Regulation and Federalism*

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Over the past few decades, there has been uncritical acceptance in many quarters of the notion that the federal government is the best level of government at which to establish regulatory programs. Congress, the entire federal apparatus, and even the states seemed to agree that when someone said "there ought to be a law," that meant a federal law. With the federal law came federal regulations, federal enforcement, federal judicial review, and, of course, federal bureaucracy.

President Reagan has challenged that assumption. Both through his New Federalism initiatives[1] and his program for regulatory relief,[2] the President is realigning responsibilities among the different levels of government and streamlining the operation of regulatory programs. This paper describes how the Administration is meshing the goals of federalism and regulatory relief and sets forth a framework for considering what level of government is most appropriate for particular regulatory programs.

This framework is built on two basic precepts: first, that there should be a presumption in favor of state and local operation of regulatory programs; and, second, that this should be a rebuttable presumption. The latter point reflects a recognition that state and local administration of regulatory programs may conflict in some instances with other goals of regulatory relief or with other important federal interests. For example, individual states may operate specific programs more effectively than the federal government, but the combined effect of disparate state regulatory standards may intolerably burden interstate commerce, thus requiring uniform federal regulation. The relationship between the Administration's efforts to reinvigorate federalism and its program of regulatory relief can best be understood by examining the practical operation of this rebuttable

* The views expressed by the author are his own and do not necessarily represent the views of the Reagan Administration.

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1. The New Federalism initiative is described in THE WHITE HOUSE, FEDERALISM: THE FIRST TEN MONTHS (1981), and The White House, Fact Sheet: Federalism Initiative (Nov. 27, 1982).

2. The Administration's regulatory relief activities are described in The White House, Materials on President Reagan's Program on Regulatory Relief (June 6, 1981); Presidential Task Force on Regulatory Relief, Reagan Administration Achievements in Regulatory Relief: A Progress Report (Aug. 1982); Presidential Task Force on Regulatory Relief, Reagan Administration Achievements in Regulatory Relief for State & Local Governments: A Progress Report (Aug. 1982); Presidential Task Force on Regulatory Relief, Reagan Administration Regulatory Achievements (Aug. 1983).

presumption. To begin with, however, the general contours of these two initiatives must be understood.

I. The New Federalism and Regulatory Relief

A. *The New Federalism*

The New Federalism is President Reagan's effort to restore local control to local units of government. The concentration of power in the federal government over the past 50 years has led to numerous problems. Individual communities have lost the ability to control what should be local decisions. Those decisions have often been removed to the federal level, where they are not fully understood. Smaller units of government are in close touch with their constituents, but the federal government is generally remote from the citizens' day-to-day lives and concerns. This problem of remoteness is compounded by the federal government's inefficiency; smaller units of government can operate modest streamlined programs tailored to meet local needs, but federal programs often are unmanageable in size and rely on unnecessary levels of bureaucracy. By returning power to states and localities, President Reagan hopes to remedy many of these difficulties.

The President's philosophy of federalism encompasses federal regulatory programs. These programs are susceptible to all of the generic criticisms set out above. They are frequently inconsistent with local needs and preferences, administered by bureaucrats who are unaccountable to local citizens, and riddled with inefficiencies. The Administration generally believes that many of the problems that plague some existing federal regulatory programs would diminish or disappear if these programs were established at the state or local level of government.

B. *Regulatory Relief*

Regulatory relief is one of the cornerstones of President Reagan's program for economic recovery. At the beginning of his term, the President established the Presidential Task Force on Regulatory Relief, chaired by Vice President Bush, and initiated an extensive review of existing and proposed regulations.[3] To date, the Task Force's review and revision of existing regulations, together with Congress' elimination of interest rate ceilings in late 1982, will provide $150 billion in savings over the next decade to consumers, state and local governments, and large and small businesses.[4] Most of these savings represent private funds that can now be

3. Exec. Order No, 12,291, 3 C.F.R. 127 (1982).
4. 1983 Task Force Report, *supra* note 2, at 5.

put to more productive uses; some, however, represent state and local funds now freed up for state and local governments to spend as they and their constituents see fit.[5] The deregulatory efforts focused primarily on administrative changes in the first two years; the focus has now shifted to statutory revisions, which could result in more local flexibility.

President Reagan's Executive Order sets out the principles that have animated and governed the regulatory relief effort: The federal government should not regulate unless there is a demonstrated need for regulation; it should regulate only where the benefits exceed the costs; and, in cases in which the quantification of benefits is impossible, it should be certain that it has chosen the most cost-effective approach, one that incorporates a determination of the best and most responsive unit or units of government to vest with regulatory responsibility.[6]

The last phrase is, of course, the most important for purposes of the federalism initiative. In establishing or revising regulatory programs, the Administration emphasizes the return of regulatory authority to states and localities. This gives state and local governments the ability to fashion their own solutions and to set their own priorities. The virtues of this freedom are severalfold:

First, it permits governmental programs to be tailored to meet local needs. Those who operate these programs are able to respond quickly and effectively to problems as they arise.

