

State-Federal Relations: Continuing Regulatory Federalism

By John Kincaid

American federalism demonstrated remarkable continuity and responsiveness throughout the horrific events associated with the 2000 presidential election and the terrorist attacks of 2001. Yet, the contemporary era has also been one of coercive or regulatory federalism, marked by historically unprecedented levels of federal preemptions, mandates, conditions of aid and other extensions of federal power into state affairs. The U.S. Supreme Court has pursued a countervailing state-friendly federalism jurisprudence since 1991, but in the political realm, there is substantial bipartisan and even intergovernmental support for coercive or regulatory federalism.

The most momentous events of the past year were the terrorist attacks of September 11, 2001. The attacks shook the foundations of American society but did not fracture the foundations of American federalism. Despite the utter surprise and devastation caused by the attacks, the federal system performed remarkably well. Local, state and federal officials responded immediately in ways consistent with the division and sharing of powers in the federal system. States and localities across the country reacted to the crises quickly and cooperatively in concert with the covenantal foundation of American federalism. Citizens aboard the doomed flight that crashed in Pennsylvania decided democratically to overwhelm their hijackers, choosing to die as defenders of the union rather than as unwilling weapons against it, and the people of New York City and the Washington, D.C. area responded with extraordinary civility and mutual aid. The values of democracy and local self-government far outshone the fireballs of that day. Thus, despite the terrible loss of life and structural devastation, September 11th showed American federalism at its best.

Federalism and Counterterrorism

Whatever the partisan bickering and intergovernmental wrangling that will arise as Americans debate how best to prevent terrorism, the federal system can respond to the threat. Indeed, this threat suggests a need to restore certain basics of American federalism, especially the federal government's key responsibility to prevent terrorism under its national-defense and foreign-affairs powers, while states and local governments backstop the federal government in these areas domestically and focus on their responsibilities for infrastructure and for the health, welfare and safety of their citizens. Counterterrorism will be most effective as a cooperative intergovernmental response, not as a centralized national response. The possibility of cooperation is perhaps enhanced by the fact that former governors are in key leadership positions, including George Bush of Texas, Tom Ridge of Pennsylvania, Tommy Thompson of Wisconsin and Christine Todd

Whitman of New Jersey.

There is a need to improve intergovernmental and interagency coordination, beginning with the federal government. The U.S. General Accounting Office has reported repeatedly on the absence of effective coordination among the approximately 150 federal agencies with counterterrorism duties. How much improvement can be achieved by the president's new Office of Homeland Security remains uncertain. There is a paramount need for federal agencies to share intelligence with state and local officials to prevent attacks and to reduce casualties by identifying the attack agent (e.g., biological, chemical or radiological) and providing appropriate assistance. There is an imperative need to train and equip local police, firefighters and emergency personnel to respond more safely and effectively. There is need, as well, for intergovernmental and public-private coordination to ensure communication among all responders.

President Bush has proposed counterterrorism aid for states and localities, though debates will ensue over how to allocate funds, whether to channel funds through block or categorical grants, and how much aid should go through state capitols and how much should go directly to local governments. A proposed U.S. Senate bioterrorism bill, for instance, would employ a block grant. To date, anti-terrorism measures have not broadly preempted state laws, although some proposals would do so, and Congress did federalize airport passenger and baggage screening. However, the new aviation-security law permits states to use grant funds for airport security and authorizes five demonstration projects for state and local governments or private firms to manage security.

Combating terrorism will comingle military institutions, domestic police agencies, civilian regulatory institutions and the private sector in ways that will strain the separation of military and civilian affairs. Private security forces will increase, posing new challenges of regulation and coordination for state and local officials, and states will need to strike new balances between public and private security for critical infrastructure.

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Making counterterrorism a substantial component of national defense and domestic governance will pose challenges to the protection of individual rights and liberties. It may also possibly challenge state legislatures' and high courts' ability to grant higher rights protections under their state constitutions than are available federally, especially in criminal procedures such as search and seizure, where most states impose some rules that are stricter than those governing federal officials. Counterterrorism will generate pressure to blur distinctions between citizens, legal immigrants and illegal aliens, and persons believed to be associated with suspected terrorists will be snared by law-enforcement nets. In addition, states must consider draconian but necessary questions, such as who can quarantine animals or human beings in the event of contagion. Security measures will hamper citizens' free and easy access to their governments' buildings. Life has changed, and therefore federalism will change, too; but it can do so in principled ways.

