

State-Federal Relations: A Policy Tug of War

By John Kincaid

The new Democratic majority in Congress and the governorships will alter some federal policies and frustrate some presidential policy initiatives, but the centralizing course of federalism will endure, and most facets of coercive federalism will persist. State policy activism will remain vigorous, but the Supreme Court is not likely to resuscitate its federalism revolution.

The Democrats' 2006 electoral victories, which gave them majority control of Congress and the governorships (28) for the first time since 1994, reflected not only public dissatisfaction with the Iraq war but also challenges to federal policies emanating from many states. For example, in the face of Congress' refusal to increase the national minimum wage, voters in six states approved minimum wage increases in 2006, bringing to 29 the number of states having a minimum wage higher than the federal \$5.15 per hour. Likewise, in health insurance, environmental protection, global warming, stem cell research and other policy fields, many states forged ahead of the federal government.

Although the Republican congressional majority that captured power in the 1994 midterm elections had genuflected toward federalism and states' rights, this majority, which held the Congress for 12 years, fell in line with the march of coercive federalism that began in the late 1960s. This majority continued wresting policy power from the states through pre-emptions, mandates, conditions of aid and the like, this time to advance Republican rather than Democratic objectives. This drive accelerated when Republican George W. Bush won the White House in 2000.

As coercive federal policies weighed more heavily on the states and contradicted the policy preferences of many Democratic states, state officials and voters sought to wrest control of important domestic policies from the federal government. A tug of war ensued as states reopened their shuttered laboratories of democracy in order "to try experiments in legislation and administration"¹ and, thereby, also attract public support for new policies.

Consequently, "the common theme" of the National Governors Association's 2006 summer meeting "was one of utter disdain for Congress."² Examples of state contestants in this tug-of-war include Eliot Spitzer, former Democratic attorney general and now governor of New York, and the Republican governors of two Democratic states, Arnold Schwarzenegger of California and Mitt Romney of Massachusetts.

The Democratic gains in the states and Congress might produce more federal-state cooperation in policymaking, especially as Congress addresses such issues as the minimum wage, stem cell research, health insurance, consumer protection and global warming where many states have acted already. However, the combination of divided government, 44 fiscally conservative Blue Dog Democrats in Congress, federal deficits and debt, defense and security costs, and entitlement spending will limit Congress to marginal increases in federal grants-in-aid. Coercive federalism is not likely to be reversed either. The revenue-parched Congress will be tempted to advance Democratic policy objectives and nationalize pioneering state policies through mandates, pre-emptions and conditions of aid.

Whither Coercive Federalism?

Although American federalism remains cooperative in many ways, especially in most areas of intergovernmental administration, the predominant political, fiscal, statutory, regulatory and judicial trends feature federal dictates on state and local governments.

Grants-in-Aid

Congress' failure to complete FY 2007 appropriations in 2006, plus the turnover of Congress to Democrats, make it impossible to predict near-term levels of federal aid. The president's \$2.9 trillion FY 2008 budget proposal would eliminate or deeply cut 141 federal programs and increase discretionary spending outside of security by only 1 percent over 2007, below the rate of inflation. Bush proposed aid reductions for both FYs 2006 and 2007; however, even the Republican Congress refused to cut as deeply as the president requested in previous years. The new Democratic majority will certainly resist cuts; nevertheless, in the long term, federal aid for non-social-welfare programs will slip downward, and even federal aid for social welfare, such as Medicaid, will barely keep pace with inflation. Alone, the rising costs of the federal government's three major entitlements—Social Security, Medicare and Medicaid—will crowd out

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federal discretionary spending, which includes most grants-in-aid.³ These three programs, plus other social welfare programs, constitute 54 percent of Bush's FY 2008 budget request.

Overall, federal aid under coercive federalism exhibits three characteristics.

