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SUNDAY, MARCH 28, 2010

Why do the Cato Institute and Randy Barnett care about federalism?

Brian's post on the constitutionality of health care legislation inspires my question, but Randy's support for federalism runs deeper than his Washington Post argument against the individual mandate in Obama's health care legislation: He also represented the appellees in *Gonzales v. Raich*, 545 U.S. 1 (2005). Moreover, it is not just Randy: American libertarians seem to have a fondness for federalism that strikes me as odd. The Cato Institute, for instance, has been a strong supporter of beefed-up limits on Congress' enumerated powers, filing a good amicus brief before SCOTUS defending the Fourth Circuit's position in the *Comstock* case that the power to enact a civil commitment statute for sexual predators must be tied to some express power of Congress and cannot be inferred from the Necessary & Proper clause alone.

I do not want to discuss the merits of any of these positions. (For the record, I think that Randy is wrong about the constitutionality of the individual mandate but that the Cato Institute is correct in their *Comstock* position). Instead, I am curious as to why American libertarians like federalism. This is not exactly an obvious libertarian position: If one level of government is bad, then one might think that two levels of government are twice as bad. Indeed, European libertarians, to my knowledge, have never liked federalism much. (On this point, see Rudolf Schlesinger's book on Federalism in East Central Europe, at pp 47-66).

So why do American libertarians think that federalism is consistent with their commitment to individual liberty? Why not, instead, support a strong national government that can suppress subnational trade wars and protect a robust set of national liberties? What's the payoff, in terms of individual liberty, from protecting subnational jurisdictions' exclusive jurisdiction over certain topics? In my own view, federalism bears very little relationship to libertarianism. I happen to support both normative theories, but I experience nothing but tension in my dual loyalties. (For me, federalism generally wins out). So, while I am glad that

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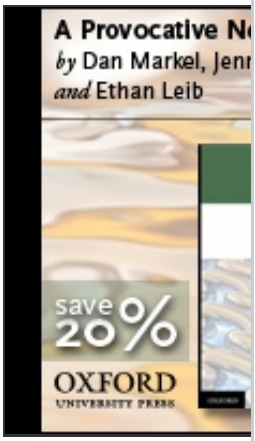

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Randy and Ilya Somin and others keep churning out those pro-federalism amicus briefs, I can't help but think that they are really just undermining their own political commitments. Why do they do it?

I have three theories to explain the connection that libertarians draw between federalism and libertarianism, which I'll label the (a) "feet-voting" theory; (b) "shrink-and-drown" theory; and (c) "insincerity" theory. But, as I explain after the jump, they are neither very convincing explanations or justifications for the libertarians' pro-federalism position.

(1) Take, first, the "feet-voting" theory. The idea is familiar from the "fiscal federalism" literature that developed in the wake of Wallace Oates' revival of Tiebout's hypothesis about locational economies. (For a recent collection of essays describing this idea, see ">Bill Fischel's edited volume on the Tiebout hypothesis). The basic idea is that citizen-consumers reveal their preferences for local public goods by moving between competing subnational jurisdictions. In the context of fundamental constitutional rights, citizens can "vote with their feet" for liberty over laws that they deem oppressive. Think Mormons' trekking to Utah from Nauvoo, Illinois; Puritan pilgrims making their way to New England, Exodusters heading west to flee white supremacy, etc. Ilya Somin, among others, has pressed this argument for federalism in several articles.

I am willing to concede that foot-voting provides a a weak and indirect method of limiting governmental power. Note that it requires vigorous national protection of interstate mobility through the devices like the dormant commerce clause,Article IV, section 2, etc. Note also that the theory works best when state expropriate mobile assets and works worst when states persecute nationally unpopular groups like, say, accused sexual predators who have nowhere to flee because they are too few in number to capture a state government: The notion that foot-voting would do a lot to help out Mr. Comstock, for instance, strikes me as fanciful. Note finally that theory is a really attenuated way to protect liberties from very large states that can extract locational rents: yes, you can flee California and New York, but you'll have to leave behind family, friends, community, and so forth. It is not like moving to New Jersey when rents rise in NYC.

But put these objections aside and consider a larger difficulty with "libertarian federalism": Why support this indirect method of defending individual liberty rather than the straightforward way of using national courts to enforce a robust set of national rights? Must we really hire U-Hauls rather than attorneys to vindicate our

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fundamental liberties? If, as Randy tells us, the Constitution is a charter of basic liberties, then why not spend one's litigating energies pressing for a more robust Ninth Amendment rather than trying to give states like Kansas first dibs at locking up Mr. Comstock? (Note that, to my knowledge, the Cato Institute filed no amicus brief in *Kansas v. Crane*, the SCOTUS decision upholding *state* civil commitment under the 14th Amendment's due process clause.

