

State-Federal Relations: Dueling Policies

By John Kincaid

The 2008 elections will not alter the coercive course of American federalism. Given that little will be accomplished in Washington, D.C., before 2009, the new president and new congressional majority will likely address such long-simmering issues as education, entitlements, health insurance, immigration and infrastructure. However, centralizing trends—such as conditions of aid, mandates and preemptions—will endure because they have enjoyed bipartisan support since the late 1960s. Intergovernmental administrative relations will be mostly cooperative, and state policy activism will remain vigorous, but the Supreme Court will not resuscitate federalism.

Public disenchantment with the Democratic Congress and Republican White House was evident throughout 2007 and will persist through 2008 as the two branches butt ideological heads. Partly because of this stalemate, state-federal policy duels have been prominent. States embark on new policy paths in response to federal inaction and also challenge federal policies deemed inadequate. Some policies respond to issues amenable to state action; others reflect partisan dueling for political advantage between state and federal officials. Fundamentally, though, neither federal officials nor most state and local officials value federalism as a constitutional end rather than a political means to partisan ends. On the rare occasions when federalism was mentioned during the 2008 presidential campaigns, it was couched in partisan terms of political expediency. Only Fred Thompson touted federalism as a core principle, but his campaign quickly flopped.

Policy dueling became strikingly visible Dec. 19, 2007, when the U.S. Environmental Protection Agency ruled that under the new Energy Independence and Security Act of 2007, signed by President George W. Bush on the same day, California and other states have no authority to set their own standards for greenhouse gas emissions from motor vehicles. “The Bush administration is moving forward with a clear national solution, not a confusing patchwork of state rules,” said EPA Administrator Stephen L. Johnson. California Gov. Arnold Schwarzenegger, a Republican, furiously vowed to challenge the EPA in federal court. Several other governors echoed his fury.

The administration previously refused to regulate greenhouse gases, and denied California waivers to regulate carbon dioxide emissions on the ground that the Clean Air Act did not cover such gases. This inaction motivated a number of states to sue the EPA to force action. In a major ruling in April 2007, the U.S. Supreme Court held, in a 5-4 decision, that the

EPA has authority under the Clean Air Act to regulate carbon dioxide and other heat-trapping gases.¹ The petitioners were 12 states—California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington, as well as Baltimore, New York City and Washington, D.C.; American Samoa; and various nongovernmental organizations. In order to reach its decision, the court first had to rule that Massachusetts suffered an injury from the EPA’s nonregulation that gave the commonwealth standing to sue. This was a rare expansion of standing to sue under the current court.

Some 300 bills were recently introduced in 40 states to curb greenhouse gases. California is becoming a leader in these efforts, first with a 2004 law regulating carbon dioxide from motor vehicle emissions. This law was based on the state’s authority under the Clean Air Act of 1970 to enact air pollution standards stricter than those of the federal government so long as it obtains a federal waiver. California had never been denied a waiver. Then, in 2006, California mandated a 25 percent reduction of carbon dioxide emissions by 2020. The automobile industry, among others, lobbied the federal government to deny waivers for California’s new regulations, especially in light of the new energy act’s fleet-wide standard of 35 miles per gallon by 2020 compared to California’s mandated fleet average of 36 miles a gallon by 2016.

If Democrats capture the White House and maintain control in Congress, they will likely reverse the EPA’s California ruling, though they will do so for policy, not federalism, reasons. Whenever nationalization furthers policy objectives, Democrats, like Republicans, will advance coercive federalism, frequently with state and local support. Being parched for discretionary revenue, any new regime will be tempted to achieve objectives through mandates, preemptions and conditions of aid.

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Another Fiscal Squeeze

Another major issue is the fiscal squeeze produced initially by the slumping housing market and the subprime mortgage crisis, which appeared to be propelling the nation's economy toward recession in 2008. Most state and local governments face revenue shortfalls as well as growing costs arising from mortgage foreclosures, unemployment and social-welfare demands.

Even without recessions, the U.S. Government Accountability Office estimates that during the next decade, state and local governments will experience sizable deficits requiring them "to make tough choices on spending and tax policy."² The principal deficit drivers will be increased Medicaid spending and heightened costs of health insurance for state and local employees and retirees.

