

# **Tense Commandments: Federal Prescriptions and City Problems**

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## Introduction

Each year the United States government publishes a report called *The State of the Cities*. The final year of the 20<sup>th</sup> Century was a very good one. Thanks to “the Clinton-Gore economic policies and effective empowerment agenda,” the-end-of-the millennium edition proclaimed, “most cities are showing clear signs of revitalization and renewal.”<sup>1</sup> Yet, the authors conceded, even in these times of great prosperity, the nation’s central cities still faced “challenges.”

Challenges? During the last decade, dozens of large cities— including such major centers as Baltimore, Cincinnati, Cleveland, Milwaukee, Philadelphia, Pittsburgh, St. Louis, and Washington, D.C.--continued to shed inhabitants. Sprawling suburban subdivisions still accounted for more than three-quarters of all new metropolitan growth. Although many other cities finally managed to regain population in the 1990s, few kept pace with the growth of their suburbs.<sup>2</sup>

Differences in employment growth between the metropolitan core and its outlying communities remained huge as well. Suburbs continued to capture the bulk of new jobs. One study of 92 metropolitan areas found that, though 56 percent of their central cities began netting some increase in private sector jobs between 1993 and 1996, 25 percent did not---and fully 82 percent of all the cities continued to record a declining share of private employment in relation to the rest of their respective regions.<sup>3</sup>

In absolute terms, the enclaves of poverty left behind in central cities by the dispersal of people and jobs to distant peripheries shrank in recent years.<sup>4</sup> This was no small accomplishment,

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<sup>1</sup> U.S. Department of Housing and Urban Development, *The State of the Cities 1999: Third Annual Report* (GPO, 1999).

<sup>2</sup> See Bruce Katz and Jennifer Bradley, “Divided We Sprawl,” *Atlantic Monthly*, December 1999.

<sup>3</sup> The estimate is based on an analysis of 92 large metropolitan areas in John Brennan and Edward W. Hill, *Where Are the Jobs? Cities, Suburbs, and the Competition for Employment* (Brookings Center for Urban and Metropolitan Policy, November 1999), p. 1.

<sup>4</sup> While poverty has declined in central cities in absolute terms, urban rates of poverty are still twice as high as suburban poverty rates, 18.8 percent compared to 9 percent in 1997. In 1989 suburban median income was 58 percent higher than the median income in central cities. By 1996 the gap had widened to 67

but it scarcely changed the fact that poor people remained a large percentage of the resident populations of many cities. At long last the strain of sustaining these dependents has diminished almost everywhere, including urban counties where dependency declined by more than 40 percent between 1994 and 1999.<sup>5</sup> But it is no less true that cities still are typically the locus of the heaviest caseloads in comparison with surrounding communities. Philadelphia County has 12 percent of Pennsylvania's people, but 47 percent of all Pennsylvanians on welfare. Baltimore accounted for 58 percent of Maryland's welfare cases. Nearly two-thirds of all welfare recipients in the Washington metropolitan area were clustered inside the District of Columbia.<sup>6</sup>

At long last, the depopulation, impoverishment and decay of much of urban America has abated. Whether the decline has been durably halted, let alone lastingly reversed, is another matter. If the national economy soon does not resume a robust rate of growth, the apparent revival of U.S. cities will be set back. In any event, when choosing where to live and work, far more Americans today still locate outside old cities than inside them. If anything, save for anomalies like New York, the margin of disparity generally continues to widen, not narrow.

Most of the underlying causes of this country's urban predicament have long been familiar. Among them are disproportionate poverty--hence crime and blight--in the inner cities, some lingering barriers to racial assimilation in suburbs, a cultural preference for the suburban way of life, stiff city tax rates heightened by the costs of supporting large unionized bureaucracies, the unsatisfactory public services they deliver, and so on.<sup>7</sup> Less recognized is the distinct possibility that certain policies fashioned, but not adequately funded, by the federal government---particularly the manifold rules and rulings its lawmakers, bureaucrats, and judges

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percent. See Bruce Katz, "Enough of the Small Stuff! Toward a New Urban Agenda," *Brookings Review*, vol. 18, no. 3 (Summer 2000), p. 8. The proportion of the nation's welfare families that live in the 89 urban counties that contain the 100 largest U.S. cities swelled to 58 percent between 1994 and 1999. Bruce Katz and Katherine Allen, "Cities Matter: Shifting the Focus of Welfare Reform," *Brookings Review*, vol. 19, no. 3 (Summer 2001), p. 31.

<sup>5</sup> "Mean Streets," *The Economist*, July 22, 2000, p. 31.

<sup>6</sup> Brookings Center for Urban and Metropolitan Policy, *A Region Divided: The State of Growth in Greater Washington, D.C.* (Brookings, 1999), p. 3.

impose--have also disadvantaged many cities, complicating their ability to attract residents and businesses.

Of late, the weight of this “mandate millstone” (as a mayor of New York called it years ago) appears to have lifted somewhat, thanks in part to a spell of self-restraint by policymakers in Washington, but also because municipal economies mostly fared better in recent years than in earlier decades, enabling local governments to shoulder more of the burden.<sup>8</sup> Whether the relief has been substantial enough to suffice for the years to come--and whether more of it would have left the cities in an even stronger position today—remain open questions.

The following paper begins with a general glance at trends in both the revenues and the regulations that the national government directs at cities. Next, the paper delineates why some of the recent cost-shifting under centralized standards makes sense, but also how a good deal of it has exceeded legitimate bounds. In two subsequent sections, the essay provides accounts of federally mandated activities that have encumbered municipal governments in realms such as labor relations, environmental management, disabilities policy, and school administration. The paper then offers explanations for the encumbrances. The concluding pages assess the extent and likely implications of recent federal regulatory retrenchment.

### **“Shift and Shaft” Federalism**

City governments in the United States, unlike municipal administrations in most of Europe, must largely support themselves; they collect on average approximately two-thirds of their revenues from local sources.<sup>9</sup> German localities, by comparison, derive less than one-third

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<sup>7</sup> On the latter considerations, see for example Pietro S. Nivola, “Apocalypse Now? Whither the Urban *Polity*, vol. 14, no. 3 (Spring 1982), pp. 371-394.

<sup>8</sup> Edward I. Koch, “The Mandate Millstone,” *The Public Interest*, no. 61 (Fall 1980).

<sup>9</sup> Dennis R. Judd, *The Politics of American Cities: Private Power and Public Policy*, 3<sup>rd</sup> ed. (Scott, Foresman, 1988), p. 201.

of their income from local revenues.<sup>10</sup> Britain's local councils are now responsible for as little as a fifth of their budgets for basic functions.<sup>11</sup> The locally-sourced share is even less in the Netherlands and, until very recently, Italy.<sup>12</sup>

In principle, the relative self-sufficiency of local government in America is a virtue; municipal taxpayers ought to pay for the essential services they use. But in practice, these taxpayers are also being asked to purchase plenty of other costly projects, many of which are prescribed by federal law. A handful of national rules bore down on local government before 1965. Today there are hundreds that claim substantial shares of municipal resources.<sup>13</sup> Meanwhile, federal aid to large cities declined sharply in constant dollars between 1980 and 1996, the last year for which reliable data are currently available (Figure 1).<sup>14</sup> To be sure, support from state governments and increases in locally-collected revenues helped offset the federal reductions, but at least in large Frost-Belt cities through 1996, the local increases were not large—and perhaps in some cases, not large enough (Figure 2). Thus, a group of prominent mayors continued to complain that the federal government's unfunded mandates “destabilize” local budgets.<sup>15</sup>

Federally mandated expenditures are especially burdensome to cities that are fiscally frail. But even in healthier cities, the sheer volume of added commitments may compel municipal officials to forego further rounds of badly needed tax reductions.<sup>16</sup> And finances

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<sup>10</sup> See Hartmut Haubermann, “The Relationship between Local and Federal Government Policy in the Federal Republic of Germany,” in Chris Pickvance and Edmond Preteceille, eds., *State Restructuring and Local Power: A Comparative Perspective* (London: Pinter Publishers, 1991), pp. 92, 93, 99.

<sup>11</sup> “Local Difficulties,” *The Economist*, May 9, 1998, p. 55.

<sup>12</sup> There was a good deal of fiscal decentralization in Italy in the 1990s. By 1998, Milan, for example, had become much like an American big city government—relying on local sources for more than two-thirds of its overall revenues. Comune di Milano, *Relazione al Bilancio di Previsione, 1999*, p. 25.

<sup>13</sup> Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Policymaker's Snapshot of the Federal Regulatory State, 2000 Edition* (Washington, D.C.: Competitive Enterprise Institute, April 2000).

<sup>14</sup> On the withdrawal that began in the 1980s, see Demetrios Caraley, “Washington Abandons the Cities,” *Political Science Quarterly*, vol. 107, no. 1 (1992).

<sup>15</sup> Stephen Goldsmith and others, *Markets Not Mandates: A Request to Congress for a New Contract with America's Cities* (Washington, D.C.: Cato Institute, 1998), p. 1.

<sup>16</sup> New York City, where as much as half of the city's budget was spoken for by federal and state mandates, provides a stark illustration. Its overall tax rates have been so high, further increases were likely to yield

aside, some mandates impinge extensively upon local administration of everyday services, tying the hands of managers and at times thwarting improvements that the beleaguered taxpayers in cities consider past due.

### **The Case for Federalization**

It would be nice if America's municipal governments had a consistent history of good conduct. In reality, much has gone wrong---at times so wrong, any fair observer would have welcomed, or at least understood, an extensive federal usurpation of local powers. Think about the following episodes from various cities.

On the evening of May 31, 1921, a lynch mob in Tulsa, Oklahoma, descended on the municipal courthouse in search of a black man who had been charged with (and later acquitted of) raping a white woman.<sup>17</sup> After an altercation at the courthouse, the mob invaded the city's black neighborhood, destroying 35 square blocks and murdering hundreds of residents. How did the city respond as the bloodbath unfolded? The Tulsa police department deputized large numbers of white vigilantes and, according to court records at the time, instructed them to "go out and kill."

In 1975, a strange thing happened: New York, the biggest city in the world's richest nation, neared bankruptcy. The sources of this fiscal crisis were complex, but at least one root cause was unmistakable: New York had spent beyond its means on redistributive social services.<sup>18</sup> This municipal welfare state could no longer be sustained by its vulnerable local tax base.

