

Federalism in flux

Experts examine the changing nature of state-federal relationships

BY LAURIE CLEWETT

Conventional wisdom holds that the 1990s was the decade of the states. Bolstered by a series of U.S. Supreme Court rulings and congressional actions, the argument goes, states gained significant power and influence in relationship to the federal government. Indeed, many observers declared there was a “federalism revolution.”

And when George W. Bush became president in 2001, bringing with him to Washington, D.C. former governors such as Tommy Thompson, Christine Todd Whitman and, later, Tom Ridge, many people expected the “devolution revolution” to continue.

Yet, in 2003, the promise of increased state power seems to have faded in many areas, and some observers wonder whether the initial claims of change were overblown.

“The federalism revolution never really was much of a revolution,” Robert F. Nagel recently told a group of Midwestern state legislators, speaking of the Supreme Court’s record during the last decade.

Nagel, the Ira C. Rothberger Jr. Professor of Constitutional Law at the University of Colorado Law School, is the author of *The Implosion of American Federalism*. He spoke at the 58th Annual Meeting of the Midwestern Legislative Conference in Milwaukee, Wis.

Nagel’s co-panelist during the keynote session, titled “The Changing Nature of State-Federal Relations,” was Dennis Dresang, professor of political science and public affairs, and director of the Center for State, Local and Tribal Government at the La Follette School of Public Affairs at the University of Wisconsin-Madison.

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gained in recent years. “Be very wary of governors who go to Washington, D.C.,” he advised, “whether their name is Reagan or Carter or Clinton or Bush.”

“As they campaign for office, they talk about their position as having been governors, appreciating state governments, and really wanting to return a lot of discretion to the states,” Dresang said. “But ... once they get there, they become very infatuated with the conditions that they can put on federal dollars, and with the whole idea of mandates, and we really don’t see a lot of follow-through on those kinds of pledges.”

The federal government, he explained, has “an enormous amount of cash” because of the federal income tax and because the federal government does not have to balance its budget. “It’s an important source of money; there’s no way of getting around it,” he said. “And whereas they could be using this to equalize opportunities, to enhance what states do best, the tendency is instead to use it for control.”

Along with conditions on federal aid, Dresang pointed to unfunded mandates as “a major issue, a major burden, a major challenge for state governments.”

When he asked audience members to name the most costly unfunded mandates that states and local governments have, legislators quickly answered “Medicaid” and “special education.” Yet, as Dresang reminded them, these programs both come with some funding.

The most costly unfunded mandates for state and local governments, according to Dresang, are the Safe Drinking Water Act, Clean Air Act, Americans With Disabilities Act, Family and Medical Leave Act, Fair Labor Standards Act, Occupational Safety and Health Act, and, most recently, the Patriot Act. He predicted that HIPAA, the Health Insurance Portability and Accountability Act, will be added to the list once its costs become clearer.

In 1995, Congress passed the Unfunded Mandates Reform Act to protect states and local governments from the burden of unfunded mandates. Title I of the act allows Congress to make a procedural objection if a bill imposes on states and local governments an unfunded mandate greater than \$50 million per year in direct costs. Title II of the act requires executive branch agencies to review the costs to states and local governments when they promulgate rules.

“There have been some instances where this act has really helped,” Dresang said. “However, it’s important to note that we’ve got some exemptions from the Unfunded Mandates Act.” Laws or regulations that existed before the measure went into effect, those that deal with civil rights or national emergencies, and conditions of federal aid are all exempt from the act’s provisions.

In addition, Dresang said, Congress gets around the law by structuring bills so their

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cost to state and local governments is less than \$50 million. “So instead of having one big bill, you break it up into parts, each one of which the effect is less than \$50 million.”

Meanwhile, during both the Clinton and Bush administrations, less than 1 percent of federal agencies have complied with the law as they have promulgated rules. “They’re just not obeying the law,” Dresang said, “so they’re not making the estimates of how much it is going to cost states to comply.”

Dresang did point to one hopeful development in state-federal relationships: the increased use of waivers.

Although states have always been able to request waivers from federal requirements, there has been an increased emphasis on the use of waivers since the middle of the Clinton administration, he said. “And this has been continued full force in the Bush administration.” Medicaid is one example of a program in which a significant number of states have been granted waivers.

