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THE TENTH AMENDMENT: *The Promise of Liberty*

Strategies to Restore the Balance of Power Between the Federal and State Governments

Board of Directors' Committee on Federalism

910 17th Street N.W. ■ Fifth Floor ■ Washington, D.C. 20006
(202) 466-3800 ■ FAX (202) 466-3801

ABOUT THE AUTHORS. . .

Charles J. Cooper concentrates his practice in the areas of civil litigation and administrative law. From 1985-1988, he served as Assistant Attorney General in the Department of Justice's Office of Legal Counsel. As Assistant Attorney General, he provided the President and the departments of the executive branch with formal legal opinions and informal legal advice. Prior to that appointment, he served as Deputy Assistant Attorney General in the Civil Rights Division, supervising all appellate litigation from 1981-1985. Since leaving the Department of Justice in 1988, Mr. Cooper has been in private practice, litigating cases in the banking, civil rights, First Amendment, and other federal administrative areas. Last year, he served on the Scholars Advisory Committee on Federalism which was created by the States' Federalism Summit Steering Committee. The Scholars Advisory Committee presented proposals to restore balance to the federal system at the States' Federalism Summit held in Cincinnati, Ohio in October 1995.

During his tenure with the Department of Justice, Mr. Cooper also served as Chairman of the Domestic Policy Council's Working Group on Federalism, as well as a member of the National Security Council's Policy Review and Planning and Coordinating Groups.

From 1978-1979, Mr. Cooper clerked for Justice (now Chief Justice) William H. Rehnquist of the United States Supreme Court. The previous year, he clerked for Judge Paul H. Roney of the United States Court of Appeals for the Fifth (now Eleventh) Circuit.

Mr. Cooper, who graduated first in his law school class in 1977, earned his B.S. and J.D. degrees from University of Alabama. Among his many law school honors, he was inducted into the Order of the Coif. He served as Editor-in-Chief of the *Alabama Law Review* from 1976-1977 and, since then, has been a frequent contributor to policy and legal journals.

David H. Thompson is a constitutional lawyer in Washington, D.C. He has participated in cases challenging federal encroachment of state sovereignty in contravention of the Eleventh Amendment and has been an advocate for the restoration of federalism. He received both his undergraduate degree and his law degree from Harvard University.

The State Factor: The Tenth Amendment: The Promise of Liberty
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American Legislative Exchange Council
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THE TENTH AMENDMENT: THE PROMISE OF LIBERTY

Strategies to Restore the Balance of Power Between the Federal and State Governments

Executive Summary

Last October, the American Legislative Exchange Council ("ALEC") and other organizations[1] sponsored a national federalism summit to consider specific proposals that would restore the balance of power between the States and the federal government. At that time, ALEC and the other sponsoring organizations agreed that the following four such proposals merit further consideration:

- *A mechanism to provide the people of the states, through their legislatures, the power to require Congress to reconsider laws or regulations that interfere with state authority.*
- *A mechanism that would allow the states to propose specific amendments to the U.S. Constitution subject to ratification by the United States Congress.*
- *Statutory remedies and/or constitutional reforms to address the problems of conditions attached to federal spending grants, regulations and mandates.*
- *A federalism act to enhance the political safeguards and give states a more effective voice in congressional deliberations.*

This report presents ALEC's analysis of the way in which each proposal should be enacted.

1. The National Government of the People Amendment

- Under this constitutional amendment, the People acting through their state legislatures would be able to repeal intrusive federal legislation and regulations.
- Targeted statutes and regulations would be rescinded upon the adoption of resolutions of disapproval by two-thirds of the States within a seven-year period.
- The States could repeal either an entire statute or regulation or a specific provision of federal law.

2. The States' Initiative

- Under this constitutional amendment, three-fourths of the States would be able to propose constitutional amendments that would become part of the Constitution unless two-thirds of each house of Congress voted against the measure within two years of submission.
- This amendment would fulfill the Founders' vision of a process of amending the Constitution that the States control.
- The States' Initiative would empower the People through their state legislatures to ratify constitutional amendments that enjoy broad support but that Congress has failed to propose.

3. The Accountability in Government Amendment

- This constitutional amendment is specifically aimed at ending three intrusive federal practices: regulatory mandates, unfunded mandates, and the imposition of impermissible conditions on federal spending grants. All of these federal encroachments obscure the lines between state and federal policy and thereby decrease the political accountability of elected officials.

- Section 1 of the amendment would prohibit the federal government from imposing regulatory mandates on the States or their political subdivisions. To the extent that there may be some efficiency gains in allowing States to participate in the implementation of federal programs, the amendment would in no way preclude the States from voluntarily participating in such programs.

- Section 2 of the amendment would prohibit congressional imposition of unfunded mandates on state and local governments, or mandates that are not enacted pursuant to the enumerated powers of the federal government. The amendment contains a flat prohibition unfunded mandates and would not allow the federal government to impose even "de minimis" unfunded mandates. The amendment would also retroactively repeal any unfunded mandates that have already been imposed upon state and local governments by the federal government.

- Section 3 of the amendment would also prohibit the imposition of conditions that are unrelated to the actual expenditures of funds allocated by Congress. The amendment would thus put an end to the congressional practice of requiring States to implement or conform their laws to federal policies in order to receive funds that may have nothing to do with the required policy. At the same time, the amendment would permit Congress to continue to specify how the funds that it appropriates are actually spent.

4. The Federalism Act

- The Federalism Act addresses several discrete aspects of the current imbalance between the federal and state governments.

- First, the statute would circumscribe the scope of the preemption doctrine pursuant to which the federal government can invalidate state laws. The statute would eliminate the practice of federal agencies' preempting state law without express congressional authorization. Furthermore, under the Act, a federal court could only invalidate a state law where there was an explicit congressional statement of intent to preempt such a state law or a direct conflict between federal and state law.

