The Devil in Devolution

John D. Donahue | November 30, 2002

The shift in government's center of gravity away from Washington and toward the states—a transition propelled by both popular sentiment and budget imperatives, and blessed by leaders in both major parties—reflects an uncommon pause in an endless American argument over the balance between nation and state. That argument got underway when the Framers gathered in Philadelphia to launch a second attempt at nationhood, after less than a decade's dismal experience under the feeble Articles of Confederation. The Constitution they crafted was a compromise between those who wanted to strengthen the ties among essentially autonomous states, and those who sought to establish a new nation to supersede the states as the locus of the commonwealth. While anchoring the broad contours of state and federal roles, the Framers left it to their successors to adjust the balance to fit the circumstances of the world to come and the priorities of future generations.

This moment of consensus in favor of letting Washington fade while the states take the lead is badly timed. The public sector's current trajectory—the devolution of welfare and other programs, legislative and judicial action circumscribing Washington's authority, and the federal government's retreat to a domestic role largely defined by writing checks to entitlement claimants, creditors, and state and local governments—would make sense if economic and cultural ties reaching across state lines were weakening over time. But state borders are becoming more, not less, permeable.

From a vantage point three-fifths of the way between James Madison's day and our own, Woodrow Wilson wrote that the "common interests of a nation brought together in thought and interest and action by the telegraph and the telephone, as well as by the rushing mails which every express train carries, have a scope and variety, an infinite multiplication and intricate interlacing, of which a simpler day can have had no conception." Issues in which other states' citizens have no stakes, and hence no valid claim to a voice, are becoming rarer still in an age of air freight, interlinked computers, nonstop currency trading, and site-shopping global corporations. Our current enchantment with devolution will be seen one day as oddly discordant with our era's challenges.

The concept of "the commons" can help to cast in a sharper light the perils of fragmented decision making on issues of national consequence. In a much-noted 1968 article in Science, biologist Garrett Hardin invoked the parable of a herdsman pondering how many cattle to graze on the village commons. Self-interest will lead the herdsman to increase the size of his herd even if the commons is already overburdened, since he alone benefits from raising an extra animal, but shares the consequent damage to the common pasture. As each farmer follows the same logic, overgrazing wrecks the commons.

Where the nation as a whole is a commons, whether as an economic reality or as a political ideal, and states take action that ignores or narrowly exploits that fact, the frequent result is the kind of "tragedy" that Hardin's metaphor predicts: Collective value is squandered in the name of a constricted definition of gain. States win advantages that seem worthwhile only because other states bear much of the costs. America's most urgent public challenges—shoring up the economic underpinnings of an imperiled middle-class culture; developing and deploying productive workplace skills; orchestrating Americans' engagement with increasingly global capital—involve the stewardship of common interests. The fragmentation of authority makes success less likely. The phenomenon is by no means limited to contemporary economic issues, and a smattering of examples from other times and other policy agendas illustrate the theme.

FAITH AND CREDIT

In the late 1700s, states reluctant to raise taxes instead paid public debt with paper money, with progressively little gold or silver behind it. Even states like Georgia, Delaware, and New Jersey that exercised some restraint in issuing paper money saw merchants lose confidence in their currencies, as the flood of bad money debased the reputation of American money in general. Half a century later defaults and debt repudiations by Pennsylvania, Arkansas, Florida, Illinois, and a few other states—which for the states concerned were unfortunate, but apparently preferable to the alternative of paying what they owed—polluted the common American resource of creditworthiness, and for a time froze even solvent states and the federal government out of international credit markets.

