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Limiting the reach of the federal government has always been a dream of conservatives. Now, they are waging war on many fronts to make it a reality, while critics call it a mirage.

The New Federalism

by RICHARD C. REUBEN

For most lawyers, the 10th Amendment was something they noted for the bar exam and then promptly forgot about.

But for many conservative lawyers and politicians, the 10th Amendment—which reserves to the states all powers not given to the federal government—has been anything but academic.

For them, it embodies the founders' promise for a nation in which the states and federal government are near-equal partners. And they have fought long and hard to give the amendment its proper due.

As the rise of House Speaker Newt Gingrich, R-Ga., and his Contract with America attest, their day may have finally come. Today, federalism, or limiting the federal government and returning power to
Charles J. Cooper: Feds must listen to states’ needs.

The states, has become the central rallying cry for political change.

"Restoring true federalism lies at the heart of the conservative revolution," agrees Clint Bolick, a civil rights activist with the conservative Institute for Justice in Washington, D.C.

"Returning power to the states," he says, "will allow people to re- connect with their government and to be able to participate in it more directly, which in turn makes government more accountable."

Accomplishing this will be "the most fundamental restructuring of state and federal relations since the New Deal," Bolick predicts.

The movement is not limited to Washington. A number of states have begun challenging federal programs in court, claiming their sovereignty in formal resolutions, and responding to the call for a limited constitutional convention.

Much of this points what American University law professor Herman Schwartz calls "political reality," not "political posturing." But given a history of centralization, many lawyers and legal scholars question whether the vision of a new federalism is more of a mirage conjured up by conservative tactical maneuvers.

Difficult Questions

Determining what issues are best handled by federal, state or local governments has long been a formidable task. Which one should regulate business and the environment, the workplace and immigration? What about highway construction and disaster relief?

Such questions have been fairly easy for liberals, who posit that only a strong national government can solve such issues as national economic stability, race and gender discrimination, and environmental preservation. They tend to believe, as did James Madison, that local majorities and their prejudices are the greatest threat to individual liberty.

Not so with today's conservatives, a diverse group that includes those focused on specific issues and others with broader concerns. While they may have the common bond of a belief in a limited central power, they splinter on theories of how power should be shared.

Libertarians, like Roger Pilon, senior fellow and director of the Center for Constitutional Studies at the Cato Institute in Washington, D.C., see an important role for the federal government, "to police overwhelming us of state power."

On the other hand, traditionalists like Grover Norquist of the Americans for Tax Reform believe that cedes far too much to the federal government. "We should be moving in the direction of funding only the defense system at the national level," he insists.

But experts caution that such clear distinctions cannot easily be drawn.

"We’ve been working at this for years, and it is a very difficult problem in a highly complex world," says Bruce McDowall, director of policy research for the U.S. Advisory Commission on Intergovernmental Relations, which was founded during the Eisenhower administration to improve relations between the federal, state and local governments.

McDowall compares the relationship between the various governments to a marble cake, in which the various functions of government are intermingled, rather than a layer cake, in which the governmental functions are more segregated. "We can work up theoretical models of decentralization, but in practice virtually every function necessarily ends up to be an intergovernmental partnership," he says.

Criminal law provides a good example. McDowall points out. Defendants are often tried in county courts, where, in an age of "three strikes" laws, judges and prosecutors are increasingly reliant on the federal government and other states to provide information about prior crimes and sentences.

As such, much of the decentralization debate during the early days of the new Congress has focused on how to change the nature of the federal government’s role in the intergovernmental partnership from Big Daddy to Big Buddy.

Some subtle types of decentralization already are under way, as the federal government has moved toward providing research and support for the states in some areas, and setting national performance standards for measuring state efforts. The National Report Card for education is a prime example, and McDowall says he expects to see the federal government head toward this type of relationship with the states in other areas, too.

One area that may be ripe for similar changes is the federal regulatory structure. "We’ll probably see less legislation with highly specific commands and more legislation that provides guidelines, with ceilings, floors and economic incentives that will give states and the free market a lot of latitude in determining what they will do," says Cass Sunstein, a law professor at the University of Chicago Law School.

In the products liability context, for example, Sunstein says he sees federal law offering economic incentives for providing more information about health risks, rather than specific directives requiring great technical compliance.

State Action

While Congress considers divesting itself of power, the states through legislation and other maneuvers are attempting to reclaim power.

Last year, four states—Colorado, Hawaii, Illinois and Missouri—passed "sovereignty" resolutions designed essentially to remind the federal government that the states are not its agents. Several other states are considering similar resolutions this year.

