

The States Fight Back: Scholars and Grassroots Groups Promote Statehouse Revolt

By Elias Crim

Summary: Spurred by the specter of fiscal collapse and mounting federal mandates, Tea Party activists and legal scholars are mounting a movement to restore power to state legislatures. They are sponsoring a wave of controversial new legislative proposals aimed at restoring state sovereignty. Some of the ideas may seem far-fetched, but without political imagination there is no political reform. The U.S. Constitution is the movement's yardstick.

In 2009 House Speaker Nancy Pelosi was asked a question about where in the U.S. Constitution she found the authority to require every American to purchase private healthcare insurance. The Speaker responded with a laugh and then replied, “Are you serious? Are you serious?” When the questioner said he was not joking, Pelosi just shook her head and took another question.

Pelosi’s off-handed dismissal was representative of the reaction of many politicians when they are asked where they get the authority to do what they want to do. Her scornful remarks are infuriating to increasing numbers of Americans who want to hold elected politicians and appointed judges to the higher authority of the Constitution.

A February 2010 Rasmussen poll confirms the public’s frustration: 59% of likely voters now believe the states should have the right to opt out of federal programs of which they disapprove. Another 15% are not sure.



Polls have shown that large numbers of voters believe the NAFTA agreements, the Patriot Act, the Wall Street bailouts and the 2009 fiscal stimulus were enacted without the “deliberation” required by the U.S. Constitution.

But when citizens insist that the text of the Constitution must be cited to show the authority for congressional action their appeals are rejected and ridiculed.

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AFL-CIO staff writer Mike Hall wrote this on the AFL-CIO Now Blog:

“Most cults are based in some sort of skewed spiritual vision or the worship of a charismatic leader, but there is a re-emerging cult that bows down at the feet of the 10th Amendment to the U.S. Constitution. Many of them want to bring their cultish beliefs to the halls of Congress and are running for election this fall.”

Washington Post columnist Richard Cohen is similarly annoyed by appeals to the Constitution:

“This fatuous infatuation with the Constitution, particularly the Tenth Amendment, is clearly the work of witches, wiccans and wackos. It has nothing to do with America’s real problems and, if taken too seriously, would cause an economic and political calamity.”

There is nothing strange about the Tenth

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Amendment to the Constitution. It reads in full: “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.”

Limiting the Power of the Federal Government

“Restore the Tenth” is a powerful idea. Perhaps that’s why it’s the name of a joint project of two groups dedicated to supporting those trying to resist federal mandates and programs. The State Policy Network (SPN) is the federation of over 50 free-market state think tanks, with one or more in every state. The Institute for Policy Innovation (IPI), a Texas-based policy organization, focuses on “lower taxes, fewer regulations and smaller, less-intrusive government.” SPN and IPI have built impressive networks of state level experts and activists who aim to persuade citizens and legislators that market-friendly policies in state government can maximize individual liberty and opportunity. They are a “refudiation” of the claim that the Tenth Amendment is the preserve of witches and wackos.

Nevertheless, today constitutional government is in serious jeopardy. The principles of separation of powers, checks and balances, and federalism used to be deeply ingrained in the minds of Americans. But they have been eroded as the federal government imposes more and more laws on the states to regulate private sector activities and individual behavior. Many of these “unfunded mandates” require states to spend their own tax revenues on programs devised in Washington, D.C. These impositions and others are fueling the public outcry that has become the Tea Party movement.

Remember Feb. 19, 2009? “We’re thinking of having a Chicago tea party in July. All you capitalists that want to show up to Lake Michigan, I’m going to start organizing it.”

This was a symbolic moment: the on-air outburst (now known as “The Rant Heard Round the World”) by CNBC reporter Rick Santelli that galvanized grassroots groups around the country. The Tea Party movement, beholden to neither Republicans nor Democrats, called on Americans to take actions constraining federal government power. The election of Tea Party candidates to Congress in 2010 is a first step to achieving that goal.

But activists and scholars are proposing many other steps, some of them quite controversial to break the grip of federal control. They are writing books, introducing resolutions in state legislatures, and refusing to implement federal mandates on the states. They are proposing binding legislation and state constitutional amendments to nullify federal power. And they are pushing measures to uphold the sovereignty of the states to determine their own policies.