- Secondly, the statute would require Congress to specify the constitutional authority for each of its legislative initiatives.

- Finally, the statute would include an endorsement of the principles inherent in the Tenth Amendment.

[1] The other sponsoring organizations were the National Governors' Association, the National Conference of State Legislatures, the Council of State Government, and the State Legislative Leaders' Foundation.

Introduction

The Constitution established federalism as a vital political principle that would ensure a proper division of power between the state and federal governments. Over the last 60 years, the federal government has increasingly encroached upon the legitimate prerogatives of the States and has effectively eviscerated the principles of federalism. As a consequence, the People are left with a centralized, unresponsive, and monolithic government that encroaches upon both traditional notions of state sovereignty and popular sovereignty.

Last October, the American Legislative Exchange Council (ALEC) and other organizations sponsored a national federalism summit to consider specific proposals that would restore the balance of power between the States and the federal government. At that time, ALEC and the other four organizations agreed that the following four such proposals merit further consideration: (1) A mechanism to provide the people of the states, through their legislatures, the power to require Congress to reconsider laws or regulations that interfere with state authority; (2) A mechanism that would allow the states to propose specific amendments to the U.S. Constitution subject to ratification by the United States Congress; (3) Statutory remedies and/or constitutional reforms to address the problems of conditions attached to federal spending grants, regulations and mandates; (4) A federalism act to enhance the political safeguards and give states a more effective voice in congressional deliberations.[1] This report presents ALEC's analysis of the way in which each proposal should be enacted.

I. Federalism and Popular Sovereignty

The Founding Fathers recognized that governmental legitimacy depends entirely on the People's delegation of their sovereign powers. Although the concept of popular sovereignty is now widely accepted, at the time of the ratification of the Constitution, this was a unique and revolutionary conception of political power. In order to ensure that the People remained the ultimate sovereigns, the Framers established a system of dual sovereigns in which both the States and the national government would have clearly defined roles and carefully limited authority. As the Supreme Court has observed, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front . . . . In the tension between Federal and State power lies the promise of liberty."[2] Thus, the drive to restore state sovereignty and the principles of federalism are motivated by the desire to empower the People through their state representatives to take a measure of control over their lives back from the national government which has consistently exceeded the bounds of its authority.

Federalism promotes the principle of popular sovereignty in several important ways. A federalist system of government recognizes that although there are certain areas in which a centralized government is necessary or beneficial, in most instances, local governments will be more responsive to the needs of the People than a remote national one. Thus, James Madison observed that the federal government's delegated powers were "few and defined," extending principally to "external objects, [such] as war, peace, negotiation, and foreign commerce...." The powers reserved by the States, in contrast, were "numerous and indefinite," extending "to all objects which, in the ordinary course of affairs, concerned the lives, liberties, and properties of the People, and the internal order, improvement, and prosperity of the States."[3] Thus, the Founders intended the States to have a "residuary and inviolable sovereignty" for all areas not specifically delegated to the federal government.[4]

A federalist system of government also encourages the States to act as laboratories for experimentation in formulating the most effective solutions to important problems. States could then look to their neighbors to learn from others' successes and failures. This experimentation is also a recognition of the important fact that the needs of different States differ dramatically and that a "one size fits all" approach to government is inherently at odds with the notion of popular sovereignty.

The clearest expression of the Constitution's endorsement of federalism is the Tenth Amendment, which provides: "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." The Tenth Amendment underscores the principle that the national government is one of limited, enumerated powers and does not have the authority to exceed those powers. Thus, the Constitution makes clear that the States and the People are the ultimate residuaries of all the powers not specifically delegated to the federal government.

II. The Federal Government's Usurpation of the Sovereignty of the States

Over the last several decades, the federal government has undermined the principles of federalism by expanding its powers beyond those delegated in the Constitution. Currently, there is virtually no category of human endeavor that the federal government does not regulate. Furthermore, the national government has infringed upon the legitimate prerogatives of state and local governments by regulating purely internal concerns, such as public schools, the criminal justice system, and the provision of welfare.

Congress has relied on a variety of mechanisms to expand its powers. In some instances, Congress has directly regulated local activities. Congress has also relied on indirect means of regulation that coerce the state governments to carry out congressional policies. One such mechanism is the modern congressional practice of conditioning eligibility for federal funds on compliance with a host of regulations, many having little or no relationship to the program being funded. Although the States "voluntarily" accept such grants, the dimension of the financial incentives involved in many federal spending programs, coupled with the size of the federal government's "bite" out of the taxing base available to the States, has effectively made the States' participation in such programs voluntary in name only.

Congress has also increasingly imposed on the States federal mandates that exceed Congress' constitutional authority. Given the breadth of powers that Congress has conferred upon itself, the use of such mandates has the potential to allow the federal government to dictate substantive policy to the States on a variety of different matters. From a theoretical perspective, mandates are objectionable insofar as they have the pernicious effect of obscuring the distinction between state and federal policy. The result is a decline in political accountability as it becomes more difficult to assign responsibility for governmental action that Congress requires the States to implement.[5] On a practical level, Congress has exacerbated the evils inherent in such mandates by often not providing funding to implement the required policies. These unfunded mandates impose a staggering financial burden on States and localities, consuming nearly 12% of all locally raised revenues.[6] Cities alone paid $6.4 billion in 1993 to meet the costs of these federal mandates,[7] and the total annual cost to state and local governments has been conservatively estimated at over $100 billion.[8] Indeed, States' financial obligations for Medicaid alone totaled $58.66 billion in 1995.[9] Likewise, the EPA estimates that compliance with federal environmental mandates costs State and local governments $30 to $40 billion each year.[10] As a result, the States are forced to raise their taxes to meet these increased burdens. The ultimate victims, of course, are the People who are confronted with a Byzantine system of regulation in which governmental actors purport to have no responsibility.

