Federalism, Then and Now

by ROGER PILON

Testifying before the Senate Judiciary Committee in 1995, a perplexed Governor Ben Nelson remarked, "When I was elected governor in 1990 and prepared my first budget, I honestly wondered if I was actually elected governor or just branch manager of the state of Nebraska for the federal government." He could have been speaking for any governor. Yet during the Senate's Obamacare machinations in 2009, then Senator Ben Nelson cast the crucial 60th vote for cloture after negotiating the infamous "Cornhusker Kickback" — "free" money for Nebraska, strings attached.

There was a time in America when the federal government focused mainly on national concerns and the states focused on state and local matters, like the health and welfare of their citizens. That division of powers, the Constitution's federalism, was never exact, of course, and it shifted over time, but it remained largely intact for a century and a half. During the New Deal, however, it was upended. Today, under what's called "cooperative federalism," the federal government's tentacles reach into almost every area of life, areas once thought the exclusive domain of state and local governments — or of no governments at all. And the result, as former Senator James L. Buckley writes in his new book, *Saving Congress From Itself*, is "runaway spending that threatens to bankrupt us and a Congress that appears unable to deal with long-term problems of any consequence."

Focusing only on federal programs that offer funds to states and localities to be used as Washington dictates, which have grown from $24.1 billion in 1970 to an estimated $640.8 billion in 2015, Senator Buckley draws on his own Senate experience in the 1970s plus a cascading body of subsequent evidence to catalogue the vast array of costs those programs impose on our very system of government. Before judging this as entirely Washington's fault, however, we would do well to consult a dense 2012 tome by Professor Michael Greve, *The Upside-Down Constitution*; it turns out that the demise of federalism is more complicated than it seems, and the states themselves are far from blameless.

In fact, of all the "auxiliary precautions" the Founders crafted to control government, beyond "a dependence on the people," none is more complex than James Madison's "compound republic," which helps explain why so much constitutional litigation has concerned this one issue. Yet as I discussed in these pages in the Fall of 2013 when government overreach was the theme, here too the heart of the problem is overweening government: as Senator Buckley puts it, "Congress's current dysfunction is rooted in its assumption, over the years, of more responsibilities than it can handle."

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To little more than outline these complexities in this limited compass, I will build here on that earlier article by first sketching the theory that animates federalism, especially as it emerges from the Constitution, then trace how that theory has played out in practice, and finally look briefly at what's to be done at this point in time.

Federalism in Theory and "in" the Constitution

The word "federalism" is nowhere in the Constitution; the idea must be inferred from the document's structure, aided by discussions throughout the *Federalist*. "Compound republic" and "dual sovereignty" capture much of its meaning. To grasp its essence, however, focus on its function — to protect liberty.

Imagine "We the People" in the beginning, sufficiently secure to think long-term, our progeny in mind, yet each with his own separate interests, and cognizant of his rights to life, liberty, and the pursuit of happiness as well as threats to those rights, for which government is the desired remedy. As Madison counseled in *Federalist 51*, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." Heeding that, we could create and empower a unitary government, as many peoples have; but then, for greater security, we could separate those powers functionally, vesting them in different branches. More safely still, we could divide powers between separate governments, each with its own jurisdiction. With powers thus separated and divided, "a double security arises to the rights of the people," said Madison. "The different governments will control each other," through divided powers (a "compound republic" — federalism), "at the same time that each will be controlled by itself," through separated powers.

History and circumstances foreordained the order of America's choices: We

began as effectively autonomous states, brought together under the *Articles of Confederation* by war. So minimal was that national government, however, that in time we realized that we needed "a more perfect union," especially to address international matters like threats from abroad and to check state impediments to interstate commerce. Thus motivated by liberty, we created a more powerful national government, through the Constitution.