Consider some of the emerging state sovereignty bills. The proposals are striking, not only for their variety but also because they don’t necessarily correspond to the ordinary politics of left and right. One Los Angeles-based grassroots group called the Tenth Amendment Center reports on the progress of these initiatives. From the Tenth Amendment Center’s website:

Firearms Freedom Act bills: “Originally introduced and passed in Montana, the FFA declares that any firearms made and retained in-state are beyond the authority of Congress under its constitutional power to regulate commerce among the states. The FFA is primarily a Tenth Amendment challenge to the powers of Congress under the ‘commerce clause,’ with firearms as the object.” (Passed in eight states, introduced or expected to be introduced in approximately 20 more.)

10th Amendment (or State Sovereignty) bills: “Unlike the many 10th Amendment

Resolutions that have been introduced around the country since 2008, these bills are proposals for binding legislation. They include language to affirm the sovereignty of the people of the state and to create a commission or a committee to review the Constitutionality of acts emanating from the federal government.” (Introduced in six states.)

Healthcare Freedom Act bills: “The Health Care Freedom Act is considered in states as either a bill or a state constitutional amendment, effectively prohibiting the enactment of any new government-run healthcare programs within the state. While many of the bills have language similar to true nullification legislation, many of them are promoted solely as a vehicle to drive a federal court battle – which is not nullification in its true sense.” (Passed as law in four states; introduced and passed one or both houses in 22 states.)

The Tenth Amendment Center explicitly promotes “nullification.” This is the idea that the U.S. Supreme Court does not possess a monopoly on the interpretation of the U.S. Constitution. Conservative historian Thomas C. Woods, the author of *Nullification: How to Resist Federal Tyranny in the 21st Century* (Regnery, 2010) argues that the Founding Fathers gave states the authority to nullify federal power.

Woods points out that Jefferson and Madison appealed to the concept of nullification (the “rightful remedy,” as they termed it) when they argued in 1798 against the Alien and Sedition laws, arguing that an unconstitutional law is *by definition* null and void. Jefferson authored a resolution passed by the legislature of Kentucky in 1798 that formulated this eye-opener: “Whensoever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force.” Today’s new “nullifiers” ask: To how much of current Congressional spending

might this observation apply? Their answer: a great deal of it.

Woods argues that the Founders understood that it is up to the states, as parties to the federal compact, to declare laws unconstitutional. The federal government cannot be expected to overturn unjust laws of its own making.

Live Free or Die

Dan Itse, a Republican state legislator in New Hampshire took steps to convert his alarm at growing federal power into action. “I knew I had to make these constitutional insights into a resolution for the New Hampshire legislature and that I wanted to make them an appeal to Jeffersonian principles, since he is of course an icon to my Democrat colleagues.” In 2009 Itse introduced HCR 6 “A Resolution Affirming States Rights Based on Jeffersonian Principles.”

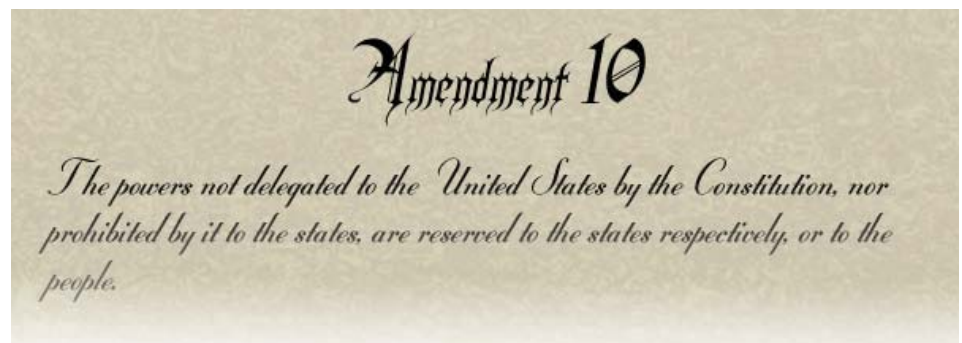
Unfortunately, HCR 6 was defeated in the New Hampshire state legislature. Moreover,

an example of that toothy language. The Montana Tea Party Coalition is asking every state legislative candidate if they will support legislation along these lines:

“Any official, agent or employee of the U.S. government or any employee of a corporation providing services to the United States government that enforces or attempts to enforce an act, order, law, statute, rule or regulation of the government of the United States in violation of this act shall be guilty of a felony and upon conviction must be punished by a fine not exceeding five thousand dollars (\$5,000) or a term of imprisonment not exceeding five (5) years or both.”

