

A COMMISSION REPORT



Federal Regulation of State and Local Governments:

The Mixed Record of the 1980s



U.S. Advisory Commission on
Intergovernmental Relations

A-126
July 1993

**Members of the
U.S. Advisory Commission
on Intergovernmental Relations**

(June 1993)

Private Citizens

Daniel J. Elazar, Philadelphia, Pennsylvania
Robert B. Hawkins, Jr., *Chairman*, San Francisco, California
Mary Ellen Joyce, Arlington, Virginia

Members of the U.S. Senate

Daniel K. Akaka, Hawaii
Byron L. Dorgan, North Dakota
Dave Durenberger, Minnesota

Members of the U.S. House of Representatives

Donald M. Payne, New Jersey
Steven H. Schiff, New Mexico
Vacancy

Officers of the Executive Branch, U.S. Government

Vacancy
Vacancy
Vacancy

Governors

Vacancy
Vacancy
Vacancy
Vacancy

Mayors

Victor H. Ashe, Knoxville, Tennessee
Robert M. Isaac, Colorado Springs, Colorado
Edward G. Rendell, Philadelphia, Pennsylvania
Bruce Todd, Austin, Texas

Members of State Legislatures

Paul Bud Burke, President, Kansas Senate
Samuel B. Nunez, Jr., President, Louisiana Senate
Vacancy

Elected County Officials

Ann Klinger, Merced County, California, Board of Supervisors
Barbara Sheen Todd, Pinellas County, Florida,
Board of Commissioners
Vacancy

A COMMISSION REPORT



Federal Regulation of State and Local Governments: The Mixed Record of the 1980s

OCCIDENTAL COLLEGE

AUG 20 1993

**LIBRARY
DEPOSITORY 56**



**U.S. Advisory Commission on
Intergovernmental Relations**

**A-126
July 1993**



**U.S. Advisory Commission on
Intergovernmental Relations
800 K Street, NW
South Building
Suite 450
Washington, DC 20575**

**(202) 653-5640
FAX (202) 653-5429**

Executive Summary

The 1960s and 1970s inaugurated a new era of regulatory federalism. A decade ago, the U.S. Advisory Commission on Intergovernmental Relations (ACIR) issued a report—Regulatory Federalism: Policy, Process, Impact and Reform—showing that mandates and regulations had begun to rival grants and subsidies as federal tools for influencing the behavior of state and local governments. In less than two decades, the Congress enacted dozens of statutes that utilized the new regulatory techniques.

Many of the new requirements addressed longstanding social problems. Most also enjoyed broad support from the general public and from state and local officials. As the number of requirements proliferated, however, questions began to be raised about the appropriateness, costs, complexity, effectiveness, and efficiency of intergovernmental regulations.

By 1981, efforts were under way in all three branches of the federal government to address the problems posed by regulation. For example, in *National League of Cities v. Usery*, the Supreme Court signaled a willingness to restore the Tenth Amendment as a check on federal actions. The Congress enacted the Paperwork Reduction Act, the Regulatory Flexibility Act, and the State and Local Cost Estimate Act. President Ronald Reagan established a Task Force on Regulatory Relief and issued three executive orders designed to institutionalize presidential control over the regulatory process, to restrain the issuance of costly mandates, and to require that agencies consider the federalism implications of their regulatory actions.

How did the mechanisms work? Overall, early optimistic evaluations were premature. By 1990, as shown in this report—Federal Regulation of State and Local Governments: The Mixed Record of the 1980s—the regulatory reform initiatives of the 1980s had failed to reduce existing requirements or restrict new regulations significantly.

ACIR's basic findings include the following:

Administrative rules and regulations affecting state and local governments continued to increase during the 1980s. An effort was made to secure regulatory relief through administrative reforms, and there were some successes. Nevertheless, analyzing data on federal regulatory activity for 18 of the 36 mandates included in its earlier *Regulatory Federalism* report, ACIR found that overall regulation continued to rise. Some of the most marked increases came in the Clean Air Act, Fair Labor Standards Act, and Occupational Safety and Health Act. Clear reductions in regulation seem to have been achieved in only 5 of the 18 programs examined.

Weaknesses in the design and implementation of Executive Order 12612 on Federalism have prevented the federalism assessment process from achieving its potential. The order, enacted in 1987, outlines principles and procedures designed to guide executive branch decisionmaking on issues that have federalism implications. The process has not been fully or consistently implemented, and it has not produced the intended changes.

The Congress continued to enact regulations. Between 1981 and 1990, the Congress enacted 27 statutes that im-

posed new regulations on states and localities or significantly expanded programs. (The record for the 1970s was 22 such statutes.) Some regulations were costly (e.g., Safe Drinking Water Act Amendments of 1986 and Asbestos Hazard Emergency Response Act of 1986). Other mandates have been noted more for their intrusiveness than for their expense (e.g., requiring states to allow longer and heavier trucks on their highways and to raise the minimum drinking age).

Although several regulatory relief measures were enacted in the 1980s, these deregulation initiatives were more than counterbalanced by new requirements. The Congress also attached new conditions to existing grant programs, particularly Medicaid, Aid to Families with Dependent Children, and local government costs for federal water projects.

The federal government has little systematic data concerning the cumulative financial costs of the regulations it imposes on state and local governments. Since 1983, the best available information has been the Congressional Budget Office (CBO) estimates of the intergovernmental fiscal effects of proposed federal legislation. These estimates are approximate and generally conservative due to the inherent difficulties in estimating mandates and to flaws in the statute. Basically, new regulations enacted between 1983 and 1990 imposed cumulative, estimated costs of between \$8.9 and \$12.7 billion on states and localities, depending on the definition of mandates that is used.

By virtue of the Supreme Court's opinion in *Garcia v. San Antonio Metropolitan Transit Authority*, reversing *National League of Cities v. Usery*, states are virtually powerless to challenge federal action in the courts on Tenth Amendment grounds. Cases following *Garcia* raised further questions about the relationship between the federal government and the state and local governments. Federal courts also became involved regularly in telling states and local governments what they must do, not just what they must not do. For example, courts have been active especially in overseeing state and local management of public institutions, such as prisons and mental hospitals.

Despite the mixed record of the federal courts in dealing with federalism issues, the State and Local Legal Center has developed an impressive win-loss record in presenting the legal arguments of state and local governments before the Supreme Court.

The Commission recommends that: (1) the federal government institute a moratorium on mandates for at least two years and conduct a review of mandating to restore balance, partnership, and state and local self-government in the federal system; (2) the Supreme Court reexamine the constitutionality of mandating as a principle; (3) those responsible for administering and utilizing the congressional fiscal notes process, the Paperwork Reduction Act, the Regulatory Flexibility Act, and the Federalism Executive Order redouble their efforts to take fullest advantage of these mechanisms, and that state and local governments identify and press for consideration of significant state-local effects in pending legislation and regulations.



Preface

A decade ago, the U.S. Advisory Commission on Intergovernmental Relations (ACIR) issued an in-depth report on a new trend, the use of compulsory federal regulations aimed at or implemented by state and local governments. In that report, *Regulatory Federalism: Policy, Process, Impact, and Reform*, ACIR probed the shift from an incentive-based (i.e., grant-in-aid) system designed to encourage state and local governments to perform an activity or provide a service, to a more command-based system requiring state and local action under federal regulation. This trend was identified first in a 1981 ACIR report, *An Agenda for American Federalism: Restoring Confidence and Competence*.

In *Regulatory Federalism*, ACIR explained:

State and local governments, like the business sector and private individuals, have been affected greatly by the massive extension of federal controls and standards over the past two decades. These extensions have altered the terms of a long-standing intergovernmental partnership. Where the federal government once encouraged state and local actions with fiscal incentives, it now also wields sanctions—or simply issues commands. The development of new techniques of intergovernmental regulation presents a challenge to the balance of authority in, and the effective operation of, American federalism.

Stating that “reform of the new regulatory programs deserves a priority position on the policy agenda of the 1980s,” the Commission listed six major findings from its report:

- 1) During the 1960s and 1970s, state and local governments, for the first time, were brought under extensive federal regulatory controls.
- 2) Federal intergovernmental regulation takes a variety of new administrative and legal forms.

- 3) Although the new forms of regulation have been litigated heavily, by and large, the federal courts have done little to constrain the regulatory proclivities of Congress or the executive branch.
- 4) The real nature and extent of the impact of federal regulation on state and local governments is still not fully understood.
- 5) Intergovernmental conflict and confusion have hampered progress toward achieving national goals.
- 6) Past efforts at regulatory reform have given little attention to problems of intergovernmental concern.

Written in the early years of the Reagan administration, *Regulatory Federalism* came too early to assess an important thrust of the Reagan presidency: regulatory reform. Elected with a perceived mandate to attack excess regulation, the Reagan administration initiated a variety of programs during the 1980s designed to reduce or to eliminate regulatory burdens. Although aimed primarily at the private sector, the relief effort also benefited the public sector.

That effort consisted of a myriad of initiatives. For the public sector, the most important executive branch initiative was Executive Order 12612 on federalism, the product of a Working Group on Federalism that had been established early in the administration.

Concern about the regulatory and financial burdens imposed on state and local governments was not limited to the executive branch. During this period, the Congress enacted the *State and Local Government Cost Estimate Act*, which provided that, “to the extent practicable,” each bill or resolution reported by a House or Senate Committee should be accompanied by a fiscal note if the aggregate annual cost to state and local governments exceeded an esti-

ated \$200 million or if it was likely to “have exceptional fiscal consequences for a geographic region or a particular level of government.” The requirement is not mandatory, however, nor does it cover measures considered by the appropriations committees.

Especially in the intergovernmental arena, some observers maintained that these reform efforts provided effective regulatory relief. The administration itself estimated that its actions had eliminated nearly 12 million hours of paperwork affecting states and localities and had saved them billions of dollars in one-time and recurring costs. Less partial observers also argued that state and local governments, rather than corporations, were “the big winners” under deregulation.

The decade of the 1980s was also judicially momentous for federalism. The most significant U.S. Supreme Court opinions were *Garcia v. San Antonio Metropolitan Transit Authority* (1985), *South Dakota v. Dole* (1987), and *South Carolina v. Baker* (1988). Together, these cases essentially reduced the status of the states to that of “interest groups” operating and competing in the national political

process. The Court’s rulings also had the effect of overturning the long-standing doctrine that the federal government is one of limited, delegated powers, thus opening the way for virtually unfettered exercises of national power vis-a-vis the states and local governments. It was these opinions that led ACIR to examine the judicial aspects of federalism more closely and to explore ways of rebalancing the federal system through constitutional reform.

With this report, ACIR examines the actions and accomplishments of executive branch initiatives to restrain and reform intergovernmental regulation during the 1980s. In addition, it inventories a number of significant new mandates enacted by the Congress during the past decade and develops a rough estimate of their cumulative costs. This study also traces the Supreme Court’s evolving doctrines affecting intergovernmental regulation. Finally, it presents the Commission’s findings and recommendations for responding to this situation.

Robert B. Hawkins, Jr.
Chairman

Acknowledgments

The principal analysts for this report were Timothy J. Conlan of George Mason University (Chapters 1, 3, 4, and 5); David R. Beam of the Illinois Institute of Technology (Chapter 2); and Cynthia Cates Colella (Chapters 6, 7, and 8). All contributed to the Findings and Recommendations. All three were among the authors of ACIR's 1984 report *Regulatory Federalism*.

Special thanks are extended to the U.S. General Accounting Office, which made available to ACIR previously unpublished data involving research on changes in 18 intergovernmental regulatory programs for 1981-1986. Draft case study documents summarizing regulatory trends in each of these programs provided the basis for much of the analysis in Chapter 2. Individuals at GAO who were instrumental in preparing this research or making this information available to ACIR included John Kamensky, Joel Marus, Paul Posner, John Vocino, and Mark Ward.

Through participation in thinkers' and critics' sessions or through written comments, many other individuals contributed to the development and final preparation of this report. Those individuals included:

Richard Bartholomew, New York State Senate,
Washington Office
Enid Beaumont, Academy for State and Local
Government
Joyce Benjamin, State and Local Legal Center
James Blum, Congressional Budget Office
Russell Chapin, consultant
Dan Chenok, U.S. Office of Management and Budget
Thomas Choman, National Association of Regulatory
Utility Commissioners
Paul Colborn, U.S. Department of Justice
William G. Colman, consultant
Margaret M. Donohoe, Regulatory Information
Service Center
Martha Fabricius, National Conference of State
Legislatures
Jon Felde, National Conference of State Legislatures
Jim Frech, Andersen Consulting
Scott Gallagher, U.S. General Accounting Office
Theresa A. Gullo, Congressional Budget Office
Michael Hamilton, University of Southern Maine

Jeffrey Hart, New York State Senate,
Washington Office
Louise Jacobs, Council of State Governments
James Edwin Kee, George Washington University
Harry Kelso, U.S. Department of Justice
Robert A. Licht, American Enterprise Institute
Daniel R. Mandelker, Washington University
James L. Martin, National Governors' Association
Donald Murray, National Association of Counties
William Niskanen, Jr., CATO Institute
William Olmstead, Administrative Conference
of the United States
Robert W. Rafuse, Jr., U.S. Department
of the Treasury
Edward Rastatter, U.S. Department
of Transportation
Mavis Mann Reeves, University of Maryland
Bernard Ross, American University
Jeffrey Schiff, National Association of Towns
and Townships
John Shannon, The Urban Institute
Catherine L. Spain, Government Finance Officers'
Association
Carl W. Stenberg, University of Virginia
David B. Walker, University of Connecticut
Margaret Wrightson, U.S. General Accounting
Office
Christine Wnuk, National Conference of State
Legislatures
Christopher Zimmerman, National Conference of
State Legislatures

The report was prepared under the direction of Bruce D. McDowell, director of Government Policy Research, with assistance from Sharon Lawrence, senior policy specialist. Joan A. Casey edited the document. Suzanne Spence provided clerical support.

The Commission and its staff are responsible for any errors of omission or commission.

John Kincaid
Executive Director

Contents

Findings and Recommendations	1
Findings	1
Recommendations	4
<i>Recommendation 1</i>	
Reconsidering the Constitutionality of Unfunded Federal Mandates	4
<i>Recommendation 2</i>	
Using Existing Mechanisms to Press Harder for Relief from Burdensome Federal Regulations	4
Recommendations on Constitutional Balance	5
<i>Recommendation 1</i>	
An Amendment of the Amendment Article	5
<i>Recommendation 2</i>	
A Commission of the States for Constitutional Revision	5
<i>Chapter 1</i> Origins and Evolution of Federal Regulation of State and Local Governments	7
The History of Federal Regulation	7
Types of Regulation	7
Support for Goals of Regulation	7
A Rising Tide of Regulatory Complaints	9
Growth of Federal Regulation	9
Changing Attitudes	9
State and Local Concern	10
A Decade of Reform and Relief Strategies	10
Temporary Respite or Permanent Relief?	11
Overview	12
<i>Part I</i> Bends in Regulation—The Executive Branch	15
<i>Chapter 2</i> The Reagan Administration’s Regulatory Relief Program	17
Origins of the Relief Effort	17
From Reform to Relief	17
Relief, Not Reform	18
Social Regulation Addressed	18
Limited Statutory Changes	18

	Key Actions: Off and Running in 1981	19
	Impact on State and Local Governments	19
	Intergovernmental Programs Subject to Review	20
	An Assessment of Regulatory Changes, 1981-1986	22
	Review Methodology	22
	Major Findings	24
	Illustrative Cases	25
	Clean Air Act	25
	Fair Labor Standards Act	26
	Occupational Safety and Health Act	26
	Success Stories	26
	Conclusion	27
Chapter 3	Executive Order 12612 on Federalism: Performance, Problems, and Potential	31
	Policy Impact Analysis	31
	The Working Group on Federalism	31
	Promulgating an Executive Order on Federalism	32
	Federalism Principles	32
	Policymaking Criteria	32
	Agency Implementation	32
	Mixed Assessments of Executive Order 12612	33
	Positive Appraisals	33
	Skeptical Judgments	33
	A Systematic Survey of Agency Compliance	34
	A Random Sample of Citations	35
	Patterns of Compliance in Major Rules	37
	Conclusion	38
Part II	Trends in Regulation — The Congress	41
Chapter 4	Intergovernmental Regulatory Enactments in the 1980s	43
	An Inventory of Intergovernmental Mandates Adopted in the 1980s	43
	Regulatory Expansion in the 1980s	46
	More Coercive Techniques	46
	Traditional Grant Conditions in the 1980s	47
	Medicaid	48
	Aid to Families with Dependent Children (AFDC)	48
	Immigration Reform	49
	Water Resources Development Act of 1986	49
	The Uneven Pace of Regulation and Reform	49
	Regulatory Relief Statutes Enacted in the 1980s	49
	Regulatory Relief through Grant Consolidation	51
	Statutory Regulation in Perspective	52
	Reasons for Legislative Activism	52
	Regulatory Federalism Becomes Commonplace	54
	Major Legislation Regulates Heavily	54
	Conclusion	55
Chapter 5	The Monetary Costs of Intergovernmental Regulatory Enactments in the 1980s	59
	Research on the Cumulative Costs of Federal Mandates	59
	Measuring Mandate Costs	59
	Estimating the Cost of Recent Federal Mandates Using the Congressional Budget Office Data	61
	Cost Estimate Overview	62
	Problems and Limitations	62
	Estimating the Costs of New Federal Legislation	63
	Data Limitations	65
	Conclusion	67

Part III	The Judiciary and Regulation in the 1980s	71
Chapter 6	Regulatory Consequences of a New Judicial Philosophy	73
	The Short Life of NLC	73
	Court's Holding Lacks Staying Power	73
	From Constitutional Protection to Political Safeguards: <i>Garcia v. San Antonio Metropolitan Transit Authority</i>	74
	States in the Founders' Vision	74
	States in the Political Process	75
	Exploring the "Weak Essence" of Federalism: <i>South Carolina v. Baker</i>	76
	Tenth Amendment Arguments Rejected	76
	Intergovernmental Tax Immunity Not Accepted	77
	Baker's Impact	77
	The Spending Power in the Courts	77
	The Doctrine of Unconstitutional Conditions	78
	Implied Preemption and the Dormant Commerce Clause	79
	Judicial Power and Implied Preemption	80
	Judicial Power and the Dormant Commerce Clause	81
	The Negative Impact of the Fourteenth Amendment	83
	Conclusion	84
Chapter 7	Regulatory Consequences of a New Public Law Model	91
	Traditional vs. Public Law Litigation	91
	<i>Spallone v. United States</i> and the Limits of Court Power	92
	<i>Missouri v. Jenkins</i> and the Breadth of Court Power	92
	Subtle Distinctions and Mixed Messages	93
	Hard Constitutional Choices: Federalism, Separation of Powers, Individual Rights, and the Custodial Institution	93
	Custodial Institutions	94
	Arguments for Far-Reaching Federal Judicial Power	94
	Arguments for Limited Federal Judicial Power	94
	The Custodial Cases and the Supreme Court	95
	Lower Courts Given Little Guidance	95
	Suing for Constitutional and Statutory Compliance: The Scope of Section 1983	96
	Section 1983 and State Immunity: A Note on the Eleventh Amendment	96
	Contemporary Construction of Section 1983: The Status of Governmental Liability and Official Immunity	97
	Local Governmental Liability	97
	Official Immunity	98
	The Substantive Reach Expands	98
	Section 1983 and Expanded Immunities	100
	Conclusion	100
Chapter 8	Conclusions and Prognoses	107
	Umpires of Federalism	107
	An Era of Ambivalence: Jurisprudential Federalism in the Eighties	107
	Federalists, Nationalists, or Something Else?	109
	Sandra Day O'Connor: Federalist	109
	O'Connor on the Guarantee Clause	111
	The Supreme Court in the 1990s: An Era of Ad Hoc Federalism?	113
	Before the Court: Legal/Constitutional Strategies in an Era of Judicial Uncertainty	113
	The State and Local Legal Center	113
	The Advisory Commission on Intergovernmental Relations	113
	Conclusion	114

Tables and Figures

<i>Table 1-1</i>	Major Statutes Regulating State and Local Governments Enacted between 1931-1980	8
<i>Table 2-1</i>	Reagan Administration Regulatory Relief Actions for State and Local Governments. 1981-1982	21
<i>Table 2-2</i>	Characteristics of 18 Intergovernmental Regulations	23
<i>Table 2-3</i>	Summary of Changes in Mandating on State and Local Governments	24
<i>Table 2-4</i>	Funding Levels for Administrative Costs in "Intergovernmental Partnership" Programs	25
<i>Table 3-1</i>	Federal Rules and References to E.O. 12612, by Agency. October 26, 1987-August 10, 1990	35
<i>Table 3-2</i>	Final Agency Rules that Reference E.O. 12612: A Random Sample	36
<i>Table 4-1</i>	Major New Enactments and Statutory Amendments Regulating State and Local Governments, 1981-1990	44
<i>Table 4-2</i>	Congressional Enactments Providing Regulatory Relief to State and Local Governments. 1981-1990	50
<i>Table 4-3</i>	Categorical and Block Grant Programs and Federal Outlays for Broad-Based and Other Grants. Selected Years FY 1975-1991	52
<i>Table 5-1</i>	Federal Mandates as a Percentage of Total Federal Aid Received by Various Jurisdictions	60
<i>Table 5-2</i>	Annual Local Costs of Meeting Selected Mandates	60
<i>Table 5-3</i>	Estimated Cumulative Capital and Operating Costs for Local Governments of Recent EPA Regulations .	61
<i>Table 5-4</i>	Potential Increase in Annual User Charges Due to Environmental Regulations	62
<i>Table 5-5</i>	State and Local Cost Estimates Prepared by CBO. 1983-1988	62
<i>Table 5-6</i>	CBO Analyses of State and Local Costs for Substantive Enactments. 1983-1990	63
<i>Table 5-7</i>	Availability of CBO State and Local Cost Estimates for Recently Enacted Regulations	64
<i>Table 5-8</i>	Congressional Budget Office Cost Estimates of New Regulations Conforming to ACIR Criteria. FY 1984-1991	65
<i>Table 5-9</i>	Congressional Budget Offi Cost Estimates of New Regulations and Grant Conditions. FY 1984-1991 .	66
<i>Table 5-10</i>	Major Tax Legislation Restricting State and Local Government Revenues	67
<i>Table 5-11</i>	Estimated Costs Associated with Other Federal Regulations	67
<i>Table 8-1</i>	Winners and Losers in Selected U.S. Supreme Court Cases. 1980-1991	108
<i>Table 8-2</i>	Nationalist and Federalist Perspectives: Positions of Justices Marshall and O'Connor in Selected Supreme Court Cases. 1980-1991	110
<i>Table 8-3</i>	Amicus Scorecard 1987-1991 Supreme Court Terms	114
<i>Table 8-4</i>	ACIR Recommendations	115
<i>figure 4-1</i>	The Growth of Regulatory Federalism: Enactments Added per Decade. 1931-1990	46
<i>Figure 4-2</i>	Functional Composition of Federal Regulations. 1931-1990	46
<i>figure 4-3</i>	Changing Composition of Regulatory Instruments. 1931-1990	47
<i>Figure 4-4</i>	Federal Mandates Enacted per Session of Congress. 1981-1990	49
<i>Figure 4-5</i>	Number of Federal Preemption Statutes Enacted per Decade: 1790-1991	53
<i>Figure 4-6</i>	Functional Makeup of Major Federal Legislation. 1951-1990	55
<i>Figure 4-7</i>	The Growing Proportion of Intergovernmental Regulation. 1951-1990	55
<i>Figure 4-8</i>	The Changing Mix of Intergovernmental Grants and Regulation. 1951-1990	56
<i>Figure 5-1</i>	Trends in Federal Aid and Mandate Burdens. 1984-1991	68





Findings and Recommendations

The 1960s and 1970s inaugurated a new era in American intergovernmental relations — an era of *regulatory federalism*. For the first time in the nation's history, federal mandates and regulations began to rival grants and subsidies in importance as federal tools for influencing the behavior of state and local governments. In less than two decades, the Congress enacted dozens of statutes that utilized new and more coercive techniques to regulate state and local governments directly or sought to enlist them as administrative agents in regulating the private sector.

Individually, many of these requirements addressed long-standing social problems and enjoyed strong public support. **As** such requirements proliferated and their cumulative burdens increased, however, serious questions began to be **raised** about the relative costs, complexity, effectiveness, and efficiency of intergovernmental regulations.

By 1981, mounting concern over the “mandate problem” had produced a surge of regulatory relief and reform efforts on the part of all three branches of the federal government to address the problems posed by regulation. In 1976, the Supreme Court signaled a willingness to restore the Tenth Amendment as a check on federal actions that endangered the institutional integrity and traditional functions of states and localities. Soon thereafter, the Congress enacted a series of statutes designed to restrain the growth and ease the burden of intergovernmental regulation, including the *Paperwork Reduction Act*, the *Regulatory Flexibility Act*, and the *State and Local Cost Estimate Act*.

At the beginning of his first term, President Ronald Reagan established a Task Force on Regulatory Relief, charged with reducing regulatory burdens. **As** the work continued, he issued three executive orders designed to institutionalize presidential control over the regulatory process, to restrain the issuance of costly mandates, and to require that agencies consider the federalism implications of their regulatory actions.

These actions generated hopes that the fiscal and administrative burdens imposed by intergovernmental regulations would be reduced, that new mandates might be avoided, and that the goals of federal regulations might be achieved by less intrusive means. Initially, these hopes ap-

peared to be met when some regulatory relief was provided in a number of highly visible cases. Indeed, some of the earliest evaluations of President Reagan's deregulation program identified state and local governments as significant winners in the process.

Overall, however, such optimistic evaluations were premature. A careful and comprehensive analysis of intergovernmental regulatory trends in all three branches of government indicates that, **by 1990**, substantial measurable growth in burdens on state and local governments had **occurred**. The modest successes achieved during the 1980s, particularly through the *Paperwork Reduction Act*, paled beside the increase in regulations. This record calls into question the effectiveness of the relief tools, **as** currently utilized.

FINDINGS

Finding 1

Despite concerted presidential action to control federal **rulemaking** activity, the burdens imposed on state and local governments by administrative rules and regulations continued to increase during the 1980s.

As detailed in Chapter 2, the Reagan administration's “regulatory relief” campaign, launched in 1981, was the first to give prominent attention to federal regulations affecting state and local governments, as well as those affecting the private sector. In the early part of the decade, while the Presidential Task Force on Regulatory Relief was in existence, 50 rules were targeted for intensive scrutiny and revision. The process established under Executive Order 12291 **also** called for thorough cost-benefit reviews of proposed rules that might cause a major increase in the **compliance** costs of state and local governments.

Some specific successes did result. Nevertheless, an analysis of data on five separate dimensions of federal regulatory activity for 18 of the 36 mandates included in the earlier ACIR *Regulatory Federalism* report suggests that the federal government's overall regulatory burden on states and localities continued to rise during the 1980s.

During the 1981-1986 period, more prescriptive program standards and administrative procedures were created

in many of these 18 policy areas. One examination of federal rulemaking activity identified a total of 140 regulatory changes during this six-year period, which added an estimated net total of nearly 6,000 requirements.

Overall, in 11 of the 18 program areas studied (or 61 percent of the total), the combined programmatic, administrative, and fiscal burden imposed by federal requirements on state and local governments actually appeared to increase rather than decrease. This increase was measured by changes in program standards, administrative procedures, net compliance costs, state administrative delegation, and enforcement patterns. Some of the most marked increases came in the areas of the *Clean Air Act*, *Fair Labor Standards Act*, and *Occupational Safety and Health Act*. Furthermore, the combined mandate burden appeared to remain about stable—that is, it was not reduced by the federal regulatory relief effort—for two additional statutes, the *Hatch Act* and Title VI civil rights requirements. Clear reductions in regulatory burden seem to have been achieved in only five of the 18 programs examined (28 percent).

While federal efforts to increase the delegation of authority to states and to rely on less intensive methods of oversight did help diminish mandate burdens, they did not seem sufficient to counterbalance the combined impact of more stringent standards and procedures and reduced aid funding.

finding 2

Although Executive Order 12612 on Federalism has had a positive impact on certain policy decisions, weaknesses in its design and implementation have prevented the federalism assessment process from achieving its potential.

Executive Order 12612 outlines a series of principles and procedures designed to guide executive branch decisionmaking on issues that have federalism implications. Since 1987, federal agencies have been instructed to:

- 1) Assess the impact of their legislative and regulatory proposals on the federal system;
- 2) Minimize the adverse or unintended effects of federal policies on states and localities; and
- 3) Restrict inappropriate preemption of state and local policy making and administrative prerogatives.

Some federal, state, and local government officials believe that the Executive Order has enhanced their ability to focus attention on federalism issues during the legislative clearance and regulatory review processes. This objective was reinforced, they point out, when President George Bush affirmed his commitment to the principles of the Federalism Executive Order in a 1990 memorandum to the heads of executive branch departments and agencies.

To date, however, the Executive Order 12612 process has not been fully or consistently implemented, and it has failed to produce the significant changes in federal agency

decisionmaking expected by most state and local government officials. In particular:

- Patterns of compliance with Executive Order 12612's procedures vary widely among federal agencies.
- Some agencies routinely fail to implement the Executive Order's certification and assessment procedures in even the most superficial way.
- Many agencies have failed to appoint a designated federalism official or have failed to inform the Office of Management and Budget (OMB) of their designee.
- In virtually all cases examined, significant regulations with important implications for state and local governments continue to be promulgated without the benefit of a comprehensive federalism assessment.

Many of these problems stem directly from weaknesses in the design and procedures of Executive Order 12612. In particular, the Office of Management and Budget, which is supposed to oversee and coordinate federal agency compliance with the order, has been granted neither the resources nor the enforcement authority necessary to ensure its effective implementation. Responsibility for deciding whether the Executive Order has been properly applied rests with each agency and its designated federalism official. Lacking the authority to challenge such agency determinations, OMB has little incentive to devote significant resources to implementing the order.

Finding 3

Between 1981 and 1990, the Congress enacted 27 statutes that imposed new regulatory burdens on states and localities or significantly expanded existing programs. This record of regulatory expansion was comparable to, and in some respects surpassed, the unprecedented pace of intergovernmental regulation compiled in the 1970s, when 22 such statutes were enacted.

As of 1980, research by ACIR had identified 36 major federal mandates affecting state and local governments. Of this total, almost two-thirds were enacted in the 1970s. Yet, by 1990, despite a decade of attempts at deregulation, 27 additional regulatory statutes had been enacted (see tabulation in Chapter 4). This total includes such laws as the *Drug Free Workplace Act* of 1988, which addressed policy concerns for the first time.

The burdens imposed by new federal mandates varied. Some contained costly financial obligations for states and localities. For example, the *Safe Drinking Water Act Amendments of 1986* will levy estimated costs of \$2 billion to \$3 billion annually on public drinking water systems.

Other recent mandates, such as those requiring states to allow longer and heavier trucks on their highways and to raise the minimum drinking age, have been noted more for their intrusiveness than for their expense. Ironically, the

1980s saw increased reliance on the two most openly coercive regulatory techniques: direct orders and crossover sanctions. Although **these** were once the least frequently used devices, they are now among the most common.

The 1980s also witnessed the enactment of several regulatory relief measures, including the creation of a series of new block grants. Overall, however, these deregulation initiatives were more than counterbalanced by the accumulation of new requirements. The Congress also attached costly and intrusive new conditions to existing grant programs. (These conditions are not included in the inventory of 27 new regulatory statutes in Chapter 4.) Particularly noteworthy was a series of new conditions added to the Medicaid program, workfare conditions attached to the Aid to Families with Dependent Children program as part of welfare reform, and legislation increasing local government costs for federal water projects.

Finding 4

The federal government should, but does not, know the cumulative financial costs imposed on state and local governments by recently enacted federal mandates. Available evidence indicates that such costs are substantial and growing at a rate faster than overall federal aid.

The federal government has little systematic data concerning the cumulative financial costs of the regulations it imposes on state and local governments. To date, the best available information about the costs of federal intergovernmental regulations is provided by the Congressional Budget Office (CBO). Since 1983, CBO has attempted to estimate the intergovernmental fiscal effects of proposed federal legislation. Between 1983 and 1989, CBO produced state and local cost estimates for more than 3,500 bills and amendments, including 457 bills that were enacted into law. **An** analysis of these data indicates that:

- New legislation adopted since 1983 has imposed cumulative, estimated costs of between \$8.9 billion and \$12.7 billion on states and localities, depending on the definition of mandates that is used.
- On an annual basis, these statutes imposed estimated costs of between \$2.2 billion and \$3.6 billion in FY 1991.
- Federally mandated costs have risen rapidly since 1986, growing at a pace faster than overall federal aid.
- Additional costly requirements are scheduled to take effect in the years ahead.

Unfortunately, the CBO data provide only an approximate and highly conservative estimate of the fiscal magnitude of federal mandates. Individually, many of the CBO cost estimates were unavoidably rough and preliminary. Cumulatively, they were incomplete. In particular, no cost estimates were prepared by CBO for one-quarter of the 27 new intergovernmental statutes inventoried in Chapter 4,

including some that later proved to be extremely costly. In other cases, subsequent research indicated that CBO estimates were too low.

Many of these problems reflect difficulties inherent in the mandate estimating process. Accurately measuring the costs—or the benefits—associated with a single mandate can be extremely difficult, and such difficulties are compounded in compiling a cumulative price tag for all regulations. Thousands of separate local governments may be affected by a single statute, and the costs of compliance often vary widely from jurisdiction to jurisdiction. Moreover, some of the costs are relatively intangible, and others require subjective assessments about governmental behavior in the absence of regulation.

Even in cases where cost estimates can be prepared, the size and complexity of congressional legislation and uncertainties concerning subsequent agency interpretation and implementation of the statutes sometimes prevent CBO from developing complete or adequate cost projections.

At the same time, other shortcomings in CBO's cost estimates reflect features of the fiscal notes statute itself and CBO's organizational limitations. Currently, cost estimates are required to be prepared when a committee reports a bill for full House or Senate consideration. This often leaves the budget office with only a few days to survey affected state and local governments and prepare a regulatory estimate, and it precludes the estimate from being used by the committee in developing the legislation.

In addition, tax and appropriations bills are excluded from coverage under the *State and Local Cost Estimate Act*. Finally, partly because of its limited size, structure, and competing responsibilities, CBO has been unable to develop a regular network of state and local government contacts which would allow it to systematize the **cost** estimating process. **As** a result, most of the cost estimates are developed hurriedly on an ad hoc basis.

Finding 5

The Supreme Court has undermined the position of state and local governments vis-a-vis the federal government through its opinion in *Garcia v. San Antonio Metropolitan Transit Authority*. As a result of that opinion, states are virtually powerless to challenge any federal action in the courts on Tenth Amendment grounds.

Furthermore, federal court actions to expand the substantive scope of 42 U.S.C. 1983 regarding civil rights violations have created grave uncertainty for states and localities regarding their scope of liability for official actions.

The State and Local Legal Center, however, has received praise for its submissions to the Court on key cases affecting state and local governments. The litigants supported by the center, through its submission of amicus briefs, have been victorious in the majority of cases.

In deciding *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court refused to intercede in disputes between the federal and state and local governments, abandoning the resolution of federalism questions to the political processes of the federal government. Subsequent to that decision, federal courts became active in telling state and local governments not only what they

could not do but what they must do (e.g., raise tax rates.) Courts have been active especially in the past decade in overseeing state and local management of public institutions, such as prisons and mental hospitals. Expansions of the substantive scope of 42 U.S.C. 1983 were a common tool used by the courts to support their actions.

Despite the mixed record of the federal courts in dealing with federalism issues, superb work is being done by the State and Local Legal Center in its efforts to restore balance to the nation's legal treatment of federalism questions. Over the past decade, the center has developed an impressive win-loss record in representing state and local interests before the courts.

RECOMMENDATIONS

Recommendation 1

Reconsidering the Constitutionality of Unfunded Federal Mandates

The Commission finds that unfunded federal mandates—by which the federal government imposes requirements on state and local governments without reimbursement of the resulting compliance costs—have reached such proportions as to constitute an overextension of the constitutionally delegated powers of the Congress and the Executive, an abridgement of the authority of citizens in their state and local communities to govern their own affairs, and an impairment of the ability of citizens to hold their elected federal officials accountable for the public costs of their decisions. This development is new and alarming. Even more alarming is the weight of recent decisions by the U.S. Supreme Court toward the view that constitutional limits on the federal government's power are nonjusticiable, even though the Constitution is founded on the premise that the power of the federal government should be limited by the primary reach of state authority.

The Commission recommends, therefore, that the Congress, the Executive Branch, and the federal Judiciary declare and honor a moratorium on the imposition of unfunded or underfunded mandates by statutory, administrative rulemaking, and judicial means for a period of at least two years, and that the Congress and the Executive Branch conduct a complete and thorough review of mandating for the purpose of restoring balance, partnership, and state and local self-government in the federal system.

The Commission recommends, furthermore, that the U.S. Supreme Court reexamine the constitutionality of mandating as a principle and also consider the constitutionality of particular mandates in the context of the cumulative impact of mandates on the federal fabric of the Constitution of the United States.

Recommendation 2

Using Existing Mechanisms to Press Harder for Relief from Burdensome Federal Regulations

The Commission finds that several mechanisms were created in the 1980s to help limit the growth in federal regulation of state and local governments. These mechanisms include the fiscal notes requirement in the Congress, the *Paperwork Reduction Act*, the *Regulatory Flexibility Act*, the

Federalism Executive Order and the *Federal Register's* semiannual state and local regulatory agenda in the executive branch; the State and Local Legal Center established by several national associations of state and local governments; and the Mandates Monitor issued by the National Conference of State Legislatures. The Commission applauds the creation of these new mechanisms, and finds that they have potential for more effective use. The Commission concludes that utilizing these mechanisms more fully offers an immediate potential for limiting and mitigating the burdens of federal regulation of state and local governments. The Commission also recognizes, however, that the regulatory relief mechanisms created during the 1980s are not perfect, that growth has continued at a rapid pace, and that significant improvements are needed in order to address the problem adequately.

The Commission recommends, therefore, that those parties responsible for administering and utilizing the congressional fiscal notes process, the Paperwork Reduction Act, the Regulatory Flexibility Act, and the Federalism Executive Order redouble their efforts to take fullest advantage of these mechanisms. The Commission recommends, further, that:

- a) State and local governments (i) identify those bills pending in the Congress and regulations to be prepared within the executive branch of the federal government that may have significant effects on state and local governments, (ii) press the committees and subcommittees of Congress responsible for the identified bills, early and often, to consider the effects on state and local governments, (iii) call for preparation of fiscal notes by the Congressional Budget Office on significant provisions of those bills before final subcommittee and committee action, (iv) provide to the committees, subcommittees, and the Congressional Budget Office with relevant fiscal and other information that should be taken into account in the legislative process, (v) press for early access to the administrative rulemaking process; and (vi) educate the public and the press about the impact of federal regulation on state and local governments, for example, by indicating the cost of unfunded federal mandates on tax and utility bills.
- b) The Congress and all appropriate agencies of the federal government should make compliance with the letter and the spirit of the *State and Local Cost Estimate*, *Paperwork Reduction*, and *Regulatory Flexibility Acts* and the *Federalism Executive Order* a high priority.
- c) The federal, state, and local governments should continue to evaluate ways to improve regulatory relief mechanisms and give high priority to the development of a more effective, efficient, and equitable intergovernmental partnership to achieve shared objectives with minimal unilateral and costly regulation.

Recommendations on Constitutional Balance

The Commission finds that increasing federal regulation of state and local governments, the lack of adequate constitutional protection for state and local authority in the decisions of the federal courts, and the increasingly crowded policy agenda of the federal government have contributed to a serious and growing imbalance in the federal system. This imbalance makes it difficult for the federal government to establish genuinely national priorities and to resolve major national problems. This imbalance also weakens the ability of state and local governments to respond to the needs of their citizens. The following recommendations are directed at setting in motion a process for restoring balance in the federal system by opening a period of national discussion of appropriate federal and state roles in the American system of constitutional government.

Recommendation 7

An Amendment of the Amendment Article

The Commission finds that existing procedures for calling a constitutional convention to amend the U.S. Constitution have proven to be a barrier to state initiative in the process of amending the U.S. Constitution in the absence of congressional initiative.

The Commission therefore recommends that the Congress propose, and the states speedily ratify, an amendment to Article V of the U.S. Constitution to clarify the procedure for calling a constitutional convention for some limited purpose, thus removing the fear of a "run-away" convention that would exceed the purpose of its call. Specifically, the Commission recommends adoption of an amendment to the U.S. Constitution to provide the following:

A convention called for the purpose of proposing amendments to the Constitution, pursuant to Article V, shall be limited to the consideration of amendments that pertain exclusively to subjects jointly specified by the legislatures of two-thirds of the several states. The Supreme Court of the United States shall have original jurisdiction to decide, in the case of dispute, whether a convention has exceeded the purpose of its call.

Recommendation 2

A Commission of the States for Constitutional Revision

The Commission recommends that, prior to petitioning the Congress to call a constitutional convention, some number of states, but no less than nine, jointly create a Commission of the States for Constitutional Revision, for the purposes of conducting an inquiry into the constitutional problems of joint concern to the states and of formulating a common resolution to be submitted to the legislatures of the several states for their consideration.

The Commission recommends further that the governor of each participating state be authorized to appoint one member of the revision commission subject to confirmation by the legislature of that state.

The Commission recommends that this procedure be followed whether or not the Congress has proposed, and the states ratified, an amendment to clarify the procedures for limiting a constitutional convention to the purpose of its call.

*Adopted by the Commission
March 1988*





Origins and Evolution of Federal Regulation of State and Local Governments

American intergovernmental relations underwent an important change in the 1970s. Federal aid to state and local governments as a proportion of federal, state, and local spending peaked in 1978 and then declined from 1979 through 1989. At the same time, more attention was being focused on the regulatory dimensions of American federalism.

The History of Federal Regulation

Intergovernmental regulation was not a wholly new phenomenon, but most of the earliest requirements imposed on state and local governments were conditions of aid, designed to ensure fiscal and programmatic accountability in the use of federal funds. They were not used ordinarily to achieve policy goals beyond the specific scope of the funding or beyond the constitutional reach of the Congress.

Although aid requirements often were highly detailed and specific—frequently making the management and coordination of multiple grants difficult for recipient governments—they were based on long-established and widely accepted legal and intergovernmental principles. Conceptually, such conditions traced their origins to the earliest categorical cash grants enacted in the late 19th and early 20th centuries.¹ Legally, such conditions had long enjoyed judicial sanction, with the courts interpreting them as voluntary agreements freely entered into by willing state and local governments in exchange for federal funding.²

Types of Regulation

By the late 1970s, this cooperative tradition was being challenged by the rise of several new and more intrusive techniques of intergovernmental regulation. As documented in ACIR's 1984 report *Regulatory Federalism: Policy, Process, Impact, and Reform*, four new types of regu-

lation proliferated in the 1960s and 1970s.³ These types included crosscutting requirements, crossover sanctions, partial preemptions and direct orders.

Crosscutting requirements are general provisions applied across the board to many or all federal grants to advance national social and economic goals. Examples include Title VI of the *1964 Civil Rights Act*, which guarantees nondiscrimination in federally assisted programs, and the *National Environmental Policy Act of 1969*, which requires environmental impact statements*.

Crossover sanctions are grant conditions that impose federal fiscal sanctions on one program for failure to comply with federal requirements under another, separately authorized, program. Illustrative of this form are the *Education for All Handicapped Children Act*, which requires that all handicapped children be provided education opportunities, and the *Emergency Highway Energy Conservation Act of 1974*, which withheld a portion of federal-aid highway funds if states failed to establish a 55 mph speed limit on roads in their jurisdictions.

Partial preemption consists of federal laws that set minimum national standards for certain activities. In these programs, responsibilities for administration and enforcement may be delegated to states or localities provided they meet federal criteria. The *Occupational Safety and Health Act of 1970* and the *Clean Air Act Amendments of 1970* may be classified as partial preemptions.

Direct orders consist of legal requirements that are enforced by civil or criminal penalties. Exemplifying this type are the *Equal Employment Opportunity Act of 1972*, barring job discrimination by state and local governments, and the *Marine Protection Research and Sanctuaries Act Amendments of 1977*, which prohibits ocean dumping of sewage sludge by cities).

Support for Goals of Regulation

In *Regulatory Federalism*, ACIR determined that, as of 1980, 36 major intergovernmental regulations employed one or more of these new techniques (see Table 1-1). All but two of the requirements were enacted in the 1960s and

Table 1-1
**Major Statutes Regulating State and Local Governments
 Enacted between 1931-1980**

Title	Public Law	Type
Age Discrimination Act of 1975	94-135	CC
Age Discrimination in Employment Act (1974)	93-259	DO
Architectural Barriers Act of 1968	90-480	CC
Civil Rights Act of 1964 (Title VI)	88-352	CC
Civil Rights Act of 1968 (Title VIII)	90-284	CC
Clean <i>Air</i> Act Amendments of 1970	91-604	CC,CO,PP
Coastal Zone Management Act of 1972	94-370	CC
Davis-Bacon Act (1931)	74-403	CC
Education Amendments of 1972 (Title IX)	92-318	CC
Education for All Handicapped Children Act (1975)	94-142	CO
Emergency Highway Energy Conservation Act (1974)	93-239	CO
Endangered Species Act of 1973	93-205	CC,PP
Equal Employment Opportunity Act of 1972	92-261	DO
Fair Labor Standards Act Amendments of 1974	93-259	DO
Family Educational Rights & Privacy Act of 1974	93-380	CC
Federal Insecticide, Fungicide, and Rodenticide Act (1972)	92-516	PP
Federal Water Pollution Control Act Amendments of 1972	92-500	CC,PP
Flood Disaster Protection Act of 1973	93-234	CC,CO
Hatch Act (1940)	76-753	CC
Highway Beautification Act of 1965	89-285	CO
Marine Protection Research & Sanctuaries Act Amendments of 1977	95-153	DO
National Energy Conservation Policy Act (1978)	95-619	PP
National Environmental Policy Act of 1969	91-190	CC
National Health Planning and Resources Development Act of 1974	93-64	CO
National Historic Preservation Act of 1966	89-665	CC
Natural Gas Policy Act of 1978	95-621	PP
Occupational Safety and Health Act (1970)	91-596	PP
Public Utilities Regulatory Policies Act of 1978	95-617	DO
Rehabilitation Act of 1973 (Title 504)	93-112	CC
Resource Conservation and Recovery Act of 1976	94-580	PP
Safe Drinking Water Act of 1975	93-523	CC,PP,DO
Surface Mining Control and Reclamation Act of 1977	95-87	PP
Uniform Relocation Act of 1970	91-646	CC
Water Quality Act (1965)	88-668	PP
Wholesome Meat Act (1967)	90-201	PP
Wholesome Poultry Products Act (1968)	90-492	PP

Key:

- CC—Crosscutting Requirement
- CO—Crossover Sanction
- DO—Direct Order
- PP—Partial Preemption

Source: U.S. Advisory Commission on Intergovernmental Relations, *Regulatory Federalism: Policy, Process, Impact, and Reform* (Washington, DC, 1984), pp. 19-21.

1970s. Most involved what is now commonly referred to as “social regulation,” addressing issues of public health and safety, civil rights, or environmental protection.

These regulatory requirements typically addressed widely perceived problems and enjoyed considerable public support. For example, in early **1965**, over half of the American public identified civil rights as “the most important problem facing this country today,”⁵ and public backing for the civil rights legislation of **1960s** has been well documented! Similarly, the enactment in **1970** and **1972** of sweeping federal laws to regulate air and water pollution was preceded by growing public concern about environmental problems. Among the general public, the percentage of respondents identifying air pollution as a serious problem doubled between **1965** and **1968**—from **28** percent to **55** percent—while those concerned about water pollution increased from **35** percent to **58** percent during this period.⁷ By **1973**, **54** percent of the public indicated a willingness to pay \$50 a year more in taxes to clean up air and water pollution.⁸

Not only did the general public typically support these new regulatory statutes: but state and local government officials also endorsed most of the goals. Several intergovernmental regulations, including many civil rights provisions, national health planning requirements, coastal management regulations, and handicapped education legislation, were patterned after earlier state and local government initiatives.

Although some of these policies generated intergovernmental conflicts and tensions, there also were significant accomplishments. The civil rights laws of the **1960s** effectively eliminated overt segregation in public services and accommodations, vastly increased minority voting participation, and proved more effective than judicial edicts in eliminating school segregation. In environmental policy, emissions of several major air pollutants have declined significantly (dramatically in the case of airborne lead) since the **1970s**.¹⁰ Such reductions are particularly impressive in view of the fact that economic and population growth during this period would have generated substantial increases in pollution in the absence of such policies. Similarly, the percentage of monitoring tests showing unacceptable levels of specified pollutants also declined during this time period.¹¹

A Rising Tide of Regulatory Complaints

Despite such accomplishments, the political dynamics of regulatory federalism began to change as the number and specificity of requirements proliferated. Today, few issues generate more intergovernmental tension than federal regulation of state and local government activities. Concerned about what they perceive to be an “explosion of federal mandates,”¹² state and local government officials increasingly are voicing objections. “Federal mandates are putting a stranglehold on state budgets,” said a recent president of the National Conference of State Legislatures.¹³

However, supporters of new federal requirements observe that most regulatory goals still enjoy considerable public support, and they often defend them as a necessary response to state and local failures. As a key aide to the chairman of the Senate Finance Committee put it: “Mandates wouldn’t be necessary if [states] were doing what they should have been doing in the first place.”¹⁴

Growth of Federal Regulation

Federal regulation in many fields began gradually and grew incrementally. The requirements of the **1964 Civil Rights Act** and the **Clean Air Act Amendments of 1970**, for example, were enacted only after earlier, less invasive approaches were judged to be inadequate. In the case of the **Civil Rights Act**, stronger federal requirements were necessary to overcome entrenched policies of racial segregation and discrimination in many states. Previous legislation addressing air and water pollution was replaced, observers indicate, because a more active federal role was deemed necessary to deal effectively with problems that spilled across state and local borders.

Following such breakthroughs, however, subsequent laws often were adopted rapidly and with less legislative scrutiny.¹⁵ For example, civil rights protections on behalf of women, the handicapped, and elderly individuals were patterned explicitly—and often verbatim—after the **1964 Civil Rights Act**. They were adopted by the Congress with virtually no discussion or debate about the similarities and differences in the forms of discrimination faced by different groups and the types of remedies that might prove most effective in dealing with them.

In addition, the total number of intergovernmental regulations grew by almost **160** percent during the **1970s**. Federal spending on social regulation increased by over **400** percent, and the number of pages of regulations published in the *Federal Register* increased almost **three-fold**.¹⁶

Changing Attitudes

As the number and stringency of regulations mounted, concern increased in various quarters. Even some supporters of various requirements began to wonder if there might be too much of a good thing. In particular, questions were raised about the overall costs and the relative cost effectiveness of many regulations.

These questions were reflected in changing public attitudes toward regulation and the federal government. The number of Americans who felt they could trust the federal government to “do what is right” in all or most cases plummeted from **61** percent to just **25** percent between **1972** and **1980**.¹⁷ The proportion of the population agreeing that “government has gone too far in regulating business” increased by over one-third between **1964** and **1978**, rising from **42** percent to **58** percent.¹⁸ Although pluralities of the public still believed that the benefits of federal regulation outweighed the costs in such specific areas as worker safety, civil rights, and environmental protection, by **1978**, a majority of Americans agreed that, overall, “the cost of government regulation outweighs the benefits.”¹⁹

State and local Concern

During this period, comparable concerns about the effects of federal regulations and mandates were growing among state and local officials. The most vigorous objections generally focused on financial costs of federal mandates. In some cases, the federal government provided little or no financial assistance for compliance and implementation. Questions also were raised about the inefficiency, inflexibility, and intrusiveness of federal regulations, as well as the cumulative threat to state and local autonomy.

In a 1981 survey of local officials, although many agreed with the basic goals and objectives of federal regulations, most respondents believed that mandated standards were unrealistic, excessively detailed, and needlessly difficult.²⁰ In another survey of municipal officials, two-thirds or more believed that “urgent” action was necessary to alleviate the impact of seven different federal regulations, including the *Clean Water Act*, the *Clean Air Act*, handicapped access requirements, and the *Occupational Safety and Health Act*.²¹ Similarly, county officials complained about the “enormous cumulative burdens” imposed by federal crosscutting requirements, including excessive costs, confusion, and delays.²²

Capturing the tone of growing concern about such requirements in 1980, then New York Mayor Edward I. Koch argued that a “mandate millstone” was strangling the vitality of the nation’s cities, that “a maze of complex statutory and administrative directives has come to threaten both the initiative and financial health of local governments throughout the country.”²³

The perception of rapidly mounting regulatory pressure from Washington was exacerbated by several developments. First, increasingly demanding conditions were being added to large grant programs, such as Medicaid and Aid to Families with Dependent Children (AFDC), for which state participation could be considered “voluntary” only in the technical sense. Second, New Federalism initiatives, such as block grants and General Revenue Sharing, which had been designed explicitly to increase state and local discretion in the use of federal funds, were delivering federal funds directly to jurisdictions that had never before received them. One result was to extend the influence of proliferating crosscutting requirements more broadly and deeply.” Finally, judicial mandates (i.e., court decisions) were being issued increasingly in traditional local government service areas, such as education, corrections, and mental health services.

Scholarly research supported the apprehensions of public officials. One study examining the fiscal impact of six federal mandates in seven local jurisdictions concluded that the costs imposed were substantial, averaging about \$25 per capita or about 19 percent of the total value of federal aid received by these jurisdictions.²⁵ Another study of federal and state mandates in ten diverse localities concluded that “there are significant fiscal impacts of mandates on local governments and . . . these impacts have political as well as fiscal importance.”²⁶

A Decade of Reform and Relief Strategies

Growing concerns about the effects of intergovernmental mandates helped launch a broad array of efforts by the federal government to reform the regulatory process and to grant relief to state and local governments and other subjects of regulation. By 1981, all three branches of the federal government had taken such actions. Although these efforts were most intense during the early years of the Reagan administration, they began during the 1970s and spanned much of the decade of the 1980s.

In 1976, for example, the U.S. Supreme Court barred the application of federal wage and hour regulations, a form of direct order mandate, to state and local governments. By doing so, the Court indicated a willingness to restore the Constitution’s Tenth Amendment as a check on federal actions that threatened the institutional integrity and the traditional functions of states and localities (see also Chapter 6). This decision spurred legal challenges to other federal intergovernmental regulations (e.g., *Surface Mining Control and Reclamation Act of 1977* and *Age Discrimination in Employment Act of 1974*), although they were unsuccessful.

By the early 1980s, the Congress had enacted a series of statutes designed to restrain the growth of federal intergovernmental regulation, including the *Paperwork Reduction Act of 1980*, the *Regulatory Flexibility Act of 1980*, and the *State and Local Cost Estimate Act of 1981*.²⁷

Within the executive branch, beginning in 1981, regulatory relief was identified as one of the fundamental components of President Ronald Reagan’s economic recovery strategy. Although deregulation was not focused specifically on intergovernmental regulations, requirements with significant intergovernmental impacts were among the major targets. The relief effort included a Presidential Task Force on Regulatory Relief and the promulgation of Executive Order 12291 in 1981.

Chaired by then Vice President George Bush and staffed by high-ranking officials in the administration, the task force was asked to study the economic impact of pending rules and regulations and to review existing rules deemed to be particularly burdensome. After soliciting recommendations from state and local governments and the private sector, the task force selected 111 rules for intensive review and modification, of which one-quarter were intergovernmental in nature.

Executive Order 12291, a key executive branch tool for regulatory relief, was issued in February 1981. It established, for the first time, a centralized regulatory review and clearance process in OMB. The order required federal agencies, where laws permit, to identify and adopt the most cost-effective approach when considering new regulations, to select alternatives in which social benefits outweigh social costs, and to submit proposed rules to OMB for review and comment before they are issued or published in the *Federal Register*.

The *Paperwork Reduction Act of 1980* requires agencies to submit annually to the Office of Management and Budget (OMB) copies of reports and forms that outside entities must complete, along with estimates of the work hours required to complete them. OMB reviews such forms, establishes a paperwork allowance or ceiling for each agency, and issues instructions for reducing or eliminating specific forms or requirements. The act stemmed from President Jimmy Carter's efforts to respond to problems identified by the Federal Paperwork Commission. Many of the procedures were first laid out in Executive Order 12174 in 1979, although the act expanded OMB's enforcement authority and resources and extended paperwork control authority to additional agencies.

The *Regulatory Flexibility Act of 1980* requires that when issuing new regulations, federal agencies consider alternative procedures and strategies that recognize the limited resources and special needs of small governmental jurisdictions (with populations under 50,000) and small businesses, and minimize the regulatory impact on them.

The *State and Local Government Cost Estimate Act of 1981* requires that, for significant legislation that is approved by congressional committees, the Congressional Budget Office (CBO) must prepare estimates of the costs that will be imposed on state and local governments. Such cost estimates are intended to be made available to members of Congress prior to floor consideration of such legislation, and they are generally included in committee reports.

President Ronald Reagan's interest in federalism reform spawned other policies with important implications for intergovernmental regulation. Although some proposals with potentially sweeping regulatory consequences were never enacted (notably the Federalism Initiative of 1982), ten new or substantially modified block grants were enacted in 1981 and 1982 in the areas of public health, education, community development, social services, and employment and training. In many cases, reporting requirements and other conditions of aid were sharply reduced.

Moreover, Executive Order 12612 on Federalism was issued by President Reagan in October 1987. This order, which was reaffirmed by President Bush, sets forth criteria to be followed by federal agencies when proposing new legislation or rules that will significantly affect state and local functions and responsibilities. It requires that such federalism impacts be assessed and minimized wherever possible in both rulemaking and legislative proposals.

Temporary Respite or Permanent Relief?

In the view of some observers, the regulatory reform and federalism agendas of the Reagan administration pro-

vided states and localities with substantial relief from federal regulatory burdens. Those individuals point out that the President's Task Force on Regulatory Relief succeeded in:

- Revising Davis-Bacon requirements to give local governments more flexibility in calculating "prevailing wages" paid in federally supported construction projects;
- Modifying regulations governing handicapped access in public transportation; and
- Reducing the reporting and accounting requirements in the federal school lunch program.

