

INTERGOVERNMENTAL RELATIONS IN THE UNITED STATES OF AMERICA

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I ntergovernmental relations (i.e., federal-state-local government relations) in the United States can be described as simultaneously co-operative, conflictual, competitive, collusive, and coercive. In the realm of public administration and the daily operations of government, intergovernmental relations are generally co-operative, as they have been since the early days of the republic. In the realm of high-level political policy-making involving elected officials, especially the members of Congress, intergovernmental relations have been significantly coercive since the late 1960s; that is, the Congress has enacted more mandates, preemptions, conditions of aid, and other regulations affecting state and local governments than ever before. Likewise, state governments have generally exercised more regulatory authority over their local governments than before. In the realm of mid-level policy-making involving senior elected and appointed executive officials, intergovernmental relations are variously co-operative, coercive, collusive, and competitive, depending on particular policy issues and constellations of political forces. It is, therefore, difficult to generalize succinctly about intergovernmental relations in the United States.

Interjurisdictional relations (i.e., state-state and local-local relations) are co-operative, competitive, and non-existent. In recent decades, states have recognized the need to co-operate bilaterally, regionally, and nationally on issues of interstate concern. Local governments have also recognized the need to co-operate on various fronts, especially for mutual aid and cost-saving service efficiencies, while still preserving their local autonomy. Interjurisdictional relations are also competitive in various policy fields, especially economic development and taxation. For the most part, though, interjurisdictional relations occupy only a small part of the attention of state and local officials. Intergovernmental relations are much more important.

PART I: CONSTITUTIONAL PROVISIONS

Article IV of the U.S. Constitution mandates two forms of interjurisdictional cooperation. Section 1 states: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” Section 2 stipulates that: “The Citizens of each State

* AUTHOR’S NOTE: This chapter contains information about the White House Office of Intergovernmental Affairs during the presidency of George Bush (1989-93) that was provided by Debra Anderson, who served as Director of that office. Ms. Anderson, however, is not responsible for any errors of omission or commission in this chapter.



shall be entitled to all Privileges and Immunities of Citizens of the several States.” States are also prohibited from laying imposts or duties on imports or exports unless they obtain the consent of the Congress to do so. Likewise, states, by implication and judicial enforcement, are prohibited from enacting taxes and regulations that discriminate against out-of-state residents and businesses. In short, the Constitution explicitly seeks to ensure interjurisdictional co-operation and to prohibit the most destructive forms of interjurisdictional competition.

The Constitution contains no general, explicit provisions on intergovernmental relations or co-operation; however, the states are mentioned 50 times in 42 sections of the document, and state-federal co-operation is implicitly assumed throughout the Constitution. For example, there is no constitutional mechanism to compel states to elect members of Congress or to select presidential electors. Hence, the entire constitutional system depends, ultimately, on the voluntary co-operation of the states. There are no references to such concepts as *bundestreue* or *loyauté fédérale*, nor is there a requirement for the federal government to engage in fiscal equalization for the constituent states. There are a few provisions intended to prohibit the federal government from discriminating among the states. For example, Article I, Section 9 provides: “No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.” Finally, the U.S. Constitution does not contemplate direct federal-local relations. Local governments are nowhere mentioned in the U.S. Constitution because they are constitutional creatures of their states.

The 50 state constitutions contain numerous and diverse provisions pertaining to intergovernmental (i.e., state-local) and interjurisdictional (i.e., local-local) relations, and states vary greatly in their degree of internal centralization, from highly centralized Hawaii to substantially non-centralized New Hampshire. Furthermore, the United States has more than 87,000 local governments of five basic types: counties, municipalities, towns and townships, independent school districts, and special districts. Overall, it is probably safe to say that state-local and local-local relations are ordinarily co-operative; however, there is too much variation and diversity to permit more specific generalizations.

