

AN INFORMATION REPORT

A FRAMEWORK FOR STUDYING THE CONTROVERSY CONCERNING THE FEDERAL COURTS AND FEDERALISM



Advisory Commission on
Intergovernmental Relations
Washington, DC
April 1986

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TABLE OF CONTENTS

PREFACE.....	v
ACKNOWLEDGMENTS.....	vi
EXECUTIVE SUMMARY.....	vii
<u>Chapter 1</u> INTRODUCTION.....	1
Historical Context.....	2
Contemporary Critical Perspectives.....	4
The Public Law Litigation Model.....	7
Statement of the Problem.....	9
Statement of Research Objectives.....	10
<u>Chapter 2</u> FEDERALISM.....	13
Introduction.....	13
Federalism and the Constitution.....	14
The Tenth Amendment.....	15
From McCulloch to Garcia.....	15
Failed Attempts to Use the Tenth Amendment.....	18
Additional Implications of McCulloch.....	19
Federalism and Political Values.....	20
Summary.....	21
<u>Chapter 3</u> DOCTRINAL DEVELOPMENTS.....	25
Introduction.....	25
Creation of Rights.....	25
Equal Protection.....	27
Due Process.....	29
Incorporation of the Bill of Rights.....	30
Expansion of the Meaning of Rights.....	32
Equitable Relief.....	35
Statutory Policies and Interpretations.....	37
Summary.....	39
<u>Chapter 4</u> CONSEQUENCES OF FEDERAL JUDICIAL DECISIONS.....	43
Introduction.....	43
Literature Review.....	45
General Explanations of Limited Court Capacity.....	45
A Catalogue of Hypothesized Consequences.....	46
Assessing What is Known Concerning the Consequences of	
Federal Court Decisions.....	49
A Plan for Future Policy Research.....	53
Selection of Substantive Issue Areas.....	54
Organizing Questions.....	56
Methodology.....	57
Management Plan.....	59
Proposed Project Timetable and Work Products.....	60

<u>Chapter 5</u> SUMMARY.....	63
Project Overview.....	63
Policy Significance and Relationship to Other Projects.....	64
TABLE OF CASES.....	67
REFERENCES.....	69

PREFACE

A primary mission of the Advisory Commission on Intergovernmental Relations is to gauge the state of federalism in America. According to many observers, the states' position in the federal system has been altered substantially during the past 50 years through federal court decisions. Simply stated, federal court decisions are alleged to have disrupted the way state and local governments fulfill essential functions in many and varied policy areas. In areas such as state correctional systems, mental health care, public school pupil placement, legislative apportionment, criminal prosecution and defense procedures, federal court involvement has been prolonged and intensive. Some judges have been characterized as having taken on the roles of legislators and managers in designing and monitoring large-scale changes in state and local institutions and policies.

The ACIR seeks to undertake a comprehensive study of the merits and limitations of federal court involvement in state affairs. Systematic policy studies are proposed to evaluate the consequences of the involvement for federalism--both positive and negative--by examining a core set of questions concerning the effects of judicial decisions on state public policy and the values of state autonomy. This Information Report provides an analytical framework for the direction and scope of the studies.

Robert B. Hawkins, Jr.
Chairman

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John Shannon
Executive Director

EXECUTIVE SUMMARY

BACKGROUND

The institutional role of the federal judiciary in the American polity has been a topic of debate since the nation's creation. During the formation and ratification of the United States Constitution, the opposing forces--the Federalists and Anti-Federalists--struggled over this issue in their attempts to shape the fundamental structure of the government of the United States. A central theme of the ensuing exchanges between the two groups focused on how federal court decisions would affect the autonomy of individual states.

The Federalists argued that an independent judiciary with lifetime tenure was essential to determine whether national and state laws were consistent with constitutional principles. In contrast, the Anti-Federalists contended that the federal judiciary would contribute to the dissolution of the states. Unless state courts were the final arbiters of the constitutionality of state policies, state governments would exist "ultimately for no purpose."

Although a sound and workable compromise emerged from this classic battle of competing viewpoints, many of the issues remained open and subject to future deliberation. In fact, the federal character of the American system with its dual lines of authority has been a primary reason for the critical importance of the federal courts; the courts adjudicate the recurring clashes between the two spheres of authority (Feeley and Krislov, 1985). A brief review of key trends in Constitutional history indicates how the federal courts have perennially made decisions affecting the basic contours of federalism. The trends include the following:

- * Under the leadership of Chief Justice Marshall in the early 1800s, the United States Supreme Court put into place the Federalists' national agenda including the principles of judicial review of Congressional and state legislation, the supremacy of the national government in its sphere of authority, and the power of the Congress to regulate commerce having an interstate impact, however, indirect.
- * Beginning in 1835, the Supreme Court applied the Fifth Amendment's Due Process Clause to restrict the federal government's regulation of property. This rollback in federal authority was carried to its ultimate end in the Dred Scott decision just prior to the Civil War.
- * After the Civil War, the Supreme Court interpreted the Due Process Clause of the 14th Amendment as a prohibition against state regulation of property. The concept of substantive due process property rights was later extended to void Congressional regulation of commerce, taxation, and spending.

- * In response to public debate and discussion, the Supreme Court modified its position on national economic policy making in 1937. Its decision to minimize judicial authority over Congressional economic policies continues to the present time.

These illustrations demonstrate that there is an historical context for the contemporary debate concerning the role of the federal courts. The current debate focuses on the courts' imposition of obligations and restrictions on the states across a wide range of policy areas. In areas such as state correctional systems, mental health, public school placement, legislative apportionment, criminal prosecution and defense procedures, federal court involvement has been prolonged and intensive.

One alternative position in the debate is to affirm current trends--the continued expansion of constitutional rights and the simultaneous restriction of state authority. The other alternative is to reconsider present trends and chart a new course of action for the future--the opportunity for states to exhibit greater diversity and to exert greater autonomy in the ways they fulfill essential functions.

The Advisory Commission on Intergovernmental Relations believes that this choice of alternatives should be informed by systematic analysis. Its far-reaching consequences demand careful research and painstaking review of alternatives to the status quo. For this reason, the Commission proposes to investigate this enduring problem in order to offer all of the partners in the federal partnership firmer knowledge on the consequences of court decisions in the modern era.

THE CONTEMPORARY DEBATE

The Courts' Critics. On the eve of the Constitution's Bicentennial, both scholarly literature and political discussions indicate that many observers of the contemporary federal court system have concerns that are strikingly similar to the perspective of the Anti-Federalists. Numerous commentaries point to a variety of ways in which judicial decisions allegedly have contributed to a displacement of state authority. The primary focus of the critics is on the federal courts' interpretations of individuals' constitutional rights and the ways that those interpretations have altered the ability of the states to fulfill key functions. (However, reactions to the recent Garcia case indicate that the scope of the Commerce Clause may once again be subject to serious debate.) Three interrelated reasons generally are mentioned to justify the claim that judicial decisions in the area of individual rights have diminished state power.

First, the number and variety of activities that are subject to constitutional standards imposed by the federal courts have become large and are growing (Glazer, 1975; Horowitz, 1977; Mishkin, 1978; Morgan, 1984; Nagel, 1978, 1984). State prison conditions, mental health treatment, legislative seat allocation, welfare administration, public school pupil placement and discipline, and public employee recruitment and retention are among the areas that now have judicially determined criteria to which state officials must adhere. Additionally, the federal courts have limited what the states may do in a

variety of social areas including abortion, public assistance to religiously supported schools, and criminal defense procedures.

Second, the depth of judicial involvement in designing relief for constitutional violations is extensive, complex, and detailed (Diver, 1979; Horowitz, 1977; Nagel, 1984). Court orders frequently require massive programmatic changes, a restructuring of state budgetary allocations, and a sharp limitation on state administrators' discretion.

Third, judicial decisions frequently fail to achieve their ostensible objectives and often produce negative side effects (Alpert, Crouch, and Huff, 1984; Graglia, 1976; Wolters, 1984). These undesired consequences are cited as serious indications of the ineffectiveness of substituting judicial decision making for the processes associated with state policy-making bodies. The negative consequences of judicial decisions are hypothesized not only to create a loss in the legitimacy of the judiciary but also to contribute to dissatisfaction among citizens toward state and local institutions, political leaders, and the value of political participation.

The Courts' Proponents. In contrast to the judicial critics, many scholars, policy makers, and jurists generally believe that the activities undertaken by the federal courts are correct and essential given the situations that courts confronted. The proponents have a vision of the courts that emphasizes the positive aspects of the judiciary's role in extending constitutional rights and in reshaping state policy. Judges are viewed as being capable and necessary in their roles as managers of public institutions (Cavanagh and Sarat, 1980; Chayes, 1976, 1982; Cox, 1976a; Perry, 1982).

Additionally, the judiciary is considered to have a unique ability to discern the appropriate meaning of "public values," at particular points in time and, hence, can declare these values in their decisions determining constitutional rights (Fiss, 1979). Finally, it is argued that there are historical precedents for the actions of the contemporary courts. It is said that while many prior assertions of judicial activity have also been controversial, the courts have proved themselves capable of governing complex organizations in the absence of actions by either executive or legislative institutions (Black, 1985; Eisenberg and Yeazell, 1980).

POLICY RESEARCH AGENDA

The Advisory Commission on Intergovernmental Relations proposes to organize a research project that will contribute to a contemporary policy debate of national significance. Specifically, the Commission seeks to provide policy makers, judges, scholars, and citizens with fuller knowledge concerning the contemporary role of the federal courts in the federal system. This will be accomplished through a multiphased study of judicial decisions in a variety of substantive issue areas and analyses of the bases for, and consequences of these decisions on public policy and its execution, the constitutional position of the states in the federal system, and the values of federalism.

Empirical investigations will be complemented by analyses of normative questions concerning fundamental constitutional and doctrinal issues. Key

topics include interpretations of the 14th Amendment, competing conceptualizations of the legitimate role of the federal courts, and alternative theories of constitutional decision making. They will be addressed by leading scholars from alternative positions. The details of how these analyses will be organized are provided in a separate report.

The first phase of the project is to plan empirical and normative studies of judicial involvement in state affairs. This paper provides an analytical framework for the empirical investigations. It identifies the critical provisions of the Constitution that allocate authority to the national government and especially focuses on the reserved powers of the states as specified in the Tenth Amendment. Previous analyses of court decisions that have interpreted the meaning of this amendment are reviewed to determine how the Supreme Court and the lower federal courts have adjudicated disputes over the division of national and state governments' respective spheres of authority. The values of federalism are also identified as an approach to examining potential consequences of judicial decisions that are particularly relevant to federalism.

Additionally, the framework paper describes the methods of interpretation that contemporary federal courts have used to justify placing restrictions on the states and in prescribing actions that the states must undertake. These methods include the doctrines used to create constitutional rights, including both contemporary theories and earlier ideas used by the courts when they applied the Bill of Rights to govern state policy. In addition, the processes through which courts have formulated equitable relief in instances of constitutional rights' violations are analyzed. This section of the framework paper also discusses the role of Congressional statutes and executive decisions that promote and invite court actions.

Quasi-experimental research designs are proposed to organize studies in substantive issue areas that address parallel questions concerning the consequences of court decisions on public policy and its administration, the structure of federalism, and federalism's values. Based on the values of federalism, several areas have been selected for analysis. They are assistance to religiously supported schools, criminal defense procedures, legislative apportionment, mental health care, public school pupil placement, and state correctional systems. The central research questions to be addressed include the following:

1. What legal and policy arguments are presented by the various parties?
2. What justifications do the federal courts offer for their decisions both in finding constitutional violations and in promulgating relief?
3. What methods do the courts use to gain information in designing and implementing relief?
4. How do court decisions affect the authority and control relationships between state officials and recipients of state services, other state and federal officials, and taxpayers?
5. How do court orders affect the process of state governmental decision

making? In particular, are states' budgetary allocations to various programs affected?

6. To what extent are the ostensible objectives of court intervention achieved? What benefits are produced? Are there negative side effects?
7. Does judicial intervention affect the confidence and interest that citizens have in state governments?
8. Does federal court involvement subsequently inhibit or foster the willingness of state officials to try new ideas?

During the second phase of the project, these questions will be addressed through a comparative analysis of jurisdictions where judicial involvement has occurred and jurisdictions where it has not. The framework paper, was approved by the Commission as an Information Report on December 4, 1985. The policy studies are scheduled to commence in early 1986 with a projected completion date of March 1987. While the policy studies are under way, the parallel normative studies will also be undertaken.

The third and final phase of the project is to synthesize the policy studies' findings with the ideas set forth in the framework paper. Additionally, the competing viewpoints developed in the normative analyses will help to integrate the framework paper and the policy studies. A comprehensive review of the two prior phases, thus, will provide a foundation for consideration of alternative recommendations by the Commission. This phase will be completed by mid-1987.

Dissemination of the project's interim and final work products will be directed toward a broad audience of judges, scholars, policy makers, and citizens. The Commission will publish and make available monographs on the separate policy studies and the synthesizing volume. Conference proceedings on the policy study topics will also be printed and distributed to the large number of individuals and organizations that regularly receive the Commission's publications. Finally, collaborative efforts will be made with groups such as the American Political Science Association and American Historical Association to reach precollegiate and college educators with appropriate versions of the study's basic findings.

SUMMARY

In the American federal system, the courts are in a pivotal position to shape the nature and significance of the states' authority. Concern has been expressed that the courts systematically have tilted the balance between national and state powers by failing to limit the scope of national government and by increasing restrictions on the states. Further, it is contended that the growing involvement by the federal judiciary has impaired the quality of public policy and the values of federalism.

A test of the propositions concerning the consequences of court decisions is vital to the current debate over the institutional role of the courts and the future of federalism. Systematic information can help reduce uncertainty

surrounding the consequences of judicial intervention in state affairs and make a unique contribution by describing the impact of controversial federal court actions within the context of theories of federalism.

Chapter 1

INTRODUCTION

The institutional role of the national judiciary in the American polity has been a topic of public debate since the beginning of the nation. During the formation and ratification of the United States Constitution, conflicting views on this subject were expressed by the contending forces seeking to shape the basic governmental structure. A central theme of these discussions was how national court decisions would affect the autonomy of individual states.

The coalition of Federalists argued that an independent judiciary was necessary to determine whether national and state laws were consistent with constitutional principles. 'It was argued that if the legislatures were unchecked by another institution, these law making bodies would soon abandon the prescribed limits of their authority (Rossiter, 1961: 464-72). In contrast, the Anti-Federalists expected that a national judiciary would contribute to the dissolution of the states. They argued that unless state courts were the final final arbiters of the constitutionality of state policies, state governments would exist "ultimately for no purpose" (Storing, 1985).

The constitutional framework that emerged was, to a considerable extent, a compromise between the opposing groups. The Federalists prevailed in most instances but in others, significant concessions were made to the Anti-Federalists. In addition, some disputes concerning the desired scope and allocation of governmental authority remained open and became issues for future discussion and analysis.

Basic constitutional issues revolving around federalism have been raised throughout American history although in different forms and in varying contexts. At critical junctures, judicial interpretations of the respective powers of the national and state governments have provided the structural foundations for long-term trends in social and economic policy making. However, even long-standing constitutional foundations of federalism have been questioned and alternative conceptualizations considered in response to major political events, such as electoral realignments, changes in the composition of the courts, and intellectual debate. New directions have then been taken, at least until the debate was prompted once again.