Federalism and Voting Reform

Terrorism overshadowed the years' other momentous event – the controversial 2000 presidential election, which included an unprecedented U.S. Supreme Court intervention into a state's (i.e., Florida's) election process. This intervention allowed George Bush to enter the White House via one of the U.S. Constitution's key federalist institutions – the electoral college. Federal democracy prevailed over national democracy, leading critics immediately to call for abolition of the electoral college. Abolition, however, is unlikely, although more states might award their electoral votes proportionally, as do Nebraska and Maine, and prohibit faithless electors.

Yet, even before September 11, voting reform plodded slowly through Congress, while some states, such as Florida, acted quickly, and most states debated reform. The major intergovernmental issue is whether the federal government will intervene substantially in state control of elections. Although Article I, Section 4 of the federal Constitution gives Congress broad authority to regulate elections, Congress has, for the most part, never done so. States have sought federal aid for voting reform, while also retaining principal authority over elections, a position largely supported by the National Commission on Federal Election Reform, which was co-chaired by former presidents Jimmy Carter and Gerald Ford. Bills introduced in Congress range from those that endorse this approach to those that would impose uniform standards and numerous conditions on the states.

Continuing Coercive-Regulatory Federalism

The mandate approach to voting reform is consistent with the era of coercive or regulatory federalism, which emerged in the late 1960s to displace cooperative federalism. Although cooperation continues to be the hallmark of daily intergovernmental relations, that cooperation occurs within a highly federalized environment, under conditions often dictated by Congress and presidents, rather than forged by cooperative agreements among federal, state and local elected officials.

This era has a number of distinctive characteristics. For one, Congress has preempted far more state laws since 1969 than it did during the previous 180 years of U.S. history. Consequently, preemption is one of the states' leading federalism concerns. A recurring issue in every proposed preemption is whether Congress should totally or partially preempt state law. Under partial preemption, Congress allows states to retain or enact state laws stricter than federal laws.

A current example is the debate over protecting personal privacy on the Internet. A key federalism issue is whether federal legislation should preempt state privacy laws, especially stricter laws. A number of states have privacy laws that are tougher and more comprehensive than those enacted in Congress's 1999 overhaul of financial services, which did not preempt stricter state laws. Consumer advocates oppose total federal preemption because they fear it will displace stronger state laws with a weaker national law. Many Internet businesses support federal preemption on the ground that they cannot comply with 50 different state privacy laws.

Another variation is the Electronic Signatures in Global and National Commerce Act (E-SIGN) of 2000, which preempted about 40 state laws that already authorized digital signatures. States, however, can resuscitate their jurisdiction by adopting the standards of the Uniform Electronic Signatures Act proposed by the National Conference of Commissioners on Uniform State Laws.

Second, nearly all mandates enacted in U.S. history have been enacted since 1969. Although the number of unfunded mandates has declined since enactment of the Unfunded Mandates Reform Act (UMRA) of 1995, it is unclear as to how much of the decline is due to UMRA and how much is due to Republican control of the U.S. House and U.S. Senate from 1995 to 2001. Furthermore, while the number of unfunded mandates has declined, the total cost of unfunded mandates has not clearly done so. The Internet Tax Freedom Act of 2001, for example, is an unfunded mandate having a multibillion-dollar fiscal impact on the states.

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The National Conference of State Legislatures termed the 2001 reauthorization of the Elementary and Secondary Education Act (ESEA) a \$16 billion unfunded mandate. This “No Child Left Behind” law entails unprecedented federal interventions into core areas of state responsibilities for education and preempts many state laws governing testing, data collection and education standards.

