

State-Federal Relations: Civil War Redux?

By John Kincaid

The 2010 elections exacerbated party polarization and, along with it, a polarization of state-federal relations, which is produced when one party controls most of the federal government and another party controls most of the states. The 2010 federal health care law aggravated this polarization and, because of its impacts on the states, produced an unprecedented challenge to its constitutionality by more than half the states. The 2010 federal financial regulation law and the U.S. Supreme Court's application of the Second Amendment to the states also presage further federal incursions into state and local governance at a time when federal budget cutbacks and rising social welfare costs will heighten state and local fiscal stress.

Ironically, in the year marking the 150th anniversary of the start of the Civil War in 1861, more than half the states are challenging a major federal law as violating state sovereignty. Some states also enacted or are considering resolutions to nullify federal laws, and some are debating a proposed constitutional amendment to allow states to repeal federal laws.¹ About 24 states have rejected the federal REAL ID Act; several states are considering bills to deny U.S. citizenship to children born to illegal immigrants; and three states have spurned federal funds to construct high-speed railways. Another 17 states are seeking to block federal regulation of carbon emissions; Gulf Coast states are resisting a presidential moratorium on offshore oil drilling; 11 legislatures are considering bills requesting more proof that President Barack Obama was born in the United States; and most states are pushing back against the federal government on Medicaid and other major matters. The governor of Texas has declared that “states must band together to fight against the intrusion of a federal government that seems to know no limit to its own wisdom,”² and a 2010 poll found 63.4 percent of Americans agreeing that “the federal government interferes in states’ decision-making.”³

At the same time, the federal government has blocked key sections of Arizona’s immigration law in court while several other states are pondering similar legislation; the Democratic president intervened rhetorically to support state-local public employee unions in Wisconsin against their Republican governor and legislative majority; and the U.S. Environmental Protection Agency has made an unprecedented move to cancel the authority of a state (i.e., Texas) to issue permits to large power and manufacturing facilities under the Clean Air Act.

State-federal conflict has reached an unprecedented level. The only thing missing from the landscape is Fort Sumter itself. This conflict, however, is not a war between the states, but between the states and the federal government over the limits of federal power and the prerogatives of the states. This conflict is driven mainly by the polarized character of American politics today.

Party Polarization and Federalism

Partisan polarization is a leading feature of contemporary political life. Congress was more polarized between liberal Democrats and conservative Republicans in 2010 than at any time since 1982, when *National Journal* first compiled its polarization data.⁴ Congressional polarization has risen steadily and dramatically since 1978.⁵ Polarization has infected virtually all political institutions, many media sources and many voters too. The incivility of public discourse—so much commented upon after the tragic shooting of U.S. Congresswoman Gabrielle Giffords and others on Jan. 8, 2011, in Tucson, Ariz.—is one manifestation of this polarization as many Americans hold increasingly intense and self-righteous political views.

Polarization has had two notable impacts on the federal system. First, it has contributed significantly to centralization and coercive federalism because control of Congress, the White House and a majority of the state legislatures and governorships by one party (which might be called unified federalism) smoothes the way for expansive federal policymaking. State partisan allies of the party in power in Washington, D.C., tend to embrace policies emanating from their federal counterparts. Second, polarization contributes significantly to state-federal conflict when the party in power in Washington, D.C., faces a majority of states con-

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trolled by the other party (which might be called divided federalism).

The 2010 elections produced such a standoff. Republicans captured the U.S. House of Representatives (241 Republicans, 193 Democrats) while Democrats maintained control of the U.S. Senate (53 Democrats, 47 Republicans) and White House. Republicans gained control of 29 governorships (with Democrats controlling 20 and an independent, but former Republican, in office in Rhode Island) and 26 state legislatures. Another seven legislatures were split between the two parties, and 16 were held by Democrats.⁶ Republicans held control of both the legislature and the governorship in 21 states and Democrats held control in 11 states, although Democrats retained control of 26 attorney generalships.