First, aid has shifted substantially from places to persons; almost two-thirds of federal aid is dedicated for payments to individuals (i.e., social welfare).⁴ Medicaid, which accounts for almost 45 percent of all aid, is the leading example. Among the long-term consequences of this shift are that place-based aid for infrastructure, economic development, education and the like has declined sharply; increased aid for social welfare has locked state budgets into programs ripe for escalating federal regulation and matching state costs; and local governments have experienced a steep decline in federal aid.

President Bill Clinton bucked this latter trend in some grant areas, such as the Community Oriented Policing Services program. However, funding for local policing has dropped precipitously since 2000. Federal aid now comprises about 1 percent of local police spending. Another example is the Community Development Block Grant, which experienced a 14-percent drop in formula funding during the last two fiscal years. Although the number of communities receiving CDBG funds directly from the federal government increased from 606 in FY 1975 to 1,128 in FY 2006, real per capita CDBG funding plunged from \$48 in FY 1978 to \$13 in FY 2006.

A second characteristic of federal aid under coercive federalism is increased use of conditions of aid to achieve federal objectives that lie outside Congress' constitutionally enumerated powers and to extract more state-local spending on federal objectives. Such conditions, now often mistakenly called unfunded or under-funded "mandates," are a powerful federal policy tool.

For example, the Child and Family Services Improvement Act of 2006, which directs \$345 million annually to the Safe and Stable Families Program, caps states' child-welfare administration costs and requires states to provide foster children a monthly visit from a social worker. The Adam Walsh Child Protection and Safety Act of 2006 imposes a number of requirements on states, including establishment of a statewide registry of sex offenders that conforms to federal standards and is compatible with a new public National Sex Offender Web site. States that fail to comply by July 2009 will lose 10 percent of their funding under the 1968 Omnibus Crime Control and Safe Streets Act.

The No Child Left Behind Act (NCLB) of 2002 is the states' current *bete noir* because of the act's costly testing and performance requirements. Beginning with North Carolina and Tennessee in May 2006, however, the U.S. Department of Education opened the door slightly to state flexibility by allowing states to measure how individual students progress year by year in math and reading rather than measuring only whether larger proportions of students pass proficiency exams each year. Critics argue that this new measurement is weaker because it measures apparent progress toward proficiency rather than proficiency achievement. The Department of Education insists, though, that the NCLB's target that all students reach proficiency by 2014 remains in place. The NCLB is due for reauthorization in 2007; many states hope that Congress will increase both flexibility and funding.

The Deficit Reduction Act of 2005 reauthorized welfare reform—Temporary Assistance for Needy Families (TANF)—for another five years at the FY 2004 level of \$16.5 billion. The original law, which expired in October 2002, had limped along on 12 temporary extensions. The law contains tougher work-participation rules, even though it keeps the prior 50-percent work-participation requirement. States also must implement work-verification procedures, and a penalty of up to 5 percent can be imposed on a state's family-assistance grant for non-compliance. The act increased funds for child care by \$1 billion, but eliminated funds for some programs, such as reducing out-of-wedlock births.

However, this act, even while also cutting federal Medicaid spending by \$4.8 billion, made a number of changes in the Medicaid program favorable to the states, especially by giving states more discretion to experiment with program design and cost-cutting without pursuing waivers from the U.S. Department of Health and Human Services.

The third notable federal aid change under coercive federalism has been congressional earmarking (i.e., state or local pork barrel projects). Earmarks in appropriations bills increased from 1,439 in 1995 to 13,997 in 2005 and then dropped to 9,963 in 2006, according to Citizens Against Government Waste. The total price of earmarks increased from \$27.3 billion in 2005 to \$29 billion in 2006. More than 50 bills, such as the Pork Barrel Reduction Act and Lobbying Transparency and Accountability Act, were introduced in Congress in 2005–06 to reform earmarking.

Some members of Congress defend earmarks, arguing that they keep spending decisions in the hands of Congress, which possesses the constitutional power

of the purse, rather than awarding discretion to the president and federal agencies. Also, earmarks send money directly to state and local officials rather than consigning the money to the discretion of federal agencies. Indeed, state and local officials help proliferate earmarks by lobbying for them, perhaps out of necessity. With federal aid for places declining, earmarks for bridges, sewer systems, parks, museums and the like are attractive alternatives.

