FEDERAL PREEMPTION OF STATE AND LOCAL GOVERNMENT ACTIVITIES*

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I. Introduction

The drafters of the United States Constitution, by employing general terms and general phrases, made possible the metamorphic nature of the federal system as it adjusted to dramatic changes in the means of production and degree of urbanization over a period of nearly two centuries. Since the Constitution is a lithe document capable of responding to new demands made by economic, social, and political changes of great magnitude, federal-state relations tend to be in a perpetual state of transition.

The drafters of the Constitution recognized the undesirability of a static distribution of political power between the Congress and the states by providing procedures for formally amending the Constitution and by authorizing congressional preemption relative to several concurrent powers.[1] During the past two decades, increasing federal preemption of traditional state and local governmental responsibilities has produced an intergovernmental revolution of the magnitude of the one produced by federal conditional grants-in-aid. The impact of the preemption revolution has not been recognized fully in terms of its implications for the governance system in the future. Somewhat surprisingly, federal preemption has not generated the same degree of criticism that conditional grants-in-aid and Supreme Court preemptory decisions evoked.

Establishing responsibility for action and/or inaction has be-

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[1] I define formal preemption as the authority granted to the Congress by the United States Constitution to assume partial or total responsibility for a governmental function. Since 1965, Congress has been enacting partial preemption statutes establishing minimum national standards and authorizing states to continue to be responsible for a specific regulatory activity provided the state standards meet or exceed national standards established by statute and/or administrative rules and regulations.

come a complex task in several important functional areas where the Congress has assumed partial or total responsibility for traditional state and local government functions. The current complexity baffles the general public, making it impossible for dissatisfied citizens to fix responsibility in many instances for failures to attain public goals. The daedalian nature of the legal mosaic is revealed even by a cursory examination of the hundreds of pages of preemptive statutes in the *United States Code* and thousands of pages of implementing regulations in the *Code of Federal Regulations*. The number of pages in the latter has been reduced since the advent of the Reagan administration and its success in persuading the Congress to replace fifty-seven categorical grant-in-aid programs with nine block grant programs and to continue the deregulation program initiated during the Carter administration.

I will explore the impact of federal preemption upon the governance system by examining federal statutes relative to atomic energy and truck size and weight. To facilitate an understanding of these statutes, I will review the controversy revolving around the intent of the framers of the Constitution and the expansion of federal preemptory powers.

II. The Intent of the Framers

Concern that the national government would encroach upon the powers of the states originated with the opposition to the proposed Constitution. *The Federalist Papers*, authored by Alexander Hamilton, John Jay, and James Madison, were designed to assure readers of New York State newspapers that the Congress did not represent a threat to the viability of the states.

According to James Madison, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[2] Madison, of course, was referring in particular to the police power. Hamilton assured readers that

> it will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities. The proof of this proposition turns upon the greater degree of in-

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[2] THE FEDERALIST No. 45, at 296 (J. Madison) (I. Kramnick ed. 1987).

> fluence which the State governments, if they administer their affairs with uprightness and prudence, will generally possess over the people; . . . .[3]

Madison added that "a local spirit will infallibly prevail much more in the member of Congress than a national spirit will prevail in the legislatures of the particular States."[4]

By 1885, Woodrow Wilson noted that Publius' assurances, contained in *The Federalist Papers*, that Congress would not encroach upon the powers of the states were not accurate forecasts. According to Wilson, "[C]ongress must wantonly go very far outside of the plain and unquestionable meaning of the Constitution, must bump its head directly against all right and precedent, must kick against the very pricks of all well-established rulings and interpretations, before the Supreme Court will offer it any distinct rebuke."[5]

In 1939, Harold J. Laski declared federalism was obsolete,[6] and in 1948 wrote that "[t]he states are provinces of which the sovereignty has never since 1789, been real."[7]

Felix Morley, offering an explanation for the drift of power to Washington, stated in 1959:

> State governments, with a few honorable exceptions, are both ill-designed and ill-equipped to cope with the problems which a dynamic society cannot, or will not, solve for itself. State Constitutions are in many cases unduly restrictive. Their legislatures meet too briefly and have the most meagre technical assistance. . . . Governors generally have inadequate executive control over a pattern of local government unnecessarily complex and confusing.[8]

To a large extent, Morley was convinced that Hamilton's forecast was correct in that political power would shift to the national government if the states fail to "administer their affairs with uprightness and prudence, ..."[9]

In 1960, an English observer of the American federal system,

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3 THE FEDERALIST NO. 17, at 156-57 (A. Hamilton) (I. Kramnick ed. 1987).

4 THE FEDERALIST NO. 46, at 299 (J. Madison) (I. Kramnick ed. 1987).

5 W. WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 36-37 (1925).

6 *See* Laski, *The Obsolescence of Federalism*, NEW REPUBLIC, May 3, 1939, at 367-69.

7 H. LASKI, THE AMERICAN DEMOCRACY: A COMMENTARY AND AN INTERPRETATION 139 (1948).

8 F. MORLEY, FREEDOM AND FEDERALISM 209 (1959).

9 *See supra* note 2, at 98.

professor D.W. Brogan, concluded that states possess relatively few important powers.

> Of the division of powers, probably the least important today is that between the Union and the states. There is, of course, an irreducible minimum of federalism. The states can never be reduced to being mere counties, but in practice, they may be little more than mere counties. The Union may neglect to exercise powers that it has and so leave them to the states (subject to varying Supreme Court doctrines as to whether the states can legislate freely in the mere absence of federal legislation, on matters affecting interstate commerce for instance). But in a great many fields of modern legislation, states' rights are a fiction, because the economic and social integration of the United States has gone too far for them to remain a reality. They are, in fact, usually argued for, not by zealots believing that the states can do better than the Union in certain fields, but by prudent calculators who know that the states can do little or nothing, which is what the defenders of states' rights want them to do.[10]

It is interesting to note that the above comments relative to the impotency of the states were written prior to the exercise by the Congress of its partial preemptory powers which have reduced significantly the discretionary authority of the states and, by implication, their political subdivisions.