In addition, Congress has in recent years preempted state and local laws far more frequently than ever before. Of 439 explicit preemptions of state and local laws enacted by Congress in the 202 years from 1789 to 1991, 233 (53%) were enacted between 1970 and 1991. Federal preemption comes directly at the expense of the People's will as expressed in the action of their state representatives.

III. The Failure of the Judiciary to Uphold Federalism

The Founders were well aware of the possibility that the national government might exceed the powers delegated to it. In the Founders' view, the Supreme Court would act as a check against any encroachment upon state sovereignty. As James Madison made clear in Federalist Paper No. 39: "Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact . . . ."[11] Nevertheless, Anti-Federalists such as Robert Yates, writing as "Brutus," believed that the federal judiciary would not adequately protect the interests of the States and would in due time "melt down the states into one entire government, for every purpose."[12]

Unfortunately, the Anti-Federalist prediction eventually came to pass. The Supreme Court has not fulfilled its role as an impartial tribunal and has abdicated its responsibility for maintaining the constitutionally mandated balance of power between the States and the national government. The demise of federalism as a governing principle is due in large part to the Supreme Court's interpretation of the Commerce Clause. The Founders merely intended the clause to authorize the national legislature to eliminate state-created trade barriers. James Madison dismissed the Commerce Clause as "an addition which few oppose, and from which no apprehensions are entertained."[13] Yet,

beginning with the New Deal, the Supreme Court began to adopt a more expansive view of the Commerce Clause. In National Labor Relations Board v. Jones & Laughlin Steel Corp.,[14] the Court upheld Congress' authority to enact the National Labor Relations Act on the ground that the local activities it regulated bore a "close and substantial relation to interstate commerce." Id. at 37.

In 1942 the Supreme Court abandoned all serious attempts to limit the scope of Congress' power under the Commerce Clause. In Wickard v. Filburn,[15] the Court authorized congressional regulation of purely local activities that when taken as a whole might substantially affect interstate commerce. Because virtually every conceivable human activity bears at least some theoretical relationship to commerce, the "cumulative effect" principle effectively licensed the national government to regulate areas traditionally within the province of the state governments. And although the Supreme Court last year acknowledged that the Commerce Clause does impose some restraints on Congress' ability to legislate local matters, such as the possession of guns in areas close to schools,[16] the States can derive little comfort from this limited precedent in light of the Supreme Court's consistent failure to defend state sovereignty over the last five decades.

IV. Constitutional Proposals to Restore State and Popular Sovereignty

In response to the federal government's sustained pattern of encroachment on the sovereign powers of the States, the federalism summit was convened last year in Cincinnati. Several proposals were considered that would collectively restore the principles of federalism embodied in the Constitution. At the summit, ALEC endorsed each of the four proposals that were discussed.

ALEC has adopted three model resolutions that urge the ratification of three of the proposals as constitutional amendments that would effect systemic change and effectively limit the federal government's ability to interfere in matters of local concern. Constitutional reform is particularly appropriate in this context since it is the Constitution that enshrined States' rights as a central part of our system of government. Although the federal government has expanded its powers without such an amendment, the fundamental structure of our democratic government makes clear that the Constitution is the most effective vehicle for restoring the balance of power between States and the national government.

Each of the constitutional amendments endorsed by ALEC is aimed at eliminating a different aspect of the current imbalance between the States and the federal government. The need for and the important features of each of these amendments will be considered in turn.

A. The National Government of the People Amendment

Section 1. Any act of Congress, or provision thereof shall be null and void upon the adoption of a resolution of disapproval by the legislatures of two-thirds of the States, provided that two-thirds of the states have adopted without subsequently rescinding resolutions of disapproval within any seven-year period.

Section 2. Any regulation, administrative directive or provision thereof shall be null and void upon the adoption of a resolution of disapproval by the legislatures of two-thirds of the States, provided that two-thirds of the states have adopted without subsequently rescinding resolutions of disapproval within any seven-year period.

Section 3. The States may not repeal any federal law or regulation that directly addresses the national security of the United States or the conduct of its foreign policy.

As the federal government has extended its legislative reach into the affairs of the States, it has become apparent that many federal laws and regulations have become counterproductive. Although these legislative initiatives may have been well-intentioned, in many instances it is clear that they have lasted beyond their useful life. Nevertheless, the inertia and gridlock in Washington, D.C. has stifled efforts to reform these programs. The National Government of the People Amendment would empower the People, acting through their state legislatures, to rescind statutes and regulations that they find repugnant.

Under this amendment, targeted statutes and regulations would be rescinded upon the adoption of resolutions of disapproval by two-thirds of the States within a seven-year period. Such resolutions could disapprove of entire statutes or of specific provisions. If 34 States adopted resolutions of disapproval within a seven-year period, the law in question would be rendered null and void. The amendment is equally

applicable to federal regulations which have also imposed substantial burdens on the states and the People.

There are several important features of the Government of the People Amendment that warrant explanation. One of the most basic requirements of the amendment is that a federal law is only repealed after two-thirds of the States have disapproved it. This supermajority requirement is a recognition that the repeal of a federal law is a serious matter. At the same time, only in the extreme case of the ratification of a constitutional amendment is a three-fourths majority appropriate.