HISTORICAL CONTEXT

A brief review will illustrate how federalism has been an essential component in some of the most fundamental controversies involving alternative models of governance. One of the most important clashes occurred shortly after the adoption of the Constitution. The newly emerging nation was confronted with questions of exactly how authority was to be allocated in particular instances. During the early 1800s, under the leadership of Chief Justice Marshall, the United States Supreme Court put into place the Federalists' agenda by establishing the power of federal judicial review over Congressional legislation (Marbury v. Madison, 1803) and state legislation (Cohens v. Virginia, 1821); the supremacy of the national government within its sphere of authority (McCulloch v. Maryland, 1819); and the power of the Congress to regulate commercial activities having an interstate impact, however indirect (Gibbons v. Ogden, 1824). The judicial success of the Federalist perspective, moreover, occurred despite an apparent shift toward more Anti-Federalist sentiments by the national electorate, as reflected in Presidential elections.

Yet, despite these judicial decisions that extended and expanded the position of the national government, while simultaneously reducing the authority of the states, the federal system underwent subsequent modifications with the creation of new judicial doctrines. One trend began in 1835 under Chief Justice Taney, Marshall's successor. The Supreme Court decided that the guarantees of the Fifth Amendment's Due Process Clause meant substantive protection for property rights; the federal government could not restrict ownership of property. The effect of this interpretation was to cut back the authority of the national government. The Court took this doctrine to its logical conclusion in the Dred Scott case (1857) decided just before the Civil War. Although there were many other issues in this case, one of the Court's principal conclusions was that Congressional legislation, in this instance the Missouri Compromise, could not intervene in, and restrict the ownership of slaves, who were deemed property.

After the Civil War, the Supreme Court gave meaning to the concept of substantive due process through interpretations of the 14th Amendment. The 14th Amendment's provision that the states are not to violate the individual's right of due process was interpreted to prohibit state (e.g., Smyth v. Ames, 1898) and federal economic regulations (e.g., Adair v. United States, 1908).

However, after the national elections of 1936, the Court changed its

view on Congressional economic regulation. Beginning in 1937, it took an expansive view of Congress' authority under the Commerce Clause and decided to minimize judicial authority over economic policy making. The result of this judicial reversal was to expand the power of the national government at the continued expense of the states.

Certainly, each of these periods of doctrinal development was marked by societal conflict and the realignment of political forces. Yet, the history of the development of alternative doctrines and their corresponding watershed cases also reveals that constitutional principles are open to sober debate and that the market place of ideas can influence policy. Existing positions can be challenged and, as judicial decisions indicate, long-standing patterns of decisions are amenable to change.

This pattern--challenge of paradigmatic doctrines, consideration of alternative doctrines, adoption of new doctrines, critical reexamination--provides an historical context for the modern era, where once again there are serious disagreements over the vital issue of federalism and the federal courts. Society, in general, and the policy making community, in particular, are at a crossroads. One path is to affirm existing trends in judicial decision making: continued expansion of citizens' constitutional rights and continued voiding of state laws and policies in light of these newly created rights. Another path begins by questioning current trends and suggesting that more deference be given to state autonomy; diversity rather than uniformity in state laws and policies should be permitted and encouraged.

In addition to the current debate over the role of modern courts in creating constitutional rights, an emerging area that may significantly limit the autonomy of the states is renewed federal judicial protection of property rights. Recent court decisions indicate that the federal courts with increasing frequency may strike down government regulations on the grounds that they violate property rights under the doctrine of substantive due process (e.g., City of Cleburne, TX v. Cleburne Living Center, 1985). This form of judicial review, which resurrects a doctrine that had been dormant for several decades, underscores the fact that these sorts of critical issues are never fully resolved. It may also represent another historical watershed for federalism if, as recent cases indicate, such a doctrine is applied asymmetrically--limiting state but not federal regulations.

The Advisory Commission on Intergovernmental Relations believes that the

contemporary debate over the institutional role of the federal judiciary deserves careful examination. This topic has enduring significance because of the federal structure; inevitable conflicts between dual lines of authority demand that courts adjudicate critical disputes. These court decisions, in turn, affect the particular character of federalism at specific points in time (Feeley and Krislov, 1985). Hence, resolution of the contemporary controversy will contribute to the understanding of federalism and to how that understanding is expressed in the years to come. Because of the Commission's goal to foster an understanding of federalism among scholars, policy makers and citizens, the topic fits squarely within its organizational mission. For this reason, the Commission seeks to explore the empirical and normative issues that are central to the modern debate and to use the information that is gathered to contribute toward knowledge concerning what the federal courts can and should do in the federal system.

CONTEMPORARY CRITICAL PERSPECTIVES

Numerous critical commentaries on the actions of the federal courts claim that judicial decisions have limited the states in fundamental ways. These decisions have determined what state policies and practices are unconstitutional and, therefore, must be terminated. They also have ordered the states to act affirmatively to meet constitutional criteria.

Although there are a variety of areas in which the federal courts have limited state actions, a dominant focus of the scholarly and popular literature is on the courts' interpretations of individuals' constitutional rights in the face of state government activities and the ways that those interpretations have altered the ability of the states to fulfill key functions.^{1/} Three interrelated reasons are generally mentioned to justify the strong claim that judicial decisions in this area have diminished state power.

First, the number and variety of state and local institutions that have become subject to constitutional standards imposed by the federal courts are large and increasing (Glazer, 1975; Horowitz, 1977; Mishkin, 1978; Morgan, 1984; Nagel, 1978, 1984). State prison conditions, mental health treatment, legislative seat allocation, welfare administration, public school pupil placement and discipline, and public employee recruitment and retention are among the many areas that now have judicially-determined criteria to which state officials must adhere. When citizens believe that policies, practices,

and specific actions fall short of those criteria, they can sue state and local governments and seek relief in federal courts. One consequence of this new legal remedy is that the recent explosion in the civil caseload of the federal courts largely is attributable to litigation directed against state and local governments (Posner, 1985; Schuck, 1983).2/

In addition to establishing standards that the states must satisfy, the courts have ruled that there are certain areas that the states may not restrict because such restraints would impose on citizens' constitutional rights. For example, the courts have limited what the states may do to restrict reading materials, movies, and public events, to regulate abortion, to render assistance to religiously supported schools, and to permit the observance of prayer or even silent meditation in the schools. Finally, the establishment of national criminal defense procedures involves both the setting of constitutional standards and the limiting of state and local policies. Defendants' rights against state actions have been created for all stages of the legal process--arrest, interrogation, trial, and appeal--with corresponding restrictions and mandates on state actions.

Many of these far-reaching decisions occurred at the same time that the other branches of the federal government expanded their involvement in domestic policy making. Both movements flowed from the social goals of promoting equality and helping the disadvantaged (Shapiro, 1983). However, the critics maintain that such actions are beyond the courts' institutional role and have intruded on the essential position of the states in the federal system.

A second reason given as to how and why the federal courts have impaired the capacity of the states to govern is because of the extensive depth of judicial involvement (Diver, 1979; Horowitz, 1977; Nagel, 1978, 1984). Many federal district court judgments finding individual states in violation of constitutional standards have resulted in sweeping, complex, and detailed implementing orders. These court orders often require major changes in programs, operational practices, and the delivery of services rendered by the states. For example, mental health facilities with thousands of patients have been ordered to deinstitutionalize patients so that they may be given treatment in what the courts considered more appropriate centers and clinics (D. Rothman and S. Rothman, 1984). This type of court-ordered relief puts the judiciary in the position of making managerial assessments that are normally the province of professional administrators and experts in specialized fields.

The resources required to meet the specified court-ordered changes have frequently reached upwards of several millions of dollars. The impact of these requirements on a state's overall budget is that the officials who normally control the budgetary process--state legislators, governors, agency heads, and budget officers--must give the court-mandated expenditures higher priority than other programs. For example, if courts decide that mental health expenditures must increase to meet the constitutionally required levels of care, then revenues must be raised or expenditures may need to be reduced in other spending areas. Hence, the intricacies of budgeting--balancing programmatic objectives, factoring in citizens' preference intensities, and stretching available resources--may be disrupted by external decisions that require substantial expenditures (Frug, 1978; Hale, 1979; Harriman and Straussman, 1983; Note, 1977). Thus, when the federal courts order complex equitable relief, they may eventually take on the sorts of responsibilities--the management and funding of state programs--normally conducted by state executive and legislative institutions.3/

A third reason given for believing that courts have disrupted state policy making is that judicial decisions frequently fail to achieve ostensible objectives, and produce, in fact, negative side effects (Horowitz, 1977). The unanticipated consequences, moreover, are undesirable by virtually any standard. For example, it is alleged that school desegregation plans have resulted in less integration (Graglia, 1976; Wolters, 1984); changes in prison conditions have resulted in an increase in inmate violence (Alpert, Crouch, and Huff, 1984; Marquart and Crouch, 1984); experimentation with less restrictive mental care has been inhibited because of a court-ordered emphasis on upgrading institutions (Note, 1975), and so forth. Besides these sorts of immediate negative consequences, there is long-term damage. Public support for the courts, and even support for the institutions that the courts have tried to change (Wolters, 1984), is allegedly reduced because of the negative consequences of judicial policy making.

Underlying this basic three-part criticism is the proposition that the judicial decisions altering the federal arrangement have flowed from developments in legal doctrine and particular normative theories of how courts should act. Certain legal developments over the past 50 years have provided the courts with a set of guideposts, rationales, and predispositions that have led to the establishment of standards for the states and intensive review of state

regulations in a wide variety of areas of public life. Among these developments are key doctrinal issues, which include the creation of constitutional rights, the application of the Bill of Rights to state actions, and changes in theories of equitable relief, as well the passage of certain statutes that mandate or invite court action. The combined effect of these and other inter-related developments (see, Horowitz, 1983) is that they reinforce and justify specific decisions with which the courts' critics take issue. Critics express skepticism toward the desirability of these developments and warn against their implications (Berger, 1977; McDowell, 1982; Morgan, 1984; Nagel, 1978, 1984). In fact, to avert further extensions of these ideas and to limit them, recommendations have been made to amend the Constitution, to limit the federal courts' jurisdiction, and to call for a new constitutional convention.

The conflict over judicial decisions is more than disagreement on actions individual courts have taken in specific cases. It also extends beyond doctrinal disputes. Controversy exists on the legitimate and proper role of the courts in the federal system.

THE PUBLIC LAW LITIGATION MODEL

The public law model of litigation is an idea around which many proponents of court involvement converge, although there is considerable diversity among the proponents' views. In a narrow sense, the public law litigation model refers to a specific conceptual framework that describes and explains the actions of federal judges in resolving disputes over the constitutionality of state policies and practices (Chayes, 1976). These disputes, which frequently result in complex plans to prevent future occurrences of constitutional violations, are generally called institutional reform or extended impact litigation. Yet, this model offers an image of the federal courts that goes beyond institutional reform and the execution of intricate consent decrees. It suggests a general model of court decision making that encompasses and justifies the setting of constitutional standards in a wider range of issues (see, e.g., Ackerman, 1984). In this broader sense, the public law litigation model shares an orientation with other ideas concerning the function and tradition of the courts. An examination of this larger picture of the federal courts reveals four themes that are especially pertinent to the topic of the federal courts and the autonomy of the states.

One theme is that the courts are capable of, and necessary for settling

controversies that bring judges into the role of quasi-managers of public institutions for extensive periods of time (Chayes, 1976, 1982; Cox, 1976a; Perry, 1982). This capability is based in part on the independence of the courts. Political flexibility allows the courts to make necessary decisions that other institutions would not and could not otherwise make (Cavanagh and Sarat, 1980; Kalodner, 1978; Kirp, 1968, 1981a). Moreover, the judges are believed to be sufficiently qualified to make these decisions so that their performance is at least as positive as that of state officials. The courts' performance is alleged to be as good as that of traditional policy-making institutions, because the judges adopt a decision-making process of bargaining and mutual adjustment common to the other institutions when they design and implement relief (Kirp, 1981b).^{4/}

A second theme is that the function of the courts is to give meaning to "public values" (Fiss, 1979). The judiciary has the ability to discern the appropriate meaning of values at particular moments in time. Although values are subject to evolutionary change, it is contended that judges are in the best position to capture their true meaning and to declare them in decisions affecting constitutional rights. For some observers (e.g., Cox, 1976a), the ability of the courts to articulate values that already exist among the mass public explains why they maintain widespread support and legitimacy despite establishment of new and, initially, controversial precedents and doctrines.

A third theme is that much of what the courts are criticized for doing today is not at all extraordinary (Black, 1985; Eisenberg and Yeazell, 1980). It is argued that there are numerous historical instances of courts managing complex public and private institutions. Although these previous experiences were extremely controversial, the courts proved themselves capable of governing in the absence of actions by either executive or legislative bodies.

Finally, many scholars, who contend that what the federal courts have been doing to extend constitutional rights is justifiable, limit their criticisms to the means taken by the judiciary to implement specific decisions. Law professors and researchers who have analyzed the problems that the courts have encountered in accomplishing their objectives direct their recommendations toward the correction of the implementation process. Some suggest that the courts pursue more refined strategies so as to achieve desired ends by using the available knowledge of organizational dynamics and social change (Fair, 1983; Harris and Spiller, 1977; Note, 1977; Note, 1980). Others propose

that, because of the tentative nature of knowledge concerning the gains and losses of alternative policy options, judges should allow for more input and advice from the communities, organizations, and groups of citizens who must carry out the implementation of judicial orders (Bloomfield, 1970). However, at rock bottom, these scholars affirm the basic precepts behind the court orders regulating activities of the states.

STATEMENT OF THE PROBLEM

The critics and the competing model of public law litigation paint contrasting portraits of what the courts can and should do. However, it is difficult to set the critics and proponents of federal court activities side by side and compare them precisely, because the two sets of arguments are voiced at different levels of abstraction. Yet, it is clear that several basic issues revolve around this controversy over the activities of the courts. Which perspective is a more accurate description of how the federal courts have affected state authority? What are the contending views of the role of the states in the federal system? How does each side interpret key provisions of the Constitution, such as the Tenth and the Fourteenth Amendments, that affect the position of the states? What are the implications of each position for the future scope of national policy making?

Undoubtedly, many judges, policy makers, and legal scholars believe federal court involvement in state affairs has been warranted on constitutional grounds and has produced positive consequences in terms of individual rights. It seems fair to say the predominant view of the federal courts in law reviews, social science journals, and related publications emphasizes the virtues of judicial involvement and places it within the tradition of a democratic society, the unique functions of the courts, and their capacity to govern. However, the courts' critics have raised issues of such paramount significance that they cannot justifiably be dismissed by virtue of being out of step with conventional thinking. The effects of the federal courts' actions on the autonomy of the states and the concept of federalism are central in determining how America is governed. Because there is the possibility that the courts' critics may have detected a substantially different kind of judicial involvement taking place today or different results stemming from judicial involvement similar to that of the past, the criticism warrants systematic attention.