Through waivers, the federal government can exempt states from certain federal regulations and allow them to develop alternative ways of administering programs or providing services to respond to local needs. Waivers must be cost-neutral, meaning that states receive no additional money.

“The whole idea and the whole emphasis on waivers is to recognize when you really need to be flexible to achieve your goals,” Dresang said. “The second reason is really a long-standing at least slogan, if not dynamic, and that is treating states as laboratories.”

“I think most of us have agreed that [waivers are] probably a step in the right direction,” Dresang said, although he noted that it is getting harder for states to obtain them. But, he added, “there are problems with the waivers and we need to be aware of them.”

Dresang said there is little federal monitoring of states’ use of waivers, and that the federal government could do a better job of sharing information among states about their successful uses.

“Even more than that, what concerns me is that the federal officials who are working with these waivers ... continue to be really distrustful and, frankly, disrespectful as they approach state offi-



cials,” he said. “There’s always the sort of notion that you’ve got something to prove, rather than going into the discussions on the assumption that everybody’s really there out of the best intentions and to do some problem-solving.”

Dresang’s comments echoed those made by Nagel as he described the Supreme Court’s relationship to the states in recent years.

Although many observers have remarked on the Court’s apparent embrace of federalism and its deference to states’ rights, Nagel said its record really shows “a very shallow form of respect and deference for state officials.”



Dennis Dresang and Robert F. Nagel discussed the changing nature of state-federal relations at the Midwestern Legislative Conference’s 58th Annual Meeting.

Those cases during the 1990s that were hailed as the beginning of a federalism revolution – which dealt with the commerce clause, the “commandeering” of state governments by national laws, and state sovereign immunity – really did not affect the national government’s regulatory power, Nagel said. “The bulk of the national power to regulate remains in place and did so throughout this so-called revolutionary period.”

In addition, he said, to understand the Court’s overall record, one must look not only at these federalism cases, but also at cases

that deal with individual rights. Every time the national government expands individual rights, it limits states’ authority to set policy over their own residents.

“If you look at the record of states’ rights and individual rights over the same period of time, what you see is ... an enormous lack of respect and deference for state institutions and state decision-making, and a concomitant decrease in the scope of regulatory power for the states.”

“There are many, many [cases] from grand, important issues like abortion to more technical, lower visibility issues ... in which time after time the Supreme Court deprecates the decisions of state legislatures and state officials in general,” Nagel said.

Even those cases that, on the surface, appear to uphold state power really indicate a preference for national authority when more closely examined, according to Nagel.

In *Grutter v. Bollinger*, for example, one of the Michigan affirmative action cases the Court heard during the last term, it held that the University of Michigan Law School may use race as an admissions criteria, deferring to the law school’s judgment that diversity is essential to its educational mission.

“But why are they to be deferred to?” Nagel asked. “Because this is the judgment that was already made by Justice Powell several decades ago and had become the established law of the land because state officials were following the instructions laid out by the Supreme Court. ... What the court is really respecting and deferring to here is its own decision in the *Bakke* case” (*University of California Regents v. Bakke*, 1978).

Looking at the Court’s record during this past term and at its overall record for the last 15 years, “the message that I see reading these decisions carefully,” Nagel said, “is essentially that when states follow the judgment and the policies laid out by the national government – and especially by the Supreme Court – then they are entitled to great respect, but not otherwise.”

The Supreme Court’s apparent preference for national power over state power should come as no surprise, Nagel said. Although the framers of the Constitution saw the states as “a source of important competition to the national government on both policy and the meaning of the Constitution itself,” the very nature of the judicial function makes it difficult for judges to encourage or support this competition.

Judges have to settle disputes authoritatively, by showing that one side is right while the other is wrong, attempting to answer questions definitively. “So judges as a matter of habit ... are not likely to respect over the long run this sort of messy, but in the end, ennobling, political process that is or was supposed to be our system of federalism,” said Nagel.

“The institutions you have to look to for independence of judgment and strength of will, for open-mindedness,” Nagel said, “are not the people on the Supreme Court, but the people who occupy state legislative chambers.”

So what should state officials expect for the future of federalism? “Federal-state relationships are very dynamic; they are changing all the time,” Dresang said. “We do have some general trends, a general framework, but given that the devil is in the details, the details and the specific approaches change a lot.”

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