

The Restoration Movement in Alaska

A Prospectus

The federal government has thwarted self-government in Alaska and our sister states. Conditions in Alaska are ripe for initiating and leading a sustained inter-state movement that challenges long-standing federal interference with state self-government. The aim of this movement is to roll back the federal government's unconstitutional accumulation of powers, and to restore the constitutionally proper balance of power between state and federal government in the United States. The name "Restoration Movement" is a placeholder for this movement.

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I. The Current Situation:

Several weeks ago the decision by the federal administration to designate more Alaska lands as part of the Arctic National Wildlife Refuge (ANWR) shattered hopes in Alaska that the state might reclaim the best prospect for her future prosperity. Although the lawlessness of the decision has shocked Alaskans, the federal government has been overstepping its constitutional limits for a long time.

Especially in the latter half of the twentieth century the federal government has accumulated new powers not granted by the Constitution. The exercise of those powers has overwhelmed self-government in the states. Increasingly, the federal government, and not the state representatives of the people, administers government of the people in the states. States are becoming subordinate administrative units of the federal government, and popular participation in government enactments to which the people are subject, has diminished. This trend has accelerated in recent decades.

Most alarming, this trend is becoming institutionalized, that is, the trend is now developing further without the superintendence or encouragement of a few guiding minds. By unthinking habit, office-holders in the federal government have continuously claimed and exercised additional powers. Congressional statutes, federal court decisions and acts of the federal executive work concurrently towards the same end, aided by federal administrations' political strategies, patronage and policies calculated to purchase state acquiescence and to punish or silence state protest.

Support for the expansion of federal powers naturally aligns with federal office-holders' career interests. Their publicly promoted motive is usually their good policy intentions. The inherited habit of breaching constitutional restraints and evoking new federal powers justifies new breaches and the accumulation of new powers. Countless precedents of this nature have diminished new office-holders' sense of guilt for their own new sins perpetrated against the Constitution. All that matters in public debate is the perceived wisdom of policy. The constitutional appropriateness of the site where policy is effected, state or federal, disappears from debate.

The most serious undertakings to correct federal overreach have been federal lawsuits initiated by the states. Taken together, the mass of favorable decisions, apart from the many unfavorable decisions, might best be described as successful rear-guard actions against an overwhelming foe – enough to delay but never enough to turn back the opponent. Complaints lodged in the other branches of the federal government are even more fruitless. The federal executive is of no assistance, and is often the source of the problem. In Congress, a delegation from an offended state might make a noisy protest but even the largest delegation from California is a minor part of each house, and requires support from other delegations to secure legislative relief. But although the delegations are united by sympathy, federal

power creates interests that divide them, and this inhibits concerted action by all state delegations in support of the offended state's delegation. This has been Alaska's experience with her delegation in Congress. Her bipartisan delegation has made dramatic appeals, but other states' Senators and Representatives have yielded no more than sympathetic statements.

Surely, some officers, legislators and judges in the federal government oppose the federal government's accumulation of powers and the gradual subordination of the states, but the institutional forces pushing this trend have proven to be too powerful for them to restrain, even too powerful for a president who wishes to restrain them.

Scattered citizen movements, some politicians, legal professionals and sometimes state governments have risen in opposition to federal overreach, sometimes with brief fanfare, but the noise and partial organization of opposition has not yet translated into a concerted movement that credibly challenges the federal government. Alaskans have occasionally participated in this opposition. In 2009 Governor Sarah Palin signed House Joint Resolution 27, sponsored by Rep. Mike Kelly, that simply affirms the Alaska Legislature's support for the Tenth Amendment. Governor Sean Parnell spoke out against federal overreach, and his administration challenged the federal government in the courts, with little success. Nationally, organizations for restoring state self-government are organic and passionate, but still fragmented. The federal government has been able to dismiss or ignore opposition and has even created new modes of interference in state self-government, often with the complaisance of friendly federal court decisions.

In Alaska, the most contentious point of conflict between state and federal government has been land management. Recently, the Obama administration decided to increase the size of Alaska lands subject to wildlife designation, which would permanently prohibit oil and gas development thereon. The Resource Development Council of Alaska estimates that if that Alaska landmass now so designated were its own state, it would rank as the eleventh largest state of the Union.

The federal administration has made this decision amidst an economic crisis in Alaska. The General Fund of the state of Alaska usually draws around ninety percent of its revenue from oil production, but the price of oil has unexpectedly dropped by almost a half in 2014-2015, at the same time that the quantity of oil production in Alaska has continued a twenty-five year decline. Today, Alaska is producing around 500,000 barrels of oil per day, approximately one quarter of average daily production at its peak in 1988. At current rates, revenues into the General Fund will meet only half the 2014 state budget.

