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Last Rites for States Rights?

Five years ago, Congress enacted legislation intended to curtail a growing tendency of federal authorities to impose unfunded mandates on state and local governments. A year later, welfare reform, featuring substantial devolution to the states, was finally adopted. And on several occasions throughout the last decade, the Supreme Court handed down decisions that sought to reaffirm the sovereignty or prerogatives of the states. To many observers, these developments appeared to signal a fundamental change in American federalism, sharply shifting the balance of power away from the central government to the states.

The following paper, however, questions the extent of the supposed shift. Centralization, the paper argues, has been the prevailing trend since the end of World War II, as federal policies have continued to preempt, through a variety of methods, a widening range of state and local responsibilities.

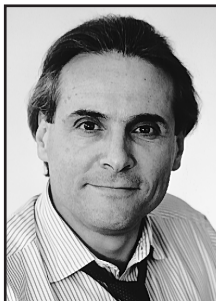
Recent legislative initiatives, aimed at moderating federal preemptions, are best understood and assessed in this broader context.

In 1908 Woodrow Wilson observed that the proper relationship between the national government and the states “is the cardinal question of our constitutional system.” The question would not be settled by “one generation,” he added, but would preoccupy “every successive stage of our political and economic development.”

The latest round of this interminable debate centers on the propensity of federal authorities to preempt state powers. Articulate critics have entered the fray—not least Senator Fred D. Thompson, Republican from Tennessee, who has floated a Federalism Accountability Act to curb a profusion of preemptions. But what, precisely, are preemptions? Are they a problem? Why have they increased in the past thirty years? And how might answers to these questions help decide the merits of proposed reforms such as Senator Thompson’s?

Terminology

The accepted definition of federal preemptions, presumably, remains the broad one advanced by the United States Advisory Commission on Intergovernmental Relations (ACIR) eight years ago.



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The Rigors of Restoring

Preemptive actions include: (1) prohibitions on state and local governments exercising particular powers, (2) federal laws or regulations that replace state and local ones, or (3) requirements that state and local authorities satisfy certain standards.

Measures preempting the states, it would appear from this formulation, cover a considerable assortment of federal commandments that narrow local autonomy. Indeed, to differentiate between a so-called preemption and, say, a binding national standard, or an unfunded (or underfunded) mandate, or a restrictive condition tied to federal funds that the states cannot do without, may be to draw a distinction without a meaningful difference.

If proposals like the Thompson bill challenge so wide a range of federal constraints on the states, such measures are by no means a sideshow. Perforce, they squarely join a larger dialogue about whether the increasing nationalization of governance in American federalism is desirable.

A Constitutional Issue?

Some of the testimony at the hearings on Senator Thompson's bill endorsed the legislation on what sounded like constitutional grounds. One witness spoke of the need to check an "unprecedented usurpation" of "traditional state authority." Another underlined the point by citing the widening reach of federal actions that "had preempted state laws affecting trade, telecommunications, financial services, electronic commerce, and other issues."

Not the least of the difficulties with this characterization of the preemption issue is the fact that, although defenders of states' rights have alluded to "traditional" state prerogatives for more than two centuries, no one has been able to delineate what they are. Surely federal displacement of state statutes in the realms of trade, financial services, and much more is anything but unprecedented. A national restriction on state taxation of electronic commerce may seem like an "unprecedented usurpation" but only because the Internet is new, not because disputes over state taxes are. At the crux of the fabled case of *McCulloch v. Maryland*, one hundred and eighty-one years ago, was a state tax that the U.S. Supreme Court disallowed.

In the latter third of the nineteenth century and first third of the twentieth, the Supreme Court attempted repeatedly to parse economic activities that Congress could constitutionally regulate and activities that would remain under the aegis of the

American Federalism

states. The result was a welter of seemingly arbitrary distinctions: federal laws governing the movement of lottery tickets, liquor, prostitutes, and harmful foods and drugs were upheld, while other basic functions—including manufacturing, insurance, and farming—were classified as *intrastate* commerce, hence left to state regulators. By the 1940s, however, the court had changed its mind. Not only were farmers and manufacturers subsumed under federally regulated interstate commerce but, in time, the court concluded that just about everybody else—even janitors and window washers—could be subject to federal regulation if they happened to work for companies transacting business across state lines.

