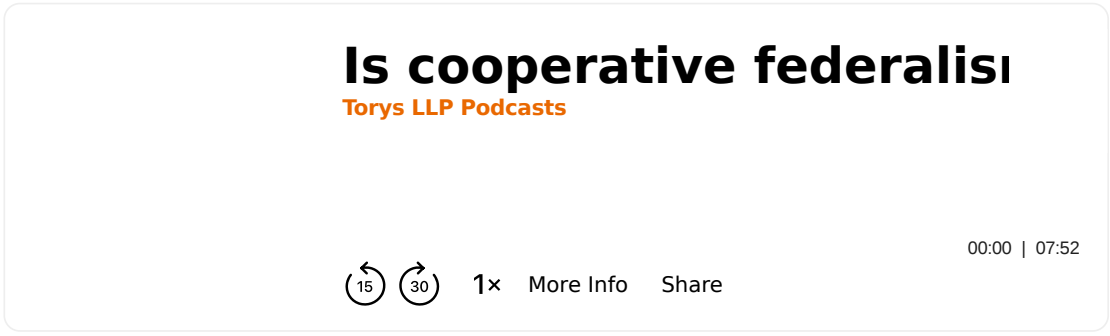
Is cooperative federalism for losers?

AUTHORS

 Andrew Bernstein

 Yael Bienenstock

Every kindergarten teacher tells their students about the benefits of cooperation. Cooperation, the theory goes, means working together, allowing people to hit heights of accomplishment that they could never reach by themselves. We are told that when we cooperate, nap time is more fun, everyone's milk and cookies are a little more delicious, and no one throws sand in your face.



Listen to authors Andrew Bernstein and Yael Bienenstock in conversation on the issue of cooperative federalism in their latest Torys in 10 podcast.

Anyone who follows federal-provincial relations in Canada knows that kindergarten can be an apt metaphor. But it turns out that the courts—forced to play referee in the federalism "sandbox"—often prefer solid legal doctrines to vague notions like "cooperation". While cooperative federalism has been invoked by the Supreme Court to blunt some overarching federal powers, arguments relying heavily on cooperative federalism are often rejected.

This winter, the Supreme Court will hear two politically charged cases that will test the limits of cooperative federalism: the references from Saskatchewan and Ontario testing the constitutionality of the federal carbon tax legislation. In their respective Courts of Appeal, both Ontario and Saskatchewan relied on the principle of cooperative federalism in arguing that the Federal carbon tax legislation invalid.

If recent history is any guide, none of these arguments will succeed. This article will briefly explain the history of this concept and show why the party who relies too heavily on cooperative federalism has likely run out of better arguments.

The rise of cooperative federalism

For nearly a century after Confederation, the governing analogy for federal and provincial powers was "water-tight compartments". On this theory, times might change, but constitutionally granted legislative authority remains the same. Federal and provincial powers were separate from one another. These powers were not intended to "leak" between different levels of government. Moreover, clauses granting what appeared to be broad authority to the

federal government, like “trade and commerce” and “peace, order and good government” were read narrowly and limited to matters such as international or interprovincial trade, national emergencies, and matters of national concern.

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As the scope and complexity of the regulatory state increased, it became increasingly difficult to keep the compartments quite so water tight. Matters arose that were not specifically contemplated by the *Constitution Act, 1867*, such as environmental regulation, public pensions, unemployment insurance and, more recently, the protection of personal privacy. Determining which level of government had jurisdiction to regulate these complicated questions inevitably blurred the boundaries between matters of exclusive federal authority (such as the criminal law, banking and Parliament’s power to make laws for the Peace, Order, and Good Government of Canada) and provinces’ broad powers over property and civil rights.

In response to these challenges, the federal and provincial governments often worked together, enacting legislative schemes meant to complement one another. As the Supreme Court noted in 1982 in *Multiple Access Ltd. v. McCutcheon*[1], a case about federal and provincial securities legislation[2]:

> [o]ur country is increasingly moving away from the older classical federalism of ‘water-tight compartments’ with provincial legislatures and federal parliament carefully keeping clear of one another. We seem to be moving towards a co-operative federalism. The co-ordinate governments no longer work in splendid isolation from one another but are increasingly engaged in cooperative ventures in which each relies heavily on the other [citations omitted].

More recently, the Supreme Court has put cooperative federalism into its constitutional context by describing it as a circumstance in which “different levels of government work together on the ground to leverage their unique constitutional powers in tandem to establish a regulatory regime that may be *ultra vires* the jurisdiction of one legislature on its own”[3].

There is no question that courts strongly support this federal-provincial cooperation, especially when it replaces federal-provincial skirmishing. An excellent example is the Supreme Court’s decision in *Reference re Pan-Canadian Securities Regulation*, where the Court held that an initiative between the federal government and certain provincial governments to implement a national cooperative system for the regulation of capital markets in Canada (called the cooperative system) was constitutionally valid.

Cooperative federalism: a dull instrument in the litigation toolbox?