Characteristics of Coercive Federalism

Although American federalism remains cooperative in many ways, the predominant political, fiscal, statutory, regulatory and judicial trends feature federal dictates.

Grants-in-Aid

Federal aid to states and localities increased from \$443,797 billion in 2007 to about \$466,568 billion in 2008; however, grants declined from 16.3 percent to 15.9 percent of federal outlays. Bush proposed aid reductions for 2006, 2007, 2008 and 2009, but even congressional Republicans refused to cut deeply, and the new Democratic majority resisted cuts and proposed increases. Nevertheless, in the long term, federal aid for nonsocial-welfare programs will decline. Even aid for social welfare, such as Medicaid, will barely keep pace with inflation. The rising costs of the three major federal entitlements—Social Security, Medicare and Medicaid—will crowd out discretionary spending, which includes most grants-in-aid.³

Federal aid under coercive federalism exhibits three characteristics: a shift in where the money goes, an increase in the conditions for aid, and an increase in Congressional earmarking of funds.

First, aid shifted substantially from places to people; 64 percent of all aid is now dedicated for payments to individuals (i.e., social welfare).⁴ Medicaid, which constitutes 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.

The State Children's Health Insurance Program became contentious in 2007 because SCHIP was slated to expire Sept. 30, 2007. After expanding SCHIP as encouraged under waivers granted by Presidents Bill Clinton and George W. Bush, some states faced funding shortfalls in 2007. Many state officials were disappointed by Bush's request for an additional allotment of only \$4.8 billion over the next five years, for a total of nearly \$30 billion. This amount, state officials complained, fell far short of some \$13 billion more needed to sustain current SCHIP benefits and eligibility levels. By contrast, House Democrats proposed to increase funding by \$50 billion, bringing the total to \$75 billion for five years. Additionally, the administration changed course on including adults. SCHIP covers about 6 million children and 639,000 adults. The president previously supported adult inclusion, which was implemented in 15 states, but sought to expel most adults in 2007.

In October, Bush vetoed an SCHIP bill adding \$35 billion over five years; he vetoed a second SCHIP bill in December. The bills, he argued, would expand SCHIP beyond its original purpose and constitute a "step toward federalization of health care." Finally, the SCHIP Extension Act of 2007, signed by Bush Dec. 21, reauthorized SCHIP and fully funded the existing program for another 18 months. However, New Jersey and several other states sued the administration for attempting to impose "mandatory, rigid and illegal" income limits on recipients.

States are also concerned about programs for children, specifically education and health care, which are vital to each state's future. Yet federal funding for children declined from 20.1 percent of the federal domestic budget in 1960 to 15.4 percent in 2006, with a further drop to 13.1 percent estimated for 2017.⁵

Occasionally, for policy or administrative reasons, states reject federal aid, especially small grants. In 2007, for example, the number of states refusing aid for abstinence-only sex education increased from four to 14, with several more states likely to refuse the money in 2008.

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

For example, the Adam Walsh Child Protection and Safety Act of 2006 imposes various requirements on states, including establishment of a statewide registry of sex offenders that conforms to federal standards and is compatible with a new National Sex Offender Web site. All states must also have a three-tier system for classifying sex offenders. States failing to comply by July 2009 will lose 10 percent of their funding under the 1968 Omnibus Crime Control and Safe Streets Act.

In an example of how the federal government changes rules and amends conditions to block grants, states in 2007 had to adapt to new rules governing Temporary Assistance for Needy Families. After failing to reauthorize the original welfare law, which had limped along on 12 temporary extensions, Congress reauthorized welfare for another five years by amending the Deficit Reduction Act of 2005 to require at least half of each state's welfare recipients to work at least 30 hours per week by 2007. The law has a more restricted definition of work and also limits work credit that can be given to recipients for job training and counseling. 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 noncompliance.

The No Child Left Behind Act of 2002—commonly referred to as NCLB—is the states' current *bête noir* because of the act's costly testing and performance requirements. The NCLB was due for reauthorization in 2007, but a deadlocked Congress failed to act.

The third notable federal aid change has been congressional earmarking, sometimes referred to as 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 price of earmarks increased from \$27.3 billion in 2005 to \$29 billion in 2006. An estimated 11,610 earmarks costing \$17.2 billion were embedded in Congress's 2008 fiscal year spending bills.

