

Emerging Constitutional Issues for the Trump Presidency

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Roderick Hills Jr. Transcript

Hi, I'm Rick Hills. I teach Con Law. I teach that [Legislation and the Regulatory State] course and a lot of state and local public law that's irrelevant to this panel. I was asked to talk about decentralization and localism and how Trump might affect that. And here's just three thoughts very quickly. I think there's three kinds of probable or plausible either re-centralization or decentralization. To be precise, two kinds of re-centralization. One kind of decentralization that's probable, or at least plausible, under a Trump administration.

So, let's take the first kind of re-centralization. It's renewal of very conventional agency preemption that industry has been seeking for a long time and got a lot of under the second Bush administration. So, for instance, California has a waiver to impose extra fuel efficiency on automobiles. They got it in the Obama administration under the Clean Air Act. I think the Trump administration will make a move to repeal that waiver. They'll have to go through notice and comment rulemaking, but they'll try to do that. The various states have consumer finance law or blue sky laws. New York State has a famous law called the Martin Act that's used to go after lenders, banks, other businesses for fraud or for deceptive practices. There was a huge move in the second Bush administration to preempt these by the Office of the Comptroller of the Currency. It was largely successful. After 2011, the Obama administration started to pull back on preemption. I suspect that the Trump administration shall try to reimpose that kind of preemption.

A lot of tort liability has been imposed by states on things like— entities like—pharmaceutical companies for defective design or production of, you know, generic drugs. There's been a lot of preemption action there. The Obama administration tried to limit that preemption. The Trump administration will certainly try to reimpose it. The thing I emphasize about this kind of re-centralization is it's very conventional. It has been the stuff of the Supreme Court's docket for the last, at least, 20 years. And when a Democratic administration's in power, the preemption tends to go down. And when a Republican administration's in power, it goes up. Maybe that's comforting. Same old stuff.

One difference I should add is that there has been certain kinds of statutory roadblocks or speed bumps to preemption. So, the Dodd-Frank Act has a preemption clause that actually resists a lot of the kinds of preemption of state consumer finance laws that I think the Trump administration will likely seek. I know that Paul Atkins, who's a Trump advisor, was on the short list for Chair of the SEC, wants to get rid of the Martin Act in the worst way. It might be difficult because Dodd-Frank says that any effort to preempt state consumer finance laws is subject to only

Skidmore, not *Chevron*, deference. It's one of the few cases where statute actually cites a Supreme Court case in a preemption clause.

Okay, a second kind of re-centralization will be enforcement of existing statutes against various sub-national deregulatory efforts. So, the first kind of cases, where the states are trying to regulate a lot, and the Trump administration says, "Hold on, we want you to deregulate. Leave those auto manufacturers alone." The second kind of centralization is where the states and locals want to deregulate, and the federal government says, "Hold on, we want you to regulate more." And the two obvious examples are medical marijuana and sanctuary cities. So, Jeff Sessions hates marijuana. And he has said that he thinks that as a schedule I substance under the Controlled Substances Act, it should be regulated. And so, there's an outside chance that he might be so foolish as to try to go after Colorado drug dispensaries, marijuana dispensaries. I think that's an outside chance because the political fallout from that, having just come from Colorado, will be enormous. I mean, the idea that you're going to tell these harried soccer moms who are piling into Manitou Springs, you know, to get their, you know, mother's-little-helper next trip—I just don't see that happening.

The more serious effort will be his proclaimed effort to go after so-called sanctuary cities. Now these are cities that have a law enforcement policy of not collecting or distributing data—immigrant data—about the immigrant status of people they detain or question. And you might ask, "What tools does the federal government have in its toolkit to go after these cities to re-centralize? To re-regulate." There's two tools that the Trump administration could use. One is an existing statutory provision that actually hasn't been on the books since I think [19]96. Has been on the books since [19]96? Which says that no city can interfere with an individual officer's desire to cooperate with federal immigration authorities. So, if there was an individual NYPD cop who is itching to help out ICE, you know, locate people who are unlawfully present in the country, in theory, they could do so.