Calling the Feds’ Bluff

Nullification proponents are sometimes maligned as secessionists and segregationists. They are equated with the Southern politicians who sought to protect racial segregation



it was only a resolution, a public statement without force of law that served notice on the Federal government to halt all activities outside the scope of its constitutionally-specified powers. Still, it gave Itse a forum, and when he appeared on Glenn Beck’s TV show he was able to report that 20 states (increased to 28 one week later) were introducing similar sovereignty resolutions. Itse said many of them borrowed language from his HCR 6.

Itse predicts the next round of state sovereignty bills will have more “teeth.” Here’s

by invoking the concept to defend “states’ rights” against federal civil rights laws. But those who want increased support for the Tenth Amendment –sometimes called “tenthers”—note the many honorable uses of nullification in American history—notably, resistance to the Fugitive Slave Law in the 1850s.

In our own time “states’ rights” is no reactionary doctrine. Under the mounting pressures of unfunded federal mandates, more and more states have adopted nullification in practice if not in principle. For instance,

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the REAL ID Act of 2005, signed into law by President George W. Bush, established national standards for state-issued driver's licenses and identification cards, and it created procedures requiring them to be approved by the Department of Homeland Security. Fiscal conservatives believed the law was another unfunded raid on state revenues, and civil libertarians objected that the government was consolidating Americans' private information. The act is still on the books, but more than two dozen states have refused to participate in the program. They have passed laws or resolutions opting out of its enforcement.

In the November elections Californians got to vote on a different nullification drive. Proposition 19 would have made recreational marijuana cultivation and use legal under California state law while leaving intact federal laws over the controlled substance. Attorney General Eric Holder announced that the Obama administration strongly opposed Prop 19 and would continue to uphold federal law. Had Prop 19 passed, it would have blocked state officers from seizing marijuana deemed in compliance with state law. This would have prevented the coordination typically undertaken between federal and state law enforcement officials. Proposition 19 was defeated by a 54-46% margin.

In 1996, however, California became the first state to nullify federal laws on medical marijuana use. Thirteen other states followed suit, and last month Arizona voters made their state the 15th to defy federal law prohibiting the use of marijuana by people claiming a medical necessity.

Resist DC

Healthcare and education are far more important issues than marijuana for most Tea Partiers and other fiscal conservative activists. "These are the two areas that are breaking the backs of the states, fiscally speaking," says Sam Rohrer, a Pennsylvania state representative who lost the Republican

primary race for governor to attorney general (and now-governor-elect) Tom Corbett. He believes fiscal pressures are the key driver in the push to regain state sovereignty.

But Rohrer also believes executive leadership is required. He notes that three state governors were responsible for stopping the Real ID Act: South Carolina's Mark Sanford, Texas' Rick Perry and a Democrat, Montana's Brian Schweitzer. "We need a whole group of governors pushing for these Tenth Amendment initiatives—that's the roadmap to national renewal," he adds.

However, Rohrer explains that what usually tempers the enthusiasm of governors—who, like many politicians, tend to come from legal backgrounds—is that they think in terms of court rules and case law. This mindset stops them from displaying executive courage once they're in office.

In Washington State, Representative Matt Shea led a group of legislators who met to look at ways that statehouses could reassert their authority. The group did not let "political reality" restrain their political imagination.

Like his New Hampshire colleague, Shea's group argued that the federal government would ignore protests against its power until the states did more than pass toothless resolutions. Meeting in summer 2009 the group wrote a four-part program called "Resist DC: A Step-by-Step Plan for Freedom." Here it is.