Amid this expanding centralism, complex, sometimes inexplicable, anomalies have persisted. Why, for example, are lawyers but not baseball players said to engage in interstate commerce, so that federal antitrust laws apply to the former but not the latter? Why, according to the courts, may the Commerce Clause empower Congress to instruct the city of San Antonio how to pay its transit system operators (*Garcia v. San Antonio Metropolitan Transit Authority*, 1985) but not to order the local police to perform background checks on prospective gun purchasers (*Printz v. United States*, 1997)? True, the courts recently have affirmed for state governments Tenth Amendment relief from federal directives for the disposal of radioactive waste (*New York v. United States*, 1992) and Eleventh Amendment immunity from certain lawsuits arising under federal labor laws (*Alden v. Maine*, 1999). Yet the same affirmation of local control has not been extended for such matters as the administration of mental health facilities, intrastate sales of natural gas, or the tax-exempt status of municipal bonds.

If judicial rulings on dual sovereignty often appear to lack consistency, the determinations of lawmakers and presidents can be downright fickle. The Republican majorities in the 104th Congress proclaimed a commitment to devolution. But soon the same Republican legislators partly preempted, among other duties of the states, the enforcement of child support laws and the establishment of eligibility standards of legal aliens for public assistance. President Bill Clinton, a former state governor, came to office determined to sort out Washington's proper role and rehabilitate state discretion in key areas. His blueprint in 1992 listed criminal justice as an area in which no expanded federal role was justified. A few years later, however, Clinton approved legislation federalizing numerous crimes that previously had been solely the purview of local law enforcement officials.

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Regardless of whether these vagaries are intellectually defensible or ultimately capricious, this much is certain: they have provided few practical guidelines as to where state sovereignty should give way to federal supremacy. Interpretations of the Tenth Amendment, in other words, have not drawn a distinct demarcation. Now and then politicians and judges have invoked that amendment to restrain the federal government from aggrandizing powers supposedly reserved to the states, but the constitutionality of the disputed usurpations has been decided, not according to some clear organizing principle, but mostly on an ad hoc basis.

The problem with preempting state laws, therefore, is not that the practice violates the Constitution. With exceptions, the courts—not to mention the other branches—have deemed that it has not. Instead, as I demonstrate below, the trouble is that the scope of the preemption phenomenon in recent decades has become so pervasive and injudicious as to create inefficiencies in the federal system and even to deepen public distrust of government.

Centralization

Preemption spans an array of methods by which the federal government dictates to the states what they must or must not do. The methods include policies that, technically, are grants in aid. In theory, states can decline to receive federal money, but in practice, they almost always don't, and federal stipulation of increasingly intricate grant conditions preempts or distorts local priorities. He who pays the piper calls the tune. New federal strings are often attached after the aid programs have been institutionalized; by then, powerful local constituencies are so dependent that the programs have all but ceased to be voluntary. And typically, the federal rules remain firmly in place even if congressional appropriations fall far short of authorizations. The local provision of special education for students with disabilities, for instance, is essentially governed by federal law, despite the fact that Congress has never come anywhere near appropriating its authorized share of this \$43 billion-a-year mandate.

These bait-and-switch dynamics aside, much of the nation's public agenda is simply unaffordable for the states to administer on their own, so it is hard to imagine how they could abstain from taking the promised federal contributions. No matter how many onerous obligations Congress affixes to it, could any state really refuse to accept federal support for Medicaid?

