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ARGUMENTS

FEDERALISM BY DEFAULT

The traditional allocation of power between the state and federal governments is undergoing some pretty remarkable renovation.

By Barry Friedman

SEVERAL MONTHS BEFORE HE GOT THE job, President Barack Obama's secretary of Education, Arne Duncan, explicitly called for national education standards to replace the ones traditionally set by localities—and the new stimulus bill gives him the clout to get that done. The administration also seems poised to reverse George W. Bush's policy and let California go its own way on limiting greenhouse gas emissions from automobiles.

One of the great engines driving American politics is federalism, the idea that certain governmental functions are more properly performed at the state and local rather than national level (or vice versa). The usual way of thinking about the allocation of these governmental functions was, well, functional. Do locally what was local, and let the federal government take care of national problems. But today a new reality is trumping our understanding of federalism. "Failure of will" has replaced functionalism as the device that separates what is local from that which is national. When one government cannot or will not fulfill its obligations, the other steps in.

The dominant ideology of the country's first decades was to leave governing primarily to the states. Gradually, more was required from the federal level, particularly during the Civil War and the rapid industrialization that followed. The Great Depression solidified the federal government's role in the national economy. "States' rights" was pretty thoroughly discredited during the civil rights movement.

Still, even as authority flowed to the center, there was always some portion of the electorate that favored returning power to the states. Nixon had his "New Federalism," Reagan too. Even Clinton got into the act. Remember "devolution," anyone?

It was Nixon's brand of federalism, ironically, that had the most intellectual integrity. Tasks would be allocated up or down the ladder of governance functionally, depending on which government was most capable of performing a particular task. "Whenever it makes the best sense for us to act as a whole nation," Nixon said, "the federal government should and will lead the way. But where state or local governments can better do what needs to be done," the job should be in their hands.

It didn't always work that way, of course, but the instinct was the right one. Political considerations and historical quirks have had their way, but in many areas good sense prevailed. The federal government largely kept its hands off things like policing, education, and zoning. It took on the issues that swept across state lines and where a single national voice was needed: the environment, market regulation, foreign affairs.

But all that is changing.

Immigration is a prime example. Since 1990 the country has experienced its greatest immigrant influx in history. Today there are estimated to be over 11 million unauthorized immigrants in the country.

Traditionally this would be a matter for the federal government to address. After all, the Constitution gives Congress the power to "establish a uniform rule of naturalization." Courts have interpreted this to mean that Congress's power over immigration is both "exclusive" and "plenary."

But Congress hasn't responded to the influx of new immigrants. It is stuck between those who demand stronger law enforcement to limit the undocumented, and those who advocate a path toward legal status for the many immigrants

already here. As U.S. senator John McCain said: “The extremes are driving this debate.” The result? Paralysis.

Into the vacuum stepped state and local governments. In the last several years, immigration measures have been adopted by municipalities such as Hazelton, Pennsylvania; Farmers Branch, Texas; and many others. Those localities penalize landlords and employers for housing or hiring illegals. Some local governments even sued the feds for failing to do their job.

On the other side of the issue, San Francisco and other cities have turned themselves into sanctuaries; Texas, Washington, and Kansas have passed legislation circumventing federal limitations on providing in-state tuition to illegal immigrants.

When it comes to education, the power is moving in the opposite direction—from localities to Washington, D.C. School policy is usually considered the quintessential example of a function best and properly performed at the local level. Parents understandably want a say in what their kids are learning, and how. But as with the federal government and immigration, there has been a failure of will among the states.

This failure is most apparent when it comes to funding. A large chunk of education money comes from local property taxes. No one happily votes to raise their taxes, even if it means better schools for their kids or their neighbors’ kids. Funding based on property taxes also creates great disparities, as kids in richer districts almost always get better-financed schools.

One common solution is to move funding up a level to state government, which can then disburse it across the state. But taxpayers apparently like paying to educate children across the state even less than they like paying for their neighbors’ kids. Numerous lawsuits have challenged intrastate funding disparities. Court-ordered relief is moving at the speed of a glacier. All the while, the quality of education fails to keep pace with the imperatives of the global economy.

In the face of state gridlock, the federal government is stepping up. For roughly half a century there have been federal grants to school districts, primarily to those with poorer children. While Bill Clinton was the first to attach conditions to those grants, it was George W. Bush’s No Child

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Left Behind (NCLB) legislation that really injected federal requirements into local curriculums.

The recent stimulus bill puts this process on steroids, providing a whopping \$100 billion in federal funds for education. And, as always, he who pays the piper calls the tune. “The money is tied to results,” said President Obama in mid-March. Arne Duncan plainly wants to change the way business is done. “States say that 90 percent of kids are meeting standards,” he said as the stimulus passed Congress, “but when we look at how they are doing on the National Assessment of Educational Progress, it’s nowhere close.” It is hard to read this as anything but an announcement that states are going to have to come up to national standards.

Environmental protection provides a third instance of “failure of will” power-shifting. The long-prevailing view was that environmental policy should be made at the national level. After all, environmental problems don’t respect state boundaries. But there has been no major environmental legislation from Congress in quite some time. During Bush’s tenure the Environmental Protection Agency regularly found itself at odds with states that wanted higher, not lower, environmental standards. And

remember Vice President Dick Cheney’s energy task force, the one that met in secret, usefully obscuring the fact that most of the meetings were with industry?

States have picked up the slack. Many are tightening the standards for mercury emissions from coal-fired power plants. Ten Northeast states banded together to set up a carbon cap-and-trade system. Most notably, California asked the EPA for permission to impose higher standards for greenhouse gas emissions from automobiles. Some 14 states, including most of those in the Northeast, signaled their willingness to follow California. Bush’s EPA vetoed the idea, but the Obama administration already has indicated it may reverse the prior administration’s decision.

The trend is now clear. Rather than any logical, functional division of power between state and national governments, authority today often is allocated by default. This should come as little surprise. Power abhors a vacuum. One even gets the impression that some elected officials themselves are happy about the change. Tied down by special interests and gridlock, they’re glad that someone—anyone—is able to get results.

Those with strong feelings about the traditional roles of local, state, and federal governments might shudder. But no need. True, “failure of will” federalism is a bit weird. But it’s also working. Federalism has never required that specific governments perform only certain functions; there is plenty of work to go around. One of the best aspects of federalism has always been the competition it fosters between governments for the hearts and minds of the people. If anything, in “failure of will” federalism, that competition has intensified.

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