Approximately ten billion barrels of recoverable oil lie underneath the Alaska lands that the federal government has designated a wildlife area. Studies moderately estimate that access to this oil would soon double Alaska's daily production. This

would rescue the Alaska economy and would fund the Alaska government for decades to come.

II. Opportune Political Conditions in Alaska

The unintended effect of the ANWR decision by the present administration in Washington is that it has created ideal political conditions to establish and anchor a permanent movement in Alaska, for restoring state self-government nationally. Paradoxically, the federal decision resolves the primary problems that have heretofore inhibited a successful restoration movement from taking strong root in any state.

In the past, movements within the states have lacked sustained, widespread support from the people and have lacked bipartisan support from state political leaders. This is why the federal government has successfully outlasted popular outrage when the will of the federal government and the will of a state government have collided. The people and the politicians have vented their outrage in demonstrations, in the media, in state capitals or in Washington, but then they resume their daily work. The object of their outrage becomes one of many campaign issues or one of many planks in a party platform, or is forgotten. As popular passions subside into habitual resignation or give way to other issues, the campaign for restoring state self-government usually becomes partisan, attached to one major party, and might leave a modest or faint trace in campaign politics. Citizen leaders and state politicians who persist in promoting state self-government remain at the margins of mainstream politics and sometimes speak with more passion than knowledge. Opponents can dismiss them as crackpots and cripple their cause. In sum, the type of support that has arisen is far from sufficient to mount a bold, credible and determined challenge to the power of the federal government.

However, federal overreach has been a durably salient issue in Alaska than in most other states. From time to time, Alaskans have signaled their annoyance with the federal government and both major parties have been compelled at least to indicate their opposition to federal encroachments in Alaska. Until a few weeks ago, Alaskan public opinion was already in favor of lifting the federal ban on oil production in ANWR, on a bipartisan basis. A modest foundation for a defense of self-government already has been established in the Alaskan people. The late decision by the federal administration has instantly broadened, deepened and hardened that foundation.

Political circumstances in Alaska are new and present a potent opportunity for change, with national implications. The unusual repugnance and alarm of the Alaskan people is palpable on talk radio, in correspondence with state representatives and in ordinary public intercourse. The Alaskan electorate was already the least party-affiliated in the nation, but this issue has obliterated lines dividing the political parties. The Alaskan people can easily see or easily can be

made to see that this time, by trespassing upon their constitutional rights, the federal government has devastated their economic interests. It is clear to all that the surest path to vindicating the economic interests of Alaskans is to vindicate their constitutional rights.

Public expressions of outrage by state legislators and executive officers have been bipartisan. A new political consensus is emerging among state leaders that the federal government has gone too far and something ought to be done. Popular opinion, reinforced by popular economic interests, is strong enough to maintain bipartisan opposition to federal overreach, and to prevent politicians' prospective defection from this bipartisanship, possibly for a sustained period of time. As Alaska's fiscal and economic crises deepen, the pressure to liberate Alaskan self-government from arbitrary federal restraints will intensify, and will intensify public resolve to find Alaska leaders who offer credible solutions.

Looking ahead, it seems possible that the Alaskan people could support a complete re-articulation of party politics in their state around the principle of state self-government. Parties and candidates who offer good ideas for regaining self-government will probably have a competitive electoral advantage and will force other parties and candidates to develop their own ideas in order to compete.

These political conditions in Alaska are especially fertile for the growth of a movement to restore state self-government. Probably, there is no better place in America to begin a new and serious movement of this kind than in Alaska, and at no better time than the present. Americans in Alaska can sustain their state government in a strong challenge to the federal government, and that challenge could unite the fragmented 10th Amendment organizations into a common movement anchored in Alaska.

III. An Alaska Strategy

Experience has banished all reasonable expectation that the states can restore their constitutional right to govern themselves solely by appealing to the federal government, the same entity that is violating the right. Given the nature of the federal government's current constitution, it is utopian to believe that the states will find the power to counter federal government power in the federal government.

Constitutional amendments might be a marginally better solution, but the current problem is not in the language of the existing Constitution but in the disobedience of the federal government to the Constitution's plain language. More law does not heal lawlessness.

We know that there is one power that the federal government surely respects – the American people. When they place their weight on the scales in favor of restoring self-government to the states, the trend will reverse. To meet and roll back federal

power to its proper place, the states, acting independently from the federal government but in concert with each other, must win the energies of the people. Once this power has disciplined the federal government, it will then be the right time to consider reforms and possibly, amendments to the Constitution.