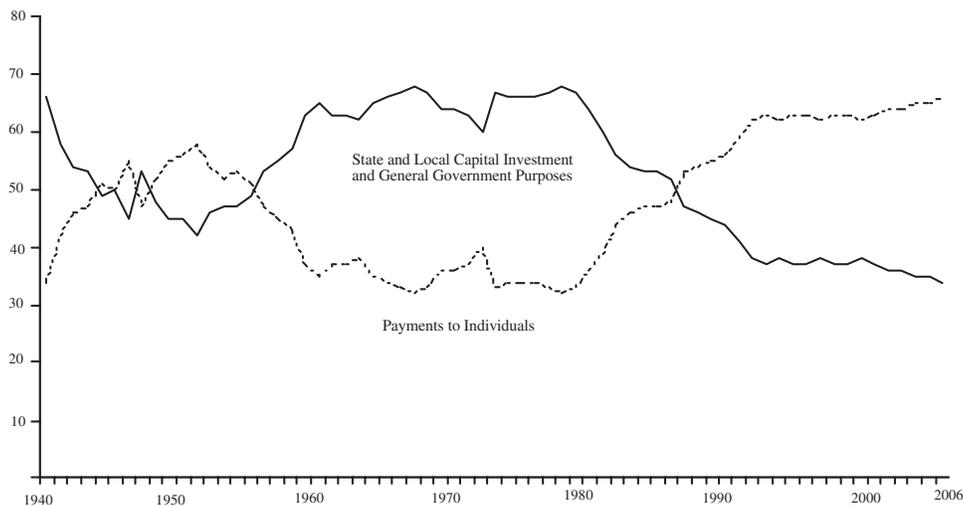
Third, there has been an unprecedented increase in conditions attached to federal aid since the late 1960s. Enactment in 2001 of the 0.08 percent blood-alcohol standard as a condition of federal highway-aid is a recent example. Some members of Congress are proposing a new highway-aid condition that would require states to ban the use of cell phones in moving vehicles.

Fourth, the composition of federal aid has shifted from places to persons. In 1978, the historic high point of federal aid, 32 percent of federal aid to state and local governments was dedicated for payments to individuals (e.g., health and welfare). By 2001, 63 percent of the federal government’s \$316.3 billion in aid was dedicated for payments to individuals, leaving 17 percent for capital investment and 20 percent for all other programs, as well as state and local government operations (see Figure A).

This transformation has enduring fiscal consequences for state and local governments. Reduced federal aid for capital investment and other purposes has increased state-local fiscal responsibility for education, economic development, infrastructure and the like. Simultaneously, because most aid-to-person programs, such as Medicaid, which accounts for more than 40 percent of all federal aid, involve state matching funds, state spending is driven up by inflation and federal policies, further decreasing funds available for other state and local purposes and capital investment. Medicaid is again the fastest growing portion of many state budgets. After cost increases of about 5 percent a year from 1995 to 1999, Medicaid costs increased by 9 percent in 2000 and might rise at the same rate for the rest of the decade. In turn, given that most aid-to-persons programs are administered by the states, direct federal aid to local governments has declined steeply since 1978.

Fifth, this era has been marked by increasing federal pressures on state taxes and borrowing, beginning especially with enactment of limits on tax-exempt private-activity bonds in 1984. The Economic Growth and Tax Relief Reconciliation Act of 2001, especially its phasing out of the federal estate tax (or death tax) by

Figure A: Federal Grants-in-Aid to State and Local Governments for Payments to Individuals and for Capital Investment and General Government Purposes as a percentage of Total Grants, 1940-2006



2000-2006 are estimated.

Source: John Kincaid, The State of U.S. Federalism, 2000-2001: Continuity in Crisis, *Publius: The Journal of Federalism* 31 (Summer 2001): 23.

Data Source: Executive Office of the President, *Fiscal Year 2002 Budget of the United States Government: Historical Tables* (Washington, DC: U.S. Government Printing Office, 2001), pp. 216-217.

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2010, will cost states well over \$65 billion. The Internet Tax Freedom Act, renewed in 2001 over the objections of more than 40 governors, could cost states \$20 billion in sales-tax revenue by 2003. Although states have developed a Streamlined Sales and Use Tax plan for the Internet era, only about 35 states have signed on to the idea, and Congress, for the foreseeable future, is unlikely to approve an Interstate Sales and Use Tax Compact to implement it. Other tax bills, if enacted, will have significant negative consequences for state revenues, and during the 2001-2002 recession, Congress even considered declaring a national sales-tax holiday.

Sixth, the era of coercive or regulatory federalism has been accompanied by the demise of executive and congressional intergovernmental institutions established during the era of cooperative federalism to enhance cooperation. Most notable was the demise of the independent U.S. Advisory Commission on Intergovernmental Relations (ACIR) in 1996 after 37 years of operation. Although some advocates are urging revival of the ACIR, there is little enthusiasm for it in Congress, and President Bush is an unlikely advocate because he vetoed a bill to revive the Texas ACIR during his governorship. Although Bush has proposed establishing a federalism watchdog via executive order, experience since President Ronald Reagan's 1987 federalism executive order suggests that state-friendly federalism takes a backseat to policy considerations in Washington, D.C.