The task force estimated that these and more than 20 other regulatory actions affecting state and local governments would save 11.8 million work hours per year, approximately \$2 billion in annually recurring costs, and \$4 billion to \$6 billion in one-time capital costs.²⁸

The 1981 consolidation of dozens of categorical programs into block grants provided an opportunity to condense and simplify program-specific grant requirements. The merger of 33 education programs into the Chapter 2 block grant, for example, allowed the administration to replace 667 pages of regulations governing the previous programs with a single 20-page set of requirements. Overall, OMB estimated that the 1981 block grants reduced paperwork requirements for states and localities by 5.9 million hours (91 percent).²⁹

These initiatives, combined with other administrative actions to accelerate the delegation of regulatory authority to the states under various partial preemption programs, led some analysts to conclude that state and local governments were among the biggest winners under deregulation. As the author of one study argued, "State and local governments quietly captured some of the most important and enduring victories of the president's regulatory relief campaign."³⁰

Others questioned the magnitude and durability of these deregulation initiatives. They pointed out that many of the most important accomplishments came very early in the Reagan administration. The Task Force on Regulatory Relief completed its mission during Reagan's first term, and some of its principal accomplishments—such as handicapped access requirements in mass transit—have been overtaken by subsequent statutory and administrative developments. Although several additional block grants were enacted after 1982, there also have been efforts to earmark and reregulate several earlier ones. Finally, although the pace of new intergovernmental regulatory enactments appeared to slow in the early 1980s, in the last several years there has been new regulatory legislation in a number of areas.

The *Clean Air Act Amendments of 1990*, for example, imposed new deadlines and requirements dealing with urban smog, acid rain, municipal incinerators, and toxic emissions.³¹ In education, the 1986 reauthorization of the *Education for All Handicapped Children Act* expanded services for pre-school children at an estimated cost to state and local governments of \$575 million annually,³² while

the *Asbestos Hazard Emergency Response Act of 1986* required schools to remove hazardous asbestos at an estimated cost of **\$3.15 billion** over **30 years**.³³

Among other requirements, federal Medicaid requirements enacted in **1988, 1989, and 1990** expanded services for low-income children and made changes in nursing home regulations that were estimated to cost states an additional \$2.5 billion; additional expanded coverage of low-income children enacted as part of the fiscal **1991** budget reconciliation act was estimated to impose another **\$1.1 billion** in costs over the next five years.³⁴

Some analysts have expressed concern that the pace of new regulatory enactments will accelerate as the Congress, constrained by large budget deficits, attempts to respond to new social problems:

There is a danger that Congress, in striving to close the gap between its desire to define large goals and its unwillingness to provide the administrative means to achieve them, will try to conscript the states. That is, it will give orders to them as if they were administrative agents of the national government, while expecting state officials and electorates to bear whatever costs ensue.³⁵

Overview

These recent developments raise important questions about intergovernmental regulatory trends in the **1980s** and the effectiveness of the various relief strategies to deal with problems of regulatory federalism. For example:

- How many significant new intergovernmental regulations were enacted during the **1980s**?
- How did the pace of regulatory enactments in the **1980s** compare with previous decades, both in absolute terms and relative to declines in overall legislative activity and changes in federal aid to states and localities?
- Can the costs of new regulatory enactments be quantified and, if so, did the fiscal burdens of intergovernmental regulation increase during the past decade?
- What do recent trends in regulation tell us about the congressional approach to intergovernmental legislation in the **1980s**, and about the effectiveness of intergovernmental impact analysis procedures, such as the Congressional Budget Office's fiscal notes process?
- Administratively, what impact have procedural changes, such as OMB's regulatory review and clearance process, had on intergovernmental regulations? Were the burdens imposed by statu-

tory mandates modified or reduced during the **1980s** through changes in administrative rules?

- Have ad hoc changes in regulations, such as those advanced by the President's Task Force on Regulatory Relief, proven to be permanent or temporary in their effects?
- How effectively has Executive Order **12612** on federalism been implemented, and what impact has it had on federal rulemaking and statutory recommendations?

These and related issues are addressed in the following chapters. In Part I, trends in the executive branch during the early **1980s** are examined. As part of that examination, Chapter 2 contains a review of the intergovernmental elements of the Reagan administration's regulatory relief program and assesses their impact on specific rules imposed by **18** federal mandates. Chapter 3 is an evaluation of the implementation of Executive Order **12612** on Federalism, exploring the extent to which federal agencies have used its procedures to ascertain and reduce regulations imposed on state and local governments.

Part II presents regulatory trends in the Congress during the **1980s**. An inventory of major new regulatory statutes and provisions enacted during the decade and their political and historical perspective is provided in Chapter 4. In Chapter 5, the costs of new regulatory statutes adopted in the **1980s** are examined, utilizing Congressional Budget Office analyses to estimate the cumulative costs of additional regulations on states and localities since **1983**.

Part III presents an overview of the important role of the judicial branch in the development of intergovernmental regulation in this period. Chapters 6, 7, and 8 contain analyses of evolving constitutional interpretations of the regulatory powers of the Congress and the courts' role in devising and promulgating judicial mandates.³⁶

Notes

¹ See W. Brooke Graves, *American Intergovernmental Relations* (New York: Charles Scribner's Sons, 1964), Chs. 14, 15; and U.S. Advisory Commission on Intergovernmental Relations (ACIR), *Improving Federal Grants Management* (Washington, DC, 1977), p. 94.

² *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

³ The following definitions are derived from ACIR, *Regulatory Federalism: Policy, Process, Impact, and Reform* (Washington, DC, 1984), ch. 1.

⁴ For additional examples and discussion of these new regulatory forms, see ACIR, *Regulatory Federalism*, pp. 7-10.

⁵ Gallup Poll, cited in Gary Orfield, *Congressional Power Congress and Social Change* (New York: Harcourt, Brace, Jovanovich, 1975), p. 67.

⁶ See Robert Erikson, Norman Luttbeg, and Kent Tedin, *American Public Opinion*, 4th ed. (New York: Macmillan, 1991), pp. 63-65; and James L. Sundquist, *Politics and Policy: The Eisenhower, Kennedy, and Johnson Years* (Washington, DC: The Brookings Institution, 1968), ch. VI.

⁷ Charles O. Jones, *Clean Air: The Policies and Politics of Pollution Control* (Pittsburgh: University of Pittsburgh Press, 1975), p. 142

- ⁸ U.S. Congress, Senate, Committee on Government Operations, Subcommittee on Intergovernmental Relations, *Confidence and Concern: Citizens View American Government*, 93rd Cong., 1st Sess., 1973, p. 165.
- ⁹ For additional evidence of this, see Seymour Martin Lipset and William Schneider, "The Public View of Regulation," *Public Opinion* 2 (January/February 1979): 6-11.
- ¹⁰ U.S. Department of Commerce, Bureau of the Census, Economics and Statistics Administration, *Statistical Abstract of the United States, 1989* (Washington, DC, 1989), p. 200.
- ¹¹ *Ibid.*, p. 199.
- ¹² Martha A. Fabricius, "Fiscal Impact of Proposed Mandates from the 102nd Congress," *State-Federal Issue Brief* 4 (November 1991): 1.
- ¹³ John Martin, quoted in Oklahoma Senate, *Fedeml Action Monitor XI* (September 6, 1991).
- ¹⁴ Quoted in Julie Rovner, "Governors Ask Congress for Relief from Burdensome Medicaid Mandates," *Congressional Quarterly Weekly Report*, February 16, 1981, p. 417.
- ¹⁵ See James Q. Wilson, "American Politics: Then and Now," *Commentary* 34 (February 1979): 41-46; and ACIR, *Regulatory Federalism*, ch. 3.
- ¹⁶ Cited in Timothy J. Conlan, *New Federalism: Intergovernmental Reform from Nixon to Reagan* (Washington, DC: The Brookings Institution, 1988), p. 203.
- ¹⁷ *Ibid.*, p. 106.
- ¹⁸ Cited in Lipset and Schneider, "The Public View of Regulation," pp. 9-10.
- ¹⁹ *Ibid.*, p. 10.
- ²⁰ See ACIR, *Regulatory Federalism*, p. 175.
- ²¹ See Clint Page, "NLC Surveys Members on Federal Rules," *Nation's Cities Weekly*, April 6, 1981, p. 10.
- ²² National Association of Counties, "The Effects of Crosscutting Requirements on County Government," Memorandum (Washington, DC, 1981).
- ²³ Edward I. Koch, "The Mandate Millstone," *The Public Interest* 61 (Fall 1980): 42.
- ²⁴ See Donald F. Kettl, *The Regulation of American Federalism* (Baton Rouge: Louisiana State University Press, 1983).
- ²⁵ U.S. Congress, Joint Economic Committee, "The Impact of Selected Federal Actions on Municipal Outlays," by Thomas Muller and Michael Fix, *Government Regulation: Achieving Social and Economic Balance*, Vol. 5, *Special Study on Economic Change* (Washington, DC, 1980), pp. 327, 368.
- ²⁶ Catherine H. Lovell et al., *Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts* (Riverside: University of California Riverside, Graduate School of Administration, 1979), p. 194.
- ²⁷ P.L. 96-511, 44 U.S.C. Sec. 3501; P.L. 96-354, 5 U.S.C. Sec. 601; P.L. 97-108, 2 U.S.C. Sec. 653.
- ²⁸ Presidential Task Force on Regulatory Relief, *Reagan Administration Achievements in Regulatory Relief for State and Local Governments: A Progress Report* (Washington, DC, 1982), pp. i-ii.
- ²⁹ See Richard S. Williamson, "A New Federalism: Proposals and Achievements of President Reagan's First Three Years," *Publius: The Journal of Federalism* 16 (Winter 1986): 25.
- ³⁰ Michael Fix, "Regulatory Relief: The Real New Federalism," *State Government News* 27 (January 1985): 7.
- ³¹ See Arnold M. Kuzmack, "The Safe Drinking Water Act: A Case Study," in Michael Fix and Daphne A. Kenyon, eds., *Coping with Mandates: What Are the Alternatives?* (Washington, DC: Urban Institute Press, 1990), p. 73.
- ³² U.S. General Accounting Office (GAO), *Legislative Mandates: State Experiences Offer Insights for Fedeml Action* (Washington, DC, 1988), p. 48.
- ³³ *Federal Register*, October 30, 1987, p. 41826.
- ³⁴ National Governors' Association, "States Feeling the Pressure for Increased Spending for Health, Transportation, Education, and Corrections," News Release, April 6, 1990; and Spencer Rich, "Benefits Grow among Budget Cuts: Deficit Reduction Bill Expands Health Aid for Poor Children," *Washington Post*, November 3, 1990.
- ³⁵ Martha Derthick, "Preserving Federalism: Congress, the States, and the Supreme Court," *Brookings Review* 4 (Winter Spring 1986): 36. See also John Kincaid, "From Cooperative to Coercive Federalism," *Annals of the American Academy of Political and Social Science* 509 (May 1990): 139-152; GAO, *Fedeml-State-Local Relations: Trends of the Past Decade and Emerging Issues* (Washington, DC, 1990), ch. 5; and John Kincaid, "From Cooperation to Coercion in American Federalism: Housing, Fragmentation and Preemption, 1780-1992," *Journal of Law and Politics* 9 (Winter 1993): 333-430.
- ³⁶ See also Timothy J. Conlan and David R. Beam, "Federal Mandates: The Record of Reform and Future Prospects," *Intergovernmental Perspective* 18 (Fall 1992): 7-11.





Part I

Trends in Regulation – The Executive Branch



The Reagan Administration's Regulatory Relief Program

2

By the early 1980s, all three branches of the federal government had signaled concern about the growth of federal mandating during the 1960s and 1970s. Bolstered by outspoken state and local government leaders, Washington seemed committed to taking strong action.

It was left to the executive branch, however, to lead the effort. This was a task that newly elected President Ronald Reagan assumed with great enthusiasm. An often-quoted statement from his 1981 Inaugural Address—“Government is not the solution to our problem. Government is the problem”—encapsulated his concern that expansion of the public sector had harmed the performance of the economy and had intruded on the freedom of individuals, businesses, states, and localities.

Origins of the Relief Effort

The Reagan platform and program built on popular currents of discontent and the official actions of his predecessors.¹ Since 1968, each president had sought, by one strategy or another, to limit or reorder federal activities. The Ford administration's WIN (Whip Inflation Now) program later spawned the Economic Impact Statement (EIS) process operated by the Council on Wage and Price Stability. President Gerald Ford also established the Domestic Council Review Group on Regulatory Reform, a body that laid much of the groundwork for the later legislative action.²

Democrat Jimmy Carter, Reagan's immediate predecessor, had successfully campaigned in 1976 against what he termed the “awful federal bureaucracy.” Once in office, he launched programs for zero-based budgetary reviews and extensive departmental reorganizations.

The Carter years also were noteworthy for a strong shift toward freeing the economy from various regulatory

controls.³ President Carter devised his own process for internal reviews of the cost of proposed regulations with Executive Order 12044, issued in March 1978. Its operations were overseen by a Regulatory Analysis Review Group (RARG), part of the Executive Office of the President.

Of lasting impact and historical importance was the enactment of a growing list of deregulatory statutes affecting railroads (1976), airlines (1978), natural gas (1980), trucking (1980), rail transportation (1980), and banking (1980). Perhaps the most noteworthy event was the abolition of the Civil Aeronautics Board, an action that seemingly marked the end of a century of federal regulatory growth that had begun with the creation of the Interstate Commerce Commission in 1887.

Events outside the nation's capital propelled regulatory reform as well. In 1978, a nationwide tax revolt followed passage of California's Proposition 13 property tax limitation referendum. Both events seemed to demonstrate mounting electoral discontent with the cost and scope of the public sector.

From Reform to Relief

Given the actions of his predecessors, President Reagan's “regulatory relief” campaign did not represent a change in basic direction, although it was more dramatic and far-reaching and nearer to the center stage of domestic policy. Unlike those of his predecessors, Reagan's program also:

- Was intended to provide “regulatory relief” by reducing, not simply rationalizing or improving, the amount of federal regulation;
- Attacked the newer forms of “social regulation,” including civil rights, environmental protection, and health and safety rules, as much or more than traditional “economic” regulation; and

- Relied chiefly on the president's administrative authority and powers, rather than on statutory change, to achieve its objectives.

Relief, Not Reform

First, Reagan differed from Presidents Carter, Nixon, and Ford in that he seemed concerned less with improving the operation of federal programs than with simply reducing their number and cost. Carter and Nixon had emphasized administrative solutions to problems of governmental operations, relying on managerial devices like departmental reorganization and reformed budgetary, analytical, and personnel processes.⁴ Reagan, in contrast,

set out to solve the problem not so much through reorganization or management reform at the federal level as by reducing the range of activities in which the federal government was involved, and by reducing the amount of "management" the federal government engaged in even for those functions it retained. In other words, the administration proposed to cure the problems of federal management by eliminating—or seriously curtailing—major segments of the federal operation?

In federalism reform, for example, Reagan's approach differed considerably from that of President Nixon, even though the title New Federalism was applied to both presidents' initiatives. One observer pointed out that, "Unlike Nixon, who hoped to **rationalize** active government, Reagan has tried on the whole to **restrain** domestic government."⁶ (Emphasis added.)

Perhaps nothing shows this difference more starkly than the fact that Nixon had fought for General Revenue Sharing (GRS) as a relatively simple and "string free" method of equitably distributing federal financial resources to the nation's cities and states. It was the centerpiece of his brand of New Federalism. Reagan, in contrast, presided over the same program's abolition.

The Reagan administration's regular use of the expression regulatory relief, in contrast to regulatory reform, also revealed this change of orientation.⁷ The altered terminology suggested a preoccupation with the "burden" of regulation on the economy—another phrase that also figured prominently in official speeches and reports—and a desire to reduce and eliminate, rather than merely streamline or rationalize, federal regulatory activities.

This orientation showed, for example, in the progress report issued by the Presidential Task Force on Regulatory Relief in August 1982, which gave principal emphasis to the financial and paperwork savings realized by the initiative. The report acknowledged that, while such statistics present "an oversimplification," nonetheless,

the easiest way to summarize the results of the review process is to cite the savings achieved to date: \$9 to \$11 billion in one-time investment

costs and \$6 billion in annual recurring costs—funds that will be put to more productive, job-creating uses. . . . In addition to these direct savings, the Administration has cut 200 million hours of paperwork for 1981 . . . ; it has also cut new rulemaking by one-half and the number of pages in the Federal Register by one-third!

Social Regulation Addressed

If the shift from reform to relief was one point of contrast, another was Reagan's attack on what is termed social regulation as well as economic regulation? The latter originated with the creation of the Interstate Commerce Commission (ICC) in 1887, and concerned the **areas served** and fees charged **by rail** and other transporters, that is, the truly economic questions of "rates and routes." Subsequently, many similar programs were administered **by** independent regulatory commissions modeled after ICC. In contrast, **social** regulation, which increased significantly during the 1960s and 1970s with the enactment of nondiscrimination, environmental, consumer, and health and safety legislation, was **primarily** administered **by** regular executive agencies, such as the Environmental Protection Agency or the Occupational Safety and **Health** Administration.

Although the Carter years were a time of significant deregulation, most of the action was concentrated on the older forms of economic regulation. Continuing regulatory growth in the social sphere was accepted and even promoted by President Carter." The Reagan administration, in contrast, resisted expanded social regulation. Indeed, such newer statutes, among them bilingual education rules, energy efficiency standards, and noise abatements, provided the president with most of his examples of excessive regulation.

limited Statutory Changes

A third point of differentiation between the Reagan administration and predecessor programs concerned the character of deregulatory actions. Under President Carter, many key regulatory reform programs were legislative proposals. The Reagan administration, for the most part, did not seek substantive legislative **change**.¹¹ Instead, the president used both old and new tools of executive power to accomplish his goals.

Toward this end, the staffing of regulatory agencies and functions was reduced, agency budgets were cut, and personnel were appointed with an eye toward their acceptance of the administration's diminished regulatory agenda. Furthermore, expanded centralized control over agency rulemaking was established within the Office of Management and Budget (OMB).

Many observers decried the administration's lack of attention to legislative change, feeling that lasting reform would be impossible without it, but the effort represented an important experiment. Some observers noted that, until Reagan, "no president had made a concerted effort to bring [his] formidable array of management powers to bear on regulatory **policy**."¹²

Key Actions: Off and Running in 1981

President Reagan took the most significant steps for carrying out this ambitious program very early in his first administration. He established the Presidential Task Force on Regulatory Relief, a cabinet-level body chaired by Vice President George Bush, just two days after his inauguration. The task force was charged with reviewing pending and existing regulations with the goal to “reverse the trend of recent years and see at the end of the year a reduction in the number of pages in the Federal Register instead of an increase.”¹³ One week later, on January 29, 1981, the president ordered federal regulatory agencies to postpone the effective dates of all regulations scheduled to take effect by March 20. He also directed them to refrain from issuing any final regulations until that date. This 60-day freeze was intended to allow the new administration time to review the so-called “midnight regulations” issued during the final days of the Carter presidency. Shortly thereafter, several rules were withdrawn, rescinded, or postponed indefinitely.¹⁴

Subsequently, President Reagan signed Executive Order 12291 on February 17, 1981, establishing a new procedure for measuring the benefits of proposed rules against their costs and directing agencies to determine the most cost-effective approach for meeting their regulatory objectives. Responsibility for coordination and implementation was centralized in OMB and its Office of Information and Regulatory Affairs (OIRA), under the general supervision of the task force.

Impact on State and Local Governments

The private sector, not the public sector, was to be the chief beneficiary of the Reagan administration’s deregulatory initiatives. The campaign for regulatory relief was designed principally as a component of the president’s policies for stimulating investment and employment, rather than of his New Federalism proposal for decentralizing domestic program responsibilities to states.

Reflecting this orientation, responsibility for developing the administration’s initial program rested with economists, such as Murray Weidenbaum, who headed the transition task force on regulation and then chaired the Council of Economic Advisors, and James Miller, who had served as assistant director of the Council on Wage and Price Stability during the Ford administration.¹⁵ In a later survey of 171 key regulatory personnel, the most frequently cited goals of regulatory relief were “less cost to the regulated community” (13 percent of the respondents), “less paperwork burden on government and industry” (11 percent), “opening markets to foster greater competition” (10 percent), and “getting government off industry’s back” (9 percent).“

Nonetheless, because of its broad scope, the president’s regulatory relief program had significant implications for state and local governments. This was true, first, because in many areas of social regulation, state and local governments bear the primary responsibility for assuring that businesses or individuals located within their borders comply with federal requirements. In sharp contrast, prior deregulation initiatives, which concentrated on areas of more traditional economic regulation, had comparatively few direct effects on state and local governments. Air transportation routes and rates, for example, had long been regulated exclusively by the federal government. Consequently, the *Airline Deregulation Act of 1978*, while a revolution for the industry, did not directly influence state and local policy and operations — although deregulation of industries, coupled with federal preemption of state or local authority to reregulate, did impose costs on state and local governments as they sought to compensate for service losses or reductions.”

Second, in many areas of social regulation, state and local governments are themselves regulated entities. Like business corporations, they may be compelled to comply with national standards for environmental quality, nondiscrimination, worker safety, and labor standards, among others.

Third, intergovernmental regulatory relief also was an express, if somewhat secondary, objective of the program. Despite the deregulatory actions of his predecessors, President Reagan “was the first to give [intergovernmental regulation] prominent attention by including national rules affecting state and local governments in his proposals for regulatory reform.”¹⁸ This concern was secondary, however, to the economic objectives: only 4 percent of the federal executive survey respondents mentioned “returning power to the states” as central to their regulatory relief activities.¹⁹ Similarly, just 19 percent rated state officials as having played at least a “moderate” role in the formulation of their specific regulatory reform proposals.²⁰

Despite these views, cognizance was taken of the intergovernmental mandating issue from the outset.²¹ Executive Order 12291 defined major rules to include those that might cause “a major increase in costs or prices for . . . State or local government agencies” as well as industry and consumers. The president’s statement on “America’s New Beginning,” issued the day following the promulgation of Executive Order 12291, also pointed out the “costs to business, nonprofit institutions, and State and local governments of complying with regulations.”²²

Consistent with this orientation, state and local government officials, and the groups that represent them, such as the National Governors’ Association (NGA), were actively solicited for recommendations on needed regulatory changes. This request produced 2,500 submissions identifying rules regarded as especially burdensome or inefficient.²³ Many of these regulations became the subject of federal reviews. For example, bilingual education requirements were among the first rules withdrawn by executive agencies. According to the White House, the rules requiring all school systems to offer bilingual education to

each child whose primary language was not English could have resulted in up to \$1 billion in costs during the first five years of the program. Also modified in the first days of the regulatory relief campaign were noise emission standards for garbage trucks, proposed by the Environmental Protection Agency (EPA). Compliance with these, EPA had estimated, would cost \$25 million annually, with most of this amount borne by municipalities.”

On March 25, 1981, the vice president issued a list of 36 rules to be postponed and 27 existing rules to be reviewed, including many affecting states and local jurisdiction. Among these were rules governing: the provision of catheterization service by schools during the school day (postponed); urban transportation planning provisions for federal-aid highways and mass transit (postponed); new obligations for local governments receiving general revenue sharing funds to prevent discrimination against the handicapped (postponed); a variety of Medicaid regulations (to be reviewed); Davis-Bacon prevailing wage requirements (to be reviewed); and a review of Department of Transportation handicapped access provisions, estimated to impose capital costs on New York City alone of up to \$1.6 billion. In addition, a June 13, 1981, press release highlighting progress in regulatory relief gave special emphasis to the Department of Education's elimination of regulations that put schools at risk the loss of federal funds if they distinguished between boys and girls in their dress codes.²⁶

At the end of President Reagan's first year in office, the vice president issued a summary of actions taken by the Regulatory Relief Task Force. It observed that fully one-quarter of the regulations and paperwork requirements under review had their primary effect on state and local governments. Federal relief in these areas, the vice president said, would “lead to greater authority and accountability for State and local governments, improved delivery of local services, and substantial financial relief at a time of large Federal budget reductions.” This overview also emphasized that the brevity of regulations for the nine new block grants, just 10 pages, would reduce state and local reporting requirements by up to 91 percent?

During 1982, federalism reform was the domestic policy theme, as indicated by the President Reagan's State of the Union Message. A more comprehensive regulatory analysis, issued in August, gave special attention to the administration's achievements in regulatory relief for state and local governments. It claimed cost savings for these jurisdictions of \$4-\$6 billion in capital investments and about \$2 billion in annual recurring outlays as a result of the 13 regulatory reviews completed.²⁸

These results were reiterated in the final report of the task force, released in August 1983.²⁹ It also set forth ten regulatory policy guidelines, two of which had specific bearing on intergovernmental mandating. The report specified that:

Federal regulations should not preempt State laws or regulations, except to guarantee rights of national citizenship or to avoid significant burdens on interstate commerce; and

Regulations establishing terms or conditions of Federal grants, contracts, or financial assistance should be limited to the minimum necessary to achieving the purposes for which the funds were authorized and appropriated.³⁰

The report cited several advantages of decentralized decisionmaking; saying that these applied with particular force to regulatory action:

- Local regulations are more apt to be responsive to local circumstances.
- Local regulations afford citizens a greater degree of choice among divergent public policies.
- Local regulations allow for diversity and experimentation.³¹

Such considerations, it was pointed out, suggested that the federal government should defer to state and local governments except when fundamental questions (such as legal equality among the races) are involved. The efforts of the Interior Department and EPA to “defederalize” regulatory procedures for the control of surface mining and local air pollution problems were noted particularly. Moreover, the report contained a warning against the temptation to add grant conditions that are not germane to the basic purpose for which funds had been appropriated, for example, the air quality attainment provisions tied to federal transportation grants.

Intergovernmental Programs Subject to Review

Fifty regulations affecting state and local government, singled out by the Reagan administration for regulatory reviews either by the presidential task force or independently by various federal agencies, are listed in Table 2-1 (page 21). Among these were *Davis-Bacon* requirements, bilingual education rules, Section 504 of the *Rehabilitation Act*, the *Education for All Handicapped Children Act*, the *Clean Air Act*, and most of the others that were on the list of the “ten most burdensome federal mandates” from ACIR's *Regulatory Federalism* report.³² Also included were many other regulatory programs identified in ACIR's inventory of major federal statutes regulating state and local governments (see Table 1-1).³³ Examples are rules established under the *National Historic Preservation Act of 1966*, Title IX of the *Education Act Amendments of 1972* (pertaining to sex discrimination in education), and the *Surface Mining Control and Reclamation Act of 1977*.

The Reagan administration employed a very broad definition of mandating in selecting federal regulations affecting state and local government for review. Targeted was a large number of grant-in-aid requirements, including community development block grant regulations, de-

Table 2-1
Reagan Administration Regulatory Relief Actions for State and Local Governments, 1981-1982¹

Advisory Council on Historic Preservation

1. Protection of Historic and Cultural Properties*

Corps of Engineers

2. Dredge and Fill Permit Program*
3. Water Conservation Clause (Engineer Regulation 1105-2-20)*

Department of Agriculture

4. National School Lunch Program—Cost Accounting (7 CFR 210)*
5. State Administration of Food Stamp Program (7 CFR 270 et. seq.)

Department of Education

6. Bilingual Education (Lau Rules) (45 CFR 52052)
7. Education Consolidation and Improvement Act (34 CFR 201-204; 298)
8. Education of Handicapped Children (34 CFR 300)*
9. General Administrative Regulations (EDGAR)*
10. Personal Appearance Codes (34 CFR 106)
11. Section 504 of the Rehabilitation Act (34 CFR 104)*
12. Title IX—Athletics Policy (34 CFR 106)*

Department of Energy

14. Residential Conservation Service Program (10 CFR 456)*

Department of Health and Human Services

15. Grant Administration Manual*
16. Health Care Facility Capital Expenditures (42 CFR 122)
17. Health Care Financing Administration Rules (42 CFR 431, 435, 436, 440, 441, 447, 456)
18. Medicaid Regulations (42 CFR 431, 435, 436, 441, 447)*
19. Regulations Implementing Block Grants (45 CFR 16, 74, 96)
20. Survey and Certification of Health Care Facilities (42 CFR 405, 431, 442, 489, 490)*

Department of Housing and Urban Development

21. Community Development (24 CFR 570, Subpart F)*
22. Environmental Policies (24 CFR 58)*
23. Lease and Grievance Procedures (24 CFR 866)*
24. Minimum Property Standards for One- and Two-Family Dwellings*
25. Modernization of Public Housing Projects (24 CFR 868)

26. Tenant Allowance for Utilities in Low-Income Housing (24 CFR 865)*

Department of Interior

27. Surface Mining Regulations (30 CFR 700-850)*

Department of Justice

28. Section 504 of the Rehabilitation Act (28 CFR 41)*

Department of Labor

29. Mass Transit Labor Protection (UMTA)*
30. OFCCP/Affirmative Action (41 CFR 60 et. seq.)*
31. Prevailing Wage (Davis-Bacon) (29 CFR 1,3, 5)*

Department of Transportation

32. Airport Layout Plan Approvals*
33. Charter Bus Operations*
34. Federal Highway Administration Rules (23 CFR 450, 655,772)
35. Guide to Reporting Highway Statistics*
36. Highway Geometric Design Standards for 3R Projects (23 CFR 625)*
37. Non-Urbanized *Area* Formula Grants (23 CFR 825)
38. Section 504 of the Rehabilitation Act (49 CFR 27)*
39. UMTA White Book—Procurement of Buses

Environmental Protection Agency

40. Consolidated Permits (40 CFR 122)*
41. Construction Grant Regulations (40 CFR 35)
42. Emissions Trading Policy
43. Financial Assistance for Environmental Programs (40 CFR 35)
44. Pretreatment (40 CFR 403)*
45. State Implementation Plans (SIPs)* (40 CFR 51)

Federal Emergency Management Agency

46. Executive Order 11988—Floodplain Management*
47. Insurance in Coastal High Hazard Areas (44 CFR 9)*

Office of Management and Budget

48. Local Clearinghouses (Circular A-95)*
49. **Urban** Impact Analysis (E.O. 12074 and Circular A-116)*

Office of Personnel Management

50. Merit System of Personnel Administration*

* Indicates a regulation designated for review by the Presidential Task Force on Regulatory Relief.

¹ Includes programs for which regulatory reviews were completed by the Presidential Task Force on Regulatory Relief or federal agencies, programs for which reviews were under way at the time of the report (August 1982), and additional programs designated for review.

Source: Presidential Task Force on Regulatory Relief, *Reagan Administration Achievements in Regulatory Relief for State and Local Government: A Progress Report* (Washington, DC, 1982), pp. 3-23.

sign standards for highways, food stamp procedures, and school lunch program cost accounting requirements.

Although grant regulations were clearly rules, they were not typically defined as mandates. These types of administrative requirements existed in early federal aid programs, and had won clear judicial acceptance as a proper exercise of the federal government's conditional spending power.³⁴ The issues posed by such programmatic conditions of aid, then, could be, and often were, differentiated from those created by the growth of the four newer types of regulatory federalism programs.

Also singled out for review by the Task Force was a number of administrative procedures employed by federal agencies in grant management. Examples of these were the **A-95** Project Notification and Review process and the Urban Impact Analysis procedure, both administered by OMB. The former had been created initially to allow state and local governments an opportunity to comment on, and coordinate plans for, federally funded projects in their region. Such procedures fell outside of the types of programs most commonly identified with mandating.

An Assessment of Regulatory Changes, 1981-1986

All of these key efforts were concentrated principally in the first two and one-half years of President Reagan's first term. In August 1983, the Task Force on Regulatory Relief issued its final report and disbanded. At that time, it claimed "substantial improvements in federal regulatory policies," which would result in "savings of more than \$150 billion to consumers, businesses, universities, and state and local governments over the next ten years."³⁵

Others were less congratulatory. Murray Weidenbaum concluded that "only a fraction of the regulatory reforms envisioned at the beginning of 1981" had been accomplished.³⁶ Journalistic and academic observers thought they had identified a "bipartisan swing back to more regulation."³⁷

One additional important step followed 17 months later, in January 1985. Executive Order 12498 established a formal regulatory planning process, requiring each agency to submit to the Office of Management and Budget a statement on its regulatory policies and goals for the coming year, including basic information on all significant regulatory actions contemplated. This order extended White House oversight from specific rules to every agency's overall rulemaking activities, as the draft programs were to be reviewed for consistency with the president's priorities.³⁸

In August, the first Regulatory Program of the United States Government was issued, a document that in substance and purpose invited comparison with the executive budget, first established in 1921." The difference is that

the latter procedure for executive control precedes formal legislative review, while the former does not. This produced considerable criticism, especially by some members of Congress, who felt that the administration was placing the goal of consistency with its own regulatory principles and the findings of cost-benefit analyses over adherence to federal statutes. The measure was challenged for intruding on constitutionally protected prerogatives of both the Congress and executive agencies. Representative John Dingell, chairman of the House Energy and Commerce Committee, mounted a counterattack against Executive Order 12498 by requiring agencies under the committee's jurisdiction to report on all regulatory modifications made as a result of OMB's advice.⁴⁰

Review Methodology

As suggested in Chapter 1, impressions differ considerably concerning the effectiveness of the Reagan administration's effort to restrain federal regulation by executive action. To assess the impact of the regulatory relief program on state and local governments, the U.S. General Accounting Office (GAO) gathered data concerning administrative procedures for 18 of the major federal mandates identified by ACIR in *Regulatory Federalism*. These previously unpublished data offer the most complete record of changes in existing intergovernmental regulatory programs affecting state and local governments during the 1980s. The following discussion is based on draft material that was made available to ACIR for this study.⁴¹

GAO examined changes in regulatory requirements during 1981-1986, using information from the *Federal Register* and the *Code of Federal Regulations* (CFR). To bolster and help interpret conclusions suggested by these empirical data, and to obtain information on changes in the level of funding, delegation of regulatory decision-making to states, and the intensity of federal administrative oversight, GAO also interviewed federal agency officials, public interest group members, and state and local officials. Data were obtained for 18 programs in environment and health, community development, civil rights, and labor (see Table 2-2, page 23).

Although comparable, detailed data are not available for the last two years of the Reagan administration or the first years of the Bush administration, findings for 1981-1986 appear to reflect the overall trend for the 1980s. The years studied went well beyond the period of the most extensive administrative action. They followed expressions of congressional concern with regulation and mandating, as demonstrated by the enactment of the *Paperwork Reduction Act*, the *Regulatory Flexibility Act*, and the *State and Local Government Cost Estimate Act*. They also embraced the period in which President Reagan championed his far-reaching New Federalism proposals. The most important and most recent development not within the scope of this research effort, namely, the implementation of Executive Order 12612 on Federalism, is considered in detail in the next chapter.

Table 2-2
Characteristics of 18 Intergovernmental Regulations

Description/Date of Statute	Objective	Public Law	Mandate Type
Age Discrimination in Employment Act (1974)	Prevent discrimination on the basis of age in federally assisted programs	94-135	CC
Clean Air Act (1970)	Establish national air quality and emissions standards	91-604	CC,CO,PP
Davis-Bacon Act (1931)	Assure that locally prevailing wages are paid to construction workers employed under federal contracts and assistance programs	74-403	CC
Endangered Species Act of 1973	Protect and conserve endangered and threatened animal species	93-205	CC,PP
Fair Labor Standards Act Amendments of 1974 (FLSA)	Extend federal minimum wage and overtime pay protections to state and local government employees	93-259	DO
Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA, 1972)	Control the use of pesticides that may be harmful to the environment	92-516	PP
Flood Disaster Protection Act of 1973	Expand coverage of the national flood insurance program	93-234	DO
Handicapped Education (1975)	Provide a free appropriate public education to all handicapped children	94-142	CO¹
Hatch Act (1940)	Prohibit public employees from engaging in certain political activities	76-753	CC
Historic Preservation Act (1966)	Protect properties of historical, architectural, archaeological, and cultural significance	89-665	CC
National Environmental Policy Act of 1969 (NEPA)	Assure consideration of the environmental impact of major federal actions	91-190	CC
Ocean Dumping (1977)²	Prohibit Ocean dumping of municipal sludge	95-153	DO
Occupational Safety and Health Act of 1970 (OSHA)	Eliminate unsafe and unhealthful working conditions	91-596	PP
Rehabilitation Act of 1973	Prevent discrimination on the basis of physical or mental handicap in federally assisted programs	93-112	CC
Safe Drinking Water (1974)	Assure drinking water purity	93-523	CC,PP,DO
Title VI Civil Rights (1964)	Prevent discrimination on the basis of race, color, or national origin in federally assisted programs	88-352	CC
Uniform Relocation (1970)	Set federal policies and reimbursement procedures for property acquisition under federally assisted programs	91-646	CC
Wholesome Meat (1967)	Establish system for the inspection of meat sold in interstate commerce	90-201	PP

Key:
 CC—Crosscutting Requirement
 CO—Crossover Sanction
 DO—Direct Order
 PP—Partial Preemption

¹ Although participation in the *Educational for All Handicapped Children Act (P.L. 94 142)* is voluntary, the failure of a participating state to comply with federal requirements may result in the withholding of funds from several federal handicapped education programs. The requirements of **P.L. 94-142** are nearly identical to those established by the Department of Education under Section 504 of the *Rehabilitation Act*, a crosscutting requirement.

² *Marine Protection Research and Sanctuaries Act Amendments of 1977.*

Source: U.S. General Accounting Office, unpublished case studies.

Major Findings

Despite the administration's regulatory relief campaign, federal regulation of state and local governments continued to increase during the 1980s. More prescriptive regulations added programmatic requirements and compliance costs, while federal funding for state administration generally declined. Overall, it is suggested from this analysis that the effectiveness of the regulatory relief strategies of the Reagan administration was limited.

The results were not completely uniform. **As** Table 2-3 indicates, mandating rose between 1981-1986 in 11 of the 18 program areas and remained stable in two. It fell in five cases, with the largest reductions occurring under the *Davis-Bacon Act*, the *Uniform Relocation and Real Properties Acquisitions Act*, and the *Flood Disaster Protection Act*. The general upward trend was consistent enough, however, to indicate a continuing increase in intergovernmental regulation during the same time the federal government mounted the most direct attack ever on federal mandates.

Regulatory Changes. Between 1981 and 1986, a total of 140 regulatory changes was identified, which added an estimated net total of 5,943 requirements in the 18 policy areas. These included a net 4,702 additions to program standards and a net 1,241 changes in administrative

Table 2-3
**Summary of Changes in Mandating
on State and Local Governments
(for 18 Programs, 1981-1986)**

Mandate Burden Increased (11)

1. Clean *Air Act*
2. Endangered Species Act
3. Fair Labor Standards Act (FLSA)
4. Handicapped Education (1975)
5. Historic Preservation Act
6. Ocean Dumping
7. Occupational Safety and Health Act (OSHA)
8. Pesticides (FIFRA)
9. Rehabilitation Act of 1973 (Section 504)
10. Safe Drinking Water Act
11. Wholesome Meat Act

Mandate Burden Stable (2)

1. Hatch Act
2. Title VI Civil Rights

Mandate Burden Reduced (5)

1. Age Discrimination in Employment Act
2. Davis-Bacon Act
3. Flood Disaster Protection Act
4. National Environmental Policy Act (NEPA)
5. Uniform Relocation Act

Source: US. General Accounting Office, unpublished case studies.

procedures. There was an increase in both the stringency of program standards and the prescriptiveness of administrative procedures. For example, during the review period:

- Thirty-six states were affected by new visibility standards for federal park lands issued by the Environmental Protection Agency.
- An additional 7.7 million state and local employees were brought under the coverage of the *Fair Labor Standards Act*.
- Nearly 2,500 requirements expanding existing occupational safety and health standards for states were issued by the Occupational Safety and Health Administration.
- More than 2,200 requirements were promulgated by seven federal agencies under Section 504 of the *Rehabilitation Act of 1973*.
- About 250 animal and plant species were added to the endangered and threatened lists under the *Endangered Species Act of 1973*, an increase of over 150 percent since 1980.
- Approximately 415 new requirements affecting state and local governments were added by the National Park Service and Advisory Council on Historic Preservation under the *National Historic Preservation Act of 1966*.
- There was a net increase of 382 monitoring/oversight procedures and 238 financial management processes.

Funding Levels. **As** requirements mounted, **the costs of** compliance also generally rose, but federal assistance declined. **In** nine of the 18 programs studied,⁴² in which states serve as "partners" in assuring compliance with national standards, federal agencies provide grants to support state administrative operations, such as technical assistance and oversight. This federal grant support declined between FY 1981 and FY 1988 for all nine programs, by amounts ranging from \$1.9 million for *Flood Disaster Protection* to \$12.2 million under the *Clean Air Act* and \$15.5 million for *Handicapped Education*. On a percentage basis, the largest cuts were in the *Endangered Species* and *Historic Preservation* programs (see Table 2-4). For most programs, the largest cuts occurred in FY 1982. After that year, there were slower rates of decline or modest increases for several programs. In the other nine programs studied, state and local governments are regulated directly by the federal government, and no federal funds are generally available for compliance with standards. Increased state and local costs were anticipated for several of these programs. Most importantly, the Urban Mass Transportation Administration (now the Federal Transit Administration) estimated that local transit authorities would need to spend up to an additional \$79 million annually to provide services, such as wheelchair lifts and extended service hours for handicapped persons, not previously required under more lenient interim regulations.

Table 2-4

**Funding levels for Administrative Costs
in "Intergovernmental Partnership" Programs**
(millions of constant 1981 dollars)

Program	FY 1981	FY 1986	Percent Change
Clean Air Act	\$83.6	\$71.4	-15%
Endangered Species Act	5.4	3.3	-38
FIFRA (certification and training)	3.0	2.0	-34%
FIFRA (enforcement)	10.1	9.2	-9
Flood Disaster Protection	4.5	2.6	-35
Handicapped Education	899.5	884.0	-2
Historic Preservation	25.3	15.2	-40
OSHA	63.3	56.8	-8
Safe Drinking Water	37.0	27.0	-25
Wholesome Meat Act	28.3	23.5	-16

Other Changes. Two other specific administration strategies mitigated the regulatory burden on states and localities to some degree. Perhaps most important, increased authority was delegated to states, thus refocusing program decisionmaking. For example, EPA responded to state requests for additional discretion by delegating authority to 49 states to monitor and enforce compliance with newly established clean air standards, such as maximum levels for sulfuric acid emissions. Changes of this kind occurred in eight of the nine "partnership" programs.⁴³ The overall value of this approach was limited, however, because it was implemented at the same time that program standards increased and federal funds for state enforcement decreased.

A movement to rely on less intensive oversight of state and local activities also reduced intergovernmental burdens. Agency strategies for ensuring state and local compliance were relaxed in seven of the 18 programs. In several instances, agencies depended more on state oversight, court actions, or complaint mechanisms to monitor adherence to federal standards. Federal budget and staffing cuts were the key reasons why federal agencies reduced oversight intensity, and federal assurance that states and localities were complying with national standards seems to have been weakened. Furthermore, the trend was not consistent. A few federal agencies strengthened oversight by increasing their reliance on more active monitoring strategies. Examples include the Federal Emergency Management Agency in enforcing the *Flood Disaster Protection Act*, and the EPA for the FIFRA (pesticide) and Safe Drinking Water programs.

Illustrative Cases

As shown in the foregoing data, there was a considerable increase in the stringency of program standards and in the specificity of administrative procedures, and a de-

cline in funding. Often, such increasing stringency reflected the impact of legislative or judicial decisions that constrained the scope of possible executive action.

Clean Air Act

A primary example of this development may be found in the *Clean Air Act*, identified in the early ACIR study as one of the "ten most burdensome" programs of intergovernmental regulation and singled out for review by the Environmental Protection Agency. Despite such designations, the scope and severity of the rules were increased during the early 1980s.

The *Clean Air Act Amendments of 1970*, adopted at the height of popular concern over the declining quality of the natural environment, went far beyond prior law. The amendments "conscripted" state and local governments into the antipollution battle." They granted the Environmental Protection Agency authority to establish and enforce national standards for air pollutants, and required each state to submit to EPA for approval a state implementation plan (SIP) specifying how national standards would be achieved. Following approval of the plan, EPA is required by law to oversee state performance and progress toward plan goals.

The act also empowered EPA to (1) publish regulations prescribing national ambient air quality standards, (2) make grants to states and localities for carrying out air pollution programs, and (3) impose sanctions on states that fail to enforce air quality standards. Further, the agency was authorized to prepare air quality implementation plans for states that fail to prepare their own.

During 1980-1986, EPA promulgated a wide variety of new air quality program standards and administrative requirements. Included among these, in response to legislative amendments, were 1981 rules requiring states to devise strategies to reduce existing visibility impairments from man-made air pollution at national park and wilderness area sites, and to prevent future impairments.⁴⁵

These new standards were opposed by many of the 36 states affected, typically because they believed the issue was strictly local. Consequently, only one of these states included the visibility standard in its SIP. In 1982, the Environmental Defense Fund and other plaintiffs filed suit against EPA, alleging that the agency had failed to enforce requirements for the adoption and implementation of visibility plans.⁴⁶ The settlement agreement reached in 1984 led EPA to establish specific deadlines for the completion of revised state plans, which were to include emissions limitations, schedules of compliance, and appropriate visibility monitoring research.

Similarly, in 1984, EPA revised its national standard for asbestos control.⁴⁷ This effort was undertaken to reinstate the "work practice and equipment" provisions of the standard that the U.S. Supreme Court held not to be an emission standard.⁴⁸ (The Congress had amended the act in 1977 to authorize the requirements that were being challenged by the Court.) EPA promulgated new standards for spraying, fabricating, and insulating materials, as well as demolition and renovation.

Fair Labor Standards Act

Another illustration of the combined impact of legislative and judicial actions is the *Fair Labor Standards Act* (FLSA). As originally enacted in 1938, FLSA excluded employees of state and local governments from its minimum wage and overtime provisions. Imposing such requirements seemed beyond the proper reach of the federal government, given the legal and political opinions of that time. In 1974, however, the Congress amended FLSA to extend its coverage to virtually all state and local government workers.⁴⁹

State and local officials protested within and outside the legal system, with unexpected success. In 1976, the Supreme Court held in *National League of Cities v. Usery*⁵⁰ that the 1974 amendments to FLSA exceeded the regulatory authority granted the Congress under the commerce clause of the Constitution. Further, the Court indicated that the FLSA amendments operated “to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions. . .,” thus violating their protected rights under the Tenth Amendment. By this decision, the Court removed most state and local employees from coverage under FLSA.

Less than 10 years later, the Supreme Court took the unusual step of specifically overruling its own prior finding. In the far-reaching case of *Garcia v. San Antonio Metropolitan Transit Authority*,⁵¹ the Court held that the Congress possessed sufficient authority under the interstate commerce clause to apply FLSA’s pay requirements to state and local government employees, including those engaged in the most traditional local government activities. This decision extended FLSA coverage to approximately 13.8 million government workers. (For a detailed discussion of these cases, see Chapter 6.)

Responding to the Court’s reversal, the Congress stepped in to offer relief in 1985. Recognizing the substantial costs imposed by the new FLSA rules, and spurred by local government protests, federal lawmakers again amended the law to exempt some 6.1 million government workers (about 44 percent).⁵²

Despite this favorable action, the Court’s ruling and the 1985 amendments resulted in a major increase in regulation for states and localities. Some 7.5 million state and local employees were included under the law even after the Department of Labor (DOL) revised FLSA program standards in the wake of the 1985 amendments.⁵³ In addition, new procedures were established for data gathering, oversight, and enforcement. New DOL rules meant changes in collective bargaining agreements and other employment practices, which increased costs for state and local governments. DOL estimated the additional state and local minimum wage and overtime costs at \$612 million annually, none of which is reimbursable through federal aid funds. Furthermore, state and local governments had to create separate procedures to distinguish overtime accumulated prior to and after the 1985 amendments. This and other actions necessitated higher computer and record-keeping costs.

Occupational Safety and Health Act

A third example of continuing regulatory expansion in the 1980s is provided by the *Occupational Safety and Health Act* (OSHA). Adopted in 1970, OSHA’s workplace safety and health standards are directed principally at private sector employers. The act also allows states to assume responsibility for operating and enforcing their own programs if their health and safety standards are at least as stringent as the federal standards.

Although public employees are normally excluded from OSHA, so-called state plan states must develop standards for their state and local government workers that are equal to standards applied to the private sector. About half of the states have selected this option. They receive some federal assistance to help pay for their programs, but they also are subject to federal monitoring and reporting requirements.

Generally, in response to the act’s provision that standards be based on the most recent scientific data and the need to maximize worker protection, the Labor Department added nearly 2,500 requirements that necessitated a substantial commitment of state time and resources in order to develop implementation and enforcement strategies and to create training mechanisms. For example, the hearing protection standard established in 1981 requires employers to monitor employee exposure to workplace noise, to supply hearing protection equipment, and to assure that employees are tested for any possible hearing loss. The asbestos protection program established in 1986 required employers to monitor and limit employee exposure to asbestos, train employees in the use of respirators and asbestos avoidance, and establish a program of medical surveillance.

Despite this increase in requirements, federal funding to states for the administration of OSHA programs fell by 8 percent (in constant dollars) between 1981 and 1986. (No funds are provided to assist states in complying with the requirements.) The most significant decrease occurred between 1985 and 1986 as a result of mandatory federal budget reductions. On the other hand, OSHA delegated more enforcement responsibilities to the states and shifted away from on-site reviews to certification and review of state records. In these respects, the federal oversight presence declined. Nonetheless, the combined effect of the changes, especially new funding constraints, led some states to consider terminating their OSHA programs, thus relinquishing their status as state plan states. California discontinued its program in 1987, in part because of the unavailability of additional federal funds.

Success Stories

The brief profiles of the *Clean Air Act Amendments* and the *Fair Labor Standards Act* both suggest the limited effectiveness of administrative attempts to reduce federal agency rules and requirements in the face of legislative and judicial bodies inclined toward more expansive interpretations. The example of the *Occupational Safety and Health Act*, in particular, shows the problems resulting from the proliferation of new requirements coupled with cuts in financial support. These cases demonstrate that

President Reagan's election, the creation of the Presidential Task Force on Regulatory Relief, and the new rulemaking procedures associated with Executive Order 12291 did not alter the fundamental dynamics of the policymaking process.

On the other hand, the research also pointed to some instances—involving 5 of the 18 statutes studied—where the burden of federal rules and requirements was lessened during 1981-1986. Perhaps the most striking case was the adoption by federal agencies of a common set of regulations for implementing the *Uniform Relocation and Real Properties Acquisition Policies Act of 1970 (URA)*.⁵⁴ As its name suggests, URA contemplated standardized procedures, but by the early 1980s, federal agencies had developed a host of separate regulations for relocating and reimbursing people displaced by federal construction projects. Consequently, the act was targeted as a candidate for reform by the Task Force on Regulatory Relief.

A presidential memorandum issued in 1985 designated the Department of Transportation (DOT) as the lead agency to develop model URA regulations. In 1986, 17 agencies adopted the model rule devised by DOT, thus creating a single, uniform federal approach to relocation assistance. The adoption of this common rule eliminated conflicts among the requirements of different federal agencies, easing regulatory problems for state and local governments. The rule also reduced states' administrative workload by lowering the number of calculations and the amount of relocation information needing verification.

The result was positive even though the common rule increased the total number of regulatory requirements because it was often more comprehensive and specific than the old separate rules. The clarification of relocation requirements did not reduce the fiscal costs associated with compliance, nor was it expected to result in any significant dollar savings.

Another comparative success story involved the *Davis-Bacon Act*? This legislation, first adopted in 1931 and since applied to nearly 80 separate federal aid programs, offers "prevailing wage" protections to workers on federally assisted construction projects.

During the 1981-1986 period, the Department of Labor revised its methods for determining prevailing wages three times in order to eliminate circumstances that were resulting in excessive wage rates or creating inequities. In 1983, for instance, DOL rescinded what was known as the "30 percent rule," which defined the prevailing wage as the local wage rate paid to the greatest number of similarly employed workers, if that rate was paid to at least 30 percent of those employed. (If not, the average rate for all workers was to be used.) The department revised the standard from 30 to 50 percent, reflecting a concern that the existing rule ignored the wages paid to as many as 70 percent of all workers, which was generally lower than the rate established by regulation. Similarly, DOL acted in 1985 to bar the use of data from metropolitan counties in making wage determinations for rural areas. DOL also prohibited the use of wage data from projects subject to the *Davis-Bacon Act*, thus assuring that wage determina-

tions would be based on the rates actually prevailing in private construction projects.

DOL estimated that the regulatory changes adopted during 1981-1986 reduced construction costs for federal and federally assisted projects in the range of \$120 million annually. Although the federal government obtains most of this fiscal benefit, state and local governments also are aided by the resulting reductions in their matching share of project costs. DOL, however, has not been able to accurately estimate the cost savings to these jurisdictions.⁵⁶

Conclusion

Beginning in early 1981, the executive branch launched a comprehensive program of regulatory relief. This program extended and expanded steps instituted during the Ford and Carter administrations. Though aimed principally at the private sector, the Reagan program also took cognizance of the growing state and local concern about mandating. Various reports issued by the Presidential Task Force on Regulatory Relief and other observers highlighted specific accomplishments in reducing certain regulations that affected state and local governments.

An examination of 18 major intergovernmental regulation statutes shows that mandates under these programs continued to rise during 1981-1986 in 11 cases and remained roughly constant in another two. Changes appeared to lessen the administrative and fiscal effect for state and local governments in only five of the statutes. Overall, federal programmatic and administrative standards continued to rise for most programs, including some that had been singled out for executive branch regulatory reviews, while federal assistance to support state program administration declined.

Taken together, these results seem to suggest the limitations of the administrative strategy toward deregulation employed by President Reagan as well as by his predecessors. This conclusion is quite consistent with the views expressed by other observers at the time, among them Murray L. Weidenbaum, the first chairman of President Reagan's Council of Economic Advisers and one of the early architects of the regulatory reform initiative. In mid-1983, he noted:

[T]he major obstacles to further substantial improvement in the regulatory process clearly cannot be eliminated by executive action. The basic statutes governing all regulatory activities are too full of rigid requirements and limitations that can only be changed by act of Congress. Recent experience shows that the fundamental shortcomings of government regulation result from statutory deficiencies more than from administrative ones.⁵⁷

Even where rule changes were advanced, he added, the courts had struck down many specific actions judged to be inconsistent with the provisions of federal statutes. Hence,

just as the regulatory relief campaign **was in fact winding down**, Weidenbaum argued that “the time is ripe for . . . a new phase of regulatory reform: the review **and revision** of the substantive laws governing the regulatory **process**.”⁵⁸

Notes

¹ ACIR reviewed the issue of growth of government in the years prior to the 1980 presidential election, noting substantial concern over administrative failures and red tape, poor program performance, excessive **cost and waste**, and inadequate political accountability. See U.S. Advisory Commission on Intergovernmental Relations, *A Crisis of Confidence and Competence* (Washington, DC, 1980). This is the introductory volume in a 10-part series on “The Federal Role in the Federal System: The Dynamics of Growth.”

² See Marshall R. Goodman and Margaret T. Wrightson, *Managing Regulatory Reform: The Reagan Strategy and Its Impact* (New York: Praeger Publishers, 1987), pp. 30-32.

³ The intellectual and political foundations of deregulation are examined in Martha Derthick and Paul J. Quirk, *The Politics of Deregulation* (Washington, DC: The Brookings Institution, 1985).

⁴ David R. Beam, “Public Administration is Alive and Well—And Living in the White House,” *Public Administration Review* 38 (January-February 1978): 72-77.

⁵ Lester M. Salamon and Michael S. Lund, “Governance in the Reagan Era: An Overview,” in Lester M. Salamon and Michael S. Lund, eds., *The Reagan Presidency and the Governing of America* (Washington, DC: The Urban Institute, 1984), p. 13.

⁶ Timothy J. Conlan, *New Federalism: Intergovernmental Reform from Nixon to Reagan* (Washington, DC: The Brookings Institution, 1988), p. 99.

⁷ For a discussion of this terminology, see George C. Eads and Michael Fix, *Relief or Reform? Reagan’s Regulatory Dilemma* (Washington, DC: The Urban Institute, 1984), esp. pp. 1-2.

⁸ Presidential Task Force on Regulatory Relief, *Reagan Administration Achievements in Regulatory Relief: A Progress Report* (Washington, DC, 1982), p. 1.

⁹ This distinction between social and economic regulation is discussed in Eads and Fix, *Relief or Reform?* pp. 12-15, and in Goodman and Wrightson, *Managing Regulatory Reform*, p. 48.

“Major social regulation signed into law by President Carter included the Resource Conservation and Recovery Act (1976), Surface Mining Control and Reclamation Act (1977), Marine Protection Research and Sanctuaries Act Amendments (1977), National Energy Conservation Policy Act (1978), and Public Utilities Regulatory Policies Act (1978). See Goodman and Wrightson, *Managing Regulatory Reform*, pp. 33-34.

¹¹ Murray Weidenbaum commented that statutory changes had been “disappointingly few,” a situation he attributed largely to a fear within the administration that raising controversial questions might impede enactment of tax and budget initiatives to which it gave higher priority. See his “Regulatory Reform under the Reagan Administration” in George C. Eads and Michael Fix, *The Reagan Regulatory Strategy* (Washington, DC: The Urban Institute, 1984), p. 19.

¹² Goodman and Wrightson, *Managing Regulatory Reform*, p. 27.

¹³ “Remarks by the President,” January 22, 1981, in *Materials on President Reagan’s Program of Regulatory Relief*, June 13, 1981, p. 37.

¹⁴ See The White House, “Fact Sheet: President Reagan’s Initiatives to Reduce Regulatory Burdens,” February 18, 1981.

¹⁵ Goodman and Wrightson, *Managing Regulatory Reform*, p. 36.

¹⁶ *Ibid.*, p. 50.

¹⁷ Joseph F. Zimmerman, “Regulating Intergovernmental Relations in the 1990s,” *Annals of the American Academy of Political and Social Science* 509 (May 1990): 48-59. See also ACIR, *Federal Preemption of State and Local Authority* (Washington, DC, 1992).

¹⁸ Goodman and Wrightson, *Managing Regulatory Reform*, p. 89.

¹⁹ *Ibid.*, p. 50.

²⁰ *Ibid.*, p. 61.

²¹ See Richard S. Williamson, *Reagan’s Federalism: His Efforts to Decentralize Government* (Philadelphia: Center for the Study of Federalism and Lanham, Maryland: University Press of America, 1990), Ch. 5.

²² Both documents are included in *Materials on President Reagan’s Program of Regulatory Relief*, pp. 45-50 and 55-59.

²³ Goodman and Wrightson, *Managing Regulatory Reform*, p. 103.