A loud collision of wills between the federal and state governments can awaken the attention, judgment and interests of the American people.

A collision of this kind could reveal to the eyes of the people that the king wears no clothes. For years, apologists have amassed an incrementally enlarged heap of indefensible justifications for the expansion of federal power. Arguments clothed in the professional language of the law have hidden the general import of each individual federal act from the people. But, however skillfully individual federal acts may be defended as lawful and constitutional, these federal acts in the aggregate plainly upset the proper balance of power between the state and federal government outlined in the Constitution. This general tilt of power against the liberties of the people is so egregious, that the justice of the case is easy to prove.

But although we have a solid case, we have lacked a public forum in which to try the case in front of the American jury. We now have the means to create that public forum. In Alaska, a clear example of harm to the interest of the people, originating in the federal government's abuse of power, has finally exhausted the patience of the people in that state. With the dependable support of the people, the state of Alaska might firmly resolve to oppose the federal power.

This will bring on the collision of wills between the state of Alaska and the federal government. In this collision the federal government will not be able to outlast the will of the Alaskan people as it has in prior, less aggravating cases. Unique political conditions in the state permit the Alaska government to be slow, deliberate and bold. Boldness attracts national attention; slow speed buys time to educate the American public; deliberate action means that constitutional arguments have been fully engrossed and supported with the strongest empirical evidence.

An Alaska movement of this character can shine a bright and steady light on the pervasiveness and egregiousness of federal overreach in the United States, contrast these violations of the Constitution with the proper system of government manifest in the Constitution, and draw other states and organizations into a national restoration movement.

If restorationists believe that they are right and the defenders of expanding federal power are wrong, then they should welcome this collision of wills as timely, and a rare opportunity to make their case in the forum of national public opinion.

This is better done now than later. On principled grounds alone, the late decision by the federal administration in Alaska would deserve firm opposition at any time. On strategic grounds, the opportunity in Alaska should not now be deferred.

As the balance of power between federal and state governments continues to tip in favor of the federal government, the prospect of restoring that balance becomes more unlikely. American government and the character of the American people will continue to transform. At some point, the people might sleep beyond the possibility of awakening. Restoration may become impossible.

IV. A Rough Plan to Proceed

a. The Goal

The following are carefully considered elements of a plan for the state of Alaska to challenge the federal government.

It is recommended that

- 1) the state consider and then carefully and gradually implement the interposition of state authority against the federal government, with the ultimate prospective goal of nullifying the federal wilderness designation in ANWR, with certain modifications that the state feels are appropriate to protect the environmental stewardship of the land.
- 2) The state also uses the prospective nullification goal as an entering wedge into the broader issue of excessive exercise of federal power, generally.
- 3) Federal lawsuits are considered; our congressional delegation becomes leaders in Washington for restoring the balance of state-federal power. As interposition gains traction among the people, we might make meaningful progress in the federal branches of government.

The state will move slowly, each step calculated for public attention.

The Alaska people are engaged, with the objective of establishing state interposition as the primary topic of Alaska politics for the next several years.

b. Organization

During this session of the 29th legislature, the majority and minority leadership together with the governor initiate strategic discussions on organizing the challenge. Our congressional delegations are notified and invited to contribute.

It is crucial that bipartisanship is maintained. The majority may need to maintain discipline of its caucus to prevent partisanship from alienating the minority from the movement, and to preserve focus on the goal, for the good of the state and nation.

Leadership of a prospective committee is appointed, to report to majority and minority legislative leadership. The committee develops networks inside and

outside the state; identifies executive assistance; funding needs identified and contacted. This committee becomes the hub for all restoration information, auxiliary organizations and connects restoration movements together.

Plans begin to be formed with the help of outside expertise, with the probable goal of a joint resolution by the end of the 1st session.

The author has collected sources from legal scholarship that describe prospective and tested strategies.¹ These will deserve thorough research, with the help of outside expertise.

Reports and first plans are presented to the majority and minority leadership.

c. Statewide Dialogue Opened

The legislature announces the opening of dialogues around the state and releases public notice of the state's intention to consider the option of state interposition. The majority and minority leadership specifies that "the legislature is considering interposition of state authority." Public comment is encouraged. Radio show hosts and press is contacted.

When pressed for further comments, it is fair to say that the state is considering interposition at this time and has no plan.

d. Alaska Restoration Resolution of 2015

This Resolution is presented to the Alaska legislature, before the end of the 1st session, with the concurrence of the governor, who is prepared to sign.

The author has substantially drafted a suggested joint resolution, which is a work in progress. The language references the Constitution, Federalist 46 and the Virginia Resolution of 1798. Below is an outline.

