The Promises and Pathologies of Presidential Federalism

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Abstract

State and local politics have dominated the first year of Donald Trump's presidency. Despite promises to reinvigorate states' rights both before and after his campaign, Trump has used the administrative powers of the modern presidency to pursue his policy agenda at the subnational level. From waiving certain provisions of federal programs, to filing lawsuits against states and localities, Trump has taken advantage of the opportunities crafted by his predecessors to use subnational politics for the presidency's own ends. We place these nascent developments in historical and theoretical context to suggest that "presidential-federalism" at once signifies the continued strength and relevance of subnational governance, while providing occasions for further administrative aggrandizement. Trump, despite remaining highly unconventional in a number of ways, might further reinforce the presidency's centrality to modern American federalism.

"We're also going to do whatever we can to restore the authority of the states when that is the appropriate thing to do. We're going to give you back a lot of the powers that have been taken away from states and great people and great governors. And you can control it better than the federal government because you're right on top of it. You have something that's controllable. So I think that's going to be very important. You see that already taking effect."

Donald J. Trump
Remarks in Meeting with the National Governors Association
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American federalism is now of the genus "presidential." The proliferation of federal waivers for statutory requirements, the ever-increasing ingenuity of federal regulators and their guidance documents, and the vast expansion of competitive grant initiatives are hallmarks of the federal system. And among the many issues of contemporary governance that President Trump has promised that he "alone…can fix," responsibility for recovering any semblance of federal-state-local balance falls squarely on his Resolute Desk.

In this way, President Trump has appeared remarkably conventional. By promising to take the lead on restoring some sense of balance between the federal and state governments, Trump pledged to do something his presidential predecessors also vowed to fix. Indeed, every Republican president since Dwight D. Eisenhower has admitted a responsibility to set the order right, to "recognize occasionally the very great responsibility, authority, and power that should reside in our States" (Eisenhower 1955). For many of the president's supporters, this commitment to a constitutional principle softened his more populist and unorthodox promises. After eight years of Obama-era rule and a trial-run in the big-government compassion of President George W. Bush, those principled defenders of American federalism foresaw a new age in federal-state-local relations (Conlan and Posner 2011). At the very least, some of president's detractors suggested, with Trump in the White

House, liberals might learn to embrace constitutional boundaries and local autonomy (Goldberg 2016).

There are many aspects to Trump's presidency that are unique developments in American politics. However, the administrative onslaught that so far characterizes his tenure marks the continuation of a far-reaching development in American politics: the power available to chief executives to pursue their programmatic and partisan goals by negotiating with, and sometimes commanding, subnational governing authorities. The institutional pathologies and tensions implicated in presidential federalism were on full display during Trump's first year in office: the political contestation ensured by constitutionalizing multiple, separate governments remains, but it is fueled by a form of administrative governance that champions executive management and presidential dominance of that political process. Modern federalism may or may not be entirely different from what the framers of the U.S. Constitution foresaw. However, new governing expectations, altered constitutional doctrine, and institutional restructuring have created unique challenges and opportunities for actors at all levels of the current federal system.

By placing these modern governing tendencies in a broader theoretical and historical context, we therefore seek to highlight three problematic features of federalism's current instantiation: mutability in public law, fiscal instability in intergovernmental finance, and the political vortex of plebiscitary presidentialism. We also recognize, however, that each of these tendencies suggest something promising about the status of contemporary federalism: mutability in the law is often tempered by a judiciary motivated to preserve state-federal balance; modern budgetary politics signifies the massive influence of subnational actors in lobbying for desired policy outcomes; and presidential overreach has invigorated a new set of state and local leaders determined to resist presidential overreach. Federalism at once reflects something old while appearing unfamiliar and new.

The Constitutional Logics of Presidential-Federalism

Presidential federalism is born of two constitutional faiths. On the one hand, there is the belief that the authority of governmental levels should be determined and articulated through the processes and structures established by the Constitution. Layered on top of this system of horizontally and vertically separate institutions is a new recognition, refined through legislation and presidential unilateralism, of what non-centralized government can and should accomplish (Tulis 1987). Importantly, these new expectations grew out of the Constitution's initial under-specification of what that federal structure entailed.

System One: Federalism as Political Contestation

Under the Constitution, the division of authority between the states and the national government was left incomplete. While academics and jurists alike often speak of recovering or maintaining a "balance" of governing authority between states and nation, the constitutional text itself eschews any comprehensive or exhaustive allocation of authority. The Constitution enumerates the powers of the national government, specifies limits to those powers, recognizes the continued operation of state governments, and situates both levels of government in a regime of national supremacy. Alongside those empowering clauses, the text identifies several restrictions placed on both the states and the new national government. The 1789 Constitution further incorporated state governments into the operation of the national government through the process of apportionment, regulating elections, selecting the president, appointing senators, and passing amendments. The Constitution thus crafted a set of electoral avenues and legal-political procedures through which citizens themselves could use politics to define the federal-state (and perhaps local) balance of governing authority. While the specific federal-

state relationship was left to future political debate, the institutional configuration that allowed citizens to negotiate and revise that relationship was constitutionally inscribed (Ewing 2016, Whittington 1996).

