The Devolution Tortoise and the Centralization Hare

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There has been much talk in recent years of devolving powers and functions from the federal government to the states. Some observers even proclaim a "devolution revolution" (Nathan 1996), the result of which will be a more efficient and effective federal government and more robust and responsive states. The generally recognized objectives of devolution include (1) more efficient provision and production of public services; (2) better alignment of the costs and benefits of government for a diverse citizenry; (3) better fits between public goods and their spatial characteristics; (4) increased competition, experimentation, and innovation in the public sector; (5) greater responsiveness to citizen preferences; and (6) more transparent accountability in policymaking.

These are ambitious objectives, although, to date, no consensus on direction is apparent, no plan of execution is in place, and examples of devolution are scarce. Indeed, there are only two commonly cited examples of devolution: congressional repeal of the national 55-mph speed limit and welfare reform. The prospects for significant devolution during the foreseeable future are not bright, largely because federal officials are reluctant to relinquish powers they have acquired in the twentieth century to advance national policy objectives. Consequently, devolution is plodding along at a turtle's pace while centralization is still racing ahead at a rabbit's pace.

Devolution and Dual Sovereignty

Devolution is also a curious notion because, strictly speaking, there can be no devolution in the American federal system. Unlike British parliamentary supremacy, whereby Parliament can unilaterally devolve powers to regional and local authorities that possess no sovereignty or supremacy of their own, the U.S. Congress possesses only limited, delegated powers, and the U.S. Constitution establishes a system of dual

sovereignty characterized by the U.S. Supreme Court in 1869 as "an indestructible Union of indestructible States" (*Texas* v. *White* 1869, p. 725). The Congress possesses limited, enumerated powers delegated to it by the sovereign peoples of the several states; all other powers are reserved to the states or to the people as stipulated by the Tenth Amendment. The U.S. Constitution, therefore, does not contemplate devolution of powers from the federal capitol to the state capitols.

Furthermore, while the Constitution implicitly allows the states to exercise some powers that have been delegated to the federal government but not exercised by the Congress (for example, regulation of economic activities not regulated by the Congress under the interstate commerce clause), the Constitution does not authorize the Congress to exercise reserved powers of the states that are not exercised by some or all of the states. In other words, the states have historically served as backstops for the federal government, reserving authority to act in the face of federal inaction so long as state action does not violate the U.S. Constitution or run afoul of what the U.S. Supreme Court has called the "dormant commerce clause" by enacting laws that interfere with interstate or foreign commerce, even though the Congress has not occupied a field or acted to preempt or prohibit state action.

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Dual sovereignty is further entrenched in the constitutional amendment processes (Article V), which guarantee that no formal transfers of constitutional powers can be effected between the federal government and the states without the explicit, concurrent consent of the Congress and the state legislatures (plus the people, in the never-used constitutional convention method of amendment). Changes in the allocation of constitutional powers require the joint consent of both the "indestructible Union" and the "indestructible States." If this were not the case, the United States would be a decentralized unitary polity rather than a noncentralized federal polity.

Defining Terms

Nevertheless, the constitutional niceties of federalism have not, until recently, been evident in public discourse. As President Franklin D. Roosevelt put it in 1937, "I am not in love with any particular methods, but I am in love with particular objectives" (quoted in Mason 1952, p. 15). Since the New Deal, debate has been dominated by considerations of political and policy objectives rather than constitutional methods. Since the late 1960s, moreover, such debate has occurred within the context of growing public disaffection from the federal government and increasing public ignorance of the federal system. Given, for example, that fewer than half of American adults know that their state has its own constitution (U.S. Advisory Commission on Intergovernmental Relations [ACIR] 1988, p. 6), most citizens have little conception of dual sovereignty and constitutional federalism. Consequently, while "devolution" strikes a dissonant note for constitutional purists, "devolution," along with related buzz words—decentralization, deregulation, delegation, deconcentration, and decongestion—seems to strike a harmonious note for citizens said to be "fed up" today with the politicians in Washington, whose objectives and methods no longer inspire much public confidence.

Defining "devolution" is not easy, however, because the term is used loosely in politics and often used interchangeably with "decentralization." For biologists, devolution means de-evolution, namely, evolutionary degeneration toward greater simplicity and, often, disappearance. This is not the commonly understood political definition of devolution, although the biological definition might resonate with some advocates of devolution who envision a steadily shrinking federal government, as well as with some opponents of devolution who fear an enfeebling degeneration of federal power.

Devolution can be defined as a transfer of specific powers or functions from a superior government to a subordinate government. The transfer is of constitutional magnitude even if not effected through a written constitution; it is ordinarily intended to be permanent; it surrenders all the powers associated with the devolved functions (namely, political, legislative, ad-

ministrative, and fiscal); and it leaves the functional field vacant for occupancy by subordinate governments. Devolution occurs in the context of vertical intergovernmental relations. Hence, devolution can occur within the British parliamentary system and can also be said to occur within the fifty American states where, constitutionally, local governments are creatures of their state, but it cannot occur between the federal government and the states without constitutional change.

Delegation can be defined as one government authorizing another government to carry out functions on its behalf, much like a representative. The implementing government remains accountable to the delegating government and may or may not enjoy freedom to design methods of implementation. Delegation can occur in the context of vertical or horizontal relationships between governments. Delegation is common in the American federal system and is, in reality, what is often labeled "devolution." The 1996 "welfare reform" act (The Personal Responsibility and Work Opportunity Reconciliation Act), for example, fits a delegation model better than a devolution model because, even though delegation gives states much greater discretion to design, implement, and finance certain welfare programs, the states remain accountable to the federal government and reliant on federal funds, and they are subject to penalties from federal authorities for failures to achieve federal performance objectives. The federal government can also prohibit certain modes of implementation, examples being President Bill Clinton's 1997 decisions to prohibit the outsourcing of certain welfare functions to private firms and to extend federal labor-law mandates to welfare recipients in state workfare programs.

Deregulation (in the public sector) can be defined as the loosening or removal of regulations enacted or promulgated by one government to control or direct the behavior of another government or set of governments. The states, in principle, have plenary regulatory authority over their local governments, except where prohibited by the U.S. Constitution. The federal government has a limited range of direct regulatory authority over the states under the supremacy clause of the U.S. Constitution (Article VI), although this clause has been broadened by twentieth-century interpretations of the Constitution, such as the Fourteenth Amendment (1868). The federal government has an even broader range of indirect regulatory authority over the states through grants-in-aid enacted pursuant to the Congress's spending and general welfare powers (Article I, Section 8). The rise of "regulatory" (ACIR 1984) or "coercive" federalism (Kincaid 1993b) since the mid 1960s has become a matter of great concern to most state and local government officials; consequently, calls for intergovernmental deregulation are often intermixed and confused with calls for devolution.

Decentralization has been subject to a host of definitions, plus distinctions between legislative, administrative, political, fiscal, and spatial decentralization. Decentralization can be defined as the transfer of responsibilities of various kinds to subordinate administrative units or subordinate units of government, much the way most states decentralize functions through counties. This was, for example, Alexis de Tocqueville's preferred model of federalism. Rather than "an incomplete national government" like that created by the U.S. Constitution, a strong federal union, according to de Tocqueville, needs a complete national government in which political power is centralized while administrative authority is decentralized through subordinate units of government like counties (Tocqueville 1969). Given that the U.S. states are not county-like administrative arms of the federal government and given that the federal government is, in effect, an incomplete national government, the concept of decentralization, like devolution, does not fit the American federal polity, even though the net results of devolution, delegation, and deregulation may look like decentralization (Mayer 1976).

What is being advocated, under the rubrics of devolution and decentralization? Restorations of powers to the states and their local governments as well as deaccessions of unwanted functions, which could produce a rebalancing of power between the federal government and the states.

The difference is subtle but important. Decentralization, like devolution, requires a complete national government able to decentralize and recentralize power, as metropolitan councils discovered during Margaret Thatcher's tenure as prime minister. Decen-

tralization and devolution are fully applicable, for example, to the former Soviet Union and its satellite countries wherein power was highly centralized through the Communist party. The American federal union, however, is really noncentralized (Elazar 1984) because it is a system of dual sovereignty constituted of multiple centers of power independently accountable to the people.

A prime example is taxation. No centralized tax power exists in the United States. The power to tax is noncentralized, and some tax powers are concurrent (that is, exercised by both the federal government and the states, such as income taxation). The federal Constitution imposes only a few limits on state tax powers (for example, states cannot tax imports or exports without the consent of the Congress) while, in turn, delegating only a few tax powers to the federal government (however broad and deep the de facto impacts of the federal income tax). Indeed, the U.S. Constitution had to be amended in 1913 to give the Congress the power to tax income (Amendment 16). The states are free to levy any taxes not prohibited by the federal Constitution, while the federal government is permitted to levy only those taxes delegated to it through the U.S. Constitution.

If devolution and decentralization do not, strictly speaking, fit the American situation, then what is occurring, or being advocated, under the rubrics of devolution and decentralization? The answer would appear to be a process involving restoration, deaccession, and rebalancing: that is, restorations of powers to the states and their local governments as well as deaccessions of unwanted functions, which, together, could produce a rebalancing of power between the federal government and the states. Few of the powers and functions nominated as candidates for devolution were even exercised or performed by the federal government a generation or two ago. These powers and functions were exercised by the states or, in some cases, could have been, and perhaps should have been, exercised by the states under their general police power. Hence, when the U.S. Advisory Commission on Intergovernmental Relations advocated a shift of most federal highway functions and revenue sources to the states, the Commission used the term "turnback" (ACIR 1987). Similarly, the "devolution" language used most often by elected officials is that of restoring or reviving state powers or states' rights and rebalancing the federal system (for example, Council of State Governments 1996).

Although we may be stuck with the term "devolution" because the media and some academics have embraced it, many different things are occurring in the federal system, some of which point, for the first time during this century, to the possibility of genuine restorations of some state powers and genuine limits on certain further expansions of federal power while, at the same time, centralization or "counter-devolution" continues apace.

Forces for Restoring State Powers

The most immediate force propelling discussions of shifting powers back to the states was the 1994 midterm elections, which brought a Republican majority into both houses of Congress. The 1994 elections ended more than sixty years of nearly continuous Democratic control of the Congress (with Democratic control of the U.S. House of Representatives having been the longest period of one-party rule in U.S. history) and also unseated an incumbent House Speaker for the only time in this century.

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The Republicans' "Contract with America" contained several provisions aimed at curbing federal power and restoring state powers, beginning with mandate reform, which was enacted in 1995 with bipartisan support as the Unfunded Mandates Reform Act (UMRA). The state-friendly provisions of the "Contract with America" reflected long-standing Republican concerns dating back to President Dwight D. Eisenhower, who had likened the centralization of power and rise of the "military industrial complex" in the United States during the New Deal and World War II to the "extreme and dictatorial concentration of power" then occurring in communist Eastern Europe (Coleman and Goldberg 1990, p. 20).

President Eisenhower was not, however, able to tilt power back toward the states. On the contrary, Eisenhower's nomination of Earl Warren to be Chief

Justice of the U.S. Supreme Court, his support for the National Defense Highway Act of 1956 and for the National Defense Education Act of 1957, his dispatch of federal troops to Little Rock, Arkansas, in 1957 to enforce desegregation pursuant to the U.S. Supreme Court's ruling in *Brown* v. *Board of Education* (1954), and other policy actions, all enhanced federal power. Thus, federal policymaking during the supposedly conservative 1950s reinforced Alpheus T. Mason's observation that: "For two generations American political and economic life has been moving swiftly toward 'bigness,' toward monolithic organization" (Mason 1952, p. 1).

President Richard M. Nixon's New Federalism, which echoed Eisenhower's federalism sentiments, was, despite General Revenue Sharing (1972 to 1986), no more successful in stemming the growth of federal power. President Ronald Reagan began his Administration with strong, emphatic support for a New Federalism aimed at shifting substantial power back to the states. Reagan's success was modest at best, and the federal government continued to expand its power through mandates, preemptions, and conditions attached to federal aid (Conlan 1988; Kincaid 1993b).

This brief history suggests two hypotheses. First, many of the Republicans elected to the Congress in 1994 arrived with strong commitments to long-frustrated desires to limit federal power, which for some, though not all, also means restoring state powers. This was reinforced by the new Republicans elected from the increasingly Republican South and from the Mountain West—both growing regions historically suspicious of, and often hostile to, the federal government. Second, it is the Congress more often than the White House that alters the balance of power in the federal system. If these conclusions are correct, then some significant restorations of state powers are likely to occur if the Republicans maintain control of the Congress, if the Republicans capture the Presidency in 2000, and if the currently federalism-friendly majority on the U.S. Supreme Court is maintained or increased after 2000.

These prospects are further strengthened by support for rebalancing federal-state power among more members of the Democratic party than was true in the past. In a 1997 statement, for example, the Democratic Leadership Council, with which President Clinton was affiliated, said:

> The New Democrat movement has consistently rejected the old-fashioned liberal prejudice against state governments and state elected officials. . . . Now more than ever, state elected officials represent the future of our party and our country. State capitals are the battlegrounds where the big challenges of American domestic policy on the eve of the 21st century are being met (1997, p. 1).

The 1996 Democratic party platform even claimed that "Republicans talked about shifting power back to the states and communities—Democrats are doing it."

This is a far cry from Governor George Wallace standing in the doorway of the University of Alabama in 1963 defying federal authority, but the states have since experienced a remarkable rehabilitation, which has placed them in a much more favorable light. Well into the 1970s, most Americans expressed more trust and confidence in the federal government than in the states. Since then, however, public trust and confidence—to the extent the public has any trust and confidence in any governments—has shifted gradually and substantially from the federal government to the states. For example, a 1995 poll conducted by Princeton Survey Research Associates found that 61 percent of Americans trusted their state government to "do a better job of running things" than the federal government. Nearly every subgroup except black Americans and Jews expressed similar support for the states. Adults under age thirty favored the states by 72 to 21 percent, Democrats, by 48 to 35 percent, and self-described liberals, by 49 to 36 percent (Donahue 1997, p. 13). These findings are consistent with trends in most polls asking similar questions for the past decade.

Since the 1970s, public trust and confidence—to the extent the public has any trust and confidence in any governments—has shifted gradually and substantially from the federal government to the states.

This opinion change is due partly to the "modernization" of state and local governments and political systems that has occurred since the 1950s, with much assistance and pressure from the federal government. The structural changes highlighted by most observers—such as constitutional revision, legislative reapportionment, professionalized legislatures, four-

year tenure for 48 governors, and strengthened judiciaries (ACIR 1985; Reeves 1990)—have been important, but the most significant change has been the altered relationship between citizens and their state and local governments. State and local political systems are more electorally inclusive and representative of diversity than in the past, and they are no less inclusive than the federal arena. Previously excluded groups have more opportunities to win office and gain employment in state and local governments than in the federal government. On average, state and local governments are also more accessible to citizen reform, not simply because they are smaller arenas but also because state constitutions and amendments require popular ratification in 49 states; because state constitutions compel recourse to the people and to supermajority consent on many important matters; and because a number of state constitutions give citizens initiative, referendum, and/or recall powers. The federal government is constitutionally impervious to such direct citizen participation. In addition, state and local governments are better equipped today than in the past to provide more and better services for citizens, and with the appearance of less corruption. Furthermore, state and local tax systems are more diversified than in the past and are often less regressive than the federal tax system, where Social Security and Medicare taxes—the largest tax bites for most Americans—are regressive. In addition, most state and local governments have been more fiscally disciplined than the federal government.