The Supreme Court and Original Intent

The constitutional debate opened by United States Attorney General Edwin Meese, III, in 1985, relative to the intent of the framers of the Constitution has ensured that important issues of federalism are discussed in public forums. Addressing the American Bar Association on July 9, 1985, the Attorney General argued:

> A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection. A Jurisprudence of Original Intention also reflects a deeply rooted commitment to the idea of democracy. The Constitution represents the consent of the governed to the structure and powers of the government. To allow the court to govern simply by

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10 D. BROGAN, POLITICS IN AMERICA 228 (1960).

> what it views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered. The permanence of the Constitution is weakened. A Constitution that is viewed as only what the judges say it is, is no longer a constitution in the true sense.[11]

On October 12, 1985, Associate Justice William J. Brennan, Jr., of the United States Supreme Court responded to the Attorney General's speech and rejected his views in strong terms:

> There are those who find legitimacy in fidelity to what they call "the intentions of the Framers." In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. . . . It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions. . . . Typically, all that can be gleaned is that the Framers themselves did not agree about the applications or meaning of particular constitutional provisions, and hid their differences in cloaks of generality.[12]

On November 18, 1985, Judge Robert H. Bork of the United States Court of Appeals entered the debate in the following terms:

> In short, all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a premise. That premise states a core value that the framers intended to protect. The intentionalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the framers could not foresee. . . .
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> Thus, we are usually able to understand the liberties that were intended to be protected. We are able to apply the first amendment's free press clause to the electronic media and to the changing impact of libel litigation upon all the media; we are able to apply the fourth amendment's prohibition on unreasonable searches and seizures to electronic surveillance; we apply the commerce clause to state regulation of interstate trucking. . . . At the very least, judges will confine themselves

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11 Meese III, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 PUB. ADMIN. REV. 701, 704 (1985).

12 W. Brennan, Jr., The Constitution of the United States: Contemporary Ratification 4 (Oct. 12, 1985) (paper presented at a text and teaching symposium, Georgetown University).

> to the principles the framers put into the Constitution. Entire ranges of problems will be placed off-limits to judges, thus preserving democracy in those areas where the framers intended democratic government. That is better than any non-intentionalist theory can do.[13]

In 1985, Professor H. Jefferson Powell of the University of Iowa Law School published a major article examining the cultural factors influencing legal interpretation when the Constitution was adopted and concluded "the claim or assumption that modern intentionalism was the original presupposition of American constitutional discourse . . . is historically mistaken."[14]

Nevertheless, the constitutional debate opened by the Attorney General is a healthy sign that the American governance system remains vigorous and important issues of federalism are debated continually even if each side labels the other side with pejorative terms. It is difficult to argue with the Meese contention that constitutional change should be made by the elected representatives of the people. One could extend the debate further by advocating constitutional change only with the direct consent of the electorate, the practice in all states except Delaware. Judge-made law cannot be avoided in its entirety because constitutional provisions are framed in general terms and it is impossible to divine what the precise intention of the framers was when the provisions were drafted. Furthermore, as critics of Meese correctly point out, many issues coming before the judiciary today have been generated by urbanization and industrialization, phenomena not in existence at the time of the Philadelphia Convention which drafted the Constitution.

III. The Preemptory Powers of the Congress

Although the Constitution might have been designed to allocate specified functions to each of the two planes of government, a decision was made to have the Constitution delegate enumerated powers only to the Congress. Included among the delegated or expressed powers were exclusive powers—such as foreign affairs, coinage, post office, and declaration of war—

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[13] Address by Robert H. Bork, University of San Diego Law School (Nov. 18, 1985).

[14] Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985).

which states were forbidden to exercise.[15] The states were denied other powers—such as passing any bill of attainder, ex post facto law, or granting titles of nobility—by the Constitution.[16]

Two types of concurrent powers are provided for by the Constitution. The first type includes the power to tax[17] which is not subject to formal preemption short of a constitutional amendment. The second type of concurrent power includes powers granted to the Congress and not prohibited to the states. These powers generally may be exercised freely by the states until the Congress decides to exercise them. In the event of a direct conflict between a federal statute and a state statute, the supremacy clause of the Constitution provides for the prevalence of the federal law by nullifying the state law.[18] In other words, the exercise of this type of concurrent power by a state is subject to complete or partial preemption by the Congress.

The Constitution also contains a list of powers that the states may exercise only with the consent of the Congress; examples include the levying of import and tonnage duties, keeping of troops in time of peace, and entrance into compacts with other states.[19] The Supreme Court, however, has not interpreted these powers to mean that in all cases they be exercised only with the consent of the Congress. In *Virginia v. Tennessee*,[20] the Court held congressional consent is required only if states desire to enter into "political" compacts affecting the balance of power between the states and the Union. In 1976, the Court ruled that the prohibition of the levying of "imposts and duties on imports and exports" without the consent of the Congress does not prohibit the levying of a property tax on imported products.[21]

Opponents of the proposed constitution feared its adoption would result in a strong centralized government and were successful in persuading the proponents of the document to agree to adoption of a Bill of Rights in order to gain sufficient support for the ratification of the proposed constitution. The tenth amend-

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15 *See* U.S. CONST. art. I, §§ 8, 10.

16 *Id.* § 10.

17 *Id.* § 8.

18 *Id.* art. VI.

19 *Id.* art. I, § 10.

20 148 U.S. 503 (1893).

21 *See* Michelin Tire Corp. v. Wages, 423 U.S. 276, 286 (1976).

ment was included in the Bill of Rights to ensure that there would be no confusion relative to the powers of the Congress which in theory were limited to the enumerated powers. The amendment stipulates "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[22] The division of powers approach to government—*an imperium in imperio*—often is termed "dual" or "layer cake" federalism.

