

# DOES FEDERALISM STILL MATTER?

ECONOMIC, POLICY, AND POLITICAL conditions that influence federalism have changed, maybe permanently.

The power of federal preemption — together with other factors including media influence, technology, political parties, the role of money in politics, and the tremendous power of the professional-advocate class — have tilted the field. These elements have thrown federalism into a state of imbalance to a degree that the Founders could not anticipate.

## Background of federalism

At the founding of our nation, state governments relative to the federal government were well established. The Founders drafted the U.S. Constitution to protect the federal government against irrelevancy in comparison to the states, which was the fate under the Articles of Confederation (Fed. 46). It was a first principle that both federal and state governments derived authentication from the people; however, “[the States should be regarded as distinct and independent sovereigns ... and are so regarded by the Constitution proposed” (Fed. 39 and 40).

Madison declared that for “the new government, as in the old, the general powers [of the national government] are limited; and that the states in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction” (Fed. 40). The Founders did not declare whether the federal or state governments were dominant; instead, they left sufficient ambiguity because the political costs of selecting one over the other would likely doom the birth of the Constitution.

## Pressure for reform

The powerful recession of 2007-2009 and its aftermath will have profound long-term effects on the scope and scale of government at all levels. Most every recessionary cycle has sparked debate about the long-term sustainability of government’s ability to deliver on its promises, but those debates did not morph into permanent reforms.

Economics may be the tipping point that pushes application of the doctrine of federalism toward substantive change.

The post-recession pace of recovery in jobs, income, and investment remains flat, at best, through the intermediate term and slow to return to

pre-recessionary growth levels. At the state level, revenues have crept back to pre-recession levels, but expenditures remain behind. This “new normal” now manifests in numerous U.S. Bureau of Labor Statistics data points, including that the share of the available labor force that is working dropped to 63.6 percent in November 2012 from 65.7 percent when the recession ended in June 2009. Obligations, however, continue to rise, including but not limited to mounting federal debt and interest payments, pension and health care liabilities, mandatory growth in entitlements, and a growing list of deferred infrastructure maintenance and investment needs.

This “new normal” also infects politics. The political trench warfare over the debt ceiling, sequestration, and the “fiscal cliff” only exacerbates uncertainty for individuals and businesses and deepens skepticism about the federal commitment to real solutions.

The fiscal crisis brought on by the recent recession also has brought a new seriousness to government reform efforts. This invites reconsideration about core services delivered by government because government



cannot tax or borrow, redeploy depleted accounting gimmicks, or cut discretionary spending deep enough to overcome structural budgetary imbalances. This seriousness creates an opening to reevaluate the practical application of federalism and consider its realignment as part of any “new normal.”

### **New way to view federalism**

The Founders envisioned balance of power between the states and federal government. But federal encroachment over the decades has choked off sub-federal liberty to a point where the partnership envisioned by the Founders has devolved, in many cases, into a dysfunctional relationship. An alternative could be distributive federalism.

Distributive federalism would allocate responsibility on issues among the levels of government within the nation’s constitutional structure using a “best interest of the public” standard to improve how government serves the people. Assuming that federalism is more a political than a legal doctrine, open to subjective influences, the application of a standard of review offers an objective tool to referee certain

federal preemptions. This standard of review could include factors such as:

- What level of government has the strongest capacity to deliver in terms of professional expertise and budget/ fiscal support?
- Has the level of government ceded authority over this issue previously?
- What level of government has the most to gain from securing primary authority over a particular issue?
- Is the focus of the issue (the principal target of outcomes, *not* the means to achieve them) primarily on the individual/local, group/national, or some combination?
- Do the affected parties recommend a preferred level of government to hold primary authority because that level offers necessary objectivity?
- Does the issue involve an emergency matter of national significance (e.g., war powers) that would preclude state primacy?

Federalism, if practiced fairly, aligns more closely with competition — not monopoly — because the levels of government are serving the same people. For the same reasons private

monopolies are considered inefficient generally, a federal “monopoly” chills innovation and creativity. Distributive federalism is intriguing because it may help enable invention, balance, and nimbleness. If the people and their public servants — elected and career — uphold distributive federalism, then our federal partners must stand down on occasion.

### **Roadmap toward distributive federalism**

To put distributive federalism into practice, we need the means to make operational the assignment of responsibilities among the levels of government according to the “best interest of the public” standard.

