Quackery and bluster define SALT lawsuit

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In August, the Treasury Department issued new regulations addressing the gimmicks various states concocted to dodge a new $10,000 cap on the state and local tax deduction (pun inducingly known as SALT). Blue-state politicians such as New Jersey Gov. Phil Murphy decried"[the president's] unfair and arbitrary tax hike on working and middle class families" (just how many working-class families in New Jersey pay more than $10,000 a year in state taxes remains unclear). This rhetoric also comes with a lawsuit, which was filed in July by New York, New Jersey, Maryland, and Connecticut, and claims that capping the deduction is not simply a policy disfavorable to those state's citizens but an unconstitutional attack on federalism itself.

While one can debate the policy merits of the cap, and the tax-reform legislation as a whole, the contention that it offends any constitutional principle whatsoever should be consigned to the dustbin of quackery and bluster.

Explaining tax policy without the reader falling asleep is more or less the Kobayashi Maru of op-ed writing, but I've never believed in no-win scenarios. The gist is this: Until the recent tax bill, state taxes were deductible from your federal income tax. That is, if you made $100,000 a year, and your state tax obligation was $20,000, for purposes of federal income tax you only had an income of $80,000 dollars. This was an effective subsidy for high-tax states — they could raise taxes on their citizens at a discount since the increased state taxes paid would be compensated by a decrease in federal liability.

Last December's tax bill limited this free ride. The deduction is capped at $10,000 (for couples), and so in our example the feds will tax you on $90,000 worth of your income. Citizens of high-tax states will now more fully feel the brunt of both state and federal regimes. Low-tax states perhaps gained some solace from the remedy of this inequality, but their relief was no match for the high-tax states' indignation.

Saddled with the horror of their citizens actually noticing how much they were paying in taxes, the high-tax states decided to sue. Their claim, such as it is, is that decreasing the cushion protecting state taxes limits their "sovereign authority" to tax their citizens into penury. They also point out that the high-tax states are mostly blue and the low tax states mostly red. Therefore, limiting the state and local tax deduction is a discrimination against Democrats. Also, the federal government never before limited this deduction, so no backsies.

Federalism's respect for state prerogatives does not require that every policy affect every state equally. The 50 states have 50 bundles of interests, and any policy change may fall heavier on some more than others. Changes to the Medicare program are most important in states with large

elderly populations. Immigration enforcement is most consequential in border states. Whether the Utah Prairie Dog should be protected under the Endangered Species Act is of far more interest to the residents of Utah than their fellow countrymen. Principles such as "equal state sovereignty" described in Supreme Court cases such as *Shelby County* and the anti-commandeering rules developed in cases such as *Printz* simply limit the federal government's discriminatory intrusion into sovereign prerogatives and prevent the co-opting of state officials to do federal dirty work.

Limiting the SALT deduction intrudes on no prerogative nor co-opts any official. States remain free to tax their citizens as heavily as they wish; their citizens will simply notice more readily now. That Congress has not exercised some power before now does not itself mean that the exercise is foreclosed (the late Justice Antonin Scalia once derided this sort of argument as the "adverse possession" theory of constitutional interpretation). Critics of the cap point out that many such state taxes pre-existed the modern federal income tax, and so therefore it made sense to accommodate them when implementing the Sixteenth Amendment.

But it's not at all clear why the federal government is required to accommodate the states, rather than vice versa — why is it not the states that should allow deduction of federal taxes before imposing their own? Of course, since the two regimes are drawing on the same pool of money, one can hypothesize combinations where the total liability imposed exceeds the actual income available. Someone exacted at 110 percent of their earnings may well have some sort of constitutional claim against being driven into debt peonage, but again it is not clear why it would be the federal rather than the state regime that must give way. The federal government is a sovereign of limited powers, but the power to tax is among them, and the Sixteenth Amendment (perhaps regrettably) extends that power to incomes.

Behavioral economics posits a psychological phenomenon termed the "endowment effect." On this model, homo sapiens feel far more pain over the loss of a possession than they would gain value from its acquisition. We therefore go to irrational lengths to retain what we feel is ours, even if we came to it through happenstance. These theories are not without their detractors, given how difficult it can be extending laboratory results to the realm of flesh and bone. We should thank our blue-state politicians for their service to science in providing an excellent example of the theory in action.

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