Federalism in Flux: Three Candidate Models to Explain Trends in Federal Decentralization

Jenna Bednar
University of Michigan
jbednar@umich.edu

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Abstract

Federations are characterized not only as "centralized" or "peripheralized", but as "centralizing" or "peripheralizing"—indicating that their nature is both dynamic and can be captured by a single dimension. While some changes are brought about through institutional transformation, more often the changes cannot be traced to the formal adjustment of constitutional rules governing the distribution of authority between federal and state governments. In other work (Bednar 2009), I have described a model for slow change in federalism's boundaries by focusing on the system of safeguards that reacts to attempts to change the location of authority. To explain the other side of the dynamic equation, the demand for change, in this essay I propose three candidate models: interest-based pressure, path dependence, and cultural spillovers. I argue that of the three candidate models, only the cultural spillovers model can capture trends across policy domains. Furthermore, equipped with this model, we may better understand moments of acceleration, creating tips in the balance of power between federal and state governments that lead to a new era of centralization or peripheralization.

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"By the steady accumulation of small changes you get new species." —*Charles Darwin*

Let's say, for the sake of discussion, that the boundaries of authority separating the federal and state governments, and shaping the United States federation, have changed over time. Let's further agree with the bulk of analysts that in general the trend has been toward increasing centralization, with some degree of reperipheralization under Reagan/Rehnquist. Finally, let's lay on the table the recent fiddling with the boundaries in policy domains as diverse as voting rights and gun control, and the states' confident pushing from below in matters of marijuana legalization and gay marriage, while resisting federal plans to expand Medicaid. Some claim that these developments signal a resurgence of state influence, and that the United States is on a path toward greater decentralization.

In this essay I examine the theoretical basis of this interpretation: that a series of events might become a trend, one so significant that it reshapes the nature of the federal constitutional relationship. It is counterpoised against two alternatives: first, that the authority shifts are unrelated, and therefore any patterns discerned are spurious, no more than momentary alignments, like casting double sixes. A second alternative would grant that the coincidence of centralized or decentralized authority shifts is real, but that it is attributable to an exogenous force, such as a world war that calls for the central coordination of all domestic matters. As soon as the exogenous force is relieved then the pattern is free to change, the current arrangement has

no endogenous effect on the future shape of the federal system. Against these two alternatives—spurious patterns and exogenous force—stands the alternative: that these periods dubbed the "age of federalism" or a "new era of states' rights" are real trends that have meaning, that the alignment of shifting power, whether simultaneous or sequential, is related, and that the array of power between federal and state governments affects the extent of future authority migration.

There exist two approaches to understanding authority migration within federal systems: through behavior or through institutions. The behavioral side represents the demand for authority migration, such as legislative proposals that push at the boundaries of authority. The institutional side represents the systems of safeguards (structural, judicial, political, popular) that react to these demands. Quite obviously, a change to the formal institutions can lead to a near immediate rearrangement of the federal-state relationship; these changes are set aside for this essay. Also set aside is the complexity of the system of safeguards, a system of imperfect, interconnected parts, that in ordinary operation does allow for small modifications to the boundaries. In other work (Bednar 2009) I have written at length about change through the institutional side, and so here I will invoke it only to frame the behavioral questions. For the present purposes we will concentrate on the behavioral side: the forces that shape the demand for change. That said, the division between perspectives is not tidy, as when the Court rules expansively or when political agents respond to boundary-shifting legislation with

federalism-changing tactics of their own. In this essay, I include those latter efforts as well.

To understand demand for centralization or decentralization, we need a theory that can accomplish two aims: it must explain why authority in distinct domains would move at the same time, and why that movement would have bearing on the future authority migration. Why would the pressures on the federal boundaries organize into patterns of centralization or peripheralization that can be discerned historically, even if they are difficult to identify in the midst of a transformation? A useful model must be able to explain authority migration from a horizontal perspective—with one policy influencing another, loosely related domain—as well as a vertical, historical perspective where past policies influence the here and now.

