

NATIONAL REVIEW

No More Fair-Weather Federalism

Ilya Somin

August 18, 2017

The Republicans are supposed to be the party of state autonomy and strict limits on federal power. But you would not know it based on the first six months of the Trump administration. On a variety of major issues involving immigration, law enforcement, and the “war on drugs,” the administration’s policies exemplify the phenomenon of “fair-weather federalism”: respecting limits on federal power only when politically convenient.

Last week, the city of Chicago filed a lawsuit challenging the constitutionality of Attorney General Jeff Sessions’s plan to coerce “sanctuary cities” into helping enforce federal immigration law. The Justice Department policy threatens to deny cities some federal law-enforcement grants in order to compel obedience. The plan blatantly violates the constitutional requirement that conditions on federal grants must be clearly stated in advance by Congress, so that state and local governments can make an informed choice. They cannot be imposed after the fact by the executive.

In January, President Trump issued an executive order, much like Sessions’s new policy, that unconstitutionally commandeers state officials and imposes new conditions on federal grants — conditions to which the cities never consented. Fortunately, the order was invalidated by a federal court. Ideally, Sessions’s policy will meet the same fate. But the struggle over these issues is far from over.

Should the administration prevail, it will set a dangerous precedent that goes far beyond the specific issue of sanctuary cities. If the president can unilaterally add new conditions to one federal grant program, he can do the same thing with others. Conservatives who may be cheering Sessions now are likely to regret it when a future Democratic president uses similar tactics to force states to increase gun control or adopt a “common core” curriculum.

Sessions has also undermined federalism by reinstating a federal asset-forfeiture program. Under this policy, known as “equitable sharing,” federal officials work with state law-enforcement agencies to seize the property of people, many of whom have never been charged or convicted of any crime. Asset forfeiture disproportionately victimizes the poor, racial minorities, and others who lack resources and political clout.

The policy also enables state and local law enforcement to profit from these seizures, even in the many states that have banned such practices. The federal program allows law-enforcement

agencies to circumvent state restrictions by funneling the assets through the federal government, which then disburses some of the profits back to state and local cops. As a result, law-enforcement agencies will have incentives to prioritize drug cases that are likely to net them money. Curbing violent crime, and other objectives that state governments might value more, will be a lower priority. Control over the funding and priorities of state and local law enforcement is a core element of state sovereignty. Sessions's asset-forfeiture policy is a frontal attack on it. The administration also appears to be planning an extensive federal crackdown on marijuana, even in the many states that have legalized it. This too is an assault on state autonomy.

Sadly, the Trump administration and the GOP are far from the only fair-weather federalists in politics. Many of the liberal Democrats currently relying on federalism principles to protect sanctuary cities against Trump decried those very constraints in the past, when they impeded progressive priorities. Both the Left and the Right could benefit from a more principled commitment to limiting federal power. In a large and diverse nation, it is unlikely that we can find a workable, one-size-fits all approach to numerous contentious policy issues involving law enforcement, health care, and drug use, among others. This is especially true in an era of deep partisan polarization, when Democrats and Republicans are farther apart on most issues than they have been in decades.

Decentralization of power can also help defuse the partisan hatred that is poisoning our politics. If the federal government had less control over our lives, both sides would have less to fear from their opponents' victories at the national level. Each group could still pursue its preferred policies at the state and local level. Competition and experimentation by states and localities would offer more opportunities for people to better their lot by voting with their feet and moving to new locales.

Some people understandably fear that restricting federal power might open the door to oppressive state and local policies. The federal government undoubtedly has a role to play in enforcing constitutional rights and preventing unconstitutional discrimination by state and local governments. But carrying out those functions does not require anything approaching the sweeping authority currently wielded by Washington. Robust federal antidiscrimination efforts do not require virtually unlimited federal power to regulate anything that might have some effect on the economy, or nearly unconstrained federal authority to use conditional grants to pressure states and localities to do their bidding. As the sanctuary-cities litigation demonstrates, the latter is likely to be a menace to vulnerable minority groups rather than a benefit to them. Moreover, unlike in some previous eras, many minority groups today often have greater clout at the state and local level than in Washington.

Since the election of Trump, leading progressive scholars such as National Constitution Center president Jeffrey Rosen and Yale Law School dean Heather Gerken have urged the Left to take a more favorable view of federalism. Left and Right are unlikely to come to a complete consensus on federalism any time soon. But there is considerable potential for agreement nonetheless. A new bipartisan and cross-ideological appreciation for limits on federal power could become one

of the few beneficial developments of the Trump era. Together, we might yet make federalism great again.

*Ilya Somin is a professor of law at George Mason University, an adjunct scholar at the Cato Institute, and the author of *Democracy and Political Ignorance: Why Smaller Government is Smarter*.*