

Fake Federalism: How American “Federalism” Works and Why It Doesn’t

By

Lauren Maisel Goldsmith

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

Jurisprudence and Social Policy

in the

Graduate Division

of the

University of California, Berkeley

Committee in charge:

Professor Malcolm M. Feeley, Chair

Professor Anne Joseph O’Connell

Professor Martin M. Shapiro

Professor Sean Farhang

Spring 2016

Abstract

Fake Federalism: How American “Federalism” Works and Why It Doesn’t

by

Lauren Maisel Goldsmith

Doctor of Philosophy in Jurisprudence and Social Policy

University of California, Berkeley

Professor Malcolm M. Feeley, Chair

My dissertation introduces a new, positive theory of federalism that explains that the divergence of *institutional* and *individual* interests is an important cause of instability in federal systems. This is because, when the interests of state institutions and individual politicians differ, rational, self-interested politicians will pursue their individual interests at their states’ expense. My dissertation then applies this theory to the United States. I use two qualitative case studies, education and crime control, to show why this “interest gap” between states and state politicians developed, and further, how the short sighted, self-interested decision-making of state actors contributed to American federalism’s decline.

To my loving husband, Paul.

Table of Contents

Chapter 1	A Theory of American Federalism	1
Chapter 2	Federalism and Education	35
Chapter 3	Federalism and Crime Control	72
Chapter 4	Our Fake Federalism	111
Selected Bibliography		134
Appendix		141

Chapter 1

A Theory of American Federalism

Part I: Introduction

Justice Scalia of the United States Supreme Court once said, “Like some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening children and school attorneys.”¹ Justice Scalia was referring to the Court’s invocation of the long-dormant *Lemon* Test—a test for alleged Establishment Clause violations—but he might as well have been referring to American federalism.

The United States was conceived with both federalism and nationalism in mind. At different points in its history, one or the other has predominated in terms of the Court’s jurisprudence, political rhetoric, and academic scholarship. Sometimes, for long stretches, federalism has seemed, in Justice Scalia’s words, “killed and buried.”² Now is not one of those times. Since the 1990s, federalism seems to have predominated. However, a careful analysis reveals that federalism has been in decline since 1789, and that even in periods of seeming state ascendance, federalism has continued to diminish.

This dissertation describes this decline, reveals the various masks that have obscured it, and explores the common practices of state officials that have unwittingly undercut federalism’s vitality and viability. This Chapter sets out the framework for my argument. Part II explicates my positive theory of federalism and presents a series of hypotheses about the wounds state officials have inflicted upon their states. Part III lays out the theory’s historical foundations. Part IV previews some of the theory’s contributions to current debates about contemporary federalism, and the implications of other long standing theories, such the “Political Safeguards Theory.” Part V provides a roadmap for the chapters that follow.

Part II: A Positive Theory of Federalism

Federalism is a distinct mode of intergovernmental relations. What distinguishes federal political systems from non-federal political systems is the division of power between a central government and one or more constituent governments, all of which derive their existence from some sort of constitutional or political agreement, rather than each other.³ For example, power in a unitary political system is centralized in a national government, whereas regional governments enjoy only whatever discretion is given to

¹ *Lamb’s Chapel v. Ctr Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring).

² *Id.*

³ For this reason Daniel Elazar has insisted that the United States is “non-centralized” rather than “decentralized” and that the notion of “levels” of government in the United States is as misleading as it is wrong. DANIEL J. ELAZAR, *EXPLORING FEDERALISM* 35 (1987); Daniel J. Elazar, *Federalism vs. Decentralization: The Drift from Authenticity*, 6 *PUBLIUS* 9, 13 (1976).

them. In contrast, power in a federal system is shared among co-sovereigns that enjoy wide latitude to govern within agreed upon spheres of authority.⁴

Many well-established theories of federalism claim that federal systems are inherently unstable. William Riker, the father of modern federalism studies, argued in the 1960s that because of this instability, federal systems were prone to dissolution once the threat that gave rise to the initial federal political agreement disappeared, unless specific conditions were present.⁵ More recently, Malcolm Feeley and Edward Rubin argued that the source of instability in federal systems is an “incomplete” political identity.⁶ That is, some citizens relate to the center and others to the constituent units, the result of which is an unstable and (“tragic” in their eyes) compromise. According to Feeley and Rubin, barring the establishment of some equilibrium, this crisis of identity is likely to resolve in favor of either nationalization or dissolution.⁷ For them, Switzerland may be the exception that proves the rule.