²⁴ “Fact Sheet on President Reagan’s Initiatives to Reduce Regulatory Burdens,” February 18, 1981, p. 3, included in *Materials on President Reagan’s Program of Regulatory Relief*, pp. 61-66. The bilingual education rules were withdrawn by the Secretary of Education on February 2, 1981. On February 9, 1981, EPA asked the D.C. Court of Appeals to remand to it the rule setting noise emission standards.

“The Vice President,” “Statement by the Vice President Regarding Actions Taken by the President’s Task Force on Regulatory Relief,” included in *Materials on President Reagan’s Program of Regulatory Relief*, pp. 69-88.

²⁶ The White House, “Highlights of Recent Progress,” June 13, 1981, p. 1, included in *Materials on President Reagan’s Program of Regulatory Relief*, p. vii.

²⁷ The Vice President, “Media Advisory,” December 30, 1981, p. 3. The large-scale grant consolidations occurred under the *Omnibus Budget Reconciliation Act of 1981* (OBRA).

²⁸ Presidential Task Force on Regulatory Relief, *Reagan Administration Achievements in Regulatory Relief for State and Local Governments: A Progress Report* (Washington, DC, August 1982), pp. 1-2.

²⁹ See Presidential Task Force, *Reagan Administration Regulatory Achievements*, pp. 81-83.

³⁰ *Ibid.*, p. 19.

³¹ *Ibid.*, pp. 50-51.

³² ACIR, *Regulatory Federalism: Policy, Process, Impact, and Reform* (Washington, DC, 1984), p. 184.

³³ *Ibid.*, pp. 6, 19-21.

³⁴ For an historical overview of such provisions, see ACIR, *Categorical Grants: Their Role and Design* (Washington, DC, 1977), ch. 1.

³⁵ Presidential Task Force, *Reagan Administration Regulatory Achievements*, p. 1.

³⁶ Murray L. Weidenbaum, *Confessions of a One-Armed Economist* (St. Louis: Washington University, Center for the Study of American Business, 1983), p. 44.

³⁷ “A Bipartisan Swing Back to More Regulation,” *Business Week*, May 30, 1983, pp. 74-75, cited in Eads and Fix, *The Reagan Regulatory Strategy*, p. 37.

³⁸ See the discussion in Goodman and Wrightson, *Managing Regulatory Reform*, pp. 3, 43-45, and Michael D. Reagan, *Regulation: The Politics of Policy* (Boston: Little, Brown, and Company, 1987), pp. 165-166.

³⁹The most recent volume is *Regulatory Program of the United States Government, April 1, 1992-March 31, 1993* (Washington, DC, 1993)

⁴⁰For a more detailed discussion of these legislative objectives, see Reagan, *Regulation: The Politics of Policy*, pp. 166-171.

⁴¹The Commission wishes to acknowledge the cooperation of John Kamensky, then assistant director of GAO's Intergovernmental Relations Group, and his staff, in making available their data and preliminary appraisal. The conclusion expressed here are the views of the author and not those of the General Accounting Office.

⁴²Such "partnership programs" include the National Historic Preservation Act of 1966; Safe Drinking Water Act of 1974; Clean Air Act Amendments of 1970; Endangered Species Act of 1973; Federal Insecticide, Fungicide, and Rodenticide Act; Flood Disaster Protection Act of 1973; National Environmental Policy Act of 1969; Occupational Safety and Health Act of 1970; and Wholesome Meat Act.

⁴³The exception was the Wholesome Meat Act.

⁴⁴Mel Dubnick and Alan Gitelson, "Nationalizing State Policies," in Jerome J. Hanus, ed., *The Nationalization of State Government* (Lexington, Massachusetts: D.C. Heath and Company, 1981), p. 57.

⁴⁵40 CFR Part 51.300; Subpart P.

⁴⁶*Environmental Defense Fund v. Gorsuch*, 713 F. 2d 802 (D.C. 1983).

⁴⁷40 CFR Part 61.

⁴⁸*Adamo Wrecking Company v. United States*, 434 U.S. 275 (1977).

⁴⁹Fair Labor Standards Act Amendments of 1974 (P.L. 93 259).

⁵⁰426 U.S. 833 (1976).

⁵¹469 U.S. 528 (1985).

⁵²Fair Labor Standards Act Amendments of 1985 (P.L. 99 150).

⁵³29 CFR Part 553.

⁵⁴P.L. 91 646. The Uniform Relocation Act established procedures covering moving expenses and replacement housing intended to assure equitable treatment for persons and businesses displaced as a result of federally assisted programs. Although federal agencies are responsible for overseeing the act's provisions for activities they support, state and local governments ultimately administer financial payments to those displaced as a result of federally assisted programs.

⁵⁵P.L. 74 403.

⁵⁶In addition to these changes, DOL initiated two other regulatory revisions that would have reduced state and local burdens. Neither was implemented because of federal court actions. In May 1982, DOL modified the helper-to-journeyman ratio to reflect the widespread construction industry practice of employing many semiskilled workers. Cost savings were estimated at \$363 million annually. The AFL-CIO sought and obtained a permanent injunction that blocked implementation of the rule. See *Building and Construction Trades Department, AFL-CIO v. Donovan*, 553 F. Supp. 352 (1982).

⁵⁷Weidenbaum, "Regulatory Reform under the Reagan Administration," p. 37.

⁵⁸*Ibid.*, p. 38.



Executive Order 12612 on Federalism: Performance, Problems, and Potential

Federal regulations increased administrative requirements for state and local governments during the **1980s**. That growth occurred despite numerous executive branch initiatives in the early **1980s** designed to provide regulatory relief. Although many of the reform initiatives benefited state and local governments, most were designed primarily to respond to problems experienced by the private sector. On October **26, 1987**, however, President Ronald Reagan promulgated Executive Order **12612** on Federalism, which was intended to address the regulatory concerns of states and localities. This chapter examines the implementation and effects of the executive order.

- Varying patterns of compliance;
- Routine failure by certain federal agencies to comply with the certification and assessment procedures; and
- Failure to *carry* out federalism assessments in a number of regulations with important implications for state and local governments.

Policy Impact Analysis

Since **1969**, important federal initiatives have been implemented to ascertain the effects of proposed federal programs and activities on **(1)** the environment (environmental impact statements), **(2)** the economy (inflation impact statements), **(3)** cities (urban impact statements), **(4)** state and local governments (state and local cost estimates), and **(5)** the economic and social targets of regulation (regulatory impact analyses). E.O. **12612** added another type of impact analysis to the federal policy arsenal—a federalism assessment.

The order outlines a series of principles and procedures designed to guide federal agencies in formulating legislative and regulatory proposals that will affect state and local governments. It is intended to minimize the adverse or unintended effects of federal policies on states and localities and to restrict inappropriate preemption of state and local policymaking and administrative prerogatives.

Although **E.O. 12612** has had a positive impact on certain policy decisions, a systematic analysis of its implementation underscores a number of problems and weaknesses, including:

The Working Group on Federalism

The origins of the Executive Order on Federalism can be traced to the work of a policy task force in the Reagan administration during the **mid-1980s**. By the president's second term in office, some administration officials had become dissatisfied with the limitations of the deregulation initiatives. They sought to respond with new federalism and regulatory initiatives. One of these new initiatives was the creation of the Working Group on Federalism, an interagency task force established by the Domestic Policy Council in **1985**.

The working group issued a report in November **1986** in which it raised deep concerns about the “evisceration of federalism as a constitutional and political principle.” It argued that the gradual development of an “expansive, intrusive, and virtually omnipotent national government” had served over time to transform state governments from “the hub of political activity and the very source of our political tradition [into] . . . administrative units of the national government.”

Although the group praised earlier initiatives by the Reagan administration to consolidate categorical programs into block grants, to reduce intergovernmental regulation, and to cut federal taxes, it argued that such actions “focused more on certain symptoms of federalism’s decline than on its root causes.”² Consequently, the working group recommended that additional reforms,

ranging from proposed amendments to the Constitution to procedural and institutional changes in the legislative and administrative processes, be considered by the president. Among the latter was a proposal that the president issue “a comprehensive executive order on federalism setting forth concrete guidelines to be referred to by agencies when they undertake actions with federalism implications.”³

Promulgating an Executive Order on Federalism

This final recommendation led directly to President Reagan’s issuance of E.O. 12612 on October 26, 1987. The order identified principles and administrative procedures to guide federal agencies in formulating and implementing policies affecting state and local governments!

Federalism Principles

Specifically, E.O. 12612 spelled out nine “fundamental federalism principles” to assist executive branch agencies and departments in the design of new legislative proposals and administrative rules. These included the following

- Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.
- In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly.
- The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires.
- Acts of the national government—whether legislative, executive, or judicial in nature—that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.
- In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level?

Policymaking Criteria

To supplement these general principles, E.O. 12612 specified additional policymaking criteria, which encompassed special provisions intended to minimize federal preemption

of state authority and to guide the development of legislative proposals submitted to Congress, including:

- Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope.
- With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible.
- Executive departments and agencies shall: (1) encourage States to develop their own policies to achieve program objectives. . . , (2) refrain, to the maximum extent possible, from establishing uniform, national standards for programs, and. . . (3) when national standards are required, consult with appropriate officials and organizations representing the States.
- To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.
- Any regulatory preemption of State law shall be restricted to the minimum level necessary.
- Executive departments and agencies shall not submit to the Congress legislation that would: (a) directly regulate the States in ways that would interfere with functions essential to the States’ separate and independent existence or operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions; and (b) attach to Federal grants conditions that are not directly related to the purpose of the grant.⁶

Agency Implementation

In order to ensure the application of these principles and criteria to policies and regulations with federalism implications, the executive order also set forth implementation procedures. Each agency head was instructed to designate an official to oversee compliance and determine whether proposed agency actions warranted the preparation of a formal and comprehensive assessment of their federalism implications. If warranted, such federalism assessments are required to contain:

- Certification that the policy has been assessed in light of the federalism principles, criteria, and requirements set forth in the order;
- Identification of any provisions or elements of the policy that are inconsistent with such federalism principles and criteria;
- **An** estimate of additional costs or burdens that will be imposed on states and the probable source of funding to address those costs; and
- A description of the extent to which the policy interferes with aspects of state sovereignty or the performance of traditional state functions.

Any federalism assessments must accompany the agency's submission to the **Offi** of Management and Budget (**OMB**) for legislative clearance or regulatory review. In addition, OMB is responsible for providing government-wide coordination and review of agency compliance with the executive order.

Mixed Assessments of Executive Order 12612

There has been little formal or comprehensive evaluation of the performance and accomplishments of E.O. 12612.

Positive Appraisals

Some federal, state, and local officials believe that the executive order has enhanced their ability to focus attention on federalism issues during the legislative clearance and regulatory review processes. Supporters note that President Bush affirmed his personal commitment to the principles of the federalism executive order in a 1990 memorandum to the heads of executive branch departments and agencies.⁷

Robert C. Raymond of the Department of Health and Human Services maintains that the order has "changed the nature of internal debate. You frequently find people citing it to make their case, arguing either that there is a significant federalism impact or an overriding national need."⁸ James Martin of the National Governors' Association agrees, noting that state and local government representatives "try to use it all the time" to influence the design of federal regulations. "It provides essential hooks for influencing policy debates."⁹

Such views are shared by some of the designers of the executive order. Paul Colborn, of the Office of General Counsel in the Department of Justice, served on the staff of the Working Group on Federalism. He agrees that E.O. 12612 has influenced agency decision-making. Although there have been relatively few formal federalism assessments, Colborn believes that "there are many informal reviews of federalism issues within

federal agencies now. My sense is that there is a lot more attention to federalism showing up in the preambles and explanations of new regulations."¹⁰ He notes, for example, that such informal, "small a," assessments succeeded in the late 1980s in deterring the administration from proposing legislation to preempt California's Proposition 65 food labeling requirements.

On the other hand, Colborn and others emphasize that the purpose of the executive order is not to guarantee results favorable to states and localities. Rather, it is designed to assure that federalism issues are adequately considered in the process of making executive branch decisions. For example, the Justice Department conducted its first formal federalism assessment when considering federal legislation to overturn the Supreme Court's ruling in *McNally v. United States*, a case limiting the use of federal mail fraud statutes to prosecute state and local officials for corruption.¹¹ The department and the Reagan administration ultimately proposed such legislation, but only after a full consideration of the federalism issues involved.

Skeptical Judgments

Notwithstanding such positive assessments of the executive order's performance, many other appraisals have been more circumspect, if not critical. Few officials can point to important instances in which E.O. 12612 has significantly altered agency decisions. Some have expressed concerns about fundamental weaknesses in the order's procedures that have kept it from achieving its full potential. This is particularly true of OMB officials charged with coordination and review of the E.O. 12612 process. "I wish that I could point to some successes with 612," observed one former OMB official, "but the record to date has been **disappointing**."¹² "To my knowledge, there is no case to hold up as a good example," another agreed.¹³

These officials give several reasons for such negative evaluations. First and foremost, there is a conviction among some OMB staff that the executive order process "lacks teeth." "There is no enforcement mechanism," observes Kimberly Newman.¹⁴ Decisions about the need to perform a federalism assessment and certification that requirements have been met rest entirely with each agency's designated federalism official. "We don't have authority under the order to second-guess the agency federalism official," observes another OMB official.

Contrast this situation with OMB's regulatory review authority under E.O. 12291. The budget agency has the power, where statutory authority permits, to return proposed regulations to the issuing agency if the Office of Information and Regulatory Affairs staff believes that the economic assessment requirements have not been adequately met or the underlying data is incomplete or has been misinterpreted.

This lack of authority in the federalism order was intentional. "We didn't want to create a new scheme full of red tape and routine filings," explains Paul Colborn. "We deliberately left the decision to perform a federalism assessment to agency discretion in order to avoid a lot of

boilerplate language on every regulatory and legislative proposal.” As a result, the tendency to mass produce routine, superficial federalism certifications has been avoided by most, although not all, federal agencies. This accomplishment, however, leaves OMB with little procedural recourse if an agency fails to consider relevant federalism issues. Newman explains:

As new rules and proposals have come in from Transportation, HUD, and so on, we have attempted on an ad hoc basis to go back and get additional information when federalism issues have been raised. But it’s hard to get anything more than “we considered it.”¹⁵

Due to these procedural weaknesses, agency compliance with the executive order has often been haphazard. Following President Bush’s election in 1988, many federal agencies failed to designate a federalism official until January 1990, when the president sent a memorandum to department and agency heads reaffirming his commitment to E.O. 12612 and reminding them of its requirements.

Although OMB officials observed a positive response from this expression of presidential support, agency compliance remained incomplete. Six months after the president’s memorandum, OMB’s list of designated agency officials included only five of the 14 executive departments and 17 independent federal agencies. Among the agencies missing were many with important intergovernmental responsibilities, including the departments of Agriculture, Education, and Housing and Urban Development; the Environmental Protection Agency; the Occupational Safety and Health Administration; and the Federal Emergency Management Agency.¹⁶

Moreover, in approximately half of the agencies that had a designated federalism official, that person was the cabinet secretary or agency head. Although this might be interpreted as a sign of high-level commitment, it raises questions about the degree of attention that may be given to federalism issues, particularly during the often critical early stages of developing legislative initiatives and proposed rulemakings.

Hence, it is not surprising that important legislative proposals and regulations have managed to escape the executive order’s purview. For example, there was no federalism assessment for the Bush administration’s transportation policy proposals, despite their implications for distributing billions of dollars of federal aid and restructuring federal programs for mass transit, interstate, primary, and secondary highways.” Similarly, despite the recent promulgation of multi-billion dollar environmental regulations to assure that states and localities provide cleaner drinking water, remove asbestos from schools, and improve their waste disposal practices, one of OMB’s environmental analysts confessed that he had “never seen” a federalism assessment prepared by the EPA.¹⁸ Likewise, Robert Raymond confirmed that his agency at HHS “has never done a full-blown federalism assessment.”¹⁹

A Systematic Survey of Agency Compliance

Many of the problems identified by officials familiar with the implementation of E.O. 12612 can be substantiated by a systematic analysis of announcements and rules promulgated in the *Federal Register*. These data confirm that:

- Patterns of compliance vary dramatically among agencies.
- Many agencies routinely fail to follow the certification and assessment procedures.
- In many cases, compliance with the order’s procedures is strictly pro-forma.
- Formal federalism assessments were not made for a number of significant new rules that were clearly intended to be covered by requirements.

These conclusions are based on a computer-assisted search of all *Federal Register* entries between October 26, 1987, and August 10, 1990. During this 34-month period, 89,015 entries were published in the *Federal Register*, including agency announcements, notices of proposed rulemaking, and final rules and regulations. Of this total, 2,999 contained some reference to the federalism executive order, and 1,751 of these references were included in final rules.

The frequency of references to E.O. 12612 varied dramatically among regulatory agencies and departments, with ten of them being responsible for 2,874 of the 2,999 references (see Table 3-1, page 35). The patterns of citation also varied enormously. The Department of Transportation (DOT) stands out with more than 2,000 references, and Commerce (DOC), Justice (DOJ), and Housing and Urban Development (HUD) each had more than 100 references.

To some extent, these variations reflect differences in overall regulatory activity. DOC and DOT, for example, were extremely active regulators during this period. The departments of Energy, Health and Human Services, and Interior also were active, but they produced far fewer references to E.O. 12612.

The need to reference the executive order also depends on an agency’s substantive jurisdiction. One would not expect frequent references by agencies that primarily regulate the private sector rather. Yet, the pattern is not predictable. The Environmental Protection Agency and the Department of Education heavily regulate public entities, yet their *Federal Register* entries contain few references to the executive order. In contrast, active regulatory departments like Commerce and Transportation direct many of their rules to private sector activities, such as airline safety (air worthiness directives) and ocean fisheries. In such regulations, they routinely cite the executive order to acknowledge that the proposals have no federalism impact.

These differences underscore the distinctive implementation approaches that agencies have adopted. Some include pro-forma references to E.O. 12612 whether or not the rule affects state or local governments. Others are

Table 3-1
Federal Rules and References to E.O. 12612, by Agency, October 26,1987-August 10,1990

Federal Department or Agency	Total Federal Register Entries	Entries with Reference to E.O. 12612	Percent	Final Rules Citing E.O. 12612	Percent
Commerce	5,570	370	6.6%	242	4.3% ¹
Education	1,270	5	0.4	4	0.3
Energy	7,962	41	0.5	18	0.2
Health and Human Services	5,576	19	0.3	10	0.2
Housing and Urban Development	1,018	134	13.2	66	6.5
Interior	6,509	15	0.2	7	0.1
Justice	2,239	119	5.3	83	3.7
Labor	2,835	28	1.0	11	0.4
Transportation	7,059	2,112	29.9	1,214	17.2 ²
Environmental Protection Agency	4,758	11	0.2	7	0.1

¹ Omitting Ocean fisheries regulations, the Commerce Department issued 174 final rules citing E.O. 12612 (3.1% of total entries).

² Omitting air worthiness directives, the Transportation Department issued 441 final rules citing E.O. 12612 (6.2% of total entries).

Source: ACIR compilation from the Federal Register.

far more selective. Some agencies, such as EPA, regularly fail to discuss the executive order and its requirements, even in major rules affecting states and localities, in which the agency evidently has considered issues involving federalism.

A Random Sample of Citations

In order to determine how often federal agencies go beyond pro-forma certifications and review federalism issues seriously, or undertake a formal federalism assessment when that appears warranted, a random sample of final rules was examined. Omitting air worthiness and Ocean fisheries regulations, the agencies included in Table 3-1 issued 823 final rules mentioning E.O. 12612 between October 26, 1987, and August 10, 1990. These were listed and numbered consecutively, and a random sample of 30 rules was drawn.

Only four of the 30 rules drawn from this group had a clear intergovernmental impact:

- The Chapter 1 program regulations issued by the Department of Education;
- EPA's rules governing state implementation plans under the *Clean Air Act*;
- Regulations promulgated by HHS mandating that federal contractors and grantees operate a drug-free workplace; and
- HUD's regulations governing the development of enterprise zones (see Table 3-2, page 36).

Not one of these regulations was judged to warrant a full federalism assessment. Given the size of the sample, this suggests that only a tiny fraction of federal rules that are analyzed for their impacts on state and local governments are scrutinized for their federalism implications. Judging from this sample, the executive order require-

ments are commonly given perfunctory treatment by federal regulatory agencies. For instance, HUD's enterprise zone regulations altered the department's method for ranking and selecting communities to participate in the program. The program specifically sought "to encourage state and local governmental actions to augment... federally designated enterprise zones." Yet, the agency's designated federalism official determined that the regulations "do not have federalism implications and, thus, are not subject to additional review under the order."²⁰

The effects of HHS rules for implementing the Drug-Free *Workplace Act* were more far-reaching. This act required that all federal grantees and contractors, including state and local governments, certify that they operate a drug-free work environment and implement employee education and treatment programs intended to assure that result. Failure to comply with the act's crosscutting requirements, as demonstrated by drug-related convictions of state and local government employees or other evidence of failure to make a "good faith" effort to eliminate drug use in the workplace, could result in the suspension or termination of federal aid to the agency or jurisdiction in question.

Although such requirements were potentially costly and far-reaching, federal officials determined that this rule "will not have sufficient Federalism implications to warrant the preparation of a Federalism assessment."²¹ This decision reflected a judgment that the burdens imposed on state and local government grant recipients were somewhat streamlined compared to those placed on federal contractors. In particular, states could elect to make a single annual certification to each federal agency from which they received funds, rather than submit a separate certification for each grant.

Although the remaining 26 rules were drawn from a group that cited the executive order, none were intergovernmental in character. The large percentage of non-

Table 3-2
Final Agency Rules that Reference E.O. 12612: A Random Sample

Department of Commerce

Individual Validated Licenses and Commodity Control Lists, 55 FR 31852, August 6, 1990
U. S. Standards for Grades of Fish Fillets, 55 FR 23550, June 11, 1990

Department of Education

Chapter 1 Program in Local Educational Agencies—Final Regulations, 54 FR 21752, May 19, 1989

Department of Energy

Financial Assistance Rules: Technical Amendments, 54 FR 23958, June 5, 1989

Department of Health and Human Services

Requirements for a Drug-Free Workplace—Grants, 54 FR 4947, January 31, 1989

Department of Housing and Urban Development

Enterprise Zone Development, 53 FR 48638, December 2, 1988
Home Equity Conversion Mortgage Insurance, June 9, 1989

Department of Justice

Acceptance by Overseas Immigration and Naturalization Service Offices and U.S. Consulates of Jurisdiction of Relative Petitions, 54 FR 34141, August 18, 1989
Adjustment to Permanent Resident Status, 54 FR 50339, December 6, 1989
Documentary Requirements, Waivers, and Proceedings to Determine Deportability of Aliens in the United States, 55 FR 24858, June 19, 1990

Department of Transportation

Light Truck Fuel Economy Standards—1990-91, 53 FR 11074, April 5, 1988
Changes to Honolulu and Guam Marine Inspection Zones, 53 FR 21814, June 10, 1988
Amendments to Railroad Safety Regulations, 53 FR 28594, July 28, 1988
Improved Flammability Standards—Airplane Cabins, 53 FR 32564, August 25, 1988
Editorial Changes, Coast Guard Reorganization, 53 FR 34532, September 7, 1988
Inspection, Repair, and Maintenance, 53 FR 49402, December 7, 1988
Traffic Alert and Collision Avoidance System, 54 FR 940, January 10, 1989
Odometer Disclosure Requirements, 54 FR 7772, February 23, 1989
Special Flight Rules in Vicinity of Grand Canyon, 54 FR 111926, March 22, 1989
Control of Drug Use in Natural Gas and Hazardous Liquid Pipeline Operations, 54 FR 14922, April 13, 1989
Federal Motor Vehicle Safety Standards—Air Brake Systems, 54 FR 18890, May 3, 1989
Special Federal Aviation Requirements, 54 FR 23864, June 2, 1989
Motor Vehicle Safety Standards—Air Brake Systems, 54 FR 25460, June 15, 1989
Anti-Drug Program for Aviation Personnel, 54 FR 53282, December 27, 1989
Shippers Use of Tank Cars with Localized Thin Spots, 55 FR 922, January 5, 1990
Imported Vehicles Subject to Federal Safety Standards, 55 FR 3742, February 5, 1990
Prevention of Pollution from Ships, 55 FR 18578, May 2, 1990
Special Local Regulation—Sheboygan Independence Day, 55 FR 23200, June 7, 1990
Removal of Transponder with Automatic Altitude Reporting in Fargo, North Dakota, 55 FR 29986, July 23, 1990

Environmental Protection Agency

State Implementation Plan Completeness Review, 55 FR 5824, February 16, 1990

Note:

Italics indicate regulations affecting state and local governments.

Source: ACIR compilation from the *Federal Register*.

intergovernmental requirements in the sample (87 percent) highlights once again the tendency of certain agencies, particularly the departments of Commerce and Transportation, to make pro-forma references to E.O. 12612 even when they are not required.

Patterns of Compliance in Major Rules

A key question remains unanswered: Are there other cases in which important intergovernmental rules are promulgated without a federalism assessment?

We attempted to isolate the most important intergovernmental regulations promulgated during this period by examining those that were classified by OMB as major rules according to the criteria of Executive Order 12291. For the purposes of this order, a major rule is defined as a regulation that is likely to result in:

1. An annual effect on the economy of \$100 million or more;
2. A major increase in the costs or prices for consumers, individual industries, Federal, State, and local government agencies, or geographic regions; or
3. A significant adverse effect on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Major rules were isolated for EPA and HUD, which appear to respond differently to the requirements of E.O. 12612. These rules were examined for their intergovernmental effects, for references to the order, and for some form of federalism assessment. As was the case with overall references to E.O. 12612, patterns of citation and compliance for major rules varied considerably between the two agencies.

EPA placed 4,758 announcements in the *Federal Register* between October 26, 1987 and August 10, 1990. Of these, 1,382 involved the issuance of final rules, 373 of which referred to the regulatory impact analysis that is usually required when a major rule is promulgated. In most of these cases, the regulatory impact analysis was not carried out because the rule was not considered to be major in scope.

OMB reported that EPA promulgated six major final rules in 1988 and another three in 1989.²² Not one of the nine rules referred to E.O. 12612, and none was accompanied by a formal federalism assessment. Only seven of the 1,382 final rules issued or discussed by EPA during this period mentioned the requirements of E.O. 12612. None of these rules was deemed to be major, however, nor did any contain a full federalism assessment.”

The absence of references to the executive order does not mean that EPA did not promulgate any rules during this period that imposed significant fiscal and administrative requirements on state and local governments. On the contrary, several of the most costly and far-reaching rules

issued during this period were clearly intergovernmental in character. Included in this group were rules covering materials containing asbestos in schools; requirements for financial responsibility, notification, record keeping, and reporting for underground storage tanks; toxic chemical release reporting under community-right-to-know legislation; national drinking water regulations for filtration, disinfection, and turbidity; and effluent guideline plans under the Clean Water Act.

EPA estimated that its asbestos removal requirements would affect 100,000 school buildings and impose costs of \$3.145 billion over 30 years.²⁴ Similarly, the agency's underground storage tank regulations were estimated to impose incremental costs of \$48 billion over 30 years.²⁵ Substantial portions of this cost would be borne directly by state and local jurisdictions, which operate independent fleets of vehicles for police, fire, school, highway, and other government departments. In addition, state and local governments were responsible for implementing major portions of the regulatory program. Yet, in neither of these cases, nor in the other major regulations listed above, did the agency make any reference or citation to the president's executive order on federalism.

The agency's procedural noncompliance with the formal requirements of E.O. 12612 does not necessarily indicate a pattern of insensitivity to intergovernmental considerations. Prior to issuing its asbestos removal requirements, EPA established a committee of state and local school and health agency officials to help design regulations responsive to state and local government experience and concerns.²⁶ Similarly, EPA stressed that two of the “key operating principles” used in designing its underground storage tank requirements were that the program “must be designed to be implemented at the state and local levels” and that “the requirements must be kept simple, understandable, and easily implemented” by small owners and jurisdictions.²⁷

In 1985, the agency created a state-EPA consultation committee, with 17 state representatives, that meets four times a year. Nevertheless, the agency's failure to evince even superficial or pro-forma compliance with the technical requirements of E.O. 12612 would appear to underscore important weaknesses in the design and implementation of the executive order.

Compliance with the formal requirements of the executive order on federalism was generally higher at the Department of Housing and Urban Development, but the eventual outcome was much the same. Major regulations with important intergovernmental implications were subjected to little more detailed scrutiny under the order at HUD than at EPA.

HUD placed 1,018 announcements in the *Federal Register* from October 27, 1987, until August 10, 1990. Of these, 249 were final rules, including 128 that were considered for major rule status under E.O. 12291, 66 that addressed E.O. 12612, and 63 that addressed both sets of requirements.²⁸ Whereas fewer than one percent of the final rules that were scrutinized for major economic im-

pacts at EPA made any reference to the executive order on federalism, 52 percent of such rules issued by HUD did so.

Nevertheless, a more detailed examination of the resulting rules showed that numerous regulations with important intergovernmental impacts were promulgated with only a cursory discussion of their federalism implications. A survey of these regulations again uncovered no instance in which a major rule was subjected to a full-scale federalism assessment.

In some cases, a more detailed analysis of federalism issues was deemed unnecessary because the rule in question was designed to increase state or local flexibility. This was the case when HUD joined other federal agencies in issuing a common rule establishing uniform administrative requirements for federal grants. Much more common, however, were regulations with important federalism impacts but little statutory flexibility. Thus, in issuing final regulations governing implementation of the *Fair Housing Act Amendments of 1988*, the agency's general counsel and designated federalism official determined that

the policies contained in this rule would, if implemented, have federalism implications and are subject to review under the Order. . . . The effect of the amended *Fair Housing Act* will be to encourage States and localities to amend their laws to match the . . . strengthened Federal law. . . or suffer the eventual loss of [federal] recognition. . . [and] eligibility for grant funds. . . . While the rule would have federalism impacts, review under the Federalism Executive Order is not required because the implementation of the statute leaves little discretion with HUD to lessen these impacts. HUD's statutory mandate is clear."

A similar rationale was elaborated in regulations involving comprehensive homeless assistance plans and the public housing drug elimination program. HUD acknowledged that both sets of rules entailed important federalism implications, but no detailed assessment was deemed necessary given the degree of statutory prescriptiveness involved.

Conclusion

Promulgation of Executive Order 12612 represented the *last* comprehensive initiative undertaken by the Reagan administration to restrain federal government involvement in state and local affairs. Its authors believed that a presidentially sponsored federalism impact analysis process would complement earlier federalism reform initiatives and limit the promulgation of unduly burdensome and preemptive federal regulations.

However, the weight of both anecdotal assessments and systematic analysis suggests that E.O. 12612 has had little impact on federal regulations that affect state and local governments. Many federal agencies have failed to appoint a

designated federalism official. During the regulatory process, some agencies routinely fail to follow the most basic procedures outlined in the order. Among those agencies that do comply, such compliance appears to be largely pro-forma. Although some officials can cite isolated examples to the contrary, the sample of regulations reviewed uncovered no instance in which a thorough federalism assessment was undertaken by an agency in the course of promulgating significant intergovernmental regulations.

Such limitations appear to result from weaknesses in design and procedures of the order. Among these weaknesses is the fact that the Office of Management and Budget, which is to oversee and coordinate federal agency compliance, has been granted neither the resources nor the enforcement authority necessary to assure its effective implementation. These constraints could be rectified by amending the executive order and increasing the resources devoted to ensuring compliance with it.

Some shortcomings of E.O. 12612 go beyond the order. Analysis of several major regulations promulgated by the Department of Housing and Urban Development suggests that even the most thorough federalism assessment procedures would have limited effect in certain cases because the statutes in question provide little regulatory flexibility. As was concluded in Chapter 2, after analyzing earlier regulatory relief efforts, these cases reflect the limitations of any unilateral administrative strategy for providing regulatory relief.³⁰ An effective regulatory impact assessment process must be part of a comprehensive strategy that devotes attention to the legislative process as well.

Notes

¹ Working Group on Federalism, "The Status of Federalism in America: A Report of the Working Group on Federalism of the Domestic Policy Council" (Washington, DC, November 1986), p. 1.

² *Ibid.*, p. 3.

³ *Ibid.*, p. 67.

⁴ *Federal Register*, October 30, 1987, pp. 41685-41688.

⁵ *Ibid.*, pp. 41686-41687.

⁶ *Ibid.*

⁷ The White House, "Memorandum for the Heads of Executive Departments and Agencies," February 16, 1990.

"Remarks of Robert C. Raymond, director, Research, Evaluation, and Special Analyses, Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services, to the Washington Intergovernmental Roundtable, March 13, 1990.

⁹ Remarks of James L. Martin, Legislative Counsel, National Governors' Association, to the Washington Intergovernmental Roundtable, March 13, 1990.

¹⁰ Interview with Paul Colborn, Office of Legislative Counsel, U.S. Department of Justice, June 12, 1990.

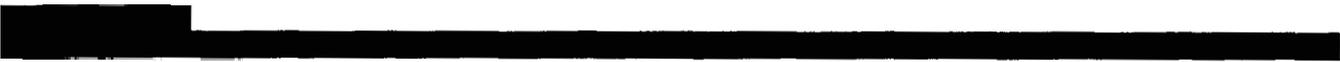
"483 U.S. 350 (1987).

¹² Interview with James Mason, Office of Information and Regulatory Affairs, Office of Management and Budget, July 12, 1990.

¹³ Interview with Kimberly A. Newman, Intergovernmental Affairs Liaison, Office of Management and Budget, June 21, 1990.

¹⁴ *Ibid.*

- ¹⁵ *Ibid.*
- ¹⁶ Some omissions of departments and agencies from OMBs list of federalism officials may be the result of miscommunication. Representatives of the Department of Transportation, for example, note that the department's general counsel was designated as DOT's federalism official in January 1988, although this is not indicated on OMBs tally.
- ¹⁷ DOT officials note, however, that federalism assessments were made for sunset legislation for the Interstate Commerce Commission and for hazardous materials transportation legislation.
- ¹⁸ Interview with Rick Belzer, Office of Information and Regulatory Affairs, Office of Management and Budget, July 12, 1990.
- ¹⁹ Remarks to Washington Intergovernmental Roundtable, March 13, 1990.
- ²⁰ *Federal Register*, December 2, 1988, p. 48639.
- ²¹ *Federal Register*, January 31, 1989, p. 4950.
- ²² Office of Management and Budget, *Regulatory Program of the United States*, April 1, 1990-March 31, 1991 (Washington, DC, 1991), pp. 627-629.
- ²³ These seven were rules pertaining to State Implementation Plan Completeness Review (Clean Air Act); Implementation Plans, Surface Coal Mines and Fugitive Emissions; Implementation Plans, Air Quality New Source Review; Preparation, Adoption, and Submittal of Implementation Plans (Clean Air); Maintaining a Drug-Free Workplace; Cooperative Agreements and Superfund State Contracts for Superfund Response Actions; and Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.
- ²⁴ *Federal Register*, October 30, 1987, p. 41844.
- ²⁵ *Federal Register*, September 23, 1988, p. 37082.
- ²⁶ OMB, *Regulatory Program of the United States Government*, April 1, 1988-March 31, 1989 (Washington, DC, 1989), p. 27.
- ²⁷ *Federal Register*, September 23, 1988, p. 37082.
- ²⁸ Those rules, which were analyzed for economic burdens but not federalism impacts, generally were not intergovernmental in character. Most dealt with issues such as Federal Housing Administration requirements on home mortgage interest rates.
- ²⁹ *Federal Register*, January 23, 1989, p. 3232. Similarly, although Executive Order 12291 requires that major rules must be rigorously analyzed to assure that social benefits outweigh costs and that the most cost-efficient mode of regulation is selected, these requirements apply only when permitted by statute. Despite the professed lack of statutory flexibility in the Fair Housing Amendments, HUD proceeded nevertheless to conduct a regulatory impact analysis pursuant to Executive Order 12291, although refraining from conducting a federalism assessment.
- ³⁰ For a comprehensive analysis of the pros and cons of an administrative approach to deregulation, see Marshall R. Goodman and Margaret T. Wrightson, *Managing Regulatory Reform: The Reagan Strategy and Its Impact* (New York: Praeger Publishers, 1987).





Part II

Trends in Regulation – The Congress



Intergovernmental Regulatory Enactments in the 1980s

In the foregoing examination of executive branch rulemaking and regulatory relief activities, it was demonstrated that federal requirements increased during the 1980s in a majority of the regulatory programs examined. Intergovernmental regulation was reduced in approximately one-quarter of the cases studied. Moreover, the principal regulatory relief mechanism for state and local governments, Executive Order 12612, produced little substantive change.

As discussed in Chapters 2 and 3, one important reason for this sustained level of federal rulemaking activity lays outside of the bureaucracy. In several cases, the promulgation of additional administrative and programmatic requirements was a direct consequence of previously enacted statutes. Because of such legislative stimulation of the regulatory process, any comprehensive understanding of regulatory federalism in the 1980s and 1990s must examine trends in legislative enactments as well as administrative rulemaking.

In Part 11, the regulatory record of the Congress during the 1980s is examined, especially the extent to which the Congress increased the statutory requirements on state and local governments. Chapter 5 contains an analysis of the financial costs attributable to such regulations.

imposed multiple new obligations and requirements on both public and private entities. The 1990 Clean Air Act Amendments (P.L. 101-549), for example, contained provisions affecting both the intergovernmental regulatory system for controlling urban smog and industrial pollution and direct limitations on emissions from municipal incinerators and power plants. New policy concerns for federal regulators were addressed in some legislation, such as the Drug Free Workplace Act of 1988. Others, such as the Education of the Handicapped Act Amendments of 1986, built on and expanded earlier federal initiatives.

Despite these and other differences, all of the statutes in the inventory conform to the regulatory framework developed by ACIR in *Regulatory Federalism: Policy, Process, Impact, and Reform*. All of the laws imposed significant new regulations on states and localities, utilizing either partial preemptions, direct orders, crosscutting requirements, or crossover sanctions.'

The consistency of the inventory with this conceptual framework permits comparisons with ACIR's earlier research and analysis of regulatory trends over time. It means, however, that traditional forms of legal conditions attached to individual grant-in-aid programs are excluded from this list, even though the conditions may be extremely costly or intrusive. Some of the more important examples of traditional grant conditions adopted in the 1980s, such as those attached to the Medicaid and AFDC programs, will be discussed later in this chapter. Also omitted from the list are statutes that provided intergovernmental regulatory relief, such as the Local Government Anti-Trust Act of 1984 and the Fair Labor Standards Act Amendments of 1985. These, too, will be addressed separately.

Finally, this inventory does not include federal statutes that imposed only modest requirements on state and local governments. For example, the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (P.L. 99-410) required states to accept a uniform federal absentee ballot form for federal elections if state absentee ballots are not made available on a timely basis. Also omitted from this

An Inventory of Intergovernmental Mandates Adopted in the 1980s

Table 4-1 contains a description of 27 statutes enacted during the 1980s that imposed significant new regulations on states and localities.

Some, like the 1988 Ocean Dumping Ban Act (P.L. 100-688), which prohibits any additional dumping of municipal sewage sludge in Ocean waters, were relatively simple and direct. Others were lengthy and complex laws that

Table 4-1
**Major New Enactments and Statutory Amendments Regulating State and Local Governments,
 1981-1990**

Title	Public Law	Type
Age Discrimination in Employment Act Amendments of 1986 Outlawed mandatory retirement at age 70 , with a seven-year delay in coverage for police, fire fighters, and college professors.	99-592	DO
Americans with Disabilities Act (1990) Established comprehensive national standards to prohibit discrimination in public services and accommodations and to promote handicapped access to public buildings and transportation.	101-327	CC,DO
Asbestos Hazard Emergency Response Act of 1986 Directed school districts to inspect for asbestos hazards, develop management response plans, and take necessary actions to protect health and the environment; required state review and approval of local management response plans.	99-519	DO
Cash Management Improvement Act of 1990 Created new management procedures for the disbursement of federal aid funds to states, resulting in an overall reduction of interest earned on federal funds by states.	101-453	CC
Child Abuse Amendments of 1984 Overturned federal court ruling and authorized the promulgation of "baby doe" regulations protecting seriously ill newborns.	98-457	CO
Civil Rights Restoration Act of 1987 Reversed Supreme Court ruling in <i>Grove City College v. Bell</i> and expanded institutional coverage of laws prohibiting racial, gender, handicapped, and age discrimination by recipients of federal assistance.	100-259	CC
Clean Air Act Amendments of 1990 Imposed strict new deadlines and requirements dealing with urban smog, municipal incinerators, and toxic emissions; enacted new program for controlling acid rain .	101-549	PP
Commercial Motor Vehicle Safety Act of 1986 Established minimum national standards for licensing and testing commercial and school bus drivers; directed states to issue and administer licenses by 1992 or risk losing 5-10 percent of major highway grants.	99-570	CO
Consolidated Omnibus Budget Reconciliation Act of 1985 Extended Medicare hospital insurance taxes and coverage to all new state and local government employees.	99-72	DO
Drug-Free Workplace Act of 1988 Required certification by all federal grantees and contractors of a drug-free workplace and creation of employee awareness, sanction, and treatment programs.	100-690	CC
Education of the Handicapped Act Amendments of 1986 Expanded coverage and services for preschool children, ages 3-5 .	99-457	CO
Education of the Handicapped Act Amendments of 1990 Prevented states from claiming sovereign immunity under the 11th Amendment from lawsuits by parents seeking tuition reimbursement under the <i>Handicapped Education Act</i> , thereby reversing the Supreme Court's holding in <i>Dellmuth v. Muth</i> .	101-476	CO
Emergency Planning and Community Right-to-Know Act of 1986 Promulgated new national hazardous waste cleanup standards and timetables; established community right-to-know program, requiring state and local notification of potential hazards and dissemination of information to public; expanded local emergency response planning.	99-499	PP
Fair Housing Act Amendments of 1988 Extends <i>Civil Rights Act of 1968</i> to cover the handicapped and families with children.	100-430	DO
Hazardous and Solid Waste Amendments of 1984 Reauthorized and strengthened scope and enforcement of the <i>Resource Conservation and Recovery Act of 1976</i> ; established program to regulate underground storage tanks for petroleum and hazardous substances; required annual EPA inspections of state and locally operated hazardous waste sites.	98-616	PP

Table 4-1 (cont.)
Major New Enactments and Statutory Amendments Regulating State and Local Governments, 1981-1990

Title	<i>Public Law</i>	<i>Type</i>
Handicapped Children's Protection Act of 1986 Reversed Supreme Court decision in <i>Smith v. Robinson</i> to allow the recovery of attorneys' fees under the <i>Education for all Handicapped Children Act</i> .	99-372	CO
Highway Safety Amendments of 1984 Set uniform national minimum legal drinking age of 21.	98-363	CO
Lead Contamination Control Act of 1988 Amended <i>Safe Drinking Water Act</i> to require that states establish programs for assisting schools with testing and remediating lead contamination problems in drinking coolers.	100-572	DO
Ocean Dumping Ban Act (1988) Outlawed remaining ocean dumping of municipal sewage sludge.	100-688	DO
Older Workers Benefit Protection Act of 1990 Overturned Supreme Court ruling in <i>Public Employees Retirement System of Ohio v. Betts</i> , broadening the <i>Age Discrimination in Employment Act's</i> prohibitions against discrimination in employee benefit plans.	101-433	DO
Safe Drinking Water Act Amendments of 1986 Promulgated new procedures and timetables for setting national drinking water standards; established new monitoring requirements for public drinking water systems; tightened enforcement and penalties for non-complying water systems.	99-339	PP,DO
Social Security Amendments of 1983 Prohibited state and local governments from withdrawing from Social Security coverage; accelerated scheduled increases in payroll taxes and payment of payroll taxes by state and local governments.	98-21	DO
Social Security: Fiscal 1991 Budget Reconciliation Act Extended Social Security coverage to all state and local government employees not otherwise covered by a public employee retirement system.	101-508	DO
Surface Transportation Assistance Act of 1982 Enacted uniform national size and weight requirements for trucks on interstate highways.	97-424	CO
Voting Accessibility for the Elderly and Handicapped Act (1984) Required that states and political subdivisions assure that all polling places used in federal elections are accessible, and that a reasonable number of accessible registration sites be provided.	98-435	DO
Voting Rights Act Amendments of 1982 Extended provisions of the 1965 <i>Voting Rights Act</i> for 25 years and expanded its coverage of disabled voters and those needing language assistance; amended the <i>Voting Rights Act</i> to prohibit any voting practice that results in discrimination, regardless of intent, thereby overturning Supreme Court decision in <i>Mobile v. Bolden</i> .	97-205	DO
Water Quality Act of 1987 Established new grant programs and set forth requirements for states for identifying and controlling nonpoint pollution; promulgated new requirements for testing and permitting municipal storm sewer discharges; directed EPA to develop regulations governing toxic wastes in sewage sludge; reduced and restructured funding programs for municipal waste treatment plants.	100-4	PP,CC,DO

Key:
 CC—Crosscutting Requirement
 CO—Crossover Sanction
 DO—Direct Order
 PP—Partial Preemption

inventory is the *Rail Safety Improvement Act of 1988* (P.L. 100-342), which amended the *National Driver Register Act of 1982* to provide greater access by railroad employees and job applicants to driving records maintained by state governments.

Regulatory Expansion in the 1980s

The level of federal regulatory activity during 1981 to 1990 compared with earlier decades is shown in Figure 4-1. This comparison makes clear that, despite efforts to constrain the growth of intergovernmental regulation, the 1980s were years of regulatory expansion rather than contraction. Twenty-seven new laws or major amendments to statutes added significant regulatory requirements for state or local governments. This is comparable to the 22 major pieces of intergovernmental regulation adopted during the 1970s.

Some of the new enactments imposed significant financial costs on state and local jurisdictions, whereas others were noteworthy more for their limitations on policymaking discretion. The *Safe Drinking Water Act Amendments of 1986*, for example, were recently estimated to impose additional annual costs of \$2 billion to \$3 billion on public water systems.² The *Asbestos Hazard Emergency Response Act of 1986* required schools to remove hazardous asbestos at an estimated cost of \$3.15 billion over 30 years.³ An estimated \$575 million will be spent annually for implementation of the 1986 reauthorization of the *Education for All Handicapped Children Act*, which expanded services for preschool children? A more complete analysis of the cumulative costs of these and other regulatory statutes enacted in the 1980s, together with related trends in federal grant-in-aid funding, is presented in the next chapter.

In contrast, other recent mandates have been noted more for their intrusiveness than their expense. The Congress, during the past decade, enacted laws requiring states to allow longer and heavier trucks on interstate highways, raise the minimum age for the consumption of alcoholic beverages to 21, and abolish mandatory retirement age policies.

As in the past, approximately two-thirds of the intergovernmental regulations enacted in the 1980s involved either energy and environmental policy or civil rights (see Figure 4-2). Of the newest statutes, 40 percent prohibited some form of discrimination on the basis of age, race, gender, or physical handicap, compared with 28 percent of earlier intergovernmental regulations. Of the post-1980 statutes, 24 percent involved environmental or energy policy, compared with 42 percent of earlier regulatory statutes. In both eras, the remainder was made up of regulations affecting transportation, health and safety, or general management.

More Coercive Techniques

Although civil rights and environmental protection remained the focus of functional activity throughout the time period examined, policymakers in the 1980s relied increasingly on more coercive techniques of intergovernmental regulation. As Figure 4-3 illustrates, 68 percent of

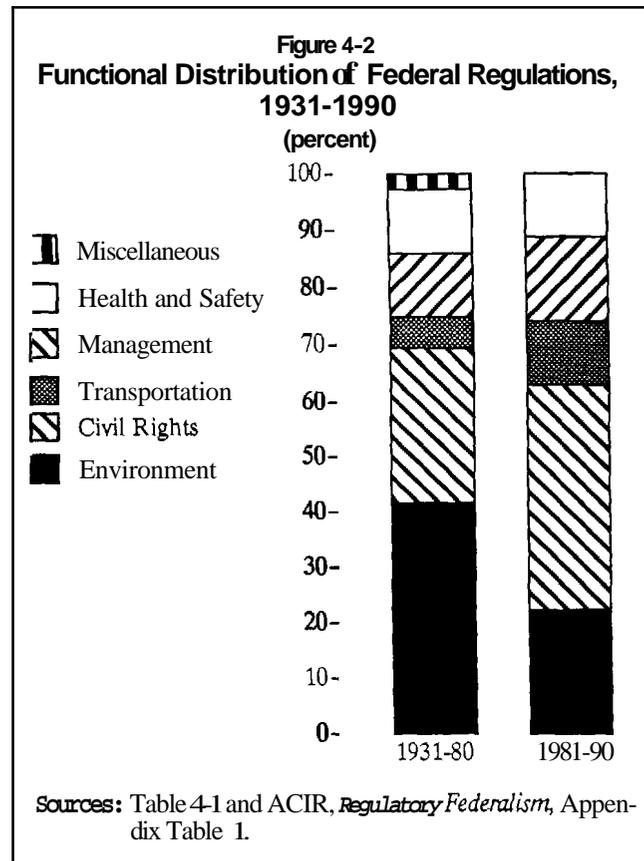
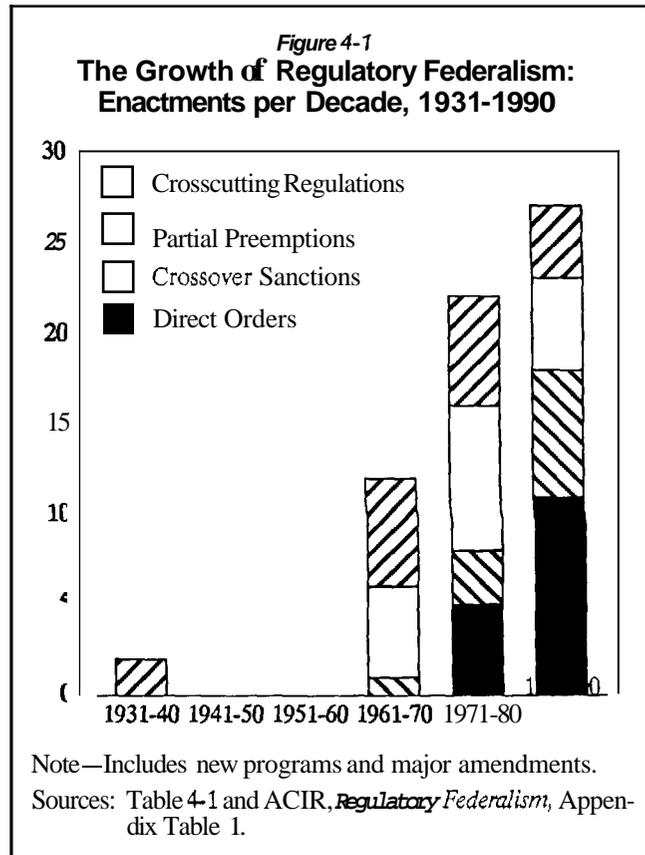
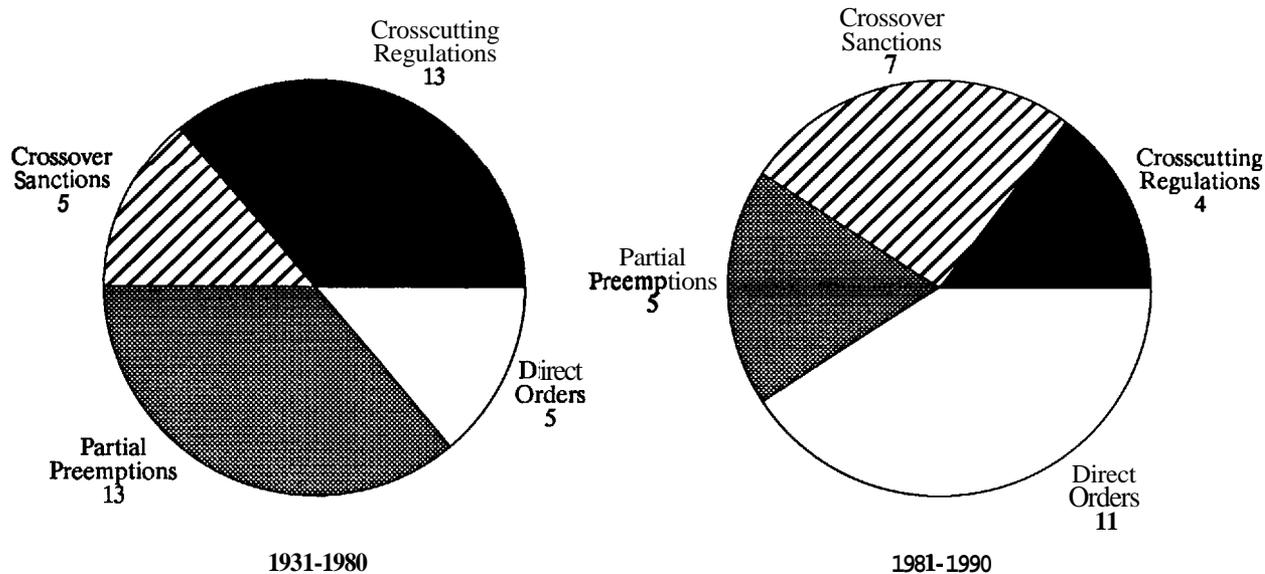


Figure 4-3
Changing Composition of Regulatory Instruments, 1931-1990



the requirements enacted between 1981 and 1990 utilized crossover sanctions or direct order mandates. In contrast, only 28 percent of earlier intergovernmental regulations employed these two instruments. Reliance on crosscutting requirements declined sharply in the 1980s.

Another important difference between intergovernmental requirements is the extent to which the post-1980 statutes built and expanded on existing regulations and policies rather than establishing new fields of regulatory activity. Approximately 90 percent of the statutes in ACIR's 1984 inventory applied one of the new techniques of intergovernmental regulation to a policy goal, such as protecting endangered species of plants and animals, for the first time.

Only 25 percent of the statutes enacted between 1981 and 1990 addressed substantially new issues or problems. These included laws:

- Removing hazardous asbestos from schools;
- Establishing national standards for truck licensing;
- Setting national requirements for truck size and weight;
- Discouraging drug abuse by federal grantees and contractors;
- Notifying local communities about hazardous chemicals;
- Establishing a uniform minimum legal age for purchasing alcoholic beverages;
- Reducing lead contamination in school water supplies; and
- Promoting access to polling places by the elderly and physically handicapped.

A few of the new laws, such as the *Clean Air Amendments of 1990*, combined refinements and expansions of existing requirements with regulations targeted at new problems like acid precipitation. The remainder of the post-1980 statutes, however, expanded or modified existing regulatory goals and programs, such as adding testing requirements and identifying additional contaminants in the *Safe Drinking Water Act*; codifying and expanding prohibitions against various forms of discrimination; and expanding coverage of state and local government employees in *Social Security* and Medicare. Six of the laws were designed to reverse recent court decisions, thus restoring and in some cases expanding the coverage of earlier rules and requirements. Included in this category were the:

- *Child Abuse Amendments of 1984*;
- *Civil Rights Restoration Act of 1987*;
- *Education of the Handicapped Act Amendments of 1990*;
- *Handicapped Children's Protection Act of 1986*;
- *Older Workers Benefit Protection Act of 1990*; and
- *Voting Rights Act Amendments of 1982* (see Table 4-1).

Traditional Grant Conditions in the 1980s

For most state and local officials, any discussion of federal mandates would be incomplete without consideration of requirements that have been added recently to Medicaid and AFDC. These requirements are not included in Table 4-1, nor were they addressed in ACIR's

earlier catalog of regulatory statutes, because they do not employ one of the newer, more coercive techniques of regulation that have been the focus of this research. Rather, they are conditions attached to grant-in-aid programs.

Grant-in-aid conditions have long been considered by the courts to be voluntary contractual obligations. If a state or local government objects to the conditions attached to such a program, the courts have reasoned that it is free to avoid them by refusing to accept the federal government's offer of financial assistance.⁵ Although the courts have not acknowledged this distinction, the newer forms of regulatory federalism are more difficult to avoid, either because they apply across the board to all or to multiple federal aid programs, or because they derive their legal authority from some constitutional provision besides the conditional spending power.

Nevertheless, in programs such as AFDC and Medicaid, which are integral to the delivery of basic social benefits in the United States, neither legal nor analytical distinctions about the degree of compulsion imposed by different regulatory instruments seem significant. In contrast to small or modestly sized federal project grants, no state could opt out of multi-billion dollar programs like Medicaid because it objected to expanded federal requirements. Yet, during the late 1980s, mandated Medicaid benefit expansions were estimated to cost states an additional \$2.56 billion annually by 1992.⁶ These and other costly grant-in-aid service requirements are briefly reviewed below.

Medicaid

The FY 1991 federal budget mandated that, over the next 12 years, states must extend Medicaid coverage to all poor children between the ages of 6 and 18. (Previously, most states set the eligibility cutoff for individuals at income levels below the official poverty line.) By 1995, the new requirement is estimated to add approximately 700,000 children to the program, at a five-year cost of about \$1 billion to both the federal government and the states.⁷

An additional mandate in the *Budget Enforcement Act* requires that states cover the Medicare expenses of elderly beneficiaries living below the poverty line—at a five-year cost of several hundred million dollars. On the other hand, federal and state Medicaid programs are expected to save more than \$2 billion during this same period because pharmaceutical companies are now required to give the Medicaid program discounts on commonly used prescription drugs.

These new Medicaid requirements are part of a broader pattern of mandated coverage that emerged from the Congress during the late 1980s.⁸ In 1989, the Congress required coverage of poor children up to age 6 from families with incomes below 133 percent of the poverty threshold. Additional mandates were enacted the year before as part of the *Medicare Catastrophic Coverage Act*, which required coverage of the elderly poor and individuals threatened by spousal impoverishment? Initially, the added costs of these provisions were to be offset by state savings from expanded Medicare coverage. But when the Con-

gress subsequently repealed the catastrophic health insurance program, it left the Medicaid mandates in place.

