Does federalism have a future?

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The current consensus among savants of American federalism is that, at long last, power is shifting back to the states. The Cold War, which gave Washington politicians a national-security pretext for immersing themselves in local tasks like building bridges and highways, is history. Republican majorities, reputedly solicitous of state sovereignty, have controlled Congress since 1995. They promptly enacted legislation that would supposedly kick the congressional habit of heaping expensive obligations on state and local governments but not appropriating the money to help them comply. A year later, Congress also put the states in charge of handling more of the national welfare program. The Clinton administration not only signed off on this devolution but granted state agencies a degree of discretion in administering Medicaid and in managing some aspects of U.S. environmental policy. Much of the energy stirring public policy these days—from school reform to the reprise of prohibitionism (this time targeting tobacco)—seems to emanate from the statehouses.
haps most notably, during the past few years the Supreme Court has handed down several opinions that have sought to shore up prerogatives of the states. (Soon there may be a few more of these opinions: In the coming year, the Court will decide whether states can be sued in federal court for alleged job discrimination against persons with disabilities and whether the Army Corps of Engineers can prevent a state from building a landfill that might upset the habitats of some migratory birds.)

However interesting these developments are, their importance is nevertheless being exaggerated. Editorial writers and op-ed commentators seemed inconsolably frightened, for instance, by the Supreme Court's affirmations of states' rights—which made "a kind of fetish out of state sovereign immunity," opined one in the Washington Post, or even harked back to "racist precedents of the 1880s," declaimed another in the New York Times. In truth, neither the recent body of court decisions nor of legislative initiatives will restore the decentralized federal system that prevailed in this country prior to the latter half of the twentieth century. A bigger, or at least more invasive, central government has been the dominant trend for decades. And signs today (including the latest Republican and Democratic party platforms, neither of which would abolish a single federal agency) augur anything but a radical reversal.

Federal preemptions

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 enduring debate grapples with the propensity of federal authorities to "preempt" state laws. A glimpse at this controversy is worthwhile, not least because it suggests that the contemporary dissent against federal dominance is by no means steadily gaining traction.

The ink was barely dry on the devolutionary measures of the mid 1990s when state and local officials noticed that their
policies were still being displaced by new prescriptions and prohibitions stipulated by federal lawmakers or bureaucrats. Concern over a profusion of such so-called preemptions was duly aired in congressional hearings in 1999, but to no avail. Correctives—such as those in a proposed Federalism Accountability Act authored by Tennessee senator Fred Thompson—were advanced but eventually withdrawn.

The short answer to why projects like Senator Thompson's fizzled is that corporations presently fear aggressive regulators and tax collectors in the state legislatures and bureaucracies even more than the divided, hence suitably gridlocked, governing institutions at the federal level. These business interests now look to preemptive acts of Congress not just to set baselines (floors) below which state policies must not fall but to secure compulsory ceilings on the possible excesses of zealous states. Perceived as disabling this type of legislated constraint on local zealotry, the Thompson bill was zapped by an eleventh-hour corporate lobbying blitz.

And there were other complications. Challenging the ability to preempt ultimately meant questioning multiple forms of federal leverage over the states. The kinds of illustrations offered at hearings before the Senate Committee on Governmental Affairs in July 1999 included more than the much-reviled Internet Tax Freedom Act, which imposes a moratorium on state taxation of Internet retail transactions, and a few other unvarnished injunctions on states and localities. Also on the list of examples were new requirements accompanying federal grants-in-aid and instances of what policy makers a few years earlier had characterized as unfunded mandates: that is, new federal commandments that foisted unwanted financial liabilities on the states.

Measures preempting the states, it appeared, covered a considerable assortment of federal encroachments. There seems to be little perceptible difference between a preemption and, say, a binding national standard, or an inadequately funded mandate, or a restrictive condition tied to federal aid that the states cannot do without. What continued to rankle many governors, mayors, and other proponents of local flexibility, in other words, was more or less the same range of devices with which federal powerbrokers have been commandeering local
policies for decades. Deactivating the full range was, to put it mildly, a tall order.

**Constitutional confusion?**

Some of the testimony at the hearings, moreover, raised what sounded like constitutional objections against the government's intrusions. One witness spoke of the need to check an "unprecedented usurpation" of "traditional state authority." Another cited the widening perimeter of federal actions that "had preempted state laws affecting trade, telecommunications, financial services, electronic commerce, and other issues."