Many state officials, however, oppose earmarks. As a Colorado transportation department official remarked: "Why do we spend 18 months at public hearings, meetings and planning sessions to put together our statewide plan if Congress is going to earmark projects that displace our priorities?"⁵

Many efforts were made in 2006 to eliminate or reduce earmarks or make them transparent. One proposal is to create a database listing all federal grants, contracts and other payments. Some of this is already available on the Federal Assistance Award Data System.

Finally, an enduring characteristic of grants has been the unwillingness of Congress and presidents to funnel substantial amounts of aid through block grants. The lion's share of aid flows through categorical grants.

Mandates

Mandates characterize coercive federalism, too. However, the 1995 Unfunded Mandates Reform Act (UMRA) cut mandate enactments, though it did not eliminate standing mandates. Only seven intergovernmental mandates with costs above UMRA's threshold have been enacted since 1995.

The most recent mandate was a 2006 tax law requiring state and local governments that spend more than \$100 million annually to withhold for federal taxes 3 percent of their payments to vendors and to pass that money on to the federal government. The law, which takes effect in 2011, was opposed by state and local officials. However, pursuant to the U.S. Supreme Court's ruling in *Printz v. United States* (1997), the law might be vulnerable to challenge as an unconstitutional commandeering of state and local governments.

A sizable new mandate is the REAL ID Act of 2005. States argue that it is underfunded and could cost them \$11 billion to produce compliant driver's licenses. States, which must comply with the act by May 2008, can opt out of its rules, but then their residents' licenses will not be accepted for any federal government purpose, including boarding an airplane, riding Amtrak, purchasing a firearm, opening a bank

account, applying for federal benefits and entering a federal building. In May 2006, the National Governors Association (NGA), National Conference of State Legislatures (NCSL) and American Association of Motor Vehicle Administrators (AAMVA) said that the states need more federal money and another eight years to implement REAL ID.

By wide margins, both houses of Congress reauthorized until 2032 the three temporary sections of the 1965 Voting Rights Act. Section 5 requires nine states and portions of seven other states having histories of voter discrimination to obtain clearance from the U.S. Department of Justice before making any changes related to voting. This section is vulnerable to challenge by the Supreme Court. Another section requires polling places to provide ballots in Spanish as well as Asian and American Indian languages when a sizable portion of their voters speak one of those languages and lack English fluency. Section 8 permits federal observers to look for discrimination at polling places.

Many state officials also regard costly conditions of federal aid as unfunded mandates, and they lobbied in 2006 to amend UMRA to include conditions of aid in the act's definition of unfunded mandates. By one estimate, federal programs cost state and local governments some \$51 billion in FYs 2004 and 2005.⁶ However, the likelihood of persuading Congress to add aid conditions to UMRA is slim. State and local governments are more likely to convince Congress to increase funding, though not fully, for such costly programs as No Child Left Behind and REAL ID.

Pre-emptions

Federal pre-emptions of state laws under the U.S. Constitution's supremacy clause are another characteristic of coercive federalism. U.S. Rep. Henry Waxman, D-Calif., reported in June 2006 that during the past five years, Congress voted at least 57 times to pre-empt state laws. Of these votes, 27 yielded pre-emption bills signed by President Bush.

For state officials, the most egregious 2006 pre-emption is the National Defense Authorization Act, which allows the president to federalize any state's National Guard without the consent of the governor in the case of "a serious natural or manmade disaster, accident or catastrophe" within the United States, Puerto Rico or U.S. territories. This law was hastened along by the relief disaster that followed Hurricane Katrina in 2005.

Congress also passed the Combat Meth Act, which pre-empts state laws that regulate the sale of pseudo-

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ephedrine, the main ingredient of methamphetamine. The act requires all drugs containing pseudoephedrine to be sold behind pharmacy counters.