While cooperative federalism is undoubtedly a positive development, its role in resolving constitutional disputes is much less certain. A quick perusal of recent judicial decisions reflects that whatever else it might be, cooperative federalism has become an argument for governments trying either to justify an intrusion into another’s jurisdiction or preventing the exercising legitimate constitutional authority. In other words, cooperative federalism seems to be the argument that parties make when they do not actually want to cooperate.

A useful interpretive aid

In the context of conflict, parties run up against a fundamental hurdle. Although everyone approves of cooperation in principle, the idea of cooperative federalism is contrary to the way Canada’s constitution was designed. The text of the *Constitution Act, 1867* grants to each level of government the exclusive legislative authority for the enumerated classes of subjects.

Because cooperation was not built into the system, but instead has been layered on top of it, relying on cooperative federalism has been most effective when used as an interpretative tool in the application of other constitutional doctrines. For example, it has been usefully employed to prevent provincial law from being subject to federal

interjurisdictional immunity, or to narrowly construe the purpose of a federal law to avoid bringing it into conflict with provincial legislation to avoid giving too broad a scope to paramountcy.

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The plea of "stop them so we can cooperate" was used most effectively in *Canadian Western Bank v. Alberta*, where the Supreme Court relied on the concept of cooperative federalism to limit the doctrine of interjurisdictional immunity[4]. A doctrine focused on exclusivity rather than cooperation, interjurisdictional immunity protects the "basic, minimum and unassailable content" of federal authority in section 91 of the *Constitution Act 1867*, effectively immunizing it from the application of provincial legislation. However, in *Canadian Western Bank*, the Court held that a broad use of the doctrine was "incompatible with the flexibility and co-ordination required by contemporary Canadian federalism"[5]. As a result, the Court described it as a "doctrine of limited application" that should not be used as a "doctrine of first recourse in a division of powers dispute"[6].

Cooperative federalism cannot limit the legitimate exercise of constitutional power

When cooperative federalism is invoked as a standalone principle it is most often rejected. As the Supreme Court reminded us in the *Reference re Securities Act*[7], when Parliament attempted to take control of securities regulation without cooperation, "the "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state"[8].

Perhaps the best example of this is in *Québec (Attorney General) v. Canada (Attorney General)*, where Parliament enacted legislation to repeal the long gun registry, decriminalize their possession and destroy the registry[9]. Québec (seeking the data for its own registry) relied heavily on the concept of cooperative federalism in arguing that the destruction provision was *ultra vires* the federal government, and that it was entitled to the data. These arguments were rejected in a 5-4 decision, the majority noting that the "primacy of our written Constitution remains one of the fundamental tenets of our constitutional framework"[10] and that the "principle of cooperative federalism, therefore, cannot be seen as imposing limits on the otherwise valid exercise of legislative competence"[11]. Put simply, "[n]either this Court's jurisprudence nor the text of the *Constitution Act, 1867* supports using that principle to limit the scope of legislative authority or to impose a positive obligation to facilitate cooperation where the constitutional division of powers authorizes unilateral action"[12]. Arguments focused on cooperative federalism were similarly rejected in *Rogers Communications Inc. v. Châteauguay (City)*, where the Supreme Court—noting that cooperative federalism can neither "override nor modify the division of powers itself"—held that the City of Châteauguay could not prevent Rogers from constructing a cellphone tower[13].

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Ultimately, courts appear to recognize that despite its superficial appeal, cooperative federalism is not capable of answering the question "who gets the last word?" In *Canada Post Corporation v. Hamilton (City)*, the city argued that the principle of cooperative federalism should operate to allow a by-law requiring municipal permits for community mailboxes to be upheld because it could be read harmoniously with the federal *Mail Receptacles Regulations*[14]. The Court rejected this argument, finding that the by-law "asserts a supervisory jurisdiction over the decision-making of Canada Post"[15]. It was therefore "not co-operative but competitive, displacing one discretionary authority with another"[16].

There was a brief moment when cooperative federalism seemed like magic words that could solve constitutional disputes, with legislative authority substituting for the pails and shovels in the constitutional sandbox. However, outside of kindergarten, it turns out that sharing is not always caring, or even possible. Instead, cooperative federalism has turned out to be largely an argument of last resort. As advocates, we heartily endorse making any legitimate argument that may help a client succeed in court. But at least for now, cooperative federalism does not appear to be a winner.

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[1] [1982] 2 SCR 161

[2] *Ibid*. at p. 190

[3] R. v. Comeau, 2018 SCC 15 at para. 86

[4] 2007 SCC 22

[5] *Ibid*. at para. 45

[6] *Ibid*. at para. 33

[7] 2011 SCC 66

[8] *Ibid*. at para. 62

[9] 2015 SCC 14

[10] *Ibid*. at para. 18

[11] *Ibid*. at para. 19

[12] *Ibid*. at para. 20

[13] 2016 SCC 23

[14] 2016 ONCA 767

[15] *Ibid* at para. 83

[16] *Ibid*.