PART 2: INTERGOVERNMENTAL CO-OPERATION

From the beginning of the republic in 1789, federal, state, and local officials have recognized the need to co-operate in order to achieve both their common and their separate public objectives. Furthermore, until the mid-twentieth century, the federal government was too fiscally and administratively weak to accomplish much on its own domestically; thus, it had to rely greatly on the co-operation of state and local officials.

Intergovernmental relations in the United States have always been very fluid and informal. There is nothing in the U.S. system directly comparable to the executive federalism prevalent in some federal systems, such as Canada, nor is there a bevy of joint decision-making bodies common in some federations, such as Germany. Given the dualistic nature of U.S. federalism, in which the U.S. government and the states are co-sovereign, state and federal officials have resisted the establishment of formal intergovernmental institutions. One historic exception, the Advisory Commission on Intergovernmental Relations, which consisted of three members of the President's



Cabinet, three U.S. House members, three U.S. senators, four governors, three state legislators, three county commissioners, four mayors, and three private citizens, lasted for only 37 years (1959-96). Other factors inhibiting the creation of formal intergovernmental institutions are the huge size and great diversity of the United States, as well as the virtual impossibility of getting Democratic and Republican federal, state, and local officials to agree on specific matters. On intergovernmental issues, moreover, the 50 states and more than 87,000 local governments rarely agree on anything beyond general principles. In addition, the American federal system is not rooted in parliamentary government but rather in the separation of powers within governments under a system of dual constitutionalism.

Instead, intergovernmental relations offices and officers are institutionalized separately within the federal, state, and local governments, primarily in the executive branch, although the Congress and state legislatures have committees pertinent to intergovernmental relations. This mode of institutionalization allows federal agencies and the various state and local governments to pursue their own interests in the intergovernmental system. State and local officials cooperate with each other and place joint pressure on the federal government through their voluntary, non-profit, national organizations, principally the National Governors' Association, Council of State Governments, National Conference of State Legislatures, American Legislative Exchange Council, National Association of Counties, National League of Cities, U.S. Conference of Mayors, National Association of Towns and Townships, and International City/County Management Association. Consequently, intergovernmental entities are usually ad hoc and short-lived committees, task forces, and working groups created for intergovernmental consultation and negotiation on specific issues. Intergovernmental relations also tend to take the form of "picket-fence federalism" in which each policy field has its own intergovernmental relations. Federal and state bank regulators, for example, know each other and interact with each other. Within the field of environmental protection, the federal, state, and local water-pollution administrators know each other and interact with each other, as do the air-pollution administrators and so on. These arrangements have the advantage of dividing the huge intergovernmental system into more intimate, personal, and manageable sets of relations. The disadvantage, however, is the difficulty of co-ordinating intergovernmental policy across fields.

Another feature of intergovernmental relations is the important role of the private sector. For one, about half of all federal aid to state and local governments is ultimately expended by private, non-profit organizations (i.e., NGOs) that perform public services, such as health and social welfare. Second, most high- and mid-level federal, state, and local administrators are members of the same nationwide professional and scientific associations within their respective fields of policy responsibility and expertise. Within these associations, federal, state, and local officials share information and interact with each other, while also interacting with relevant academics and colleagues in the private for-profit and non-profit sectors. These associations generate a considerable amount of intergovernmental co-operation and policy formulation by developing legislative ideas enacted by the Congress and/or state legislatures, adopting professional and scientific standards adhered to by all members, and performing informal intergovernmental dispute-resolution functions. Third, all interest groups in the political system interact with federal, state, and local officials, thus variously promoting or frustrating intergovernmental co-operation.



PART 3: THE EXECUTIVE BRANCH

Since the decline of patronage in the political system, wherein the Postmaster General was the President's principal intergovernmental relations officer, recent presidents have maintained a White House Office of Intergovernmental Affairs. During the first George Bush presidency (1989-93), for example, this office consisted of a Deputy Assistant to the President, who served as director of the office; three Special Assistants to the President; and seven staff members. One Special Assistant worked with all state-wide elected officials (e.g., governors, lt. governors, attorneys general, secretaries of state, and treasurers). Another Special Assistant worked with all state legislators and with the chairmen or presidents of Indian tribal governments. The third Special Assistant was responsible for relations with all local elected officials (e.g., mayors, county commissioners, and town and township officers). The Director and two special assistants in Bush's office had previously been state or local elected officials themselves. This is a common pattern; all presidents staff this office partly or substantially with former state or local elected officials.