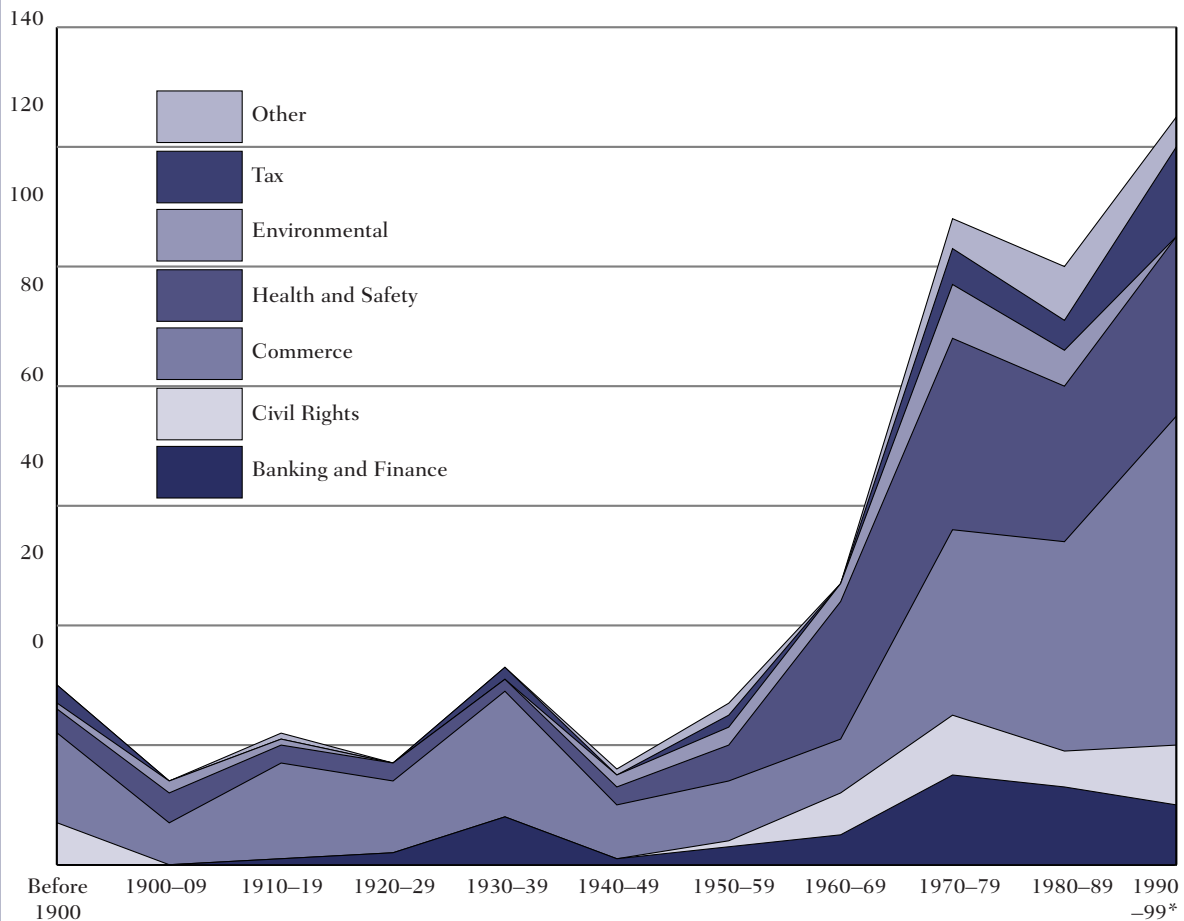
How many federal preemption statutes, broadly defined, has Congress enacted? The only authoritative answer to that question was supplied in 1992 by the ACIR. The commission's compendium painted an astonishing picture (Figure 1). There were more preemptions between 1960 and 1969 than in any previous decade, but what happened during the 1960s pales in comparison with the explosion that followed.

More preemptive laws were piled on after 1970 than in the entire preceding history of the Republic.

Interestingly, the Reagan and Bush administrations scarcely slowed this surge of what came to be called coercive federalism. Despite their protestations against the

Figure 1:

Number of Federal Preemption Statutes Enacted Per Decade: 1790–1999



Source: U.S. ACIR, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues*, September, 1992, p.9
 *Estimation based on preemption data for 1990–91.

Washington-knows-best mindset, these Republican presidents signed numerous laws setting federal standards for matters that used to be decided by the states. A number of these laws, it should be emphasized, had virtually no intelligible rationale for turning a local concern into a federal preoccupation. Who should be allowed to consume alcoholic beverages, whether a local school needs to remove asbestos, what height and strength qualifications a local fire department sets for its recruits, or how a community purifies its drinking water, for example, are hardly questions that beckon for national answers. Yet each became subject to national directives.

Efficiency

It strains credulity to suppose that the world became, all of a sudden, so utterly different after 1970 as to warrant what Figure 1 shows: a *doubling* of the amount of centralization in American government. However, some conditions did change rather fundamentally, and these changes necessitated broader federal intervention.

Most important was the rise of environmentalism. A substantial share of the inter-governmental strictures imposed in the past thirty years pertains to environmental protection. For some forms of pollution, the abatement efforts of localities and states would not suffice, for the simple reason that much pollution crosses jurisdictional boundaries. Certainly a forceful case could be made for national oversight of the Clean Air Act. Emissions of greenhouse gases and of sulfur dioxide are not localized problems. Even local concentrations of ozone can blow across hundreds of miles, and one region's foul air can create another's impure water.