These arguments may be correct, but they neglect another source of instability in federal systems—the focus of this dissertation—, which is the potential for conflict between the interests of government institutions and the individuals who represent them. Institutions are composed of and dependent upon groups of individuals for their survival. Each of those individuals has interests, separate and distinct from the institution’s interests, and the two may and often will differ. First and foremost, successful institutions are enduring ones, whereas successful politicians are those who win elections. The former requires long-term strategic planning, and the latter, short-term. In other words, any politician, no matter how successful she is, will pass only briefly through an institution’s life. Most politicians, however unwittingly, act like it.

But federal systems can endure only if every sovereign unit in the system both possesses “rights,” and is represented by politicians who are willing, at appropriate times, to wield them. Whether politicians will act in this manner turns on the degree to which it serves their individual interests and does not interfere with the pursuit of their individual goals. When rational, self-interested, politicians’ and the institutions they are entrusted to represent and protect have misaligned or incompatible interests, those politicians will prioritize their self-interest. This self-interested decision-making often will come at the institution’s expense, either through actually harmful behavior or sheer neglect.

This incompatible set of interests, rather than Washington’s aggressiveness, accounts for decline of the American federal political system. As I develop this argument, I will show that the misalignment between *institutional* interests at the state level and *individual* interests of state representatives at the state level have undercut the federal principle, and facilitated the national government’s primacy.

⁴ *Id.*

⁵ WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE (1964).

⁶ MALCOLM FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE (2008); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1993).

⁷ FEELEY & RUBIN, *supra* note 6.

A. The “Interest Gap” in the United States

Power in the United States is shared between the federal government and fifty state governments. This power-sharing arrangement emerged against the backdrop of British rule in North America, the Revolutionary War, and especially, the failure of the Articles of Confederation. The Articles of Confederation, adopted in 1777, created a weak central government, reserving for each state “its sovereignty, freedom, and independence, and every power, jurisdiction, and right . . . not . . . expressly delegated to the United States in Congress assembled.”⁸ It was because the states retained too much power relative to the Continental Congress under this arrangement that the Articles of Confederation came to be viewed, not ten years after its adoption, as a failure. The 1789 Constitution’s main purpose was to lessen this imbalance of power. For that reason, and because of the political necessity to compromise, the Framers established a quasi-federal system consisting of a federal government of limited powers and state governments of general powers.

The Constitution’s framers assumed that perpetual conflict between federal and state politicians, both of whom would seek Americans’ loyalty, would perpetuate the federal system. Specifically, they believed, state politicians would jealously guard their sphere of authority from federal encroachment. This assumption underlay the view of some of the Framers that rational state politicians would find it in their interest to prevent the accretion of power to the federal government, and to protect the states’ autonomy—in effect the first statement of the political safeguards of federalism.⁹ As James Madison explained:

On the other hand, should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.¹⁰

⁸ U.S. ARTICLES OF CONFEDERATION art. II.

⁹ See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980). See also Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUMBIA LAW REVIEW 215 (2000).

¹⁰ THE FEDERALIST NO. 46 (JAMES MADISON), <http://thomas.loc.gov/home/histdox/fedpapers.html>.

