

**BRIEF ANALYSIS**

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## **Guide to Regulatory Reform: The Federalism Rule**

The U.S. Constitution established a unique federal system of government to replace the original Articles of Confederation. National concerns were to be addressed by a national legislature and president while *local* concerns would remain the responsibility of state legislatures and governors. Only within specifically delineated areas would federal power displace state authority. Certain areas were the exclusive province of the individual states — public health and safety chief among them.

The reasoning behind this design was fairly straightforward. Government is likely to work better when it is as close as possible to the governed. Thus, while national defense requires coordination by the central government, drainage ditch decisions do not

This principle of federalism can be expressed quite simply: The federal government's proper role is limited to carefully defined and constitutionally legitimate problems beyond the reach of the individual states.

**The Constitutional Basis for Federalism.** Federalism should not be confused with "states' rights." States do not have rights, they have *powers*. The Ninth and Tenth amendments in particular demonstrate that the Founding Fathers were not confused over the distinction between rights and powers.

Amendment IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

However, the principle of federalism is today more rhetoric than reality in our nation's capital. For example, in October 1987, President Reagan issued Executive Order 12612, setting out fundamental principles of federalism for every member of the bureaucracy to adhere

to. Yet Timothy Conlan and David Beam, writing in *Intergovernmental Perspective* magazine, found that "some agencies routinely fail to implement the Executive Order's certification and assessment procedures in even the most superficial way."

**Federalism in Practice.** Applying the principle of federalism consistently has become a problem as America has grown in social and commercial complexity. Nevertheless, the principle requires a clear delineation between state and federal powers. In the environmental arena, the past three decades have seen an enormous expansion of federal power to regulate local behavior, all in the name of environmental protection. Yet even if federal intervention was once justified on the basis of slack state-level protection, that is no longer the case. Many federal environmental laws go far beyond anything that could be justified under federalism. For example:

- The Superfund law assumes that thousands of local sites — from industrial zones to abandoned waste dumps — pose a serious threat to human health unless the federal government acts.
- The Safe Drinking Water Act assumes that the federal Environmental Protection Agency is more interested in protecting human health than are local officials.
- The wetland provisions of the Clean Water Act assume that even isolated plots of occasionally soggy ground should be regulated by federal bureaucrats rather than local officials.

Each of these assumptions is untrue and a clear violation of the principle of federalism. The federal government's proper role in environmental protection is limited to those areas that exceed the jurisdiction of a single state or that cannot be resolved by several states working in concert.

**Unfunded Mandates.** Unfortunately, the principle of federalism is routinely violated. Federal laws that leave little room for local decision making often take the form of unfunded mandates. This is particularly true of laws dealing with welfare and the environment.

- The share of state budgets devoted to federally imposed Medicaid is projected to grow from about 10 percent in 1987 to 20 percent in 1995, possibly exceeding \$77 billion.
- Federal environmental regulations are estimated to cost the U.S. economy \$150 billion annually.
- In Columbus, Ohio, the growing costs of compliance with environmental regulations are expected to consume 23 percent of the city's budget in the year 2000.

These examples are just the tip of the iceberg. The Advisory Commission on Intergovernmental Relations studied the growth of mandates from 1981 to 1991. It found that Congress passed 27 laws that included at least one mandate on the states or their political subdivisions. The National Conference of State Legislatures reported that 185 federal mandates currently impact state and local governments.

As far as localities are concerned, there are two sources of unfunded mandates; both state and federal officials seek to shift the costs and keep the political benefits of environmental laws. However, local governments are political subdivisions of the state, and not the federal government, and state officials are obligated to represent the interests of the local communities that elect them. Much of the problem of federal unfunded mandates has arisen because, until recently, state officials had not made an effective case against them.

**Subsidies as Sources of Mandates.** Violations of federalism are not limited to unfunded mandates imposed on the states by federal authorities. Many times, federally collected dollars are used to subsidize local activities or programs such as disaster relief, Superfund site cleanup or public education. Of course, much of this federal largesse comes with strings attached, thus entangling state and federal officials in a Gordian knot of unfunded mandates and unjustifiable subsidies.

**Backlash Among the States.** The backlash against federal overreaching and interference in local affairs is growing.

- Eight states (Arizona, California, Colorado, Hawaii, Illinois, Missouri, Oklahoma and Pennsylvania) passed resolutions in 1994 that asserted state sovereignty under the Tenth Amendment and called on the federal

government to "cease and desist" from actions that exceed the constitutional delegation of powers from the states.

- Seven states (Alabama, South Dakota, Arizona, California, Delaware, Michigan and Pennsylvania) have passed legislation requesting that the state's federal delegation appear before the state legislature to discuss unfunded mandates and other federally imposed requirements.
- Four states (Arizona, California, Florida and Texas) have filed suit against the federal government to recoup costs incurred due to the presence of illegal immigrants. The federal government has a constitutional duty to control the borders, so these states reason that the federal government's failure should not burden the state's taxpayers.

**Policy Implications.** The recent renewal of interest in the Ninth and Tenth amendments to the Constitution may encourage a reexamination of the full range of federal regulations and laws. In fact, both the Constitution and common sense require that the federal role in regulatory affairs be carefully defined rather than simply assumed. Together, the Ninth and Tenth amendments require the federal government to fully justify its every action. Furthermore, the federal government is not empowered to "deny or disparage" any rights of individuals without an express grant of authority in the Constitution. It is a government, in other words, of specific and limited powers over its citizens. And, finally, the states as political entities or through their respective citizens are presumed to retain all other governmental powers.

Traditionally, the states were seen as laboratories of democracy. They were able and expected to develop policies appropriate to widely varying local conditions. Today, the federal government asserts authority over the full range of economic and environmental issues, imposing a "one size fits all" policy. It is time to reestablish the federal government in its proper role so that future power grabs become more difficult and less likely.

*This Brief Analysis was prepared by NCPA Senior Fellow Kent Jeffreys.*