The Heritage Foundation
Backgrounder
Executive Summary

No. 1245 January 27, 1999

# FEDERALISM REFORM: SEVEN OPTIONS FOR CONGRESS

ADAM D. THIERER

Last May, the White House ignited a surprising political firestorm when it released Executive Order (E.O.) No. 13083 on federalism policymaking. As public awareness of the content of this executive order grew, it triggered a unique series of events that placed the Clinton Administration on the defensive and ultimately forced it to abandon the new form of federalism it had tried to establish through this executive order.

After many years of neglect, Washington's policy elites once again are talking about the importance of federalism in the American system of constitutional governance. Federalism—which uniquely determines the relationship between and among the jurisdictions of the federal, state, and local governments—is perhaps most succinctly described in the words of President Ronald Reagan's Domestic Policy Council Working Group on Federalism: a "constitutionally based, structural theory of government designed to ensure political freedom and responsive, democratic government in a large and diverse society." Federalism has long been considered by many to be the ultimate guardian of liberty within the American Republic.

The reaction to President Bill Clinton's surprising executive order helped to forge a bipartisan alliance among Members of Congress, state and local officials, interest groups, legal scholars, political commentators, and average citizens who believed that E.O. 13083 violated certain sacred tenets of the U.S. Constitution on the proper division of powers for the various levels of government. This alliance signaled a renewed interest among the people at large in examining how best to reinvigorate and protect the Founding Fathers' original system of federalism. In fact, the renewed focus on protecting federalism eventually forced President Clinton to withdraw his executive order just a few months after issuing it.

Sadly, however, President Clinton appears not to have learned any lesson from last year's federalism fight. In his recent State of the Union Address, he showcased a litany of new federal programs that ignore the proper constitutional balance of powers by promoting even more federal intrusion into

Produced by
The Thomas A. Roe Institute
for Economic Policy Studies

Published by
The Heritage Foundation
214 Massachusetts Ave., N.E.
Washington, D.C.
20002–4999
(202) 546-4400
*http://www.heritage.org*

matters that are best dealt with by state or local governments.

As the 106th Congress—the last Congress of the 20th century—begins its important work, it must examine the system of government that has developed over the past decade and delineate areas in which reform is needed to protect the Framers' dynamic system of federalism for the future. Legislators must establish firm principles and strategies to reinvigorate federalism, and then devise a timetable to accomplish these goals in the near and long terms. If the 106th Congress succeeds in implementing such reforms as those summarized in Table 1, this accomplishment may stand as its most important legacy to future generations.

*Adam D. Thierer is Alex C. Walker Fellow in Economic Policy at The Heritage Foundation.*

Table 1 B1245

## Seven Practical Steps for Congress to Reinvigorate Federalism

| | |
|---|---|
| **Short-Term Federalism Reform Strategies** | |
| Objective: Establish clear and firm federalism policymaking guidelines for Congress and executive branch agencies. | Strategy #1: Codify the Federalism Policymaking Criteria in Executive Order No. 12612. |
| Objective: Provide adequate consideration of and justification for legislation with potential federalism implications. | Strategy #2: Mandate that Members of Congress identify the constitutional basis of proposed legislation and debate the merits of that authority. |
| **Mid-Term Federalism Reform Strategies** | |
| Objective: Curtail the use of preemptive federal statutes and regulations put forth under a loose reading of the Commerce Clause. | Strategy #3: Limit the ability of the federal government to preempt state or local laws under the Commerce Clause, unless clear constitutional justification exists. |
| Objective: Curtail the power of cabinet departments and independent regulatory agencies to preempt state and local governments. | Strategy #4: Enact anti-delegation legislation that ends the unconstitutional transfer of law-making authority from the legislative to the executive branch. |
| **Long-Term Federalism Reform Strategies** | |
| Objective: Rectify the imbalance between the states and the federal government regarding how amendments to the Constitution are proposed. | Strategy #5: Allow the states to propose amendments to the Constitution without having to call for a constitutional convention. |
| Objective: Rectify the accountability problem created by the adoption of the Seventeenth Amendment, which stripped the states of their power to elect Senators to Congress directly. | Strategy #6: Allow states to hold their congressional representatives accountable by convening their congressional delegations when egregious federal mandates and policies are being imposed. |
| Objective: Identify additional steps that would provide the states with a firm check on federal preemption and conscription efforts. | Strategy #7: Give states supermajority veto power over federal legislation or regulations that preempt their authority or require them to administer federal programs or rules. |

The Heritage Foundation
Backgrounder
214 Massachusetts Avenue, N.E. Washington, D.C. 20002-4999 • (202) 546-4400 • http://www.heritage.org

No. 1245 January 27, 1999

# FEDERALISM REFORM: SEVEN OPTIONS FOR CONGRESS[1]

ADAM D. THIERER

Last May, the White House ignited a surprising political firestorm when it released Executive Order (E.O.) No. 13083[2] on federalism policymaking. As public awareness of the content of this executive order grew, it triggered a unique series of events that placed the Clinton Administration on the defensive and forced it to acknowledge and, ultimately, to abandon the new form of federalism it had tried to establish through this executive order.

After many years of neglect, Washington's policy elites once again are talking about the importance of federalism in the American system of constitutional governance. Federalism—which uniquely determines the relationship between and among the jurisdictions of the federal, state, and local governments—is perhaps most succinctly described in the words of President Ronald Reagan's Domestic Policy Council Working Group on Federalism: a "constitutionally based, structural theory of government designed to ensure political freedom and responsive, democratic government in a large and diverse society."[3] It has long been considered by many to be the ultimate guardian of liberty within the American Republic.

The reaction to President Bill Clinton's surprising executive order helped to forge a diverse and bipartisan alliance among Members of Congress, state and local officials, interest groups, legal scholars,

Produced by
The Thomas A. Roe Institute
for Economic Policy Studies

Published by
The Heritage Foundation
214 Massachusetts Ave., N.E.
Washington, D.C.
20002–4999
(202) 546-4400
*http://www.heritage.org*

1. Portions of this paper are adapted from the author's recently published book on federalism. See *The Delicate Balance: Federalism, Interstate Commerce, and Economic Freedom in the Technological Age* (Washington, D.C.: The Heritage Foundation, 1999), pp. ix–xiv; 40–46; 119–143.
2. President William J. Clinton, Executive Order No. 13083, "Federalism," May 14, 1998; see *Federal Register,* Vol. 63, No. 96 (May 19, 1998), pp. 27651–27655.
3. "The Status of Federalism in America," *A Report of the Working Group on Federalism of the Domestic Policy Council,* November 1986, p. 1.

political commentators, and average citizens who believed that E.O. 13083 violated certain sacred tenets of the U.S. Constitution on the proper division of powers for the various levels of government. This alliance signaled a renewed interest in Washington, and among the population at large, in examining how best to reinvigorate and protect the Founding Fathers' original system of federalism. In fact, the renewed focus on protecting federalism eventually forced President Clinton to withdraw his executive order just a few months after issuing it.