Constitutional Challenges to the Federal Health Law

The most dramatic and confrontational example of this polarization is the constitutional challenge mounted by Republican governors or attorneys general of 28 states against President Obama's chief legislative achievement, the Patient Protection and Affordable Care Act. This law was a major overhaul of the country's health care system. It requires all individuals to purchase health insurance beginning in 2014; authorizes states to sell federally approved health insurance products through state-operated exchanges with a government subsidy for low-income people; expands Medicaid eligibility up to 133 percent of the poverty level; prohibits denial of health insurance for pre-existing conditions; eliminates lifetime coverage limits; and allows young people to remain on their parents' insurance to age 26.

The challengers' principal contention is that the federal health care reform violates state sovereignty. Specifically, they challenge the legislation's individual mandate, saying it exceeds Congress's commerce power. This mandate requires every uninsured citizen and legal resident to purchase federally approved health insurance by 2014 unless they are exempt (e.g., for religious reasons). Those who do not buy insurance will have to pay to the U.S. Treasury an annual penalty of \$750 or 2 percent of their annual income (whichever is higher) by 2016. When Congress debated this mandate, the president said the penalty was "absolutely not" a tax or tax increase. In response to states' challenges, the U.S. Department of Justice defended the mandate as a proper exercise of Congress' "power to lay and collect taxes."⁷

The key issues are whether "activity" is required for Congress to employ its interstate commerce power and whether the individual mandate is "activity" or "inactivity." The challengers contend the individual mandate regulates inactivity—because not buying insurance is "inactivity"—and that compelling individuals to purchase insurance would remove all conceivable limits on Congress's commerce power and nullify the concept of federalism that is embedded in the principle of limited federal power. The defenders of health care reform contend that activity is not needed to trigger Congress's commerce power, but that even if it is required, not purchasing insurance is "activity." They also argue the individual mandate can be upheld because it is an appropriate exercise of Congress's power "to make all Laws necessary and proper" to regulate interstate commerce.

Another challenge to the health care reform law is that it violates the 10th Amendment because it commandeers the states to enforce federal law. This ground might be tenuous, though, because the legislation allows states to implement their own provisions or let the federal government do so instead. Some states contend the law also violates the Constitution's spending clause, as well as the Ninth and 10th amendments because it unilaterally increases state Medicaid costs. In addition, Virginia's attorney general filed a separate lawsuit contending that his state's law nullifying the health care reform legislation pre-empts federal law.

As of February 2011, three federal district court judges (all appointed by Democratic presidents) had upheld health care reform, while two federal district court judges (both appointed by Republican presidents) had struck down all or parts of it. Some 29 state legislatures are considering state constitutional amendments to nullify sections of the health care reform law, while more than half have rejected such nullification proposals. Consistent with party polarization, the majority of Democratic governors and legislatures support health care reform, while the majority of Republican governors and legislatures oppose it. Nevertheless, nearly all the states are proceeding with its implementation.

Selected Contours of Coercive Federalism

Does this revolt of the states presage the demise of coercive federalism and a rebalancing of state-federal power? Probably not. The revolt is a product of policy disagreements drawn along polarized party lines; it is not a bipartisan revolt based on federalism principles. When either party controls

the federal government, it wields federal power on behalf of its national policy preferences regardless of the preferences of the majority of state officials. The current revolt might curb expansions of federal power in certain policy fields, but will not likely reverse the long-term historical trend of coercive federalism associated with centralization because future elections will produce unified federalism, both Democratic and Republican.

Federal Grants-in-Aid

Federal aid to state and local governments is expected to decrease from \$625.2 billion in 2011 to \$584.2 billion in 2012 and \$567.5 billion in 2013. Federal aid is expected to begin rising again to \$622.9 billion in 2014, \$660.9 billion in 2015, and \$703.2 billion in 2016. Aid is expected to decline from 17.6 percent of federal outlays in 2010 to 15.7 percent in 2016 and from 4.2 percent of GDP in 2010 to 3.6 percent in 2016. Consequently, fiscally stressed state and local governments cannot expect federal funds to alleviate their distress over the next several years.

More importantly, federal aid has shifted dramatically from places to persons since 1978.⁸ In 1978, an historic high point in federal aid, only 31.8 percent of aid was dedicated to payments for individuals (i.e., Medicaid and other social welfare). In 2011, 62.8 percent of aid was dedicated to payments for individuals. In 2016, an astounding 78.2 percent of aid will go to payments for individuals according to the president's Office of Management and Budget.

