

Conservative Innovators, by Ben Merriman. Chicago, IL: University of Chicago Press, 2019, 232 pp. \$32.50 paperback

Reviewed by Ilaria Di Gioia

Centre for American Legal Studies, Birmingham City University

What are the effects of the current political climate of hyper-polarization on intergovernmental relations? In *Conservative Innovators*, Assistant Professor of the University of Kansas Ben Merriman argues that polarization has “everything to do with state governments” and it has encouraged heightened intergovernmental disagreement. The main assumption of the book is that state-level conservative figures, such as state governors and attorney generals, have developed a repertoire of strategies to challenge the Obama administration’s policies during the years 2009-2016, which have transformed partisan disagreement into a conflict between different levels of government. This has been possible, Merriman argues, because the Obama era coincided with the consolidation of a long process in which the executive powers of state officials had grown along with the expansion of the federal government.

Conservative innovators is as a study of the different legal and political strategies used by state conservatives to push back on Obama’s major reforms.

Chapter one sets the scene by discussing the growth of the administrative state and the resulting expansion of the executive power of agencies, endorsed by the courts’ elaboration of the doctrine of judicial deference. State executives grew in parallel with the federal executive at the expense of state legislatures, a phenomenon defined by Merriman as a “relatively successful model of executive federalism”. The major implication of the concentration of state power in the executive is that executive officeholders (State Attorneys General) became increasingly important and could coordinate interstate legal and administrative actions.

Chapter two exposes how state-initiated litigation has now become “a way of political life” by providing statistical data on the increase in conservative multistate litigation before the Supreme Court during the Obama presidency. Merriman contextualises this increase in the rise of the so-called “conservative legal movement”, i.e. the intellectual movement coordinated by the Federalist Society that trained young conservative lawyers who are today in State Attorney General offices or in the federal judiciary. Justice Gorsuch is the obvious example of this

successful strategy. As described by Hollis-Brusky in *Ideas with Consequences*, the Federalist Society has been successful in promoting the federal judicial recognition of legal arguments relatively favourable to the states; and conservatives have taken advantage of this doctrinal legitimacy. Overall, the argument that a conservative legal movement is now expanding and occupying state offices is convincing. However, it is still a mere claim that could have been reinforced by a case study delivering insights into one of the lawsuits. An interesting finding of Merriman's research into the lawsuits is that they have not produced, as one would expect, any conventional landmark legal victory for states' rights. States have been more successful at blocking the implementation of major federal policies (air-quality measures, immigration orders) using administrative procedural arguments rather than classic states' rights discourse. Despite their apparent political significance, state-initiated lawsuits often do not involve constitutional questions but remain restricted to the domain of administrative procedure or state-guaranteed positive rights (such as the right to hunt around challenges to federal gun regulations). This aspect of the conservative strategy is under-studied in *Conservative Innovators* and would deserve, in my opinion, further research. The fact that conservative litigators purposely avoid states' rights litigation in favour of administrative procedure expedients represents a significant abandonment of ideological litigation in favour of more effective issue-based lawsuits. Contemporary state litigators are certainly more focussed on the results than the means; and this is a characteristic of the conservative legal movement that potentially clashes with the initial framework of increasing polarization.

Chapter three is a novel study of interstate compacts as an additional way for states to advance their interests. Merriman studies their function as a fallback strategy if litigation did not succeed, as a means of producing litigation or devices for coordinating state resistance. This constitutional tool has traditionally been used for administrative purposes (for example river compacts) and has rarely been studied as a mechanism for advancing states' interests. In this original study, Merriman explains the significance of the Health Care Compact as a fallback strategy in case the *Obamacare* litigation proved not successful: the compact represented a valid legal means for allowing states to opt out of federal regulation without the repeal of the Medicaid provision. The case study on the proposal of a Compact for a Balanced Budget is also extremely well-crafted by the author. He points out the legal advantages of the Compact over individual state Art. V calls for a balanced budget amendment and thereby sheds light on the fact that compacts retain the status of public agencies and can engage in political advocacy without the limits to lobbying for regulations.