The new requirements, combined with the rapid inflation of overall health care costs, increased the proportion of state spending budgeted for Medicaid from 9 percent in 1980 to 14 percent, or \$32.4 billion, in 1990.¹⁰

Aid to Families with Dependent Children (AFDC)

In 1988, the Congress launched a comprehensive overhaul of the nation's welfare system by enacting the *Family Support Act (FSA)*, P.L. 100-485. Although it was initially promoted and strongly supported by the nation's governors, this legislation imposed a wide variety of new mandates and service requirements on states and those local governments that provide and finance welfare benefits.¹¹ Specifically, the *Family Support Act* requires that all states:

- 8 Enact laws requiring employers to withhold automatically all court-ordered child support payments from the paychecks of absent parents;
- Follow federal guidelines when determining the size of court-ordered child support payments;
- 8 Expand their efforts to determine the paternity of children who receive public assistance benefits;
- Provide transitional health and child care benefits to welfare recipients who obtain low-paying, full-time employment, with sliding scale fees for such services based on ability to pay;
- 8 Participate in the *AFDC-UP* program, which allows two-parent families to qualify for welfare benefits if the principal wage earner is unemployed;
- 8 Require one parent to compensate the government for AFDC-UP benefits by working at least 16 hours per week in approved public or community service employment; and
- 8 Establish federally approved workfare programs that provide education, training, transportation, and child care services to specific categories of welfare recipients; and
- Gradually enroll expanding percentages of their welfare recipients in approved workfare programs.

Some of these provisions imposed substantial costs on state and local governments. For example, the mandatory extension of AFDC-UP programs to the 24 states that did not provide such benefits was estimated to cost the affected governments an additional \$674 million in AFDC and Medicaid expenses over five years.¹² Provision of transitional health and child care benefits to AFDC recipients who obtain employment was estimated to cost states and localities \$640 million over five years.¹³

On the other hand, some provisions of the act, such as the child support and workfare requirements, were estimated to save states hundreds of millions of dollars by reducing the size of the welfare population, although the stringent and specific requirements substantially reduced state and local flexibility in the provision of such services. Overall, the act was estimated to impose net costs of \$99 million on states and localities over five years.¹⁴

Immigration Reform

Another piece of legislation that imposed substantial service obligations on state and local governments, but also provided substantial resources to defray the initial costs, was the *Immigration Reform and Control Act of 1986 (P.L. 99-603)*.

Under this legislation, states were required to verify the legal status of immigrants who applied for public assistance benefits. The federal government, however, would reimburse them for the costs of implementing this requirement. In addition, the legislation established a capped entitlement of \$4 billion to compensate states for the increased costs of providing welfare, health, and education services to newly legalized immigrants. States also would be reimbursed for the expense of incarcerating illegal aliens who are convicted of criminal offenses.

Because states previously were obligated to educate the children of illegal aliens and because they were providing welfare benefits to many of the newly legalized aliens, the Congressional Budget Office estimated that states and localities initially would experience net budgetary savings under this legislation. These savings were estimated at \$2.3 billion over the first five years of the program. States, however, would subsequently experience increased costs when the federal reimbursement provisions expired.¹⁵

Water Resources Development Act of 1986

The Congress also enacted a major reform of the federal government's procedures for financing flood control, dam, and harbor projects during the 1980s. These reforms substantially increased the share of water project costs to be paid by local governments, port authorities, and private users and beneficiaries of such projects. Although the nonfederal share varies depending on the size and nature of the specific project, approximately 25 percent of the costs of new projects must be assumed by users and local governmental entities. This contrasts with local shares of 5-10 percent in prior years.¹⁶ The legislation also imposed new fees on the users of these facilities to help finance the federal government's \$12 billion share of the projects authorized in the measure. Furthermore, it allowed local authorities to assess their own fees and tolls to finance their increased share of project costs and maintenance.

The Congressional Budget Office estimated that overall state and local costs for the projects authorized in the bill would exceed \$900 million for the first five years of the program and \$4.9 billion for the period between 1991 and 1998. Subsequent annual operating and maintenance costs were estimated to be about \$300 million."

The Uneven Pace of Regulation and Reform

Not all intergovernmental regulatory statutes enacted during the 1980s imposed additional costs or regulations on

state and local governments. Complementing the Reagan administration's deregulation efforts, a number of laws granted a degree of regulatory relief to states and localities. These statutes affected the newer instruments of regulatory federalism and more traditional grant-in-aid programs.

Concerted regulatory relief activity comprised an important new dimension in the evolution of regulatory federalism. Nevertheless, the relief statutes were neither as numerous nor as significant as the enactments that increased regulation. Moreover, as the 1980s progressed, the political momentum favoring regulatory reform appeared to wane, while the adoption of new requirements accelerated.

In grant consolidation, for example, the greatest accomplishments in regulatory reform occurred in the first year of the Reagan administration. Later proposals had far less legislative success. In contrast, 70 percent of the new regulations passed during the prior decade were enacted after 1985 (see Figure 4-4).

Regulatory Relief Statutes Enacted in the 1980s

Nine statutes that provided some degree of regulatory relief to states and local governments are described in Table 4-2. Some of these relief measures were extremely modest in their effects. The *Tandem Truck Safety Act of 1984*, for example, allowed states to request changes in the Department of Transportation's (DOT) designations of highways required to provide access to larger and heavier trucks as mandated under the 1982 *Surface Transportation Act*. There were no guarantees that such requests would be granted.

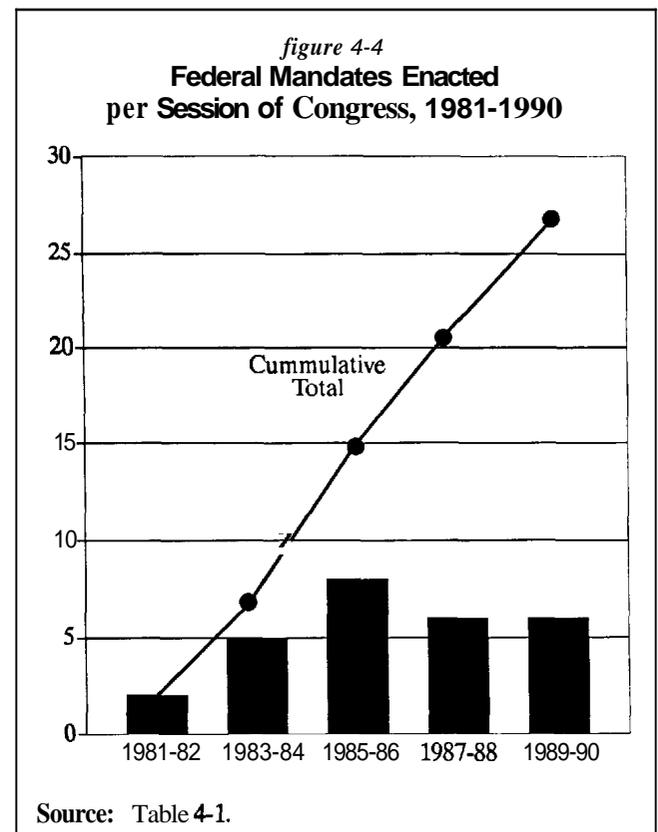


Table 4-2
**Congressional Enactments Providing Regulatory Relief to State and Local Governments,
 1981-1990**

Title	Public Law	Type*
Endangered Species Act Amendments of 1982 Revised act to speed up the process for adding and removing species from endangered classification and for resolving environmental and developmental conflicts; did not include administration proposal to require cost-benefit analysis.	97-304	CC
Education Amendments of 1984 Recognized alternative forms of instruction for teaching children whose primary language is other than English, and authorized the spending of 4 to 10 percent of bilingual education grants on specified alternative instructional programs.	98-511	CO
Local Government Anti-Trust Act of 1984 Overturned Supreme Court ruling in <i>Community Communications Inc. v. City of Boulder</i> , which held local governments liable for treble damage antitrust awards; restored the Federal Communication commission's authority to seek injunctions against local governments for anti-competitive practices.	98-544	DO
Tandem Truck Safety Act (1984) Amended the 1982 <i>Surface Transportation Act</i> , which established uniform national truck size and weight requirements on major highways, to permit states to request that the Department of Transportation exempt certain segments of the Interstate and primary highway systems from the uniform requirements for safety reasons.	98-554	CO
Fair Labor Standards Act Amendments of 1985 Restricted the impact of the Supreme Court's ruling in <i>Garcia v. San Antonio Metropolitan Transit Authority</i> by modifying provisions of the <i>Fair Labor Standards Act</i> to permit the use and substitution of compensation time for overtime work by state and local government employees; to allow the use of volunteers and special detail assignments; and to grant a one-year extension in the date for compliance.	99-150	DO
Omnibus Health Programs (1986) Abolished the health planning system established under the <i>National Health Planning and Resources Development Act of 1974</i> .	99-660	CO
Surface Transportation and Uniform Relocation Assistance Act (1987) Authorized states to raise the legal speed limit from 55 mph to 65 mph on rural interstate highways.	100-17	CO
School Asbestos Management Plans (1988) Amended the <i>Asbestos Hazard Emergency Response Act of 1986</i> to grant a six-month extension in the statutory deadline for submission of local school asbestos management plans to state authorities, due to delays in training of certified inspectors and planners.	100-368	DO
Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988 Provided flexibility in bilingual education programs and authorized additional funding for alternative instructional approaches.	100-297	CO

Key:
 CC—Crosscutting Requirement
 CO—Crossover Sanction
 DO—Direct Order
 PP—Partial Preemption

Indeed, DOT's initial regulations permitted large trucks to use **38,000** miles of primary and access roads that state highway departments had deemed unsafe or unsuitable for such use. Although states eventually succeeded in removing 17,000 miles of highways from the initial designation, the Federal Highway Administration subsequently added **19,000** miles to its original list.¹⁸ Similarly, the *School Asbestos Management Plans Act* of **1988** granted local school districts a brief extension in the deadline for submitting **asbestos** cleanup plans to state authorities, largely because there were not enough **inspectors** trained by the Environmental Protection Agency to assist them, **as** the law required. But the **act** did nothing to ameliorate the often substantial **costs** imposed by the original cleanup mandate.

Other relief statutes provided greater benefits, but still fell **short** of the changes advocated by many regulatory reformers. For example, the **1982** amendments to the *Endangered Species Act* **simplified** and accelerated procedures for listing endangered species, but the Congress specifically rejected far more sweeping proposals by the Reagan administration to require cost-benefit analysis. Similarly, the federal bilingual education program was amended twice during the **1980s** to allow more flexibility and funding of alternative approaches for instructing children from non-English **speaking** backgrounds. Yet, these alternative approaches, which were favored by many educators and local school districts, remained a relatively small element of the program.

However, some of these statutes did provide substantial regulatory relief to state and local governments. The **1987 Surface Transportation Act** permitted states to raise the legal speed limit to **65** mph on rural interstate highways without suffering previously required cutbacks in federal funding.

In two other important cases, the Congress granted relief from regulatory obligations imposed by judicial interpretations of statutes. One was the *Local Government Anti-Trust Act* of **1984**, which overturned the Supreme Court's ruling in *Community Communications Inc. v. City of Boulder*. This legislation restored the status quo ante by exempting local governments from liability for triple damage awards in antitrust lawsuits.

The following year, the Congress passed the *Fair Labor Standards Act Amendments* of **1985** (FLSA), which modified the Supreme Court's ruling in *Garcia v. San Antonio Metropolitan Transit Authority* (see Chapter 6). The amendments redefined the FLSA application of minimum wage and overtime provisions to state and local governments. Specifically, it:

1. Altered the overtime provisions to make compensation time available to state and local employees in lieu of overtime pay under specified conditions;
2. Exempted from coverage as employees local government volunteers who receive modest compensation for their services; and
3. Eliminated retroactive liability for compliance with FLSA requirements and deferred application of the new requirements for one year.

Overall, the Congressional Budget Office (CBO) estimated that these legislative changes would "significantly reduce the budgetary impact of extending FLSA to state and local governments," although the precise savings were considered highly variable and **uncertain**.¹⁹ CBO's preliminary estimates of the cost of extending application of the FLSA to states and localities ranged from \$0.5 billion to **\$1.5** billion, depending on local collective bargaining agreements in force and variations in the use of volunteers, scheduling, and personnel management practices. Subsequent analysis by the U.S. Department of Labor estimated that the amended FLSA would still affect some **7.7** million state and local government employees at an added cost of about **\$612** million annually.²⁰

Regulatory Relief through Grant Consolidation

Due to the efforts of the Reagan administration, the Congress also created a net total of **12** new block grants between **1981** and **1990**. Many of these grants substantially expanded state and local flexibility in the use of federal funds and significantly reduced traditional administrative and reporting requirements.

Most of the new block grants, however, were passed very early in President Reagan's first term. Although **24** additional block grants were recommended throughout the **1980s**, the Congress rejected most of these proposals. Furthermore, several earlier block grants were either terminated or partially transformed into categorical grants.

The most striking success occurred in **1981**, when the Congress consolidated **77** separate categorical programs into nine new or modified block grants as part of the *Omnibus Budget Reconciliation Act of 1981*. Originally, President Reagan recommended an even more sweeping set of consolidations, combining **85** federal programs into seven broad block grants. Although the Congress modified the president's proposals—particularly in health care—by consolidating fewer programs and retaining greater federal oversight and reporting requirements, this single effort combined more federal programs into block grants than all previous grant consolidations.

Establishment of these **block** grants allowed administration officials to condense and simplify the requirements attached to the **77** consolidated programs. In education, for example, the merger of **33** separately authorized programs into a single block grant allowed administrators to replace **667** pages of regulations governing the old programs with a single 20-page set of requirements.²¹ Reductions in other block grant regulations were equally dramatic. For example, the new health care block grants regulations totaled just **six** pages each and did little more than restate the limited statutory conditions on the use of the funds.

OMB estimated that the **1981** block grants reduced overall paperwork requirements by **5.9** million work hours, or **91 percent**.²² The seven block grants under the jurisdiction of the Department of Health and Human Services were estimated by the administration to have saved states **\$52** million alone in paperwork costs.

Table 4-3
Categorical and Block Grant Programs and Federal Outlays for Broad-Based and Other Grants
Selected Years FY 1975-1991

Type of Grant	Number of Grant Programs						
	1975	1978	1981	1984	1987	1989	1991 ^e
Block Grant	4	4	4	12	13	14	14
Categorical	422	492	534	392	422	478	543
Total	426	496	538	404	435	492	557
Outlays for General Purpose, Broad-Based, and Categorical Grants Billions of Dollars							
General Purpose	\$7.0	\$9.6	\$6.8	\$6.8	\$2.1	\$2.3	\$2.4
Broad-Based	4.6	11.5	10.0	13.0	13.1	12.7	14.5
Categorical	38.2	56.8	77.9	77.8	93.2	106.9	141.7
Total	49.8	77.9	94.7	97.6	108.4	122.0	158.6
Outlays for General Purpose, Broad-Based, and Categorical Grants Percentage of Total							
General Purpose	14.1%	12.3%	7.2%	7.0%	1.9%	1.8%	1.5%
Broad-Based	9.2	14.7	10.6	13.3	12.1	10.4	9.2
Categorical	76.7	73.0	82.2	79.7	86.0	87.6	89.4

e—estimate

Source: U.S. Advisory Commission on Intergovernmental Relations, *Characteristics of Federal Grant-in-Aid Programs to State and Local Governments: Grants Funded FY 1991* (Washington, DC, 1992), pp. 1 and 5.

These successes proved difficult to repeat. Over the next nine years, the Reagan and Bush administrations recommended that the Congress create an additional 26 block grants.²³ Yet, after 1981, only seven block grants were created, including: the *Job Training Partnership Act of 1982*, which revised and restructured the *Comprehensive Employment and Training Act* (CETA) block grant; the HOME Investment Partnerships program, which restructured low-income housing programs to provide state and local block grants for construction, rehabilitation, and rental assistance; and a child care block grant created under Title IV of the *Social Security Act*.

These achievements were partially counterbalanced by the repeal in 1985 of the Primary Care Block Grant. That action eliminated the little-used block grant option provided to states under the community health centers program. The federal government also terminated the Alcohol and Drug Abuse Treatment Block Grant in 1988. In a related departure from providing flexible funding to states and localities, the Congress eliminated the General Revenue Sharing program in 1986.

As a result, the proportion of federal aid devoted to block grants and other broad-based assistance declined from a high of 13.3 percent in 1984 to 10.5 percent in 1989 (see Table 4-3). Although this proportion may increase again, depending on appropriations for the newly created housing and child care block grants, block grant funding constituted a smaller proportion of federal aid when President Reagan left office than when he entered in 1981.²⁴

Statutory Regulation in Perspective

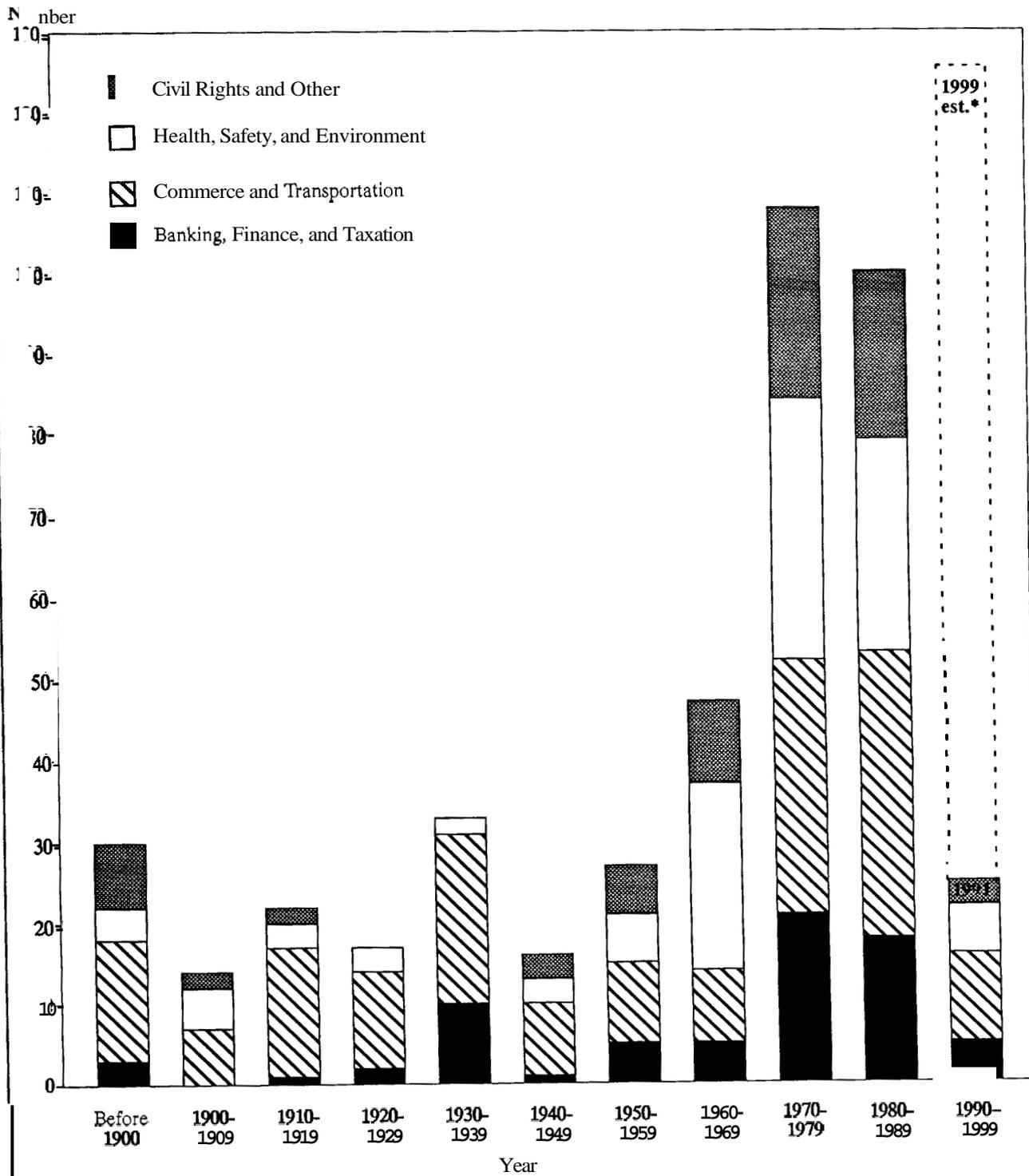
Between 1981 and 1990, the Congress enacted 27 statutes that utilized or significantly expanded one of the new instruments of regulatory federalism. As illustrated in Figure 4-4, this record of regulatory expansion was comparable to the energetic pace of intergovernmental regulation in the 1970s. The regulatory relief legislation of the 1980s was outweighed by the number and scope of regulatory expansions. They were further counterbalanced by expensive and intrusive conditions attached to traditional grant-in-aid programs.

Given the amount of attention devoted to regulatory relief and reform efforts during the 1980s, both statutory and administrative, this record of regulatory expansion may seem surprising. Yet, it is consistent with the record established in federal preemption of state and local authority during the same period. As shown in Figure 4-5, almost as many preemptive statutes were enacted between 1980 and 1988 as in the 1970s.²⁵ For these reasons, the 1970s and 1980s stand out from prior decades as periods of legislative activism.

Reasons for Legislative Activism

The factors contributing to this continued activism are many and complex. Constraints imposed on new federal spending programs by large and chronic budget deficits throughout the 1980s were important. Because regulatory

figure 4-5
Number of Federal Preemption Statutes Enacted per Decade: 1790-1991
 (by date of enactment and purpose)



* The 1990-1991 rate was multiplied by 5 to estimate how many preemptions might be enacted during 1990-1999.

Source: U.S. Advisory Commission on Intergovernmental Relations, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues* (Washington, DC, 1992), p. 7.

and preemption programs generally impose greater costs on regulated third parties than on the federal government, they represent, in federal budgetary terms, a relatively low-cost method of responding to issues and problems.

This also was an important factor contributing to the rapid growth of regulation in the economically troubled 1970s. As one former member of the Johnson administration observed in the mid-1970s:

Congressmen see themselves as having been elected to legislate. Confronted with a problem . . . their strong tendency is to pass a law. Ten years ago, money was Washington's antidote for problems. Now, the new fiscal realities. . . mean that Congress provides fewer dollars. Still determined to legislate against problems, Congress uses sticks instead of carrots.²⁶

Continued legislative activism also has been sustained by the erosion of once powerful barriers to federal regulatory action. Historically, opposition to initial federal involvement in a new field of policy activity was very strong. Once this opposition was overcome, through the enactment of landmark legislation, it typically proved to be much easier to enact subsequent program expansions? This pattern of "breakthrough politics" was an important element in the expansion of federal aid and regulatory programs in the 1960s and 1970s, and its legacy continued to shape politics in the 1980s.²⁸

Regulatory Federalism Becomes Commonplace

Although various regulations came under renewed scrutiny in the 1980s, the techniques of regulatory federalism had become commonplace and widely accepted. As noted earlier, many of the new requirements were expansions of regulatory programs and missions. Although they were significant expansions—imposing new costs and responsibilities on affected states and localities—they were clearly built on an established regulatory foundation. Moreover, their legitimacy was further enhanced by the strength and breadth of their political acceptance.

For instance, the sweeping *Clean Air Act Amendments of 1990* were supported strongly by the governors and state air pollution officials despite, and in some cases because of, their expanded federal controls. The public also has demonstrated strong support for tougher air pollution requirements. One recent survey found that 80 percent of respondents agreed with the strongly worded statement that, "Protecting the environment is so important that requirements and standards cannot be too high, and continuing environmental improvements must be made regardless of cost."²⁹

In some respects, the record of regulatory activity in the 1980s was all the more significant given the overall decline of substantive legislative activity. On average, the Congress passed 21 percent fewer public bills per legislative session during the 1980s compared to the 1960s.³⁰

Although the decline in total bills enacted averaged only 5 percent from the 1970s to the 1980s, the reduction in substantive legislation was even more dramatic. Whereas approximately 10 percent of all legislation passed in the mid-1970s was commemorative in nature, that proportion grew to nearly 50 percent a decade later." Thus, the 27 intergovernmental regulations adopted in the 1980s not only comprised an overall level of activity comparable to the 22 statutes enacted in the 1970s, they represented a far larger proportion of a diminished substantive legislative agenda.

To be sure, such comparisons overlook other important changes in the legislative process. Although the number of substantive enactments declined in the 1980s, the average length and complexity of the bills that were enacted increased considerably. The 1980s became notorious for the enactment of enormous budget reconciliation and omnibus appropriations bills, often rolling into one measure proposals that previously might have been enacted in dozens of separate bills.

Major Legislation Regulates Heavily

One way to account for this change is to focus solely on trends involving "major" legislation. Although judgments about what constitutes important or significant legislation are somewhat subjective, a defensible and validated set of prominent enactments has been compiled by one leading congressional scholar. It can be adapted to provide an additional perspective on the regulatory record of the past decade.

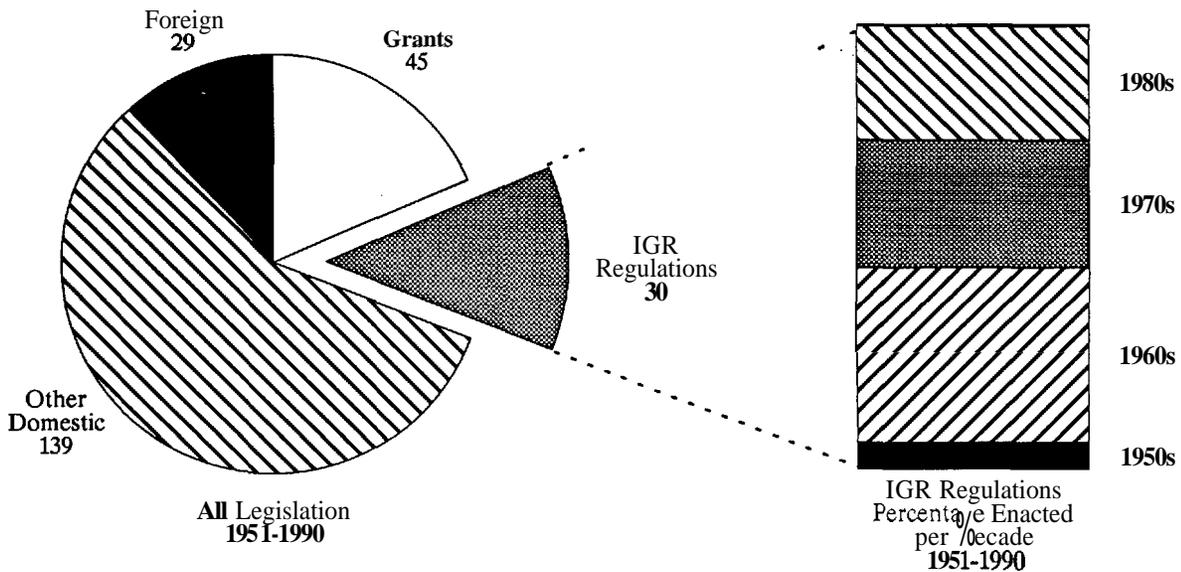
David Mayhew developed an inventory of major legislative enactments since World War II by combining assessments of the most notable legislative achievements at the conclusion of each session of the Congress with subsequent judgments by historians and policy specialists.³² He compiled 267 significant laws enacted between 1947 and 1988. The list includes all major policy fields, as well as intergovernmental grants and regulations. Among the latter, it includes some of the intergovernmental regulatory statutes compiled in Table 4-1, as well as many of the regulations examined earlier by ACIR. Prominent examples include the *Clean Air Act of 1970*, the *Clean Water Act*, the *Occupational Safety and Health Act*, and the *Civil Rights Act of 1964*.

To make Mayhew's inventory comparable with the time periods used in earlier sections of this chapter, the 22 laws enacted from 1947 to 1950 were deleted. Of the 245 significant laws enacted between 1951 and 1990, almost one-third were intergovernmental in nature. Thirty statutes (12 percent) were classified as intergovernmental regulations under ACIR's definition, and 45 statutes (18 percent) were intergovernmental grants (see Figure 4-6). The remainder addressed defense or foreign affairs or another aspect of domestic policy.

Eight of the 30 intergovernmental regulations (26 percent) were adopted in the 1980s. This is roughly comparable to the number enacted during the 1970s, but it is less than the 12 major regulations (39 percent) enacted between 1961 and 1970.

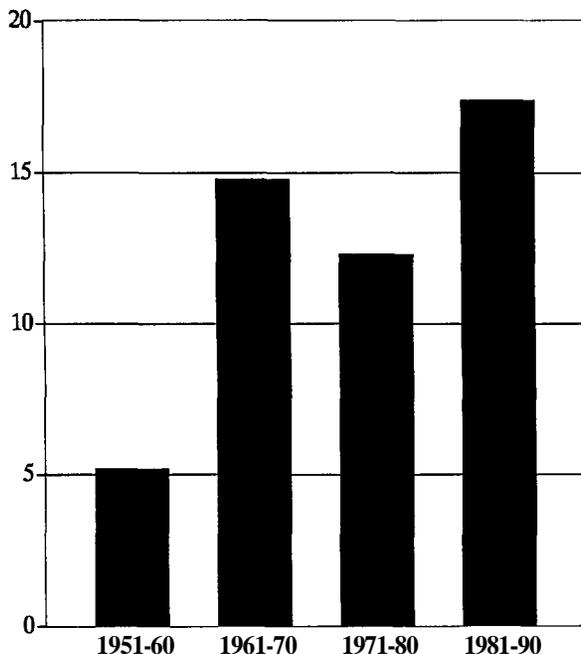
As noted earlier, however, less substantive legislative activity of all kinds occurred during the 1980s. Eighty-

Figure 4-6
Functional Makeup of Major Federal Legislation, 1951-1990



Source: David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-1990* (New Haven: Yale University Press, 1991), Table 4.1., and author's tabulations.

Figure 4-7
The Growing Proportion of Intergovernmental Regulation, 1951-1990
 (Percentage of All Major Laws)



Source: David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-1990* (New Haven: Yale University Press, 1991), Table 4.1., and author's tabulations.

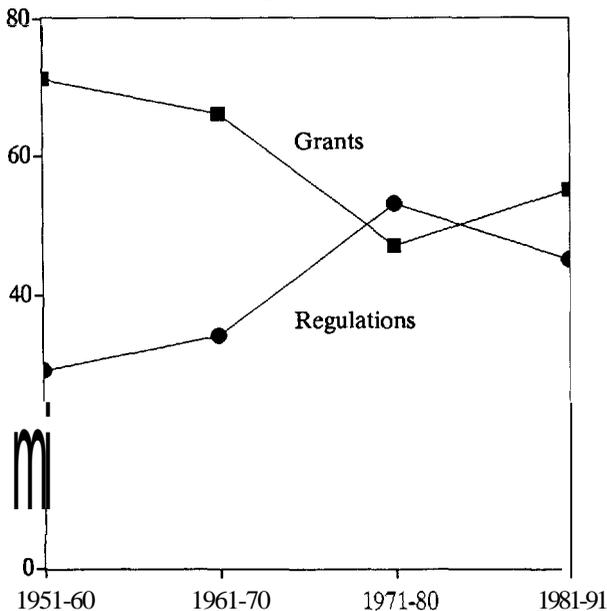
seven major statutes were enacted in the 1960s, compared with 73 during the 1970s and 46 during the 1980s. Thus, as a proportion of all significant legislative activity, the percentage of major statutes that were both intergovernmental and regulatory in nature was larger during the past decade than in any previous ten-year period (see Figure 4-7).

Analyzed in another way, these data reaffirm that the 1970s and 1980s stand out from earlier decades in their reliance on regulating state and local governments, rather than providing financial subsidies to these entities, to influence their actions. Whereas intergovernmental grants outnumbered intergovernmental regulations nearly two to one during the 1950s and 1960s, grants and regulations were employed with almost equal frequency during the past two decades (see Figure 4-8).

Conclusion

Whether one examines total intergovernmental regulations over time, federal preemption of state and local authority, or major federal legislation, the 1980s was a decade of continued legislative activity in regulatory federalism. This sustained level of regulatory activism appears all the more significant given the efforts devoted to regulatory relief during the decade and the overall reduction in legislative outputs. As with the findings concerning administrative rulemaking in Chapter 2, this conclusion demonstrates that regulatory federalism has become a permanent and prominent feature of contemporary intergovernmental relations.

Figure 4-8
The Changing Mix of Intergovernmental Grants and Regulation, 1951-1990



Source: David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-1990* (New Haven: Yale University Press, 1991), Table 4.1., and author's tabulations.

This finding assumes **even** greater importance given recent changes — and overall declines — in the significance of federal grant-in-aid programs. Assessing the cumulative financial costs of these new regulations for state and local governments, and placing them into the context of broader changes in fiscal federalism, is the subject of the next chapter.

Notes _____

¹ As explained in more detail in Chapter 1, crosscutting requirements are applied to many or all grants-in-aid across the board to advance national social and economic goals. Crossover sanctions are grant conditions that impose federal fiscal sanctions in one program area for failure to comply with federal requirements under another, separately authorized, program. Partial preemption programs entail minimum national regulatory standards under which administrative responsibilities may be delegated to states or localities provided they meet certain federal criteria. Direct order mandates are legal requirements imposed by the federal government on states and localities, enforced by civil or criminal penalties.

² See Arnold M. Kuzmack, "The Safe Drinking Water Act: A Case Study," in Michael Fix and Daphne A. Kenyon, eds., *Coping with Mandates: What Are the Alternatives?* (Washington, DC: Urban Institute Press, 1990), p. 73.

³ *Federal Register*, October 30, 1987, p. 41826.

⁴ U.S. General Accounting Office, *Legislative Mandates: State Experiences Offer Insights for Federal Action* (Washington, DC, 1988), p. 48.

⁵ See, for example, *Massachusetts v. Mellon*, 262 U.S. 447 (1923). For a more thorough discussion of judicial doctrines concerning regulatory federalism, see Chapter 6.

⁶ Julie Rovner, "Governors Ask Congress for Relief from Burdensome Medicaid Mandates," *Congressional Quarterly Weekly Report*, February 16, 1991, p. 417.

⁷ Spencer Rich, "Benefits Grow among Budget Cuts: Deficit-Reduction Bill Expands Health Aid for Poor Children," *Washington Post*, November 3, 1990.

⁸ See U.S. Advisory Commission on Intergovernmental Relations (ACIR), *Medicaid: Intergovernmental Trends and Options* (Washington, DC, 1992).

⁹ A condition whereby a spouse is required to exhaust virtually all financial assets in order to qualify the ill person for the federal Medicaid program.

¹⁰ "National Governors' Association, "States Feeling the Pressure for Increased Spending for Health, Transportation, Education, and Corrections," News Release, April 6, 1990, p. 1.

¹¹ "These provisions are summarized and reviewed in Mark Rom, "The Family Support Act of 1988: Federalism, Developmental Policy, and Welfare Reform," *Publius: The Journal of Federalism* 19 (Summer 1989): 57-73; and Julie Rovner, "Congress Approves Overhaul of Welfare System," *Congressional Quarterly Weekly Report*, October 8, 1988, pp. 2825-2831.

¹² Congressional Budget Office estimate contained in U.S. Congress, Senate Committee on Finance, "Family Support Act of 1988," Senate Report 100-377, to accompany S. 1511, 100th Cong. 2d. sess., May 27, 1988, pp. 92-93.

¹³ *Ibid.*

¹⁴ *ibid.*

¹⁵ U.S. Congress, House of Representatives, Committee on Judiciary, "Refugee Assistance Extension Act of 1986," Report to Accompany H.R. 1452, 99th Cong., 2d. sess., May 15, 1983, p. 30-31.

¹⁶ "1986 *Congressional Quarterly Almanac* (Washington, DC, 1987), p. 127.

¹⁷ U.S. Congress, Senate, Committee on Environment and Public Works, "Water Resources Development Act of 1986," Report to Accompany S. 1567, 99th Cong., 2d. sess., August 1, 1985, p. 126.

¹⁸ Barbara Harsha, "DOT Sets Final Routes for Large Trucks," *Nation's Cities Weekly*, June 19, 1984, p. 2.

¹⁹ U.S. Congress, Senate, Committee on Labor and Human Resources, "Fair Labor Standards Act Amendments of 1985," Senate Report 99-159, to Accompany S. 1570, 99th Cong., 2nd sess., p. 16.

²⁰ 29 CFR part 553. See Chapter 2 of this report for a more extensive discussion of FLSA's effects on states and localities.

²¹ Richard S. Williamson, "A New Federalism: Proposals and Achievements of President Reagan's First Three Years," *Publius: The Journal of Federalism* 16 (Winter 1986): 25.

²² *Ibid.*

²³ See Sandra Osbourn, *Block Grants: Inventory and Funding History* (Washington, DC Library of Congress, Congressional Research Service, November 21, 1986); and *The Budget of the United States Government*, various years.

²⁴ U.S. Office of Management and Budget, *Special Analyses: Budget of the United States* (Washington, DC, various years), Special Analysis H.

²⁵ ACIR, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues* (Washington, DC, 1992), p. 9. See also Joseph F. Zimmerman, *Federal Preemption: The Silent Revolution* (Ames: Iowa State University Press, 1991). A num-

ber of statutes, particularly partial preemptions and direct order mandates such as *The Safe Drinking Water Act Amendments of 1986* and the *Asbestos Hazard Emergency Response Act of 1986*, are counted as intergovernmental regulations in the current study and as preemptions in Figure 4-5. Federal statutes that preempt state regulation of the private sector but do not otherwise enlist or regulate state governments are not counted as intergovernmental regulations. By the same token, crosscutting requirements applied to federal grants are generally not included in the inventory of preemptions.

²⁶ Samuel Halperin, "Federal Takeover, State Default, or Family Problem," in Samuel Halperin, ed., *Federalism at the Crossroads: Improving Educational Policymaking* (Washington, DC: Institute for Educational Leadership, 1976), p. 19.

²⁷ See James Q. Wilson, "American Politics: Then and Now," *Commentary* (February 1979).

²⁸ See ACIR, *The Condition of Contemporary Federalism: Conflicting Theories and Collapsing Constraints*, Volume II of *The Federal*

Role in the Federal System: The Dynamics of Growth (Washington, DC, 1981), ch. 3; and *Regulatory Federalism: Policy, Process, Impact, and Reform* (Washington, DC, 1984), ch. 3.

²⁹ Quoted in Stephen Klaidman, "Muddling Through," *The Wilson Quarterly* 16 (Spring 1991): 73.

³⁰ Calculated from Table 6-4, "Congressional Workload," in Norman J. Ornstein, Thomas E. Mann, and Michael Malbin, *Vital Statistics on Congress, 1987-1988* (Washington, DC: Congressional Quarterly, 1987).

³¹ Roger Davidson, "The Presidency and Three Eras of the Modern Congress," in James Thurber, ed., *Divided Democracy: Cooperation and Conflict between the President and Congress* (Washington, DC: Congressional Quarterly, 1991), p. 65.

³² David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-1990* (New Haven: Yale University Press, 1991), Table 4.1.



The Monetary Costs of Intergovernmental Regulatory Enactments in the 1980s

5

The number of regulatory statutes grew substantially during the 1980s. Such regulatory growth raises a number of intergovernmental issues, including concerns about:

- Federal prescription of policy direction in areas of traditional state and local policymaking responsibility;
- Erosion of state and local institutional integrity by statutes governing essential features of personnel management, administrative structure, and governmental finance;
- Inefficiencies that result from the application of uniform national approaches to problems with varied geographic effects and public preferences;
- Dilution of public accountability resulting from multiple layers of governmental responsibility;
- Administrative costs imposed by detailed federal requirements; and
- Financial burdens of complying with federal laws and regulations.

Clearly, the monetary costs of federal statutes are not the only issue of intergovernmental concern. In many cases, such costs are not even the principal source of intergovernmental friction, but they do represent the most visible dimension of the mandate problem for many state and local officials.

How expensive were the regulatory accretions of the 1980s, both in absolute terms and relative to other fiscal trends? Did the financial requirements imposed during the 1980s grow in proportion to the number of new statutes, or were the most costly requirements targeted for deregulation? Are there reliable sources of information about the cumulative costs of federal intergovernmental regulation?

This chapter contains a summary of several efforts to estimate the costs of federal mandates and utilizes the

Congressional Budget Office estimates to develop a rough but conservative estimate of the fiscal costs of federal regulations to state and local governments.

Research on the Cumulative Costs of Federal Mandates

Remarkably little data are available on the cumulative costs of federal mandates, despite the significance of the issue for state and local government officials. In part, this is due to the difficulties and the costs of measuring such expenses.

Measuring Mandate Costs

Conceptually, mandate costs may include direct and indirect expenditures. In either case, only incremental costs are properly attributed to federal mandates; that is, only the portion of a mandated activity that is attributable to federal prescription rather than state or local option is counted. If a jurisdiction is engaged in a mandated activity prior to the federal requirement, for example, the costs should not be attributed to the mandate unless the jurisdiction would have chosen to stop providing the service without the federal prescription. The costs of a mandated activity also are not included in this estimate if a jurisdiction would have provided the service regardless of the federal requirement.¹

Obviously, determining what a jurisdiction might have done in the absence of federal activity can be highly subjective. The effort raises a host of methodological and conceptual problems. In some cases, existing trends in state and local activity and expenditures may be projected into the future, but this technique assumes that there will be no change in the pattern of behavior. Moreover, such information must be collected or estimated for a large number of laws and regulations across a broad spectrum of

jurisdictions, because the impacts of federal mandates have been shown to vary widely, depending on the nature and geographical scope of a problem, jurisdictional size, prior levels of activity, and varying patterns of state-local functional responsibility.

Such considerations led the authors of one pioneering study of the fiscal impacts of state and federal mandates to refrain from reporting any dollar figures because they found “a wide gap between . . . data needs . . . and data availability.” This caused them to be “uncomfortable about [the] accuracy” of their findings?

The Urban Institute Study. One influential *study* that addressed these methodological difficulties successfully was prepared by Thomas Muller and Michael Fix of the Urban Institute in 1980. Their research on ‘The Impact of Selected Federal Actions on Municipal Outlays’ measured the individual and cumulative financial costs of six federal regulations in seven different jurisdictions nationwide as of 1978.

They found that these requirements imposed “substantial” costs on local governments, averaging about \$25 per capita in 1978,³ a level corresponding to the funds received by these jurisdictions under General Revenue Sharing. Comparing mandate costs to the total amounts of federal aid received, this study estimated that the local costs of federal requirements averaged about 19 percent of all federal aid received (see Table 5-1).

Equally important, the study found that mandate costs varied widely between jurisdictions. Overall, the *Clean Water Act* was the most expensive requirement (see Table 5-2). Its annual costs ranged from a high of \$36.86 per capita in Newark, New Jersey, to a low of \$0 in Burlington, Vermont.⁴ Similarly, estimates of the per capita costs of complying with the *Education for All Handicapped Children Act* varied from \$24.82 in Fairfax, Virginia to \$0 in Cincinnati, Ohio.

The EPA Municipal Sector Study. In a study prepared for the U.S. Environmental Protection Agency (EPA) in 1988, Policy Planning and Evaluation, Inc., attempted to measure the cumulative costs of laws and regulations im-

Table 5-1
Federal Mandates as a Percentage of Total Federal Aid Received by Various Jurisdictions

City	Mandate Costs as a Percentage of Federal Aid
Alexandria, Virginia	11.3%
Burlington, Vermont	9.0
Cincinnati, Ohio	8.8
Dallas, Texas	15.4
Fairfax, Virginia	46.0
Newark, New Jersey	32.2
Seattle, Washington	15.2
Mean	18.9

Source: U.S. Congress, Joint Economic Committee, “The Impact of Selected Federal Actions on Municipal Outlays,” by Thomas Muller and Michael Fix, *Government Regulation: Achieving Social and Economic Balance*, Vol. 5, *Special Study on Economic Change* (Washington, DC, 1980), p. 368.

posed during the 1980s.⁵ They examined the fiscal effects of 22 recent and pending environmental regulations on a sample of 270 local governments,⁶ covering several of the most costly provisions.

Since the promulgation of Executive Order 12291 in 1981, the fiscal effects of significant regulations generally must be estimated and considered in conjunction with the review of proposed regulations. Such analyses, however, are performed on a case-by-case basis.

EPA’s *Municipal Sector Study* sought to analyze the combined effects of multiple regulations and to examine the ability of affected jurisdictions to finance compliance. While the researchers identified 39 major new requirements expected to affect local governments, they considered the fiscal effects of only the 22 for which detailed estimates of capital, operating, and administrative costs were available.’

Table 5-2
Annual Local Costs of Meeting Selected Mandates
(in millions)

	Operating Cost	Capital Costs	Total Costs
Clean Water Act	\$27.5	\$8.3	\$35.8
Education of the Handicapped	18.7	0.5	19.2
Unemployment Compensation	0.9	0.0	0.9
Access for the Handicapped	0.5	1.1	1.6
Bilingual Education	4.1	0.0	4.1
Total	51.7	9.9	61.6

Source: U.S. Congress, Joint Economic Committee, “The Impact of Selected Federal Actions on Municipal Outlays,” by Thomas Muller and Michael Fix, *Government Regulation: Achieving Social and Economic Balance*, Vol. 5, *Special Study on Economic Change* (Washington, DC, 1980), p. 368.

Despite these limitations, it was estimated, as shown in Table 5-3, that local governments would have to expect to spend approximately \$22 billion on capital expenditures to comply with pending and recently promulgated rules, along with \$2.8 billion in annual expenses for operations and maintenance. To finance such expenditures, it was estimated that 15 percent of local jurisdictions—all of them with populations of 2,500 or less—would at least have to double their fees for environmental services.⁸ Another 29 percent of local governments may need to raise fees for water, sewer, and solid waste disposal by 50-100 percent. Given the magnitude of these costs, it was estimated that as many as 21 percent of the nation's water and sewer systems may find it difficult to issue revenue bonds or obtain bank loans to finance the required capital improvements. Again, this was particularly true of smaller jurisdictions?

As with the Urban Institute study, this research indicated that the costs of environmental regulations were likely to vary widely. Variations reflect differences in jurisdictional size, the quality and capacity of existing facilities, demographics, and geographical location. Most communities, according to the authors, would be affected by only five or six of the 22 requirements. In terms of overall costs, the greatest impacts were likely to be felt by the smallest communities, some of which may have to invest in basic environmental controls for the first time, and the largest jurisdictions, many of which will be affected by the most costly requirements (see Table 5-4, page 62).

Estimating the Cost of Recent Federal Mandates Using the Congressional Budget Office Data

In 1981, the Congress enacted the *State and Local Government Cost Estimate Act*. This statute requires the Congressional Budget Office (CBO) to prepare estimates of the anticipated costs to be imposed on state and local governments by "significant" bills that are approved by congressional committees. Cost estimates are intended to be available to members of the House and Senate prior to floor consideration of such legislation, and they are generally included in committee reports.

The supporters of this "fiscal note" process believed that one cause of excessive regulatory costs was inadequate information. For example, one of the most costly intergovernmental statutes enacted during the 1970s was Section 504 of the *Rehabilitation Act of 1973*, which prohibited discrimination against handicapped persons in federally assisted programs. For public transportation programs alone, CBO estimated in the late 1970s that Section 504 would require \$6.8 billion over 30 years to equip buses with wheelchair lifts, to install elevators in subway systems, and to take other measures to expand access to public transit systems for the physically disabled.¹⁰ Rep. Charles Vanik, the original author of the provision, said that neither he nor anyone in the Congress "had any concept that it would

Table 5-3
Estimated Cumulative Capital and Operating Costs for Local Governments of Recent EPA Regulations
(thousands of 1986 dollars)

Population	Number of Governments	Drinking Water			Waste Water			Solid Waste			Miscellaneous			Cumulative		
		Total Capital	Annual Operation and Maintenance	Total Capital	Annual Operation and Maintenance	Total Capital	Annual Operation and Maintenance	Total Capital	Annual Operation and Maintenance	Total Capital	Annual Operation and Maintenance	Total Capital	Annual Operation and Maintenance			
0-500	12,291	\$491,640	\$49,164	\$282,693	\$24,582	\$24,582	\$24,582	\$454,767	\$61,455	\$1,253,682	\$159,783	\$1,253,682	\$159,783			
500-2,500	14,024	645,104	98,168	1,612,760	70,120	140,240	140,240	603,032	84,144	3,001,136	392,672	3,001,136	392,672			
2,500-10,000	6,279	659,295	87,906	1,657,656	69,069	232,323	232,323	715,806	69,069	3,265,080	458,367	3,265,080	458,367			
10,000-50,000	2,694	738,156	105,066	2,850,252	118,536	460,674	460,674	1,050,660	94,290	5,102,436	778,566	5,102,436	778,566			
50,000-100,000	323	365,636	35,530	1,061,055	42,636	140,505	140,505	248,710	23,256	1,866,294	241,927	1,866,294	241,927			
100,000-250,000	140	261,660	28,420	1,331,400	51,100	329,000	329,000	264,460	32,620	2,186,520	247,660	2,186,520	247,660			
250,000-500,000	35	224,735	23,135	1,062,390	45,185	94,465	94,465	139,965	21,420	1,842,715	184,205	1,842,715	184,205			
Over 500,000	24	240,240	34,968	2,465,808	96,984	164,040	164,040	231,168	25,584	3,575,544	321,576	3,575,544	321,576			
Total	35,810	\$3,626,466	\$462,357	\$12,324,014	\$518,212	\$2,434,359	\$1,392,349	\$3,708,568	\$411,838	\$22,093,407	\$2,784,756	\$22,093,407	\$2,784,756			

Source: Jasbinder Singh, Raffael Stein, Sanjay Chandra, and Brett Snyder, *Municipal Sector Study: Impacts of Environmental Regulations on Municipalities*, prepared for the Sector Study Steering Committee (Washington, DC: Environmental Protection Agency, September 1988), p. III-3. Calculated from Table III-2.

Table 5-4
Potential Increase in Annual User Charges Due to Environmental Regulations
(dollars per household)

Population	Types of Regulations				Total
	Waste Water	Drinking Water	Solid Waste	Miscellaneous*	
0-2,500	\$45	\$40	\$26	\$59	\$170
2,500-10,000	20	15	23	32	90
10,000-50,000	20	5	32	23	80
50,000-250,000	20	10	28	12	70
Over 250,000	60	15	51	34	160

* Includes school asbestos removal and underground storage tank requirements.

Source: Jasbinder Singh, Raffael Stein, Sanjay Chandra, and Brett Snyder, *Municipal Sector Study: Impacts of Environmental Regulations on Municipalities*, prepared for the Sector Study Steering Committee (Washington, DC: Environmental Protection Agency, September 1988), p. v.

involve such tremendous costs.”¹¹ To avoid such costly, unintended consequences in the future, the Congress subsequently required CBO to prepare “fiscal notes” for legislation with anticipated costs of \$200 million or more.

Cost Estimate Overview

The Congressional Budget Office began preparing such state and local cost estimates in November 1982. Between 1983 and 1988, it generated 3,554 cost estimates on 2,821 bills approved by House and Senate committees (see Table 5-5).¹² Although CBO is required to produce cost estimates only for bills with anticipated fiscal impacts of \$200 million or more, the agency prepares estimates for most bills affecting state and local governments, in part because much

of the work is already completed in the process of ascertaining whether legislation exceeds this dollar threshold.

CBO’s analysis of its cost estimates for the first six years of the program indicates that most of the legislation considered by the Congress and approved by committee imposed no financial costs on state and local governments. Eighty-nine percent of the estimates prepared by the budget office between 1983 and 1988 showed no intergovernmental fiscal impact (see Table 5-5). Only 382 of the fiscal notes prepared (11 percent), indicated a positive or negative financial impact on states and localities. The number of bills estimated to impose substantial costs of \$200 million or more was even smaller. By CBO’s estimates, only 89 bills would have produced such large financial impacts. This was a mere 3 percent of all bills analyzed, although it constituted about one quarter (23 percent) of the bills estimated to have some impact on state and local governments.

Problems and limitations

Although CBO generally provides the Congress with useful information that is not readily available from other sources, the cost estimating process has a number of problems and limitations. These problems can affect the timeliness and the quality of the fiscal information provided to the Congress.¹³

First, the estimates are often developed hurriedly at a relatively late stage in the legislative process. The law requires CBO to prepare cost estimates only for bills that are reported from committee for floor consideration, although the agency will prepare a fiscal note earlier on request. This provision reduces the agency’s workload to more manageable proportions, and it targets only those proposals most likely to be enacted. It also means, however, that information about regulatory costs and potential options may not be available to the members of Congress during subcommittee and committee deliberations when most important legislative decisions are made. Especially

Table 5-5
State and local Cost Estimates Prepared by CBO, 1983-1988

Estimates Prepared	1983	1984	1985	1986	1987	1988	Total	Average
For bills approved by committee	483	554	367	465	393	559	2,821	470
Other	90	87	166	125	138	127	733	122
Total	573	641	533	590	531	686	3,554	592
Estimates with no state/local cost	496	584	488	543	448	598	3,157	526
Percent	87%	91%	92%	92%	84%	87%	89%	89%
Estimates with some cost	77	57	45	47	83	73	382	64
Percent	13%	9%	8%	8%	16%	11%	11%	11%
Estimates with impact above \$200 million	24	6	14	8	22	15	89	15
Percent of Total	4%	1%	3%	1%	4%	2%	3%	3%
Percent of Bills with Some Cost	31%	11%	31%	17%	26%	21%	23%	23%

Source: Congressional Budget Office Bill Estimates Tracking System, in Theresa A. Gullo, “Estimating the Impact of Federal Legislation on State and Local Governments,” in Michael Fix and Daphne A. Kenyon, eds., *Coping with Mandates: What Are the Alternatives?* (Washington, DC: Urban Institute Press, 1990), p. 43.

in the House, relatively few bills are subject to floor amendment, and a broad degree of deference is usually granted to decisions rendered in committee. CBO often has only a few days in which to prepare cost estimates for inclusion in the committee report prior to floor consideration. Such timing also means that cost estimates do not necessarily reflect final legislation as it is passed. Fiscal notes are not generally prepared for, and do not reflect the effects of, substantive floor amendments that may significantly raise or lower state and local government costs. Thus, congressional consideration of Section 504 of the *Rehabilitation Act of 1973* might not have been altered had the fiscal notes process been in effect in 1973 because the provision was added as a floor amendment in the House.

CBO's cost estimating also is less systematic than its creators anticipated. Initially, CBO analysts hoped to create a substantial data base of state and local fiscal contacts and budgetary information over time. This, they hoped, would gradually create an increasingly detailed and reliable source of cost information. Unfortunately, the broad range of issues and the large number of governments affected have forced the process to remain essentially ad hoc in nature. As one CBO analyst noted:

The diversity of the data required [was] simply too great to allow the creation of one comprehensive database or network of contacts that could be tapped routinely for all state and local estimates. For example, in the past few years, CBO has had to analyze the potential effects of immigration reform, safe drinking-water requirements, prohibitions against sex discrimination in pension plans, and requirements for handicapped access to voting facilities.¹⁴

CBO's cost estimates, therefore, are often based on data provided by a relatively few state and local officials. This encourages analysts to focus on legislative provisions that are not strictly regulatory but for which fiscal information is quickly and readily available, such as the requirements for state and local governments to match federal funds in a given program area. On the other hand, despite wide geographic variations in the effects of regulations, the agency does not provide state-by-state estimates of costs because of the obstacles to compiling such detailed information in the time available.

Due to these limitations on time and information, CBO cost estimates are not always completed or made available for inclusion in committee reports. For example, no state and local cost estimates were provided for several of the new regulations identified in Chapter 4. Such exceptions included some requirements that ultimately proved to be very costly, such as the *Asbestos Hazard Emergency Response Act of 1986* and the *Water Quality Act of 1987*.

In addition, some bills are excluded from the act's coverage, even though they may impose significant costs. CBO does not produce cost estimates for the effects of tax legislation or appropriations bills, in large part because such legislation is exempt from the agency's federal budget estimating responsibilities.

Estimating the Costs of New Federal Legislation

Most observers believe that, despite their limitations, CBO cost estimates make a valuable contribution to the legislative process. They provide useful information that would otherwise be lacking from congressional decision-making, and they comprise the most complete data base available for estimating the cumulative costs of intergovernmental regulatory legislation enacted since 1981. A longitudinal analysis of these estimates can provide a partial, and generally conservative, estimate of the costs of recently enacted federal mandates.

Such an analysis begins by isolating state and local cost estimates for bills enacted into law. CBO estimates were prepared and published in committee reports for 504 out of a total of 690 statutes enacted between 1983 and 1990 (see Table 5-6).¹⁵

Eighty of these analyses estimated that state or local governments would experience costs or savings, while 424 anticipated no state or local cost or fiscal impact. The remaining 186 statutes had no cost estimates included in the committee report. Most of these were foreign policy and defense bills with little state or local impact, or tax and appropriations bills. Some of the statutes without estimates were significant intergovernmental regulatory measures, however, for which CBO lacked sufficient time or information to prepare a reliable cost estimate.

Of the 27 regulatory statutes discussed in Chapter 4, eight could not be included for technical reasons. Two of these were enacted prior to the implementation of the fiscal notes act, while the remainder were enacted in 1990

Table 5-6
CBO Analyses of State and Local Costs for Substantive Enactments, 1983-1990

Type of Impact Anticipated	1983	1984	1985	1986	1987	1988	1989	1990	Total
Number of laws with estimated cost or savings	4	27	6	15	5	11	1	11	80
Number of laws with no cost or state/local impact	39	71	30	77	30	113	26	38	424
Number of laws with no cost estimate in committee report	18	29	11	26	13	35	30	24	186
Total number of substantive statutes	61	127	47	118	48	159	57	73	690

Source: Author's tabulations, derived from *U.S. Code, Congressional and Administrative News*, various years.

and the costs associated with them did not accrue during the period being examined in this study. Full or partial cost estimates were prepared for 12 of the remaining 19 statutes. Six of these contained detailed annual cost estimates; two contained estimates of some, but not all, costs of the regulatory provisions; and four were judged to have no significant fiscal impact (see Table 5-7). Finally and significantly, CBO failed to produce usable cost estimates for seven statutes, including several that were costly and important.

