

Introduction

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INTRODUCTION

LAWRENCE R. VELVEL

THIS SYMPOSIUM comes at a propitious time for an examination of federal-state relations. As all must know, until well into the twentieth century the role of the federal government was far less significant in internal affairs than it is today. But the events of the New Deal and after worked a great change in our system: from the "hundred days" of Franklin Roosevelt until our own time, the federal establishment has basically been the focal point of efforts to obtain social, economic and racial change in this country.

Today, however, there is a movement afoot to alter the trend of the last forty years by shifting more power and responsibility to the states. In the political and economic sphere, this movement has at least two interrelated causes. One has been the war in Indo China. Not only did the war create vast dissatisfaction with the foreign and military policies of the federal government, but it also spawned a more generalized dissatisfaction with many aspects of American life. Serious and bitter criticism was leveled at the federal establishment, at federal politicians, at traditional ideologies and at traditional life styles. The general atmosphere was ripe for the view that there should be less power in Washington.

A second source of the movement to shift authority to the states in the political and economic sphere has been the surprisingly intractable nature of so many of the serious domestic problems faced by the nation. Problems such as housing and welfare, for example, have thus far proved unamenable to solution. They have confounded the efforts of social planners who believe that solutions can be achieved by relying on Washington.

The movement to shift authority away from the federal establishment also has a judicial sphere. In this sphere it is argued that the federal courts should be curbed in general or should have their authority diminished vis-a-vis their state counterparts in par-

ticular. There are some legitimate bases for such arguments, but I am afraid that too much of the primary impetus does not stem from the serious considerations of concerned judges and lawyers who are honestly debating the wisdom of extending the federal rights of the citizen. Rather, a great share of the impetus comes from politicians and other persons whom I call the "law and order hypocrites." Preying upon the fears of the average citizen, the "law and order hypocrites" call for cracking down on lawbreakers. But when it suits their own political purposes, they are in the forefront of those who cause or condone breaches of the law. Election frauds, graft, municipal corruption, failure to prosecute friendly tax evaders, illegal uses of force against citizens, illegal uses of force abroad—all these things and more are in the arsenal of politicians who most stridently call for law and order and who consequently spearhead the movement to diminish the authority of the federal judiciary and the rights of the citizen.

The present Symposium deals with the political, economic and the judicial spheres of the movement to shift power from the federal establishment to the states. Subjects like revenue sharing, federal incorporation and the viability of state governments pertain to the political and economic spheres. They contain within them subissues of such grand sweep that they are perennial on the American stage. Are the state governments closer to the citizen and more responsive to him than the far-off federal bureaucracy? Are state and local governments organized in a way which makes them capable of providing a modern, efficient government? Will more money make the state and local governments more viable? Are the states, the federal government or its independent agencies dominated by vested interests? Are the states destructive of the rights and entitlements of ordinary citizens and minority groups, whereas the federal government is more solicitous toward such persons? Are the states truly laboratories for experiments in human progress, or would they be if they had more money? When one considers some of the subissues which can arise in discussions of subjects treated in this Symposium, it becomes clear that these discussions conjoin the novel and the traditional. In the modernistic garb of revenue sharing and federal incorporation are clothed the ancient concerns of the body politic.

While reading the arguments pro and con in the Symposium, one may begin to feel some uneasiness about another ancient American concern—the quest for competence. In economic matters, this quest has been expressed by seeking efficient production. In political terms, the quest has been expressed by seeking “good government.” The institutional systems which are used to produce goods, to run governments, to deliver services, to give education, and to do just about any other job one can think of, are supposed to be designed to encourage and liberate competent performance.