- Part I. Renewed Pledge of Loyalty and Affection for our Constitution, National Government and Union
 - o The pledge lists the achievements of the national government, and especially praises the national government for fulfilling its duty to guarantee republican government in each state by enforcing equality of citizenship, which was an appropriate interference in state governments that were violating the principles of republican government confirmed by the 13th, 14th and 15th Amendments.

¹ See, e.g., Barak Y. Orbach et al., *Arming States' Rights: Federalism, Private Lawmakers, And The Battering Ram Strategy*, 52 ARIZ. L. REV. 1161 (2010); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007).

- The pledge admonishes advocacy of secession as rash, unwise and inconsistent with the only rightful standard of secession, which is the right of revolution in our Declaration.
- Part II. The Federal Government's Encroachment Upon the Right of Self-Government
 - This part denounces and distances the state of Alaska from the misuse of state interposition by nineteenth century slaveholders to protect slaveholding oligarchies from the just and constitutional reach of the national government.
 - This part explains that the balance of power between state and national government tilted against the national government in favor of the states in antebellum era; now it is tilting against the states, and is endangering liberty and self-government in the states.
 - A brief affirmation of the theory and explicit language of the Constitution.
 - A concise, short list of the national government's violations in Alaska. This must be carefully researched so that it is airtight but also presents the egregiousness of the violations.
- Part III. (or in a separate resolution, if necessary) Creation of a Committee of Correspondence on Restoration of Self-Government
 - The charge of the committee is stated to study and consider the remedy of state interposition to restore self-government in Alaska;
 - To educate the Alaska people on the theory of our government and their rights;
 - An appeal to our sister states to open their state legislatures in correspondence with us, to consider joint action, interposing the concerted action of states against unconstitutional encroachment of federal authority against states.

e. Inter-Session Development

Meetings with constituents, more radio shows, press briefings.

Work of Committee of Correspondence

- Completes study and legal analysis of federal violations in Alaska, with outside help; disposition of state with regard to ANWR defined. Recommendations and report.
- Compilation of research on worst federal encroachments in states, with participation of other states; establishment of inter-state database with commentary – available online, simplified for public viewing and searching.
- Coordination with other 10th amendment restoration movements
- takes stock of national reaction
- continues to develop contacts with other states' legislative leadership
- finalizes plans for next session

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Possible tools:

- The legislature presents a more forceful resolution declaring our competency to read the Constitution ourselves; listing specific, well-researched and documented grievances; calling for the governor to present these grievances to the President, the Speaker of the House, or Senate Majority leader, to demand an answer.
- A resolution requesting the Lt. Governor to call for an election for delegates to a state convention in Anchorage (UAA?) to consider endorsement of nullification (but not actual nullification).
- A resolution requesting the Lt. Governor to call for a plebiscite in 2016, on the endorsement of nullification.

V. Appendix - A Brief Account of Federalism

In his *Summary View of the Rights of British America*, written before the Revolution in 1774, Thomas Jefferson describes the relations between the imperial British government and the colonies, and offers a solution to the King. The description of the existing relation bears an uncanny resemblance to existing state and federal relations today. His solution proposed to the King bears an uncanny resemblance to the system of government manifest in the Constitution of 1787. This document is an important one for understanding the crisis of state self-government today.

Although the British government permitted certain individual liberties to the colonists, it restricted political liberty, that is, the right of people to govern themselves. In general, the imperial British government ruled over the colonies without the participation of the colonists in the laws to which they were subject. The colonists could govern themselves only to the extent that the crown permitted them.

To win their policy preferences, the colonists needed to supplicate, that is, to beg the royal authority to grant pleas. Excellence at the art of begging favor of royal authority determined policy success. This skill was necessary since counter-suppliants were also present at court. As in all times, parties formed around opposing interests, but under this form of rule, opposite interests won or lost their preferred policies in begging matches. This is how imperial government functions. The structure of the monarchic regime form determines this and explains why manners in royal courts take their peculiar form.

Jefferson objected to this style of government on natural rights grounds, and he averred that Americans refused to engage the government on these terms. He wrote,

“Let those flatter who fear; it is not an American art.” Americans expected, by natural right, to govern themselves and refused to supplicate, beg or flatter.

Jefferson proposed a plan. The King should invest the colonies and all other parts of the Empire with co-equal status. All parts of the British Empire would be equal and each would govern itself locally, by natural right. The King would preside over this Union and he and his royal government would address only those objects that properly concerned the national functions of the British Empire. Jefferson’s counter-proposal to the King hinted at converting the Empire into something like a United States of Britain.