Adding force to efforts to rebalance federal-state power has been migration to the suburbs and to the Sunbelt, along with the perceived fiscal crisis of the federal government.

The case for devolution has been bolstered as well by a recovering economy. As a result, most states have had year-end budget surpluses during the 1990s; state budget surpluses amounted to $24 billion at the outset of 1998; state and local government spending has increased by 14.3 percent in real terms since 1990; 31 states reduced taxes in 1996; and state and local government employment has increased by about 1.8 million persons since 1990 while federal government employment has declined by more than 345,000.

Adding force to rebalancing efforts has been migration to the suburbs and to the Sunbelt. The United States has been, and continues to be, a nation of small and medium-size communities. Never in the history of the United States have more than 30 percent of Americans lived in urban places having 100,000 or more residents. The high points of big-city life in America occurred between 1920 and 1970. By the late 1980s, the United States had become a suburban nation. In addition, the center of population continues to migrate southwestward as most Sunbelt states experience tremendous growth.

A political sine qua non of suburban life is local self-government, jealously guarded and combined with stout resistance to metropolitan consolidation or other arrangements perceived as threatening to local autonomy, as well as a proclivity for service-efficient council-manager type governance free of "politics" (see, for example, Baker 1975). Hence, the suburban mentality, whatever the shortfalls and shortcomings of its realization, is receptive to "devolution," and the federal government and most state governments have been deferential to this suburban mentality. This deference is reflected, for instance, in the U.S. Supreme Court's unwillingness to extend court-ordered school busing beyond central-city boundaries, in the Congress's and the states' overwhelmingly preferential funding for highways rather than mass transit, in the unwillingness of both the federal government and the states to enforce fair housing laws with any vigor, in the reduced federal funding since the Reagan era for metropolitan regional structures (for example, councils of governments), and in the unwillingness of state legislatures to mandate jurisdictional consolidations.

Migration to the Sunbelt is having at least two devolutionary effects. For one, given that most Sunbelt states have, historically, been states' rights states, migration into those states has strengthened the states' rights voice in Washington, DC. At the same time, migration has helped to "modernize" those states, to make many of them more progressive and innovative and to soften the hard surfaces, such as racism, historically characteristic of politics in many of those states. Migration has helped to pull the Sunbelt states toward the center of the national political spectrum while simultaneously pulling the national political center slightly rightward.

Stemming in part from this suburban and Sunbelt migration has been the emergence of Republican con-

trol of a majority of the governorships (32 as of March 1998). On average, Republican governors have been more supportive of restoring state powers than Democratic governors, and Republican governors, for example, played a major role in shaping "welfare reform" in 1996. The governors, however, including Republican governors, do not champion state prerogatives across the board. Most governors continue to advocate federal preemptions of state powers in many areas affecting interstate commerce, and most governors supported the preemption-laden North American Free Trade Agreement (NAFTA) in 1993 and the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994.

Both Democratic and Republican state and local officials have given strong support to deregulatory measures and other efforts to reduce federal "micromanagement" of state and local affairs. Here, elected state and local officials have been nearly unanimous, as reflected in their concerted lobbying for the Unfunded Mandates Reform Act (UMRA). The state-local coalition constructed to support UMRA was unusual because state and local officials rarely speak with one voice in Washington, DC.

Certain historical imperatives, especially the perceived fiscal crisis of the federal government, have added force to rationales for shifting power toward the states. This was the reality facing President Clinton when he declared the end of the era of "big government." Regardless of one's views about federal budget deficits and the size of the federal government, the weight of public opinion perceives these to be serious problems, even though the public does not endorse draconian remedies. The federal government lacks the fiscal resources, and perhaps the political will as well, to sustain, let alone augment, the kinds of expansive and state-intrusive policies associated with the New Deal of the 1930s and the Great Society of the 1960s. By a combination of default, deaccession, and disinvestment, therefore, certain powers and responsibilities must necessarily flow into the states, and the Congress will likely dump certain fiscally onerous and politically volatile functions onto states and localities.

The growth of entitlement spending, which now dominates the federal budget, adds more pressure on Congress to off-load "discretionary" programs that carry real budget costs. Although the 1996 "welfare reform" ended certain long-standing entitlements, their costs pale in comparison to the costs of Social Security, Medicare, and Medicaid. These entitlements are likely to remain entrenched federal responsibilities not only because they are advocated by influential reformers (Rivlin 1992; Peterson 1995) but also, and more important, because they are predominantly middle-class entitlements. Even Medicaid has become a middle-class entitlement because of the high costs of long-term health and nursing home care for the elderly. Entitlement pressures on the federal budget will, moreover, begin to skyrocket in 2010 when baby boomers commence retirement.

Public disaffection from the federal government has also contributed to support for restoring state powers. The federal government has experienced an astonishing erosion of legitimacy in recent decades, coupled with disillusionment and skepticism about the efficacy of many federal programs—an attitude reinforced by the generally critical media. Although many federal programs are more successful than is generally believed by voters, reality is what citizens perceive it to be, and this perceived reality underwrote President Clinton's pledge to "reinvent" government and, among other things, "to end welfare as we know it." Whatever its past successes, "welfare as we knew it" became widely viewed as a counterproductive failure.

Support for restoring state powers and rebalancing the federal system arises not only from factors particular to the United States but also from a worldwide trend toward decentralization, which some link to a broader trend of "flattening hierarchies" across all sectors of postmodern life.

Undoubtedly, some advocates of restored state powers desire little more than to shrink, even cripple, the federal government, while still others wish to abolish or reduce certain federal policies and programs by using the subterfuge of federalism to turn them over to the states where, they hope, the policies and programs will be dismantled or cut back. Such opportunistic forum shopping has long been common in the federal system, and one can expect the debate

over restorations of state powers to continue to be clouded by opportunism.

But such motives are overshadowed by another legitimizing force: namely, the power of an idea. Demands for decentralization, devolution, deregulation, federalism, power sharing, and the like have become prominent worldwide. These demands often come from ethnic, tribal, linguistic, religious, and political groups within multinational states, such as the Baltic states, Belgium, Canada, India, Malaysia, Mexico, Nigeria, Pakistan, the Philippines, Rwanda, Spain, Ukraine, the former Soviet Union, the Sudan, Uganda, the United Kingdom, the former Yugoslavia, and others. Elsewhere, though, as in Denmark, France, Japan, Norway, and Sweden, pressure for decentralization or "deconcentration" has stemmed from escalating national welfare costs, rising unemployment, and a growing belief that regional or local governments can provide services more efficiently and effectively (see, for example, Baldersheim and Stava 1993).

An interesting and somewhat surprising twist on the enthusiasm for decentralization has been its support from the left, such as the Socialist party in France, which promoted extensive devolution (Bernier 1992), and the British Labour party's promotion of successful devolution referenda in Scotland and Wales in 1997. At the same time, the rise of the more rightward Public Choice school of thought has provided important intellectual underpinnings for devolution (see, for example, Buchanan 1995).

Decentralization and even federalism have gained substantial legitimacy from the perceived failures of the centralized state (Wunsch and Olowu 1995), failures of planned economies, and weakening of the historic nation-state (Elazar 1995). Pressures for decentralization and federalism are usually linked now to political democratization, economic deregulation, denationalization and dereservation of state enterprises and lands, and decriminalization of previously forbidden market and voluntary sector activities. Hence, while federalism in the United States is often viewed as a conservative idea because of the historical backdrop of reactionary states' rights, federalism (or at least decentralization) in many other countries is frequently viewed as a liberal or progressive concept because of the historical backdrop of centralized tyranny (Kincaid 1995). As Carlos Fuentes wrote along these lines in 1990: "*The Federalist Papers* should be distributed in the millions."

In summary, support for restoring state powers and rebalancing the federal system arises not only from factors particular to the United States but also from a worldwide trend toward decentralization, which some observers link to a broader trend of "flattening hierarchies" across all political, social, economic, and cultural sectors of postmodern life.

Federal Actions Restoring State Powers

Despite predictions of a "devolution revolution" (Nathan 1996) and prognostications of doom that "wholesale devolution invites the balkanization . . . of America" (Donohue 1997, p. 14), there are few examples of "devolution," although a discernible crawl toward some rebalancing of the federal system is under way in the Congress, the Presidency, and the Supreme Court.

Congressional Federalism

Early steps toward rebalancing were General Revenue Sharing (GRS), enacted as the State and Local Fiscal Assistance Act of 1972, and the enactment of two of six block grants proposed by President Nixon. GRS was created when it was still credible to argue that the federal government was positioned to generate surplus revenue that could be disbursed to fiscally handicapped state and local governments. GRS funds were delivered to state and local governments by formula and with few regulatory strings. The basic idea was that state and local governments, with citizen input, were best positioned to set priorities for spending GRS monies in ways most useful and appropriate for their jurisdictions. The Congress expected GRS funds to be expended primarily for capital investments; however, many states and localities used GRS to support current operations and/or to reduce taxes. Such "misuses" of GRS confirmed the belief of skeptics that state and local governments cannot be trusted to behave responsibly without congressional direction and that restoring powers to state and local governments will not enhance policy efficiency, effectiveness, or equity. GRS was terminated for the states in 1980 during President Carter's Administration and then allowed to expire for local governments in 1986 during President Reagan's Administration.

Another step toward providing states with greater flexibility in using federal funds occurred when 77 categorical grants were consolidated into nine new or amended block grants in the Omnibus Budget Reconciliation Act of 1981. Although President Reagan had sought to consolidate about 85 categoricals into only seven block grants, the Congress refused

to go that far. It also declined to remove as many grant-reporting and oversight rules as had been proposed by President Reagan. Nevertheless, the number of block grants leaped from four to twelve, and additional block grants were enacted up through the 1996 Temporary Assistance for Needy Families (TANF) block grant and the 1997 State Children's Health Insurance Plan block grant.

Block grants, however, are not sterling examples of devolution for three reasons: (1) the Congress tends to re-categorize block grants over time, not only for political reasons but also for accountability reasons; (2) block grants are more vulnerable to funding reductions than many categorical grants-in-aid, and (3) only about 15 percent of federal aid flows to state and local governments through block grants. The Congress has a distinct preference for more tightly controlled categorical grants, and 618 such grants were funded in fiscal year 1995 compared to only 15 block grants (ACIR 1995).

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A de facto fiscal dumping of certain functions can be said to have occurred from 1978 to 1990 when federal aid to state and local governments declined from 17.0 percent of federal outlays to 10.8 percent, and federal aid as a proportion of state and local outlays declined from 26.5 percent to 18.9 percent. Although federal aid has since increased to about 23 percent of state and local outlays, functional dumping has continued because nearly two-thirds (63 percent) of federal aid is now dedicated for payments to individuals (mostly social welfare), whereas in 1978 more than two-thirds (68 percent) of federal aid was dedicated for state and local government policy functions and operations.

Most of the discussion of devolution, however, has been stimulated by more recent enactments. The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), President Bush's 1992 Executive Order 12803 on infrastructure privatization, and President Clinton's similar 1994 Executive Order 12893, are cited by some observers as harbingers of devolution. ISTEA created a multimodal surface transportation block grant, gave states more discretion over certain aspects of surface transportation while also requiring statewide transportation plans, and placed more emphasis than previously on "performance" standards for states and localities. ISTEA also permitted funds transfers between transportation programs when requested by state governments or metropolitan planning organizations (MPOs), authorized the same state-local funding match for most programs so as not to disadvantage certain transportation choices, and provided the country's 339 MPOs with greater authority over transportation planning and federal funds allocations. Although the outcomes of ISTEA appear to be generally satisfactory, initial evidence also suggests that "regulatory and workload burdens have grown significantly" (Gage and McDowell 1995, p. 148), particularly for MPOs.

Advocates for highway devolution argue, among other things, that:

> First, the responsibility for building, owning and operating [transportation] systems is primarily regional or local, not national. Now that the interstate highway system has been completed, the federal role in highways can be dramatically reduced. Second, there are major disadvantages with the centralized federal trust-fund approach to funding transportation infrastructure. Third, it is states and cities—not the federal government—that have been most innovative in seeking new and better ways to invest in infrastructure and improve its performance, by making use of public-private partnerships (Poole 1997, p. 20).

Federal highway aid, moreover, remains a prime target for congressional "crossover sanctions" (ACIR 1984, p. 43). These are reductions of aid disbursements to states that fail to comply with aid conditions that are arguably not germane to the aid's central objectives and original intentions. One of the first crossover sanctions was the Highway Beautification Act of 1965, which was prompted by Lady Bird Johnson's dislike of highway billboards. A recent prominent example is the 21-year-old drinking age requirement that was attached to federal highway aid in 1984 and upheld by the U.S. Supreme Court in 1987 (*South Dakota* v. *Dole*). However, the Congress did repeal a crossover sanction in 1996, namely, the 55-mph speed limit enacted under the Emergency Highway Energy Act of 1976, thus giving states freedom to set or not set highway speed limits, but it also enacted a new condition requiring states to prohibit persons under age 21 from driving with a blood alcohol level of 0.02 percent or

higher. Any state failing to enact a law to enforce this prohibition within three years of 1996 will lose 5 percent of its federal highway aid in the first year and 20 percent each year thereafter.

Amendments enacted in 1996 to the Safe Drinking Water Act of 1974 substantially changed the regulatory regime within this field by giving states more funding to comply with environmental standards and also more flexibility to exercise authority over drinking water standards and their enforcement. The act also responded favorably to growing complaints from local governments, especially small localities, about out-of-reach costs of bringing water systems into compliance with regulations and time limits promulgated by the U.S. Environmental Protection Agency (EPA). Small jurisdictions can now choose to comply with alternative treatment and monitoring standards. Environmental remediation is likely to be a continuing intergovernmental issue because the EPA has estimated that local governments will bear about 88 percent of the cost of public sector compliance. It is also "projected that by 2000, local governments will have to spend an extra $12.8 billion per year, or 65 percent more than they did in 1988, just to maintain current levels of environmental protection" (Habicht 1992, p. 27).

Other recent measures viewed as restoring some state and local powers include food-safety legislation that withdrew an earlier standard of "zero cancer risk" for pesticide residue on processed food and provided instead for a uniform health-oriented standard for chemical residues on agricultural produce and processed food. The Selected Housing Program Extensions Act of 1996 delegated more powers to local public housing authorities to evict residents who abuse drugs or alcohol and to set aside housing exclusively for senior citizens and persons with disabilities. The commuter policies included in the 1990 Clean Air Act were made voluntary; these were previous mandates that required states with carbon monoxide and ozone non-attainment areas to reduce employee commuting trips through car pooling and other measures.

The case of welfare reform. The premier specimen of "devolution," however, is "welfare reform," which one observer terms "the most vivid example of authority cascading to lower levels of government" (Donahue 1997, p. 7).

The devolutionary centerpiece of "welfare reform" is the Temporary Assistance for Needy Families (TANF) block grant. This reform eliminated the open-ended Aid to Families with Dependent Children (AFDC) entitlement, along with JOBS and Emergency Assistance. TANF will provide $16.38 billion per year to states during fiscal years 1997 to 2003 to operate time-limited cash assistance for needy families coupled with work requirements for most recipients. States can use their federal money in any way "reasonably calculated to accomplish the purposes of TANF" (Section 404(a)). States have broad discretion to determine eligibility, methods of assistance, and benefit levels; to operate new food stamp and employment and training programs; and to decentralize welfare functions to local governments. Many state officials, especially governors, helped to shape TANF and supported its enactment. The legislation also made substantial though not always state-friendly changes in child care, the Child Support Enforcement program, food stamps, SSI for children, and benefits for legal immigrants. It also set funding for the Social Services Block Grant at $2.38 billion in fiscal years 1996 to 2002 and at $2.8 billion in fiscal year 2003 and thereafter. A number of technical changes were made in 1997, most of which were favorable to the states.

