

FEDERALISM

The Rise of Post-Supremacy Federalism

What happens when the federal government stops cooperating?

BY VICTORIA GRACE LITMAN

What happens when federal laws remain on the books but vanish in practice? That is, what happens when private actors, state governments, and even federal courts begin to treat those laws as merely symbolic, binding in theory but absent in practice? We get a glimpse of this in the thousands of state-licensed cannabis dispensaries operating in plain sight that are legal according to local law but violate federal law.

This dichotomy is not the result of legal dysfunction; it is deliberate. For years, critics of the federal bureaucracy have demanded a government that is smaller and more constrained. Though this has been an ongoing project, it has been catalyzed by the return of a Trump administration intent on reducing federal employment. The result is new federalism is emerging in many key areas of law and regulation.

Many states, businesses, and ordinary people have been slow to adapt to this new regulatory environment: The United States constructed a legal system that depends on federal enforcement, and its scaffolding is crumbling.

WHAT IS FEDERALISM?

Federalism is the constitutional system that divides power between the federal government and the states. Under Article I of the Constitution, Congress has only limited, enumerated powers such as regulating interstate commerce, collecting taxes, and declaring war. All powers not granted to the federal government are reserved to the states under the Tenth Amendment.

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The Supremacy Clause (Article VI) makes clear that when federal and state law conflict, federal law prevails. In practice, this has long meant shared authority: Congress passes national laws and states regulate within their borders, especially in areas like education, health, public safety, and local economies. Over time, the federal role has expanded, particularly through civil rights enforcement and federal spending conditions. For instance, the federal government lacks the power to enact a nationwide drinking age minimum of 21, but it promotes that by threatening to withhold federal transportation dollars from states that do not raise their drinking age.

Even as its reach expanded, the federal government's power has always depended on its enforcing its laws. However, that assumption—that federal law would be enforced—is now collapsing. Traditional theories of federalism focus on cooperation and conflict, exploring how states partner with or push back against federal power. But these presume a functioning federal government. Our current era operates under a different premise: In some policy areas, the federal government has largely stopped showing up.

LIVING IN THE GAP

I study, teach, and write about state-regulated drugs like cannabis and psychedelics, substances governed locally but affected by federal prohibition. Yet, the era of active federal enforcement of that prohibition is in the past. I've become deeply familiar with what it means to live under federal non-enforcement.

Cannabis possession, cultivation, and sale remain illegal under federal law, yet nearly half the states have created comprehensive licensing regimes for recreational marijuana. Congress hasn't amended the law, and there is no formal policy of nonenforcement—just a patchwork of rescinded

Justice Department memos and a narrow appropriations rider shielding medical programs. Dispensaries operate with impunity, and states tax and regulate as if supremacy doesn't apply.

Why hasn't the DOJ shut it all down? Cost is one reason, and fear of a political backlash is another. But the deeper explanation is structural: The federal government no longer can—or no longer chooses to—enforce drug laws that remain “good laws.” The statutes are alive, but enforcement is gone.

THE FIRST FLARE

This dynamic isn't confined to drug policy. In recent Supreme Court opinions like *McMahon v. Department of Education* (2025) and *AFGE v. Trump* (2025), Justices Sonia Sotomayor and Ketanji Brown Jackson warned of a deeper shift: When federal agencies are gutted, the statutes they once enforced are rendered hollow. Drug policy was the first flare of non-enforcement, but the fire is spreading.

The acceleration became unambiguous after the Trump administration's creation of the so-called Department of Government Efficiency (DOGE). Initially marketed as a modernization initiative, DOGE rapidly became the nerve center for administrative dismantling: issuing mass layoff orders, purging enforcement staff, and defunding critical oversight offices across the federal government. Entire divisions were eliminated and statutory deadlines passed without consequence. Regulated industries began planning around the assumption that federal oversight simply would not arrive. Mass layoffs continued in the subsequent government shutdown, further weakening enforcement capacity.

This reduction in capacity isn't dysfunction; it is strategy. Hollowing out enforcement while leaving statutes intact creates maximum disruption with minimum political accountability. Laws remain “on the books” so critics can't claim repeal, but practically they have been rendered inert. In essence, it amounts to federalism by default: a structural shift not rooted in principle or negotiation but in the retreat of federal enforcement. I call this condition *post-supremacy federalism*: a legal regime in which federal law remains formally binding, but it no longer governs in practice.