Could the judiciary do it? The courts in recent years have upheld the presumption against preemption, blocking federal overreach in certain regulatory preemptions. The role of the courts, however, is to adjudicate preemption challenges, not make initial allocation decisions because those are inherently political questions.

Could Congress do it? While constitutionally reasonable, the track record of Congress to muster the

political will necessary to make decisions on a consistent and timely basis is subpar.

Instead of a straw-man proposal that might produce either excitement or angst about the reincarnation of the U.S. Advisory Council on Intergovernmental Relations, consider these general principles to begin a conversation about an operational framework.

First, it must be agreed that federalism is foundational. The doctrine must be revered as first principle and made resistant to capture by party or personality. Building such a policy-legal-political culture requires an ongoing, long-term process, demands a critical mass of top-down and bottom-up leadership committed to support it, and begins only after a thorough evaluation that concludes this is the right course of action.

Second, decisions that affirm federal preemption should include a sunset clause to force a review after a date certain to repeal, modify, or renew the preemption. This would reaffirm the presumption against preemption. Any operational strategy must sanction sufficient authority to investigate issues, evaluate conditions, make recommendations, and conduct oversight over gray-zone preemptions. It also must support independence to guard against excessive influence from any particular affected entity.

Third, to allocate responsibility on issues among the levels of government requires administrative nimbleness to meet changing conditions that drive public policy. Preemptions that may appear clear cut today can turn cloudy fast because conditions do change.

Fourth, any operational strategy must be intergovernmental. If a formal structure emerges, the design of its leadership structure must ensure equalized representation among the levels and branches of government. Rules of operation must protect the intergovernmental balance of power, promote institutional stability but ensure regular infusion of new members, and preserve balanced representation by geography, experience, and point of view.

Fifth, the lines of jurisdictional responsibility on issues among the levels of government must be distinct. They would not necessarily be redrawn in matters governed by enumerated powers or affirmed by long-standing federal statutory or regulatory authority that captured the field. Not so for gray-zone matters about which Congress has either not spoken, or only indirectly tackled. This would likely include issues for which the question of primary authority is debatable because relevant conditions changed and for which states have normative responsibility historically but the federal government seeks to commandeer authority. Following the nimbleness principle, however, precise lines of jurisdictional responsibility may shift over time.

Embracing federalism as a means of assigning responsibility on issues among the levels of government could help advance an improved policy process, robust participation, stronger outcomes and outputs, and clearer allocation of power focused on how government can best deliver for the public. It also presents an opening to begin a robust debate whether federalism still matters.

### **Federalism matters**

Federalism matters because it provides a method to reset relationships and responsibilities in a post-recession economy. The recession's trauma reaffirmed that the federal government cannot do it all. This time, however, the federal government has nearly exhausted any real or perceived cushion that, in the past, afforded more time and delayed hard conversations and difficult decisions about priorities. The recovery period provides a window of time for government at all levels to engage in painful conversations about restructuring according to needs versus wants. Those discussions also should create new opportunities to educate the federal branch about how states and local governments work because the federal government must not shift onto them the federal promises it cannot deliver. No

doubt, these conversations will raise questions about fairness over choices made; yet there is no question about the justness in finally having to make them.

Federalism matters because without it, federalization prevails, marginalizing federal-state-local collaboration. Collaboration requires teamwork and trust that could help redirect policies toward ends, not means. There has been much talk but little change to federalism in practice because the federal government sets the terms. The federalization of federalism means that states often engage in a “mother-may-I” struggle with the federal government on many critical policy issues. It seems that modern federalists often dismiss sincere concerns about a federal-centric normative structure because, their argument goes, without the federal-parent setting the agenda, those child-states would race to the bottom. Reflexive default to preemption — modern federalism's proxy — poisons the well for collaboration. Distributive federalism would help recalibrate federalization's skewed emphasis on means, not ends, and shift focus onto what level of government delivers best for the public on a particular gray-zone issue.

Finally, federalism matters because not every public policy challenge requires a national solution. Many are complex, and responses must not default to “one-size-fits-all” because some challenges invite states and local governments to innovate. This shift, if allowed to ripen into a foundational principal, would help usher in a functional intergovernmental relationship that can help rebalance responsibilities and reach accord about what issues are truly national in scope.

The future for federalism could be bright, if given the chance.

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