Three other elements of TANF are interesting for their implications of future restorations of state powers. One is Section 417, which reads: "No officer or employee of the Federal Government may regulate the conduct of the States under this part or enforce any provision of this part, except to the extent expressly provided in this part." This is a signal to the executive branch not to interpret the law liberally so as to extend its regulatory reach beyond the boundaries expressly set out by the Congress.

Second, TANF overturned *Shapiro* v. *Thompson* (1969) by allowing states to treat newly arrived welfare claimants differently than resident recipients by applying, for up to 12 months, the welfare rules of the migrant's former state of residence. This provision is intended to reduce rent-seeking migration that might drive states into "a race to the bottom," but the larger significance is the willingness of the Congress to overturn a 27-year-old state-restrictive and rights-protective ruling of the U.S. Supreme Court.

Third, the Brown Amendment added to the Personal Responsibility and Work Opportunity Act of 1996 enhances the authority of state legislatures over budgetary and nonbudgetary aspects of devolution. The Amendment affirms the authority of the legislatures to appropriate block grant monies for Temporary Assistance for Needy Families and for child-care development, rather than leaving these matters in the hands of the governors who, in the past, had served essentially as administrative agents for the federal

government. The Amendment, therefore, also increases legislative leverage over the governor, places state legislatures on a more equal policymaking footing with governors and the Congress, and exposes welfare policymaking to greater voter input through legislative elections and popular initiatives.

While the above provisions constitute the major "devolutionary" elements of "welfare reform," other provisions suggest a continuing and enhanced federal regulatory role. For example:

- States must meet maintenance-of-effort rules requiring them to spend on TANF-related activities 80 percent of what they spent with state and local funds on AFDC and related programs in fiscal year 1994.
- States cannot use federal funds to aid families that have received TANF-related assistance for a cumulative total of five years, although states can set time limits under five years, and they can exempt up to 20 percent of their caseload in any one year from the five-year limit.
- States can lose up to 25 percent of their TANF allotment for failure to meet work-participation requirements, which increase annually so that by 2002, 50 percent of all recipients from all welfare families should be working at least 30 hours per week, and 90 percent of all recipients from two-parent welfare families should be working at least 35 hours per week. (Although most states are rhetorically emphasizing "work first," most have used a waiver in the law that allows them to opt out of the workfare mandate. For example, Massachusetts "has excused 82 percent of the 72,500 families on the rolls from the 60-day workfare deadline" [Whitman 1998, p. 26]. Many states are also diverting families from multiyear cash assistance to part-time work and to short-term service provision, such as job-search programs and education.)
- States can be penalized for failure to participate in the Income and Eligibility Verification System and for failures to submit required reports to federal officials.
- States must comply with paternity establishment and child-support enforcement rules set by the federal government, and states can be penalized up to 5 percent of their TANF grant for failure to deduct a minimum of 25 percent from a family's cash assistance when the recipient does not cooperate with child-support rules without good cause.
- States must enact laws to suspend the driver's, professional, occupational, and recreational licenses of individuals whose child-support payments are in arrears.
- Pursuant to welfare reform as well as immigration reform, Social Security numbers must be recorded on a variety of official documents, including driver's licenses and birth certificates.
- States must maintain assistance when parents cannot locate child care for a child under age six.
- States must use at least 4 percent of their combined grant funds under TANF and the newly consolidated Child Care and Development Block Grant to increase the availability and improve the quality of child care.
- States must implement Electronic Benefit Transfer programs by October 1, 2002, unless waived by the U.S. Department of Agriculture.
- Beginning in fiscal year 1998, a mandatory formula grant was added to the Maternal and Child Health Block Grant to provide $50 million annually to states to operate abstinence-only sex-education programs.
- No more than 15 percent of a state's TANF grant can be used for administration.

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If "welfare reform" is a vivid illustration of "devolution," then the states may find themselves in the proverbial predicament of the dog who finally catches the speeding car. The states won new discretion and flexibility to design, fund, and operate welfare programs, but they also inherited onerous and prescriptive requirements, especially in work participation and child support (although the 43 states that had already received waivers to reform welfare may not have to comply with every aspect of the new act for five years).

In effect, the federal government is requiring the states to accomplish what the federal government could not accomplish during its sixty-some years of co-funding, overseeing, and tinkering with welfare as we knew it. When states fail to meet the work-participation requirements, or to meet them adequately with upwardly mobile jobs that do not displace currently working low-income persons, they will likely be criticized as being unfit for devolution.

Several other aspects of "welfare reform" are problematic too. The anticipated reduction of $54 billion in federal welfare spending during the six years following reform and the caps on federal funding for Temporary Assistance for Needy Families and the Social Services Block Grant could prove costly for states during recessions. Local governments will be the most fiscally vulnerable, because persons who fall through the safety net will land on their doorsteps. In addition, the restriction requiring state use of federal funds for abstinence-only sex education is an extraordinary dismissal of state prerogatives, although it is consistent with the "family values" advocated by many members of Congress today. It is also consistent, for example, with the Defense of Marriage Act of 1996, which, while relieving the states of a constitutional obligation to recognize same-sex marriages solemnized out of state, also establishes a national definition of marriage as a heterosexual union, for purposes of federal benefits. The power to define marriage, including marriage for federal-benefit purposes, had belonged exclusively to the states since 1776.

In 1997, President Clinton and congressional Republicans concluded a budget agreement that includes a new program to provide $24 billion to the states over five years to cover uninsured children for health care. The law gives states implementation choices, such as bringing uninsured children into Medicaid, into a state's largest health maintenance organization, into a state's health insurance program for public employees, or into programs comparable to health insurance for federal employees. It is too early to assess this program's devolution success, although one news reporter has already called it

> the devolution dilemma. The good news is that the five-year budget deal the President signed last Tuesday gives states a free hand and $24 billion in new money to extend medical coverage to millions of uninsured children. The bad news: State officials may be unprepared to assume control of the largest expansion in health care services in 30 years (Jeter 1997, p. 29).

One can point to other hints of devolution-like elements in congressional policymaking, but, in the final analysis, there have been few substantive turnbacks of functions from the federal government to the states.

Presidential Federalism

President Clinton came into office two years before the congressional Republicans, also promising to restore state powers: "I intend to do my very best," he told the governors, "to be faithful to the lessons that I learned as a governor—that most of what you do ought to be done by you and not by us" (Broder 1993). Yet, conclusions similar to those for the Congress pertain to Clinton's initiatives, beginning with his "reinventing government" campaign headed by Vice President Al Gore under the name National Performance Review (NPR). Although NPR addressed a wide range of management issues primarily within the federal government, the NPR report, issued in September 1993, contained the following intergovernmental recommendations.

1. Create flexibility and encourage innovation by designing a bottom-up solution to the problem of grant proliferation and its accompanying red tape. Also, support the pending proposal for Federal-State Flexibility Grants that has been developed by the National Governors' Association and the National Conference of State Legislatures. Establish a Cabinet-level Enterprise Board to oversee NEW initiatives in community improvement.
2. Issue an Executive Order addressing the problems of unfunded federal mandates and regulatory relief and authorize Cabinet Secretaries and agency heads to obtain selective relief from regulation or mandates in programs they oversee.
3. Modify OMB Circular A-87, "Cost Principles for State and Local Governments," to provide a fixed fee-for-service option in lieu of costly reimbursement procedures covering actual administrative costs of grant disbursements.
4. Simplify OMB's requirements to prepare multiple grant compliance certifications by allowing state and local governments to submit a single certification to a single point of contact in the federal government.
5. Modify OMB Circular A-102, "Grants and Cooperative Agreements to State and Local Governments," to increase the dollar threshold for small purchases by local governments from $25,000 to $100,000.
6. Reinvent the Advisory Commission on Intergovernmental Affairs [sic] (ACIR) and charge it with the responsibility for continuous improvement in federal, state and local partnership and intergovernmental service delivery. Direct the ACIR to identify opportunities to improve intergovernmental service delivery and develop a set of benchmarks (NPR 1993, p. 167).

Many other recommendations affecting intergovernmental relations were embedded in other sections of the NPR report.

NPR's recommendations were modest. The first recommendation, similar to the block grant proposals of President Reagan's New Federalism, called for consolidating 55 categorical grants worth $12.5 billion into broader "flexibility grants." This recommendation has not been enacted by the Congress, but President Clinton did quickly endorse "bottom-up" consolidation plans submitted by Indiana and West Virginia to coordinate 199 federal grants affecting children and families, thus setting a precedent for other states to follow suit. When the new Republican Congress floated proposals for larger block grants that would include major entitlement programs, President Clinton opposed most of the proposals, arguing that these programs need a significant, continuing federal role. The Republicans' major block grant proposals covered cash welfare benefits (consolidating seven programs), child welfare and abuse (consolidating 38 programs), child care (45 program consolidations), food and nutrition (10 consolidations), housing (27 consolidations), health (22 consolidations), Medicaid, employment and training (154 consolidations), social services (33 consolidations), and law enforcement (12 consolidations). The first result was a mouse: a small block grant, approved in 1995, which authorized $503 million for local law-enforcement.

Federal categorical grants continued to proliferate during the Clinton Presidency, reaching more than 640 by 1996. Categoricals procreate not only because the Congress is reluctant to channel funds to states through more discretionary block grants, but also because small grants provide a means to satisfy various interest-group pressures without large federal expenditures.

Pursuant to NPR's first recommendation, the Administration established a Community Enterprise Board in 1993, chaired by the Vice President. Among other things, the Board coordinates the Administration's implementation of the Local Empowerment and Flexibility Act of 1994 through 31 empowerment zones, two supplemental empowerment zones, and 95 enterprise communities, four of which are enhanced enterprise zones. This act is one of the economic development benefits the Administration was able to obtain for local governments, and it does provide significant flexibility for local governments (Liebschutz 1995). "Designated zones and communities receive tax benefits and flexible grants and are entitled to apply for waivers of certain Federal regulations; the underlying principle of the program is that communities know best how to solve their own problems but may lack the necessary resources" (*Economic Report of the President* 1998, pp. 34–35).

Considerable progress has been made on the second through fifth recommendations (Galston and Tibbetts 1994), in part because implementation of these primarily administrative recommendations requires little if any congressional consent. In the process, the Administration has also given the regional offices of many federal agencies more decision-making authority. This has especially been the case for the U.S. Department of Housing and Urban Development, which is so important to the President's relations with the country's mayors and other local officials.

Regarding NPR's last recommendation, the Administration initially endeavored to reinvigorate ACIR, but the Commission was de-funded in 1996. The President declined to defend it, primarily because ACIR's staff had produced a preliminary report (required by the Unfunded Mandates Reform Act) that recommended reductions and terminations of a number of federal mandates. The report sparked a political firestorm; more than 300 interest groups, many representing constituencies important to President Clinton, lined up against it; and the Commission killed the report in a partisan vote (McDowell 1997).

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The Clinton Administration has also sought to create more flexibility in federal-state relations by establishing "performance partnerships," whereby states develop performance measures for implementing federal programs and rules; in return, they are given more flexibility by federal agencies to meet their performance objectives. The most developed perfor-

mance partnership was forged with Oregon, which conducted a six-year statewide initiative to identify benchmarks against which to measure its policy progress. The benchmarks also apply to performance-based contracts between state and federal agencies under conditions that eliminate or relax the requirements attached to multiple categorical grants (Goshko 1995).

The EPA has sought to build a "National Environmental Performance Partnership System" to give states more voice in program decision-making and, in the case of states meeting performance objectives, reduce EPA's regulatory oversight. The EPA has also asked the Congress to enact performance partnership grants that would enable states to consolidate multiple EPA grants and use them more flexibly (U.S. General Accounting Office 1996). The General Accounting Office noted in early 1996 that:

> the historically poor EPA-state relationship has improved, but it continues to be strained, and program implementation suffers as a result. . . . EPA has taken positive, though tentative, steps toward improving its relationship with the states, in particular trying to provide the states with the flexibility to achieve cost efficiencies and to address the states' priorities. However, one of the root causes of the agency's past problems—a prescriptive, media-based legislative framework—remains firmly in place (U.S. General Accounting Office 1996, pp. 3–4).

Under the Government Performance and Results Act of 1993, the Administration also launched pilot projects to develop performance measures in selected units in all Cabinet departments and a number of independent agencies. Each unit began to develop a strategic plan, define its mission, set goals, and establish performance standards for measuring results. These pilot projects were then extended to a number of federal grant programs, particularly Goals 2000 for education.

The second phase of reinventing government was initiated in President Clinton's fiscal year 1996 budget proposals, which contained sweeping intergovernmental reforms involving greater scope for program devolution to the states, program terminations, grant consolidations, privatization, and more performance partnerships. The Administration proposed, for example, to consolidate many U.S. Department of Transportation grants into three block-like programs: a discretionary grant, a more unified allocation of transportation funds to state and local governments, and the establishment of state infrastructure banks. The Administration also proposed to consolidate sixty programs managed by the U.S. Department of Housing and Urban Development into three more flexible and performance-based programs for community economic opportunity, affordable housing, and modernization of public housing. Altogether, the Administration proposed to consolidate 271 grant programs. These more sweeping proposals of the second wave of "reinventing government" appear to have been motivated in part by a belief that the Republican Congress would be more receptive to such consolidations than previous Democratic Congresses and in part as a counterplay to Republican block grant proposals.

The most significant block grant signed by President Clinton, of course, was Temporary Assistance for Needy Families. After his own welfare-reform initiative failed to gain steam, President Clinton pledged to the governors to expedite administrative waivers for welfare experimentation and to make changes in food stamp rules. From the states' perspective, however, the waiver process moved too slowly. The average wait for approval was 210 days (Milbank and McGinley 1996). Initially, President Clinton vetoed a Republican welfare-reform measure in December 1995 that included sizable reductions in Medicaid spending, as well as a follow-up measure in January 1996. After gaining some concessions from the Congress, especially the removal of Medicaid from the proposal, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

Aside from the "devolutionary" elements of the TANF block grant, very little in the President's rhetoric and that of members of Congress suggests that devolution was a fundamental principle or primary objective of welfare reform.

Aside from the "devolutionary" elements of TANF, very little in the President's rhetoric and that of members of the Congress suggests that devolution was a fundamental principle or primary objective of welfare reform. Instead, reform seemed far more motivated by election-year political advantage. The

stigma attached to welfare and the weakened political clout of interest-group advocates for welfare made AFDC a much easier candidate for conversion to a block grant than any of the other block grants proposed by the Republicans. Indeed, opposing the other block grant proposals contributed to President Clinton's increasingly successful reelection strategy of portraying the Republicans as radical opponents of benign government and as insensitive to the needs of children, women, senior citizens, minorities, and the poor. As a Democrat, moreover, President Clinton believes in most of the programs targeted for reform by the Republicans; consequently, his Democratic principles took precedence over his federalism principles. While being tough on welfare, Clinton could not appear to be a party to what columnist Carl Rowan saw as the consequences of the Republican revolution: " 'States rights' is about to reign again in America, and millions of Americans are going to be hurt by it" (quoted in Ehrenhalt 1995).

