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States' Rights for the Left

By JEFFREY ROSEN DEC. 3, 2016

IN the wake of the presidential election, as Democrats realized that Republicans will soon control all three branches of the federal government, progressives disinclined to secede from the Union rediscovered another exit strategy: states' rights.

Mayors in several so-called sanctuary cities, including Los Angeles, Oakland, Chicago and New York, immediately reaffirmed their commitment *not* to work with federal immigration officials in detaining and deporting illegal immigrants. President-elect Donald J. Trump, like Attorney General Loretta Lynch before him, promised to block federal funding for cities whose law enforcement officials refuse to cooperate with federal immigration authorities.

In Connecticut, Gov. Dannel P. Malloy pledged to stand up for state laws when they conflicted with the Trump administration's policies on immigration, abortion, L.G.B.T. rights, social services spending and guns. And the State Innovation Exchange, a progressive organization based in Madison, Wis., predicted that "for the foreseeable future, our nation's state legislatures will provide one of the only consistent places where advancing progressive policy reforms is possible."

Small-government conservatives are accusing progressives of opportunism in their invocation of states' rights to resist the big government conservatism of Donald Trump. After the cast of the musical "Hamilton" urged Vice President-elect Mike Pence to "work on behalf of all of us," Rush Limbaugh observed: "I wonder if the people in this cast have any idea who they are lionizing and celebrating. This guy's

Donald Trump. Alexander Hamilton was a huge nationalist. He did not like states' rights. He wanted a massive federal government."

Mr. Limbaugh had a point: Since the 1930s, progressives have unapologetically embraced Hamiltonian big government. But in rediscovering the virtues of Jeffersonian small government, Democrats and liberals are returning to a tradition of "progressive federalism" that they favored before the New Deal and the Great Society — and that they began to revive during the second Bush administration.

Jefferson viewed American history as a clash between centralization and decentralization, between monopolistic financiers and agrarian producers. Jefferson proposed a constitutional amendment that would have prohibited Congress from chartering corporate monopolies and opposed Hamilton's Bank of the United States because the claim that Congress had "implied powers" to charter corporations would clash with the 10th Amendment, which protects states' rights.

This tradition of economic populism continued to be embraced by Democrats through the presidency of Andrew Jackson, who vetoed the Second Bank of the United States as an instrument of the "moneyed aristocracy." Woodrow Wilson ran in 1912 pledging to break up monopolies and appointed his chief economic adviser, Louis Brandeis, to the Supreme Court in 1916. Brandeis was the 20th century's leading progressive champion of federalism, attacking "the curse of bigness" and defending the states as "laboratories of democracy."

In the 1960s, however, much of Democratic and progressive activism shifted to expanding rights for previously excluded groups, like minorities and women, while the labor movement continued to push for greater economic equality. Progressives deplored the South's "massive resistance" to federal desegregation efforts; they viewed Jefferson as a flawed slaveholder and states' rights as the enemy of liberty and equality. But their focus on civil rights rather than on economic equality had legal and political implications that culminated in Mr. Trump's Electoral College victory.

After George W. Bush's second victory in 2004, when Republicans held all three branches of government, progressive scholars and public officials began to rediscover the virtues of what Heather K. Gerken of Yale Law School, the intellectual

guru of the movement, calls “A New Progressive Federalism.” David J. Barron, now a judge on the United States Court of Appeals for the First Circuit, wrote an article in *Dissent* after Mr. Bush’s re-election referring to “the emergence of why-go-to-Canada-when-you-have-federalism discussions within lefty circles.”

Several progressive politicians relied on these arguments, from Barney Frank’s urging the city of San Francisco to use the rhetoric of local control to resist a federal gay marriage ban to Senator Richard B. Blumenthal’s invoking states’ rights when he was the attorney general of Connecticut on issues ranging from banking regulations to banning assault weapons. In fact, you can make a credible case that the most important progressive victories in the Obama era — including health care reform and marriage equality, both originally tested in Massachusetts — emerged from the states during the Bush administration, just as Brandeis anticipated.