Coupled with independent executive and judicial powers, the new national government monopolized the powers of national sovereignty: common defense, diplomatic relations, commercial regulation, and superintendence of interstate conflict. At the same time, states, maintained "most of the policy tools for governing everyday American life," from police protections, to local schooling, and the regulation of commerce (Robertson 2012, 32). Nevertheless, on the question of what was a national object and what was in the purview of the states, the Constitution clarified the process of adjudicating this inherently political question. At the center of this political process was Congress (Carey 1968). As the representative body designed to give legislative expression to the democratic will of its various constituencies, Congress is charged with defining the scope and application of national power, subject to constitutional limitations. This dimension of the federal system reflects the belief, frequently associated with Madison's thinking, that representation could "refine and enlarge the public views." A properly structured legislature could identify the issues on which national action was warranted because those issues would draw sufficient support from the people's representatives. Far from being pre-politically determined, then, the state-federal relationship is an emergent phenomenon, the result of constitutionally structured politics (Bednar 2011).

Taking the long view in 1789, what might Madison have envisioned for the development of this new "compound republic"? The first indicator, no doubt, would be conflict. As long as independent centers of authority exist, so will disagreement among those centers. The chief objection cited by the Constitution's critics during the ratification debates was that such disagreements would result in the abuse and over-extension of

national power, at the expense of traditional state prerogatives (Storing 1981). This worry was abetted, in part, by the underdeterminacy of the state-federal relationship: with no constitutionally specified federal-state relationship, disagreements over the authority of and relationship between levels of government were inevitable. This fact was not lost on the Constitution's drafters. The defeat at the constitutional convention of a national veto over state laws was quickly followed by the construction of the federal judiciary, charged with ensuring the supremacy of national law (LaCroix 2010, 158-166). Even in the ratification debate, despite Anti-Federalist fears of judicial power, Madison spoke to the role the federal courts would play in the new compound republic. For example, while arguing in *Federalist* 39 that the Constitution "is in strictness neither a national nor a federal constitution," he conceded that, "It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government" (256-257). For the same reason that Congress would give voice to the will of the whole polity, so too the Supreme Court would resolve disputes over the relative authority of the Union and its component parts. Courts were, therefore, a central part of the Madisonian system. Nonetheless, while the courts were to play an essential role in resolving questions over the "proper line of partition" in the federal system, the structure of that system precluded the complete eradication of conflict. Indeed, the absence of conflict in the federal system would seem to suggest something very anti-Madisonian about what the constituent parts of the compound republic were, in fact, doing.

While conflict is endemic to the constitutional logic of federalism, so too is a degree of generality in what the national government accomplishes. The administrative tools and policy objectives of the national government remaining intentionally vague, congressional determination of new governing authority would necessarily require, at minimum, majority support. Moreover, by constitutionally guaranteeing representation for spatially-defined

communities in the U.S. Senate, any expansion of national power would have to account for political differences across the country's geography. Importantly, not only are specific geographies represented, but they are symmetrically powerful. Equality in state representation therefore makes it more probable than not that any nationalizing move of general applicability would treat those entities as equal.

Finally, Madison clearly recognized that the parchment demarcation of limited government worked in tandem with other limits, which no framer could prudently craft. The balance between state and nation was to be in flux, the better to serve the fundamental purposes of government. But national power would inevitably wane as it approached both a technological limit and less easily definable cultural ceiling. Though rapid advances in transportation and public administration make the technological limits less burdensome, the cultural limit Madison envisioned seems more enduring. Writing in *Federalist* 46, Madison explicitly acknowledges the extra-constitutional side-constraint on the negotiated politics of American federalism. "If…," Madison speculates, " the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration." However, he continues, "even in that case the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered" (292-293).

Madison's "nature of things" argument at once identifies an enduring rationale for localized governance while acknowledging that people are both able and likely to transfer their confidence between levels of government. Or, as Francis Greene (1994) writes, "there would always be a reservoir of popular attachment to the state governments, establishing a limit, thereby, to how far federal power could ever be extended" (60). An variable constraint on an underdetermined political process might suggest deception or ulterior motive on

Madison's part**,** but the argument for federalism's constitutional development takes on greater significance when seen alongside federalism's inherently *political* nature. Federalism, as a political process, not only drew from preexisting cultural differences and political attachments, it also made visible and elevated that "nature of things." Most important, it nourished the temperament and passion of democratic self-governance, a sentiment at once natural and precious but easily drowned by the expansion of national power (Beer 1978; Diamond 1972).