President Clinton has also supported regulatory and mandate relief for state and local governments. Initially he responded administratively to state and local concerns. On September 30, 1993, he issued Executive Order 12866, "Regulatory Planning and Review." A major purpose of this executive order is to ease the federal regulatory burden on state, local, and tribal governments by planning the issuance of regulations more carefully; coordinating and streamlining regulations; consulting closely and regularly with state, local, and tribal officials; and limiting the promulgation of regulations only to those "required by law, or [that] are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people." Although this clause leaves open a wide field of action for federal regulators, the basic intent of the executive order is to limit the impacts of federal mandates on states and localities to what is really required by law or to what is reasonably necessary.

On October 26, 1993, President Clinton issued another executive order (E.O. 12875) entitled "Enhancing the Intergovernmental Partnership." This order was a preemptive response to "National Unfunded Mandates Day," a protest held by state and local officials on October 27. The executive order requires federal agencies to expedite and streamline their waiver-application processes for state, local, and tribal governments. "Furthermore, E.O. 12875 declares that no agency shall promulgate any regulation not required by statute or impose a mandate on a state, local, or tribal government, unless: (1) funds necessary to pay the direct costs incurred by the state, local, or tribal government for complying with the mandate are provided by the federal government, and (2) the agency provides, before the formal promulgation of regulations, a description of consultations with state, local, and tribal representatives, the nature of their concerns, and the agency's position supporting the need to issue the regulation containing the mandate" (Galston and Tibbetts 1994, p. 28). Subsequently, President Clinton supported and signed the Unfunded Mandates Reform Act of 1995.

Nevertheless, despite President Clinton's sympathy for state and local mandate concerns, he has signed many bills containing mandates, such as the Handgun Violence Prevention Act of 1993 (the Brady Bill), the Family and Medical Leave Act of 1993, the Full Faith and Credit for Child Support Order Act of 1994, the Multiethnic Placement Act of 1994, the Safe Drinking Water Act of 1996, the Health Insurance Portability and Accountability Act of 1996, and the federal Megan's Law of 1997. In examples in other fields, the Student Loan Reform Act of 1993 requires states where institutions of higher education have a student-loan default rate of more than 20 percent to assume partial responsibility for the cost of the defaults. The 1993 Reform Amendments to the Hatch Act prohibit any elected state official from making or transmitting, to any officer or employee of a federal agency, any verbal or written recommendation or statement about an employee or applicant, except for recommendations based solely on job performance. The Comprehensive Child Health Immunization Act of 1993 requires state Medicaid programs to cover some recommended childhood vaccines and to reimburse providers for administering vaccines. The National Child Protection Act of 1994 requires authorized state criminal justice agencies to report child-abuse crime information to the national criminal background-check system.

The special case of crime. President Clinton has also contributed to the extraordinary federalization of criminal law that has occurred since the late 1960s. Thomas Jefferson, in drafting the Kentucky Resolutions of 1798 in response to the Federalists' Alien and Sedition Acts, noted "that the Constitution of the United States . . . delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the high seas, and offenses against the laws of nations, and no other crimes whatever." In short, the U.S. Constitution specifies only four crimi-

nal offenses punishable by the federal government. Today, the federal government can punish individuals for more than 3,000 criminal offenses and invoke the death penalty for more than 50 offenses, including federal criminal offenses committed in the 13 states that prohibit capital punishment. This federalization of criminal law is a matter of growing alarm to civil libertarians.

Although even the Administration's 1992 policy blueprint *Mandate for Change* identified crime as a policy area in which "no federal role is justified," President Clinton strongly advocated The Violent Crime Control and Law Enforcement Act of 1994. This act provides $39.3 billion to state and local governments over a six-year period for prisons, 100,000 "cops on the beat," drug treatment in prisons, youth-crime prevention, and other programs. The law requires, as a condition of full funding, that states, among other things, enact a truth-in-sentencing statute, assure that violent offenders serve a substantial portion of their sentences, recognize victims' rights, and register violent sexual offenders upon their release from prison and being placed on parole or on supervised release. A current address for the offender must be provided to a designated law-enforcement agency. The statute also requires clerks of state courts to report to the Internal Revenue Service information on persons who post cash bonds in excess of $10,000.

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President Clinton pressed for this legislation, in part, because being "tough on crime" has become politically popular for Presidents and members of Congress from both political parties. Republicans are no less eager than Democrats to intrude upon traditional state and local prerogatives when it comes to "fighting crime." President Clinton also advocated this legislation because it was a backdoor mechanism for channeling more federal money to local governments, especially big cities—a prime Democratic constituency base. Congressional Republicans attacked this strategy and succeeded in reducing the final flow of money to local governments.

In summary, flexibility for state and local administration of federal programs, not devolution of federal programs, has been the hallmark of the Clinton Administration. Although President Clinton has supported and implemented devolution-like measures that have provided greater administrative flexibility and regulatory relief for state and local governments, the President, like the Congress, has not sent "authority cascading to lower levels of government" nor has he acted to constrain significantly his ability to support or implement virtually any politically desirable mandate. Even Clinton's first use of the line-item veto in 1997 was anti-devolutionary because one of the three items struck from the budget was a waiver that had been granted by the U.S. Department of Health and Human Services to New York State to tax health-care providers to help cover Medicaid costs. One of the ironies, then, of the Clinton Presidency is that when the Congress was in Democratic hands, he could not push his intergovernmental reform agenda far enough because of old-guard opposition. Now that the Congress is in Republican hands, he cannot go far enough to support the Republicans' more ambitious devolution proposals.

Judicial Federalism

The United States Supreme Court will play a major role in any restoration of state powers and rebalancing of the federal system, because the accession of power by the federal government during the twentieth century required judicial deference to broad interpretations of the Congress's constitutionally enumerated powers as well as activist judicial interpretations of the U.S. Constitution, especially the Fourteenth Amendment and the Bill of Rights.

This is one reason why issues of fidelity to constitutional federalism and of constitutional amendments to rebalance federal-state power have surfaced in the Congress and in the states. A proposed Enumerated Powers Act, for example, would require the "Congress to specify the source of authority under the United States Constitution for the enactment of laws." A proposed Tenth Amendment Enforcement Act is intended to have a similar effect. Neither of these bills is likely to be enacted, although the U.S. House of Representatives did adopt a rule in early 1997 requiring committee reports on bills to cite each bill's constitutional authority. State legislators and gover-

nors are also debating four statutory and constitutional proposals developed at their 1995 Federalism Summit:

- A federalism act to enhance political safeguards of federalism and give states a more effective voice in congressional deliberations.
- A mechanism to provide the people of the states, through their legislatures, the power to require Congress to reconsider laws, specific provisions of laws, or regulations that interfere with state authority.
- A mechanism that would allow the states to propose specific amendments to the U.S. Constitution subject to ratification by the United States Congress.
- Statutory remedies and/or constitutional reforms to address the problems of conditions attached to [federal] spending grants, regulations, and mandates (Council of State Governments 1996, p. 75).

Portions of these statutory proposals are likely to be enacted by the Congress, but the proposed constitutional amendments are unlikely to pass muster in the Congress and the state legislatures. Indeed, in August 1997, the National Conference of State Legislatures failed to achieve a three-fourths vote to endorse the above constitutional proposals. Many legislators believe that the Congress and the U.S. Supreme Court are moving in a state-friendly direction and that constitutional change is not now necessary.

Consequently, in late 1997, state legislators and governors adopted an 11-point plan for statutory federalism reform: (1) declare and justify the constitutionality of legislation enacted by the Congress; (2) limit and clarify federal preemption of state law; (3) prohibit federal conscription and coercion of state governments; (4) use points of order on the floors of the U.S. House and U.S. Senate to help protect states against excessive mandates and preemptions; (5) consolidate many more categorical grants-in-aid into block grants; (6) protect state laws and procedures in expending federal funds; (7) prohibit conditions of federal aid not germane to aid purposes; (8) clarify the intent of the Unfunded Mandates Reform Act; (9) require congressional and executive federalism-impact statements for proposed bills and regulations; (10) streamline federal regulatory procedures; and (11) simplify federal financial reporting requirements.

Given the reluctance of state leaders to redress state powers through constitutional change, questions of constitutional federalism and the parameters of congressional power will be decided principally by the U.S. Supreme Court and secondarily by the Congress. In the 1990s, the Court has turned away from its 1985 ruling in *Garcia* v. *San Antonio Metropolitan Transit Authority,* in which the Court sought to abandon its role as umpire of the federal system by holding that states could not seek Tenth Amendment redress from the Court for federal encroachments upon state powers. Instead, the states, like interest groups, would have to rely on the political safeguards of federalism to defend their powers in the national political arena.

Although the Court has not overturned *Garcia*, it has increasingly ignored it by seeking to limit federal authority and to protect or restore state authority in six basic ways (compare, Tolley and Wallin 1995).

State autonomy. First, Justice Sandra Day O'Connor has advanced a "state autonomy" defense of federalism (Merritt 1988) based on the Tenth Amendment and the U.S. Constitution's republican guarantee clause (Article IV, Section 4). In this view, the federal government cannot deprive citizens of a state of their essential democratic right to make fundamental decisions about their state polity. Specifically, Justice O'Connor advanced this argument in *Gregory* v. *Ashcroft* (1991), which upheld a provision of the Missouri Constitution requiring state judges to retire at age 70 despite the federal Age Discrimination in Employment Act. What is especially interesting in this age of individual rights is Justice O'Connor's reconceptualization of the Tenth Amendment as not protecting traditional states' rights but, rather, as protecting the dual citizenship rights of state residents. As Justice O'Connor has argued repeatedly:

> the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather federalism secures to citizens the liberties that derive from the diffusion of sovereign power. . ." (*Gregory* v. *Ashcroft* 1991).

The U.S. Supreme Court will play a major role in any restoration of state powers and rebalancing of the federal system, just as the accession of federal government power in the twentieth century required activist judicial interpretations of the U.S. Constitution.

Nevertheless, this doctrine is still narrow, lacks majority support, and is weakened by Justice O'Connor's concession that the Congress could have extended the reach of the Age Discrimination in Employment Act to cover state judges if it had "expressly" declared its intent to restrict state governments.

Plain statements. A second judicial strategy is to require "express" or "plain statements" in legislation of the Congress's intent to preempt state authority (for example, *Gregory* v. *Ashcroft* 1991); to abrogate states' Eleventh Amendment immunity (*Atascadero State Hospital* v. *Scanlon* 1985); to permit civil-rights suits against states under 42 U.S.C. Section 1983 (*Will* v. *Michigan Department of State Police* 1989); and to attach conditions to grants-in-aid (*Suter* v. *Artist* 1992). These rules are also limited, however, because this strategy allows the Congress to expand its power simply by "expressly" stating its intent to do so.

Federal conscription. A third strategy is to prohibit the Congress from "conscripting" or "commandeering" state officials to carry out federal laws. This doctrine was best articulated in *New York* v. *United States* (1992), wherein the Court declared unconstitutional the "take title" provision of the federal Low-Level Radioactive Waste Disposal Act. This statute requires states to provide for the proper disposal of low-level radioactive wastes within their own borders or in other states through interstate compacts. Failure to do so by 1996 would have required state governments to take title to such wastes and be liable for harms caused by them. The Court held that the Congress violated the Tenth Amendment by compelling state governments to enact such laws and regulations.

Justice O'Connor's state autonomy argument also figured in this decision, but with a new twist. The "take title" provision had been enacted as part of a set of compromises negotiated between the governors and the Congress. Hence, the National Governors' Association vetoed a proposal for the State and Local Legal Center to file a state-supportive *amicus* brief in *New York*. The Council of State Governments, therefore, filed, for the first time, an *amicus* brief before the Court. The majority opinion held that even though the "take title" provision was an example of cooperative federalism, the governors lacked authority under the Tenth Amendment to surrender state sovereignty to the Congress and thereby sell out the citizenship rights of state taxpayers.

This anti-conscription doctrine was reaffirmed in *Printz* v. *United States* (1997) wherein the Court struck down the provision in the Brady Handgun Control Act that required local law-enforcement officers to conduct background checks of handgun buyers. Justice Antonin Scalia delivered an impassioned opinion upholding "dual sovereignty" in the federal system and protecting the sovereignty of the states against congressional encroachments through liberal interpretations of the "necessary and proper" clause of Article 1, Section 8 of the federal Constitution.

Limits on the commerce power. A new strategy not seen since 1936 emerged in *United States* v. *Lopez* (1995), in which the Court struck down the Gun-Free School Zones Act of 1990 as an unconstitutional exercise of the Congress's interstate commerce power. During oral argument, the solicitor general was asked to identify a human activity that could not be brought under congressional regulation through generous interpretation of the commerce clause. The solicitor general could not identify a single activity. Reversing sixty years of precedent, the majority opined: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." Although it is unlikely that the Court will roll back congressional economic regulation in significant ways, *Lopez* signaled the Congress that the Court is prepared in a limited way to prohibit regulation that unduly restricts state powers in areas not substantially related to interstate commerce. However, the Congress, upon urging from President Clinton, resurrected the Gun-Free Schools Zones Act through the Omnibus Appropriations Act of 1996, wherein the Congress sought to establish a firm legislative history for a substantial connection between interstate commerce and guns brought onto local school grounds. Whether such congressional attempts to establish regulatory authority in such areas as guns in local schools will, like "plain statements" of preemption, be upheld by the Court is uncertain, although so long as the five-member majority in *Lopez* remains on the Court, the Supreme Court is unlikely to overturn or ignore *Lopez*.

Laboratories of democracy. A fifth strategy is a "laboratories of democracy" view of state powers, derived from Justice Louis D. Brandeis's famous opinion that "a single courageous state may, if its citizens choose, serve as a laboratory, and try social and economic experiments without risk to the rest of the country" (*New York Ice Co.* v. *Liebman* 1932, p. 311). This view was expressed in a quite different context than today when many states were enacting innovative and progressive rights and social welfare laws

while the Congress and especially the Supreme Court were often hostile to such initiatives.

This strategy was reflected in *Vacco* v. *Quill* (1997) and *Washington* v. *Glucksberg* (1997), wherein the Court declined to recognize physician-assisted suicide as a fundamental right under the Fourteenth Amendment to the U.S. Constitution, thus upholding state prohibitions of physician-assisted suicide. The Court did not deny that such a right might exist; it held instead that hitherto unrecognized Fourteenth Amendment rights must be deeply rooted in the nation's history, legal traditions, and moral practices, not in "the policy preferences of the members of this Court." Hence, the Court reserved to the democratic processes of the fifty states the task of deciding, over the long term, whether physician-assisted suicide is to be recognized as a fundamental right. There is "no reason to think the democratic process will not strike the proper balance," wrote the majority.

A corollary to this strategy is the Court's endorsement of "the new judicial federalism" (Kincaid 1988) in *Michigan* v. *Long* (1983), which immunizes from federal judicial review state judicial and legislative expansions of individual rights protections based on "independent and adequate" state constitutional grounds that go beyond rights protections recognized by the U.S. Supreme Court under the U.S. Constitution. For example, the federal Court has ruled that the right of household privacy and protection against warrantless searches and seizures does not cover trash placed outside one's home for public collection. The New Jersey Supreme Court, however, has ruled that state and local police in the Garden State do need, pursuant to the state constitution, a warrant to search someone's curbside trash. State high courts have issued about 800 such rights-expansive rulings since the mid 1970s. Similarly, even though the U.S. Supreme Court struck down the federal Religious Freedom Restoration Act of 1993 (RFRA) in June 1997, the New York State Assembly passed a state RFRA in early August 1997 in direct reaction to the Court's rights-restrictive ruling.

