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States' rights, red and blue

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In February 2013, Utah Gov. Gary Herbert canceled plans to establish a state-run exchange for individual health insurance, bringing to 34 the number of states opting out of that essential piece of the Affordable Care Act. Meanwhile, another part of the law, an expansion of Medicaid rolls, is being defied by more than 20 states. Having survived congressional logrolling, tea party rallies, a presidential election and a Supreme Court case, Obamacare may yet be sunk by a resurgent force that many had thought dead: federalism.

The new federalist fervor is coming from both sides of the aisle. Among the governors refusing to create state health-insurance exchanges are two Democrats (in Missouri and Montana), while the Democratic governor of President Barack Obama's home state, Illinois, is willing only to "partner" with the federal government in setting up an exchange. Nor is the resistance limited to Obamacare. Last November, California's Democratic governor, Jerry Brown, warned "federal gendarmes" to stop interfering with his state's medical-marijuana law — echoing former Massachusetts Rep. Barney Frank, who had championed medical marijuana as a states' rights issue for years.

Such deep-blue states as New York and Massachusetts have tried (unsuccessfully) to block the Secure Communities Act, which requires every arrested person's fingerprints to be run through federal immigration databases. The Democratic governor of locavore Vermont is locked in a battle with the feds over who gets to determine the future of the Vermont Yankee Nuclear Power Plant: the state Legislature or the presidential appointees on the Nuclear Regulatory Commission. In March 2012, Yale law professor Heather Gerken took to the pages of *Democracy* to urge her fellow progressives to embrace federalism because state and local governments were more effective "sites of empowerment for racial minorities and dissenters" than the federal government.

Conservatives may still be the most vocal advocates of greater state autonomy, but federalism is far from a uniquely conservative phenomenon. Indeed, the revival of states' rights is a movement that has the potential to unite left and right while fundamentally changing the balance of power in America.

Political scientists divide American federalism — broadly speaking, the system that divides sovereignty between the federal government and the states — into three eras: dual, cooperative and coercive.

Dual federalism, which lasted from 1789 until the New Deal, reflected the Founders' original understanding of the state and federal governments as joint sovereigns, each supreme within its

own sphere. Article I of the Constitution grants Congress relatively few powers, relating to defense, tariffs and the like. The 10th Amendment, added in 1791, clarifies that the states and the people retain all powers not delegated to the central government.

Even before the 10th Amendment, however, James Madison observed in Federalist 45 that the Constitution gave states nearly complete power to pass and enforce laws touching on "the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." Realizing that individual liberty is at risk whenever political power becomes concentrated in one level or one branch of government, the Constitution's framers considered federalism, together with the separation of powers, a far more important safeguard of freedom than the Bill of Rights.

During the era of dual federalism, the national government focused on its constitutional duties while the state and local governments tended to the safety and welfare of their residents. The debates of the time would seem quaint today, such as the controversy that raged over Congress' authority to subsidize infrastructure projects; as president, Madison vetoed a bill providing for roads, canals and other "internal improvements" as beyond the powers of the federal government.

Franklin Roosevelt's New Deal put an end to dual federalism. At first, the Supreme Court killed off a number of the president's new programs, but after FDR threatened to install six additional pro-administration justices, it began to change course. In the 1941 case United States vs. Darby, which upheld the federal takeover of wage and hour laws, the court brushed aside the 10th Amendment as a mere "truism" that didn't limit the scope of Congress' powers.

Thus was born the era of cooperative federalism, characterized by "a constantly increasing concentration of power at Washington in the stimulation and supervision of local policies," as FDR adviser Edward Corwin put it. Notwithstanding the federal encroachment on their turf, states often welcomed the new federal programs because they were accompanied by unprecedented grants. Those grants were subject to relatively few conditions; instead, the federal government treated the states as partners in implementing national policy and gave state officials considerable flexibility in carrying out their roles.