Second, it fosters diversity and experimentation. The 50 states represent 50 different ways government can function. The value of trying varied approaches to regulation has been overlooked in the nation's drive to create centralized federal programs. Placing regulatory responsibilities at the state level permits experimentation. For each type of regulation — economic, environmental, health — different states are likely to establish different types of regulatory programs. Thus, the states can serve as laboratories for identifying and redefining the kinds of regulatory programs that work most effectively.

Third, it produces regulatory programs that are more accountable, and therefore more responsible, to local preferences. This should increase not only the efficiency, but also the legitimacy, of governmental regulatory efforts.

The ideal of local control, however, must be balanced against the need for a strong central government to promote commerce and other federal

5. The Presidential Task Force on Regulatory Relief estimates that its review and revisions of existing regulations have saved state and local governments at least $2 billion annually and $4 to $6 billion in capital costs. *Id.*

6. Exec. Order No. 12,291, *supra* note 3.

interests. That is why the presumption in favor of state and local regulation must be rebuttable.

II. Striking a Proper Balance

The remainder of this paper explores the implementation of this rebuttable presumption and describes circumstances in which the conflicts between federalism and regulatory efficiency require a very careful and subtle balancing of interests and concerns. The examples used are grouped under four rubrics: burdens on interstate commerce; federal accommodation; interstate competition; and federal expertise.

A. *Burdens on Interstate Commerce*

A central concern of the federal government is the prevention of burdens on interstate commerce.[7] Indeed, the prevention of such burdens was one of the reasons why the federal government was created. A principal reason for the failure of the Articles of Confederation was the ability of each state to regulate and tax products produced in neighboring states as those products passed across its borders.[8] As Madison wrote in the *Federalist Papers*, the federal government was to "provide for the harmony and proper intercourse among the states."[9]

The following section describes some of the cases in which New Federalism principles and potential burdens on interstate commerce have been involved. These cases illustrate the considerations that must be involved in choosing the appropriate level of government for regulatory programs, if any are required.

1. *National Product Liability Legislation*

Product liability is one area in which the Administration has supported national legislation to overturn substantive state laws. Implicit in this decision was a determination that conflicting state product liability laws have created such significant burdens on interstate commerce that preemptive federal legislation was necessary to provide consistent nationwide treatment of product liability disputes.

Historically, the liability of manufacturers for injuries caused by their products has been determined under state law. Significant differences, however, exist among the product liability laws of the several states. For example, a manufacturer's duty of care toward product users varies

7. U.S. CONST. art. I, § 8.
8. *See* E. KITCH, REGULATION, FEDERALISM AND INTERSTATE COMMERCE 17-18 (1981).
9. THE FEDERALIST No. 41, at 291 (J. Madison) (H. Dawson ed. 1873).

widely from state to state. While in most states the manufacturer will not be held liable for injuries provided that it utilized the best available existing technology in designing its products,[10] in at least one state the manufacturer may be strictly liable for injuries even if they could not feasibly have been designed out of its product with then-current technology.[11] Similarly, most states now require warnings of dangers associated with the use of a product; however, the content and extensiveness of these warnings are judged by standards that vary considerably from state to state.

States may also differ sharply in the defenses they make available to a defendant manufacturer. In many states, for example, a manufacturer is not at liberty to establish that its product was significantly misused or altered after leaving its control, while in other states such evidence may be considered.[12] Most states exclude evidence of subsequent remedial measures by manufacturers in order to encourage safety innovations;[13] however, a few jurisdictions admit such evidence in strict liability cases.[14] State laws governing subrogation rights for recoveries under workers compensation laws for persons injured in the workplace also vary significantly.[15]

As it currently exists, product liability law creates tremendous uncertainty for manufacturers. The wide differences in state laws, as well as the frequent changes in those laws, make it practically impossible for manufacturers of products sold throughout the United States to determine the standards of conduct to which they will be held.[16]

This uncertainty injures manufacturers in a number of ways. Because manufacturers cannot predict the standards by which their products will be judged, they may be reluctant to introduce new designs or innovative products. Shifting and conflicting legal standards also generate extensive and expensive litigation, the costs of which are undoubtedly reflected in still higher insurance rates. Since the sale of products is not limited to the state in which they are manufactured, insurance companies must take into account, in setting rates, the manufacturers' potential liability in states with the strictest laws. Higher insurance rates increase the cost of doing business, thereby raising entry barriers for new firms and disadvantaging smaller producers who have to spread insurance costs over smaller

10. *See, e.g.*, Boatland v. Bailey, 609 S.W.2d 743, 748 (Tex. 1980).
11. *See e.g.*, Beshada v. Johns-Manville Prods. Corp. 90 N.J. 191, 204, 447 A.2d 539, 546 (1982).
12. S. REP. NO. 670, 97th Cong., 2d Sess. 43 (1982).
13. *E.g.*, Ault v. International Harvester Co., 13 Cal.3d 113, 117 n.1, 117 Cal. Rptr. 812, 813 n.1 528 P.2d 1148, 1150 n.1 (1974).
14. *See e.g.*, Shuldies v. Service Mach. Co. 448 F. Supp. 1196, 1202 (E.D. Wis. 1978).
15. *See generally* S. REP. NO. 670, 97th Cong. 2d Sess. 47 (1982).
16. *Id.* at 5.

volumes of production.