Final arbiter of the Constitution. A sixth, related strategy was reflected in *City of Boerne* v. *Flores* (1997), which struck down the Religious Freedom Restoration Act. "The power to interpret the Constitution in a case or controversy remains in the judiciary," opined the majority, and the Congress has no authority to expand the scope of the Fourteenth Amendment beyond the "proportionality and congruence" of the problem being addressed by legislation. Many state and local officials contested RFRA because it required them to demonstrate a "compelling interest" justification for restrictions on religious freedom. Justice Anthony Kennedy wrote that RFRA was a "considerable intrusion into the states' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." More generally, since the Court's ruling on abortion in *Roe* v. *Wade* (1973), the Court has often curbed, reduced, or declined to expand individual rights, especially in criminal proceedings, that excessively intrude or impose upon state and local governments.

The Court has acted in other ways to protect the states by showing greater deference to state court proceedings under the abstention doctrine, by restricting the authority of federal judges to entertain *habeas corpus* claims from state prisoners, by upholding various types of state economic regulation, and by loosening the constraints of some federal court orders.

The U.S. Supreme Court has returned to the field to umpire the constitutional game of federal-state power-balancing with rulings surprisingly favorable to the states; however, there has been no wholesale restoration of state powers or denigration of federal powers.

In summary, the U.S. Supreme Court has returned to the field to umpire the constitutional game of federal-state power-balancing with rulings surprisingly favorable to the states; however, there has been no wholesale restoration of state powers or denigration of federal powers, nor is the Court in a political position today to make the kind of swift "switch in time that saved nine" that it made in 1937. Instead, the Court has breathed new life into constitutional federalism through emerging doctrines pregnant with implications for future umpiring more supportive of state sovereignty. The cases conveying these doctrines, however, are of limited scope, uncertain precedent, and mixed motives and are supported only by 5-to-4 and 6-to-3 majorities. If only one justice in the majority

of most of these federalism cases—especially William Rehnquist, Sandra Day O'Connor, or Clarence Thomas—were to be replaced by a justice with the minority views expressed in these cases, the umpire might retire from the field again or, at best, oversee the game from the bleachers.

Much the same can be said of the panoply of congressional and presidential actions taken thus far in the 1990s. No substantial shift of power to the states has been executed, and the most oft-cited example of devolution, namely, "welfare reform," was driven as much or more by the political advantages of ending welfare as we knew it as by principled arguments for restoring federalism as we knew it. These baby steps toward devolution are potentially significant but currently limited because the debate over federalism is part of a larger debate over the very nature and future of American society. The United States is perhaps on the threshold of a paradigm shift comparable to those of the Civil War, Progressive, and New Deal–Great Society eras. Consequently, emerging forces favoring rebalancing necessarily collide with obstacles to restoration of state powers.

Forces Against Restoring State Powers

A significant obstacle to "devolution" is public opinion. Even though there is a generalized public preference for local and state performance of public functions, just as there is a generalized preference for a balanced federal budget, each particular "devolution" proposal, like each particular item slated for a budget cut, encounters opposition from particular beneficiaries anxious to maintain the status quo while being willing to urge devolution of someone else's programs. Even in welfare reform, for example, despite negative public attitudes toward welfare, half of the respondents to a survey by the Kaiser/Harvard Program (1995) supported granting more flexibility to states to experiment with welfare programs, but also agreed that the "federal government has to set guidelines when it gives money to states . . . in order to assure that the states will treat everyone fairly and do the right thing for poor people."

The devolution of any function or shift of any power to the states poses risks and uncertainties for the interests that benefit from the maintenance of federal control. Opposition is likely to stiffen, moreover, when proposals to shift powers to the states are linked to calls for policy reform, budget cuts, deficit reduction, and downsizing (Weaver 1996).

Devolution is also frustrated because, even though the Republican majority in the Congress has tended to express the most support for devolution, Republicans are often more committed to principles of individualism than of federalism. As U.S. House Speaker Newt Gingrich has expressed it:

> The last sixty years has seen so much centralization in Washington that at this point the best we can do is start by shifting power back to the state capitals. Power in fifty different cities is better than power centralized in one city.
>
> Yet our ultimate goal is to move power even beyond the state capitals. Many governors and county commissioners are deeply suspicious of state governments and would prefer bloc [sic] grants and programs that come straight to them. . . .
>
> However, much as I sympathize with both state and local governments, what we really want to do is to devolve power all the way out of government and back to working American families. . . . Republicans envision a decentralized America in which responsibility is returned to the individual (Gingrich 1995, pp. 104–105).

Principles of individualism and federalism frequently collide with each other because the promotion of individualism often requires constraints on state and local governments as well as the federal government. As a result, for example, on grounds of individual liberty, many Republicans as well as some Democrats support federal preemption of state authority to reregulate sectors of the economy deregulated by the Congress.

Many policy functions that enhance federal power and reduce state powers, such as civil rights, environmental protection, middle-class entitlements, and crime control, enjoy broad and deep public support.

Politically, the devolution agenda that was set forth by the Republicans encountered numerous obstacles that blocked enactment of nearly the entire agenda. Proposals to devolve various health and social welfare programs, for example, jeopardize the entitlement status of programs for both states and individuals. Many state officials have sought to main-

tain state entitlements to federal support in order to guarantee adequate and predictable federal aid while many congressional Republicans have sought to reduce expenditures. In turn, numerous advocacy and clientele groups have sought to maintain individual entitlements in order to prevent states from denying or reducing benefits to currently eligible citizens. Entitlement advocates have also expressed concern, for example, "that removing individual entitlement in the Medicaid program would lead states to concentrate resources on popular and powerful clienteles, such as the frail elderly in nursing homes" (Weaver 1996, p. 49).

Conflicts over funding formulas have also frustrated devolution. "Formula fights" are among the most vigorous in Congress, and they pit states and regions against each other. In essence, no state or region wants to be a net loser in devolution. States, however, have generally been united in seeking federal guarantees of increased funding during recessions, while many congressional Republicans have opposed such guarantees. Some devolution proposals have also pitted states against their local governments, as local officials seek to defend their prerogatives and shield their jurisdictions from negative fallouts. Devolution proposals have sparked vigorous debates as well, over maintenance-of-effort requirements, maintenance of federal standards, mandates, and accountability. In the end, many Republicans as well as Democrats are unwilling to let go of policy objectives that might be defeated by devolution to states having different policy objectives.

Additionally, many policy functions that enhance federal power and reduce state powers, such as civil rights, environmental protection, middle-class entitlements, and crime control, enjoy broad and deep public support. Furthermore, issues are often framed in ways that make it politically impossible to refuse federal action. How many members of Congress, for instance, could publicly oppose a federal Megan's Law? However strongly President Reagan wished to shrink federal power, he could hardly refuse to sign the bill supported by Mothers Against Drunk Drivers that made it a condition of federal highway aid that states increase the minimum drinking age to 21 in order to reduce teenage highway fatalities and clean up "blood borders." This political dynamic is currently reflected in President Clinton's proposal, thus far approved by the U.S. Senate, to establish—as a condition of federal highway aid—a national blood-alcohol standard of 0.08 percent for drunk driving, in contrast to the 0.10 standard in force in 33 states. Proponents of the proposed standard regard it as good public policy; many opponents argue that it intrudes upon the historic constitutional prerogatives of the states. Hence, the most viable candidates for devolution are powers and functions that do not enjoy strong public support as well as functions of a more administrative nature that are invisible to the general public.

Similarly, a number of federal policy functions are highly beneficial for members of Congress and serve to benefit the constituency interests of the federal government generally. Thus, for example, "in contrast to the bipartisan embrace of welfare-reform block grants, there has been deafening bipartisan disinterest in major devolution of infrastructure activities, such as highways, to the states, despite the existence of a strong performance rationale and incentives for state leadership of these activities" (Posner and Wrightson 1996, p. 107).

In addition, there continue to be strong incentives to use three key tools of coercive federalism: mandates, conditions of aid, and preemption (Kincaid 1993). Unfunded and underfunded mandates are especially tempting because they allow the Congress and the White House to claim credit for "feel good" policies and to respond to interest groups while "devolving" the costs of those policies to state and local governments. Although the Unfunded Mandates Reform Act appears to be having some limiting effects on the enactment of new unfunded mandates (National Governors' Association 1996), the act has many exemptions, its point of order can be overridden by a simple majority vote in either house of Congress, and it is no barrier to politically popular or compelling mandates such as the bipartisan support for increasing the federal minimum wage in 1996, which will cost

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state and local taxpayers about $1.3 billion during the next five years, according to the Congressional Budget Office. Furthermore, Republicans have proved to be no less eager than Democrats to mandate their policy preferences nationwide now that they are in power on Capitol Hill.

Conditions of aid remain one of the most open flanks for federal encroachments upon state powers and for federal accessions of powers wholly outside the Congress's constitutionally enumerated powers. The U.S. Supreme Court has upheld such conditions on the ground that federal aid is voluntarily accepted by the states (*South Dakota* v. *Dole* 1987), even though, as a practical political and fiscal matter, states cannot opt out of the large grant-in-aid programs, such as Medicaid and highways. In the case of highways, moreover, if a state were to decline federal highway aid in order to avoid compliance with objectionable conditions, the state's residents would, presumably, still be required to pay the federal motor fuels tax while deriving no benefit from it. Consequently, the large federal-aid programs like highways and Medicaid become vehicles for expanding federal power.

A major structural change in the federal system has been the shift in federal policymaking from places to persons and a reconceptualization of the federal union as one constituted by individuals, not sovereign states.

The single greatest devourer of state-local powers, however, is preemption, namely, federal displacement of state law under the supremacy clause of the U.S. Constitution (Article VI). More than 53 percent of all explicit preemption statutes enacted by the Congress since 1789 have been enacted only since 1969 (ACIR 1992). The new Republican majority in Congress, like previous Democratic majorities, has a healthy appetite for preemption (see, for example, Shenk 1997). Indeed, Republican efforts to preempt state product liability, food and drug labeling, Internet taxation, and medical malpractice laws, among others, have made a number of congressional Democrats ardent states' rights advocates.

Pressure in the federal system for preemption is enormous, primarily for economic reasons. For one, many businesses engaged in interstate commerce would rather be regulated by one 500-pound gorilla in Washington than by 50 monkeys on steroids. Second, deregulation of the economy has increased preemption so as to prohibit state regulators from rushing into regulatory vacuums created by federal withdrawal. Third, rising concern about international economic competition has spurred preemptions of state and local barriers to business competitiveness. For example, as Secretary of the Treasury Nicholas Brady said on introducing President George Bush's proposals to preempt certain state powers over interstate banking, something is seriously amiss when a bank in California can open a branch in Birmingham, England, but not in Birmingham, Alabama (ACIR 1992, p. 38). Fourth, foreign-trade agreements eliminating not only tariffs but also non-tariff barriers to free trade pose substantial, long-term preemption threats to a broad range of state and local tax, regulatory, and policy powers (Weiler 1994).

All of these mechanisms for expanding federal power also reflect a major structural change in the federal system that first occurred during the 1960s, namely, a shift in federal policymaking from places to persons and a reconceptualization of the federal union as one constituted by individuals, not sovereign states. This shift reflects a long-standing debate in American history that reached a flashpoint during the 1980s when President Reagan declared that "the Federal Government did not create the States; the States created the Federal Government." President Reagan's opponents countered along the lines of William H. Seward in 1850: "The States are not parties to the Constitution as States; it is the Constitution of the people of the United States." As Justice Harry A. Blackmun later put it: "Ours . . . is a federal republic, conceived on the principle of a supreme federal power and constituted first and foremost of citizens, not sovereign states" (*Coleman* v. *Thompson* 1991). This individualist view of the union is one reason why Justice O'Connor has sought to transform the Tenth Amendment from a guarantor of states' rights to a guarantor of individual rights.

Politically, the reorientation of federal policymaking from places to persons has been driven primarily by the U.S. Supreme Court's reapportionment decisions requiring "one person, one vote" electoral districts for the U.S. House and for state legislatures (*Reynolds* v. *Sims* 1964; *Wesberry* v. *Sanders* 1964). Reapportionment—coupled with other developments

during the 1960s, especially the rise of the national media and of party primaries—was fully implemented by 1972. The principal consequence for state powers was that reapportionment disconnected members of the U.S. House and, as a result, members of the Senate, too, from their historic electoral ties to state and local party organizations and thereby to elected state and local officials. The electoral incentives for members of Congress shifted from dependence on state and local party and government officials to dependence on national interest-group support and direct appeals to voters. Hence, the greatest federal encroachments upon state powers occurred not during the New Deal, when the federal government vastly expanded its power over the economy, but during and after the Great Society, when members of Congress had growing incentives to legislate directly for the interests of persons regardless of the effects of such legislation on places, namely, state and local governments. Virtually every empirical indicator of expanding federal power (for example, numbers of mandates, conditions of aid, preemptions, and federal court orders) shows unprecedented increases since 1969—increases that continued unabated through Democratic and Republican administrations and shifting balances of partisan power in the Congress (Kincaid 1993a & b).

A bellwether has been the Fair Labor Standards Act of 1938 (FLSA). The act was upheld in *United States* v. *Darby* (1941), in which the U.S. Supreme Court dismissed the Tenth Amendment as merely "a truism." However, the Congress specifically exempted state and local government employees from the FLSA, and *Darby* concerned only the FLSA's applicability to private employers. In 1968, though, the U.S. Supreme Court permitted the U.S. Department of Labor to apply the FLSA to a limited range of state and local institutions held to be enmeshed in interstate commerce (*Maryland* v. *Wirtz* 1968). In an unexpected decision eight years later, however, the Court struck down the application of the FLSA to state and local governments as a violation of the Tenth Amendment's protection of traditional state governmental functions and sovereignty (*National League of Cities* v. *Usery* 1976). A government that cannot determine the wages of its own employees cannot be said to be sovereign.

Nine years later, the Court reversed course again by overturning *National League of Cities* in *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985). The principal doctrinal argument was that the Court is obligated to protect individual rights, including the employment rights of state and local government employees, but not states' rights under the Tenth Amendment. Although the states obtained some congressional relief, though not exemption, from *Garcia*, the "political safeguards" of state powers in the federal system that had long protected state sovereignty from the FLSA had clearly deteriorated by the 1970s, such that the Court's *National League of Cities* ruling was widely viewed as an anomaly that proved, indeed, to be short-lived (Kincaid 1993a). It was not happenstance, therefore, that seven of the twelve UMRA-eligible mandates identified by the Congressional Budget Office in 1996 and early 1997 concerned wage impacts on state and local government employees.

Still another obstacle to devolution is the set of fears often expressed about the possible consequences of devolution, especially destructive interstate competition, limited state capacities to assume responsibility for devolved functions, accountability for policy and expenditure outcomes of devolved programs, and greater disparities of service provision and quality among jurisdictions.

It is difficult to predict what, if any, interjurisdictional competition might be sparked by devolution. It is also difficult to predict outcomes, because states and localities are quite different polities and communities today than they were in the 1930s and even the 1960s. So is the federal government.

The Question of Interstate Competition

Devolution talk has already generated doomsday fears of destructive interstate competition (for example, Donahue 1997). Such fears are exaggerated, for several reasons.

