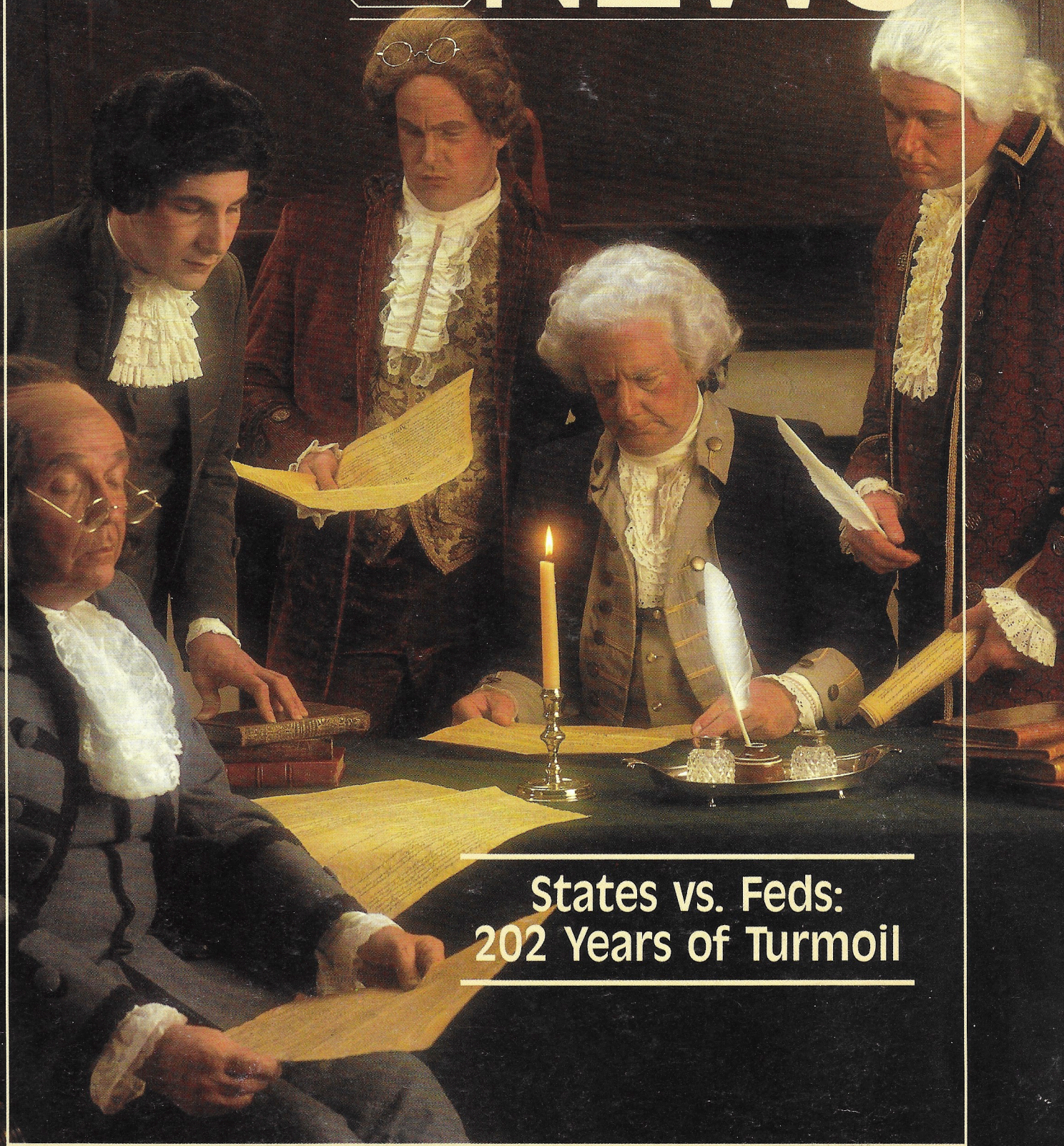




STATE GOVERNMENT NEWS



**States vs. Feds:
202 Years of Turmoil**

The gavel passes:

States take charge

by David McCormick

In Florida, the state Supreme Court has declared that its residents have an unrestricted constitutional right to abortion, regardless of what the U.S. Supreme Court may decide.