Such political pronouncements are largely symbolic. More concretely, activists also are increasingly drawing on the machinery of law to bolster state power.

Much of their effort has been driven by practical concerns, especially the costs of paying for and administering federal programs or unfunded mandates.

While no national number has been determined for the cost of
these unfunded mandates to the states, a U.S. Conference of Mayors survey last year showed an average of 11.7 percent of city budgets are eaten up by just 10 such mandates. Chicago pegs the cost of compliance with federal mandates at more than $190 million a year. Meanwhile, Columbus, Ohio—a city of fewer than 850,000 people—estimates it will cost $1 billion this year to comply with the Clean Water Act and other federal environmental requirements.

Plainly, states and local governments don't like the federal government telling them what to do. In fact, some are mad as hell and aren't going to take it anymore. "I was elected governor—not administrator of federal programs in Nebraska," complains Gov. E. Benjamin Nelson, a Democrat.

Nelson has been an enthusiastic supporter of a new approach called the Conference of States—something of an ongoing constitutional convention to propose amendments to the nation's founding charter.

The idea behind the conference, which has been endorsed by the National Governors Association and the executive committee of the National Conference of State Legislatures, is to have a formal body through which states can communicate with Congress.

"If the states formally speak with one voice, it will be hard for Congress to ignore it," says Dan Sprague, executive director of the Lexington, Ky.-based Council of State Governments, which is coordinating the effort.

Sprague says a model resolution calling for the conference to be convened later this year is currently before the legislatures of all 50 states. Four states—Delaware, Kentucky, Utah, and Virginia—passed it before the end of January.

The conference will be convened if at least 26 states pass resolutions pledging their participation. Each state would send a bipartisan delegation of legislators and the governor. Conferees expect to focus on "process-oriented" proposed amendments to the Constitution—such as one that would allow states to bypass Congress and propose amendments on their own, and another that would give states the power to veto most federal laws by a three-fourths vote.

Recommendations from the conference would be submitted to each state for formal endorsement by a three-fourths majority before being sent to Congress as a "states' petition."

Sharing the Power

"The power of the conference is in the process," says Gov. Michael Leavitt of Utah. "It reasserts the role of states as coequal players in our federal system, rather than being mere lobbyists or special-interest groups."

Some states are also taking
granted on Feb. 13, but the state is appealing.

Wilson's second salvo—a massive assault on the so-called "motor voter" law, the Motor Vehicle Registration Act of 1993—is drawing even closer attention. The act requires states to provide voter registration for federal elections at motor vehicle locations as well as through the mail. Several states have protested. Pennsylvania and Illinois, for example, have refused to pass legislation necessary to implement the law, prompting legal action by the U.S. Department of Justice.

Wilson, however, has taken the opposition to a new level, affirmatively vetoing California's enabling legislation and suing the federal government to get the law declared unconstitutional, Wilson v. United States, 95-20042-JW.

"It's based on the principles of federalism and whether the 10th Amendment allows the federal government to compel state employees on state time using state resources to administer a federal program without providing the funds to pay for the program," says Wilson's legal secretary, Daniel M. Kolkey, who pegs the cost of compliance at $20 million.

If it gets that far, Wilson's challenge to the motor-voter law could provide the Rehnquist Court with its first opportunity to weigh in on the unfunded mandates that lie at the heart of Wilson's complaint. The Supreme Court has rejected similar claims in a variety of cases, including Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982). But that was on a 5-4 vote, and all but one member of that slim majority have retired and been replaced by more conservative justices.

**Stumbling Block**

The struggle over unfunded mandates, however, also points to a weakness in reaching the new federalism: Its adherents act autonomously, even on issues they agree about.

For instance, the likelihood of ratification of a balanced budget amendment is contingent, say experts, on achieving a rapprochement with state government. The House failed, says one prominent conservative lawyer, in not heeding a clarion call from the states that language prohibiting unfunded mandates be an integral part of the amendment.

Without this, he says, states could be subject to what a leading Republican, Ohio Gov. George V. Voinovich, has dubbed "the shift and shaft"—making up the deficit caused by cuts in federal spending. "It is unrealistic to expect the states to embrace and ratify a balanced budget amendment that is certain to deepen, rather than relieve, their current fiscal woes," predicts Charles J. Cooper, a former Justice Department official who chaired President Reagan's working group on federalism, and who still is very active on the issue as adviser to Virginia Gov. George Allen's Advisory Council on Self Determination and Federalism.

"While the states are no doubt willing to do their fair share in the..."
war against the burgeoning federal deficit and the fiscal catastrophe it portends, I do not believe they will agree to be kamikaze pilots," says Cooper, now with Pittsburgh's Shaw, Pittman, Potts & Trowbridge.