System Two: Federalism as Administrative Management

Formal constitutional change has come hand-in-hand with technological and economic developments that have diminished the distinctiveness of territorially-defined, culturally distinct communities. Yet, Madison's federalism can accommodate those developments. The federalism of the 1789 Constitution rested on a robust faith in politics to assign political authority in a manner responsive to democratic will and governing capacity. It clashes, however, with an administrative, or hierarchical theory of the constitution – a doctrine which presupposes something fundamentally different about the goal of federated government. At the center of this challenge was a new conception of the modern presidency. And, undergirding this new ideal was an revolutionary interpretation of what "administration" entailed and how power "evolved" inside the constitutional system.

First, the theory of the modern presidency emphasized a new sphere of government activity that Madison and his fellow framers had supposedly ignored: the idea of "public administration." Of course, the authors of The Federalist recognized administration as a central feature of constitutional politics. But Progressive-era thinkers, led by Woodrow Wilson, challenged their view by declaring administration as something that was inherently apolitical. "The field of administration is a field of business," Wilson (1887)

argued, "It is removed from the hurry and strife of politics… Although politics sets the task of administration, it should not be suffered to manipulate its offices" (209-210). Progressives drew a "sharp line of distinction" between the fields of politics and administration, the second of which required the meticulous and methodical implementation of public law. Determination of that law was political; its execution scientific. Indeed, Wilson suggested that the practice of good administration was entirely unrelated to the constitutional form of the political regime – there exists just "one rule of good administration for all governments alike" (218). Or as Vincent Ostrom describes it, under the Wilsonian paradigm, "duplication of services and overlapping jurisdictions are presumed, on prima facie grounds, to be wasteful and inefficient. The proliferation of agencies and the fragmentation of authority are presumed to provoke conflict and create disorder and deadlock" (1973, 29).

Wilson's scientific study of administration can be too easily caricatured as a naïve faith in the wisdom and benevolence of expert-driven rule. However, his goal was not so much to supplant the people's voice with that of bureaucrats, but to give that voice unity and therefore power in directing an organized, efficiently run administrative apparatus. For Progressives, the modern presidency was to be imbued with ambition to break through old legal formulations and transcend state borders to become a leader of a newly-constructed nation. Holding firm to the idea that government naturally evolved to project its "straightforward and unquestionable power," Wilson eventually saw the presidency as the institution most ripe to politically power over the new army of scientific administrators (1908, 199). Stressing the national character of the presidency, Wilson suggested that the president alone uniquely captured and commanded the full force of American politics because of the institution's "extraordinary isolation" from the demands of party politics and Congressional deliberation. Especially with the rise of the United States as an industrial

and world power, he argued, the president should strive to "be as big a man as he can," for in *modern* America: "there is but one national voice in the country and that is the voice of the President." As soon as the president was to assume office, the president must realize that, "the nation as a whole has chosen him…[and] If he rightly interpret the national thought and boldly insist upon it, he is irresistible" (Ibid., 68)

The fusion of these two modernized conceptions of power – administration and presidentialism – politicized the apolitical science of administration and rationalized an institution constitutionally induced into conflict. At the beginning of the 20th century, this was a decidedly progressive notion of presidential power. But the consolidation of executive power during Franklin Roosevelt's presidency weakened the partisan conflict over national administrative power (Milkis 1993). Roosevelt's extension of the Wilsonian critique was more than just rhetorical. FDR's second term, particularly the creation of the Brownlow Committee and the enactment of the 1939 Reorganization Act, marked the point that "the progressive presidency's asymmetry between large responsibilities and few resources was ending and the modern presidency was beginning" (Arnold 2009, 207). Macroeconomic theory and liberal internationalism required that politics become a search for pragmatic solutions to the challenging responsibilities that America had to assume at home and abroad. From the end of the Second World War to the late 1960s, Americans held to a widely shared faith in Progressive ideals: public trust in government, belief in the standard of expert-driven "neutral competence," and consensus about the direction of domestic and foreign policy. Liberal reforms, which dominated this period, comported easily with the Wilsonian concept of presidential power. And yet, Richard Nixon and Ronald Reagan, in capturing an administratively empowered White House, proved that the president's "extraordinary isolation" allowed him to move policy in a conservative direction (Nathan 1983). Rampant polarization within the Congress has made both parties even more

dependent on presidential leadership and unilateral action (Milkis and Jacobs 2017). In the final analysis, the power of the modern presidency has captured both parties' ambitions and has bestowed bipartisan legitimacy on the Wilsonian doctrine of presidential management.