Presidential primaries, which are run state by state, provide another example. Each state prefers to be first in line to hold its primary (or at least early in the queue). In recent presidential election seasons—and especially the 1996 Republican primaries—states have wrecked the common resource of a deliberative primary process in a rational (but nonetheless tragic) pursuit of parochial advantage. California's primary in June 1992 had come too late to matter; anxious to avoid another episode of irrelevance four years later, it staked out March 26 for its vote. But several other states, whose own votes would be rendered superfluous once California's crowd of delegates was selected, rescheduled their primaries in response. A spiral of competitive rescheduling led to ugly squabbles as Delaware and Louisiana crowded New Hampshire's traditional first-in-the-nation franchise; a mass of state primaries ended up bunched right behind New Hampshire, and a grotesquely compressed primary season ensued. The outcome was clear by the first days of March, and California's primary—although held two months earlier than it had been in 1992—was just as irrelevant. Most voters perceived the 1996 primary season as a brief spasm of televised name-calling. Even supporters of the eventual nominee felt that Senator Dole, and the voters, had been ill served by the process.

Term limits for representatives and senators present a similar "commons" problem. Despite a flurry of term-limit legislation at the state level, anyone convinced that the United States should have a less-professionalized Congress may not want to count on state term-limit laws to accomplish the goal. If less-entrenched legislators make for better law—a plausible although not invulnerable proposition—then a citizen legislature is a common benefit for the nation as a whole. Yet an individual state is usually better off when represented by politicians with experience in the ways of Washington and a deep reserve of past favors on which to trade. Even if a majority of a state's citizens would like to see a Congress of fresh faces, they may well prefer to see other states restrict representatives and senators to a few years' service, while keeping their own old lions on the job.

The Constitution's "full faith and credit" clause, a court case in Hawaii, and the quadrennial uptick in political tawdriness brought an unusual sort of commons problem to center stage in 1996. The issue was whether the definition of "marriage" should be broadened to include same-sex unions. A handful of Hawaiian same-sex couples had asserted the right to have their relationships reckoned under state law as no different from heterosexual marriages, invoking provisions in the state constitution that bar sex discrimination in almost any form (including, the plaintiffs argued, restrictions on the gender of one's spouse). When a shift in the composition of Hawaii's supreme court made a seemingly lost cause suddenly viable, it dawned on advocates and opponents alike that if Hawaii legitimated same-sex marriage, those unions would have to be recognized nationwide. If any homosexual couple—at least those able to afford two tickets to Hawaii—could bypass more restrictive laws in their home states, the rapid result could be a national redefinition of what marriage means, without anyone outside Hawaii having any voice in the outcome.

National opponents of gay marriage staged a preemptive strike in the form of the Defense of Marriage Act, requiring the federal government to counter heterodoxy in Hawaii or anywhere else by declaring a national definition of marriage—one man, one woman, and that's that. Beyond excluding same-sex spouses from receiving benefits under any federal program, the act gave states the right to refuse recognition to other states' marriages. The Defense of Marriage Act raced through Congress and President Clinton quickly signed it (albeit without ceremony and literally in the middle of the night). Annoyed at being forced to alienate his gay supporters in order to stay wrapped in the family-values mantle, Clinton charged, no doubt correctly, that the bill's authors were driven by the partisan spirit of the election year. But whatever their motivations—and however one feels about same-sex marriage—they had a point: The definition of marriage in the United States should be settled by national deliberation.

There is an interesting historical irony here, however. Not so long ago, divorce was only a little more common, and only a little less out of the mainstream, than homosexual unions seem today. While the causes for its increase are many and complex, the pace was set in part by states' calculations of parochial advantage. Around the turn of the century legislators in several Western states—notably Nevada—passed liberal divorce legislation in part to encourage economic development. Unhappy couples facing onerous divorce laws in their home state could head West for a few weeks or months. There they could dissolve their union, while solidifying the local economy, in some striving desert town. Other states might have resisted the trend to more lenient divorce laws. But any couple—at least any able to afford a ticket to Reno—could bypass their home-state restrictions. If a legislature held the line it would only be subjecting its citizens to extra expense while sending money out of state.