Expansion of National Powers

The powers of the national government have been broadened appreciably, at the expense of the states, by accretion of power resulting from constitutional amendments, statutory elaboration of delegated powers, and judicial interpretation. This power expansion has been responsible for a continuing ideological debate over the proper roles of the national government and the states.

Constitutional Amendments

The fourteenth amendment was the first amendment specifically restricting the powers of the states by stipulating:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[23]

These guarantees have served as the basis for numerous Supreme Court decisions invalidating as unconstitutional actions taken by states, including state laws enacted under the tenth amendment's reserved police power. And the Court also has interpreted the privileges and immunities clause to include the first amendment's guarantees.

The fifteenth amendment, adopted in 1870, and the fourteenth amendment, currently serve as the constitutional basis for the Voting Rights Act of 1965 as amended, an unusual suspensive preemp-

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[22] U.S. CONST. amend. X.

[23] *Id.* amend. XIV.

tory statute.[24]

The sixteenth amendment's authorization for the Congress to levy a graduated income tax enables the Congress to raise huge sums of money to finance, among other things, categorical grant-in-aid programs for state and local governments. The conditions attached to the grants allow the Congress and federal administrators considerable influence over reserved powers matters.

Judicial Interpretation

Since the development of the doctrine of implied powers in *McCulloch v. Maryland*,[25] and the doctrine of the continuous journey in *Gibbons v. Ogden*,[26] the Supreme Court has tended to interpret national powers broadly. The decisions of the Supreme Court interpreting the commerce clause as limiting the police power of the states relative to economic matters are well-known. Less public attention, however, has been paid to decisions, commencing in 1976, extending the first amendment's guarantees by partially preempting state corrupt practices laws limiting political campaign contributions and expenditures.

Since 1976, state corrupt practices acts must conform to the guidelines laid down by the Court in *Buckley v. Valeo*,[27] a case involving the Federal Election Campaign Act of 1971 and its amendments in 1974. With respect to this case, the Court upheld the individual contribution limits, the disclosure and reporting provisions, and public financing provisions, but ruled "that the limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds are constitutionally infirm."[28] Relative to the limitations on personal expenditures by candidates, the Court held the limitation "imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression."[29] Two years later, the Court invalidated a Massachusetts law restricting corporate contributions to

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[24] For details, see Zimmerman, *The Federal Voting Rights Act and Alternative Election Systems*, 19 WM. & MARY L. REV. 621 (1978).

[25] 17 U.S. 316 (1819).

[26] 22 U.S. 1 (1824).

[27] 424 U.S. 1 (1976).

[28] *Id.* at 143.

[29] *Id.* at 52.

referenda campaigns involving issues "that materially affect its property, business, or assets" by holding that, under the first amendment to the Constitution, a corporation could spend funds to publicize its views in opposition to a proposed constitutional amendment authorizing the General Court (state legislature) to levy a graduated income tax.[30]

Statutory Elaboration

A flexible federal system was guaranteed by the constitutional grant of preemptory and other powers to the Congress in general terms. The Congress did not exercise one of its preemptory powers until 1898 when the Bankruptcy Act was enacted which nullified the bankruptcy laws of the forty-eight states.[31]

The next exercise of the power to totally preempt responsibility for a regulatory function was the Atomic Energy Act of 1946 which assigned complete responsibility for the regulation of ionizing radiation to the former Atomic Energy Commission, now the Nuclear Regulatory Commission.[32] A 1959 amendment, however, authorizes the Commission to enter into agreements with the states under which a state is allowed to assume certain regulatory responsibilities.[33] Another example of complete supersession of state laws by Congress is the Uniform Time Act of 1966 which totally preempted responsibility for determining the dates on which standard time is changed to daylight savings time and vice versa.[34]

Federal statutes totally preempting responsibility for an area of regulation, such as bankruptcy, generally have not significantly undermined the states as polities. Informal and formal partial federal preemption statutes, however, generated fears that the states and their political subdivisions have become largely stipendiaries and ministerial arms of the federal government.

IV. Partial Federal Preemption

Intergovernmental relations were not impacted significantly

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30 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).
31 *See* 11 U.S.C. § 101 (1982 & Supp. IV 1986).
32 *See* 42 U.S.C. § 2011 (1982).
33 *Id.* § 2021(c).
34 *See* 15 U.S.C. § 260 (1982 & Supp. IV 1986).

by formal federal preemption until 1965. States, for example, were able to exercise the police power with respect to interstate commerce provided an undue burden was not placed upon the commerce. Prior to 1965, most references to federal preemption were to a type that was initiated voluntarily by the states and local government accepting conditional federal grants-in-aid and the use of tax credits by the Congress.

Informal Preemption

Federal grants-in-aid on a continuing basis are traceable to the Hatch Act of 1887 which authorized grants-in-aid to the states to promote agricultural research.[35] In 1894, the Congress enacted the Carey Act which contained the first condition, a type of *de facto* partial preemption, for the receipt of federal funds by states—a preparation of a comprehensive plan for the irrigation of arid land.[36] Matching requirements and federal inspection date to 1911 when Congress enacted a law providing grants-in-aid to the states for state forestry operations.[37]

In 1940, the sharp increase in federal grants-in-aid to the states and their political subdivisions led G. Homer Durham to write that "[s]ome of the largest and politically most powerful state agencies, such as highway administration with an almost total absence of merit personnel, are no longer dependent on their operating jurisdictions for funds . . . ."[38] Such grants-in-aid exploded in the 1950's and 1960's. In 1978, the United States Advisory Commission on Intergovernmental Relations issued a report noting that "[a]t least through the 1950s, federal assistance activities were confined by an effort to restrict aid to fields clearly involving the national interest or an important national purpose."[39] However, "the concept of the national interest lost most of its substantive content" subsequent to 1965 and "any action passed by both legislative chambers and signed by the

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35 7 U.S.C. §§ 361(a)-361(i) (1982).