I define *post-supremacy federalism* using three structural criteria:

- **Statutory persistence:** Federal laws remain formally binding but are no longer meaningfully enforced.
- **Durable enforcement retreat:** Agencies lose the capacity—or the will—to implement those laws because of defunding, attrition, or court rulings.
- **No formal devolution of power:** Authority isn't transferred to the states; it is simply abandoned, leaving a legal and institutional vacuum.

These conditions create a system where states govern alone, under threat, without backup or clarity. It does not amount



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to classical federalism; it's erosion. What follows are examples of this framework in action—through the legal gray zones of drugs, education, and the environment—but the collapse of enforcement giving rise to this new reality is not confined to these areas.

CANNABIS WITHOUT ENFORCEMENT

The Controlled Substances Act of 1970 makes marijuana illegal nationwide, categorizing cannabis as a Schedule I drug—meaning it is deemed to have no accepted medical use and a high potential for abuse. Congress has not repealed or amended this law as it relates to marijuana.

Yet, as of 2025, 24 states have legalized recreational marijuana. More than 75 percent of Americans now live in states with some form of legal access.

Federal enforcement began to fade during the Obama administration, when DOJ guidance advised prosecutors to deprioritize action against state-compliant businesses. Trump attorney general Jeff Sessions rescinded that guidance in 2017, but no crackdown followed. A congressional appropriations rider now blocks DOJ interference with state medical marijuana programs, but it offers no protection for adult-use markets.

Meanwhile, the costs of federal illegality persist. Under § 280E of the Internal Revenue Code, cannabis businesses cannot deduct ordinary expenses, and most banks will not serve them. Parents have lost custody of their children over medical use of marijuana, and immigrants have faced deportation for working in licensed dispensaries.

The result is an economy operating on two tracks: An official one governed by federal law and a shadow one where billions of dollars in commerce are exchanged in legal gray zones. A dispensary in Colorado may be fully legal under state law but be underbanked, underinsured, and vulnerable to federal prosecution. I call this the snapback threat: the ever-present possibility that dormant federal supremacy could spring back to life without warning.

This unpredictability is perhaps the most corrosive aspect of post-supremacy federalism. It's not just that federal law isn't enforced; it's that nobody knows when that might change, or how, or why. Governance becomes a gamble on the whims of the administration in power.

EDUCATION WITHOUT OVERSIGHT

Public education illustrates how post-supremacy federalism can arise where federal oversight has long played a critical role in developing a floor for state regulation. For decades, laws like Title IX, Title VI, and Title I set national civil rights baselines, and the US Department of Education enforced them through audits, investigations, and funding conditions.

But in 2025, that enforcement infrastructure is collapsing. A wave of mass layoffs depleted the department's Office for

Civil Rights, and entire enforcement units were disbanded. The Supreme Court allowed the cuts to proceed even while acknowledging that the agency could no longer meet its statutory obligations. At the same time, executive directives pressured school districts to abandon diversity programs or risk losing Title I funds—despite multiple federal court injunctions.

The result is legal ambiguity. For instance, the Individuals with Disabilities Education Act (IDEA) requires schools to provide appropriate services to disabled students. With enforcement now gutted, what happens when schools fail to comply, complaints go unprocessed, and hearings are delayed indefinitely? The legal right exists on paper, but the machinery to enforce it has been dismantled.

Teachers are caught in impossible positions: legally obligated to deliver services without adequate resources, navigating contradictory state and federal directives, watching students suffer while infrastructure crumbles. The human cost is measured in educational opportunities lost, futures foreclosed, promises broken.

Some states have expanded protections for students. Others have moved in the opposite direction, restricting curricula, banning books, and threatening teachers. The federal floor has given way to a patchwork.

ENVIRONMENTAL LAW IN THE SHADOW OF SUPREMACY

Environmental protection follows the same trajectory. Statutes like the Clean Air Act and Clean Water Act remain intact. The US Environmental Protection Agency still exists. But its enforcement capacity is being dismantled.

In 2025, the EPA eliminated its Office of Research and Development and laid off nearly a quarter of its staff. Pollution enforcement actions were paused. Satellite monitoring programs have been defunded.

