Political Resistance and Two Dirty Words

Reframing Federalism and State Sovereignty in the Face of the Second Trump Term

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The dust has settled, the shock – not really. On November 6, Donald Trump won the 2024 presidential election in a landslide, winning all Swing States and the popular vote. This not only marks the unfortunate end to Kamala Harris' campaign to become the first female president of color – the Republicans also flipped the Senate and held the House. Add to that the conservative Supreme Court, and it becomes clear that the U.S. will be in the MAGA movement's firm grip for the foreseeable future.

Given the dire consequences of Trump's second presidency looming on the horizon (see here), it would be natural for Democrats' reactions to include some of English's finest swear words, the f- and the s- words in particular (see here at 7:43 or here at 27:52 and 34:52). But besides swearing being impolite (oh, the irony), there are at least two other dirty words to consider: Federalism and (State) Sovereignty. While in theory neutral concepts, they have been contentious in the U.S. due to historical ties to slavery and racism. Nevertheless, it is time to use them for progressive purposes and shield Democrat states against excessive overreach by the Trump administration, as some had already suggested during the first Trump presidency (see, e.g., here, here, and here).

Values and Vices of Federalism and State Sovereignty

While there are varying definitions, federalism generally denotes a system of divided (political) authority among separate levels of government. One feature of federal nations is the subnational units' right to self-government, better known in the U.S. as State sovereignty. This admittedly opaque concept (alongside the X. Amendment) serves as the basis for several constitutional doctrines protecting the States' authority beyond the mere enumeration of powers inherent in every federal system.

By dividing political authority among the different levels and shielding the states from federal intrusion, federalism and sovereignty can serve valuable purposes: they can provide adaptive means to accommodate different needs in geographically and climatically diverse nations (see, e.g., the Clean Air Act's special provisions concerning California). This can also help alleviate ethnic, cultural, or linguistic tensions and allow for a government "close to the people". Moreover, federalism and sovereignty allow governments to compete and experiment, becoming "laboratories of democracy". They similarly enable differing policies on the federal and state levels, giving political minorities a chance to put their visions into practice (see, e.g., the "We Are Still In" initiative). Finally, they slow down the political process and provide checks on government overreach. While often lamented for their inefficiency, they can equally bolster individual rights protections and block an oppressive federal government.

Of course, federalism and sovereignty also pose risks. They can lead to inequalities, create tensions in polarized political systems, undermine democratic accountability and can be misused for autocratic purposes, especially in the U.S. (Pepper, Laboratories of Autocracy, 2021). Nevertheless, both concepts are inherently value neutral. They can be wielded by Democrats and Republicans alike in service of their agendas. Their core benefits lie in their potential to accommodate diversity and shield States from hostile federal intrusion.

Instruments of Racism and Slavery

In the U.S., however, these benefits have historically been (ab)used to promote the goals of slavery and racial discrimination. The U.S. Constitution presented a compromise between large and small States, but also between Free States and Slave States, as evidenced inter alia by the Fugitive Slave Clause, the Three Fifths Compromise, or the Electoral College.

The controversy continued throughout the Westward Expansion during the first half of the 19th century. Advocates of slavery used federalism and sovereignty to argue that the federal government couldn't abolish slavery in the new States, opponents of slavery objected rigorously. In the end, the Supreme Court stepped in: in its most despicable decision to-date (Dred Scott v. Sandford) it not only declared that black people weren't citizens, but also used its own theory of sovereignty to prohibit the federal government from banning slavery.

The tensions escalated and in 1861, eleven States seceded from the U.S. In its declaration of secession, South Carolina invoked slavery as the main cause, but additionally relied on sovereignty to justify its treacherous act. This resulted in the Civil War with over 600,000 soldiers dead. In 1865, the abolitionists won and brought about a radical transformation of the South (and the entire federal system) during the Reconstruction Era, with the Amendments XIII, XIV and XV protecting fundamental rights against the States and granting the federal government significant new powers. Still, Reconstruction proved to be only partially successful, and the situation of black people remained precarious.

The perspectives on federalism and sovereignty also changed more generally: whereas the case law was characterized by conservative (and often racist) tendencies until the mid-1930s, the New Deal ushered in Cooperative Federalism and the understanding of federal powers changed: States and the federal government were not deemed entirely separate and independent anymore, and the latter's powers were interpreted more broadly. In tandem, these developments enabled the rise of the modern administrative state and civil rights legislation. Opponents again sought to invoke sovereignty but failed: the Supreme Court understood the protection of State self-government to be one of political process, not of substantive doctrine.

From the 1990s on, however, the conservative Supreme Court started a "Federalism Revolution" – the same Court that issued controversial decisions like Dobbs or Trump v. United States and is going to shape the U.S. constitutional landscape for the foreseeable future. Rebuilding a more robust federalism, it developed new doctrines grounded in state sovereignty and the X. Amendment to protect the States from federal interference. Conservatives have seized that momentum: During the Biden administration, the South has used federalism and sovereignty as excuses to defy federal orders concerning individual rights. Among the most striking examples is Texas Attorney General Ken Paxton, who refused to fulfil his duties towards the federal government on numerous occasions, and relentlessly sued federal authorities in matters such as vaccination mandates.

Progressive Federalism and Sovereignty against the Trump Administration

Despite these concerns, robust understandings of federalism and sovereignty can prove useful in blocking Trump's authoritarian plans – fully in line with their virtue of protecting against federal tyranny and their vice of inefficiency. I will focus on two routes Democrats can take to harness the progressive potential of the f- and s-words.