Earmarks illustrate the bipartisanship of coercive federalism because in the lead-up to the 2006 elections, Democrats ridiculed Republicans for earmarking, but once in majority control in 2007, Democrats embraced earmarks. Upon assuming the chairmanship of the defense appropriations subcommittee, Sen. Daniel Inouye, D-Hawaii, said, in reference to the outgoing chair, Sen. Ted Stevens, R-Alaska: "We pledged to each other that no matter what happens, we will continue with our tested system of [earmarking] bipartisanship and we've been doing this for 25 years."⁶

Finally, an enduring grant characteristic has been congressional unwillingness to funnel much aid through block grants. Instead, most aid flows through categorical grants.

Mandates

Mandates also characterize coercive federalism. However, the 1995 Unfunded Mandates Reform Act reduced mandate enactments. Only seven intergovernmental mandates with costs above the threshold set in the act 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 3 percent of their payments to vendors for federal taxes 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 Supreme Court's *Printz v. United States* (1997) ruling, the law could be challenged as an unconstitutional commandeering of state and local governments.

Beginning in 2008, the federal government will gradually eliminate funding for child-support enforcement. The Congressional Budget Office estimates that state administration costs will increase by at least \$100 million per year. Beginning on Oct. 1, 2007, however, federal law mandated that parents pay \$25 in any year in which states collect at least \$500 in child support for them. Two-thirds of the fee goes to federal deficit-reduction; one-third helps subsidize state child-support enforcement. States objected to this fee and are lobbying for its repeal.

A sizable new mandate is the REAL ID Act of 2005. States argue it is under-funded and could cost them \$11 billion to produce compliant driver's licenses. States, which must comply by May 2008, can opt out of REAL ID's rules, but their residents' licenses will be unacceptable for federal government purposes, including boarding an airplane, riding Amtrak, purchasing a firearm, opening a bank account, applying for federal benefits, and entering a federal building.

About 17 states—including Maine and Washington—enacted measures in which they refused to participate in REAL ID, expressed opposition to the law, and/or asked Congress to amend or repeal the law. In 2007, Sen. Susan Collins, R-Maine, introduced a bill in Congress to delay implementation. When it appeared that she had a veto-proof majority behind her bill, the Department of Homeland Security proposed to ease regulations.

In January 2008, DHS issued new rules and estimated that state implementation costs will not

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exceed \$3.9 billion. On May 11, 2008, state driver's licenses and identification cards will no longer be valid for federal purposes unless DHS rules that a state has complied with REAL ID or has received a DHS waiver authorizing a compliance extension. States had until March 31, 2008, to request an initial extension of compliance until the end of 2009. DHS expects all states to comply by 2011, but states will have until May 11, 2014, to issue compliant licenses to drivers born after 1964, and until Dec. 1, 2017, for drivers born before 1964. Congress has appropriated \$90 million to help states implement REAL ID, though only \$6 million has been obligated. Bush's 2009 fiscal year budget proposed \$50 million for verification system development and connectivity support, as well as a new \$100 million National Security and Terrorism Prevention Grant.

Many state officials also regard costly conditions of federal aid as unfunded mandates, and they lobbied in 2007 to amend the Unfunded Mandates Reform Act to include aid conditions. The National Conference of State Legislatures contends that the federal government shifted \$100 billion of costs to the states during the past four years.⁷ However, the likelihood of persuading Congress to add aid conditions to the reform act is slim.

In a small counter to this trend, the U.S. Flag Code was amended in July 2007 to require federal buildings to lower the U.S. flag to half-staff when the governor of their resident state orders flags lowered to honor soldiers killed in military service.

Preemptions

Federal preemptions of state laws also characterize coercive federalism. U.S. Rep. Henry Waxman, D-Calif., reported in 2006 that during the previous five years, Congress voted at least 57 times to preempt state laws; 27 of those votes yielded preemption statutes. It also became evident by 2006 that the president will use executive rule-making to advance preemption when Congress drags its feet.

After Congress failed to pass a preemptive telecommunications bill, the Federal Communications Commission issued a rule in December 2006 preempting some aspects of local control of cable television franchising. The rule, issued on 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.

