

# Federalism's Ups and Downs

It's pretty much agreed that devolution has waned, and there are considerable pressures for centralization. What's not clear, is why.

By Carl Tubbesing

## Cable TV Program Note

Debate on the Federalism Channel has intensified over erosion of state authority. In last night's program, Alexander Hamilton argued that one necessary consequence of the war on terrorism—or any war—is centralization of power with the national government. "Balderdash," retorted a panelist looking eerily like Franklin Roosevelt. "It's the economy, stupid. The federal government has to take charge when the economy falters." Benjamin Franklin argued that the trend toward weakening of state authority is systemic and was well under way before the terrorism attacks or the recession.

The Federalism Channel has gradually expanded its niche viewership with use of stand-ins for historical figures, state capitol "Jeopardy" and live auctions of Thomas Jefferson and John Adams bobble head dolls. Tonight's programming will be highlighted by a rare, behind-the-scenes look at the presidency of Millard Fillmore, the only president, according to '60's humorist Stan Freeberg, who was born with a clock in his stomach.

Which of our historical talking heads is right? What accounts for the recent slippage of the states in the federalism standings? Is it Alexander Hamilton, our founding father's staunchest advocate for a strong, national government? What about Franklin Roosevelt, who, by most accounts, had to overcome his own caution about central-

izing power before launching the New Deal and shifting the federalism center of gravity toward Washington, D.C.? Or is it Benjamin Franklin, renowned early American curmudgeon and contrarian? Let's take a look at some recent history first, and then we'll look at our panelists' arguments.

Two more recent figures—Bill Clinton and Newt Gingrich—are helpful in understanding current federalism history. Bill Clinton was elected president in 1992. As Arkansas governor, he had been a leader in the National Governors' Association and a believer in state innovation and experimentation. Like many state legislators and governors during the late 1980s and early 1990s, Clinton bristled at the implied arrogance of one-size-fits-all federal solutions. And like other state officials, he railed against unfunded federal mandates and cost shifts from federal to state governments.

In his first months as president, Clinton met frequently with state legislators and governors and was sympathetic to their pleas about restoring balance in the federal system. In October 1993, the president issued an executive order that told federal agencies to stop imposing unfunded mandates on state and local governments. That action proved to be the first of several steps taken during the 1990s that freed states to craft their own solutions to policy challenges.

The next steps followed the Republican takeover of Congress in 1994. Congressman Newt Gingrich and other Republican strategists orchestrated a national campaign around the Contract with America, a public relations gem,

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that, among other things, promised to end federal unfunded mandates and to devolve power to state governments.

The combination of a Republican congressional majority committed to devolution, a New Democrat, former governor as president and the lobbying clout of NCSL [National Conference of State Legislatures] and other state and local groups resulted in a series of new laws that dramatically shifted responsibilities to state governments.

This devolution litany included the Unfunded Mandate Reform Act, the welfare reform act, a major revision of the safe drinking water act, surface transportation legislation, a new children's health law, changes to Medicaid and protection of tobacco settlement funds. State legislatures assured their prominent role in devolution by securing language in several 1990s laws that guarantees legislatures the ability to appropriate federal block grant money.

Our three stand-in panelists, though, appear to accept the premise that devolution has waned—or, at least, that there are still considerable pressures for centralization. Secretary Hamilton, President Roosevelt and Ambassador Franklin differ, though, in their explanations. It's a bit audacious, but let's see if we can figure out who is correct.

### WAR AS THE CENTRALIZING FORCE

Our Alexander Hamilton impersonator bases his claim on history. When the United States has gone to war, power has gravitated dramatically toward the federal government. The federal government did not just mobilize the armed forces for World War II, it mobilized the country. It established gasoline and tire rationing. It established wage and price controls. Congress found a major source of revenue and power when it used the income tax to finance World War I.

President Truman seized the steel mills during the Korean conflict. President Lincoln suspended writs of habeas corpus during the Civil War.

The war on terrorism, though, is being waged not just in Afghanistan. It's being fought in our own country as well with its well-established federalism structure and recent history of devolution and with hundreds of law enforcement agencies at all levels of government being enlisted in the war for homeland security. There has not been as much centralization as Mr. Hamilton would expect.