For one, little "devolution" has occurred thus far, and what devolution can be said to have occurred is

too new to permit proper assessment; hence, doomsday predictions are premature. It is difficult to predict what, if any, interjurisdictional competition might be sparked by devolution and whether such competition would be constructive or destructive in different functional areas and under different degrees of devolution. It is also difficult to predict outcomes, because devolution would not entail a return to pre-federalized circumstances. States and localities are quite different polities and communities today than they were in the 1930s and even the 1960s. So is the federal government, and it is difficult to argue today that the federal government is necessarily the superior repository of policy wisdom and political virtue. Furthermore, with modern communications and the existence of numerous public and private institutions dedicated to "watchdog" tasks and to diffusing policy ideas, any interstate competition stimulated by devolution has a greater chance of yielding positive outcomes—such as experimentation in state "laboratories of democracy," diffusion of innovations, and efficiency enhancement—than at any time in our federal history.

Second, even "welfare reform," the most oft-cited example of "devolution," provides no conclusive evidence, despite much research, that the states have been, are currently, or will become engaged in a race to the bottom over welfare benefits (see, for example, Gresenz 1997; Schram, Nitz, and Krueger 1998). Thus far, reports Donna E. Shalala, Secretary of the U.S. Department of Health and Human Services, "There has been no race to the bottom in state welfare spending" (quoted in Vobejda 1998). Too many other factors influence state welfare decision-making, and the relative positions of most high-benefit and most low-benefit states have not changed over the years, even though the real-dollar value of AFDC has declined in all states. The prospects for such competition are also constrained, first, by the authority of high-benefit states to give migrants during their first year in-state the lower benefits they received in their previous state of residence, and second, by the five-year limit on TANF benefits, although because states can lower this limit, there may be some competitive pressure to do so. Furthermore, Social Security for senior citizens, Medicare, Medicaid (for the most part), and a range of other welfare-type programs were not included in the "welfare reform" measures. The lion's share of redistributive spending still lies with the federal government, thus alleviating disparities that might otherwise stem from interstate competition. It is possible that some states might emphasize dead-end jobs so as not to attract out-of-state TANF recipients seeking better employment, but such a strategy would be counterproductive to a state's self-interest. If TANF beneficiaries migrate to states offering better employment opportunities, such migration would be positive.

Similarly, no systematic evidence has been seen of a race to the bottom in environmental standards (Revesz 1997), although certain Rustbelt states appear to skimp on environmental protection standards that increase industrial production costs. A race to the bottom in environmental protection is also unlikely even with further devolution, because environmental interest groups have clout in most states and because environmental protection is increasingly an economic asset for many states. More generally, the shift toward a service economy places a greater value on quality-of-life assets, such as environmental protection, thus dampening competitive pressures that might otherwise push standards downward and fueling competitive pressures that might push standards upward. Consequently, devolution in the context of a service economy rather than an urban-industrial economy is less likely to trigger environmentally destructive interstate competition.

Devolution could stimulate some healthy intergovernmental competition between the states and the federal government, thus possibly enriching policymaking with the best ideas of two worlds.

Third, devolution policies can be designed to minimize destructive interstate competition, to the extent it might occur, as reflected in some of TANF's provisions. Mandates, conditions of aid, performance standards, schedules of fines for falling short of performance standards or for creating negative externalities, and other mechanisms could be fashioned for this purpose.

Fourth, zero-sum competition for business facilities through state and local subsidies, tax abatements, and so on is not likely to be accelerated much, if at all, even with substantial devolution. This form of competition is already common and is being driven more by concerns about international economic competition and by state

needs to generate more revenue through economic development so as to limit or avoid tax increases.

Fifth, fears of such zero-sum competition usually overlook the negative consequences that could emerge from suppression of such competition, particularly by the federal government. States would find new ways to compete and, under conditions of substantial devolution, such competition could take place primarily in fields of devolved domestic responsibility, such as welfare. If states cannot compete for business through subsidies (however wasteful or ill-advised such subsidies), they may feel compelled to compete through general tax and expenditure reductions and through reductions aimed at unpopular programs and vulnerable populations. Suppression of such competition would also increase state and local pressure on the federal government to redistribute resources to meet the various competitive needs and interests of the states. The unmediated competition of the interstate marketplace would be replaced by mediated competition within the Congress and executive agencies. The proposition that tax resources can be allocated more efficiently through political competition among the states within the Congress and the federal executive branch rather than through fiscal competition within the interstate marketplace is not credible (Kenyon and Kincaid 1991).

Sixth, given the huge number and range of federal mandates, conditions of aid, preemptions, individual rights protections, court orders, and the like, state and local governments have less room within which to compete and fewer tools with which to compete against each other. Economic deregulation coupled with federal preemptions of state-local regulatory authority is rapidly depriving states of viable tools for regulatory competition. As such, regulatory competition might become more localized because citizens are likely to cling tightly to local regulatory powers, such as zoning, that protect property values and lifestyle choices. Thus, even with further devolution of functional responsibilities, massive federal constraints on interstate competition will continue.

Seventh, devolution could also stimulate some healthy intergovernmental competition between the states and the federal government, thus possibly enriching policymaking with the best ideas of two worlds.

The Question of State Capability

The question of state capability can be addressed both empirically and normatively. One can determine empirically the fiscal and administrative capacities of states to assume responsibilities for devolved functions under maintenance-of-effort assumptions. But the short answer to the question will be: Some states can and some cannot, and some will do a better job than others. Substantial devolution may result in greater diversity and heterogeneity across the states.

The normative question of state capability is whether states should be held to maintenance-of-effort requirements and other federal rules governing policy objectives. True devolution in a federal democracy would leave such decisions to the citizens of each state. Whether a state has the capability to assume responsibility for any devolved function, therefore, depends substantially on whether the state's citizens wish to give their state that capability. Here, the normative question intersects with the empirical question, and causes concern among opponents or skeptics of devolution.

The public's general disaffection from government is being vented within states and localities, which are more accessible to direct citizen activism. Much of this activism might be said to reflect the revenge of the "silent majority"—the public voice that President Nixon sought to activate against what he regarded as a strident liberal minority. The silent majority struck with force in 1978 through voter approval of Proposition 13 in California, which set off a wave of citizen efforts to restrain state taxes and expenditures nationwide. Tax and expenditure limits have found their way into more and more state constitutions along with other restraints on state and local governments, including widespread public support for term limits. These limits do not necessarily mean that citizens would be unwilling to allow their states to assume responsibilities for devolved functions, but the limits will constrain state capacities to do so if they prove workable.

Another significant feature of the revenge of the silent majority is its almost single-minded focus on majoritarian rights—sometimes, though not always, at the expense of minority rights. Tax and expenditure limits reflect efforts to protect taxpaying majorities against "big government." The victims' rights movement was one of the first non-fiscal reflections of the desire of the silent majority to protect its rights in the face of then-increasing rights protections for criminals. State and federal Megan's Laws are the latest manifestation of this desire to protect the majoritarian community against what it regards as previously overprotected predators. Similarly, growing opposition to affirmative action, to equal

protection for non-heterosexuals, and the like are efforts to protect majority rights. This revenge of the silent majority does not have much of a civic dimension. Instead, the attitude seems to be: What's in it for me?

The silent majority is likely to be receptive to devolution because it would shift powers and functions from a largely out-of-reach government to more within-reach governments where devolved powers and functions could be constrained by majoritarian rule and directed more toward the interests of the majorities within states and localities. In this respect, devolution could "empower" citizens and enhance majoritarian democracy federally rather than mono-

Devolution would shift powers and functions from a largely out-of-reach government to more within-reach governments, where they could be directed more toward the interests of the majorities. Whether such an outcome would be positive or negative depends on one's point of view.

lithically. Whether such an outcome would be positive or negative depends on one's point of view.

Being largely ignored in the devolution debate is what one scholar has called the challenge "to find ways of restoring the sense of accountability and belonging offered by smaller, more human-scale institutions, institutions that can serve as schools of citizenship while retaining the benefits of national government. This is precisely the promise of federalism" (McClay 1996, p. 24).

Of course, more technical questions of state capability arise as well. Devolution will require, for example, continued intergovernmental cooperation, especially as details of separating and sharing responsibilities within specific programs, such as TANF, are worked out under statutory rules. Significant federal regulations are likely to accompany most devolutions, and the states are likely to remain vulnerable to new policies and rules enacted by the Congress or promulgated by federal agencies with little or no advance warning. States, therefore, will need to maintain an anticipatory and defensive stance. State legislatures will also face control and oversight issues, such as assignments of devolution implementation issues to appropriate legislative committees and, more important, decisions about how much authority to embed in state law and how much authority to delegate to the executive branch to implement and alter programs flexibly, pursuant to federal law (Olson 1996). State legislators are especially concerned that the Congress will bypass the state legislatures and state constitutions by devolving control over spending and programmatic implementation to governors. As noted earlier, state legislators succeeded in convincing the Congress to include the Brown Amendment in the 1996 "welfare-reform" law (Section 901), which requires that new block grant funds be appropriated by the state legislature, but it is by no means certain that the Brown Amendment will become a basic principle of devolution.

The logic and fiscal imperatives of devolution, coupled with deregulation and privatization, will require states to work more closely with local governments, nonprofit institutions, civic organizations, businesses, and other states as well (Feustel 1997). Devolution may also have side effects on state and local governments, such as increased lobbying in state capitols, county courthouses, and city halls, as these governments assume more policy and fiscal responsibility for public functions. This could, in turn, increase voter pressure for lobbying and campaign-finance reform as well as stricter ethics laws (Feustel 1997, p. 25).

Conclusion

To date, there is no evidence of wholesale devolution, although there is a discernible and, until recently, unanticipated nudging toward restoring some state powers and rebalancing federal-state relations in the federal system. It is difficult to predict the outcome if this nudge should become a surge, because such rebalancing will occur within historical circumstances quite different from those that prevailed at the outset of the federal government's twentieth-century power expansion. There is no a priori reason, therefore, to expect that substantial devolution, should it ever occur, would be more malignant than benign.

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Discussion

David R. Beam, Associate Professor and Director of the Graduate Program in Public Administration, Illinois Institute of Technology

First, let me say that I agree with much of John Kincaid's analysis. The paper is a careful sifting of important recent intergovernmental developments. I certainly agree with his finding that we now have as many centralizing influences emerging as decentralizing influences.

However, I was asked by moderator George Latimer to consider areas of disagreement with Kincaid's paper. One of the first I noticed was his reference to the Unfunded Mandates Reform Act (UMRA) as a leading idea in the Contract with America. Certainly this was true, and in fact it was one of the few ideas from that document to be adopted. But as someone involved with the issue for a long time, I am troubled to hear it described in this fashion. Similar legislation very nearly was adopted by the *preceding* Congress, with the strongest support from state and local organizations for any issue since general revenue-sharing. And Newt Gingrich made it clear in his book that he became familiar with this issue only recently. In fact, the desire in the Congress to enact this UMRA legislation so quickly was fueled by the need to get the governors on board for the balanced budget amendment, not because of any deep commitment to its principle.

Another point the paper made that troubled me was about trust in government. It is clear that the current level of trust in the federal government is low, but I do not know if trust in state and local governments should be viewed as "high". The newspaper brought to my hotel room today, *USA Today*, described a poll that tried to address this question. I was pleased to see that local fire departments are trusted: 78 percent of the population say they trust their local fire department "a lot." But city and local governments are trusted by only 14 percent of the population, while state governments are trusted by 9 percent and the federal government by 6 percent. These figures indicate very little trust for government at any level.

A third point that troubled me about the paper was the suggestion that suburbanization could be viewed as an important reason for devolution. Suburbanization is a post-World War II phenomenon for the most part, and it has gone on continuously since that time. Certainly the proportions of population and jobs that have been suburbanized have increased. But during that same period, the federal government has also grown rapidly. To try to explain devolution on the basis of suburban growth strikes me as inadequate. Overall, in fact, I do not think Kincaid's paper was able to come to terms with adequate explanations for devolution, and certainly I would not point to surburbanization as a major factor.

I am in closer agreement on many other points in the paper. First, from my own perspective, I just celebrated my 55th birthday, and I have seen interest in federalism reform come and go four times during my lifetime. My perception is that devolution is an issue that periodically appears, catches fire for a short time, then burns itself out and is gone. Those of us who are here today may keep up a continuing interest in intergovernmental reform and federalism issues, but on the whole they are not at the top of the general political agenda very often.

The four instances occurred once under Eisenhower, once under Nixon, once under Reagan, and now; the current burst of interest began with the Republican Congress elected in 1994. None of the earlier episodes lasted longer than six years, and the period in which each accomplished its chief legislative objectives was between one and three years. The active period in Nixon's time was 1972 through 1974, although he had made devolution a central theme in his campaign in 1969; Reagan's active period occurred during his first year, 1981. While the major theme in Reagan's first State of the Union address in 1982 was the issue of federalism reform, his trade-off and turnback proposal was never seriously considered by the Congress, in part because it was so contrary to a proposal on the same issue that the governors were advancing.

Each of these campaigns fell dramatically short of its stated objectives. Some legislative accomplishments resulted, but they never added up to the sweeping reforms their advocates had hoped for. I agree with the view of Plunkitt of Tammany Hall that reformers are only morning glories, and, given the time frame of earlier campaigns, the clock may already have run out on the current wave of reform.

Furthermore, not only has each burst of federalism reform been brief, but each has been followed by or has even coincided with significant elements of centralization. Over the last four decades, a shift has occurred from more gentle forms of federal intervention through federal grants that could rightly be viewed as cooperative measures, to a form of regula-

tory federalism that employs far more coercive measures, such as unfunded mandates. Not only have federal involvements increased, but their nature has become more objectionable to many state and local officials.

Not only has each burst of federalism reform been brief, but each has been followed by or has even coincided with significant elements of centralization.

So the lesson of history is clear: Political leaders never really get religion as a result of their brief conversions to the faith of federalism reform. Two ideals are implicit here, and I would like to distinguish between them: first, the constitutional ideal of a limited national government, and second, the intergovernmental reform ideal of an effectively operating federal partnership. Neither one ever holds adherents for long. Instead, political leaders quickly return to their pattern of making new promises to voters and organized interests and sponsoring and voting for new, intergovernmentally operated programs.

Categorical grants were the earliest and the most popular: Kincaid notes that 618 were funded in fiscal year 1995. One could also consider the growth in mandates in recent years. In the middle of President Reagan's crusade for a new federalism, just as recently, the widely held belief was that we were rolling back the Great Society and the New Deal. But, by the end of the 1980s we had more programs, more regulations, and less funding, as I in fact had predicted at the beginning of the decade. Categorical grants grew from 534 to 543. There were 27 major new mandates, while grant outlays actually fell by roughly 7 percent.

Overall, the longer-run political forces for federal intervention consistently dominated the short-run but high-profile forces for containment of the federal government this last time around. Some important, lasting changes did emerge in several policy arenas during the Reagan era, but alongside movement in other areas toward increased centralization.

So what about this time? Is there any reason to believe it will be different? Kincaid hesitates to offer a clear forecast on that issue. He suggests a number of reasons why it could be different, though. I thought the most provocative was his claim that we are now in the midst of a worldwide trend toward decentralization across all political, social, economic, and cultural sectors, that we may be on the eve of a paradigm shift comparable to those of the Civil War, the New Deal, or the Great Society eras. If that is true, I do not want to miss it!

Kincaid's strong statement struck me in part because, looking through earlier accounts, I saw Morton Grodzin's explanation of why the Kestnbaum Commission of the 1950s had failed in its effort to return power to the states. One reason he gave was the countervailing tendency of all power to flow to central institutions, not only in the United States but all over the world; and not only in government but also in religious, business, and labor organizations. To believe these tendencies can easily be reversed is to ignore the power of great historical forces, he argued.