Seventh, there has been a decline in federal-state cooperation in major grant programs such as Medicaid and surface transportation, with Congress altering programs more in response to interest groups than state and local governments, which are now viewed as little more than interest groups. Congress also declines to honor agreements. During ESEA's 2001 reauthorization, for example, states were disappointed that House conferees killed an attempt to increase the federal contribution for special education under the Individuals with Disabilities Education Act from 15 percent to the 40 percent promised in 1975.

Eighth, this era has been marked also by an extraordinary federalization of criminal law, with federal offenses increasing from four specified in the U.S. Constitution to more than 3,000 today. The era has also been marked by continuing federal pressure on states to get tough on criminals. For example, Aimee's Law, enacted in October 2000, and which is retroactive, holds states accountable for new crimes committed in another state if the felon did not serve at least 85 percent of his sentence or if the average sentence for his crime in the state fell below the national average. A

state is penalized by having some of its criminal-justice grant funds cut off and given to the other state where the felon committed a new crime. Such policies have driven up state prison populations and corrections costs, posing long-term fiscal challenges, too, as aging inmates convert prisons into nursing homes.

Ninth, the era has been characterized by unprecedented numbers of federal court orders and other judicial interventions into state affairs. Although the U.S. Supreme Court became more state friendly during the 1990s, expanded access to federal courts produces continual legal challenges to state policymaking. The much-heralded "resurgence of the states" has been accompanied by frequent needs for states to defend their policy innovations in federal courtrooms. For example, immediately after Maine enacted a prescription-drug plan, the Maine Rx Program, in 2000, the pharmaceutical industry sued the Pine Tree State in federal court. In 1999, when New Jersey became the first state to confine non-local trucks to interstate highways and the National Network, the American Trucking Association filed suit against the Garden State. In 2000, the U.S. Supreme Court let stand an appeals-court ruling overturning Iowa's ATM law.

In summary, recent developments, overall, suggest continuation of coercive or regulatory federalism, despite claims, for example, of a devolution revolution. The principal, and usually only, example offered for devolution is the Temporary Assistance for Needy Families (TANF) block grant. Yet, TANF is not true devolution because while states are accorded considerable administrative discretion, they are mandated to achieve specific performance objectives and to reform welfare in only one way, namely, moving at least 50 percent of their welfare recipients into workplaces by 2002. States can achieve that objective in different ways, but they must achieve it in order to avoid federal penalties. Congress also retains authority to alter TANF, and it likely will amend it during TANF's reauthorization in 2002. In addition, block grants remain Congress's least preferred way to distribute federal aid, preferring instead the control and targeting that can be achieved through categorical grants. Efforts to block grant major programs, such as Medicaid, have failed in Congress. Furthermore, congressional earmarking of federal funds for specific projects in members' states and districts, regardless of the preferences and priorities of elected state and local officials, has increased significantly since the late 1980s.

Waiver Federalism

Pressure from state officials for more discretion in implementing federal programs has built up, however.

One increasing response to this pressure has been executive waivers of federal law to allow states to experiment with new implementation strategies. TANF, for instance, was based on welfare-reform experiments conducted by states under waivers. However, waivers reflect unintended consequences of coercive or regulatory federalism.

Waivers have become a presidential tool of inter-governmental relations for several reasons. Federal statutes and regulations became more complex and restrictive as New Deal and Great Society programs were expanded, amended and encrusted with new rules over the decades. In addition, federal social legislation and regulation have long emphasized procedural rules rather than performance outcomes; an ethic of doing things properly prevailed over an ethic of doing things effectively. Success was frequently measured by how much money was spent, under the assumption that bigger inputs produce better outputs. By the 1980s, there was growing criticism of federal social programs and growing pressure to allow states more discretion to improve outcomes. The states' matching costs of federal social programs, especially Medicaid, skyrocketed, as well, during the 1980s, creating pressure to constrain costs without sacrificing services. By the 1990s, the shift of federal aid from places (i.e., state and local capital investment and general government purposes) to persons (i.e., payments to individuals) also locked states into programs that involve continual cost increases and pose complex outcome issues.