Second, the world economy has become much more integrated. National prosperity now rests more than before on the ability of firms to compete efficiently in global markets and on standardizing rules that might otherwise complicate the free flow of trade, foreign investment, and financial capital. In the United States, as in other major trading partners such as the European Union, it is no surprise that higher orders of government increasingly have moved to dismantle local impediments to negotiating international trade treaties, improving the competitive position of businesses, and streamlining financial markets. At least in part, globalization helps explain recent federal efforts to harmonize banking regulations and to challenge anticompetitive practices in some states—their decisions to harbor trade sanctions, for instance, and to countenance boundless tort litigation.

Alongside the accelerating liberalization of international commerce came advances in procompetitive regulatory reform for key U.S. industries. This process, too, has called for correcting some local practices, sometimes to the point of justifying more uniform standards. Restructuring the electricity industry offers a current example. Although state initiatives account for much of the progress that has been made to date, consummating the deregulation of electric power—and ensuring a successful outcome nationwide—has demanded federal legislation.

Finally, the breakneck pace of change in telecommunications and information technologies is also forcing preemption of some local policies. The cellular phone industry in Europe is ascendant because, among other reasons, the European Union quickly established a single Continent-wide technical standard. Meanwhile, wireless service in the United States has lagged in part because companies here have to navigate multiple systems. No doubt, this eccentricity cannot last long. Similarly, another local convention—namely, excise taxation on almost any purchase of goods

and services within the geographic jurisdictions of states—chafes against the realities of online commerce and against the national, if not international, interest in encouraging its growth.

And Inefficiency

But along with good reasons to overrule variations of policy among states, there also have been plenty of unconvincing ones—or, more accurately, reasons more rooted in bureaucratic rigidity or raw politics than in sober deliberation.

Too many of the federal environmental programs that burgeoned after 1970 adopted a one-size-fits-all approach. Not every environmental problem has the trans-boundary properties of air pollution. The Environmental Protection Agency's uniform standards for landfills, for example, impose unnecessary costs on local governments in the Southwest. Double liners for landfills are essential in wet climates, where rainfall can cause pollutants to leach into water tables. But they are less necessary in, say, Arizona or parts of southern California, where there is little rain. Likewise, for all but a handful of biological contaminants in drinking water, the dangers of high concentrations of poisons are borne only by residents in the vicinity who might consume the polluted water for a lifetime. To quote Paul R. Portney of Resources for the Future, "Why, then, not allow the states, or perhaps even individual communities to decide how stringently they wish to regulate their drinking water?"

Another notable share of the centrally-dictated standards that have multiplied in the past three decades falls under the capacious category of civil rights. What began in the 1960s as a straightforward goal of ensuring equal opportunity for African Americans would later expand into a vast apparatus of federally mandated protections and preferences for multiple minorities, women, the elderly, the disabled, and so on. Whether all these groups merit the same compulsory remedies is a good question. So is the question of whether all the remedies ought to be designed and decreed from the top down.

Consider the rights of persons with disabilities. The goal of accommodating the physically impaired is just and desirable. But should every state and municipality be told how to improve handicapped access to its public facilities? To comply with the U.S. Department of Transportation's (DOT) rules for modernizing public buses and retrofitting subways, New York City estimated in 1980 that it needed to spend more than \$1 billion in capital improvements on top of \$50 million in recurring annual operating expenses. As the city's mayor, Edward I. Koch, wrote in the journal *The Public Interest* at the time, "It would be cheaper for us to provide every severely disabled person with taxi service than make 255 of our subway stations accessible."

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It strains credulity to suppose that the world became, all of a sudden, so utterly different after 1970 as to warrant a doubling of the amount of centralization in American government.

Mercifully, the federal planners later relented and lowered these staggering costs. But that prescribing them had been contemplated at all is disturbing. New York, with its old and extensive transit system, should never have been sidetracked from opting for cost-effective alternatives to the DOT's budget-busting retrofit policy. It was obvious from the outset that investing in advanced paratransit or even, as Mayor Koch suggested, subsidizing taxi rides would secure a greater net benefit not only for the city's beleaguered taxpayers but for the truly disabled as well.

The larger point here is that when top-heavy federal regulations indiscriminately preempt local options, they risk stifling local innovations and foreclosing solutions that fit local circumstances. The result can be enormously wasteful.

In recent years, the GOP-controlled Congress, with more than a little acquiescence by the Clinton administration, has been busy federalizing yet another field in which the states used to have primary responsibility, namely, controlling crime. As with some other extensions of federal paternalism, this one is troubling.

