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The End of the Federalism Revolution . . .

. . . if such a revolution had ever occurred

RAMESH PONNURU

The Supreme Court's decision in the medical-marijuana case is being taken as the end of the "federalism revolution" that began under Chief Justice Rehnquist. The Court held that the feds could outlaw the medicinal use of marijuana, whatever California's government (and voters) preferred. Six justices of the Court ruled that the feds could prohibit medical marijuana because the Constitution gave Congress the power to regulate interstate commerce. Justice Clarence Thomas, one of the three dissenters, said that if Congress could use the Commerce Clause to regulate sick people's personal use of marijuana, "then it can regulate virtually anything — and the Federal Government is no longer one of limited and enumerated powers."

This case does not, however, represent the first rumor of the federal revolution's death. Two years ago, the Court ruled — again with the support of six justices — that Congress could subject state governments to lawsuits under the Family and Medical Leave Act. Many legal commentators thought that this decision, like the medical-marijuana decision, was hard to square with the Court's previous pro-federalism decisions. Justice Ruth Bader Ginsburg, who had dissented from those pro-federalism decisions, crowed, "Federalism this term was the dog that did not bark."

So is the federalism revolution over? No: For the revolution to be over it would have had to begin. The truth is that there never was a federalism revolution.

The most striking thing about the Court's "revolutionary" decisions — which inspired some reporters and commentators to talk as though the Articles of Confederation were making a comeback — is how very limited they were. The "landmark" cases of the revolution struck down the Gun-Free Schools Act and provisions of the Violence Against Women Act on grounds that Congress was acting beyond its Commerce Clause authority. But there were many ways for Congress to get around those decisions. Indeed, Congress enacted a modified Gun-Free Schools Act and the courts left it alone. Justice Stephen Breyer's dissent in the Violence Against Women Act even outlined a variety of ways the Congress could circumvent the Court's ruling.

The Gun-Free Schools Act case provided two other pieces of evidence that the Court's federalism was unserious. The first was that two of the five justices in the majority — Sandra Day O'Connor and Anthony Kennedy — included, among the reasons to strike down the act, that most states had already banned guns in the school. The country was agreed as to ends, and disagreed only as to means. The implication here is that a federal law might have been justifiable if the states were split evenly on the issue. It was, in other words, a vote for federalism because national uniformity already existed.

The second piece of evidence came in the form of judicial silences. Neither the federalist justices nor the centralizing justices have been willing to admit that modern government has strayed far away from the Founders' federalism. Justice Thomas's opinion in the case argued that the Constitution, as originally understood, strictly limits congressional power. But he was unwilling to take the obvious next step with this argument, and declare that much of modern government is unconstitutional. Indeed, he denied any need for a "wholesale abandonment" of the Court's post-New Deal jurisprudence in these matters.

SYMBOLIC FEDERALISM

Many times over the last 15 years it has been said that the Rehnquist Court was getting ready to attack the "core" of the modern regulatory state. Yet the Supreme Court was never likely to pose any threat to the New Deal or to civil-rights statutes. It may very well have been wise for the justices not to have threatened too much of modern government, for it is hard to see how a judicial campaign to undo the New Deal could have been sustained politically. What that has left us with, as Orin Kerr, a law professor at George Washington University, has written, is a "symbolic federalism." The Court insists on federalism when doing so would not make much practical difference.

The Court's federalism is limited in another way. The justices have tended to think about federalism in terms of the "status," "interests," and "dignity" of state governments. That isn't the only possible conception of federalism. Michael Greve, who runs the Federalism Project at the American Enterprise Institute, argues that many provisions of the Constitution are better understood as limiting the state governments by promoting competition among them. The Rehnquist Court has not shown much interest in reviving these features of the Constitution's federalist architecture.

The medical-marijuana case demonstrated some of the conceptual problems created by a view of federalism that centers on state governments. Either the Commerce Clause authorizes the federal government to prohibit the medicinal use of marijuana, or it does not. But nothing should turn on what the government of California wants. If the federal government has the power to prohibit medical marijuana, then it can do so over the state's objections. If it does not have that power, it does not have that power anywhere. It does not have it in states that agree with it any more than in states that object.