Therefore, it is the intent of the Commission to organize a study on the

contemporary federal courts' involvement in state affairs. The scope of the study will include analyses of both empirical propositions of the courts' capacity to determine state policy and normative theories of how the courts should exercise their authority. Although the empirical and the normative issues are interrelated, they will each be the focus of separate investigations.^{5/}

The purpose of this paper is to provide the framework for the empirical component of the larger study. Such research will contribute to an understanding of federalism in two ways. On the one hand, a stock-taking effort to determine the relationship between the contemporary federal court system and the states will highlight the constitutional meaning and significance of federalism. Whereas federalism is unquestionably a structural feature of American Government, it is less certain how the concept of federalism relates to court decisions. What consideration is given to federalism? How does federalism constrain national policy making?

On the other hand, it is important to know how judicial decisions bringing the courts into the state policy arena bear on the structure and values of federalism. What sort of federalism emerges from these judicial decisions and what are their consequences? Hence, federalism is both a useful context for analyzing the federal courts and an idea to be clarified by such an analysis.

The normative studies will enhance the empirical analysis by providing a context to the specific findings concerning court capacity. It will place quantitative measures and policy studies within the broader perspective of constitutional decision making and democratic governance. When both the empirical and normative analyses are completed, a richer understanding of the institutional role of the federal courts in the federal system should emerge.

STATEMENT OF RESEARCH OBJECTIVES

This paper sets forth a framework for an empirical study of the consequences of federal court decisions as they affect federalism. A series of empirical studies will follow. A synthesis of this framework and the empirical studies with the formulation of overall conclusions and recommendations will be the third phase. An indication of this study's success will be whether policy makers are drawn to this topic and pursue subsequent Commission recommendations and whether scholars build on the hypotheses that emerge from this

Figure 1

PROPOSED PROJECT SCHEDULE

<u>Project Phase</u>	<u>Time Schedule</u>	<u>Work Product</u>
Phase One	March-December 1985	Framework Paper
Phase Two	September 1985-March 1987	Empirical Policy Studies; Normative and Constitutional Studies
Phase Three	April 1987-September 1987	Synthesis of the Framework Paper, the Policy Studies, and the Normative Studies Dissemination of Project Reports

study. (An outline of the project's three phases is found in Figure 1.)

This framework paper will be used initially to guide policy studies of federal court involvement, ensuring that parallel questions are addressed and analyzed in a comparable manner. Ultimately, it will unify the policy study findings and provide policy makers, judges, and scholars with a more systematic understanding of the relationships between federal courts and federalism.

The paper consists of four basic parts, which are treated in subsequent chapters. Chapter 2 examines the federal courts in light of various theories of federalism. Chapter 3 traces the expansion of federal court involvement in state affairs. Chapter 4 reviews the literature on the impact of federal court decisions on the states. Chapter 5 concludes with an examination of the implications and a statement of the significance of the proposed empirical investigations.

NOTES

- 1/ Of further interest is the issue of the preemption of state and local authority by the federal government in certain program areas, e.g., economic and environmental regulation. The Supreme Court has played a significant role through both its constitutional interpretation of the range and depth of national authority and by its statutory interpretation

of specific acts of Congress regarding Congress' intentions to preempt the field. An Advisory Commission on Intergovernmental Relations' study on this topic is currently underway, with completion scheduled for January 1987.

2/ Most commentators on the controversy surrounding the federal courts and federalism do not attach special significance to the relationship between state-level institutions and activities and local institutions and activities (e.g., prisons, mental health hospitals, legislative apportionment versus jails, school districts and police departments). One relevant feature of the relationship is that the states' frameworks for the delivery of local services differ substantially. For example, some states operate and finance local courts, jails, and schools, whereas other states permit local units of government to contract out the provision of local services to private organizations (Ostrom, 1969). Analyses of federal court involvement at the local level must, therefore, take this diversity into account. However, for purposes of exposition, this report refers primarily to the states as the key units of analysis in framing research issues.

3/ Equitable relief is typically in the form of an injunction that orders the defendant (e.g., state prison official, school superintendent, mental health administrator) to perform some specific action.

4/ It is important to lay out, at least briefly, the reasoning behind the belief that judicial involvement is "necessary" or "essential" given the situations that judges have confronted. In bald terms, the argument claims that the judges really have no choice but to intervene in state affairs in order to ameliorate intolerable and uncivilized social conditions in light of political inaction by other units of government. Indeed, it presupposes that such intolerable and uncivilized conditions would have persisted in the absence of court intervention (see, e.g., Cooper, 1984; D. Rothman and S. Rothman, 1984).

Although this perspective does not necessarily herald or extol the virtues of judicial involvement, it rests on two critical empirical assumptions: (1) that prior to judicial involvement conditions were so intolerable that judges were justified, indeed compelled, to overturn the results of the political process and (2) that the courts had some capacity to improve the conditions at least to some degree. These empirical assumptions are, of course, open to question and verification.

5/ The analyses of normative questions will focus on alternative conceptualizations of fundamental constitutional and doctrinal principles. Key topics include interpretations of the Tenth and the 14th Amendments, conceptualizations of the legitimate role of the federal courts, and theories of constitutional decision making. They will be addressed by leading scholars who will take alternative positions--offer a justification for a particular point of view and trace out the implications of that viewpoint. The specific details of how the normative analyses will be organized are provided in a separate report.

Chapter 2

FEDERALISM

INTRODUCTION

Federalism is both a principle for the allocation of authority and a set of political values that surround that allocation. In the American system, a key principle is that the national government and the individual state governments each can make authoritative decisions. Provisions of the Constitution specify separate spheres of authority for each unit, although the exact separation between them is subject to perennial debate and interpretation.

The historical context for the framing of the Constitution was a confederation of newly independent, sovereign states that sought to define the scope of governmental decision making and to devise an appropriate division of authority. The exact consensus among the framers is unclear as to where precisely the division was to be made and what specifically the framers expected the new federal system to achieve in the short and long run. However, some general observations can be made concerning federalism that highlight the role the federal courts have played.

The autonomy of the states is seen as a means to secure important values, such as the promotion of political participation, self-government, policy experimentation; the close correspondence between the substance of public policies and local views in a geographically large and diverse society; and the avoidance of the concentration of power. However, the extent to which these values are realized depends on the presence of other key conditions, such as social pluralism, political competition, commitment to the "rules of the game," and, finally, the ability of the principle of federalism to be self-sustaining.

The intellectual history of American federalism documents how its meaning has shifted in reaction to cataclysmic changes in society--the break of the Colonies from England, the Civil War, and the Great Depression. These periods of rethinking follow a pattern found in constitutional democracies throughout the world where major political events such as revolution, war, and social upheaval are the causes of renewed constitutional decision making and where modified or new constitutions reflect the consequences of those events. Addi-

tionally, federalism has been redefined, at least partially, by every Presidential administration since World War II. There have been successive versions of "Cooperative Federalism" including "Creative Federalism" and two phases of "New Federalism." These incremental, but meaningful, modifications have manifested themselves in a number of ways, including the formulas and programs used to finance the intergovernmental transfer and expenditure of public resources. Despite the infinite ways that the concept has been used to describe relationships between the national and individual state governments (for a compendium of the many definitions of federalism see, Stewart, 1984), there remains a set of ideas that prescribe how and why the states should be free from the total domination of the national government. This core is derived from the Constitution and a body of literature on the developments associated with federalism. It is important to review these ideas because of their implications for the assessment of contemporary federal court involvement in state affairs.

FEDERALISM AND THE CONSTITUTION

Article 1, Section 8 of the Constitution "enumerates" those powers the Congress shall have including the power to tax, to regulate foreign and interstate commerce, to declare war, and to maintain armed forces. In contrast, there are only a handful of statements in the Constitution that speak directly to how authority is to be divided between the national government and the state governments. They are the Tenth Amendment, the Necessary and Proper Clause, and the Supremacy Clause.¹ They read as follows:

Tenth Amendment. The powers not delegated to the United States by the Constitution, nor prohibited to the states, are reserved to the states respectively, or to the people.

Necessary and Proper Clause--Article 1, Section 8. The Congress shall have the power.... To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof.

Supremacy Clause--Article 6, Section 2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States; shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The Tenth Amendment. The Tenth Amendment is the clearest assertion that the states have independent status. Power remains with the states if it is not delegated. Despite the seeming simplicity of this provision, it is subject to considerable disagreement. Some proponents of state sovereignty read the Tenth Amendment as a sharp limitation on what the national government can do and that the states are otherwise free to act except where prohibited by the Constitution. Advocates of an expansive national authority claim that the Tenth Amendment historically has been over-read by its proponents and that its force was, in any event, reduced in significance by the Civil War Amendments. Under this view, the 13th, 14th, and 15th Amendments gave the national government, specifically the Congress, the broad power to enforce those same rights guaranteed to citizens by the Constitution against infringement by the national government, against infringements by state legislation and policy.

Another view is that the Tenth Amendment is a declaratory statement of the division of power between the national government and the states. (see, Berns, 1966; Mason, 1968). The Tenth Amendment stipulates that there is a division of authority, but adds nothing to that which would have been reserved to states without it. Because what is not withdrawn from the states by the Constitution is undoubtedly reserved to them, the Tenth Amendment does not constrain national government policy in any specific way (see, ACIR, 1986).

However, for all three interpretations, the meaning of what is "delegated" to the national government is crucial. What is delegated is a set of explicit, if general, "enumerated" powers, the power to make all laws that are "necessary and proper" for carrying out all other powers explicitly granted, and the power to enforce the national Constitution and laws as supreme to any state constitution or law that might conflict with them. Hence, the breadth of the enumerated powers and the meaning of the Necessary and Proper Clause, in conjunction with the Supremacy Clause determine the national and state spheres of authority.

From McCulloch to Garcia. The meaning of what is necessary and proper was shaped very early in the landmark case of McCulloch v. Maryland, (1819). In this case, the Supreme Court prohibited the State of Maryland from taxing or otherwise interfering with the Bank of the United States, a corporation chartered by the Congress, by levying a stamp tax on bank notes issued by the Baltimore branch of the Bank. Although this case is usually cited as establishing the supremacy of the national government within its delegated sphere

of authority, the Court's interpretation of the meaning of "necessary" in this specific decision had lasting effects on how federalism was interpreted. It decided that, if the ultimate end of a given national policy is within the scope of a specified power, and is not forbidden by the Constitution, then the Congress is free to choose the means to the end. In other words, "necessary" was not read by the Court to mean "absolutely necessary" but rather to mean "convenient" or "useful". As a result, the national government became able to expand the scope of its decision making so long as the end or objective of the policy was useful or convenient in executing some specified power.

In practical terms, the Supreme Court had decided that it was to determine, by virtue of its power of judicial review, whether the end of a Congressional policy that regulates the states is within the scope of specified national power. However, although McCulloch v. Maryland indicated that the Court would assess the propriety of the ends of the national government, it prescribes no specific limitation and provides the Court no clear basis on which to craft doctrine to delineate a set of specific guidelines by which reserved powers might be defined. The Court said that it would analyze the disputes over national regulation within the context of the enumerated powers and the necessary and proper clause and offer its judgment whether the action lies within the scope of those powers delegated to the national government.

Yet, because the breadth of enumerated powers has expanded over time, the scope of the national government is extended and the possible role for the states is limited. A classical illustration is the Commerce Clause. Despite whatever may have been the Founding Fathers' intentions, the meaning of "interstate commerce" has grown and, with this growth, the range of activities subject to Congressional legislation has multiplied.

An implication of McCulloch relevant to the issue of the contemporary federal courts and the states' autonomy is that the constitutional foundations of federalism place responsibility for protecting state authority, if only indirectly, with the federal courts. Their interpretation of what activities are within the powers delegated to the national government determines what is and is not left in the hands of the states. However, the test used by the courts to determine what actions are and are not within the purview of the national government is a negative one for the states; the emphasis is on fashioning a test to assess precisely what powers have been delegated to the national government with little or no explicit consideration of the states.

Presumably, such a test would consider whether the ends of a Congressional policy were consistent with some national interest, objective, or purpose; whether the ends were achievable by the exercise of a power delegated to the national government; and whether the particular action was both necessary and proper to achieve such an objective. If the policy was necessary to execute one of the enumerated powers (e.g., a national tax, welfare, or commerce policy), then the action would be within the delegated powers of the Congress. In the absence of a national connection, the Court would presumably consider the ability to act in the area beyond the delegated powers of the national government and thereby, unless the states were expressly prohibited, find that the states have the reserved power of formulating policy in the area.^{2/}

Problems confronting the federal courts in shaping the appropriate limits of the national government and, thereby defining the scope of state governments, are dramatically highlighted in the Supreme Court's decision concerning Congressional authority over state and local public employees in a case decided in 1985. In García v. San Antonio Metropolitan Transit Authority, et al., the Court overturned an earlier decision (National League of Cities v. Usery, 1976) and held under the Commerce Clause that the Congress had the authority to regulate the wages of local transit employees (by requiring the transit authority to adhere to national minimum wage standards) despite objections that the regulations would have negative consequences on the financing of a traditional local government function.

In reaching its decision, the Court reasoned that the explicit basis for providing protection to states in the federal system is not normally a responsibility of the judiciary. Federalism's intrinsic institutional characteristics--representation in Congress of the states' interests through the views of Senators and Representatives--provide the appropriate means for determining whether viability of the states is diminished by the otherwise legitimate national government actions. This means that the Court is still without working criteria to define the legitimate scope of state independence, i.e., by limiting the scope of enumerated powers and interpreting the Necessary and Proper Clause, and, thereby, distinguishing the scope of national and state governments. The locus of decision making with respect to whether the states' interests are enhanced or impaired, is now in the Congress.

Reliance on this feature of the political process to settle questions concerning states' interests has substituted what may be an even weaker mechanism

for ensuring state authority than the already weak judicial test of whether Congressional policy falls within the scope of enumerated powers and the meaning of the Necessary and Proper Clause. The Court's assumption that state interests are represented in Congress has not been confirmed. Research on Congressional voting has not demonstrated that the states' form voting blocs to protect their interests. Hence, Garcia may represent a further weakening of the position of the states.^{3/}

Failed Attempts to Use the Tenth Amendment. Although Garcia may be part of a tradition extending back to McCulloch v. Maryland that depreciates the states' reserved powers, the Supreme Court did attempt to use the Tenth Amendment as a working criterion to delimit the proper sphere of the national government in the 1920s and 1930s. The Court made a series of rulings that found Congressional legislation in the areas of economic regulation, taxing, and spending to be unconstitutional, because they were in conflict with judicial definitions of interstate commerce, taxes and expenditures. Well-known examples include the Court's striking down child labor standards in Hammer v. Dagenhart, 1918. Here the Court embellished the Tenth Amendment to read that powers not "'expressly' delegated to the national government are reserved" (emphasis added). Other illustrations include the Child Labor Tax Case, 1922, in which the Court held unconstitutional a federal tax on net annual profits of businesses that employed child labor, holding them to be penalties rather than true taxes. Another key case was U.S. v. Butler, which dealt with the Agricultural Adjustment Act (AAA) of 1936. That act provided federal payments to farmers who cooperated in the government's program of price stabilization through production control. The Court found that the AAA infringed on state prerogatives under the Tenth Amendment, despite Congressional power to tax and spend for the general welfare.