For instance, CBO was unable to develop a reliable cost estimate for the *Voting Accessibility Act of 1984*, which required that state and local polling places be accessible to handicapped individuals. Agency officials informed the Senate Rules Committee that “the impact of this bill would vary widely among states and localities. . . and we do not have sufficient data to estimate total cost.”¹⁶ Similarly,

no cost estimate was prepared for the *Water Quality Act of 1987*, although the cost of pending waste water requirements was put at \$12 billion by EPA’s *Municipal Sector Study*.¹⁷

Even in cases for which cost estimates were prepared, the size and complexity of the legislation, and uncertainties concerning agency interpretation and implementation, sometimes prevented CBO from developing complete or adequate cost projections. CBO’s estimate for the *Asbestos Hazard Emergency Response Act*, for example, included only costs associated with state administration, training, and management. The far higher costs of developing local asbestos management plans and removing the material from local schools were not included. Similarly, CBO’s cost estimates for the *Hazardous and Solid Waste Amendments of 1984* did not include underground storage tank

Table 5-7

Availability of CBO State and local Cost Estimates for Recently Enacted Regulations

MONETARY COST ESTIMATES

- Social Security Amendments of 1983
- Consolidated Budget Reconciliation Act of 1985
- Education of All Handicapped Children Act Amendments of 1986
- Safe Drinking Water Amendments of 1986*
- Ocean Dumping Ban Act of 1988*
- Lead Contamination Control Act of 1988

PARTIAL COST ESTIMATE

- Hazardous and Solid Waste Amendments of 1984
- Asbestos Hazard Emergency Response Act of 1986*

NO COST OR MONETARY IMPACT ANTICIPATED

- Age Discrimination in Employment Act Amendments of 1986
- Handicapped Children’s Protection Act of 1986
- Civil Rights Restoration Act of 1987
- Fair Housing Act Amendments of 1988

NO ESTIMATE OF REGULATORY PROVISION(S)

- Highway Safety Amendments of 1984**
- Child Abuse Amendments of 1984
- Voting Accessibility for the Elderly and Handicapped Act
- Emergency Planning and Community Right to Know Act of 1986
- Commercial Motor Vehicle Safety Act of 1986**
- Water Quality Act of 1987
- Drug-Free Workplace Act of 1988**

REGULATIONS EXCLUDED FROM ANALYSIS

- Surface Transportation Assistance Act of 1982
- Voting Rights Act Amendments of 1982
- Americans with Disabilities Act (1990)
- Clean Air Act Amendments of 1990
- Education of All Handicapped Children’s Act Amendments of 1990
- Fiscal 1991 Budget Reconciliation Act

*Cost estimate not included in committee report; filed subsequently or attached to a comparable piece of legislation.

**No committee report filed, or regulatory provision was added subsequent to committee action.

requirements. EPA subsequently estimated the costs of complying with these provisions in the billions of dollars.¹⁸

Given these exceptions and limitations, CBO's state and local cost estimates provide only a partial and a generally conservative portrait of the incremental costs imposed by intergovernmental mandates in the 1980s. The following data should be interpreted not as precise cost estimates but as approximate indicators of the magnitude of the costs.

The eight statutes for which full or partial state and local cost estimates were prepared by CBO, along with their anticipated effects, are listed in Table 5-8. The cumulative costs of these regulations between fiscal years 1984 and 1991 were nearly \$9 billion, over half imposed by the expansion of Social Security coverage and the acceleration of state and local government Social Security payments in 1983.

Only regulatory measures that conform to ACIR's criteria of new regulatory methods, and for which detailed cost estimates were available, are shown in Table 5-8. As discussed in the previous chapter, however, certain federal grant conditions also are considered frequently to be mandates, and CBO provided detailed cost estimates for a number of these statutory requirements.

A more expansive definition of federal regulatory instruments would add 11 statutes to Table 5-8, eight of which imposed net costs on states and localities and three that were predicted to result in net budgetary gains (see Table 5-9, page 66). The cumulative total of those requirements imposing costs on state and local governments was estimated to exceed \$12.6 billion for the eight fiscal years examined.

By 1991, this was equal to the combined annual funding of federal grants for impact aid, vocational education, economic development (EDA), highway safety, and the block grants for community service, preventive health, and local education. These mandated costs were partially balanced by estimated savings of \$2.7 billion from Medicare provisions included in the *Deficit Reduction Act of 1984*, child support enforcement legislation, and immigration reform.¹⁹ The cumulative net impact of all of these regulatory requirements was approximately \$10 billion between fiscal years 1984 and 1991.

Data Limitations

These data have limitations. Many of the estimates were rough approximations to begin with, and their reliability decreases as costs are projected into the future. All of the estimates were prepared on the basis of general and sometimes vague statutory language rather than on specific administrative rules and regulations. Later estimates generated during the rulemaking process have often been different, and generally higher.

An example of this may be found in the safe drinking water program. CBO estimated the capital costs of complying with the *Safe Drinking Water Amendments of 1986* to range between \$25 billion and \$3.5 billion for public water systems. Subsequent EPA estimates of \$6 billion approximately doubled the capital costs for community water systems, which include some private as well as public systems.²⁰

Table 5-8

Congressional Budget Office Cost Estimates of New Regulations Conforming to ACIR Criteria, FY 1984-1991

Regulation	1984	1985	1986	1987	1988	1989	1990	1991	Total
Social Security Amendments of 1983 (P.L. 98-21)	1,238	443	258	242	741	771	803	838	5,334 ^a
Hazardous and Solid Waste Amendments of 1986 (P.L. 98-616)	9	8	6	4	3	2	1	0	33 ^a
Medicare Coverage for New State and Local Employees (COBRA, P.L. 99-272)			26	211	290	256	293	306	1,382 ^a
Asbestos Hazard Emergency Response Act (P.L. 99-519)				15	12	13	14	14	68
Safe Drinking Water Act Amendments (P.L. 99-339)							422	438	860
Ocean Dumping Ban Act of 1988 (P.L. 100-688)							32	33	65
Lead Contamination Control Act of 1988 (P.L. 99-572)						2	6	6	14
Education of the Handicapped Amendments of 1986 (P.L. 99-457)							575	600	1,175
Total	1,247	451	290	472	1,046	1,044	2,146	2,235	8,931

^aThe cost estimate has been extrapolated beyond the Congressional Budget Office's original five-year projection. Where a clear trend is present in CBO's five-year estimate, regression is used to project future costs. Where no clear trend is evident, the final year estimate has been adjusted for inflation.

Source: Congressional Budget Office cost estimates, various years.

Table 5-9
**Congressional Budget Office Cost Estimates of New Regulations and Grant Conditions,
 FY 1984-1991**

Regulation	1984	1985	1986	1987	1988	1989	1990	1991	Total
Social Security Amendments of 1983 (P.L. 98-21)	1,238	443	258	242	741	771	803	838	5,334"
Hazardous and Solid Waste Amendments of 1984 (P.L. 98-616)	9	8	6	4	3	2	1	0	33"
Medicare Coverage for New State and Local Employees (COBRA, RL. 99-272)	26	211	290	256	293	306	1,382"		
Pipeline Safety Authorization (P.L. 99-516)	50	52	54	57	213	^a			
Water and Reclamation Projects (P.L. 99-546)	3	2	3	6	9	23			
Lead Contamination Control Act of 1988 (P.L. 100-572)	2	6	6	14					
Veterans Benefits and Health Care (P.L. 99-576)	2	2	2	2	2	10			
Education of the Handicapped Amendments of 1986 (P.L. 99-457)	575	600	1,175						
Employment for the Disabled Act (P.L. 99-643)	2	4	6	7	19				
Water Resources Development Act (P.L. 99-662)	15	45	79	247	524	548	1,458"		
Medicare Catastrophic Coverage Act (P.L. 100-105)	140	260	190	190	780				
Medicare Catastrophic Act Repeal (P.L. 101-234)	270	385	460	,115					
Asbestos Hazard Emergency Response Act (P.L. 99-519)	15	12	13	14	14	68			
Safe Drinking Water Act Amendments (P.L. 99-339)	422	438	860						
Ocean Dumping Ban Act of 1988 (P.L.100-688)	32	33	65						
Family Support Act (P.L. 100-485)	-2	-22	160	136					
Subtotal	1,247	451	305	522	1,321	1,880	3,291	3,668	12,685
State Medicaid Savings Due to Changes in Medicare (DEFRA, P.L. 98-369)	2	-12	-21	-29	-39	-47	-56	-65	-267"
Child Support Enforcement (P.L. 98-378)	7	-59	-44	-39	-30	-20	-11	-196	^a
Immigration Reform and Control Act (P.L. 99-603)	-71	-153	-518	-753	-817	-2,312			
Subtotal	2	-5	-80	-144	-231	-595	-829	-893	-2,775
Grand Total	1,249	446	225	378	1,090	1,285	2,462	,775	9,910

^a The cost estimate has been extrapolated beyond the Congressional Budget Office's five-year projection. Where a clear trend is present in CBO's five-year estimate, regression is used to project future costs. Where no clear trend is evident, the final year estimate has been adjusted for inflation.

Source: Congressional Budget Office cost estimates, various years.

Moreover, these data omit several important and costly requirements for which detailed CBO cost estimates were not available. As noted earlier, CBO does not prepare cost estimates for revenue and tax legislation. Although no comparable estimates are available from other sources, Table 5-10 contains a list of major tax laws enacted in the 1980s that significantly affected state and local governments.

Also missing from Table 5-9 are several important statutes enacted in 1990, the effects of which will be felt in subsequent years. The National Conference of State Legislatures estimated that 20 additional mandates were enacted during the 101st Congress, imposing costs totaling \$15 billion on states over the next five years.²¹ Several of these laws are listed in Table 5-11, along with estimates of their potential fiscal impacts.

Finally, CBO's cost estimates generally assume that all funds authorized by the Congress will be appropriated. This assumption is particularly important for the statutes that were estimated to produce cost savings for states and localities, such as immigration and welfare reform legislation. Yet, the Congress rarely provides full funding for discretionary programs. ACIR's research into funding for federal aid programs, for example, found that appropriations in 1970 averaged only 65 percent of authorized levels.²² Although this research is dated, subsequent investigations of this topic found similar results.²³

Table 5-10
**Major Tax legislation Restricting
State and local Government Revenues**

1982	Tax Equity and Fiscal Responsibility Act	RL 97-248
	Limited use of proceeds and increased reporting requirements on industrial revenue bonds (IDBs).	
1984	Deficit Reduction Act of 1984	RL 98-369
	Imposed volume limitations on private activity bonds; additional restrictions placed on use of proceeds from IDBs.	
1986	Tax Reform Act	RL 99-514
	Eliminated the income tax deduction for state and local sales taxes.	
	Imposed stringent limitations on the use of bond proceeds; further restricted the volume of new bonds permitted; broadened and increased reporting requirements; and subjected interest earned on private activity bonds to alternative minimum tax.	
1990	Omnibus Budget Reconciliation Act	P.L. 101-508
	Raised the alternative minimum tax on interest from tax-exempt bonds.	
	Restrictions placed on deductions for state and local taxes for high-income taxpayers.	
	Required mandatory Social Security coverage for all state and local government employees not participating in public retirement plans.	

Source: Government Finance Officers Association.

Table 5-11
**Estimated Costs Associated
with Other Federal Regulations**

Asbestos Hazard Emergency Response Act	\$3.145 billion over 30 years ¹
Leaking Underground Storage Tank Requirements	\$428 million capital costs; \$128 million annually for operations and maintenance ²
Waste Water Treatment	\$12.3 billion capital costs; \$518 million annually for operations and maintenance ³
Americans with Disabilities Act	Less than \$1.0 billion ⁴
Clean Air Act Amendments of 1990	\$250-300 million annually ⁴
Medicaid Expansions in 1990 Budget Agreement	\$870 million over 5 years ⁴
Estimated State-Local Savings	
Fair Labor Standards Act Amendments of 1985	\$1.0-1.5 billion ⁴

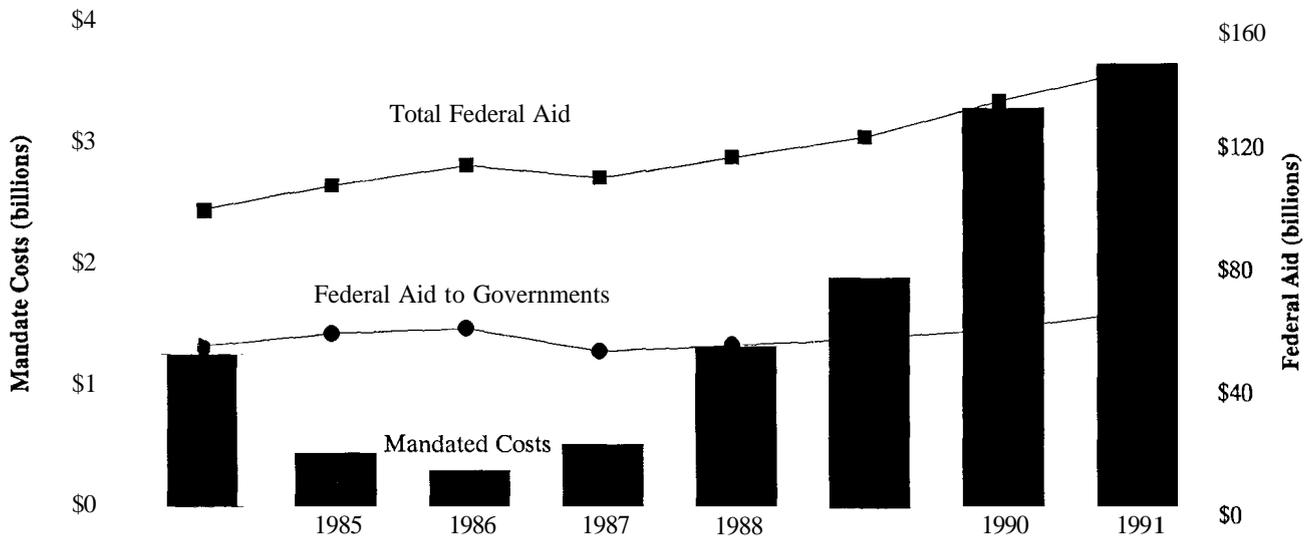
Sources: ¹*Federal Register*, October 30, 1987, p. 41845; ²*Municipal Sector Study*, pp. B-40,41; ³*Municipal Sector Study*, Table III-2; ⁴CBO cost estimates, various years.

Conclusion

Estimating the financial costs imposed on state and local governments by federal laws and regulations is a difficult and imperfect task. There is relatively little systematic data available about the costs of legislation enacted prior to the 1980s, although limited information about selective statutes in specific jurisdictions has indicated that the costs of federal mandates could be quite high. Similarly, most of the costly rulemaking initiatives reviewed in the case studies in Chapter 2 were regulatory products of earlier enactments. Only since 1983 have the Congressional Budget Office cost estimates been prepared for most proposed federal legislation with potential fiscal implications for state and local governments.

A review of these state and local cost estimates for enacted legislation indicates that the cumulative costs of recently adopted intergovernmental regulations are considerable and growing. Although lapses and limitations in the data make it impossible to be precise, a conservative estimate would place the costs of complying with federal requirements at between \$2.2 and \$3.6 billion in 1990, depending on the definition of mandate that is used. Since 1983, the cumulative costs of such regulatory provisions are estimated to range between \$9 billion and \$12 billion, not including the costs of requirements scheduled to take

Figure 5-1
Trends in Federal Aid and Mandate Burdens, 1984-1991



*Mandate costs include only those laws passed between 1983 and 1989 with Congressional Budget Office cost estimates.

Source: ACIR computation from Table 5-9

effect in the years ahead. Overall, as shown in Figure 5-1, the financial burdens imposed by federal laws and regulations have been increasing faster than the growth of federal aid since 1986. By fiscal 1990, the combined costs of these regulations were approximately equal to the amount of funding provided by the Preventive Health, Health Services, State Education, and the Community Services block grants.

It also is clear that federal requirements vary considerably in their fiscal effects. Some impose heavy financial burdens on certain states and localities, while others restrict policymaking options or limit administrative discretion without substantial fiscal implications. Both forms of federal governmental intervention, financial and nonfinancial, have remained lingering sources of intergovernmental concern throughout the 1980s and have provoked continuing legal challenges in the courts. The evolving judicial doctrines that have permitted the development and expansion of such regulations are examined in Part III of this report.

Notes

¹ A thorough discussion of these and other factors involved in conceptualizing and measuring the fiscal impacts of mandates can be found in Catherine H. Lovell et al., *Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts* (Riverside: University of California, Graduate School of Administration, 1979).

² *Ibid.*, pp. 150-151.

³ U.S. Congress, Joint Economic Committee, "The Impact of Selected Federal Actions on Municipal Outlays," by Thomas Muller and Michael Fix, *Government Regulation: Achieving Social and Economic Balance*, Vol. 5 of *Special Study on Economic Change*, 1980, p. 327.

⁴ *Ibid.*, p. 368.

⁵ Jasbinder Singh, Raffael Stein, Sanjay Chandra, and Brett Snyder, *Municipal Sector Study: Impacts of Environmental Regulations on Municipalities*, prepared for the Sector Study Steering Committee (Washington, DC: Environmental Protection Agency, September 1988).

⁶ Despite the title, the study examined impacts on townships, school districts, counties, and other local governments, as well as municipalities, as appropriate.

⁷ There was insufficient information about local government costs for the remaining 17 requirements. In some of these cases, EPA was still considering alternative rulemaking options with widely varying cost implications for local governments. In other cases, the effects on local governments were considered too uncertain to generate reliable estimates.

⁸ Singh et al., *Municipal Sector Study*, p. iii.

⁹ *Ibid.*, p. vi.

¹⁰ Congressional Budget Office, *Urban Transportation for Handicapped Persons: Alternative Federal Approaches* (Washington, DC, 1979), p. xi.

¹¹ Quoted in Timothy Clark, "Access for the Handicapped," *National Journal*, October 21, 1978, p. 1673.

¹² In some instances, more than one estimate is prepared for a single piece of legislation, due to differences between House and Senate bills and because of requests for estimates at other stages in the legislative process.

¹³ Many of the following issues are discussed in more detail in: Theresa A. Gullo, "Estimating the Impact of Federal Legislation on State and Local Governments," and Ann Calvaresi Barr, "Cost Estimation as an Anti-Mandate Strategy," in Michael Fix and Daphne A. Kenyon, eds., *Coping with Mandates: What Are the Alternatives?* (Washington, DC: Urban Institute Press, 1990), pp. 41-56; and U.S. Congress, Senate, Governmental Affairs Subcommittee on Government Efficiency, Federalism, and the District of Columbia, *Reauthorization of the State and Local Cost Estimate Act of 1981, Hearing on S. 1530*, Senate Hearing 100-192, 100th Cong., 1st sess., 1987.

¹⁴ Gullo, p. 44.

¹⁵ These statistics differ from those in Table 5-5 because they deal entirely with enacted legislation. Although CBO produced more than 3,500 intergovernmental cost estimates during this same period, this number includes duplicate estimates for companion House and Senate bills, estimates for bills that were not enacted into law, and estimates for particular amendments and bills at other stages of the legislative process.

¹⁶ U.S. Congress, Senate, Committee on Rules and Administration, "Voter Accessibility for the Elderly and Handicapped," Senate Report 98-590 to Accompany H.R. 1250, 98th Cong., 2d sess., August 9, 1984, p. 8.

¹⁷ Singh et al., *Municipal Sector Study*, p. 111-113.

¹⁸ *Federal Register*; October 30, 1987, p. 41845.

¹⁹ Child support enforcement illustrates the limitations of relying on cost alone as an indicator of the effects of federal regula-

tions. In this case, the Congress enacted highly prescriptive legislation that specified in great detail state procedures for collecting child support payments under specified circumstances. Although these conditions were highly intrusive, following them would result in considerable savings in welfare payments for both states and the federal government.

²⁰ Arnold M. Kuzmack, "The Safe Drinking Water Act: A Case Study," in Fox and Kenyon, eds., *Coping with Mandates*, p. 73.

²¹ Martha A. Fabricius, "Fiscal Impact of Proposed Mandates from the 102nd Congress," *State-Federal Issue Brief* 4 (November 1991): 1.

²² U.S. Advisory Commission on Intergovernmental Relations, *The Gap between Federal Aid Authorizations and Appropriations* (Washington, DC, 1970).

²³ Allen Schick, *Congress and Money* (Washington, DC: Urban Institute Press, 1980), p. 176.



Part III

The Judiciary and Regulation in the 1980s

The 1980s were judicially momentous years for federalism. The most significant U.S. Supreme Court opinions were *Garcia v. San Antonio Metropolitan Transit Authority* (1985), *South Dakota v. Dole* (1987), and *South Carolina v. Baker* (1988). It was these decisions that led ACIR to examine the judicial aspects of federalism more closely and to explore ways of rebalancing the federal system through constitutional reform. During the 1980s, therefore, the Commission issued a number of reports addressing these issues, including *Reflections on Garcia and Its Implications*

for Federalism (1986), *A Framework for Studying the Controversy Concerning the Federal Courts and Federalism* (1986), *Federalism and the Constitution: A Symposium on Garcia* (1987), *Is Constitutional Reform Necessary to Reinvigorate Federalism* (1987), and *Hearings on Constitutional Reform of Federalism: Statements by State and Local Government Association Representatives* (1989).

In addition to these reports, the Commission adopted two recommendations on constitutional balance in March 1988 (see page 5 and Table 8-4).



Regulatory Consequences of a New Judicial Philosophy

6

There is no theme more familiar to constitutional law than the clash between federal power and state autonomy. The history of that struggle reveals, by and large, a long losing battle by the states.¹

The Short Life of NLC

If not the most important, then at least the most noted intergovernmental constitutional development of the 1980s was the U.S. Supreme Court's repudiation of its 1976 decision in *National League of Cities (NLC) v. Usery*.²

At issue in *NLC* were 1974 amendments to the *Fair Labor Standards Act* (FLSA) extending national minimum wage and maximum hour requirements to most state and local employees, an action alleged by numerous state and local interests to be an unconstitutional encroachment on state autonomy.³ The Supreme Court agreed, ruling:

Insofar as the 1974 amendments operate directly to displace the states' abilities to structure employer-employee relationships in areas of **traditional governmental functions** . . . they are not within the authority granted Congress by the Commerce Clause. . . . Congress may not exercise its power to regulate commerce so as to force directly upon the states its choices as to how essential decisions regarding the conduct of **integral governmental functions** are to be made.⁴ (Emphasis added.)

Moreover, the Court went on to note that the federal government's commerce power, as applied to the states and their political subdivisions, encountered an affirmative barrier in another portion of the Constitution, namely, the Tenth Amendment.

Court's Holding Lacks Staying Power

Despite the initial euphoria that *NLC* engendered among state and local officials, the Court's narrow holding, achieved by a tenuous concurrence, boded ill for the doctrine's longevity. According to Bruce La Pierre, "Justice Rehnquist's opinion, coupled with Justice Blackmun's separate concurrence, invited at least three different tests of state immunity from national regulation."⁶

The district court, on remand, took the view that traditional state activity enjoyed absolute immunity from federal regulation.⁷ The absolute immunity position, however, was cast in considerable doubt by Rehnquist's own disclaimers regarding the relatively narrow parameters of *NLC*, which were inclusive of activities related to the commerce clause but presumably exclusive of numerous additional constitutional provisions, including the spending power, the Fourteenth Amendment, and the war power.⁸

Further complicating *NLC*'s subsequent explication was Blackmun's concurrence, predicated on his understanding that the Court had, in fact, applied a balancing test to the outcome of the case, "permitting . . . national regulations to the states when the national interest was 'demonstrably greater' . . ."⁹

The results of these interpretive difficulties were apparent almost immediately. Far from bringing uniformity to the interpretations of the circuit courts, *NLC* appeared to breed a virtual cottage industry of interpretation of the various legal actions, each accompanied by lower court rulings indicative of doctrinal confusion, dissatisfaction, or both.¹⁰

Five years of such chaos found the Supreme Court revisiting *NLC* in what would ultimately be a vain attempt to clarify constitutionally protected areas of state sovereignty. In *Hodel v. Surface Mining and Reclamation Association*, the Court endeavored to explain its position by constructing a "Tenth Amendment test":

First, there must be a showing that the challenged statute regulates the "States as States."
Second, the federal regulation must address mat-

ters that are indisputably “attributes of state sovereignty.” And third, it must be apparent that the States’ compliance with the federal law would directly impair their ability “to structure integral operations in areas of traditional functions.”

However, the *Hodel* criteria did little to quell mounting disquietude over what increasingly was seen as a “rule of state immunity. . .unsound in principle and unworkable in practice. . ..”¹²

From Constitutional Protection to Political Safeguards: *Garcia v. San Antonio Metropolitan Transit Authority*

*The attempt to draw the lines of state regulatory immunity in terms of “traditional governmental functions” is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which National League of Cities purported to rest.*¹³

In 1985, after less than a decade of wrestling with seemingly intractable doctrinal demarcations, particularly the identification of so-called “traditional governmental functions,”¹⁴ a sharply divided Supreme Court¹⁵ overturned *NLC*, virtually abandoning any specific constitutional defenses against federal regulation of state functions. Rather, a five-member majority suggested in *Garcia v. San Antonio Metropolitan Transit Authority*¹⁶ that “if there are to be limits on the Federal Government’s power to interfere with state functions—as undoubtedly there are—we must look elsewhere to find them.”¹⁷ That “elsewhere,” according to Justice Harry A. Blackmun, was not to be discovered in specific constitutional limitations, but in the national political process.

Presumably relying heavily on such treatises as Herbert Wechsler’s “Political Safeguards of Federalism”¹⁸ and Jesse Choper’s *Judicial Review and the National Political Process*,¹⁹ Blackmun asserted that

the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.²⁰

Blackmun’s *Garcia* analysis invited sharp rebuttals from three of the four dissenters. Justice Lewis F. Powell, Jr., citing a previous ACIR report, condemned the Court’s premise that states, in the latter twentieth century, could

find adequate protection in the national political forum. On the contrary, he asserted that the Court’s view was “clearly at odds with the proliferation of national legislation over the past 30 years, . . . [because] ‘a variety of structural and political changes occurring in this century . . . combined to make Congress particularly insensitive to state and local values.’”²¹ Moreover, in a statement reminiscent of the Court’s pre-*NLC* relegation of the Tenth Amendment to a mere “truism,”²² Powell accused the majority of once again reducing that amendment “to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.”²³

Equally disturbed by the abdication of precedent, Justice Sandra Day O’Connor accused the Court of reducing federalism to a “weak ‘essence,’”²⁴ while Justice William H. Rehnquist maintained confidently that *NLC*’s principles would “once again command the support of a majority of this Court.”²⁵

Outright rejection of precedent being rare, especially within a decade after the initial decision, *Garcia* generated considerable analytical and critical literature.²⁶ Although commentators disagree about the broader consequences of the case, it seems that the Court has decided “that protecting the states from . . . exertions of federal regulatory authority is no longer a judicial function.”²⁷ That conclusion has both constitutional and structural implications.

States in the Founders’ Vision

Among the by-products of *Garcia* was a renewal of interest in the Founders’ vision of a federal balance. Justice Blackmun, for instance, cited considerable evidence for the proposition that the Founders believed the political process to be the appropriate and sufficient forum for protecting the “residuary and inviolable sovereignty” of the states.²⁸ In *Federalist* No. 46, Madison explained that the federal government “will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual states, or the prerogatives of their government. . . .” Madison added, “James Wilson observed that, ‘it was a favorite object in the Convention’ to provide for the security of the States against federal encroachment and that the structure of the Federal Government itself served that end.”³⁰

In contrast, Justice Powell noted that decisive legal restraints, including the Tenth Amendment, were added to the Constitution specifically to allay Anti-Federalist fears that the national political system would overwhelm state autonomy.³¹ Moreover, in *Federalist* No. 45, Madison speaks of separate constitutional “spheres of sovereignty.”³²

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain to the State Governments are numerous and indefinite. The former will be exercised principally on such external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liber-

ties and properties of the people; and the internal order, improvement, and prosperity of the State.³³

While both sides appear to have fallen prey to “quote mongering” from the *Federalist*, this is understandable when dealing with constitutional federalism. Most observers agree that the federal principle is a, if not the, core underpinning of the American political structure, yet, determining its parameters from the text of the Constitution can be a daunting task.³⁴ Thus, both the *Garcia* majority and its dissent were forced to rely more on the “spirit of the Constitution”³⁵ and on historical developments since its ratification than on any explicit legal instructions.

The Court, however, placed itself in the difficult position of determining its own role in the resolution of federal questions, deciding whether it would avoid such challenges or continue to act as “the balance wheel of the federal system.”³⁶ Its holding in *Garcia*, of course, was for the former.

According to Martha Field, a proponent of the *Garcia* logic, judicial restraint is supported by constitutional vagueness and historical evolution.³⁷ After all, 200 years of commerce clause development have seen the steady accumulation of federal power, generally attained with the full acquiescence of the Court, at the expense of state autonomy. Nor has the legal-political amplification of the commerce power occurred in a constitutional vacuum: the forces of nationalism were similarly abetted by expansive interpretations of non-commerce related Article I, Section 8 provisions as well as by the additions of the Sixteenth, Seventeenth, and, most important, Fourteenth Amendments.

In addition, the Tenth Amendment provides little constitutional solace for defenders of an *NLC*-style judiciary. Even the *Garcia* dissent was forced to conclude that the amendment, at its inception, lacked affirmative content. Thus, Justice O’Connor notes that:

The text of the Constitution does not define the precise scope of state authority other than to specify, in the Tenth Amendment, that the powers not delegated to the United States by the Constitution are reserved to the States.³⁸

The march of time and the impervious nature of the Tenth Amendment notwithstanding, several commentators view *Garcia*’s constitutional bequest as disturbing at best. “Even if the Constitution is inconsistent with the notion of state sovereignty, there is no doubt that our federalism is based on the continuance of the states as fully independent and autonomous governments.”³⁹ According to A.E. Dick Howard, the Court’s decision to withdraw from the federalism fray breaches

a basic tenet of Anglo-American constitutionalism [that] . . . no branch of government should be the ultimate judge of its own powers . . . [and that] principle is especially important in a system that, in addition to being federal, looks to checks and balances and the separation of powers to restrain arbitrary government.⁴⁰

States in the Political Process

The Court’s determination to disengage itself hinges on its belief that “the internal safeguards of the political process” act as adequate informal checks and balances on the possibility that unduly burdensome congressional actions will be promulgated.⁴¹ As mentioned previously, the Court found theoretical support for this position in the work of Herbert Wechsler and, more recently, that of Jesse Choper.

In what he calls his “Federalism Proposal,” Choper maintains that:

The federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-a-vis the states; rather, the constitutional issue of whether federal action is beyond the authority of the central government and thus violates “states’ rights” should be treated as nonjustifiable, final resolution being relegated to the political branches—i.e., Congress and the President.⁴²

Choper’s argument is basically a defensive one. Responding to the debate over the legitimacy and proper bounds of judicial review, Choper seeks to salvage the judiciary’s constitutional function by confining it to questions of individual liberties—presumably, that aspect of constitutional guarantee most in need of protection against the majoritarian political process.

Thus, Choper draws a fundamental distinction between individual liberties and states’ rights, asserting that while individual liberties involve issues of principle, states’ rights involve questions of practicality:

When government action abridges constitutionally ordained personal liberties, it seems likely that, at least in view of short-run concerns for efficient public administration and businesslike accomplishment of laudable public objectives, the commonweal would usually better be served by compromising the interests seeking judicial protection. Thus, one of the major reasons for Federalist opposition to a bill of rights was the fear that it would inhibit effective government. . . . Constitutional issues of federalism, on the other hand, are a distinguishable species. One of the principal purposes behind the abandonment of the Articles of Confederation and the adoption of the Constitution—if not *the* major purpose—was to establish a workable central government, one whose authority was unquestionably limited but one nonetheless with sufficient power to cope with problems which prior experience had shown the states incompetent to resolve separately and for which national action was desperately needed.⁴³

As a result, because courts are less suited to the resolution of pragmatic issues than the Congress and the President, federalism questions are more properly the preserve of the latter two branches. Presumably, the judiciary hus-

bands its scarce political resources for the individual rights battles to which it is institutionally most suited.

Moreover, Choper notes numerous points of institutional intersection between states' rights and national political interests, sufficient, supposedly, to preserve essential aspects of state governance.⁴⁴ That, it will be recalled, was the basis of the majority's holding in *Garcia*.

Choper's argument concerning the relationship between individual liberties and judicial solicitude has considerable philosophical and historical merit.⁴⁵ Several commentators, however, have taken issue with his now virtually Court-sanctioned "Federalism Proposal," arguing, in effect, "that the political process is not necessarily a reliable mechanism for protecting state autonomy, and to that extent is an insufficient restraint on federal commerce power."⁴⁶

Howard, for example, contends that the Court's *Garcia* abnegation rests on two "erroneous suppositions," one institutional, the other political.⁴⁷ Institutionally, the Court, along with academic supporters like Choper, assumes "that the states play a major role in structuring the national government."⁴⁸ Under an older set of rules, that assumption had considerable validity: state legislators selected senators, states largely controlled electoral mechanisms and determined the franchise, and the drawing of congressional districts was a state responsibility.⁴⁹

The old rules, however, no longer apply. The Senate has long since become a popularly elected body. Numerous judicial holdings and U.S. laws virtually have federalized the franchise and national election standards, and the Supreme Court has circumscribed state redistricting power. The result has been a severe truncation of the states' ability to shape and influence national institutions and processes.

Moreover, the states have suffered a corresponding decline vis-a-vis supposed national "political safeguards."⁵¹ For instance, state political parties "do face a difficult and very different political environment today."⁵² Gone are the days of the powerful state "kingmakers." In addition, the nationalization of campaign finance has served to "strengthen the financial bond between candidates and national party committees and encourage state and local parties to defer to the fiscal and organizational superiority of their federal counterparts. . . ."⁵³

Finally, the intricate web of financial and regulatory relationships characteristic of modern intergovernmental relations is largely of federal design and dictate, the result, in part, of broad interpretations not only of the commerce clause, but of the spending, taxing, and war powers, and of the Fourteenth Amendment. The result is often a sense of "top-downness" with the states cast in the unenviable role of fiscal supplicants and regulatory enforcers.

Given such a scenario, Howard, among other legal analysts,⁵⁴ has concluded that "it is no less legitimate and proper for the Supreme Court to concern itself with assuring the health of federalism than it is for the Court to uphold individual liberties as such."⁵⁵

Exploring the "Weak Essence" of Federalism: *South Carolina v. Baker*

If Garcia was "thenew and clean slate on which to inscribe the future jurisprudence of state-national relations," the Court's first markings on that slate leave a dangerous message.⁵⁶

Any assumptions that the doctrinal reversal in *Garcia* would itself be overturned in the wake of personnel changes on the Court or would affect only issues related to the commerce clause were overturned within three years⁵⁷ with the Court's decision in *South Carolina v. Baker*.⁵⁸

At issue was the constitutionality of the *Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)*.⁵⁹ In relevant part, the act withholds the federal income tax exemption on long-term bonds issued by state and local governments unless the bonds are in registered form.⁶⁰ South Carolina, supported by the National Governors' Association (NGA), filed suit, charging that the act abrogated Tenth Amendment principles and violated the doctrine of intergovernmental tax immunity.⁶¹ The Supreme Court, in a 7-1 holding, disagreed with the state on both counts.⁶²

Tenth Amendment Arguments Rejected

In support of its Tenth Amendment claim, South Carolina contended that TEFRA forced states to issue bonds in registered form only, effectively banning the issuance of unregistered or bearer bonds.⁶³ Deferring to the Court's reasoning in *Garcia*, the state argued that the political process had failed to protect state interests because relevant portions of TEFRA were "imposed by the vote of an uninformed Congress relying upon incomplete information."⁶⁴ Be that as it may, the Court rejoined that "nothing in *Garcia* or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation."⁶⁵

Intervening on behalf of South Carolina, NGA further questioned the Tenth Amendment validity of the act, arguing that resultant legislative, administrative transition, transaction, and interest rate differential costs diminished state sovereignty by "commandeering . . . state legislative processes."⁶⁶ Once again, however, the Court demurred to the Tenth Amendment thrust of the complaint, suggesting that

"commandeering" is . . . an inevitable consequence of regulating a state activity. . . . That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional directive!

Moreover, the Court found "NGA's theory of 'commandeering'" disturbing and, finally, insupportable because it "would not only render *Garcia* a nullity, but would also re-

strict congressional regulation of state activities even more tightly than it was restricted under the now overruled *National League of Cities* line of cases.”⁶⁸

Intergovernmental Tax Immunity Not Accepted

Nor was the Court more sympathetic to the plaintiffs' contention that TEFRA unconstitutionally violated the doctrine of intergovernmental tax immunity.⁶⁹ Treating the doctrine in its narrowest sense, Justice William J. Brennan, Jr., writing for the majority, concluded that the doctrine only prevents the federal government from directly imposing certain taxes on the states. Finding “no constitutional reason for treating persons who receive interest on government bonds any differently than persons who receive income from other types of contracts with the government,” the Court held that intergovernmental tax immunity did not reach state bond income.⁷⁰

Baker's Impact

The constitutional importance of *Baker* can hardly be overstated. According to one observer:

Baker has all the indicia of a landmark decision. First, it is the Court's most extensive treatment of state sovereignty and the tenth amendment since *Garcia*. Because it answers questions that *Garcia* left open and generally extends *Garcia's* rationale, *Baker* is likely to overtake *Garcia* as the leading case on American federalism. Second, *Baker* addresses a matter of acute political interest. The Court's decision upholds congressional regulation of one of the most significant sources of state and local revenue and does so in terms that will permit even more extensive regulation in the future. The importance of *Baker* makes the decision's doctrinal, substantive, and jurisprudential shortcomings especially disappointing.⁷¹

If *Baker* was the opening salvo in the *post-Garcia* intergovernmental contest for power, the Court would appear to have severely weakened the constitutional reserve of the states. First, *Baker* appears to signal an even further retreat on the part of the Court away from principled questions of federalism. Thus, while the *Garcia* Court left the states largely to the mercy of the national political process, it did so only after some analysis of the costs and benefits of that process.⁷² Moreover, *Garcia* “did take care to leave open some possibility [albeit a narrow one] of a state sovereignty limitation on congressional powers. . . .”⁷³

Baker, on the other hand, treats the need for such analysis casually,⁷⁴ saying that if a state is represented in the national political process, any examination of the outcome of that process would amount to an inappropriate second-guessing of congressional intent and method.⁷⁵ On one reading, *Baker*

reduces the tenth amendment to a vacuous procedural presumption: unless a state can show it was denied participation in national politics, the

Court will automatically find that the political process provided it with sufficient protection.⁷⁶

This analytical posture calls into serious question what act would be sufficient to warrant Court action on behalf of the states. However, like the *Garcia* majority before it, the *Baker* majority did not “attempt any definitive articulation. . . [of] the defects that might lead to invalidation” of a congressional statute,⁷⁷ except to suggest that a state would have to prove the unlikely possibility “that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it **politically isolated and powerless.**”⁷⁸ (Emphasis added.)

Additionally, *Baker* seems unconcerned with arguments placing “the power of the states to raise revenue [among] the core substantive guarantee[s] of the American federal system. . . .”⁷⁹ Instead, any such discussion was left to Justice O'Connor in her lone dissent. O'Connor criticized the Court for “never expressly consider[ing] whether federal taxation of state and local bond interest violates the Constitution.”⁸⁰ Moreover, she not only suggested a breach of Tenth Amendment principles but argued “that the States' autonomy [maybe] protected from substantial federal intrusions by virtue of the Guarantee Clause of the Constitution.”⁸¹

While the revenue-raising effects of the contested portions of TEFRA may indeed be “de minimis,”⁸² the Court's reasoning in *Baker* may give “Congress free rein to tax bond interest income unconditionally,”⁸³ a possibility that could have a major impact on the fundraising capacities of the states.⁸⁴ Thus, “if there is any danger [in decisions like *Baker*], it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.”⁸⁵

The Spending Power in the Courts

The countervailing maelstroms created first by *NLC* and then by *Garcia* barely brushed long-standing (but unsettled) jurisprudence in the area of conditioned spending under Article I, Section 8. As mentioned above, *NLC* sidestepped the issue when Justice Rehnquist declined to “express . . . [any] . . . view as to whether different results might obtain if Congress [sought] to affect integral . . . state . . . operations . . . under . . . the spending power. . . .”⁸⁶

Despite massive changes in the fiscal and regulatory configurations of grants-in-aid, the federal judiciary has remained generally consistent in its view of conditional spending over a span of nearly seven decades.⁸⁷ The federal courts have uniformly maintained that the decision to enter into a financial contract, being voluntary as to both parties, allows the grantor considerable discretion to attach conditions as long as the grantee “knowingly accepts the terms of the ‘contract’.”⁸⁸ As a result, state parties to federal financial assistance have been denied relief from

allegedly unconstitutional conditions because they “voluntarily submitted to federal law”,⁸⁹ because the “participation [was] purely at their option”,⁹⁰ and because the acceptance of the grant was “not compulsory on the state. . . .”⁹¹

In many respects, therefore, the spending power is more far-reaching and less subject to limits than any other Article I, Section 8 power of the Congress. According to Albert J. Rosenthal,

the validity of an exercise of the commerce power (traditionally the most important vehicle for federal regulation) requires not only that there be the necessary relationship between the legislation and interstate or foreign commerce but also that such constitutional limitations as those protecting civil liberties and the autonomy of state and local government not be breached. . . . Similarly in the case of the taxing power even though a tax satisfies the comparatively few express constitutional requirements it still will fail if it impinges too greatly upon first or fifth amendment rights or perhaps if it encroaches too far into the autonomy of the states.⁹²

By contrast, “it is much less clear that conditional spending is invalid even when it invites forfeiture of individual liberties or intrudes deeply into state autonomy.”⁹³

The Doctrine of Unconstitutional Conditions

In part, the problem of conditions attached to federal spending is related to the much larger subject of so-called “unconstitutional conditions.”⁹⁴ The idea is that government, having the power to deny privileges, also has the power to grant certain favors on its own terms, “including the surrender of otherwise applicable constitutional right.”⁹⁵ Thus, in the 19th century, the Supreme Court ruled that part of a state’s power to exclude foreign companies from engaging in local commerce included the authority to grant such a privilege conditioned on the alien corporation’s surrender of its right to press legal claims in federal court.⁹⁶

Such a tolerant approach to governmental power was relatively short lived however.⁹⁷ Beginning in the 20th century, the Court ostensibly took quite the opposite approach, holding that government may not “condition its largess upon the willingness of the [recipient] to surrender a right he would otherwise be entitled to exercise.”⁹⁸ The term ostensibly is key here, for while this approach has frequently been followed in dealing with individual rights,⁹⁹ it has not held the same sway in dealing with states’ rights. To date, the Court has found no area in which Congress might not spend its way around what would otherwise be the constitutional prerogatives of state power.

South Dakota v. Dole. Illustrative is the Court’s 1987 holding in *South Dakota v. Dole*.¹⁰⁰ At issue in that case were amendments to the *Surface Transportation Assistance Act* designed to encourage states to raise their minimum drinking age to 21. The 1984 amendments, titled the *Na-*

tional Minimum Drinking Age Act,¹⁰¹ contained a threat to withhold 5 percent of federal highway funds from states that failed to impose the higher drinking age within the first year after enactment and another 10 percent if compliance was not achieved by the second year.¹⁰²

In challenging the act, South Dakota relied partly on the now familiar argument that the Congress may not achieve indirectly through conditioned spending what it cannot achieve directly through the other enumerated powers. Not surprisingly, the Court rejected the state claim, as it has done consistently in the past, countering that Congress may use its spending prerogative to achieve local goals as long as its activities are “in pursuit of the general welfare,”¹⁰³ unambiguous so that states are “cognizant of the consequences of their participation,”¹⁰⁴ related to “the federal interest in particular national projects or programs,”¹⁰⁵ and separate from “constitutional provisions [that] may provide an independent bar to the conditional grant of federal funds.”¹⁰⁶

The Court’s fourth point is especially important because it was proffered in response to the second part of South Dakota’s contention, that is, that relevant provisions of the act, in essence, constituted an unconstitutional condition. Hence, inasmuch as the 21st Amendment appears to place the “regulation. . . of liquor. . . squarely within the ambit of those powers reserved to the States . . . ,”¹⁰⁷ the Congress, in implementing a minimum age, would seem to “condition its largess upon the willingness of the [states] to surrender a right which [they] would otherwise be entitled to exercise. . . .”¹⁰⁸

Not only did the Court reject the state’s argument, it used the opportunity to reformulate the doctrine of unconstitutional conditions, stating now that the

“independent constitutional bar” limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptional proposition that the power may not be used to induce the states to engage in activities that would themselves be unconstitutional.¹⁰⁹

Put another way, by virtue of conditioning the receipt of highway money on the states’ willingness to set the drinking age at the national minimum, the Congress “induced the states to engage in a constitutional activity, and, therefore, its exercise of the spending power was legitimate.”¹¹⁰

This newly reframed doctrine of unconstitutional conditions unsettled several commentators, including dissenting Justices Brennan and O’Connor. Reasserting the doctrine in more familiar terms, Brennan contended that “since States possess [the] constitutional power [to regulate liquor under the Twenty-First Amendment], the Congress cannot condition a federal grant in a manner that abridges this right.”¹¹¹

Similarly, Richard Epstein, branding *Dole* “a statutory end run around the twenty-first amendment,”¹¹² found the Court’s opinion to be theoretically “unsatisfactory.”¹¹³

Where conditions involve powers reserved to the states under the tenth amendment, the Court has traditionally required that the federal government show a sufficiently compelling interest to override the state interest. The danger that Congress will leverage its broad spending powers to subvert the twenty-first amendment is as great as the danger that it will leverage its power to subvert the tenth amendment, and should be met with the same judicial response. The state, in its effort to decide whether or not to accept the condition, has to decide whether it values the loss in federal revenue more than it values its own independence in setting the minimum age for liquor consumption. In principle, if Congress has the power to reduce highway revenues to the states by five or ten percent, there is no reason why it could not exclude any state from participation in the program by cutting off its revenues entirely. The power of discretion therefore allows the federal government to redistribute revenues, raised by taxes across the nation, from those states that wish to assert their independence under the twenty-first amendment to those that do not.¹¹⁴

According to James Corbelli, the result of *Dole* is to extend even further Congress' already considerable spending reach because "the Constitution only restricts congressional power to place conditions on federal grants if those conditions induce states to act unconstitutionally."¹¹⁵

Nevada v. Skinner. Corbelli's conclusion was supported in a 1989 ruling by the Ninth Circuit in *Nevada v. Skinner*.¹¹⁶ The case involved the first challenge to the national 55-65 mile per hour (mph) speed limit. Not unlike the minimum drinking age requirements that were the impetus for *Dole*, the maximum federal speed regulations of 55 mph (in 1987, the speed limit was increased to 65 mph on certain low-density roads) were added by amendment to a long-since promulgated highway funding agreement. Failure to comply would result in denial of all future federal highway aid to the non-complying state.¹¹⁷

At issue in *Skinner* was a 1986 Nevada statute allowing the state Department of Transportation to post speed limits as high as 70 mph. The regulations contained a provision requiring the speed limit to be lowered at such time that Nevada was threatened with the loss of highway aid. Federal highway officials, responding within one minute of the establishment of the first 70 mph stretch of road, advised the state transportation department that all funds would be withheld unless the speed limit was reduced.

Nevada sued against enforcement of the federal speed provision, arguing that "the national limit violated the 'coercion' limitation on the Federal Government's Spending Power."¹¹⁸ At least theoretically, "in some circumstances the financial inducement offered by the Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"¹¹⁹

Relying heavily on the Supreme Court's ruling in *Dole*, and noting that "the coercion theory has been much

discussed but infrequently applied in federal case law and never in favor of the challenging party," the circuit court decided for the national government, upholding the federal speed limit.¹²⁰ Judge Reinhardt's opinion dismissed the state's claim in an early footnote:

Almost all the reservations about the permissible scope of the federal spending authority have come not from courts, but from commentators. In fact, the parties have cited to us only one case—the generally discredited Supreme Court opinion in *United States v. Butler*. . .—which declined to interpret expansively the congressional spending power.¹²¹

Implied Preemption and the Dormant Commerce Clause

[C]ongress has a wonderful power that only judges and lawyers know about. Congress has the power to keep silent. Congress can regulate interstate commerce just by not doing anything about it. Of course when congress keeps silent, it takes an expert to know what it means. But the judges are experts. They say that congress by keeping silent sometimes means that it is keeping silent and sometimes means that it is speaking. If congress keeps silent about the interstate commerce that is not national in character and that may just as well be regulated by the states, then congress is silently silent, and the states may regulate. But if congress keeps silent about the kind of commerce that is national in character and ought to be regulated only by congress, then congress is silently vocal and says that commerce must be free from state regulation.¹²²

Garcia, Baker, and Dole were about national legislative power and what, from a certain state perspective, appears to be an inexorable congressional expansion of regulatory terrain. There is, however, another side to regulatory activity, one in which the congressional role is merely implied or altogether nonexistent and in which the judiciary, rather than playing the role of facilitator, takes the lead.¹²³ This has been the case in the increasingly arcane doctrinal thicket of preemption.

Generally speaking, preemption doctrine rests on the long-standing authority of the federal government to preclude state and local activities under the supremacy clause of the Constitution (Article VI, clause 2). Under that provision, federal power, in some areas of regulation, must be exclusive of state power on "the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."¹²⁴

Simple on its face, the doctrine of preemption has nonetheless been the constitutional progenitor of legal claims and counterclaims dating almost to the nation's founding.¹²⁵ The result today is a confusing array of

court-inspired principles which, in large part, place preemption decisions in the hands of the federal judiciary. Of particular note in this regard are the doctrine of implied preemption or supersession and the so-called dormant or negative commerce clause.¹²⁶

Judicial Power and implied Preemption

Unlike the dormant commerce clause, which springs from a direct, though unstated, constitutional lineage,¹²⁷ judicial preemption is initially rooted in statutory interpretation. A preemption occurs when the Congress overrides a state statute. In many instances, the success or failure of such an appropriation depends on the judiciary assuming the character of constitutional umpire, balancing the intent of the Congress against an alleged state interest.

Although preemptive intent is most clearly discerned from “express” congressional declarations,¹²⁸ the courts have typically sanctioned two additional forms of preemption, “implied” and “conflict”:

Absent explicit pre-emptive language, Congress’ intent to supersede state law altogether may be found from “ ‘a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,’ because ‘the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,’ or because ‘the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.’ ” Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when “compliance with both federal and state regulations is a physical impossibility.”¹²⁹

Regardless of form, the actual preemptive order is based on judicial analysis of federal legislative intent.

In its earliest applications, the Supreme Court tended to perceive “broad preemptive intent in virtually all federal legislation.”¹³⁰ Such complete deference to federal regulatory authority, however, was replaced, during the 1930s, with an approach more solicitous of state interests. Thus, the Court required that “preemptive intent be ‘clearly indicated’ and ‘definitely expressed’ within . . . statutory language.”¹³¹ In the absence of clear delineation of congressional purpose, state law stood.

The 1940s saw yet another change in the judicial attitude. Thus, in *Hines v. Davidowitz*,¹³² the Supreme Court asserted:

There is not . . . any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. . . . [The judiciary’s] primary function is to determine whether, under the circumstances of

[a] particular case, [a state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.¹³³

In fact, the *Hines* standard was “sobroadly phrased and inherently adaptable that congressional intent to preempt could be found in virtually any area of comprehensive federal legislation.”¹³⁴

Although *Hines* remains controlling in many respects, the Court has sought, in recent years, to narrow the standards by which a federal preemption may be presupposed, exhibiting a general unwillingness to supersede state action under the ambiguous circumstances of vague congressional intent.¹³⁵ As early as 1963, the Court began to espouse the position

that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.¹³⁶

Moreover, the Court has relied increasingly on the relatively simple “dual compliance” mode of preemptive analysis, inquiring less whether a state action frustrates some broad congressional purpose and more whether conformity with both federal and state law is literally impossible.¹³⁷ Recent case law in the field of nuclear regulation is illustrative of contemporary Court doctrine.

In *English v. General Electric Company*,¹³⁸ a unanimous Court held that a nuclear facility employee may sue for state tort relief despite federal preemption of the “entire field of nuclear safety concerns.”¹³⁹ Although Section 210 of the *Energy Reorganization Act of 1974* grants a federal administrative remedy to aggrieved nuclear employees, the Court refused to rule that the section preempted state remedies, noting that the fact that “every subject that merits congressional legislation is, by definition, a subject of national concern . . . cannot mean . . . that every federal statute ousts all related state law. . . .”¹⁴⁰

To a considerable extent, the *English* decision followed the logic espoused in two earlier cases of nuclear-related litigation: *Silkwood v. Kerr-McGee*¹⁴¹ and *Pacific Gas & Electric Company v. State Energy Resources Conservation and Development Commission*.¹⁴² The former case revolved around the decedent claim of Karen Silkwood, who was allegedly contaminated by plutonium while a Kerr-McGee employee. Specifically before the Court was Kerr-McGee’s contention that federal law preempted the state-authorized award of punitive damages for conduct related to radiation hazards. Given that the Court had previously recognized congressional occupation of the field of nuclear safety,¹⁴³ *Silkwood* required a deft judicial balance between “the States’ traditional authority to provide tort remedies to their citizens and the Federal Government’s express desire to maintain exclusive regulatory authority over the safety aspects of nuclear power.”¹⁴⁴

In *Silkwood*, the Court tipped the scales toward long-standing state prerogatives. Despite near-exclusive federal guardianship over the nuclear industry, the Court

interpreted congressional silence on remedies for radiation injuries, together with a failure to provide federal remedies to persons injured by corporate nuclear misconduct, as sufficient sanction for state-authorized redress. The upshot of both *Silkwood* and *English* is that “even congressional goals that are tightly-stated will be interpreted narrowly when testing traditional forms of state action for conflict with those goals.”¹⁴⁵

At issue in *Pacific Gas* was a California moratorium on certification of new nuclear plants pending development of means to dispose of high-level radioactive waste. Preemptive conflict in the case emerged “from the intersection of the Federal Government’s efforts to ensure that nuclear power is safe with the exercise of the historic state authority over the generation and sale of electricity.”¹⁴⁶ Again, a unanimous Court deferred to traditional state authority, noting that although federal preemption of the field of nuclear safety is complete, the state’s economic rationale for the plant stoppage lay outside the federally occupied field. Moreover, the justices declined to give a broadly preemptive reading to the Atomic Energy Act’s implied purpose of promoting the nationwide use of nuclear power. Rather, the Court asserted that had the Congress intended to develop nuclear generation “at all costs,”¹⁴⁷ it would have specifically barred state actions prohibiting its utilization.

Whatever current Court doctrine, preemption remains a mine field of shifting standards, difficult for even the most astute constitutional scholars to pinpoint with unerring accuracy or to “reduce . . . [to] general formula” One commentator places preemptive decisions within the general judicial ambit of balancing essential interests, noting that the courts will infer a “heavy presumption against preemption” where state law is seen as safeguarding the “vital interests of state citizens.”¹⁴⁹ Another places supersession doctrine within a broadly historical/ideological context, arguing that preemption is far more likely to be deduced when the Court adheres to a generally nationalistic philosophy than when its prevailing tendency is to view “state and federal governments as partners.”¹⁵⁰

It is at least possible to assume that the Supreme Court’s present inclination to defer to traditional state interests is a politically appropriate and philosophically accountable response to *Garcia*. Hence,

By declining to infer preemption in the face of congressional ambiguity, the Court is not interposing a judicial barrier to Congress’ will in order to protect state sovereignty—an interposition that would violate *Garcia*—but is instead furthering the spirit of *Garcia* by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end. . . . [T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect state interests.¹⁵¹

Viewed another way, to make the judiciary — “the organ of the federal government most insulated from state

influence and the organ traditionally most feared by the states”¹⁵²—the primary locus of preemptive decisions would seem to be at the least inconsistent with the premise of *Garcia*, at the most, a rather cynical and draconian judicial ploy. On such an understanding, the Court’s current approach to preemption may be seen as ideologically consistent with *Garcia*’s assumptions of national political aegis. Indeed, in the post-*Garcia* climate, of potentially greater philosophical concern than preemption, with its basic congressional and thus “political” foundation, may be the wholly court-centered dormant commerce clause.

Judicial Power and the Dormant Commerce Clause

[T]he nature and scope of the negative function of the commerce clause . . . is not the simple, clean-cutting tool supposed. Nor is its swath always correlative with that cut by the affirmative edge, as seems to be assumed. For clearly as the commerce clause has worked affirmatively on the whole, its implied negative operation on state power has been uneven, at times highly variable. More often than not, in matters more governable by logic and less by experience, the business of negative implication is slippery. . . . [T]he history of the [dormant] commerce clause has been one of considerable judicial oscillation.¹⁵³

Although dormant commerce clause theory¹⁵⁴ is not, strictly speaking, a doctrinal offshoot of preemption, it often is considered a constitutional kissin’ cousin. Hence, while

preemption challenge[s] involve . . . questions of congressional intent in light of the delicate interrelationships between federal and state power, . . . dormant commerce clause challenge[s] involve . . . state regulation[s] alleged to be repugnant to the federal government’s enumerated powers. . . .¹⁵⁵

In either case, the outcome may diminish state activity by virtue of federal judicial order. Where the judicial role in preemption cases may be that of mediating congressional intent, in dormant commerce clause litigation, it rises to the status of constitutional conductor, for the dormant commerce clause assumes no particular congressional role, inferring, rather, that “the commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method. . . .”¹⁵⁶ (Emphasis added.)

