

Protect and Enhance Federalism

The Framers of the Constitution intended federalism to act as a check not only on the national government, but on state governments as well. In addition to the relatively well known limits on Congress, the Constitution imposes a number of limitations on the states. For example, the Compact Clause (Article I, Section 10) prohibits states from entering into agreements with other states without congressional approval. This was intended to restrict the ability of groups of states to gang up on other states or on the federal government.

But these restraints have been severely weakened. There has been a growing federal intrusion into state and local issues. More recently, states themselves have begun to create a new form of national regulation through state attorneys general (AGs) acting in concert. The first trend is obvious. The second, because it is too new to

be widely recognized or open to public scrutiny, could well be more dangerous.

In areas ranging from financial regulation and tobacco control to global warming and fuel economy mandates, state attorneys general are entering into new alliances aimed at imposing national regulatory schemes via litigation. These joint litigation campaigns are often fueled by lucrative deals between state AGs and private lawyers, and many states join simply because such lawsuits have the potential to generate huge sums of money. But under the Constitution such joint campaigns by the states require advance congressional approval. Congress should actively review them, rather than sit on the sidelines while new national regulations are imposed by default.

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