Moreover, while the substantive laws of the states differ, the ability of any individual state to improve the situation is sharply limited. An individual state cannot protect its manufacturers from the costs and uncertainties of product liability laws of other states. At the same time, a state that restricts the ability of local residents to recover from manufacturers places local residents at a disadvantage compared to residents of other states — with little corresponding gain for manufacturers. As a consequence, governors in Kansas[17] and Connecticut[18] have vetoed state product liability legislation, noting that individual state efforts make little difference in resolving the problem. Efforts to enact reform legislation to reduce the scope of transaction costs and excessive or unreasonable damage awards may also face their strongest opposition at the state level, where lawyers' groups opposed to any change in the current system are very influential.[19]

The inability of individual states to solve the problems that result from conflicting product liability laws generates a need for federal involvement. Federal legislation can create uniform product liability standards that provide the predictability and certainty that manufacturers need and currently lack — in short, that remove the burden on interstate commerce created by conflicting state laws. It should be emphasized, however, that the Administration's decision to seek preemptive substantive legislation was coupled with a resolve to oppose any undercutting of state court jurisdiction over product liability issues or the creation of any new federal enforcement powers or machinery.

The New Federalism is concerned with returning control over local lifestyles to local decision-makers. Consequently, the Administration has sought to increase state control of health, education, and welfare choices. In contrast, while the *extent* of commercial regulation is of great concern to the Administration, the positioning of such regulation at the federal level does not itself infringe upon local lifestyle preferences.

Another reason for proceeding at this time with a federal law governing product liability is that in this substantive area the federalist process of state experimentation and testing of alternative approaches has already had a full opportunity to develop the issues and the available forms for legislation. Federal legislation following this long period of state experi-

17. Veto Message, Gov. John Carlin (April 24, 1980).

18. Veto Message, Gov. Ella Grasso (June 16, 1978).

19. *See Products Liability Reform Hearings on S.2631 Before the Senate Subcomm. on Consumers of the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 85 (1982) (testimony of Thomas Bendorf, representing American Trial Lawyers of America, questioning accuracy and sufficiency of claims data underlying insurance industry advocacy of federal products liability statute).

mentation will therefore not have the stifling effect that it would have had if a uniform federal rule had been imposed prior to any experimentation by the states.

2. *Coal Slurry Pipeline*

Federal legislation to promote the development of coal slurry pipelines is an example of a situation in which the exercise of state authority, at least on an initial review, was not deemed to burden interstate commerce sufficiently to justify federal regulation. While the Administration's position on such legislation is under continuing review and could certainly change as a better understanding of the overall economic effects of any such legislation develops, the initial decision to oppose such legislation is nevertheless instructive as it concerns the analysis of interstate commerce issues.

In 1982, a Senate bill sought to facilitate the construction of interstate coal slurry pipeline distribution systems by granting broad authority to the Secretary of Energy.[20] The bill provided that any person proposing to build an interstate pipeline distribution system that the Secretary of Energy found to be in the national interest would be authorized to acquire a right-of-way through private lands by the exercise of the power of eminent domain.[21] The power of eminent domain could not be used to acquire water rights, however.[22] Use of eminent domain is a practical necessity in any pipeline construction plan since it is not likely that railroads, which derive enormous revenues from coal transportation, would voluntarily sell the rights-of-way necessary to build coal slurry pipelines that would then compete directly with railroads for the lucrative coal transportation business.

The initial response of the Reagan Administration was to oppose federal legislation to resolve the coal pipeline issue. Opposition to the bill focused not on whether coal slurry systems should be granted eminent domain powers over railroads, but rather on what level of government should make this choice. The Administration concluded that the decision regarding the award of eminent domain power to facilitate the construction of a pipeline through any given state should be made solely by that

20. S. 1844, 97th Cong., 1st Sess. (1981). A similar House bill, H.R. 4230 97th Cong. 1st Sess. (1981), would have given the power of eminent domain to the Interstate Commerce Commission (ICC), rather than the Secretary of Energy. The reasons for the Administration's opposition to granting the power of eminent domain to the Secretary of Energy similarly apply to all other federal agencies, including the ICC.

