



Whither Federalism?

Martha Derthick

“Do you still think federalism is dead?”, asked an academic friend, alluding to the decentralizing measures advanced by the Republican majority in the 104th Congress. He knew of my belief that centralization has been the secular trend in American intergovernmental relations, and that it has culminated since the 1960s in the clear subordination of states to the federal government. I never said federalism was dead. Under the Constitution, there is no way to kill it. I also think it much too early to conclude that the trend toward centralization is being reversed.

What Is American Federalism?

American federalism is complicated and unstable. The design calls for functions to be divided between the national government and the states, but just how is left open to political and judicial dispute. The Constitution grants powers to the national government in elastic terms.¹ The Tenth Amendment stipulates that all else will be reserved to the states and to the people. But the Constitution also imposes broad prohibitions on the states, the most important of which are embodied in the Fourteenth Amendment (“No State shall. . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”)

Between what the federal government is authorized to do and what the states are pro-

hibited from doing, there is vast room for expansion of the federal government’s reach.

States, of course, are here to stay. They are guaranteed equal representation in the Senate, a provision protected against constitutional amendment. The boundaries of the states may not be changed without the consent of their legislatures, guarantee-

ing that the states will continue

to exist. And states are

unmistakably endowed

with the properties of

governments. They

have constitutions

derived from the

people. They

have their own

chief executives,

legislatures, and

judiciaries. They

raise revenues;

enact, interpret,

and enforce laws;

put people in jail; and

even impose the death

penalty.

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al guarantees enjoyed by the states,

federalism has undeniably atrophied over

time.

The place of place, for example, is much

attenuated in American politics and govern-

ment. Consider, if nothing else, the fact that

two of nine Supreme Court justices, Rehnquist and O’Connor, are from Arizona,

and that President Clinton contemplated

appointing a third person from that state,

Bruce Babbitt, without anyone’s objecting to

him on geographic grounds. The time is long

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variety of forms—preemptions of several kinds, judicial decrees, direct legislative regulation, grant-in-aid conditions—all of which for the past 10 to 15 years have been marching under the banner of “mandates.” Federal grants-in-aid to state and local governments amount to more than 20 percent of their outlays, and most come in the relatively restricted form of categorical grants rather than more permissive block grants. Hundreds of congressional statutes impose obligations on the states in the fields of health and safety, transportation, civil rights, and the environment.

Hundreds of local school districts operate under desegregation decrees of federal courts. As of 1990, 320 state prisons, about a fourth of the total, were operating under sweeping court orders applying to a wide range of policies, facilities, and personnel practices. At least 21 states are under federal judicial supervision in regard to child welfare services.

Is Federalism Being Reinvigorated?

Do the kinds of proposals introduced by the Republican majority in the 104th Congress represent a reversal of the course of centralization? The measures for Aid to Families with Dependent Children (AFDC) and Medicaid would replace elaborately conditioned categorical grants with far more permissive block grants. States would regain much of the control over eligibility rules and benefit levels that has been taken away by 60 years of statutory enactment and judicial interpretation in AFDC, and by 30 such years in Medicaid.

The Republican proposals also enunciate a revised conception of federal-state relations. In regard to AFDC, they stipulate that the law “shall not be interpreted to entitle any individual or family to assistance,” or “to require any State to provide assistance to any individual. . . .” In regard

to Medicaid, they would instruct the Secretary of Health and Human Services to “act in a cooperative manner with the states.” States would have a right to challenge in court any federal penalty that reduced their grants, while beneficiaries and providers would be explicitly prohibited from bringing suits against the states. This repudiates judicial practices that evolved during the “rights revolution” of the 1960s and 1970s to the detriment of state governments.

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The changes proposed for these programs are important and surprising, but they have not become law. And if they, or proposals like them, were to become law, they would still need to be put into perspective before they are hailed as recasting intergovernmental relations in the United States.