Specifically, dormant commerce clause theory presumes to avert the “economic balkanization of the United States . . . ,”¹⁵⁷ by virtue of the self-bestowed court power to determine whether a state regulation, in the absence of any congressional action in the area, impedes the flow of interstate commerce.¹⁵⁸ In such cases, the courts look to “the nature of the state regulation involved, the objective of the state, and the effect of the regulation on the national interest in commerce.”¹⁵⁹ Thus, “the courts. . . make. . . what amount to . . . intrinsically legislative determination[~]s to whether a particular type of commerce requires exclusive regulation.”¹⁶⁰ The bottom line, according to Laurence Tribe, appears to be:

Even judges... ordinarily hesitant about federal judicial intervention into legislative choice tend to support a relatively active role for the federal judiciary "when the centrifugal, isolating or hostile forces of localism are manifested in state legislation."¹⁶¹

Sample Cases. Illustrative of the Supreme Court's contemporary approach to dormant commerce clause issues is *Tyler Pipe v. Washington*.¹⁶² At issue in *Tyler* was a state manufacturing tax that partially exempted local manufacturers selling intrastate. That exemption was found to discriminate against manufacturers engaged in interstate commerce.¹⁶³ Significantly, the Court overruled a previous decision upholding the same state tax,¹⁶⁴ now applying to state taxation schemes generally "what might be called internal consistency—that is the tax must be such that, if applied by every jurisdiction, there would be no impermissible interference with free trade."¹⁶⁵

Although dormant commerce clause analyses contain a strong presumption against discriminatory activity, courts have not been entirely unsympathetic to local preference schemes. Indeed, starting in 1976, the Court began fashioning a "market participant" exception to the dormant commerce clause. In *Hughes v. Alexandria Scrap*,¹⁶⁶ for instance, the Court ruled that where a state acts not as a regulator, but as a "purchaser, in effect,"¹⁶⁷ it frees itself from dormant commerce clause scrutiny, for "nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."¹⁶⁸

In *Reeves, Inc. v. Stake*¹⁶⁹ and *White v. Massachusetts Council of Construction Employers*,¹⁷⁰ the Court further expanded its discussion of market participant immunity, reiterating and attempting to clarify the two prongs of *Alexandria Scrap*. First, a state seeking immunization must be analogous to a private trader, that is, it must be engaged in the enterprise as opposed to the regulation of commerce. Second, the Court again recognized the right of a state to act "as guardian and trustee for [its] people."¹⁷¹ Moreover, the Court acknowledged the importance of state "experimentation in things social and economic."¹⁷²

Notwithstanding the above, the Court's foray into market-participant immunity has proved an uneasy and "erratic" journey.¹⁷³ Its most recent decisions suggest possible dissatisfaction with the rule.¹⁷⁴ Hence, in *South Central Timber Development v. Wunnicke*,¹⁷⁵ the Court expressed some disquietude over its inability theretofore to establish "the precise contours of the market-participant doctrine. . . ."¹⁷⁶ A plurality refused to grant an exemption to Alaska's requirement that timber produced in the state (including that destined for foreign markets) be processed in the state. In rejecting Alaska's claim, the Court noted "the presence of 'foreign commerce, a natural resource, and restrictions on resale, . . .'" further asserting that the market participant "doctrine is not carte blanche to impose any conditions that the State has the economic power to dictate. . . ."¹⁷⁷

In *New Energy Company of Indiana v. Limbach*,¹⁷⁸ the Court refused to entertain Ohio's contention that its award of a tax credit for ethanol manufactured in Ohio (or in any other state granting reciprocal credits to Ohio producers) placed it beyond commerce clause scrutiny as a market participant. Indeed, in a unanimous holding, the Court declared that the "Ohio action ultimately at issue is neither its purchase nor its sale of ethanol, but its assessment and computation of taxes—a primeval governmental activity."¹⁷⁹ (Emphasis added.) Thus, a state seeking market participant immunity must be able to demonstrate a clear analogy "to the activity of a private purchaser."¹⁸⁰

Nor were the justices sympathetic to Ohio's claim that the discrimination in question was implemented on the basis of the state's traditional duty to guard the health of its citizens. On the contrary, the Court remarked that while

the protection of health is a legitimate state goal, . . . there is no reason to suppose that ethanol produced in a State that does not offer tax advantages to ethanol produced in Ohio is less healthy, and thus should have its importation into Ohio suppressed by denial of the otherwise standard tax credit.¹⁸¹

Critics' Questions. Market-participant exemption or no, the dormant commerce clause remains a theoretically uncertain basis for judicial regulation of state action. The Court itself has not infrequently acknowledged its own tendency to oscillate where the negative implications of the commerce clause are asserted.

Its more severe critics attribute such vacillation to the obscure, if not nonexistent, constitutional foundations of the doctrine. For instance, Martin Redish and Shane Nugent maintain that "there is no dormant commerce clause to be found within the text or textual structure of the Constitution":¹⁸²

Ultimately, we conclude that the dormant commerce clause is invalid because it reverses the political inertia established by the Constitution. Under the dormant commerce clause, the federal judiciary . . . makes the initial legislative judgment whether state regulation of interstate commerce is reasonable. If the Court strikes down economic regulations, the states must somehow force Congress to reverse the decision of the Court through legislation—a process made difficult because of Congress's inherent political inertia. Our historical and textual analyses lead us to conclude that this is clearly not the plan of the Constitution.¹⁸³

More significant, in a recent and vigorous dissent, Justice Scalia called into question the clause's jurisprudential logic, constitutional validity, and practical outcomes:

It takes no more than our opinions this Term. . . to demonstrate that the practical results we have deduced from the so-called "negative" Commerce Clause form not a rock but a "quagmire." Nor is this a recent liquefaction. The fact is that in the

114 years since the doctrine of the negative Commerce Clause was formally adopted as holding of this Court, and in the 50 years prior to that in which it was alluded to in various dicta of the Court, our applications of the doctrine have, not to put too fine a point on the matter, made no sense. . . . The historical record provides no grounds for reading the Commerce Clause to be other than what it says—*an authorization for Congress to regulate commerce*. . . . [T]o the extent that [the Court has] gone beyond guarding against rank discrimination against citizens of other States—which is regulated not by the Commerce Clause but by the Privileges and Immunities Clause—the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent non-textual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well.¹⁸⁴ (Emphasis added.)

Despite Justice Scalia's admonition that original judicial regulation of state activity under a congressional grant of power may be constitutionally dubious, it is unlikely that the Court will soon reject (nor is it by any means universally conceded that the Court should reject) its dormant commerce clause jurisdiction.

Granted, the market participant exemption may reflect "a conscious choice by the Court to limit the reach of the dormant commerce clause in order to protect important state interests,"¹⁸⁵ however, the doctrine remains relatively nascent and untested. Moreover, the "mix of justifications" employed for its application—"the sensed rightness that citizens comprising political units may dispense their own property as they see fit; the values in a federalist system of facilitating local experimentation and differentiated responses to different local needs; the reduced risk that marketplace preferences pose to the dormant commerce clause's goal of economic nationalism; and formal and institutional considerations counseling judicial restraint in this distinctive setting"¹⁸⁶—may signal a particular instance of the sort of general dormant commerce clause confusion that has so dogged Court and commentators alike. Hence, while market participant immunity may allow the post-Garcia Court to extricate itself somewhat from the problems that the dormant commerce clause presents for the "political safeguard" theory of federalism, its practical manifestations remain to be seen.¹⁸⁷

The Negative Impact of the Fourteenth Amendment

The federal courts have long employed the Fourteenth Amendment¹⁸⁸ and its derivative legislation¹⁸⁹ as a means to implement equal protection and due process

claims against state and local governments.¹⁹⁰ Ironically, in recent years, they have not been averse to using the same constitutional foundation to strike down local race-conscious remedies.¹⁹¹ Of particular interest in this regard is the Court's ruling in *City of Richmond v. J.A. Croson*.¹⁹²

At issue in *Croson* was a 1983 Richmond city ordinance requiring prime contractors to whom the city awarded construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more minority business enterprises (MBEs). It is important to note that the city's plan was not unique. Richmond, like numerous jurisdictions across the country, had been encouraged to implement such programs when the Supreme Court upheld a similar congressional plan in 1980.¹⁹³

Although *Croson* is difficult to unravel, due in large part to the multiple opinions, it is significant because of the Court's distinction between federal and state remedial powers. Hence, the Court had upheld the earlier congressional plan, despite any findings of specific discrimination, because it approached its decisional task "with appropriate deference to Congress [as] a co-equal branch. . ."¹⁹⁴ and because it found the Congress to have "*unique remedial powers under Section 5 of the 14th Amendment*":¹⁹⁵ (emphasis added)

Here we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in *no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress*. . .¹⁹⁶

Nevertheless, the city and its supporting amici,¹⁹⁷ asked the Court to treat Richmond's plan with the same respect it had accorded the congressional set-aside, arguing that, "It would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination in its own public works program, but a city government does not."¹⁹⁸

Because the [fourth circuit] court of appeals in this case has imposed on state and local governments more exacting requirements than *Fullilove* applied to the federal government, state and local governments face an unjustified double standard. The federal government, in the exercise of its spending power, is permitted to prescribe remedies for past discrimination that apply in every state and every municipality. But in identical circumstances, state and local governments—with their vastly greater familiarity with local history and conditions—are disabled from acting similarly to remedy discrimination.¹⁹⁹

In her opinion, Justice O'Connor rejected the municipal claim, pointedly reminding states and localities that:

The Civil War Amendments. . . worked a dramatic change in the balance between congressional and state power over matters of race. . . . That Congress may identify and redress the effects of soci-

ety-wide discrimination does not mean that, a fortiori, the State[s] and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit constraint on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions.²⁰⁰

Despite the Court's continuing ambivalence on the subject of affirmative action, *Croson* would appear to place significant hurdles in the way of state and local jurisdictions hoping to implement remedial programs. The opinion strongly suggests that these governments back up such plans with very specific documentation of past de jure discrimination.²⁰¹ Such rigorous documentation, however, may prove a perilous undertaking because "specific admission of past discrimination could expose a state or local government to liability in damages. . . ." ²⁰² Ironically, "requiring such an admission [may] . . . deter voluntary efforts to eradicate the effects of past discrimination."²⁰³

In the absence of demonstrable proof, the Court will probably sanction only set-aside programs employing race-neutral criteria such as those aimed at "economically and socially disadvantaged persons."²⁰⁴ Apparently, even if such race-neutral plans "disproportionately aid a particular minority group, they do not violate the equal protection clause unless a plaintiff can prove that they were adopted with the *intent* to discriminate against a particular racial or ethnic group."²⁰⁵ (Emphasis added.)

Finally, it is possible, though by no means certain, that state and local jurisdictions may still be able to implement somewhat attenuated race-conscious remedies if such programs do not employ criteria that the Court might interpret as "rigid numerical quota[s],"²⁰⁶ but rather only require "special efforts to contact minority group . . ."

Conclusion

Whether as legislative facilitator or constitutional bellwether, the federal judiciary can have a profound impact on independent state action, limiting state and local power under the imperatives of Article I, Section 8 and the Fourteenth Amendment. There is, however, an affirmative regulatory side to the long-standing relationship between the federal courts and the state political branches. That concept will be explored in detail in the next chapter.

NOTES

¹ Dan T. Coenen, "Untangling the Market Participant Exemption to the Dormant Commerce Clause," *Michigan Law Review* 88 (1989): 395-396.

² 426 U.S. 833 (1976).

³ See also John Kincaid, "Constitutional Federalism: Labor's Role in Displacing Places to Benefit Persons," *PS: Political Science and Politics* 26 (June 1993): 172.

⁴ *Ibid.*

⁵ Justice Rehnquist was joined in his opinion by Chief Justice Burger and Justices Blackmun, Powell, and Stewart. Justice Blackmun filed a separate concurring opinion.

⁶ Bruce La Pierre, "Political Accountability in the National Political Process: The Alternative to Judicial Review of Federalism Issues," *Northwestern University Law Review* 80 (1985): 587.

⁷ *National League of Cities v. Marshall*, 429 E. Supp. 703 (1977).

⁸ The majority thus asserted: "[W]e express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, sec. 8, cl. 1, or sec. 5 of the Fourteenth Amendment. . . [or] under its war power." *National League of Cities v. Usery*, 426 U.S. 833 at 852, n. 17 and 18.

⁹ La Pierre, "Political Accountability," p. 588, citing 426 U.S. 833 at 856 (Blackmun, J., concurring).

¹⁰ For instance, in 1979, the Department of Labor issued FLSA regulations extending wage and hour requirements to certain "nontraditional" state and local functions, including local mass transit systems. Indicative of the legal confusion engendered by *National League of Cities* was the fact that the regulations were upheld in Georgia (*Joiner v. Macon*, 699 F.2d 1060, 11th Cir., 1983) and Alewine v. Augusta, 699 F.2d 1060, 11th Cir., 1983), Delaware (*Kramer v. New Castle Transit Authority*, 677 E.2d 308, 3rd Cir., 1982), and Tennessee (*Dove v. Chattanooga Transit Authority*, 701 F.2d 50, 6th Cir., 1983); but were found unconstitutional in Texas (*San Antonio v. Donovan*, 557 F. Supp. 445, D.C.W.D. TX., 1983) and Puerto Rico (*Molina-Estrada v. Puerto Rico Highway Authority*, 680 E.2d 841, 1st Cir., 1982). Moreover, La Pierre notes that in a "survey of the 200 cases decided between 1976 and 1982. . . , apart from cases holding the FLSA unconstitutional. . . , only a handful of courts ever held a national statute unconstitutional under NLC. Most of these judgments were subsequently reversed or discredited. As of June 1, 1982, there were only two reported, outstanding judgments that a national statute was unconstitutional under NLC." La Pierre, "Political Accountability," p. 581.

"452 U.S. 264 (1981).

¹² *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 at 546 (1985).

¹³ *Ibid.*, p. 528.

¹⁴ Prior to 1985, lower courts had held that the following were protected under NLC: regulating ambulance services (*Gold Cross Ambulance v. Kansas City*, 538 F. Supp. 956, WD Mo., 1982), licensing automobile drivers (*U.S. v. Best*, 573 E.2d 1095, CA9, 1978), operating a municipal airport (*Amersbach v. Cleveland*, 598 E.2d 1033, CA6, 1979), performing solid waste disposal (*Hybud Equipment v. Akron*, 654 E.2d 1187, CA6, 1981), and operating a highway authority (*Molina-Estrada v. Puerto Rico Highway Authority*, 680 E.2d 841, CA1, 1982). However, the courts found that the following activities were not entitled to NLC protection: issuance of industrial development bonds (*Woods v. Homes and Structures of Pittsburg, Kansas*, 489 E. Supp. 1270, Kan., 1980), regulation of intrastate natural gas sales (*Oklahoma ex rel. Derryberry v. Federal Energy Regulatory Commission*, 494 E. Supp. 636, WD Okla., 1980), regulation of traffic on public roads (*Friends of the Earth v. Carey*, 552 E.2d 25, CA2, 1975), regulation of air transportation (*Hughes Air Corp. v. Public Utilities Commission of California*, 644 F.2d 1334, CA9, 1981), operation of a tele-

phone system (*Puerto Rico Telephone Co. v. Federal Communications Commission*, 553 E 2d 694, CA1, 1977), leasing and sale of natural gas (*Public Service Company of North Carolina v. Federal Energy Regulatory Commission*, 587 E 2d 716, CA5, 1979), operation of a mental health facility (*Williams v. Eastside Mental Health Center*, 699 E 2d 671, CA11, 1982), and provision of domestic services for the elderly and handicapped (*Bonnette v. California Health and Welfare Agency*, E 2d 1465, CA9, 1983).

¹⁵ Justice Blackmun, whose concurrence in *National League of Cities* provided the majority in the earlier case, was joined in his *Garcia* opinion by Justices Brennan, White, Marshall, and Stevens. Justice Powell filed a dissenting opinion in which Chief Justice Burger and Justices Rehnquist and O'Connor joined. Justice Rehnquist filed a separate dissenting opinion, as did Justice O'Connor, in which Justices Powell and Rehnquist joined.

¹⁶ 469 U.S. 528 (1985).

¹⁷ *Ibid.*, p. 547.

Columbia Law Review 54 (1954): 543.

¹⁹ Jesse Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980.)

²⁰ 469 U.S. 528 at 552. Specifically, Blackmun mentioned that: Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article 1 powers, the principle means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. . . . The Framers thus gave the States a role in the selection both of the Executive and Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. . . . They were given more direct influence in the Senate, where each state received equal representation and each Senator was to be selected by the legislature of his state. *Ibid.*, pp. 550-551. Ironically, Blackmun cited as his main evidence for the continuing significant influence of the states their ability to extract substantial financial assistance from Congress (*ibid.*, p. 552), neglecting to make note of regulations attached to such spending that have further contributed to congressional dominance over state functions during the latter twentieth century. For a discussion of the spending power, see "The Spending Power in the Courts," pp. VI-10 to VI-13.

²¹ *Ibid.*, p. 565, footnote 9 (Powell, J., dissenting), citing U.S. Advisory Commission on Intergovernmental Relations, *Regulatory Federalism: Policy, Process, Impact and Reform* (Washington, DC, 1984), p. 50.

²² *U.S. v. Darby*, 312 U.S. 100 (1941).

²³ 469 U.S. 528 at 560 (1985).

²⁴ *Ibid.*, p. 580 (O'Connor, J., dissenting).

²⁵ *Ibid.* (Rehnquist, J., dissenting).

²⁶ For some examples, see Dorothy Lowe Boardman, "Comment: National League of Cities Overruled," *Florida State University Law Review* 13 (1985): 277; Martha A. Field, "Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine," *Harvard Law Review* 99 (1985): 84; A.E. Dick Howard, "Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles," *University of Georgia Law Review* 19 (1985): 788, and "Garcia: Of Federalism and Constitutional Values," *Publius: The Journal of Federalism* 16 (Summer 1986): 17; Lawrence A. Hunter and Ronald J. Oakerson, "An Intellectual Crisis in American Federalism,"

Publius: The Journal of Federalism 16 (Summer 1986): 33; La Pierre, "Political Accountability"; Bernard Schwartz, "National League of Cities Again: R.I.P. or a Ghost that Still Walks?" *Fordham University Law Review* 54 (1986): 141; Stephen L. Smith, "State Autonomy after Garcia: Will the Political Process Protect States' Interests?" *Iowa Law Review* 71 (1985): 1527.

²⁷ Schwartz, "National League of Cities Again," p. 150.

²⁸ 469 U.S. 528 at 550, citing Madison, *Fedemlist* No. 39, p. 285, Benjamin F. Wright, ed. (Cambridge, Massachusetts: Belknap Press, Harvard University Press, 1961).

²⁹ *Ibid.*, p. 551, citing Madison, *Fedemlist* No. 46, p. 332

³⁰ *Ibid.*, citing James Wilson, 2 Elliot 438-439.

³¹ *Ibid.*, p. 568 (O'Connor, J., dissenting).

³² *Ibid.*, p. 570.

³³ *Ibid.*, p. 570-571, citing Madison, *Fedemlist* No. 45, p. 313.

³⁴ As Justice Blackmun noted in his *Garcia* opinion, "to say that the Constitution assumes the continued role of the States is to say little about the nature of that role." *Ibid.*, p. 550. Recently, it has been suggested that the Court may be able to reconcile the inevitable tug-of-war between state autonomy and federal power by reference to the guarantee clause in Article IV, Section 4 of the Constitution. In relevant part, that section "guarantee[~] to every State in this Union a Republican Form of Government." It has been suggested that no state can maintain a republican government without significant autonomy. Under such understanding, the Tenth Amendment simply reinforces the federal principle stated in the guarantee clause. See for example, Justice O'Connor's dissent in *South Carolina v. Baker*, 485 U.S. 505 (page 76 and note 80, this chapter). See also Deborah J. Merritt, "The Guarantee Clause and State Autonomy Federalism for a Third Century," *Columbia Law Review* 88 (1988): 1.

³⁵ 469 U.S. 528 at 585 (O'Connor, J., dissenting).

³⁶ Howard, "Garcia and the Values of Federalism," p. 790.

³⁷ Field, "Garcia v. San Antonio Metropolitan Transit Authority."

³⁸ 469 U.S. 528 at 582 (O'Connor, J., dissenting).

³⁹ Schwartz, "National League of Cities Again," p. 150.

⁴⁰ Howard, "Garcia and the Values of Federalism," p. 791. On this point, see also Schwartz, "National League of Cities Again," p. 157-158.

⁴¹ 469 U.S. 528 at 556.

⁴² Choper, *Judicial Review and the National Political Process*, p. 175.

⁴³ *Ibid.*, pp. 201-202.

⁴⁴ Like the Court, Choper enumerates the structural features of the national political process likely to preserve state autonomy: the Senate, the House, electors, national representatives, the presidency, and the intergovernmental lobby. *Ibid.*, pp. 176-84.

⁴⁵ In *Fedemlist* No. 78, Hamilton makes much of the vulnerable position of the individual exposed to the "occasional ill humors of society" and the important role of the judiciary in tempering liberty endangering majoritarian passions.

⁴⁶ Smith, "State Autonomy after Garcia," p. 1528.

⁴⁷ Howard, "Garcia and the Values of Federalism," p. 792.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, p. 792-793.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

- ⁵² Timothy M. Conlan et al., “State Parties in the 1980s,” *Intergovernmental Perspective* 10 (Fall 1984): 23.
- ⁵³ Cynthia Cates Colella, “Intergovernmental Aspects of FECA,” *Intergovernmental Perspective* 10 (Fall 1984): 18.
- ⁵⁴ See, for example, Schwartz, “National League of Cities Again,” and Smith, “State Autonomy after Garcia”
- ⁵⁵ Howard, “Garcia and the Values of Federalism,” p. 797.
- ⁵⁶ “The Supreme Court 1987 Term: Leading Cases: I. Constitutional Law,” *Harvard Law Review* 102 (1988): 232, Citing Andrzej Rapaczynski, “From Sovereignty to Process: The Jurisprudence of Federalism after Garcia,” *1985 Supreme Court Review*, p. 419.
- ⁵⁷ During that time, Justices Scalia and Kennedy were added to the Court’s membership.
- ⁵⁸ 485 U.S. 505 (1988). See also, Margaret T. Wrightson, “The Road to South Carolina: Intergovernmental Tax Immunity and the Constitutional Status of Federalism,” *Publius: The Journal of Federalism* 19 (Summer 1989): 39.
- ⁵⁹ 26 U.S.C. Section 103 (1982).
- ⁶⁰ Section 310(b)(1). Unregistered or so-called bearer bonds became the focus of congressional attention because they leave “no paper trail and thus facilitate. . . tax evasion.” 485 U.S. 505 at 507.
- ⁶¹ The doctrine restricts the power of state and federal governments to tax one another. *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895).
- ⁶² Justice Brennan delivered the opinion of the Court, in which Justices White, Marshall, Blackmun, and Stevens joined, and in which Justice Scalia joined except for Part II. Justice Stevens filed a concurring opinion. Justice Scalia filed an opinion concurring in part and concurring in the judgment. Chief Justice Rehnquist filed an opinion concurring in the judgment. Justice O’Connor filed a dissenting opinion. Justice Kennedy took no part in the case.
- ⁶³ The state argued that “even though almost all state bonds were issued in bearer form before [the law] became effective, since then no state has issued a bearer bond.” 485 U.S. 505 at 510.
- ⁶⁴ *Ibid.*, p. 515.
- ⁶⁵ *Ibid.*
- ⁶⁶ *Exceptions of the National Governors’ Association to the Report of the Special Master and Brief in Support Thereof No. 94*, Original, May 9, 1987.
- ⁶⁷ 485 U.S. 505 at 517.
- ⁶⁸ *Ibid.*, p. 518.
- ⁶⁹ See note 60.
- ⁷⁰ 485 U.S. 505 at 533. The Court thus explicitly overruled its previous understanding of intergovernmental tax immunity in *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895).
- ⁷¹ “The Supreme Court 1987 Term,” p. 227.
- ⁷² Hence, the Court asserted in *Garcia* that “the status of public mass transit simply underscores the extent to which the structural protections of the Constitution insulate the States from federally imposed burdens.” It went on to note that the federal government, in addition to imposing regulatory requirements, had provided billions of dollars in transit aid to the states. 469 U.S. 528 at 555.
- ⁷³ Field, “*Garcia v. San Antonio Metropolitan Transit Authority*,” p. 89.
- ⁷⁴ Note that Justice Rehnquist, in his concurrence, simply accepts at face value the Special Master’s conclusion that Section 310(b)(1) of TEFRA would have “a de minimis impact on the States. . . .” 485 U.S. 505 at 539 (Rehnquist, C.J., concurring).
- ⁷⁵ *Ibid.*, p. 515.
- ⁷⁶ “The Supreme Court 1987 Term,” p. 228.
- ⁷⁷ 485 U.S. 505 at 513.
- ⁷⁸ *Ibid.*, p. 514.
- ⁷⁹ Cf., *Metcalfe & Eddy v. Mitchell*, 269 U.S. 514 at 521-22 (1926), in which the Court asserted that obligations sold to raise public funds. . . are all so intimately connected with the necessary functions of government, as to fall within the established exemption; and when the instrumentality is of that character, the immunity extends not only to the instrumentality itself but to income derived from it. . . .” Cited in *Harvard Law Review* 102 (1988): 230.
- ⁸⁰ 485 U.S. 505 at 542 (O’Connor, J., dissenting).
- ⁸¹ *Ibid.* The guarantee clause in Article IV, Section 4 states: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on application of the Legislature, or of the Executive. . . against domestic violence.” See note 33.
- ⁸² 485 U.S. 505 at 539 (Rehnquist, C.J., concurring).
- ⁸³ *Harvard Law Review* 102 (1988): 231.
- ⁸⁴ *Ibid.* “The special master agreed with South Carolina that the forfeiture of tax-exempt status would require states and localities to increase the interest paid on their obligations significantly. . . . It has been estimated that the bond interest exemption reduced state borrowing costs by \$4.713 billion in 1985.” *Ibid.*, citing Motion for Leave to file Complaint, Complaint, and Supporting Brief, *South Carolina v. Regan*, 466 U.S. 948 (1984).
- ⁸⁵ Laurence Tribe, *American Constitutional Law* (2d ed.) (Westbury, New York: Foundation Press, 1988), p. 381, cited in 485 U.S. 505 at 546 (O’Connor, J., dissenting).
- ⁸⁶ 426 U.S. 833 at 852, n. 17 (1976).
- ⁸⁷ *Massachusetts v. Mellon*, 262 U.S. 447 (1923). The conditional spending power allows the Congress to attach qualifications and/or requirements to federal grants.
- ⁸⁸ *Pennhurst State School and Hospital*, 451 U.S. 1 at 17 (1981). For a more complete discussion see ACIR, *Regulatory Federalism*, pp. 30-31 and 40-44.
- ⁸⁹ *Named Individuals of the San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 at 1028 (5th Cir. 1971).
- ⁹⁰ *Macon v. Marshall*, 439 E Supp. 1209 at 1217 (M.D. Ga. 1977).
- ⁹¹ *North Carolina v. Califano*, 445 E Supp. 532 at 535 (E.D.N.C. 1977) aff’d. 435 U.S. 962 (1978). See also *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Lau v. Nichols*, 414 U.S. 563 (1974); *Ivanhoe Imigation District v. McCracken*, 357 U.S. 275 (1958); *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); and *United States v. Butler*, 297 U.S. 1 (1936).
- ⁹² Albert J. Rosenthal, “Conditional Federal Spending and the Constitution,” *Stanford Law Review* 30 (1987): 1108.
- ⁹³ *Ibid.*, p. 1108-09.
- ⁹⁴ The present text does not claim to do justice to this large and complex subject. See John D. French, “Unconstitutional Conditions: An Analysis,” *Georgetown Law Journal* 50 (1961): 234; Seth F. Kreimer, “Allocational Sanctions: The Problem of Negative Rights in a Positive State,” *University of Pennsylvania*

- Law Review* 132(1984): 1293; Rosenthal, "Conditional Federal Spending and the Constitution"; and William W. Van Alstyne, "The Demise of the Right Privilege Distinction in Constitutional Law," *Harvard Law Review* 81 (1968): 1439.
- ⁹⁵ Rosenthal, "Conditional Federal Spending and the Constitution," p. 1120.
- ⁹⁶ *Doyle v. Continental Insurance Company*, 94 U.S. 535 (1876), overturned in *Terral v. Burke Construction Company*, 257 U.S. 529 (1922).
- ⁹⁷ See, for example, *Frost & Frost Trucking v. Railroad Commission*, 271 U.S. 583 (1926).
- ⁹⁸ Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," p. 1446. See especially, *Frost & Frost Trucking v. Railroad Commission*, 271 U.S. 583 at 594 (1926) in which the Court held that: If the state may compel the surrender of one constitutional right as a condition of its favor it may in like manner compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.
- ⁹⁹ See, for example, *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364 (1984) in which the Court held unconstitutional an editorial prohibition against broadcasters receiving funds from the Corporation for Public Broadcasting.
- ¹⁰⁰ 483 U.S. 203 (1987).
- ¹⁰¹ 23 U.S.C. Section 158 (Supp. II 1984). See also Sarah F. Liebschutz, "The National Minimum Drinking Age Law," *Publius: The Journal of Federalism* 15 (Summer 1985): 39-51.
- ¹⁰² The National Minimum Drinking Age Act is an example of what ACIR termed a "crossoversanction," one which threatens "the termination or reduction of aid provided under one or more specified programs unless the requirements of another program are satisfied." ACIR, *Regulatory Federalism*, p. 8; see also p. 43. Interestingly, the Dole majority found that the minimum age requirement was reasonably related to the purposes of the Surface Transportation Assistance Act (see text following), although the dissent demurred: "[Congress] is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety." 483 U.S. 203 at 215 (1987) (O'Connor, J., dissenting).
- ¹⁰³ 483 U.S. 203 at 207 citing *U.S. v. Butler*, 297 U.S. 1 (1936).
- ¹⁰⁴ *Ibid.*, citing *Pennhurst State School and Hospital v. Halde- man*, 451 U.S. 1 at 17 (1981).
- ¹⁰⁵ *Ibid.*, citing *Massachusetts v. Mellon*, 262 U.S. 444 at 461 (1923).
- ¹⁰⁶ *Ibid.*, p. 208 citing *Lawrence County v. Lead Deadwood School District*, 469 U.S. 256 at 269-270 (1985).
- ¹⁰⁷ *Ibid.*, p. 212 (Brennan, J., dissenting).
- ¹⁰⁸ Van Alstyne, "Demise of the Right-Privilege Distinction in Constitutional Law," p. 1446.
- ¹⁰⁹ 483 U.S. 203 at 210. As examples of what would now constitute unconstitutional conditions, the Court offered the unlikely possibilities of "a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment."
- ¹¹⁰ James Corbelli, "Tower of Power: South Dakota v. Dole and the Strength of the Spending Power," *University of Pittsburgh Law Review* 49 (1988): 1115.
- ¹¹¹ 483 U.S. 203 at 212 (Brennan, J., dissenting).
- ¹¹² Richard A. Epstein, "The Supreme Court 1987 Term; Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent," *Harvard Law Review* 102 (1988): 44.
- ¹¹³ *Ibid.*, p. 45.
- ¹¹⁴ *Ibid.*, pp. 45-46.
- ¹¹⁵ Corbelli, "Tower of Power," p. 1117.
- ¹¹⁶ 884 E 2d 445 (1989).
- ¹¹⁷ The Federal Aid Highway Act was originally passed in 1916 as a way of directly providing the states with highway maintenance funds. In 1973, the act was amended to include the Emergency Highway Energy Conservation Act which required states to post a maximum speed limit of 55 mph on interstate and intrastate highways. Failure to comply would be attended by the threatened loss of all future highway aid. In 1987, the act was amended to allow states to post speeds of up to 65 mph in low population density areas.
- ¹¹⁸ *Nevada v. Skinner*, 884 E 2d 445 at 446.
- ¹¹⁹ *South Dakota v. Dole*, 483 U.S. 203 at 211 (1987), citing *Steward Machine Co. v. Davis*, 301 U.S. 548 at 590 (1937).
- ¹²⁰ 884 F. 2d 445 at 448.
- ¹²¹ *Ibid.*, p. 447, footnote 2.
- ¹²² Thomas Reed Powell, "The Still Small Voice of the Commerce Clause," in 3 *Selected Essays on Constitutional Law* (1938), p. 932, cited in Laurence Tribe, *Constitutional Choices* (Cambridge, Massachusetts: Harvard University Press, 1985), p. 34.
- ¹²³ The theory is that given the press of legislative business, Congress simply lacks the capacity to review and "test for compatibility with the federal system" every state statute that may conflict with the commercial design of the Constitution. It then falls to the Supreme Court to impede the forces of localism, ensuring that the "inertia of government. . . [is] on the side of the centralizing forces of nationhood and union." Tribe, *American Constitutional Law*, p. 401, citing, in part, Ernest J. Brown, "The Open Economy: Justice Frankfurter and the Position of the Judiciary," *Yale Law Journal* 67 (1957): 222.
- ¹²⁴ *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 at 523 (1935).
- ¹²⁵ *Gibbons v. Ogden*, 9 Wheat. 1 (1824). For background, see also ACIR, *Regulatory Federalism*, pp. 26-28; Joseph F. Zimmerman, *Federal Preemption: The Silent Revolution* (Ames: Iowa State University Press, 1991); and ACIR, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues* (Washington, DC, 1992).
- ¹²⁶ The following text cannot and does not claim to do justice to the whole field of preemption or to the numerous additional judicial doctrines surrounding its implementation. For a more thorough discussion of preemption generally, see ACIR, *Federal Preemption of State and Local Government Authority*; and David E. Engdahl, "Preemptive Capability of Federal Power," *University of Colorado Law Review* 45 (1973): 51.
- ¹²⁷ See subsequent text on the dormant commerce clause.
- ¹²⁸ *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). Even so-called "express" preemptions may not be entirely free of ambiguity. As Rothschild notes: The doctrine of express preemption is easily stated. Its application, however, is far more problematic, since before an express preemption clause can be applied to state action, one must inquire whether the clause is truly applicable to the particular state action. Since an express provision can bar all state action to which it applies, the dispositive factor in such cases is whether the express preemption provision is applicable, by its own terms, to the particular state action at issue in the case. David P. Rothschild, "A Proposed 'Tonic' with Florida Lime to Celebrate Our New Federalism: How to Deal

- with the 'Headache' of Preemption," *University of Miami Law Review* 38 (1984): 843-844.
- ¹²⁹ *Pacific Gas and Electric Co., v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 at 203-04 (1983).
- ¹³⁰ Mark King, "Federal Preemption of the State Regulation of Nuclear Power: State Law Strikes Back," *Chicago-Kent Law Review* 60 (1984): 992.
- ¹³¹ *Ibid.*, p. 992, citing *Mauer v. Hamilton*, 309 U.S. 598 at 614 (1940) and *H.P. Welsh Co. v. New Hampshire*, 306 U.S. 79 at 85 (1939).
- ¹³² 312 U.S. 52 (1941).
- ¹³³ *Ibid.*, p. 67.
- ¹³⁴ King, "Federal Preemption of the State Regulation of Nuclear Power," p. 993.
- ¹³⁵ See, for example, *Maryland v. Louisiana*, 451 U.S. 725 (1981).
- ¹³⁶ *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132 at 142 (1963).
- ¹³⁷ *Ibid.* See also Rothschild, "A Proposed 'Tonic' with Florida Lime to Celebrate Our New Federalism," p. 854.
- ¹³⁸ 110 S.Ct. 2270 (1990).
- ¹³⁹ *ibid.* (citation omitted)
- ¹⁴⁰ *Ibid.*, p. 2279, citing *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707 at 719 (1985).
- ¹⁴¹ 464 U.S. 238 (1984).
- ¹⁴² 461 U.S. 190 (1983).
- ¹⁴³ 461 U.S. 190 at 212.
- ¹⁴⁴ 464 U.S. 238 at 248.
- ¹⁴⁵ Tribe, *American Constitutional Law*, p. 489.
- ¹⁴⁶ 461 U.S. 190 at 194.
- ¹⁴⁷ *Ibid.*, p. 222.
- ¹⁴⁸ Tribe, *American Constitutional Law*, p. 479.
- ¹⁴⁹ "Note: A Framework for Preemption Analysis," *Yale Law Journal* 88 (1978): 379-380.
- ¹⁵⁰ William W. Bratton, Jr., "The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court," *Columbia Law Review* 75 (1975): 653.
- ¹⁵¹ Tribe, *American Constitutional Law*, p. 480.
- ¹⁵² Martin H. Redish and Shane V. Nugent, "The Dormant Commerce Clause and the Balance of Federalism," *Duke Law Journal* (1987): 573.
- ¹⁵³ *Prudential Insurance Company v. Benjamin*, 328 U.S. 408 at 418-20 (1946).
- ¹⁵⁴ In recent years, the dormant commerce clause has been the subject of some scholarly interest. See, for example, Julian N. Eule, "Laying the Dormant Clause to Rest," *Yale Law Journal* 91 (1982): 425; Daniel A. Farber, "State Regulation and the Dormant Commerce Clause," *Constitutional Commentary* 395 (1986): 395; Earl M. Maltz, "How Much Regulation Is Too Much?" *George Washington Law Review* 50 (1981): 41; Redish and Nugent, "The Dormant Commerce Clause and the Constitutional Balance of Federalism"; Donald H. Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," *Michigan Law Review* 84 (1986): 1091; Robert A. Sedler, "The Negative Commerce Clause as a Restriction on State Regulation and Taxation," *Wayne Law Review* 31 (1985): 885; and Mark V. Tushnet, "Rethinking the Dormant Commerce Clause," *Wisconsin Law Review* (1979): 125.
- ¹⁵⁵ Rothschild, "A Proposed 'Tonic' with Florida Lime to Celebrate Our New Federalism," p. 840.
- ¹⁵⁶ *South Carolina State Highway Department v. Barnwell Brothers*, 303 U.S. 177 at 185 (1938).
- ¹⁵⁷ *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 at 19 (1990) (Third Cir.)
- ¹⁵⁸ There is considerable disagreement among courts and commentators about the historical basis and precise constitutional rationale for the dormant commerce clause. As to the historical location of the doctrine, the term was first employed by Chief Justice Marshall in *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829) referring to the federal "power to regulate commerce in its dormant state. . ." (p. 252). According to Redish and Nugent, however, Marshall failed to provide "guidance as to the nature of the 'dormant state' present within the commerce clause." Alternatively, Justice Scalia points to allusions to the doctrine in *Gibbons v. Ogden*, 9 Wheat. 1 at 209 (1824) and *Cooley v. Board of Wardens*, 12 How. 299 at 319 (1852) and formal adoption of the theory by the Court in *Case of the State Freight Tax*, 15 Wall. 232 (1873). [Tyler Pipe v. Washington, 483 U.S. 232 at 260 (1987) (Scalia, J., dissenting)] In any event, the result is that although the "Court has for many years simply assumed the dormant commerce clauses' constitutional legitimacy, it is not as easy as one might think to discover the original constitutional theory behind the concept's creation" (Redish and Nugent, "The Dormant Commerce Clause and the Constitutional Balance of Federalism," pp. 577, 575). Moreover, the legal rationale for the clause is somewhat muddy. Obviously, the Congress is given the power to regulate interstate commerce. The Court, however, has interpreted the commerce clause as having a flip-side: that is, it is presumed to limit state authority. Nevertheless, the economic/philosophic basis for that limitation remains unclear. For instance, Maltz points to a "free location principle" flowing from the commerce clause, which infers generally that the movement of commerce should know no state boundaries (Maltz, "How Much Regulation is Too Much"); Tushnet infers a constitutional "efficiency" standard that argues for the nullification of state regulations which cause substantial price increases in other states (Tushnet, "Rethinking the Dormant Commerce Clause"); and Monaghan views the dormant commerce clause as "a development of constitutional common law based on a national free trade philosophy embedded in the commerce clause" (Henry P. Monaghan, "The Supreme Court 1974 Term; Forward: Constitutional Common Law," *Harvard Law Review* 89 (1975): 15-17, cited in Tribe, *American Constitutional Law*, p. 402).
- ¹⁵⁹ *Arkansas Electric Coop. Corp. v. Arkansas Public Commission*, 461 U.S. 375 (1983). (citation omitted)
- ¹⁶⁰ Redish and Nugent, "The Dormant Commerce Clause and the Constitutional Balance of Federalism," p. 582.
- ¹⁶¹ Tribe, *American Constitutional Law*, p. 401, citing Brown, "The Open Economy: Justice Frankfurter and the Position of the Judiciary," pp. 219-220.
- ¹⁶² *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*.
- ¹⁶³ The ruling follows a relatively long line of cases in which the Court has overruled taxes that exempt local activities where comparable interstate commerce is taxed. See, for example, *Hale v. Bimco Trading Inc.*, 306 U.S. 375 (1939) and *Armco v. Hardesty*, 467 U.S. 638 (1984).
- ¹⁶⁴ *General Motors Corp. v. Washington*, 377 U.S. 436 (1964).
- ¹⁶⁵ 483 U.S. 232 at 247 (footnotes omitted).

¹⁶⁴ 425 U.S. 794 (1976).

¹⁶⁷ 426 U.S. at 808.

¹⁶⁸ *Ibid.*, p. 810.

¹⁶⁹ 447 U.S. 429 (1980).

¹⁷⁰ 460 U.S. 204 (1983).

¹⁷¹ 447 U.S. 429, at 438.

¹⁷² *Ibid.*, p. 441.

¹⁷³ Indeed, the justices appear to prefer an ad hoc, as opposed to a philosophically coherent, approach to the matter. For instance, Justice Powell wrote the Alexandria Scrap opinion, but was part of the Reeves dissent. Justice Marshall, conversely, was part of the Reeves majority, but an Alexandria Scrap dissenter. Justice Stevens dissented in Reeves, but joined with the White majority. Justice Blackmun dissented in White but was part of the Reeves and Alexandria Scrap majorities. Justice Brennan, who generally demurred to the market-participant exception, joined the majority in White. See Coenen, "Untangling the Market-Participant Exemption to the Dormant Commerce Clause," p. 405.

¹⁷⁴ Indeed, the exception has been roundly criticized in the legal-academic literature. For example, Tribe describes the "uneasy fit between the exempted state actions and their characterization as "market participation" rather than regulation. . . . Tribe, *Constitutional Choices*, p. 144. But see Coenen, "Untangling the Market-Participant Exemption to the Dormant Commerce Clause."

¹⁷⁵ 467 U.S. 82 (1984).

¹⁷⁶ *Ibid.*, p. 93.

¹⁷⁷ *Ibid.*, pp. 96-97, cited in Coenen, "Untangling the Market-Participant Exemption to the Dormant Commerce Clause," p. 403.

¹⁷⁸ 486 U.S. 269 (1988).

¹⁷⁹ *Ibid.*, p. 277.

¹⁸⁰ *Ibid.*, p. 278.

¹⁸¹ *Ibid.*, p. 279.

¹⁸² Redish and Nugent, "The Dormant Commerce Clause and the Constitutional Balance of Federalism," p. 571.

¹⁸³ *Ibid.*, p. 573.

¹⁸⁴ 483 U.S. 232, at 260, 264-65 (Scalia, J., dissenting) (footnotes omitted).

¹⁸⁵ Coenen, "Untangling the Market-Participant Exemption to the Dormant Commerce Clause," pp. 487-488.

¹⁸⁶ *Ibid.*

¹⁸⁷ Of additional interest and possibly wide-ranging consequence, in 1991, the Supreme Court sanctioned the use of 42 U.S.C. Sec. 1983 as a cause of action for violations of the commerce clause. For further discussion, see Chapter 7.

¹⁸⁸ In relevant parts, the Fourteenth Amendment states: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of 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. . . . Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. The Fourteenth Amendment has a long and especially rich history. For a brief description of that history, see ACIR, *Regulatory Federalism*, pp. 28-30. For a more

thorough discussion, see Jerold H. Israel, "Selective Incorporation: Revisited," *Georgetown Law Journal* 71 (1982): 253.

¹⁸⁹ Of particular importance to state and local governments over the past several decades has been judicial implementation of the Civil Rights Act of 1871, 42 U.S.C. Section 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or 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 for redress. For additional discussion, see Chapter 7, the section on "Contemporary Construction of Section 1983: Status of Governmental Liability and Official Immunity." For a brief earlier history of Section 1983, see also Cynthia Cates Colella, "The Mayor, the Mandate, and the Menace of Liability," *Intergovernmental Perspective* 7 (Fall 1981): 15.

¹⁹⁰ A portion of Chapter 7 contains a discussion of positive judicial mandates on states and localities.

¹⁹¹ Particularly problematic in the courts' eyes have been affirmative action requirements. Such requirements, of course, began as judicial mandates on state and local governments in school desegregation cases. See ACIR, *Regulatory Federalism*, p. 44. When school districts, with a history of racial discrimination, have failed to make progress in desegregating, the Supreme Court has allowed lower federal courts to fashion affirmative remedies. See, for example, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). However, the high court has demurred at activities that appear aimed at achieving racial balance when past de jure discrimination has not been proved. See, for instance, *Miliken v. Bradley*, 418 U.S. 717 (1974) and *Pasadena Board of Education v. Spangler*, 427 U.S. 424 (1976).

¹⁹² 488 U.S. 469 (1989).

¹⁹³ *Fullilove v. Klutznick*, 448 U.S. 448 (1980) involved a challenge to a federal statute requiring that 10 percent of federal grants for local public works projects be used to purchase services or supplies from minority contractors. Although the Court was badly divided in *Fullilove*, it nonetheless upheld the congressional set-aside program. The 1983 Richmond ordinance in question in *Croson* followed most of the definitions and details of the federal act. As of January 1988, at least 32 states and 160 local governments had set-aside programs in operation. See Brief of the National League of Cities, U.S. Conference of Mayors, National Association of Counties, and the International City Management Association as Amici Curiae in *Supp.* of Appellant, *City of Richmond v. J.A. Croson*, January 15, 1988.

¹⁹⁴ *Richmond v. Croson*, 488 U.S. 469 at 487 citing *Fullilove v. Klutznick*, 448 U.S. 448 at 472

¹⁹⁵ 488 U.S. 469 at 488.

¹⁹⁶ *Ibid.*, citing 448 U.S. 448 at 483.

¹⁹⁷ See, for example, Briefs of the National League of Cities et al., April 21, 1988, and January 15, 1988.

¹⁹⁸ 488 U.S. 469 at 489, citing Brief for Appellant 32.

¹⁹⁹ Brief of the National League of Cities et al., January 15, 1988, p. 4.

²⁰⁰ 488 U.S. 469 at 490. Chief Justice Rehnquist and Justice White concurred in this portion of Justice O'Connor's opinion. Apparently, Justice Scalia would place even tighter restrictions on the power of state and local governments to adopt affirmative action plans.

²⁰¹ "Constitutional Scholars' Statement on Affirmative Action after *City of Richmond v. J.A. Croson*," *Yale Law Journal* 98

(1989) 1711, cited in Kenneth M. Murchison, "Local Government Law," *Louisiana Law Review* 50 (1989): 283-284.

²⁰² Brief of the National League of Cities et al., January 15, 1988, p. 10, citing *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *Firefighters v. Cleveland*, 478 U.S. 501 (1986); *Steelworkers v. Weber*, 443 U.S. 193 (1979); and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

²⁰³ *Ibid.*

²⁰⁴ Murchison, "Local Government Law," p. 283.

²⁰⁵ *Ibid.*

²⁰⁶ Justice O'Connor interpreted the Richmond program as drawing a very rigid line. See 488 U.S. 469 at 508 (note her references to "rigid numerical quota" and "rigid line drawn on the basis of a suspect classification").

²⁰⁷ Murchison, "Local Government Law," p. 283.

Regulatory Consequences of a New Public Law Model

7

The types of cases discussed in the previous chapter involve federal courts telling state and local governments what they cannot do. Some of the nation's most controversial judicial decisions, however, include directives telling those governments what they must do, in other words, "affirmatively prescribing governmental policy." During the nearly four decades since the Supreme Court held that the federal district courts' "proximity to local conditions" made them uniquely qualified to manage school desegregation efforts,² the federal judiciary has routinely engaged in the legislative- and executive-like enterprises of restructuring school districts, revamping prisons and jails, relocating public housing, reforming mental institutions, remediating environmental disputes, and rearranging union composition and practice.³

Traditional vs. Public law litigation

Federal judicial involvement in aspects of state and local government operations dates from *Brown II*'s⁴ rather vague delegation to the trial courts of primary supervisory responsibilities in school desegregation cases.⁵ From that point on, the lower courts have been coping with the difficulties that inevitably arise when the judiciary turns "from dispute resolution to governance"⁶—in other words, the difficulties that arise when courts move from "traditional" to "public law" litigation.

Abram Chayes, who in 1976 coined the term "public law litigation,"⁷ explains the distinctions in some detail:

In the classical model . . . , litigation is bipolar: two parties are locked in a confrontational, winner-take-all controversy. Second, the process is retrospective, directed to determining the legal consequences of a closed set of past events. Third, right and remedy are linked in a close, mutually defining logical relationship. Fourth, the

lawsuit is . . . bounded in time: judicial involvement ends with the determination of the disputed issues. . . . [And] the impact is limited to the (two) parties before the court. Finally, the whole process is party initiated and party controlled. The judge is a passive, a neutral umpire. . . .⁸

In the contemporary model, the parties to the litigation and the matter in controversy are amorphous, defined as the proceedings unfold rather than determined by legal theories and concepts. Second, the lawsuit is prospective rather than historical. Third, because the relief sought looks to the future and is corrective rather than compensatory, it is not derived logically from the right asserted. Instead, it is fashioned ad hoc, usually by a quasi-negotiating process. Fourth, prospective relief implies continuing judicial involvement. Because the relief is directed at government or corporate policies, it will have a direct impact that extends far beyond the immediate parties to the lawsuit. All of these features press the trial judge into an active stance, with large responsibilities for organizing the case and supervising the implementation of relief?

The distinction between the traditional negative injunction and the newer affirmative mandate, or so-called public law model, is important on at least two levels. **An** order to cease a discriminatory tax scheme, for instance, may result in the future loss of state revenue. However politically unpalatable, that loss may be replaced with other revenue-raising schemes or business incentives. Affirmative judicial mandates, on the other hand, may call for an immediate (and sometimes substantial) expenditure of funds, requiring the reallocation of resources and legislative preferences, often for some unspecified future.¹⁰

In addition, the traditional negative judicial model and the so-called public law model differ considerably on jurisprudential grounds. In "traditional" litigation, a judicial decree usually signals the end of a legal battle:

Money damages are preferred over equitable relief, and satisfaction of the judgment commonly is

a one-time affair. Just the opposite is true in public law litigation: issuance of the decree likely begins a stage in the litigation at least as long if not longer than the trial that preceded it. Equitable remedies are favored over money damages. Relief is wide-ranging, typically requiring effort by many layers of government. Implementation frequently intimately involves judges—usually federal judges—in day-to-day operations of state government.”

The differences between the two models, then, are both structural and philosophical.

Moreover, recourse to this new public law model has been facilitated over several decades by broad interpretations of constitutional and statutory causes of action. In particular, the now sweeping scope of 42 U.S.C. Sec. 1983 (*Civil Rights Act of 1871*)¹² has allowed for countless public lawsuits against local government and state and local officials.

Applauded by some as an effective remedy to institutional obstinacy,¹³ the new public law litigation is believed by others to be at least constitutionally ambiguous; at most, a constitutionally illegitimate basis for the increasing tendency among federal district judges to act “as [the] day-to-day managers and implementors” of affairs traditionally in the purview of state elected officials.¹⁴ Yet, until recently, “the Supreme Court has maintained a near Sphinx-like silence”¹⁵ on the affirmative power of the lower federal courts.¹⁶ Its rather bewildering breach of that silence in 1990, by virtue of its opinion in *Spallone v. United States*, merits discussion.

Spallone v. United States and the limits of Court Power

At issue in *Spallone v. United States*¹⁷ was the City of Yonkers long-standing litigation over segregation in public housing.¹⁸ Ultimately, the city was found liable for intentionally promoting racial segregation in public housing in violation of Title VIII of the *Civil Rights Act of 1968*¹⁹ and the equal protection clause of the Fourteenth Amendment. Following considerable discussion over the terms of a nonspecific court order to remedy the situation, parties to the suit agreed in 1988 to a consent decree setting forth “certain actions which the City of Yonkers [would] take in connection with a consensual implementation . . . of the housing remedy order.”²⁰ The consent decree was approved by a 5-2 vote of the city council.

Notwithstanding council approval, the city failed to fulfill its legal obligations, hoping first to exhaust all appellate remedies, even though the court had not granted a stay of execution. In response, the district court entered a more detailed Long-Term Plan Order, requiring the city to adopt a remedial legislative package or be held in contempt of court and subjecting it to escalating daily fines if it violated the court’s orders. Significantly, the court applied the threat of contempt and its attendant fines not only to the city but to individual council members as well.²¹

Despite the increasingly heavy hand of the district court, the city council defeated a resolution to adopt appropriate legislation in a timely manner, prompting the court to hold the city and four majority council members in contempt. On appeal, the finding of contempt and the application of fines was upheld by the court of appeals.²² The U.S. Supreme Court accepted the case for review on the relatively narrow but important issue of “federal judicial power against individual [local] legislators.”²³ On consideration of that problem, a divided Court reversed.²⁴

In his opinion for the majority, Chief Justice William Rehnquist found a “significant difference” between fines imposed against a city and those levied against recalcitrant councilmen:

Sanctions directed against the city for failure to take actions such as those required by the consent decree coerce the city legislators and, of course, restrict [their] freedom . . . to act in accordance with their current view of the city’s best interests. . . . But . . . imposition of sanctions on individual legislators is designed to cause them to vote, not with a view to the interests of their constituents or of the city, but with a view solely to their own personal interests. . . . Such fines thus encourage legislators, in effect, to declare that they favor an ordinance not in order to avoid bankrupting the city for which they legislate, but in order to avoid bankrupting themselves.”²⁵

Individual sanctions, according to the chief justice, cause “a much greater perversion” of the local democratic process than do coercive measures aimed at government as the offending entity.²⁶

Missouri v. Jenkins and the Breadth of Court Power

Three months later, a different set of circumstances and a different configuration of justices were willing to tilt the constitutional balance away from local autonomy and toward the defense of Fourteenth Amendment rights in deciding *Missouri v. Jenkins*.²⁷ Like *Spallone*, *Jenkins* involved protracted litigation, begun in 1977 when the Kansas City, Missouri, School District (KCMSD) and a group of students proved that KCMSD and the state operated a system of segregated schools.²⁸

As a result of the civil rights violation, a district court issued an order providing detailed remedies and setting forth the financing necessary to effect implementation.²⁹ Because Missouri’s constitution and statutory law limited the amount of money the school district could raise to meet its share of the financial obligation, the court assessed most of the costs to the state.³⁰

For several reasons, the case was appealed. Although the court of appeals affirmed all findings of liability and much of the remedial order, it disagreed with the district court’s allocation of the financial burden, suggesting, instead, that the costs be divided equally between the state and the school district? Throughout the appeal, proceedings before the district court continued, with KCMSD pro-

posing, and the court approving, an expensive magnet school plan. In the face of voter and legislative resistance, unfunded school district costs began increasing, even without the recommended 50-50 split.

Meanwhile, the district court, still concerned about the relative abilities of the two parties to meet their escalating financial obligations, concluded that the state bore primary responsibility for the unconstitutional conditions that prompted the litigation in the first place and determined that costs should be distributed according to a 75-25 ratio, with the state bearing the major burden. It was obvious that KCMUSD would be unable to finance its share. As a result, the court ordered that the school district property tax be raised beyond the limits imposed by the Missouri Constitution.

On appeal to the 8th Circuit Court of Appeals, the action of the district court was upheld.³² The appeal court's only objection to the ruling was that in the future the district court should not set tax rates itself, but rather "should authorize KCMUSD to submit a levy to the state tax collection authorities and should enjoin the operation of state laws hindering KCMUSD from adequately funding the remedy."³³ Thereafter, the state requested that the U.S. Supreme Court review its complaint, arguing that the property tax increase violated Article III, the Tenth Amendment, and principles of federal-state comity.

Although the Supreme Court reversed the district court's direct imposition of a tax increase as "not only intrud[ing] on local authority but circumvent[ing] it altogether,"³⁴ the majority nonetheless upheld, on principle, the appellate court's strategy prohibiting the operation of state laws that prevent local jurisdictions from meeting court-imposed financial obligations.³⁵ In its ruling, the Court argued that "state policy must give way when it operates to hinder vindication of federal constitutional guarantees."³⁶

Subtle Distinctions and Mixed Messages

In the end, both *Spallone* and *Jenkins* hinge on judicial nuance. The Supreme Court, for example, readily admits that whether fines are levied against governmental structures or governmental officials, they may be expected to alter a legislator's view of the "public interest" artificially. Fines against governments apparently would force elected representatives to engage in the acceptable legislative task of balancing public good against public opinion, while fines against individuals would force them to abrogate legislative duty altogether in favor of naked economic self-interest.³⁷ Moreover, a federal judge may circumvent state policy, including state constitutional policy, but not via the direct imposition of a tax—at least not until all other avenues have been tried and tested.³⁸

If *Spallone* and *Jenkins* appear to tender only minimal, and at that somewhat oblique, guidance, it is because, as one observer noted, *Spallone* and *Jenkins* "offer little beyond the bland proposition that district court remedial powers are broad but 'not unlimited'."³⁹ Hence, the *Jenkins* majority suggested that federal courts may choose from a variety of corrective measures, including the indi-

rect imposition of local taxes, to alleviate unconstitutional conditions.⁴⁰ Conversely, the *Spallone* majority made its focal point "the doctrine that a court must exercise 'the least possible power adequate to the end proposed'."⁴¹

The likely interpretation of the opinions in these cases is a fundamental philosophic disagreement within the Court's ranks:

Since *Brown II*'s ambiguous charter to desegregate schools "with all deliberate speed," the controversy over judicial intervention has often turned on the extent to which undeniably culpable local elected officials deserve the deference of appointed federal district court judges. One view, adopted by *Spallone* and elaborated upon in the *Jenkins* concurrence, emphasizes local autonomy, regards states as sovereign fortresses, and tends to equate popular sovereignty with majority rule. The alternative view, articulated by *Jenkins* and the *Spallone* dissent, is less certain of the legitimacy conferred by electoral majorities and offers a functional account of the constitutional division of authority, one which rejects the language of impenetrable boundaries and separate spheres.⁴²

The kinds of issues presented to the Court in *Spallone* and *Jenkins* implicate all of the related philosophic dichotomies that have plagued the nation since its inception—national power versus state autonomy, judicial review versus majoritarian preferences, individual rights versus democratic self-governance, and governmental interests versus private moral and legal claims. It is unlikely that the justices will soon develop any definitive answers to the questions surrounding the affirmative institutional powers of federal district courts. In the meantime, the constitutional and practical dilemmas of judicial remediation remain unsettled.

Hard Constitutional Choices: Federalism, Separation of Powers, Individual Rights, and the Custodial Institution

Almost from the start, the transformation of the district court role from supposedly neutral arbiter to explicitly political participant, as prompted by the public law model, has engendered controversy. In part, the contention arises from issues of practical competence. Are judges, by training, experience, institutional position, and administrative capacity, well suited to the task of managing political institutions on a long-term basis?⁴³ The controversy also involves questions of constitutional legitimacy, relating to separation of powers and federalism principles.⁴⁴ The fact that the debate remains far from resolved is illustrated by the Court's ambivalent conclusions in *Spallone* and *Jenkins*, personified in portrayals of district court judges, who are variously lionized as heroes or derogated as villains.⁴⁵

Custodial Institutions

From a constitutional perspective,⁴⁶ the so-called “institution cases” often occur at the uncomfortable nexus between the rights of unpopular minorities and the autonomy of state political institutions. This has been particularly true in cases involving conditions in custodial institutions such as prisons, jails, and mental hospitals.

Although the means by which desegregation is accomplished in particular local settings may remain controversial, the goal of racial equality is now widely supported, if not always in concrete terms, at least in the **abstract**.⁴⁷ That same statement probably cannot be made about the idea that prisons and jails should meet certain constitutional standards, particularly when those standards are articulated by outside judicial forces and involve the reallocation of existing resources or the generation of new ones. In other words, the public objects when federal judges tell local politicians where, how, and when to spend state money on unpopular causes and individuals.