36 43 U.S.C. §§ 641-641(d) (1982).

37 16 U.S.C. §§ 552-552(d) (1982).

38 Durham, *Politics and Administration in Intergovernmental Relations*, 207 ANNALS 1, 5 (1940).

39 U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, CATEGORICAL GRANTS: THEIR ROLE AND DESIGN 52 (1978).

President being accepted as appropriate."[40]

The discretionary authority of the states and local governments has been decreased significantly by conditional grants-in-aid as they lack the power to modify federally aided programs, such as welfare, because the rule-making power resides in federal administrative agencies or to reduce the amount of funds they must appropriate for federally aided programs to meet maintenance-of-effort requirements. In addition, states lost the power to completely reorganize their executive branches because of the federal requirement that a single agency administer each federally aided program. In 1976, Charles L. Schultze questioned whether major national purposes are served by conditional grants-in-aid and maintained that the grants "simply reflect the substitution of the judgment of federal legislators and agency officials for that of state and local officials . . . ."[41]

Recognition also must be accorded to the fact that federal administrators are authorized by conditional grants-in-aid to veto state plans, policies, and implementation of programs. This significant expansion of the decision-making powers of federal bureaucrats has evoked fears of administrative imperialism.[42]

Formal Preemption

Informal federal preemption does not represent as great a threat to the ability of the states and local governments to initiate independent action as formal preemption because the former is initiated voluntarily by the subnational units. The latter type of federal preemption is coercive in nature although it may on occasion be supported by many states. For example, the National Governors' Association adopted the following policy position for 1980-81:

> The Association is concerned with increasing costs to truckers as well as consumers resulting from the lack of uniformity in allowable vehicle weights and dimensions which still exists among many states. . . . The Association urges that Congress immediately enact legislation establishing national standards

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40 *Id.* at 52-53.

41 Schultze, *Federal Spending: Past, Present, and Future*, in SETTING NATIONAL PRIORITIES: THE NEXT TEN YEARS 367 (H. Owen & C. Schultze eds. 1976).

42 *See generally* Buckley, *The Trouble with Federalism: It Isn't Being Tried*, COMMONSENSE, Summer 1978, at 13.

for weight (80,000 gross; 20,000 per single axle; 34,000 for tandem) and length (60 ft.).[43]

In 1985, Commissioner Stanley J. Pac of the Connecticut Department of Environmental Protection pointed out that federal preemption "has the advantage of allowing Connecticut to place pressure on the Environmental Protection Agency to require Massachusetts to clean up rivers flowing into Connecticut."[44] Prior to partial federal preemption of responsibility for water pollution abatement, the only recourse Connecticut had against Massachusetts was to sue the Commonwealth.

A number of federal laws contain express provisions for total federal preemption. The Flammable Fabrics Act, for example, stipulates "no State or political subdivision of a State may establish or continue in effect a . . . regulation . . . unless the regulation is identical to the Federal standard or other regulation."[45] Many congressional acts do not contain an explicit partial or total preemption section, yet have been held by courts to be preemptive. In 1941, the Supreme Court emphasized that each challenge of a state law on the ground of inconsistency with a federal law must be determined on the basis of the particular facts of the case.

> There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[46]

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[43] NATIONAL GOVERNORS' ASS'N, POLICY POSITIONS: 1980-81 (1980).

[44] Interview with Stanley J. Pac, Commissioner of the Connecticut Department of Environmental Protection, Hartford, Connecticut (Nov. 8, 1985).

[45] 15 U.S.C. § 1203(a) (1982).

[46] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

In 1947, the Court explicated two tests of federal preemption: (1) "[t]he question in each case is what the purpose of Congress was," and (2) does the act of Congress involve "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[47]

On occasion, the Court invalidates only a section of a state law or local ordinance. In 1978, the Court let stand the first section—requiring oil tankers to be guided by state-licensed pilots—of a three-section State of Washington law pertaining to oil tankers in Puget Sound, but invalidated the sections specifying design standards for tankers and banning all tankers over 125,000 deadweight tons.[48]

The power of the Congress to preempt state laws has been limited occasionally by the Supreme Court. In 1970, the Congress lowered the voting age in all elections to eighteen, but the Court ruled the Congress lacked the power to lower the voting age for state and local elections.[49] Six years later, the Court, in *National League of Cities v. Usery*,[50] invalidated the 1974 Fair Labor Standards Act amendments extending minimum wage and overtime pay provisions to nonsupervisory employees of state and local governments on the ground the extension violated the tenth amendment to the Constitution and threatened the "separate and independent existence" of the units.[51]

Although this latter decision was hailed by many state and local officials as evidence that the Supreme Court was finally recognizing the fact that states were sovereign relative to certain matters, in 1985 the Court reversed its 1976 decision in the following terms:

> Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism

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47 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

48 *See* Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); *see also* WASH. REV. CODE ANN. §§ 88.16.170 to .190 (West Supp. 1989).

49 *See* Oregon v. Mitchell, 400 U.S. 112 (1970).

50 426 U.S. 833 (1976).

51 *Id.* at 845.

> principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.[52]

This case in particular raises the question as to whether the Congress should utilize specific criteria in determining when to preempt totally or partially responsibility for a governmental function. Writing for the majority, Justice Harry A. Blackmun stressed:

> [T]he principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.[53]

Accepting Justice Blackmun's view as an accurate assessment of the national political process, the argument can still be advanced that in enacting preemption statutes the Congress should consult closely with associations of state and local officials to obtain guidance on the nature of the needed preemptory activity and the formation of an effective national-state-local partnership, and include an explicit preemption statement in each law instead of leaving the determination of preemption to the unelected national judiciary. If this approach is followed by the Congress, the confused responsibility associated with nuclear power plant evacuation procedures and truck safety would be avoided.