Like many of the Framers, Madison believed implicitly that state politicians would fiercely defend their states' right to self-govern *because it would be in their interest to do so*.¹¹

This competition between federal and state politicians that the Framers anticipated is, in some ways, well-trodden territory in the federalism literature. The federalism literature virtually ignores, however, the competition that exists between state and local politicians.¹² Yet it is this competition that fosters the interest gap between state institutions and state politicians. This *intrastate* competition is not typically studied because local governments have no formal status in the federal system;¹³ the states can create and abort them. However, this is a critical omission.¹⁴ In this dissertation, I argue that the rivalry that exists between state and local politicians plays a critical, though not obvious, role in shaping the federal-state relationship and defining the contours of the American political system.

Before turning to a discussion of the mechanics and consequences of intrastate competition, the next section specifies my methodological approach and clarifies the stakes involved.

a. Rational Behavior

Rational choice theory holds that federalism arises where it serves politicians' self-interest—from politicians' "realist awareness" that federalism is necessary for their political survival.¹⁵ In other words, rational individuals choose federalism because they believe it will benefit them. In an important respect, however, the rational choice literature has fallen short. The rational choice literature fails to recognize the distinction between individual and institutional interests, and that the two may not always be aligned.

¹¹ In *The Federalist Papers* No. 51, Madison explained, the new government must give "to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of others." THE FEDERALIST NO. 51 (JAMES MADISON), <http://thomas.loc.gov/home/histdox/fedpapers.html>.

¹² But see Richard Briffault, "What About the 'Ism'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1305 (1994) ("But states and localities are often bitterly at odds, and national government actions have at times advanced the position of local governments at the expense of the states.").

¹³ But see, e.g., *id.*; Roderick M. Hills, Jr., *Is Federalism Good for Localism?* 21 J.L. & POL. 187 (2005); Heather Gerken, *The Forward: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

¹⁴ For example, as Harvey Mansfield has explained, "[t]he multiplicity of elected local officials, their statewide organizations, the county and city political machines, and the locally oriented legislators make state-local relations usually in fact federal, whatever the theoretical plentitude of state powers." Harvey C. Mansfield, *Functions of State and Local Governments*, in THE 50 STATES AND THEIR LOCAL GOVERNMENTS 108 (James W. Fesler ed., 1967).

¹⁵ RIKER, *supra* note 5, at 12; Benjamin Kleinerman, *William Riker's 'Rationalist' Federalism*, in THE ASHGATE RESEARCH COMPANION TO FEDERALISM 413 (Ann Ward & Lee Ward ed., 2009). See generally ROBERT C. COOTER, THE STRATEGIC CONSTITUTION (2000); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

When they are not, rational decision-makers will pursue their interests, even at their institutions' expense. This is a key insight that explains why some federal systems fail.

This section describes the constitutional, statutory, and other constraints within which federal, state, and local politicians make decisions. To an extent, this is a familiar doctrinal story. But to a much greater extent, what follows is an analysis of the role of these constraints in shaping individual actors' interests, and thus their behavior, in the federal political system. The section that follows then explains that, although most Americans probably believe that "federalism is the most rational manner in which to organize a large state,"¹⁶ the federal system has broken down because preserving it is, at best, a secondary concern for politicians, whose political survival turns on their ability to compete with rival politicians and meet Americans' demands for goods and services.¹⁷

1. The Federal Government and Federal Politicians

The federal government is, paradoxically, the most constrained and the most powerful government in the American political system. On the one hand, it is a government of limited powers, and thus it may do only what the Constitution grants it the power to do.¹⁸ On the other hand, it is the Supreme Court's interpretation of the

¹⁶ Kleinerman, *supra* note 15, at 422.

¹⁷ This is in contrast to Riker's assertion in *Federalism* that the federal bargain arises from politicians' desire to expand their territorial control or because of "some external military-diplomatic threat or opportunity." RIKER, *supra* note 5, at 12.