The cooperative model began to break down in the 1960s, as Congress attached ever more specific and intrusive conditions to federal aid. The Highway Beautification Act of 1965, for example, told states to follow federal rules for regulating billboards or lose 10 percent of their highway funding. By the 1970s, such conditional grants, combined with unfunded mandates — marching orders that the federal government issues but doesn't pay for — created the model that persists to this day: coercive federalism.

In this context, "coercive" is "a descriptive, not a normative, term," explains John Kincaid, who directs the Meyner Center for the Study of State and Local Government at Lafayette College. It's troubling enough that in the academy, "coercion" has become a neutral label for what the federal government does every day.

Far more troubling, however, is that the constitutionality of coercive federalism rests upon a legal fiction: that federal programs don't infringe on state sovereignty because they are voluntary. States are always free to liberate themselves from federal mandates, the theory goes, simply by rejecting the grants to which the mandates are attached.

That argument is unpersuasive. States and cities don't embrace federal programs out of enthusiasm; they do so out of fiscal necessity, trying to regain some fraction of the tax revenue that their citizens send to Washington every April. The most dependent state is Mississippi, where federal aid constitutes 49 percent of all state revenue; even in the least dependent, Alaska, it's nearly a quarter of all revenue. In the aggregate, states depend on federal funding for 35.5 percent of their income.

Any governor who turns down a federal grant is effectively asking his state's taxpayers to subsidize the other states — not a formula for political success. Federal aid, Cato Institute scholar Neal McCluskey writes, is "the mighty tool that Washington uses to make states do its unconstitutional bidding — taking tax dollars from state citizens whether they like it or not, and forcing states to follow federal rules to 'voluntarily' get some of the money back."

Further, federal aid crowds out other spending at the state and local levels, be it for "education or pothole repair," says Kincaid. "Maintenance of effort" rules require that federal grants can't be used to free up state and local dollars for other purposes. If a state accepts a federal education grant, for example, it can't use the funds to reduce its own education spending.

The result is that state spending effectively tracks federal priorities, which, increasingly, means health and welfare entitlements. Already, state spending on Medicaid has surpassed education spending — a trend that will continue, as entitlement programs are projected to eat up 75 percent of all federal grant funds by 2020.

Breaking Washington's coercive hold on states is the holy grail of federalism. The most straightforward approach would be shrinking the federal budget, cutting federal taxes proportionately, and letting state and local governments decide what to do and how to pay for it. Today, such a proposal would be regarded as a tea party fantasy, but not long ago, it was championed by liberal icon Daniel Patrick Moynihan.

Toward the end of his career, the late New York senator, having seen New York consistently run a negative balance of payments with the federal government, suggested letting states keep more of their own money. "Less activism in Washington in return for more revenue at home, for whatever active measures recommend themselves to the state or municipality in question," Moynihan proposed in a 1999 report for the Kennedy School of Government.

Unfortunately, federal programs have strongly entrenched constituencies that would object loudly to having their federal funding yanked, even if it were replaced by state dollars. The federal government need not balance its budget and can, in any event, print money. Why take a chance on being funded by your home state, which has far less fiscal flexibility? Besides, proposals to abolish federal programs are vulnerable to cheap but effective demagoguery: If you don't like the federal Department of Education, you're anti-education.

The next best alternative, from a federalist's perspective, is to give states a way to opt out of federal programs, or at least to opt out of federal micromanagement. For instance, Rep. Scott Garrett, R-N.J., introduced legislation in March that would allow states to decline federal transportation funding without being penalized. Under the current system, a federal fuel tax is collected at the gas pump and then sent to Washington, where Congress and the Department of Transportation decide how much each state gets back in transportation grants and under what conditions. Nowadays, the conditions include such absurdities as the Department of Transportation's Livability program, which tells towns where to build bike paths and

recreational trails. Garrett's bill would let a state keep the roughly 18 cents per dollar collected in federal fuel taxes and use that money according to the wishes of the state's voters.