For one thing, it raises the question of "whether we want most of our legal relationships decided at the national rather than local level," as Chief Justice William Rehnquist pointedly asked in his recent report on the federal judiciary. Nationalizing criminal law is not comparable to merely setting standards for some aspects of state civil justice systems. The excesses of certain types of local civil suits, already rampant, may be abetted by special interests (such as the trial lawyer's lobby) that may wield disproportionate influence in state legislatures and often seem oblivious to the damage inordinate litigation can do to the national welfare. In sum, national tort reform has a justification: it may protect the commonweal from the capture of state politics by what James Madison called in *Federalist 10* "the mischiefs of faction."

The same logic does not hold for the ascent of national authority over criminal law. Granted, the administration of criminal justice varies, sometimes peculiarly, among states. But the differences in how crime is policed by the states usually reflect diverse objective conditions and public preferences, not the clout of potent pressure groups in dogged pursuit of material gain for themselves. Indeed, federal supervision of state law enforcement and correctional policies, if anything, runs the risk of spawning such questionable stakeholders where none existed. For example, prodding and pushing the states to adopt sentencing guidelines that force offenders to serve 85 percent of their sentences may sound like an unalloyed reform. In fact, it can impel a state to spend billions of dollars on new prison construction, entrenching a vested interest in mass incarcerations. At a minimum, if this federally induced growth industry expands

at the expense of other local needs, or of local experimentation with better alternatives, it decidedly misallocates resources.

Behind Justice Rehnquist's critique also is serious doubt that national institutions are prepared to cope with the added burden they appropriate. Hauling the federal judiciary into the adjudication of more and more local crimes, for instance, taxes its limited resources and capabilities. In contrast to the overloaded central administrations of unitary regimes, a federal system attains efficiencies through a division of labor and the decentralization of routine tasks. This advantage of federalism will erode in the United States if Congress persists in preempting one state function after another.

Credibility Crisis

In 1964, three-quarters of the American public said they trusted the federal government to do the right thing most of the time. By 1998, barely over a quarter did. Confidence in state and local governments has also sagged, but far less. The number of Americans who said they preferred more concentration of power at the federal level than in the states plunged from 56 percent in 1936 to 26 percent by 1995. According to a survey reported in 1998 by the Pew Research Center for the People and the Press, 59 percent of respondents viewed the federal government unfavorably, compared to 29 percent who held an unfavorable view of the states. The concept of returning more responsibilities to the states has gained popularity, even if it promises no net reduction in tax burdens. A poll in 1995 asked, Would you still favor shifting responsibility for programs from the federal government to the state governments if it meant your state taxes would increase to offset a decrease in your federal taxes? Fully 76 percent said yes, only 16 percent said no. Of course, this support sometimes diminishes when "shifting responsibility" means devolving specific programs rather than discussing abstractions. Still, it is hard to escape a conclusion that the public has become increasingly disenchanted with the dominance of Washington in the contemporary American political system.

A central government that homogenizes the choices available to local communities has itself to blame for a good deal of this disenchantment. Is it surprising that taxpayers in Phoenix, Arizona, which averages seven inches of rainfall a year, question federal mandates that force the city to devote large sums every year to monitoring runoff from practically nonexistent rainstorms? Is it any wonder that citizens in Midland, Michigan, resent EPA regulations that make the community spend far more than necessary to dispose of solid waste? (Sitting on seventy-five feet of clay, Midland's landfill would be perfectly safe without the federally required liner.)

Americans, at least during the past thirty-five years, have largely tolerated a hyper-active federal government when its activism was wrapped in the mantle of civil

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rights. But even then, patience wore out as federal paternalists overreached. The national government did not endear itself to a majority of citizens by ordering, for example, dozens of cities to bus thousands of schoolchildren, sometimes across vast distances, in the name of racial balance. Nor did Washington's social engineers earn the respect of most voters by insinuating that, as a condition of aid, state universities should practice in effect reverse discrimination to achieve suitably "diverse" enrollments. Such distortions of a shared national value—equality of opportunity—offended common sense and hence provoked a backlash.

So did the presumption that national jurists ought to be the final arbiters of some other complex moral issues, including many on which there was no consensus. Whatever one's views on legalized abortion, for instance, substantial segments of the public understandably have felt uncomfortable with an absolute, nationwide standard imposed by judicial fiat. On highly charged, morally unsettled questions such as this, many Americans would prefer a measure of community discretion, greater federal humility, and at a minimum, no Olympian edict from an unelected body invoking the "penumbras" of the Bill of Rights to decide matters of life and death (*Roe v. Wade*, 1973).