Actions so far have, in fact, shown some, though not complete, deference to state and local governments. The new aviation security law allows states to use grant money for airport security. That is greater flexibility than they had before. The aviation security law federalizes baggage and passenger screening. It also provides for demonstration projects at five airports to let state and local law enforcement agencies or private companies handle security. Major proposed legislation on bioterrorism in the Senate would use block grants to states as its funding mechanism—the no-strings-attached approach that state legislators normally prefer.

Anti-terrorism bills that would directly preempt state laws so far have not passed. At the end of last year, the House was considering legislation to protect insurance companies against losses caused by terrorist attacks. That bill would also preempt some state tort law provisions and some of their authority to regulate insurance, both traditional areas of state purview.

Tom Ridge, director of Homeland Security, has called for a strong state-federal partnership to combat terrorism. Officials at all levels point out the need for greater coordination among law enforcement agencies. The U.S. Conference of Mayors, for example, has endorsed legislation that would enable the FBI and other federal agencies to share more information with state and local police officials. "America is under attack," says New Orleans Mayor Marc Morial, "and our nation's police forces must be fully integrated into our national homeland defense effort."

New York Senator Steve Saland, NCSL's president, supports these calls for greater cooperation and puts them in a federalism context. "We have a law enforcement network that works reasonably well. Our approach is really reflective of our federal system and the sharing of responsibilities among the three levels of government. No one is now advocating centralization of law enforcement with the federal government. What is needed is better coordination."

Panelist Hamilton probably won't concede his point. But he might admit that his case is not as strong regarding this war on terrorism as it has been in previous wars. The country is mobilized in the war against terrorism. It would appear, though, to be a cooperative effort, rather than one in which the federal government's authority is enhanced at the expense of the states.

### THE RECESSION AND FEDERALISM

Panelist Roosevelt, always an imposing personality, says he knows why the states' influence has waned recently.

When the economy slows, he argues, the federal government has to step in to get it back on track. The federal government has many tools to do this. It can lower interest rates; it can cut taxes; and it can spend money. The states are more constrained in what they can do to help. In fact, the requirements that states have balanced budgets often forces them into policy decisions that actually exacerbate the economic downturn. They may have to raise taxes when cutting them could help the economy. They may have to cut funding just when more spending might create jobs and encourage economic activity.

Congressional and administration proposals to stimulate the economy surfaced immediately after the terrorist attacks. Debate, posturing and negotiations over the proposals dragged well into December and eventually broke down. The conflict over economic stimulus revealed classic, philosophical fissures between Republicans and Dem-

ocrats. But the debate, less conspicuously perhaps, also demonstrated tensions in the federal system.

"State legislators understood that some of the recovery proposals were better for the states than others," notes Salland. "Some, in fact, would actually be harmful. Good intentions at the national level do not necessarily translate into benefits for the states."

One major proposal that would have been included in a final package would have done considerable harm to the states. Negotiators rejected several proposals that state officials had advanced.

The economic stimulus proposal most damaging for states was an accelerated depreciation schedule for business investments. Supported by both Republicans and Democrats in Congress and the administration, this proposal would actually have caused revenue losses for state governments as high as \$15 billion over the next three years—at a time when their budgets are already reeling from the recession. The reason? Most states tie their business depreciation to the federal schedule. A change in the federal structure means a change in state schedules.

Most of the proposals that would have been sensitive to state concerns were not included in 11th hour negotiations. State officials liked those that freed them of financial obligations, made tax changes without affecting states or sent new federal money in their direction. NCSL, for example, supported a plan offered by New Mexico Senator Pete Domenici that would have created a month-long federal payroll tax holiday. For a month, employees and employers would stop making their FICA (Social Security) contributions. Employers—including state governments—would save money and employees would have bigger paychecks. Both outcomes would generate economic activity. Negotiators flirted with the Domenici proposal, but eventually dropped it.

The National Governors Association made changes in Medicaid matching rates its biggest economic stimulus priority. The governors' organization likened reductions in state Medicaid spending to revenue sharing. The Bush administration and congressional negotiators rejected this plan as cumbersome, expensive and politically unfeasible.

NCSL leaders argued for tax rebates for individuals instead of permanent changes to the income tax code. Negotiators, instead, opted for a reduction in one of the middle income tax brackets—a change that would substantially reduce revenues in states that link their income tax system to the federal one.

Panelist No. 2, our FDR look-alike, claims he has won the argument—that is that the center of federalism gravity moves toward the national government when the economy is weak. "What would the states have gotten out of that stimulus package?" he wonders. "Not much. If anything, their budgets would have been in worse shape because of the changes in the federal tax code." He's willing, though, to give Ben Franklin a chance.