Each Cabinet department of the federal government (e.g., U.S. Departments of State, Justice, Commerce, Agriculture, Labor, Housing and Urban Development, and the Interior), as well as other major federal agencies (e.g., the U.S. Environmental Protection Agency), has an office of intergovernmental affairs. These offices are often staffed partly or substantially by former state and local officials appointed by the President. The White House Office works closely with all of these offices. During the Bush presidency, for instance, the White House Office held monthly meetings with the intergovernmental staff from each department and agency in order to share information, receive advance notice of upcoming programs and issues, and get briefed by pertinent agency personnel about specific issues affecting state and local elected officials.

The basic theory underlying the White House Office is that an elected state or local official can contact the office with a problem, query, or concern. In turn, the White House Office refers the official to, or helps the official contact, the correct White House, department, or agency person or office within the particular federal agency. The White House Office of Intergovernmental Affairs often thinks of itself as a "one-stop shopping" center; that is, a state or local official does not have to waste time calling all around federal agencies to locate the correct person or office. This can be very frustrating and time consuming for state and local officials. In turn, by helping and building cordial relations with state and local elected officials, the White House can solicit their support for the President's policy and program objectives.

The White House Office also "represents" state and local elected officials within the White House. When proposals and programs are being formulated in the White House, the intergovernmental affairs office makes sure that state and local views are represented in the deliberations and also tries to ensure that the President does not take a position opposed to state and local interests. When the President does oppose their interests, then the White House Office engages in "damage control" by trying to "sell" the proposal or program to state and local officials, or at least to blunt their criticism and alleviate some of their concerns. As a rule, for example, state and local officials hate federal mandates; hence, the White House Office tries to be very sensitive in having the President and federal agencies avoid mandates if possible.

Occasionally, the White House Office recruits state and local officials to lobby their own representatives and senators in Congress on issues important to the President. State and local elected

officials are usually opinion leaders in their states and communities. As such, they can often be effective lobbyists.

The White House Office of Intergovernmental Affairs also works closely with the major national associations of state and local officials, such as the National Governors' Association and others mentioned above. All of these associations have full-time offices and staff in Washington, D.C. The White House Office interacts regularly with the elected leaders of these associations, holds many briefings and events for them at the White House, and arranges for the President to address their annual, national meetings. Most of these associations have lobbyists in Congress as well. Hence, provided that they agree with the President, they can be very helpful in gaining support in Congress for the President's legislative priorities.

Many state and local officials also interact directly with the President. This is especially true of governors, state-legislative leaders, and big-city mayors of the President's own party. They can be strong supporters of the President across the country and before the Congress; in turn, the President, if publicly popular, frequently campaigns for them in their states and cities. The party system, therefore, plays an important role in intergovernmental relations. At the same time, even though all presidents steer some aid toward, and tailor some regulations for, jurisdictions governed by state and local officials of their own party, there is a strong normative expectation that the President will be bipartisan on all major issues and will include state and local officials of both parties in all important deliberations. Furthermore, given constitutional and judicial rules governing regulation, the fact that most federal aid to state and local governments is distributed by a formula, and the Congress's preeminent role in "pork-barrel" spending on behalf of specific jurisdictions, the President is limited in his ability to reward or punish specific state or local officials in significant ways.

Since the promulgation of Republican President Ronald Reagan's executive order on federalism in October 1987, subsequent presidents have maintained such an order. Reagan's order governed federal department and agency relations with state and local governments in a manner largely friendly to those governments and restrictive of federal agencies. President Bush I retained Reagan's order. Democratic President Bill Clinton abrogated the Reagan executive order and issued a new executive order without consulting state and local officials. These officials vigorously opposed the new order and compelled Clinton to withdraw it and to promulgate a more Reagan-like order in consultation with state and local officials. Presently, at the time of this writing, President Bush II is re-writing the federalism executive order. This is a matter of some concern to state and local officials, although the White House is consulting with them.