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diminishing returns. See Andrew Haughwout and others, "Local Revenue Hills: A General Equilibrium Specification with Evidence from Four U.S. Cities," *National Bureau of Economic Research, Working Paper 7603* (Cambridge, Mass.: NBER, March 2000). Mayor Rudolph Giuliani managed to scale back a few of the city's manifold taxes (the commercial rent tax, for instance), but others, including the personal income tax, remained higher than when Mayor Ed Koch left office at the end of 1989.

<sup>17</sup> For a full account of the murderous Tulsa race riot, see Brent Staples, "Unearthing a Riot," *New York Times Magazine*, December 19, 1999, pp. 64-69.

<sup>18</sup> See Paul E. Peterson, *City Limits* (University of Chicago Press, 1981), chaps. 10-11.

More recently, the Atlanta metropolitan area has been experiencing a buildup of air pollution.<sup>19</sup> Along the Eastern seaboard, no metropolis belches more smog than Atlanta. It has one of the dirtiest coal-fired power plants in the country, and emission levels of nitrous oxides from motor vehicles have regularly exceeded the U.S. Environmental Protection Agency's caps and projections. The local political establishment, however, has been slow to act. While Draconian steps such as ordering a four-day workweek were rightly rejected, so were more modest notions--like charging for parking spaces, and converting to cleaner fuels. The latter idea, which implied a slight increase in energy prices, caused consternation in the Georgia legislature.

In 1989, a well-known journalist, staunchly committed to public education, described a problem his son experienced in a classroom of the public school system of the city in which they resided. "One of my children," the journalist recounted, "spent a year with an elementary school science teacher who had been shifted from teaching English. She was fully qualified to teach, since she had her credentials, but she knew less about science than most of the children did." One of the things this qualified science teacher didn't know was how the moon revolved around the earth.<sup>20</sup>

### *The Trouble with Localism*

These derelictions range from the barbaric to the regrettable, the irresponsible, and the merely ridiculous. What they imply, though, is that in the absence of national intervention, some self-governed communities have proven capable of sinking below the most elementary regard for public competency, environmental safeguards, financial prudence, or even basic human rights.

The anecdote about the public school teacher who did not understand the orbit of the moon was hardly unique. Reports of this sort, or worse, are sufficiently common to stir calls for

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<sup>19</sup> See David Goldberg, "Heads Up, Atlanta: Cities Are Scrambling to Comply with the Clean Air Act's Planning, vol. 64 (July 1998).

national education standards. Nor was the Tulsa race riot of 1921 an isolated incident. In a wave of hysteria about rumored rapes of whites by blacks in the 1920s, racial violence erupted in cities across the country. The federal government may not have had at its disposal adequate statutory powers to quell these atrocities, or even to prosecute their perpetrators. Would that it had.

In the case of Atlanta's polluted atmosphere, the argument for national "hammers" to compel an end to the local policy paralysis went beyond a need to protect the region's residents from health risks. Air pollution crosses boundaries. Concentrations of ozone can drift across thousands of square miles. One place's foul air pollutes another's water.<sup>21</sup> Why should people living in other jurisdictions have to inhale or swallow the poisons spewing from a neighboring urban area whose citizens, year after year, fail to curtail their wide-ranging effluents?

As Madison warned in *Federalist No. 10*, the inertia of local government has to do, at least in part, with the ability of entrenched interests to capture small polities: How can municipal school systems reinvent themselves when their administrations remain in the grip of obstructive teachers' unions? Will a one-company town, whose factory is the local economy's mainstay but also its worst polluter, put in a fix? In addition, localism begets free-loading. When some jurisdictions serve as welfare magnets, others are tempted to lower their levels of benefits below an acceptable minimum. A city or state whose contaminated air or water flows downstream to neighboring cities or states has little incentive to control the spillover for their sake. Indeed, localities competing for business investment and taxable income might reciprocally "dumb

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Clearly, if interjurisdictional competition and externalities arbitrarily enrich certain communities at the expense of others or else draw too many into a "race to the bottom," or if local

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<sup>20</sup> James Fallows, *More Like Us* (Houghton Mifflin, 1989), p. 169

<sup>21</sup> Nearly all the PCBs flowing into the Great Lakes originate from the air. An estimated quarter of the nitrogen in the Chesapeake Bay derives from polluted air drifting from at least four neighboring states. Mary Graham, *The Morning After Earth Day: Practical Environmental Politics* (Brookings, 1999), p. 80.

<sup>22</sup> See, for example, Susan Rose-Ackerman, "Does Federalism Matter? Choice in a Federal Republic," *Journal of Political Economy*, vol. 49, no. 1 (1981).



mismanagement is so endemic it corrupts the commonweal, or mischievous local factions egregiously violate the fundamental freedoms of citizens, the solution seems plain: “extend the sphere” of governance, as Madison recommended, shifting control from the “smaller”

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### *Mandating Without Money*

In the past half-century, most of this remedial enlargement of the national ambit has been, quite literally, purchased with federal dollars. As of 1990, nearly \$120 billion in grants to state and local governments were being disbursed to patch alleged shortcomings of local policies in transportation, environmental protection, economic development, job training, education, public safety, and much more.<sup>24</sup> Over recent decades, however, the manner in which Washington exerted control underwent a change. As the national government’s deficits grew and Congress’s capacity to underwrite domestic programs bumped against budget caps, there developed a tendency to regulate local governments more while aiding them less. In 1980, approximately two dozen federal laws had reflected this pattern. Eleven years later, Congress had more than doubled the body of statutes that dictated, but scarcely paid for, additional undertakings.<sup>25</sup>

From the local standpoint, of course, this arrangement has seemed unfair and irrational. From the perspective of policymakers at the national level, on the other hand, there was method in the madness. Arguably, before the retrenchment of the 1980s, federal grant-giving had gotten out of control. Between 1960 and 1980, expenditures increased one and a half times as fast as the growth of the economy. Funds were being tossed hither and yon, sponsoring countless questionable “community development” needs---like the construction of a tennis complex in an

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<sup>23</sup> James Madison, “The Federalist No. 10,” in *The Federalist* (Random House, 1937), pp. 61-62.

<sup>24</sup> *Budget of the United States Government, Fiscal Year 1993*, pp. 164-165.

<sup>25</sup> On the expansion of regulatory federalism, see Timothy Conlan, *From New Federalism to Devolution: Twenty-Five Years of Intergovernmental Reform* (Brookings, 1998), pp. 204-206.

affluent section of Little Rock, Arkansas, and the expansion of a municipal golf course in Alhambra, California.<sup>26</sup> Gradual curtailment of such waste after 1980 was long overdue, regardless of whether a less profligate government might try to extend its influence by off-budget means.

Indeed, as the federal government applied the brakes to its discretionary spending, and eventually managed to bring a bloated budget into balance in the 1990s, inflation and interest rates fell, and the national economy surged. Federal austerity yielded by way of economic growth a large net gain for the nation, and for the treasuries of many states and municipalities as well. With plenty of states and quite a few cities now running surpluses, there was something to be said for devolving to them more chores and expenses.

Up to a point, passing responsibilities to local authorities is fiscally prudent, not only for the federal fisc, but for society.<sup>27</sup> If local public works are mostly funded by Washington, their costs are harder to contain. States, cities and counties do not print money; to spend, they have to tax. Local resistance to taxation encourages cost-consciousness.<sup>28</sup> Naturally, local politicians wish Congress would simply shovel them cash and ask no questions. What the same politicians do not always acknowledge is that when Congress declines to write blank checks, and instead subjects state and local governments to uncompensated demands, some of the demands actually conform to local preferences.<sup>29</sup> Hence, while the locals are quick to say that, at a minimum, they should be paid back for the cost of meeting federal requirements, an indiscriminate policy of reimbursements would pose a moral hazard. States and municipalities that had been poised to

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<sup>26</sup> Bernard J. Frieden and Marshall Kaplan, *The Politics of Neglect: Urban Aid from Model Cities to Revenue Sharing* (MIT Press, 1977).

<sup>27</sup> On how devolution has been a cost-controlling mechanism for social programs such as Medicaid, see James R. Tallon, Jr. and Lawrence D. Brown, "Who Gets What? Devolution of Eligibility and Benefits in Medicaid," in Frank T. Thompson and John J. DiIulio, Jr., *Medicaid and Devolution: A View from the States* (Brookings, 1998), p. 237.

<sup>28</sup> See generally, on the efficiency gains from interjurisdictional competition within federal systems, Michael S. Greve, *Real Federalism* (Washington, D.C.: AEI Press, 1999). For the leading analysis of its disadvantages, see Paul E. Peterson, *The Price of Federalism* (Brookings, 1995).

<sup>29</sup> Paul C. Light, *The True Size of Government* (Brookings, 1999), p. 32.

take desired actions anyhow would acquire an excuse to stop, sit back, and wait for federal payments.

Nor should taxpayers from afar be expected to indulge particular local governments that make a mess. The rotting garbage at New York City's primary municipal dump discharges into the tri-state region not only one million gallons of polluted water each day, but also large quantities of carbon dioxide and methane gases, known contributors to global warming. People residing in Oregon or Oklahoma--or, for that matter, New Jersey and Connecticut--should not be taxed to detoxify the garbage New Yorkers generate. Efficiency and equity require that the polluters pay. Most federal environmental regulations operate on that logical principle.

In sum, there are times when the union, in Madisonian terms, has reason to take charge of local affairs---and can legitimately do so even without significantly indemnifying local governments.

### **The Yellow Line**

But there also can be too much of a good thing.

Consider a small sample of the municipal functions now touched by national regulations. Federal law draws a line, typically bright yellow, behind which passengers ("standees") are forbidden to stand when they ride city buses. Federal law has a say in how firemen should be deployed when fighting a fire. Federal law has influenced decisions about how long some unruly students in public schools can be suspended. Federal law has a bearing on how much a city pays for everything from snow removal services to contracts for sidewalk ramps for persons with physical disabilities. Federal law can affect whether the recruits for a police department are physically fit. Whether your child can walk to school or must commute by bus may well depend on federal law. The degree to which a city's vacant industrial land parcels have to be cleared of toxic waste is dictated by federal law. The salary your child's teacher is paid may be affected by

federal law that reaches well beyond the national minimum wage. Federal law addresses what protective measures must be taken to secure municipal landfills, school buildings that contain asbestos, and housing units with lead paint. Federal law determines how a city has to purify its drinking water.

