987).

### **Rediscovery by Liberals**<sup>17</sup>

*The paradox is that federalism is being rediscovered by liberals. Rep. Barney Frank (D. Mass) recently was compared to states' righter and former U.S. Senator Strom Thurmond when Frank argued that the states (with Massachusetts out front) should be the arbiters of gay marriage.<sup>18</sup> Barney Frank is not alone. Other liberals see the states, particularly states with liberal leaders, as the appropriate governments to deal with many program issues.*

- **Protecting Medicaid** — *The federal government has tried several strategies to slow the growth of the Medicaid program, which aids the elderly, the disabled, and poor families. But since the program has a broad constituency of recipient groups (not just the poor) and multiple provider interests, states have fought hard (and so far pretty much successfully) to shield Medicaid from Washington's retrenchment efforts.*
- **Cleaning Up the Environment** — *This is a policy area in which many states are ahead of the curve compared to the federal government, as shown by the nine-state Northeastern accord to freeze power plant emissions and similar regional efforts underway in California, Washington, and Oregon.<sup>19</sup>*
- **Equalizing School Aid** — *Hard-charging activists in many states are pulling every lever — courts, the executive, and legislative — to distribute school aid in ways that give more aid to poor core-city and rural communities and provide more aid overall.*
- **Providing Public Infrastructure** — *Although the federal highway act is a big factor in the transportation field, activists at the state level generally see states as their best avenue for rehabilitating, maintaining, and constructing new roads, schools, parks, and other public facilities. Some of this is old-fashioned pork barreling, but that doesn't diminish its importance in providing facilities for services advocated by supporters of public education, libraries, economic development, the arts, recreation, parks, etc.*

<sup>17</sup> Richard P. Nathan, "There Will Always Be a New Federalism," pp. 1-3.

<sup>18</sup> Franklin Foer, "The Joy of Federalism," *The New York Times Book Review*, March 6, 2005. This article contains a useful scan of liberal views on state activism.

<sup>19</sup> Anthony DePalma, "9 States in Plan to Cut Emissions by Power Plants," *The New York Times*, August 24, 2005.

*The same point applies for regulatory issues:*

- **The Minimum Wage** — *This is a good example of an area where some states are out front nationally. According to a USA Today survey, 17 states covering 45 percent of the national population have set minimum wages above the federal rate of \$5.15 an hour.*
- **Stem Cell Research** — *Following California's lead with its \$3 billion bond issue to support stem cell research, other states have joined the parade, notably Illinois, Connecticut, and New Jersey.*
- **Sex Education** — *This, too, is not a good area for liberals to pursue nationally, the expectation being that any action would cater to the rigidity and the intense concerns of religious fundamentalists.*
- **End-of-Life Decisions** — *One could argue that the 2005 debates on the Terri Schiavo case in Florida was an example of states favoring more liberal positions than those of President George W. Bush and Florida Governor Jeb Bush.*
- **Teaching about Evolution** — *While not a likely area for federal policy making, still it is another example of a sensitive subject that from a liberal point of view is best left to the states.*

*This is a sampling of issues that spurs liberals to look to the states at a time when the conservative cost-cutting mood in Washington is not propitious for them. Every day, in similar ways, issues move around in American federalism. There is the case, for example, of a bill to combat the use of methamphetamine in cold medicines. The Congressional sponsors of a national law sided with states, in this case Oregon, that “wanted to be tougher than the federal law.”<sup>20</sup> In a more recent Oregon case before the U.S. Supreme Court, the question at issue is whether the U.S. Attorney General (John Ashcroft in 2001) could abrogate a state law permitting the administration of drugs to assist suicides. The Wall Street Journal sided with the state, referring specifically to the way in which liberals are discovering federalism in an editorial aptly entitled, “The New New Federalism.”<sup>21</sup>*

<sup>20</sup> Jim Barnett, “Federal Meth” *The Oregonian*, July 29, 2005.

<sup>21</sup> “The New New Federalism” *The Wall Street Journal*, October 5, 2005. See also Linda Greenhouse, “Justices Explore U.S. Authority Over States on Assisted Suicide” *The New York Times*, October 6, 2005.