Presidents also vary in their philosophy and style of intergovernmental relations. Reagan, for instance, regarded intergovernmental relations as a purely federal-state matter; therefore, he refused to address the annual meetings of the national associations of local officials. Local governments had obtained a seat at the intergovernmental bargaining table as the third partner in the federal system during the New Deal era of Democratic President Franklin D. Roosevelt in the 1930s. Reagan, however, ignored local governments in the 1980s, partly because most big-city mayors and many other important local officials were Democrats during his administration. Clinton was the first President to accommodate the nation's 561 tribal governments at the intergovernmental table as the fourth partner in the federal system. This was reflected in the phrase "state, local, and tribal governments" used in presidential speeches, executive orders, and various

documents. Clinton was motivated to do so in part because, even though Indians constitute less than 2 percent of the U.S. population, they tend to vote Democratic. The new wealth accumulated by many tribes since 1988 through the gaming industry (under the federal Indian Gaming Regulatory Act of 1988) has made the tribes strong players in state and national politics. This has also created some intergovernmental conflict because tribes have been asserting their self-governance rights as “domestic dependent nations” while states, especially those in the West that have large Indian reservations, often resist this newly asserted tribal autonomy.

There are a few long-term intergovernmental consultative bodies, such as the Intergovernmental Policy Advisory Committee to the U.S. Trade Representative (USTR). This committee was created in 1988 at the insistence of state and local officials who became concerned about the potential impacts of trade agreements, such as NAFTA and WTO, on traditional state and local powers. In turn, USTR asked each state to establish a “single point of contact,” usually in the governor’s office, for communications and notifications. The “single point of contact” operates in a number of other federal agency–state agency policy fields as well. This causes some concern for state legislators because these single points of contact are usually located in the governor’s office or an executive-branch agency. State and local officials are also exempted from the federal Advisory Committee Act, which compels federal agencies to provide advance notice of the formation and meetings of all advisory committees and to disclose complete information about participants. In this respect, state and local elected officials have successfully maintained that they are co-sovereign partners in policy formation, not private lobbying interests.

Within the states, all governors have offices and staff dedicated to intergovernmental relations, both state-federal and state-local relations. The philosophy, style, and operation of these offices vary considerably across the states and across governors within each state. Generally, the purpose of these offices is to protect and advance the interests of the state and of the governor in the intergovernmental system. Most states also have an executive Department of Community Affairs that deals specifically with state-local relations. Like the President, the governor interacts directly and regularly with local officials, and especially with local officials of his or her own political party. Again, though, the governor is ordinarily expected to be “above politics” when addressing issues of significant importance to local governments across the state. Some state departments and agencies also have an office or officer devoted to intergovernmental relations. About 26 states have a state-local intergovernmental advisory institution of some sort made up of state and local officials.

State universities and local community colleges, which comprise the lion’s share of faculty and students in the United States, also play roles in intergovernmental relations. They are primary institutions of research and technical assistance for the federal government, which pours billions of dollars into their research coffers. Likewise, they are expected to provide technical assistance to their state and its local governments and otherwise deliver low-cost services that benefit local communities and their residents.

Only some very large cities (e.g., New York City, Chicago, and San Francisco) and a few large urban counties have an office or officer dedicated to intergovernmental relations. Most municipalities, towns, and townships are governed by part-time elected officials and administered by only one or two full-time employees. As a result, local officials pool their resources for intergovernmental relations. In most of the 48 states that have counties, there is a statewide county associa-

tion that lobbies the governor and state legislature, negotiates with state agencies, and, in turn, works with the National Association of Counties to influence the Congress and the President. Each state has a state-wide municipal league, association of towns and townships (in the states where these governments exist), association of local school boards, association of local police chiefs, and so on. There are several hundred such associations across the states which represent their members' interests in the state capital and also in Washington, D.C., via their national association.

