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How liberals learned to love federalism

The left was skeptical of giving power to the states. Until the Trump era.

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This is what the battle over federalism looked like in the United States for many decades: Conservatives sought to limit federal power over state and local governments, and liberals tried to expand it.

The partisan division often shaped policy: Liberals championed national environmental rules (restricting even activities with purely local effects), the creation of new federal crimes (such as under the Gun-Free School Zones Act) and the steady expansion of civil rights laws, and the right pushed back, arguing that states deserved more autonomy in these areas. For many liberals, the ideal of state and local independence was permanently tainted by Southern states' "massive resistance" to federal attempts to remedy racial discrimination in the 1950s and '60s. "If one disapproves of racism, one should disapprove of federalism," political scientist William Riker categorically asserted in 1964.

But in the Trump era, many progressives are rediscovering the merits of federalism. They are finding that state and local governments can serve as an important check on a president whose policies they deplore, and — even more striking, given the history of the debate — that states and cities can provide valuable protection for vulnerable minorities.

Some of the most important legal battles over federalism in recent years are playing out around the question of whether "sanctuary cities" and states that oppose the Trump administration's immigration policies must help enforce them. So far, judges from across the ideological spectrum have largely sided with the sanctuary jurisdictions. But conflicts between "blue" jurisdictions and the federal government have flared up across a range of policy areas, from drugs to carbon emissions to physician-assisted suicide.

Liberals, in short, are helping to make federalism great again.

Some politicians are surely using federalism opportunistically, as a tool to promote their policy preferences. This new liberal appreciation for a legal doctrine they had long resisted may not last into the next Democratic administration. But Americans of every political stripe have much to gain from stronger enforcement of constitutional limits on federal authority. One-size-fits-all federal policies often work poorly in a highly diverse and ideologically polarized nation.

[Congress isn't just a co-equal branch. We're first among equals.]

Giving more power to states and localities can make it easier for political adversaries to coexist in relative peace. During Barack Obama's presidency, conservatives could take comfort that red states were still pursuing right-wing goals, such as adding work requirements to welfare programs; under President Trump, policy decisions in blue states provide a similar outlet for liberals. Federalism can help keep the "loyal opposition" from turning bitter and potentially disloyal, writes the liberal Yale Law School dean Heather Gerken, who has long urged liberals to take a more favorable view of federalism.

Federalism can also enhance Americans' opportunities to "vote with their feet," moving to other states or cities whose policies align with their own. With such moves, millions of Americans have, historically, improved their political and economic circumstances.

As recently as 2012, few liberals were cheering federalism, viewing it as an obstacle to their preferred national policies. In its ruling that year in *NFIB v. Sebelius*, for instance, the Supreme Court struck down the part of the Affordable Care Act that would have withheld all Medicaid funds from states that declined to expand the program to cover people well above the poverty line. Chief Justice John G. Roberts Jr. called the threat to withhold Medicaid dollars "a gun to the head" of the states and therefore unconstitutionally coercive. Many liberals were appalled. But from today's vantage point, with federalism opening fresh opportunities for blue states, they have good reason to think better of this part of Roberts's opinion and federalism more generally.

Over the past seven years, for example, 11 primarily Democratic-leaning states (and Washington, D.C.) have legalized recreational marijuana, despite the federal ban on its possession. That represents pushback against one aspect of the federal war on drugs, which has had a disproportionately negative effect on minority groups. Nine mostly liberal states and the District have legalized physician-assisted suicide for terminally ill patients, thanks in large part to a 2006 Supreme Court decision that prevented George W. Bush's Justice Department from blocking it.

More recently, California has reasserted its right to set tougher auto emissions standards than the federal government wants, as part of its efforts to slow global warming — suing to preserve targets set under Obama as the Trump administration moves to roll back those goals.

Liberal skepticism of federalism dates at least as far back as the New Deal, when conservatives resisted national-level efforts to regulate the economy. While liberals viewed these policies as essential to pull the country out of the Depression, conservatives argued that they exceeded the legitimate authority of the federal government. Later, state-level resistance to civil rights protests and laws amplified that hostility toward federalism. Alabama defied *Brown v. Board of Education* for years, culminating, at the college level, in Gov. George Wallace infamously blocking a doorway at the University of Alabama in 1963 to try to prevent the enrollment of two black students. The National Guard made him step aside. Virginia shut down public schools in Charlottesville, Norfolk and Warren County in 1958, rather than follow court orders to desegregate.

But some 80 years after the New Deal, it is hard to argue that tighter limits on federal power, along the lines we have been seeing, prevents Washington from adequately managing the economy. And in the Trump era, the view that states are the enemies of vulnerable minority groups, and the federal government their friend, seems increasingly dated. Among other reasons,

minority voters now often have greater clout in many state and local governments than they do with the federal government.

The most dramatic examples of the new political valence of federalism are the legal battles over the Trump administration's efforts to make sanctuary cities do its bidding — those jurisdictions, including San Francisco, Chicago and Philadelphia, that refuse to cooperate, in various ways, with federal efforts to deport undocumented immigrants. These cities typically refuse to help apprehend and detain undocumented immigrants who have not committed crimes (beyond illegally entering the United States), and they sometimes refuse to share people's locations and identities, arguing that such cooperation undermines trust in local government and hampers broader law enforcement.

The legal battles over sanctuary cities can get technical, but the court rulings are creating freedom for states and towns to go their own ways when they disagree with national policies. Ironically, given the solace liberals are taking from these decisions, many of the new opinions are rooted in precedents written by conservative Supreme Court justices.