21. S.1844, 97th Cong., 1st Sess. § 6 (1981).

22. *See To Facilitate the National Distribution and Utilization of Coal: Hearings on S.1844 Before the Senate Comm. on Energy & Natural Resources*, 97th Cong., 1st Sess. (1981) (Statement of Garey Caruthers, Assistant Secretary, Land & Water Resources, Dep't. of Interior).

state.

This decision was also influenced by a perception that what was at issue was a matter of advantage for one industry over another, rather than a problem affecting a broad spectrum of interstate business activity as in the case of product liability legislation. In addition, by allocating land and water uses, the construction of a coal slurry pipeline could affect the level and composition of state economic activity, the use of land, and even the quality of the environment in the localities involved. In addition, the use and disposition of local real estate has historically been a fundamental element of local law. For these reasons, the Administration concluded that each state involved should be able to balance, for its own citizens, the tradeoffs involved in a decision regarding the extension of eminent domain authority.

At least after its initial review, the Administration concluded that the arguments in favor of creating the pipeline did not justify alteration of the presumption in favor of state and local decisionmaking. The Administration was especially reluctant to endorse preemption of state law because the eminent domain decision would be made exclusively at the federal level and, once made, would be irreversible and would exclude any meaningful state role in its implementation. Unlike national product liability legislation, under which the application of general law to specific cases is a significant function that could be left to the states, the pipeline dispute revolves largely around a single decision to extend eminent domain power, and federal preemption would remove *all* state participation in that decision. Furthermore, although individual states, or even groups of states, are generally powerless to resolve the product liability problem because products are sold nationwide, the construction of any pipeline, bridge, highway, or airport is a discrete issue that an individual state or small group of states can resolve without federal intervention.

In part because of the finality of a federal decision regarding eminent domain and its foreclosure of further debate or participation at the state level, the Administration was unwilling to support the coal slurry pipeline legislation unless an extremely strong showing was made of generalized economic advantages from the pipeline that could only be achieved through federal action. Indeed, even though recent deregulation of rail freight rates could produce some economic dislocation, given the fixed and limited location of railroad systems and the inadequacy of localized rail competition, the Administration initially determined that the dislocation could be assessed as effectively at the state level as at the federal.

The decision not to endorse the pipeline legislation permitted further study of the issue before enormous amounts of private capital would be committed irrevocably to specific projects. In fact, analysis has been con-

tinuing to determine the extent to which pipeline construction would produce widespread economic benefits through lower utility rates, and also the extent to which local decisionmaking might preclude regional benefits, especially where many beneficiaries of such lower utility rates might be unrepresented in the states with power to control pipeline construction. As knowledge of these and other factors increases, the initial legislative decision could be revised at any time.

3. *Chemical Labeling*

OSHA is currently considering a proposed chemical labeling regulation to inform workers of the dangers posed by chemicals with which they work.[23] The proposed regulation would include a requirement that upstream suppliers identify hazards in chemicals sold to downstream customers.[24] More than ten states or cities have already adopted their own local chemical labeling standards,[25] and others are considering similar requirements.[26]

The proposal has engendered considerable opposition from within the Administration, but it enjoys broad support from *both* business and labor groups (although these two groups differ as to the details). While labor support is not surprising — the rule is one of the AFL-CIO's top regulatory priorities — the support from business was not completely anticipated. After all, the costs that the proposed requirements would impose on industry could run into the billions over the next 40 years.[27] There appear to be three factors that help to explain the business support: First, the rule could assist in protecting businesses against product liability and workman's compensation exposure; second, it should halt the rapid proliferation of regulations at the state and local level; and third, since most chemical manufacturers in fact *already* provide labeling, adoption of the rule would generate some favorable publicity for these companies at little cost, while at the same time imposing substantial costs on competitors who do not provide labeling.

Those within the Administration who oppose the chemical labeling initiative question whether this is not really a marketplace-works-best argu-

23. OSHA Hazard Communication, 47 Fed. Reg. 12,092 (1982) (proposed Mar. 19, 1982).

24. *Id.* at 12,101.

25. The states of Arizona, California, Connecticut, Maine, Massachusetts, Michigan, New York, and Washington, and the city of Philadelphia have all enacted unique hazard communication statutes. *Id.* at 12,095, 12,100.

26. For example, at the time of the OSHA rule was proposed, New Jersey, Ohio, Wisconsin and such cities as Louisville, Ky., and Santa Monica, Cal., were in various stages of enacting hazard communication or worker right to know legislation. *Id.*

27. The estimated cost of the current proposal, over a 40-year period using a 10% discount rate, is \$2.6-\$3.0 billion. *Id.* at 12,110.

ment. They suggest that the status quo is now addressing the worker safety problems said to require the initiative; most workers are already protected by current chemical industry labeling practices, and OSHA otherwise regulates substances that are hazardous to workers. Opponents to the proposed regulation also question whether the argument for a consistent nationwide standard is sufficient to outweigh the basic principle — included in OMB's Executive Order 12291 guidelines — that regulations would be administered at the lowest geographic level consistent with meeting public needs. The discussion here will be limited to the second issue.