The Politics of Preemption

The inordinately long arm of federal law in local affairs is more than clumsy; its intrusive reach may alienate, if not infantilize, significant parts of American society. Not unaware of this failure, why doesn't the Washington political establishment desist?

To solve this puzzle, it is useful to begin by recalling the fact that, since 1970, majorities of both parties in Congress have not hesitated to nationalize issues when it was to the advantage of their respective clienteles.

During these decades, the Republicans have repeatedly paid lip service to decentralization. Yet, a recent systematic study of roll calls in the 98th through the 101st Congresses found the Republicans actually more prone than the Democrats to preempt state and local regulations.

One source of this propensity, of course, has been the customary prominence of business regulatory issues on the GOP's agenda. Business interests tend to prefer comprehensive regulatory standards to a differentiated hodgepodge of local rules. Why, for example, did Republicans join the congressional crusade to compel every local school district to remove asbestos from classrooms? Worried about the threat of lawsuits from local parent associations and public health guardians, asbestos manufacturers lobbied for a generic statutory standard. At least that way the companies might know precisely what was expected of them everywhere, instead of

remaining exposed to the case-by-case caprice of local juries. Similarly, bipartisan support for federal motor vehicle safety and emissions controls coalesced when the automobile industry lobbied to preempt the states from setting disparate standards. Better to have one 500-pound gorilla in charge of regulating the industry, its lobbyists reckoned, than to deal with 50 monkeys on steroids.

Politicians of both parties today also invoke “the law of the land” in more and more controversies because, contrary to Tip O’Neill’s aphorism, their politics are no longer local. As links to local party organizations have weakened, the allegiances of congressmen have moved increasingly beyond strictly parochial concerns to the causes of *national* lobbies and advocacy groups. This delocalization of influence is reflected in the pattern of congressional campaign finance. Whereas candidates, particularly for House seats, once depended primarily on the backing of the local party hierarchy, the soaring costs of campaigns now compel office seekers to rely more heavily on external sources. The winners of recent House elections drew almost 40 percent of their contributions from political action committees—that is, from the funding arms of national interest groups.

Further, the news media contribute to the heightened national profile of every imaginable misfortune by depicting isolated events as “trends” worthy of prime-time attention. Lawmakers do not want to seem uncaring about the latest reported tragedy, typically portrayed as afflicting the country from coast to coast. Their response: enact a law.

In the September 1995 issue of *Governing*, Alan Ehrenhalt recounts the case of Representative Dick Zimmer, Republican from New Jersey, who in principle believed that states and localities are quite capable of discharging their duties without interference from an officious federal government. Early in 1995, Congressman Zimmer supported a measure aimed at restraining Congress from imposing unfunded mandates on the states. Then, in July 1995, something ugly happened in his home state. A child was brutally assaulted by a paroled sex offender whose presence in the community had not been disclosed to residents. To be sure, the episode was not part of a general trend. Throughout the United States in the 1990s violent crime was declining. State and local law enforcers deserved a good deal of credit. But the occurrence in New Jersey drew wide coverage and outrage. Zimmer soon came up with an idea: a bill directing every state in the union to set up a community notification program for released sex offenders.

In addition, federal rules increasingly preempt local ones because the terms of more policy debates in Washington are now framed as questions of rights. Emulating the civil rights movement of the 1960s, interests of all kinds have found it expedient to

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press their needs or claims as a quest for basic justice. Soon, to borrow a phrase from Philip K. Howard's book *The Death of Common Sense*, "Congress began handing out rights like land grants." Major environmental programs, for example, were said to secure everyone's "*inherent right* to the enjoyment of pure and uncontaminated air" or water. Today, even airline passengers, truckers protesting fuel prices, and subscribers to health maintenance organizations are queuing up to obtain, not just relief, but also a "bill of rights." These correctives, taking the form of solemn legal protections to which all claimants are entitled, imply national commands and controls. A right, after all, is not a mere aspiration that can be adjusted up or down according to local preferences; it is absolute and universal. There is, in other words, no such thing as a partial inherent right. Rights are all or nothing. And because these legal warrants, by definition, are not divisible, they cannot be allowed to vary by locale.

To be sure, a skeptic might consider much of the resulting standardization to be superfluous. By the time policymakers in Washington had begun introducing proposals to affirm a universal right to special education for preschool handicapped children, forty-two states already had begun programs of this sort. Before Congress proclaimed that every student should be entitled to attend an asbestos-free school, at least thirty-one states had programs to inspect and abate the potentially hazardous substance. Predating the proposed federal patients rights bill for managed care recipients were the policies of forty-one states that banned the use of so-called gag clauses in communications between HMO doctors and patients.