I propose three models for understanding the changes to the federal system: (1) that it changes in response to changing preferences, (2) that it evolves along a traceable path, and (3) that it is influenced and constrained by behavioral patterns that spill across policy domains. The three candidate models will be evaluated for their ability to address three questions related to the aggregation of incidents (ie legislative acts, judicial decisions, or political maneuvering) into a trend that reforms the nature of a federal relationship. These three models are related. They build in complexity, and each subsequent one subsumes the prior in its theoretical apparatus, but adds an additional mechanism. While each of these three models is useful, I argue that of the three candidate models, only the cultural spillovers model

can capture trends across policy domains. Furthermore, equipped with this model, we may better understand moments of acceleration, leading to tips in the balance of power between federal and state governments that lead to a new era of centralization or peripheralization.

1 Three Questions for Modeling Federalism Trends

Three questions animate the analysis of the various models. First, how does centralization even become part of the policy debate? Second, how do trends toward or against centralization spread across domains? And, finally, how do trends manifest temporally? The first of these requires the most fleshing out. One of the more puzzling aspects of the trends in federalism is how particular policy domains become subject to federal-state bargains in the first place. Gun control, abortion, affirmative action, health insurance, marriage rights: on the face of it, none of these policy areas make one think about the federal-state balance of power, and yet, federalism animates discussions over these policy areas far beyond the courtroom, and their resolution threatens to reshape the American federation. Other policy domains are somewhat curiously outside of the federalism debate. For instance, consider identity cards and social security. For the identity cards, the federal government issues two identications for the general citizenry: a social security card and a passport. The passport is optional and the SS card has no photo so cannot

be used in most instances as valid identification. Despite related debates over voter identification that sit squarely within the federalism debate, there exist no serious call for a standard, federally-issued government photo ID. Likewise, the debates over privatization of social security never suggested that social security be turned back over to the states, even though some states, like Illinois, have never abandoned their programs. Instead, the modern policy debate concentrated on public vs private, where public maintenance never had the second, state-level, alternative.

The question begged by these examples is how the question of federal vs. state provision of policy becomes part of the policy debate at all. How did anyone think to invoke a state- or federal-level alternative as a means to achieving their desired policy goal? In modeling terms, it is a question of how an agent comes to recognize what alternatives are available to her. Rational choice models routinely assume that agents know all options available to them, but in a pointed critique of the rational choice model, Herbert Simon suggested that for any given full set of alternatives A, an agent may only "consider" or "perceive" a subset of alternatives, A' (1955:102). There is no a priori reason to think that the optimal action is contained in the set of alternatives that an agent considers. Technically, although this is problem that nearly all formal theorists ignore, the contents of A' must be justified theoretically.[1] While all considered alternatives make sense with the benefit of

[1] Psychologists do work on this issue, and some decision scientists have. Kahneman and Tversky call this "accessibility" of an idea (Kahneman 2005): how immediately the mind associates an idea (for us, an alternative) with an observation. I am still mulling

hindsight (naturally the Republicans would consider turning to the state legislatures to wage their campaign against Obamacare), Simon points out that humans often don't know how long to keep searching for more alternatives—they don't have the luxury of being perched on the "mountain-top of a more complete model" (1955:112), and very often, will *satisfice*, taking the first acceptable outcome, rather than continuing to expand their choice set to reveal more possibilities. In the context of our problem, we need a model to describe how political agents think of drawing the migration of authority between federal and state governments into a problem of getting their own way on public policy. That is, we need a model of how public policy becomes a question of federalism.

A second question is closely tied to the first. How does the inspiration to federalize a policy question diffuse across policy domains?[2] Ideally, we would be able to spot trends as they emerge. Can the model make any prediction about the direction of flow of the idea? At the least, can we identify policy domains that are more likely to be early and those that would be late to have a shift in authority, and the significance of each?

A final test for our three candidate models is their ability to explain the historicity of federalism trends. One reason that we characterize federations

through the intuition vs reason argument and how it might work with a model of cultural evolution, so will not include accessibility further than this placeholding footnote.