The OSHA statute does not provide for preemption of state law.[28] As a practical matter, however, states and localities are very likely to defer to the federal government upon adoption of a federal standard — and, perhaps just as important, labor unions will cease lobbying for new state and local labeling regulations. Moreover, a federal standard can provide not only uniformity, but also more certain protection against compromises of trade secret data. When, then, is the basis in federalism for objecting to a federal standard? State experimentation is not much of an issue, since the question is not whether or how to *control* certain substances, but merely whether to provide information. Local familiarity with the issues involved is also not much of an issue, since most of the products are manufactured by multinational corporations with little local ownership and are sold internationally as well as interstate, and since local health officials do not have any special incentive to second-guess a federal agency's specifications in this area. Finally, those who bemoan the loss of diversity and accountability with respect to some qualities of American life would not likely select chemical labeling as a prime example of the dangers of centralized regulation. It might be added that those who oppose a federal regulation on the ground that it is merely an effort by "big" business to increase the costs to be borne by smaller competitors cannot deny that the practical effect of a sensibly written federal regulation may be to reduce the cumulative costs imposed by local governments.

The question remains whether a federal regulation should be adopted solely for the purpose of obviating the need for inconsistent state regulations. Assuming that there are no other arguments for the rule, there is no reason why a voluntary guideline, rather than a binding rule, could not resolve the problem of inconsistency. There are, however, other arguments for the regulation, and unions, relying on those arguments, will probably

28. In establishing OSHA, Congress recognized the historical powers of the states to regulate safety and health matters: "Nothing in this chapter shall prevent any state agency or court from asserting jurisdiction under state law over any occupational safety or health issue with respect to which no standard is in effect under 655 of this title." Occupational Safety and Health Act of 1970, § 18(a), 29 U.S.C. § 667(a) (1976).

not be satisfied *at the local level* with the adoption of a non-binding federal guideline. A binding federal rule would therefore appear to be necessary to discourage the adoption of burdensome and inconsistent local laws.

B. *Federal Accommodation*

In some cases, it is politically easier for the federal government to act than the states. As a consequence, federal regulatory programs frequently develop because the federal government can take the political heat and the states cannot. The desirability of such federal accommodation is open to question: When, if ever, should federal preemption of local control be encouraged? Additionally, how should programs based on such federal accommodation operate? The following section explores these questions.

1. *Highway Safety*

All branches of the federal government and a variety of interest groups in Washington spend considerable time, money, and effort debating the advisability of numerous automobile safety regulations issued by the National Highway Traffic Safety Administration (NHTSA). However, the agency's regulations do not deal with the consumption of alcohol, which accounts for roughly half of the automobile accidents in this country. Nor do they establish, as French laws do, penalties for failure to wear seat belts. It may well be that while safety standards are important, they have diverted too much attention from other policy options of equal importance. Should not the federal government address drunken driving and other non-engineering factors that affect accidents, such as driving age and seat belt use?

If the federal government is better able to take the heat on these issues, it might be suggested that highway funds or some other carrot be withheld from states that do not enact severe penalties for drunken driving or failure to wear seat belts. On the other hand, it could be argued that federal regulation of alcohol and seat belt use would constitute an impermissible intrusion that would ultimately face rejection and that would further stifle local initiative.

How a locality disciplines its drivers is obviously a question of considerable local concern,[29] and there is an equally obvious benefit in state experimentation with the best method to discourage drunken driving or encourage seat belt use. The issue of drunken driving has indeed become an

29. *See The War Against Drunk Drivers*, NEWSWEEK, Sept. 13, 1982, at 31 (finding that 27 states recently passed tougher drunk driving laws, and that other states are considering similar actions).

issue of local, grassroots concern. Moreover, the federal legislation signed by the President to provide $125 million in grants over three years to states that implement stiffer controls and penalties for drunken driving will help to highlight and reinforce such local concerns.[30] Additionally, the Reagan Administration has begun an educational campaign designed to focus on drunken driving *and* the advisability of wearing seat belts.[31]

Needless to say, there are many critics who say that federal education and the creation of incentives with respect to these two issues are not enough. The courts may in any event ultimately decide whether to mandate passive restraint systems, perhaps absolving localities of any responsibility for seat belt use.[32] But local governments can make a contribution to driver safety and should not be discouraged from doing so by federal-level hyperactivity that will not always achieve its intended results.