Yet, obtaining legislative relief by the 1980s had become difficult for the states because of divided government in Washington, partisan polarization in Congress and thick interest-group conflict. Governors, therefore, bypassed the legislative gridlock by pressing presidents for waiver relief, a strategy that proved most fruitful by the mid-1990s with the Clinton White House and Republican Congress. The only major change in federal-state social programs during the 1990s was the 1996 welfare reform, which affected the fiscally small AFDC program that served a politically weak clientele vulnerable to criticism for not working. Otherwise, efforts to enact a major overhaul of Medicaid were politically impossible. Hence, states still must rely on waivers to alter Medicaid – a process that state officials often find onerous and inhibiting of innovation.

Waivers are not without criticism. They jeopardize the integrity of the rule of law and potentially enhance executive power over legislative power in both Washington and state capitals. They also pose issues of democratic accountability insofar as they are negotiated and implemented by executive officials outside of

floodlit legislative processes. They raise questions of equity, as well, because they introduce variability in the implementation of law and, thus, equal-protection concerns, and they politicize law enforcement and inter-governmental programs.

The U.S. Supreme Court's State-Friendly Federalism

The one federal dissenter from coercive or regulatory federalism has been the U.S. Supreme Court. Consistent with a trend that began in 1991, the Court's "Federalism Five" – Anthony Kennedy, Sandra Day O'Connor, William Rehnquist, Antonin Scalia and Clarence Thomas – continued their state-friendly jurisprudence during 2000-2001 by restraining federal power in important, though not revolutionary, ways. The Court has not overturned its 1985 *Garcia* decision in which it held that Congress can regulate the states through laws of general applicability and that states should rely on the national political process rather than on judicial enforcement of the 10th Amendment to protect their powers against federal encroachments. But the Court has increasingly skirted *Garcia* by limiting federal authority and protecting or restoring state authority in seven basic ways:

1. *Protecting the Republican Autonomy of State Politics.* Justice O'Connor has articulated a "state autonomy" defense of federalism based on the 10th Amendment and the Constitution's republican-guarantee clause (Art. IV, Sec. 4). In O'Connor's view, the federal government cannot deprive citizens of their essential republican (i.e., democratic) right to make fundamental decisions about their state polity. She advanced this argument in *Gregory v. Ashcroft* in 1991, which upheld a provision of the Missouri Constitution requiring state judges to retire at age 70, despite the federal Age Discrimination in Employment Act. O'Connor also recast the 10th Amendment as not so much a protector of traditional states' rights as of individuals' dual citizenship rights.

2. *Prohibiting Federal Conscription of State Officials.* A second strategy is to prohibit Congress from conscripting or commandeering state and local officials to execute federal laws. This doctrine was articulated in *New York v. United States* (1992), which declared unconstitutional the take-title provision of the Low-Level Radioactive Waste Disposal Act. The Court held that Congress violated the 10th Amendment by compelling states to enact such regulations. This doctrine was reaffirmed in *Printz v. United States* (1997) wherein the Court voided the interim provision in the Brady Handgun Control Act that required local law-enforcement officers to conduct background checks of

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handgun buyers. Justice Scalia delivered an opinion upholding dual sovereignty and protecting state sovereignty against congressional encroachments through liberal interpretations of the necessary-and-proper clause of the federal Constitution. However, the Court narrowed this doctrine somewhat in *Reno v. Condon* in 2000 by holding that the doctrine prohibits only federal laws that “require the States in their sovereign capacity to regulate their own citizens.”

3. *Limiting the Federal Commerce Power.* A new strategy not seen since 1936 emerged in *United States v. Lopez* (1995), in which the Court struck down the Gun-Free School Zones Act of 1990 as an unconstitutional exercise of Congress’s interstate commerce power. Reversing 60 years of precedent, the majority opined: “To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” Although the Court is unlikely to roll back federal economic regulation significantly, *Lopez* signaled the Court’s readiness to prohibit regulation that unduly restricts state and local powers in areas not substantially related to interstate commerce.

Again, in *United States v. Morrison* (2000), the Court struck down a provision of the Violence Against Women Act as an overreaching of Congress’s commerce power. In a 2001 case raising a similar commerce issue, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Court narrowed the interstate reach of federal environmental law by opining that in the absence of clear congressional intent, the U.S. Clean Water Act does not allow federal officials to regulate self-contained ponds and wetlands located within one state and not clearly tied to the nation’s interstate streams, lakes and other wetlands. However, the Court did not directly decide whether the applicable provision of the Clean Air Act exceeded the commerce power.