Throughout the federal system, there are many forms of intergovernmental co-operation, such as federal grants-in-aid, low-interest loans, shared revenues, and tax expenditures for state and local governments. States pass through substantial amounts of federal aid to their local governments while also providing similar own-source fiscal benefits to their local governments. There are various forms of mutual aid between governments, and there is considerable sharing of information, ideas, and other communications among federal, state, and local officials. The federal government provides technical assistance to state and local governments, and states provide technical assistance to their local governments. There are also temporary exchanges of personnel between governments. The federal Intergovernmental Personnel Act, for instance, provides specifically for federal officials to work temporarily in state or local agencies and for counterpart state or local administrators to work in federal agencies.

In summary, intergovernmental relations in the executive arena, which constitutes, by far, the largest realm of intergovernmental relations and deals with the day-to-day operations of the federal system, are quite fluid, informal, and diverse. Although there is certainly frequent conflict, the predominant operational norm among administrators is one of co-operation.

PART 4: THE LEGISLATIVE BRANCH

Although each house of Congress (Senate and House) has had a committee wholly or partly devoted to intergovernmental relations since the 1940s, the influence of these committees has waxed and waned over the years, mostly waning to insignificance since about 1986. Likewise, the U.S. General Accounting Office, the investigative arm of the Congress, once had an intergovernmental relations unit, but it was disbanded in the early 1990s. As one U.S. senator commented to this author in 1988, "there is no political capital in intergovernmental relations." Helping a governor, county commissioner, or mayor rarely translates into votes for a member of Congress or produces significant contributions for his or her re-election campaign.

Institutionalized intergovernmental relations committees and other intergovernmental entities associated with the Congress were never deemed necessary until the late 1940s when President Roosevelt's New Deal had intensified and begun to bureaucratize intergovernmental relations, and these entities never acquired much importance after their establishment. Prior to the late 1960s, members of Congress were highly protective of state and local governments and solicitous of their officials because the territorial structure of congressional representation and of the party system, which was rooted in county power bases, made members of Congress highly dependent on state and local government and party officials for election and re-election. This system, which dated back to the beginnings of the republic, was altered radically during the 1960s by "one person, one vote" election-district reapportionment mandated by the U.S. Supreme Court, by the rise of the



mass media, with its penchant for focusing on Washington, D.C., and national politics, by the proliferation of primary elections in the party system, by the civil-rights movements of the 1960s, and by other forces of that decade – all of which disconnected members of Congress from their historic electoral moorings in state and local governments and party organizations. Consequently, members of Congress turned their attention to the direct interests of the constituents who can vote for or against them and to local, regional, and national interest groups that can provide campaign contributions. Satisfying these interests often requires the Congress to enact laws that override state and local powers and contradict state and local government interests.

One can, therefore, identify the rise of an era of coercive federalism emanating primarily from the Congress since about 1968. Coercive federalism has been characterized by unprecedented increases since 1968 of crosscutting and crossover conditions (i.e., regulations) attached to federal grants-in-aid, mandates (unfunded, underfunded, and funded) on state and local governments, preemptions (i.e., displacements) of state law by federal law under the supremacy clause (Art. VI) of the U.S. Constitution, encroachments upon state tax powers, and criminal statutes that duplicate state law and usually provide more punitive penalties than those required by state law. Arguably, for example, the Constitution identifies only four federal criminal offenses; today, there are more than 3,000 federal criminal offenses, including about 50 offenses for which execution is a punishment. In their effort to curry favour with voters by getting “tough on criminals,” members of Congress have become more death penalty enthusiastic than any of the legislatures in the 37 states that permit capital punishment.