This shift in the composition of federal aid has had six major consequences for state and local governments. For one, it has reduced aid for place-based functions, such as economic development, infrastructure, criminal justice, environmental protection and government administration. Medicaid alone now accounts for nearly half of all federal aid. Because of Medicaid especially, "other federal grants—including those for education, highways, weatherization, housing, and other programs—are projected to decline as a percentage of GDP after 2010," reported the Government Accountability Office (GAO).⁹ A long-term impact of this shift is likely to be reduced state and local spending on infrastructure, higher education and other core "place" functions that provide public goods beneficial to all citizens. States now engage in many redistributive functions that transfer wealth from the young to the old and, to a lesser extent, the wealthy to the poor.

Second, this shift has hooked state budgets to social-welfare programs susceptible to escalating

federal regulation, cost-shifting, and matching state—and sometimes local—costs, with Medicaid being the gorilla in state budgets. By 2020, states also will pay a portion of the costs arising from the 2010 health care reform law. Because of the aging population, the long-term care portion of Medicaid will become especially costly.

Third, the shift has heightened the role of states as administrative agents for the federal government, whereby they deliver services to individuals on behalf of the federal government under federal rules.

Fourth, the shift of aid from places to persons is the major factor in the decline of federal aid for local governments since the mid-1970s. States are the primary recipients of federal aid for social welfare. Local governments will likely experience further aid reductions, with municipal governments being affected most acutely because they perform the fewest social welfare functions. Spring 2011 negotiations over the federal government's 2012 fiscal year budget pointed toward cuts in such locally important programs as the Community Development Block Grant, Brownfields Economic Development Initiative and the Low-Income Home Energy Assistance Program. In turn, states will have less revenue to send to local governments.

Fifth, the growing scarcity of federal aid for non-social welfare functions will increase competition among all the public and private entities that now receive aid. This competition also will inhibit efforts to consolidate the federal government's 1,122 grants¹⁰ into block grants, because interest groups will defend programs that benefit them.

Sixth, this shift partly explains why, despite the huge increase in federal aid since 1987, federal aid has not significantly alleviated long-term state-local fiscal stress and why the infusion of \$87 billion for Medicaid through the American Recovery and Reinvestment Act of 2009 still left most states with large budget shortfalls even after the 2009 end of the recession.

Another coercive aid characteristic is the increased use of crosscutting and crossover conditions (i.e., rules and regulations) attached to federal aid since the mid-1960s. These conditions advance federal policy objectives, some of which fall outside of Congress' constitutional powers, and also extract state and local spending for those objectives.

One category of conditional aid that has been increasing is congressional earmarking. Earmarks in appropriations bills increased from 1,439 in 1995 to 9,129 in 2010, costing \$16.5 billion.¹¹ Congress

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is reining in overt earmarks because many voters now view them as wasteful, but earmarks are likely to quietly continue (e.g., telephone earmarking).

Escalating Fiscal Crisis

Overall, state-federal relations will be shaped increasingly by fiscal austerity, which will further weaken state and local powers. Austerity will be driven mostly by rising social welfare spending that will siphon funds from critical state and local government functions, such as infrastructure, criminal justice, education and economic development, and also will constrain economic growth. In turn, reduced economic growth will increase social welfare needs and reduce revenues. State and local governments will have less room to raise taxes because the federal government will be the stronger tax competitor. The federal government will limit state and local authority to tax activities deemed important for interstate and global commerce. Citizens will restrain state and local taxes more readily than federal taxes because state constitutional amendments and other tools of democracy—such as the initiative, referendum and recall—are more accessible than are federal officials and the U.S. Constitution.