Political Routes and The Dirty F-Word: As to political resistance, the work of the Nationalist School of Federalism deserves a particular shoutout. Led by Dean Gerken of Yale Law School, its members seek to promote new ways in which States can implement their own policies and strengthen the rights of minorities.

Although the States and the federal government formally act separately, in practice they often cooperate to administer joint programs in what can be called "Intrastatutory Federalism". The States (and localities) have thus considerable influence on the actual implementation of federal measures and can (re-)shape or

block harmful programs, engaging in Uncooperative Federalism. Through disaggregation of political bodies and diffusion of power, national minorities can become local majorities and shape policy themselves, thereby dissenting by deciding. Furthermore, local communities offer the opportunity to establish their own programs at a local level and strengthen their case in opposition to federal policies – it is easier to argue if you can point to concrete, well-functioning practical examples. That way, they can also work to protect individual rights – federalism and rights work as "interlocking gears". Such a comprehensive account of federalism can help Democrats understand its progressive potential and adapt accordingly. As Gerken argues, this proves more useful against the Trump Administration than arguments relying on sovereignty (see here, here, or here).

Doctrinal Routes and The Dirty S-Word: Nevertheless, sovereignty has merits for progressive purposes as well (for somewhat similar arguments during the first Trump administration c.f., here, here, or here). More specifically, it is time to turn the Supreme Court's recent doctrinal innovations during its "Federalism Revolution" against their conservative creators. Three examples illustrate my point:

First in line is the Anti-Commandeering Doctrine. The U.S. Constitution formally envisions a dual system in which the federal and state levels administer their own laws independently. The Court built on this by prohibiting the federal government from *directing* the States' legislative and executive branches to implement federal programs (New York v. United States; Printz v. United States). While the Anti-Commandeering Doctrine has often hampered progressive policies like gun control, it can now foreclose attempts by the Trump administration to force the States to enact its policies.

The Anti-Coercion Doctrine heads in a similar direction. Since the federal government has limited or no competence in several policy areas like healthcare, it can only use its spending powers to financially induce the States to enact desired policies. However, the Supreme Court has set certain limits. In particular, Congress cannot coerce States into enacting these policies via large financial offers and/or sanctions (South Dakota v. Dole; NFIB v. Sebelius). The Anti-Coercion Doctrine can therefore block coercive Republican efforts (for a first, albeit unsuccessful attempt, see State of New York v. Yellen and here).

A third candidate is the Equal Sovereignty Doctrine, established in Shelby County v. Holder. Here, the Supreme Court declared Section 4(b) of the Voting Rights Act of 1965 unconstitutional. The law had established a formula under which States with a historical track record of voting rights discrimination were subject to an oversight procedure. It therefore only targeted some States and severely restricted their capacity to regulate elections as part of their right to self-government. The Court therefore demanded that such unequal treatment among the States be sufficiently justified. Considering the progress in the fight against voting discriminations, the Court deemed the differentiation no longer justified and declared § 4(b) VRA unconstitutional. As expected, however, this lead to a resurgence of voting discriminations which have also impacted the current presidential election. The ruling is one of many in which the Supreme Court has undermined minority voting rights and faced heavy criticism, also with regards to the previously unknown Equal Sovereignty Doctrine (see the dissent by "The Notorious RBG"). It is viewed as emblematic of the Roberts Court's blind spot for racism and its elevation of States' rights over individual rights (see, here, here, or here). But that need not be the case going forward: like the general principle of equality, the Equal Sovereignty Doctrine is value-neutral and can be used for progressive purposes. Recently, Hayes proposed using it as a basis to include territories like Puerto Rico. Should the Trump administration target Democrat States, the Equal Sovereignty Doctrine is the way to go. A first glimpse of this defense was on display in the plaintiff's motion in State of New York v. Wolf, where the first Trump administration tried to force only New York to change its immigration laws by making interstate travels more difficult for New York citizens. The issue was resolved on other grounds, but the Equal Sovereignty Doctrine supported New York's cause just as well (see also here).

These examples are merely the tip of the iceberg. There are more ways to defy an excessive federal government and more doctrines that await a progressive reframing. In fact, we are already witnessing first steps in this direction: California Governor Gavin Newsom has declared that his administration will enhance its efforts to protect reproductive rights and the environment, among others. It intends to improve and solidify current legislation and to redirect budgets to facilitate bringing claims against federal actions. This embraces both the federalism and the sovereignty strategies outlined here. Indeed, Newsom emphasized the importance of federalism for preserving the Constitution – causing another Trump tirade.

Not So Dirty After All?

Trump's second term will be a challenge for the international legal order, American democracy, and fundamental rights, particularly of the most vulnerable. It is the Democrats' task to step up and alleviate the worst consequences of a MAGA federal government.

Two dirty words might help them in doing so: federalism and sovereignty are contested notions in the U.S. given their historical ties to racism and slavery. Nevertheless, they are at their core value neutral and should be used both politically (federalism route) and doctrinally (sovereignty route) to counter federal MAGA policies. While they have been nourished by conservative agendas for too long, it is time to harness their inherent progressive potential.

It would be naïve, to think that this will suffice to stop Trump. There is no guarantee, for instance, that the Supreme Court will stick to its doctrines, given its doubtful reasoning in recent cases. Moreover, federalism and sovereignty cannot protect federal institutions. Nevertheless, they will be useful tools in a larger toolbox Democrats will need to develop as soon as possible. Let's not shy away from the dirty f- and s-words – perhaps they aren't so dirty after all?

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