[2]While I am writing of this in public policy terms, naturally the same question holds for legal questions: under what circumstances does the Court bring federalism into its resolution of a legal challenge, particularly when federalism was not directly implicated? Or vice versa: why does it leave federalism questions unanswered, presumably leaving in place the existing federal-state relationship?

as “centralized” or “decentralized” is that the labelling is a heuristic, helping us to make predictions about future assignment of authority. If a federation is centralized, then when new authority assignments are considered, we presume that the central government is most likely to get the assignment.

One curious interaction to notice: there may be no correlation between a federation’s state (centralized or peripheralized) and the likelihood that a policy domain gets federalized. That is, a model may or may not link the likelihood that federal-state balance of authority is invoked as an alternative in a policy debate to the existing distribution of authority.

In this essay we will use these three questions as criteria for evaluating the appropriateness of each model as a means to capture the formation of a trend in a federal system. A model must explain how agents come to express their policy preferences in federalism terms, how that expression spreads across policy domains, and how it carries over historically, influencing future choices.

2 The Random Walk of Interests

The foundation of behavior is preferences, and so the first candidate model stresses the interaction of interests. If the policy space is unidimensional, and preferences are uniformly or normally distributed, then policy is drawn, in a Downsian fashion, to the median interest. Interest-based theories for action are best developed as models of legislative action or voter choice, but

have been extended convincingly to capture behavior of other governmental agents, including the judiciary (eg Epstein and Knight 1998). In terms of explaining shifts in authority, the model predicts that changes would track changes in the policymakers' assessment. It can be pulled from the median due to institutional structure (Shepsle 1979); for example, such as constitutional rules that explicity assign authority to one level or another, although the current debate over regulation of firearms—including Missouri's narrow miss at nullifying federal background check laws[3]—is a showcase example of how even settled questions of federal assignment are subject to further interpretation.

The interest-based family of models is a great starting point for analyzing particular changes. It can help us understand the statehouse battles over Medicaid expansion, and perhaps even the decision to shut down the federal government. But it is simply not equipped to help us understand how those ideas emerge and spread; it is the very model that Simon was critiquing in 1955.

The standard interest-based model also cannot help us to understand the significance of the existing nature of the federal union on future attempts to shift authority. An agent's choice is not affected by earlier choices; the model is silent to history. One might make assumptions about relative ease of applying the status quo, but that drifts over into the next section's model.

[3]On September 11, 2013, the Missouri legislature failed to override the governor's veto of HB436 by a single Senate vote. The bill would have made it illegal to conduct required federal background checks, among other measures.

Absent external assumptions about changing preferences (which would in effect be assuming whatever result one wanted), the interest-based model must be presumed to create a *random walk* around the existing relationship; with each new policy debate, the federation is equally likely to become more centralized, less centralized, or stay the same. While it might help us to understand the outcome of any particular debate, it cannot help us to understand the emergence or importance of trends.

3 Path Dependence

Path dependence implies that the sequence (or as the theory is often applied, the set) of events in the past influences future outcomes: history matters. The most common model of the force that generates path dependence assumes that behaviors become less costly over time—for example, as routines develop—and therefore become more likely (eg. David 1985, Arthur 1994). To apply this model of increasing returns to explain the development of trends in federalism, once an assignment of authority is made, it may be more likely to remain in place for reasons extending from bureaucratic inertia to public expectations. The authority assignment becomes a self-absorbing state, one that does not change.

This model of path dependence accords with mid-century assessments of the American federation made by prominent theorists, including Grodzins (1961), Elazar (1962), and Riker (1964). All wrote of a growing central-

ization of the American federation, to the point where federal government dominance would be essentially inevitable. For Elazar, the centralization is a product of American expectations and can be found in early federal-state partnerships. Efficiency demands (1976:9) pushed the federation to an ever more centralized state. To Riker, the American federation lacked institutional safeguards to prevent its centralization, as well as a the public will to defend the priority of the states (noting the declining "loyalty" to the state). Grodzins noted the "marble cake" nature of the American federation, where the authorities of federal and state governments bleed into one another. As the central government grows more efficient it dominates the state governments in any areas of shared authority.[4]

However, it appears that federations do reverse course and peripheralize, as long as the conventional wisdom is correct in identifying juridically-driven decentralization under the Rehnquist Court, the Reagan-era administrative decentralization, and the authority devolution by Congress following the Repubican's Contract with America. If so—if centralization is not irreversible—then a path dependence model that relies on increasing returns cannot capture periodic trends in federal system. Some historical institutionalists introduce exogenous shocks, so called *critical junctures*, to explain qualitative shifts, at which point the increasing returns from routine behavior take back over, and the form persists until the next exogenous shock (eg Pierson 2000).