Under the Government of the People Amendment, the state legislatures are responsible for exercising the repeal authority. Enabling state legislatures to protect themselves reflects that it is their authority that is being diminished and that by reclaiming this authority, the States can better serve their constituents. The exercise of a repeal is more than an expression of the People's popular will; it is also an expression by their locally elected representatives that the States themselves should address matters of local concern. Such a repeal is an assertion by the States to the federal government that they are the proper policymakers for an issue.

Under the amendment, States will be able to repeal specific portions of regulations and legislation. This feature will allow the States to exercise their power under the amendment in a responsible and flexible manner, and parallels the item veto that a majority of the States have entrusted to their governors. Without this feature, Congress could incorporate intrusive or otherwise objectionable provisions into useful and popular (and even unrelated) laws that the States would not want to veto.

The amendment also empowers the States to repeal intrusive and otherwise objectionable federal regulations. This provision recognizes that federal agencies have violated the principles of the Tenth Amendment in the same manner that Congress has. The power of independent agencies, which are not held accountable for their acts by any of the traditional constraints of the Founders' system of checks and balances, further necessitates giving the States a mechanism with which to protect their sovereignty.

Another important feature of the amendment is its flexibility. The amendment contains no limitation on the time from enactment of a federal law within which the States would have to exercise their authority to veto the law. Sometimes laws that initially appear quite reasonable upon enactment and initial implementation manifest an intrusive or objectionable nature only after a period of some time, especially when the federal judiciary interprets those laws in a controversial manner. The States should have the ability to veto such laws and regulations at such time as they become objectionable. Furthermore, if the States had to exercise their powers within a certain time from enactment of a law, the amendment would, in effect, only have prospective application. Given the massive usurpation of the States' sovereignty by Congress over the last 50 years, there is no reason that the amendment should be so narrowly drawn. Only if the States have the ability to redress the current imbalance, rather than merely guarding against future encroachment, will the amendment have the potential to restore the principles of federalism that are so central to our form of government.

Indeed, the only temporal limitation included in the amendment is a requirement that the 34th disapproving resolution to be passed without subsequently being rescinded must be passed within a prescribed period. The purpose of this limitation is to ensure that the repeal of a federal law under the amendment actually represents the will of the People at the time the repeal becomes effective.

In keeping with the Founders' understanding that there are certain specific and well-defined areas which are beyond the competence of the States, the Government of the People Amendment exempts certain issues from its scope. As James Madison observed in Federalist No. 45, the national government's powers are to be "exercised on external objects, [such] as war, peace, negotiation, and foreign commerce."[17] Accordingly, the amendment provides that the States may not repeal any federal law that directly addresses the national security of the United States and its foreign policy. This exception to the scope of the amendment demonstrates that the goal of the Government of the People Amendment is not to give the States more influence over the federal government's legitimate exercise of power, but is instead to restore the States' rightful authority in domestic policy matters.

B. The States' Initiative Amendment

Whenever three-fourths of the legislatures of the States deem it necessary, they shall propose amendments to this Constitution. These proposed amendments are valid for all intents and purposes two years after they are submitted to

Congress. The said amendments will be invalid if both houses of Congress, by two-thirds vote, disapprove them within two years after their submission.

Under the States' Initiative Amendment, three-fourths of the States would be able to propose constitutional amendments that would become part of the Constitution unless two-thirds of each house of Congress voted against the measure within two years of submission. This amendment would fulfill the Founders' vision of a process of amending the Constitution that the States control.

Given that the Constitution represents the People's delegation of their sovereign rights, it is a "fundamental principle of republican government which admits the right of the People to alter or abolish the established Constitution."[18] Article V of the Constitution establishes two means for proposing amendments. Under one alternative, Congress can propose amendments which when passed by a two-thirds majority of each house, are then sent to the States for ratification. Under the other alternative, Congress must call a constitutional convention upon the application of two-thirds of the state legislatures. Amendments proposed under either method must then be ratified by three-fourths of the States.

The second alternative under Article V establishes the collective power of the States to amend the Constitution in a two step process with virtually no interference from the Congress. As James Madison observed in Federalist No. 43, "it [Article V], moreover, equally enables the general and the State government to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other."[19] The necessity of establishing a process for amending the Constitution free from congressional interference was noted by George Mason at the Constitutional Convention when he stated: "It would be improper to require the consent of the Natl. Legislature because they may abuse their power, and refuse their consent on that very account."

Nevertheless, in spite of the States' power under Article V to propose amendments to the Constitution with minimal interference by the Congress, a second constitutional convention has never been convened. The unfounded prospect of a "runaway" convention has deterred the States from asserting their right to propose amendments to the Constitution. As a result, the States have been unable to effect the structural changes necessary to restore the Constitution's promise of a federalist system of government. And, not surprisingly, Congress has rejected every effort to undertake such reform.

Consequently, the States' Initiative Amendment is a critically needed reform in the effort to restore a proper balance between the state and federal governments. The States' Initiative will empower the People through their state legislatures to ratify constitutional amendments that are broadly supported everywhere except in the Congress of the United States. For example, the States could propose a balanced budget amendment or a flag burning amendment on their own initiative.

Nevertheless, consistent with the procedures for amending the Constitution established in Article V, the States should be able to ratify such amendments only upon the approval of three-fourths of the States. This supermajority requirement will ensure that any amendments to the Constitution genuinely reflect the will of the People.

The States' Initiative also confers upon Congress the power to disapprove of any amendment proposed pursuant to this new procedure, but only if the proposed amendment is disproved by a two-thirds vote of both houses. This involvement ensures that Congress will be able to prevent the ratification of any amendment that would, in the view of two-thirds of the Members of Congress, prejudice the national interest. Thus, the States' Initiative strikes a balance between prohibiting any congressional involvement and allowing a simple majority, or even a minority, of Congress to thwart the States' ability to amend the Constitution.