The document's federalism provisions are summarized in the Tenth Amendment: "The powers not delegated to the *United States by the Constitution*, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Mischievously called the "states' rights" amendment, it's meant to reaffirm the very theory of the Constitution: the federal government has only those powers that the people gave it, as enumerated mainly in Article I, Section 8, all of which pertain to national concerns; the balance of powers, if not prohibited to the states, are reserved to them — or to the people, never having been given to either government. And states' powers, as Madison wrote in *Federalist 45*, "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State" — to be checked through state constitutions.

Thus, federalism's core idea, divided jurisdictions, is achieved in the Constitution itself mainly by enumerating and hence limiting Congress's powers — the balance reserved, by implication, to the states or the people. That's not a detailed division, to be sure, which accounts for the ensuing litigation; but it's doubtless the best that could be done, given the indefinite subject. Yet the main point is clear: most government is to remain at the state level. In various places the Constitution addresses other aspects of federal-state relations — as in the much litigated Supremacy Clause, which makes federal law supreme over conflicting state law — but the point remains: as Madison put it in *Federalist 45*, Congress's powers are "few and defined."

As it emerged from the Constitution, then, federalism maximized liberty in four crucial respects. First, it empowered the federal government to address truly national matters that were inadequately addressed under the Articles, like national defense, international and interstate commerce, immigration, and protection for intellectual property. But second, to protect state interests and check federal power, Senators were chosen by state legislatures. Third, federalism respected subsidiarity: responsibility rests first with the lowest authority, the individual; then, if necessary, with local, state, and, finally, national officials. That maximized liberty by keeping authority as close to the individual as possible, thus affording a greater opportunity to check errant authority. And finally, given that citizens are free to move, federalism maximized liberty by making states compete for their allegiance. Individuals were presumed, by their choices, to maximize their own liberty. If local or state governments themselves failed on that score, their citizens could simply vote with their feet. That's "competitive federalism."

Federalism in Practice

Complex though it is — unitary government is so much simpler — federalism worked, for the most part, as the Founders meant it to — until the New Deal. It did because federal power remained relatively limited, because the states remained relatively autonomous, and because the sectionalism that grew following the Constitutional Convention's compromise over slavery, to ensure union, impeded the federal-state collusion that would follow the New Deal.

But that compromise would not last. Slavery did not wither away over time, as many Founders hoped it would. It took a civil war and the Civil War Amendments to end it — and the Fourteenth Amendment, in particular, to bring the states at last under the Bill of Rights, marking a fundamental change to our federalism. Under Section 1 of the amendment, citizens could now ask federal courts to protect them against their own states. And under Section 5, Congress could enforce those rights through legislation. Here again, national power was enhanced not to restrict but to better secure liberty — to more effectively limit state governments. Thus, federalism doesn't always entail the devolution of power. If its aim is liberty, it can go in the other direction.

In practice, of course, federalism's "mid-course correction" through the Fourteenth Amendment did not occur all at once. Indeed, it was painfully slow in unfolding — witness the long Jim Crow era — and it's still unfolding, not always evenly or accurately. But with it, the grand principles of the Declaration of Independence were at last incorporated in the Constitution.

We come now, however, to the reversal of that course, to the Progressives' express rejection, as the 20th century was dawning, of the Founders' limited government vision. Distrusting free markets regulated under the common law, Progressives were social engineers who looked to European "good government" models, envisioning a world in which elites like themselves would plan vast areas of life through social and economic legislation. Their initial efforts, directed mainly toward the states, garnered mixed results since courts generally saw their schemes as unconstitutional.

Once ensconced in Franklin Roosevelt's New Deal administration, however, Progressives shifted their focus to the federal level, yet here too the Supreme Court stood mostly athwart their efforts. So after the landslide election of 1936, Roosevelt unveiled his infamous threat to pack the Court with six new members. The plan failed politically, but the Court got the message. With the "switch in time that saved nine," it began "rewriting" the Constitution, especially its implicit federalism. In 1937 it opened the floodgates for the modern redistributive and regulatory state by eviscerating the doctrine of enumerated powers. In 1938 it bifurcated the Bill of Rights, reducing economic liberty to a second-class status. And in 1943 it jettisoned the non-delegation doctrine, enabling Congress to delegate ever more of

its law-making authority to the burgeoning executive branch agencies it had been creating.