The implications of this new constitutional theory and accompanying institutional developments are threefold. First, the administrative presidency emerged alongside new rhetorical and partisan expectations. Indeed, the legitimacy of new administrative tools and executive-structures depended, in part, on the fact that few issues or problems laid outside the president's ever-expanding purview. As Americans routinely witness, presidents define what federalism means to them as a constitutional principle on the campaign trail and while in office. Federalism has become the stuff of electioneering slogans, and legislative branding. For Lyndon Johnson it was "creative," for Nixon "new," and for Clinton, the Democratic Party coalesced around their president who declared that the time had come for a "a reinvigorated federal-state-local partnership" (Galston and Tibbetts 1994, 23)

Second, having defined federalism as an executive prerogative, presidents are free to pursue administrative correctives to the federal-state-local relationship through the enhanced capacity of the Executive Branch. The president has a plan and states and localities are not off limits. Efficiency is the *modus operandi* of effective administration and the White House can legitimately rely on state actors to develop and implement policy. Moreover, the president can use the administrative latitude built into law to bring recalcitrant jurisdictions in line with presidential objectives, in many cases despite statutory change. Waivers, grant-incentives, the threat of litigation, and agency guidance create new policy and new politics.

Finally, the institutionalization of the federal-state-local relationship through rhetorical and administrative developments created new expectations of the states and localities themselves. Sub-national political actors became resources for presidential

politicking, in turn creating opportunities for savvy politicians and bureaucrats at all levels to advance their policy interests. Indeed, for many early 20th Century Progressives executive power in the states and cities held greater prospects for reform than at the national level. Over time, Governors might take the place of a skeptical Congress if "efficient" administration required more financial resources. Mayors and their national lobbying associations might prove favorable to bypassing state agencies in the name of enhanced cooperation or coordination, even if a few strings were attached to federal grants-in-aid.

Tensions between System One and System Two: Presidential Federalism

The modern presidency has become an institution not confined to Pennsylvania Avenue, but one that actively seeks to restructure the incentives and capacities of governors, state bureaucracies, and municipalities in order to placate demands for policy outcomes. The Madisonian conception of American federalism may provide for an enduring institutional arrangement that structures decentralized policymaking in the modern era. Nevertheless, Madison's system induces conflict between national and sub-national actors, in part by defining their supporting constituencies in terms of varying geography. The president – the only elected official with a national constituency – does not share this incentive. Indeed, the presidential impulse for "partnership," "coordination," and "cooperation," is at direct odds with federalism's conflictual nature. The Madisonian system also suggests that when national outcomes do emerge, a certain degree of generality will exist to account for meaningful differences in state political economy and culture. The modern presidency thrives on that generality and seeks to push legislative delegation further. When such acquiescence is not forthcoming, presidents have developed new administrative tools to take advantage of statutory ambiguities. Finally, the Madisonian

system assumes that there is something "in the nature of things" that perennially limits federal aggrandizement. The enhanced administrative capacity of the modern executive – a ballooning White House Staff, a judiciary largely deferential to agency determinations, and a gridlocked Congress – can overcome the limitations that, in 1789, seemed natural. And, the nationalized and media-driven "movement" politics of the modern presidency threatens federalism's ultimate political safeguard: that the people would find their geographically-distinct political communities meaningful and worth preserving.

Madison gives further insight into the tension between the first and second systems in one of his Party Press Essays, which were published anonymously in the *National Gazette* in 1791-92. Writing on the topic of "consolidation" Madison returned to the theme that dominated the ratification debates: the threat that the states would be combined into a single government. First, Madison suggests that the consolidation of states into one government would almost inevitably extend the executive's power. Absent the divided responsibility of local or regional authority in the many state legislatures, Madison argues that there would be no conceivable way that a single deliberative body would be able to handle the legislative workload. The second line of argument in Madison's argument also concerns federalism's relation to executive power. "In such a state of things," he speculates, "the impossibility of acting together, might be succeeded by the inefficacy of partial expressions of the public mind, and this at length, by a universal silence and insensibility, leaving the whole government to that *self directed courses*, which, it must be owned, is the natural propensity of every government." The growth of executive power presents an accountability problem as well as a serious threat to the prospects of self-government. Here Madison suggests that consolidation fundamentally challenges the idea that a people could be adequately represented in the lawmaking process. Lacking political efficacy, citizens will in time be rendered politically silent and despondent, ultimately leaving government to a

"self-directed" as opposed to popularly controlled course. In this defense of federalism Madison highlights the promise of self-government, stressing executive power's insensitivity to that promise but also its realization under a form of decentralized governance. In the end, governmental consolidation threatens to sever the connection between citizen and government at the foundation of constitutional self-governance.