The wholesale liberalization of American divorce laws is often seen as a mistake—if not from the perspective of men who can cast off unwanted obligations with minimal bother, at least from the perspective of women and, especially, young children who all too often are left economically stranded. Which raises a question: If states should be free to refuse recognition to marriages made elsewhere, on the grounds that another state's definition of marriage offends local morals, should they also be able to refuse to recognize out-of-state divorces? Suppose that Vermont, say, passed legislation toughening divorce laws and declaring Vermont marriages immune to dissolution by another state's laws. If the legislation survived constitutional challenge (which is doubtful, as it is for the Defense of Marriage Act's comparable provisions) there would be some definite advantages: More traditional states could wall themselves off as enclaves against unwelcome national trends; a potential spouse could signal the depth of his or her commitment by proposing a Vermont wedding. On the other hand, the United States would become a little bit less of a nation.

In one of the less glorious episodes in American history, this country attempted to define human slavery as an issue each state could settle on its own, according to its own economic and ethical lights. Northern states, however, eventually proved unwilling to accept the proposition that the moral commons could be so neatly subdivided. The Fugitive Slave Act required antislavery states to make room in their moral world for slaveholders to transport their "property" for use anywhere in the nation. The repercussions ultimately led to attempted secession, and then to the national abolition of slavery. The meaning of marriage may be another moral issue so basic that it must be dealt with through a national debate, protracted and painful as that will doubtless turn out to be.

ENVIRONMENTAL REGULATION

Antipollution law is perhaps the most obvious application of the "commons" metaphor to policymaking in a federal system. If a state maintains a lax regime of environmental laws it spares its own citizens, businesses, and government agencies from economic burdens. The "benefits" of environmental recklessness, in other words, are collected in-state. Part of the pollution consequently dumped into the air or water, however, drifts away to do its damage elsewhere in the nation. If states held all authority over environmental rule-making, the predictable result would be feeble regulations against any kinds of pollution where in-state costs and benefits of control are seriously out of balance. Even in states whose citizens valued the environment—even if the citizens of all states were willing to accept substantial economic costs in the name of cleaner air and water—constituents and representatives would calculate that their sacrifice could not on its own stem the tide and reluctantly settle for weaker rules than they would otherwise prefer.

A state contemplating tough antipollution rules might calculate that its citizens will pay for environmental improvements that will be enjoyed, in part, by others. Even worse, by imposing higher costs on business than do other states, it risks repelling investment, and thus losing jobs and tax revenues to states with weak environmental laws. Congress explicitly invoked the specter of a "race for the bottom"—competitive loosening of environmental laws in order to lure business—to justify federal standards that would "preclude efforts on the part of states to compete with each other in trying to attract new plants." In a series of legislative changes starting in the early 1970s, the major choices about how aggressively to act against pollution were moved to the federal government. While aspects of enforcement remained state responsibilities—introducing another level of complications that continues to plague environmental policy—the trade-off between environmental and economic values moved much closer to a single national standard.

National regulation in a diverse economy does have a downside. States differ in their environmental problems, and in the priorities of their citizens. Requiring all states to accept the same balance between environmental and economic values imposes some real costs and generates real political friction. Yet even if the tilt toward national authority is, on balance, the correct approach to environmental regulation, there is reason to doubt we got all the details right. Moreover, logic suggests that the federal role should be stronger for forms of pollution that readily cross state borders, and weaker for pollution that stays put. But federal authority is actually weaker under the Clean Air Act and the Clean Water Act than under the "Superfund" law covering hazardous waste. Toxic-waste sites are undeniably nasty things. But most of them are situated within a single state, and stay there.

CORPORATE CHARTERING

Few questions about the division of economic authority across our federal system have received as enormous an investment of intellectual energy as the state chartering of corporations. Since corporations can operate nationally, whatever their state of incorporation, state decisions on chartering have national implications. In the eighteenth and much of the nineteenth centuries, corporate charters were granted under far more stringent conditions than they are today, usually on the understanding that demonstrable public good would result from the corporation's activities. As corporations came to be seen less as agents of the public interest; as states came to presume, instead of demanding proof of, public benefits from business enterprise; and as some firms became sufficiently national to have meaningful choices about which state to call home, the specific terms of state chartering came to matter more. In 1896, New Jersey adopted aggressively liberal chartering rules, and became the legal home of choice for major corporations. New Jersey shifted to a somewhat tougher chartering law in 1913, however, and rapidly lost its hegemony to Delaware, which had altered its own incorporation provisions to mirror New Jersey's previous law. Delaware has tenaciously defended its dominant place in corporate chartering ever since.