In discussing revenue sharing or other devices for shifting power and responsibility to the states, the arguments in this Symposium are basically talking about changes in the institutional systems toward government competence. The goal of the desired changes is, of course, to make possible a better governmental performance in regard to domestic problems. Yet, as I read the pros and cons, it seemed to me that there probably is no clearly right or clearly wrong answer as to which institutional changes would be most productive of better governmental performance. It further struck me as being at least arguable that all across the spectrum of American life a most fundamental problem today is not so much that systems are intrinsically deficient, but that large numbers of people are not performing their jobs competently. Be it in politics and government, in the labor force, in the educational establishment or in any one of a number of other areas, one is constantly confronted by an inadequate quality of work, sometimes coupled with a relatively uncaring attitude. If it is true that a lack of competent effort has become a most basic problem, or perhaps *the* most basic problem, then I am afraid we shall have to address ourselves to more than revenue sharing to cure the ills of the nation. Determining the root causes and solutions for a broad absence of competent performance is bound to involve difficulties which make the complexities of revenue sharing seem trivial by comparison.

In the judicial sphere, the Symposium treats the traditional subjects of habeas corpus and abstention, which affect the degree to which the federal judiciary will protect the citizen. The arguments on these topics speak for themselves, and I would attempt but one or two embellishments. Ideas which curtail the federal judiciary's ability to protect the rights of the citizen have had a significant

history in this century. But an all too prevalent judicial failure to protect citizens is precisely what has caused a large diminution in respect for the courts among minorities, the young, and other segments of society. It is my judgment that the courts would do better to expand and protect the rights of the citizen than to curtail those rights. Certainly the courts would be doing better from the moral standpoint; and since the young of today are already numerous and will be the mass of citizens tomorrow, the courts will ultimately do better from the pragmatic standpoint as well. And if the protection and expansion of rights causes howls from state judges or even Presidents, then so be it. The rights of citizens should be safeguarded from the mob by the federal judiciary even when the mob is led by state judges or the President of the United States.

Finally, I would note that the subject of preemption, which is treated here by Harrop Freeman, bridges the two spheres of the movement to shift power to the states: it bridges the economic and political sphere on the one hand and the judicial sphere on the other. The doctrine of preemption is relevant to judicial determinations on the question of what organs of government have the political authority to protect the citizen from the dangers which reside in the modern economy and modern technology. If the federal standards for permissible radiation emissions are thought by a state to be dangerously low, is the state preempted from setting higher standards? Is a state preempted from regulating the safety of products which are sold nationally but which the state regards as harmful? When the federal government is violating its own statutes or Constitution, can the state sue to enforce those documents, or is its right to do so preempted in effect by the notion that only the federal government is *parens patriae* where federal laws or the federal Constitution is involved? Are the states preempted from stopping the pollution of interstate waterways by interstate businesses?

The abuses of modern technology and the modern economy are usually perpetrated by interstate organizations, and curtailing these abuses will consequently have interstate effects of one kind or another. Thus, the easy answer for courts to give on the preemption problem is often that the power of cure resides solely in the

national government. This is particularly easy when the national government has already addressed itself to the problem in some way. But, knowing what we do know of the inadequacies in Washington, the easy answer may not always be the safe one from the standpoint of health and welfare.

The real challenge is for the courts to work out a set of coherent legal doctrines which have the effect of insuring that the citizen obtains adequate protection against technological and economic abuse. Such doctrines would have to be flexible enough to permit protection to be given by the political branches of the federal government when they are doing a better job than the states, and to be given by the states when they are doing a better job than the political branches of the federal government. At the same time, the doctrines would have to be sufficiently principled so that decisions would not be rendered on a totally ad hoc basis. Lastly, the complete set of doctrines would have to provide for judicial protection in cases where neither the states nor the political branches of the federal government are protecting the citizen: in such cases the judicial protection would have to be based on some sort of evolving common law.

In concluding this Introduction, I would reiterate that this Symposium comes at an opportune time. The days ahead will see much political and legal discussion of the topics treated in the Symposium, and may see much social and legal change along lines which it broaches. The Symposium, then, is a contribution to evolving fields of thought and action.