4. *Reasserting States’ Sovereign Immunity.* Equally striking has been the Court’s reassertion of states’ sovereign immunity under the 11th Amendment, which 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.” In *Seminole Tribe v. Florida* (1996), the Court ruled that Congress cannot abrogate the states’ sovereign immunity through laws enacted under the Congress’s Article I powers. The Court strengthened this doctrine in *Alden v. Maine* (1999) by asserting that the states’ sovereign immunity

in any tribunal, including state courts, is an essential attribute of their sovereignty, which they retained when they entered the union, regardless of the federal Constitution’s delegations of power to the Congress in Article I and to the federal courts in Article III.

The Court reached similar results in two 2001 cases. In *Board of Trustees of the University of Alabama v. Garrett*, the Court ruled that private parties cannot sue states for monetary damages for alleged violations of the Americans with Disabilities Act. In *Alexander v. Sandoval*, the Court held that private parties may not sue federally funded state agencies to enforce the “disparate-impact regulations” issued under Title VI of the Civil Rights Act of 1964. Such regulations prohibit activities that have a disparate impact on racial minorities, even if there is no demonstration of intentional discrimination. Martha Sandoval had sued Alabama for failing to offer her a driver’s license exam in Spanish. The question was not the authority of the federal government to enforce such regulations; the Court simply limited private suits against the states. In the *Sandoval* case, moreover, Alabama had begun offering its driver’s license test in Spanish, French and five other languages after Sandoval won a trial-court victory in 1998. Following the Supreme Court’s ruling reversing Sandoval’s lower court victories, Governor Don Siegelman said that Alabama would continue offering the test in multiple languages.

5. *Limiting Section 5 of the 14th Amendment.* In *City of Boerne v. Flores* (1997), the Court struck down the federal Religious Freedom Restoration Act (RFRA). The case involved a church challenge under RFRA to the authority of Boerne to use its zoning power to prohibit the church to enlarge the size of its historic structure in a historic-preservation zone. “The power to interpret the Constitution in a case or controversy remains in the judiciary,” opined the Court. Congress cannot expand the scope of its enforcement power under Section 5 of the 14th Amendment beyond the “congruence and proportionality between the injury to be prevented and remedied and the means adopted to that end” in legislation. Justice Kennedy termed RFRA a “considerable intrusion into the states’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”

The Court reached similar conclusions in three later cases. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* (1999), the Court held that the Patent Remedy Act was not valid under Section 5. The Court ruled similarly on the Age Discrimination in Employment Act in 2000. In *Board of Trustees of the University of Alabama v. Garrett*, the Court also held that Titles I and II of the Americans

with Disabilities Act exceeded the Congress's Section 5 enforcement power.

6. *Requiring Plain Statements by Congress.* A sixth strategy requires "express" or "plain statements" in statutes of Congress's intent to preempt state authority (e.g., *Gregory v. Ashcroft* in 1991); to abrogate states' 11th Amendment immunity (*Atascadero State Hospital v. Scanlon* in 1985); to permit civil-rights suits against state and local governments under 42 U.S.C. Section 1983 (*Will v. Michigan Department of State Police* in 1989); and to attach conditions to grants-in-aid (*Suter v. Artist* in 1992). These rules are limited in their constraints on Congress, however, because Congress can expand its power simply by "expressly" stating its intent.

7. *Allowing States to be Laboratories of Democracy.* Another strategy is a laboratories-of-democracy view of state powers, derived from Justice Louis D. Brandeis's famous 1932 opinion that "a single courageous state may, if its citizens choose, serve as a laboratory, and try social and economic experiments without risk to the rest of the country." This strategy was well reflected in *Vacco v. Quill* and *Washington v. Glucksberg* in 1997, in which the Court declined to recognize physician-assisted suicide as a fundamental right under the 14th Amendment, thus upholding 49 state prohibitions of physician-assisted suicide. The Court did not deny that such a right might exist; it held instead that hitherto unrecognized 14th Amendment rights must be deeply rooted in the nation's history, legal traditions and moral practices, not in "the policy preferences of the members of this Court." The Court reserved to the 50 states the tasks of deciding whether physician-assisted suicide is to be recognized as a fundamental right and of experimenting with approaches to such a right. There is "no reason to think the democratic process will not strike the proper balance," wrote the majority in *Glucksberg*.

