

Re-embracing Federalism

THE ISSUE:

In the American plan of constitutional government, the national government was never supposed to have all of the power or make all of the decisions. Indeed, most powers of government were located, and the decisions that affect citizens' day-to-day lives were to be made, at the state level. This relationship was turned on its head over the course of the 20th century. Ever-increasing amounts of regulations and laws emanating from the federal government have centralized and bureaucratized political rule in America, undermining the balance of federalism and threatening self-government.

THE FACTS:

- **A Nation of States.** Federalism is a crucial component of our system of government and part of the very infrastructure that makes our political liberty possible. It is evident throughout our history and our laws: the mirror image of the limited authority and extent of the federal government's powers in the United States Constitution. The clearest statement of this relationship is found in the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
- **Growth of the Federal Government.** The relative size of the various levels of government has changed dramatically since 1900. Then, almost 60% of government spending took place at the state and local levels. Today, the federal government spends more than twice as much as all other levels of government combined.
- **Centralization of Administration.** Over the course of the 20th century, the administration of government has been increasingly centralized under the federal govern-

ment, gathering particular momentum with the expansion of the regulatory state in the 1960s. The *Federal Register*, which contains the text of new federal regulations, notices, and decisions, ran to 22,877 pages in 1960; it was 68,598 pages in 2009.

- **Subsuming of States Under National Programs.** Today, states increasingly administer policies and programs emanating from Washington, making them for the most part agents of a national administrative government that, in theory if not in fact, is unlimited and all-encompassing. As a result, states often act like supplicants seeking relief from the federal government.
- **A Renewed Threat.** The policies of the current Administration and Congress—from massive spending to the takeover of whole industries to new regulatory initiatives and the resulting explosion of debt—have been especially threatening to and destructive of the idea and structural integrity of federalism.

THE SOLUTIONS:

- **Changing the Dynamic.** The best path toward achieving the goal of decentralizing government power starts with practical but significant reforms that will change the dynamic in key policy matters. There are several areas that in recent decades have become federal government concerns but are better dealt with at the state and local levels of government. Five areas are especially ripe for this kind of reform.
- **Health Care.** A centralized approach to health care cannot possibly produce a system that will work efficiently everywhere in the United States, given the country's diversity and also the complexity of health care. The federal government should instead create the conditions for states to take the lead in discovering the best ways

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to achieve affordable health care for their citizens. To do this the federal government must end the bias in the tax code against individuals who purchase health coverage on their own, in order to help foster market innovation. It must promote interstate commerce in health insurance. And it should provide states with waivers from the statutes governing such programs as Medicaid and Medicare—not just the regulations—to spur state experimentation.

- **Education.** We must restore the preeminent role of the states in establishing the education priorities that are best suited to their own citizens' needs. States should have the freedom to opt out of federal education programs and assume full responsibility, free of stifling federal mandates, to direct their education funding and policy. States should be able to consolidate federal funding and direct it to any educational purpose that is lawful under state statute. In exchange for freedom from federal mandates, states should provide increased transparency about performance standards and be able to show results in terms of student achievement over time.
- **Transportation.** States should control and establish the priorities for their highway and other transportation-related programs rather than be beholden to the one-size-fits-all, lobbyist-driven mandates now entrenched in federal law. This includes control of their share of federal money allocated to them from the highway trust fund. States that want to opt out of the federal highway program altogether and retain all of the federal fuel tax revenues raised within the state should be able to do so.
- **Homeland Security.** State and local governments include far more individuals involved in domestic security

than the federal government has, and policies should reflect that dynamic. Homeland security grants have become pork-barrel legislation and should be scrapped and replaced by cooperative agreements between the federal government and the states. Not every natural disaster is a national disaster, so federal law should be changed to prevent the federal takeover of every natural disaster and allow more effective state responses. In general, despite the enormous growth of the federal government, states maintain the flexibility to develop innovative solutions to America's toughest challenges. Congress should help the states by amending federal laws—for example, in the area of immigration—to clearly permit the states to experiment with reform efforts.

- **Overcriminalization.** The power to make laws and decisions about the enforcement of those laws should generally reside as close as possible to those who will be most affected. Yet Congress has criminalized broad swaths of American life that have no clear connection to legitimate federal interests or to the Constitution. This over-federalization of crime undermines state and local accountability for law enforcement, undermines cooperative and creative efforts to fight crime, and injures America's federalist system of government. To stop this over-federalization, Congress should require written analysis and justification of every new or modified federal criminal offense or penalty, including (1) a direct statement of the express constitutional provision authorizing the new criminalization, (2) an analysis of whether the criminalization is consistent with both constitutional and prudential considerations of federalism, and (3) a discussion of any overlap between the proposed criminalization and existing state law criminalizing the same conduct.