A similar plan was the basis for the American Union. All states were co-equal in the Constitution. Article IV, section 3 of the Constitution authorizes the Congress to hold new territories in a state of pupillage, but when they grow to sufficient size, they are graduated, by an enabling act of Congress, into states co-equal to the older states. Article IV, section 4 required the federal government to guarantee to every state a republican form of government. By these means, the Constitution contemplated an expanding union, comprising self-governing states, superintended by a supreme national government. The American union would be a “republic of republics.”

The question that this plan raised to many skeptical Americans in 1787 was whether it would be possible to maintain republican government over such a large territory. Virginia alone was the largest republic in human history in 1787. Republics had always been small; large nations had always been ruled monarchically. Hence, the Anti-Federalists argued that the federal government was given too much power, and this power would overawe the states, and ultimately rule over them despotically (see Brutus, for example).

Not so, the Federalists argued. As long as the federal government only exercises its enumerated powers, it would never rule despotically. The purpose of dividing the powers of government between the enumerated powers granted to the federal government and reserving all other powers to the states was to insure that republican government could be maintained over an extended and expanding nation.

The enumerated powers granted to the federal government are national in character, for example the decision to wage war or to declare a cessation of hostilities. Alaska’s share of the federal government’s decision to wage war is appropriately calibrated to roughly its share of overall population since this decision is national in character and affects all Americans equally. Alaska’s congressional delegation equals 3/535 and its share of population, 700,000/330 million. Her small share of influence in this national decision and the supremacy of the federal government’s power over this decision do no injustice to her.

The powers reserved to the states are local in character, for example, the decision to build a road in an Alaskan town. This decision affects only Alaskans. Were that

decision made by the Congress, Alaska's small participation in the decision would be less than 1% of congressional authority. Others would be deciding questions affecting Alaskans' way of life, since our share of that decision is negligible. In proportion to the unconstitutional expansion of federal powers that operate directly on the people in the states, such as where and when to build roads or deciding how to balance environmental stewardship and economic development in the state, the people lose self-government. If the Congress grants the power to decide these local questions to unelected agencies in the executive branch, the authority is even further removed from accountability to the people who are affected by the decisions.

This division of powers between state and federal governments would not be necessary if, for example, America was a small republic, with the size and population of New Jersey, at roughly 9 million people. The decision to build a road from Newark to Princeton and the decision to go to war both come close to equally affecting the 9 million citizens. In that case, the people are equally participating in the enactment of laws to which they are subject.

But the American republic is large, which necessitates the separation of powers between federal and state governments so that the laws that operate on the whole people equally are framed by the federal government, and the laws that fall on the states particularly are framed by the state governments. A mistake made by critics of federalism is to assume that the sole qualification of republican government is majoritarian rule. That is a necessary but insufficient qualification. Those subject to the laws must be the ones who determine their enactment. Just because a majority of Californians might vote for a law forbidding New Yorkers to wear bow ties should not bind New Yorkers to obedience.

The author of this memorandum has attended comment sessions held in Alaska by certain federal agencies that presume to have the authority to decide local questions such as where to build a road. The author was struck by the supplications and counter-supplications of the commenters, and how this undignified spectacle resembled the spectacle of imperial courts, so loathed by Jefferson, and by Franklin, from bitter personal experience. Interests from inside and outside the state supported the supplicating commentators. A begging match ensued. The agency officers who presided over these sessions and made the decisions for Alaska were beyond the accountability to the people who were directly affected by their decision. This author understood what he was witnessing – the transformation of republican self-government into imperial government. Alaska citizens' recourse to influence major policy decisions is to supplicate, or to pay professional supplicants in Washington, known as lobbyists, who will do our begging for us. Alaska's congressional delegation is virtually impotent, and so the paid beggars at the imperial city become more influential for us than our own elected representatives.

Certainly, Alaska is not alone in having felt the overawing power of the federal government. The recent blow she has received is only one of many withstood by our sister states, but this last is perhaps the most painful to us, and should be the

last we are willing to withstand without calling her people to come to her defense. The American founders insist that by natural right and duty, the people ought not to suffer rule without their consent, and ought to demand participate in the enactment of laws that they are required to obey. These are the elements of republican government, which the federal government is bound by the Constitution to guarantee in each of the states.

Yet, the federal government is robbing us of what it should be the guarantor. In doing so, the federal government has broken a sacred constitutional trust and is incrementally fulfilling the fears of the Anti-Federalists, not because of the failure of the Constitution but because of the failure of the federal government to obey it. When Americans are given laws without constitutional authority, are told to obey over their widespread objections, and the harm to the people is material, it is time to consider lawful means of resistance, and to bring our federal government back to obedience to our organic laws, ratified by the American people.