## IT'S NOT THE WAR, IT'S NOT THE RECESSION

Remember, the Federalism Channel's Ben Franklin asserts that the recent waning of state authority was well under way before the economy faltered and the nation went to war against terrorism.

"It doesn't take Poor Richard to figure out that we created a system in Philadelphia that was always going to be in tension. The states made great progress in the mid-'90s. I loved devolution! But even then, there were pressures in the other direction. The economy has changed. Technology has changed. Politics have changed. Unfunded mandates are making a comeback; and preemption never went away." Hold on to your lorgnette, Mr. Roosevelt. Ambassador Franklin may have a point.

One of Congress's last major actions of 2001 was to approve the conference agreement on reauthorization of the Elementary and Secondary Education Act. The year began with President Bush and Congress making education reform their top priority. Passage of the ESEA legislation, the vehicle for the reform proposals, gave Congress and the president, Republicans and Democrats, a major accomplishment unrelated to either the war on terrorism or economic recovery. The new law, though, is not without detractors, including state legislators who worry about its assertion of an imposing, new role for the federal government in an area traditionally reserved for the states.

"It's a federalism double-whammy," claims Virginia Delegate Jim Dillard. "The bill preempts state laws on accountability, standards, testing and data collection. And it threatens to be a huge unfunded mandate."

State legislators were particularly disappointed that House conferees thwarted an amendment that would have forced the federal government finally to live up to a 1976 agreement to fund 40 percent of the costs of special education.

NCSL calls this a \$16 billion unfunded federal mandate that remains the single most intractable education issue states face in their attempt to improve the performance of their schools.

State legislators were not alone in their disappointment. Vermont Senator Jim Jeffords left the Republican party earlier this year over a dispute about special education funding. His response to the ESEA conference agreement? "The resources are not there to make this bill work."

Last spring—before Sept. 11, before the recession—Congress and the president agreed to a \$1.35 trillion tax cut package. Repeal of the federal estate tax was a key feature. The bargain struck over the tax also eliminated the state pick-up tax, a long-standing provision of the tax code that lets states take a dollar-for-dollar credit against the federal liability for state estate taxes paid. The new law gradually repeals the federal estate tax over 10 years. Yet it eliminates the state estate tax credit by FY 2005.

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"This sounds harmless," notes California Senator Jim Costa. "The effect on state revenues, though, isn't. States will lose as much as \$65 billion because of this change."

One important congressional battle of 2001 was fought to a federalism draw. State and local officials had worked for more than a year with members of the Senate, including North Dakota Senator Byron Dorgan and Wyoming Senator Mike Enzi, to craft legislation that would allow state and local governments to collect taxes on Internet sales. Their intent was to link this authorization to legislation that would extend a moratorium on taxation of Internet access fees.

When negotiations faltered, state legislators, led by Tennessee Representative Matt Kisber and Illinois Senator Steve Rauschenberger, choreographed an alternative that extends the moratorium on taxation of access fees for two years.

"This extension carries with it the implicit understanding and hope that the states themselves can finalize their own system for collecting taxes on Internet sales," says Kisber.

"Though not ideal by any means," Rauschenberger says, "this alternative was far preferable to the federally imposed solution that had been developed."

Preoccupation with terrorism and economic recovery delayed consideration of several other bills with significant implications for federalism. The patients' bill of rights that stalled in conference committee would preempt numerous state laws that govern managed care.

Proposed energy bills would preempt the states' authority to locate transmission lines. Another bill under consid-

eration at the end of the session could preempt state and local authority to regulate new broadband technology.

### IS BEN FRANKLIN RIGHT?

Although the session produced a few clear successes for state governments—including pension portability legislation and House approval of election reform legislation that NCSL helped develop—the overall report card for 2001 gives considerable support to Mr. Franklin's argument. There are substantial pressures right now in our federal system for centralization—pressures that had surfaced well before the terrorist attacks and the recession.

Before we let Mr. Franklin celebrate, though, we should caution him to remember the insight of another well-known aphorist: "It ain't over 'til it's over." States will be tested again this year as Congress and the president take up unfinished business, such as election reform and broadband legislation, and as they move on to other significant issues, including welfare reform and surface transportation reauthorization. It promises a year full of lively debate and entertainment on the Federalism Channel. Stay tuned.

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