*There has been similar back-and-forth debate involving the Supreme Court and the states about prescribing marijuana for patients suffering from cancer and other serious illnesses. Other federalism issues arise in the field of bioethics and genetic engineering<sup>22</sup> and on matters involving federal efforts to water down and weaken state constitutional restrictions against using state funds to support religion.<sup>23</sup>*

*While it is not decidedly a liberal versus conservative issue, the way state governments are digging in their heels to oppose federal rules and ratings under the No Child Left Behind national education reform law of 2002 is further evidence of state governments being outspoken about their prerogatives at a time when the national administration, uncharacteristically for Republicans, is relatively uninterested in federalism principles.*

## **Conservatives Have a Point.**

As noted, recent upbeat comments by liberals on the benefits of the federal form (which some would say is not so much a discovery as a rediscovery) have their counterpart in the writings of scholars on the right. In a paper presented at the American Enterprise Institute, Michael Greve advanced a strident theory of American federalism as “inverted” in the way it produced governmental growth and the accretion of governmental powers and responsibilities.

**In short, we have not one but two federalism problems. The first, well-known problem is federal overreach and meddling in local affairs that “can never be desirable cares of general jurisdiction.” The second, poorly understood but increasingly virulent federalism problem is state interference with sister-states’ in national affairs. My shorthand for the concurrent emergence of those problems is “constitutional inversion.”<sup>24</sup>**

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<sup>22</sup> Glenn McGee, *Beyond Genetics: Putting the Power of DNA to Work in Your Life* (New York: HarperCollins Publishers, 2003).

<sup>23</sup> Anne Farris, Richard P. Nathan, and David J. Wright, *The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative* (Albany: Rockefeller Institute Press, 2004).

<sup>24</sup> Michael S. Greve, “Madison With a Minus Sign,” pp. 1-2.

Greve lambastes the rise of “intergovernmental cartels” consisting of public agencies and unions, interest groups, and the providers of public service that in his view have powered this inversion. He goes so far as to say that “we might be better off with a wholly national government,” believing that it would have produced a less expansive public sector.<sup>25</sup> In a similar vein, conservative writer, Steven Malanga of the Manhattan Institute views the problem today in American government as the role of “coalitions of tax eaters” (unions, service providers, and their functional area advocates) — powerful forces in the march of big government.<sup>26</sup>

...within this coalition, one group stands out as increasingly powerful and not quite in step with the old politics on the Left: those who benefit from an expanding government, including public-sector employees, workers at organizations that survive off government money, and those who receive government benefits. In cities, especially this group has seized power from the taxpayers, as the vast expansion of the public sector that has taken place since the beginning of the War on Poverty has finally reached a tipping point.<sup>27</sup>

Ideas like these are not new. In the political science literature, the concept of “iron triangles” has had salience for a long time, referring to coalitions of legislators, interest groups and public agencies that advance their governmental interests. President Eisenhower in his farewell speech spoke about the dangers of the “military industrial complex”<sup>28</sup> in a way that resembles Greve’s intergovernmental cartels, Malanga’s coalitions of tax eaters, and the political science concept of iron triangles. They could be characterized, using Eisenhower’s

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<sup>25</sup> *ibid.*, p. 3.

<sup>26</sup> Steven Malanga, “The Real Engine of Blue America,” *City Journal*, Winter 2005, <http://www.freerepublic.com/focus/f-news/1319836/posts> , Accessed on May 5, 2005.

<sup>27</sup> *Ibid.*, p. 1.