A basic difficulty with this line of attack is 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*, 181 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 strove repeatedly to parse economic activities that Congress could constitutionally regulate and activities that would remain under the aegis of the 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 would farmers and manufacturers be subject to federal regulation of commerce but, in time, just about anybody else, whether the local janitor or window-washer, was too, if he happened to work for a company transacting business across state lines.

Amid this expanding centralism some inexplicable anomalies have persisted. Why, for example, are lawyers but not baseball players said to engage in interstate commerce, so that
federal antitrust laws tag 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 but not to direct the local police to perform background checks on prospective gun purchasers? True, the courts recently have affirmed for state governments Tenth Amendment relief from federal directives for the disposal of radioactive waste and Eleventh Amendment immunity from certain lawsuits arising under federal labor laws. Yet the same guarantee of local latitude 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 sometimes 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 preempted, among other duties of the states, the enforcement of child-support laws and the eligibility standards of legal aliens for public assistance. President Clinton, a former governor, came to office determined to rehabilitate state competencies 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 were previously the sole purview of local law-enforcement officials.

Regardless of whether these vagaries are intellectually defensible or ultimately capricious, this much is certain: They have provided few practical guidelines for determining where state sovereignty should give way to federal supremacy. Interpretations of the Tenth Amendment, in other words, have not drawn a distinct demarcation. Occasionally, 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 aggrandizement has been decided not according to some clear organizing principle but mostly on an ad hoc basis. The phenomenon, therefore, is not easily critiqued on constitutional grounds. Albeit with exceptions, the courts, not to mention the other
branches, have deemed that even the strangest assertions of federal primacy are permissible.

Coercive federalism

To suspect that a legalistic critique of federal preemptions was bound to fail, however, is hardly to imply that critics do not have much of a case. The practice of displacing state policies with federal ones, though sometimes quite justifiable, has arguably become so pervasive and often injudicious that the outcome is often, not surprisingly, inefficiency and public distrust.

At issue, again, is a variety of means 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 that option is mostly illusory, and federal stipulation of increasingly intricate grant conditions overrides or distorts local priorities. New federal strings are often attached after aid programs have been institutionalized; by then, powerful constituencies are so deeply invested in the programs, and so fiercely protective of them, that what started as a voluntary partnership with the states degenerates to federal arrogation. And typically, 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, even though Congress has never appropriated anything near 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 too expensive for the states to administer on their own, so it is hard to imagine how they could forgo 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 preemptive statutes, broadly speaking, has Congress enacted? The only authoritative answer to that question was supplied a number of years ago by the now-defunct U.S. Advisory Commission on Intergovernmental Relations (ACIR). The commission's compendium painted an astonishing picture. There were more preemptive laws passed between 1960 and 1969 than in any previous decade, but what happened during
the 1960s pales in comparison with the explosion that followed. More preemptions 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 coercive federalism. Despite their protestations against the Washington-knows-best mindset, the Republican presidents signed several pieces of legislation setting federal standards for matters that were once decided by the states. A number of these 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 chooses for its recruits, or how a community purifies its drinking water, for example, are hardly questions that demand national answers. Yet each became subject to national directives.

**The use and abuse of centralization**

It strains credulity to suppose that the world suddenly became so utterly different after 1970 as to warrant what the ACIR documented: a doubling of the amount of centralization in American government. However, some fundamental changes did occur that necessitated broader federal intervention.

The rise of environmentalism was one. A substantial share of the intergovernmental strictures imposed in the past 30 years pertain 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 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 local problems. Even local concentrations of ozone can blow across hundreds of miles, and one region's foul air can become another's impure water.

Second, the world economy has become much more integrated. National prosperity now rests more than ever on the ability of firms to compete 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 in-
creasingly have moved to dismantle local impediments to negotiating international trade treaties, improving the competitive position of businesses, and streamlining financial markets. Globalization at least partly explains 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 of key U.S. industries. This process, too, has called for correcting some local eccentricities by imposing more uniformity. Restructuring the electricity industry offers a current example. Although state initiatives account for much of the progress that has been made to date, the complete deregulation of electric power may require federal legislation to ensure a successful outcome nationwide.

Finally, the breakneck pace of change in telecommunications and information technologies is also calling local variances into question. The cellular phone industry in Europe is ascendant because, among other considerations, the European Union promptly 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 anachronism cannot last indefinitely. Similarly, another local convention—namely, excise taxation on almost any purchase of goods and services within the geographic jurisdictions of states—chafes against the borderless nature of online commerce and against the national, if not international, interest in encouraging its growth.