None of these examples, it should be stressed, are flights of fancy. What can be called the yellow-line rule is a detailed stipulation, courtesy of the U.S. Department of Transportation (DOT).<sup>30</sup> The instructions for positioning firefighters appear in the U.S. Occupational Safety and Health Administration's (OSHA) so-called "2-in, 2-out" rule.<sup>31</sup> Beginning in the 1960s, a number of federal court decisions greatly expanded the rights of students to appeal school suspensions. Despite more modulated opinions by the Supreme Court in later years, few teachers or principals can ignore the legal minefield they enter when they contemplate disciplinary actions, especially against students classified as suffering learning disabilities.<sup>32</sup>

When charges for basic municipal services rise, personnel costs are typically the reason. In the wake of the Supreme Court's opinion in the 1985 case of *Garcia v. San Antonio Metropolitan Transit Authority*, the entire local public sector became liable for retroactive pay to employees filing claims for overtime compensation. (Prior to that time, the court had exempted state and local governments from the minimum wage and overtime pay provisions of the Fair Labor Standards Act.)<sup>33</sup> *Garcia*, in other words, can help explain the high cost of operating a fleet of city snowplows during a Sunday night snowstorm.

The Americans with Disabilities Act of 1990 (ADA) tells every municipality to install ramps so that streets and sidewalks can be wheelchair accessible. But when any federal funds help construct these special accommodations (or any other local public works projects), the

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<sup>30</sup> Motor Carrier Safety Administration, Federal Highway Administration, Regulation no. 393.90.

<sup>31</sup> According to the so-called "2-in, 2-out" regulation, promulgated in October 1998, at least two firefighters have to remain outside a burning building when two go inside.

<sup>32</sup> See Abigail Thernstrom, "Where Did All the Order Go? School Discipline and the Law," in Diane Ravitch, ed., *Brookings Papers on Education Policy, 1999* (Brookings, 1999), p. 213. In a North Carolina school district, for instance, a student who broke a teacher's arm was given a mere two-day suspension.

Davis-Bacon Act, a vestige of the New Deal, requires that the municipal contracts go, not to the lowest bidders, but to those who pay the “prevailing” (that is, union-negotiated) wage of laborers working on comparable projects in the geographic vicinity.<sup>34</sup>

Federal anti-bias suits are now so pervasive that they shape the employment practices of every municipal agency. Sometimes this litigation appears to have discouraged police departments from testing rigorously for the physical qualifications of the men and women that apply for jobs. For example, after it interrupted such testing in 1986 because of legal challenges, the New York Police Department reportedly found itself with some hires that were unfit.<sup>35</sup>

As we shall see shortly, federally-ordained “special education,” frequently micromanaged by judicial consent decrees, now takes so large a bite out of the budgets of urban school districts that many are unable to raise their regular classroom teachers’ salaries, which lag behind those of wealthier suburban districts. As for whether children in a city attend neighborhood schools or are bused sometimes over great distances, the answer often hinges on whether, and with what methods, a federal court order is regulating the racial composition of the city’s school system.

### *Crossing the Line*

The immersion of the central government in most of these matters seems hard to understand. Why should a national cabinet department or regulatory bureaucracy concern itself with how “standees” ride city buses, or with the procedures of firemen? If local transit authorities or fire departments cannot be left to decide such minutiae, what, if anything, are local governments for? Surely, few of the activities in question here---putting out fires, riding buses,

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<sup>33</sup> *National League of Cities v. Usery* (1974).

<sup>34</sup> On the impact of Davis-Bacon, see U.S. Advisory Commission on Intergovernmental Relations, *The Role of Federal Mandates in Intergovernmental Relations* (January 1996), p. 13.

<sup>35</sup> Walter Olson, *The Excuse Factor: How Employment Law is Paralyzing the American Workplace* (Free Press 1997), p. 185.

disciplining troublemakers in classrooms, hiring policemen, remunerating city workers or contractors---blow fallout across jurisdictions the way some kinds of environmental pollution do.

Indeed, even some of the national strictures intended to protect the environment seem overly preoccupied with localized problems, not with perils that spill across jurisdictions. Leaking landfills are undesirable, but they seldom contaminate the watersheds in adjacent states or regions.<sup>36</sup> Asbestos or lead paint in buildings is dangerous if absorbed in large quantities, but whatever their risks, neither wafts from one community to another. The same holds for the toxic waste sites regulated by the Comprehensive Environmental Response, Compensation and Liability Act, otherwise known as Superfund. Federal tutelage in the field of environmental protection is easy to justify for forms of pollution that traverse boundaries. But Superfund sites do not migrate; they are located in certain places, and stay there.<sup>37</sup> Likewise, for all but a few biological pathogens in drinking water, the risks associated with high concentrations of contaminants are borne almost entirely by people in the immediate vicinity who might consume the impure water for a lifetime. Why, then, should the standards of national regulators trump those of localities with regard to how stringently to filter the local drinking water?<sup>38</sup>

Nor can a plausible case be made that the federal involvement in *all* these particulars is meant to restrain potentially destructive competition among communities and thus prevent a downward spiral of standards and services. How many local communities really have fire departments so inept that they need OSHA to specify the number of firefighters that must remain outside a burning structure to be ready to rescue those who go inside? Before Congress acted to rid the Republic of asbestos, at least thirty-one states already had programs to inspect and abate the potentially hazardous substance.<sup>39</sup> Long before EPA promulgated expensive new rules to curb lead poisoning, few state and municipal code enforcement agencies were oblivious to this

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<sup>36</sup> Paul R. Portney, "Environmental Policy in the Next Century," in Henry J. Aaron and Robert E. Reischauer, eds., *Setting National Priorities: The 2000 Election and Beyond* (Brookings, 1999), p. 379.

<sup>37</sup> John D. Donahue, *Disunited States* (Basic Books, 1997), p. 65.

<sup>38</sup> Portney, "Environmental Policy," p. 379.

public health issue.<sup>40</sup> Granted, local regulators also were aware that the cost of deleading buildings could be high, and so would compete with other urban needs such as the desire to supply “affordable” housing. But recognizing that tradeoff is not “dumb”; it is appropriate. Alas, certain local services occasionally may suffer *because* of federal legalities that have unintended consequences. The physical condition of as much as a fifth of New York’s “finest” was said to have deteriorated after the department grew fearful that its pre-employment fitness test, if kept up, might be deemed discriminatory.<sup>41</sup>

Federal supervision is emphatically warranted on the grounds of upholding basic civil liberties or rights. Yet, the legal doctrines that started out establishing fundamental protections—like defending due process for students who were being wrongfully or arbitrarily punished—later began to wander far afield. (In the case of school discipline, legal actions in the federal courts gradually began dissuading school officials from meting out any serious punishments at all, even in cases where a teacher’s life or limb was at risk.)<sup>42</sup> Today, some assertions of constitutional rights bear scant resemblance to the noble national cause of combating truly appalling injustices—the likes of Tulsa, for instance.

Finally, if James Madison were alive today, he would be startled by how often federal regulation seems to empower local oligarchies more than it liberates us from them. Take the supposedly minimal requirements of the Fair Labor Standards Act (FLSA). In the context of the local public sector, even this seemingly unassailable law is less innocuous than it appears. Local public employees have, as a chief of New York City’s sanitation workers once boasted, a natural advantage than no private-sector union has: “We have the ability to elect our own boss”—that is, the employer.<sup>43</sup> He could have added that the threat of a strike in a city is unlike that posed by

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<sup>39</sup> Paul I. Posner, *The Politics of Unfunded Mandates* (Georgetown University Press, 1998), p. 64.

<sup>40</sup> See, for instance, Pietro S. Nivola, *The Urban Service Problem* (D.C. Heath, 1979), pp. 145-146.

<sup>41</sup> Olson, *Excuse Factory*, p. 185.

<sup>42</sup> See Kay S. Hymowitz, *Ready or Not* (Free Press, 1999).

<sup>43</sup> Quoted in Fred Siegel, “The Social Democratic City,” *The Public Interest*, no. 139 (Spring 2000), p. 89. It was estimated that when New York City’s full- and part-time municipal workforce was at its peak, this





can be onerous for others. The reach of the *Garcia* ruling is illustrative. It extends to public employees the mandatory minimum wage and other provisions that the Fair Labor Standards Act used to reserve only for private firms. Not only does this generic regulation of workplaces carry different implications for municipalities than markets; its effects vary from one location to the next. Obviously, *Garcia* would not have for many suburban towns, with no unionized employees, comparatively small payrolls, and bountiful tax bases, the same costly consequences it has had for some major cities. Likewise, a federal lawsuit that contests traditional fitness tests can pose difficulties for a big city's police force, like New York's, which has to cope with crime-ridden slums. The same suit would be of little consequence for, say, Beverly Hills, a place so affluent and sheltered that, as the joke goes, the police department has an unlisted phone number.

### *Green Mandates*

The unequal impacts of federal environmental regulations are sometimes notorious.<sup>45</sup> In 1987 Congress concluded that every municipality in the United States would have to treat stormwater much the same as the discharge of polluted water from industrial plants. This requirement, appropriate for humid climates, was ill-suited to arid regions such as much of the Southwest. Never mind that Phoenix records an average grand total of seven inches of rainfall a year. This city nonetheless was required to spend large sums of money each year monitoring the runoff from practically nonexistent rainstorms.

Between 1974 and 1994, American taxpayers poured \$213 billion into upgrading municipal wastewater treatment plants. Now, the EPA predicts that an additional \$200 billion will be needed through the year 2014 to bring local wastewater systems up to newly specified design criteria. To that estimate must be added another \$132 billion for the replacement of aging

plants. The projected total, therefore, rises to \$332---a figure that does not include the soaring increases in operating and maintenance expenses associated with more advanced technologies. If the recent past is prologue, the bulk of these enormous costs will have to be defrayed with local, not federal, tax revenues (see Figure 3).