Chapter four shifts the focus from conservative strategies to push back on federal policies to the way in which partisan values reflect on the administration of elections, which is traditionally a domain of the states. The author discusses how Republican states have put in place restrictive registration and voting laws that have survived legal challenges. He advocates for stronger federal oversight of such practices and for a larger role of the judiciary in protecting voting rights. I found this chapter useful in terms of understanding how states can differ in policies when they are left with quasi-exclusive control but could not see clearly the relevance of its findings to the overall theme of the book.

Chapter five is a very original study of the experiment of Kansas in limited government. Kansas is traditionally a red state engaged in all of the strategies described in the book. During his tenure (2011–18), Governor Brownback made extensive use of executive powers. In his first year in office, he issued forty-nine executive orders and nine executive reorganisation orders that resulted in “significant agency consolidation and the elimination of many jobs in the state executive branch”, a reduction of the state income tax and the privatization of healthcare (KanCare). According to the author, the experiment was not successful and led to a revenue shortfall that required other measures such as the increase in sale taxes. The investigation into the Kansas experiment in limited government continues with findings on the operation of the Office of the Repealer, an agency charged with collecting and assessing suggestions from citizens and individual members of government to repeal state laws. I am not aware of major studies on the topic and found Merriman’s findings very meaningful. In particular, he reports that only 19.9 % of the citizen suggestions to the Office were substantive repeal requests and that the rest were grievances, requests to pass bills under consideration or non-substantive requests to repeal general policies. Furthermore, he argues that the Office is a pseudo-public initiative because it can collect suggestions and select them without being subject to public scrutiny. He defines the Office as a free source of ideas “that can be used if they advance the governor’s goals and ignored without political risk if they do not advance those goals”. The parallel between the functioning of the Office of the Repealer and the broader involvement of states in the federal regulatory process was particularly insightful. Merriman argues that the two systems provide only for an apparent but not substantial representation of the people. Just like state intergovernmental lobbying groups are “granted privileged access to the regulatory process” but are “insulated from public scrutiny”, the Office is in a position to advance proposals but can discard citizens’ suggestions at will. This reflection is particularly relevant

to assess the extent to which State Attorneys General are representative of the state and can advance state interests.

Overall, the book analysed what it calls a “repertoire of political behaviours” that have become increasingly important in American intergovernmental relations during the Obama administration. Ironically, in the last four years blue states have used litigation to push back on certain Trump policies, replicating the recourse to litigation and administrative resistance in many policy areas including immigration (sanctuary cities) and the environment (lawsuits over emissions standards). Blue states appeal to traditionally conservative legal doctrines such as the anti-commandeering and separation of powers doctrines to defend their right to non-cooperation. These doctrines are dear to conservative judges and justices alike. Remarkably, in May 2018 the Supreme Court upheld the anti-commandeering doctrine in a decision that allowed states to legalize sports betting. The case of *Murphy v. National Collegiate Athletic Association* has already been used as a precedent in the sanctuary litigation cases (*Chicago v. Session* and *States of New York v. Department of Justice*), where it shaped the decision in favour of sanctuary cities. The use of the states’ rights discourse by blue states is a paradox of contemporary uncooperative federalism; but, at the same time, it is a very compelling representation of the status of contemporary American federalism. At a time when ideology is in decline but parties are increasingly polarized, it would seem that the idea of state sovereignty is no longer linked to a conservative view of the Constitution but is very much a doctrine that adapts to the political objective of the day.

From this point of view, Merriman’s study is not only an investigation of conservative strategies but may constitute one of the first studies on the new ways in which state governments (red or blue) protect their interests vis-à-vis the federal government and, perhaps, a new way to safeguard American federalism.

References

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