But along with solid justifications for federal rules to supersede the variations among states, there are also plenty of unconvincing reasons more rooted in bureaucratic rigidity or raw politics than in sober deliberation. For example, too many of the federal environmental programs that burgeoned after 1970 adopted a one-size-fits-all approach. Not every environmental problem has the transboundary properties of air pollution. For all but a handful of biological contaminants in drinking water, for instance, the dangers of high concentrations of toxins are borne only by residents in the vicinity who might consume the polluted water for a lifetime.
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. It is questionable whether all these groups merit the same compulsory remedies, and whether the remedies ought to be designed and decreed from the top down.

Consider the rights of persons with disabilities. Accommodating the physically impaired is a just and desirable goal, but should every state and municipality be told how to improve handicapped access to its public facilities? To comply with the Department of Transportation’s (DOT) rules for modernizing public buses and retrofitting subways, New York City concluded in 1980 that the requisite capital improvements and annual operating bills would amount to a budget-busting expense. As the city’s mayor, Edward I. Koch, wrote in 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."

Mercifully, after pitched legal battles, the federal planners relented and lowered the costs. New York, with its old and extensive transit system, should never have been sidetracked from opting for cost-effective alternatives to the DOT’s retrofit plans. The larger point here is that when top-heavy federal regulations indiscriminately narrow local options, they risk stifling local innovations and foreclosing solutions that fit local circumstances. The result can be enormously wasteful.

Federalizing crime

In recent years 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. This raises the troubling 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 1998 report on the federal judiciary. Nationalizing criminal law is not com-
parable 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 lawyers' lobby) that not only may wield disproportionate influence in state legislatures but also often seem oblivious to the damage inordinate litigation can do to the national welfare. National tort reform has a justification: It may protect the commonweal from the capture of state polities 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 conditions and public preferences, not the clout of potent pressure groups in dogged pursuit of material gain for themselves. If anything, federal supervision of state law enforcement and correctional policies runs the risk of spawning such questionable stakeholders where none existed. For example, prodding the states to adopt stricter sentencing guidelines may sound like an unalloyed reform. But what if it impels some states to overspend on new prison construction, and entrenches 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.

Also behind Justice Rehnquist's critique is serious doubt whether 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 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 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 now 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 1995 poll 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 seems clear that the public has become disenchanted with the intrusions of Washington in affairs formerly settled through self-governance.

During the past 35 years, Americans have largely tolerated a hyperactive federal government when its activism was wrapped in the mantle of civil 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 numerous 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 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 federal judges should be the final arbiters of various other complex moral issues on which there was no consensus. Whatever one’s views on legalized abortion, for instance, substantial segments of the public are understandably uncomfortable with an absolute, nationwide standard set by judicial fiat. On such highly charged, morally
unsettled questions, 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.

The politics of preemption

The inordinately long arm of federal law in local civic life is more than clumsy; its intrusive reach may alienate, if not infantilize, significant parts of American society. Not unaware of this failure, why does the Washington political establishment have trouble desisting?

To solve this puzzle, it is useful to begin by recalling 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, Republicans have repeatedly paid lip service to decentralization. Yet a recent systematic study of roll calls in the 98th through the 101st Congresses actually found the Republicans more prone than the Democrats to overrule state and local regulations.

One source of this proclivity, of course, has been the customary prominence of business regulatory issues on the GOP's agenda. Large companies tend to prefer comprehensive regulatory standards to a hodgepodge of local rules. How, for example, did bipartisan support for federal motor-vehicle safety and emissions controls coalesce? The automobile industry lobbied to preempt the states from setting disparate standards, some of which might be overly militant. 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 either party 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 cam-
campaigns now compel office-seekers to rely more heavily on external sources. The winners of recent House elections have drawn upwards of 40\% percent of their contributions from political action committees—that is, from the funding arms of national interest groups.

Further, the media contribute to the heightened national profile of every imaginable misfortune by depicting the events as “trends” worthy of prime-time attention. Members of Congress do not want to seem uncaring about the latest reported tragedy. Their response: Enact a law. This was how, for example, the Anti-Car Theft Act, “Megan’s Law,” and various other federal incursions into local law enforcement sailed through.