My own expectation regarding devolution is that this time is *not* so different, and our present infatuation with the idea will probably fade away. If it does not, the main reason would be that the Supreme Court has for the first time come down clearly on the side of the advocates of devolution, a striking development. But I cannot believe that the cases seen thus far can do more than snip away at the edges of the intergovernmental regulatory apparatus. And there are other acceptable ways of achieving the same federal objectives. One view is that the Congress has finally acquired the nerve to pass legislation it never would have before, and it has been slapped down for doing it. In a sense the cases reflect congressional assertiveness, not judicial restraint.

Another important point is that not very much in economic, political, or administrative theory rationalizes or justifies the devolutionary proposals we have seen recently. Let me contrast that with many prior intergovernmental reform proposals that were well thought out and, as a result, commanded significant bipartisan support. They had been developed over a long period of time, and whether or not they were good ideas, many people at the time thought they were, and this was what pushed them through the legislative process. Nixon's revenue-sharing proposals traced their origins back to Walter Heller and Joseph Pechman in the Johnson Administration. Community development and manpower training block grants had support from people who worked in those program areas. Even Nixon's failed family assistance plan in the days of talk of nationalizing welfare—these bills were all products of lengthy consideration in their relevant public policy communities.

In contrast, take welfare reform, the leading action to date of the current devolution drive. For decades the conventional view among policymakers has been that redistributive functions are best performed by central governments. Paul Peterson, in one of the major recent books on federalism, argues that moving income maintenance to the state level, which the Republicans were trying to do, would be a mistake because it would give the states responsibilities for which they are ill-suited. His view, which I believe to be a common one, is that redistributive functions are better handled at the national level and developmental functions at the state and local levels. Peterson goes further, predicting that any policy that dramatically shifts the responsibility for welfare downward to states and cities will prove unworkable and short-lived.

John Donahue, who is here with us today, has also written that "the devolution of antipoverty policy will be seen eventually as a mistake. If welfare policy is permanently turned over to the states, I believe the well-being of the most marginal members of society will be adversely affected in serious ways. When the first serious recession arrives, state-based welfare policies will reveal their built-in bias toward undue harshness, and antipoverty programs will spiral toward the furthest degree of austerity that citizen consciences will permit."

Some features of the welfare reform act did reflect the findings of research, but the implications of closing off the AFDC matching grant program and turning it into a block grant have not been explored adequately. Writing in the *National Tax Journal*, the late Steven Gold commented that the abandonment of open-ended matching grants is inconsistent with the view that such grants are needed to stimulate the production of services that produce external benefits. He noted that people seem no longer to accept the idea that there are production externalities—for example, that poverty breeds crime and that welfare tends to reduce crime. Still another important implication of adopting block grants for welfare programs is that the amount of financial aid provided to states will not automatically increase in response to a recession, as it did in the past.

The most clearly stated rationale for the present welfare policy direction, in my view, was articulated by James Q. Wilson. In a recent article Wilson argued that we know so little about the tangle of pathologies that produce welfare dependency that we may as well turn welfare over to the state and local governments. His is not a strong argument based on theory. He calls it an argument based on humility. We do not know what to do at the federal level, so we may as well turn it over to the states and see if they can do better than we have to date.

Let me close with an observation about one unfortunate difference affecting the current devolutionary drive—the high level of distrust, and even fear, of the federal government. Similar levels of distrust emerged during the Reagan era, and both then and now the drive for devolution was merely one component in a host of essentially antigovernment measures. These included the desire for tax, expenditure, and deficit cuts, all simultaneously; also for deregulation, privatization, less bureaucracy, less reliance on experts, and more faith in the common man. We are in a period in which Jeffersonian values are rising paramount over our basically Hamiltonian government and way of life. The main problem, in my mind, is that nothing in this revolutionary and often very cynical spirit assures that we will in fact move any closer to the historical ideal of federalism.

For decades the conventional view among policymakers has been that redistributive functions are best performed at the national level, developmental functions at the state and local levels.

Our founders did not seek a weak national government, but rather a limited national government that would be able to operate effectively in a restricted sphere. We must now redefine that sphere—but I see no signs that we are trying to do so in a meaningful fashion. President Clinton is backing away from areas I would view as high on the list of real national concerns, such as health care financing and delivery, which probably require more federal intervention and indeed have already required more federal intervention since the defeat of his earlier proposal. Instead, he is focusing on law enforcement and education, traditionally among the most local of functions.

Nor is there any reason to believe much can be done to renew the confidence in government of the voters who are coming to dominate the electorate. I certainly see this in my students. Vietnam, Watergate,

a long period of economic stagnation, and a host of other scandals and disappointments have left permanent marks on our political landscape.

Conversely, it was the effort of attacking the Great Depression, the mobilization for and successful prosecution of the Second World War, and the long period of postwar prosperity that created an environment in which new federal initiatives were sought and welcomed. The era, not so much of big government but of popular confidence in government, probably really is over. Certainly Washington has lost much of the moral authority that, starting in the 1950s, accounted for its triumph over the traditional defenders of states' rights.

The condition we face, then, is not so much one where we have granted increased power to the states through some process of devolution. State governments do have greatly improved capabilities now over the 1960s, when the great federal growth began. And certainly the states have been leaders in a number of policy areas since the early 1980s. But they now look strong and trustworthy largely because the federal government appears to so many to be scandal-ridden, ineffective, wasteful, and remote. I believe this view is widespread. And, unlike our interest in devolution, this impression is likely to be with us for years to come.

Discussion

David T. Ellwood, Lucius N. Littauer Professor of Political Economy, John F. Kennedy School of Government, Harvard University

I quite enjoyed John Kincaid's thoughtful and comprehensive paper. It seems an excellent place to begin any discussion of devolution. As requested by our hosts, I propose to amplify a few points and then focus on some larger questions raised by the paper.

The first part of the paper seeks to understand the origins of devolution this time around. Kincaid properly points to the long and rich constitutional debate surrounding issues of federalism and the many battles fought on this ground in both the Congress and the courts. He notes that there have been some relevant court fights this time around, and constitutional grounds are occasionally cited by congressional proponents of devolution. But he rightly discounts these factors as the primary forces motivating the current debate.

A second alternative is that devolution is the result of shifting political power. The Republican Congress coupled with wins by Republican governors has led to control by a group with different political and philosophical orientations, which led to a push toward devolution. Or more precisely, perhaps devolution fit the politics of the moment. By one framing, the move to devolution was based not on a carefully drawn conclusion that state governments would do a better job, but rather on a particular political environment.

Welfare, as Kincaid and others have noted, seems to be the only domain where a really dramatic move toward devolution has actually occurred. And those who might argue that devolution in this case was as much a result of shifting political sands as anything can make a good case. If you examine the recent legislative history, you find that in the course of two years the Republicans went through three welfare bills, each of which was widely supported within the party. The first bill stipulated two-year limits and workfare requirements within the current structure. It was followed by an unbelievably restrictive "we are going to regulate every aspect of welfare recipients' lives as well as the states that administer them" bill, a kind of conservative micro-management bill. This was followed by a pure devolution bill, relinquishing all decisions to the states. The final bill was an awkward mixture of all three. The bill is in many ways a classic legislative product, but it is very difficult to make the case that this bill emerged from a carefully constructed and fully evolved view of devolution. One bill along the way did have some of those characteristics, but it failed to meet other objectives and was discarded.

Yet for those who would deny that devolution in welfare had an important basis in frustration with federal controls and a belief that states could do a better job, let me recount one anecdote. Immediately after the election of the 1994 Congress, when the President was trying desperately to get a foothold on the welfare issue, he called a special meeting at Blair House, the building across the street from the White House, and invited governors, members of Congress, and the like. Those of us in the Administration were terrified about this meeting because the President, when surrounded by governors, tended to go into an

extreme devolution mode. And indeed, the first part of the meeting went precisely as anticipated, even though we had tried to prepare the President by emphasizing the dangers of recessions, showing why matching grants make a difference, and so on. Tommy Thompson, governor of Wisconsin, aided quite effectively by the governor of Michigan, made a compelling case saying, "Look, the states have been doing all the interesting innovation lately. You guys have had 60 years and basically have made a mess of things. Give us the ball." You could see all the heads nodding, including the President's, as Thompson spoke. His arguments were basically true: Any recent innovation in welfare has been at the state level.

Then we turned to the second topic, child support enforcement, an equally important part of welfare reform that never gets any public attention. Some of us in the Administration wanted more national control, more standards in this area, as interstate issues are enormous in child support enforcement: Over one-third of cases are interstate cases. We were braced for the next barrage, where this issue too would push toward devolution. To our astonishment, Tommy Thompson spoke passionately and effectively about why federal standards were absolutely essential in this area. He talked about how we needed more mandates on states because otherwise they could not reach these deadbeat dads, and how this was a huge problem for America. It was a well-reasoned and thoughtful argument against devolution in this area. And in fact the final welfare bill ended up including virtually all of the Clinton Administration's child support enforcement measures in it. It was clearly a centralization of these regulations, more than any of us had expected.

Let me turn to the question of whether this cycle of devolution is real or not. I agree with the general thrust of Kincaid's paper, which seems to say that in most policy areas it is not very real. My first point is that the paper properly assesses the legislative intent, which was that the devolution not be entirely real. In the welfare reform bill, the Congress did give the states the opportunity to pursue various programs in whatever way they see fit, but the Congress also wanted work requirements, time limits, and so forth, in part because that is what the public really wanted out of welfare reform. The public did not care very much about the state versus federal question—it has always hated the federal government more than the states—but it did want the bill to be about work. So the Congress said, "Listen, we are going to give welfare policy to the states, but we are going to include work requirements and a few other goodies for various factions in the political parties."

So the goal seemed to be partial devolution. Yet when you look at the bill, in fact it is almost a pure devolution bill, because any restrictions are in fact so loose that any clever state can figure out ways around them. Let me give you a couple of examples. The bill includes work requirements, but they are written in the following way. A state must have a certain fraction of the welfare caseload working or the caseload could have been reduced by an equivalent amount. Let me explain: One choice is hard, the other is easy; one is expensive, the other is cheap. And what does "caseload" mean anyway? A state can redefine completely the population it serves: It does not need to have the same group of people on welfare. What is the difference between an old caseload and a new caseload? Or perhaps you can now serve, using the very few resources available, only the working poor—in which case they are all working.

Much of the devolution literature misses what is now the central challenge in social policy, that is, that we as a society want both the advantages of federal rule and some of the advantages of state rule.

This is the result of a process whereby the Congress drafts a bill under an old concept, in this case of the welfare population, while simultaneously changing all the old rules. Many states are operating as if Temporary Assistance to Needy Families (TANF) kept the same program in place but allowed a bit more flexibility. In fact, TANF allows states to do anything they want. Over the long run, I think it will be much more interesting to see the results of TANF than at present. But let us be clear. TANF replaced the AFDC program, which required $13 billion in expenditures at the federal level: a tiny, trivial program. Given all the current excitement about the changing nature of government, TANF does not amount to much, even if it were an example of pure devolution.

That said, I do want to take issue with whether or not we should be worried about the effect TANF may

Table 1
Poverty Rates and Median Household Income in 1993, and State Contributions per Poor Child for AFDC/JOBS in FY 1994
Selected States

State	Poverty Rate among Children Ages 5 to 17 (1993)	Median Household Income (1993)	Approximate Annual State Contributions per Poor Child in FY 1994 for AFDC and Related Employment and Training (JOBS)[a]
Arkansas	23.3%	$24,018	$ 164
California	24.1%	$34,129	$1,759
Connecticut	15.4%	$42,105	$1,815
Florida	21.8%	$28,230	$ 635
Mississippi	31.2%	$22,952	$ 110
Wisconsin	14.2%	$32,201	$1,170

[a]Using 1993 Census estimates of poor children ages 5 to 17 multiplied by 1.45 to account for children ages 0 to 4. Includes administration and emergency assistance. Excludes IV-A child care.
Source: U.S. Bureau of the Census, Internet Table P93-00; Administration for Children and Families, Internet table.

have. TANF is ambiguous and it should be. Kincaid's paper, along with much of the devolution literature, misses what I think is the central challenge now in social policy, that is, that we as a society want both the advantages of federal rule and some of the advantages of state rule. For many programs, this choice is easy. No one has suggested sending Social Security to the states: It is a pure rule-based, national system. And almost no one has suggested the federal government take over child welfare protective services, because clearly that is a local issue and a developmental program. The problem is with the services in the intermediate area.

In Tables 1 and 2, I present a simplified and much less sophisticated version of what Bob Tannenwald does in his paper. Table 1 looks at the poverty rate among children in six representative states; you can see that it varies from 15 percent in Connecticut and 14 percent in Wisconsin to 31 percent in Mississippi. That gives us a measure of need. Median household income also shows approximately a two-to-one ratio between these states, but highly inversely correlated with this need. And when we look at what these states spent on low-income children, keeping in mind the strong inducement from the federal government for poorer states to spend more, we find that Mississippi spent $110 per year per poor child, while states like Connecticut spent nearly $2,000 per poor child. This disparity suggests that states really do have very different views of their role as welfare providers as well as differing capacities to provide relief to poor children. That would seem to argue for a federal role.

On the other hand, why do we want states involved in welfare provision? Why not just make it a purely federal program? For a long time, we thought that welfare was about redistribution and that the role of the federal government in this arena was to determine eligibility and to write checks. Welfare reform implied that this was precisely the wrong business for the federal government to be in. Rather, we ought to help people help themselves, that is, run a welfare-to-work business. But the federal government is not very good at that type of developmental program. As a result, we are now in a somewhat awkward position. On the one hand, the arguments for the redistributive fiscal side of the federal role are very powerful, but the arguments for state innovation and the like are powerful too. A gap remains, certainly, between what now happens and what really needs to happen at the state and local levels, involving not only questions about adaptability but also about innovation. But the early results of welfare reform show that it has already generated a great deal of innovation.

The real challenge, in my view, is the mixed plans that try to combine federal and state involvement in a particular policy arena. If the federal government simply gives the states money and says spend it any way you want, but we would like you to spend it on poor folks, there is no reason to believe that the distribution of state spending will be any different from the way states spent their previous dollars. This is shown in the highly variable data in the third column of the table on child poverty. When the federal government sees that some states are not

spending this money on the poor, it is likely to try to force states to spend it in ways the federal government prefers.

Once the federal government starts the process of trying to direct precisely for whom money is to be spent, soon it is in the business of trying to dictate how it is spent. And the states are in the business of trying to be clever and not spend it the way the federal government wanted. If you look at the Medicaid program, the real innovations by states in recent years have been in finding new ways to match the unmatchable: that is, in finding something you are doing anyway and matching it. The states have a strong incentive to "innovate" around whatever financial restrictions the federal government attempts to place on them. A tension inevitably develops and this is why I think block grants do not work very well in the long run. Kincaid's paper begins with a very clever categorization of the different strategies for devolution; the mixed strategies are the most interesting and difficult cases.

Let me say one final thing about whether we should be nervous about TANF. Look at Table 2. Why should the federal government be involved in social policy at all at this stage? Let's turn the question around. If the best argument for federal involvement you can come up with is equalization of fiscal needs and some desire for uniformity across states, then you would expect that the poor states would benefit more than the rich states from federal involvement. But Table 2 shows that by freezing in place the existing payments, TANF is giving vastly more money to the rich states than to the poor states. Indeed, we are probably taking tax revenue out of Mississippi to give to Connecticut as part of this devolution. This does not strike me as a particularly stable or logical outcome in the long term, although it is easy to see how it came about politically. Couple that unstable outcome with the possibility of a recession, and you have good reason to be nervous about the future impact of TANF. When things get tough, states inevitably are going to have to start cutting benefits or taking other measures to cut costs. Before long, I think we will see that, for example, state A will say, Look, we are going to do things right in our welfare reform: We will have training, child care, and so on. And state B will say, You know, we want to do those things too: Here's a ticket to state A. I think that is a real danger that must be faced.

