

The Future of Federalism

Tivas Gupta

September 24, 2019

The balance of power between state and federal governments remains a divisive political issue.

Among the pressing political issues addressed in the first Democratic debate for the 2020 presidential race this past June, one topic — while not explicitly mentioned — was surprisingly prevalent: federalism. From Sen. Elizabeth Warren’s (D-Mass.) calls for a federal abortion law to Sen. Kamala Harris’ (D-Calif.) attacks against former Vice President Joe Biden and his record of leaving racial integration practices to the states, the debate demonstrated that the balance between state and federal power continues to be a divisive issue in the United States.

A defining principle of American politics, federalism refers to the division of power between national, state, and local governments. In the 200 years since our nation’s founding, Americans’ perceptions of the appropriate roles of these levels of government and, consequently, the balance of power between them, has evolved. Federal power has increased while the lines between national and state authority have become evermore contested in an increasingly polarized political climate. Federal and state governments are clashing to a new extent as minority political parties use state power to advance national policy agendas. This trend has raised new concerns around the ideological consistency and effectiveness of the U.S. government, particularly with regards to protecting civil liberties.

The Evolution of Federalism

The United States’ transition from the Articles of Confederation to the current Constitution in 1787 represented one of the first experiments with federalism in the world. The Articles of Confederation delegated almost all political authority to the states rather than the fledgling national government — reflecting Americans’ distrust of centralized authority after the American Revolution. This distrust manifested clearly in the later writing of the 10th Amendment to the Constitution, which delegates any powers not directly given to the federal government to the states.

As public perception of the role of centralized government evolved over the ensuing centuries, so did the United States’ federal system. When citizens looked to the federal government to provide economic security during the Great Depression, Franklin D. Roosevelt’s administration responded by implementing the New Deal. This measure greatly expanded the national

government's role in the economy by authorizing several public works projects and creating new public welfare programs, including social security. The responsibilities of federal government moved beyond economic welfare as the public began to demand more protections for racial minorities in the 1960s. The federal government responded by establishing the Civil Rights Act, making guaranteeing civil liberties its duty by banning segregation in public places and forbidding employment discrimination. And as trust in "big government" hit then-historic lows in 1980 due to Watergate and fears of communism, Ronald Reagan advocated for returning political power to the states. Although Reagan reversed the trend of growing federal power, his stance on federalism catered as much to changing public opinion as did FDR's New Deal.

Today, federalism reflects a different political climate. Ilya Somin, a law professor at George Mason University and an adjunct scholar at the Cato Institute, told the HPR that modern federalism is characterized by a "degree of political polarization [that] is much higher now between the two major [political] parties than it has been at any time over the last several decades." Amidst this polarized political climate, political parties have pushed to assert their own agendas and reclaim power from their opponents through the level of government over which they have the most control. In effect, the balance between federal and state power has transformed into a partisan battleground between the Democratic and Republican parties.

Under Obama, for example, Republican state governments challenged national policies on immigration, the environment, and healthcare. Democratic state governments now do the same under Trump, attacking his travel ban and defending transgender people's right to serve in the military.

These challenges to federal policy by the minority party have largely come in the form of states suing the federal government. State attorneys general are now filing lawsuits against the federal government at the highest rate in history, reflecting a broader movement by the larger political parties toward increased state power and resistance to central authority.

The Strengths of Federalism

As the nation becomes increasingly polarized, shifting political power to the states can allow governments to better respond to their constituents' needs. While the number of bills passed by the federal government has slowed considerably in the age of increased polarization, states have had an easier time passing more partisan legislation, finding little need to compromise with the opposite party. Part of the lag at the federal level can be attributed to the divide in control over the U.S. Congress, with Democrats controlling the House and Republicans in charge of the Senate. This disconnect heightens the importance of compromise, leading to fewer bills being able to pass into law. By contrast, there is only one such divided state legislature nationwide. The ability of state governments to pass legislation more easily than Congress allows parties to experiment with more conservative or liberal policy solutions on a state level before it would even be possible to imagine their implementation nationwide. It also allows for states to be more responsive than the federal government to the needs of their people, leading to more effective governance.

State policymaking can also benefit constituents because of greater consistency in political representation. In the last century, no party has held the presidency for more than 12 years straight, with each of the last five administrations switching parties after the end of every presidency. This constant back-and-forth means that the policies any Republican or Democratic administration puts into place may quickly be undone. For example, Trump immediately attempted to reverse several of Obama's policies upon taking office, including the Affordable Care Act and the Iran nuclear deal.