It also became evident in 2006 that the president will use the executive rule-making process to advance pre-emption when Congress drags its feet.

For example, the Food and Drug Administration (FDA) issued a prescription-drug labeling regulation saying that FDA approval of manufacturers' labels "pre-empts conflicting or contrary state law." The rule's preamble includes language that pre-empts state liability laws. Manufacturers who comply with the federal standard cannot be sued in state courts by persons injured by their products. Many Democrats accused the FDA of abusing its power. The NCSL accused the FDA of inadequate consultation in formulating the rule, and other critics noted that the lawsuit-immunization provision was cleverly placed in the preamble, which is not usually subject to public comment. Ultimately, the federal courts will have to sort out this pre-emption issue, though meanwhile, some state courts might hold that they are not bound by the FDA's rule unless Congress explicitly affirms the pre-emption.

For the first time in its 33-year history, the Consumer Product Safety Commission issued a rule on mattress flammability that pre-empts state laws that set higher standards and includes language in the preamble to protect mattress manufacturers from state court lawsuits when their mattresses conform to the new federal standard.

After Congress failed to pass a pre-emptive telecommunications bill, the Federal Communications Commission issued a rule in December 2006 pre-empting some aspects of local control of cable television franchising. The rule, issued by a 3-2 party-line vote, requires states and localities to complete negotiations with prospective providers within 90 days and prohibits "unreasonable" build-out requirements.

Many state attorneys general and other critics argue that these and other pre-emptions disadvantage consumers to the benefit of corporations. A spokesman for the Office of Management and Budget replied: "State courts and juries often lack the information, expertise and staff that the federal agencies rely upon in performing their scientific, risk-based calculations ... having a single federal standard can be the best way to guarantee safety and protect consumers."⁷

Pre-emptions are frequently upheld by the Supreme Court. Indeed, the formerly "Federalism Five" justices (Kennedy, O'Connor, Rehnquist, Scalia and Thomas) most often voted against the states in pre-emption cases.

Taxation

Federal constraints on state taxation and borrowing are another facet of coercive federalism. Federal judicial and statutory prohibitions of state taxation of Internet services and mail-order sales are among the most prominent constraints. In response, a number of states negotiated the Streamlined Sales and Use Tax Agreement to collect sales taxes on interstate mail-order sales. The agreement was implemented voluntarily among consenting states in October 2005. Although several large retailers voluntarily comply with the agreement, Congress has not sanctioned the agreement and authorized states to require sales tax collections by out-of-state vendors. Obtaining congressional recognition of the agreement, even with the new Democratic majority, will be difficult.

In 2005, the President's Advisory Panel on Federal Tax Reform recommended eliminating deductions for state and local taxes. Most state and local officials oppose removing these deductions. This issue has a partisan electoral dimension because the average state-local tax payment in blue (Democratic) states was \$7,487 in 2005 compared to \$4,834 in red (Republican) states. State and local tax deductions equaled 5.9 percent of average income in the blue states and 3.7 percent in the red states.⁸ Because most state income taxes are coupled to the federal tax code, state officials fear that changes in federal tax laws, especially tax cuts and retroactive changes, will reduce state tax revenues.

The NGA expressed concern in 2006 about the proposed Business Activity Tax Simplification Act (BATSA), which would pre-empt state laws by establishing a federal physical-presence rule to determine when a state can levy franchise taxes, business license taxes and other business-activity taxes on out-of-state businesses. The Congressional Budget Office concluded that BATSA would be an unfunded mandate under UMRA.

Federalization of Criminal Law

Another feature of coercive federalism is the federalization of criminal law. There are some 3,500 federal criminal offenses; more than half of them have been enacted since the mid-1960s. These laws cover a wide range of behavior from terrorism to carjacking, disrupting a rodeo, impersonating a 4-H Club member, and carrying unlicensed dentures across state lines. Generally, federal criminal laws are tougher, including capital punishment, than comparable state laws.