V. The Responsibility Problem

If the theory of dual federalism was implemented fully in a nation, citizens readily could determine which level of government—national or state—was responsible for failures or the inability to achieve desired goals. In the United States, the theory possessed a considerable amount of explanatory value from 1789 until the national economy and society became extremely complex in the twentieth century. Until the turn of the present century, national and state governmental actions were not entwined intricately and it generally was possible for voters to enforce responsibility. Today, the extensive use of total and partial preemption powers by the Congress has made it extremely difficult

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52 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985).
53 *Id.* at 556.

for the electorate in a number of functional areas to determine who should be held responsible for actions taken or not taken.

A central premise of democratic theory is the critical need for the establishment of governmental and public officer responsibility in order to allow the electorate to hold governments and/or public officers accountable for their failures to achieve mandated goals or to fulfill effectively assigned responsibilities.

In establishing a federal system of government, the drafters of the Constitution were aware that uncertainty regarding governmental responsibility was inherent in a federal system and could not be eliminated completely from all functional areas when *imperia* exist within an *imperium*.

As noted earlier, the drafters of the Constitution provided for two types of concurrent powers with one type subject to preemption under the supremacy clause of the Constitution should a federal statute conflict with a state statute on the same subject. The authors of *The Federalist Papers* noted the preemption problem but suggested that the states were more apt to encroach upon national powers than the Congress was apt to encroach upon the reserved powers of the states.[54]

Both total preemption and partial preemption can create intergovernmental relations problems and cloud the responsibility for action or inaction. One would assume that the exercise by the Congress of total preemptory powers would result in the Congress and appropriate federal administrative agencies being completely responsible for the preempted function. The intergovernmental problem, however, is caused by the fact the Congress is a government of enumerated powers and may lack essential complementary powers to ensure that it is able to successfully execute a preempted function.

Regulation of Ionizing Radiation

The dependence of the national government upon a state and a number of its political subdivisions for auxiliary support relative to a totally preempted function is illustrated by the problems surrounding nuclear power plants. In 1983, Governor Mario M. Cuomo of New York highlighted such a problem in his

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[54] *See generally supra* note 2, at 118-28.

state in a letter he posted to United States Senator Daniel P. Moynihan of New York.

> I am writing to request that you initiate a hearing process to: (1) achieve a clarification and a precise specification of the respective responsibilities of local, state and federal governments for off-site emergency plans at our nation's nuclear plants, and (2) devise a federal system for the administration and funding of the extensive activities undertaken by all three levels of government in the implementation and (3) examine the consequences of decisions required by this off-site emergency planning process.[55]

In 1985, continuing controversy relative to evacuation plans for the area around the Shoreham nuclear power plant under construction in Long Island led Governor Cuomo to write to United States Secretary of Energy John S. Herrington objecting to the Department's support of the Long Island Lighting Company's (LILCO) evacuation plans.

> The emergency preparedness situation concerning the Shoreham plant is the result of scrupulous and deliberate decisions of the County of Suffolk and New York State not to adopt or implement an offsite emergency plan for Shoreham. These governmental decisions were reached through the exercise of police powers which are vested inherently in the State government and the local governments to which the State has delegated those powers. The efforts of your Department to promote LILCO's emergency plan over the constitutionally sound objections of the State and local governments is an affront to the sovereignty of New York State and an injury to the people of New York.[56]

In his letter, Governor Cuomo specifically quoted a statement by President Ronald Reagan that " '. . .this Administration does not favor the imposition of Federal Government authority over the objections of state and local governments in matters regarding the adequacy of an emergency evacuation plan for a nuclear power plant such as Shoreham.' "[57]

On January 13, 1986, Suffolk County adopted an ordinance

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55 73 CONG. REC. S7556 (daily ed. May 25, 1983) (statement of Sen. Moynihan).

56 Letter from Governor Mario M. Cuomo of New York to United States Secretary of Energy John S. Herrington (Mar. 28, 1985) (available from the Executive Chamber, Albany, N.Y. 12224).

57 *Id.*

making it a criminal act for a "person to conduct or participate in any test or exercise of any response to a natural or manmade emergency situation" provided the test or exercise involves the performance of or simulation of the performance of county functions and the exercise or test either was not submitted to the county for prior approval or was disapproved by the county. On February 4, 1986, the United States Department of Justice sought permanent injunction against the county and a declaration that the ordinance was unconstitutional.[58] On February 10, 1986, the court ruled that a local government may not "obstruct the information-gathering process" of the Nuclear Regulatory Commission and the county ordinance "impermissibly interferes with a preempted Federal area."[59]

The initial federal evaluation of the test was positive according to Roger B. Kowieski, chairman of the Regional Assistance Committee representing eight federal agencies, who stated "[t]his was better than first drills at other nuclear plants."[60] Regional Director Frank P. Petrone of the Federal Emergency Management Agency, however, stated his agency was unable to give "reasonable assurance" that the public would be adequately protected in an emergency without the participation of New York State and area local governments.[61]

The adequacy of the evacuation plans made newspaper headlines on April 15, 1986, when Regional Director Petrone resigned and charged that Julius W. Becton, head of the agency in Washington, D.C., had applied pressure to have Petrone drop his conclusion from a soon-to-be-released report that he could not "give reasonable assurance that public health and safety" would be protected should an emergency occur at the plant.[62] Mr. Petrone added that he believed his agency superiors agreed in general with his conclusion, but were pressured by the United States Department of Energy, the Nuclear Regulatory Commission, and the "power

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58 News Release, United States Dep't of Justice, Washington, D.C., Feb. 4, 1986, at 1.