Of course, the states are not consolidated and Madison's conjured image of monarchical rule has not materialized. The states exist and the institutional structure that would at once limit executive power and create overlapping administrative units survives. But it survives alongside a doctrinal theory of administrative management that creates bold new governing expectations at odds with the constitutional system's original governing ends. In this situation of layered constitutional logics, law becomes more mutable as presidents seek to rationalize a constitutionally conflictual system to make good on partisan ends. Yet often times those ends are defined by state and local actors themselves. For example, about half of all state governors have a lobbying office in Washington, and mayors, since at least the 1920s, have relied upon professional organizations to ensure that their demands are heard (Jensen 2016). In addition to lobbying for new law, state and local executives exert tremendous pressure on federal officials during the implantation of law. Due to their reliance on subnational administrative capacity, the presidency cannot simply steamroll recalcitrant localities into compliance. As such, administrative discretion often provides opportune moments for subnational officials to bargain for a more federalism-friendly outcome (Nugent 2009). The courts, too, retain much of their constitutional role in referring intergovernmental disputes. In fact, as the political processes that guarantee states a place in the system become more administrative and submerged, judicial decisions may have become more important in determining just what lines of authority exist.

Nevertheless, while states remain important political actors, their dependence on national fiscal and institutional resources sets a limit on how much they can negotiate, which diminishes the dissenting role they play in constructing national majorities. States and the federal government can cooperate in mutually self-serving arrangements, but there is little inducement to take into account the whole governing picture. Moreover, with the rise of a more executive-centered party, administrative bargaining is highly sectionalized. Through the presidency, states can secure more favorable outcomes and thus safeguard their constitutional status, but those outcomes are not always "state interests" so much as Republican or Democratic interests. In the judiciary, executives, including ambitious attorneys generals, have found the courts an effective place to pursue their partisan objectives, often with little regard to how decisions might matter for federalism under different distributions of partisan power. State political culture has become wrapped up in broader national debates, exposing the American people to leaders who scorn institutional restraints in defense of the national party objective.

Presidential Federalism in the Era of Trump

Scholars have not let the ascendency of presidential federalism go unnoticed. Case-studies abound describing instances of bureaucratic negotiation and intergovernmental logrolling (Greve 2016; Metzger 2015; Gerken 2010; Gaiss and Fossett 2006) Notably, such scholarly inquiry has offered a "qualified defense" of this emergent mode of governance, recognizing that while it offers an avenue for policymaking in an era defined by partisan polarization, it raises serious concern over the relevance of Congressional deliberation and transparency in government (Bulman-Pozen 2016). Furthermore, these and related developments have underscored the Court's inability to formulate a stable federalism jurisprudence, all while remaining vital institutional actors (Gerken 2014). Palace intrigue

aside, the first full year of Donald Trump's presidency sheds further light on promises and perils of presidential federalism. The tension between the two constitutional understandings described above grows with each passing presidential administration, but the tension we outline also becomes especially clear with the transfer of power between a Democratic and Republican administration. Specifically, we recognize three problematic tendencies that emerge from these layered institutional logics: the growing mutability of federal law; the weakening financial stability of the intergovernmental relationship; and presidential-federalism's contribution to political and sectional polarization.

Mutability in the Law

Presidential-federalism is a principal contributor to mutability of federal law. It is common for most who study America's current political malaise to lament the plague of "gridlock" that prevents effective governing responses to public problems. Yet even a cursory review of the last nine years would show that the political system responded to a flurry of demands for new policy (Melnick 2014). The issue is when those demands keep changing.

President Trump motivated his campaign, in part, on disparaging the "major power grabs of authority" that peppered the Obama administration. Since taking office, however, Trump has not only used that executive authority to overturn Obama's administrative actions, but to redirect them towards longstanding conservative ends. For state and local governing officials, these new administrative directives represent major challenges to their own ability to effectively respond to citizen demands. The recension of several Obama-era guidance directives – Title IX on college campuses, restroom accessibility for transgender students, prohibiting military grade weapons-sales to local police – are all noteworthy

instances of presidential-federalism's inherent mutability. By the stroke of the presidential pen, policy was reversed.

State-level action is responsible, in part, for one of President Trump's most high-profile administrative decisions to date – the repeal of the Deferred Action for Childhood Arrivals (DACA) policy. The move was evidently an attempt to strengthen the president's ties to his conservative base, but it was also a decision more or less forced by the impending lawsuit threaten by ten states' attorneys generals. Once rescinded though, fifteen other states filed lawsuits to prevent repeal. The fate of millions remained precarious until the Supreme Court decided that their status would remain unsettled until the normal appeals process was exhausted. In a striking display of the opportunities and constraints posed by presidential federalism, Trump at once appeared empowered and impaired. States at once remained relevant and dependent on the rulings of the federal courts. The judiciary served its function as an important arbiter of controversies between national and subnational actors, but the likelihood of future policymaking through such presidential overreach has hardly abated.