Beginning in 1937, the Supreme Court reversed the trend of restricting national government activity in economic policy making on the basis of the Tenth Amendment. In cases that year, such as National Labor Relations Board v. Jones and Laughlin Steel Co. and Steward Machine Co. v. Davis, the Court shifted to a position of finding the Tenth Amendment to be of limited relevance in assessing the constitutionality of Congressional taxing and spending policies. This shift, of course, was the product of widespread public support for the agenda of the New Deal and a repudiation of the intellectual underpinnings of the Court's reasoning prior to 1937. The pre-1937 judicial foray to enforce

federalism by limiting the scope of enumerated powers under the Tenth Amendment did not enhance the position of the states in the long run. In fact, the refusal of the judiciary after 1937 to limit the national government under the pre-New Deal interpretation of the Tenth Amendment, combined with its inability to find limits under the McCulloch interpretation of "necessary and proper," may have motivated the Court finally to transfer this responsibility to Congress in the Garcia case.

Additional Implications of McCulloch. McCulloch v. Maryland and its progeny have established not only that the national government is supreme within its delegated sphere of authority, but also that its delegated sphere is virtually unlimited, with the exception of express constitutional prohibitions placed upon it, of which there are none with respect to the states (see, ACIR, 1986). In light of this fact, some critics of contemporary court decisions are willing to concede that federalism plays a minor role in defining the division of governmental authority and in defining what comprises a right protected by the Constitution from abridgement by the states; but they argue that federalism deserves the highest priority when the courts go about interpreting Congressional legislation and crafting relief.

If federalism is to endure in the presence of such an unlimited national government, it is argued that the federal courts must take into account the states' ability to perform their functions in an effective manner despite the establishment of national supremacy. Hence, the federal courts need to consider the viability of the states in order to interpret the meaning of national legislation and to fashion relief in ways that do not sacrifice the states' authority (Howard, 1980).

Much of this criticism is directed at the judicial interpretations of the Civil Rights Act of 1871. The first section of this act, which is now Section 1983 of Title 42 of the United States Code, was interpreted in the 1960s to permit citizens to bring suits against state and local officials when their actions were found to violate constitutional rights. On the basis of Section 1983, the federal courts have subsequently designed extensive changes in state institutions, such as prisons, mental health facilities, and schools to bring them into conformity with judicially enumerated constitutional standards.

Controversy over Section 1983, as it is commonly labeled, centers on whether state interests are adequately taken into account in light of the prin-

ciple of federalism. The courts' critics suggest that when rights are defined, state authority is depreciated and the conceptions of "citizens" and their rights are expanded to include a wider range of individuals and a greater number of rights (Nagel, 1979). Believing that contemporary courts are too intrusive in this regard, concrete suggestions have been advanced regarding how state interests can and should be given greater weight (Nagel, 1978).

Contemporary observers point to several ways in which the federal courts may have interpreted Congressional legislation and crafted relief in a manner that is inconsistent with the constitutional principle of federalism--autonomous and viable states--given the presence of a national government with so few limitations placed upon its ability to regulate states' activities. The federal courts are alleged to have shirked their consideration of states' interests and, as a result, the ability of the states to function as legitimate and authoritative units is believed to have been hampered unjustifiably.

FEDERALISM AND POLITICAL VALUES

The literature on American federalism contains a diversity of opinion on exactly how a structural division of authority between levels of government fosters certain values. For example, whereas some observe federalism enhancing political freedom, others see it as either having no connection (Neumann, 1962) or permitting local majorities to tyrannize minorities (Riker, 1964; but see Riker, 1982). One contributing factor to the lack of unanimity on federalism's relationship to political values is the changing division of authority. As historians have noted (e.g., Scheiber, 1980), the pattern began with a long period of dual federalism (1789-1861) and was followed by increasing centralization (1862-1945) and then state involvement, primarily in form of administering national programs (1946-80). Some analysts see tendencies of a limited return to dual federalism, at least in certain areas (Scheiber, 1980).

Yet, despite the fact that shifts in the division of authority have occurred, certain basic benefits remain associated with the principle of divided authority. Modern theorists posit that federalism promotes positive values, but different academic disciplines emphasize particular features that create different conceptual frameworks of federalism (e.g., ACIR, 1981). As a result, although there is no one, definitive theory of federalism, the following is a list of the advantages that have been ascribed to the role of the states in the federal system.

1. In a diverse society, the existence of individual states ensures a greater degree of correspondence between public policy and local preferences (Macmahon, 1962; Oates, 1972; Olson, 1969; Ostrom, 1973; Tiebout, 1956; Tullock, 1969).
2. Autonomous states yield greater experimentation and diffusion of policy innovations (Grodzins, 1966; Macmahon, 1962; Scheiber, 1980).
3. Independent states are sources of countervailing power to national monopolies (Ostrom, 1971, 1973; Truman, 1971).
4. State governments are close to the people in a variety of ways, political participation is encouraged, alienation is minimized, and citizens are more informed, all of which makes state and local governments more responsible (Elazar, 1968; Grodzins, 1966; Ostrom, 1973; Scheiber, 1980) and protects individual liberty (Brennan and Buchanan, 1980, 1982).
5. Autonomous states reduce the administrative and political burdens placed on the national government's agenda and, thereby, minimize the serious problems inherent in managing complex policies in a centralized manner (Ostrom, 1973; Scheiber, 1980; Weidner, 1962).

These values are directly relevant to the federal courts' decisions. When assessing the relative importance of the states' interests and the effects of judicial decisions on those interests, this list suggests that there are advantages to be gained from divided governmental authority. If these values are threatened by a particular national policy, such a threat constitutes a ground for deciding to restrain the national government by denying it the authority to act.

Finally, these values are pertinent to empirical analyses of the controversy concerning the impact of the federal courts on the states. They provide a rationale for choosing substantive areas for the purpose of testing propositions concerning the consequences of court decisions; the areas selected should accentuate the values of federalism.

SUMMARY

The principles and values of federalism have been subject to redefinition and refinement as society has changed. Some points in American history mark critical shifts in federalism's structure while others signal more incremental modifications. The fact remains that the federal courts are key actors in determining the direction of these changes.

The Supreme Court and the lower federal courts have been forces for greater centralization in the federal system by agreeing to an expansion of Con-

gressional authority to regulate, tax, and spend, while simultaneously restricting the same ability of the states. For an intermittent period between 1918 and 1936 the Supreme Court attempted to use the Tenth Amendment to limit the scope of the national government's economic policy making. However, that effort, which was terminated by the upheaval of the Great Depression, was politically unpopular, and became intellectually discredited. Although the federal courts have been relatively inactive in restricting the national government, contemporary critics contend that the judiciary has aggressively constrained state authority through the imposition of constitutional standards across a wide range of policy areas. Moreover, critics of current court involvement may fear that an asymmetric application of the substantive due process doctrine to states but not to the national government, may portend further shifts in the balance of power between the national government and the states.

Much of the criticism of the courts is founded on the belief that they have not honored sufficiently the autonomy of the states and that this lack of recognition has eroded the principles and has impaired the values of federalism. Consequently, a review of the ways that the federal courts have come to this position will clarify the forces behind the trends in court policy that are the subject of this strong criticism.

NOTES

- 1/ There are other provisions of the Constitution that bear on the authority of state governments although they are quite secondary to the Tenth Amendment, the Necessary and Proper Clause, and the Supremacy Clause. For an exhaustive list of these provisions, see Choper, 1977, and Miller, 1985.
- 2/ There are limits to how far the judicial process of interpreting the meaning of "necessary" can go before the power of the states is vanquished. The outcomes from the estimation of national interest potentially can undermine the viability of the states as political units. Hence, if the conditions for the states to exist as alternative levels of government are threatened by Congressional action, the Court presumably would decide cases in the states' favor. For a more elaborate explanation of how the viability of the states can be, and has been taken into account by the Supreme Court see Nagel, 1981. Nagel has proposed that there are at least four conditions and argues that some Supreme Court opinions have taken them into account. Although Nagel claims that these conditions can be culled from the writings of the Founding Fathers, one such decision was National League of Cities v. Usery (1976), which was reversed in the recent case of Garcia v. San Antonio Metropolitan Transit Authority, et al. (1985).

3/ For some critics of Garcia, the degree of the states' representation in Congress is irrelevant, because the question of the limits of the national government's powers is a constitutional rather than a political matter.

Chapter 3

DOCTRINAL DEVELOPMENTS

INTRODUCTION

In the last 50 years, the federal courts have steadily expanded the meaning of constitutional rights in many policy areas and have reviewed state policies and practices accordingly.^{1/} This extension occurred not only in the courts' negating specific state actions as unconstitutional, but also in imposing affirmative constitutionally based obligations on the states. Underlying this trend has been the development of supporting legal doctrines that define the source of citizens' constitutional rights, the specific content of those rights, and the formation of remedies when the courts determine that rights have been violated.

Much of this is due to an expanded interpretation of portions of the Constitution, in particular, the 14th Amendment. Prior to the adoption of the 14th Amendment, the Constitution offered few and only limited prohibitions on the states with regard to governance of their citizens. The 14th Amendment, adopted in the aftermath of the Civil War, provides that the national government has the authority to protect certain individual rights against possible actions by the states. The precise scope of these rights is not obvious from the language of the 14th Amendment and has been a subject of considerable debate over the years.

The foundations for many of the specific decisions restricting state actions and implementation of specific court orders depend upon modern interpretations given to the 14th Amendment. Although there are conflicting views of exactly what authority is given to the national government and what restrictions are placed on the states under that amendment, certain views have prevailed in terms of doctrine, custom, and tradition.

CREATION OF RIGHTS

The federal government is explicitly prohibited in the Constitution from interfering with the rights of individuals. These restrictions are largely laid out in the Bill of Rights, the first eight amendments to the Constitution. In contrast, there are very few and limited protections of individual rights

from state interference. An example is Article I, Section 10, which prohibits states from "pass[ing] any Bill of Attainder, ex post facto law, or law impairing the Obligation of Contracts..."

Those original restrictions on state actions clearly were overshadowed by the adoption of the 14th Amendment. The first section of the amendment reads as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Of the Civil War Amendments, the 14th had the specific purpose of ensuring the legal protection of newly freed slaves. Although its arguably broad language has provoked continuing controversy as to whether its purpose was intended to be so limited, it is clear that it has become the primary justification for prohibitions against state action affecting individual rights.^{2/}

The federal courts through their interpretation of the 14th Amendment have played a key role in modifying the relationship of the states to individual citizens. Development of 14th Amendment doctrine has come exclusively from interpretations of the Due Process and Equal Protection Clauses.^{3/} These two clauses became not merely restrictions against state interference with private action but also sources of affirmative state obligations (Cox, 1976b). The effect was greatly to expand the national government's (read federal courts') scope of authority in setting public policy.

In addition to whatever content the Due Process Clause has in itself, interpretation in the 20th century has made it the basis for the extension of the Bill of Rights into barriers against state as well as national government activities. Commonly called the Incorporation Doctrine, the reasoning that held the Bill of Rights applicable to state as well as federal government action became the underpinning for the federal court's involvement in the administration of criminal justice in the states. Finally, not only has the Bill of Rights been made applicable to the states, but over time the Court has expanded the meaning of these rights, with the effect of further constraining state action.

Equal Protection. The critical task confronting the judiciary has been to fashion an appropriate test to determine whether state action violates equal protection--treating individuals in like circumstances alike. Absolute equality of treatment has never been required because virtually every act of government requires that distinctions be made between classes of citizens or categories of activities. These distinctions, for example, may determine who will be taxed; which activities will be regulated and which will not; which types of governmental services will be provided, to whom, in what amounts and in what circumstances. Recognizing state decision makers' need for discretion in making policy judgments, particularly in economic and regulatory matters, the standard that evolved for assessing the constitutional validity of state classifications was a lenient one: Legislatively created classifications were presumed to be valid if they were rationally related to legitimate governmental objectives. A state classification would thus be invalidated only when there was no reasonable basis for it. A reasonable basis would be found to exist if any set of facts could be posited in support of the classification.

The "rational basis" test was grounded in a strong deference to state policy judgments and a presumption in favor of the validity of actions by state decision makers. Those challenging legislative classifications on equal protection grounds had a very heavy burden to bear. As a practical matter, under the rational basis test only a rare state classification scheme would fail--one that was clearly unrelated to a legitimate policy goal and resulted in invidious discrimination.

The Supreme Court's increasing sensitivity to civil liberties over the last 50 years has led to its articulation of a second test for assessing the validity of legislative classifications--"compelling state interests." Although most legislation continues to be examined under the rational basis test, a different test is used when state laws are considered to create what in the eyes of the Court are "suspect" classifications of individuals or to affect what are characterized by the Court as "fundamental rights." In those instances, the presumption in favor of the validity of state legislation is reversed: The burden of proof is shifted to the state and it is required to show not merely that there is a rational policy basis for the distinctions but that the classification scheme is justified by a "compelling state interest."^{4/}

The development and use of the "compelling state interest" test have raised problems on both doctrinal and practical levels. One basic problem is

that there are no objective or agreed-upon standards for determining which test the Court will apply. In addition to those on the basis of race, which classifications are "suspect"? On what basis does one define a right as "fundamental"? The lack of certainty as to the circumstances in which the "compelling state interest" test will be used compounds the practical effects of its use: In those instances where the test is applied, the state must justify the classification, and the burden which it must satisfy has been thought by some to be virtually insurmountable.

An illustration of the difficulty states have in meeting the test designed to define the meaning of "equal protection" is shown in the 1965 case of Shapiro v. Thompson. In that case the Supreme Court heard a challenge to regulations that mandated a one-year residency period for eligibility for assistance under the Aid to Families with Dependent Children (AFDC) program. The effect of the regulation was to create two classes of needy residents: those who had lived in the jurisdiction more than one year and those who had been resident less than one year.

The state had sought to justify the distinction between needy residents by showing that the waiting period requirement was directed primarily at preserving the fiscal integrity of the AFDC program. It would facilitate budget planning, provide an objective criterion of residency, minimize the opportunity for fraud, and encourage an individual's early entry into the work force.

The Court, however, required more than a rational basis for the classification. The one-year waiting period burdened individuals in exercising their "right to travel," which the Court recognized as a fundamental constitutional right. In reviewing the objectives advanced in support of the classification, the Court found no compelling state interest sufficient to justify the infringement of this right to travel. The waiting period requirement was therefore invalidated as invidious discrimination denying residents equal protection.

Problems with the use of the "compelling state interest" test were laid out in the vigorous dissent in Shapiro by Justice Harlan. Harlan first criticized the Court's definition of the right to travel, which the majority did not ground in any particular clause of the Constitution, as fundamental. In his view, the Court was merely "pick[ing] out particular human activities, characteriz[ing] them as fundamental, and giv[ing] them added protection under an unusually stringent equal protection test." The result of such an approach,

argued Harlan, was that the Court was taking on the character of a "super-legislature," interjecting itself and new Constitutional standards into broad areas of legislative policy making. The normal presumption in favor of the constitutionality of state legislation was reversed, and the likelihood for diversity and experimentation in state policies and programs was sharply reduced if not eliminated. In light of the history of the 14th Amendment and its explicit focus on ensuring the legal rights of the freed slaves, Harlan would have limited the "compelling state interest" test to classifications made on the basis of race. Harlan, thus, would have reviewed--and upheld--the state classification according to the rational basis test.