Just how much the federal government's attempted regulation of highway safety discourages local initiative and responsibility is unclear. It is possible, for example, that insurance companies, which are regulated primarily by the states, could induce some passive restraint purchases by providing appropriate premium discounts — *if* it were clear that the federal government would not mandate passive restraints and thus render the profit-reducing premium cuts unnecessary. On the other hand, the insurance companies have declined to lower premiums by the amounts that would compensate for the cost savings they claim passive restraints would provide, which suggests that they have questions about whether they would in fact produce the claimed results. The federal government's attempted regulation with respect to passive restraints has thus done little good so far and may have been counterproductive. If passive restraints will work (because consumers will not unhook them), then the financial incentive provided by insurance is probably a better "regulator" than a flat availability rule issued by a federal agency or court. An insurance policy can make its coverage of an accident contingent on the driver's *not* having unhooked the passive belt, whereas a federal regulation cannot influence this behavior in the slightest. On the other hand, if passive restraints will not work (because drivers will not keep them hooked in the absence of a financial incentive to do so), then the federal government's activities will have come to nothing and may in fact have discouraged

30. Alcohol Traffic Safety - National Driver Register Act of 1982, 98 Stat. 1738 (to be codified at 23 U.S.C. §§ 401, 402).

31. Exec. Order No. 12,358, 47 Fed. Reg. 16,311 (1982) (establishing Presidential commission on drunk driving).

32. *See* Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856 (1983) (holding NHTSA's recision of passive restraint regulations invalid and remanding the issue to the agency for reconsideration).

states and localities from trying something else in the meantime.

In short, it is not clear that the federal government's past regulatory activities in this area have achieved a great deal; they may in fact have discouraged alternative approaches at the local level. Alcohol consumption is the most logical target. The experience with Prohibition suggests that direct federal regulation in this area would not be successful and that the Administration is correct to encourage local governments to address the issue. But the states, which have traditionally regulated insurance, might also explore ways to prod insurance companies to provide the economic incentives for passive belt purchases that the companies assert — at least to federal officials — would provide significant benefits.

2. *Inspection and Maintenance Under the Clean Air Act*

States that do not achieve certain air pollution standards mandated under the Clean Air Act by specified dates are required to implement plans that require automobile inspection and maintenance (I&M) programs.[33] These programs are enormously unpopular at the state level and are viewed by citizens and local politicians as egregious abuses of federal power. Their unpopularity is not surprising, if not also entirely defensible. While the ultimate efficacy of I&M programs is still debated, they do remain the only obligation of the Clean Air Act that is imposed on individual citizens directly (as opposed to indirectly in the form of higher costs for automobiles and other goods).

Inspection and maintenance programs are an example of questionable federal accommodation. They demonstrate that when citizens at the local level strongly oppose regulatory programs created but not administered at the national level, severe problems will result. Here, state and local governments all but refuse to implement I&M plans, and bitter opposition continues.[34] It is unlikely that the I&M program will survive unchanged

33. 42 U.S.C. § 7410(a)(2)(G) (Supp. IV 1980). The statute provides that to gain Administrator approval, a state implementation plan must, among other things, provide "to the extent necessary, and practicable, for periodic inspection and testing of motor vehicle to enforce compliance with applicable emmission standards." *Id.*

34. For example, on vetoing state legislation proposed to stop implementation of an automobile emmission inspection/maintenance program ordered by EPA for three metropolitan areas of Pennsylvania, Gov. Thornburg stated:

> I resent the choice that current federal legislation, the federal courts, and the action of the prior [state] administration imposes on me . . . . I am forced to veto this bill which would block a program that I agree is unfairly burdensome and unnecessary, or face the loss of over $400 million in federal funds.

Governor Vetoes Bill Stopping I/M plan, Prefers to Contest in Courts, Congress, 12 ENV'T REP. (BNA) 450 (July 31, 1981). Inspection/maintenance programs also encountered problems in California. *See California Senate Votes Down I/M Bill; EPA to Begin Funding Sanctions Process,* 11 ENV'T REP. (BNA) 670 (Sept. 5, 1980); *Brown Pledges to Draft New I/M Plan for December Session of Legislature,* 11 ENV'T REP. (BNA) 822 (Oct. 17, 1980).

in Congress. But there are some who regret its probable demise, since the program probably represents the only way to educate the citizenry to the fact that the Clean Air Act leads to burdens as well as benefits.

C. *Interstate Competition*

The stringency of regulatory requirements may become a focus of competition among states. Certain states may seek to attract industry, funds, or population by creating regulatory programs that are more lenient than those of other states. Federal regulation is sometimes necessary to prevent the unfair and undesirable effects of this competition.

The central question in determining the necessity of federal regulation is whether individual states fully internalize the costs of competition with their neighbors. Where individual states can benefit by relaxing regulatory requirements and the harmful effects of that leniency are visited upon other states, federal regulation is necessary. However, where states must bear the full costs of their actions, federal regulation is rarely desirable.

It should be noted also — and this is a phenomenon reflected vividly in the Clean Air Act — that many national regulatory standards are a product of the desire of one region, state, or locality to be protected against the natural economic advantages of another. The following discussion covers some of the problems that have a local base and that would not require national attention but for the desire to equalize *natural* advantages or disadvantages.