And for at least some cities, the bill will be needlessly steep. Under the Clean Water Act, cities have to install secondary wastewater treatment facilities that can remove the remaining organic matter not treated in primary facilities. While secondary treatment is usually necessary for landlocked communities, it may not be for many seaport cities. Tides at coastal cities help flush excess organic residue from water bodies. Although the EPA has granted a number of waivers, arguably more oceanside cities ought to receive dispensations.

So stringent are the federal criteria for cleaning up local land containing toxic wastes, and so unsparing are the liability provisions, that developers and lending institutions have resisted investing in many abandoned industrial and commercial sites. A recent survey of more than two hundred cities by the U.S. Conference of Mayors reported no fewer than 81,000 acres of brownfields, including some undoubtedly entangled in Superfund suits. These sites continue to languish in the inner cities, costing them possibly as much \$2.4 billion in lost property tax revenue each year, and foreclosing opportunities to create as many as 550,000 jobs. Meanwhile, policymakers bewail the “sprawl” wrought by businesses that, steering clear of the legal liabilities, opt to locate on virgin acreage in the suburbs.

### *Rights and Wrongs*

If some U.S. environmental standards do not admit enough diversification and

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<sup>45</sup> The ensuing discussion is drawn from Pietro S. Nivola and Jon A. Shields, *Managing Green Mandates: Local Rigors of U.S. Environmental Regulation* (AEI-Brookings Joint Center for Regulatory Studies, 2001). Documentation for the various examples, and other data, is cited therein.

cognizance of costs at the local level, the federal laws that fall under the capacious category of protecting civil rights permit even less. For the most part, this is as it should be. “Rights tend to be viewed as absolutes,” explains Robert A. Katzmann, “overriding considerations of cost

<sup>46</sup> But no society can afford to extend “total justice” to an ever-increasing variety of petitioners.<sup>47</sup> What began in the 1960s as a long-awaited effort to secure equality of opportunity for African-Americans has expanded into a vast apparatus of federally-orchestrated protections and preferences for many additional groups. Whether every class of claimants merits maximal compulsory remedies is a good question. So is the question of whether each remedy should be determined from the top down.

Consider the rights of persons with disabilities. The idea of accommodating the physically impaired is just and desirable, but should every municipality be told how to improve handicapped access in its public facilities? To modernize public buses and retrofit subways, as demanded by the Rehabilitation Act of 1973, New York reckoned in 1980 that the requisite capital improvements and annual operating bills would amount to a budget-busting expense. Mayor Edward I. Koch figured “It would be cheaper for us to provide every severely disabled person with taxi service than make 255 of our subway stations accessible.”<sup>48</sup>

Mercifully, after pitched legal battles, the federal planners relented and lowered the costs. New York, with an old and extensive transit system, should never have been sidetracked from opting for alternatives to the federal retrofit policy. For this city, it should have been obvious from the outset that investing in advanced paratransit or even subsidizing taxi rides would secure a greater net benefit for the truly disabled and for beleaguered local taxpayers.

In 1973, during the congressional debate on the Rehabilitation Act, the bill’s authors seemed to have had no clue that in venues like New York the legislation’s burdens might well

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<sup>46</sup> Robert A. Katzmann, *Institutional Disability: The Saga of Transportation Policy for the Disabled* (Brookings, 1986), p. 189.

<sup>47</sup> The term is from Lawrence M. Friedman, *Total Justice* (Russell Sage Foundation, 1988).

<sup>48</sup> Koch, “Mandate Millstone,” p. 45.

exceed its benefits. One of the chief sponsors admitted afterwards that neither he nor any of his colleagues “had any concept it would involve such tremendous costs.”<sup>49</sup> The deliberations were not altogether different sixteen years later when Congress took up the Americans with Disabilities Act, an even bolder piece of legislation mandating “fair and just access.”<sup>50</sup> Local authorities pleaded for greater leeway, or else for federal aid to cushion compliance costs, but Congress seemed untroubled. It wrote into the ADA a raft of rigid requirements and almost no financial assistance.<sup>51</sup>

At congressional hearings on the ADA a representative of the Memphis Area Transit Authority guessed that the measure, if adopted, would force that city to eliminate hundreds of thousands of transit trips annually.<sup>52</sup> Dire predictions like this about the fiscal havoc the bill portended proved mostly exaggerated. Nevertheless, the law’s seeming insouciance about variations in local fiscal capability hit some communities hard. Ordered to incorporate curb cuts and sidewalk ramps in its plans for downtown street repaving, the city of Philadelphia concluded that more than a third of its planned replacements would be unaffordable.<sup>53</sup>

### **City Schools: Teaching and Taxing Uncle Sam’s Way**

America’s urban public schools are perhaps the clearest case of a crucial local service tottering under the unbalanced weight of federal mandates. Few other advanced nations, if any,

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<sup>49</sup> Representative Charles Vanik quoted in Timothy Clark, “Access for the Handicapped,” *National Journal*, October 21, 1978, p. 1673.

<sup>50</sup> For a definitive treatment of this initiative see Thomas F. Burke, “On the Rights Tract: The Americans with Disabilities Act,” in Pietro S. Nivola, ed., *Comparative Disadvantages: Social Regulations and the Global Economy* (Brookings, 1997).

<sup>51</sup> See Stephen L. Percy, “ADA, Disability Rights, and Evolving Regulatory Federalism,” *Publius* (Fall 1993), p. 97.

<sup>52</sup> U.S. Congress, House Committee on Public Works and Transportation, Subcommittee on Surface Transportation, *Hearings on the Americans with Disabilities Act*, 101<sup>st</sup> Cong. 1<sup>st</sup> sess. 1989, p. 2721.

<sup>53</sup> Percy, “ADA,” p. 104.

devote as large a share of their total public education expenditures to *non-teaching* personnel.<sup>54</sup>

There may be several excuses for this lopsided administrative overhead, but among the explanations almost certainly is the growth of government regulation and the throngs of academic administrators needed to handle the red tape.

For decades, urban school systems labored under forced busing orders, many of which had the unwanted result of accelerating “white flight” to the suburbs. Today, the schools also are required, among other things, to test drinking water, remove asbestos, perform recycling, ensure “gender equity,” offer bilingual-bicultural instruction for students with limited proficiency in English, and provide something called special education. Buried somewhere under the lengthening federal wish-list is the primary function of an educational institution: *to teach*.

#### *Enter the Federal Risk Regulators*

The Asbestos Hazard Emergency Response Act of 1986, for example, ordered a significant diversion of local resources. Asbestos in school buildings was a concern of state and local officials well before Congress took up the issue. But the goal of the federal enactment was to eliminate possible health risks in all of the nation’s school districts. Whether the presence of asbestos is, always and everywhere, a hazard worth regulating is uncertain. A symposium at Harvard University concluded in 1989 that the risk of dying from low level exposure to asbestos was approximately 400 times lower than from, say, exposure to passive cigarette smoke.<sup>55</sup> The

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<sup>54</sup> See Pietro S. Nivola, *Laws of the Landscape: How Policies Shape Cities in Europe and America* (Brookings, 1999), p. 81.

<sup>55</sup> John D. Spengler and others, *Summary of Symposium on Health Aspects of Exposure to Asbestos in Buildings* (Cambridge, Mass.: Energy and Environmental Policy Center, John F. Kennedy School of Government, Harvard University, August 1989). On cancer risks from low exposure levels, see Brooke T. Mossman and J. Bernard L. Gee, “Asbestos-Related Diseases,” *New England Journal of Medicine*, vol. 320, no. 26 (1989).

cost of banning asbestos has been estimated to exceed \$123 million per life saved.<sup>56</sup> And the process of ripping out the feared substance from old structures, like those in many cities, can actually elevate the volume of airborne fibers to harmful levels, which may persist for years.

Yet, as if America's distressed city school systems did not have enough demands on their budgets, each has had to move tens of millions of dollars into renovations that will further minimize what is by and large a slim health risk. New York City delayed opening its public schools in the fall of 1993 so that classrooms could be inspected for asbestos. The city spent \$100 million on the task—money that could have gone to a much more pressing safety problem at the time: the insufficient number of security guards.<sup>57</sup>

### *A Troubled IDEA*

Let us also take a closer look at special education, a federal entitlement originally affirmed in the Education of All Handicapped Children Act and subsequently renamed the Individuals with Disabilities Education Act (IDEA). In 1975, when Congress voted almost unanimously to plant this federal foothold in local public education, the lawmakers hardly anticipated what lay ahead.

As its original title indicated, the program was intended to assist the comparatively small number of children who were *handicapped*—that is, blind, deaf, paralyzed, or otherwise gravely impaired. In the ensuing quarter-century, however, definitions of disability widened to include categories of emotional, mental, or behavioral characteristics that had scarcely denoted a “handicap” in years past. Twenty-five years ago, for instance, there was no clinical classification for inattentive pupils. Now, diagnosed as suffering from “attention deficit disorder,” they could

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<sup>56</sup> Robert N. Stavins, *Environmental Protection: Visions of Governance for the Twenty-First Century*, Working Paper, John F. Kennedy School of Government, Harvard University, June 23, 1998, p. 22. The figure is in 1994 dollars.

be eligible for special services.<sup>58</sup> Twenty-five years ago, under-achieving students were simply called slow learners. Now, they, too, could qualify for special treatment; according to the U.S. Department of Education, “a severe discrepancy between achievement and intellectual ability” could signify that such students were learning disabled.<sup>59</sup> Partly in this fashion, IDEA gradually amassed about 6.1 million clients—and with them, colossal costs.<sup>60</sup>

The lawmakers of 1975 envisioned an expense that might rise to \$8 billion nationwide, 40 percent of which would be defrayed by federal grants.<sup>61</sup> By the late 1990s, the initiative’s annual total was more than five times larger.<sup>62</sup> In the meantime, the federal contribution settled between 8 and 12 percent as congressional appropriators fled the oncoming budgetary behemoth.

### *Malfunctions*

Instead, state and local governments were left to confront it. And cities bore the brunt. With their extensive impoverished neighborhoods, the cities have been the breeding grounds of family disintegration, drug abuse, violence, and trauma, all closely associated with higher percentages of emotional disturbance, mental retardation, and other learning disorders.<sup>63</sup>

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<sup>57</sup> National School Boards Association, *A Survey of Public Education in the Nation’s Urban School Districts* (Alexandria, VA: NSBA, 1995).