C. The Accountability in Government Amendment

Section 1. No State shall be obligated, without its consent to enact or enforce any State law or regulation, or to administer any federal regulatory program imposed by or pursuant to a law enacted by Congress acting pursuant to its enumerated powers.

Section 2. Any obligation imposed upon a State by or pursuant to a law enacted by Congress shall not be enforceable against such State unless the federal government has acted pursuant to its enumerated powers and has provided the State with the funds needed to pay the States' cost of compliance with the obligation.

Section 3. No condition on the receipt of federal funds by a State, imposed by or pursuant

to a law enacted by Congress, is valid unless such condition is clearly stated, directly related to and does no more than specify the purposes for which, or manner in which, the funds are to be spent.

As outlined above, the federal government has impermissibly expanded its power beyond its constitutional bounds at the expense of state and local governments by imposing federal mandates and conditioning spending grants on unrelated federal policies. Although these federal encroachments take a variety of forms, they are linked by the manner in which they obscure the lines between state and federal policy and thereby decrease the political accountability of elected officials of both governments. This common evil warrants a single constitutional response, the Accountability in Government Amendment. This amendment is aimed specifically at ending three intrusive federal practices: regulatory mandates, unfunded federal mandates, and the imposition of impermissible conditions on federal spending grants.

1. Regulatory Mandates

Section 1 of the amendment would prohibit the federal government from imposing regulatory mandates on the States or their political subdivisions. The purpose of this provision is to ensure political accountability by allowing the People to discern which governmental actors are imposing obligations and expenses upon them. Thus, if the Congress wishes to promote a program pursuant to its enumerated powers, it should do so in a straightforward manner by establishing a federal implementation program rather than by commandeering the state governments to enact federal policies. Any other approach is an impermissible encroachment upon state sovereignty and has the consequence of blurring the lines of political accountability. It should also be noted that the amendment in no way relaxes the requirement that Congress may act only pursuant to one of its enumerated powers.

The amendment would place a flat prohibition on such regulatory mandates. In that regard, it would codify and indeed strengthen the standards articulated under the Tenth Amendment by the Supreme Court in New York v. United States. To the extent that there may be some efficiency gains in allowing States to participate in the implementation of federal programs, the amendment would in no way preclude States from voluntarily participating in such programs.Such voluntary action by the States is not problematic since it would neither violate a State's sovereignty nor blur the lines of political accountability since the States would have expressed their support for the program by voluntarily assisting in its implementation.

2. Unfunded Mandates

Section 2 of the amendment prohibits congressional imposition of unfunded mandates on state and local governments. By definition, unfunded mandates impose substantial financial obligations on States and their political subdivision. In a time of scarce resources, it is indefensible for the federal government to force state and local governments to raise their taxes to implement federal policy preferences. Of course, the ultimate victim is the taxpayer who is left with the bill and with little understanding of which political entity is responsible.

Although Congress has passed legislation directed at curbing the problem of unfunded mandates, a stronger response is needed. The congressional legislation does not go far enough in vindicating the important interests of state and popular sovereignty that are violated by the imposition of unfunded mandates. Section 2 of the amendment contains a flat prohibition on the imposition of such unfunded mandates. The fact that the amendment does not include an exception for de minimis unfunded mandates reflects that the imposition of any mandate violates state sovereignty. Furthermore, local and state governments will inevitably not view the imposition of millions of dollars of unfunded federal obligations as "de minimis." Thus, no such exception should be included in the amendment. Furthermore, the amendment also makes clear that it in no way expands the federal government's powers and that any mandate that exceeds Congress' enumerated powers is unconstitutional.

In addition to prohibiting the future imposition of any unfunded mandates, the amendment also strikes down unfunded mandates that have already been imposed upon state and local governments. In light of the substantial obligations that States already must bear as a result of such mandates, the retroactivity of the amendment is an important component of restoring state sovereignty. In essence, retroactivity is justified on the same principle that underlies the amendment as a whole: if Congress thinks a program or policy is sufficiently important to justify the costs engendered by it, Congress should have to allocate funds to pay for it.

Finally, the amendment should have no exceptions for special areas of legislation. The principles of state sovereignty and popular sovereignty that compel the adoption of this amendment admit of no exception and should not be violated in any circumstance.

3. Conditional Spending Grants

Congress has frequently imposed conditions on its spending grants that have little or nothing to do with the manner in which the appropriate funds are spent. Through this mechanism, Congress has forced the States to conform their conduct to federal policies that could otherwise not have been imposed upon them. Section 3 of the amendment is aimed at ending this intrusion into the legitimate prerogatives of the States.

In essence, the amendment prohibits the imposition of conditions that are unrelated to the actual expenditure of funds allocated by Congress. Thus, the amendment will put an end to the congressional practice of requiring States to implement or conform their laws to federal policies in order to receive funds that may have nothing to do with the required policy. At the same time, the amendment permits Congress to continue to specify how the funds that it appropriates are actually spent. This is a legitimate congressional function and should not be impeded. Thus, the amendment strikes a balance between protecting state sovereignty and preserving Congress' authority over its appropriations.

V. The Federalism Act: A Statutory Approach to Restoring State Sovereignty

In addition to the constitutional amendments discussed above, ALEC endorsed at the federalism summit a statute designed to curb Congress' appetite for usurping state sovereignty. Although a statutory solution to this problem lacks the permanence of the proposed constitutional reforms, it is, of course, considerably more expedient to enact a statute than to ratify a constitutional amendment. Furthermore, a federalism statute can address issues that, while important, may not merit independent constitutional redress.