Moreover, the institution cases raise questions about the separation of powers and federalism, and interbranch and intergovernmental relations. Although seemingly related by history and theoretical purpose, the Supreme Court has hinted that the separation of powers doctrine relates only to the “coordinate branches of the Federal Government, and not the federal judiciary’s relationship to the states. . . .”⁴⁸ Nonetheless, Laurence ~~Trie~~ notes that

many disputes implicate . . . complex combinations of separation and federalism concerns. Thus, the limits on federal judicial intrusion into state and local governments reflect both notions about the role of federal courts vis-a-vis the other branches of the national government, and notions about the role of the national government in matters of intensely state and local concern.⁴⁹

Notwithstanding the ambiguous association between these two concepts, the following discussion will assume that when federal district judges order the upgrading of state custodial facilities on constitutional grounds, they tread the (not too brightly drawn) lines of federalism and separation of powers.

Arguments for Far-Reaching Federal Judicial Power

By and large, advocates of far-reaching judicial power in cases of institutional **reform**⁵⁰ place a lower premium on separation of powers and federalism concerns than on the protection of individual rights. Thus, they

assume . . . that the federal government has ultimate responsibility for and a vital interest in all aspects of American life. [They] accept. . . that state and local governments have important primary responsibilities in certain areas, but . . . generally oppose . . . limits on federal power that prohibit federal intervention in these areas. [They] contend that federal courts have an essen-

tial role in defining and protecting individual freedom and dignity and in structuring the relationship between the individual and government. [In short, they] favor federal court reform of state and local prisons and mental hospitals, even if that entails the erosion of state and local government authority.⁵¹

A more subtle version of this scenario views broad judicial power as the best line of defense against the dehumanizing effects of bureaucracies. Hence,

it is more accurate or at least more helpful. . . to think of the courts in these cases as institutions exercising an oversight function on behalf of the interests and groups as well as the individuals **af**-fected by the challenged bureaucratic actions. In this oversight role, courts need not be seen to be in conflict with the legislature or the politically responsible elements of the executive branch. For in the contemporary administrative state, bureaucratic actions do not necessarily bear a stamp of legitimacy as outcomes of a democratic process. Indeed the political branches are also struggling to make the bureaucracy behave—not only in the traditional sense of preventing official imposition on the individual, but also in the newer and equally important sense of trying to ensure that the bureaucracy carries out the positive programs assigned to it. The courts have been essential partners in this **endeavor**.⁵²

Put another way, courts exist “to give meaning to constitutional values in the operation of large-scale **organizations**.”⁵³

Arguments for limited Federal Judicial Power

Commentators and jurists supporting a more limited federal judicial role in institutional reform cases tend to view broad decrees as unsettling on separation of powers and federalism grounds. They contend that, “Courts should act like courts, not like legislatures.”⁵⁴ **According** to Gerald E. Frug, the problem with such orders is that,

rather than preventing the government from **act**-ing in an unconstitutional way, [they] mandate **af**-firmative action by the legislative and executive branches to correct a Constitutional violation. Moreover, the court orders involve a subject matter that is the very foundation of the discretion that is lodged in the other branches [as well as autonomous state governments]: the raising, allocation, and spending of government **funds**.⁵⁵

Although constitutional violations demand constitutional remedies, it is entirely unclear to such observers that the ongoing, open-ended judicial management of state institutions is a legitimate constitutional antidote. **At** the very least, they believe the imposition of long-term and costly financial arrangements **by** the “life-tenured federal judiciary” to be “a violation of both separation of powers and the principle of federalism.”⁵⁶

The Custodial Cases and the Supreme Court

Notwithstanding its virtual silence until 1990 on the general subject of district court remediation, the Supreme Court has had several occasions to speak to the particular issue of conditions in custodial institutions. In important respects, “the Court’s prisoner cases play out an unresolved—and perhaps unresolvable—debate over the appropriate balance between [individual] rights and ‘deference’ to . . . state legislatures.”⁵⁷

Like the public law suit, cases involving custodial conditions in public institutions are a relatively new phenomenon. Historically, the circumstances of individuals who are involuntarily confined were treated as matters for administrative discretion rather than for judicial scrutiny.⁵⁸ Prisons and prison-like institutions were not viewed as grand repositories of constitutional rights, ripe for review and amelioration by court personnel. What has come to be known as the “hands-off” doctrine was premised on at least three rationales:

1. Courts lacked expertise in prison matters.
2. If they did intervene, courts could not secure compliance with their directives.
3. Inmate lawsuits addressed privileges, not rights, and thus failed to state claims for which relief could be granted.⁵⁹

By the late 1960s, the hands-off policy began to give way under an alternative framework, which saw federal judges paying considerable attention to the constitutional claims of inmates.⁶⁰ The result today, two decades after Judge Frank Johnson began his attempts to reform Alabama’s custodial arrangements,⁶¹ is a nationwide system of court orders seeking improvements in the prison systems of 41 states and the District of Columbia, together with scores of additional decrees aimed at local jails and mental health facilities.⁶²

Lower Courts Given Little Guidance

Although the Supreme Court has responded less than enthusiastically to the issue of custodial reform, it has attempted only indirectly to restrict the discretion of lower court judges in institutional suits. According to Alfred Mamlet, “These [haphazard] attempts to limit discretion . . . send confusing signals to lower courts, fail to control the courts, and distort substantive doctrine.”⁶³

First, as with the public law suit in general, the Court has insisted that the institutional “remedy be tailored to the violation.”⁶⁴ As Mamlet points out, however, this mandate, based on the traditional model of litigation, “provides virtually no guidance to lower courts”⁶⁵ involved in public law litigation. For example,

many lower courts use a “totality of the circumstances” test for determining whether prison con-

ditions violate the eighth amendment.⁶⁶ Thus, district court judges are faced with the logically impossible task of showing that each specific part of a remedy is necessary to cure the constitutional deficiencies revealed by the “totality of circumstances test. . . . It is not realistic to use [the Supreme Court’s] tailoring maxim to show that the Constitution prohibits solitary confinement for more than thirty days, when a number of prison practices are challenged.”⁶⁷

Generally, “the Supreme Court’s tailoring paradigm ignores the reality that district court judges fashion their decrees as policy makers rather than deduce them logically as traditional judges. Remedying institutional violations necessarily involves making discretionary public policy choices.”⁶⁸ Thus, the Court’s insistence on employing the traditional remedial metaphor in the face of nontraditional legal battles offers little in the way of practical instruction to judges on the front lines.

Second, since the mid-1970s, the Supreme Court has attempted to impose more stringent justiciability requirements on those seeking equitable relief.⁶⁹ Indeed, the Court has moved recently to separate disputes about a plaintiff’s standing to sue into different categories, depending on the requested remedy.⁷⁰

This marks a “departure from traditional standing doctrine which focuses on the harm suffered by the plaintiff.”⁷¹ (Emphasis added.) Ironically, the Court’s new standing requirements mark a clear departure from standing doctrine under the traditional lawsuit.⁷²

Finally, the Court has tried to limit judicial discretion through narrow interpretation of substantive constitutional rights in institutional, particularly custodial, settings. As a result, patients committed to state mental hospitals have only a minimal right to training;⁷³ convicted prisoners are not free from conditions that may be “restrictive and even harsh;”⁷⁴ and even nonconvicted pre-trial detainees lose substantial constitutional rights at the jailhouse door.⁷⁵

For a number of possible reasons, the Supreme Court has been less sympathetic to the need for custodial institutional reform than, for instance, to that of school system reform. It has exhibited more deference to local prison and jail administrators than to others.⁷⁶ Nonetheless, its message to the lower courts has been obscure at best. According to Barry Bell, the Court

has discovered that “deference” [to state and local administrators] is a difficult jurisprudential horse to harness. As long as the Court explicitly or implicitly acknowledges that second-guessing prison officials is at least occasionally correct, some lower court judges will continue to intervene. . . . Although the . . . Court has opted for . . . exhortations to discourage excessive lower court intervention in the day-to-day operation of prisons, a majority of the Justices believes that intervention remains appropriate when the conditions of confinement pass the bounds of civilized standards. Although

the Court has demonstrated that such cases arise infrequently, it has offered no clear guidelines for recognizing them when they do arise.⁷⁷

Perhaps, Bell notes, alluding to Justice Potter Stewart's famous obscenity "doctrine," the lower courts "will know them when they see them."⁷⁸

Perhaps, too, as Chayes insists, "the attributes of public law litigation are strongly resistant to conscious efforts [even conscious efforts by the Supreme Court] at reversal."⁷⁹ Whatever the specific institutional setting or issue,

in neither the standing area nor the realm of remedial discretion has the Court been able to cut back significantly on the developments that have accompanied the shift from the traditional to the public law model of litigation. . . . The Court has responded to the procedural problems generated by the new forms of adjudication with concepts and modes of thought derived from the old. The resulting doctrines neither guide lower courts and litigants nor illuminate and refine what should be dispositive issues. They do provide a convenient umbrella for whatever results commend themselves to a majority of the Court.⁸⁰

Suing for Constitutional and Statutory Compliance: The Scope of Section 1983

Among the means for attacking state actions, including custodial conditions, probably none has been as powerful over the past 30 years as Section 1983 of the *Civil Rights Act of 1871*:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or 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 for redress.⁸¹

A statutory derivative of the Fourteenth Amendment, Section 1983 provides a direct federal remedy for official violations of federal law. Yet, throughout its first 90 years, the act was notable primarily for its legal insignificance.⁸² Long-standing common law exemptions embodied in the Eleventh Amendment, shielding state and local officials and municipalities on the basis of their "good faith" and the state immunity doctrine, rendered Section 1983 suits virtually ineffective for the purposes of collecting damages. In the 1961 case of *Monroe v. Pape*, however, the Supreme Court opened the floodgates to litigation under

the civil rights statute, as it found the actions of 13 Chicago police officers justiciable "under color of state law."⁸³ With *Monroe*, the legal landscape was to change dramatically.

Section 1983 and State Immunity: A Note on the Eleventh Amendment

Before proceeding to a general discussion of the scope of Section 1983, it is necessary to mention briefly the status of the Eleventh Amendment.⁸⁴ It states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The amendment's rather obscure fiat has given rise to numerous interpretations⁸⁵ variously embraced, rejected, and modified by the Court. Eleventh Amendment jurisprudence has been described as "replete with historical anomalies, internal inconsistencies, and senseless distinctions."⁸⁶ That critique, in turn, is founded at least in part on the line of decisions stemming from *Ex Parte Young*.⁸⁷

The story of *Ex Parte Young* actually begins in 1890 with the case of *Hans v. Louisiana*,⁸⁸ which held that the state sovereign immunity principle embodied in the Eleventh Amendment restricted even suits arising under the U.S. Constitution and laws.⁸⁹ Given full girth, *Hans* may have proved a formidable, if not insurmountable, obstacle to future enforcement of federal rights against state actions.⁹⁰ With just such a possibility in mind, the *Young* doctrine was developed.

At issue in *Young* was an injunction prohibiting a state attorney general from enforcing a state law alleged to be contrary to the Fourteenth Amendment. Presumably, under *Hans*, such a suit would have been proscribed. To decide the *Young* case, however, the Court employed the following logic:

The [statute] to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the state to enforce an unconstitutional [statute] is a proceeding without the authority of and one which does not affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state to enforce a legislative enactment which is void because it is unconstitutional. If the [statute] which the state Attorney General seeks to enforce be a violation of the federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of the Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States?⁹¹

Hence, the Court salvaged the enforcement of national rights through a remarkable legal fiction: “although the actions of the Attorney General were those of the state for the purpose of the [Fourteenth] Amendment, they were not the actions of the state for the purposes of the [Eleventh].”⁹² The result is that “states and state agencies cannot be named as parties to suits filed under Section 1983 or related Reconstruction-era civil rights legislation. [Rather,] suits directed against such entities must be styled as suits against responsible state officials.”⁹³

The same fiction does not apply to local governments. As early as 1890,⁹⁴ the Court held that Eleventh Amendment immunity does not extend to localities and would present no barrier to Section 1983 suits filed against local governments as governments.⁹⁵ The distinction is of vital concern to localities, particularly since the Court does recognize certain realms of personal immunity from liability for damages.⁹⁶ The result, according to Peter W. Low and John C. Jeffries, Jr., is a legal conundrum:

Since the state cannot be sued directly, the successful assertion of personal immunity by a state official may prevent recovery of damages from any source for an admittedly unconstitutional state practice. By contrast, local government has no 11th amendment immunity. Thus, recovery may not be possible against the state or any governmental official in certain circumstances where a similar action against local government would succeed.⁹⁷

Contemporary Construction of Section 1983: The Status of Governmental Liability and Official Immunity

Local Governmental Liability

As mentioned above, the indemnification from Section 1983 liability enjoyed by state governments does not extend to local governments. Suggested as early as 1890, the possibility of bringing civil rights actions against municipalities became a clear and attractive reality in 1978 when the Supreme Court, in *Monell v. Department of Social Services*, declared such units “persons” for Section 1983 purposes,⁹⁸ albeit “persons” who enjoyed a qualified good faith immunity.

In 1980, however, even the “good faith” immunity of city government evaporated when the Court held that “municipalities have no immunity from damages liability flowing from their constitutional violations. . . .” That pronouncement came as part of the Court’s decision in *Owen v. City of Independence*,⁹⁹ a case revolving around the dismissal of the chief of police without formal written reason or hearing. According to the chief, the firing was in violation of his constitutional rights to procedural and substantive due process. The Supreme Court affirmed. As a result, the city, through the official acts of its city manager

and council members, was deemed liable for damages, and was unable to assert the “good faith” of municipal functionaries in its defense.¹⁰⁰

The extent of municipal susceptibility to damages was expanded further in 1986, when the Court decided that a single decision by a city officer might constitute “official policy” for purposes of Section 1983 liability. The leading case on this point, *Pembaur v. Cincinnati*,¹⁰¹ concerned a prosecutorial instruction to police to enter a medical clinic forcibly, in violation of the owner’s Fourth Amendment rights. Dismissing the city’s claim that “official policy” could refer only to the “formal rulings or understandings” promulgated by legislators, the Court instead found that

if [a] decision to adopt [a] particular course of action is properly made by [a] government’s authorized decisionmakers, it surely represents an act of official government “policy” as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly.”

In the years following *Pembaur*, the Supreme Court has struggled several times, with less than satisfying results, “to define the kinds of circumstances, relationships, and patterns of authority determinative of whether a municipality is liable for the misconduct of its employees.”¹⁰³ Indeed, the Court itself recently noted that “the definition of municipal liability manifestly needs clarification.”¹⁰⁴

To that end, it explored further the issue of “final policymaking authority” in *St. Louis v. Praprotnik*.¹⁰⁵ In that case, the Court asserted, first, that “the identification of officials having [such] authority is a question of state (including local) law, rather than a question of fact for the jury.”¹⁰⁶ Moreover, in attempting to limit the “legal standard for determining when isolated decisions by municipal officials or employees may expose [a] municipality to Section 1983 liability,” the Court determined that

when a subordinate’s discretionary decisions are constrained or subject to review by authorized policymakers, they, and not the subordinate, have final policymaking authority. Positing a delegation based on their mere acquiescence in, or failure to investigate the basis of, the subordinate’s decisions does not serve Section 1983’s purpose where . . . the wrongfulness of those decisions arises from a [subordinate’s] retaliatory motive or other unstated rationale.”

In this case, because the city subordinate in question did not possess delegated authority to deprive Praprotnik of his civil rights, the city avoided liability.

Related to the issue of ultimate decisionmaking authority is the extent to which cities are liable for constitutional violations suffered at the hands of inadequately trained municipal employees. Following at least two disappointing attempts to resolve the question,¹⁰⁸ the Court held, in 1989, that municipalities may be liable for failure to

sufficiently instruct employees, but “only where the failure to train in a relevant respect amounts to **deliberate** indifference to the constitutional rights of persons with whom [employees] come into **contact**.”¹⁰⁹ (Emphasis added.)

While adding to the potential liability of cities, the Court was careful to circumscribe the conditions under which a plaintiff might seek damages for instructional deficiencies, noting that municipal responsibility may be inferred only where “the need for more or different training is so obvious, and the inadequacy so likely to result in violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.”¹¹⁰ Moreover, the Court added that even if such failure is evident, a “respondent must still prove that the deficiency in training actually caused. . . the ultimate injury.”¹¹¹

Although cities have clearly borne the brunt of governmental liability claims, courts have considered the possibility that other jurisdictional entities may be considered “persons” for Section 1983 purposes. The record is a mixed one.

In 1990, the Supreme Court decided that U.S. territories cannot be held liable for damages as Section 1983 “persons”;¹¹² however, a school board may not claim a “sovereign immunity” defense in Section 1983 actions, even when such actions are brought in state court.¹¹³

Of potentially major financial and regulatory significance is a recent ruling by the District Court for Western Kentucky considering county liability.¹¹⁴ Although Judge Ronald E. Meredith could find no prior case law directly on point, he determined, employing *Monell*¹¹⁵ and *Will v. Michigan Department of State Police*¹¹⁶ criteria, that under Kentucky law, counties more closely parallel municipal corporations than they do states. Consequently, they must “be considered persons for purposes of. . . Section 1983.”¹¹⁷ Clearly only the first legal round, the issue is likely to be revisited numerous times.

Official Immunity

Although municipalities and analogous local governments are included among the persons to whom Section 1983 applies, numerous real people are not. Previously, the Supreme Court has determined that legislators engaging in legislative activities are absolutely immune from Section 1983 damages,¹¹⁸ as are judges¹¹⁹ and prosecutors¹²⁰ acting in their official capacities. At the same time, the Court has offered qualified immunity to both street- and decision-level executives; to police acting in good faith and with probable cause;¹²¹ and “to officers of the executive branch,” depending on “the scope of discretion and responsibilities of the office. . . .”¹²²

In the 1989 case *Will v. Michigan Department of State Police*,¹²³ the Court extended Section 1983 immunity to the awarding of damages to state officials acting as state agents, reasoning that “a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office. . . . As such, it is no different from a suit against the state itself,” and thus is barred by the Eleventh Amendment.¹²⁴ Though a victory

for state agencies, it is important to note that *Will* does not present a barrier to Section 1983 suits seeking injunctive or prospective relief from state officials acting in their official capacities, but rather, only to actions pursuing monetary damages.¹²⁵

The Substantive Reach Expands

While the Supreme Court has extended the range of official immunity and has moved to **limit** somewhat the conditions under which governments may be found liable for constitutional and statutory infractions, it has, ironically, broadened the substantive reach of Section 1983. Noteworthy in this regard are *Golden State Transit Corp. v. Los Angeles*,¹²⁶ *Wilder v. Virginia Hospital Association*,¹²⁷ and *Dennis v. Higgins*.¹²⁸

Traditionally, Section 1983 was thought to apply only to “interests secured by the Constitution”¹²⁹ in general, and the Fourteenth Amendment in particular. As a result, in its early post-Monroe utilizations, Section 1983 proved a relatively effective tool for redressing abrogations of basic civil rights and liberties. Beginning in 1980, the Court expanded the scope of the civil rights law to interests created by federal statutory provisions.¹³⁰ It broadened that reach further in the cases mentioned above.

Golden State. At issue in *Golden State Transit* (1989) were complex issues relating to collective bargaining, work stoppage, and the awarding of city franchises to taxicab companies. Specifically at issue was the City of Los Angeles’ denial of a franchise extension to *Golden State*, the city’s largest cab company, during a strike by the company’s workers. In a resulting legal action, *Golden State* alleged that the National Labor Relations Act (NLRA)¹³¹ preempted the city’s franchising decision because it was in the midst of a labor dispute. Moreover, it asserted that the supremacy clause of the Constitution and NLRA give rise to rights enforceable by Section 1983. Although the cab company’s claim was denied by both the district court¹³² and the Ninth Circuit,¹³³ it was vindicated in 1989 by the United States Supreme Court.

The Court declared, 6-3, that NLRA creates rights against state interference in labor-management disputes. “Thus, if the state regulates conduct that is actually protected by federal law, pre-emption follows as a matter of substantive right.”¹³⁴ Speaking for the majority, Justice John Paul Stevens noted that participants to a collective bargaining agreement are afforded “the right to make use of ‘economic weapons’ . . . free from . . . governmental interference.”¹³⁵ Because *Los Angeles* had violated that right, *Golden State* could employ the broad remedial scope of Section 1983.

In dissent, Justice Arthur M. Kennedy, for himself, the chief justice, and Justice Sandra Day O’Connor, argued against an interpretation of Section 1983 allowing “a cause of action for damages when the only wrong committed by the State or its local entities is misapprehending the precise location of boundaries between state and federal power.”¹³⁶ He went on to assert that Section 1983 “distinguishes secured rights, privileges, and immunities from

those interests merely resulting from the allocation of power between State and federal Governments. . . .¹³⁷

According to one observer, *Golden State*

could significantly affect federal litigation. Preemption plaintiffs may now seek damages for prior injury under section 1983 as well as attorneys' fees. In addition, because section 1983 was conceived as a powerful remedy for abuse by state officials, section 1983 suits embody exceptions to doctrines restricting federal jurisdiction. For example, section 1983 plaintiffs need not exhaust their remedies in state courts. In addition, section 1983 is one of the few exceptions to the Anti-Injunction Act, which forbids federal court intervention in state judicial proceedings. Although the Court recently held that a federal court cannot enjoin a state court proceeding simply because it infringes on an area preempted by federal law, *Golden State* creates an exception that almost swallows the rule.¹³⁸

Wilder v. Virginia Hospital Association. The year following *Golden State*, the Court added to the growing list of actionable deprivations with its ruling in *Wilder v. Virginia Hospital Association* (1990). At issue was the question of state reimbursement to health care providers for services rendered under Medicaid.¹³⁹ In this case, the Virginia Hospital Association (VHA) contended that the provider reimbursement plan promulgated by the state and approved by the Secretary of the U.S. Department of Health and Human Services (HHS) violated the *Medicaid Act* because "rates are not reasonable and adequate to meet the economically and efficiently incurred cost of providing care to Medicaid patients. . . ."¹⁴⁰ As a consequence, VHA sought to utilize Section 1983 as a cause of action to challenge Virginia's compliance with the *Medicaid Act*. That challenge was subsequently upheld by the district court and affirmed by the Fourth Circuit on the grounds "that the language and legislative history of the Boren Amendment [to the *Medicaid Act*] demonstrate that it creates 'enforceable rights' and that Congress did not intend to foreclose a private remedy for the enforcement of those rights."¹⁴¹

In his opinion for a narrowly divided (5-4) Court, Justice William J. Brennan, Jr., upheld the rulings of the lower courts, deciding that state Medicaid reimbursement rates can be challenged in Section 1983 suits. Speaking broadly to the relationship between statutorily conferred rights and Section 1983, Brennan asserted that a plaintiff alleging violation of a federal law may sue under the civil rights act "unless (1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of [Section] 1983,' or (2) 'Congress has foreclosed such enforcement of the statute in the enactment itself' "¹⁴² He concluded that the Medicaid Act "provides a substantive right to reasonable and adequate rates . . . enforceable by health care providers under Section 1983. . . ."¹⁴³

In dissent, Chief Justice Rehnquist rejected the Court's reasoning, as much on his reading of congressional intent as on his solicitude for state autonomy in matters of Medicaid reimbursement. Citing relevant portions

of the *Medicaid Act* requiring states to compensate providers according to "methods and standards *developed by the State*. . ."¹⁴⁴ (emphasis added), he concluded that the Court's ruling would effectively reverse the policy dynamic contemplated by Congress:

[E]very Section 1983 action hereafter brought by providers to enforce [the Boren Amendment] will inevitably seek the substitution of a rate system preferred by the provider for the rate system chosen by the State. Thus, whenever a provider prevails in such an action, the defendant State will be enjoined to implement a system of rates other than the rates "determined in accordance with methods and standards developed by the State," which the "State finds . . . are reasonable and adequate," and with respect to which the State made assurances to the Secretary [of HHS] that the Secretary found "satisfactory." The court orders entered in such actions therefore will require the States to adopt reimbursement rate systems different from those Congress expressly required them to adopt by the above-quoted language.¹⁴⁵

Dennis v. Higgins. Despite their potential ramifications, *Golden State* and *Virginia Hospital Association* simply extend the logic propounded a decade ago "that Section 1983 generally . . . supplies the remedy for vindication of rights arising from federal statutes."¹⁴⁶ The Court appeared to break entirely new ground in 1991, however, holding in *Dennis v. Higgins* that "suits for violation of the Commerce Clause may be brought under Section 1983."¹⁴⁷

At issue in *Dennis* was a system of "retaliatory" taxes and fees imposed by the state of Nebraska on motor carriers operated in the state but registered in other states. In his complaint, petitioner Dennis claimed that the taxes and fees represented an unlawful burden on interstate commerce and that the state Department of Motor Vehicles and others were liable under Section 1983.

The Nebraska Supreme Court denied the civil rights claim, holding that "despite the broad language of Section 1983," it does not create a cause of action "for violations of the commerce clause."¹⁴⁸ The state court, relying largely on a 1984 Eighth Circuit opinion,¹⁴⁹ reasoned that such claims were not anticipated by Section 1983 because "among other things, 'the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments' "¹⁵⁰

Finding that the Nebraska Supreme Court and the Eighth Circuit erred in construing the 1871 act too narrowly, the U.S. Supreme Court, in a 7-2 decision, asserted that "a broad construction of Section 1983 is compelled by statutory language that speaks of deprivations of "any rights, privileges, or immunities secured by the Constitution or laws."¹⁵¹ (Emphasis in original.) Although the Court conceded that "the 'prime focus' of Section 1983 . . . was to ensure 'a right of action to enforce the protections of the Fourteenth Amendment' and related statutes,¹⁵² it nevertheless noted that its own rulings since 1980 had taken Section 1983 far beyond its original goal.

Responding specifically to the commerce clause claim, the Court granted “that the . . . Clause is a power-allocating provision, giving Congress pre-emptive authority over the regulation of interstate commerce.”¹⁵³ However,

it is also a substantive “restriction on permissible state regulation.” . . . [And] individuals injured by state action that violates this aspect of the Commerce Clause may sue and obtain injunctive and declaratory relief. . . . This combined restriction on state power and entitlements to relief under the Commerce Clause amounts to a “right, privilege, or immunity” under the ordinary meaning of those terms. . . . [Hence], the Commerce Clause of its own force imposes limitations on state regulation . . . , and is the source of a right of action of those injured by regulations that exceed such limitations.¹⁵⁴

Section 1983 and Expanded Immunities

Recent Supreme Court rulings on Section 1983 have exhibited countervailing tendencies, expanding the substantive scope of the Act on the one hand, while, on the other, restricting its application through the use of immunities and other procedural devices.¹⁵⁵ One obvious consequence is to leave municipalities (and municipal-like entities) especially vulnerable to liability for damages as well as the sort of open-ended prospective relief faced by cities and states alike.

However, this strain on municipal budgets may not be the only result of the Court’s somewhat opposing stances in the realm of Section 1983. As one observer notes, the substantive expansion of the civil rights statute

may . . . prove hollow for those plaintiffs most in need of section 1983’s special protection. Preemption plaintiffs are not among those whom section 1983 was intended to protect. At a practical level, many of these new plaintiffs can sustain litigation more easily and thus have less need of the incentives provided by section 1983 than civil rights plaintiffs generally do. Normatively, the rights generated by federal preemption do not have the same importance to individuals as the core concerns of section 1983—equal protection and due process. Extending section 1983 outside the core area weakens the argument that section 1983 plaintiffs need special protections. By choosing the expansive “functional vision” of section 1983 rather than the narrower “historical” one, the Court may actually have diluted the ability of the statute to vindicate the rights that most concerned its framers. Bereft of its roots as a civil rights remedy, section 1983 loses much of its justification as a powerful remedy against abuses by state and local officials.¹⁵⁶

The Court’s expansion of Section 1983 causes of action, together with its “tendency to respond prophylactically” to

that expansion via the route of official immunities and procedural roadblocks, while increasing the vulnerability of certain state and local governments, may, ironically, be decreasing the protection available to the intended beneficiaries of the Reconstruction statute.¹⁵⁷

Conclusion

The increasing popularity of the public lawsuit, together with the Supreme Court’s apparent inability to speak broadly or coherently to the subject, has had numerous fallouts for intergovernmental relations. No longer is the Court the umpire of the federal system in certain key respects. On the contrary, public law litigation has engendered the proliferation of multiple umpires in the form of 575 federal district court judges.

Moreover, in the absence of clear policy directives from the Supreme Court, these umpires possess considerable individual autonomy and power. Indeed, one result of *Jenkins* may be to add to that power in the future. As Justice Kennedy noted in concurrence, “This assertion of judicial power in one of the most sensitive policy areas, that involving taxation, begins a process that over time could threaten fundamental alteration of the form of government our Constitution embodies.”¹⁵⁸ Possessed now of the power to tax, even where such taxation is hostile to state law, the district court potentially takes on a kind of supra-legislative, supralocal aura.

Nor would this potential necessarily be confined to the politically palatable realm of school desegregation. The Supreme Court itself has remarked that “desegregation case[s] do . . . not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right.”¹⁵⁹ As one commentator has noted:

The significance of *Jenkins* also lies in its potential application to other cases involving funding for constitutional violations where the equitable powers of the court also play a significant role, such as public housing, prisons, state apportionment schemes, and state mental health systems, among others.¹⁶⁰

Jenkins, for all its nuance, injects another element of uncertainty into the intergovernmental landscape. This jurisprudential instability is evident as well in the ever-mutating doctrine of Section 1983 causes of action. Indeed, so dynamic has been interpretation of the now ancient civil rights statute that it has become a slippery legal slope for plaintiff and respondent alike.

These realms of uncertainty, among other issues, are taken up in the next chapter.

Notes

¹ Alfred M. Mamlet, “Reconsideration of Separation of Powers and the Bargaining Game,” *Emory Law Journal* 33 (1984): 685.

- ² *Brown v. Board of Education*, 349 U.S. 294 at 299 (1955).
- ³ For background, see U.S. Advisory Commission on Intergovernmental Relations (ACIR), *Regulatory Federalism: Policy, Process, Impact, and Reform* (Washington, DC, 1984), pp. 444-9. In what is apparently the first case of its kind, Judge Thomas E. Hogan of the U.S. District Court for the District of Columbia found city officials liable for statutory and constitutional violations in the operation of a foster care system. *LaShawna A. v. Dixon*, 762 E. Supp. 959 (1991).
- ⁴ *Brown II* refers to *Brown v. Board of Education*, 349 U.S. 294 (1955). This was the successor to *Brown v. Board*, 347 U.S. 483 (1954). In *Brown II*, the Supreme Court transferred to the appropriate U.S. district courts the responsibility for supervising the "transition to a system of public education freed of racial discrimination." 349 U.S. 294 at 299.
- ⁵ *Ibid.* In fact, *Brown* was the first in a series of judicial and legislative events which, in combination, worked to transform the judicial task. For example, *Baker v. Carr*, 369 U.S. 186 (1962), and subsequent redistricting controversies augured a more active role for the judiciary. During the late 1960s and 1970s, the Congress passed numerous acts (e.g., the various civil rights acts, the clean water and air acts, the Occupational Safety and Health Act, the Consumer Product Safety Act, and the Freedom of Information Act) requiring court enforcement. Class action rules were liberalized in 1966. In 1971, Judge Johnson ordered what was to become the prototypical institutional restructuring in *Wyatt v. Stickney*, 334 E. Supp. 1341 (M.D. Ala. 1971). See Abram Chayes, "Public Law Litigation and the Burger Court," *Harvard Law Review* 96 (1983-82): 6-7. See also, ACIR, *Regulatory Federalism*, pp. 44-49.
- ⁶ Barry Friedman, "Book Review Right and Remedy," *Vanderbilt Law Review* 43 (1990): 595.
- ⁷ Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 59 (1976): 1281.
- ⁸ Chayes, "Public Law Litigation and the Burger Court," p. 4-5. For further discussion, see sections following.
- ⁹ *Ibid.*
- ¹⁰ For further discussion, see sections following.
- ¹¹ Friedman, "Book Review Right and Remedy," p. 595-96.
- ¹² See "Suing for Constitutional and Statutory Compliance: The Scope of Section 1983," following.
- ¹³ See, for example, Chayes, "The Role of the Judge in Public Law Litigation," and Steven Flanders, "Blind Umpires, A Response to Professor Resnik," *Hastings Law Journal* 35 (1984): 505.
- ¹⁴ Charles Fried, "Curbing the Judiciary," *New York Times*, November 10, 1981. See also, Gerald E. Frug, "The Judicial Power of the Purse," *University of Pennsylvania Law Review* 126 (1978): 715; Raoul Berger, *Government by Judiciary: The Transformation of the 14th Amendment* (Cambridge, Massachusetts: Harvard University Press, 1977); Donald L. Horowitz, *The Courts and Social Policy* (Washington, DC: The Brookings Institution, 1977); and Archibald Cox, *The Role of the Supreme Court in American Government* (New York: Oxford University Press, 1976).
- ¹⁵ "The Supreme Court, 1989 Term: Leading Cases: II. Federal Jurisdiction and procedure," *Harvard Law Review* 104 (1990): 2%.
- ¹⁶ In general, the Court has declined to review the institutional restructuring programs of lower federal courts. See, for example, *Liddel v. Missouri*, 731 E.2d 1294 (8th Cir.) (ordering a tax increase to finance school desegregation), cert. denied, 469 U.S. 816 (1984); *Newman v. Alabama*, 559 E.2d 283 (5th Cir.) (restructuring the state's prisons), cert. denied, 438 U.S. 915 (1978); *U.S. v. Chicago*, 549 E.2d 415 (7th Cir.) (prohibiting the disbursement of federal funds until minority police hiring and promotion goals were met), cert. denied, 434 U.S. 825 (1977). The Court has occasionally reprimanded lower court action, but only somewhat cryptically. See *Rizzo v. Goode*, 423 U.S. 362 (1976) (hinting that constitutional comity principles may extend to the relationship between federal courts and local governments); *Milliken v. Bradley*, 418 U.S. 717 (1974) (on the inappropriateness of interdistrict desegregation absent proof of interdistrict de jure discrimination). Cases cited in *Harvard Law Review* 104 (1990): 297.
- ¹⁷ 110 S. Ct. 625 (1990).
- ¹⁸ The litigation began in 1980.
- ¹⁹ 82 Stat. 81, as amended, 42 U.S.C. section 3601 (1982 ed.).
- ²⁰ 10 S.Ct. 625 at 629.
- ²¹ The fines for the city were \$100 the first day, to be doubled for each consecutive day of noncompliance; those for the council members were \$500 a day. *Ibid.*, p. 630.
- ²² *U.S. v. Yonkers*, 856 F.2d 444 (2d Cir. 1988). The appeals court limited fines against the city so they would not exceed \$1 million a day.
- ²³ 110 S. Ct. 625 at 631. The Court did not speak to the liability of the city, asserting instead that, "here can be no question about the liability of the city of Yonkers for racial discrimination. . . ." Nor do we question . . . the District Court's remedial order. . . ." *Ibid.*
- ²⁴ Chief Justice Rehnquist was joined in his majority opinion by Justices White, O'Connor, Scalia, and Kennedy. Justice Brennan filed a dissenting opinion, in which he was joined by Justices Marshall, Blackmun, and Stevens.
- ²⁵ 110 S. Ct. 625 at 634.
- ²⁶ *Ibid.* See also Joseph E. Zimmerman, "Federal Judicial Remedial Power," *Publius: The Journal of Federalism* 20 (Summer 1990): 45-61.
- ²⁷ 110 S. Ct. 1651 (1990).
- ²⁸ *Jenkins v. Missouri*, 593 E. Supp. 1485 (WD Mo. 1984). During the year following the filing of the original complaint in 1977, the district court realigned KCMSD as a defendant in the litigation. *School District of Kansas City v. Missouri*, 460 E. Supp. 421 (WD Mo. 1978).
- ²⁹ Originally, the court estimated the cost of desegregation to be nearly \$88 million over a three-year period.
- ³⁰ The court assessed the state \$67,592,072 and the school district \$20,140,472. Even this amount, however, was problematic for the school district. The Missouri Constitution limits local property taxes to \$1.25 per \$100 of assessed valuation unless voters approve a higher tax of up to \$3.25. Further, the Constitution requires property tax rates to be rolled back when property is assessed at a higher valuation, presumably insuring that taxes won't be increased purely as a result of reassessments. Statutory law further limits the financial discretion of the school district. 110 S. Ct. 1651 at 1656 165%.
- ³¹ *Jenkins v. Missouri*, 807 E.2d 657 (8th Cir. 1987), cert. denied, 484 U.S. 816 (1987).
- ³² 855 E.2d. 1295 (8th Cir. 1988).
- ³³ 110 S. Ct. 1651 at 1658 9.
- ³⁴ *Ibid.*, p. 1663.
- ³⁵ The Court largely avoided the constitutional issues, basing its decision primarily on comity principles. The Court was unanimous in striking down the district court's direct tax imposition, but divided sharply (White, Brennan, Marshall, Blackmun, and Stevens for the majority, and Kennedy, Rehnquist,

- O'Connor, and Scalia concurring in part and concurring in judgment) on the appeals court's enjoinder strategy.
- ³⁶ **110 S. Ct. 1651 at 1666.** See also John Clayton Thomas and Dan H. Hoxworth, "The Limits of Judicial Desegregation Remedies after *Missouri v. Jenkins*," *Publius: The Journal of Federalism* 21 (Summer 1991): 93 108.
- ³⁷ *Spallone v. U.S.*, **110 S. Ct. 625** (1990) at 634.
- ³⁸ **110 S. Ct. 1651** (1990).
- ³⁹ *Harvard Law Review* 104 (1990): 304, citing **110 S. Ct. 625 at 653**, quoting *Whitcomb v. Chavis*, **403 U.S. 124 at 161** (1970).
- ⁴⁰ Interestingly, the debate internal to Jenkins saw the Court disagreeing on highly nuanced understandings of previous case law. Thus, Justice White's opinion interpreted *Griffin v. County School Board*, **377 U.S. 218** (1964), as authorizing district courts to order tax levies in school desegregation cases. Justice Kennedy, however, found the *Griffin* analogy to be badly flawed, contending, first, that where *Griffin* involved "an unrepentant and recalcitrant school board" that openly funded white schools while refusing even to operate black schools (**110 S. Ct. 1651 at 1673**), the KCMSD was entirely sympathetic and willing to implement any measures necessary toward alleviating the unconstitutional conditions. Moreover, the school board at issue in *Griffin* (Prince Edward County, Virginia) possessed the power to impose a higher tax, whereas KCMSD lacked any plenary taxing authority, so that even an indirect judicial taxing order amounts to the commandeering of state constitutional practice. (Ibid.) For a more thorough discussion, see Douglas J. Brocker, "Taxation without Representation: The Judicial Usurpation of the Power to Tax in *Missouri v. Jenkins*," *North Carolina Law Review* 69 (1991): 741.
- ⁴¹ **110 S. Ct. 625 at 632**, quoting *Anderson v. Dunn*, **6 Wheat. 204 at 231** (1821).
- ⁴² *Harvard Law Review* 104 (1990): 304.
- ⁴³ For the most complete discussion of this issue and one that results in a negative response to the question of judicial competency in the area of institutional management, see Horowitz, *The Courts and Social Policy*.
- ⁴⁴ See discussion which follows.
- ⁴⁵ See particularly, various accounts of the work of Judge Frank Johnson in Alabama, e.g., Tinsley E. Yarbrough, *Judge Frank Johnson and Human Rights in Alabama* (Tuscaloosa: University of Alabama Press, 1981) and Robert Francis Kennedy, *Judge Frank Johnson, Jr.: A Biography* (New York: Putnam, 1978). For a masterful account of the travails of the first "managerial judges," those charged with implementing school desegregation, see James W. Peltason, *Fifty-Eight Lonely Men* (New York: Harcourt, Brace, and World, 1961).
- ⁴⁶ An assessment of the managerial competence of the federal trial courts is beyond the scope of this chapter and the expertise of its author. However, see, among others, Larry W. Yackle, *Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System* (New York: Oxford University Press, 1989); Horowitz, *The Courts and Social Policy*; Susan Sturm, "Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons," *University of Pennsylvania Law Review* 138 (1990): 805; Flanders, "Blind Umpires, A Response to Professor Resnik"; Donald L. Horowitz, "Decreeing Organizational Change: Judicial Supervision of Organizational Change," *Duke Law Journal* 33 (1983): 1265; Judith A. Resnik, "Managerial Judges," *Harvard Law Review* 96 (1982) 376; and Chayes, "The Role of the Judge in Public Law Litigation."
- ⁴⁷ See, for example, "Race in America," *The Christian Science Monitor*, January 17, 1989, citing recent polls suggesting that the public is increasingly committed to the goals of equality.
- ⁴⁸ *Elrod v. Burns*, **427 U.S. 347** (1976) at 351, quoting *Baker v. Carr*, **369 U.S. 186 at 210**. In each case, the Court was discussing what constituted a so-called "political case." "[T]he separation-of-powers principle, like the political question doctrine, has no applicability to the federal judiciary's relationship to the States" (*Elrod v. Burns* at 349). As mentioned previously (see note 33), *Baker v. Carr* was a watershed event for the new public law. Its distinguishing separation of powers between the federal branch as the stuff of "political questions" from relations between nation and state as legal fodder was crucial. According to Horowitz, with the clearing of the "political thicket" that took place in legislative reapportionment, state administrative terrain began to look like mere underbrush. If courts could refashion state and federal legislatures, not to mention electoral rules under the Voting Rights Act and patronage systems under the first amendment, why, then, could they not refashion schools, prisons, welfare administrations, mental hospitals, housing authorities, and all the rest? What was unthinkable before became litigable. Horowitz, "Decreeing Organizational Change: Judicial Supervision of Organizational Change," pp. 1280-1281 (footnotes omitted).
- ⁴⁹ Laurence Tribe, *American Constitutional Law*, 2d ed. (Westbury, New York: The Foundation Press, 1988), p. 21.
- ⁵⁰ In this section, an attempt will be made to avoid such highly charged terms as "activism" and "restraint" and "liberalism" and "conservatism" in describing the judicial response to institutional reform. In most cases, such terms are more obfuscating than illuminating when describing the complexities of judicial decisionmaking and the often, at first blush, surprising judicial alignments in what might be called "federalism cases." See the section on "Judicial Philosophy" below.
- ⁵¹ David Rudenstine, "Judicially Ordered Social Reform: Neofederalism and Neonationalism and the Debate over Political Structure," *Southern California Law Review* 59 (1986): 455.
- ⁵² Chayes, "Public Law Litigation and the Burger Court," p. 59.
- ⁵³ Owen M. Fiss, "The Supreme Court 1978 Term; Foreword: The Forms of Justice," *Harvard Law Review* 93 (1979): 5.
- ⁵⁴ Mamlet, "Reconsideration of Separation of Powers and the Bargaining Game," p. 686.
- ⁵⁵ Frug, "The Judicial Power of the Purse," pp. 735-736.
- ⁵⁶ Brocker, "Taxation without Representation," p. 741.
- ⁵⁷ Barry R. Bell, "Prisoners' Rights, Institutional Needs, and the Burger Court," *Virginia Law Review* 72 (1986): 161.
- ⁵⁸ See, for example, *Banning v. Looney*, **213 F. 2d 771** (CA10, 1954) (per curiam); cert. denied, **348 U.S. 859** (1954); "Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations." For a more thorough discussion of the historical relationship between courts and custodial administration see ACIR, *Jails: Intergovernmental Dimensions of a Local Problem* (Washington, DC, 1984).
- ⁵⁹ James R. Robertson, "The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates," *University of Cincinnati Law Review* 56 (1987): 94.
- ⁶⁰ Inmates went, in a decade, from possessing virtually no justiciable rights to being recognized as having at least the basic, if somewhat truncated, constitutional rights. See, for example, *Battle v. Anderson*, **564 E. 2d 388** (CA10, 1977) (Eighth Amendment right to protection from degenerative prison conditions); *Bonner v. Coughlin*, **517 F. 2d 1311** (CA7, 1975), cert. denied, **435 U.S. 932** (1978) (limited Fourth Amendment protection from search and seizure); *Woodhous v. Virginia*, **487 F. 2d 889** (CA4, 1973) (per curiam) (reasonable protection from pervasive inmate violence); *Sostre v. McGinnis*, **442 E. 2d 178** (CA2 1971) (cert. denied **404 U.S. 1049** (1972) (limited right to freedom of speech); *Jackson v. Bishop*, **404 E. 2d 571** (CA8, 1968)

(corporal punishment prohibited); *Hamilton v. Covington*, 445 E Supp. 195 (W.D. Ark. 1978) (protection from fire hazards); *Wright v. Enomoto*, 462 E Supp. 397 (N.D. Cal. 1976) (right to procedural due process before being placed in administrative segregation), aff'd. 434 U.S. 1052 (1978); *Teterud v. Gillman*, 385 F. Supp. 153 (S.D. Iowa 1974) (prisoners allowed freedom of religion), aff'd. sub nom. *Teterud v. Burns*, 522 E 2d 357 (8th, 1975); *Carter v. McGinnis*, 351 E Supp. 787 (W.D. N.Y. 1972) (inmates have Fifth Amendment right against self-incrimination in disciplinary proceedings); and *Sawyer v. Sigler*, 320 F. Supp. 690 (D. Neb. 1970) (limited right to medical care), aff'd. 445 E 2d 818 (CA8, 1971) (per curiam). See *Robertson*, p. 94. Still, it should be noted that convicted prisoners and pretrial detainees do not retain all the rights available to the unincarcerated. See, for example, *Bell v. Wolfish*, 441 U.S. 520 (1979).

⁶¹ See, for example, *Wyatt v. Stickney*, 344 E Supp. 373 (M.D. Ala 1972) (reforming mental institutions) and *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala 1976) (reforming prisons) See also note 43.

⁶² *Washington Post*, June 18, 1991.

⁶³ "Reconsideration of Separation of Powers and the Bargaining Game," p. 689.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ See, for example, *Rhodes v. Chapman*, 452 U.S. 337 (1981). For a discussion of *Rhodes*, see ACIR, *Regulatory Federalism*, pp. 48-49.

⁶⁷ Mamlet, "Reconsideration of Separation of Powers and the Bargaining Game," p. 691.

⁶⁸ *Ibid.* See also, Chayes, "Public Law Litigation and the Burger Court."

⁶⁹ *Ibid.*, p. 692. See, for example, *Rizzo v. Goode*, 423 U.S. 362 (1976) (injunction denied where "requisite personal stake in the outcome" is not demonstrated) and *O'Shea v. Littleton*, 414 U.S. 488 (1974) (injury cannot be "conjectural" or "hypothetical")

⁷⁰ See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

⁷¹ Mamlet, "Reconsideration of Separation of Powers and the Bargaining Game," p. 692.

⁷² *Ibid.*

⁷³ *Youngberg v. Romeo*, 447 U.S. 307 (1982).

⁷⁴ *Rhodes v. Chapman*, 452 U.S. 337 (1981) at 347.

⁷⁵ *Bell v. Wolfish*, 441 U.S. 520 (1979).

⁷⁶ For one thing, custodial inmates, by the nature of their confinement, have a more truncated liberty interest than others in society. In its 1991-1992 term, the Supreme Court decided to apply a more flexible standard to the implementation of consent decrees. While the ruling would appear to benefit state and local authorities, allowing them more easily to modify decrees, its full effects remain to be seen. *Rufo v. Inmates of the Suffolk County Jail*, 112 S. Ct. 748 (1992).

⁷⁷ "Prisoners' Rights, Institutional Needs, and the Burger court," p. 190.

⁷⁸ *Ibid.*

⁷⁹ Chayes, "Public Law Litigation and the Burger Court," p. 56.

⁸⁰ *Ibid.*, pp. 56-57.

⁸¹ Hereafter referred to as Section 1983.42 U.S.C. Section 1983, originally, Section 1 of the Ku Klux Klan Act of 1871. The 30-year benchmark is derived from the Supreme Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961). For a more thorough discussion of earlier Section 1983 case law, beginning with *Monroe v. Pape*, see Cynthia Cates Colella, "The Mandate,

the Mayor, and the Menace of Liability," *Intergovernmental Perspective* 7 (Fall 1981): 15.

- ⁸² From 1871 to 1961, the Supreme Court cited the legislation just 36 times. In contrast, from 1961 to April 1991, Section 1983 has been cited 431 times.
- ⁸³ 342 U.S. 117 (1961).
- ⁸⁴ In fact, the following discussion will be limited only to that Eleventh Amendment jurisprudence relevant to Section 1983 litigation. For a more thorough discussion, see, among others, Vicki C. Jackson, "The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity," *Yale Law Journal* 98 (1988): 1; and David Mason, "Slogan or Substance? Understanding 'Our Federalism' and the Younger Abstention," *Cornell Law Review* 73 (1988): 852.
- ⁸⁵ Two theories about the intent of the Eleventh Amendment have been particularly prominent. "Diversity interpretation" holds that the amendment's prohibition was meant only to a pply to suits "between a State and Citizens of another State," (U.S. Constitution, Article III) and was not constructed to prohibit any other federal jurisdiction. Such an interpretation would give wide latitude to federal courts in federal question cases. The second theory, the "immunity theory," holds that the doctrine of sovereign immunity requires consent in order for suits to be lodged against state or federal governments. Such an understanding severely limits federal question cases. In fact, the Supreme Court has teetered between the two, never fully accepting one or the other. Peter W. Low and John C. Jeffries, Jr., *Civil Rights Actions: Section 1983 and Related Statutes* (Mineola, New York: Foundation Press, 1988), pp. 17-18.
- ⁸⁶ *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468 (1987) at 521 (Brennan, J., dissenting), citing *John V. Orth, The Judicial Power of the United States: The Eleventh Amendment in American History* (New York: Oxford University Press, 1987).
- ⁸⁷ 209 U.S. 123 (1908).
- ⁸⁸ 134 U.S. 1 (1890).
- ⁸⁹ Tribe, *American Constitutional Law*, p. 176.
- ⁹⁰ Low and Jeffries, *Civil Rights Actions*, p. 18.
- ⁹¹ 209 U.S. 123 at 159.
- ⁹² Low and Jeffries, *Civil Rights Actions*, p. 19.
- ⁹³ *Ibid.*, p. 21. Moreover, such suits may be only for prospective relief and not for current monetary damages. See *Will v. Michigan State Police*, 491 U.S. 58 (1989). The *Will* case is discussed below under "Official Immunity."
- ⁹⁴ *Lincoln County v. Luning*, 133 U.S. 529 (1890).
- ⁹⁵ *Monell v. Department of Social Services*, 436 U.S. 658 (1978).
- ⁹⁶ See *Tenney v. Brandhove*, 341 U.S. 367 (1951), establishing the doctrine that persons engaging in legitimate legislative activities enjoy absolute immunity from civil liability; and *Pierson v. Ray*, 386 U.S. 547 (1967), extending immunity to judicial acts.
- ⁹⁷ Low and Jeffries, *Civil Rights Actions*, p. 21.
- ⁹⁸ 436 U.S. 658.
- ⁹⁹ 455 U.S. 622 (1980).
- ¹⁰⁰ Ironically, city officials had no definitive way of knowing they had acted unconstitutionally because Supreme Court decisions establishing a right to a hearing were issued weeks after Chief Owen's firing. Not discussed in the text but of considerable significance to local governments facing liability suits, was the Supreme Court's application, also in 1980, of the Civil Rights Attorney's Fees Award Act (42 U.S.C. Section 1988) to Section 1983 claims. See *Maine v. Thiboutot*, 448 U.S. 1 (1980)

- and *Maher v. Gagne*, 448 U.S. 122 (1980). Section 1988 allows the prevailing party in Section 1983 cases to collect attorney's fees as part of the cost of litigation. It thus may increase considerably the expenditures of losing parties.
- ¹⁰¹ 475 U.S. 469 (1986).
- ¹⁰² *Ibid.*, p. 481. The constitutional violation at issue in *Pembaur*, the Fourth Amendment prohibition on the warrantless search of a home or office (even to arrest a third party), was not firmly established until after the action had been culminated. *Steagald v. U.S.*, 451 U.S. 204 (1981).
- ¹⁰³ Peter H. Schuck, "Municipal Liability under Section 1983: Some Lessons from Tort Law and Organizational Theory," *Georgetown Law Journal* 77 (1989): 1753. See, for example, *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *City of Springfield v. Kibbe*, 481 U.S. 1033 (1987) (per curiam); and *City of Los Angeles v. Heller*, 475 U.S. 796 (1986).
- ¹⁰⁴ *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) at 119.
- ¹⁰⁵ *Ibid.*
- ¹⁰⁶ *Ibid.*, p. 112.
- ¹⁰⁷ *Ibid.*
- ¹⁰⁸ *Oklahoma v. Tuttle*, 471 U.S. 808 (1985) and *City of Springfield v. Kibbe*, 481 U.S. 1033 (1987).
- ¹⁰⁹ *City of Canton v. Hams*, 489 U.S. 378 (1989). It is important, also, to note that the Court has refused to impose the doctrine of respondeat superior on cities. That doctrine holds that a master is liable for the negligence of servants, even if the master was not negligent and did everything possible to prevent the servant from acting negligently. *Monell v. Department of Social Services*, 436 U.S. 658 at 691.
- ¹¹⁰ 489 U.S. 378 at 390.
- ¹¹¹ *Ibid.*, p. 391.
- ¹¹² *Ngiraingas v. Sanchez*, 110 S. Ct. 1737 (1990).
- ¹¹³ *Howlett v. Rose*, 110 S. Ct. 2430 (1990).
- ¹¹⁴ *Smallwood v. Jefferson County Government*, 753 E Supp. 657 (W.D. Kent. 1991).
- ¹¹⁵ 436 U.S. 658.
- ¹¹⁶ 109 S. Ct. 2304 (1989). This case will be discussed below.
- ¹¹⁷ 753 F. Supp. 657 at 660. Where counties, through agreements with municipal governments, act as municipal entities, they are currently liable for damages under Section 1983. See, for example, *Ross v. United States*, 910 F. 2d 1422 (CA7, 1990).
- ¹¹⁸ *Tenney v. Brandhove*, 341 U.S. 367 (1951).
- ¹¹⁹ *Pierson v. Ray*, 386 U.S. 547 (1967).
- ¹²⁰ *Imbler v. Pachtman*, 424 U.S. 409 (1976).
- ¹²¹ *Pierson v. Ray*, 386 U.S. 547. But see, recently, *Ross v. United States*, 910 F. 2d 1422 (CA7, 1990), ruling a deputy sheriff ineligible for qualified immunity where his preventing private intervention to save the life of a drowning child may have caused the child's death.
- ¹²² *Scheuer v. Rhodes*, 416 U.S. 232 (1974). For instance, a governor, acting under perceived emergency conditions, would have a better defense against liability claims because his responsibilities are so wide-ranging and his discretion, as the immediate and ultimate executive officer, is necessarily so broad.
- ¹²³ 109 S. Ct. 2304 (1989).
- ¹²⁴ *Ibid.*, p. 2311.
- ¹²⁵ "Of course, a State official in his or her official capacity, when sued for injunctive relief, would be a person under Section 1983 because 'official capacity actions for prospective relief are not treated as actions against the State.'" *Ibid.*, footnote 10, citing *Ex Parte Young*, p. 159-160. Moreover, in 1991, the Court determined that "state officers may be held personally liable for damages under Section 1983, based on actions taken in their official capacities." *Hafer v. Melo*, 112 S. Ct. 358 (1991).
- ¹²⁶ 110 S. Ct. 444 (1989).
- ¹²⁷ 110 S. Ct. 2510 (1990).
- ¹²⁸ 111 S. Ct. 865 (1991).
- ¹²⁹ According to Justice Kennedy, Representative Shellabarger, the sponsor of the civil rights statute, "spoke only of interests secured by the Constitution." *Golden State Transit Corporation v. Los Angeles*, 110 S. Ct. 444, Kennedy, J., dissenting at 454.
- ¹³⁰ See, for example, *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987) (Section 1983 may be used as a cause of action against rights to a particular calculation of rent based on the Brooke Amendment to the United States Housing Act of 1937, 42 U.S.C. Sec. 1437a); and *Maine v. Thiboutot*, 448 U.S. 1 (1980) [Section 1983 may be used as a cause of action to secure benefit rights created by the Social Security Act, 42 U.S.C. Sec. 602(a)(7)].
- ¹³¹ 49 Stat. 449, as amended, 29 U.S.C. Sec. 151 et seq.
- ¹³² 660 E Supp. 571 at 575 (C.D. Cal. 1981).
- ¹³³ 857 E 2d 631 at 634-35 (9th Cir. 1988).
- ¹³⁴ 110 S. Ct. 444 at 450.
- ¹³⁵ *Ibid.*, p. 451.
- ¹³⁶ *Ibid.*, p. 453 (Kennedy, J., dissenting).
- ¹³⁷ *Ibid.*, p. 454.
- ¹³⁸ "The Supreme Court, 1989 Term: III. Federal Statutes and Regulations," *Harvard Law Review* 104 (1990): 347.
- ¹³⁹ At issue were the reimbursement requirements of the 1980 Boren Amendment to the Medicaid Act, 42 U.S.C. Sec. 1396a(a)(13)(A). See also, ACIR, *Medicaid: Intergovernmental Trends and Options* (Washington, DC, 1992).
- ¹⁴⁰ Complaint, para. 1, App. 4 cited in *Wilderv. Virginia Hospital Association*, 110 S. Ct. 2510 at 2514 (1990).
- ¹⁴¹ *Ibid.*, p. 2515, citing *Virginia Hospital Association v. Baliles*, 868 F. 2d 653 (CA4 1989).
- ¹⁴² *Ibid.*, p. 2517, citing *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 at 423 (1987). In order to create statutory rights, the Congress must be clear in its intent and not merely state a "congressional preference." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 at 19 (1981).
- ¹⁴³ 110 S. Ct. 2590 at 2517.
- "*Ibid.*, p. 2525 (Rehnquist, C.J., dissenting) citing the Boren Amendment.
- ¹⁴⁵ *Ibid.* (Rehnquist, C.J., dissenting) (footnotes omitted).
- ¹⁴⁶ *Ibid.*, p. 2526 (Rehnquist, C.J., dissenting), making note of *Maine v. Thiboutot*, 448 U.S. 1 (1980).
- ¹⁴⁷ 111 S. Ct. 865 (1991).
- ¹⁴⁸ *Dennis v. State*, 234 Neb. 427, 451 N.W. 2d 676 at 678 (1990).
- ¹⁴⁹ *Consolidated Freightways Corp. of Delaware v. Kassel*, 730 E 2d 1139 (CA8), cert. denied, 469 U.S. 834 (1984).
- ¹⁵⁰ 111 S. Ct. 865 at 868 (citation omitted).
- ¹⁵¹ *Ibid.*, p. 868.
- ¹⁵² *Ibid.*, p. 869.
- ¹⁵³ *Ibid.*, p. 870.
- ¹⁵⁴ *Ibid.*, pp. 870-871, 872.