The GAO estimates that without policy changes, the federal government faces unsustainable debt growth.¹² The 2007–09 recession exacerbated the problem. The GAO concluded, “debt held by the public as a share of GDP could exceed the historical high reached in the aftermath of World War II by 2020.”¹³ Debt could grow to 85 percent of GDP by 2018 and exceed 100 percent by 2022.¹⁴

If Congress wishes to prevent debt over the next 75 years from exceeding its 2010 level (53 percent of GDP), it will have to increase revenue by 50 percent or reduce noninterest spending by 34 percent. Under current policies, demographic changes (mostly a growing population of senior citizens), rising health care costs and deficit spending will require the federal government to spend 93 cents of every dollar of federal revenue by 2030 on its major entitlement programs and net interest payments.¹⁵ The Urban Institute¹⁶ and the National Research Council and National Academy of Public Administration¹⁷ issued equally dismal analyses, attributing the causes mostly to an aging population and rising Social Security, Medicare and Medicaid costs.

The GAO also projects fiscal decline for state and local governments through 2060 and expects revenue growth as a percentage of GDP to remain

flat.¹⁸ In order to stem this decline, state and local governments will have to reduce spending by about 12.3 percent annually for the next 50 years or increase revenues by a comparable level. The principal driver of state fiscal decline is health care costs, mostly Medicaid and health insurance for state and local government employees and retirees. The health care reform law, moreover, which increases Medicaid eligibility to 133 percent above the poverty line, will likely increase Medicaid enrollment by about 25 percent (18 million more enrollees) by 2014. In addition, state and local governments face huge pension liabilities, along with other social welfare costs for such programs as the Children’s Health Insurance Program, Temporary Assistance for Needy Families and unemployment insurance.

Federal Mandates on State and Local Governments

Federal mandates are legal requirements that state or local officials perform functions under pain of civil or criminal penalties. Congress enacted one major mandate in 1931, one in 1940, none during 1941–63, nine during 1964–69, 25 during the 1970s, and 27 in the 1980s. After considerable state and local pressure, however, Congress enacted the Unfunded Mandates Reform Act in 1995. This law is one of the few restraints on coercive federalism. The reform act cut unfunded mandate enactments, though it did not eliminate existing mandates. Only 11 intergovernmental mandates with costs above the reform act’s cost threshold were enacted between 1995 and 2010.¹⁹

However, the Unfunded Mandates Reform Act covers only some of the federal actions imposing costs on states and localities. It does not include conditions of aid, pre-emptions and some other policies. Overall, the National Conference of State Legislatures estimates that up to 10 percent of a state’s general fund budget goes to filling in gaps in federal unfunded mandates.²⁰ During 2002–08, moreover, the federal government promulgated an average of 527 rules per year regulating state governments and 343 regulating local governments, the costs of which are not known.²¹

An unknown question is the extent to which health care reform will become a *de facto* unfunded mandate for the states. A report from the Senate Finance Committee and House Energy and Commerce Committee estimated states will have to spend \$118 billion during 2017–23 to cover the legislation’s expansion of Medicaid. Previously, the

Kaiser Commission estimated new state spending on Medicaid at \$43.2 billion through 2019, and the Congressional Budget Office estimated such new state spending at \$60 billion through 2021.²² The health care reform law does give states the opportunity to withdraw from the Medicaid program if it becomes too costly, although, as a practical matter, withdrawal seems impossible.

Federal Pre-emptions of State Powers and Financial-Reform Legislation

Another major characteristic of coercive federalism is federal pre-emption (i.e., displacement of state law). From 1970 to 2004, Congress enacted some 320 explicit pre-emptions compared to about 200 explicit pre-emptions enacted from 1789 to 1969.²³ That is, 62 percent of all explicit pre-emptions in U.S. history have been enacted since 1969. In addition, a vast but uncounted field of implied pre-emption is embedded in federal agency regulations and federal court rulings, and recent presidents have used executive rule-making to advance pre-emption when Congress drags its feet. Although some pre-emptions benefit the states,²⁴ the unprecedented leap in pre-emption since 1969 has irrevocably established the federal government as the King Kong-sized partner in the federal system.

