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## FEDERALISM AND THE ROLE OF THE STATES

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A key element of the United States Constitution's defense of liberty is its system of divided powers and defined jurisdictions; not just between branches of the national government but also between the national and state governments. This latter concept, federalism, is specifically provided for in the Constitution which allots to the national government certain specific, enumerated, powers and directs that there are some powers that cannot be exercised by the states.<sup>1</sup> It then provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>2</sup>

This division of authority and jurisdiction, with most authority retained by the states, provides essential protections to citizens from the dangers of a centralized administrative state. It ensures accountability in government by ensuring that key decisions affecting citizens' daily life are made by officials close to those who will be affected. It also advances a compelling policy, that Professor Jeffrey L. Rensberger calls "interstate pluralism." This is "the feature of our federal system that reflects the ability of each state to establish itself as a distinct community. It entails the ability of each state to make and enforce choices on foundational matters such as fundamental ordering of commercial relations, family relations, property ownership, incidents, obligations, and aesthetic values." It "seeks to protect each state's ability to create and enforce these fundamental orderings and thereby define its society."<sup>3</sup>

To the degree federalism is weakened, local control over issues important to communities (such as education, family life, etc.) is lost and power is transferred to distant, unapproachable and unaccountable policy makers

intent on imposing agendas potentially at odds with the “different preferences and needs” of the citizens in those communities. When this happens these citizens are “alienated from their government.”<sup>4</sup> That this is not merely hypothetical is clear when one asks what states can now do about issues like abortion, obscenity, and control of lands in the state owned by the national government. All these matters are almost wholly controlled by national standards and centralized government power.

Despite the importance of federalism to our system of ordered liberty, the division of powers and emphasis on state authority envisioned by the Constitution’s Framers, has been severely undercut since ratification.<sup>5</sup>

## THREATS TO FEDERALISM

The federal system, with its emphasis on state authority is obviously threatened by an overreaching national government intent on imposing a national policy of uniformity.<sup>6</sup> This overreaching takes the form of (1) expansive interpretations of Constitutional provisions granting authority to the national government (such as the idea that the Interstate Commerce Clause should be understood to allow Congress to regulate purely intrastate commerce), (2) the practice of providing national funding to states on condition that the states adopt national standards (such as with education funding), (3) decisions by the United States Supreme Court that certain issues of state concern must be controlled by its own interpretations of the U.S. Constitution and other factors.

Sister states, too, can threaten interstate pluralism by attempting to export their unique policies to other states. Some courts have contributed to this problem through mistaken interpretations of the U.S. Constitution’s Full

Faith and Credit Clause. As an example, a recent federal court decision required one state to issue a birth certificate listing two legal parents of the same-sex (that would not have been available to that state’s own citizens) to a same-sex couple who had adopted in another state. This threat will become more pressing as activists attempt to export “progressive” policies on issues like same-sex marriage, from states like Massachusetts to other states.

The states themselves can weaken federalism, such as by accepting (or even aggressively soliciting) national funding for state programs and projects with requisite strings attached. Another example of a state undermining its own independence occurs when state courts adopt ideological legal theories alien to the constitutions of those states.

The increasing homogenization of culture across state borders (through television and similar media) also creates pressure for states to adopt national norms and policies to the detriment of local cultures that reflect community standards and distinctive interests. Most obvious is the now widespread toleration of obscene material that would have clearly been excluded from many communities just decades ago.

## THEORETICAL RESPONSES

The most common response proffered to the overreaching of national government has been judicial – opponents of national centralization seeking federal court decisions that more narrowly construe national government authority. There is certainly a place for this approach since federal courts are actively engaged in the business of determining limits on national power (or approving expansions). This is, however, a weak foundation on which to rest a defense of state authority

and distinctiveness as suggested by the wild swings in U.S. Supreme Court interpretations of relevant Constitutional provisions, even over short periods of time.<sup>7</sup> The Court's commitment to protecting state prerogatives is fickle at best.<sup>8</sup>

Occasionally, there is talk that hearkens back to the "nullification" theories made prominent by John Calhoun (although based on the thinking of James Madison and Thomas Jefferson). This theory posits that states can "negative" national legislation individually or in combination with other states. This effort was unsuccessful the first time it was employed (when South Carolina attempted to prevent a national tariff, in an action that was understood as a prelude to the Civil War) and a neo-nullification effort would be more difficult to maintain with the widespread acceptance by states of national *largesse*.<sup>9</sup>

James Madison probably intended the primary defense of state prerogatives to be political. He believed the national Congress, especially the Senate, would guard state authority. An element of a political response would have included (and still could include) a constitutional protection through amending the U.S. Constitution in ways that protect states pursuant to Article V of the Constitution.<sup>10</sup>

## PRACTICAL INITIATIVES

Any response to the overreaching of the national government or the incursions of sister states ought to be guided by a set of basic principles. First, priority should be given to what is possible to achieve. Second, the primary focus of pro-federalism efforts should be on the political and constitutional protections intended by the Framers. Third, specific issues on which federalism is invoked should be carefully chosen. This last is important

because historically, some of the causes most associated with the idea of "state's rights"<sup>11</sup> (like segregation and slavery) were ignoble and repugnant. If the loudest advocates of federalism seem only to be interested in issues that are comparatively trivial or even bad or misguided, the cause of federalism will suffer.