Sadly, however, President Clinton appears not to have learned any lesson from last year's federalism fight. In his recent State of the Union Address, he showcased a litany of new federal programs that ignore the proper constitutional balance of powers by promoting even more federal intrusion into matters that are best dealt with by state or local governments.

As the 106th Congress—the last Congress of the 20th century—begins its important work, it must examine the system of government that has developed over the past decade and delineate areas in which reform is needed to protect the Framers' dynamic system of federalism for the future. Legislators must establish firm principles and strategies to reinvigorate federalism, and then devise a timetable to accomplish these goals in the near and long terms. If the 106th Congress succeeds in doing so, this accomplishment may stand as its most important legacy to future generations.

## A CONFLICT OF VISIONS: RESTORING VS. REMAKING FEDERALISM

President Clinton's Executive Order No. 13083 on federalism outlined a set of new "Federalism Policymaking Criteria" that would have given federal bureaucrats and regulators generous leeway to intervene in the affairs of the states or to pass uniform, preemptive federal rules under a remarkable variety of circumstances. For example, the executive order delineated that federal action could be justified:[4]

- "When decentralization increases the costs of government thus imposing additional burdens on the taxpayer";
- "When States would be reluctant to impose necessary regulations because of fears that regulated business activity will relocate to other States";
- "When placing regulatory authority at the State or local level would undermine regulatory goals because high costs or demands for specialized expertise will effectively place the regulatory matter beyond the resources of State authorities"; or
- "When the matter relates to Federally owned or managed property or natural resources, trust obligations, or international obligations."

Perhaps more important, E.O. 13083 proposed the revocation of an earlier executive order on federalism issued by President Ronald Reagan in 1987, No. 12612.[5] E.O. 13083's open-ended, expansionary policymaking criteria are very different from President Reagan's, which placed substantive limits on the ability of federal officials to intervene in the affairs of the states and the people. For example, President Reagan's E.O. 12612 notes that

> Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope.[6]

4. Executive Order 13083, *op. cit.*
5. President Ronald Reagan, Executive Order No. 12612, "Federalism," October 26, 1987; see *Federal Register,* Vol. 52, No. 210 (October 30, 1987), pp. 41685–41688.
6. *Ibid.*

Within these two orders are two distinct visions of federalism. President Reagan's vision stressed, above all, adherence to the original intentions of the Founders and the language of the Constitution regarding the federal government's limited, enumerated powers, and it promoted a healthy respect for the benefits of state and local autonomy. President Clinton's vision, on the other hand, is based on a new federalism paradigm that calls for greater constitutional malleability and an acceptance of the frequent need for federal intervention to alleviate any ill.

## THE PUBLIC REBUKE OF E.O. 13083

President Clinton's federalism manifesto did not initially generate a great deal of media or public attention because the White House quietly released E.O. 13083 in early 1998 while the President was out of the country. But, by mid-summer, a growing number of Washington policymakers, state and local officials, and national organizations had become sufficiently concerned about its potential effects to begin asking the Clinton Administration to explain its new thinking on federalism.

Their concerns culminated in a hearing on July 28, 1998, in the House Government Reform and Oversight Subcommittee on Regulatory Affairs. During this hearing, the Clinton Administration was castigated uniformly for its decision to abandon the fairly non-controversial Reagan executive order and impose the new federalism guidelines that appeared to grant the federal government unlimited policymaking authority over the states.

Several Members of Congress condemned President Clinton's new federalism guidelines and introduced legislation to force him to revoke his executive order. For example, a Sense of the Senate Resolution introduced by Senator Fred Thompson (R–TN), which encouraged the President to revoke his order, passed by unanimous consent in late July. Dissenters in Congress were joined by representatives of many well-respected state and local organizations, including the National Governors' Association, the National Conference of State Legislators, the United States Conference of Mayors, the National League of Cities, and the National Association of Counties.

On August 5, the White House finally succumbed to this intense pressure and announced it would suspend the proposed executive order "in order to enable full and adequate consultation with State and local elected officials, their representative organizations, and other interested parties."[7] At least temporarily, the bipartisan alliance of those who understood the Constitution's firm limits on the scope of federal power had prevailed.

## THE NEED FOR REFORM

The temporary victory for the ardent supporters of a limited, constitutional government was largely symbolic. There remains a strong and continuing need to formulate comprehensive federalism reforms to revive, reinvigorate, and protect the Founding Fathers' delicate balance of powers so carefully delineated in the Constitution.

Restoring the proper balance of power between the states and the federal government will not be easy, but it can and must be done. Several decades of legislative abuse and judicial neglect have left the Founders' federalist system in disarray, largely because, as Supreme Court Justice Sandra Day O'Connor observed,

> The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities.[8]

7. President William J. Clinton, "Suspension of Executive Order 13083," White House, Office of the Press Secretary, August 5, 1998.

Table 1 B1245

## Seven Practical Steps for Congress to Reinvigorate Federalism

| | |
|---|---|
| **Short-Term Federalism Reform Strategies** | |
| Objective: Establish clear and firm federalism policymaking guidelines for Congress and executive branch agencies. | Strategy #1: Codify the Federalism Policymaking Criteria in Executive Order No. 12612. |
| Objective: Provide adequate consideration of and justification for legislation with potential federalism implications. | Strategy #2: Mandate that Members of Congress identify the constitutional basis of proposed legislation and debate the merits of that authority. |
| **Mid-Term Federalism Reform Strategies** | |
| Objective: Curtail the use of preemptive federal statutes and regulations put forth under a loose reading of the Commerce Clause. | Strategy #3: Limit the ability of the federal government to preempt state or local laws under the Commerce Clause, unless clear constitutional justification exists. |
| Objective: Curtail the power of cabinet departments and independent regulatory agencies to preempt state and local governments. | Strategy #4: Enact anti-delegation legislation that ends the unconstitutional transfer of law-making authority from the legislative to the executive branch. |
| **Long-Term Federalism Reform Strategies** | |
| Objective: Rectify the imbalance between the states and the federal government regarding how amendments to the Constitution are proposed. | Strategy #5: Allow the states to propose amendments to the Constitution without having to call for a constitutional convention. |
| Objective: Rectify the accountability problem created by the adoption of the Seventeenth Amendment, which stripped the states of their power to elect Senators to Congress directly. | Strategy #6: Allow states to hold their congressional representatives accountable by convening their congressional delegations when egregious federal mandates and policies are being imposed. |
| Objective: Identify additional steps that would provide the states with a firm check on federal preemption and conscription efforts. | Strategy #7: Give states supermajority veto power over federal legislation or regulations that preempt their authority or require them to administer federal programs or rules. |

Constructive federalism reform strategies are available to correct this imbalance (see Table 1). These strategies should be prioritized according to those that could be implemented in the short term (that is, within the next six months to two years) and those that should follow in the mid- or long term (that is, from two to five years).