The Federalism Act seeks to enhance federalism as a governing principle by addressing several discrete aspects of the current imbalance. First, the statute would circumscribe the scope of the preemption doctrine pursuant to which the federal government can invalidate state laws. Secondly, the statute would require Congress to specify its constitutional authority for each of its legislative initiatives. Finally, the statute would include an endorsement of the principles inherent in the Tenth Amendment. Each of these facets of the federalism statute will be considered in turn.

Under the Supremacy Clause of the Constitution, Congress has the authority to preempt and thereby invalidate state law.[20] Over time, the federal judiciary has gradually expanded the doctrine of preemption to invalidate state laws even where there is no explicit directive from Congress that it intended to invalidate state law. The Federalism Act would seek to limit the doctrine of implied preemption by requiring that there be either an explicit congressional statement of intent to preempt state law or a direct conflict between federal and state law before a federal court could invalidate a state law. Furthermore, the statute would eliminate the practice of federal agencies' exercising implied preemption. Under the statute, a federal agency would be able to preempt a state law only if it had an explicit congressional authorization to preempt such laws or there was a direct conflict between state law and federal law. Furthermore, whenever an agency promulgated a rule that had a preemptive effect upon state law, the states whose laws would be invalidated would have to be given an opportunity to be heard during the rule-making process. Finally, the statute would also require Congress to notify the governor of each State and the presiding officer of each chamber of the legislature of each State that one of their State's laws will be invalidated through preemption.

The combined effect of these provisions will be to restore the doctrine of preemption to its proper scope. Preemption of state law by its very nature poses an infringement upon state sovereignty. And although the Constitution makes clear that federal law is the supreme law of the land, the federal government should exercise its power to override state laws only where essential national interests require it. The federalism statute effectively limits the power of unelected judges and agency officials from invalidating laws passed by the duly elected state representatives of the People.

The proposed statute also promotes the principles of federalism by requiring Congress to identify its constitutional authority for enacting any future legislation. This requirement stands as an important reminder to Congress that the federal government is one of limited and enumerated powers and does not have authority to regulate every human endeavor throughout the country. Nevertheless, it should be noted

that this provision will largely be symbolic given that the Congress will be able to justify much of its legislative action under the Supreme Court's unduly expansive interpretation of the Commerce Clause.

Finally, the Federalism Act should also endorse the principle of a limited federal government articulated in the Tenth Amendment. Although congressional recognition of the principles embodied in the Tenth Amendment will have little legal effect, such a statement would serve as an important reminder to the federal government that under the republican form of government ordained by the People, the States are just as much sovereigns as the federal government.

Conclusion

ALEC fully endorses the initiatives proposed at the federalism summit. Certainly, none of these proposals standing alone would restore the Founders' vision of a republic in which both the States and the federal government were truly sovereign. In fact, even the combined effect of all these proposals may fall short of this goal. Yet, these measures would serve the important purpose of providing the States, and thus the People, with a means of defending their sovereignty against federal encroachment.

Endnotes

[1]The five sponsoring organizations are ALEC, the National Governors' Association, the National Conference of State Legislatures, The Council of State Governments and the State Legislative Leaders Foundation.

[2]Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[3]The Federalist Papers No. 45 at 292-93 (C. Rossiter ed. 1961) [hereafter cited as The Federalist Papers].

[4]The Federalist Papers No. 39 at 245.

[5]The Supreme Court has recently struck down one of the most egregious forms of these regulatory mandates. In New York v. United States, 112 S. Ct. 2408 (1992), the Supreme Court invalidated the take title provision of the Low-level Radioactive Waste Policy Act pursuant to which a state was required either to provide for the disposal of low-level waste or to take title to it and be held responsible for any damages resulting from failure to take possession. The Court stated that "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." Id. at 2420. The Court concluded that if allowed to stand, such congressional practices would have the detrimental effect of blurring the lines of political accountability between state and federal governments: "It may be state officials who will bear the brunt of public disapproval, while the federal officials who devise the regulatory program may remain insulated from the electoral ramifications of their decision." Id. at 2424.

[6]Issues '96: The Candidate's Briefing Book, The Heritage Foundation at 417.

[7]USA Today, Jan. 12, 1995, at 8A citing the U.S. Conference of Mayors.

[8]CATO Handbook For Congress, Cato Institute, 1995, at 66.

[9]National Association of State Budget Officers, 1995 State Expenditure Report

[10]Issues '96: The Candidate's Briefing Book, The Heritage Foundation, at 417.

[11]The Federalist Papers No. 39 at 245-46.

[12]See "Brutus," N.Y.J. Feb. 7, 1788, reprinted in 2 The Complete Anti-Federalist 441, n.13 (Herbert J. Storing ed. 1981).

[13]The Federalist Papers No. 45 at 293.

[14]301 U.S. 1 (1937).

[15]317 U.S. 111 (1942).

[16]United States v. Lopez, 115 S. Ct. 1624 (1995).

[17]Federalist Papers No. 45 at 292-93.

[18]Federalist No. 78.

[19]The Federalist Papers, No. 43 at 278-279.

[20]Of course, Congress' ability to preempt state law is itself limited to those areas in which the Constitution confers legislative authority upon the Congress.

MODEL RESOLUTION

GOVERNMENT OF THE PEOPLE AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

A resolution for the purpose of petitioning the Congress of the United States to propose an amendment to the Constitution of the United States for submission to the states to establish a mechanism for nullification of federal laws and regulations where the states determine that such laws or regulations exceed the authority of the federal government under the Constitution of the United States.