Pre-emption will still reign during upcoming years, but its pace could slow, depending on partisan control of Congress, the White House and the Supreme Court. Generally, Republicans prefer total pre-emption of a wide range of state powers pertaining to the economy, consumer affairs, product liability and environmental protection. As U.S. Rep. Henry Waxman (D-Calif.) reported in June 2006, Congress had voted at least 57 times to pre-empt state laws over the previous five years. Those votes yielded 27 statutes, including 39 pre-emptions.²⁵ Business, too, often prefers total pre-emption because it prefers regulation by one 500-pound gorilla in Washington, D.C., than the 50 states. The pace and number of pre-emptions will likely increase under Republicans.

Democrats are less eager to pre-empt state powers pertaining to the economy, consumer affairs, product liability and environmental protection. When they do so, they often endorse partial pre-emption, whereby federal law establishes a national minimum standard that can be exceeded by states or delineates policy fields subject to state action. In 2009, for example, President Obama signed the Family Smoking Prevention and Tobacco Control Act, which allowed the U.S. Food

and Drug Administration to regulate most tobacco products. The act specifically preserves state product-liability laws.

In the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, a major reform of financial regulation, the Democratic majority in Congress, with Obama’s support, both pre-empted and strengthened state powers. The law protected most existing state regulatory authority in consumer protection and banking, and reversed some Bush-era pre-emptions. The law allows states to enforce some federal consumer-protection laws on national and state banks, and the new federal Consumer Financial Protection Bureau can examine state banks only jointly with state bank supervisors. A majority of states can petition the new federal consumer bureau to issue new protection rules. The law often treats federal consumer law as a floor, not a ceiling, and does not explicitly pre-empt exclusive state regulation of insurance. State insurance regulators will still oversee equity-indexed annuities, which the law exempts from regulation by the federal Securities and Exchange Commission. The law created a new Office on Insurance in the U.S. Department of the Treasury, but it will not regulate state-regulated insurance or securities. “The act did, however, establish federal authority to create new national standards governing how states regulate the reinsurance market and how states collect taxes for highly specialized and unique risks, known as ‘surplus lines.’”²⁶ Hedge funds and other investment advisers handling less than \$100 million will be regulated by the states, not the SEC. The previous threshold was \$25 million. “The SEC estimates about 4,000 investment advisors will switch to the states.”²⁷

In other policy fields, especially civil rights, Democrats more willingly support pre-emption, including total pre-emption. During his 2008 campaign, Obama told Planned Parenthood, “The first thing I’d do as president is sign the Freedom of Choice Act”²⁸ that would pre-empt virtually all state and local laws deemed to be barriers to abortion. He also has expressed his support for the federal government to take over the establishment and enforcement of safety standards for mass-transit systems and to increase federal regulation of insurance.

Conservatives on the Supreme Court support pre-emption more often than liberal justices. The prospect of a liberal majority appearing on the court in the near future is probably about equal to that of a conservative majority. The average age of

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the court's liberals is 65; the conservatives' average age is 64. The swing justice, Anthony Kennedy, is 75. Even with a liberal majority, though, the court would be a speed bump, not a barrier, on the freeway of pre-emption.

A major, unknown factor is whether the court will uphold the health care reform legislation. This law contains mandates as well as a blockbuster *de facto* pre-emption, namely, authority for the federal government to enter a state to establish an exchange to sell federally approved health insurance to residents when the elected officials of that state refuse to operate such an exchange. However, the act explicitly pre-empts only state laws that block the application of health care reform. Other state statutes, such as insurance regulation, will still be in force.

This will be a revolutionary federal displacement of traditional state power. Although there is ample judicial precedent for the federal government to enforce its laws within recalcitrant states, the magnitude of enforcing the individual mandate through federal operation of exchanges in unwilling states might be said to violate the Constitution's republican guarantee clause.

Federal Restrictions on State and Local Tax and Borrowing Powers

Federal incursions into the tax and borrowing powers of state and local governments also characterize coercive federalism and will continue to constrain state and local revenue generation. Prominent limits are the Supreme Court's restriction on state sales taxation of out-of-state mail-order sales,²⁹ which cost the states about \$8.6 billion in lost revenue in 2010,³⁰ and the Internet Tax Freedom Act Amendment Act of 2007, a seven-year extension of an already 10-year-old moratorium on state-local taxation of Internet access.