(2) The "shrink-and-drown" theory argues that, by distributing power among governments with fewer resources, government will be easier to control. It is easier to drown a kitten than a tiger in a bathtub, and states look more kittenish than then feds. Again, there may be something to this idea, (a theory which is heavily dependent on constraints in states' fiscal capacity induced by taxpayer mobility). But is it not counter-balanced by the greater danger *a la Federalist #10* that states move faster and in a more populist direction than the feds? 'Three strikes, you're out," civil commitment for sexual predators, etc, are more likely to be enacted more quickly by the states than the gridlocked Congress supervising a bureaucracy not easily mobilized for popular vendettas. As a libertarian strategy, federalism again seems a bit attenuated.

(3) Finally, it just might be that the libertarians are insincere about federalism: While Randy and Co. find it a convenient way of limiting one level of government, they do not ultimately want to defend a federal system with robust subnational jurisdictions but rather intend to suppress the states with some robust theory of the 14th Amendment, dormant commerce clause, etc, when the time is right. They simply believe that a frontal assault on the welfare state is impossible before this Court and, therefore, are focusing their energies on the feds, saving the states for a later attack except on issues like the Second Amemndment where they think that they can pick off five votes.

I have no objection to insincere litigation for a sincere political goal. But one must be careful what one sues for: If one aggressively argues that issues like civil commitment, home-grown marijuana, crime control, family relations, and so forth, belong exclusively with state jurisdiction, then it may be tricky later to argue that the 14th Amendment places substantial limits on such "traditional state concerns.", federalism, after all, did not evaporate as an important concern of the Constitution in 1868: If courts can enforce federalism-based limits against Congress under Article I, then surely they can do against themselves under the 14th Amendment, reserving this provision for only the invasions of liberty that are most obvious affronts to the concerns of 1868. On this theory, federalism remains a background rule of construction

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for the 14th Amendment, to resolve interpretative doubt in favor of state power in close cases.

In other words, the pro-federalism rhetoric of the Cato Institute in *Comstock* may come back to haunt them in *McDonald v. City of Chicago*, where they filed an amicus brief favoring incorporation of the Second Amendment. As a federalism supporter who is lets his libertarian sympathies take second place to his love of subnational democracy, I certainly hope so.

Posted by Rick Hills on March 28, 2010 at 12:17 PM in Constitutional thoughts | Permalink

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COMMENTS

Randy Barnett offered the following considerations in response to my post above, which I post here because Randy is having some technical difficulties posting on the comments:

"[N]ote that I jointly submitted the Cato brief in Comstock that you like. And I also litigated the Ninth Amendment/Due Process Clause theory in Raich. It was the Ninth Circuit's ruling for us that propelled the Commerce Clause theory to the Supreme Court (where we continued to assert 9th/DP). When the Supreme Court declined to consider that theory, we then argued and lost the 9th Amend/DP claim on remand to the Ninth Circuit.

"Unlike some I could name, I feel free to employ the whole Constitution-- including e.g. the Privileges or Immunities Clause of the 14th Amendment -- both the parts the Court is more inclined to accept and those parts which, for now, are 'lost' but not yet repealed."

Posted by: Rick Hills | Mar 28, 2010 7:25:53 PM

Randy also posted the following over at Volokh's:

The Constitution has some protections of "federalism" in the form of enumerated federal powers. It also has some constraints on the police powers of the states such as the Thirteenth and Fourteenth amendments. I believe defenders of liberty are entitled to assert both sorts of clauses in litigation, and I do not see how invoking

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one should "come back to haunt" anyone when invoking the other. Unless, that is, one places one's love of subnational democracy above both liberty and the Constitution.

In response, I would just reiterate the question pressed above in my original post: Why does Randy *care about* federalism? Of course, it is possible consistently to urge both Article I limits on the national government and 14th Amendment limits on state governments. But, to the extent that the former are rooted in a strong normative principles about the value of subnational democracy - you know, those "values of federalism" recited by *Gregory v. Ashcroft* - then those normative principles will tend to cut against a broad reading of the 14th Amendment (as, indeed, they did in *Gregory*).

The theory of federalism urged by Randy in *Raich* and *Comstock* might not rely on any such robust normative theory: Randy might avoid all of those rhetorical tropes in favor of "labs of democracy," etc., choosing instead to slalom between the precedents and massage text and original understanding. If so, then such purely positivist defenses of federalism will do his libertarianism no harm. But, if he ventures outside of technical legal considerations to defend federalism as a normative goal, then I think that there is tension between the "values of federalism" and the values of liberty

Posted by: Rick Hills | Mar 28, 2010 8:39:56 PM

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