<sup>28</sup> Dwight D. Eisenhower, Farwell Speech, January 17, 1961.

phrase, as a “domestic industrial complex” that has acquired steadily increasing power in fields such as health care, education, transportation, and the environment. One reaction to this interpretation recently referred to the yeasty pluralism of American federalism insightfully as “a constitutional framework for rational venue shoppers.”<sup>29</sup>

I need to qualify points made here. It is an oversimplification to depict functional-area power centers (whatever you call them) as operating at the state or national levels and either pulling for more governmental action from the center or pushing for it from the states. They are intergovernmental. They operate in the marble cake at both the federal and state levels and in many large local governments as well. They blend national, state, and local governmental and nongovernmental actors and actions. Their strongest influence, whether it is exercised in Washington or at the state and local levels, depends on the politics of the times. In conservative periods, liberal activists are likely to view the center as their best bet for getting things done. It is not federalism they care about; it is power and advancing it. It is easier to advance one’s purposes from the center rather than from fifty or more places as venues for political action, but it is not always possible to do so.

One result is that over the past four decades social programs have grown appreciably. Each has its own constituency to advance and protect. The resulting multiplicity produces untidiness, fragmentation, and inefficiencies, but the overall and cumulative effect is that for many areas of governmental activity domestically (e.g., health, housing, child care, education, aid for the aged and disabled, drug and

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<sup>29</sup> Donald W. Moran, e-mail message, November 28, 2005.

AIDs treatment and other social services) the American social safety net is much more extensive than is customarily assumed.<sup>30</sup> It is a common mistake to focus on what is going on in Washington in the pulling and hauling of interest actors in the national political process and to fail to appreciate the growing size and scope of institutional structures — state, local, nonprofit, and private— that, when viewed in the aggregate, result in the country as a whole having manifold tools and techniques for meeting a variety of social needs. Observers from other countries, and indeed also from a Washington-centered perspective, often fail to see this reality.<sup>31</sup>

Conservative initiatives by states can impede governmental action as in states in which anti-abortion forces are powerful or where there is a strong resistance to immigration, advancing affirmative action or aiding the poor. Over time, however, this has not been the predominant effect of the cyclical dynamic of American federalism. To reiterate, the opportunistic character of American federalism, particularly since the mid-twentieth century, has abetted governmental growth through the oscillation effect of national and state action. Federalism is not the whole story, but it does have this ratcheting-up effect, which absent the vertical federalism arrangement for the division of powers in the U.S. Constitution would have produced different politics and different policy results.

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<sup>30</sup>This institutional and political complexity is a major reason why social programs are so hard to coordinate, manage, and understand.

<sup>31</sup>See the way this point is developed in James Gailbraith, “What is the American Model Really About? Soft Budgets and the Keynesian Devolution,” *Public Policy Brief*, The Levy Economics Institute of Bard College, No.72, 2003.

## **Executive Federalism**

**Martha Derthick and colleagues at the Rockefeller Institute have added an administrative dimension to this analysis. Thomas L. Gais and James W. Fossett describe what they call “executive federalism” whereby officials in the executive branches of the national government and the states have greater power by virtue of increases in the use of administrative tools and techniques like waivers, performance management systems, and social experiments, such that well placed officials can by their actions enhance the roles and responsibilities of government in domestic public affairs.** <sup>32</sup>

**The growing autonomy of federal executive powers and actions alters the dynamics of federalism. Major nationwide changes in policies no longer depend on electoral shifts in the control of the Congress, including increases or decreases in policy agreement and partisan ties between Congress and the president. Instead control over the presidency and a few governorships can be a sufficient base to launch important policy innovations.** <sup>33</sup>

**Samuel H. Beer has identified this same influence, calling the result “technocratic federalism.”** <sup>34</sup>

**The general term which suggests the decision-making power based on technical expertise of the new professionals is “technocratic.” By using it I do not mean to raise fears of dictatorship of men in white coats. On the contrary, one of the more interesting features of this new influence is the way in which it has promoted the rise of a countervailing power in**

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<sup>32</sup> Thomas L. Gais and James W. Fossett, “Federalism and the Executive Branch,” in *The Executive Branch*, Joel D. Aberbach and Mark A. Peterson, eds. (Oxford University Press: Institutions of American Democracy Series, 2005), pp. 486-522. Martha Derthick, “Inside the Devolution Revolution: The Doctrine and Practice of Grant in Aid, (Unpublished manuscript, University of Virginia, February 2005).

<sup>33</sup> Thomas L. Gais and James W. Fossett, “Federalism and the Executive Branch,” p. 515.