The sanctuary cities' stance puts them at odds with U.S. Code Chapter 8, Section 1373, a 1996 law that bars states and localities from instructing their employees to withhold from federal authorities any "information regarding the citizenship or immigration status . . . of any individual." To force compliance, in January 2017, Trump issued an executive order seeking to deny virtually all federal grants to states and localities that did not obey that statute.

Six months later, then-Attorney General Jeff Sessions announced that states and cities that receive certain federal law enforcement grants for training police, treating drug offenders and other purposes had to obey three conditions: They must comply with Section 1373, allow Department of Homeland Security officials access to detention facilities to determine the immigration status of any noncitizens being held, and give DHS 48 hours' notice before a jail or prison releases a person whom the agency had asked to detain.

The potential implications went far beyond immigration policy. State and local governments depend on federal grants for nearly a third of their total funding. If the president could impose new conditions on those grants, the White House would suddenly have a powerful club to force states and municipalities to follow its orders.

Many cities, plus a coalition of seven states led by New York, sued to challenge the new conditions linking the grants to immigration enforcement. At least a dozen federal trial court decisions and four appellate rulings have gone against the administration, while none have supported it. Only Congress, these decisions have affirmed, can impose such terms on grants given to states and towns.

Three trial court decisions also invalidated Trump's executive order for a more fundamental reason, the same one Roberts cited in striking down Medicaid expansion: It was too coercive, amounting to a "gun to the head." In other words, it would even be unconstitutional for Congress to legislate similar conditions.

Several federal courts have gone even further in preserving state and local power vis-a-vis Washington. They have ruled that Section 1373 itself — the whole law, not just the penalties the administration wanted to impose for not following it — is unconstitutional, because it violates constitutional restrictions on federal "commandeering" of state governments.

Commandeering, a doctrine the Supreme Court established in the 1990s, occurs when the federal government forces states and cities to help enforce federal law. One key anti-commandeering case from 1997, *Printz v. United States*, struck down a part of the Brady Handgun Violence Prevention Act that forced local law enforcement officers to do background checks on handgun buyers. (Most liberals hated that ruling at the time.)

The anti-commandeering argument against Section 1373 was strengthened by an important 2018 case involving, of all things, sports betting. In *Murphy v. NCAA*, the Supreme Court struck down a part of the 1992 federal Professional and Amateur Sports Protection Act that told states they could not “authorize” such betting. The government had not ordered the states to ban betting; it restricted their ability to repeal laws that banned it already. Section 1373 is similarly indirect: It does not tell states to cooperate with federal officials but rather says they cannot order their employees to *not* cooperate. Preventing state or local governments from changing their own laws is still commandeering, the court said. “Congress cannot issue direct orders to state legislatures,” wrote Justice Samuel Alito in a 7-to-2 decision featuring an unusual coalition, with the liberal justices Stephen G. Breyer and Elena Kagan joining their five conservative colleagues.

Murphy drew striking and surprising praise from the left — marking a sharp shift from liberals’ previous reactions to decisions limiting federal power. Liberal legal analyst Mark Joseph Stern, of Slate, immediately perceived the implications of this “fantastic opinion” for marijuana legalization, sanctuary cities and physician-assisted suicide. “Its most immediate impact,” Stern wrote, “will be to remind Trump and Sessions that they can’t always boss blue states around.”

Since *Murphy*, several federal courts — including district courts in Philadelphia, Chicago and New York City — have ruled that Section 1373 is unconstitutional because it, too, amounts to a “direct order” to state and local governments, preventing them from exercising control over their own officials.

Blue jurisdictions’ pushback against the Trump agenda continues on multiple fronts. California upped the stakes in the federalism wars by enacting, in 2017, “sanctuary state” laws that impose strict limits on cooperation with federal deportation efforts and open federal immigration detention facilities to state inspection, to curb abuses. Last July, a federal trial court cited principles of federalism to uphold large portions of the laws, and most of that decision was affirmed in April by an appellate court.

All these cases add up to an important degree of agreement, crossing partisan lines, on the autonomy that the Constitution reserves for the states.

Of course, it is possible that recent liberal praise for constitutional constraints on federal power will prove to be an example of “fair-weather federalism,” the tendency of both left and right to rely on federalism whenever their opponents control the White House, only to jettison it when they themselves are in power. Conservatives, for instance, used constitutional federalism as a tool against the Obama administration but often ignore it under Trump. But there may be a trend here that goes beyond short-term partisanship.

Liberals and conservatives alike can benefit from stronger constraints on federal power. Each party can gain from protecting local diversity and experimentation, and from the insurance federalism provides in times when its opponent hold the reins of power in

Washington. Left and right can agree on the need for substantial constitutional limits on federal power, even if they differ on exactly how tight those limits should be.

The bitter civil rights experience continues to hover over the debate. But liberals can favor broad federal authority to protect against unconstitutional discrimination, while granting states and cities much more leeway in other areas.

Liberals may be tempted to abandon their newfound interest in federalism when and if they regain the White House. The “democratic socialist” wing of the Democratic Party would probably prefer to expand federal power over many issues. But Democrats would do well to remember that Trump may not be the last president whose policies pose a threat to minorities or imperil blue-state priorities on the environment and other issues. Nor are the dangers of over centralization in a diverse society likely to disappear anytime soon.

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