Table 2
TANF Grants per Poor Child
Selected States

State	Median Household Income (1993)	Approximate TANF Dollars per Poor Child per Year in FY 1997[a]
Arkansas	$24,018	$ 360
California	$34,129	$1,850
Connecticut	$42,105	$2,150
Florida	$28,230	$ 775
Mississippi	$22,952	$ 350
Wisconsin	$32,201	$1,550

[a]Using 1993 Census estimates of poor children ages 5 to 17 multiplied by 1.45 to account for children ages 0 to 4.

Source: U.S. Bureau of the Census, Internet Table P93-00; Administration for Children and Families, Internet table.

We are now seeing a period of real innovation, because states do not have money crunch problems. But when the welfare caseload comes back up again during a recession, the danger is very real that the states will start cutting benefits.

That said, we are now seeing a period of real innovation, because states do not have money crunch problems. The welfare caseload is coming down in a number of states, and they are redeploying their resources and moving them elsewhere. But when that caseload comes back up again during a recession, the danger is very real that states will not find the new money necessary to support their new recipients and instead will start cutting benefits.

Let me conclude by saying I thought Kincaid wrote a very provocative and helpful paper, making the point that precisely because TANF is ambiguous, we should be careful about calling it devolution. It is a mixed strategy that is not very well formulated. That makes it a challenge for those of us who are looking for practical solutions to devolution in the future.

Discussion

William F. Fox, Professor of Economics and Director of the Center for Business and Economic Research, College of Business Administration, University of Tennessee at Knoxville

Like David Beam, I found this to be a really fascinating paper. John Kincaid did a wonderful job of summarizing so much information, and I learned a great deal from reading it.

Kincaid concludes in his paper that what we see now is a nudge toward rebalancing federal and state relationships, but certainly no wholesale devolution. And when welfare becomes the prime example we can name of devolution, it is easy to agree with his conclusion. My office was involved with the state of Tennessee on issues of both Medicaid reform and welfare reform. The waiver processes the states had to go through and the tight constraints that remain on states do not provide much flexibility. My office continues to work with both state agencies there, putting together analytical summaries of new requirements from the federal agencies. In this context, it is awfully hard to conclude that much movement toward devolution is occurring.

Kincaid notes that devolution is either taking place or being discussed by governments around the world, and he gives three reasons for that trend. First are the important ethnic differences to be found within countries. He singles out the East European countries as prime examples of ethnically driven devolution. Second, escalating social welfare costs drive devolution in other countries. And third is the growing belief that regional or local governments can provide services more efficiently. Kincaid uses each of these reasons to explain why devolution is taking place in particular countries. It seems to me that all three reasons apply in the United States, so why do we have so little devolution in fact occurring here? Why can Kincaid give as many explanations for devolution not happening as for it happening? As a bit of a cynic, I was led to the conclusion that any level of government that has power is awfully unwilling to yield it to another level of government.

Outside the United States, in Russia, for example, since the reform a good deal of power has landed at the state level rather than the national or local level. And the biggest opposition to getting devolution down to the local level in Russia has been the state governments, which are unwilling to cede any of their authority to the local governments. For example, legislation pertaining to local governments just cannot get through the Federation Council, which is composed of the governors of each of the 89 regions. Similarly, some effort is also being made to try to recentralize power, and the states are the biggest opposition there. I think we are simply seeing the same kind of unwillingness to yield power here in the United States.

Devolution is difficult to achieve in the United States because the federal government has such productive revenue sources that it can generate more revenue than it needs to deliver those services it would be most efficient at delivering.

It seems to me, looking at this from a fiscal perspective, that devolution is difficult to achieve in the United States because the federal government has such productive revenue sources that it can generate more revenue than it needs to deliver those services it would be most efficient at delivering. That extra revenue gives the federal government control that transcends the limits it ought to observe. My major concern about how devolution may progress arises from the inability of state and local governments to control their own revenue sources, particularly as the U.S. and the world economies become more interstate and more international. The most recent example of this is electronic commerce. It is increasingly difficult in such an environment for state and local governments to collect revenues.

If we think about which taxes state governments could collect easily, clearly they would be taxes on production that occurs within their borders. But that is exactly where the tax competition takes place. So while states could efficiently collect taxes on production, they cannot levy much of a tax in that area because of the interstate competition for business. Several years ago, the state of Massachusetts contemplated imposing a tax on the production of financial

services. It is no real surprise that financial services would quickly have fled, just as banking has done already through a variety of other forms, because of the type of tax structure. Another perfect example of what is going on is the way states are now backing off from sales taxes on investment equipment purchased by manufacturing firms. I do not mean to object: It is a good idea; it was also a good idea a long time ago. But what is different today is that the increased competition between states means that production taxes simply will not be viable over the long term. So where does this leave the states? It leaves them really needing to be able to levy consumption taxes, because the same degree of competition will not occur with consumption taxes.

But in order to levy consumption taxes effectively, the states require empowerment from the federal government, because it is the federal government that controls interstate activity. And a significant share of the production–consumption relationship takes place in an interstate environment. At a minimum, for devolution to succeed, the states need federal support that will allow the collection of revenues when the production activity takes place in one location and the consumption activity in another location. Without such federal enabling legislation, a big change will occur in the way state governments collect revenue. In fact, the change is already under way. States continue to use the sales tax as their largest source of revenue, on average raising one-third of total revenues, but this has required increasing the median rate from just over 3 percent two decades ago to 5 percent today, and it is rapidly approaching 6 percent. State sales taxes have grown only slightly as a share of personal income, but the rates have gone up 60 percent in order to do that. Without federal enabling legislation, the base that states are able to tax becomes smaller and smaller. If we do not see the enactment of federal enabling legislation, states will be forced to rely more on income taxes and less on consumption taxes to raise revenue; otherwise, they must rely more on the federal government to collect the taxes and send the money to them. But this would mean that devolution could occur only on the expenditure side, not on the revenue side, and I would argue that you cannot have devolution on just one side of the coin. So my concern about devolution in the United States is focused on the revenue side.

For devolution to succeed, the states need federal support that will allow the collection of revenues when the production activity takes place in one location and the consumption activity in another location.

Let me add a few comments about our recent work in Tennessee. As we analyzed various welfare reform issues for the state, we realized immediately that the current federal legislation meant that at the margin, the state of Tennessee would have to pay 100 percent of any increase in welfare costs, whereas in the past it had paid roughly 33 percent. In the event of a recession, the state would have a serious problem, particularly given its extraordinarily inelastic tax system. In the 1990–92 period, for example, in two of those three years the elasticity of state revenue relative to income was zero. The state was experiencing no revenue growth in an environment in which expenditure demands continued to rise; and in such a situation it is inconceivable that the state would be willing to increase welfare expenditures at the margin in the way that would be required.

My advice to the state fiscal officers at the time was to pass legislation that would allow the commissioner of finance to reduce money paid to each welfare case by an amount bearing some relationship to the amount by which the state's expenditures would otherwise rise. In other words, simply hold state spending to what was initially appropriated by having legislation already in place that permits the commissioner of finance to make appropriate adjustments. The legislation has not passed but I predict it will pass, come the first recession, because the state simply will not have the resources to make those increases in spending. Fortunately for the states, the caseloads have been falling. Tennessee's 110,000 AFDC cases had declined to 95,000 at the point at which welfare reform was passed; the level is now 64,000. We do not know where the caseload is going to go from here because we have no information by which to make reliable estimates for recessions.

Let me summarize my remaining comments on Kincaid's paper as follows. I am surprised when I hear concerns that one of the outcomes of devolution may be different service levels across states. I thought that was the point of devolution. One of devolution's

options for states will be higher expenditures, but another will be lower expenditures. I do not consider it opportunism if someone supports devolution as a means to achieve smaller government. It may be that person prefers smaller government and that devolution is the best way to achieve that goal.

If we take a broader look at what devolution offers, it is clear that competition is exactly what we want.

I am also surprised when I hear concerns that devolution may lead to competition. Why is that a problem? I thought competition was what we wanted to achieve. Admittedly, in the case of welfare, the concern may be that competition would lead us down a path that some would find undesirable. But welfare is only a minuscule part of what we are considering, and if we take a broader look at what devolution offers, it is clear that competition is exactly what we want. Indeed, when the World Bank and similar organizations suggest devolution to developing countries, stimulating competition and reaping its gains are precisely why they are pushing for devolution.

Economists have observed for many years that all local governments can do effectively is allocation-type functions, while the federal government should do stabilization- and distribution-type functions. Economists have now begun to reconsider that view and to return to those early papers and think through the assumptions they made, many of which simply are not valid in the economy as it operates today. There is a much bigger role for stabilization by local governments than economists' conventional wisdom has allowed. I wonder whether the same thing may not be true about distribution as well.

Discussion

William B. Modahl, Director of Tax Affairs, Digital Equipment Corporation

Having read John Kincaid's wonderful paper and heard these interesting analyses, it is with a sense of humility that I offer any comments at all. (I would add that these are my views, and not necessarily those of my company.)

Kincaid opens his paper with the observation that, strictly speaking, there can be no devolution in the United States because from the beginning our system has been one of dual sovereignty. I would question that statement. It seems to me that the current movement advocating devolution is trying to recover and restore state and local governmental functions that over a long period of time have been usurped and centralized. The movement's aim is to shift us closer to the original division of powers, which was a very well-thought-out scheme. Whatever one may think of its appropriateness to current conditions, it was not the product of accident, as are the present arrangements.

Of course, any consideration of which activities now carried out by the central government might suitably be devolved back to state or local levels really poses a more fundamental question, and that is, what should our government be doing, and why? The fact that this question has become such a common topic of discussion points up the growing unease with the consensus built up during much of this century. Perhaps because of the two Great Wars, the Great Depression, and the Cold War, we Americans felt we needed a powerful central force to address these sorts of problems. And if circumstances pushed us in that direction, I think that intellectual currents pushed us that way as well. The early and middle parts of the century were characterized by a lot of thinking about market failures. Welfare economics focused on how the shortcomings of the market could be set right by the actions of government, which was presumed to function in a benign and efficient manner. The wonderful image of James Buchanan comes to mind: It was as if a singing contest were held between two sopranos and, upon hearing the first singer, the jury promptly voted the prize to the second and adjourned without waiting to hear anything more.

Thinking back on my days in law school nearly 40 years ago, I can recall the lack of interest in the insights

of the founding fathers. Their central insight was that government has a legal monopoly on coercion, so how do you limit its exercise? That is, how can you limit the abuse of the state's monopoly on coercion, so that the activities of citizens can flourish? You need the government's monopoly on coercion to prevent fraud, abuse, and violence, but the monopoly itself becomes a potential threat. Rather than the founders' vision of government, this century's vision has been of a powerful, omni-competent institution that would bring in a better future through planning. Government would be the center of action and innovation, reducing the citizenry to passive recipients of government largesse, the beneficiaries of good planning. Citizens and the lower levels of government were not seen as playing an important or active role in civic life.

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But this concentration of power and the removal of restraints on the federal government required a substantial remodeling of the Constitution, which we sometimes forget because it has been with us for so long. For example, the Sixteenth Amendment, which permitted the levying of an unapportioned income tax, provided the substantial federal revenue needed for this new approach to government. The interstate commerce clause and the general welfare clauses were interpreted by the Supreme Court in such a manner as to swallow up the original idea that the federal government was limited to enumerated powers and the states were to serve as the front line of government. The Civil War amendments were interpreted so as to give the central government power over state action. The "takings" clause of the Fifth Amendment, requiring payment of compensation for property taken for public use, was greatly limited. Federal mandates, preemptions, conditions attached to federal aid, and the creation of new individual rights all greatly limited state activities.

While these changes may no longer appear remarkable to us, they were in fact very dramatic changes. And far from producing the benign conditions once hoped for or indeed assumed, this systematic centralization of power and the removal of constraints on its exercise have led instead to dissatisfaction and discontent. I think there is now a growing feeling of governmental incompetence: Analyses of market failures have given way to analyses of government failure. Indeed, a whole school of economics, Public Choice, pursues this line of thought, and a number of recent Nobel Prize winners have gained recognition by their contributions in this area.

Current campaign finance revelations are pointing up the interest group, rent-seeking aspect of government at the center. Perhaps we are forgetting that much of the same activity goes on at the state and local levels, too. But in this general atmosphere of discontent, two movements have emerged: the movement to reinvent government and the devolution movement. The movement to reinvent government seeks to deal with an overgrown and unaccountable bureaucracy by importing a concept of better customer service. But this movement in no way changes the fundamental incentives controlling human action: It simply exhorts public officials to adopt a better attitude towards public service. In the end, this movement simply perpetuates the idea of the citizenry as passive consumers of government rather than active and independent contributors to civic life in de Tocqueville's sense.

We often forget how much was carried out by private voluntary activity prior to the rise of the American Leviathan. Beneficial associations, firefighting, education, and militias all depended upon voluntary associations of citizens and their activities, which added an important dimension to our democracy. Devolution offers promise in its central notion that government functions can best be performed at the lowest feasible level, as more innovation and creativity can be expected when that happens.

Devolution offers promise in its central notion that government functions can best be performed at the lowest feasible level, as more innovation and creativity can be expected when that happens.

Another way of evaluating devolution is to consider that there are two ways of approaching any social problem: the first, through comprehensive planning that attempts to anticipate every eventuality; the second, through preparation so as to be able to deal flexibly with rapidly changing conditions and circumstances, without trying to spell out all the results or exactly how everything should be done in advance. The first is a centralized, bureaucratic approach, and the second is more in accordance with the thinking of Hayek or von Mises, and is more characteristic of the business world, say, Silicon Valley. The devolution model may correspond most closely to the second approach. Certainly the twentieth century is a history of the playing out of the impossibility of the first approach.

The biggest problem now is that there is not sufficient national understanding of the fundamental issues of government, much less any consensus in favor of devolution.

The biggest problem now is that there is not sufficient national understanding of the fundamental issues of government, much less any consensus in favor of devolution. While we see discontent with certain federal programs, at the same time we see things going in the other direction—the President campaigning to require school uniforms, for example. The American people do not say, "Well, that is a good idea, but what business is it of the President's?" And the members of Congress want to deal with truly local matters like tort rules. The problem is that the citizenry is very poorly educated in these basic concepts of civics, so how can one expect much real progress toward devolution?

Still, from small beginnings combined with success in devolving individual programs, a significant movement may grow. Positive signs can be seen in states such as Wisconsin and Michigan and in the cities too. Instead of just waiting for the federal government to act, they are trying to take the lead in certain areas. The preliminary results of their efforts appear to be positive. Certainly the country seems starved for a sense of community, and to the extent that we have tried to seek community in large federal programs, we have not found it. One turns back to Burke's idea of the little platoons, our relationships with the little communities around us on a daily basis. It is there that our sense of community, our relationship to our fellow citizens can be found. I have trouble believing that such local programs may somehow become less humane or more indifferent to the suffering of others than a central program distant from the communities in which we each live out our lives. Devolution will develop slowly and gradually, in my view, and I remain optimistic, even though very little has happened thus far and it will be a long road if we do proceed very far in that direction.