Now, except for an opinion by Ralph Winter, I think in 2000, there's almost no discussion in the courts about what this means. If all it means is that individual cops can moonlight for the feds, that's not a real help to the federal government, you know. I presume they could already work for the feds if they wanted to. If what it means is that individual officers get to use proprietary data that they only have in their capacity as employees of the city, well, that raises really interesting constitutional questions. My own sense is there's a powerful argument that that's commandeering the city government. You know, the officer has a badge, a gun, and a computer. But that's city stuff. And the fact that the officer wants to use it on behalf of the feds really doesn't mean that the feds are not, in fact, taking over city property. As you know, they can't do that from constitutional law. There's state autonomy doctrine that forbids that.

The other tool that they could use against sanctuary cities is that they could try to pull various law enforcement grants, like federal OJP money. Cities do get a significant amount of law enforcement money, but it's not that much. It's not like huge-ticket money. So, in order for this cudgel to be effective against a city that has very large electoral incentives not to turn over immigration or collect immigration information, I think they'd have to go after other grants. They'd have to go for the grants that are only tenuously related to law enforcement. Now, as you know from *National Federation of Independent Businesses v. Sebelius*, our own Chief Justice Roberts has written an opinion that says you can't go after unrelated money if it's a very large sum of money. And if it's a very large sum of money that looks like it's being used to coerce sub-national governments into cooperating with the feds. And so, ironically, a precedent that liberals hate will turn out to be the last best hope of sanctuary cities. Because if Trump tries to go after, say, city Medicaid money—New York City actually gets Medicaid money—well, that would raise, I think, serious constitutional questions of state autonomy.

So, those are the two kinds of efforts where the Trump administration might try to suppress cities: Either by requiring them or forbidding them from regulating. I'm just gonna close by talking about what I think is actually the most salient effect of the Trump administration on localism. I actually think it's likely to be a very decentralizing administration simply because it's politically easier to decentralize. What do I mean by that? Well, the Obama administration did impose various civil rights mandates on cities and states. Let me give you some examples: The "Dear Colleague" letter from the Office of Civil Rights and the Department of Education enforcing Title IX sexual assault standards against both public and private universities. Betsy DeVos, at her hearing, you know, talked a little bit about that policy. It's very likely to go by the wayside in a Trump administration. Since it was just a "Dear Colleague" letter, the stroke of a pen will take care of that policy.

[Another example:] Title VI oversight of state courts or public schools. The Obama administration has sent out letters to state courts saying, "You better have translators even in civil suits, even for plaintiffs, regardless of the wealth of the litigant." That caused a lot of anger from a lot of state judges. That's likely to go by the wayside. Again, it's just a letter. Stroke of a pen gets rid of it.

[Another example:] Affirmatively furthering Fair Housing. The Obama administration went after Westchester County, saying, "You've got to desegregate your suburbs." It's just a lawsuit. They just closed the deal a couple weeks ago in a consent decree. I doubt there'll be any more AFFH lawsuits to desegregate suburbs.

The Prison Rape Elimination Act gives the Department of Justice oversight over state incarceration practices to reduce prison rape. Don't think that's gonna be going on anymore. And

then, lastly, DOJ oversight of police behavior, for instance, in Chicago. I think that that's probably gonna go down.

Now all of that are instances where the federal government actually decentralizes. That is to say they just get out of the way and let state and local governments do what they want. Like it or hate it, it is an opportunity for you guys at the local level to do what you want. And the example I would give is New York City. New York City's crime rate has plummeted and their police practices have improved. And part of that is that a lot of New Yorkers have done a lot about New York City. You know, it's interesting that Chicago police are rougher and yet they have a higher murder rate. New York City cops are under the oversight of a lot of people, including our own Peter Zimroth, who's sitting right there, and the court-appointed mediator by Judge Scheinlin on the stop-and-frisk case. And he's written excellent reports giving recommendations to NYPD. Well, he can continue to write reports. The Trump administration won't stop that. And they won't stop anybody else in New York City from improving our practices.

So, keep in mind that decentralization is both risk, but it is an opportunity, and it's coming your way soon as a result of a new administration.