Legislatively, 2007 was a relatively quiet preemption year, but preemption is frequently upheld by the Supreme Court. Indeed, the former "Federalism Five" justices—Anthony M. Kennedy, Sandra

Day O'Connor, William Rehnquist, Antonin Scalia and Clarence Thomas—most often voted against the states in preemption cases.

Taxation

Another characteristic of coercive federalism has been federal constraints on state taxation and borrowing, beginning especially with limits imposed on tax-exempt private activity bonds in 1984. Judicial and statutory prohibitions of state taxation of Internet services and mail-order sales are prominent constraints. In October 2007, President Bush signed a seven-year extension of the moratorium on state-local taxation of Internet access.

In response, a number of states negotiated the Streamlined Sales and Use Tax Agreement to collect sales taxes on interstate mail-order sales, but Congress has not endorsed the agreement and authorized states to require sales tax collections by out-of-state vendors. Obtaining congressional endorsement, even with a Democratic president, will be difficult.

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. Another aspect of this federalization has been administration efforts to enforce federal death penalty statutes in states lacking capital punishment.

Demise of Intergovernmental Institutions

Coercive federalism has also been marked 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 in 1996 after 37 years of operation. Committees dedicated to intergovernmental relations disappeared from Congress.

Decline of Political Cooperation

There has been a decline, too, 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 interest groups.

Presidential depletion of National Guard personnel and equipment for the Iraq war also reflects diminished cooperation. All 50 governors have petitioned

the president for enhanced National Guard resources and for replacements of equipment left in Iraq.

The Supreme Court's Federalism Blinders

In 2002, the Supreme Court halted its state-friendly federalism jurisprudence initiated in 1991. What became evident by the end of the court's 2006–07 term were ideological polarization and the emergence of Justice Kennedy as the new swing vote replacing retired Justice O'Connor. Thirty-five percent of the court's decisions were 5-4 votes, more than during any recent term. The four conservatives—Chief Justice John G. Roberts and Justices Samuel A. Alito Jr., Antonin Scalia and Clarence Thomas—were often arrayed against the four liberals—Stephen G. Breyer, Ruth Bader Ginsburg, David H. Souter and John Paul Stevens. Because Kennedy more often leans right than left, the court has a conservative bent. However, this bent has not resurrected federalism, partly because the court has befriended business.

In *Watters v. Wachovia Bank*, an important federalism case, the court ruled that the National Bank Act (originally enacted in 1863) preempts state regulation of the mortgage-lending subsidiaries of national banks. The bank regulators and attorneys general of all 50 states urged the court to sustain state regulation, especially because mortgage lending requires close oversight.⁸ Yet, the ruling preempted, for example, the application of predatory lending laws in 37 states to national banks and might spur even broader administrative preemption of state regulation. The decision seriously wounded the historic dual-banking system.

Otherwise, the court ruled that school districts cannot assign students solely to promote racial integration and that racial balancing is not a compelling state interest.⁹ The justices also held that parents of children with disabilities do not need a lawyer to challenge public schools' education plans for their children.¹⁰ However, in the "Bong Hits 4 Jesus" case, the court ruled that schools can censor student speech deemed to advocate illegal drug use.¹¹

Additionally, the court held that the U.S. Foreign Sovereign Immunities Act does not prevent New York City from suing foreign governments for failing to pay property taxes on diplomatic missions used to house sub-ambassadorial officials.¹²

Endurance of Administrative Cooperation

Administratively, however, intergovernmental relations remain largely cooperative. For example, almost all the states now have a "fusion center" that assembles federal, state and local data on terrorism. The centers receive federal aid, although state and local

officials complain about declining aid and federal reluctance to share intelligence information. However, since 2002, the Department of Homeland Security has awarded \$16 billion in grants for anti-terrorism, but states have spent only \$11 billion. Cooperation can be bumpy, too. For instance, DHS did not solicit state and local input in developing a new National Response Plan to guide how federal, state and local officials, plus private and nonprofit entities, coordinate during emergencies. Yet, the Federal Aviation Administration is negotiating with local police and fire officials on the use of low-flying drones for rescues, manhunts, forest fires, searches for missing children, and the like.