WHEREAS, the federal government was established by the states through ratification of the Constitution of the United States; and

WHEREAS, the federal government was granted certain limited powers under the Constitution of the United States; and

WHEREAS, the Constitution of the United States requires, under the 10th Amendment that: "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;" and

WHEREAS, the Constitution of the United States established a system in which the states only ceded certain powers to the federal government; and

WHEREAS, the framers recognized that separation of powers is essential and ensured that the rights of the people would be protected by establishing checks and balances not only between the branches of the federal government, but also between the federal government and state governments; and

WHEREAS, the legislative, executive and judicial branches of the federal government have by many actions usurped powers reserved to the states and to the people; and

WHEREAS, by the combined actions of the legislative, executive and judicial branches of the federal government, the relationship between the federal government and state government established by the Constitution; and

WHEREAS, the federal Judiciary, itself a branch of the federal government, has failed to stop many of these federal excesses; and

WHEREAS, the federal government is more distant from the people than state governments and is thereby less efficient and effective in providing for functions that, under the Constitution of the United States, were to have been reserved to the States and to the people; and

WHEREAS, to achieve government of the people, by the people and for the people, government must become closer to the people; and

NOW THEREFORE BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF {INSERT STATE}, A MAJORITY OF ALL MEMBERS OF THE TWO HOUSES CONCURRING SEPARATELY HEREIN, that the Congress of the United States is hereby petitioned to propose the *Government of the People Amendment* to the Constitution of the United States, for submittal to the states for ratification, providing for the states to nullify federal laws and regulations, in such cases as the states deem that the federal government has exceeded the limits of its authority.

BE IT FURTHER RESOLVED that to achieve the purpose expressed above that the *Government of the People Amendment* shall provide that:

1. Any act of Congress, or provision thereof shall be null and void upon the adoption of a Resolution of Disapproval by the legislatures of two-thirds of the states, provided that two-thirds of the states have adopted without subsequently rescinding resolutions of disapproval within any seven-year period.

2. Any regulation, administrative directive or provision thereof shall be null and void upon the adoption of a resolution of disapproval by the legislatures of two-thirds of the states, provided that two-thirds of the states have adopted without subsequently rescinding resolutions of disapproval within any seven-year period.

BE IT FURTHER RESOLVED that the *Government of the People Amendment* shall contain reasonable limitations on the use of resolutions of disapproval with respect to issues of national security and foreign policy.

BE IT FURTHER RESOLVED that the Secretary of State of the State of {insert state} transmit copies of this Resolution to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, the President of the Senate and the Speaker of the House of Representatives of each state legislature in the United States, and each member of Congress from the state of {insert state}.

MODEL RESOLUTION

STATES' INITIATIVE AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

A resolution for the purpose of petitioning the Congress of the United States to propose an amendment to the Constitution of the United States for submission to the states to provide the states a method of offering amendments to the Constitution of the United States.

WHEREAS, the ratification of the Constitution of the United States by the states created a balance of power between the federal government and the states; and

WHEREAS, the federal government was granted certain limited powers under the Constitution of the United States; and

WHEREAS, the Constitution of the United States requires, under the 10th Amendment that: "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;" and

WHEREAS, by the combined actions of the Congress, the Executive and the Judiciary, today, power is concentrated in the federal government; and

WHEREAS, the original checks and balances created by the founders have been eroded and the national government has consolidated power and authority; and

WHEREAS, the federal government is more distant from the people than state governments; and

WHEREAS, to achieve government of the people, by the people and for the people, government must become closer to the people; and

WHEREAS, there is a need for an effective mechanism by which the states can offer amendments to the Constitution of the United States;

NOW THEREFORE BE IT RESOLVED, BY THE LEGISLATURE OF THE STATE OF {INSERT STATE}, A MAJORITY OF ALL MEMBERS OF THE TWO HOUSES CONCURRING SEPARATELY HEREIN, that the Congress of the United States is hereby petitioned to propose the *States' Initiative Resolution* as an amendment to the Constitution of the United States for ratification by state legislatures. This resolution shall be submitted to the states for ratification, providing for the states a method through which they may amend the Constitution of the United States.

BE IT FURTHER RESOLVED that to achieve the purpose expressed above, the *States' Initiative Amendment* shall provide that: Whenever three-fourths of the legislatures of the states deem it necessary, they shall propose amendments to this Constitution. These proposed amendments are valid for all intents and purposes two years after they are submitted to Congress. The said amendments will be invalid if both houses of Congress, by two-thirds vote, disapprove them within two years after their submission.

BE IT FURTHER RESOLVED that the Secretary of State of the State of {insert state} transmit copies of this Concurrent Resolution to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, the President of the Senate and the Speaker of the House of Representatives of each state's legislature of the United States of America, and the {insert state} Congressional Delegation.

MODEL RESOLUTION

ACCOUNTABILITY IN GOVERNMENT AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

A resolution for the purpose of petitioning the Congress of the United States to propose an amendment to the Constitution of the United States for submission to the States to prohibit the federal government from imposing: (1) regulatory mandates on the States or their political subdivisions; (2) unfunded mandates on state and local governments; and (3) spending conditions that are unrelated to the actual expenditures of funds allocated by Congress.