59 May, *Lilco to Test Evacuation Plan Today*, N.Y. Times, Feb. 13, 1986, at B2, col. 1.

60 *Shorham Drill Gets Positive Initial Appraisal*, N.Y. Times, Feb. 16, 1986, at 48, col. 1.

61 *Id.*

62 Perlez, *U.S. Aide Quits, Charging Pressure Over Lilco's Drill*, N.Y. Times, Apr. 15, 1986, at B5, col. 5.

lobby."[63] He also stressed "[t]he Federal Government can no longer have the arrogance to think they can set forth a program and just go with it and say state and local governments be damned."[64]

Similar questions have been raised relative to the February 26, 1986, test of the evacuation procedures at the Seabrook nuclear power plant under construction in New Hampshire. Massachusetts officials withdrew from the two-state exercise because of safety considerations and seven New Hampshire towns refused to participate. Chairman John Walker of the Hampton Selectmen stressed "[t]here just isn't a highway structure in place to handle the traffic, yet they have known for seven years—since Three Mile Island—that they needed an evacuation plan."[65]

Regional Director Edward Thomas of the Federal Emergency Management Agency concluded the plan had too many deficiencies and stated the major problems were evacuation buses (sixty percent did not report to their proper locations), and an inadequate backup strategy to compensate for local governments refusing to participate in the exercise.[66] A telephone number broadcast as an emergency information number turned out to be the commercial loan department of a bank in nearby Portsmouth.[67]

The United States General Accounting Office, while not examining the adequacy of plans for the evacuation of residents within a ten-mile radius of nuclear power plants, issued a highly critical report on progress made by the Nuclear Regulatory Commission in implementing its own action plan to prevent another Three Mile Island accident:

> Since 1980, however,
> —much of the action plan work has slipped several years,
> —many high priority items have not been completed,
> —NRC has decided not to complete some action plan work, and
> —NRC staff reporting has overstated utilities' progress on the

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63 *Id.*

64 May, *Deciding who Decides on Shorham*, N.Y. Times, Apr. 16, 1986, at B2, col. 1.

65 Pokorny & Richard, *Seabrook Tests Evacuation Plans*, Boston Globe, Feb. 27, 1986, at 23, col. 1.

66 March, *Seabrook drill called a failure*, The Keene Sentinel (New Hampshire), Mar. 1, 1986, at 1, col. 2.

67 *Full participation in Seabrook drill is critical to plan, critics assert*, The Keene Sentinel (New Hampshire), Mar. 3, 1986, at 6, col. 1.

action plan.[68]

Based upon its audit, the General Accounting Office recommended that the Commission should transmit a report to the Congress "describing the status of each action plan item, addressing the significance of each complete item to public safety, and showing how incomplete items will be pursued, accounted for, and reported on in the future."[69]

Testifying before a House of Representatives subcommittee on March 15, 1986, Chairman Nunzio J. Palladino of the Nuclear Regulatory Commission stressed that he was "concerned there may be inadequate attention being given to the broad aspects of chemical safety at nuclear facilities."[70] Other testimony revealed that two telephone numbers listed at the Kerr-McGee fuel processing plant in Oklahoma as providing emergency access to the Nuclear Regulatory Commission were private telephones and one of the individuals answering the telephone reported he had the same number for twenty-four years.[71] Adding to the controversy over the adequacy of the Nuclear Regulatory Commission regulatory program are the charges by Commissioner James K. Asselstine that the other four commissioners rushed through approval of the Diablo Canyon nuclear power plant license without public hearings required by law which would afford opponents of the licensing to testify as to the impact of an earthquake in the San Luis Obispo, California, area on the nuclear plant and the inadequacy of emergency evacuation procedures.[72]

The refusal of a number of general purpose local governments to participate in nuclear evacuation exercises raises the question of whether federal preemptory powers are adequate for the task of protecting public safety. Although the Congress can preempt state and local laws relative to ionizing radiation on sites of nuclear facilities and the transportation of nuclear materials, including spent control rods and other radioactive wastes, it is apparent that the fed-

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68 U.S. GENERAL ACCOUNTING OFFICE, THE NUCLEAR REGULATORY COMMISSION SHOULD REPORT ON PROGRESS IN IMPLEMENTING LESSONS LEARNED FROM THE THREE MILE ISLAND ACCIDENT 29 (1985).

69 *Id.*

70 *Commissioner Tells of Concerns on Nuclear Safety*, N.Y. Times, Mar. 16, 1986, at 28, col. 1.

71 *Id.*

72 Franklin, *House Panel to Scrutinize Nuclear Safety Rulings*, N.Y. Times, Mar. 25, 1985, at B12, col. 1.

eral government lacks the administrative capacity to guarantee public safety. The cooperation of state governments and their political subdivisions is essential when a decision is made that an area within ten miles of a nuclear power plant must be evacuated and/or nuclear materials are being transported. Corporation and not compulsion is the key. One can advance the premise that conditional federal grants-in-aid would be more successful in eliciting state and local government cooperation than arrogant federal assumption of complete responsibility for regulating ionizing radiation.

Truck Size and Weight

Confused responsibility for the public's safety is the product of the Surface Transportation Assistance Act (STAA) of 1982 and its provisions allowing heavy trucks, including tandem trailers, to operate on interstate highways, certain federally-aided primary routes (designated by the Secretary of Transportation), and local "access" routes to service stations, motels, restaurants, and terminals.[73] No criteria were provided in the preemptive law for determining whether older interstate highways and federally-aided primary routes are capable of accommodating the larger and heavier trucks safely or for determining which local roads are bona fide "access" routes.

In preempting state and local responsibilities for highway safety, Congress responded to the powerful trucking industry, a major contributor to congressional candidates, without adequate consideration of the safety problems that would be created that states and their political subdivisions would be unable to address because of federal preemption.