[4]The judicial practice of adhering to precedent will also bias outcomes in favor of increased centralization if standing decisions are in favor of the national government.

Ideally a model would be able to explain reversals in trends as well as smooth continuations of them. One model of path dependence that is agnostic on the direction of change (and therefore a more flexible candidate model) is Greif and Laitin (2004). In their model, optimal response to incentives can generate changes to the problem environment, in effect changing the payoff structure for a given institution. They call these externalities "quasi-parameters." The quasi-parameter may affect the utility of a policy or change the information structure of the choice. For example, under the Affordable Care Act, states are given the option of setting up their own insurance exchanges or joining in the federally-created exchange. The responsibility is new to the states, and so some may not be confident about the consequence of program choices. Rather than setting up their own exchange, they may take the lower-cost option of adopting the federal exchange. Over time they learn more about the policy environment, and may see ways to improve upon the federal example, reclaiming the responsibility as their own. Unlike the interest-based models, here change occurs not because preferences have shifted but because behavior changes the incentives, in turn leading to a shift in behavior.

The quasi-parameter model of Greif and Laitin is a nearly ideal candidate model for understanding trends in federalism. It captures well the weight of history and the significance of the existing state on the future status of the federation within any given policy domain. However it does not address the reach across policy domains, one of the criteria for modeling a trend. As

a model, it remains rooted in single policy dimensions (or at least, single institutional spaces). It is possible that actions can create spillovers in other realms, affecting payoffs in other institutions, but that spillover effect is not explicitly modeled. For that phenomenon, we turn to a model of cultural spillovers.

4 Behavioral Spillovers

[*to save space, a portion of this section is left largely in outline form*]

To satisfy the criteria for modeling a trend in a federal system, the model should be able to capture relationships across domains of authority as well as trace the constraints in the shifts within an authority domain through time. In a sense, the model should capture horizontal, intratemporal relationships as well as vertical, intertemporal relationships.

Although it is not the only force that interprets or shifts the boundaries of federalism, the judiciary is particularly influential. Far more than legislative acts, judicial decisions, particularly those rendered by the Supreme Court, have the capacity to address and influence multiple, distinct policy realms, and therefore reassign authority. The weight of the Court's decisions carry forward through the practice of adherence to precedent. Court decisions therefore are both gooey and sticky; they are capable of spreading horizontally across policy domains and vertically through time, to a far greater extent than legislative acts. With one decision the court can reset the

shape of the federal relationship; as these decisions accumulate, their effects are even more significant.

1. The most visible set of cases reshaping federalism during the mid 20th century are those that addressed Congress' powers to regulate commerce.

2. Importance of Lopez

3. Spending Powers

4. Preemption

Judicial decisions are important markers of shifts in the contours of federalism. The weight of precedent, combined with respect of the Court's interpretation of the Constitution, means that decisions can create path dependent waves, and when broadly construed, draw disparate policy domains in its wake. Its visibility and apparent influence draw attention to the Court, and it becomes tempting to identify the Court as being the most important force shaping federalism, but it is not the unique determinant of the federal boundaries, and it may not even be the most important. Extrajudicial forces, from Congress, the political parties, and the state governments, are involved in shaping federalism as well, both pushing against the boundaries and resisting change.[5] And theorists of popular constitutionalism, including Kramer

[5] For more on state influence, read Wechsler, Ryan, Nugent. On parties: Riker; Filippov, Ordeshook, and Shvetsova; Chhibber and Kollman. For a systems view combining the variety of safeguards, Bednar 2009.

and Friedman, underscore that behind the formal governmental forces, stand a public in judgment of their actions. As Friedman shows, the Court is rarely long out of synch with popular sentiment about the Constitution's meaning. Popular constitutionalism accords with the intuition of a wide array of federalism theorists, from Ostrom, Elazar, Riker, and Weingast, that the ultimate force shaping federalism is the existence of a federal culture.