Due Process. A major development over the last two decades in the evolving interpretation of the 14th Amendment has been the Supreme Court's expansion of what constitutes "property" under the Due Process Clause. Historically, the law has drawn a line between "rights" and "privileges." With respect to due process protection, rights were carefully protected from governmental interference; privileges, on the other hand, were not. However, the growth in social welfare legislation with its wide range of statutory entitlements to government services caused the Court to reject the rights and privileges dichotomy. Under traditional categorizations, services or benefits provided by the state were considered privileges which could be offered or withdrawn at the government's sole discretion. Ultimately, the Court recognized statutory entitlements as a property interest warranting due process protection.^{5/}

Categorizing various governmental entitlements as creating constitutionally protected property rights and imposing due process requirements on the termination of program benefits has had consequences in a wide range of policy areas. The immediate result has been the "constitutionalization" of decision-making procedures with respect to government programs and services, ranging from income maintenance and social security benefits to probation, occupational and professional licensing, education, employment, and so forth. Placing these governmental activities under a constitutional shield, it is asserted, subjects the administrators to a significant degree of federal oversight, constricting the authority and discretion that may be needed to run various programs efficiently and within budgetary limits (Frug, 1978).

The level of involvement in state activities that has occurred is illustrated by Goss v. Lopez, (1975). This case involved a due process challenge to procedures in the Ohio public schools which permitted students to be sus-

pending for up to ten days without a hearing either before or after the suspension decision. In examining the students' contention, the Court first looked to the right or interest for which they sought due process protection. Although Ohio has no constitutional obligation to operate a public school system, the Court determined that the state's decision to establish and maintain such a system and to make attendance mandatory created a student's "legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that clause."

The Court then examined the procedures in use in the Ohio schools in light of constitutional standards. The Court, after reviewing the nature and severity of the deprivation (suspension) and the interests of the school authorities, concluded that in the context of a ten-day suspension or less, due process required that the students receive oral or written notice of the charges. In the event that the charges are denied, evidence must be presented to the student and an opportunity must be granted to refute it. The Ohio procedures flunked.

A dissent by Justice Powell focused on two related issues--the basis for the Court's conclusion that the statutory entitlement invoked due process protection and the effect of the decision on the administration of the public schools. First, Powell criticized what he saw as the Court's automatic acceptance of statutory entitlements as warranting due process protection. Reviewing the alleged deprivation caused by a suspension of less than ten days, Powell would have held that no constitutionally protected right was violated. Second, Justice Powell decried the Court's deepening involvement in the operation of the public schools. Powell feared that the decision would open the way for further judicial oversight and further undermine the authority of local school officials.

Incorporation of the Bill of Rights. The first eight amendments to the Constitution, the Bill of Rights, explicitly define individual rights and protections against national governmental action, including freedom of speech, assembly, religion, and procedural guarantees to defendants in federal criminal proceedings. Very early in American history it was understood that the amendments were directed only at the national government and not against the states. Any doubt in that regard was explicitly resolved by the Supreme Court in a case decided in 1833 (Barron v. Baltimore). The propriety of state law

enforcement practices and court procedures was thus determined solely by standards set forth in state laws or constitutions. Likewise states were free to legislate without regard to federal constitutional law in such areas as separation of church and state, and speech. However, the 14th Amendment, adopted in 1868, eventually became the basis for a doctrine that overturned this long-standing tradition.

The doctrine provides that the 14th Amendment's Due Process Clause incorporates the protections of the Bill of Rights. Hence, the Bill of Rights contains barriers against state government actions. This position, referred to as the Incorporation Doctrine, was reached despite conflicting views concerning the scope of the rights that were incorporated.^{6/}

Specifically, the total incorporationist position argued that the Due Process Clause of the 14th Amendment was intended to incorporate in toto the protections of the Bill of Rights. The effect of such a total incorporation would have been that each provision of the Bill of Rights would be automatically applicable to state as well as federal action. Although this total incorporation doctrine has never been accepted directly by the Supreme Court, the Court ultimately reached the same basic result.

The first interpretation that any of the protections contained in the Bill of Rights properly restrained state action came in a 1925 opinion (Gitlow v. New York) when the Court assumed that freedom of the press and freedom of speech fell within the "liberty" protected by the Due Process Clause. Over the next two decades each of the protections of the First Amendment--press, speech, assembly, association, religion--were held to be fundamental liberty rights restraining state action. By 1947, all First Amendment guarantees had been held to be applicable to state action.

The application of the protections of the Bill of Rights came even more slowly to the administration of criminal justice. In the 1937 case of Palko v. Connecticut, the Supreme Court read the Due Process Clause as protecting from state interference those rights contained in the Bill of Rights which were considered "fundamental" or "implicit in the concept of ordered liberties." This articulation of a standard for the examination of individual rights required the Court to make a case-by-case examination of the various protections contained in the Bill of Rights. Upon making such an examination in Palko, the Court held that protection against double jeopardy was neither "fundamental" nor "implicit in the concept of ordered liberties" even when

the defendant's life hung in the balance. The Court permitted the sentence of death against the defendant to stand. Ultimately however, in a series of decisions in the 1960s, the Supreme Court held that most of the guarantees in the Bill of Rights were "fundamental rights" which the states had to observe in their criminal proceedings.^{7/} This case-by-case process has been referred to as "selective incorporation."

The selective incorporation doctrine has been subjected to criticism from both within and outside the Court. Most obviously, the doctrine is subject to criticism on the grounds that it proceeded to do piecemeal exactly what a large body of Supreme Court decisions held should not be done--application of the entire Bill of Rights to the states--and did so during the exact period of time a majority of the Court was resisting wholesale incorporation. It is argued that the selective incorporation process provided no criteria to ensure that the basis of selection is not the subjective judgment of a current (and possibly shifting) majority of the justices. One of the severest critics of selective incorporation was Justice Harlan, who, in criticizing the "fundamental" rights approach, urged the Court instead to adopt what he considered to be a more objective test: whether the procedure was necessary for the defendant to receive a fair trial (see, Harlan's dissent in Duncan v. Louisiana, 1968). It is unclear, however, whether this test is ultimately any less subjective or whether it would have led to significantly different results in many cases.

Expansion of the Meaning of Rights. Application of the protections of the Bill of Rights to the states through the 14th Amendment has had profound significance for the operation of the federal system. Limits have been imposed in areas traditionally left to state law. The administration of criminal justice by the states, in particular, has become subject to extensive federal supervision.

However, the 14th Amendment has not been the only vehicle for the creation of constitutional rights in the past 50 years. The Supreme Court has found new rights through at least three other modes of analysis. They include:

- 1) recognition of "fundamental rights," not in any specific provision of the Bill of Rights;
- 2) evolution in the content or meaning of clearly established constitutional protections; and
- 3) application of due process requirements that restrain the states' abilities to act in areas that are not otherwise protected against their actions.

Illustrations of the first form of analysis include the right to travel, which invalidated state residence requirements for income maintenance (Shapiro v. Thompson, 1969); the prisoner's right of access to the courts, which required the establishment of adequate law libraries at correctional institutions (Bounds v. Smith, 1977); and the right of privacy in abortion and related matters (e.g., Roe v. Wade, 1973). The specific justifications given for these rights vary from case to case, resting on one or more of the following lines of reasoning: it is difficult to imagine a complex society without such a right; the right rests on a presumed tradition reflected in parallel cases; or, it is implied by specific sections of the Constitution and relevant statutory law.

These justifications tend to be general and abstract. For example, whereas the right to freedom from state restrictions on interstate travel may be deemed fundamental, its application in the context of eligibility rules for income support is less compelling, especially when eligibility rules in other areas (e.g., voting, attendance at state universities) remain permissible. Similarly, the Court's argument that privacy rights arise from the "penumbras," "emanations," or "shadows" of particular amendments makes it difficult to see the linkage between the abstract right and the specific application of the right in a particular case.

As a result, in these cases, the dissenting opinions have criticized the Court's discovery of rights lying in the shadows of constitutional provisions, stressing the absence of language in any article or amendment to the Constitution that provides an underpinning to the majority's opinion that these rights are "fundamental." It may be argued that the controversy over what is a fundamental right diverts attention from the real issue--whether the notion of a hierarchy of rights, as implied by the judicial notion of fundamental rights, is indeed consistent with the Constitution. Yet, as long as these decisions are in place, they affect how welfare administrators set eligibility requirements; they require that correctional administrators provide inmates with reasonable access to decent legal libraries; and they prescribe what regulations states may establish concerning abortions.

The second category of analysis is illustrated by the Supreme Court's review of prison conditions in Rhodes v. Chapman, 1982. The Eighth Amendment, as applied to the states through the 14th, limits the extent to which states may punish convicts, levy excessive fines, and inflict punishments that are

"cruel and unusual." There is no question that the Eighth Amendment is meant to apply, almost exclusively, to criminal offenders. It is the interpretation of this amendment and the determination of whether specific conditions and practices meet its standards that have provoked critical reactions.

In Rhodes v. Chapman, the Supreme Court used phrases such as "depriv[ations]... of the minimal civilized measure of life's necessities" in an attempt to give substance to the words "cruel and unusual." The Court recognized "evolving standards of decency" rather than the standards in vogue at the time of the passage of the Eighth Amendment in determining constitutionality.

Despite the advantages that the flexible nature of constitutional phrases offer in adjusting the Constitution to changing realities, this sort of modification has consequences that affect the states. As the Rhodes case illustrates, one consequence is that lower courts may subsequently expand on the Court's already expansive language. In Hoptowit v. Ray and Capps v. Atiyeh, courts held that the Eighth Amendment requires the provision of "basic human needs," including "adequate food, clothing, shelter, sanitation, medical care, and personal safety." Although medical care and personal safety may be regarded as essential to a constitutionally sound prison system, issues of food, clothing, shelter, and sanitation may be beyond the coverage of what constitutes protection against cruel and unusual punishment and properly remain within the strict determination of the states (see, e.g., Brakel, forthcoming).

A second consequence of the Rhodes decision lies in its interpretation that a deprivation that might not be found individually to be cruel and unusual could, in combination with others, be ruled unconstitutional. It is such broad "totality of conditions" claims that have been at the heart of the major class actions brought by litigators such as the American Civil Liberties Union's National Prison Project, the NAACP Legal Defense Fund, and others. Some of these cases, if successful, will require massive institutionwide or systemwide changes at enormous financial expense.

An example of the third form of analysis is the Supreme Court's policy concerning capital punishment. In 1972, the decision in Furman v. Georgia held the imposition of the death penalty to constitute cruel and unusual punishment under the Eighth Amendment. Legislatures in 35 states revised their statutes to address the concerns about uneven imposition that had been articulated in Furman. Statutes based on different approaches to eliminate arbitrariness and to constrain discretion came to the Supreme Court on Eighth

Amendment challenges in 1976. In the lead case, Gregg v. Georgia, the Court upheld individualized sentencing and made that approach "a constitutionally indispensable part of the process of inflicting the penalty of death."

As Justice Rehnquist observed in his dissenting opinion, the Court appears to be importing due process considerations into Eighth Amendment analysis. That is, the Court is conceiving of what it considers desirable procedural protections when the death penalty is to imposed.

EQUITABLE RELIEF

The federal courts' expansion of rights has been paralleled by a shift in the relief that courts will order upon a finding of rights violations. This shift has been seen first in the availability of "equitable relief," most typically the injunction. Equitable relief was once viewed as an extraordinary remedy; it now has become the typical form of relief in litigation in which practices of states' agencies or programs have been challenged as falling below constitutional criteria.

An evolution has also occurred in the form of injunctive relief. The injunction has evolved from a predominantly negative remedy to an affirmative one, that is, from an order prohibiting the defendant from engaging in specific conduct to one requiring the defendant to undertake certain action. This shift has been traced to the 1954 Supreme Court desegregation decree in Brown v. Board of Education.

In that decision (Brown I), the Supreme Court held that the racial segregation of children in public schools violated the Equal Protection Clause of the 14th Amendment to the Constitution. In devising a remedy, the Court could simply have enjoined states from enforcing their laws that required or permitted the establishment or maintenance of dual school systems. Instead, the Court in a decision the next year (Brown II) called for an affirmative program of desegregation. The Brown II decision was unprecedented, in terms of the scope of the federal courts' involvement in formulating and enforcing various forms of relief.

Under Brown II, primary responsibility for developing desegregation plans rested with school authorities in the states. The lower federal courts, which had originally heard the cases, were charged with the responsibility of overseeing these efforts, with jurisdiction to enter such orders and decisions as were necessary to effectuate the desegregation holding.

The lower courts, perhaps inevitably, became deeply involved not only in reviewing state-devised plans, but in formulating plans themselves, and in superintending their implementation. This involved "detailed administration for protracted periods under constant judicial supervision" (Cox, 1976b:77). The content of the relief was wide ranging. Undoing the consequences of past violations was felt to require the states to alter basic aspects of their public school systems--including organization, employment, curriculum, and extracurricular activities.

Brown II set what was to become the pattern for the courts' involvement in institutional adjudication--cases involving schools, prisons, mental health hospitals, and so forth. Upon establishment of a violation of the plaintiff's constitutional rights by the defendant, the remedy has rarely been a negative injunction--a simple proscription against the defendant's continuing the challenged practices or against the enforcement of the challenged law. Rather, relief has been prescriptive, a decree outlining, typically in considerable detail, the actions to be taken by defendants to enforce the rights found to have been violated.

The rationale for this approach has been twofold. On the one hand, providing a remedy is understood to be the traditional function of the court upon a showing of injury and legal entitlement. Doing so in institutional adjudication, therefore, is to be expected. In that context, the court's task is to fashion relief in such a way as to redress the underlying condition (see, e.g., Eisenberg and Yeazell, 1980; Fiss, 1979). On the other hand, given the circumstances of many of these cases, it is believed that judicial formulation of the remedy and close supervision of its implementation is the only avenue that can reasonably assure an effective remedy (Cavanagh and Sarat, 1980).8/

The use of affirmative injunctions has been the subject of considerable controversy on a number of grounds. One challenge is directed at the court's use of its equity powers. According to some (see, e.g., McDowell, 1982), the Supreme Court in Brown II, in order to reach the affirmative outcome of requiring the integration of public schools, abandoned requirements that had previously constrained the court's use of equity relief, thereby establishing the basis of an entirely new judicial paradigm that would take shape over the next 20 years. These previous constraints were necessary, even essential, because of the extraordinary nature of the equity power, which traditionally had

served to give the court broad discretion to fashion relief to the needs of individual cases. Without those constraints, the federal courts have assumed under this new paradigm an enhanced power to formulate rather than simply to negate public policies.

Other challenges focus more directly on the implications of the use of the affirmative injunction on the federal system. The affirmative injunction constitutes a considerable intrusion upon state functions. If not displacing elected and appointed state officials from traditional decision-making functions, then it often creates a separate source of authority. This is aggravated by the level of specificity typically found in affirmative decrees, their long duration, and their wide impacts.

STATUTORY POLICIES AND INTERPRETATIONS

The general expansion in the scope of government at all levels over the past 50 years has undoubtedly contributed to the sheer volume of the federal courts' business. Disputes arising over governmental rules, procedures, and programs have increased with the passage of statutes and the creation of executive agencies and corresponding administrative rule making. This increase in social and economic regulations has been accompanied by a willingness of citizens, organizations, and governmental units to press their preferred interpretations of these regulations into the legal arena. Consequently, courts have become more involved in adjudicating disputes involving state laws and policies because the laws and policies themselves have increased in scope and complexity.