In response to the Supreme Court's ruling, some states have joined the Streamlined Sales and Use Tax Agreement, a collective interstate effort to set up an enforceable mail-order sales tax system. Congress has not approved the agreement. Some states have devised ways to collect sales taxes on some out-of-state mail-order sales, especially by arguing that in-state marketing affiliates of big online retailers should collect the state sales tax. Some states have retreated in the face of threats from online retailers to drop affiliates in their states and, thus, cause the states to lose businesses and jobs. Whether this tax strategy will withstand judicial scrutiny is unknown.

Another important issue is whether the federal government will increase taxes significantly during the upcoming years or enact a federal sales tax or value-added tax. This would place downward political pressure on state and local sales tax rates, reduce state and local sales tax collections, and especially hurt states such as Florida, Tennessee and Washington, which rely heavily on sales taxes for revenue. The national governments of most federal countries levy a value-added tax and share some of its revenues with their constituent governments. It is unlikely Congress would do the same.

Nationalization of Criminal Law

In the Kentucky Resolutions of 1789, Thomas Jefferson wrote that the U.S. Constitution "delegated to Congress a power to punish" four sets of crimes "and no other crimes whatever." Today, about 4,500 federal criminal laws, including about 50 capital offenses, and 300,000 federal regulations can be enforced by criminal penalties. By one estimate, Congress creates about 56 new crimes each year.³¹ Only recently have critics, both left and right, challenged this nationalization,³² which is another feature of coercive federalism.

One recent proposal for stemming this tide of federal criminalization would be to require both Congress and the executive branch to report regularly on the nature and extent of this nationalization of criminal law. It also would require Congress to analyze whether proposed federal crimes "are consistent with constitutional and prudential considerations of federalism" and compare proposed penalties "with the penalties under existing federal and state laws for comparable conduct."³³

Demise of Intergovernmental Institutions

Coercive federalism also produced the demise of executive, congressional and independent intergovernmental institutions established during the era of cooperative federalism. Most notable was the death of the U.S. Advisory Commission on Intergovernmental Relations (ACIR) in 1996 after 37 years of operation.³⁴ Many state advisory commissions have disappeared as well.³⁵ Congress no longer has important committees on federalism and intergovernmental relations, and federal departments either have no intergovernmental office or a highly political one. President Reagan dismantled the intergovernmental unit in the Office of Management and Budget in 1983, and the GAO's intergovernmental unit was phased out in the early 1990s. The White House Intergovernmen-

tal Relations office, now called Intergovernmental Affairs and Public Engagement, is an important political and favor-dispensing office but not a vital node for intergovernmental policymaking.

At a time of fiscal austerity and further interlocking of the federal and state governments as reflected in health care reform, no dedicated institutions address fundamental and systemic intergovernmental structures and processes.³⁶ There have been occasional calls to revive the Advisory Commission on Intergovernmental Relations, for example, but no such institution is likely to come back into existence.³⁷

Federal Judicial Intervention and Gun Rights

Coercive federalism also has included unprecedented numbers of federal court orders requiring state and local governments to undertake policy actions. Although federal court orders dictating major and costly changes in such institutions as schools, prisons and mental health facilities have declined since the early 1990s, state and local governments are still subject to high levels of litigation in federal courts. Judicial consent decrees, some of which last for decades, are another restraint on state and local officials. Decrees are a major way to guarantee state or local government compliance with federal rules in many intergovernmental policy areas, such as education, environmental protection and Medicaid. The U.S. Supreme Court resurrected the 11th Amendment in the 1990s to restrain some types of litigation, but the reach of the court's decisions has been quite limited.

The major U.S. Supreme Court decision affecting state and local governments in 2010 was *McDonald v. City of Chicago*.³⁸ In this 5-4 ruling, the court opined that the Second Amendment to the U.S. Constitution guarantees individuals the right to bear arms and that the Second Amendment, like most other provisions of the U.S. Bill of Rights, must be applied to the states under the 14th Amendment (1868). The ruling reversed a long-held view that the Second Amendment referred to organized state militias, not individual rights.