The Food and Drug Administration announced in July 2007 that it will rely more on state regulatory agencies to ensure food safety, including imported foods inspected by the FDA. The FDA's turn toward better cooperation came in the wake of criticism of FDA's performance as well as substantial improvements in many state food-safety programs, with New York reputed to have the best program. Given reduced funding for the FDA and given that about one-third of the country's imported food enters through New York, the FDA's diminished New York staff of 380 (down from 531 in 2003) needs help from New York's 100 inspectors.¹³

In another show of intergovernmental cooperation, President Bush in December 2007 signed the Sudan Accountability and Divestment Act, which supports and shields from preemption state and local government decisions to divest from companies that do business in Sudan. Numerous states are divesting also from Iran and other countries deemed supportive of terrorism.

State Activism

State policy activism has been a seemingly contradictory development under coercive federalism. However—especially since the early 1980s—this activism has been both a response to coercive federalism as states have bucked federal policies and filled federal policy voids and also a stimulant of coercive federalism as interest groups have sought federal tranquilization of hyperactive state policymaking. For example, most states have enacted laws requiring companies and governments that experience thefts or losses of personal information to disclose such losses to affected individuals.

Recently, states have been visibly active enacting immigration laws. After a federal immigration bill failed in Congress, Sen. John McCain, R-Ariz., said the country "will see the states and cities scram-

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bling to pass their own laws and regulations, and you're going to get a completely contradictory set of policies."¹⁴ Four days later, Gov. Janet Napolitano, a Democrat, signed an Arizona law to suspend or revoke the business licenses of employers who hire illegal immigrants. During 2007, some 1,500 immigration bills were introduced in the 50 state legislatures, and more than 40 states passed about 250 immigration laws covering such matters as education, public benefits, law enforcement, education, health, driver's licenses, identification and voting. The issue of sanctuary cities was raised in the run-up to the presidential primaries because a number of cities—including Houston, Los Angeles, New Haven, Conn., and New York—provide services to illegal immigrants and do not report them. Some localities also clashed with the U.S. Immigration and Customs Enforcement agency over its raids on businesses and arrests of undocumented aliens.

In April 2007, Maryland became the first state—followed by New Jersey in January 2008—to approve an “Agreement Among the States to Elect the President by National Popular Vote.” More than 300 legislators in 47 states have introduced identical bills. This compact would replace the Electoral College with a de facto nationwide popular vote by obliging each member state to give all its electoral votes to the winner of the national popular vote regardless of who wins the state's vote. States that join the compact will award their electoral votes as they do now until the compact includes enough states to constitute a majority of the Electoral College (270 electoral votes). Then, the winner of the popular vote would have an Electoral College majority and, thus, capture the presidency. A potential downside is that the nation's 11 largest states holding 271 electoral votes, or some other combination of a minority of states, could implement the compact regardless of the views of the vast majority of states.

Conclusion

A new regime in Washington, D.C., will institute near-term changes in federal policy-making, but the long-term trends in federalism will remain largely on course.

Notes

¹ *Massachusetts v. Environmental Protection Agency*, 549 U.S. ____ (2007).

² U.S. Government Accountability Office, “State and Local Governments: Persistent Fiscal Challenges Will Likely Emerge within the Next Decade,” Washington, D.C.: GAO-07-1080SP, July 18, 2007, 2.

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), 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 C. Eugene Steuerle, Adam Carasso, and Gillian Reynolds, *Kids' Share 2007: How Children Fare in the Federal Budget* (Washington, D.C.: The Urban Institute, March 2007).

⁶ Quoted in Donald Kaul, “Better Get Used to ‘Earmarks,’” *Progressive Populist* 13 (January 1–15, 2007): 23.

⁷ Carl Tubbesing and Vic Miller, “Our Fractured Fiscal System,” *State Legislatures* 33 (April 2007): 26.

⁸ *Watters v. Wachovia Bank*, 550 U.S. ____ (2007).

⁹ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. ____ (2007).

¹⁰ *Winkelman v. Parma City School District*, 550 U.S. ____ (2007).

¹¹ *Morse v. Frederick*, 551 U.S. ____ (2007), 127 S. Ct. 2618 (2007).

¹² *The Permanent Mission of India v. City of New York*, 551 U.S. ____ (2007).

¹³ Jane Zhang, “Strapped FDA Turns to States,” *Wall Street Journal*, August 1, 2007, A6.

¹⁴ Quoted in David Broder, “Congress failing states on immigration,” *Express-Times* (Easton), July 8, 2007, A7.

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