An example of a crosscutting condition is the minimum drinking-age condition attached to federal highway-aid in 1984. Given that the Congress lacks constitutional authority to mandate a minimum age for purchasing alcoholic beverages, it simply induced all state legislatures to increase the age to 21 by threatening to reduce highway aid by as much as 20 percent for any state refusing to increase the drinking age within a few years of enactment of this condition. President Reagan signed the legislation, despite his states’ rights rhetoric, because it was politically impossible for him not to do so in light of the very effective national campaign mounted by a new interest group, Mothers Against Drunk Drivers (MADD). MADD dramatized teenage drinking and condemned “blood borders” resulting from different drinking ages among the states. South Dakota challenged this condition as a violation of the Tenth Amendment to the U.S. Constitution, but the U.S. Supreme Court upheld the condition on the ground that no state is compelled to accept federal highway-aid. As a practical matter, however, no state can afford to lose the millions or billions of dollars that would be lost under a 20 percent aid cut.

In turn, business groups have lobbied vigorously for federal preemptions of state powers because they would rather be regulated by “one 500-pound gorilla in Washington than 50 monkeys on steroids.” Likewise, many civil-rights groups lobby for federal mandates, preemptions, and conditions of aid that benefit their members and promote uniformity or equality nationwide.

Generally, therefore, federal policy-making has shifted from places to persons since the late 1960s, that is, away from the interests of state and local governments and toward the interests of individuals. This is most strikingly noticeable in the changing nature of federal grants-in-aid to state and local governments. In 1978, the historic high point of federal aid, only 31.8 percent of federal aid was dedicated for payments to individuals (e.g., health and social welfare); in 2001, 63.1 percent was dedicated for such payments. Medicaid (i.e., health care for the poor) alone accounts

for about 42 percent of all federal aid to state and local governments. This shift of aid from places to persons has had three important intergovernmental consequences. For one, in 2001, only 36.9 percent of federal aid went to capital investments, infrastructure, education, economic development, government operations, and the like for state and local governments. Second, because states are responsible for aid-to-persons programs, they now capture about about 89 percent of all direct federal aid. Third, because most aid-to-persons grants entail matching state expenditures, they have driven up state spending on such functions. For example, by the late 1980s, Medicaid (enacted in 1965) had become, on average, the second largest category of state spending, displacing other state priorities, including higher education, which was previously the second largest category of state spending.

Another coercive facet of grants-in-aid is that more than 85 percent of all federal aid is delivered to state and local governments through some 635 narrow categorical grants, each of which must be spent in specific ways for specific purposes. Only about 15 percent of federal aid flows through block grants (e.g., the Community Development Block Grant for cities), which are broader, more multi-purpose grants that give state and local governments more fiscal and functional discretion than categorical grants. Presidents Reagan, Bush I, and Clinton all proposed the enactment of more block grants, including some mega-block grants, but the Congress approved very few of them.

As a result, there has been a general decline in the co-operative character of intergovernmental programs, especially large long-standing ones, such as Medicaid and federal-aid highways (both of which are categoricals), and state and local officials believe that they are treated by Congress in the same manner as private interest groups. State and local officials have to line up in "Gucchi gulch" with all other lobbyists in their attempts to influence the Congress.

The contest of interest groups in which state and local officials are often pitted against powerful private interest groups has produced a certain paralysis in intergovernmental policy-making in which it is often impossible for the Congress to make needed programmatic adjustments. Hence, state and local officials have put increasing pressure on the President to grant waivers of federal law that allow states to engage in programmatic experiments and innovations. The Congress initially resisted such waivers when Reagan and Bush were in the White House, but it acquiesced to a large number of waivers issued by the Clinton administration. Hence, the President now plays a new role in intergovernmental relations in which he authorizes specific waivers of federal law for specific states as a way of compensating for the intergovernmental paralysis in the Congress.

All state legislatures have a committee or subcommittee on federalism or intergovernmental relations in each chamber (i.e., House and Senate, except Nebraska, which has a unicameral legislature). In many states, these committees are important, and more important than their congressional counterparts, in part because the state legislative committees must deal with issues associated with federal aid, mandates, preemptions, and court orders. The smaller political arenas in the states also allow for more direct and personal relations between state legislators and local officials. However, as with the federal government, intergovernmental relations in the states are segmented across policy fields. Consequently, every substantive committee of the legislature addresses intergovernmental relations as well. In addition, given the different constitutional and statutory statuses of counties, municipalities, towns and townships, school districts, and special

districts, the nature and character of intergovernmental relations vary across these types of local governments.