Consider smog, for example. It is primarily a problem of the Los Angeles basin (known as the "valley of the smokes" long before modern settlement), and five of the seven counties that violate the national nitrogen oxide (NOx) standard are located in southern California. As a result, California has its own NOx standard,[35] which until recently was more stringent than the national standard. Why, then, should consumers in the other 49 states be forced to pay for extra pollution control equipment that may not produce any benefit outside of southern California?

This question has never been satisfactorily answered. Although the problem of acid rain resulting from SO2 and NOx emissions has often been cited as justification for the NOx control expenditures, there is no convincing evidence that NOx emissions outside of New England are subject to enough long-range transport to contribute to the problem there. Yet

35. The California nitrogen oxide emissions standard was set in 1981 at 0.7 grams per mile (gpm) for passenger cars, and 1.0 gpm for light duty trucks and medium-duty vehicles weighing less than two tons. The standards apply for 1983 and subsequent model year vehicles. The previous, more stringent, California standard was 0.4 gpm for passenger cars and light duty trucks. *Air Resources Board Relaxes Limit for Vehicles Nitrogen Oxide Emissions*, 12 ENV'T REP. (BNA) 215 (June 5, 1981). The federal standard is 1.0 gpm. *See* 42 U.S.C. § 7521(b)(1)(B) (Sup. IV 1980).

the Congress has never seriously considered applying a stricter standard to cars sold in New England, no doubt because such a standard would meet intense opposition from car dealers to automobile price differentials, based upon their fear of the resulting competition from dealers in neighboring states. Such opposition did exist in California during the period in which there was a difference between the California standard and national standard.

The influence of the car dealer lobby also explains one of the most bizarre examples of a federal standard imposed to protect just one locality from price competition: the high-altitude requirements of the Clean Air Act.[36] These requirements, which apply beginning in September, 1983, require *all* cars to be equipped with pollution control equipment that will enable them to comply with pollution standards at high altitudes, where only three percent of the cars drive. Car dealers in the Denver area are principally responsible for this ridiculous *national* standard. They do not want to have to sell cars at higher prices, because of special equipment requirements, than dealers elsewhere in the country. There is, however, some indication of broad, bipartisan congressional interest in overriding the objection of the Denver area dealers and limiting the high-altitude requirement to high-altitude areas. There seems to be no support for eliminating federal high-altitude regulation altogether and leaving the issue to those few areas affected.

Acid rain itself, of course, has aspects of a regional struggle. Acid rain may appear to be a classic case of externalities that require federal action. That is, many Midwestern power plants put up so-called "tall stacks" to disperse emissions, prompting complaints that these stacks were merely sending the pollution to the lakes and forests of the Adirondacks and New England and Canada. Side by side with the alleged consequences of acid rain, however, is the fact that Canada's NOx limits are far more lenient than this country's (3.3 gpm versus 1 gpm) — a comparison that holds true for lead standards as well. It is also relevant that Midwestern utility rates are lower than rates in New England, primarily because the Midwest has its own local source of energy (high sulfur coal) and New England does not. Leaving the scientific controversy to one side, there remains the suspicion that the drive to impose severe controls in Midwestern power plants stems in part from a desire to narrow utility rate differences between the Midwest and New England — and, in the case of the Canadians, to lead industrial customers in New England and the Midwest to buy Canada's excess hydroelectric power and natural gas, which would become more competitive as acid rain controls pushed up Midwest utility

36. 42 U.S.C. § 7521(f) (Supp. IV 1980).

rates.

The level of utility rates is important. New Hampshire, for example, has long been in violation of its Clean Air Act SO2 emissions requirements, and recently asked EPA for permission to more than *double* its allowable SO2 emissions. To be sure, the tonnage involved is much less than in the Midwest, but so is the dispersion factor. Vermont and Maine have also been in violation of SO2 limits in the past. Yet no New England state would incur any expense under the congressional acid rain control proposals. This is of questionable fairness; if acid rain is a problem calling for federal action, the costs of control should be shared, at least by those who contribute to the problem.

The related percentage reduction requirement[37] is a better example of one region using the Act to protect itself from the natural endowments of another. The Act requires installation of extremely expensive equipment ("scrubbers") to treat all coal, including low sulfur coal, at such great expense that Midwest and Southeast utilities have every financial incentive to ignore the availability of low sulfur coal from the West and to rely instead on their own cheaper local — and usually high sulfur — coal deposits. The primary purpose of the requirement is to protect the high sulfur coal deposits and mining jobs in the Midwest, although it does also operate to reduce sulfur emissions in the West marginally below what they would otherwise be. Since there are other far more cost-effective ways to achieve the same air quality results, there is little national justification for the requirement other than blunt political realities.