If legitimacy of doctrine depends on public reception then a model of federal trends, including those that focus on the court directing the change, still need to incorporate changing public acceptance of the distribution of authority. A reshaping of the federation has to make sense to the public. There are two recent developments in modeling dynamics of social processes that can help us to understand this process.

First, let's consider how to measure tipping points. It is natural to events at moments of big jumps or greatest acceleration of change as the force responsible for a change in the state of a system. For example, in our interest in the dynamics of federal centralization and decentralization, we'd focus on the court decisions or major legislative acts as the pivotal moment in reshaping the federal system. But reconsider the insights from those theorists who point to the dependence of the court on the public's receptiveness. It may be that the Court can influence the pace of redirection, but not the direction of it; that is, in moments of significant shift the Court (or Congress, or other political forces) are only taking advantage of the opportunity. Think of it this way: consider a ball resting on top of a flattish hill. It can roll around

on top of the hill, but at some point, it will start on a downward path. As it falls it will speed up at the steepest part of the downward path, but the direction that it takes down the hill was determined when it started rolling down the side, even though at that point it was moving rather slowly. These slow changes near the top are most important in determining the path that it takes; once rolling down the hill, the ball's direction is set. Lamberson and Page (2011), doing the math, warn that focusing on inflection points in dynamical systems misses the importance of earlier forces. Instead, we should focus on moments where the probabilities over outcomes change: such as when a system shifts from multiple equal probabile outcomes to a single likely outcome. These moments may exhibit only marginal changes in the characteristic of the system, but be critical for the future shape of it.

The Lamberson and Page tipping point measure fits the arguments of the legal system theorists well. Although the distribution of authority may not be changing significantly, the groundwork for big shifts is set through incremental changes and ultimately, by a shift in public perception about the appropriate distribution. Seen this way, "major" Court decisions or legislative acts are nearly inevitable, the direction of change set by cultural forces, and the only question is how far they will push the federation in a new direction.

We now must invoke another model to describe the inner mechanics of the early development of these shifts when small changes to the distribution of authority (whether realized, or perhaps even only proposed) spread across

policy domains, and then hold through time.

First, recall the problem I introduced when describing the interest-based model. Need to be able capture where the idea of federating (commonly, decentralizing) authority comes from. In rational choice theory, typically modelers assume that agents know their full choice set, and then choose the action that optmizes their payoffs (whether max-min, expected value, or by assuming payoff maximization), but recall Simon's criticism: models need to justify how their agents know what strategies are available to them. They need a model of the agent's understanding of the problem, including the source of ideas for what actions they can take.

In work with Scott Page, I've developed a model of where agents' behavior spills across games (Bednar and Page 2007). An agent's response to a games is a function of the broader context of games that the agent faces, not because we assumed that to be the case, but because of the way that agents learn to play games. Ideas for how to approach a game—what action to take—are related to what the agent is doing in other situations. For example, we have experiments where subjects play a prisoner's dilemma (PD) game repeatedly.[6] When the PD is the only game that they play, they do what behavioral subjects have done in the hundreds of times that the game has been studied: about 55% of the subject pairs eventually figure out to cooperate with one another, maximizing their individual returns. But when they play the PD and another game, the likelihood that they cooperate falls.

[6] Bednar, Chen, Liu, and Page 2012.

When the payoff-maximizing behavior in the other game is relatively easier to figure out, the subjects play the same way in the PD that they play in the other game. They solve easier games first and then apply that action as a heuristic for playing a more complicated game.[7] Behavior—figuring out how to respond to incentives—is dependent on the context, on what else the agents are thinking about at the same time.

In this model, not only are the games connected together within the context of the model, but as long as the difficulty of the games can be compared, the model can predict the direction of the influence. Actions diffuse from easy-to-solve games toward those where coordination is harder—where there are multiple actions that are each nearly as good as the other, or where there's a significant punishment for failure to match the other's play.