Education is another area targeted by the new federalists. Rep. Rob Bishop, R-Utah — a former high school teacher and the founder of the 10th Amendment Task Force — argues that "we've tried everything except giving schools the freedom to be different." In the last Congress, Bishop introduced the APLUS Act, which would let states receive federal education grants without having to submit to federal micromanagement; the states would merely enter into broad "performance agreements" with the Department of Education.

An alternative measure introduced by Garrett would give each state the power to opt out of federal education programs entirely and receive a tax credit equivalent to its share of federal education funding. The credit would flow through to the state's taxpayers, leaving states and school districts free to impose additional taxes to fund their own education priorities.

Other creative solutions are percolating up from the House backbenches. Under legislation sponsored by Houston Republican John Culberson, when a state rejects a federal grant, the unused money would have to be used to reduce the federal deficit, rather than to subsidize other states. And some House Republicans have called for eliminating Medicaid's current funding system — in which the feds match whatever each state spends, so long as the state adheres to federal requirements — and replacing it with block grants with few strings attached. Block grants don't have to be partisan poison; in fact, Democrats pioneered them in the 1960s for health and crime-prevention programs.

The states themselves retain considerable power to resist Washington — above all, by challenging federal laws that exceed Congress' enumerated powers. For 60 years after the New Deal, Congress justified legislation with no clear basis in the Constitution by citing its constitutional power to regulate interstate commerce, and the Supreme Court agreed.

But that changed under the Rehnquist and Roberts courts. Today, federal legislation under the Commerce Clause must actually target "economic activity" with a plausible relationship to interstate commerce. And it doesn't count if the legislation simply forces citizens to engage in commerce, as the court held in its 2012 Obamacare decision. (Alas, Congress' taxing power was invoked to save the individual mandate.)

With increasing vigor, states are testing the boundaries of Congress' jurisdiction under the Commerce Clause. Take the Montana Firearms Freedom Act, the brainchild of activist Gary Marbut. The law declares that guns that are manufactured in Montana and remain within the state aren't subject to federal regulations, including registration requirements. The act, which is being tested in a pending federal lawsuit, has inspired copycat laws in seven other states and pending bills in 24 others. Legislators have applied the firearms strategy to other products — for example, "light bulb freedom" statutes that would allow the intrastate manufacture and sale of incandescent bulbs, despite federal mandates to switch to compact fluorescents.

States are also exercising their right to withhold their assistance in implementing federal policies. For example, 13 have adopted laws prohibiting state and local officials from carrying out the Affordable Care Act. These laws rely on a 1997 Supreme Court decision, Printz vs. United States, that established that Congress cannot "commandeer" a state's administrative machinery in the service of federal law (in that case, the Brady Handgun Violence Prevention Act). But the tradition of state resistance goes back much further — all the way to the Virginia and Kentucky Resolutions of 1798, which proclaimed the right of states to "interpose" their authority to block

the hated Alien and Sedition Acts. Those resolutions were invoked in the 19th century when some Northern states refused to enforce the federal Fugitive Slave Act.

Finally, states are beginning to explore interstate compacts as a way of casting off unwanted federal mandates. The Constitution envisions interstate compacts — regulatory agreements among states — and there are more than 200 currently in force. In 2010, future Sen. Ted Cruz, writing for the Texas Public Policy Foundation, encouraged states to enter into a compact exempting themselves from Obamacare. In 2011 and 2012, seven states approved a draft compact in which the member states would assume responsibility for regulating health care.

In order to trump federal law, an interstate compact must be approved by Congress, seemingly a tall order in the era of divided government. But at some point, even congressional Democrats may recognize that their constituents are calling for more local control over their lives and pocketbooks. A reinvigorated federalism would transfer today's most polarizing issues to the state capitols, where a more pragmatic brand of governing still obtains. Not only is that what the Constitution provides for; it might just be good for the Republic.