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Trump, Federalism and the Punishment of Sanctuary Cities

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H istorically, 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 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 federal funds to help its implementation. While the Supreme Court upheld the core of a statute against constitutional challenge, the lawsuits 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 by conditioning all of the state's Medicaid funding on whether the state did not accept the Medicaid expansion. Congress was effectively making the states an offer that they could not refuse. Federalism does not permit this.

The second precedent arose from litigation over provisions of a 1993 federal gun-control statute named for James Brady, President Ronald Reagan's press secretary who was badly wounded in a 1981 assassination attempt on the president. The "Brady Bill" sought to prevent the sale of guns to persons who were barred by law from owning them because of, for example, their criminal history.

In furtherance 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. But before the database could be completed, the law also contained interim provisions requiring local law enforcement officers to conduct background checks in connection with proposed gun sales until the database was completed.

Two local sheriffs who objected to being temporarily commandeered into federal service under the Brady Bill brought lawsuits claiming that these interim provisions violated the Constitution. And they won.

In 1997, in Printz 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 our federalist structure of government, as described in the 10th Amendment.

Writing for a 5-4 majority, Justice Antonin Scalia stated that "the executive branch may not coerc[e] and commandeer local officials in violation of the Tenth Amendment." 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.

John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.)