The administrative changes to Medicaid, in particular, will likely remain one of the most enduring policy changes enacted by the current administration. Failing to make good on his pledge to end Obamacare, Trump relied on the tools of the administrative presidency to fundamentally transform healthcare policy anyways. Almost one year after taking office, the Director for the Centers for Medicare and Medicaid Services (CMS 2018) sent a guidance letter to each state Medicaid director informing them of new demonstration project - section 1115(a) - waivers. With agency permission, the new guidance allows states to restrict Medicaid benefits to state residents who are unemployed, or who do not meet of forms of "community engagement." In re-defining the eligible population of beneficiaries, the guidance letter represents the most significant change to the program since the

legislative expansion of benefits under the Affordable Care Act. This time, however, no new statutory authorization was necessary. And within one day, CMS approved Kentucky's plan to impose work requirements and remove 95,000 state residents from Medicaid roles, saving an estimated $2 billion over the course of five years (Bevin 2016). The fiscal and partisan upshot is that the new waiver allowances might persuade the 17 states who refused to expand Medicaid under the Affordable Care Act to do so if CMS grants them waivers. Republicans in North Carolina, Virginia, Kansas, and Utah indicated shortly after the CMS announcement that they would introduce such legislation (Stein 2018).

To be sure, waivers within the Medicaid program have been essential features of policy innovation and "entrepreneurship" by state governments. Moreover, executive-negotiated changes to Medicaid have been important policy tools in an era of partisan polarization (Thompson 2012). However, it is not clear if waivers-by-design represent a tool of last-resort in the shadow of legislative gridlock, or if the program's rapid growth and ever-increasing complexity demand Congressional acquiescence to the executive. Though one could argue that the rapid sea-change in agency policy and program directives are legitimate responses from an election that ushered in a new partisan administration, in the context of the federal system this democratic argument rests on the assumption that the citizenry is able to comprehend both the decision-making process and the policy consequences that emerge from that process. According to the structural logic of the Constitution, the people are the ultimate judge of changes to the distribution of authority between levels of government. But, as Madison wrote in *Federalist* 62, "It will be of little avail to the people, that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood…or undergo such incessant changes than no man, who knows what the law is today, can guess what it will be tomorrow." Though federalism is by no means a simple form of government,

it is oriented towards making self-governance more realizable. With its vast administrative powers and ubiquitous, yet opaque, presence presidential-federalism poses a considerable challenge to that ideal.

Intergovernmental Finance

Budgetary authority in the United States might ultimately rest with the U.S. Congress, but fiscal accountability is a presidential prerogative – one that implicates the entire federal structure. The generality built into the federal appropriations process presents presidents with multiple and obscure mechanisms to enact policy change. And since approximately 17 percent of all federal outlays, or four percent of GDP, flow through state and local governing institutions via grants-in-aid, these presidential directives remain as consequential as formal legislative revisions (CBO 2013). Thirty federal departments and independent agencies in the executive branch oversee those funds. Moreover, presidential budget proposals necessarily implicate state and local budgets. Although they are not legally binding appropriations, they nevertheless transform plans and expectations of federal, state, and local government actors. For example, just three months on the job OMB Director Mick Mulvaney ordered that agencies must use the President's budget proposal in submitting their budget requests for FY2019. Thus agency heads must plan as if Congress were to follow through on the near $1.4 trillion cuts to the non-defense discretionary budget over ten years (OMB 2017). States and localities, likewise, use OMB circulars to anticipate federal spending and taxing priorities. OMB sets and unilaterally revises the budgetary standards for ensuring efficient coordination of federal-state-local spending targets (OMB 2004).

The "fiscal sustainability" of state and local government is tied to presidential initiative and managerial tools (Ward and Dadayan 2009). In giving states and localities

greater budgetary flexibility, the Trump administration has set its sights on regulatory reform. Pledging to repeal two regulations for each new one passed, the longer term effects will likely emerge from new Regulatory Reform Task Forces, now present in each federal agency (Trump 2017a). Likewise, the administration's "Clean Power Plan" is likely to generate a fiscal boon for states dependent on oil, natural gas, coal, and nuclear energy resources (Trump 2017b). And, the Medicaid work-requirement waivers previously discussed add further uncertainty to the fiscal future, as healthcare costs comprise a growing percentage of all government expenditures. While many of these managerial changes might grant states a budgetary reprieve, their effects are contingent on the current presidential administration. If a hallmark of health budgetary politics is the ability to plan for long-term financial viability, then the politics of presidential federalism provide, at most, a temporary reprieve to the major fiscal challenges states and localities face.