1. Reclaim State Sovereignty through Nullification Legislation. The document recommended that the states introduce bills to nullify Obamacare and any national "cap-and-trade" energy regulatory laws. It also demanded that Congress specify the enumerated power it uses to justify its own laws. If the federal government fails to do so, Shea's group said states should pass laws establishing an "Escrow Account" for federal tax dollars. That would allow the states to

hold any taxes payable to the feds pending their compliance with the Constitution's requirement that they specify an enumerated authority to spend the revenue.

2. Erect an impenetrable wall around the County Sheriff and the Second Amendment. To protect the right to self-defense the group supported "Sheriff First" legislation recognizing the "pre-eminent" legal authority of the county sheriff. It would require federal agents and officers to give notice to and seek permission from sheriffs before conducting any arrest or search and seizure.

3. Restore Sound and Honest Money. States should put pressure on Congress to audit the Federal Reserve in order to reveal that the system enables private bankers to profit at public expense. Shea also called on the states to back resolutions putting the federal government on notice to end fractional reserve banking and restore a currency backed by gold and silver (and perhaps commodities). The document cites the expertise of noted constitutional scholar Dr. Edwin Vieira to support its monetary theory and history.

4. If State Legislatures Fail, Introduce Laws through the Initiative Process. The people are the final check and balance against arbitrary power. Recognizing that many state legislatures will refuse to consider proposals such as those mentioned above, Shea emphasizes the importance of reserving to the people the final power of legislation. That means protecting and expanding the political processes of the Initiative, the Referendum, and the Recall.

The Repeal Amendment

OK, suppose Congress passes a law that is not unconstitutional—but it's still a bad idea. Is there anything the states can do to overturn it? Enter the strategy of the Repeal Amendments.

In a Sept. 16 Wall Street Journal column, Georgetown University law professor Randy

Barnett and William Howell, the Speaker of the Virginia House of Delegates, suggested that states could use their powers under Article V of the Constitution to call a convention that would propose a federalism amendment to repeal laws passed by Congress. Obamacare is the law they have in mind. Here's the proposed language:

Any provision of law or regulation of the United States may be repealed by the several states, and such repeal shall be effective when the legislatures of two-thirds of the several states approve resolutions for this purpose that particularly describe the same provision or provisions of law or regulation to be repealed.

Barnett stressed that such an amendment would be structural (i.e., it is not tailored to a particular policy) and self-executing (i.e., it does not rely on the courts to enforce it). Unlike nullification, which asserts the constitutional rights of the states, the repeal amendment functions more like the president's veto power.

How would repeal work? In January the legislature of Virginia will consider proposing just such an amendment. This effort, paired with Virginia Attorney General Ken Cuccinelli's court battles over Obamacare, will make the state a veritable hotbed of federal pushback.

Repeal the 17th Amendment

Besides restoring the Tenth Amendment, some scholars and activists have urged the repeal of the Seventeenth. That's the constitutional amendment ratified in 1913 that removed state legislatures from the process of selecting U.S. senators and adopted the election of senators by popular vote in each state. The Progressive movement thought popular elections would prevent state legislators from exercising their power to control how

senators voted in Congress. But the practical effect, many would argue today, is that senators' votes are now controlled by special interest groups in Washington, D.C.

"If senators were again selected by state legislatures," argues Washington Times columnist Tony Blankley, a former top aide to former Speaker of the House Newt Gingrich, "the longevity of Senate careers would be tethered to their vigilant defense of their state's interest—rather than to the interests of Washington lobbyists." The Senate would then take on its original function—the place where the states are represented in the federal system. In the Nov. 15 issue of National Review George Mason University law professor Todd Zywicki observes that the common practice of using the states to carry out federal mandates would be unthinkable if U.S. senators were beholden to state governments.

By Any Peaceful Means Necessary

Tom Woods recognizes that nullification proposals and other political initiatives to push back federal power are still at the drawing board stage. He argues that all forms of decentralization—nullification, repeal amendments, even (peaceful) secession—deserve consideration. "We need a national united front of decentralists—a patchwork of efforts which can get majority support."

