

## ISSUES

# The Ailing Past of the New Federalism

Collin Canright

"The more I look at it . . . the more I like it." These words from King Crimson's new album, *Discipline*, did not readily come to mind when I began thinking seriously about President Reagan's New Federalism, nor did I think they ever would. But I do think it could be good. Unfortunately, the fact is no matter how I study it, no matter how I take it apart, no matter how I break it down, it remains inconsistent.

Little of Reagan's program is new. That does not make it insidious. The provisions for local administration of federal money may contribute to the type of local self-determination all freedom-base ideologies aspire to. Some of the ideas have worked in the past, while others have caused much national turmoil. But most important is the debate Reagan has generated. If he deserves credit for anything in his administration, it is that.

The term "New Federalism" was coined in 1969 by Patrick Buchanan, then a speechwriter for President Richard Nixon. Nixon first used the term in a speech delivered on August 8, 1969 saying, "After a third of a century of power flowing from the people and the states to Washington, it is time for a New Federalism in which power, funds and responsibility will flow from Washington to the states and to the people."

The object of Nixon's New Federalism was sound: to give local officials a greater voice in the administration of local spending of federal funds. The federal government provided funding through revenue sharing to cities and community blockgrants. Ironically, these revenue sharing programs were cut last summer in the Reagan budget.

My experience with these programs in my small Northern Indiana community has

demonstrated to me that they bring concrete benefits to communities. Over the past few years, the town of Porter has rebuilt its streets, sidewalks and storm sewer system with federal money received from the community bloc grant program.

Reagan's proposed transfer of highway, mass transit, economic development, urban renewal and education now strictly administered by the federal government could well have the same profitable results. Local problems are handled best at the local level, provided local government is responsive to the needs of the community. If it can be demonstrated that this is so, Reagan's New Federalism may well be a boon to the people it is to serve.

Great problems would have to be overcome for such a system to work. First, the responsiveness of local governments to community needs would have to be determined — no easy task. Second, truly local problems would have to be identified. Mass transit, for instance, certainly is a local problem. But an effective mass transit system would have to work in coordination with other local systems. Who should oversee this coordination? Education is another example of the fine line between national and local concerns. Certainly a high level of education nationwide is desirable. Local school corporations best know how money can be spent to remedy their own weaknesses. The questions are: who is best responsive to community needs? How those needs are to be determined? Who is to make this determination? A simple "We" or "They" answer is not enough.

Taken as a whole, Reagan's program has confused national priorities with local ones. The keystone of his plan is the transfer of the Aid to Families with Dependent Children and food stamp programs to

the states for administration. Poverty is a national, not a local concern. The Great Depression dramatically demonstrated the relationship of mass poverty and the functioning of the national economy. If unemployment would result from federal policy, the federal government should insure uniform relief. A brief look at the judicial history of the national/local commerce conflict provides greater insight.

The concept of "Federalism" is quite old. It can be traced back to the beginning of the century, imbedded in the Constitutional interpretation doctrine known as Dual Federalism. First expressed in 1895, Dual Federalism was as revolutionary then as New Federalism is advertised to be now.

Dual Federalism was a radical departure from past Constitutional interpretation. The passage of the Interstate Commerce Act of 1887 and the Sherman Anti-Trust Act of 1890 began an era of vast expansion in the regulation of the economy by the federal government. Powerful private interests whose past business practices were checked by these acts resorted to the courts to challenge the authority of Congress.

Most Congressional authority for legislation in economic matters explicitly is based on the Commerce Clause of the Constitution. Article I, Section 8 gives Congress the authority to "regulate commerce . . . among the states." As challenges to economic legislation mounted, the courts had to determine the extent of this commerce power. (From Peter Woll, *Constitutional Law: Cases and Comments*).

The original interpretation of the Commerce Clause was enunciated by Chief Justice John Marshall in *Gibbons v. Ogden*, 6 L. Ed. 23 (1824). Marshall gave Congress a broad license to regulate commerce. "This power," he wrote, "like all others, is complete in itself, may be exercised to its utmost extent, and acknowledge no limitations, other than are prescribed in the Constitution."

Marshall's *Gibbons* opinion potentially supported a vast and virtually unlimited network of federal regulation, that is until the Sherman Act was challenged in 1895. It was then, in *United States v. E. C. Knight Co.*, 39 L. Ed. 325 (1895), that Dual Federalism received its first and highest expression.

*Knight* concerned the power of the federal government to deter monopoly in the sugar business by preventing the sale of four sugar refining companies to the American Sugar Refining Company. The sales would have given American Sugar control over 90 percent of the companies manufacturing refined sugar in the U.S.

However, the Supreme Court ruled that manufacturing was in the realm of state controlled commerce (intra-state commerce), not federally controlled commerce (inter-state commerce). Congress did not have the power to prevent the sales, the Court ruled.

In place of Marshall's empiric test to determine what constituted inter-state commerce (that the point of origin and the point of destination lie in different states), the Court in *Knight* formulated the direct/indirect test: Congress had the regulatory power only if intra-state commerce directly affected intra-commerce. Thus began a period of Constitutional history in which the powers reserved to the states were taken as a limitation on federal power.

At issue is the manner in which the 10th amendment to the Constitution is read. It states: "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." Before 1895 and after 1937, the amendment was interpreted as merely a truism. During the Dual Federalist period, the amendment was read with the word "ex-

pressly" inserted after "not." In this manner, the amendment does constitute the barrier to federal power envisioned between 1895 and 1937.

Reagan's New Federalism welfare transfer is similar in spirit to the flow of commerce as interpreted by Dual Federalist doctrine. During Dual Federalism it was the social predilection of the Courts justices, rather than Constitutional principles, that determined the extent of Congress' regulatory power.

For example, in *Champion v. Ames*, 47 L. Ed. 492 (1903), lottery tickets were prohibited from interstate commerce because they were judged harmful to the morals of society. Yet in *Hammer v. Dagenhart*, 62 L. Ed. 1101 (1918), furniture manufactured by child labor could not be barred from interstate commerce because the products in themselves were harmless.

The Child Labor Act of 1916 was ruled unconstitutional as a result of *Hammer*. The questions arise: What difference is there between lottery tickets and furniture manufactured by child labor as far as the health, safety and morals of society is concerned? And why ban one and not the other?

Under Reagan's New Federalism, the poor will be at the mercy of the social predilections of the several states, just as early economic regulation was at the mercy of the social predilections of the Supreme Court. As in the earlier period, inconsistency is bound to be the result. The same mistake will be repeated: national problem (poverty) will be treated as a local one, just as child labor was in 1918.

After 1937, Marshall's original interpretation of the Commerce Clause was returned as precedent. Clearly the conflict has not diminished; all that has changed is the denominator. It was Franklin Roosevelt's New Deal which changed the sides; it is Franklin Roosevelt's New Deal Reagan wishes to dismantle to change the sides again. The result can only be a continuation of the conflict.

What Reagan really has brought into question (he would shudder if he only knew) is not New Federalism against New Deal, but the concept of federalism itself. The founding fathers felt the national/local conflict would keep the system in balance. If this balance would no longer be maintained, maybe the nature of the system should be investigated to eliminate the source of the conflict — federalism itself.