The Trump presidency has also enlivened a formerly esoteric debate over fiscal imbalances between the states. For over 100 years, the federal government allowed individuals to deduct the amount they paid in state and local taxes (SALT) from their overall tax burden. By limiting the deduction for SALT on federal income filings, the Republican tax reform hits hardest those living in states with higher costs of living, tax rates, and property values. The politics of the policy have not gone overlooked. As New York Governor Andrew Cuomo noticed, this means that the SALT deduction matters most for those living in states that traditionally vote Democratic: California, New York, New Jersey, Massachusetts, and Illinois, are the battlegrounds for America's new "economic civil war" (Greve 2017). The political back-and-forth is deeply substantive, and it is tied up to an intractable feature of the American federal system: the federal "balance of payments" problem. Those who argue for a limited SALT deduction question why some states should effectively subsidize high-spending, high-taxing experiments in others. The other side

points to the fact that those living in those high-tax states routinely give more to the federal government than they receive back from it. The new tax code is the work of a Republican Congress, but the political consequences clearly comport with the nationalized, polarized, and presidency-centered politics that at once saw Republicans abandon their traditional commitment to balanced budgets, while also dismissing those states that traditionally go "blue" in presidential elections.

Other examples of this new economic sectionalism abound. The president's second year in office began with a flurry of proposed tariffs on imported steel and aluminum. The economic effects are national, but importantly are viewed by the White House as geographically differentiated: some areas of the country *might* benefit from these punitive measures, while others will pay the difference in higher prices. A testament to the geographic offsets of this trade policy, China explicitly acknowledged that its proposed retaliatory measures target agricultural exports from states that helped send Trump to the White House (Wei, Kubota, and Lin 2018). It is also noteworthy that the dramatic budget increases Trump secured for the Department of Defense are also tied to predictable partisan, and geographic, boundaries. Such largesse clearly points to the powerful voice states have in contemporary policymaking.

Plebiscitary Politics

Like his predecessor Barack Obama, Trump's odds-defying ascendance to the presidency in 2016 marked a new chapter in the age of presidentialism. Like Obama, Trump styles himself as the leader of a "movement" dedicated to transforming an isolated party establishment. Like Obama, Trump built his base through the unprecedented (if not as technical) command of media. Sensitive to the fact that the substance of Obama and Trump's messages are radically divergent, their method of communication has nevertheless

further ritualized the independent and plebiscitary nature of presidential-politicking. Tip O'Neill once famously declared, "All politics is local." After the 2016 Election, it is fair to say that (most) politics is presidential.

In the domineering shadow of the president, states have tried in earnest to remind their citizens of their constitutional autonomy and relevance. Many states – mostly Democratic – refused to cooperate with the President's election integrity commission, which disbanded eight months into operations. The U.S. Conference of Mayors spearheaded an effort to maintain municipal commitment to the Paris Climate Accord's pollution targets after Trump withdrew from the international deal in June 2017. After the Interior Secretary Ryan Zinke moved to open up all U.S. coastlines to offshore drilling and oil exploration, governors balked. Notably, fellow Republican Rick Scott, Governor of swing-state Florida, secured an exemption after high-profile, one-on-one meetings with the administration. Presidential politics does not challenge the legal authority of state and local governments *per se*; and states have used the federal judiciary to block many presidential directives, including, at least temporarily, the president's immigration ban. However, further aggrandizement challenges the institutional restraints on political actors who make determinations of where the boundaries of state-federal authority lie. In no policy domain is this clearer than in how states and Trump have clashed over immigration enforcement.

Given his campaign promises, it is not surprising that Trump's executive actions on immigration have dominated his administration. Just five days after his inauguration, Trump signed his third executive order, which set new priority guidelines for federal immigration officials, but also signified legal and fiscal consequences for any state or municipality that refused to cooperate with Department of Homeland Security Officials (Trump 2017c). Claiming the power to impound federal funds for non-compliant states across a wide range of policy issues, the administration went further that March in

publishing a lengthy list of non-compliant police departments in an effort to shame them into cooperation. While President Trump's order faces ongoing legal challenges, his administrative actions and accompanying rhetoric have galvanized state-led efforts to cut off intergovernmental transfer for cities and counties in their jurisdictions. Before Trump's inauguration, Texas Governor Greg Abbot (R) threatened to withhold nearly $1.8 billion from Travis Country after a highly-public spat with its newly-elected sheriff Sally Hernandez, who ran a campaign pledging to reduce cooperation with federal officials. Similar state-local conflicts erupted in North Carolina.