¹⁸ Article I, section 8, which is the source of most of the federal government's power, authorizes Congress "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; To borrow money on the credit of the United States; To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States; To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures; To provide for the punishment of counterfeiting the securities and current coin of the United States; To establish post offices and post roads; To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; To constitute tribunals inferior to the Supreme Court; To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; To provide and maintain a navy;

Constitution's provisions that determines the scope of the federal government's enumerated powers, and the Court's interpretation has been expansive.

i. The Commerce Clause

The Commerce Clause is amongst those constitutional provisions that both empowers the federal government to act and that the Supreme Court has found to be limited in its application.¹⁹ On the one hand, this provision—Article I, section 8 of the United States Constitution—confers upon Congress the power “[t]o regulate Commerce with foreign Nations, and among the several states”²⁰ and has provided the source of authority for the vast majority of congressional legislation.²¹ For most of American history, Congress has relied on the Commerce Clause both to realize its policy goals and to expand the scope of its constitutional authority.²² On the other hand, the Supreme Court has, at times, recognized important limits on Congress's exercise of the commerce power. Predominantly in the late-Nineteenth Century to early-Twentieth Century and again in the late-Twentieth Century, the Supreme Court imposed some constraints on Congress's exercise of the Commerce Clause by narrowly reinterpreting the meaning of the word “Commerce” and the phrase “among the several states.”²³

For example, in the Court's earliest case arising under the Commerce Clause, *Gibbons v. Ogden*, the justices enforced an expansive reading of the Clause, concluding that Congress could regulate intercourse, or all phases of business, including navigation,

To make rules for the government and regulation of the land and naval forces;
To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;
To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;
To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;--And
To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.” U.S. CONST. art. I, §8.

¹⁹ *Id.*

²⁰ *Id.*

²¹ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 238 (2d ed. 2002).

²² *Id.*

²³ *See, e.g.*, *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *National Federation of Independent Business v. Sebelius*, 567 U.S. 1 (2012).

concerning more states than one.²⁴ This was the prevailing interpretation of the Clause until 1887, when the Supreme Court began to distinguish between “commerce” and other, distinct, phases of business, such as mining, manufacturing, and production, and to require that there be a “direct effect” on interstate commerce.²⁵ The Court’s position on the Commerce Clause, until 1937, thus was somewhat limiting as to Congress’s power to regulate economic activity.

Beginning in 1937 until the early-1990s, the Court retreated to its view, first articulated in *Gibbons*, that commerce includes all phases of business and that Congress can regulate any local activity that, in the aggregate, affects interstate commerce.²⁶ This allowed for substantially more congressional legislation and of a wider variety than in the previous forty years. However, in 1995, in *United States v. Lopez*, the Court once again found there to be limits on Congress’s exercise of the commerce power, concluding that the phrase “among the several states” permitted Congress to regulate only the channels of interstate commerce, the instrumentalities of interstate commerce and persons or things in interstate commerce, and activities that have a substantial effect on interstate commerce.²⁷ In subsequent cases, including *United States v. Morrison* and *National Federation of Independent Business v. Sebelius*, the Court clarified that only so-called “economic effects” could be aggregated and that Congress cannot regulate “inactivity.”²⁸ *Sebelius* is further discussed below, as it demonstrates a more recent general shift in the Court’s thinking on Congress’s powers, and also that the Court’s interpretations of Congress’s enumerated powers do not always evolve in tandem.

ii. The Taxing and Spending Clause

Like the Commerce Clause, the Supreme Court has found that there are limitations on Congress’s power under the Taxing and Spending Clause,²⁹ although until recently, those limitations were minimal. Contrary to the principle of limited government and a narrow or Madisonian construction of the taxing and spending power, the Court consistently has held that Congress has broad authority to tax and spend for the general welfare. That is, the federal taxing and spending power is broader than Congress’s enumerated powers. The Court adopted this position in *United States v. Butler*, which invalidated the Agricultural Adjustment Act, rejecting the argument that the taxing and spending power is limited to the “enumerated legislative fields committed to the

²⁴ 22 U.S. 1 (1824).