Another aspect of this federalization has been an effort by the Bush administration to enforce federal death penalty statutes in states lacking capital

punishment. In 2006, for example, a federal jury in North Dakota imposed the death penalty in a murder case. North Dakota does not have the death penalty, and this case was the first death sentence in the state since 1914.

Demise of Intergovernmental Institutions

Coercive federalism has been marked, too, by the demise of executive and congressional intergovernmental institutions established during the era of cooperative federalism. Most notable was the death of the U.S. Advisory Commission on Intergovernmental Relations (ACIR) in 1996 after 37 years of operation.

Decline of Political Cooperation

There also has been a decline in federal-state cooperation in major intergovernmental programs such as Medicaid and surface transportation. Congress earmarks and alters programs more in response to national and regional interest groups than to elected state and local officials, who themselves are viewed as mere interest groups. A coalition led by Americans for Tax Reform (ATR) has petitioned Congress to terminate the exemption from federal lobbying rules of state and local government lobbyists. The ATR also wants to defund the NGA, labeling it “another liberal lobbying group.”⁹

Presidential depletion of National Guard personnel and equipment for the Iraq war also reflects diminished cooperation. All 50 governors petitioned the president and the Pentagon for enhanced resources for the National Guard and for replacements of equipment left in Iraq. About one-third of the ground troops in Iraq belong to the Army National Guard.

The Supreme Court’s Federalism-Lite

Since 2002, the Supreme Court has not advanced its state-friendly federalism jurisprudence initiated in 1991. This was reflected in two Eleventh Amendment sovereign-immunity cases in 2006, which held that states are not immune from suits brought under the Americans With Disabilities Act by disabled prisoners and from private lawsuits brought under federal bankruptcy law. The Court also ruled unanimously that the Eleventh Amendment does not protect local governments.¹⁰

In other cases, the Court upheld, by a 6-3 vote, Oregon’s Death With Dignity Act, ruling that the 1970 federal Controlled Substances Act’s prescription rule does not allow the U.S. attorney general “to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting

such conduct.”¹¹ Justice Anthony Kennedy’s majority opinion stated that “the structure and limitations of federalism ... allow the states great latitude under their police powers to legislate for the protection of the lives, limbs, health, comfort and quiet of all persons.” The new chief justice, John G. Roberts, participating in his first prominent federalism case, joined Antonin Scalia and Clarence Thomas in dissent.

The Court overturned a lower court’s invalidation of New Hampshire’s Parental Notification Prior to Abortion Act, opining that the act only needed a medical-emergencies provision to pass constitutional muster.

The Court unanimously rejected a taxpayer challenge to tax concessions given by Ohio to Daimler-Chrysler AG to expand its Ohio plant.¹² The plaintiffs argued that such corporate tax breaks violate the U.S. Constitution’s commerce clause by advantaging in-state companies over out-of-state firms, thus hindering interstate commerce. Although the Court declined to address this issue because it ruled that the plaintiffs had no standing to sue Ohio, the decision seems to shield this type of interstate tax competition from federal judicial foreclosure.

In two important environmental cases, a fragmented Court slightly curtailed the Army Corps of Engineers’ broad application of the Clean Water Act.¹³ Four liberal justices upheld the broad application covering all of the country’s waters, while four conservative justices narrowed the law to the nation’s “permanent standing or continuously flowing” navigable waters. Justice Kennedy’s prevailing middle position held that the Clean Water Act covers any wetlands having a “significant nexus to waters that are or were navigable in fact or that could reasonably be so made.” Kennedy asserted that his significant-nexus test raises “no serious constitutional or federalism difficulty.”

In a decision likely to exacerbate the political bloodletting associated with congressional redistricting, the Court upheld, by a 7-2 vote, the highly controversial 2003 redrawing of congressional districts by Texas’ Republican legislature. The decision opens the door to mid-decade redistricting when a new party captures a legislature and governorship. However, the Court struck down, by a 6-3 vote, Vermont’s low campaign contribution limits (e.g., a \$400 limit on contributions to gubernatorial candidates in a two-year election cycle).