8. Justice Sandra Day O'Connor, *New York* v. *United States*, 505 U.S. 144, 157 (1992).

It is important to note that most of these strategies are not new ideas; indeed, the principles behind them date back to the age of the founding of the American Republic. Unfortunately, the principles and protections in the original federalist system of governance established in the Constitution have been eroded by a century's worth of corrupt jurisprudence and unwarranted advances by federal legislators and regulators. And, with the notable exception of the passage of the Unfunded Mandates Reform Act (UMRA) of 1995, efforts to revive and reinvigorate these principles have not been forthcoming. The reform objectives and strategies set out here are steps in the proper direction, are supported by numerous national groups, and are vital if Congress wishes to reestablish the centrality of federalism for a vigorous constitutional republic.[9]

## SHORT-TERM FEDERALISM REFORM STRATEGIES

The 106th Congress faces a crowded legislative calendar that may be abbreviated further by the upcoming presidential election cycle. With this in mind, Members of Congress should dedicate the next few months to advancing federalism reforms that uphold and protect the constitutionally delineated balance of power. Fortunately, two simple but important reform strategies can be introduced immediately that would make this possible:

### Strategy #1: Congress should codify President Ronald Reagan's Federalism Policymaking Criteria in Executive Order No. 12612.

To guide the process of assessing jurisdictional responsibility and limiting the role of the federal government to tasks that are permissible under the Constitution, Congress would be wise to codify President Reagan's excellent federalism policymaking criteria contained in E.O. 12612, which was issued on October 26, 1987.[10] This action would establish clear and firm guidelines for Congress and executive branch agencies to follow when they set about crafting new public policy with federalism implications.

E.O. 12612 called for strict adherence to constitutional principles. It directed cabinet agencies and executive branch offices to

> restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies.

In Section 3, executive branch agencies were ordered to follow a strict set of Federalism Policymaking Criteria[11] "when formulating and implementing policies that have federalism implications." (See Appendix for the full text of E.O. 12612.) For example:

- "Executive departments and agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of the States, and should carefully assess the

9. Groups representing state and local interests, such as the American Legislative Exchange Council, the National Governors' Association, the National Conference of State Legislatures, the Council of State Governments, and the State Legislative Leaders Foundation, have endorsed variations of these recommendations. For a summary of the principles and reforms of federalism they support, which were agreed on in a summit on federalism in October 1995, see Charles J. Cooper and David H. Thompson, "The Tenth Amendment: The Promise of Liberty; Strategies to Restore the Balance of Powers Between the Federal and State Governments," American Legislative Exchange Council *The State Factor,* Vol. 22, No. 7 (October 1996).

10. Executive Order 12612, *op. cit*.

11. See James Miller III, Office of Management and Budget, "Implementation of Executive Order No. 12612, Federalism," *Memorandum for the Heads of Executive Departments and Agencies,* December 16, 1987; and President George Bush, "Federalism Executive Order," *Memorandum to the Heads of Executive Departments and Agencies,* February 16, 1990.

necessity for such action. To the extent practicable, the States should be consulted before any such action is implemented.

- "With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Federal oversight of State administration is neither necessary nor desirable.
- "Executive departments and agencies shall: (1) Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States. (2) Refrain, to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards. (3) When national standards are required, consult with appropriate officials and organizations representing the States in developing those standards."

Although widely ignored by most regulatory agencies then and now, President Reagan's executive order was an important acknowledgment of the federal government's overwhelming power relative to the states. On a more practical level, E.O. 12612 provides a roadmap for returning to the Founders' framework by encouraging federal officials to work more closely with the states.

It is fortunate, therefore, that the Clinton Administration's attempt to revoke President Reagan's executive order was repelled successfully by a bipartisan effort. It is important that the criteria embodied in E.O. 12612 be codified so that future Administrations cannot thwart the spirit of the Constitution. For example, codification of E.O. 12612 would require "Federalism Assessments" of any proposed rule that might have substantive federalism implications. These assessments would be reviewed by the White House's Office of Management and Budget (OMB) and by Congress to ensure that federal agencies abide by the Constitution and respect the autonomy of state and local governments.

Statutory codification of Reagan's Federalism Policymaking Criteria could take many forms. Congress, for example, could take the language of the executive order and codify it as law without significant changes or accompanying statutory language. This approach was taken in two bills that were proposed during late summer 1998: the Federalism Enforcement Act of 1998 (S. 2445) introduced by Senator Fred Thompson and several cosponsors, and the Federalism Act of 1998 (H.R. 4422) introduced by Representative James Moran (D–VA) and cosponsors from both parties. Both bills, despite minor differences regarding the inclusion of judicial review language, relied heavily on the language of E.O. 12612.

A second option would be to amend existing statutes that deal with jurisdictional matters, intergovernmental affairs, or regulatory policymaking. Two legislative vehicles that could be amended to include the federalism guidelines and protections in E.O. 12612 are the UMRA[12] and the Congressional Review Act (CRA), which was implemented as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996.[13]

The UMRA was one of the first pieces of legislation enacted by the 104th Congress. It requires the Congressional Budget Office (CBO) to estimate the costs of proposed mandates on state and local governments, and allows a point of order to be raised against any bill or joint resolution that lacks such an estimate or results in direct costs to state and local governments of more than $50 million.

The UMRA has been helpful in allowing Members of Congress to deliberate more carefully

12. Public Law No. 104–4, March 22, 1995.

13. Public Law No. 104–121, March 29, 1996. The Congressional Review Act is contained in Subtitle E of Title II of the Small Business Regulatory Enforcement Fairness Act of 1996.

their legislative proposals. CBO cost estimates have helped Congress to drop costly proposals or modify them to reduce their costs.[14] The UMRA is an important existing vehicle that provides statutory protection against federal intrusion into state and local matters. It could be improved, however: For example, its reach should be extended to existing statutes and mandates.[15] And its new and existing requirements should be strengthened by including E.O. 12612's Federalism Policymaking Criteria within Title II and stronger judicial review language within Title IV. With these improvements, the UMRA would give Congress and the courts a mechanism to demand the strict federalism accountability of federal officials.

The CRA provides a mechanism by which Congress can review and disapprove final rules issued by federal regulatory agencies. It also requires agencies to estimate costs associated with new rules and provide interpretations or explanations regarding the need for these rules. Yet, as of today, Congress has failed to use the CRA to rein in overzealous federal regulators.[16] In fact, it has failed to reject *any* new rules under the CRA, despite an onslaught of expensive new regulatory proposals from federal agencies in recent years.[17] Nonetheless, the CRA has the potential to become an important tool in future congressional efforts to control federal regulatory activity. Amending the CRA to include President Reagan's Federalism Policymaking Criteria would create another procedural impediment to federal preemption. At the very least, Congress would be obligated to review federal rules for their federalism implications and strike down those that do not abide by the Constitution.