As Professor Gerken explained in an article for the journal *Democracy* in 2012, progressive federalism is a way to create a decentralized system “where national minorities constitute local majorities,” thus allowing “minorities to protect themselves rather than look to courts as their source of solace.” Progressive federalists like Professor Gerken argued during Mr. Obama’s second term that decentralization could help minorities in mostly African-American cities like Atlanta or in a state like California, where Hispanics are the largest group.

Having lost all three branches of the federal government again, progressives are now concluding that they have no alternative but to redouble their efforts at the local level. Some of these efforts will be defensive: If a Supreme Court with more than one Trump appointment overturns *Roe v. Wade*, the abortion issue, as Mr. Trump noted, “will go back to the states.” Progressives would then have to make the case against abortion restrictions state by state.

But some important progressive victories have already occurred in blue and red state referendums. On Nov. 8, voters in three states (California, Nevada and Washington) voted for stricter gun control. Four states (Arizona, Colorado, Maine and Washington) voted to increase the minimum wage. Four Trump states (Arkansas, Florida, Montana and North Dakota) passed ballot measures allowing or

expanding the use of medical marijuana, while California, Maine, Massachusetts and Nevada voted to legalize the use of recreational marijuana.

These state marijuana legalization initiatives, however, may be challenged by the Trump Justice Department and the Supreme Court. And the tables may be turned as White House conservatives abandon their devotion to federalism to pursue a national war on drugs while progressives invoke states' rights to defend local legalization efforts. In August 2013, the Obama Justice Department announced that while federal law continues to regulate marijuana as a controlled substance, it would conditionally waive its right to challenge Colorado and Washington State laws legalizing the drug. A Trump administration, however, might reverse this policy and enforce federal anti-marijuana laws. The battle could end up at the Supreme Court, much as it did in 2005, when the Bush administration challenged California's medical marijuana law.

THE last time around, these challenges divided Hamiltonian and Jeffersonian conservatives on the Supreme Court, who reached opposite conclusions. In *Gonzales v. Raich*, the court held by a 6-3 vote that the Controlled Substances Act was a constitutional exercise of Congress's power to regulate interstate commerce and therefore pre-empted California's law legalizing medical marijuana. The sometime Hamiltonian nationalist Justice Antonin Scalia joined Justice Anthony M. Kennedy and the four liberal justices in holding that local use of marijuana might affect supply and demand in the national marijuana market. The Jeffersonian Justice Clarence Thomas joined two other states' rights conservatives — Chief Justice William Rehnquist and Justice Sandra Day O'Connor — in holding that Congress was threatening the ability of states to serve as "laboratories of democracy."

After his inauguration, Mr. Trump will have an opportunity to nominate a replacement for Justice Scalia. Some of the nominees on the list of 21 names he released before the election are principled Jeffersonian defenders of federalism and states' rights who might vote to restrict Congress's power to second-guess state laws. Others are Hamiltonians who would side with congressional power over states' rights. Most claim to be defenders of federalism and judicial restraint and therefore should face hard choices about whether to strike down progressive state gun control laws or wage laws in the name of the Second Amendment or economic liberty.

One thing is clear. In the Progressive Era, Herbert Croly, an adviser to President Theodore Roosevelt, urged liberals to use Hamiltonian means to achieve Jeffersonian ends, drawing on federal power to defend economic liberty and individual rights. With no branch of federal power at their disposal during the Trump era, progressives will have to use Jeffersonian means to achieve Jeffersonian ends, convincing some blue and purple states to serve as laboratories of democracy and to protect equal rights and civil liberties for all.

Whether the Republican White House, Congress and Supreme Court allow progressive federalists to get away with that will depend on whether Republicans prove as devoted to states' rights now that they control the federal government as they were when they were the ones in the wilderness.

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