Regulation and the US Intergovernmental System

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A Mosaic of Government Actors

Nearly 90,000 governments in the U.S.

- National Government
- 50 State Governments plus the District of Columbia
- 3000 County Government
- 19,000 Municipalities
- Remainder are special or more limited purpose governments
Elements of US Federalism

- US Constitution contemplates two levels of governmental power, the national government and the states. There are conflicting views as to how power is divided.
  - Dual Sovereignty
  - Sovereignty of the People
- Local governments are not mentioned in the Constitution. They are “creatures” of the state.
Federalism: A Legal Concept

A form of government in which a union of states recognizes the sovereignty of a central authority while retaining certain residual powers form themselves.

Characteristics:

• Union of autonomous political entities
• Division of powers
• Operation of powers within geographic area
• Dual citizenship
• Supremacy of the National Government
Three Major Constitutional Questions

1. Under what circumstances can the federal government act?
   • Enumerated powers

2. Under what circumstances can state governments act?
   • Reserved powers
   • When is a state “preempted?”

3. Assuming that the national or state government is acting within its constitutionally assigned authority, can it impose obligations on the other “sovereign?”
Role of American Pragmatism

• US ideology is pragmatism: realities influence our practice and that influence is their meaning for us.
  – William James: “Theories become instruments, not answers to enigmas, in which we can rest.”
  – Pragmatism as a philosophy dates back to Aristotle

• Thus, we tend to decide things not based on “pristine” theories of federalism, but based on the realities of the situation.
History of American Federalism

Many approaches to dividing up historical periods of US history; but a simplified approach is the following:

1. State-centered federal system 1789-1930.
2. Federal-centered system 1930-1980
3. Mixed, competitive system 1980-current
   - Neither federal or state centered
   - Fluid and constantly evolving
State-Centered Period 1789-1930

• Characterized as “Dual” federalism or “layer cake”
• Small, relatively stable governments; by 1930 total spending just 10 percent of GDP---three fourths at the state-local level.
• Federal government restricted both by finances and Supreme Court decisions.
• States became responsible for most basic services, directly or through their local governments.
Federal-Centered Period 1930-1980

Four crises influenced the growth of the national government:
1. Crisis of totalitarianism
2. Crisis of industrialism
3. Crisis of racism
4. Crisis of confidence in state governments.
Federal-Centered Period 1930-1980

• Crisis-driven, the federal government gradually increased its power and responsibility.
  – 16th Amendment providing for a national income tax. (1913)—national fiscal power.
  – 15th Amendment provided for the regulation of states (1868)—eventually led to expansion of national police power.
  – “Commerce Clause”—interpreted more broadly beginning in 1930s (“Switch in time that saved nine.”)

• By 1983 total government spending had grown to 33 percent of GDP, 24.3 percent at national level.
Mixed, Competitive Period 1980-

- Slower government growth (until recently).
- More constrained/restrained federal government; more activist state governments.
- Little restriction on the federal government’s regulatory power (except some recent court cases)
- ?? Post 9-11 period; economic crisis??
Dividing Regulatory Power

• Hamiltonian vs. Jeffersonian debate in the nation’s early history.

• *McCulloch v. Maryland* (1819), opinion by Chief Justice John Marshall:
  
  – Power of national government flows from the people, not the states; it is independent from the states.
  
  – Congress has power to incorporate a bank—”all laws which are necessary and proper” to its enumerated powers.
  
  – State cannot tax a national bank: “Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them…”
State Powers

- State’s derive their constitutional authority to regulate from their own governmental/constitutional structure—not from the federal government.
  - Concurrent Power

- Federal government rarely interfered with the states in the exercise of their power unless a specific federal statute restricted the states from acting.
The Expanding Commerce Clause

• *Gibbons v. Ogden (1824), CJ Marshall:*
  – Both national government and state governments can regulate commerce; however national government has preeminence over *interstate commerce*—enumerated power.
  – There are no limitations on the power of the federal government to regulate commerce.
  – Commerce between the states must mean commerce going into the state—not stop at the state’s border.

• 110 years of sometimes conflicting interpretations of the extent of the commerce clause power.
• *Hammer v. Dagenhart* (1918)—Child Labor (5-4 decision):
  
  – Congress had no power to prohibit the interstate transportation of goods manufactured by child labor.
  
  – Congress was not regulating commerce but attempting to preempt states on its police powers.
• Early New Deal cases were lost on 5-4 vote:

• After 1936 elections and FDR court-packing scheme, Court took a more pragmatic approach to New Deal legislation.
  – *NLRB v. Jones & Laughlin Steel Corp* (1937) (5-4) upheld authority of national government to regulate labor laws of a national company.
  – *U.S. v. Darby* (1941) upheld federal minimum wage laws which prohibited shipment of goods in interstate commerce not manufactured at specified wages.
Commerce Clause as Limiting States Regulatory Power

• Explicit preemption: Congress mandates something on the states or specifically overturns or outlaws state actions in a particular area.

• Implicit preemption: Congress passes a comprehensive set of legislation that “occupies the field” and leaves no room for state action.
Limitations of Federal Power

• Some recent Supreme Court decisions seem to want to limit the power of Congress under the Commerce Clause.
  – *New York v. U.S.* (1992) (6-3—federal government cannot appropriate a state function and compel action—though it can entice through grants, etc.)

• Court seems to be returning to concept of Dual Sovereignty.
Regulations and the States

• State variation in regulating nursing homes, environment, etc.
• Federal role has largely been as a source of funds; however, it used those funds as a basis for requiring certain actions by the states.
Federal Regulatory Scheme

Regulatory processes are a search for both fairness and efficiency.

• Administrative Procedures Act of 1946
  1. Notice of Inquiry: proposal for a rule
  2. Notice of proposed rule
     – Hearings; written comments
     – Negotiated Rulemaking Act of 1990
  3. Final Rulemaking
Office of Information and Regulatory Analysis (OIRA)

- Important office within the Office of Management and Budget (OMB).
- Applies and monitors a variety of Executive Orders:
  - Cost-benefit analysis
  - Impact on small business, the States, etc.
Modern Challenges to Current Regulator Scheme

• The health care market—no longer local; clearly national and global in many respects.
• Role of the internet in making available advice, drugs, etc.
• Is the current state-dominated regulatory scheme outdated?
• What are the limits of potential federal action?
Regulatory Balancing Act

• National Government can preempt, but does not always do so. Why?
  – Keeping role of federal government limited
  – Using states as prime enforcers of federal law; States assume “primacy.”

• States are developing their own modern regulatory systems.
  – Can they keep us with technology?