On the state level, however, the opposite phenomenon has occurred. David Schliecher, a professor at Yale Law School, explained to the HPR that "states can have one party in a state legislature for a really long time" as their politics are "largely uncompetitive." The data supports Schliecher's analysis: The same party has represented the governments of most states for 10 to 20 years. This longevity allows citizens to have consistent political expectations for their state governments. This political consistency and the responsive nature of state government may contribute to higher levels of trust in state governments as opposed to the national one, with only 24 percent of Americans saying they trust the federal government and a nationwide average of 58 percent saying they trust in the states.

More than distrust of federal government, many Americans distrust increased executive power, even when it might serve their political interests. Over 75 percent of the American public, across both parties, believes that it would be too risky to give more power to the president. The American people still tend to distrust the presidency as an institution, potentially because political control of the position switches between the parties almost every eight years, and Americans tend to trust the federal government more when their party is in control.

The Limits of Federalism

While increased state power can allow for the protection of Americans' civil rights against harmful federal policies, many would argue that it also allows the states to infringe on those same rights. This fear stems in part from the history of U.S. policy on race. From the nation's early dependence on slavery through the Jim Crow era, many state governments infringed upon or ignored the civil rights of minorities with little to no consequence, at least until the passage of the Civil Rights Act of 1964. This Act prohibited discrimination based on race, gender, national origin, or religion. With this troubling history in mind, the current movement toward greater state power can raise concerns about leaving the protection of civil liberties up to the states, even as it may be motivated by this very cause.

Leaving the protection of civil rights to the federal government alone, however, can also have troubling consequences. As control of the presidency and Congress can switch parties every few years, protections enacted by one administration can be reversed by the next. For example, in 2017, the Trump administration repealed the transgender bathroom protections that the Obama administration had implemented and that around half of Americans supported. Even if the federal government adequately protects civil rights, it can be necessary for states to complement these policies with protections of their own. As the federal government switches between political

parties with changing presidential administrations, the consistency of state governments can help guarantee civil liberties.

A state government can also complement federal civil rights policies by serving as a leader on and example of how to protect certain civil liberties. For example, before the Supreme Court legalized gay marriage nationwide in 2015, 12 states had already legalized the practice, pioneering a key platform of the LGBTQ+ civil rights movement. In order for civil liberties to be properly protected on a federal level, states often first act as trailblazers on guaranteeing rights.

While some view protecting civil liberties and empowering the states as fundamentally at odds, this may not be the case anymore in today's United States. The federal government can maintain its responsibility of guaranteeing civil rights even as states take the lead on certain policy issues. Just because the states are gaining more political authority does not mean the federal government necessarily must lessen its protections of civil liberties. Somin added that the idea of states being considerably worse than the federal government at protecting human rights "oversimplifies past American history, and it is certainly not very valid today ... where minority groups often have more influence over many state governments than they do in Washington." Despite the harmful historical legacy of state politics and racial rights, a shift today toward greater state political authority could actually enhance the protection of civil liberties.

Furthermore, the discussion about balancing federal and state power to protect civil liberties often overlooks a crucial third aspect of federalism: localities. State governments tend to work with local governments to decide how to best serve the interests of their communities. For Amy Liu, a director at the Brookings Institute who spoke with the HPR, "local governments are [physically] closest to people and most accountable [for their wellbeing]," making them "the best level of governing" on many key policy issues. Whereas the federal government can be inconsistent with protecting civil rights depending on which party is in power, localities can take more immediate action to reflect the interests of and protect their constituents.

The Future of Federalism in America

Even as polarization continues to drive an overall shift toward increased state power, majority political parties continue to contest state authority at the federal level. As Somin explained, "The more power is centralized, the more this kind of thing will be a factor ... that fear of letting in the other side." Whichever party captures the presidency and controls the federal government has little incentive to afford any power to the political opposition, as it can more effectively implement its political agendas at the national level. However, even if one party manages to capture the presidency and Congress, and does not concede power willingly, this trend — the opposition wielding state politics to fight back and implement their policies — may only persist.

As the American political system remains deeply polarized, minority parties are effectively using state governments as proxies for national policy battles. While the nation speculates on the political consequences of the 2020 presidential election, the policy changes already taking place at the state level may have the most impact in shaping Americans' futures.