He also acknowledges the challenge of bipartisan collaboration: Will NRA second amendment activists want to collaborate with potheads who want to legalize marijuana? "Can we work with people who want exemption from federal laws that we may happen to like but which are in fact unconstitutional?"

To accomplish that requires the citizens of the several states to buy into a philosophy of "I leave you alone, you leave me alone," which has a libertarian ring that not all conservatives can comfortably embrace. But Woods argues that these aren't left/right

issues: "It should be a structural question: Do you want to live in an imperial society or a self-governing one?"

The states are capable of using power badly, Woods agrees. "But at least you have some recourse when they do. Nobody can control Washington, D.C.—this is obvious." That's why many Tea Party rebels are looking to the states.

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Many thanks.

Terrence Scanlon
President

Briefly Noted

ACORN filed for Chapter 7 bankruptcy last month in order to escape its debts. Despite a 40-year track record of corruption and lawbreaking, ACORN chief organizer **Bertha Lewis** blamed the organization's problems on its conservative critics, claiming ACORN was the victim of its own "highly effective strategies" that succeeded in "catching the attention of right-wing media and its proponents." According to Lewis, the undercover videos last year showing ACORN employees giving tax and legal advice on starting a brothel for pedophiles had nothing to do with it.

ACORN executive **Amy Busefink** cut a last-minute deal with Nevada prosecutors in hopes of avoiding prison time for her role in a voter fraud-related conspiracy. Busefink entered an "Alford plea," roughly equivalent to "no contest." Prosecutors say she condoned a conspiracy to provide illegal monetary bonuses to voter registration canvassers who exceeded daily quotas. Nevada law forbids this because it provides an incentive for canvassers to file bogus registrations. Sentencing for Busefink is set for Jan. 10. ACORN is not quite off the hook. Prosecutors say they plan to pursue already pending conspiracy charges against ACORN itself.

Federal auditors say ACORN can't account for \$3.2 million in government grants it received to remove lead paint in homes. They want ACORN to repay the money, part of which they say was spent inappropriately on fundraising and political campaigns.

The **George Soros**-funded **Secretary of State Project** did not achieve its aims in the November elections. Of seven secretary of state candidates endorsed by the SoS Project, only Democratic incumbents **Mark Ritchie** of Minnesota and **Debra Bowen** of California survived the GOP onslaught. The leftist SoS group tries to elect secretaries of state who believe voter fraud is a figment of conservatives' imaginations.

George Soros is also bankrolling a documentary that celebrates anarchists who plotted to napalm Republicans at the 2008 GOP convention in Minnesota. The soon-to-be-released film *Better This World* depicts **David McKay** and **Bradley Crowder** as idealistic activists who, according to the official blurb, "set out to prove the strength of their political convictions to themselves and their mentor." In fact, their plot to hurl Molotov cocktails at Republicans was foiled by former radical activist **Brandon Darby**, who worked with the **FBI**. The film depicts Darby as the villain, and McKay and Crowder as heroes. They were convicted of possessing unregistered "firearms" and are now serving prison terms. The **Sundance Institute's** Documentary Film Program, which provided a grant to the filmmakers, has received \$9.6 million since 2002 from Soros's **Open Society Institute**. Sundance has taken in \$11.2 million in government grants since 1997.

A government commission with a good idea? The co-chairmen of President **Obama's** bipartisan commission to reduce the federal debt have proposed killing federal funding for the **Corporation for Public Broadcasting**. CPB funds the left-wing radio network NPR and PBS. Taxpayers would save almost half a billion dollars. The commission's full report is due this month.

The **American Conservative Union Foundation**, sponsor of the annual **Conservative Political Action Conference** (CPAC), is hosting its first ever CPAC Mid-Winter Cruise this month. Emerging conservative leaders Sen.-elect **Marco Rubio** (R-Fla.) and Puerto Rico Gov. **Luis Fortuno** are among the featured guests on the cruise that will begin in Ft. Lauderdale and visit Puerto Rico, Turks and Caicos, the U.S. Virgin Islands, and the Bahamas. The 2011 **CPAC** begins Feb. 10 in Washington, D.C.