Section 411(a) of the Act stipulates:

> [n]o State shall establish, maintain, or enforce any regulation of commerce which imposes a vehicle length limitation of less than forty-eight feet on the length of the semitrailer unit operating in a truck tractor-semitrailer combination . . . on any segment of the National System of Interstate and Defense Highways . . . and those classes of qualifying Federal-aid Primary System highways as designated by the Secretary . . . .[74]

In addition, section 133(b) prohibits a state from enacting or

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[73] *See* 23 U.S.C. § 101 (1982 & Supp. IV 1986).

[74] 49 U.S.C. § 2311(a) (1982 & Supp. IV 1986).

enforcing a law prohibiting large trucks to travel to and from the Interstate Highway System for the purpose of acquiring food, fuel, repairs, and rest.[75] Interestingly, section 133(a) employed federal highway grants-in-aid, a type of informal preemption, to induce states to allow heavier trucks on interstate highways.

A major advantage of the Act, recognized by critics and supporters, is the eliminating of the patchwork quilt of conflicting state truck size and weight limits. Critics, however, stressed the safety problems that will be produced by the STAA. On August 9, 1983, New York State Executive Deputy Commissioner of Transportation John K. Mladinov testified at a public hearing in Albany, New York, that the traffic congestion and substandard condition of New York City metropolitan area highways necessitate the prohibition of tandem trucks in the city and on Long Island because " 'many of the designated highways have serious geometric, safety and capacity problems.' "[76]

Testifying at the same public hearing, Nassau County Police Commissioner Samuel Rozzi maintained that allowing tandem trailers " 'to utilize our arterial and secondary roadways would be to jeopardize the safety of our motorists, bicyclists and pedestrians.' "[77] In 1983, the New York State Department of Transportation identified 884.46 miles of federally designated highways with a substandard lane width for at least a portion of the total length of the route.[78] On May 3, 1983, responding to the Department's complaint, the Federal Highway Administration removed several routes from the federally designated system; the removed routes generally were parallel to interstate highways meeting all safety standards.[79] However, fourteen of the non-New York City-Long Island highways classified as substandard by the New York State Department of Transportation were not removed from the designated system by the Federal Highway Administration.[80]

In March, 1983, adding fuel to the controversy between the

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75 *See generally* 23 U.S.C. §§ 101-157 (1982 & Supp. IV 1986).

76 NEW YORK STATE LEGISLATIVE COMM'N ON CRITICAL TRANSPORTATION CHOICES, IMPLEMENTING NATIONALLY UNIFORM TRUCK LAWS: WHAT ARE NEW YORK STATE'S CHOICES OF ACTION? 8 (1983).

77 *Id.*

78 *Id.* at 9.

79 *See* 48 Fed. Reg. 20,022 (1983) (codified at 23 C.F.R. ch. 1).

80 *See supra* note 76, at 9.

Congress and the states over control of highways, Congress enacted an amendment to the STAA requiring all states, except Hawaii, to permit 102-inch wide trucks on all federally designated highways if lane widths exceed twelve feet.[81] Vermont Attorney General John H. Easton, Jr., maintained "[i]t looks like some guy with a Rand McNally map sat in an office here and drew the whole thing up and he simply forgot, for instance, that Vermont has hills."[82] In a similar vein, Dean Tisdale of the Idaho Transportation Department stressed, "[w]e are not against trucks out here—after all, we allow double trailers and even triple trailers on our interstates and many other roads. . . . But this plan simply did not put enough emphasis on the safety factor [on mountain roads]."[83]

Congressional Response

The strong protest by officials of various states against the STAA led to congressional responses to state concerns in the form of the Tandem Truck Safety Act of 1984[84] and the Motor Carrier Safety Act of 1984.[85] The former Act established a procedure under which the governor of a state, after consulting concerned local governments, may notify the Secretary of Transportation that the governor has determined that a specific segment(s) "of the National System of Interstate and Defense Highways is not capable of safely accommodating motor vehicles" of the length permitted by STAA of 102-inch vehicles other than buses.[86]

The Act also addresses the safety concerns of state officials relative to local access roads by stipulating:

> [n]othing in this section shall be construed as preventing any State or local government from imposing any reasonable restriction, based on safety considerations, on any truck tractor-semitrailer combination in which the semitrailer has a length not to exceed 28 1/2 feet and which generally operates as part

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81 49 U.S.C. § 2316(a)-(f) (Supp. IV 1986).

82 Holsendolph, *State Officials Gather to Plan Resistance to Big-Truck Rules*, N.Y. Times, Apr. 15, 1983, at B10, col. 1.

83 Holsendolph, *Double-Trailer Trucking Plan Stirs an Outcry in Some Unexpected Quarters*, N.Y. Times, Apr. 11, 1983, at A14, col. 1.

84 49 U.S.C. §§ 2301-2316 (Supp. IV 1986).

85 *Id.* §§ 2501-2520.

86 *Id.* §§ 2301-2302.

of a vehicle combination [as described in the Act].[87]

The Motor Carrier Safety Act of 1984 directs the Secretary of Transportation, within eighteen months of the enactment date of the Act, to issue regulations establishing minimum safety standards for commercial motor vehicles ensuring that

(1) commercial motor vehicles are safely maintained, equipped, loaded, and operated;
(2) the responsibilities imposed upon operators of commercial motor vehicles do not impair their ability to operate such vehicles safely;
(3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate such vehicles safely; and
(4) the operation of commercial motor vehicles does not have deleterious effects on the physical condition of such operators.[88]

The Act also established a Safety Panel to advise the Secretary of Transportation relative to whether a "State law or regulation is additional to or more stringent than a regulation issued by the Secretary."[89] The state law or regulation may be enforced commencing five years after the enactment date of the Act unless the Secretary determines:

(A) there is no safety benefit associated with such State law or regulation;
(B) such State law or regulation is incompatible with the regulation issued by the Secretary . . .; or
(C) enforcement of such State law or regulation would be an undue burden on interstate commerce;[90]

The Act authorizes any person, in addition to a state, to petition the Secretary of Transportation for the issuance of a waiver from a determination of the Secretary that a state law or regulation is preempted.[91]

VI. Conclusion

Although rationally thinking governmental reformers are

87 *Id.* § 2312.
88 *Id.* § 2505(a).
89 *Id.* § 2507(c).
90 *Id.*
91 *Id.* § 2507(d).

convinced the assignment of functional responsibilities is maladroit and advance proposals to eliminate the "maze" by sorting out and assigning responsibility for functions to specific planes of government,[92] elimination of the "maze" is an impossibility since the planes of government are interdependent and action on one level can impact the other levels.