<sup>58</sup> See Wade F. Horn and Douglas Tyman, “Revamping Special Education,” *The Public Interest*, no. 144 (Summer 2001), p. 38.

<sup>59</sup> Under the wide-ranging category of students said to suffer a “specific learning disability (SLD) are those who may have trouble listening, speaking, reading basic words, comprehending what they read, expressing themselves in writing, problem-solving in mathematics, or doing mathematical calculations. Wade and Tyman report that, according to the director of the University of Minnesota’s National Center on Educational Outcomes, over 80 percent of all schoolchildren in the United States could qualify as having SLD under one definition or another. Wade and Tyman, “Revamping Special Education,” p. 38.

<sup>60</sup> The 6.1 million figure was for 1999-2000 and included children ages 3 to 21. In 1976-77 the number of children receiving special-ed services and accommodations had been 3.7 million. Horn and Tyman, “Revamping Special Education,” p. 36. See also Jeffrey L. Katz, “Policy on Disabled Is Scrutinized over *Congressional Quarterly Weekly Report*, May 11, 1996.

<sup>61</sup> *Congressional Quarterly Almanac, 1975*, vol. 31 (Congressional Quarterly, Inc., 1976), p. 651.

<sup>62</sup> *Congressional Quarterly Almanac, 1975* (Congressional Quarterly, Inc. 1976), p. 651. Tom Loveless and Diane Ravitch, “Broken Promises: What the Federal Government Can Do to Improve American *Brookings Review*, vol. 18, no. 2 (Spring 2000), p. 20.

<sup>63</sup> See Jay Gottlieb and others, “Special Education in Urban America,” *Journal of Special Education*, vol. 27, no. 4 (1994).

Chicago's public schools handle more than half of all the special-ed students in the state of Illinois.<sup>64</sup> With the average per pupil expenditure in special education exceeding three times the average cost of instructing regular students, New York City found itself allocating a quarter of its entire education budget to special-ed, an obligation so massive it displaced more than \$1 billion of other local priorities, from programs boosting gifted and talented kids to improved street lighting.<sup>65</sup>

Slightly over 17 percent of the children enrolled in Baltimore's public schools qualify for special education.<sup>66</sup> These students absorb as much as one-third of the school district's budget, and *one-half* of local tax dollars raised to run the city's schools.<sup>67</sup> No suburban county in the vicinity has had to allocate its hard-earned educational resources in this fashion. Baltimore's exceptional outlays for special education crowd out per pupil spending for regular instruction, whereas the much more modest costs of the program in the suburbs enables at least four of the region's five suburban districts to support regular instruction more solidly.<sup>68</sup> Measured in terms of such key indicators as teachers' salaries, the schools in the city are not holding their own in relation to the superior ones outside.<sup>69</sup>

The compulsory, and largely unreimbursed, dedication of great sums of money to the exigencies of a minority at the expense of other weary city dwellers, who need to educate their

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<sup>64</sup> Paul G. Vallas, "Saving Public Schools," *Manhattan Institute Civic Bulletin*, no. 16 (March 1999), pp. 1-2, 9.

<sup>65</sup> See Mark Lankford and James Wycoff, "The Allocation of Resources to Special Education and Regular Education (Brookings, 1996), p. 231; Norm Fruchter and others, *Focus on Learning: A Report on Reorganizing General and Special Education in New York City* (New York University, 1995); Sam Illon, "Special Education Absorbs School Resources," *New York Times*, April 7, 1994, p. A1; Scott Minor Brook, "The Cratering of New York," *U.S. News & World Report*, May 27, 1991, p. 31.

<sup>66</sup> Based on data in Maryland State Department of Education, *The Fact Book: 1998-99* (1999), pp. 8, 30.

<sup>67</sup> The budget figure is for 1997. Kalman R. Hettleman, "Special-Ed Funding Isn't Fair to All Students," *Baltimore Sun*, May 17, 1998, p. 1L. The local effort estimate is drawn from Maryland State Department of Education, *Selected Financial Data---Part 1 (Revenue, Wealth, and Effort)*, 1997-98 (April 1999), Tables 1-9.

<sup>68</sup> Based on data in Maryland State Department of Education, *Selected Financial Data---Part 3 (Analysis of Costs)*, 1997-98 (April 1999), Table 3; *Selected Financial Data---Part 2 (Expenditures)*, 1997-98 (April 1999), Table 6; *Fact Book*, 1997-98, p. 3.



children, too, would seem to be the most questionable aspect of the federal special-ed scheme as presently constituted.<sup>70</sup> But it is not the only one. IDEA, as interpreted in the federal courts, has often frustrated the ability of schools to protect classrooms from disruptive, even violent, students.<sup>71</sup> Emotionally disturbed children are more likely than the average child to exhibit behavior that a normal school cannot tolerate. However, expelling or suspending these students raises the question of whether they are being denied, as the law entitles them, an “appropriate education” and whether the punishments conform with the requirement that “the child shall remain in the current education placement until the local education agency and the parent agree on a new placement.” For the most part, the lower courts adjudicating such cases have barred expulsions, and sharply limited suspensions as well. In 1997, Congress amended IDEA, giving schools more flexibility to discipline violent special-ed students. The procedural hurdles, however, remain high.

In the 1996-97 period, public schools in the United States were the sites of tens of thousands of violent assaults.<sup>72</sup> The frequency of these problems was on average approximately four times worse in inner city schools than in predominantly white suburban ones. How much, if at all, this differential has been associated with the corresponding ratios of special-ed enrollments is not known. But quite possibly, heavy concentrations of youngsters that manifest disorders such as “serious emotional disturbance” are inauspicious for urban schools struggling to stop the flight of middle-class families to safer districts.

The reason to have lingered here over the tribulations of this particular federal program is that the regeneration of the nation’s urban centers may be slowed by national policies that

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<sup>69</sup> Teachers’ salaries in Baltimore were dead last in the state. Maryland State Department of Education, *Selected Financial Data---Part 3 (Analysis of Costs), 1997-98* (May 1999), Table 3.

<sup>70</sup> The extent to which special-ed is an uncompensated mandate *on municipalities* varies by state. Some states cover nearly all of the direct expense, whereas others devolve it to local communities. In the 1980s in Florida, only two to three percent of special education spending came directly from local districts. Paul E. Peterson, Barry G. Rabe, and Kenneth K. Wong, *When Federalism Works* (Brookings, 1986), p. 156.

<sup>71</sup> See R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* (Brookings, 1994), pp. 165-166.

<sup>72</sup> NCES survey reported in Thernstrom, “Where Did All the Order Go?” p. 301.

debilitate, more than strengthen, perhaps the single most important service cities must provide: viable schools for the majority of residents.

### **How It Came to This**

How the federal government become steeped, often awkwardly and penuriously, in what had once been the separate competences of municipalities is a monumental question. To do it full justice would require an historical review of the multiple sources of centralization in American federalism as a whole. Short of that, at least six basic considerations come to mind.

#### *Twists and Turns of Environmentalism*

One was the evolution of environmental politics. Once the transboundary properties of certain environmental pollutants provided a plausible rationale for federal intrusion, an argument for extending it to other, less mobile kinds gained traction. We might suppose, for example, that the regulation of community drinking water ought to remain a local responsibility. Yet, because persons who might imbibe impurities in a community's water supply are not *always* just local residents (out-of-town visitors, say, might drink the community's water, too), proponents of national laws such as the Safe Drinking Water Act were able to draw at least some parallels with precedents like the Clean Air Act that regulated wide-ranging hazards.

Some U.S. anti-pollution measures that began by aiming selectively at the right targets gradually became less discerning, not only because the extent of the problem they were meant to solve was characterized as multi-jurisdictional in scope, but as the process of setting standards became politicized. Communities and interest groups would lobby to redistribute their burdens. The upshot, quite commonly, was not less federal regulation, but more of it spread more widely. The original standards of the Clear Air Act of 1970 cracked down on utilities that burned high-

sulfur coal, produced chiefly in West Virginia, Kentucky, Ohio and Pennsylvania. To regain market share, these states prevailed on Congress to amend the law. After 1977 power plants across the land, regardless of the sulfur content of their fuel, were uniformly required to install smokestack scrubbers. Never mind that this coast-to-coast requirement was less a national public health imperative than an opaque cross-subsidy to Eastern coal producers.<sup>73</sup> Now, a relatively clean-burning municipal generating facility in Kansas or Colorado would have to be equipped no differently than a foul one in Georgia or New Jersey.

Another reason why regulators at the national level took charge of localized pollution problems was that sheer zealotry entered the mix in some legislative debates, summoning up exacting standards and countenancing less local latitude. The political dynamics occasionally seemed to go something like this: Skilled policy entrepreneurs, aided by frenzied media coverage, would zero in on some supposed menace in the environment. The issue *du jour* (asbestos in classrooms, say, or radon in tap water) might vary in severity from place to place. It might not move from one to another. And it might be of relatively minor importance compared to other dangers (like global warming or the runoff from agricultural pesticides). No matter; through strong, emotional appeals, mass opinion and lawmakers would be mobilized to purge the selected evil. Sponsors of bills would vie with one another for maximal impact; a process of “speculative augmentation” would unfold, as Charles O. Jones observed in his definitive study of the 1970 Clean Air Act, where moderate bills were deemed sell-outs, and increasingly forceful alternatives gained legitimacy.<sup>74</sup> Thus, some legislation managed, not only to override local judgments with national ones, but to outlaw any margin of risk, not matter how small, at all costs, everywhere: *no* carcinogenic additives in food, *any* ill-health effects from air pollution, *zero* discharge of pollutants into rivers, and so on. The price of attaining utopian goals, of course, can be prohibitive for local governments, as for many firms.

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<sup>73</sup> See Bruce A. Ackerman and William T. Hassler, *Clean Coal/Dirty Air* (Yale University Press, 1981).

In part, a combination of scientific advances and continuing uncertainties has enabled alarmists to dramatize the dangers of inaction. Increasingly sophisticated technologies have enabled scientists to detect hazardous substances in smaller and smaller concentrations. A possible contaminant measured in parts per million might be noticed in only a handful of scattered sites. But if the same substance is later discerned in parts per trillion, it suddenly may be perceived as ubiquitous. Its presence, even if presenting a miniscule threat in most places, can suffice to frighten people---and turn what might be a serious worry for only a few localities into seeming cause for nationwide vigilance.