Herbert Croly, the Progressive intellectual, considered state chartering a silly anachronism by 1909, arguing that "a state has in the great majority of cases no meaning at all as a center of economic organization and direction." Croly's call for national chartering was made "not because there is any peculiar virtue in the action of the central government, but because there is a peculiar vice in asking the state governments to regulate matters beyond their effective jurisdiction." States whose chartering rules appeal to managers win taxes, fees, and ample job opportunities for corporate attorneys, while the costs of unbalanced corporate law are spread widely, wherever the state has operations, sales, creditors, or investors. The commons scenario predicts a systematic weakening of the conditions of incorporation.

The phrase "race to the bottom" was introduced in 1933 by Supreme Court Justice Louis Brandeis—who also, interestingly enough, popularized the term "laboratories of democracy"—in connection with corporate chartering. Multistate companies, Brandeis said, sought charters "in states where the cost was lowest and the laws least restrictive. The states joined in advertising their wares. The race was one not of diligence but of laxity." The modern debate over the prudence of state chartering got underway in the early 1970s with an article by William L. Cary in the Yale Law Journal on the pernicious effects of interstate competition for corporate charters.

Some defenders of rivalrous state chartering argued that Delaware's advantage was not due to weak conditions of incorporation, but rather to its efficient procedures for chartering—streamlined administrative rule-making, courts dedicated to corporate law, a specialized private bar, and a tradition of depoliticizing corporate law made sustainable by the paucity of actual corporate operations within the state. But the more interesting rebuttal to the "race for the bottom" critics came from a group of scholars who emphasized the importance of market rationality in the crafting of corporate law. Ralph Winter, in an influential 1977 article, started by acknowledging that states compete to maximize their share of the nation's corporate charters, and that they do so primarily through loosening the conditions of chartering. But the race was to the top, not the bottom, Winter and like-minded analysts argued, because the goal toward which states raced, and the pace of their scramble, turn out to be set not by corporate managers but by investors.

The story goes like this: Corporations must attract capital. Investors will be more likely to commit their funds to firms whose charters require managers to do right by investors. And that story seems sound, so far as it goes. But this is not quite the end of the conversation. Interstate competition promotes laws that favor investors not because legislators are directly solicitous of shareholders, but because investors have leverage over managers, and managers have leverage over state policymakers. By this same logic, interests with a weaker claim on managers' devotion have no reason to expect that interstate competition will generate favorable results. For example, the dynamics of state competition for corporate charters are unlikely to generate a national pattern of laws that strengthens the hand of employees within the firm.

LEGALIZED GAMBLING

There has never been a time in America when a person determined to gamble could not find some action. Nor is legal gambling, for that matter, anything new. The Continental Congress fed and armed Washington's army, in part, with revenues from a lottery, and state-sanctioned games of chance financed the early growth of Harvard and other colleges. For much of this century, however, gambling has operated in the economic shadows. Except for the exotic enclave of Nevada, government's stance toward gambling ranged, until recently, from vigilant hostility to narrowly circumscribed tolerance.

This has changed with an astonishing speed and completeness. In 1988 Nevada and New Jersey were alone in allowing casino gambling. Eight years later there were around 500 casinos operating in 27 states, and some form of gambling was legal in all but two states. The total annual amount wagered legally in the United States is about $500 billion. (For a sense of scale, consider that America's entire annual output is in the range of $7,000 billion.)

Gambling brings some obvious benefits to the state that runs the lottery or hosts the casinos. It can generate relatively high-paying jobs even for workers without much training. It yields welcome revenues for the state treasury. (States took in $27 billion from lotteries in 1994, and had $9.8 billion in revenues left over after paying off winners and covering administrative costs. In 1994, taxes paid by casinos alone yielded $1.4 billion for states and localities.) Legalized gambling can also produce political benefits, most directly the rich lodes of campaign contributions available from a highly profitable industry that is so intensely dependent on political favor.