- Even if such proposals were someday enacted in their entirety, income support would still be overwhelmingly a function of the federal government, which has largely taken over that function through the development of Social Security and Supplemental Security Income (SSI).
- That which would be decentralized, mainly AFDC and Medicaid, was never fully centralized. AFDC in particular has long resisted nationalization and standardization. Insofar as nationalization did take place, much of the change came from judicial action during the high tide of the rights revolution, and was never endorsed by Congress. Furthermore, for the last

several years AFDC has been undergoing piecemeal devolution through the technique of waivers granted individually to the states by both the Bush and Clinton administrations. Welfare reform may be interpreted as one all-embracing permanently authorized waiver.

- If House Republicans in the 104th Congress, who are in the vanguard of policy change, have their way, states will have to fashion their own programs within a federally prescribed framework of unusual specificity and severity. One version of welfare reform, for example, would include provisions denying additional benefits to mothers who have more children while on welfare and denying all benefits to teenage mothers who have children out of wedlock. Another would condition benefits on work after two years of welfare receipt, require specific rates of participation in work activities by that time, and limit lifetime benefit receipt to a five-year maximum. States, thus, would not be free to offer traditional programs of cash support (i.e., support conditioned only on poverty and family status). Such rules are hardly consistent with a strategy of devolution.
- More than anything else, it was the costly outpouring of federal Medicaid mandates between 1984 and 1990 that led to today’s heightened interest in recasting intergovernmental relations. Congress repeatedly imposed expansions of Medicaid on the states, and persisted in doing so even after receiving a bipartisan, near-unanimous plea from the governors in the summer of 1989 to observe a moratorium. This extreme indifference to the states’ protests provoked an extreme reaction, culminating in the governors’ unprecedented willingness to give up federal money in exchange for freedom from mandates. That 30 governors were

Republican after 1994 contributed to this unusual development.

When American federalism was being constructed, James Madison wrote that the states would be “subordinately useful.” That is precisely what they have become, whether Democrats or Republicans control national offices. Today the states are useful to conservative Republicans in Congress who seek to reduce federal spending. With rhetorical homage to the states’ restored sovereignty and the collaboration of Republican governors, Congress can turn back to the states functions that have become political and financial liabilities.

Welfare is thoroughly unpopular. It has no constituency. Not even the adult recipients of AFDC profess to like it. Medicaid is another matter. At the very least, the nursing home industry has a big stake in preserving it. But, at a time when federal office holders feel compelled to search for savings, Medicaid’s rapidly growing costs make it a prime candidate for reduction, and its shared nature increases its vulnerability to cuts.

The Longer Run

Federalism has always meant that the states were available to perform governmental functions that for one or another reason—constitutional tradition, lack of supporting political coalition, lack of will power—Congress did not claim. What

Congress is doing that is *unfamiliar* is giving back what had previously been centralized. At a time when the nation is coming to grips with the politics of retrenchment, Congress is exercising its historic option of leaving matters to the states—thereby alleviating its own burden of making hard financial and policy choices. In an earlier phase of national development, Congress could relieve this burden simply by inaction. Today, leaving uncomfortable choices to the states demands

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legislative action, so far has centralization advanced in the past 60 years.

I see the current trend as an adjustment to the exigencies of the time. It is pragmatic and politically driven, as changes in intergovernmental relations generally are. The states are as much “used” as honored in the process, but that they are available for such use testifies to the survival of at least the form federalism takes in the United States.

What ensues from the current effort at devolution will reveal much about federalism’s political and social

realities. Federalism both presumes and facilitates differences among the states. Assuming that the states are granted more freedom, will policy differences among them widen, or will their policies tend to converge? And if they grow farther apart, will this be tolerated, or will it be seen as *prima facie* evidence of injustice, requiring a national remedy and thus recentralization?

Time will tell. As always, legislation will be but an uncertain first step toward change. At least in the short run, states are likely to continue to do very much what they are doing right now. Social institutions have a great deal of inertia.

Federal and state governments have become so thoroughly interdependent—and so deeply engaged in the game of mutual cost-shifting—that it is very hard to imagine their putting an end to that game and restoring anything remotely approaching the world of separate sovereignties that arguably existed before the New Deal. Even block grants, after all, are still grants, a form of intergovernmental relations. Decentralization is not divorce. The proposed changes would constitute a partial, tentative separation—an agreement to be more apart for a while, for certain purposes.



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