



Reclaiming the Constitution: An Agenda for State Action

Pushing back against the current overreach of the federal government—and protecting against future expansions of its power—are urgent and daunting tasks. They will require the concerted efforts of many States, and the use of many tools.

The undersigned public policy institutes, hailing from States across the country, believe that in coming years States will have to play a leading role in reclaiming the Constitution's balance of state and federal governance.

We propose the following *Agenda for State Action* to help focus state leaders on the priority tasks that could help States strengthen the boundary between state and federal power, and shield individual liberties from the increasingly relentless federal overreach.

Interstate Compact for Health Care Reform. Interstate compacts are an effective way to regulate areas of mutual concern among two or more States. They can also play a key role in marking the boundary between state and federal authority. In areas of overlapping state and federal jurisdiction, or where state legislation is preempted by an enumerated federal power, the Constitution requires congressional consent for interstate compacts (Art. I, sec. 10). The Supreme Court has held that such congressional consent makes interstate compacts “the law of the Union,” thus trumping prior federal law.

Interstate compacts have enormous unexplored potential as a way of shielding areas of traditional state authority from the concentration of power in Washington. We propose to develop one or more interstate compacts to provide States the autonomy and flexibility they need to regulate health care according to their particular needs, and to provide citizens greater choice in purchasing insurance across state lines. Given the freedom to choose their preferred model for health care policy, States could try a wide variety of models, from single-payer systems as in Canada and Europe, to consumer-driven market-based models. States could:

- Opt out of Obamacare;
- Establish consumer-driven health care exchanges;
- Elect to administer Medicare themselves; or

- Choose to receive federal Medicaid funds as block grants.

The compact could contain the following provisions:

- A “notwithstanding” clause providing that the operation of any federal law contrary to the provisions of the compact is superseded as to the signatory states;
- A mechanism for addressing necessary changes in federal law, such as legislation necessary to restructure entitlements as block grants or to ensure that people are not required to pay federal taxes for federal health programs that states have chosen to fund and administer themselves;
- A mechanism for amending the compact under which amendments adopted by the States would be effective for purpose of state and federal law unless within one year Congress objects to the amendment;
- A provision for the purchase of health insurance across state lines; and
- A provision for congressional consent.

Constitutional Amendments. Constitutional amendments can be proposed in one of two ways. First, Congress itself can propose the amendment. Second, on the call of two-thirds of the States, Congress must convene an Article V convention; the convention then proposes one or more amendments for ratification. In either case, three-fourths of the States must then ratify the amendment. In order to eliminate any theoretical risk of a “runaway convention” (in the case of an Article V process) the call of the States could limit the convention to proposing specified amendments. States could consider a number of different amendments, separately or in combination:

- A balanced budget amendment with strict limits on deficit spending by the federal government.
- A requirement of a congressional super-majority to raise taxes.
- A line-item veto for federal appropriations.

continued on back

- A requirement that increases in the federal debt be approved by a majority of state legislatures.
- A “repeal amendment” allowing two-thirds of the states to repeal any federal law, essentially granting to the states a veto power over federal legislation.
- A “Madison amendment” changing the constitutional amendment process so that, instead of an Article V convention, two-thirds of the states can propose specific amendments for ratification directly.

Opting out of Federal Programs and Federal Funds. The problem of federal funding with conditions and mandates attached is an increasingly serious threat to the constitutional balance of federalism and to state authority within the State’s most essential functions. It is a problem that States must address in a concerted manner. We propose that States pass reciprocal legislation, or enter into an interstate compact, providing that none of them will accept federal funds with mandates and conditions attached (but accommodating federal funds in the form of block grants for a specified purpose). The laws could be triggered to go into effect once a certain number of states—for example 26 (a majority) or 38 (three-fourths, enough to ratify a constitutional amendment)—have adopted them. This would alter the politics of federal appropriations significantly. It would focus more attention on the way in which taxes paid into general federal revenue are diverted to States other than their States of origin, and it would highlight the prohibitive economic penalties imposed on States that refuse to comply with federal policies that they are under no legal obligation to obey.

Federal Lawsuits. States have been fighting back against the federal government by suing in federal court. More than 20 States have sued the federal government to escape the impositions of Obamacare. Texas has filed at least eight separate federal actions seeking relief from various federal environmental actions. More States should join in existing lawsuits, and state legislatures can adopt laws requiring their attorney general to file suit in defense of specific rights.

States can enhance their ability to use the federal courts. One way is to adopt measures such as ALEC’s Model Legislation on Coordination, under which state officials can avail themselves of the coordination requirements that federal law imposes on federal agencies, thereby softening, delaying, or blocking the impact of onerous federal regulatory actions. Another is to create Constitutional Defense Councils empowered to challenge the constitutionality of federal actions. Yet another is to pass laws providing that individuals don’t have to comply with the individual mandate in Obamacare. Such laws are likely null and void on their face under the Supremacy Clause of the Constitution—unless Obamacare is itself unconstitutional. Thus, state legislation can help “create” a justiciable controversy in the form of a direct conflict between state and federal law, and consequently strengthen the case for standing for a state’s attorney general to challenge the federal law.

Federal Legislation. Our representatives in Congress can play an important role in stopping federal overreach. If we can secure a strong congressional majority in favor of restoring constitutional limits on federal power, there is much that can be accomplished. For example, a simple amendment to the Administrative Procedures Act could establish that the Supremacy Clause of the Constitution (Article VI) shall not apply to federal regulatory actions, and that in cases of conflict between a federal administrative agency rulemaking and state law, state law prevails. Federal laws could modify entitlement programs to allow States to opt into “block grant” arrangements, either singly, or through interstate compacts. Other federal laws could modify canons of construction and rules of decision for federal courts, instructing them to construe statutory ambiguities in favor of Tenth Amendment rights, thereby establishing a legal presumption against federal power. ★

Sponsoring Organizations

Commonwealth Foundation (Pennsylvania)
 Evergreen Freedom Foundation (Washington)
 Goldwater Institute (Arizona)
 Illinois Policy Institute (Illinois)
 The James Madison Institute (Florida)

Mackinac Center for Public Policy (Michigan)
 Oklahoma Council of Public Affairs (Oklahoma)
 Texas Public Policy Foundation (Texas)
 Washington Policy Center (Washington)

