Trump, Federalism and the Punishment of Sanctuary Cities

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Historically, liberals have tended to hold more expansive understandings of the scope of federal power.

Conservatives, on the other hand, have tended to embrace stronger theories of federalism - the term we use to describe the reservation of government power to state and local governments under the Constitution.

The 10th Amendment captures the essence of our federalism: “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.”

Consider the recent debates over the constitutionality of the Affordable Care Act, also known as Obamacare. Many liberals defended Obamacare as a perfectly appropriate exercise of federal power to solve a national problem. Many conservatives, in contrast, saw Obamacare as a vast federal overreach. These positions typified the usual positions of liberals and conservatives on major federal social programs.

Now, consider the emerging debate over the vigorous enforcement of the nation’s immigration laws promised by the Trump administration. In this new context, the traditional positions of liberals and conservatives with respect to federalism have been turned on their heads.

On Jan. 25, President Donald

SEE CONSTITUTION D6
Sanctuary cities cases could lead to important new federalism rulings

CONSTITUTION FROM D1

Trump issued an executive order directing that federal funds be withheld from so-called "sanctuary cities." Sanctuary cities, which are typically controlled by relatively liberal political forces, limit their cooperation with the federal government in enforcing national immigration laws as a matter of local policy. In response to the executive order, a number of sanctuary cities filed lawsuits challenging its constitutionality. These lawsuits assert a number of theories, but place two arguments front and center.

First, the order coerces the cities to participate in a federal law program from which they are constitutionally entitled to abstain. Second, the order impermissibly commandeers local authorities to serve as unwilling agents of the federal government. The success of these arguments will likely depend on how courts apply two Supreme Court federalism precedents created in the context of conservative challenges to liberal federal regulatory programs.

The first precedent arose from the fight over Obamacare. Recall that, after Obamacare was enacted, a number of states refused to accept the Medicaid expansion, which would have made available to state and local governments federal funds to cover the costs of health care for low-income individuals. The Supreme Court upheld the core of the statute against constitutional challenge, the lawsuit succeeded in part.

In 2012, in National Federation of Independent Business v. Sebelius, the Supreme Court held that Congress could not coerce a state to accept Obamacare's Medicaid expansion provisions as a gun to the head of the states.

The “Brady Bill” sought to prevent the sale of guns to persons who are barred by law from owning them because of, for example, their criminal history. In the context of this objective, the Brady Bill authorized development of a federal database that would be used to determine whether potential purchasers were indeed eligible to buy guns. By threatening to withhold federal funds, Congress was effectively obligated to do so under federal law. The law also contained intergovernmental provisions requiring that the database be used to conduct background checks in connection with proposed gun sales.

Sanctuary cities challenges to liberal federal regulatory programs.

The success of these cases illustrate that federalism is not only the domain of conservatives. In 1976, in New York v. United States, the Supreme Court held that the commandeering of local law enforcement officials worked by the Brady Bill's interim provisions is not permitted under the federalist structure of government, as described in the 10th Amendment.

Writing for a 5-4 majority, Justice Antonin Scalia stated that such legislation could blurr the lines of political accountability, as voters who do not want their local elected officials doing federal background checks might not realize that the officials were obligated to do so under federal law. Also, upholding such legislation would violate the federal government's right to prosecute state governments as its subordinate agents instead of as separate sovereigns.

Perhaps these cases will make their way to the Supreme Court and give rise to important new federalism rulings. In any event, it is not too early to take note of how these cases illustrate that federalism is not only the domain of conservatives.

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