However, the federal courts have been part of the process that has increased the magnitude of activities subject to judicial review. The emphasis placed on the First and the 14th Amendments by the Supreme Court has encouraged many to seek judicial relief from legislative or administrative bodies. The courts and the Congress abet this encouragement by increasing access through loosening the requirements of standing, jurisdiction, justiciability, and ripeness. It is extremely difficult, if not impossible, to sort out the relative causal importance of the courts' actions versus the Congress' actions. Some of the responsibility lies with the courts and some lies with the Congress and the nature of a litigious society (Rosenbloom, 1983).

Within the maze of factors that have contributed to the increasing workload of the federal courts, one element that is assigned special significance

is the creation of new rights for individuals seeking to oppose public agencies. The vehicle used by the courts to hold public agencies accountable was established long before the "administrative state" arose but was put into effect only after the administrative state was well under way. The concept of enabling citizens to hold public officials accountable through litigation in the federal courts was placed in statutory form in the Civil Rights Act of 1871, which was intended to enforce the 14th Amendment. Subsequently codified as 42 U.S. Code, Section 1983, it provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, usage, of any state or territory, subjects, or causes to be subjected any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding providing for redress.

Its original purpose was straight forward--to protect the emancipated slave population in the South. However, Section 1983, as it is commonly called, was dormant for nearly 100 years. A primary reason why the meaning of Section 1983 was construed narrowly, and ignored as a legal remedy for many years is that parallel Supreme Court cases gave narrow interpretation to the protections of individuals' rights against state actions. The scope of citizens' "rights, privileges, and immunities" under the 1871 act was restricted by the Court's limited view of "privileges or immunities" in the Slaughterhouse Cases (1873). Similar interpretations of the 1871 act were made by the federal judiciary until 1961. That year, in Monroe v. Pape, the Supreme Court upheld a citizen's right to sue police officers for damages.

In its opinion the Court interpreted "under color of state law" to include any misconduct by officials. This led Justice Frankfurter to write a dissenting view contending that Section 1983 was intended to cover only misconduct that the state had authorized. In spite of the broadening effect of Monroe v. Pape on Section 1983, this law was still constrained temporarily by the Court's interpretation of "every person" to preclude suits against municipalities and other governmental entities.

Monroe v. Pape established Section 1983 as a remedy that citizens could invoke affirmatively against officials' misconduct. Subsequent decisions expanded its potency by stripping away past immunities available to individuals

and government' defendants in Section 1983 actions (see, Schuck, 1983). The governor of a state was found not to be entitled to absolute immunity, even in a crisis situation (Scheuer v. Rhodes, 1974). Municipalities lost immunities including the qualified immunity of a "good faith" defense in the 1980 decision in Owen v. City of Independence. That year the Court also interpreted Section 1983 to apply not only to constitutional and civil rights torts but to violations of the many federal statutes that state and local officials help to administer or enforce (Maine v. Thiboutot).

Although state judges and prosecutors continue to enjoy immunities against personal liability, and punitive damages awards against governmental entities are barred, the Court has transformed Section 1983 into a powerful tool. The Court continues to open up new avenues for the plaintiffs: the possibility of asserting negligence claims (Paratt v. Taylor, 1981) and punitive damages against individual officials (City of Newport v. Facts Concerts, Inc., 1981).

Thus, the Supreme Court has made a series of interpretations of the Civil Rights Act of 1871 that has created the risk of liability for public torts across a wide range of state and local activities. Findings of official misconduct under Section 1983 have involved the federal courts in ordering complex remedial changes in state and local institutions.

SUMMARY

The last 50 years have seen the development of several key doctrines and statutory interpretations by the Supreme Court that lead the federal judiciary to the position of reviewing state laws and policies for possible violations of constitutional rights. The doctrines flow primarily from analyses of the 14th Amendment's Equal Protection and Due Process Clauses, although the latter is also the basis for the Incorporation Doctrine. The creation of rights includes various means by which the Court has expanded the content or meaning of rights. Finally, the Court has made a series of decisions that vastly expands the rights of citizens to sue state and local governments. Section 1983, which is the legal remedy used by citizens, is a critical foundation for federal court involvement in state and local affairs.

This chapter's overview of doctrines and interpretations describes the general manner in which federal courts have arrived at their current level of involvement in both restricting certain actions of state governments and pre-

scribing certain standards to which they must adhere. Having been put in place, these ideas constrain states and local governments in the conduct of their business.

NOTES

- 1/ The general trend toward increased judicial involvement in state policy making has not been without exception. A notable recent example is San Antonio Independent School District v. Rodriguez, 1973. In that case the Supreme Court upheld against an equal protection challenge a public school financing system based on local property taxes. Despite this and analogous decisions (e.g., Dandridge v. Williams, 1970; Lindsey v. Normet, 1972; and Rizzo v. Goode, 1976) there has been an undeniable trend toward judicial involvement in other policy areas, including prisons and mental health hospitals, which, some observers (e.g. Kaden, 1980) note, do not involve the court in the intricacies of state administration to the same extent as in public school finance.
- 2/ The argument that the 14th Amendment was intended to protect only freed blacks against reprisals, and thereby, should be interpreted consistently with this intention, is made by several observers. See, for example, Berger, 1977; Fairman, 1949; Morrison, 1949. A contrary position that claims that the amendment was designed with much broader objectives and those objectives permit a wide range of applications is taken by others, including Dworkin, 1977a.
- 3/ Early judicial interpretations gave the "Privileges or Immunities" Clause an extremely limited meaning, essentially eliminating it as a source of rights. In 1873, the Supreme Court held, in the Slaughterhouse Cases, that the Privileges or Immunities Clause of the 14th Amendment provided for the protection of individuals' rights against federal actions but not state actions. On the basis of this interpretation, the Court held that a state slaughterhouse monopoly did not deprive the butchers of New Orleans of their rights under the 14th Amendment. Instead, they were told to seek redress in Louisiana's state court system.
- 4/ Court decisions disclose a third standard which falls somewhere between "rational basis" and "compelling state interest." To withstand an equal protection challenge, a classification must serve an "important" governmental objective and be "substantially" related to the achievement of those objectives. Although the Court has not acknowledged the establishment of a third test, this standard has been used in a number of cases involving classification according to sex, e.g., Craig v. Boren, 1976. The use of this "middle tier" does not resolve the problems with respect to the states as the effect of its use is to overturn classifications that would have been upheld under a rational basis test.
- 5/ The federal courts have previously used the 14th Amendment to protect property rights. However, the concept of property referred to private ownership and the production of goods and services. Using this definition, the courts interpreted both national and state government economic

regulations as unconstitutional. This application of substantive due process occurred in the late 1800s and the early 1900s.

6/ There is not an obvious connection between the 14th Amendment and the Incorporation Doctrine judging by the length of time that elapsed between the enactment of the 14th Amendment in 1868 and the doctrine's manifestation. It may be argued that an early expression of the doctrine occurred in 1884 in the dissenting opinion of Justice Miller in Hurtado v. California. However, it seems fair and accurate to say that the Incorporation Doctrine was not expressed by a majority of the Supreme Court until 1925, over a half a century after the 14th Amendment's adoption, and the precedent was only in terms of the First Amendment's incorporation. The applications to criminal defense procedures, which began in 1961, did not occur until nearly a century after the adoption of the Amendment.

7/ Search and seizure [Mapp v. Ohio, 367 U.S. 643 (1961)]; cruel and unusual punishment [Robinson v. California, 370 U.S. 660 (1962)]; counsel [Gideon v. Wainwright, 372 U.S. 335 (1963)]; self-incrimination [Malloy v. Hogan, 378 U.S. 1 (1964)]; confront adverse witnesses [Pointer v. Texas, 380 U.S. 400 (1965)]; speedy trial [Klopfer v. North Carolina, 386 U.S. 213 (1967)]; compulsory process [Washington v. Texas, 388 U.S. 14 (1967)]; jury trial [Duncan v. Louisiana, 391 U.S. 145 (1968)]; double jeopardy [Benton v. Maryland, 395 U.S. 784 (1969)].

8/ However, there are instances where federal courts have ordered and monitored substantial changes in state policies although the original grievances in the successful complaint were not granted relief. For example, statewide changes in West Virginia's public school system were made pursuant to a court's decision but the plaintiff's original claims were not satisfied. See Oakerson, 1983.

Chapter 4

CONSEQUENCES OF FEDERAL JUDICIAL DECISIONS

INTRODUCTION

The position of the states in the federal system is greatly affected by how the courts interpret the limits of the national government and by their review of state policies in light of citizens' expanding constitutional rights. In recent years, the federal courts have extended the authority of the national government by requiring state adherence to a broad spectrum of constitutional standards. Doctrinal developments have provided the courts with a rationale for this interventionist posture although, in some instances, Congressional legislation promotes and invites the courts to become involved in state affairs.

The courts' decisions have provoked criticism of the justifications given for judicial interventions and produced skepticism of the courts' ability to make decisions regarding appropriate state public policy. In a general sense, there are two different types of critical reactions. First, there is a two-part normative argument: (1) that, in general, the national government, whether the courts or otherwise, should not become involved in trying to reform state public policy--absent explicit constitutional delegation to do so--because these attempts violate the intentions of the Founding Fathers concerning the relationship of the national government to the states, and (2) that the courts, in particular, should refrain from efforts to reform public policy at any level, especially at the state level, because such attempts violate the Founding Fathers' intentions concerning the institutional role of the courts in a federal system. This normative argument concludes, therefore, that much current federal court involvement in state affairs rests on questionable legal doctrines.

Second, there is the empirical question whether the courts have the capacity to decide what constitutes necessary and appropriate state policy. Hypotheses concerning the consequences of court decisions are important for several reasons.

One reason is that many scholars believe that the performance of the federal courts in determining what programmatic changes are required to meet con-

stitutional standards has been necessary, appropriate, and positive. These scholars view the courts as possessing the capacity to assess social alternatives and to choose the one with the greatest net gain. However, the purported benefits of judicial involvement have been challenged. One recurrent theme of the critics is that the consequences of much court involvement have been seriously negative outcomes according to any standard (e.g., desegregation orders leading to increased segregation). The examination of the consequences of court decisions permits the testing of competing ideas and, thereby, may offer systematic information that is relevant to an important debate.

Empirical results also have an important bearing on the normative argument. If the courts are found to be ineffective, inefficient, or counter productive, this evidence constitutes a sound reason for concluding that they should restrain themselves and adopt a less interventionist role.

The logic for the inference that the courts need the capacity to support their jurisdiction in these matters is based on the fundamental premise that "ought implies can." Accepting this major premise, it follows that when an individual or group of individuals cannot do something, the action should not be prescribed or attempted. In the context of the current research, this means that if the federal courts cannot achieve appropriate social policy goals, then they should not engage in this form of activity. However, it does not follow that if the courts are shown to be effective, then they should be involved, because this is committing the "naturalistic fallacy" of concluding that "whatever is, should be." Hence, evidence of negative consequences from the proposed empirical investigations can serve only to call into question the judicial role in state affairs, but evidence of positive consequences does not justify the involvement by normative standards. That is, rejecting the critics' contentions is necessary but not sufficient to affirm federal court involvement in state affairs.

Some observers might object to this proposed linkage between the consequences of judicial decisions (or the capacity of the courts) and the normative question of whether the courts should be involved in changing state policies. For example, Dworkin (1977b) argues that court decisions to desegregate public schools do not rest on social science evidence concerning the connections between segregation and student performance, current de jure segregation and de facto antecedents, or the benefits and costs of integration. Rather, the decisions are rooted in "interpretative judgments" of norms, values, and a

sense of community. Hence, for Dworkin, evidence of negative, unintended consequences of school desegregation decisions does not call into question what relief courts have designed and tried to implement, because their actions are justified independently of such data.

Although Dworkin is correct in assuming that normative arguments must be internally consistent and must be argued on their merits, his complete separation of normative and empirical considerations makes the former irrefutable. Certainly, values are subject to empirical analysis, because no one speaks in favor of inefficient, ineffective and counter-productive actions. Hence, evidence on the consequences of judicial decisions is considered to be relevant to the study of the federal courts and federalism, no less than evidence of the efficacy of a medical procedure and the possibility of adverse side effects is considered relevant in the decision to render a specific treatment in cases where undertaking none of the positive treatments may lead to the patient's death.

Finally, limited verification of the proponents' and the critics' claims leaves a serious gap in our knowledge of an issue of national significance. Uncertainty over the actual consequences--both positive and negative--of court decisions inhibits clarification of issues and resolution of the policy debate.^{1/} Obtaining a consensus on the appropriate role of the courts depends on a firmer base of data concerning the nature of the courts' interventions and their effects. For all of these reasons, there is a need to conduct a systematic inquiry into the testable propositions that hypothesize linkages between court decisions and social outcomes.

LITERATURE REVIEW

A review of the critical commentaries on court capacity reveals that there is both a general rationale for why the courts are considered deficient when they attempt to impose standards, policies, and practices on the states and a catalogue of specific instances of disastrous outcomes. Both the explanatory scheme and the specific claims are highlighted below.

General Explanations of Limited Court Capacity. Two factors are generally identified as the reasons why the courts allegedly err in choosing among social policy alternatives (Horowitz, 1977:25-6, 290-1; Diver, 1979:60-1; Rubin, 1987: 165-7). First, the members of the bench are believed to lack the expertise necessary to process the complex information needed to understand

the relationships that give rise either to alleged constitutional deprivations or to the appropriate relief in the event that constitutional violations are found. Courts cannot accurately determine the linkages between the injury, state policies, and extraneous factors. As a result, courts may be misled into accepting spurious relationships between the deprivation and a policy instead of learning the true source of the alleged wrong.

This difficulty is compounded by the judges' lack of understanding of how to fashion relief that fits each context. Even if relief is warranted, judges may not know what needs to be changed in order to achieve the desired amelioration. In fact, court-ordered changes may prove counter productive because of a lack of information on the complex network of authority and incentives that exist among the participants in every policy area.

Second, the process of adjudication is not conducive to the sort of problem solving required to achieve desired ends, because it treats the alleged facts of each case in isolation from behavioral theories. Adjudication is oriented toward an analysis of the facts strictly as presented by the parties rather than in light of more general explanations. This means that theories are not used to interpret the nature and significance of alleged instances of rights violations. As a result, consequences of judicial decisions for state public policy may frequently be negative.

Additionally, litigation is not conducive to needed problem solving because it neglects costs. Problem solving generally involves the examination of the gains and losses of alternatives, the amount of scarce resources consumed by each alternative, and the opportunity cost of not being able to use resources for other purposes. These factors are seldom central to the judicial assessment of constitutional rights. Cost may even be disregarded as irrelevant to the determination of rights or the violation of rights and the design of relief in the event of violations.

Adjudication also lacks a routine feedback mechanism to inform the court when its orders are encountering problems of implementation. Without a mechanism to correct its decision because of unforeseen problems, the court must rely on the parties to inform it of any difficulties. Although masters or monitors may be employed to assist the court in managing post-trial implementation of court orders, these adjuncts have a tendency to develop their own agendas and, hence create another type of feedback problem for the court.^{2/}

A Catalogue of Hypothesized Consequences. In virtually every area in

which the federal courts have intervened and set standards to which the states must adhere, a body of literature has arisen that is critical of the interventions' effects. In many of the writings, the critical observations are drawn from instances where a federal district court has reviewed a particular social policy and rendered a specific decision. The effects of the court's decision are described in great detail but without the benefit of parallel observations from other courts and other policies. A review of this literature, however, reveals certain common themes in the kinds of effects that are attributed to the courts' involvement.