Such magnification becomes all the more likely if an excitable public is predisposed to discourage moderation. By the time Congress was debating the tough new amendments to the Clean Air Act in 1990, for example, a growing number of Americans had become convinced, erroneously, that the nation's air quality had steadily deteriorated and, insouciantly, that "environmental improvements must be made *regardless of cost*."<sup>75</sup> In this charged atmosphere, some highly restrictive measures became national law, often with minimal knowledge of whether local communities (let alone much private industry) could afford to comply.

### *Race to the Bottom---or the Top?*

It is generally assumed that Washington intervenes in local decisions primarily to prevent intergovernmental rifts and rivalries from degrading basic norms for public health, safety, or welfare. Federal authorities, the theory goes, chiefly step in to set suitable baselines---for Atlanta's air quality, or New York's fiscal practices, or the competence of school teachers in a

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<sup>74</sup> Charles O. Jones, *Clean Air: The Policies and Politics of Pollution Control* (University of Pittsburgh Press, 1975).

<sup>75</sup> Survey results in James Q. Wilson and John J. DiIulio, Jr., *American Government: Institutions and Policies*, 7<sup>th</sup> ed. (Houghton Mifflin, 1998), p. 655 (italics added). Even today, according to recent opinion polls, more than two-thirds of the public subscribe to the statement: "Despite the Clean Air Act and Clean

bunch of cities. But in reality, much federal preemption of local policies works the other way around: It subjects state and local governments to national directives even when those governments are emulating, indeed outdoing, one another to run standards up, not down.

In 1986 Congress moved to extend to preschoolers the universal right to special education for handicapped children. But 42 states already had begun programs of this sort.<sup>76</sup> Similarly, by the time Congress proclaimed that every schoolchild should be guaranteed an asbestos-free environment, most school districts already had programs to repair dangerous buildings. In 2001, a new administration in Washington proposed to coax and cajole the states to start rating the performance of all their local elementary and secondary schools. But less noticed during the national “education reform” debate was that 17 states already assigned such ratings, four more were poised to initiate them in 2002, and at least two more planned to do so soon thereafter.<sup>77</sup> The concept of school accountability, in other words, was percolating and spreading at the local level well in advance of any coercive federal measures.

Proponents of central coercion, however, frequently seem unimpressed. By their logic, if so many state and local initiatives have already blazed a trail, national standards only complete what the locals have started. The latter, it would appear, are as likely to have their independence shorn when they are proactive and progressive as when they are laggards.

Behind this phenomenon is the fact that though the United States is a federation, *neither* of its political parties, when you scratch them, has remained a stalwart guardian of local autonomy. Since 1970 both parties have not hesitated to preempt local law when it was to the advantage of their respective clienteles. During these decades, Republicans have repeatedly paid lip service to decentralization. Yet a recent systematic study of roll calls in the 98<sup>th</sup> through the 101<sup>st</sup> Congress actually found the Republicans more prone than the Democrats to overrule state

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Water Act, air and water pollution seem to continue to get worse.” Jonathan Rauch, “There’s Smog in the  
*Washington Post*, April 30, 2000, p. B4.

<sup>76</sup> Posner, *Unfunded Mandates*, p. 64.

and local prerogatives.<sup>78</sup> One source of this proclivity has been, of course, the traditional prominence of business regulatory issues on the GOP's agenda. Republican preemptive initiatives have sought to neutralize state or local practices deemed inimical to corporate interests. At times, these preemptions have had a legitimate national purpose (as when they have challenged states that harbor trade sanctions, for example, or that countenance boundless tort litigation, or that cling to anachronistic banking regulations).<sup>79</sup> At other times, their encroachment on local self-governance has seemed gratuitous. One might think that how a community chooses to enforce its zoning ordinances falls squarely within the customary orbit of local administration. Not so, according to the House Republicans, who passed a bill last year giving real estate developers recourse to litigate those decisions through the federal courts.<sup>80</sup>

In recent decades controversies of every kind have moved to the federal level because, simply put, Tip O'Neill's aphorism ("all politics is local") is out of date. As links to local party organizations weakened, the allegiances of congressmen have extended far beyond the concerns of districts or states, and increasingly have embraced the causes of organized *national* issue advocates. These assertive groups, no longer upstaged by traditional labor and industry associations, have proven equally capable of cultivating ties with congressional committees, and now successfully press what Jeffrey Berry has called postmaterial issues.<sup>81</sup> Whatever the challenges facing given communities---wetlands conservation, teenage smoking, school violence, car jackings, sex-abstinence education, "drunk driving"---lobbies in Washington exist to amplify the topic, and add it to the nation's preoccupations.

The amplification further resonates in Congress thanks to the pattern of campaign finance. Whereas candidates, particularly for House seats, once depended almost entirely on the

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<sup>77</sup> "School Accountability: How Are States Holding Schools Responsible for Results?" *Education Week*, vol. 20, no. 17 (January 11, 2001), p. 80.

<sup>78</sup> Posner, *Unfunded Mandates*, p. 143.

<sup>79</sup> See Pietro S. Nivola, "Does Federalism Have a Future?" *The Public Interest*, no. 142 (Winter 2001), especially pp. 50-51.

<sup>80</sup> Juliet Eilperin, "House Votes to Speed Zoning Lawsuits," *Washington Post*, March 17, 2000, p. A12.

backing of local contributors and of the local party hierarchy, the soaring cost of campaigns now compels office-seekers to rely more heavily on external sources. The winners of recent House elections have drawn upward of 40 percent of their contributions from political action committees--that is, the funding arms not only of unions and corporate donors but also of a lot of other well-financed interests with a national presence.<sup>82</sup> For many of these groups, the laying on of federal hands is the solution to almost any problem.

Increasingly, too, the news media contribute to this mindset by heightening the profile of misfortunes in particular communities and depicting them as “trends,” seemingly afflicting the country from coast to coast. Members of Congress do not want to seem uncaring about the latest reported tragedy, whether it happens to be a widespread woe, or a relatively isolated event. Their response: Enact a law. This was how, for example, the Anti-Car Theft Act, “Megan’s Law,” and various other federal instructions to local law enforcement agencies sailed through, even as the war on crime in the vast majority of municipalities and states was already being won by their own police and correctional institutions.<sup>83</sup> It was also how pressure mounted for a national blood-alcohol standard for motorists, even while alcohol related accidents were at an all-time low. And it was how certain U.S. environmental proscriptions were rushed into law: The nationwide ban on ocean dumping of sludge, for example, followed the highly publicized appearance of trash slicks along the coastlines of New York and New Jersey during the summer of 1988, even though the garbage that had washed onto the beaches that year had spilled from antiquated local sewers, not from dumping waste at sea.<sup>84</sup>

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<sup>81</sup> Jeffrey M. Berry, *The New Liberalism: The Rising Power of Citizen Groups* (Brookings, 1999), especially chaps. 5-6.

<sup>82</sup> Pietro S. Nivola, “Sweet and Sour Pork: Or Why Regulating Is More Succulent than Spending,” Paper prepared for delivery at the Annual Meeting of the American Political Science Association, Washington, D.C., August 28-31, 1997, pp. 5-6.

<sup>83</sup> See Alan Ehrenhalt, “Mandating from Above: The Irresistible Impulse,” *Governing*, vol. 8 (September 1995).

<sup>84</sup> Michael Specter, “Sea-Dumping Ban: Good Politics, But Not Necessary Good Policy,” *New York Times*, March 22, 1993.

## *Legacies of the Rights Revolution*

Commencing in the 1960s, and waxing at various junctures thereafter, a basic legal transformation got under way in this country: An expanding variety of social expectations sought, and increasingly attained, the status of rights---that is, privileges to which citizens are justly entitled according to courts of law. Emulating the civil rights movement, new interest groups learned to frame their grievances as pleas for constitutional justice. After African-Americans had shown the way, additional minorities, women, the elderly, the disabled, and others joined the procession. Soon, to borrow Philip K. Howard's description, "Congress began handing out rights like land grants."<sup>85</sup>

Inevitably, federal dockets bulged as the courts began adjudicating charges from more plaintiffs that their newly-minted rights had been abridged.<sup>86</sup> In short order, scores of cities were entangled in federal cases realigning the racial composition in schools, reforming city jails, providing special accommodations for handicapped individuals, eliminating gender biases on police and firefighters' tests, fashioning "appropriate" schooling for learning-disabled students, increasing the number of indigents eligible for welfare payments, tenuring aging public employees (or else impelling their employers to buy out retirements), providing shelters to the homeless, securing freedoms from various environmental threats, and deciding details like the use of city fire alarm boxes.<sup>87</sup>

For city governments, employment practices became one continual source of legal strife. Employment cases accounted for about a quarter of all civil suits against city agencies by the mid-1980s, and they continued to multiply as a growing number of complainants sought to be

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<sup>85</sup> Philip K. Howard, *The Death of Common Sense: How Law Is Suffocating America* (Random House, 1994), p. 61.

<sup>86</sup> Federal litigation as a whole exploded after 1960. That year there was a total of only 2,483 civil filings under the categories of civil rights-related cases, for example, whereas the number of such cases reached 98,153 by 1995. Richard A. Posner, *The Federal Courts: Challenge and Reform* (Harvard University Press, 1996), pp. 57, 60-61.



made whole by one or another of the federal government's anti-discrimination statutes.<sup>88</sup>

Energized by various bold enactments, such as the Age Discrimination in Employment Act of 1975 and 1986, the Americans with Disabilities Act of 1990 and the Civil Rights Act amendments of 1991, federal anti-bias suits fanned out to service a lengthening queue of clients. Plaintiffs acquired new incentives to sue.<sup>89</sup> After 1991, for example, the burden of proof in cases of alleged racial or ethnic discrimination was tilted against defendants. The mere composition by race of an employer's payroll could be used as *prima facie* evidence of racism, leaving the truth to the accused, not the accusers, to establish. The latter, moreover, could have the fees of their attorneys and expert witnesses recovered in multiples when prejudice was proved. And compensatory and punitive damages became available, with the odds of collecting significant sums improved by the use of jury trials.