While this work is early and abstract, we have hopes that it can be fruitfully applied to contexts as real and significant as decisions about whether or not to centralize or decentralize policy in a federation. If there is broad agreement about the location of authority in one realm—say, that the federal government is more capable than state governments in regulating the banking industry and in coordinating the electrification of rural areas—and then the federal government becomes the focal authority for other projects, such

[7] In experiments where agents played the PD with a game that rewards alternating "you win then I win" behavior, a significant portion of our subjects *alternated* in the PD, playing the off-diagonals of cooperate then defect. To our knowledge, this is the first instance where the alternating behavior has been witnessed to any significant extent in the PD. This is an example of what Kahneman and Tversky would call associative play; the agents thought of a strategy that is absolutely never witnessed in experiments because they were playing another game where that strategy is a really good choice.

as building the foundations of a welfare state. The model would predict that as authority begins to shift domains, it starts with areas of broad agreement or where the other level of government has proven incapable of responding. From there it can move to domains that are more contentious.

The original model concerned simultaneous games, the horizontal relationship between domains. We have extended the model to consider sequential game introduction, and using the same mechanism—the potential for behavioral spillovers between games—find conditions that produce *institutional path dependence* (Bednar and Page 2013). If a significant portion of the population learns how to play new games by drawing on heuristics developed in similar games—the behavior that we saw in our earlier studies—then path dependence becomes essentially inevitable, particularly the more similar the games. Furthermore, early games often have the most influent on the future path of play.

Our results are related to Greif and Laitin's model of path dependence driven by quasi-parameters described in Section 3. As quasi-parameters shift, the institutional incentives drift. Although they do not state it explicitly, there may be stickiness in behavior that causes behavior to be inefficient—that a better response exists but the agents don't locate it. Our model describes this situation explicitly and provides a prediction for when we might see behavioral correction. Our model predicts disjointed leaps in behavior, and argues that it does not imply disjointed shifts in either preferences or incentives. That is, even if public attitudes, political strategies, or judicial

decisions seem to reverse course abruptly, the underlying environment—both in terms of preferences and needs—may be changing slowly. The steady accumulation of small changes that reinforce one another leads to aggregate behavior that resembles a trend.

5 Modeling Federalism in Flux

When theorists of federalism characterize a federal system as centralizing or peripheralizing, the characterization reduces a complex, multidimensional space to a single dimension. In order for this simplification to make sense, the many drivers of federalism's shape must be correlated. The boundaries of federalism are pushed by legislative acts and judicial decisions, sometimes reshaping those boundaries. If they were uncorrelated, then the shifts to federalism's boundaries would resemble a jagged line, jumping toward centralization then decentralization without any aggregate coherence. This random walk does not describe how the terms centralizing and peripheralizing are commonly invoked: either to describe a function that is approaching the limit of one extreme, or an oscillation between the two states of centralization and peripheralization. A trend is more than a series of events and reactions to those events. In a trend, the events are related to one another and not just to a single large event. Instead, they appear to self-organize into a pattern.

This essay has proposed three ways of thinking about the patterns that emerge as agents push against the boundaries of federalism. The first, of

explaining behavior in terms of shifting preferences, dominates the literature. While it has many advantages, including parity, for analyzing single events, it is not equipped to draw connections between policy domains and across time. The second model relies on the concept of path dependence. It proves a good model of the historicity of behavior within a single policy domain, but the model lacks a method for linking policy domains. The third model, of behavioral spillovers, is capable of explaining connections in behavior across policy domains as well as its stickiness through time. This third model can also explain how small policy changes may well lay the foundation for transformative events, the seminal policies and decisions that are the focus of historical accounts of the federal bargain. These large events need not though be tipping moments, moments in which the future path has become more certain. Instead, they may be signposts on a path that was laid out by a cohort of earlier actions and decisions.

The idea that behaviors spill across institutions and contexts may have even broader purchase. It may well help us to understand the formation and slow change of political culture, that popular force that so many theorists of federalism and legal systems point to as significant. More elaborate models of spillovers offer the potential therefore, to not only explain patterns in the centralization and decentralization of federal systems, but to begin scaffolding the concept of political culture as well.

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