With this in mind, the following initiatives may be worth pursuing:

- State and national officials, prodded by citizens groups, should insist that certain issues be handled solely at the state level. A most obvious candidate would be education.
- National legislators should be challenged during election seasons to commit to assessing votes by the criteria of whether a piece of legislation is properly within the scope of authority delegated to the national government and they should be expected to be able to specify the source of that authority.
- Advocates of federalism should contest any attempt to weaken interstate protection of state prerogatives. For instance, by fighting a repeal of the Defense of Marriage Act that prevents a state being forced to recognize a same-sex marriage contracted in another state. State policies regarding divorce, parenting and the protection of life should also be guarded.
- These advocates should also be involved in court battles that could result in reining in current expansive understandings of national authority, as long as this is not the sole strategy.
- States should adopt unique constitutional amendments that reflect their distinctive policies and concerns. For instance, a state might profitably choose to enact an amendment that extends protection to parents' ability to direct

the upbringing of their children; protection significantly greater than the modest protection offered by current U.S. Supreme Court precedent.

- Perhaps a “State Constitution Project” could be launched to examine the history and proper understanding of state constitutions and explain these in a way that would allow them to guide judicial decision-making at the state level. This would be a far cry from the project endorsed by former U.S. Supreme Court Justice William Brennan whereby ideological goals would be imported by court interpretation into state constitutions until they are endorsed by a majority of the U.S. Supreme Court.<sup>12</sup>
- Since political parties are usually state-based, the state party organizations could adopt policies and procedures that protect and expand their role in the national political process.

All of these, and other worthy efforts, would require significant efforts and resources, but would be amply justified if they resulted in the reclamation of the Framers’ vision and the reinvigoration of the states’ foundational role in protecting ordered liberty.

The following case study addresses a real and present example of how federalism and the role of the states, as envisioned by the Framers, can guide our efforts to restore and preserve our liberties today.

## CASE STUDY: EDUCATION POLICY

Public education is one aspect of government that has fallen victim to federal overreaching. Since the U.S. Constitution does not grant the national government authority to administer or control schooling, federal officials have had to gain influence by offering states financial incentives in exchange for compliance with

various regulations. Notwithstanding concerns expressed by the states over time, this approach has led to a gradually-expanding federal role in education.

Schooling has almost always been a local affair, based on the belief that local resources – parents, school teachers and administrators, and communities – are best equipped to meet the unique educational needs and goals of their children. Utah received no federal funds for public education until 1916 and from then until 1935 received only .5 percent (½ of one percent) of its total K-12 funding from the federal government.<sup>13</sup> The first significant funding arrived in the 1940’s and the first regulations attached to it in 1958.<sup>14</sup>

The 1960’s brought a greatly-expanded federal role with the introduction of the Elementary and Secondary Education Act of 1965 (ESEA).<sup>15</sup> As one of Lyndon B. Johnson’s Great Society programs, ESEA aimed to help eliminate poverty and racial inequality by distributing funds to schools with high proportions of low-income families.<sup>16</sup> ESEA boosted the federal portion of education funding in Utah from 4.3 percent to 7.0 percent. Though the new law mandated limited testing, it also preserved major aspects of federalism by recognizing that the federal government had no authority to control the curriculum or administration of any educational institution.<sup>17</sup>

In the 1990’s, the states increasingly supported academic standards, but only voluntary, state-level, self-designed standards.<sup>18</sup> Nevertheless, when ESEA was reauthorized in the form of the Improving America’s Schools Act of 1994 (IASA),<sup>19</sup> it extended the scope of standards to apply to all students in Title I schools, not just to the disadvantaged. States were required to create “challenging” standards in reading and math, align

tests with those standards, correlate those standards and tests with non-Title I schools in the state, and take steps to assist schools that did not meet standards.<sup>20</sup>

ESEA was reauthorized once again as the No Child Left Behind Act of 2001 (NCLB).<sup>21</sup> This version expanded the federal role more than ever before. NCLB inflated ESEA from less than fifty pages in 1965 to almost 1,000 pages today<sup>22</sup> and increased federal aid to nine percent of Utah's public education budget.