Another vexing category of cases for cities was the mounting litigation associated with environmental advocacy, which also drew considerable inspiration from the rights revolution. Environmental restrictions on cities had come to be advanced as, in essence, legal protections to which all city-dwellers were entitled. The debate on the Clean Air Act, for example, was framed from the outset as a matter of securing an "*inherent right* to the enjoyment of pure and uncontaminated air."<sup>90</sup> Akin to a civil right, a legal warrant to a clean environment ceases to be a mere aspiration that can be adjusted up or down to according to community preferences and cost considerations; it is absolute, universalistic, and non-economic. There is, in other words, no such thing as attaching a price tag to an "*inherent right*," and allowing it to vary by locale. Because rights, by definition, belong to citizens equally, they imply nationally standardized commands and controls.

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<sup>87</sup> Don Vannatta, Jr., "U.S. Judge Says Removing Alarm Boxes Discriminates Against the Deaf," *New York Times*, February 14, 1996, p. B3.

<sup>88</sup> Yong S. Lee, "Civil Liability of State and Local Governments," *Public Administration Review* vol. 47, no. 2 (March/April 1987), p. 169.

<sup>89</sup> See Pietro S. Nivola, "The New Pork Barrel," *The Public Interest*, no. 131 (Spring 1998), p. 99.

Thus, when the U.S. Supreme Court ruled in *City of Chicago v. Environmental Defense Fund* (1994) that the ash produced in Chicago's municipal incinerators had to be treated as hazardous waste, the court not only managed to shut down Chicago's waste-to-energy incineration plants (and thus impelled the city to truck all its trash to out-lying landfills); citizens of *every* community were entitled to the same remedy, given the Clean Air Act's absolute ban on adverse health effects.

That this or almost any other federal entitlement would be ubiquitously enforced, moreover, became more likely as Congress deputized citizens to sue public agencies, not just private enterprises, to ensure accountability. The ease with which complainants, including those challenging public entities, could have their day in court had long been a distinguishing feature of the U.S. legal system. By the 1980s it was hard to think of a major U.S. environmental statute, employment law, or civil rights measure that did not provide for private rights of action. Extensive standing to sue, combined with other time-honored attributes of American law---ample opportunities for fee shifting and class actions, for instance---would keep the judiciary busy, as private parties increasingly took states and cities to court for alleged noncompliance with national regulations, and sued the national regulators themselves if they appeared to cut state and city officials too much slack.

Aggressive mobilization of the courts set in motion political dynamics that, in some key instances, eventually produced comprehensive legislated mandates. The special education story was illustrative. In 1972, a federal court decided that the state of Pennsylvania had to provide free public education and training appropriate for mentally retarded children.<sup>91</sup> The following year, a court ruled that all handicapped children in the District of Columbia were constitutionally entitled

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<sup>90</sup> These, in fact, were the words of the bill's sponsor, Senator Edmund Muskie (Democrat of Maine). *A Legislative History of the Clean Air Amendments of 1970*, Committee print, Senate Committee on Public Works, 93 Cong. 2 sess., pp. 227, 231 (italics added).

<sup>91</sup> *Pennsylvania Association of Retarded Citizens v. Commonwealth of Pennsylvania* (1972).

to such services, even if the city lacked funds to pay for them.<sup>92</sup> By 1974, thirty-six similar lawsuits were pending or had been resolved in two dozen states, prompting many to enact special-ed programs.

As the issue migrated from state to state and into the national consciousness---and as the expense of local programs began to increase---state education departments and local school boards looked to the federal government for assistance. The Education for All Handicapped Children Act of 1975 cleared Congress on votes of 404 to 7 in the House, 87 to 7 in the Senate. This overwhelming support was ensured, in no small part, by a strong endorsement from state and local officials who were promised federal money to pay for an entitlement that plaintiffs' lawyers and federal judges had effectively created. What the state and local enthusiasts did not anticipate at the time was that the authorized funding would never materialize---while the costs and legal complications of special education, now mandated nationwide, would only multiply.

### *Unfunded Mandates*

As more federal policies enshrined rights and hence deployed the courts, more of the federal government's stewardship naturally moved off-budget. If, for example, a public decision about the economic development of a depressed urban neighborhood turns, not on how to underwrite investment there, but on whether a given investment violates somebody's civil rights (or "environmental justice"), juridical considerations eclipse financial ones.<sup>93</sup> And if, say, a federal tribunal decides that citizens are owed municipal facilities that must operate virtually free of health risks (as the Supreme Court in essence ruled with regard to city incinerators), the result is not an elective "program" to be aided; it is a binding legal obligation that carries little or no

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<sup>92</sup> *Mills v. Board of Education of the District of Columbia* (1972).

<sup>93</sup> See, for example, "Judge Blocks a Slag Plant as Violation of Civil Rights," *New York Times*, April 21, 2001, p. A13. For a full analysis of the environmental justice movement and its implications see Christopher H. Foreman, Jr., *The Promise and Peril of Environmental Justice* (Brookings, 1998).

federal budgetary responsibility. Federal authorities may police local compliance with the obligations, much as they enforce other constitutional rights, but do not ordinarily appropriate funds and distribute grants for that purpose.

Washington's unfunded demands on cities and states also increased in the late 20<sup>th</sup> Century as the national government's debt grew and Congress's capacity to sponsor direct action encountered budget constraints. "When its ability to make grants declined," observed Alice Rivlin in 1992, "the federal government turned increasingly to mandates as a means of controlling state and local activity without having to pay the bill."<sup>94</sup> Later in the decade, when the economy began expanding briskly in almost all regions of the country, federal office-holders gained an additional excuse to allot less money to their mandates: locally-raised revenues were on the rise. Some policymakers at the national level had long regarded as intergovernmental "subsidies" the deduction of local property taxes from the federal income tax and the exclusion of interest income earned from various forms of state and local debt.<sup>95</sup> With many states and most municipalities now in relatively good financial shape amid a reasonably concerted effort to balance the federal budget, there was a case to be made for greater devolution of costs.

But a good deal of national mandating also became plainly opportunistic: It enabled politicians in Washington to claim credit by doing good---cleaning up the environment, protecting victims of bias, educating individuals with learning disorders, increasing the mobility of persons with physical impairments, and so forth---without incurring, in R. Douglas Arnold's term, "traceable" blame for the tax increases that would surely follow.<sup>96</sup> If more members of Congress played this card now than in the past, part of the reason was that the objections of local officials seemed to carry less weight in the halls of the Capitol. Members of the House of Representatives, who used to be especially sensitive to the concerns of mayors, county

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<sup>94</sup> Alice M. Rivlin, *Reviving the American Dream: The Economy, the States and the Federal Government* (Brookings, 1992), p. 107.

<sup>95</sup> For the subsidy argument see James R. St. George, "Unfunded Mandates: Balancing State and National *Brookings Review* (Spring 1995).

executives, and other local notables back home, now behaved more like senators or presidential candidates: They, too, pitched appeals to wider audiences, including Washington-based advocacy groups, many of which seemed to care, or know, little about the practicalities on the ground for local governments.

Hence, during the run-up to the nationwide asbestos-removal requirement for schools, local administrators worried audibly about its looming costs. But these murmurs scarcely gave pause to the Democratic representatives, who led the charge for this mandate. And Republican opposition never coalesced either. Indeed, the House Republicans enlisted in the asbestos campaign, incanting that “Everyone wants to do the same thing. We want to help children.”<sup>97</sup> Local misgivings notwithstanding, the House passed the asbestos bill unanimously.

#### *Nationalizing the Mischiefs of Faction*

In principle, a prime justification for elevating governance from the local to the national level is to overrule factions that may arrogate power and exploit or even tyrannize other citizens in a local polity. The first aim of federal civil rights protection, for instance, was (or should have been) to halt all local lynchings, indeed to avenge the 4,742 African-Americans who were tortured, hanged and burned to death by racist bands between the 1880s and the 1960s.<sup>98</sup> But in practice, a good deal of national oversight no longer serves this type of core purpose. On the contrary, the federal regulatory regime often installs or solidifies cartels, so to speak, that ought to have their local influence reduced, not enhanced, especially when it stymies local innovation.

Special education appears to be a case in point. This federally-decreed service has acquired vested interests that seem to resist reform. No matter how urgently the federal role in special-ed needs rethinking, few policymakers at any level of government are eager to antagonize

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<sup>96</sup> R. Douglas Arnold, *The Logic of Congressional Action* (Yale University Press, 1990).

<sup>97</sup> Republican Congressman William Goodling quoted in Posner, *Unfunded Mandates*, p. 101.

the program's organized armies of administrators, psychologists, social workers, lawyers, and other ensconced clients and advocates.

To be sure, the special-ed establishment, with its silos of professional and client groups embedded in states and school districts but aligned more closely to powerbrokers in Washington, is far from unique. More often than not, when the federal government hatches an intergovernmental program, it eventually spawns a protective constituency. Gaze again at the public contracting provisions of the Davis-Bacon Act that can add a costly premium to municipal construction projects. Somehow the interests (chiefly organized labor) bonded to this Depression-era law remain potent enough to keep it unshaken. Or marvel at the disparate-impact test for discrimination, a legal precept that has laid siege to the municipal workplace. At the behest of the civil rights bar and bureaucracy, and a retinue of other organized proponents, this policy, too, became a federally-enforced legal fixture, even though it actually is hard to adduce from the original language of the Civil Rights Act of 1964.<sup>99</sup> These custodians have operated much like other successful iron triangles in American politics: "they have entrenched themselves deeply in networks of clientele groups, legislative committees, and program agencies."<sup>100</sup>

All this is not to say that the client lobbies are always so dominant as to be able to extract fully from congressional appropriations committees the funds needed to honor Congress's grandiose goals. The clients are commonly powerful enough, however, to make state and local governments cough up the difference, and to keep them playing by the federal rules even when those rules prove flawed.

In this sense, a final paradox of the politics of federalization is that it frequently seems to abet, not curb, the mischief of factions.

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<sup>98</sup>The tally is in Leon F. Litwack, *Without Sanctuary* (Twin Palms Publishers, 2000).

<sup>99</sup>On the genesis of the disparate-impact concept see Roger Clegg, "The Bad Law of 'Disparate Impact'," *The Public Interest*, no. 138 (Winter 2000), p. 80.

## Where Things Stand

Federal regulation of the nation's cities, like the rest of American federalism, has been undergoing some changes. Several recent developments have relieved municipal governments somewhat from what had often become inordinate financial and administrative impositions.