Proponents of federal preemption, however, have been undeterred. Their logic simply becomes: if so many states have already blazed a trail, national standards only complete what the states have started. The states, in short, are as likely to have their independence shorn when they are proactive and progressive as when they are laggards.

This is not to say that national preemption is always instigated inside the Beltway. Sometimes state officials agitate to have their powers trumped by federal law. In an effort to avoid liability in the fiercely litigious arena of environmental policy, for example, state and local officials sometimes seek cover under the blanket of federal standards. Invoking a coast-to-coast rule, even if a blunt instrument, is often safer than trying to defend nuanced exercises of local discretion. In the proceedings that led to broad national criteria for safe drinking water, the National Governors Association and various associations representing public water systems favored all-encompassing standards that might help insulate local administrators from incessant legal wrangles.

Still, the centripetal force of Washington has largely acquired a momentum of its own. Contrary to what one might suppose, fiscal constraints over the past twenty years have scarcely shrunk the federal leviathan. Its influence used to increase primarily with the growth of grants-in-aid. Once many state and local governments became, so to speak, federal aid junkies, they would be at the mercy of congressional benefactors and federal patron agencies that could attach to their dollars increasingly elaborate requirements. But that inexorable tightening of grant conditions was in some ways less coercive than the current tendency of national policymakers to simply commandeer local authorities without offering any compensation.

Budgetary deficits in the 1980s, followed by relatively austere discretionary spending in the 1990s, provided a pretext for this practice of mandating activities and shifting costs. In her thoughtful book, *Reviving the American Dream*, Alice Rivlin noticed the connection early in the 1990s: “When its ability to make grants declined, the federal government turned increasingly to mandates as a means of controlling state and local activity without having to pay the bill.”

What Rivlin and other critics also observe is that the political incentives to prescribe or prohibit state functions in this fashion are formidable. National politicians could now continue to claim credit for their supposed good deeds but without incurring “traceable” blame for the tax increases required, to use the Princeton political scientist R. Douglas Arnold’s term.

Finally, no explanation for the consolidation of federal power is more fundamental than the historic role reversal of the federal judiciary. For most of the nation’s history, the federal courts delimited the scope of federal supremacy. By 1937, however, the Supreme Court had mostly switched sides, and in 1941 it concluded that the Tenth Amendment was “but a truism” (*United States v. Darby*, 1941). Judicial conceptions of the Commerce Clause, among other muscular provisions of the Constitution, became so open-ended that almost any act of Congress could be justified under them. According to an August 21, 1996, article in the *Wall Street Journal*, a federal judge sustained the constitutionality of the Violence Against Women Act (a 1994 statute that effectively preempted state criminal codes in the case of crimes “motivated by gender”) because the law was “a proper exercise of congressional power under the Commerce Clause.” Interstate commerce, the judge thought, might suffer if victimized women experienced medical costs, diminished productivity, fear of traveling on business, and so forth. On May 15, 2000, in *United States v. Morrison*, the Supreme Court signaled that this type of reasoning may not stand up indefinitely. Even so, the pendulum of opinion is quite unlikely to swing back to where it was some sixty-five years ago.

Implications for a Federalism Accountability Act

The statutory reforms pending in Congress aim to roll back, or at least decelerate, the federal juggernaut by interposing procedural requirements that rule makers and legislators would have to fulfill before preemptive policies could take effect. Under Senator Thompson's scheme, for example, federal agencies would be required to operate "in cooperation with" state officials when preparing performance measures for state-administered grants from Washington. Rules promulgated by agencies or bills clearing congressional committees would require impact assessments—that is, reports on how the measures might affect intergovernmental relations. These would be buttressed by independent evaluations from the Congressional Budget Office (CBO) and by biannual reports from the Office of Management and Budget and the Congressional Research Service. Any federal statute or rule effectively subordinating state and local laws would have to state its intent clearly or risk nullification by judicial review.

These proposals have deep roots. Their inspirations can be traced to executive orders in the 1980s and 1990s, to the critical work of the ACIR in 1984, 1988, and 1992, and even to the 1955 report of the Kestnbaum Commission (a body appointed by President Dwight Eisenhower to help define the proper parameters of federal and state jurisdictions). The main departure the Thompson legislation makes from these earlier projects is that it no longer relies on mere exhortation; state authorities could now go to court to challenge, among other omissions, federal laws that fail to mention explicitly what state statutes are being preempted.

