



BY ROBERT A. LEVY

CHAIRMAN'S MESSAGE

Volte-Face: Federalism in the Age of Trump

In the aftermath of the Trump election, liberals seem to have rediscovered federalism—although grounded less on principle than on the conviction that states' rights might better serve the progressive agenda. Not to be outdone, Republicans, who now control both legislative and executive branches, appear willing to abandon federalist principles in favor of strong central government freshly enabled to advance conservative preferences.

That role reversal is reflected in positions on issues such as drug legalization, tort reform, sanctuary cities, and gun control—reinforced by flawed views of the Constitution's Commerce Clause, spending power, and the Second Amendment.

Let's start with Congress's power to regulate interstate commerce. Marijuana in some form is now legal in 44 states. But under federal law, the use, possession, sale, cultivation, and transportation of marijuana is illegal. What say our conservative champions of federalism?

Republican drug warriors—buttressed by liberal Justice John Paul Stevens's 2005 opinion in *Raich v. Gonzales*—have invoked the infinitely elastic Commerce Clause to justify national prohibition. Indeed, Attorney General Jeff Sessions criticized President Barack Obama for not being tough enough on marijuana, saying “You have to have leadership from Washington.” And White House press secretary Sean Spicer confirmed on February 23 that the Justice Department will be doing more to enforce federal marijuana laws.

Never mind the warning from conservative Justice Clarence Thomas, who dissented in *Raich* despite his anti-drug predilections. Thomas wrote that *Raich* used marijuana that had never been bought or sold, had never crossed state lines, and had no demonstrated effect on the national market. He added, if Congress can regulate that under the Commerce Clause, then it could regulate virtually anything—quilting bees, clothes drives, and potluck suppers.

Or consider tort reform—especially malpractice cases, in which the litigants are almost always from the same state. Nowhere in the Constitution is there a federal power to set rules that control lawsuits by in-state plaintiffs against in-state doctors for in-state malpractice. Some malpractice awards may be shocking, and the impact may be widespread. But not every national problem is a federal problem.

Nonetheless, House Speaker Paul Ryan and Tom Price, secretary of health and human services, have pledged to include tort reform in their replacement for

the Affordable Care Act. They say frivolous lawsuits are inflating malpractice insurance premiums, which raise health care costs. The remedy: nationalize malpractice relief. So much for the federalist notion that the states should serve as 50 experimental laboratories.

Ditto when it comes to the spending power and sanctuary cities. Mayors in several cities—including Los Angeles, Chicago, and New York—have refused to cooperate with federal immigration authorities in detaining and deporting illegal aliens. In response, President Trump has promised to cut federal funding for those cities. That threat ignores two principles of federalism.

First, while federal law supersedes conflicting state law, and states may not impede federal enforcement, neither the president nor Congress can commandeer state officials to execute federal law. Second, the feds may not deny funding to states in a manner that essentially compels cooperation. That's how the Obama administration tried to force states to expand Medicaid—by withholding all Medicaid funding if a state said no. The Supreme Court reminded the administration that a coercive condition imposed on receipt of federal funds is incompatible with federalism and thus unconstitutional.

Finally, consider the Second Amendment and the right to bear arms. On November 8, voters in California, Nevada, and Washington opted for stricter gun control. Some conservatives demand national gun control standards. But Second Amendment rights are not absolute. Local jurisdictions retain the ability to regulate the manner of carrying guns, prohibit carrying in sensitive places, bar weapons that are not covered by the Second Amendment, and disqualify possession by dangerous individuals. And federalism dictates that what's allowed in the hills of Montana need not be allowed in downtown Chicago.

Recall that the essence of federalism is dual sovereignty—shared authority between federal and state governments to shield individuals from concentrations of power. Justice Anthony Kennedy in *United States v. Bond* put it this way: “By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual.” That means the proper balance between federal and state power must be rooted in the Constitution's embrace of limited government and individual liberty—not liberal or conservative politics.

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