Regardless of which statutory vehicle Congress chooses to codify federalism policymaking guidelines, it is vital that stronger judicial review language be included. Such language is an essential component of reform because it would establish another enforcement avenue. That is, the inclusion of judicial review language within such legislative reforms would encourage the courts to become institutional defenders of federalism and a bulwark against the unconstitutional overreach of the other branches of government.

To accomplish this task, Congress might consider taking advantage of the judicial review language in the SBREFA. The provisions contained in Section 611 of the SBREFA could be adopted and slightly modified to give the courts the power to review agency rules that potentially violate newly enacted Federalism Policymaking Criteria. The courts could decide if such rules should be struck down as unconstitutional, or simply remand the rule to the agency for review and revision until it complied with the new guidelines and protections.

Unfortunately, these judicial review provisions have only limited applicability under SBREFA and do not apply to the CRA, which is attached as a subtitle to that statute. Therefore, when Congress attempts to craft new federalism policymaking guidelines, judicial review provisions should be broadened to cover any legislative and regulatory activities with potential federalism implications.

### Strategy #2: Congress should be obligated to identify the constitutional basis of each of the statutes it considers and allow debate on the merits of that asserted authority.

14. See Angela Antonelli, "Promises Unfulfilled: Unfunded Mandates Reform Act of 1995," *Regulation* No. 2 (1996), pp. 46–54.

15. *Ibid.*

16. See Angela Antonelli, "Needed: Aggressive Implementation of the Congressional Review Act," Heritage Foundation *F.Y.I.* No. 131, February 19, 1997; and Susan E. Dudley and Angela Antonelli, "Congress and the Clinton OMB: Unwilling Partners in Regulatory Oversight?" *Regulation,* Fall 1997, pp. 17–23.

17. See Angela Antonelli, "Two Years and 8,600 Rules: Why Congress Needs an Office of Regulatory Analysis," Heritage Foundation *Backgrounder* No. 1192, June 26, 1998.

This action would ensure that Congress provided adequate consideration and justification for any legislation with potential implications for federalism.

Many bills, committee reports, and other congressional documents include a standard boilerplate statement concerning how and why federal intervention in the given field is justified. Yet, as James Madison—one of the key architects of the Constitution—argues in *Federalist* No. 39, "[Federal] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."[18] And in *Federalist* No. 45, Madison notes, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[19]

It is clear from the Founders' writings that the clauses and phrases of the Constitution were not intended to be vague, open-ended mechanisms that could be used to justify the exercise of federal authority over any conceivable form of human activity. Instead, these clauses and phrases were to act as policymaking parameters or boundaries on federal activity.

Therefore, to reinvigorate and protect the Constitution's original form of federalism, policymakers must put in place firm procedural requirements that obligate Members of Congress to cite the clause or section of the Constitution under which their proposed legislation is justified.

Such a proposal was introduced in the House by Representative John Shadegg (R–AZ) in 1998, and it is scheduled to be reintroduced again this year. The Enumerated Powers Act would require that

> Each Act of Congress shall contain a concise and definite statement of the constitutional authority relied upon for the enactment of each portion of that Act. The failure to comply with this section shall give rise to a point of order in either House of Congress. The availability of this point of order does not affect any other available relief.

In a 1996 *Journal of Commerce* article, Senator Spencer Abraham (R–MI) aptly summarizes the reasons such a reform is needed:

> The requirement that every bill include a statement of Constitutionality will perform three important functions. First, it will encourage us to pause and reflect about where the law we are considering enacting fits within the Constitutional allocation of powers between the federal government and the States. A statement of Constitutional authority also will put Congress' view of its authority on the record for the people to judge. This will spur further useful reflection on our part and open up the possibility of conversation with and among the people on the subject of federal powers. Finally, such a statement will help the courts evaluate the legislation's constitutionality. Legislation that falls within our enumerated powers will more likely be upheld if it contains an explicit explanation of its Constitutional authority. As important, we will be less likely to enact laws or regulations that overstep proper Constitutional bounds. And if the statement of constitutional authority does not stand up to scrutiny, both the courts and the people will find it easier to hold us accountable.[20]

But legislators might want to go beyond this relatively straightforward reform and require actual oral debate on the House and Senate floors over the constitutional justification of each act under consideration. It is routine today for

18. Clinton Rossiter, ed., *The Federalist Papers* (New York, NY: NAL Penguin, 1961), p. 245.

19. *Ibid.*, p. 292.

20. Senator Spencer Abraham, "Downsizing Federal Authority," *Journal of Commerce*, February 27, 1996, p. 8A.

Members of Congress to dispense with the reading of the bills on which they are about to vote. Far too often, federal legislators have little to no idea of what new federal programs or powers are contained in the legislation they are considering. Worse, very little consideration goes to what power in the Constitution authorizes those acts of Congress. Clearly, legislators should devote at least five or ten minutes of floor time to justify the statutes they propose. Points of order then could be raised against bills that were not subjected to such floor debate.

Other variants of this type of federalism reform option are possible, but regardless of how such a reform is structured, the important purpose is that it perform an important educational function for Members of Congress and the public. Such requirements will remind legislators and voters alike that the powers of the federal government are limited and enumerated under the Constitution. Furthermore, by requiring that greater justification be put forward in the future, legislators and citizens will become more familiar with the Constitution, too. As a consequence, legislators and citizens will better understand the constitutional balance of powers and become more aware of the efforts of some to manipulate or abuse the language of the Constitution in order to expand the powers of the federal government.

These reforms represent the bare minimum that Congress should do in the short term to reinvigorate federalism.

## MID-TERM FEDERALISM REFORM STRATEGIES

Members of Congress should consider the following two important reform objectives as part of their ongoing efforts to revive and protect the Founders' original federalist system of governance:

**Strategy #3: Congress should limit its ability to preempt state or local laws under the Commerce Clause, unless clear constitutional justification exists to do so.**

Among the few enumerated powers entrusted to federal lawmakers in the U.S. Constitution is the power to "regulate commerce...among the several states" (Article I, Section 8, Clause 3). The Commerce Clause, as it is more commonly known, has undergone the most tortuous literal metamorphosis in American political and legal history. What "regulation of interstate commerce" meant was commonly understood by the Founders, lawmakers, and jurists of the early Republic; yet modern federal jurists and legislators, as well as many so-called progressive academics and legal theorists, have contorted the interpretation of this phrase to give it a meaning the Founders never intended. They use it to justify an ever-expanding array of federal programs and regulatory interventions.