Lurking here is the possibility of considerable litigation, as the courts try to determine whether this or that federal bureau adequately "cooperated" with local officials, whether the language of the *Federal Register* is "explicit" enough, and so on. Opening yet another avenue for legal squabbles in America's excruciatingly adversarial administrative procedures may be a dubious exercise, but it also might serve part of its intended purpose: to delay, if not deflect, at least some peremptory federal actions.

The additional reporting requirements in the legislation may further contribute to this result. This is not simply because more reporting might bury federal administrators in red tape. (They are already suffocating.) Rather, the formal disclosure of impacts on federal-state relations, especially when assessed by the CBO, might occasionally discipline a few members of Congress. Casually voting to preempt the states—and to saddle them with new costs—may become less appealing when a vote's implications are transparent.

That said, to suppose that these steps could radically realign the balance of power between the federal government and the states is a stretch. It is worth recapitulating the reasons.

First, the operative constitutional restraints on federal aggrandizement seem minimal. Surely, in the sweep of its jurisprudence since the mid-1930s, the Supreme Court has maintained precious few limitations, notwithstanding a handful of recent verdicts that may restore some limits but that have been decided by the slimmest of majorities. (These cases include *United States v. Lopez*, 1995; *Seminole Tribe of Florida v. Florida*, 1996; *Alden v. Maine*, 1999; *Kimel v. Florida Board of Regents*, 2000; and *United States v. Morrison*, 2000.) Indeed, especially in the past three decades, federal court orders have themselves become a prime vehicle for national micromanagement of local government. Senator Thompson's reforms scarcely address the towering issue of judicial activism.

Second, economic and technological changes will continue to furnish many reasonable justifications for supplanting local with national, even international, standards.

Third, whether the resulting uniformity is always commendable or not, powerful corporate lobbies will apply great pressure to secure it.

Fourth, both parties in Congress remain receptive to centralist claims. The Republicans, for instance, profess to defend prerogatives of the states. But when championing them frustrates business interests, or softens the GOP's "tough on crime" image, or makes the party appear insensitive to someone's "rights," enthusiasm for state prerogatives recedes.

There is not much basis for believing that all this will change. Multiple forces—including the role of the news media and of contemporary campaign finance, to name but two—will continue to intensify the political temptations to nationalize, or preempt, public policy in the American federal system. At best, those temptations can only be slightly mitigated, not suspended, by devices such as the Federal Accountability Act.

Annotated References

For the long-standing definition of federal preemptions and how the phenomenon has grown, see U.S. Advisory Commission on Intergovernmental Relations, *Federal Statutory Preemption of State and Local Authority: History, Inventory and Issues* (ACIR, 1992). On President Clinton's 1992 ideas for sorting out federal-state roles, as well as a good synopsis of survey data on devolution, readers are referred to the excellent chapter on federalism in James Q. Wilson and John J. DiIulio Jr., *American Government: Institutions and Policies*, 7th ed. (Houghton Mifflin, 1998).

In 1964, three-quarters of the American public said they trusted the federal government to do the right thing most of the time. By 1998, barely over a quarter did.

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Other polling results cited in this article are drawn from Joseph S. Nye Jr., Philip D. Zelikow, and David C. King, eds., *Why People Don't Trust Government* (Harvard University Press, 1997); Timothy Conlan, *From New Federalism to Devolution: Twenty-five Years of Intergovernmental Reform* (Brookings, 1998); and reports by the Pew Research Center for the People and the Press in March 1998 and April 2000.

For a comprehensive analysis of preemption, including a discussion of how federal law displaced state regulation when various industries were deregulated (for example, airlines and trucking), see Joseph F. Zimmerman, *Federal Preemption: The Silent Revolution* (Iowa State University Press, 1991). On the politics of preemptive mandates, a valuable source is Paul L. Posner, *The Politics of Unfunded Mandates: Whither Federalism?* (Georgetown University Press, 1998).

Although *Roe v. Wade* (1973) is the landmark abortion case, readers should also consult *Planned Parenthood v. Casey* (1992), wherein Justice Sandra Day O'Connor, writing for the majority, delineates some areas of discretion for state legislatures in regulating abortions.

One place to observe rhetoric that characterizes the abatement of pollution as a right, not just a social need or preference, is in the original debates and hearings on the Clean Air Act. See for instance Senate Committee on Public Works, *A Legislative History of the Clean Air Amendments of 1970*, 93 Cong. 2 sess. (GPO, 1974).

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