The last time the Supreme Court incorporated a provision of the U.S. Bill of Rights into the 14th Amendment was 1969.³⁹ Indeed, 55 percent of all such incorporations occurred during the 1960s. Incorporation, strongly supported by liberals, produced a flood of citizen litigation against state and local governments. Many conservatives and gun-rights organizations such as the National Rifle Association, however, had long advocated the

incorporation ruling in *McDonald*. This ruling has already spawned many lawsuits challenging state and local gun regulations and will keep the federal courts enmeshed in this state-local policy field for decades. Litigation may be especially prolonged because the Supreme Court set forth no criteria for determining when state laws or local ordinances might violate the Second Amendment. The court did not even rule on the constitutionality of the two gun-control laws from Chicago and Oak Park, Ill., that were at issue in this case. Instead, the Supreme Court remanded the cases to the lower courts to decide whether the ordinances are consistent with the Second Amendment.

Conclusion

The broad and coercive reach of federal power with respect to the states and their local governments shows no signs of abating. Many states are pushing back against federal power, but this revolt is motivated substantially by partisan polarization and will not likely be successful in the long run. One possible exception would be a U.S. Supreme Court ruling striking down portions of the health care reform law, especially the individual mandate, as being an unconstitutional exercise of Congress's commerce power.

Notes

¹This proposal is very similar to the National Reconsideration Amendment proposed by the States' Federalism Summit in 1995. See The Council of State Governments, *Restoring Balance in the American Federal System* (Lexington, KY: CSG, 1996).

²Rick Perry, *FED UP! Our Fight to Save America from Washington* (New York: Little Brown, 2010), 177.

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⁴Ronald Brownstein, "Pulling Apart," *National Journal* 43 (February 26, 2011): 19.

⁵Nolan McCarthy, Keith T. Poole, and Howard Rosenthal, *Polarized America*, <http://polarizedamerica.com/> accessed Feb. 16, 2011.

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⁸John Kincaid, "The State of U.S. Federalism, 2000–2001: Continuity in Crisis," *Publius: The Journal of Federalism* 31 (Summer 2001): 1–69.

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¹⁴ The Peterson-Pew Commission on Budget Reform, *Red Ink Rising* (Washington, D.C.: Commission, 2009).

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¹⁶ John L. Palmer and Rudolph G. Penner, *Have Recent Budget Policies Contributed to Long-Run Fiscal Stability?* (Washington, D.C.: Urban Institute, 2010).

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¹⁹ U.S. Congressional Budget Office, *A Review of CBO’s Activities in 2009 Under the Unfunded Mandates Reform Act* (Washington, D.C.: CBO, March 2010).

²⁰ National Conference of State Legislatures, “Unfunded Mandates Letter” (November 16, 2010) at <http://www.ncsl.org/default.aspx?tabid=21723>, accessed January 28, 2011.

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²² U.S. Senate Finance Committee and U.S. House Energy and Commerce Committee, *Medicaid Expansion in the New Health Law: Costs to the States* (Washington, D.C.: U.S. Congress, March 1, 2011), 1.

²³ National Academy of Public Administration, *Beyond Pre-emption: Intergovernmental Partnerships to Enhance the New Economy* (Washington, D.C.: NAPA, 2006).

²⁴ Joseph F. Zimmerman, *Congress: Facilitator of State Action* (Albany: SUNY Press, 2010).

²⁵ OMB Watch, “States Losing Ability to Protect Public Due to Federal Preemptions,” June 13, 2006 at <http://www.ombwatch.org/node/2957>, accessed Dec. 19, 2010.

²⁶ Timothy J. Conlan and Paul Posner, “Inflection Point? Federalism and the Obama Administration.” Paper presented at the Annual Meeting of the American Political Science Association. Washington, D.C. Sept. 2, 2010, pp. 29–30.

²⁷ Kara Scannell, “States Will be Hedge-Fund Police,” *Wall Street Journal*, August 19, 2010, C3.

²⁸ YouTube, “Barack Obama Promises to Sign FOIA,” July 17, 2007 at <http://www.youtube.com/watch?v=pf0XIRZSt8>, accessed November 19, 2010.

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³⁹ *Benton v. Maryland*, 395 U.S. 784 (1969).

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