The above lines of jurisprudence, however, do not mean that the Court always or mostly favors state powers. In many areas of commerce, as well as civil rights, the Court still frequently limits state powers. For example, in 2000-2001, the Court struck down Massachusetts' Burma-sanctions law on the ground that it was preempted by federal law. The Court ruled that police roadblocks set up to check drivers for drugs at random are unconstitutional; police use of a thermal-imaging machine on the home of a suspected marijuana grower without a warrant is an unreasonable search in violation of the 4th Amendment; and the U.S. Controlled Substances Act contains no exception for private medical use of marijuana. The Court struck down a Missouri law that directed the state's congres-

sional delegation to support a constitutional amendment to limit congressional terms, and required ballots to label candidates for Congress as supporters or opponents of term limits. Nine other states had a similar law. In *Apprendi v. New Jersey*, the Court struck down a New Jersey hate-crimes law that allowed a judge to increase a felon's prison sentence for conduct not reviewed by the jury. The decision could trigger thousands of appeals by state prisoners because its broader holding is that a judge cannot exceed the statutory maximum sentence stipulated for a particular crime by considering extra evidence such as motive, weapon used or volume of drugs sold by the felon.

Whether the Court's state-friendly federalism rulings augur a new era of federalism is uncertain. Virtually all of these rulings have been 5-4 decisions, and the Court has been much criticized for the rulings. Critics have declared that the unelected Court is assaulting the powers of the people and substituting itself for the people's elected representatives in Congress. The states themselves were divided on many of these federalism cases. In *Garrett*, 14 states filed *amicus* briefs opposing Alabama. Consequently, the future composition of the Court was a major issue in the 2000 presidential election, with most observers assuming that Bush will nominate justices likely to align with the "Federalism Five."

Some critics have also urged the Court to retreat from its state-friendly jurisprudence in the face of terrorism. This is no time, they argue, for the Court to emphasize "states' rights" over national power. Justice John Paul Stevens had raised this issue in his 1997 *Printz* dissent, arguing that international terrorism might "require a national response before federal personnel can be made available ... Is there anything [in the U.S. Constitution] that forbids the enlistment of state officials to make that response effective?" Justice Stephen Breyer raised the same concern in a speech in October 2001, suggesting that enlisting state and local officials to combat terrorism could "help both the cause of effective security coordination and the cause of federalism." However, there are means short of conscription to ensure state and local cooperation, and the most common complaint of state and local officials has been of insufficient cooperation from federal officials. A policy of commandeering state and local officials could hamper cooperation by putting the federal government in the position of simply commanding rather than cooperating.

Continuing Trends

Coercive or regulatory federalism emerged in the late 1960s from a confluence of developments, includ-

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ing one-person, one-vote reapportionment; the spreading of television; and the proliferation of primary elections, all of which loosed members of Congress and presidents from their historic moorings to state and local governments and party organizations. As a result, the era has been bipartisanly coercive. Each party in Washington, D.C. champions “states’ rights” when it suits its policy preferences, but expands federal power to meet most of its policy preferences. In debates over a Patients’ Bill of Rights, for instance, most Democrats, asserting states’ rights, have sought to allow patients to sue health-care providers in state courts. President Bush and most Republicans have sought to contain such lawsuits in federal courts.

Although state and local officials and critics often view coercive or regulatory federalism as an unwelcome federal intrusion, this era of federalism also emerged with, and is partly sustained by, substantial state and local government support. Virtually all of the U.S. Supreme Court’s state-friendly rulings, for example, were opposed by some states, while other states declined to support the cases with *amici* briefs. While most governors support state sales-taxation of Internet transactions, a few governors oppose it. Nearly all federal preemptions, mandates, conditions of aid, and other coercive or regulatory federal policies have attracted support from some or many state and local officials. Frequently, state and local support falls along partisan policy lines paralleling those in Congress and the White House. If a Democratic president and congressional Democrats support a federal mandate, many Democratic state and local officials do so as well. If a Republican president and congressional Republicans support a preemption, many Republican state and local officials do so too. As a result, while discrete federal actions are supported by various state and local officials, the cumulative effect of those actions is unwelcomed by state and local officials.

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