If Congress hopes to breathe new life into the Founders' original federalist model, it is important that policymakers reaffirm and clarify the original interpretation of the Commerce Clause so that it cannot be used to advance unconstitutional objectives.

"Interstate commerce" is the economic activity between or involving two or more states. The term "commerce" in interstate commerce does not signify manufacturing, production, or anything else. "[T]he Founders conceived of 'commerce' as 'trade,' the interchange of goods by one State with another," notes legal historian and federalism expert Raoul Berger.[21] And Supreme Court Chief Justice Melville Weston Fuller's summation in the 1895 case *United States* v. *E.C. Knight Co.* notes that "Commerce succeeds to manufacture, and is not a part of it."[22] This is indicative of the prevailing view among jurists for the first 150 years of America's legal history.

Moreover, to qualify for coverage under the Commerce Clause, an activity not only must represent *bona fide* commerce, but it must be truly interstate in scope. Obviously, this means that

21. Raoul Berger, "Judicial Manipulation of the Commerce Clause," *Texas Law Review,* Vol. 74, Issue 4 (March 1996), p. 703.

22. Justice Melville Weston Fuller, *United States* v. *E. C. Knight Co.,* 156 U.S. 1, 12 (1895).

federal lawmakers cannot reach any trade or commerce that is purely *intra*state—that is, taking place solely within the confines of one state—under the Commerce Clause.

Finally, it is important to note that even when a certain activity qualifies as "interstate commerce," it does not mean that the Founders intended the federal government to regulate that trade or commerce in the modern sense. As Roger Pilon, a constitutional law scholar with the Washington, D.C.–based Cato Institute, argues, the purpose of the Commerce Clause was "not so much to convey a power 'to regulate'...as a power 'to make regular' the commerce that might take place among the states."[23]

The Founders gave the national government limited preemptive authority under the Commerce Clause to end economic protectionism and discrimination among the states and to ensure that a free capitalistic marketplace could develop nationwide. In fact, in an 1829 correspondence with J. C. Cabell, James Madison made it absolutely clear what the purpose of the Commerce Clause was:

> [It] grew out of the abuses of the power by the importing States in taxing the non-importing, and was intended as a negative and preventative provision against injustice among the States themselves, rather than as a power to be used for positive purposes of the General Government.[24]

And as former Judge Robert Bork explained more recently, "[E]veryone agrees that the historic, central function of the commerce clause was to empower Congress to eliminate state-created obstacles to interstate trade."[25]

The Commerce Clause was intended to protect the free flow of commerce among the states, not to be a prescriptive tool of social engineering to re-craft the states in the image of the national government's liking. The modern reach of the Commerce Clause since the New Deal has come to encompass almost every human activity. Today, activities that traditionally were considered parochial in nature and therefore best administered or monitored by state and local officials are subject to federal regulation or oversight through a tortured reading of the Commerce Clause. Federal programs and regulations in the fields of crime control, education, infrastructure development, and environmental protection, to name a few, are justified under this Commerce Clause rationale, despite their often *intra*state, and inherent non-commercial, nature.

It is important that Congress initiate a debate over the purpose and scope of the Commerce Clause. Furthermore, Congress should reevaluate existing federal programs and policies and consider devolving programs spawned through contorted interpretations, or abolishing them altogether.

In several important recent Supreme Court decisions, such as *United States* v. *Lopez*[26] and *Printz* v. *United States*,[27] the Court showed a newfound willingness to strike down as unconstitutional federal laws that were conceived under a spurious Commerce Clause rationale. In *Lopez* and *Printz*, it struck down two federal gun statutes—the Gun-Free School Zones Act of 1990 and the Brady Handgun Violence Prevention Act of 1993—largely because federal policymakers injudiciously had invoked the Commerce Clause

23. Roger Pilon, "Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles," in David Boaz and Edward H. Crane, eds., *Market Liberalism: A Paradigm for the 21st Century* (Washington, D.C.: Cato Institute, 1993), p. 42.

24. Letter from James Madison to J. C. Cabell, February 12, 1829, quoted in Berger, "Judicial Manipulation of the Commerce Clause," p. 705.

25. Robert H. Bork, "Federalism and Federal Regulation: The Case of Product Labeling," *Critical Legal Issues*, Washington Legal Foundation *Working Paper Series* No. 46, July 1991, p. 10.

26. U.S. 93–1260.

27. U.S. 95–1478.

as justification for preempting state and local prerogatives in this field. The Court made it clear in these decisions that such activities were neither "interstate" in nature nor "commerce" in the true sense of the term, and therefore could not be reached by Congress under the Commerce Clause.

Regrettably, however, a remarkable range of federal programs and policies remain on the books, and many new laws are introduced each session, that invoke the Commerce Clause as their *raison d'être*. To end this practice, Congress must demand that adequate consideration and justification for legislation that has potential federalism implications be undertaken before the legislation can be passed into law.

Congress also may need to take steps to ensure that the Commerce Clause in particular cannot be cited as justification for federal programs or policies unless they meet specific tests outlined in detail in a recent Heritage publication, *The Delicate Balance: Federalism, Interstate Commerce, and Economic Freedom in the Information Age*.[28]

To summarize, legislation is needed that clearly defines what each of the terms in the phrase "regulation of interstate commerce" means, such that the understanding is consistent with the Founding Fathers' original intent. Specifically, such legislation would need to delineate which issues fall under the Commerce Clause and which do not. Finally, the legislation would need to address the ways in which existing programs or court precedents that do not support the original understanding of the Commerce Clause would be handled. Congress would be wise to eliminate as many programs and precedents as possible that rest on questionable Commerce Clause foundations.

Congress must not "throw the baby out with the bath water," however, by striking down Commerce Clause cases handed down by the Court this century that protect or encourage the free flow of interstate commerce. The Supreme Court has developed a substantial body of law over the past century known as Dormant Commerce Clause (DCC) jurisprudence, which deals with the constitutionality of state efforts to regulate interstate commerce whenever Congress has been silent on the issue. Relying on the Commerce Clause as justification, the courts typically struck down as unconstitutional state laws and regulations that regulated interstate commerce, even though the Constitution empowers only Congress to protect the free flow of interstate commerce.[29] Some legal scholars have questioned the Court's authority to take any steps to guard the lanes of interstate commerce when Congress has not acted, and have recommended that all Dormant Commerce Clause jurisprudence be struck down as unjustifiable judicial activism.

These critics make an important point, but they should recognize the beneficial nature of the Court's decisions in this field. "In the absence of the DCC, the history of American interstate commerce may well have been substantially different, and worse," argues Michael DeBow, professor of law at Samford University's Cumberland School of Law,[30] because DCC decisions have helped to create a more free, open national marketplace for companies and consumers by preventing economic balkanization, trade wars, and product discrimination among the

28. See "New Federalism Tensions and a Framework for the Future," in Thierer, *The Delicate Balance*, pp. 81–118.

29. For example, see *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511 (1935); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945); *H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525 (1949); *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951); *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Pike* v. *Bruce Church*, 397 U.S. 137 (1970); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976); *Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333 (1977); *Raymond Motor Transportation* v. *Rice*, 434 U.S. 429 (1978); *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979); *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 622 (1981); *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269 (1988); *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988); and *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994).