State Activism

A seemingly contrary development under coercive federalism has been state policy activism, especially since the early 1980s. However, this activism has

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been both a response to coercive federalism as states have bucked federal policies and filled federal policy voids and a stimulant of coercive federalism as interest groups have sought federal tranquilization of hyperactive state policymaking.

State officials have pursued litigation and regulation in many policy areas, especially environmental and consumer protection. Connecticut Attorney General Richard Blumenthal expressed a leading justification for such activism: "Our action is the result of federal inaction."¹⁴ Also, in an effort to compete with the conservative American Legislative Exchange Council (ALEC), several hundred state legislators launched the Progressive Legislative Action Network (PLAN) in 2005.

State action on environmental protection garnered considerable attention in 2006, especially when California Gov. Arnold Schwarzenegger joined British Prime Minister Tony Blair to sign an accord on global warming in August 2006. In September, Schwarzenegger signed a bill to reduce California's greenhouse gas emissions by 25 percent by 2020. In 2004, California implemented rules on vehicular greenhouse gases that are stricter than the federal standards. Ten other states have adopted California's rules, which limit the amount of carbon dioxide and other gases that automobiles can expel into the atmosphere. In addition, California, New York and eight other states sued the U.S. Environmental Protection Agency for failing to regulate carbon dioxide emissions from power plants. Some 23 states have set standards requiring utilities to generate up to 33 percent of their energy from renewable sources by 2020.

In April 2006, Massachusetts became the first state to enact universal access to health care for its citizens. Many other states have sweeping health care plans under consideration.

Conclusion

Short-term changes in federal policymaking will be instituted by the new divided government in Washington, D.C., but the long-term trends in federalism will remain largely on course.

Notes

¹ James Bryce, *The American Commonwealth*, 3rd ed. (New York: Macmillan, 1907), I, p. 353.

² David Broder, "Governors seek relief from Congressional gridlock," *The Express-Times* (Easton), August 8, 2006, A7.

³ See also, Rudolph G. Penner, "The Coming Federal Budget Squeeze and Its Impact on State and Local Government," *Proceedings: 98th Annual Conference on Taxation* (Washington, D.C.: National Tax Association, 2005), pp. 111–117.

⁴ For explication, see John Kincaid, "The State of U.S. Federalism, 2000–2001," *Publius: The Journal of Federalism* 31 (Summer 2001): 1–69.

⁵ Quoted in Brody Mullins, "As Earmarked Funding Swells, Some Recipients Don't Want It," *Wall Street Journal*, December 26, 2006, A10.

⁶ William Wyatt, "Washington Watch: 10 Top Issues for States," *State Legislatures* 32 (January 2006): 15.

⁷ Quoted in Stephen Labaton, "'Silent Tort Reform' Is Overriding States' Powers," *New York Times*, March 10, 2006, C5.

⁸ John Maggs, "Limping Toward Tax Reform," *National Journal* 37 (October 22, 2005): 3280.

⁹ Peter J. Ferrara, "The NGA Should Pay Its Own Way," *Policy Brief* (Washington, D.C.: Americans for Tax Reform, 2005).

¹⁰ *Northern Insurance Company New York v. Chatham County*, 126 S.Ct. 1689 (2006).

¹¹ *Gonzales v. Oregon*, 546 U.S. 243 (2006).

¹² *DaimlerChrysler v. Cuno*, 547 U.S. ____ (2006).

¹³ *Rapanos v. United States*, No. 547 U.S. ____ (2006) and *Carabell v. United States Army Corps of Engineers*, 547 U.S. ____ (2006).

¹⁴ Quoted in Brooke A. Masters, "Who's Watching Out for the Consumer?" *Washington Post National Weekly Edition*, January 17, 2005, 30.

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