



Fair-Weather Federalists

Conservatives continue to champion the 10th Amendment while ignoring the Trump administration's overreach

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A common refrain from conservative Donald Trump supporters was that Trump would ensure the sanctity of the 10th Amendment through his court picks and his nominee for attorney general. Only a month into the administration, however, that hope is already in danger of collapsing.

While there is every reason to believe that Neil Gorsuch will be a solid federalist, the trajectory of the Department of Justice and the administration as a whole is threatening a much different path.

Recently White House Press Secretary Sean Spicer said that states that have legalized marijuana would see more federal enforcement action. This suggests that the Sessions Department of Justice would take a more federal line on marijuana than the Obama administration, which largely, albeit inconsistently, respected state laws legalizing marijuana.

The response from at least one legalizing state was immediate: Washington Attorney General Bob Ferguson, fresh from a successful challenge to the Trump administration's Muslim travel ban, stated that he "will resist any efforts by the Trump administration to undermine the will of the voters in Washington state."

This hostility to federal intervention into state sovereignty is an argument that should be familiar and persuasive to 10th-Amendment-loving conservatives. Yet across the country, conservatives seem to be abandoning the cherished concept of state sovereignty whenever it's used to defend state behavior they don't like.

Republicans are still quick to invoke the 10th Amendment when it comes to protecting certain policies from federal interference. Just this week, Texas Attorney General Ken Paxton stated that President Obama's effort to federally protect transgender public school students "unlawfully invaded areas that are left to state discretion under the 10th Amendment." Conservatives have made similar arguments to fend off federal control of sexual assault investigations on college campuses under Title IX.

But when the debate shifts to drug prohibition or the way local law enforcement agencies interact with immigrants, that support for local control seems to evaporate, risking the credibility of the entire concept.

A strict reading of the Constitution, on which Republicans have prided themselves for decades, compels a conclusion that the federal government has no authority to override state drug policy, nor to commandeer state officials to enforce federal immigration laws. These "unlawful invasions of state discretion" are just as brazen as federal bathroom regulations, and carry much graver consequences for our constitutional system.

Criminal justice is traditionally a state function, and historically when the federal government wanted new authority to invade the state criminal justice space, it had to ask for it.

When the federal government wanted to ban alcohol, for instance, federal agents didn't just start arresting alcohol traffickers. Prohibition advocates were forced to secure an entirely new amendment to the Constitution granting the government the authority to prohibit alcohol. That authority was subsequently rescinded by the 21st Amendment when alcohol prohibition turned out to be a disaster.

Why should drug prohibition be any different?

The citizens of eight states and the District of Columbia have voted to legalize recreational marijuana. The citizens of dozens more states have voted for some form of medical marijuana allowance. That is how our constitutional system is designed to function, and Republicans should respect that principle even if they're convinced that "good people don't smoke marijuana."

The same issue arises in the debate over sanctuary cities. The term is slightly nebulous, but the primary aspect is a policy whereby state and/or local law enforcement agencies commit to only enforcing local law, rather than splitting time as proxies for federal immigration enforcement.

That exercise of local sovereignty has similarly come under fire from the Trump administration, which has threatened to strip funding from localities that refuse to submit their enforcement agencies to federal control.

In the constitutional context, the federal takeover of local law enforcement is known as "commandeering," and it has long been opposed by advocates of 10th Amendment federalism. It's up to the federal government to enforce federal immigration law, not state agencies that are supposed to be enforcing federal law and instituting the priorities of their local constituents.

For those who care about decentralized power, checks and balances, and limited government, inconsistency by federalism's staunchest advocates should alarm.

The more seemingly partisan this fair-weather federalism becomes, the more decentralization will be seen as a Republican talking point – trotted out when it benefits conservative causes but shunned when it's used to defend local policies conservatives loathe.

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