These themes are illustrated in the following summary of the literature on court involvement in three basic state and local institutions: prisons, mental health facilities, and public schools.^{3/} The themes follow.

First, court involvement in state affairs allegedly weakens the legitimacy, authority and control of governmental officials. The authority of administrators is reduced with respect to staff members, subjects, recipients, and users of the governmental policies and institutions (Diver, 1979:81-2). This phenomenon is alleged to occur in prisons (Marquart and Crouch, 1984), mental institutions (Rubin, 1978:166), and public schools (Glazer, 1978; Graglia, 1976; Morgan, 1984; Wolters, 1984). In public schools, the decline in authority also affects how students view the administrators' authority over rebellious pupils--they believe that students who cause disturbances will not be punished (Glazer, 1978; Wilkinson, 1975:72). In fact, administrators are discouraged from taking disciplinary action where it is warranted (Wilkinson, 1975:72). The reduction in school administrations' authority is evidenced by an increase in school-related crime (Morgan, 1984:69; Wolters, 1984:242), confrontations between racial groups (Wolters, 1984:190-7), and general disciplinary problems (Graglia, 1976:275), while a decline in authority at prisons is evidenced by an increase in violence among inmates (Marquart and Crouch, 1984) and violence by inmates against correctional officials (Alpert, Crouch, and Huff, 1984). Yet, contrary to these viewpoints, others have found that court-ordered reform improves the authority and power relationships by allowing innovative administrators to come forward (D. Rothman and S. Rothman, 1984:353-60).

Second, court involvement in state affairs imposes onerous financial costs on state governmental agencies. In some instances, indirect expenditures may be required to meet an objective (e.g., purchases of vehicles to

in the federal system. If judicial involvement creates a lack of confidence in state governmental institutions, this is a more chronic problem than the immediate policy impact of court decisions on budgets, personnel, or operational procedures.

Finally, the belief in the efficacy of legal reform sometimes leads courts to impose standards or procedures on state policies that are without substance. That is, federal courts may require hearings to be held on due process grounds in order to ensure a fair evaluation of the educational needs of handicapped children or welfare recipients who have had their public assistance terminated. Yet, the hearings may prove to be empty gestures with no material improvement in the services rendered (Kirp and Jensen, 1983) but with additional cost to the states in conducting the hearings (Feurst and Petty, 1985).

ASSESSING WHAT IS KNOWN CONCERNING THE CONSEQUENCES OF FEDERAL COURT DECISIONS

A prominent belief among legal scholars is that judicial involvement in state affairs is justified because courts are better equipped to solve these sorts of problems than are other governmental bodies and that the courts are, in fact, relatively successful. However, there is a growing literature that calls these beliefs into question. Critics contend that federal court intervention weakens the legitimacy and authority of state officials, reduces the officials' control, imposes undesirable budgetary reallocations on the states, and produces negative side effects either through the courts' failure to understand the implementation process or through the courts' ill-conceived solutions to ill-defined problems. As strong as those claims are, they are more useful, because of certain methodological shortcomings, in raising issues than in settling empirical questions as to the true consequences of court decisions. An understanding of these deficiencies will permit future research to build on the ground-breaking studies that have drawn attention to the question of the courts' capacity and, thereby, to contribute to a cumulative body of propositions relevant to the debate.

Six limitations in the knowledge base on which the criticisms rest deserve mention. First, most of the studies lack clearly stated questions to guide inquiry into the consequences of judicial decisions. Clear definitions of key phases (e.g., "successful" and "unsuccessful" intervention) are lacking. Even those studies that adopt more of an empirical approach are ambigu-

ous as to what analyses of specific court decisions are intended to reveal. What are we looking for? How do we know when the organizing questions are answered? Greater clarification of what is meant by capacity, and how we can know it when we see it, are essential for a meaningful dialogue between alternative perspectives on the courts.

Second, the studies generally fail to establish a causal chain between federal court decisions and the alleged consequences of those decisions. At the most basic level, there is little systematic evidence of how the components of an individual case--the pretrial litigation, the issuance of a court order, and the monitoring of a decree--set a sequence of events in motion that culminate in some disastrous outcome. There is no question that negative outcomes are cited by the critics, but an empirical account of how the decisions and the outcomes are linked is less well established. This general limitation arises because of the design of the studies: The objective of many of the critics is to point out doctrinal weaknesses in the courts' decisions. They do not purport to have crafted sound studies of decisional outcomes. This limitation must be recognized in order to sort out what we know and do not know empirically concerning decisional outcomes.

Characteristically, the studies fail to siphon off the effects of extraneous factors likely to be present at the same time as the federal court involvement. For example, problems of authority and control can arise in prisons for reasons other than the creation of new rights. If the theory of rising expectations, as applied by Alpert, Crouch, and Huff (1984) is true, then one would expect noncourt efforts to reform institutions also to trigger a gap between expectations and achievement resulting in problems of physical violence by inmates against correctional officers and other inmates. Because some evidence points to the connection between nonjudicially inspired reform and disturbances, at least in prisons (Engle and S. Rothman, 1983), it is necessary to isolate the effects of court orders from other factors in order to attribute observable outcomes to the former. This requirement is generally not satisfied in the literature because a comparison is seldom made between jurisdictions where federal court involvement has occurred and other jurisdictions where it has not.

The importance of considering alternative sources of the alleged outcomes is heightened because the studies tend to focus on one court decision in a given substantive policy area. When the range and number of observed decisions

are limited, a deviant case may become magnified out of proportion and the general pattern obscured. Moreover, this limitation is not restricted to the courts' critics; it arises as well in studies that claim that the courts perform heroic tasks in an admirable manner (see e.g., D. Rothman and S. Rothman, 1984).

The single court approach is related to another deficiency in most of these studies--the minimal use of measurable indicators of judicial performance. Even in examinations of single decisions in an individual jurisdiction, multiple indices are essential to determine whether the point of court involvement distinguishes trends in policy outcomes. In many studies, a reasoned argument is not given as to why a given set of data is used. Descriptive facts of some undesirable behavior or outcome are offered as direct evidence of court incapacity without an adequate discussion of what actually is being measured.

Third, the measurement and conceptualization of cost appears to be narrowly restricted to the direct budgetary consequences of court-ordered relief on a given agency. In measuring cost, the scope of activities should extend beyond the resources consumed by a given agency in complying with a specific court order. Costs may be incurred by multiple agencies and multiple levels of government.

Consider, for example, the litigation brought by state prisoners challenging the conditions of their confinement because the conditions are allegedly unconstitutional. There are considerable costs in resolving prisoner grievances in the federal courts despite the fact that verdicts are made in the prisoners' favor only 1% to 2% of the time. States incur the costs of defending themselves as reflected in the time spent by state attorneys general and correctional officials in preparing answers, motions, and responses to interrogatories; attending hearings; and transporting inmates to hearings. Costs are also incurred by the federal courts in the time spent by magistrates in handling pretrial proceedings and the time spent by judges in conducting trials and in hearing appeals. Because these social costs may reach \$100 million annually (Hanson, 1986), which is a substantial proportion of the \$900 million budget for the entire federal judiciary, the discussion of costs should not be restricted to the budgetary impact of remedial decrees on a single institution.

From a conceptual point of view, budgetary costs fit very nicely into a

large body of literature on budgeting. This literature guides the choice of units, levels, and methods of analysis used to estimate the budgetary consequences of court orders (e.g., Harriman and Straussman, 1983). However, budgeting is best viewed as a highly visible activity of the much more general process of governmental decision making. It is important, therefore, to begin by asking questions about how federal judicial decisions affect the general structure and process of state decision making. Do judicial orders affect the arena in which key state decisions are made? Do they affect the size and composition of decision-making bodies? Does judicial involvement affect the planning and forecasting normally associated with state decision making? Viewed in this context, the effects of court orders on budgets become indicators of more fundamental changes in the process of government (Straussman, 1985).

Broader conceptualization and measurement of cost are especially relevant in light of federalism's values. Given federalism's emphasis on the value of keeping government close to the people, one concern is whether court orders produce changes in the process of governmental decision making, including budgeting, that affect citizen dissatisfaction with government. Do these changes cause individuals to view state and local government affairs as being beyond their control as voters or worse, irrelevant? Do financial burdens associated with court orders, over which the voters have no control, lead citizens to believe that government is unaccountable?

Fourth, despite the relevancy of federalism to the courts' critics, the values of federalism appear to be outside the scope of their analyses. Questions of innovation, diversity, and self-government tend not to be part of the critics' assessments of the consequences of judicial decisions. At least in some substantive issue areas, court decisions may very well impede or prompt the states' charting new courses of action. For example, in the area of welfare, federal court decisions expanding the rights of welfare recipients have inhibited the development of new principles of welfare administration (Williams, Price, Hanson, 1981). Hence, the search for the decisional consequences should extend beyond cost and control.

Fifth, the representation process and what interests are represented are not sufficiently addressed in the analysis of public law litigation. Although "multipolarity" has been identified as a characteristic of such litigation (Chayes, 1976), insufficient attention has been paid to the divergent inter-

ests represented by various plaintiffs (but see, Bell, 1976). An issue almost totally overlooked has been the process and quality of the representation of defendants' interests. In many instances the lawyers representing defendants have incentives quite different from the state institutional officials whose actions are being contested. In addition, the uneven quality of representation has been cited as a reason why states fail to prevail in litigation before the Supreme Court (O'Connor, 1983).

Sixth, there is limited knowledge on how the courts have gone about exercising their capacities. The absence of comparative court studies in a given policy area means there are limited data on outcomes and that the effects of variations in the methods used by the courts to achieve these outcomes remain unknown. For example, the use of masters in monitoring court orders is described by the critics as a threat to the courts' independence and should not be encouraged (Horowitz, 1977). This criticism implicitly says that masters could improve the courts' capacity if they were organized properly. Because there are different styles of monitoring (Kalodner and Fishman, 1978; Kirp and Babcock, 1981a), different styles ought to be matched with their respective outcomes to determine if some ways of monitoring provide the court with desired information better than others.

A PLAN FOR FUTURE POLICY RESEARCH

There are several questions that revolve around the basic research issue of whether the federal courts have the capacity to make decisions that directly cause behavioral changes consistent with the policy sought by the court. Are the courts' desired objectives met? At what expense to the states? Have the restrictions in state authority resulted in undesirable consequences?

Gaps in the knowledge concerning answers to these questions justify a search for more precise estimates of how well the courts have fared in shaping state public policy. More needs to be known about the consequences of court decisions in order to gauge the courts' capacity more completely and correctly. For this reason, the following sixfold scheme, which builds on prior research, is proposed to address the unanswered questions:

1. Policy studies should be undertaken in substantive state and local issue areas where the federal courts seek to impose either affirmative constitutionally based obligations or the negation of specific state actions.

2. The policy studies should be organized around a core set of questions surrounding the effects of court decisions on federalism including the impact on state authority, governmental processes, policy benefits and costs, and policy innovation.
3. The policy studies should examine the effects of the multiparty nature of the litigation on the development of the legal and factual bases for liability.
4. The policy studies should describe the processes through which the courts have gathered and analyzed information (e.g., special masters, monitors) concerning the design and implementation of relief.
5. The rationale for selecting substantive issues areas and the formulation of organizing questions should reflect the constitutional framework of federalism and its values.
6. The methodology used to conduct the policy studies should be appropriate to the state-of-the-knowledge in each issue area and the feasibility of making quantitative assessments.

Selection of Substantive Issues Areas. A critical research task is the choice of settings for the study of the federal courts' impact on state policy. Because the number of possible issue areas from which to choose is large and the amount of time and resources with which to conduct the investigations is limited, the selection process should be on a systematic basis.

In formulating selection criteria, consideration should be given to both the inherent features of federalism and research feasibility. It is appropriate to select issue areas that accentuate the values of federalism. This will facilitate the interpretation of the consequences in a manner that is meaningful for understanding the states' position in the federal system, although this consideration does not automatically imply that federal court involvement in such areas is without constitutional foundation.

One of the values of federalism that is especially pertinent is the close correspondence between public policies and citizens' preferences. The argument is that federalism creates greater harmony between policies and citizens' preferences when views and interests vary on regional and state bases. The significance of this value is brought out in a recent analysis on the basic "virtue" of the national government and state governments; the virtue of the former is uniformity and the latter's virtue is diversity (Wildavsky, 1981). Diversity as a virtue, it is posited, arises because individuals in different states have different views and these views are represented in each state's respective policy arena. The federal courts' involvement may be seen as an

attempt to achieve uniformity through the imposition of constitutional standards and, consequently, to clash fundamentally with a basic rationale for preserving the states' position in the federal system.

The above suggests that issue areas be selected for analysis where it most reasonably can be assumed that the policies prior to court intervention were, in fact, close to citizens' preferences. According to theories of public choice, close correspondence is fostered when citizens make decisions on where to locate geographically in order to achieve the most desired combination of governmental services (Tiebout, 1956). One area that seems to have been a determinant of locational choices is public education. The neighborhood school has long been a key factor in shaping where people reside, at least within the degree of freedom permitted by the availability of employment and their own resource capacities. For this reason, court involvement in establishing standards for pupil placement is a relevant issue for the study of federalism and the federal courts.

Citizens also seek a high degree of correspondence between their preferences and noneconomic policies. Social norms, religious views, and lifestyles shape citizens' preferences for the content of many public policies. Theories of political culture (Elazar, 1972:82-126) suggest that there are regional and state variations in basic perspectives on what state government should regulate and not regulate, what services they should provide, and how public goods and services should be financed. Consequently, it is appropriate to consider federal court involvement in an issue area where social values are the content of state public policy. For this reason, it is appropriate to examine judicial decisions affecting the use of public resources for religiously supported schools.

Another important value is that federalism enhances the effectiveness of public policy because certain policies require that decision makers be in a proximate position to local conditions in order to make the most appropriate choices. Public policies involving the maintenance of security and order, it can be argued, require that discretion be placed in the hands of individuals who can observe when security and order are threatened. Whereas policies that allocate services that make life more pleasant (e.g., support for the arts) may permit officials who are removed from the local scene to review daily decisions, public safety requires that authority be located where potential problems for security and order arise. For this reason, the federal courts'

involvement in establishing standards for the operation of correctional systems and the criminal justice process are two relevant policy areas for study. Additionally, although mental health facilities are intended to offer treatment and relieve individuals of mental suffering and anguish, the sensitive nature of the patients requires local decision-making autonomy. Consequently, it is also included in the list of potential issue areas for study.

A third value of federalism is that it promotes political participation, a sense of community, an informed citizenry, and ultimately, more accountable government. As a result, the control and design of channels through which citizens express their preferences and how their votes are translated into the selection of state officials are of central importance. Citizens presumably seek to maintain voting mechanisms that are in accordance with how they want their views represented. Although there are many theories of political representation, the apportionment of legislative seats is part of most conceptualizations. For this reason, federal court involvement in reapportioning the distribution of state legislative and congressional seats is a relevant area to study.

Thus, at least six issue areas are directly relevant to the central research problem of this project. They are:

- 1) public assistance to religiously supported schools
- 2) criminal defense procedures,
- 3) legislative apportionment,
- 4) mental health care and facilities,
- 5) public school pupil placement, and
- 6) state correctional systems.