There is a final, and too often neglected, limit on the Court's federalism. The Court has been willing to impose extremely modest restraints on Congress. It has not been willing to impose restraints on itself — and it is, after all, an important part of the federal government. The landmark cases of the Warren and Burger Courts discovered, or, as critics had it, invented, new individual rights, and correspondingly limited state autonomy. The Rehnquist Court has reversed none of those landmark decisions. It has merely slowed down the pace of rights creation. In recent years, it has announced that states may no longer execute murderers who were minors at the time of their crimes, prohibit sodomy, or punish partial-birth abortion.

It has also displayed a marked intolerance for disagreement, as Robert Nagel powerfully demonstrated in *The Implosion of American Federalism* by analyzing the Court's

decisions on abortion, gay rights, and term limits. When the Court reaffirmed *Roe v. Wade* in 1992, for example, it began its opinion by noting the scandal of disagreement. “Liberty finds no refuge in a jurisprudence of doubt. Yet, 19 years after our holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages, . . . that definition of liberty is still questioned.” The Court argued that *Roe*’s supporters had faced “criticism,” “ostracism,” and even “violence.” It “call[ed] the contending sides of a national controversy to end their national division by accepting” the Court’s decisions on abortion. In other words, it invited *Roe*’s opponents to dissolve their movement.

Nagel makes the simple point that fear of national division and conflict is not a promising mindset for the agents of a federalist revolution to have. Nor is an overwrought sense of the fragility of the national union. Yet in 1995 — the same year the Gun-Free Schools Act went down — the Court treated the prospect of state-imposed term limits on congressmen as an assault on the idea of America as a nation. The Court frequently finds state laws to lack a “legitimate” purpose or to be “irrational.” How much power is a Court that holds such views likely to cede to state legislatures and state electorates? A case can be made that the Court’s federalism, viewed in a broader light, has been about aggrandizing itself as the arbiter of national policy as much as it has been about empowering the states to set their own policies.

When the country enjoys a consensus on an issue, such as guns in school or violence against women, the Court may indulge in federalist gestures. When the country is emotionally divided on an issue — as on abortion, gay rights, or, to a lesser extent, medical marijuana — it will impose a national policy to end the possibility of conflict. (Or try to: Sometimes it brings those conflicts into being, and then cites the result to justify more intervention. That’s the “implosive cycle” to which Nagel’s title refers.)

MORAL FEDERALISM

Supporters of the Court’s federalist turn have tended to be relatively uninterested in, or even supportive of, the Court’s social-issues decisions. (Libertarians have been especially likely to hold these attitudes.) But this is a big mistake. For much of American history we had a federal government that was much more limited than the current one. The principal reason for the older limits was not that we had a federal judiciary that insisted on imposing them. It is that we had a broader political culture that insisted on those limits.

For a lot of reasons — the decline in the cost of transportation and communication not least among them — federalism has lost a lot of its sentimental basis and therefore its political power over the years. When political and legal debate turns to federalism these days, the discussion concerns matters that are of interest chiefly to lawyers. We talk about statutory preemption (when federal laws should be read to override state laws) or sovereign immunity (under what circumstances and in what venues state governments can be sued).

People do care, however, about social issues. People have been known to move from community to community in part because they prefer to live in places whose inhabitants share their values. This migration has helped to produce the division between “red” and

“blue” states, in which political and cultural divisions literally map each other. Moral federalism — letting states go their own way on contested social issues — could renew the political basis of federalism. But it is the very robustness of moral federalism, its capacity to generate strong emotions, that leads the Supreme Court to suppress it.

Two decades ago, the dominant assumption among constitutional lawyers was that the courts did not need to protect federalism, since the political process would take care of it. Conservatives mounted a powerful challenge to this idea: There was no reason to expect the political process to get federalism right. By now it should be obvious that there is no reason to expect the courts to get it right, either. One has to ask, at this point, what conservatives have gained by attempting to get the courts to impose limits on congressional authority. While there may be places the Supreme Court could make a salutary difference, it will not, cannot, and probably should not substantially reduce the scope of congressional power. By refusing to face this truth, conservatives have muddied what could otherwise have been a clean fight between judicial activism and restraint.

The Court cannot impose federalism over the objections of the other branches of the government. That project was never likely to succeed and is now over. What the Court can and should do is to stop eroding federalism itself.