30. Michael DeBow, "Codifying the Dormant Commerce Clause," *Public Interest Law Review*, Vol. 69 (1995), p. 77.

states. In fact, many jurists and academics who criticize DCC jurisprudence simultaneously acknowledge the substantial economic benefits associated with these legal decisions. Overturning all DCC decisions, therefore, would jeopardize the stability of certain segments of America's capitalist free marketplace and discourage economic commerce in the process.

To rectify the concerns regarding the constitutionality of the jurisprudence handed down in the field while simultaneously protecting the beneficial commercial nature of these DCC decisions, Members of Congress simply should institute a legislative version of the DCC as part of any statute they consider that deals with Commerce Clause interpretation. By implementing a statutory version of the DCC, Congress would help to legitimize the Supreme Court's jurisprudence in this field and acknowledge the importance of the DCC in guaranteeing commercial harmony throughout the union.

In effect, Congress would be saying that the country's internal lanes of trade should be free and unfettered of protectionist or discriminatory regulations. Professor DeBow, who has developed such a legislative solution to accomplish this objective, concludes that:

> Congress should legislate a version of the DCC in order to guard against interstate trade wars, while simultaneously eliminating the uncertainty caused by some aspects of current DCC doctrine.... A codification of the DCC should require simply that state laws not discriminate against out-of-state businesses. Congress clearly has the authority to enact such language under the current understanding of its commerce power, and it seems likely that Congress would have the authority to do so even under the original understanding of the Commerce Clause or, perhaps, the Privileges and Immunities Clause.[31]

In other words, a legislative version of the DCC would act, in effect, as a domestic free trade statute that clarifies and strengthens the intentions behind the Commerce Clause.

### Strategy #4: Congress should enact anti-delegation legislation that ends the unconstitutional transfer of lawmaking authority from the legislative to the executive branch.

Congress should curtail and strictly limit the powers of cabinet departments and independent regulatory agencies to preempt state and local governments. Executive branch cabinet agencies and independent regulatory agencies have amassed a disturbing amount of power. So long as federal agencies and officials enjoy the broad discretionary powers that are reserved under the Constitution to the elected lawmakers of the legislative branch, they will continue to ignore or flout federalism statutes and protections.

This should not be surprising; regulators exist to regulate. They cannot be expected either to surrender power voluntarily or to stop imposing expensive, preemptive rules because it would not be in their best interest to do so. Nor should anyone mistake who is to blame for such activity: If Congress had not delegated broad discretionary powers to these agencies in the first place, and if it would start to take back the authority that it delegated unconstitutionally in the past, then the power of federal regulatory agencies and administrative offices would be strictly curtailed and diminished.

Unfortunately, from the time of the New Deal, Congress has justified such delegation as allowing for more scientific lawmaking by administrative experts. Granting regulators rulemaking authority was seen as a way to conserve valuable time for Congress to debate the heart of the issues, leaving executive branch agencies to fill in the fine print. Although the Supreme Court struck down earlier efforts by Congress to delegate authority to these agencies,[32] the judicial branch eventually joined a

31. *Ibid.*, pp. 78–79.

silent conspiracy to undermine the Constitution and accepted the agencies' rationales for delegation.[33]

Constitutional scholars have found these justifications for delegation wholly deficient.[34] The foremost criticism is that delegation conflicts with the Constitution. The language of Article I, Section 1, is clear: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." Nowhere does the Constitution allow for the exercise of lawmaking powers or functions by non-elected executive branch administrators and bureaucrats.

Delegation also violates the principle of separation of powers among the branches of government. It cannot be regarded as a better method of serving the public because it represents a system of governance that is both unaccountable and undemocratic. As Senator Sam Brownback (R–KS) notes:

> [P]erhaps the most pernicious aspect of delegation is that voters can no longer hold government accountable. Originally designed to be the most accountable branch of government, Congress has grown increasingly irresponsible. The fundamental link between voter and lawmaker has been severed. A handful of broadly written laws has spawned a virtual alphabet soup of government agencies and an overwhelming regulatory burden that undermines the very idea of representative government.[35]

This led Cato Institute scholars David Schoenbrod and Jerry Taylor to refer to the practice of delegation as the "corrosive agent of democracy" and to argue that "delegation does not help secure 'good government'; it helps destroy it."[36]

Congressional action to end the unconstitutional practice of delegating authority to administrative agencies would have important implications for federalism. Such a bold move would minimize the preemptive powers of the federal government and hold elected Members of Congress accountable for their actions. With Congress no longer able to blame regulatory agencies and administrators for government overreach, Washington's ability to interfere in state and local matters would be greatly diminished.

Legislation was considered in the 105th Congress that would have advanced this anti-delegation agenda. The Congressional Responsibility Act of 1997, introduced in the Senate (S. 433) by Senator Brownback and in the House (H.R. 1036) by Representative J. D. Hayworth (R–AZ), garnered wide bipartisan support but was not passed by either house. If implemented, anti-delegation efforts like the CRA

32. See, in particular, *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935).

33. The Supreme Court decision in *J. W. Hampton, Jr., & Co.* v. *U.S.*, 276 U.S. 394 (1928), is widely cited as a watershed moment in the history of anti-delegation, because from that case forward the Court legitimized and accepted congressional efforts to delegate power to administrative bodies. Prior to *J. W. Hampton,* the Court had held firmly to a doctrine of non-delegation of congressional authority to administrative agencies.

34. Theodore Lowi has done pioneering work in this field. See Theodore J. Lowi, "Liberal Jurisprudence: Policy Without Law," *The End of Liberalism: The Second Republic of the United States* (New York, NY: W. W. Norton & Company, 1969, 1979), pp. 92–126. More recently, a study by New York Law School professor David Schoenbrod has been instrumental in calling attention to the deficiencies of delegation. See David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (New Haven, CT: Yale University Press, 1993).

35. Senator Sam Brownback, prepared statement on the Congressional Responsibility Act of 1997, presented before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, September 25, 1997; available on the Internet at *http://www.house.gov/judiciary/5128.htm*.

36. David Schoenbrod and Jerry Taylor, "The Delegation of Legislative Powers," *Cato Handbook for Congress, 105th Congress* (Washington, DC: Cato Institute, 1997), p. 47.

would represent a significant step back toward accountable, limited government, ending what Representative Hayworth—referring specifically to the practice of delegation—calls "regulation without representation."[37]

## LONG-TERM FEDERALISM REFORM STRATEGIES

Certain federalism reforms will require more time, consideration, and debate than those listed above; they should be considered as long-term agenda items. The three reforms that follow should be discussed in Congress, even though it is unrealistic to expect action on these items in the current session.