Meanwhile, courts have narrowed the EPA's regulatory authority. In *West Virginia v. EPA* (2022), the Supreme Court invoked the "major questions doctrine" to invalidate emissions regulations, holding that agencies cannot regulate on matters of vast significance without clear congressional authorization. Add to that the post-*Chevron* landscape, where courts no longer defer to agency interpretations of ambiguous statutes.

The result is legal instability: Some judges defer to states when federal agencies falter. Others block state efforts outright. Nobody knows which version of "federal supremacy" will apply.

States like California have stepped in, setting stricter emissions standards under Clean Air Act waivers, joining regional climate pacts. But even this leadership is precarious. EPA waivers can be revoked; tax credits can be clawed back. Dormant federal power is not dead: It waits to be used when convenient for those in power.

STATES ARE STEPPING IN, BUT NOT EQUALLY

It is not fully clear how the various states will respond to this federal retreat. Some will likely attempt to substitute for federal authority, building new protections, regulations, and civil rights mechanisms. Already, others defend against overreach, shielding various groups from surveillance, criminalization, and discrimination. Still others advance symbolic agendas, using the absence of federal enforcement to restrict rights or signal political identity.

Post-supremacy federalism doesn't just fracture national governance; it deepens the divide between what states do. The collision between divergent state approaches will create new conflicts that federal law once mediated. When California's strict vehicle emissions standards meet Texas's energy export priorities, there's no federal referee. When New York's financial regulations clash with Florida's cryptocurrency embrace, the contradictions pile up in courts that lack clear guidance. Interstate commerce—supposedly a core federal domain—will increasingly resemble a patchwork of competing sovereignties.

Traditional theories of federalism presume a functioning federal government. Cooperative federalism assumes collaboration. Uncooperative federalism assumes resistance. But both require a federal partner that still governs.

Post-supremacy federalism begins from a different premise: The federal partner has abrogated its implicit contract with the states, which now wield contingent sovereignty. They act without formal delegation and govern under the constant threat of reversal—from preemption, defunding, or snapback enforcement. States may be the laboratories of democracy, but the federal government can step in at any time to overturn the experiments, using laws already on the federal books.

Congress, for its part, has done little to clarify this moment. It has declined to amend outdated statutes, invest in enforcement, or pass legislation to devolve power to the states. Instead, it has let drift take the place of law.

This is not a stable system. It is a fragile workaround.

WHERE DOES THIS LEAD?

The trajectory of post-supremacy federalism points toward several possible futures, none of them particularly stable.

One path leads to permanent fragmentation: a de facto confederation where federal law becomes increasingly symbolic while states operate as semi-sovereign entities. Such an arrangement would constitute a fundamental restructuring of American governance more radical than anything since Reconstruction. Another possibility is a period of aggressive federal reassertion that crashes into entrenched state resistance. The legal and political disruption would potentially be enormous, destabilizing entire industries and communities that have built their lives around the current status quo. A third path entails gradual formalization, with Congress catching up to reality by amending statutes, clarifying enforcement priorities, and

formally devolving powers. This seems unlikely to occur anytime soon given the current political dynamics, but it would be the most democratically legitimate resolution.

The first step toward navigating post-supremacy federalism is recognizing it exists. We cannot restore federal enforcement capacity through wishful thinking or waiting for some sort of salutary political realignment. Instead, we must acknowledge what we're working with: a system where states have become the primary sites of governance, whether they sought that role or not.

Acknowledging this new reality would require advocates, businesses, and citizens to change their entire perception of government. If federal civil rights enforcement is hollowed out, the fight moves to state legislatures and state courts—not someday, but now. If environmental protection depends on California and New York rather than the EPA, then those states become the crucial battlegrounds for climate policy. If cannabis regulation is effectively devolved, then state frameworks determine whether those policies advance justice or create new exclusions, and advocates should divest energy and resources from federal advocacy.

What seems certain is that the current moment—marked by federal laws that exist but don't govern, enforcement that may or may not materialize, states governing in legal limbo—cannot persist indefinitely. The question is whether the resolution comes through deliberate choice or chaotic collapse.

NAMING THE FIRE

Post-supremacy federalism emerges not from formal legal change, but from structural retreat. Federal laws remain, but enforcement fades. Agencies persist, but capacity collapses. States do not seek power; they inherit it, but it comes with uncertainty, risk, and responsibility. The federal government has not relinquished its legal claims, but it has stopped meaningfully enforcing them. States act not as co-sovereigns in a balanced federal scheme, but as the last institutions standing. R

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