In California, the state attorney general wants to forbid the interstate shipment of pesticide-treated food, regardless of what the federal government allows elsewhere.

Across the nation, one of the most significant legacies of former President Reagan's new federalism has been a broad expansion of state legal authority into areas once reserved for the U.S. government. Although it has received little attention outside the legal community, experts say this expansion of states' rights could result in a fundamental reordering of the state-federal relationship.

Not waiting for Washington

As key federal agencies have relaxed their regulatory grip, state attorneys general have stepped vigorously into the areas of consumer protection, antitrust enforcement and prosecution of public corruption. Until a few years ago, this was largely the territory of federal authorities.

At the same time, as the U.S. Supreme Court has scaled back its protection of individual liberties and civil rights, activist lawyers across the nation have dusted off their state constitutions and found them far more protective than the Bill of Rights. Hot-button issues like civil rights and abortion are now likely to be settled on state, not federal, grounds — with results varying from state to state.

All this has resulted in new authority — and

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political opportunity — for state officials, particularly governors and attorneys general. "The implications haven't all been studied yet, but this is a very important development in the nature of the state-federal relationship," said John Chubb, a scholar at the Brookings Institute, a non-partisan Washington think tank. Or as Mississippi Gov. Ray Mabus likes to put it, "We're not waiting for Washington to solve our problems."

An example of the new breed of state official, Mabus, as state auditor, undertook an investigation of county purchasing that resulted in more than 40 indictments. Promoted to governor in 1987 at the age of 37, Mabus has teamed with Arkansas and Louisiana officials to form a Mississippi Delta development commission that creates joint economic programs for the poor, rural region.

"There's a feeling now among the states that if the federal government won't do it, that doesn't mean it can't get done," said Massachusetts Attorney General James Shannon. "We're becoming a lot more aggressive in a lot of new areas to try to fill in the gaps left by the retrenchment of the Reagan era."

Under Reagan, the federal courts and federal agencies took a lower profile as the president urged an increased role for state and local officials. Most observers expected this "new federalism" to result in a more conservative political climate and a more freewheeling marketplace for business. While this is certainly true at the federal level, there have been some surprising developments among the states.

State constitutional rights

In an important Florida case, the state Supreme Court in October struck down a law requiring teenage girls to obtain parental consent before having an abortion. Ignoring

the U.S. Supreme Court's agonizings over the issue, the Florida court ruled that its residents have an unrestricted right to abortion under the privacy clause of the state's own constitution.

Across the nation, state constitutions are emerging from the shadow of the U.S. Constitution and becoming recognized as guaranteeing freedoms found nowhere in the federal document. For example, 18 states have adopted their own equal rights amendments protecting against sex discrimination. In Pennsylvania, citizens enjoy a constitutional right to "clean air, pure water and to the preservation . . . of the environment." In Alaska, the right to privacy allows personal possession of marijuana. New York, Mississippi and other states have required prosecutors to follow stricter rules of evidence than the U.S. Supreme Court allows.

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States take charge

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This growing importance of state constitutions has been hailed by U.S. Supreme Court Justice William J. Brennan Jr. as "probably the most important development in constitutional jurisprudence today." A response to its activist role taken under Chief Justice Earl Warren in the 1950s and 1960s, the high court is seen as having begun in the 1970s to encourage a larger role for state decision-making. Since 1970, state supreme courts have handed down more than 500 decisions based solely on their state constitutions. But as these courts have frequently proven more liberal than their federal counterpart, some officials object to the rise of a dual standard.

"We're not waiting for Washington to solve our problems."

— Mississippi Gov. Ray Mabus

"It is a difficult enough task to translate the commands of the U.S. Constitution," Oregon Attorney General David Frohnmayer wrote in a 1986 issue of the *National Law Journal*. "Superimposing new and different state doctrinal rules on top of federal law is an open invitation to confusion and error," he cautioned.