<sup>34</sup> Samuel H. Beer, “Federalism, Nationalism, and Democracy in America.” *American Political Science Review*, Vol. 72, No. 1 (March, 1978), p. 9-21.

**the form of the intergovernmental lobby. By the intergovernmental lobby I mean the governors, mayors, county supervisors and other officeholders, usually elective, who exercise general responsibilities in state and local governments.<sup>35</sup>**

## **The New Politics of Federalism**

**In the partisan arena, this ratcheting-up theory can be seen as reversing the conventional view that conservatives should favor the federal form and liberals should favor national action. This is not to deny that when expansionist views prevail in the society, liberals can feast at the federal table or dig in their heels to pre-empt recalcitrant state actions and activities. But on the whole and over time, it is reasonable for liberals to champion federalism and conservatives to regard it as a Leviathan force (this term is used by Michael Greve) that advances governmental growth. This conclusion had less force for liberals in the pre-civil rights era. Civil rights protections have taken the sting out of the argument that given their druthers southern states would use the states' rights mantle to perpetuate racial discrimination.<sup>36</sup>**

## **The Expanded Partnership**

**This brings us to an important subject mentioned earlier. Increasingly, the enhanced role of the federal government in domestic affairs through fiscal subventions and regulatory pre-emption has involved, not just the federal-state relationship, but also fiscal and regulatory relationships between the national**

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<sup>35</sup> Ibid., p. 18.

<sup>36</sup> Martha Derthick, "American Federalism: Madison's Middle Ground in the 1980s."

government and local governments. These relationships, which Roscoe Martin writing in the mid-1950s called “the expanded partnership,” fits the marble cake metaphor.<sup>37</sup> Besides states interests as “venue shoppers” (the phrase was cited above), local reformers have an array of potential allies to advance social and liberal purposes.

The closer one gets to the ground in American government the more functions of government also blossom with opportunities for discretionary action by a legion of relatively new actors, nonprofit organizations. The “nonprofitization” movement involves not so much privatization as the growing role of these nonprofit organizations (NPOs). It has empowered thousands, indeed tens of thousands, of nonprofit organizations, especially since the Great Society years, that provide a wide array of public services and are players in the great game of government.<sup>38</sup> Michael Lipsky captured this dynamism in describing the world and work of “street-level bureaucrats” (teachers, police officers, and social workers) in a book by that name.<sup>39</sup> Not every nonprofit organization is interested in ratcheting up governmental power, but the fact remains that many are. Laws and rules promulgated by overlying governments (both federal and state) cannot fully ascertain — much less control — all of this whirling activity.

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<sup>37</sup> Roscoe C. Martin, *The Cities and the Federal System* (New York: Atherton Press, 1955), p. 171.

<sup>38</sup> Richard P. Nathan, Elizabeth I. Davis, Mark J. McGrath, William C. O’Heaney, “The Nonprofitization Movement as a Form of Devolution,” in *The Nonprofit World in the Age of Devolution*, Dwight F. Burlingame et al, eds. (Indiana University Center of Philanthropy, 1996).

<sup>39</sup> Michael Lipsky, *Street Level Bureaucracy: Dilemmas of the Individual in Public Service* (New York: Russell Sage Foundation, 1980). See also Irene Lurie, *At the Front Lines of the Welfare System: A Perspective on the Decline in Welfare Caseloads* (Albany: Rockefeller Institute Press, 2006).

## **Woodrow Wilson was Right.**

American governmental processes are always changing. They are untidy, hard to control. We wrestle all the time with issues about how to orchestrate and operate our federal form. This is reflected contemporaneously in debates about the implementation of the No Child Left Behind law enacted in 2002, health care reform, and how the nation should respond to mega-disasters of terrorism, hurricanes, and global warming. Woodrow Wilson was right. “The federal-state relationship is the cardinal question of our constitutional system. It cannot be settled by the opinion of any one generation, because it is a question of growth, and every new successive state of our political and economic development gives it a new aspect, makes it a new question.”<sup>40</sup>

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<sup>40</sup> Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1961), p. 173.