However, for all the high-profile showdown, no definitive conclusion has emerged with regards to federal or state authority. Almost immediately after signing the "sanctuary city" executive order, federal judges sided with attorneys representing San Francisco and Santa Clara counties who argued that presidential withholding is unconstitutional. The opinion rests on familiar Constitutional terrain and a long list of precedent that limits presidential discretion on conditional grants-in-aid (*Pennhurst State Sch. & Hosp.* v. *Halderman* 1981). To add salt to the President's growing wounds, the California state legislature passed three new laws to challenge directly the administration's growing crackdown on unauthorized immigrants: Assembly Bill 103 grants authority for the State Attorney General to inspect federal facilities; Assembly Bill 450 restricts private employers interactions with federal immigration officials during routine audits; and Senate Bill 40 prohibits both state and local officials from relaying information about detainees to federal officials in most cases. Not to be deterred, the Department of Justice filed a lawsuit in early March 2018 against the entire slate of new California laws. In a defense sure to induce partisan whiplash, California pleaded the Tenth, resting its case on Rehnquist-era decisions prohibiting executive commandeering of state and local government agents (*Printz v. United States* 1997).

Such back-and-forth might indicate a revived decentralized spirit in the American polity, if not increased interest in the Tenth Amendment. However, it is not so clear that Trump's administrative battery and vigorous litigation signify anything healthy about the federal-state relationship. Congress has repeatedly failed in its efforts to attach conditions to federal grants-in-aid that might coerce states and cities into cooperation. Moreover, such "coercion" seems directly at odds with the Supreme Court's recent decision over the fate of Obamacare, which finds unconstitutional any "economic dragooning that leaves the States with no real option but to acquiesce." The so called, "gun to the head" provision that struck down Medicaid expansion requirements was, in a pre-Trump era, the only silver lining Republicans claimed on that decision (*National Federation of Independent Business* v. *Sebelius* 2012).

The political war zone created by these lawsuits does not seem to have "law" as the intended outcome. Victory for the Department of Justice and Attorney General Jeff Sessions would have wide ranging legal precedent for federal authority over the states, and for future presidential administrations to set policy by withholding federal grants-in-aid. The political maelstrom on display will alter the legal and institutional restraints that parties and their presidents will make in the future. Presidents continue to behave as if they are the nation's doctor, teacher, pastor, and engineer. Meanwhile, those supposedly closest to the people remain hamstrung by federal directives and national party loyalties. Presidential-federalism makes distinct sub-national communities more dependent on the political success of their leader in the White House. In nationalizing the political conversation and policy consequences of every administrative action, presidential-federalism challenges the very idea of whether anything in contemporary U.S. politics is, "in the nature of things," truly local anymore.

Moving Forward: Thinking Politically About Presidential Federalism

It is too early in Donald Trump's presidency to know whether his approach to federal-state-local relations will leave an enduring impression on American federalism. Nevertheless, his program has given his nascent presidency some of its most important policy victories to-date, and there are few indications that his administrative strategy will subside. It is important to point out that presidential-federalism, as denoted here, sits within a broader set of political dynamics that encapsulate all executive authority (Bulman-Pozen 2016). To the extent that state and local executives are relatively free to continue to negotiate, bargain, and extend policy amongst themselves, we overlook one important feature of contemporary federalism. Our focus on the president is not intended to obscure the power wielded by executives at all levels of the federal system. We do, however, mean to clarify the unique opportunities for and constraints on presidential action resulting from the rise of a more powerful institutional presidency, and the displacement of some constitutional norms that once buttressed the federal system. The promises and pathologies of this mode of governance are strikingly visible early in the Trump presidency.

Trump's brief tenure has exposed the fault lines between the power of the modern presidency and the institutional imbalance of contemporary American federalism. The near century-long development of an expansive executive replete with budgetary authority, rhetorical gusto, and legitimized administrative discretion has placed the presidency center stage in the inevitable conflict "Our Federalism" entails. As a result, we have witnessed that presidential-federalism exposes states to mutability in the law, financial instability, and the maelstrom of nationalized, polarized politics. States may maintain their constitutional stature and can still influence politics through a variety of avenues. It matters, however, that more of those processes are channeled through the White House.

Federalism, far from diminishing presidential power, has allowed the executive to flex its administrative muscle in myriad new ways. Regardless of any net policy benefit, these are means that remain directly at odds with the original design and commitment of keeping the compound republic. The growth of presidential power does not change the fact that, "no matter what their preferences about intergovernmental relations, presidents have policy goals, political needs, and obligations of office that drive them to employ – and usually to extend – the powers of the federal government" (Derthick 2006, 502). As presidents find greater success in navigating subnational politics, it will only enhance the powers and expectations of presidents to continue to act unilaterally. To the extent that this form of administrative politics has roused political elites on both sides to delegitimize their own institutions, and to the extent that unilateral action threatens to make citizens feel even more removed from their political system, presidential-federalism does not strengthen necessary institutional relationships, it corrodes them.

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