²⁵ See, e.g., *Hammer*, 247 U.S. 251 (1918); *Schechter Poultry*, 295 U.S. 495 (1935); *Carter*, 298 U.S. 238 (1936).

²⁶ *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). See also *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942).

²⁷ *United States v. Lopez*, 514 U.S. 549 (1995). See also *United States v. Morrison*, 529 U.S. 598 (2000).

²⁸ *Morrison*, 529 U.S. 598 (2000); *Sebelius*, 567 U.S. 1 (2012).

²⁹ Article I, section 8 of the Constitution states that “Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the Units States; but all Duties, Imposts and Excises shall be uniform throughout the United States.” U.S. CONST. art. I, §8.

Congress.”³⁰ According to the Court, the power to tax and spend is “separate and distinct” from Congress’s other enumerated powers and “is not restricted in meaning by the grant of them, and only by the requirement that it shall be exercised to provide for the general welfare of the United States.”³¹

Few limitations remain as to the power of Congress to lay and collect taxes; however, traditionally, the Supreme Court distinguished between direct taxes, which were prohibited except in certain circumstances,³² and indirect taxes, which generally were permitted.³³ In the Nineteenth Century, the Court construed “direct taxes” narrowly as taxes levied on real property, leaving Congress broad power to tax almost everything else. Subsequent decisions upheld federal taxes on carriages,³⁴ state bank notes,³⁵ and income.³⁶ Although the Court invalidated the federal income tax in *Pollock v. Farmer’s Loan & Trust Co.* for violating the Constitution’s requirement that “direct Taxes shall be apportioned among the several States which may be included within this Union,” it more or less abandoned the distinction between direct and indirect taxes in the early-Twentieth Century, around the time Congress passed the Sixteenth Amendment.³⁷

The Court, in the first half of the Twentieth Century, also recognized a distinction between regulatory taxes and revenue raising taxes. Of the two types, only regulatory taxes were impermissible because they were viewed as virtually indistinguishable from a penalty or punishment. According to the Court, “in the extension of the penalizing features of the so-called tax . . . it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.”³⁸ Since 1937, however, the Court has taken the position that “[e]very tax is in some measure regulatory. . . . [It] is not any less a tax because it has a regulatory effect.”³⁹ In other words, “[s]ince . . . the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, if a tax be within the lawful power, the exertion of that power may not be

³⁰ 297 U.S. 1, 65 (1936).

³¹ *Id.*

³² U.S. CONST. art. 1, §2 (“direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers”); U.S. CONST. art. 1, §9 (“[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census”).

³³ CHEMERINSKY, *supra* note 21, at 281 (“Under the earlier cases, direct taxes seemed limited to taxes on real property; therefore, all other taxes could be imposed by Congress without concern about apportionment among the states.”).

³⁴ *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

³⁵ *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869).

³⁶ *Springer v. United States*, 102 U.S. (12 Otto.) 586 (1880).

³⁷ U.S. CONST. art. I, §2; U.S. CONST. amend. XVI (“The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration”). See also *Bank & Trust Co. of New York v. Eisner*, 256 U.S. 345 (1921); *Bromley v. McCaughn*, 280 U.S. 124 (1921).

³⁸ *Child Labor Tax Case*, *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922).

³⁹ *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937).

judicially restrained because of the results to arise from its exercise.”⁴⁰ This construction gives Congress substantial latitude to levy taxes from state and local governments, as well as from both citizens and non-citizens.