Another regional conflict disguised as a national issue is reflected in the Prevention of Significant Deterioration program.[38] The rules established under this program apply to the 80 percent of the country that is in compliance with national air quality standards for the seven criteria pollutants. Much of the complexity of the PSD rules accomplishes little and delays construction projects. It is widely suspected, though this cannot be proven, that the motivation behind the program is to reduce the natural advantage that the West has in cleaner air resources — an advantage that permits more rapid expansion of industry — and thereby to aid older and more congested industrial centers.

While the Act also deals with stationary source pollutants that are national in scope and that have no peculiar regional or local origin, the complexity of the control mechanisms established still leave room for enormous tension between federal and state enforcement officials. It is generally agreed that the process by which EPA approves state implemen-

37. 42 U.S.C. § 7411(a)(1)(A)(ii) (Supp. IV 1980).
38. 42 U.S.C. § 7470 (Supp. IV 1980).

tation plans[39] is in need of revision. But other difficulties are not so susceptible to solution. For example, one of the Administration's early regulatory relief actions — eliminating the dual definition of sources in order to permit bubbling in nonattainment areas[40] — was designed in part to accord the states more flexibility in devising their own control strategies. The Court of Appeals for the District of Columbia Circuit invalidated EPA's action,[41] eliminating the possibility of local experimentation.

Very few seriously believe, of course, that the national standard-setting role of EPA under the Clean Air Act should undergo significant change. But even so, there is room for much more particularized local, state, and regional response to pollution problems that do not require a centrally dictated, single solution. The only problem is that here, as elsewhere, there is no simple formula to determine precisely how to allocate responsibilities. Nor is there any known way to keep elected representatives from using this Act to secure, quite apart from their impact on air quality, competitive advantages for the states and districts that they represent.

D. *Federal Expertise*

Regulatory efforts sometimes require extensive and highly specialized scientific and technical expertise. In such cases, it may be inefficient to establish 50 different centers of expertise. Where these considerations make it appropriate for the federal government to take the lead in developing standards, it is important to recognize that it may nevertheless be advantageous to carve out a role for state and local governments in the implementation of those standards.

1. *Technology Requirements*

The technological challenges of all environmental, health and safety statutes are significant and require the commitment of considerable financial resources. It obviously makes little sense to impose duplicative financial burdens on individual states. Yet there is a significant danger in establishing an overwhelmingly monolithic research effort. Innovation, risk, and experimentation do require and result in some waste over the short term; nevertheless, some funds should be set aside for these purposes.

The bureaucratic incentive is to push incessantly for technology-forcing

39. 42 U.S.C. § 7410 (Supp. IV 1980).

40. 46 Fed. Reg. 50,766 (1981).

41. Natural Resources Defense Council v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982) (holding EPA application of bubble concept to nonattainment areas violates Clean Air Act and vacating regulations announced in 46 Fed. Reg. 50,766 (1981)), *cert. granted*, 103 S. Ct. 2427 (1983).

design standards rather than for more flexible performance standards that let technology develop in more innovative ways. The "bubble"[42] and trading rights policies[43] under the Clean Air Act are designed to provide the necessary flexibility. The states can play an invaluable role in structuring enforcement innovations that permit technological advances.

2. *Enforcement and Compliance Incentives*

The possibilities of using compliance incentives to improve enforcement and to reduce its cost at the same time have been largely ignored until recently. OSHA has taken the lead, targeting its routine inspections at the highest-risk industries and companies in order to conserve resources and encourage bottomline safety performance. Delegation of enforcement responsibilities to states is being explored in connection with the Section 404 "wetlands" program under the Clean Water Act.[44] If that delegation works, the result will be quicker decisions on permits and other reviews and thus less expensive construction, as well as more responsive regulatory action. The difficulty in effecting this kind of delegation, however, is the same difficulty associated with any voluntary ceding of power: Few people willingly engage in it, even if it is not necessarily permanent. The devolution of power and influence, of course, affects far more than just the particular government officials and representatives involved; it also affects the many additional lawyers, consultants, and lobbyists who reside in the greater Washington metropolitan area.

Conclusion

Left out of this discussion are those issues of paramount national concern — such as the maintenance of a stable monetary system and the enforcement of constitutional rights — with respect to which the appropriateness of and need for national-level activity are obvious. Yet there is even in these areas still the need to encourage the exercise of local responsibility — whether it be to run state or local governments in a fiscally responsible manner or to avoid constitutional rights violations before they merit federal attention. The federal establishment should never be any larger than it has to be, and the need to watch carefully the size and growth of all governments should never be forgotten in what should always be an on going effort to find the best allocation of governing responsibilities.

42. *See* 46 Fed. Reg. 50,766 (1981) (applying bubble policy to nonattainment areas).
43. *See* 47 Fed. Reg. 15,076 (1982) (interim final emissions trading policy statement).
44. Clean Water Act of 1977, Pub. L. No. 95-217, § 67, 33 U.S.C. § 1344 (Supp. V 1981), *amending* Federal Water Pollution Control Act, Pub. L. No. 92-500, § 404 (1972).