Perceived failure of the states to solve national problems prompts direct initiation of corrective action by the Congress. Our case studies relative to nuclear evacuation plans and truck weights and sizes reveal that Justice Blackmun's contention that the political system affords protection for the states with respect to congressional preemption is supported by the response of the Congress to state protests of federally established truck weights and sizes. The Congress, however, has failed to respond positively to state complaints relative to emergency evacuation plans for residents in a ten-mile radius of nuclear power plants. In part, the response of the Congress in the first instance and nonresponse in the second instance may be due to the fact that the first preemptory action affects all states and the second action affects a limited number of states. Regardless of the initial justification for preemptory action, the Congress periodically should review preemption statutes to determine whether changes are needed to meet new conditions. In the absence of congressional action, the burden of reviewing and adjusting the statute to new conditions falls upon the unelected federal judiciary. A strong case can be made for consultation of the states by the Congress when acting upon preemption bills. States have detailed knowledge of problems within their respective borders and congressional employment of this knowledge will result in the most expeditious solution of the problems. Furthermore, an active state role in solving problems promotes citizen interest in governments and helps to educate the citizenry.

The failure of many members of the Congress to appreciate the impact of preemption statutes on the subnational governance systems is illustrated by the following statement made by Mayor Edward I. Koch of New York City, a former member of the United States House of Representatives:

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92 *See* 4 U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, GOVERNMENTAL FUNCTIONS AND PROCESSES: LOCAL AND AREAWIDE 7 (1974).

> As a Member of Congress I voted for many of the laws . . . and did so with every confidence that we were enacting sensible permanent solutions to critical problems. It took a plunge into the Mayor's job to drive home how misguided my Congressional outlook had been. The bills I voted for in Washington came to the Floor in a form that compelled approval. After all, who can vote against clean air and water, or better access and education for the handicapped? But as I look back it is hard to believe I could have been taken in by the simplicity of what the Congress was doing and by the flimsy empirical support—often no more than a carefully orchestrated hearing record or a single consultant's report—offered to persuade the Members that the proposed solution could work throughout the country.[93]

States rights advocates have touted the states as experimental laboratories of democracies which invent solutions for public problems that subsequently are adopted by other states and the Congress. Currently, we are unable to determine the extent to which the inventiveness of states and their political subdivisions has been stifled by total and partial federal preemption.

It is difficult to argue against Congress playing a larger role in the domestic governance system as the economy and society become more national and international in nature. Nevertheless, the federal role should be delimited primarily on a partnership basis with the states and the general purpose political subdivisions more directly involved in shaping the nature of the conjoint attack upon major societal problems.

In determining that partial federal preemption is essential, the Congress should enact a "code of restrictions" applicable to state and local activities in the preempted functional areas. Relative to ionizing radiation, for example, the code could clearly specify the areas where subnational governments would be prohibited from banning the shipment of radioactive materials through tunnels and over bridges. The fluid nature of the federal system should be reflected in amendments to the "codes of restrictions."

In terms of federalism theory, I argue for a resurrection to prominence and acceptance by the Congress of a true concept of

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93 E. Koch, The Mandate Millstone 4 (Jan. 24, 1980) (statement made at the mid-winter meeting of the United States Conference of Mayors) (available from the Office of the Mayor, City Hall, New York, N.Y. 10007).

cooperative federalism. While numerous descriptors—such as "creative," "new," and "pragmatic"—have been employed to describe the current nature of the federal system, an effective governance system involving planes of governments of necessity must be based upon the establishment and maintenance of cooperative relations if problems are to be solved in the most efficient and effective manner. "Cooperative" federalism must become the guiding norm for relations between the Congress and the states. Coercive federal preemptive actions often have unintended adverse impacts and serious national and international problems, leading to the neglect of Congress' preemptory responsibilities.

Since the federal government lacks the police power and adequate trained personnel and equipment to handle preemptive responsibilities, it has become incumbent upon the Congress to attempt to "co-opt" states and their political subdivisions to supplement direct federal action. Conditional grants-in-aid generally have been successful in eliciting the necessary cooperation, but by themselves do not solve the coordination problem.

Coordination involves both the planning and implementation of policies and programs. Planning may be carried out on a cooperative basis through genuine consultation, information exchange, and negotiations, or planning may be imposed hierarchically. Successful coordination sequentially integrates separate government programs on all planes and projects them into one overall national program, thereby maximizing resource utilization, or ensuring that individual programs are separated completely and do not overlap or conflict.

The federal government's response to coordination problems has been piecemeal to date, perhaps reflecting uncertainty as to the desirability of establishing a new permanent, formal coordinating mechanism. A modest proposal to help ensure programs are planned and implemented in a cooperative manner is the employment of interagency committees to minimize operating problems involving several planes of government. Interagency agreements can facilitate coordination if the responsibilities of the signatory parties are spelled out clearly and procedures are established to maintain continuing communications and joint oversight of programs. In sum, the only feasible approach to ending interlevel disputes and coordination problems and facilitating maximization for resource use is a partnership approach involving all concerned governments.