### Strategy #5: Congress should give the states the ability to propose amendments to the Constitution on their own, without having to call for a constitutional convention.

This reform would rectify the imbalance between the states and the federal government regarding how amendments to the Constitution are proposed.

Article V of the Constitution allows Members of Congress to propose amendments to the Constitution in much the same way they introduce bills. But under Article V, the states can introduce amendments to the Constitution only by convening a formal constitutional convention. Perhaps the Founders thought this would be easy enough for the states to do; but over time, the states have come to view the convening of a constitutional convention as a radical step that might open the door to more harm than good. Therefore, states appear reluctant and unable to muster the support needed to call such a convention. Thus, the states rely largely on Congress to introduce constitutional amendments.

This constitutional imbalance could be easily remedied if the states simply were given the ability to propose amendments to the Constitution without having to call a formal convention. The states could, by a two-thirds majority vote, propose amendments to the Constitution. Congress then would be able to accept or reject these amendments by a similar two-thirds vote.

To change the Constitution in this manner and place the states on equal footing with the federal government, Congress would have to propose, of course, a new amendment to the Constitution. The states should work with Members of Congress to devise such a mechanism and ensure that the states have this federalism protection in the future.

### Strategy #6: Congress should allow the states to hold their representatives more accountable by giving them the right to convene their congressional delegations when they feel egregious federal mandates and policies are being imposed.

This type of reform would rectify the accountability problem created by the adoption of the Seventeenth Amendment in 1913, which stripped the states of their power to elect Senators directly to Congress.

After the adoption of the Seventeenth Amendment, Americans received the right to elect the Senators of their state through popular vote. Although this move can be considered an important victory for direct democracy, it also can be seen as a setback of sorts for the citizens of individual states. Prior to the adoption of the Seventeenth Amendment, Senators had been appointed by state legislatures, as mandated in Article I, Section 3, of the Constitution.

In certain ways, this system actually held Senators *more* accountable to the people of the individual states because Senators were appointed by members of the state legislatures, which gave elected members of these legislatures a more controlling hand or voice in the making of national policy. Essentially, the Founders opted for

37. Representative J. D. Hayworth, prepared statement on the Congressional Responsibility Act of 1997, presented before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, September 25, 1997; available on the Internet at *http://www.house.gov/hayworth/testimony/1036.htm*.

this system to ensure that at least one branch of the federal government would be held directly accountable to the state legislatures, thereby giving the states an important check on federal power. "As a result [of the adoption of the Seventeenth Amendment]," summarize former Heritage Foundation analysts Douglas Seay and Wesley Smith, "the states [lost] their role in national policymaking and their ability to carry out their constitutional role of checking and balancing the national government."[38]

Coupled with the adoption that year of the Sixteenth Amendment, which removed the restrictions on Congress's ability to tax the income of all Americans, two important impediments to the growth of national power were removed in very short order. Since 1913, the federal government has had an almost unlimited power to tax and spend, while the states have had little say in the ways in which these decisions are made, thanks to the adoption of the Seventeenth Amendment.

Although some political scientists still question the wisdom of the Seventeenth Amendment, most Americans have become accustomed to electing their political representatives directly, and they are unlikely to want to surrender this right. Optimally, however, a system or mechanism could be created that preserves the right of the citizens to elect their federal officials directly but allows them to demand more accountability of these federal officers to the interests of their states and the state legislatures at the same time.

One such mechanism might take the form of an annual or semi-annual meeting of state and federal representatives within the state capitals to discuss federal policies and programs that might affect the states. A legislature could request that the state's entire congressional delegation convene for such a meeting, or it could request that just a few members represent their state delegation of U.S. Senators and Representatives. State legislators then would be able to confront the federal representatives of their state and ask them to justify programs or regulations that have a potential impact on their state. Consequently, state officials could communicate their concerns about various federal initiatives before they have been acted on or implemented.

Alternately, or in addition to this plan, state legislatures simply could demand the right to convene their federal representatives on an ad hoc basis whenever they felt particularly egregious federal mandates or policies were being imposed on them that demand immediate attention. Either way, such mechanisms should be implemented to give the states the ability to act as a substantive check on national power, to regain a voice in federal matters, and to hold federal representatives accountable to the interests of their state.

### Strategy #7: Congress should give the states a supermajority veto power over federal legislation or regulation that preempts their authority, or that requires them to administer federal programs or rules.

If the reforms mentioned above were implemented but federal officials still found it easy to put in place rules and regulations that run contrary to the true spirit and intent of the Constitution and violate the sovereignty of the states and the people, then a more radical reform option could come into consideration that would ensure the Founders' original balance of powers was restored and protected.

Many state and local groups and representatives advocate the adoption of a "states' rights veto" power that would force Congress to reconsider particularly egregious or potentially unconstitutional acts. This states' rights veto power would require that a supermajority (that is, two-thirds) of the states pass resolutions calling for the repeal of a specific federal statute or regulation that they collectively feel has been imposed unjustly on them. The states would have three to five years to consider passage of the veto.[39]

38. Douglas Seay and Wesley Smith, "Federalism," in Stuart M. Butler and Kim R. Homes, eds., *Issues '96: The Candidate's Briefing Book* (Washington, DC: The Heritage Foundation, 1996), p. 432.

More important, however, is that, even if such a mechanism were adopted, it must have certain limits to ensure that some important powers and responsibilities guaranteed to the federal government by the Constitution are not sacrificed. For example, the states should not receive the right to use such a veto power to interfere with the federal government's foreign policy or national security decisions. The Framers of the Constitution unambiguously entrust such responsibilities to the federal government because of the importance of having a unified voice and policy in the field of global affairs and diplomacy.

This is also the case with regard to treaty-making with foreign countries in general. The Constitution prohibits the states from making treaties with foreign countries, for fear of a balkanization within the American Republic. Not only does this mean the federal government has the exclusive right to negotiate with foreign governments on behalf of all Americans in foreign policy matters, but it means also that the federal government is the only entity that has the constitutional authority to enter into trade agreements and commercial treaties with foreign countries. Therefore, if a states' rights veto mechanism were put into place, it would be vital that these sorts of exceptions—which have solid constitutional and practical justifications—be included in the measure so that the states could not overrule federal officials on sensitive matters.