WHEREAS, the federal government was established by the States through the ratification of the Constitution of the United States; and

WHEREAS, the federal government was granted certain limited powers under the Constitution of the United States and the Tenth Amendment to the United States Constitution provides that "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 the people;" and

WHEREAS, state authority has been increasingly eroded through federal assumption of powers reserved to the States under the Tenth Amendment; and

WHEREAS, the federal government has impermissibly expanded its power beyond its constitutional bounds at the expense of the state and local governments by imposing federal mandates and conditional spending grants on unrelated federal policies; and

WHEREAS, federal encroachment on state authority obscures the lines between state and federal policy, thereby decreasing the political accountability of elected officials of both governments. To ensure political accountability, the People must be able to discern which governmental actors are imposing obligations and expenses upon them; and

WHEREAS, the United States Supreme Court has ruled in New York v. United States, 112 S. Ct. 2408 (1992), that Congress may not simply commandeer the legislative and regulatory processes of the States; and

WHEREAS, federal mandates are being imposed at an alarming rate on the States without the accompanying tax dollars necessary to implement the mandated programs; and

WHEREAS, the impact of unfunded federal mandates threatens the fiscal integrity of the States as well as the States' right of self determination;

NOW THEREFORE BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF {INSERT STATE}, A MAJORITY OF ALL MEMBERS OF THE TWO HOUSES CONCURRING SEPARATELY HEREIN, that the Congress of the United States is hereby petitioned to propose the *Accountability in Government Amendment* to the Constitution of the United States, for submittal to the States for ratification, prohibiting the federal government from: (1) imposing regulatory mandates on the States or their political subdivisions; (2) imposing unfunded mandates on state and local governments or mandates that are not enacted pursuant to the enumerated powers of the federal government; (3) imposing spending conditions that are unrelated to the actual expenditures of funds allocated by Congress.

BE IT FURTHER RESOLVED that to achieve the purpose expressed above that the *Accountability in Government Amendment* shall provide that:

1. No State shall be obligated, without its consent to enact or enforce any State law or regulation, or to administer any federal regulatory program imposed by or pursuant to a law enacted by Congress acting pursuant to its enumerated powers.

2. Any obligation imposed upon a State by or pursuant to a law enacted by Congress shall not be enforceable against such State unless the federal government has acted pursuant to its enumerated powers and has provided the State with the funds needed to pay the States' cost of compliance with the obligation.

3. No condition on the receipt of federal funds by a State, imposed by or pursuant to a law enacted by Congress is valid unless such condition is clearly stated, directly related to and does no more than specify the purposes for which, or manner in which, the funds are to be spent.

BE IT FURTHER RESOLVED that the Secretary of State of the State of {insert state} transmit copies of this Concurrent Resolution to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, the President of the Senate and Speaker of the House of Representatives of each state's legislature of the United States, and the {insert state} Congressional Delegation.

MODEL RESOLUTION

RESOLUTION REQUESTING CONGRESS OF THE UNITED STATES TO ENACT LEGISLATION THAT REQUIRES CONGRESS TO SPECIFY THE CONSTITUTIONAL AUTHORITY FOR THE ENACTMENT OF LAWS

A resolution for the purpose of petitioning the Congress of the United States to enact legislation that requires Congress to specify the constitutional authority for the enactment of law; prohibits federal agency rules or regulations from preempting or otherwise interfering with state or local powers without express statutory authority; and requires a list of factual findings, establishing a substantial nexus between the regulatory effect of the proposed law and interstate commerce if Article 1, Section 8, Clause 3, of the Constitution is identified as the Constitutional provision granting authority to Congress for its proposed law.

WHEREAS, the federal government was established by the states through the ratification of the Constitution of the United States; and

WHEREAS, the federal government was granted carefully limited powers under the Constitution of the United States and the Tenth Amendment to the United States Constitution provides that "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"; and

WHEREAS, the Constitution of the United States established a system in which the states ceded only certain powers to the federal government; and

WHEREAS, the framers recognized that separation of powers is essential and ensured that the rights of the people would be protected by establishing checks and balances not only between the branches of the federal government but also between the federal government and state governments; and

WHEREAS, the legislative, executive and judicial branches of the federal government have by many actions usurped powers reserved by the Constitution of the United States to the states and to the people; and

WHEREAS, by the combined actions of the legislative, executive and judicial branches of the federal government, the relationship between the federal government and state governments established by the Constitution of the United States has been severely unbalanced; and

WHEREAS, the federal judiciary, itself a branch of the federal government, has failed to stop many of these federal excesses; and

WHEREAS, less federal preemption means states can act as true laboratories of democracy, seeking novel social and economic policies without risk to the nation; and

WHEREAS, to restore the balance of power between the federal government and state governments intended by the framers of the Constitution of the United States, the federal government must carefully consider, and be accountable for, the constitutional boundaries of its jurisdiction to protect the states and the people from the unwarranted assumption of power by the federal government.

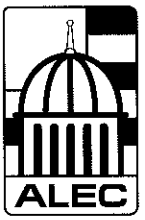
NOW THEREFORE BE IT RESOLVED by the Legislature of the state of {insert state}, a majority of all members of the two houses concurring, that the One Hundred and Fourth Congress of the United States enact legislation requiring the Congress of the United States to cite the section of the Constitution that grants Congress the authority to enact proposed laws. The {insert state} Legislature supports the inclusion in such legislation:

(a) That Congress be required to state explicitly the extent to which the proposed section of law preempts any state, local or tribal law, and if so, an explanation of the reasons for such preemption.

(b) That Federal agency rules or regulations may not preempt or otherwise interfere with State or local powers without express statutory authority. Agencies must allow states notice and an opportunity to be heard in the rule-making process.

(c) That if Article I. Section 8. Clause 3, of the Constitution of the United States, is identified as the Constitutional provision granting authority to Congress for its proposed law, Congress must report a list of factual findings establishing a substantial nexus between the regulatory effect of the proposed law and interstate commerce.

BE IT FURTHER RESOLVED that the Secretary of State of the State of {insert state} transmit certified copies of this Resolution to the President of the United states; and to each Member of the Senate of the United States; and the House of Representatives of the United States; and to the Speaker of the House of Representatives and the President of the Senate of each state legislature in the United States.



AMERICAN LEGISLATIVE EXCHANGE COUNCIL
910 17th Street N.W.
Fifth Floor
Washington, D.C. 20006

(202) 466-3800
FAX (202) 466-3801