Even the unfunded mandates bills passed by both houses earlier this year promise little solace in this regard. For one, they are not retroactive and still permit future unfunded mandates on governments of up to $50 million—which, for example, would not solve California's alleged $20 million problem with the motor-voter law.

Also the two measures are split on the issue of enforcement: The Senate measure does not include a provision, and the House measure only includes a means of judicial review of how the amount of the mandate is determined, rather than of the legitimacy of the mandate itself.

If the conference committee is unable to agree on a compromise for an effective enforcement mechanism, Cooper says Congress, as a practical matter, will still be able to pass unfunded mandates "with impunity."

**Shock to the System**

Such a prospect leads many experts to question the feasibility of a new federalism, despite the convergence of legal, political and social forces.

"After so many years of centralizing power, in part by taking power away from the state and local governments, you can't just suddenly stop, reverse field and leave them withering there on the vine," says Gerald Frug, who teaches at Harvard Law School.

Even the most visible roadblocks to real decentralization are enormously daunting. Most state and local governments don't have the fiscal resources or bureaucratic infrastructures to provide for self-sufficiency, and in fact have been financially dependent on the federal government for years. Also, the federal government surely would have to cede part of its tax base to states and local governments if decentralization is going to be possible.

This fact alone makes San Diego City Attorney John Witt skeptical. "Power gained is seldom given up voluntarily," says Witt, a past president of the American Bar Association's Section on Urban, State and Local Government Law. Even if the federal government were to give up part of its tax base, state and local politicians would be thrust into the untenable position of being the ones to raise the taxes to pay for the programs, he adds.

Similarly, the enormous wealth and resource disparities between states and between localities must be accounted for, Frug says. Competition among states for economic and cultural growth is fierce, and even proponents of decentralization fear that competition may play itself out in a "race to the bottom."

"I am not worried at all about the idea that states are going to become so cutthroat in their competition that they will get rid of good and needful regulations and ignore the health and safety considerations of their citizens," responds Cooper. Local and state elective politics would provide the necessary check on those actions as would the market-like competition between the states themselves, he says.

"A suspicious view of the new federalism is that it is really about creating the illusion of transferring power," Frug says. "We say we are sending the power back to the states, but in fact there is no regulation because states don't have the resources to regulate effectively."

Some experts also believe that local government law must be fundamentally changed to give some measure of actual autonomy. As it stands now, the law generally views local governments as mere political subdivisions of states, without any real power of their own other than that granted to them by their states.

Any attempt to begin a process of decentralization without addressing these kinds of fundamental issues, as well as the nation's continuing racial divide, is "a recipe for disaster," Frug says. "You can't just pretend that the 20th century never happened."

**John Witt: 'Power gained is seldom given up voluntarily.'**
Many liberals suggest this is precisely what the conservatives are trying to do, and view the conservative cry for a new federalism as little more than a Trojan horse for dismantling most of the federal government.

States Rights Redux

"States' rights arguments have been used throughout American history as a guise by conservatives to achieve their objectives in a rhetorically appealing manner," says Erwin Chemerinsky, a law professor at the University of Southern California Law Center in Los Angeles.

"They used it in the 1830s as a justification for slavery," he says, "in the 1860s to argue against Reconstruction, in the early part of this century to argue against national labor standards, in the middle of the century to defend racial segregation, and now, late in this century, are using it to eliminate federal programs and policies with which they disagree."

Chemerinsky says the inconsistencies in the new conservatives' call for decentralization somehow seem to track long-held conservative goals.

For example, tort law has long been viewed as the province of the states. Yet the Contract with America calls for tort reform at the federal level, including limits on punitive damage awards and scaled-back products liability laws.

Similar charges could be made about last year's crime bill, which created nearly 60 new death penalty crimes and tightened the federal grip on law enforcement.

"These are the best examples of how federalism is really being used as a euphemism for the conservative agenda," Chemerinsky says. "If they were serious about returning power to the states, they certainly wouldn't be talking about usurping traditional state power over such important areas of the law."

Norquist, of the Americans for Tax Reform, dismisses such accusations as liberal protectionism.

"If we return power to the states, and they are able to show the positive things they can do with it, then the failure of the welfare system and the creation of the underclass will be there for all the world to see," he says. "The blood will be on the liberals' hands, and they know that Americans won't be forgiving."

Only time will tell if and how the new frontier of federalism will be realized. But at least one thing is certain: The debate over its contours shows how law and policy sometimes come together to breathe new life into something as old and dusty as the 10th Amendment.

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