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Battle Lines Are Redrawn As Democrats Rediscover The 10th Amendment And State Power

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I look deeper at the policies behind the headlines. Opinions expressed by Forbes Contributors are their own.

A funny thing happened on the way to the new Donald Trump administration: Democrats have rediscovered states' rights and local government powers under the 10th Amendment to the Constitution. Why? With Republicans now in control of the White House, the Senate and the House in Washington, D.C., Democrats want to shift to a ground game in state and local government where they have a better chance to win. But it



won't be easy, since Republicans have a head start there, at least in most of the states, if not the major cities.

House Speaker Newt Gingrich of Ga., left, looks on as Senate Majority Leader Bob Dole of Kansas points to a copy of the 10th Amendment to the Constitution on Friday, Jan. 6, 1995 in Washington during a meeting between



Republican Governors and Republican members of Congress. (AP Photo/Denis Paquin)

In case you've forgotten the 10th Amendment, it provides that powers not delegated to the federal government "are reserved to the States respectively, or to the people." Along with checks and balances and balances of power, the 10th Amendment is part of the constitutional foundation for federalism, which requires that government ask which branch (executive, legislative or judicial)

and which level (federal, state or local) should act on a particular matter. Among other benefits, it allows states to act, as Supreme Court justice Louis Brandeis said in a 1932 case, “as a laboratory” trying “social and economic experiments without risk to the rest of the country.”

As a matter of principle, Republicans have been more interested in state and local power and the Democrats more focused on federalizing things in Washington. But, in reality, federalism has become the tool of whatever party is not in power in Washington. The Republicans favored it in the Obama years and now it's the Democrats' turn. It would be nice if state and local power were more a matter of principle than politics, but I guess the 10th Amendment will take whatever support it can get.

As usual, California is leading the way, setting up elaborate defenses of favorite Democrat party policies at both the state and local levels. Governor Jerry Brown has his own foreign policy on climate change, for example, saying California would move ahead aggressively even if Trump withdraws from the Paris climate accords. Now the state has its own anti-Trump lawyer too, hiring former U.S. Attorney General Eric Holder to represent the state against federal intrusion on California's policy preferences. The mayors of both Los Angeles and San Francisco have made it clear that their cities will still be “sanctuary cities,” resisting federal immigration policy. There has even been talk of a “Calexit” vote to leave the union, though few think that is a serious threat. I suppose we could call this defensive federalism, seeking to protect a true-blue state from federal intrusion by Trump.

Although California has a two-thirds Democrat majority in the legislature and all Democrats in statewide offices, it could be tougher sledding elsewhere. Republicans control 32 state legislatures and 33 governors' offices. Democrats hold the majority in only about half as many state legislatures as they did seven years ago, and Democrat governors have been reduced from 29 when President Obama took office to 16 today. But it is precisely this imbalance that Obama seems ready to tackle in his post-presidency. He recently said that “over the long haul” we need to “rebuild the Democratic Party at the ground level.” His long-time adviser David Axelrod added that with Congress gridlocked, perhaps too much emphasis was placed on the presidency “when maybe we have to be more innovative.”

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Democrats are stronger in the big cities than they are in the states so look for their new progressivism to face challenges. We are already seeing Republicans at the state level telling cities that their progressive policies on the minimum wage, or fracking, or bans on plastic bags are “preempted” by state laws to the contrary. Ohio, for example, has preempted local efforts to raise the minimum wage, saying it is a state matter. And legislatures in Michigan and Wisconsin have both passed laws saying local governments are preempted from banning plastic bags. Other states have preempted cities from banning fracking.

So it's a new day, not just in Washington, D.C. but across the country as Democrats seek to promote a new “progressive federalism” and Republican-controlled states exercise their powers of preemption. Politics is bringing the often-neglected 10th Amendment back into play in unexpected ways.

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