So far, however, the U.S. Supreme Court has taken a hands-off approach to contrasting decisions based on state constitutional grounds.

"Our court has neither the authority nor the inclination to oppose efforts to construe state constitutional provisions more liberally than their federal counterparts," Chief Justice William Rehnquist told the Conference of Chief Justices last year.

More controversial is the effort by state law enforcement officials to take a greater role in consumer protection and antitrust action, issues traditionally left to the federal government to regulate as interstate commerce.

Battles over turf

As the Justice Department and Federal Trade Commission allowed corporate merger mania to proceed virtually unchecked, state prosecu-

tors acting through the National Association of Attorneys General adopted a more stringent set of merger guidelines and banded together to enforce them. Last year, a group of Northeastern states forced Campeau Corp. to agree to sell its Filene's division to avoid a monopoly on the region's department store market. Shannon, the Massachusetts attorney general who led the case, accused federal regulators of being "asleep at the switch." More recently, 19 states joined forces and charged 31 major insurance companies with manipulating prices and the availability of liability coverage.

Encouraged by its success in the antitrust area, NAAG stepped into the consumer protection arena with guidelines requiring the airline and rental car industries to spell out more plainly the terms and conditions of their advertised prices. The attorneys general also won a settlement from Chrysler Corp. in which the automaker agreed to pay more than \$16 million to customers who bought cars with odometers that had been rolled back.

And unlike the U.S. Supreme Court, the Federal Trade Commission and Department of Transportation are resisting some of the encroachments on their turf. The FTC has opposed NAAG's recommendation that rental car damage waivers be banned as deceptive, while DOT has filed an affidavit supporting the position of three airlines who sued Texas over its attempt to regulate airline advertising.

The biggest battle may lie ahead, in the area of environmental protection. Coastal states banded together last year to pressure the Department of the Interior to declare a moratorium on offshore oil drilling, delaying some exploration that had already been approved by the federal agency. California Attorney General John Van de Kamp, a Democratic candidate for governor, recently proposed a 1990 ballot proposition in which voters can enact a sweeping "environmental bill of rights." Among other things, the bill would go much further than the federal government in restricting use of chlorofluorocarbons, and would forbid the importation of foods containing harmful pesticides allowed in other states. Assemblyman Tom Hayden, D-Santa Monica, called it "the most significant pro-

posal for protecting the environment ever placed before the voters in this country."

Cleaning out corruption

Another area in which states are taking more control over their own affairs is the regulation of political conduct. Most public corruption cases are still brought at the federal level. U.S. prosecutors have broader jurisdiction, bigger staffs and budgets and stronger investigative authority. (While it was Ray Mabus who uncovered widespread corruption in Mississippi, it was the FBI that made the case.) Nevertheless, corruption is increasingly fought at the state level through stricter legislation regulating campaign finances and prohibiting conflict of interest.

This legislation "greatly strengthens the mechanism by which the state can deter, detect and punish those officials who prove unable or unwilling to draw the line between their private interests and their public responsibilities," said Robert C. Newman, former New York chairman of Common Cause.

The New York Legislature in 1987 enacted its first ethics overhaul in 20 years, requiring financial disclosure of candidates and forbidding officials from representing private interests before public agencies.

Gov. Mario Cuomo noted: "The majority of our public officials are honest, hard-working people who need to have clear rules that define and enforce their ethical standards."

An increasing number of cities are following the states' lead and enacting ethics rules of their own. Not only metropolises like New York, Los Angeles and Chicago, but smaller cities like Austin, Texas. In Los Angeles, City Attorney James Hahn is seeking \$2.2 million in fines against Mayor Tom Bradley for allegedly failing to make financial disclosure of several business ventures.

What's ahead? Most experts believe the states are just getting warmed up, and that the state-federal relationship will continue to shift.

"Once the states realize they have the ability to do these things, I don't think it's going to end," Shannon said. "I expect this to continue." □