These areas have certain advantages from a research perspective. A sufficient amount of time has elapsed since the initial judicial involvement took place. This means that each topic can now be viewed in perspective rather than examining a continuously changing process. Moreover, during the time since the initial judicial intervention in each area, there have been empirical investigations conducted, which means that pertinent data are available, a body of literature exists, and some basic questions have already been explored. As a result, this project can build on the work of others and devote attention to the specific questions of federalism and the federal courts.^{4/}

Organizing Questions. The values of federalism also play a role in shaping the questions around which the proposed policy studies are organized. A critical value is the opportunity for policy experimentation with the

states as "laboratories." Consequently, it is important to ask whether the imposition of judicial standards inhibit or foster policy innovations. Are state policy makers less willing to try new practices because they believe that procedures either will fall short of or be in conflict with judicial opinions? Or does the intervention by courts allow innovative administrators to come forward instead of remaining in the shadows of entrenched and more traditional personnel?

The values of federalism and the contending views on the effects of federal court involvement provide a full agenda of questions to be addressed in each issue area. Hence, the following core set of questions is proposed:

1. What legal and policy arguments are presented by the various parties?
2. What sort of justification do the courts offer for their decisions, including both the finding of constitutional violations and the promulgation of relief?
3. By what process do the federal courts seek to design and implement relief? What role do adjunct officials such as masters play? Does this extrajudicial effort encourage or discourage successful implementation?
4. What are the consequences of court imposed standards on the authority of state officials? How does this affect their relationships with other state officials, direct recipients of state services, and the general public? Are the relationships marked by greater conflict or greater cooperation?
5. What changes in the process of state governmental decision making occur when the courts impose standards? What budgetary changes are associated with executing court orders?
6. Are the ostensible objectives of court intervention achieved? To what degree? Do objectives changes over time? What benefits are associated with these objectives? Who receives these benefits?^{5/}
7. Does judicial intervention affect the confidence that citizens have in state government and its institutions?
8. Does the federal court involvement have any effect on the willingness of state officials to try new ideas and implement new programs?

Methodology. There is no single methodology that the policy studies must follow because research in some areas requires more original data collection and analysis and in other areas there is a call for more review and a synthesis of existing studies. However, all of the policy studies will seek to isolate the effects of judicial decisions from other factors, to evaluate the

interaction between judicial involvement and these other factors, to apply multiple indicators to measurable variables pertinent to each policy area, and to compare states where involvement has occurred and where it has not occurred. Furthermore, every policy study will provide a short history of the court cases under investigation. However, the policy studies will not attempt to provide detailed narrative accounts of the litigation in the style of traditional case studies.

The basic analytical framework for the policy studies is the quasi-experimental design (Campbell and Stanley, 1963). For this project, a court's decision and subsequent involvement in state affairs constitute the "treatment." States experiencing such treatment are the experimental group, and states or communities within states that have not received the treatment are the comparison group. To the greatest extent possible, every policy study will document the longitudinal changes in indicators of relevant positive and negative consequences in jurisdictions where judicial involvement has occurred and the cross-sectional differences between the experimental and the comparison groups. Explicit performance measures will not be applied to the decisional outcomes of state and local institutions such as legislatures and executive agencies. However, the quasi-experimental research designs guiding the policy studies will treat the outcomes of other institutions as extraneous variables. If the effects of these extraneous factors are screened out from both the jurisdictions where judicial involvement has occurred and has not occurred, the observed consequences can then be attributed to the courts. Any interactive effects present may be scrutinized. Hence, the policy studies will offer a test of the independent effects of judicial decisions on the states as well as offering insight on how court intervention interacts with other factors.

Each study will focus on a limited number of court decisions in order to capture the necessary level of detail. The exact configuration of court decisions and the corresponding comparisons may vary. One approach relevant to the issues of prisons, mental health facilities and the public schools is to focus on three federal district court decisions. In this context, in order to gauge judicial impact, three states or communities might be analyzed intensively and the indicators of court performance compared with the same indicators applied to three states that were not subject to court involvement.

Another format may be to consider changes in relevant indicators in spe-

cific states before and after a Supreme Court decision. This may be most suitable in the areas of criminal defense procedures and legislative apportionment.

A third approach is to examine the role and impact of the Supreme Court, a Circuit Court of Appeals, and federal district courts in the context of a particular issue area. This strategy has the advantage of illuminating how each type of court influences state policy (Combs, 1984), although longitudinal or cross-sectional comparisons with jurisdictions that have experienced no involvement remain necessary to isolate the effects of judicial decision.

The efforts to synthesize existing studies will take these three approaches into account in determining the validity of various claims found in the literature. The reviews will do more than report on what prior studies have purported to have found. Previous studies will be subject to a critical analysis in which the logic of causal inferences is scrutinized in order to present a picture of what propositions have validity.

Management Plan. Scholars will be recruited by the Commission to undertake the specific policy studies. Different groups of scholars will be selected for their competency in a given substantive area, including an understanding of federal court involvement. Familiarity with the subject matter will permit the research teams to begin work on schedule and to avoid spending time on background research.^{6/} It is anticipated that the policy studies will, on average, have the equivalent of two scholars and two research assistants working half-time over a 12-month period. Reports will be prepared by each group of scholars and all of the volumes will be edited by the Commission's staff members.

Commission staff members, with the assistance of Justice Resources, will manage the selection of the scholars, the conduct of the inquiry, the preparation of policy study reports, and the editing of the final volumes.

The Commission staff members and Justice Resources will receive expert help from distinguished legal policy scholars. These individuals have been organized into a project advisory board, which will meet to review written work products, to offer specific advice on technical matters, and to assess the quality of the empirical policy and the normative studies. The board is composed of the following individuals:

Abram Chayes, Harvard
George Cole, Connecticut

Robert Nagel, Colorado
Susan Olson, Utah

Malcolm Feeley, Berkeley
Donald Horowitz, Duke
A. E. Dick Howard, Virginia
David Kirp, Berkeley
Samuel Krislov, Minnesota
Gary McDowell, Tulane

Vincent Ostrom, Indiana
Harry Scheiber, Berkeley
Stuart Scheingold, Washington
Jeffrey Straussman, Syracuse
Russell Wheeler, Federal
Judicial Center

In addition, the Commission staff will hold periodic briefing sessions with policy makers, public interest group representatives, and federal judges to apprise them of the work in progress. The sessions will also allow these individuals to suggest ways of improving the quality of the project.

Proposed Project Time Table and Work Products. The policy studies are expected to begin in March 1986, and all final reports will be submitted to the Commission by April 1987. The Commission's staff will edit these separate volumes which will be published under the aegis of the Commission. The Commission staff will then prepare a summary volume that combines the essential ideas from this framework paper together with the findings of the policy studies and the normative analyses. This document will then be submitted to the Commission for review and comment. The Commission will determine what recommendations are appropriate in light of the project's conclusions.

Dissemination of the project's interim and final work products will be directed toward a broad audience of policy makers, judges, scholars and citizens. To the extent resources permit, the Commission will publish and make available monographs on the separate policy studies and the synthesizing volume. Conference proceedings on the policy study topics will also be printed and distributed to large number of individuals and organizations that regularly receive the Commission's publications. Collaborative efforts will be made with organizations such as the American Political Science Association and the American Historical Association to reach precollegiate and college educators with appropriate versions of the study's basic findings.

FOOTNOTES

- 1/ Scholars have pointed out that there are methodological shortcomings to the research that concludes there are serious negative consequences associated with judicial involvement in state public policy (see e.g., Zimring and Solomon, 1985). These same limitations, however, are extant in the research that claims judicial involvement produces positive consequences. These deficiencies are illustrated in an issue area where social research has been extensive but the benefits of judicial involvement remain ambiguous. For example, in a recent review of the literature

on school desegregation, Hochschild (1984) observes that there are numerous studies that point to the positive effects of desegregation and find minimal negative consequences. These studies, however, do not distinguish between those instances of desegregation brought about through judicial decree as opposed to other methods. Hochschild concludes that it is difficult to attribute any positive benefits found in these studies specifically to judicially mandated desegregation rather than desegregation produced by the actions of local school boards or executive agencies. She also notes there are no studies that demonstrate that courts have performed better than other institutions. Thus, there is a need for further research to focus on both the costs and benefits of judicial involvement.

- 2/ Some writers sharply contest the allegation that judges are inadequate problem solvers and that their approach to problem solving is deficient, see Youngblood and Folsie, 1981 and Wasby, 1981. The disagreement surrounding the capacity of judges calls for the formulation and testing of propositions in order to resolve this controversy.
- 3/ The ideas expressed in these three areas are representative of the broader spectrum of criticisms voiced in other areas such as, legislative apportionment, criminal defense rights, police practices, public housing, etc. However, in limiting the scope of the examples, the general nature of undesirable consequences is highlighted rather than the substantive content of particular complaints that arise in individual policy areas.
- 4/ An omission from this list of issue areas for study is wage and hour standards for public employees, subject of the recent Garcia decision. This area was not included among the empirical studies because insufficient time has elapsed since the decision to make a thorough investigation possible. However, the theoretical issues raised by the case are the subject of ongoing Commission research, which will be integrated into the normative studies and the third phase of the project (See ACIR, 1986).
- 5/ Unlike the critics who hypothesize that negative consequence flow from judicial intervention, the proponents believe that there are positive consequences to the same intervention. Presumably, the sine qua non of a positive impact is that the courts' intended policy goals are met. To the extent that these goals can be operationalized, they will be measured and analyzed in the same way as offsetting negative outcomes. However, if the benefits of promoting, extending, and expanding constitutional rights are considered to be intangible (e.g., Jacobs; 1977; Scheingold; 1974) they are beyond the scope of the policy studies. Such benefits are more appropriate subjects for the normative analyses of what role the courts should play in creating constitutional rights.
- 6/ Research designs tailored to individual issue areas will be prepared by Commission staff members and Justice Resources. The designs will focus on the selection of units of analysis, levels of analysis, indicators and working hypotheses. They will be distributed in advance of a meeting with policy study scholars. At the meeting, specific details of the proposed research in each area will be crafted in a manner that is consistent with the project's overall framework and that is harmonious with the suggestions of the participating scholars.

Chapter 5

SUMMARY

PROJECT OVERVIEW

The institutional role of the federal courts is an issue of critical importance in determining how America is governed. Questions revolving around this topic have been the subject of debate since the clash between the Federalists and the Anti-Federalists at the nation's inception. Recently, the perspective of the Anti-Federalists has been expressed in critical reactions to contemporary court decisions and doctrines that affect the authority of the states.

Concern is expressed by observers toward what they see as undesirable trends in the way federal courts adjudicate disputes involving basic state interests and policies. One tendency is a continuation of a long-term trend by the federal courts toward depreciating the autonomy of states when they decide cases involving the division of authority between the national government and state governments. State authority erodes as the courts increasingly employ weaker mechanisms to secure the constitutional powers of state governments, culminating in the recent Garcia case's interpretation of the Tenth Amendment.

A second trend that began within the past few decades is the growing number of court decisions that restrict the authority of state governments by finding that state actions violate newly expanded definitions of individuals' constitutional rights. Here the federal courts have limited state actions in two ways. First, the courts strike down state regulations and programs as unconstitutional because they infringe on individuals' rights. Second, they require that affirmative steps be taken in terms of policies and practices to bring state and local institutions into conformity with judicially determined constitutional standards. These general trends provide the context for more specific criticisms. A growing body of literature critiques the courts' activities because of the courts' perceived incapacity to formulate constitutional standards for state public policy and to craft relief when the standards are violated. Judicial actions are alleged to conflict with many of the basic values of federalism. Court efforts to reform public policy are criti-

cized as being ineffective, inefficient, and counter productive. Because of the increasing number of criticisms, the Commission proposes to undertake a multiphased study of the role federal courts play in affecting the autonomy, viability, and legitimacy of the states as authoritative governmental units.

This paper has identified a set of central research questions to organize empirical studies of federal court involvement in several policy areas including public assistance to religiously supported schools, criminal defense procedures, legislative apportionment, mental health, public school pupil assignments, and state prisons. A core set of questions will be addressed through the application of quasi-experimental research designs to a number of judicial decisions in each area. Data will be collected on the consequences of the judicial decisions on the quality of public policy and the values of federalism. Comparisons will be made between observable consequences in jurisdictions where judicial involvement occurred with situations in jurisdictions where it has not. A synthesizing volume will draw the findings together from the separate policy studies and place them within the framework of federalism.

Normative studies will focus on more general arguments concerning key issues of constitutional design, the legal basis of federalism, and the role of contemporary legal doctrines that have justified the federal courts' involvement. The competing viewpoints developed in these analyses will help integrate the framework paper and the empirical policy studies.

POLICY SIGNIFICANCE AND RELATIONSHIP TO OTHER PROJECTS

The ultimate objective of this project is to provide policy makers, judges, and legal scholars with a better understanding of issues relevant to the debate over the institutional role of the courts. By focusing on the specific claims of the courts' critics concerning the consequences of judicial decisions, there is the opportunity to test important propositions. Verification or rejection of hypotheses will yield valuable information with regard to strong claims made concerning the consequences of judicial decisions on the states. The results will also have a bearing on normative arguments concerning the institutional role of the courts. If the courts are found to be ineffective or inefficient, this is a logical justification for restraining and curtailing such action. The proposed normative studies, of course, will offer a more direct comparison of alternative views of the constitutional and doctrinal basis for and against court intervention.

Just as the forthcoming Bicentennial of the Constitution adds significance to this project, it also creates an opportunity to put federalism and the federal courts into a richer context. One important consideration is that this study be coordinated with the many projects designed to celebrate the Bicentennial. This project will communicate the results of both the empirical investigations and the normative analyses to other organizations that are dealing with related issues. Those organizations include the American Bar Association, American Historical Association, American Political Science Association, and other national and state and local organizations.

Of special interest is a companion project on the Bicentennial sponsored by the Commission. The Commission's Bicentennial project offers the potential benefits of providing theoretical insights into issues of federalism and the federal courts through its discussion of the more generic concepts of constitutions and federalism. These discussions can inform both the conceptual underpinnings of the policy studies of federal court involvement and the preparation of the final synthesizing volume. This project, in turn, offers all of the Bicentennial committees the benefits of concrete evidence on a fundamental issue of constitutional theory and practice.

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Each Commission member serves a two year term and may be reappointed.

As a continuing body, the Commission approaches its work by addressing itself to specific issues and problems, the resolution of which would produce improved cooperation among the levels of government and more effective functioning of the federal system. In addition to dealing with the all important functional and structural relationships among the

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Studies undertaken by the Commission have dealt with subjects as diverse as transportation and as specific as state taxation of out-of-state depositories; as wide ranging as substate regionalism to the more specialized issue of local revenue diversification. In selecting items for the work program, the Commission considers the relative importance and urgency of the problem, its manageability from the point of view of finances and staff available to ACIR and the extent to which the Commission can make a fruitful contribution toward the solution of the problem.

After selecting specific intergovernmental issues for investigation, ACIR follows a multi-step procedure that assures review and comment by representatives of all points of view, all affected levels of government, technical experts, and interested groups. The Commission then debates each issue and formulates its policy position. Commission findings and recommendations are published and draft bills and executive orders developed to assist in implementing ACIR policies.