Yet there are costs as well. Some people will always gamble whether it is legal or not, but many more do so only when the law allows. Access to legal opportunities for gambling has been found to increase the number of people who develop a gambling problem. The consequences range from mild economic inconvenience to bankruptcy, embezzlement, divorce, and suicide. In 1995—ten years after their state launched a lottery, and four years after the first legal riverboat casino opened—nine out of ten Iowans indulged in gambling. One in twenty reported having a gambling problem, and Iowa social-service agencies were coping with a surge of collateral family and financial damage.

But shouldn't we leave it to officials in each state to tally up the expected costs and benefits and make decisions that sum to the right national policy? The logic of the commons makes this less than likely. If a state loosens its own restrictions on gambling, it gains the benefits in jobs, tax revenues, and political favor. It also suffers costs—but not all the costs. When citizens of other states buy the lottery tickets and visit the casinos, they leave their money behind when they return home, but take their gambling-related problems back with them. States that still ban gambling suffer much of the damage from the national trend toward legalization, but without sharing in the benefits.

Iowa, in fact, had maintained stringent antigambling laws until the mid-1980s. But as a growing number of Iowans played lotteries in neighboring states it became harder to resist proposals to revitalize a battered economy through riverboat casinos aimed at attracting out-of-state gamblers, especially from the prosperous, casino-free Chicago area. At first, Chicagoans did come, by the busload. But Illinois legislators, seeing gambling dollars heading down the interstate to Iowa, opted to allow riverboat gambling in their state, too. Iowa's initial liberalization law had tried to lower the risk of problem gambling by limiting the size of any one bet and the amount any person could gamble away in a single day. But when Illinois, Mississippi, and Louisiana introduced riverboats without any limits, Iowa lifted its own restrictions. In a similar way, after Montana allowed slot machines in taverns in 1985 neighboring South Dakota called and raised, allowing slot machines in bars and convenience stores.

By 1996 the only two states with no legal gambling at all were Utah, whose Mormon culture was uniquely resistant to the national trend, and Hawaii, where it is a good deal harder than in most other states for citizens to escape local restrictions by doing their gambling in the state next door. The federal government's absolute deference to the separate states began to bend that same year with legislation establishing a commission to examine the broader national impacts of gambling. A Nevada congresswoman denounced the bill as "the nose under the tent of Federal interference with the right of states to regulate gambling." She was entirely correct. But it is questionable whether exclusive state control over so massive a change in the legal economy's scope, with such sweeping implications for our culture, ever made much sense.

Not every issue, to be sure, can be cast as a commons problem. And even where state officials are tempted to pursue narrow agendas at the expense of national interests, it is not automatically true that the shared loss exceeds the advantages of state autonomy, or that an acceptable way can be found of safeguarding common interests without straining the framework of our federal system. There are two basic strategies for overcoming the confusion of incentives that trigger the tragedy of the commons. One is to fragment the commons into private holdings where property rights are unambiguous. The other is to maintain a polity that commands both the capacity and the legitimacy to give force to common interests. The debate over the future of America's federal-state balance can be seen, in a sense, as pivoting on this strategic choice. Devolution seeks to simplify incentives by subdividing the commons into separate plots. Federal reform requires accepting the challenge of balancing multiple interests within the national commonwealth.

Fixing the federal government is an intimidating proposition in the late 1990s. The trajectory of fiscal and political trends suggests that devolution will remain the focus of politicians' promises and citizens' hopes for some time to come. But the inherent limits of a fragmented approach to national adaptation will eventually inspire America to reappraise the ascendancy of the states. Not too far into the new century we will again collect the resolve to confront together our common fate. And we will once more take up, in the two-century tradition of Americans before us, the echoing challenge of George Washington's 1796 farewell address: "Is there a doubt whether a common government can embrace so large a sphere? Let experience solve it."