### *Corrections*

Among the welcome adjustments of recent years was the Unfunded Mandates Reform Act of 1995. In the legislative process, this law permits a point of order to be lodged against any bill that imposes uncompensated local expenses exceeding \$50 million, as scored by the Congressional Budget Office. Although the supposed efficacy of this device was oversold at the time it was passed, it does appear to have moderated at least some of the propensity in Congress to assign expensive new duties to state and local governments without appropriating the money to help them fulfil the assignments. One survey found that almost 20 percent fewer federal rules with notable budgetary liabilities for local governments were adopted in 1998, after the reform legislation was enacted, than in 1994.<sup>101</sup> It is plausible that casually tucking costly mandates into broad pieces of legislation has become a bit less tempting to members of Congress because the costs are now more transparent, and procedural challenges can force distinct and visible up-or-down votes.

To be sure, the Unfunded Mandates Reform Act does not speak to non-congressional sources of national commandments---those emanating from the federal bureaucracy or the judiciary. But of late these institutions as well have pursued somewhat less national regimentation, and shown more awareness of local fiscal realities.

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<sup>100</sup> Hugh Davis Graham, "The Origins of Affirmative Action: Civil Rights and the Regulatory State," *Annals of the American Academy of Political and Social Science*, vol. 523 (September 1992), p. 62.

The U.S. Environmental Protection Agency, for example, has greatly increased the number of its so-called Performance Partnership Agreements that grant local authorities considerable flexibility as to the means of attaining various environmental ends. Under an EPA-approved plan, New York City is being permitted to experiment with unconventional methods to protect water quality at reduced costs. In lieu of building the world's biggest filtration plant at a price of perhaps \$8 billion, the city is currently trying to improve its water supply by preventing degradation of upstate watersheds that flow into its reservoirs.<sup>102</sup> Although New York is spending many hundreds of millions of dollars on these elaborate efforts, their eventual sum, presumably, should be much cheaper than the alternative.

The courts, too, have restored a few more limits on the long arm of federal law in local civic life. Dozens of city school systems had grappled for decades with court-ordered desegregation plans, many of which had the perverse effect of aggravating racial imbalances by accelerating the exodus of white families. By the end of 1990s, the courts had allowed most (though not all) of these ordeals to wind down. For years, federal consent decrees had governed the management of municipal jails in several major cities, sometimes quite problematically.<sup>103</sup> By the late 1990s, these edicts, too, had largely run their course. (Eighteen years after a civil rights suit had placed Philadelphia's prisons under judicial supervision, the federal district judge in the case finally concluded that the city could be allowed to manage its own facilities.

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<sup>101</sup> Crews, *Ten Thousand Commandments*, p. 27.

<sup>102</sup> The project, covering some 1,500 square miles west of the Hudson River, involves everything from land acquisition and stewardship, to revision of various farming practices, to the replacement of community sewerage infrastructure including countless rural household septic tanks. U.S. Environmental Protection Agency, Region 2, *Watershed Protection Program: The 1997 Filtration Avoidance Determination, Mid-Course Review of the Catskill/Delaware Water Supply Watershed* (EPA, May 2000).

<sup>103</sup> Philadelphia was one of the few major U.S. cities that experienced rising crime rates in the 1990s. According to William D. Hagedorn and John J. DiIulio, Jr., a court decree, intended to relieve overcrowding by ordering early release and non-admission procedures for pretrial detainees, may have contributed to the city's crime wave, at least through the first half of the 1990s. See William D. Hagedorn and John J. DiIulio, Jr., "The People's Court? Federal Judges and Criminal Justice," in Martha Derthick, ed., *Dilemmas of Scale in America's Federal Democracy* (Woodrow Wilson Center Press and Cambridge University Press, 1999), especially pp. 229-348.



“Eighteen years,” the judge announced in September 2000, “is generally the age at which a child

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The sweep of certain federal lawsuits that had liberally invoked federal employment and civil rights statutes against state and local governments has been narrowed slightly by recent Supreme Court decisions. In *Alden v. Maine* (1999) and in *Board of Trustees of the University of Alabama v. Garrett* (2001), for example, a slim majority on the court reasserted for the local public sector a degree of 11<sup>th</sup> Amendment “sovereign immunity” from suits seeking particular protections under U.S. anti-discrimination protocols. In *Alexander v. Sandoval* (2001), the court restrained the standing of private plaintiffs to sue state and local agencies for unintentional discriminatory impacts, at least when the suits sought sanctions under Title VI of the Civil Rights Act.<sup>105</sup> And in *Buckhannon Board and Care Home v. West Virginia* (2001), a 5-to-4 majority finally curbed fee-shifting possibilities for civil rights and environmental litigants whose cases did not attain an actual courtroom victory or court-approved settlement.

*Plus ça Change...*

That said, the extent of new-found deference to local discretion and economic realities should not be overstated. The Supreme Court has reaffirmed some local powers in a few of its “federalism” cases, but in other legal actions, labeled differently, the pressures on municipal governments often continue to mount. In February 2001, for instance, the high court decided the momentous case of *Whitman v. American Trucking Association*. Therein the justices unanimously surmised that there was no statutory basis in the Clean Air Act for the EPA to consider tradeoffs between local economic impacts of the air-quality standards it sets and their presumed health benefits. What this means for, say, Chicago is that the EPA’s latest standards could drain at least

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<sup>104</sup> “After 18 Years, Shapiro ‘Emancipates’ City Prisons from Federal Oversight,” *Legal Intelligencer*, September 5, 2000.

\$2.5 billion a year from that city's economy and tax base, according to estimates by the National League of Cities.<sup>106</sup> Whether the public health in Chicago will be improved enough to warrant such costs remains unclear. And if the national economy continues to sputter, so stiff a regulatory exaction will feel all the more onerous.

Judicial vagaries aside, the other branches have not truly kicked the habit of socking states and cities with potentially exorbitant requirements. Take the pending proposal for education reform. It would mandate nationwide testing of elementary and secondary school students. But to develop a meaningful battery of new tests, and to implement them rigorously in tens of thousands of school districts, will be expensive. The \$320 million in federal assistance currently proposed for this purpose seems likely to be woefully insufficient. How will states and localities handle this latest underfunded mandate? Some, no doubt, will shop for low-budget, off-the-shelf tests, the wider use of which might add precious little to what is already known about educational attainment.

Or return, for a final visit, to the mother of all urban mandates: special-ed. Funding and restructuring of this program is being debated in the current budget cycle. Once again, however, there is little sign that Washington politicians, in either party, are facing up to a central dilemma: Is special-ed, as presently configured, sustainable for cities?

No affluent, civilized society can neglect the educational needs of disabled children. Back in 1975, the decision to assist them, with what was supposed to be a large infusion of federal funds, was decent and humane. But matters since then took unexpected turns---and a responsible government cannot, in effect, bring forth a blizzard of demands, and then renege on its promise, shift the expense to communities that can least afford it, and ultimately lower the welfare of the remaining citizens in those communities. It is not too much to say that federal policy for special education has erred in almost all these ways. Its constraints on claims and

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<sup>105</sup> Title VI sanctions deny federal aid to any public agency deemed discriminatory.

eligibility are feeble; its appropriated funds have consistently fallen far below authorizations; and it has weighed most heavily on overtaxed cities with weak school systems.

One way to right this imbalance would be for Congress to fully fund its original authorization, at an estimated cost of at least \$180 billion over ten years.<sup>107</sup> To throw federal dollars of that magnitude at a boutique program, however, while shortchanging the fundamentals of educational reform (like the proper performance appraisals of regular schools, teachers, and students), would seem like an odd national priority. On the other hand, to expect that the nation can “have it all” (full funding of special education, better paid teachers, newer school buildings, smaller class sizes, robust testing, and so forth) seems equally delusional, particularly as projected budget surpluses evaporate. Rather, the appropriate solution probably lies somewhere in between: Raise the level of federal support for special-ed judiciously, but also draw much brighter boundary lines on eligibility.

How much longer hard choices along these lines can be put off remains to be seen. Meanwhile, this fact will persist: Wretched schools have been among the main reasons why middle-class households have fled, or avoided, old cities for greener pastures. Even in recent years, when many cities regained inhabitants, the growth is owed primarily to an influx of childless persons (“yuppies,” “empty-nesters,” old folks), not households with children to educate. It is difficult enough for troubled urban school districts, which struggle to impart even rudimentary literacy, to match their wealthier suburban counterparts. The inequity widens when cities are pressured by federal compulsions, some of which seem, at once, too stingy and ambitious.

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<sup>106</sup> Paul Bailey, “New Air Standards: A Poor Bargain for Americans,” *Washington Post*, vol. 20 (February 3, 1997), p. 14. 20.

<sup>107</sup> The \$180 billion figure had been the sum reportedly demanded by Senator James Jeffords of Vermont before he bolted the Republican part last May. Lizette Alvarez, “A Longtime Maverick,” *New York Times*, May 25, 2001, p. A17. For its proposed fiscal 2002 budget, the White House had agreed to \$7.34 billion for special-ed. That would have brought the federal contribution to approximately 17 percent of total annual program costs, still less than half the original 40 percent authorization level. On the Bush budget proposal see, testimony U.S. House of Representatives, Appropriations Subcommittee on Labor, Health and Human Services, and Education, April 26, 2001.



Federal legislation enacted by the United States Congress and regulations promulgated by federal agencies often compel or prohibit certain activities by state, local, and tribal governments and by the private sector. To comply with or carry out these laws and regulations, subnational entities usually incur expenditures and sometimes suffer revenue losses.Â 50 Nivola, Pietro, *Tense Commandments: Federal Prescriptions and City Problems*, Brookings Institution Press (2002) at 148. 51 See Garrett, *supra* note 15, at 1138. 52 See Dana, *supra* note 48, at 39. In *Tense Commandments*, Pietro S. Nivola encourages renewed reflection on the suitable balance between national and local domains. He examines an array of directive or supervisory methods by which federal policymakers narrow local autonomy and complicate the work urban governments are supposed to do. Urban taxpayers finance many costly projects that are prescribed by federal law. A handful of national rules bore down on local governments before 1965. Today these governments labor under hundreds of so-called unfunded mandates. Federal aid to large cities has lagged behind a profusion of mandated