

## All of a Sudden, Everyone Loves the Tenth Amendment

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By David A. Carrillo and Matthew Stanford | April 17, 2020 at 06:11 PM

Federalism is having a moment. It's a prominent feature in the uneven coordination between the state and federal governments in responding to the coronavirus pandemic. And in this case, federalism is both the problem and the solution. The problem: federalism creates the space for such governmental discord, because in domestic crises like this each government occupies its own limited sphere of authority with only minimal overlap. The federalist solution is not forced collaboration. Instead, where the federal government falters, your state can save you.

Federalism describes the division of power between states and the federal government, and it is a politically agnostic check on those powers. The U.S. Constitution's framers expected the state and federal governments to be in conflict. In fact, they viewed federalism as an important counter-majoritarian feature in the administration of this vast and diverse republic. The Tenth Amendment pits state and federal ambitions against each other by reserving to states "all powers not delegated" to the federal government. This dynamic ensures that neither government can become too powerful, because citizens who feel oppressed by one sovereign can expect protection from the other.

We've been here before: federalism inspired several major upheavals in the nation's history. The post-revolution states loosely bound themselves together with the Articles of Confederation—so loosely that the central government's fundamental weakness prodded the states to call a convention in 1787 to amend the Articles and fix its design flaws. Instead, the convention replaced the Articles with a completely new federalist system, with a better balance of power between the states and the central government. Just a few decades later, arguments over that power balance nearly flashed into violence during the 1833 Nullification Crisis, which merely proved a prelude to the Civil War's actual combat over federal power. And during the civil rights era, the federal and state governments battled again—this time primarily in the courts—over individual liberty.

Those historical examples all echo in today's pandemic crisis. Some state governors called for more federal action in responding to the coronavirus, and when that call went mostly unheeded, those states acted to protect their citizens. Seventeen states—one-third of the nation—are banding together with regional pacts to coordinate their responses. Though such balkanization may conjure unpleasant Civil War memories, today's coordinated state actions in response to federal inertia show the Tenth Amendment in action.

State governors are understandably disappointed with the federal government's coronavirus coordination failures. While the national government cannot assume command in a domestic crisis as it can in a foreign war, federal government coordination to battle a plague at least poses

some benefits. In the past, the federal government harnessed its superior resources to aid states in combating domestic disasters. And this disaster's nationwide scope creates an expectation of federal leadership that, even if not constitutionally required, perhaps should be more pronounced. Yet state governors have also rightly dismissed noises about the federal government assuming absolute command of every state's pandemic response—because it can't: the federal government lacks such overall power in a domestic crisis.

The 1787 convention tells us why. By replacing the Articles of Confederation with what became the U.S. Constitution, the framers solved the weak central government problem by increasing federal power—but not by maximizing it. The federal government and the states share overall responsibility for the nation, with clearly defined roles: the federal government has limited and defined powers, while the states have general jurisdiction over most everything else.

The Tenth Amendment enshrines that division of power and reservation of state sovereignty. It provides that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Long relegated to a quiet corner full of dusty academics like us, the Tenth Amendment has roared back into public life recently, with noted conservative and liberal luminaries alike relying on it to rebut the current administration's absurd initial claim that federal authority can countermand state quarantine orders.

All this seems novel because, at least in recent memory, most fights over policy decisions have happened at the national level. Or so we've come to expect, due to our obsession with federal politics at the expense of state and local interest and participation. That memory largely flows from the most recent federalism conflict mentioned above (the civil rights movement in the 1960s), and that focus on federal solutions continued during the battle over same sex marriage as the parties sought a federal ruling to achieve nationwide effect. In both instances, liberal forces pursued a federal policy solution because they were dissatisfied with their state government policy results. That's federalism in action: forum shopping for preferable policy.

But federalism is not only a refuge for dissatisfied liberals. Both liberals and conservatives have relied on federalism to advance their agendas throughout the nation's history. The Confederate States of America aggressively advanced a conservative federalism position. In the modern era, state officials from both sides of the aisle commonly sue the federal government when the opposing party holds power in Washington. California Attorney General Xavier Becerra has filed dozens of actions against the current administration, and Texas governor Greg Abbott repeatedly sued the Obama administration. These legal battles are a normal part of state–federal relations.

Conflict between the federal government and state governments is expected and healthy, because the nation's federalist design intentionally pits them against each other. These battles are a feature, not a bug. Regardless which government you feel currently best represents your interests, you need the other to remain robust—because today's friend may be tomorrow's enemy. That's why it's a shame that state government power has waned in recent times, and why we all should be glad that states are on the march now.

Federalism is having a moment because the coronavirus crisis is shining a spotlight on state governments. Some states are meeting this challenge with total commitment; others not so much. The nation would benefit if the federal government and the states got on the same page. Meanwhile, we can at least be happy that federalism gives states the power to protect us—without the Tenth Amendment, we would all be at the mercy of Washington’s whims. Now that everyone is remembering their state citizenship, we would do well to recognize the merit in American government’s belt-and-suspenders solution, and to keep carrying a torch for the Tenth Amendment when the coronavirus crisis ends.

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