

# Federalism, man

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By David A. Carrillo, David Belcher and Michael Belcher | May 31, 2024



You can thank James Madison for former President Donald Trump’s conviction this week in New York state court: it happened only because of Madison’s concept of federalism. The fact that state and federal actions can proceed in parallel against Trump in the first place flows from Madison’s design for our nation as a federated republic of sovereign states. But regardless of how you feel about the former president’s New York trial, you should be grateful for Madison’s vision of dividing power between state and federal governments, because it’s the reason Trump’s various legal matters can reach divergent results. Absent federalism, this would be an all-or-nothing scenario, and that would be worse for liberty—his and yours.

Federalism came about when Madison solved the problem of how to get two sovereigns to rule the same land in harmony by rejecting part of the premise: his solution to the conflict inherent in joining two sovereigns was allowing them to conflict. He anticipated that conflict was unavoidable and decided to exploit it rather than futilely attempting to evade it. The advantage he saw was to individual citizens who benefit from the clash of governments in two ways: having dual sovereigns better protects liberty by allowing citizens oppressed by one government to seek refuge with the other, and slowing the policy-making process by having two policymakers is often to the individual’s benefit.

Dual sovereignty is the aspect of federalism that explains why both state and federal prosecutors can pursue the former president. That principle allows both the state and federal governments to prosecute the same person for similar crimes without violating the federal constitution’s prohibition against double jeopardy. The bar to successive prosecution doesn’t apply across the state/federal border because they are separate sovereigns, each with a sovereign’s power to prosecute crimes within their respective jurisdictions as defined by their own laws. That’s why

it's possible for state prosecutors to go after Trump, and why state judicial officers can exert personal jurisdiction over the nation's former highest officer. The mighty federal Department of Justice may be stymied, but no matter: we still have state courts.

More generally, federalism has been the cause, curse, or catalyst of many great public policy conflicts; the Civil War is the obvious example. Yet the dynamism-and-duality of federalism almost always creates a net benefit to citizens. At times, the federal government has used federalism as a sword to combat regressive state policies and further individual liberty. The Civil Rights Act, the Voting Rights Act, and school integration are classic examples. Without federalism life today would look very different in the former Confederacy.

At other times, states have used federalism as a shield against overreaching federal power, protecting policy decisions against a federal override with independent state law grounds. Indeed, many of the most progressive modern policy ideas came from the states. Same sex marriage? You're welcome (Massachusetts). Medical marijuana (Oregon). Clean air, water, and stricter car emissions standards—in fact, electric cars in general—are all from the Golden State. Just so, in the battle over individual liberty the federal government can be your best friend or your worst enemy, and the same is true for your state. That's federalism: win some, lose some.

Those policy results are the tail wagging the dog, as state policy decisions took national effect. California often illustrates this, when (as the largest market in the country) its decisions affect national policy. Think of automobile emissions standards in the clean air context, or the California same-sex marriage evolution that caused changes in federal law. Other examples similarly show the volleying that can characterize the policy debates federalism fosters: arbitration, abortion and capital punishment. Those issues all evolved in a series of competing legislative and judicial acts that bounced the action between the state and federal governments. The federalism point here is that this interactive policy-developing process is possible only because our republic is a union of sovereign states, not a strict hierarchy. Absent that and you would always have only one (federal) answer. The public debate federalism creates is its point and its benefit.

So for those who often and loudly advocate for nationalizing everything, ignoring the lessons of history, this current episode should be a reminder that one national standard can often be inferior to the seeming chaos of 51 different solutions. And this should demonstrate the foolishness of ceding ever more power to the federal government on the thin rationale of consistency. Instead, a liberty-loving person should be striving to maintain a balance of power between the two sovereigns, the better to play them against each other, the better to maintain individual freedom.

Thus, it doesn't matter whether you think convicting a former president in state court, or failing to effectively prosecute him in federal court, is a travesty or justice. Either way, you have benefited from federalism by the very fact that our nation's federalist design allowed those dueling scenarios to occur at all. Now of course the action returns to the federal arena, with other potential inflection points later this year. There too the states will play their role. If this year proves to be federalism's greatest test, then let this be its finest hour.

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