The demise of the enumerated powers doctrine was the seminal rewrite. Although the Founders had meant the doctrine to be the main structural restraint on overweening government, in truth it was often more by politics than by law that it was enforced. Here, it was Congress's power to tax and spend that was first at issue. In a pair of decisions challenging the new Social Security Act, the Court drew on a previous decision that had revisited an early debate about the scope of that power. Alexander Hamilton had held that Congress had an independent power to tax and spend for the "general welfare." That couldn't be right, said Madison, Thomas Jefferson, and most others, since if it were, then any time Congress wanted to do something unauthorized to it, it could say simply that it was spending for the "general welfare," thus rendering Congress's other enumerated powers superfluous. The General Welfare Clause, said Madison in *Federalist 41*, was simply a heading, informed by the enumerations that followed. That view largely held for 150 years. But the 1937 Court came down on Hamilton's side, freeing Congress to spend at will.

The second power at issue that fateful year concerned regulation. As noted above, under the Articles of Confederation, states had burdened interstate commerce by erecting protectionist measures for the benefit of local interests, so the Founders empowered Congress to regulate — or "make regular" — commerce among the states. The New Deal Court read that grant, however, as authorizing Congress to regulate, for any reason, anything that affected interstate commerce, which in principle, of course, is everything. The floodgates were now opened to the modern regulatory state as well.

With the demise of those structural limits, federal programs exploded. No problem was too small or local for Congress's attention as members fell over one another bringing home the bacon. And since Progressives had earlier brought about the Sixteenth and Seventeenth Amendments, there was now plenty of bacon flowing to and through Washington thanks to the income tax, while thanks to the direct election of senators, members of that chamber could ignore their state legislatures' interest in protecting states as states and attend instead to the interests of their constituents. As Senator Buckley notes, 82 federal programs today deal with teacher training — a traditional state function, over which Congress has no constitutional authority — 44 programs in 9 agencies for planning economic development, 29 programs in 8 agencies for the construction and renovation of nonresidential buildings, and on and on.

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But it's not entirely Congress's doing. As Professor Greve illustrates, today's cooperative federalism entails federal-state collusion. Congress "induces" cooperation by offering up gobs of federal money for local projects, provided states themselves contribute some funds. Although a state may have other more pressing needs, it's hard to turn down "free" money, especially if it enriches local interests. Moreover, states turning down federal offers face a hard reality: their citizens' taxes fund other states' federal programs. And on the regulatory side, as history shows, elites in "progressive" states impose "enlightened" economic regulations — favoring coercive unions, say, or minimum wage increases — putting them at a competitive disadvantage vis-à-vis other states, so they press Congress to impose those regulations on the entire nation. And once a program is established, the "iron triangle" — congressional committee, executive branch agency, and special interest — ensures its perpetuity. Perverse incentives endure in this classic prisoner's dilemma.

What's to Be Done?

For his part, Senator Buckley urges eliminating the more than 1,100 federal grants to states and localities, term limiting members of Congress, lifting the caps on individual campaign donations, and reviving federalism in the courts, all designed to free Congress to attend to its "core national responsibilities" — a tall order for sure, given the countervailing incentives.

Yet occasionally there's a glimmer of hope. Nearly half the states declined to participate in Obamacare's Medicaid expansion, for example, even though it would have been "free" for several years. And fully 36 states declined to establish state exchanges under the plan. Maybe it was a fluke — concerning the most audacious scheme to come along in ages — or maybe an awakening — we can't keep spending borrowed money. It's too early to tell.

A century ago, political forces began undermining the auxiliary precautions the Founders created, unleashing the perverse incentives that imprison us today. We are left, then, as Madison saw, with only "a dependence on the people [as] the primary control on the government." If their recent reaction to the political audacity presently surrounding us is any indication, there may indeed be hope.

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