Few, if any, local-government legislative bodies have a committee devoted to intergovernmental relations. Instead, such matters are managed on issue-by-issue and function-by-function bases. They are also left mostly to the local executive official and, in council-manager municipalities, to the professional city manager.

PART 5: THE JUDICIAL BRANCH

The courts are often neglected in discussions of intergovernmental relations because they are not direct players or lobbyists in the intergovernmental system and because they can only decide cases that are presented to them (although the U.S. Supreme Court has discretion over its appellate jurisdiction). However, by interpreting constitutions and statutes, the country's independent federal and state courts establish the constitutional frameworks of intergovernmental relations, substantially shape the balance of federal-state and state-local relations, and mandate some of the ground rules for the conduct of intergovernmental relations. The role of the courts in intergovernmental relations is a reflection of the overall role of the courts in American society; that is, litigation is more prevalent in the United States than in most countries, and courts ultimately decide many important public policy issues.

Given that local governments are legal creatures of the states rather than co-sovereigns with inherent rights of self-government, and given that citizens can file suits pertaining to state-local relations, the state supreme courts decide very large numbers of cases involving state-local relations, especially cases that test the limits of state or local government power. Consequently, many issues of state-local relations are settled permanently or temporarily by the state supreme court rather than by the legislature or the governor.

The U.S. Supreme Court decides far fewer cases; however, its decisions have profound impacts on the federal system and intergovernmental relations. The Court has often been referred to as the "umpire" of the federal system. This has been newly noticeable since 1991 because the "Federalism Five" justices on the nine-member Court have issued a surprising series of decisions friendly to state powers and restrictive of federal power.

From 1937 to 1991, the U.S. Supreme Court had routinely deferred to the Congress's interpretations of its powers under the Constitution's interstate commerce clause, supremacy clause, spending clause, Fourteenth Amendment, and other provisions. As such, the Court permitted tremendous expansions of federal power and the rise of coercive federalism. The Court also participated in the rise of coercive federalism by permitting lower federal courts to issue many orders against state and local governments and by broadening the grounds on which citizens can sue state and local governments in federal courts. State and local governments have been compelled to expend billions of dollars complying with federal-court orders and paying judgements in lawsuits. The costs of such litigation led a number of states and big cities to start budgeting in advance for the possible costs of case outcomes. The threat of costly litigation also led states and many local governments to develop dispute-resolution procedures to resolve issues outside of court.



Since 1991, however, the Court has reasserted a number of constitutional and doctrinal principles to restrain federal encroachments upon state powers:

1. Assertion of State Autonomy. In *Gregory v. Ashcroft* (1991), the Court used the U.S. Constitution's republican guarantee clause (Art. IV, Sec. 4) to uphold a provision in the Missouri Constitution requiring state judges to retire at age 70. The Missouri judges had argued that this provision violated the federal Age Discrimination Act. The republican guarantee clause states: "The United States shall guarantee to every state in this Union a Republican Form of Government." The Court opined that the federal government cannot deprive citizens of their essential republican (i.e., democratic) right to make such basic decisions about their state polity as when their judges should retire from the bench.

2. Prohibition of Federal Conscription. In *New York v. United States* (1992), the Court struck down a provision of the federal Low-Level Radioactive Waste Disposal Act on the grounds that (a) it entailed an unconstitutional federal conscription and commandeering of state officials to perform federal functions and (b) even though the governors had negotiated this provision with the Congress, the governors lacked authority under the Tenth Amendment to the U.S. Constitution to surrender state sovereignty and, thereby, sell out the citizenship rights of state taxpayers. This anti-conscription doctrine was reaffirmed in *Printz v. United States* (1997) wherein the Court struck down the interim provision in the Brady Handgun Control Act that required local law-enforcement officers to conduct background checks of handgun buyers. The Court narrowed this doctrine somewhat in *Reno v. Condon* (2000) by holding that it prohibits only federal laws that "require the States in their sovereign capacity to regulate their own citizens."