In its present form, NCLB requires the cooperation of all public schools to some degree, whether or not they receive Title I funding. States must develop academic standards for reading, math, and science and administer regular assessments.<sup>23</sup> Test scores must be collected and reported for all schools and disaggregated into subgroups such as race, ethnicity, income, disability, and language. Based on test scores, schools that fail to make "adequate yearly progress" (AYP) by not meeting state-determined proficiency standards are subject to sanctions.<sup>24</sup> Students in failing schools are supposed to receive "technical" assistance and tutoring services and have the option to transfer to another public school within the same district. States must help all schools reach proficiency by 2014. Finally, all Title I teachers and teachers of "core academic subjects" in non-Title I schools must be "highly qualified."<sup>25,26</sup>

In essence, NCLB has promoted the federal government from pitching coach to head coach. Rather than give assistance to one segment of the team, it now holds all players accountable for their performance. Certainly, states and districts still enjoy a fair amount of autonomy in determining how to satisfy mandates within the federal framework, but federal regulations are restrictive enough to cause state leaders to feel fettered.

In 2005, then State Representative Margaret Dayton and Utah School Superintendent Dr. Patti Harrington wrote:

**Utahns do not believe that the one-size-fits-all approach under NCLB is appropriate. Utahns think it's inappropriately intrusive for the federal government to insert itself into contract negotiations between locally elected school boards and individual citizens as it tries to regulate teachers under NCLB. And Utahns do not believe that the approximately 6% of budget monies coming from the federal government should control 100% of state education policy.**<sup>27</sup>

If state and local policy makers and administrators wanted to implement programs and standards similar to those mandated by the federal government, then federal aid might be a boon to help them fulfill their objectives. But pushback from Utah and other states suggests that the regulatory strings attached to aid are burdensome. Though NCLB is likely not unconstitutional because regulations are issued only upon voluntary acceptance of budgetary incentives, it is coercive from a policy perspective, which weakens federalism.<sup>28</sup>

The progression of power from local to state to federal government diminishes the influence of local policy makers and administrators who are most aware of children's needs. It deteriorates government accountability to parents and local communities since state and federal lawmakers share responsibility for federally-funded programs. Diluted federalism also impacts the classroom directly. For instance, NCLB institutionalizes perverse incentives to lower academic standards, disadvantage poor and minority students, and discourage good teachers from accepting jobs in challenging classrooms.<sup>29</sup>

Utah policy makers recognize these negative impacts and feel coerced by federal mandates, so why do they continue to accept federal aid? The lure of much-needed education funding seems to be at the root of it. Because of Utah's unique demographics, the state's funding per student usually ranks at the bottom of the 50 states.<sup>30</sup> Simply opting out of NCLB would relieve Utah of federal mandates but would also take away federal dollars. Thus, though Utahns seem to despise onerous federal regulations, they seem willing to comply with them in order to maximize the aid they can receive. They even spend their own money to qualify for matching grants that bring more regulations to follow.

The most recent evidence that Utahns are not about to reject federal funds is their plan to accept as much as \$300 million in federal aid over the next two years through the American Recovery and Reinvestment Act of 2009 (ARRA).<sup>31</sup> Accepting this aid would immediately increase federal funding for public education by 43 percent.<sup>32</sup> ARRA funds are supposed to be temporary and may or may not come with strings attached, but time will tell.

Is it too late for Utah to regain its independence? Utahns seem to recognize their conflicting desires to receive aid and reject the regulations attached to it, and deep down they may value freedom over funding. In 2003, the Legislature rejected a measure to opt out of NCLB completely, but, later on, Governor Huntsman approached the U.S. Department of Education to request leniency with regulations. After unsuccessful negotiations, a modified version of the previous bill passed in 2005 that gives state policy preference over federal regulations when they conflict.<sup>33</sup>

Today, Utah accepts enough federal aid with strings attached that the state's ability to provide the best education possible for its children is hampered; and yet, NCLB is not so engrained in state policy and its funding not so relied upon that opting out would be infeasible. Reversing the trend of expanding federal influence and cultivating more self-reliance as a state would help reclaim the benefits of federalism, the most vital being the freedom to shape education policy in the best interest of Utah's children.

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## ENDNOTES

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11. This phrase is probably a misnomer since the question is one of state jurisdiction and authority, rather than "rights" as that concept has come to dominate legal discourse.
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20. James E. Ryan, "The Perverse Incentives of the No Child Left Behind Act," 79 *New York University Law Review* 932 (2004). IASA mandated tests for reading and math at three points from K-12.
21. No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110, 115 Stat. 1425 (2002) (7th reauthorization of ESEA).
22. Manna, 3.
23. Reading and math tests in grades three through eight annually and one between grades ten through twelve. Science tests in grades three through twelve at least three times. All states must administer the National Assessment of Educational Progress (NAEP) for reading and math to a random sample of students in fourth and eighth grade every other year.
24. Schools that fail for four years must replace school staff or institute new curriculum. A five-year

- failing allows the state to reopen it as a charter school, take it over, or turn management over to a private company.
25. To be considered "highly qualified," teachers must be fully certified and either earn a degree in the subject they teach or pass a state test to demonstrate subject competency.
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  29. Ryan, 432-433.
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