In addition, federal rules supplant local ones because policy debates in Washington are now framed increasingly in the terminology of rights. Emulating the civil rights movement of the 1960s, interests of all kinds have found it expedient to portray their claims as a quest for basic justice. Major environmental programs, for example, were said to secure everyone’s “inherent right to the enjoyment of pure and uncontaminated air” or water. In the past few years, even irate airline passengers, truckers protesting fuel prices, and subscribers to health-maintenance organizations have queued up to obtain not just relief but a “bill of rights.” This style of redress implies 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 universalistic. There is, in other words, no such thing as a partial 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 superfluous. By the time policy makers in Washington had begun introducing proposals to affirm a universal right to special education for preschool handicapped children, 42 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 31 states had programs to inspect and abate the potentially hazardous substance. Proponents of central preemption, however, have been undeterred. By their logic, if so many states have already blazed a trail,
national standards only complete what the states have started. Thus states 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. In the fiercely litigious arena of environmental policy, for instance, state and local officials have sought cover under the blanket of federal tutelage. Invoking a coast-to-coast rule, even if a blunt instrument, is often safer than trying to defend nuanced exercises of local discretion.

Still, the centripetal force of Washington has largely maintained a momentum of its own. Contrary to what one might suppose, fiscal constraints over the past 20 years have scarcely shrunk the federal leviathan. Up to a point, 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 the inexorable tightening of grant conditions was in some ways less coercive than the tendency of national policy makers to impose costly undertakings on 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. 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, to use Princeton political scientist R. Douglas Arnold's term, "traceable" blame for the tax increases required.

Finally, no explanation for the consolidation of federal power is more fundamental than the historic volte-face of the federal judiciary. For most of the nation's history, the courts kept federal hegemony in check. 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). 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 a 1996 *Wall Street Journal* article, 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. Last May, in *United States v. Morrison*, the Supreme Court finally signaled that this type of reasoning would not stand up forever. Even so, the pendulum of opinion is quite unlikely to swing back to where it was some 65 years ago.

This last point bears emphasizing. Even if conservative justices hold their slight edge for the foreseeable future (a big “if”), the Supreme Court’s judgments on federal-state disputes will continue to be a mixed bag. The Court’s detractors have been quick to assail it when it has defended the states, but they seldom mention that plenty of decisions have gone the opposite way. The same Court, after all, recently overturned state policies governing everything from child-visitation rights and oil-tanker safety training, to the sale of personal databases by motor-vehicle bureaus and the ability of car-accident victims to invoke state safety standards in lawsuits.

**A nationalist government**

The statutory reforms Congress debated in 1999 were designed 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 the Thompson bill, rules promulgated by federal agencies or pieces of legislation clearing congressional committees would have required “impact assessments”—that is, reports on how the measures might affect intergovernmental relations. These were to be buttressed by independent evaluations from the Congressional Budget Office (CBO), among other watchdogs. Any federal statute or rule effectively subordinating state and local laws would have had to enunciate its intent clearly or risk nullification by judicial review.
These sorts of suggestions had deep roots. Their inspirations could be traced to largely ineffectual executive orders in the 1980s and 1990s, to the critical work of the Advisory Commission on Intergovernmental Relations in 1984, 1988, and 1992, and even to the 1955 report of the Kestnbaum Commission (a body appointed by President Eisenhower to help define the proper parameters of federal and state jurisdictions). The only major departure the Thompson proposal made from these earlier projects was that it no longer relied on mere exhortation; state officials could now go to court to challenge federal laws that, among other things, failed to mention explicitly what state statutes were being preempted.

Lurking here was the possibility of considerable litigation, as the courts tried to determine whether legislative language was “explicit” enough, and so on. Opening yet another avenue for legal squabbles seemed like a dubious exercise, but it also might have served part of its intended purpose: to delay, if not deflect, at least some peremptory federal actions.

The additional reporting requirements probably would have further contributed to this result. This was not simply because more reporting would 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, occasionally might have disciplined a few members of Congress: Casually voting to strip power from the states might become more difficult when a vote’s implications are transparent.

That said, to suppose that such palliatives, if they had been adopted, could truly stay the federal government’s heavy hand is a stretch. The operative constitutional restraints on the federal presence have remained pretty weak. Surely, in the sweep of its jurisprudence since the late 1930s, the Supreme Court has maintained precious few limitations, notwithstanding a handful of closely decided recent verdicts that may restore some limits. 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 reform scarcely addressed the towering issue of judicial activism.

Economic and technological changes will continue to fur-
nish many reasonable arguments for replacing local with national, even international, standards. Whether the resulting regimentation is always commendable or not, powerful corporate lobbies will apply great pressure to secure it. Further, for this and other reasons, both parties in Congress remain receptive to centralist claims. There is not much basis for believing that all this will change. Multiple forces—including the role of the 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 could only be tweaked, not suspended, by schemes such as a Federalism Accountability Act.