¹⁵⁵ On the issue of procedural restrictions, see *Parratt v. Taylor*, 451 U.S. 527 (1981) (denying a Section 1983 claim based on simple negligence where plaintiff failed to seek initial remedy through the state tort claims procedure); and *Hudson v. Palmer*, 468 U.S. 517 (1984) (extending *Parratt* limitations to “intentional, unauthorized deprivations”). Cited in *Harvard Law Review* 104(1990): 349.

¹⁵⁶ *Harvard Law Review* 104(1990): 347.

¹⁵⁷ *Gildin* suggests that this phenomenon of countervailance in Section 1983 decisions is due to the Court’s applying common law

doctrines to issues of official immunity, while refusing to apply those doctrines to causes of action. Gary S. Gildin, “Immunizing Intentional Violations of Constitutional Rights through Judicial Legislation,” *Emory Law Journal* 38 (1989): 371.

¹⁵⁸ 110 S.Ct. 1651 at 1678-79 (Kennedy, J. concurring in part and concurring in judgment).

¹⁵⁹ *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) at 15-16.

¹⁶⁰ Brocker, “Taxation without Representation,” p. 766.

[REDACTED]

Conclusions and Prognoses

*From the start, [President] Washington's Court did just what it was picked to do. After hesitating with preliminary actions in several lawsuits, the Court held, in the 1793 case of *Chisholm v. Georgia*, just what state sovereignty advocates had feared it would do and what the Constitution's proponents had promised it would not: it ruled that a citizen of one state could sue the government of another state in the Supreme Court. . . . The *Chisholm* decision was hailed by some as an advance for the national government, and blasted by others as "annihilating the sovereignty of the states." Georgia's state assembly was so exercised by the decision that it actually made any attempt to carry out the Court's mandate a felony punishable by "hanging without benefit of clergy." And other states were so incensed by the *Chisholm* Court's rampant nationalism that Congress was persuaded to act promptly. Less than a year later, Congress passed the Eleventh Amendment to the Constitution. . . .¹*

Umpires of Federalism

Throughout its history, the task of refereeing the precarious balance between national and state interests has occasionally thrust the Supreme Court to the center of federalism's maelstroms, from *Chisholm*, to *Dred Scott*, to *Brown v. Board of Education*. More frequently, but with little public notice and measured opposing reaction, the Court steers the course of less turbulent intergovernmental storms. Unlike President Washington's Court, which was specifically chosen to exclude those who were either "ambivalent about the new national government, or who . . . were advocates of strong state powers,"² later Courts may be characterized by a kind of collective equivocation in the face of a continuing caseload rife with often subtle implications for the delicate balance of federalism.

The Supreme Court is an enigma in flux. Over the past decade, the Court saw the departures of Justices Potter Stewart, Lewis F. Powell, Jr., William J. Brennan, Jr., and Thurgood Marshall, and Chief Justice Warren E. Burger. Replacing the old guard were Justices Sandra Day O'Connor, Antonin Scalia, Arthur M. Kennedy, David H. Souter, and Clarence Thomas. William H. Rehnquist was elevated to the position of chief justice.

The "graying Court" of the early 1980s is increasingly the "middle-aged Court" of the 1990s. The Democratic

Court of Roosevelt, Truman, Kennedy, Johnson, and perhaps, ironically, Eisenhower gave way almost completely to the Republican Court of Nixon, Ford, Reagan, and Bush. Furthermore, the Court's long-standing liberal bent gave way to a conservative inclination, most often realized in its Fourth, Fifth, and Sixth Amendment rulings. Yet, while the focal confrontation over civil liberties and rights involves the fundamental constitutional issue of federalism, the topic, for all its historical significance, is seldom discussed or fully understood.³

The following discussion is an attempt to characterize the current Supreme Court in terms of its intergovernmental philosophy. Such collective characterizations, regardless of institution or subject matter reviewed, are inherently risky, particularly with regard to what may be the nation's least comprehensible governing body.

An Era of Ambivalence: Jurisprudential Federalism in the Eighties

As mentioned above, the Supreme Court of the 1980s and early 1990s may be characterized in terms of its collective equivocation on questions of federalism. Such ambivalence was particularly apparent and noteworthy in the dramatic philosophical shift occurring between the 1976

opinion in *National League of Cities (NLC) v. Usery* and the 1985 ruling in *Garcia v. San Antonio Metropolitan Transit Authority* (see Chapter 6 for additional details). In less than a decade, the Court moved from a position favoring Tenth Amendment protection for “traditional” and “integral” state functions to one that abandoned specific constitutional defenses against intrusive federal regulations.

Of course, the NLC-to-Garcia reversal need not have augured continuing uncertainty in the Court’s handling of federal-state relations issues. Rather, *Garcia*’s legacy, followed in 1988 by *South Carolina v. Baker* (see Chapter 6) may have indicated a new and certain (if federally deferential) course. To the contrary, however, a cursory review of Court decisions over roughly the past decade uncovers an ambivalence—albeit, an ambivalence leaning toward national interests—over the direction and balance of judicial federalism.

Of the major intergovernmental cases listed in Table 8-1, 13 were decided in favor of the federal government or

of business interests, and eight in favor of state and local governmental concerns. At first blush, therefore, it would seem that, despite the change in jurisprudential language that accompanied the *NLC* overturn, the Court continued, during the past decade, to grapple with its federalism caseload, less according to some rigid philosophical guideline than according to the facts of each case.

On the other hand, if one reads the state-favorable decisions in the implied preemption cases as logical extensions of the *Garcia* doctrine: a more compelling argument may be made for a nationalist reading of Supreme Court policies in the 1980s. Moreover, a trend toward greater nationalism in Court outcomes may be bolstered by two additional factors. First, each of the major cases allocating power between federal and state or local legislatures (*Garcia*, *Baker*, *Dole*, and *Croson*) was decided in favor of national interests. Second, using *Garcia* as a judicial bellwether, of those cases decided in 1985 and after, 11

Table 8-1
Winners and Losers in Selected U.S. Supreme Court Cases, 1980-1991

Case ¹	Date	Subject ²	Decided for	
			National ³	State ⁴
<i>Garcia v. San Antonio Metropolitan Transit Authority</i>	1985	DO/CC	X	
<i>South Carolina v. Baker</i>	1988	Taxation	X	
<i>South Dakota v. Dole</i>	1987	Spending	X	
<i>English v. General Electric</i>	1990	IP		X
<i>Silkwood v. Kerr-McGee</i>	1984	IP		X
<i>Pacific Gas & Electric v. SERC&D</i>	1983	IP		X
<i>Tyler Pipe v. Washington</i>	1987	DCC	X	
<i>Reeves v. Stake</i>	1980	DCC		X
<i>White v. MACCE</i>	1983	DCC		X
<i>SCT v. Wunnicke</i>	1984	DCC	X	
<i>NECI v. Limbach</i>	1988	DCC	X	
<i>Richmond v. Croson</i>	1989	14th Amendment	X	
<i>Spallone v. United States</i>	1990	Equity		X
<i>Missouri v. Jenkins</i>	1990	Equity/Comity	X	
<i>Owen v. Independence</i>	1980	42 U.S.C. 1983	X	
<i>Pembaur v. Cincinnati</i>	1986	42 U.S.C. 1983	X	
<i>St. Louis v. Praprotnik</i>	1988	42 U.S.C. 1983		X
<i>Canton v. Harris</i> ⁵	1989	42 U.S.C. 1983	X	X
<i>Will v. Michigan</i>	1989	42 U.S.C. 1983		X
<i>GST v. Los Angeles</i>	1989	42 U.S.C. 1983	X	
<i>Wilder v. Virginia Hospital Association</i>	1990	42 U.S.C. 1983	X	
<i>Dennis v. Higgins</i>	1991	42 U.S.C. 1983	X	

Key:

- DO—Direct order
- CC—Commerce Clause
- IP—Implied Preemption
- DCC—Dormant Commerce Clause

¹ Includes only Supreme Court cases cited in the text and discussed at some length in Chapters 6 and 7. The table does not include merely referenced Supreme Court cases or lower court cases.

² Refers to the major constitutional or statutory aspect of the case. In addition, many of the cases had important Tenth Amendment implications.

³ Indicates a final disposition favorable to federal governmental or business interests and/or unfavorable to state governmental interests.

⁴ Indicates a final disposition favorable to state and/or local governmental interests.

⁵ The *Harris* outcome was mixed. The Court added to the potential liability of cities for inadequate employee training, but carefully circumscribed the conditions under which plaintiffs might seek damages for instructional deficiencies.

were decided against state and local interests, while only four were decided in their favor.

An analysis of Supreme Court decisions from 1953 to 1989 involving state and local governments as direct parties revealed similar trends? The authors found that state and local governments won smaller proportions of cases involving federalism and economic activity during the 1980s than they had during the previous three decades (see Table 8-2). State and local governments did win larger proportions of criminal procedure and civil rights cases in 1981-1989 than previously, despite the fact that the State and Local Legal Center does not intervene in individual rights cases. The wins in these areas, however, can be attributed more to changing Court attitudes toward federal rights protection and federal court caseloads than to principles of federalism. As shown in Table 8-2, the outcomes in First Amendment cases have been quite mixed since 1953.

Federalists, Nationalists, or Something Else?

Richard Fallon has suggested that the jurisprudence of courts and legal commentators may be influenced by one of two conflicting models of intergovernmental decision-making: Federalist or Nationalist! Fallon employs these models to describe philosophies in the area of “judicial federalism,” by which he means the allocation of power between federal and state courts. Broadly construed, however, the “models” may be used as ideal decisionmaking types for a variety of intergovernmental cases.

According to Fallon, the Federalist model is rooted in an interpretation of the Constitution that takes as its starting point a particular understanding of the intent of the framers of the original document and Amendments I through XI. Crucial to the ideology and methodology of a Federalist jurist is the notion that the Founders intended to leave intact certain spheres of state sovereignty:

Seen in a Federalist light, the Constitution is most importantly a document that allocates power among entities of government. . . . [F]rom a Federalist perspective, federalistic decentralization not only promotes values of democracy and

local control but also functions as a safeguard of fundamental freedoms. According to a Federalist account, the authors of the original Constitution set out to create a national government adequate to meet national concerns. But, equally significant, the framers continued to view the states as important—indeed, in many ways as the primary—entities of government. The Federalist model emphasizes that the framers delegated only an enumerated set of functions to the national government. In contrast, the states were left the “responsibility for dealing, and . . . [the] authority to deal, with the whole gamut of problems cast out of the flux of everyday life.” Viewed from a Federalist perspective, the tenth and eleventh amendments ratify these understandings.⁷

Although Nationalists, too, take an historical approach to constitutional interpretation, their perspective views the original Framers as less protective of state interests than of unity concerns. Moreover, Nationalists put enormous stock—much more, at least, than do Federalists—in the constitutional and statutory revisions occurring in the wake of the Civil War. Thus,

the Constitution embodies a strong conception of national supremacy that exalts federal interests, especially the federal interest in the effective enforcement of constitutional rights, above asserted state sovereignty interests. Viewed from a Nationalist angle of vision, the Federalist model draws too heavily from the attributes of historical Anti-Federalism in its theory of the constitutional protections afforded to state governments. . . . Although forced to compromise, the proponents of broad national authority prevailed in the historical debates surrounding the Constitution’s drafting and ratification. . . . [Moreover,] according to a Nationalist theory, state sovereignty—a concept of dubious analytical power even under the original Constitution—must be viewed as vastly diminished, if not eviscerated, by the Reconstruction amendments, at least insofar as it is invoked to frustrate the enforcement of federal constitutional rights.⁸

Table 8-2

Success Rates of State and local Governments Before the U.S. Supreme Court, 1953-1989

Case	Percentage Won	Number of Cases	Percentage Won	Number of Cases	Percentage Won	Number of Cases
Criminal Procedure	39.3	328	65.7	382	73.3	360
Civil Rights	27.9	208	54.5	277	56.1	148
First Amendment	30.4	125	50.0	170	41.5	53
Economic	55.9	68	60.5	86	50.0	60
Federalism	40.8	49	43.5	23	38.6	44

Source: Richard C. Kearney and Reginald S. Sheehan, “Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation,” *The Journal of Politics* 54 (November 1992): 1015.

In fact, neither of Fallon's models is of much practical utility for describing the output of the current Court as an institution, nor for pinpointing the intergovernmental philosophy of most of its members? They do seem to approximate the views of two of the recent justices, with Justice Thurgood Marshall's robust emphasis on individual rights placing him within the Nationalist camp and Justice Sandra Day O'Connor's generally forceful consideration of states' rights placing her in a Federalist milieu.¹⁰

Although Justice Marshall's jurisprudence of individ-

ual rights and liberties occasionally cast him in a pro-state and local stance," it more frequently found him favoring national interests (see Table 8-3). Moreover, Marshall took a decidedly Nationalist rhetorical position regarding the historical locus of constitutional power and rights, asserting that

we must be careful, when focusing on the events which took place in Philadelphia two centuries ago, that we not overlook the momentous events which followed. . . . While the Union survived the civil war, the Constitution did not. In its place

Table 8-3
Nationalist and Federalist Perspectives:
Positions of Justices Marshall and O'Connor in Selected Supreme Court Cases, 1980-1991

Case ¹	Date	National ²	State ³
		Marshall	O'Connor
Garcia v. San Antonio Metropolitan Transit Authority	1985	(M)	(O)
South Carolina v. Baker	1988	M	O
South Dakota v. Dole	1987	M	O
English v. G.E. ⁴	1990		M/O
Silkwood v. Kerr-McGee	1984	M	O
Pacific Gas & Electric v. SERC&D	1983		M/O
Tyler Pipe v. Washington	1987	M/O	
Reeves v. Stake ⁵	1980		M
White v. MACCE	1983		M/O
SCT v. Wunnicke ⁶	1984		O
NECI v. Limbach ⁴	1988	M/O	
Richmond v. Croson ⁷	1989	O	M
Spallone v. United States	1990	M	O
Missouri v. Jenkins ⁵	1990	M	O
Owen v. Independence ⁵	1980	M	
Pembaur v. Cincinnati	1986	M/O	
St. Louis v. Prapotnik ⁹	1988		M/O
Will v. Michigan	1989	M	O
GST v. Los Angeles	1989	M	O
Wilder v. VHA	1990	M	O
Dennis v. Higgins	1991	M/O	
Totals:	Marshall	14	6
	O'Connor	5	14

¹Includes only Supreme Court cases named in the text and discussed at some length in Chapters 6 and 7. The table does not include merely referenced cases. Canton v. Harris was omitted from this table (see Table 8-1) because of its mixed outcome.

²Indicates a position generally favorable to federal governmental or business interests and/or unfavorable to state governmental interests.

³Indicates a position favorable to state and/or local governmental interests.

⁴Unanimous decision.

⁵O'Connor had not yet been appointed to the Court.

⁶Marshall did not take part in this decision.

⁷It is notable that while Justices Marshall and O'Connor found themselves on the same side seven times, Croson marks the only time they "switched" sides. It is, of course, very typical of affirmative action cases to be highly indecisive, producing multiple conflicting opinions. Moreover, it suggests that such cases tend to be highly outcome oriented.

⁸Although O'Connor agreed with the Court that the district court exceeded its authority, she joined with the chief justice and Justice Scalia in Justice Kennedy's concurrence, chastising the majority for sanctioning the use of judicially imposed taxes in certain circumstances.

⁹Marshall concurred in the judgment of the Court, but joined with Justices Brennan and Blackmun in concluding that courts may not simply rely on state law in determining where actual decisionmaking authority resides.

arose a new, more promising basis for justice and equality, the 14th Amendment, ensuring protection of the life, liberty, and property of **all** persons against deprivations without due process, and guaranteeing equal protection of the **laws**.¹² (Emphasis in original.)

Sandra Day O'Connor: Federalist

Although Thurgood Marshall's departure, following closely on the heels of William Brennan's resignation, may signal a reduction of clearly Nationalistic jurisprudence on the Court, it is not necessarily the case that a strongly Federalistic philosophy will emerge in its place. With the possible, and inconsistent, exception of the chief justice," Justice O'Connor would appear to be the lone proponent of something approximating Federalistic thought. For that reason, her views are worth examination here.

More often than not, O'Connor's views have put her in the **minority**.¹⁴ Thus, O'Connor's philosophy has tended to emerge most distinctively in dissenting opinions over cases pitting federal governmental authority against that of the **states**.¹⁵ On such issues, she generally favors a Federalistic view of the Framers' intent. For instance, in her *Garcia* dissent, O'Connor spent some time discussing her reading of the decentralist tendencies of the Founders:

The true "essence" of federalism is that the States **as** States have legitimate interests which the National Government is bound to respect even though its laws are supreme. If federalism so conceived and carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States. . . . [T]he framers of our Constitution intended Congress to have sufficient power to address national powers. But the Framers were not single-minded. The Constitution is animated by an array of intentions. Just as surely as the Framers envisioned a National Government capable of solving national problems, they also envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but between the Federal Government and the States. . . . The Framers' comments indicate that the sphere of state activity was to be a significant one. . . . The States were to retain authority over those local concerns of greatest relevance and importance to the **people**.¹⁶

In conjunction with her constitutional philosophy, O'Connor has "also explained the need for courts to select an appropriate methodology for the protection of state interest~." Again, in *Garcia*, she suggested:

The proper resolution [of such cases] lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on States as States. It is insufficient, in assessing the validity of congressional regulation of a State pursuant to the commerce power, to ask only whether the same regulation would be valid if enforced against a private party. That reasoning, embodied in the majority opinion, is consistent with the spirit of our Constitution. It remains relevant that a State is being regulated. . . . **As** far as the Constitution is concerned, a State should not be equated with any private litigant. Instead, the autonomy of a State is an essential component of federalism. If state autonomy is ignored in assessing the means **by** which Congress regulates matters **af-**fecting commerce, then federalism becomes irrelevant simply because the set of activities remaining beyond the reach of such commerce power "may well be negligible."¹⁸

The need to consider special state interests as part of the decisional equation also was apparent in O'Connor's dissent over taxing and spending issues. In *South Carolina v. Baker*, she chastised her fellow justices for failing "to inquire into the substantial adverse effects on state and local governments that would follow from federal taxation of the interest on state and local bonds."¹⁹ Furthermore, in *South Dakota v. Dole*, she argued the proposition that strings attached to federal grants to states be "reasonably related to the expenditure of federal funds."²⁰

The Tenth Amendment, according to O'Connor, is more than a "truism." Although admittedly imprecise,²¹ its strong "spirit" connotes the Founders' aim to have the states "retain their integrity in a system in which the laws of the United States are nevertheless supreme."²²

O'Connor on the Guarantee Clause

More interesting in some respects is Justice O'Connor's suggestion that the essence of constitutional federalism may be found in another portion of the Constitution, namely, Article 4, Section 4 (the guarantee clause). Operating from that viewpoint, she argued in *Baker* "that the States' autonomy [maybe] protected from substantial federal intrusions by virtue of the Guarantee Clause of the Constitution."²³ O'Connor has "revisited" the guarantee clause since *Baker*, and in a very different context,²⁴ thus meriting discussion.

In relevant **part**, the guarantee clause holds that, "The United States shall guarantee to every State in this Union a republican form of government. . . ."²⁵ Historically, litigation arising under the clause has involved claims of individual rights against state governments. **As** a by-product of Dorr's Rebellion, the Supreme Court **was** asked in 1849 to decide whether the charter government of Rhode Island, by imposing **martial** law, **had** violated the republican principle contained in the guarantee clause. Although the Supreme Court decided that federal **courts** were constitutionally empowered to decide whether state governments had contra-

vened the guarantee clause, it determined that Rhode Island had not acted unconstitutionally because the martial law period imposed was of such limited duration.²⁶

Similarly, in several late 19th and early 20th century cases, litigants invoked the guarantee clause against alleged state infractions of republican tenets. **As** with the Rhode Island claim, however, the Court upheld the questioned state action in each case.²⁷

Reversing previous doctrine, the Court held in its 1912 opinion *Pacific State Telephone and Telegraph Company v. Oregon* that determining whether a state government was responsibly republican constituted a so-called political question and, thus, could not be considered by the federal judiciary.

At issue in *Pacific States* was the assertion that the state's initiative process resulted in a departure from republican structural principles.²⁸ The Court concluded that to declare one mechanism of state government unconstitutional under the terms of the guarantee clause would necessarily render the entire government a nullity. Under the Court's logic, therefore, judicial enforcement of the republican principle would "obliterate the division between judicial authority and legislative power. . . ."²⁹

As a result, the guarantee clause ceased being a potential "source of judicially enforceable private rights."³⁰

Justice O'Connor's modern variant on the guarantee clause would take the Court on an entirely different course. Rather than reading the clause as a constitutional wellspring of civil rights against state governments, she views it **as** a source of states' rights against the federal government. In her view, the Clause is a very different legal animal from the one the Court despaired of nearly eight decades ago.

Although O'Connor has only recently, and only in two cases, begun to articulate an explicit theory of the guarantee clause, she appears, implicitly, to have been leading up to such an analysis for some time. For instance, in 1982, she asserted that "federalism enhances the opportunity of all citizens to participate in representative government. . . ."³¹ Moreover, she drove the point home with an approving reference to Alexis de Tocqueville, noting especially his statement that

the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies. . . . [T]his same republican spirit [is] engendered and nurtured in the different States. . . .³²

One impetus for O'Connor's moving from an implied theory of states' rights under the guarantee clause to an explicit assertion of such rights was the 1988 publication of Deborah Jones Merritt's article "The Guarantee Clause and State **Autonomy**."³³ Although John Adams complained nearly 200 hundred years ago that he " 'never understood' what the . . . Clause meant and 'believe[d] no man ever did or ever will,' "³⁴ Merritt claims that both the language and the history of the provision support a strong measure of state autonomy.

She contends that although the term "republican" may have struck Adams as being "loose" and "indefinite,"³⁵ a core meaning of primarily majority control over government has emerged as the consensus definition among scholars and **jurists**.³⁶ **As** a result,

the guarantee clause . . . promises each state a government based on popular control. This promise plainly restricts the freedom of the states. No state may establish a monarchy, dictatorship, or any other form of government inconsistent with popular representation. At the same time, however, the words of the guarantee clause suggest a limit on the power of the federal government to infringe state autonomy: the citizens of a state cannot operate a republican government, "choos[ing] their own officials" and enact[ing] their own laws," if their government **is** beholden to Washington. Article IV's pledge by the "United States" to "guarantee. . . every State. . . a Republican Form of Government," therefore, may be read as a promise to preserve the state autonomy necessary to foster republican government. Only by leaving the citizens of each state free to establish and run their own governmental bodies can those citizens achieve Madison's republican ideal of "a government which derives all its powers directly or indirectly from the great body of the **people**."³⁷

Moreover, Merritt claims to find considerable evidence in support of her guarantee clause interpretation in Convention notes, diaries, and other materials surrounding ratification. She cites the apparently influential remarks of Jasper Yeates, a member of Pennsylvania's ratifying convention.

Yeates, a strong Federalist, was at pains to assure his fellows that the states would not be obliterated by the proposed Union, an argument he drove home by reference to the guarantee clause:

Lest anything, indeed, should be wanting to assure **us** of the intention **of** the framers of this constitution to preserve the individual sovereignty and independence of the States inviolate, we find it expressly declared by the 4th section of the 4th article. . . . [The] constitutional security [provided the states by the guarantee clause **is**] far superior to the fancied advantages of a bill of **rights**.³⁸

Similarly, a Federalist tract originating in New Jersey, but receiving nationwide attention, dubbed the guarantee clause "a guard against improper [national] encroachments" and a protector against "the danger of our state governments being **annihilated**."³⁹

To Merritt, both the language and history of Article IV, Section 4 suggest a far stronger and more supportable basis for state claims against federal intrusions than do the vague and historically problematic language and history **of** the Tenth Amendment.

As noted above, O'Connor made initial reference to the guarantee clause in her lone dissent to *Baker*.

More compelling, however, was her revisitation of a state-centered guarantee clause theory three years later in *Gregory v. Ashcroft*.⁴⁰

At issue in *Gregory* was the contention that a Missouri constitutional provision, mandating a retirement age of 70 for most state judges, violated the federal *Age Discrimination in Employment Act (ADEA)*.⁴¹ The Court held that it did not. Although the Tenth Amendment continued to be a central focus of the majority's analysis, the guarantee clause now also received attention. To wit, the Court noted:

The authority of the people of the States to determine the qualifications of their most important government officials. . . is an authority that lies at "the heart of representative government." It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States 'guarantees to every State in this Union a Republican Form of Government.'⁴²

What makes *Gregory* significant is not that it extends the guarantee clause analysis begun in *Baker*. In fact, reference to the clause is cursory, with much of the case involving a discussion of the "plain statement" rule⁴³ or equal protection analysis. Rather, the significance may lie in the fact that unlike *Baker*, in which O'Connor registered a lone dissent, her's was the majority opinion in *Gregory*, an opinion joined fully, and in relevant part, by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Souter. It is by no means clear, of course, that *Gregory*'s alignment signals the majority's willingness to press forward the state autonomy theory of the guarantee clause. The analysis is incipient at best.

Nonetheless, the fact that five justices accepted that theory in the extant case assures a scenario in which state litigants increasingly press the guarantee clause in future claims. It is at least conceivable that *Garcia* could be revisited less with an eye toward the Tenth Amendment than with a nod toward Article IV. As such, O'Connor's stance is a legally tantalizing one in need of further explication.

The Supreme Court in the 1990s: An Era of Ad Hoc Federalism?

In his *Garcia* dissent, Chief Justice Rehnquist promised that *NLC* principles would "once again command the support of the majority of this Court."⁴⁴ Yet, in three subsequent major cases pitting federal legislative power against state autonomy, he demurred from fully supporting the state or local position. Instead, he authored the opinion in *South Dakota v. Dole*.

Furthermore, the record of the other justices has not been promising in this regard. Justice Scalia has proven, overall, to be a less than enthusiastic proponent of state legislative autonomy.⁴⁵ Moreover, Justice Powell, one of

NLC's strongest supporters and the author of the principal dissent to *Garcia*, has retired. His replacement on the Court, Justice Kennedy, has a scant and somewhat mixed record.⁴⁶ Justice Souter's and Justice Thomas' views remain relatively unknown.⁴⁷ Thus, only O'Connor, among the Court's newer guard, may be said to have a fairly consistent "Federalist" record—if one somewhat marred by *Croson*.⁴⁸

On the other hand, in the space of two years, the Court's most fervent contemporary "Nationalists"—Justices Brennan and Marshall—left the Court. Of the remaining justices, White⁴⁹ and Stevens⁵⁰ have no clearly articulated intergovernmental philosophy. It is notable, however, that Justice Blackmun, whose concurrence was so crucial to the *NLC* majority, authored the *Garcia* opinion. In fact, it may be that he is the most consistently "Nationalist" jurist remaining on the Court.⁵¹

Even with some changes in personnel, the 1990s could well continue the 1980s trend of ad hoc federalism on the Court, depending on the substantive issue at hand (e.g., civil rights or interstate commerce). Although it is likely that court jurisdictional questions⁵² will lean slightly in favor of state concerns, it is equally likely that legislative jurisdictional questions, with the possible but notable exception of implied preemptions, will continue to tilt toward congressional preeminence.

Before the Court: Legal/Constitutional Strategies in an Era of Judicial Uncertainty

The collective judicial ambivalence characteristic of intergovernmental decisionmaking during the 1980s and early 1990s presents special challenges for strategic players. Such challenges are heightened by the difficulties of "lobbying" courts, which is, in a visible and substantive sense, a task that can be accomplished only as a litigant or recognized amicus. Beyond such formal roles, interested parties may only hope to influence judicial behavior via the indeterminate routes of published legal theory or editorial opinion.

The State and Local Legal Center

Notable among front-line players in the judicial arena are the State and Local Legal Center and the state and local public interest groups.

The State and Local Legal Center was created in 1983, following numerous complaints of inadequate and uncoordinated state and local legal representation and subsequent recommendations to improve the position of state and local governments before the Supreme Court.⁵³ Over the past eight years, the center has counseled state and local officials on the preparation of court briefs and oral arguments and has monitored lower court cases with Supreme Court potential. Perhaps most important, the center may count among its achievements the strong role it has played as an amicus advocate for supporting state and local interests, including the National Governors' As-

sociation, the Council of State Governments, the National Conference of State Legislatures, the National Association of Counties, the National League of Cities, the United States Conference of Mayors, and the International City/County Management Association.⁵⁴

Considering its own organizational youth and new court rules restricting amicus activity,⁵⁵ the center has had a remarkably successful track record relative to other major amici. As illustrated in Table 8-4, the center's win/lose record is comparable to, if not better in many instances than, those of organizations with much longer standing and far greater resources.⁵⁶ Of particular importance have been the center's accomplishments in the field of preemption,⁵⁷ where *Garcia's* otherwise devastating doctrine has been used to the advantage of state and local governments.

In addition to their formal, directed roles in the court process and their support of the State and Local Legal Center, the national associations of state and local government officials occasionally have endeavored to influence judicial outcomes by means of legal-political strategies.

For example, in 1988, the National Governors' Association adopted a proposal to establish a third alternative to the constitutional amendment process. Under NGA's approach:

Two-thirds of the states could pass memorials that seek the addition of a specific constitutional amendment. Unlike petitions for a Constitutional Convention that must be served on Congress, these memorials would be filed with every state. When the necessary number of 34 states is

reached, the states would appoint representatives to a committee on style that would be responsible for reconciling the language of the various memorials. Upon approval by a majority of the states represented at the committee on style, the proposed amendment would be submitted to Congress. A two-thirds vote by both houses within the next session of Congress would be necessary to stop the amendment from going back to the states for ratification. Failure to get the necessary two-thirds vote would cause the amendment to be submitted to the states for ratification by the required three-fourths.⁵⁸

In 1989, a task force of the National Conference of State Legislatures recommended a series of proposals, including one that the states begin instigating test cases for possible Supreme Court review.⁵⁹

The Advisory Commission on Intergovernmental Relations

Although ACIR does not participate directly in the judicial forum, it has played an indirect role through its reports and recommendations. Commission reports have been cited in at least 12 Supreme Court decisions⁶⁰ and 13 lower federal court opinions, although not always by the majority.⁶¹ Moreover, since 1982, Commission documents have been cited in at least 75 law review articles.⁶² Finally, in recent years, the Commission has aimed a number of its recommendations at the legal process and its participants (see Table 8-5).

Table 8-4
Amicus Scorecard:
1987-1991 Supreme Court Terms

Organization	1990-91		1989-90		1988-89		1987-88	
	W	L	W	L	W	L	W	L
State-Local Legal Center	5	4	12	11	12	4	11	8
American Bar Association	2	0	1	2	2	4	4	1
American Civil Liberties Union	N/A	N/A	11	16	19	29	14	14
Equal Employment Advisory Council	4	4	1	3	9	1	2	2
NAACP Legal Defense	10	10	10	5	7	16	5	3
National Association of Manufacturers	1	5	1	4	4	9	2	0
National Chamber Litigation Center	5	5	3	5	4	9	3	2
NOW Legal Defense	1	3	5	1	0	5	6	2
Pacific Legal Foundation	2	2	2	4	7	6	4	2
Public Citizen	8	5	7	10	9	11	N/A	N/A
Solicitor General	48	18	60	23	63	12	66	29
Women's Legal Defense Fund	1	2	2	0	1	6	N/A	N/A

Key:
W—Wins
L—Losses
N/A—Not Available

Sources: "1990-91 Amicus Scorecard," *Texas Lawyer*, August 5, 1991, p. S-2; "1989-90 Amicus Scorecard," *Texas Lawyer*, July 30, 1990, p. S-6; "1988-89 Amicus Scorecard," *Legal Times*, August 7, 1989, n.p.; and "Amicus Scorecard," *Legal Times*, August 29, 1988, n.p.

Table 8-5
ACIR Recommendations

Restoring Constitutional Boundaries

The Commission recommends a reassessment of the legal doctrines delimiting the boundaries of national constitutional authority vis-a-vis the reserved powers of the states so that those reserved powers again become meaningful and viable. To help restore a sense of balance between the levels of government, the Commission urges reconsideration by the federal legislative, executive, and judicial branches of current interpretations of the commerce and spending powers as they apply to the newer and more intrusive forms of federal regulation, such as partial preemptions, crosscutting grant requirements, crossover sanctions applied to federal aid, and direct orders. (A-95, 1984)

Judicial Interpretations

The Commission . . . expresses its hope that the federal judiciary will revive and expand the principles expressed in *NLC v. Utery*, particularly those addressing the "basic attributes of state sovereignty" and "integral functions" of state government. (A-95, 1984)

The Commission expresses its further hope that the federal judiciary, when judging grantor-grantee disputes, will recognize that "compulsion" rather than "voluntariness" and "coercion" rather than "inducement" now characterize many federal grants-in-aid and their requirements. (A-95, 1984)

The Solicitor General's Role¹

The Commission recommends that the Administration, through the Office of Solicitor General, show special sensitivity to the claims of state and local government in arguing or otherwise entering relevant cases before the federal judiciary when such cases pertain to the newer and more intrusive forms of regulation. (A-95, 1984)

Supporting the State and Local Legal Center

The Commission recommends that state and local governments and their associations give full institutional and adequate financial support to the State and Local Legal Center in its monitoring, analytic, and training efforts and in its efforts to assist in presenting common state and local interests before federal courts. (A-95, 1984)

An Amendment to the Amendment Article

The Commission recommends that the Congress propose, and the states speedily ratify, an amendment to Article V of the U.S. Constitution to clarify the procedure for calling a constitutional convention for some limited purpose, thus removing the fear of a "run-away" convention that would exceed the purpose of its call. Specifically, the Commission recommends adoption of an amendment to the U.S. Constitution to provide the following:

A convention called for the purpose of proposing amendments to the Constitution, pursuant to Article V, shall be limited to the consideration of amendments that pertain exclusively to subjects jointly specified by the legislatures of two-thirds of the several states. The Supreme Court of the United States shall have original jurisdiction to decide, in the case of dispute, whether a convention has exceeded the purpose of its call. (Adopted March 1988)

A Commission of the States for Constitutional Revision

The Commission recommends that, prior to petitioning Congress to call a constitutional convention, some number of states, but no less than nine, jointly create a Commission of the States for Constitutional Revision, for the purpose of conducting an inquiry into the constitutional problems of joint concern to the states and of formulating a common resolution to be submitted to the legislatures of the several states for their consideration.

The Commission recommends further that the governor of each participating state be authorized to appoint one member of the revision commission subject to confirmation by the legislature of the state.

The Commission recommends that this procedure be followed whether or not the Congress has proposed, and the states ratified, an amendment to clarify the procedures for limiting a constitutional convention to the purpose of its call. (Adopted March 1988)

Reaffirmation of Requirements for Explicit Intent to Preempt and Principles for Limiting Federal Preemption

The Commission reaffirms its earlier recommendations to the effect that

- (1) Congress not preempt state and local authority without clearly expressing its intent to do so;
- (2) Congress limit its use of the preemption power to protecting basic political and civil rights, managing national defense and foreign relations, ensuring the free flow of interstate commerce, preventing state and local actions that would harm other states or their citizens, and protecting the fiscal and programmatic integrity of federal-aid programs into which state and local governments freely enter;
- (3) The executive branch not preempt by administrative rulemaking unless Congress has expressly authorized such action and established clear guidelines for doing so, and unless the administrative agency taking such action clearly expresses its intent to preempt; and
- (4) The federal courts not confirm the validity of statutory and administrative preemptions unless accompanied by a clear statement of intent to preempt and unless the extent of preemption is no greater than necessary to give effect to that intent within the limits of constitutional authority. (Adopted March 1988)

State and Local Vigilance on Federal Preemptions

The Commission recommends that the national associations representing state and local governments, acting individually and jointly. . . , join litigation to limit the use of the federal preemption power to necessary and proper cases. (Adopted March 1988)

¹Deputy Under Secretary Koch, County Executive William J. Murphy, and County Supervisor Peter F. Schabarum requested to be recorded as opposing this recommendation.

Conclusion

If the long history of constitutional federalism is told in terms of the states losing battles, then the short story, beginning in 1985 with *Garcia v. San Antonio Metropolitan Transit Authority*, may well appear to be the tale of intergovernmental Armageddon—mere battles aside, states and localities seemed to have lost the whole war.

Yet, as suggested by the foregoing, within, or perhaps despite, the context of *Garcia*, the landscape of constitutional federalism remains uncertain, no doubt the result of an ever-mutating and ideologically ambivalent Supreme Court. Thus, while state and local governments remain vanquished in an important doctrinal sense, they continue to win significant legal battles.

Decisions like those in *Gregory* have given rise to hope for a brighter future among advocates of a reduced federal regulatory presence. Richard Ruda, chief counsel of the State and Local Legal Center, recently remarked that “what we saw last year [1990-91 Term], particularly near the end, was a resurgence of the 10th Amendment. . . . Certainly the philosophy that informs the 10th Amendment of *Gregory* is very different than the philosophy that informed *Garcia*.”⁶³ Others, like Charles J. Cooper, a former Reagan administration official who headed a 1986 study of federalism, are even more optimistic, boldly declaring *Garcia* to be “hanging by a thread.”⁶⁴

Still, the future is far from clear. Notwithstanding the victories of 1991, the Court can hardly be said to be pursuing an undeviating path toward a “Federalistic” jurisprudence. The dust, after all, has hardly cleared on *Baker*, *Dole*, and *Croson*, all major power-allocating decisions that only appeared to reinforce the dominant themes of *Garcia*. Moreover, the Supreme Court has displayed a mixed record in the area of public law generally. Finally, although the Court, in recent terms, has softened somewhat the blow of preemption on state and local governments, it has been prone to engage in a kind of self-generated regulatory behavior.

The bottom line, then, remains judicial ad hocery—though an ad hocery interspersed with enough tantalizing dicta and significant gains to reassure both “Federalists” and “Nationalists” about the direction of judicial federalism in the foreseeable future.

Notes

¹ Laurence H. Tribe, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* (New York: Random House, 1985), p. 55.

² *Ibid.*, pp. 54-5.

³ For instance, a cursory review of Justice Souter’s Senate confirmation hearings revealed only Sen. Arlen Specter (R-PA) directly making reference to the implications of *NLC* and *Garcia*. *Congressional Record*, September 11, 1990, S. 12777 (Exchange between Senators Joseph Biden and Specter).

⁴ See Chapter 6.

⁵ Richard C. Kearney and Reginald S. Sheehan, “Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation,” *The Journal of Politics* 54 (November 1992): 1008.

⁶ Richard H. Fallon, Jr., “The Ideologies of Federal Courts Law,” *Virginia Law Review* 74 (1988): 1141.

⁷ *Ibid.*, pp. 1152-1153. Footnotes omitted.

⁸ *Ibid.*, p. 1158. Footnotes omitted.

⁹ Nor, it should be noted, does Fallon make any such claims. The models “are intellectual constructs, . . . that ‘cannot be found in reality’ but with which ‘concrete phenomenon can be compared for the purpose of explicating some of their significant components’.” *Ibid.*, p. 1143, n. 3, citing C. Hempel, *Aspects of Scientific Explanation*, pp. 155-171.

¹⁰ In addition, Fallon cites Chief Justice Rehnquist as a generally good example of a Federalist jurist. While this has tended to be true of Rehnquist’s position in court jurisdictional issues, which is the thrust of Fallon’s article, and certain additional major cases, notably *NLC* and *Garcia*, Rehnquist’s divergence in recent years from the strong states’ rights position of his colleague, Justice O’Connor, makes him a less-than-perfect prototype for these purposes. Notably, for instance, Rehnquist joined the majorities in *South Carolina v. Baker* and *South Dakota v. Dole*.

Moreover, Justice Scalia was expected by some observers to be a strong advocate of states’ rights. However, as recent Court observers have noted, with the notable exception of his strong stance against the dormant commerce clause, “Justice Scalia has given state and local governments more reason to worry than to hope. Although the jury is still out, Justice Scalia is emerging as at best an occasional—perhaps only an accidental—advocate of federalism.” Stewart A. Baker and Katherine K. Wheatley, “Justice Scalia and Federalism,” *Urban Lawyer* 20 (1988): 353. See also David M. Gelfand and Keith Werhan, “Federalism and Separation of Powers on a ‘Conservative’ Court: Currents and Cross Currents from Justices O’Connor and Scalia,” *Tulane Law Review* 64 (1990): 1443.

¹¹ See, for instance, Justice Marshall dissenting for himself and Justices Brennan and Blackmun in *Croson*. Note especially, his comments citing liberally Justice O’Connor’s previous dissents:

It may well be that “the autonomy of a state is an essential component of federalism,” *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 588 (1985) (O’Connor, J., dissenting), and that “each state is sovereign within its own domain, governing its citizens and providing for their general welfare,” *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. at 777 (O’Connor, J., dissenting), but apparently this is not the case when federal judges, with nothing but their impressions to go on, choose to disbelieve the explanations of these local governments and their officials.

Richmond v. Croson, 488 U.S. 469 at 546 (1989) (Marshall, J., dissenting).

¹² Remarks of Thurgood Marshall, Annual Seminar of the San Francisco Patent and Trademark Law Association, Maui, Hawaii, May 6, 1987.

¹³ See endnote 9 above.

¹⁴ It is still too early to determine where Justice Souter stands on such issues and clearly far too early to predict the federalism jurisprudence of Justice Thomas.

One explanation for O’Connor’s stance on federalism issues lies in her professional background. Alone among the justices, she has served in all three branches of state government, having been an Arizona assistant attorney general, a state senator, and a state superior court judge. Savage, “Legislative Past Guides O’Connor,” *Los Angeles Times*, October 8, 1988.

- ¹⁵ See especially *Garcia, South Carolina v. Baker*, and *South Dakota v. Dole*. But see *Richmond v. Croson*.
- ¹⁶ 469 U.S. 528 at 581 (O'Connor, J., dissenting). Footnotes omitted.
- ¹⁷ Gelfand and Werhan, "Federalism and Separation of Powers on a 'Conservative' Court," p. 1452
- ¹⁸ 469 U.S. 528 at 588.
- ¹⁹ 485 U.S. 505 at 532 (1988) (O'Connor, J., dissenting).
- ²⁰ 483 U.S. 203 at 213 (1987).
- ²¹ 469 U.S. 528 at 582 (O'Connor, J., dissenting).
- ²² *Ibid.*, p. 586.
- ²³ 485 U.S. 505 at 534 (O'Connor, J., dissenting).
- ²⁴ *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991).
- ²⁵ United States Constitution, Article IV, Section 4.
- ²⁶ *Luther v. Borden*, 48 U.S. 1, 45 (1849). Cited in Laurence Tribe, *American Constitutional Law* (Westbury, New York Foundation Press, 1988), p. 98.
- ²⁷ See, for example, Attorney General ex rel. *Kies v. Lowery*, 199 U.S. 233 (1905); *Forsyth v. Hammond*, 166 U.S. 506 (1897); and *Minor v. Happersett*, 88 U.S. 162 (1875).
- ²⁸ 223 U.S. 118 (1912). Cited in Tribe, *American Constitutional Law*, p. 99.
- ²⁹ *Ibid.*, p. 142.
- ³⁰ Tribe, *American Constitutional Law*, p. 99.
- ³¹ *Federal Regulatory Commission v. Mississippi*, 456 U.S. 742 at 789 (1982) (O'Connor, J., dissenting).
- ³² *Ibid.*, p. 789-90, citing Alexis de Tocqueville, *Democracy in America*, p. 181 (H. Reeve translation, 1961).
- ³³ Deborah Jones Memtt, "The Guarantee Clause and State Autonomy," *Columbia Law Review* 88 (1988): 1. In both *Baker* and *Gregory*, O'Connor made explicit, approving note of Merritt's thesis.
- ³⁴ Letter from John Adams to Mercy Warren (July 20, 1807). Cited in Memtt, "The Guarantee Clause and State Autonomy," p. 23.
- ³⁵ *Ibid.*
- ³⁶ *Ibid.*
- ³⁷ *Ibid.*, p. 25. Quotations are those of Madison, *Federalist* No. 39, p. 251 (J. Cooke, ed. 1961).
- ³⁸ *Pennsylvania and the Federal Constitution* (1880 at 436-37). Cited in Memtt, "The Guarantee Clause and State Autonomy," p. 31.
- ³⁹ A Jerseyman, To the Citizens of New Jersey, *Trenton Mercury*, November 6, 1787. Cited in Memtt, p. 33.
- ⁴⁰ 111 S. Ct. 2395 (1991).
- ⁴¹ 81 Stat. 602, as amended, 29 U.S.C. Sec. 621-634.
- ⁴² 111 S. Ct. 2395 at 2402. Citations omitted.
- ⁴³ See *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981).
- ⁴⁴ 469 U.S. 528 at 580. (Rehnquist, J., dissenting).
- ⁴⁵ For example, Scalia concurred in the *Baker* decision, joined the majority in *Dole*, and maintained a Nationalist position in *Croson*. On the other hand, he is emerging as an opponent of the Court's dormant commerce clause activities. He also has tended to take a pro-state stance in Eleventh Amendment cases. See Gelfand and Werhan, "Federalism and Separation of Powers on a 'Conservative' Court," p. 1459.
- ⁴⁶ For example, Kennedy was not yet on the Court when *Dole* was decided; he did not participate in *Baker*; and he joined O'Connor's opinion in *Croson*. On the other hand, his was the most forceful warning against judicial taxation in *Jenkins*.
- ⁴⁷ In the one fully reviewed 1991 case, *Dennis v. Higgins*, Souter joined with the majority in concluding that Section 1983 could be used to sue for commerce clause claims. See Chapter 7. However, he joined fully in Justice O'Connor's opinion in *Gregory v. Ashcroft*. See note 39.
- ⁴⁸ It may also be notable that she silently joined the majority in *Dennis v. Higgins*, asserting that suits for violations of the commerce clause may be brought under Section 1983. The fact that O'Connor has been such an outspoken proponent of the need for maintaining realms of state sovereignty makes her opinion in *Richmond v. Croson* all the more confusing. Indeed, and ironically, an observer assessing O'Connor's jurisprudence only on *Croson* would be forced to conclude that the justice supports a Nationalist view of the constitutional balance of power. Thus, she seemingly embraced the Nationalist historicism and sounded a note that might otherwise have issued from the pen of Justice Marshall had he not, of course, been on the opposite side of this peculiar case. (Note, for instance, her reference to the "Civil War Amendments. . . work[ing] a dramatic change in the balance between congressional and state power over matters of race," 488 U.S. 469 at 490. For a more detailed description and analysis of the case, see Chapter 6. See also note 10 for Marshall's pointed references in the case to O'Connor's generally pro-state and local stance.)
- The probable explanation for the *Croson* anomaly is that, like the Court's prior confounding array of affirmative action decisions, jurisprudence was being guided by a preferred policy outcome. Generally, the Court's major affirmative action cases have yielded pluralities or, at the very least, multiple, conflicting opinions. See, among others, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (plurality) (1980); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); and *Local 28 of Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*, 428 U.S. 421 (plurality) (1986).] See also Jack M. Beerman, "Bad Judicial Activism and Liberal Federal-Courts Doctrine: A Comment on Professor Doernberg and Professor Redish," *Case Western Reserve Law Review* 40 (1990): 1053, and Robin West, "Progressive and Conservative Constitutionalism," *Michigan Law Review* 88 (1990): 669-672.
- In any event, as several commentators have noted, "the treatment of the relative powers of Congress and state and local governments in the various *Croson* opinions inverts the Court's usual line-up on federalism." Kathleen M. Sullivan, "City of Richmond v. J.A. Croson: The Backlash against Affirmative Action," *Tulane Law Review* 64 (1990): 1616. See also Gelfand and Werhan, "Federalism and Separation of Powers on a 'Conservative' Court," pp. 1454-1455; and Linda S. Greene, "Race in the 21st Century: Equality through Law?" *Tulane Law Review* 64 (1990): 1531. At the very least, it marks a disturbing departure from O'Connor's normal principled stance.
- ⁴⁹ For example, Justice White silently joined the *Baker* and *Dole* majorities and the *Croson* majority.
- ⁵⁰ For example, Justice Stevens concurred in the *Baker* decision, silently joined the *Dole* majority, and concurred in part and in judgment in *Croson*.
- ⁵¹ Justice Blackmun joined in the *Baker* and *Dole* majorities and in the *Croson* dissent.
- ⁵² Included broadly among such issues would be Eleventh Amendment questions, habeas corpus concerns, and prison administration cases, among others.

- ⁵³ See, for example, Hon. Warren E. Burger, Chief Justice of the United States, Remarks before a Conference on Supreme Court Advocacy, Washington, DC, October 17, 1983; Lawrence R. Velvel, "State 'Better Mousetrap' Could Convince the High Court," *Legal Times*, May 30, 1983, p. 10; U.S. Advisory Commission on Intergovernmental Relations, *An Agenda for American Federalism: Restoring Confidence and Competence* (Washington, DC, 1981), p. 144; Stewart A. Baker and James R. Asperger, "Foreword: Toward a Center for State and Local Legal Advocacy," 31 *Catholic University Law Review* 31 (1982): 372, and "Afterword: More about the Center," *Catholic University Law Review* 31 (1982): 505.
- ⁵⁴ As of August 1991, the center had filed 111 fully published briefs with the Supreme Court, representing work on 99 major Court cases, in support of the positions of some or all of the aforementioned public interest groups. Source: LEXIS "Briefs" file.
- ⁵⁵ In an attempt to stem the tide and burden of amicus briefs, in January 1990, the Court issued Rule 37.1
- An amicus curiae brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An amicus brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.
- ⁵⁶ Recently, the center commissioned four former Supreme Court law clerks to examine its briefs for quality, persuasiveness, and "their effect on the development of the law." On all counts, the former law clerks found the center's briefs, overall, to be of "extremely high" quality. Indeed, they judged the briefs to be among the "first tier," along with [those] filed by the Solicitor General's office and the best law firms." Memorandum submitted to Stewart Baker from Gregory Dovel, Peter Keisler, Ronald Lee, and Gene Schaerr, September 13, 1991.
- ⁵⁷ In 1991 alone, the center and its sponsoring organizations could count as major preemption victories *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), and *Barnes v. Glen Theatre*, 111 S. Ct. 2456 (1991) (allowing localities to regulate nude dancing) In addition, state and local interests won a unanimous decision in *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act does not preempt local regulation of pesticide use)
- ⁵⁸ National Governors' Association, *Policy Positions, 1988-89* (Washington, DC, September 1988), p. 2.
- ⁵⁹ Lawrence Haas, "States Bounce Back," *National Journal*, August 10, 1991, p. 1980.
- ⁶⁰ *Trivona v. Michigan Dept. of Treasury*, 111 S. Ct. 818 (1991); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 at 226 (1989); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 at 554 (1985) and at 565, 576 (dissent); *Dixon v. U.S.*, 465 U.S. 482 at 509 (1984) (dissent); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 at 787 (1982) (dissent); *Rosewell v. LaSalle National Bank*, 450 U.S. 503 at 521, 527 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 at 775 (1978); *Shapiro v. Thompson*, 394 U.S. 618 at 645 (1969) (dissent); *Avery v. Midland County*, 390 U.S. 474 at 489, 494 (1968) (dissent); *Reynolds v. Sims*, 377 U.S. 533 at 573, 584 (1964) and at 611 (dissent); *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 at 734 (1964); and *Gray v. Sanders*, 372 U.S. 368 at 382 (1963) (dissent).
- ⁶¹ *Amalgamated Transit Union International v. Donovan*, 767 E.2d (CAD 1985); *U.S. v. Frumento*, 563 E.2d 1083 (CA3 1977); *Texas Department of Public Welfare v. Califano*, 556 E.2d 326 (CA5 1977); *County of Alameda v. Weinberger*, 520 E.2d 344 (CA9 1975); *National Welfare Rights Organization v. Finch*, 429 E.2d 725 (CAD 1970); *Core v. Norwalk Redevelopment Agency*, 395 E.2d 920 (CA2 1968); *U.S. v. General Douglas MacArthur Senior Village*, 337 E. Supp. 955 (E.D. NY 1972); *Second National Bank of New Haven v. U.S.*, 297 E. Supp. 1080 (Conn. 1969); *Drew v. Scranton*, 229 E. Supp. 310 (M.D. PA 1964); *Butterworth v. Dempsey*, 229 F. Supp. 754 (Conn. 1964); *Germano v. Kerner*, 220 E. Supp. 230 (N.D. IL 1963); *Nolan v. Rhodes*, 218 F. Supp. 953 (S.D. OH 1963); and *Sobel v. Adams*, 214 E. Supp. 811 (S.D. FL 1963).
- ⁶² See, for a few examples, Memtt, "The Guarantee Clause and State Autonomy," pp. 7-8, 16, 62; Bernard Schwartz, "National League of Cities Again—R.I.P. or a Ghost that Still Walks?" *Fordham Law Review* 54 (1985): 164; George D. Brown, "State Sovereignty under the Burger Court: How the Eleventh Amendment Survived the Death of the Tenth," *Georgetown Law Journal* 74 (1985): 375-376; Stephen L. Smith, "State Autonomy after Garcia: Will the Political Process Protect States' Interests?" *Iowa Law Review* 71 (1986): 1547-1550; Bruce La Pierre, "Political Accountability in the National Political Process," *Northwestern University Law Review* 80 (1985): 584, 595; and James V. Corbelli, "Tower of Power: South Dakota v. Dole and the Strength of the Spending Power," *University of Pittsburgh Law Review* 49 (1988): 1109. The figure of 75 articles was arrived at through a search of LEXIS, which features articles from only 76 select law reviews.
- ⁶³ Cited in Haas, "States Bounce Back," p. 1980.
- ⁶⁴ *Ibid.*

Recent ACIR Publications

The Role of General Government Elected Officials in Criminal Justice, A-125, 1993	\$25.00
The National Guard: Defending the Nation and the States, A-124, 1993	\$15.00
Significant Features of Fiscal Federalism, 1993 Edition, Volume I, M-185, 1993	\$20.00
Guide to the Criminal Justice System for General Government Elected Officials, M-184, 1993	\$8.00
State Solvency Regulation of Property-Casualty and Life Insurance Companies, A-123, 1992	\$20.00
Intergovernmental Decisionmaking for Environment and Public Works, A-122, 1992	\$10.00
Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues, A-121, 1992 ...	\$10.00
Changing Public Attitudes on Governments and Taxes—1992, S-21, 1992	\$10.00
Toward a Federal Infrastructure Strategy: Issues and Options, A-120, 1992	\$8.00
Medicaid: Intergovernmental Trends and Options, A-119, 1992	\$10.00
Local Boundary Commissions: Status and Roles in Forming, Adjusting and Dissolving Local Government Boundaries, M-183, 1992	\$8.00
Characteristics of Federal Grant-in-Aid Programs to State and Local Governments: Grants Funded FY 1991, M-182, 1992	\$10.00
Metropolitan Organization: The Allegheny County Case, M-181, 1992	\$10.00
State Taxation of Interstate Mail Order Sales, M-179, 1992	\$10.00
The Changing Public Sector: Shifts in Governmental Spending and Employment, M-178, 1991	\$15.00
Coordinating Water Resources in the Federal System: The Groundwater-Surface Water Connection, A-118, 1991	\$15.00
Interjurisdictional Tax and Policy Competition: Good or Bad for the Federal System? M-177, 1991	\$10.00
State-Local Relations Organizations: The ACIR Counterparts, A-117, 1991	\$10.00
The Structure of State Aid to Elementary and Secondary Education, M-175, 1990	\$10.00
Representative Expenditures: Addressing the Neglected Dimension of Fiscal Capacity, M-174, 1990	\$20.00
Mandates: Cases in State-Local Relations, M-173, 1990	\$10.00
State Constitutional Law: Cases and Materials, M-159S, 1990	\$30.00
Intergovernmental Regulation of Telecommunications, A-115, 1990	\$10.00
1988 Fiscal Capacity and Effort, M-170, 1990	\$20.00
Local Revenue Diversification:	
Rural Economies, SR-13, 1990	\$8.00
Local Sales Taxes, SR-12, 1989	\$8.00
Local Income Taxes, SR-10, 1988	\$5.00
User Charges, SR-6, 1987	\$5.00
State Taxation of Banks: Issues and Options, M-168, 1989	\$10.00
State Regulation of Banks in an Era of Deregulation, A-110, 1988	\$10.00
State Constitutions in the Federal System: Selected Issues and Opportunities for State Initiatives, A-113, 1989	\$15.00
Residential Community Associations:	
Private Governments in the Intergovernmental System? A-112, 1989	\$10.00
Questions and Answers for Public Officials, M-166, 1989	\$5.00
Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal, A-111, 1989	\$10.00
Assisting the Homeless: State and Local Responses in an Era of Limited Resources, M-161, 1988	\$10.00
Devolving Selected Federal-Aid Highway Programs and Revenue Bases: A Critical Appraisal, A-108, 1987	\$10.00
The Organization of Local Public Economies, A-109, 1987	\$5.00



What Is ACIR

The U.S. Advisory Commission on Intergovernmental Relations (ACIR) was created by the Congress in 1959 to monitor the operation of the American federal system and to recommend improvements. ACIR is an independent, bipartisan commission composed of 26 members—nine representing the federal government, 14 representing state and local government, and three representing the general public.

The President appoints 20 members—three private citizens and three federal executive officials directly, and four governors, three state legislators, four mayors, and three elected county officials from states nominated by the National Governors' Association, the National Conference of State Legislatures, the National League of Cities, U.S. Conference of Mayors, and the National Association of Counties. The three Senators are chosen by the President of the Senate and the three Representatives by the Speaker of the House of Representatives.

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

As a continuing body, the Commission addresses specific issues and problems the resolution of which would produce improved cooperation among federal, state, and local governments and more effective functioning of the federal system. In addition to examining important functional and policy relationships among the various governments, the Commission extensively studies critical governmental finance issues. One of the long-range efforts of the Commission has been to seek ways to improve federal, state, and local governmental practices and policies to achieve equitable allocation of resources, increased efficiency and equity, and better coordination and cooperation.

In selecting items for research, 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 intergovernmental issues for investigation, ACIR follows a multistep procedure that assures review and comment by representatives of all points of view, all affected governments, 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 are developed to assist in implementing ACIR policy recommendations.