## OTHER REFORMS TO HELP TO RESTORE LIMITED, CONSTITUTIONAL GOVERNMENT

The strategies above are only a few of the reforms that could be pursued in upcoming sessions of Congress to restore the proper balance of powers between the states and the federal government. Other important reforms could be implemented to ensure that constitutional government is protected and that America's original federalist system is reinvigorated and honored.[40] For example, Congress should:

- Devise a package of devolution options to begin returning programs and powers to the states that never belonged to the federal government in the first place, such as educational, infrastructural, and most environmental controls programs.
- Impose term limits on federal officeholders to encourage greater turnover, which, in turn, would present opportunities for fresh state and local officials to represent their interests in Congress.
- Enact a simpler, fairer tax system, such as a flat tax, to impose firm limits on the federal government's ability to usurp the resources of the states and the people.
- Pass a balanced budget amendment to rein in federal spending and restrict the ability of the federal government to create expensive new programs and entitlements that encroach on traditional state and local responsibilities.
- Enact regulatory reform that requires regulatory decisions to be based on such common-sense principles as sound science and cost-benefit analyses. Regulators should be held accountable, for example, through strong judicial review mechanisms and annual reports to the public, as part of the federal budget process, on the rules they issue; how much they will spend to issue those rules; and their expected benefits and costs.

## CONCLUSION

As America approaches the 21st century and gets closer to celebrating its 225th year of

39. For more information, see Cooper and Thompson, "The Tenth Amendment: The Promise of Liberty," pp. 5–6.

40. For many other creative ways to rein in federal power, return functions to the states, and avoid any political pitfalls in the process, see Douglas Seay and Robert E. Moffit, "Transferring Functions to the States," in Stuart M. Butler and Kim R. Holmes, eds., *Mandate for Leadership IV: Turning Ideas Into Actions* (Washington, DC: The Heritage Foundation, 1997), pp. 87–127. See also Seay and Smith, "Federalism," *op. cit.*

existence, the time seems ripe for a fundamental reassessment of the current status of federalism in the American Republic. Clearly, this past century has not been kind to the Founders' original model of constitutional federalism, as federal policymakers and jurists have contorted various words and phrases of the Constitution in an effort to justify the expansion of federal power relative to the states and the people.

This is very unfortunate because federalism remains the most appropriate system of political organization for such a vibrant and diverse country as the United States. "Federalism reform" should be viewed as a quintessential "good government" issue. The reforms discussed in this paper should be undertaken as part of an ongoing effort to restore and reinvigorate sound constitutional government. More important, any reform efforts should proceed in a cooperative, non-partisan manner because federalism is neither a Democrat nor a Republican issue; rather, it is an American issue that should be placed at the top of the agenda of the leadership of both parties because it is concerned with matters that lie at the very nature of the republic.

If policymakers profess to believe in the value of creative state and local experimentation, vigorous interstate commerce, competition, and the promises of liberty that come with checks and balances on government, then they should take the necessary steps to reinvigorate and protect what many historians, constitutional scholars, and Americans believe is the Founding Fathers' most important contribution to modern civilization.

*—Adam D. Thierer is Alex C. Walker Fellow in Economic Policy at The Heritage Foundation.*

# APPENDIX: EXECUTIVE ORDER NO. 12612 ON "FEDERALISM"

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to restore the division of government responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows:

Section 1: *Definitions.* For purposes of this Order:

(a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

(b) "State" or "States" refer to the States of the United States of America, individually or collectively, and where relevant, to State governments, including units of local government and other political subdivisions established by the States.

Section 2: *Fundamental Federalism Principles.* In formulating and implementing policies that have federalism implications, Executive departments and agencies shall be guided by the following fundamental federalism principles:

(a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.

(b) The people and the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

(c) The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.

(d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

(e) In most areas of government concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people, and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies."

(f) The nature of our Constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

(g) Acts of the national government—whether legislative, executive, or judicial in nature —that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of—and should encourage opportunities for—individuals, families, neighborhoods, local government, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

Section 3: *Federalism Policymaking Criteria.* In addition to the fundamental federalism principles set forth in section 2, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There should be strict adherence to constitutional principles. Executive departments and agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of the States, and should carefully assess the necessity for such action. To the extent practicable, the States should be consulted before any such action is implemented. Executive Order No. 12372 ("Intergovernmental Review of Federal Programs") remains in effect for the programs and activities to which it is applicable.

(b) Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. For purposes of this Order:

(1) It is important to recognize the distinction between problems of a national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them).

(2) Constitutional authority for federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States.

(c) With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Federal oversight of State administration is neither necessary or desirable.

(d) When undertaking to formulate and implement policies that have federalism implications, Executive departments and agencies shall:

(1) Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States.

(2) Refrain, to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards.

(3) When national standards are required, consult with appropriate officials and organizations representing the States in developing those standards.

Section 4: *Special Requirements for Preemption.*

(a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a federal statute does not preempt State law (as addressed in subsection [a] of this section), Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and federally protected interests within its area of regulatory responsibility, the department or agency shall consult to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

(e) When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings.

Section 5: *Special Requirement for Legislative Proposals.* Executive departments and agencies shall not submit to the Congress legislation that would:

(a ) Directly regulate the States in ways that would interfere with functions essential to the States' separate and independent existence or operate to directly displace the States' freedom to structure integral operations in areas of traditional government functions;

(b) Attach to Federal grants conditions that are not directly related to the purpose of the grant; or,

(c) Preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

Section 6: *Agency Implementation.*

(a) The head of each Executive department and agency shall designate an official to be responsible for ensuring the implementation of this Order.

(b) In addition to whatever other actions the designated official may take to ensure implementation of this Order, the designated official shall determine which proposed policies have sufficient federalism implications to warrant the preparation of a Federalism Assessment. With respect to each such policy for which an affirmative determination is made, a Federalism Assessment, as described in subsection [c] of this section, shall be prepared. The department or agency head shall consider any such Assessment in all decisions involved in promulgating and implementing the policy.

(c) Each Federalism Assessment shall accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A–19, and shall:

(1) Contain the designated official's certification that the policy has been assessed in light of the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(2) Identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(3) Identify the extent to which the policy imposes additional costs or burdens on the States, including the likely source of funding for the States and the ability of the States to fulfill the purposes of the policy; and

(4) Identify the extent to which the policy would affect the States' ability to discharge traditional State government functions, or other aspects of State sovereignty.

Section 7: *Government-wide Federalism Coordination and Review.*

(a) In implementing Executive Order Nos. 12291 and 12498 and OMB Circular No. A–19, the Office of Management and Budget, to the extent permitted by law and consistent with the provisions of those authorities, shall take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order.

(b) In submissions to the Office of Management and Budget pursuant to Executive Order No. 12291 and OMB Circular No. A–19, Executive departments and agencies shall identify proposed regulatory and statutory provisions that have significant federalism implications and shall address any substantial federalism concerns. Where the departments or agencies deem it appropriate, substantial federalism concerns should also be addressed in notices of proposed rule-making and messages transmitting legislative proposals to Congress.

Section 8: *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Ronald Reagan
The White House
October 26, 1987