3. Limits on the Commerce Power. In *United States v. Lopez* (1995), the Court, for the first time since 1936, struck down a federal statute (i.e., the Gun-Free School Zones Act) as an unconstitutional exercise of Congress's interstate commerce power. Several subsequent decisions have reached the same result, thus placing new limits on expansions of federal power via expansive congressional definitions of commerce.

4. Reasserting States' Sovereign Immunity. In *Seminole Tribe v. Florida* (1996), the Court ruled that the Congress lacks authority to abrogate the states' Eleventh Amendment immunity through laws enacted under the Congress's Article I powers. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Court strengthened this doctrine in *Alden v. Maine* (1999) by asserting that the states' sovereign immunity in any tribunal is an essential attribute of their sovereignty, which they retained when they entered the federal union, regardless of the federal Constitution's delegations of power to the Congress in Article I and to the federal courts in Article III.

5. Limiting Section 5 of the Fourteenth Amendment. In *City of Boerne v. Flores* (1997), the Court struck down the federal Religious Freedom Restoration Act (RFRA). "The power to interpret the Constitution in a case or controversy remains in the judiciary," opined the Court. The Congress cannot expand the scope of its enforcement power under Section 5 of the Fourteenth Amendment beyond the "proportionality and congruence" of the problem being addressed by legislation. Justice Anthony Kennedy termed RFRA a "considerable intrusion into the states' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."



City of Boerne involved a church challenge under RFRA to the authority of its municipality to use its zoning power to prohibit the church to enlarge the size of its historic structure in an historic preservation zone.

6. Requiring Plain Statements. The Court has also required “express” or “plain statements” in statutes of the Congress’s intention to preempt state powers, to abrogate states’ Eleventh Amendment immunity, to permit civil-rights suits against state and local governments, and to attach conditions to grants-in-aid. Absent such a plain statement, the Court will strike down expansive regulatory interpretations of federal statutes by executive agencies.

7. Allowing States to be Laboratories of Democracy. In 1932, Justice Louis Brandeis argued that states can be laboratories of democracy when he opined 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.” In *Vacco v. Quill* (1997) and *Washington v. Glucksberg* (1997), the Court declined to recognize physician-assisted suicide as a fundamental right under the Fourteenth Amendment, thus upholding 49 state prohibitions of physician-assisted suicide. The Court did not deny that such a right might exist, but reserved to the 50 states the democratic task of deciding the matter and experimenting with approaches to such a right. To date, Oregon is the only state that permits limited physician-assisted suicide.

Although the Court’s state-friendly jurisprudence has slightly altered the balance of power between the federal government and the states, the Court’s decisions have been 5-4 rulings. A change of one justice on the Court, and there are likely to be two or more changes during Bush’s presidency, could halt this line of state-friendly decision-making. Indeed, some of the Court’s decisions affecting civil-rights law enforcement have sparked public controversy, and the future composition of the Court was an issue in the 2000 presidential election.

CONCLUSION

Overall, intergovernmental relations in the United States might be described as “organized chaos.” There are many actors, but no fixed hierarchy of actors, engaged in fluid and frequently informal relations characterized simultaneously by co-operation, compromise, collusion, competition, conflict, and coercion. The system works for the most part, perhaps because there are no fundamental territorially based ethnic, religious, or linguistic cleavages in the United States that create permanent blocs demanding institutionalized accommodation. All public officials – federal, state, and local – are closely tied to their constituents and seek to use the intergovernmental system to serve their constituents. The formal and informal rules of intergovernmental relations constrain clientelism and destructive behaviour. The legal rules governing intergovernmental programs minimize corruption. A basic unity underlies the system insofar as all actors understand the utility of the system and this open, porous system gives most interests opportunities to address their concerns.