Much like the taxing power, the Court has construed the spending power liberally, generally allowing Congress to freely spend federal money in service of the vague “general welfare.” The Court took this position in *Butler*, and it has reaffirmed it in a number of cases since.⁴¹ For example, in *Steward Machine Company v. Davis*, which upheld the Social Security Act, a majority of the Court rejected the view that the Act’s conditional grant provision “coerced” the states, by the “whip of economic pressure,” to cede to the federal government their reserved powers.⁴² Likewise, in *South Dakota v. Dole*, the Court saved a federal law that promised to withhold five percent of federal highway funds from any state that did not establish a 21-year-old drinking age.⁴³ In the Court’s view, the law provided a “relatively mild encouragement”⁴⁴ and “encouragement to state action . . . is a valid use of the spending power.”⁴⁵

Although the Court has blessed Congress’s use of conditional grants to influence state behavior, since the 1980s, it has demonstrated some willingness to invalidate congressional grants that are too ambiguous or too coercive. For instance, in *Pennhurst State School and Hospital v. Halderman*, the Court ruled in favor of a state that was sued for violating a provision of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 because Congress failed to state clearly the conditions of the grant. The Court stated, “if Congress intends to impose a condition on the grant of federal moneys it must do so unambiguously.”⁴⁶ Similarly, the Court invalidated a provision of the Patient Protection and Affordable Care Act of 2010, which created additional conditions on the states’ continued receipt of Medicaid funds, a slim majority finding the threatened loss of all Medicaid funding unconstitutionally coercive.⁴⁷ Despite these occasional attempts to restrain Congress’s spending power, it remains one of the most important powers in Congress’s arsenal. Until there are meaningful limits on how Congress can use federal dollars, most federal mandates will be “accompanied by federal funds that are sufficient to induce pro-spending jurisdictions to surrender control over their programs and to induce previously anti-spending jurisdictions to accept the program.”⁴⁸ At least one outspoken champion of real federalism, Michael Greve, has recognized this tactic for what it is: a tool for blunting state power.⁴⁹

⁴⁰ *McCrary v. United States*, 195 U.S. 27 (2004).

⁴¹ 297 U.S. 1 (1936); *Sabri v. United States*, 541 U.S. 600 (2004).

⁴² 301 U.S. 548 (1937).

⁴³ 483 U.S. 203 (1987).

⁴⁴ *Id.* at 212.

⁴⁵ *Id.* See also *New York v. United States*, 505 U.S. at 166-67 (noting that Congress can motivate states to act where it cannot compel them to act by putting conditions on federal grants).

⁴⁶ 451 U.S. 1, 20 (1981).

⁴⁷ *Sebelius*, 567 U.S. 1 (2012).

⁴⁸ Michael S. Greve, *Against Cooperative Federalism*, 70 *MISS. L.J.* 557, 596 (2000).

⁴⁹ *Id.* See also MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012); MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* (1999).

iii. The Necessary and Proper Clause

Article I, section 8 of the Constitution, the Necessary and Proper Clause, grants Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁵⁰ This Clause could have functioned as an important limit on Congress’s legislative power, had the Supreme Court interpreted it as allowing Congress to enact only absolutely necessary or essential laws. The Court has always rejected that view, however, explaining as long ago as 1819 and as recently as 2010 that the Necessary and Proper Clause’s “terms purport to enlarge, not to diminish the powers vested in the government.”⁵¹ Accordingly, “in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we [the Court] look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”⁵²

iv. The Tenth Amendment

The Tenth Amendment also, at various points in American history, and often in conjunction with the Court’s Commerce Clause cases, has been interpreted as a constraint on the power of the federal government, rather than a mere declaration—a “truism”—that the powers not delegated to the federal government are retained by the states and the people. The Tenth Amendment states: “The 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.”⁵³ In some of the earliest cases to come before the Supreme Court, a majority of the justices held that the Tenth Amendment is not a judicially enforceable limit on Congress’s power.⁵⁴ Writing for the Court in *Gibbons v. Ogden*, Justice Marshall declared that Congress could exercise its enumerated powers “to the utmost extent” and that those powers were “vested . . . as absolutely as [they] would be in a single government.”⁵⁵ However, as the Court’s interpretation of the Commerce Clause narrowed in the late-Nineteenth Century, its interpretation of the Tenth Amendment changed as well. In a series of cases, mostly involving the scope of Congress’s commerce power, the Court declared that the Tenth Amendment reserved a sphere of activity, or sovereignty, to the states.⁵⁶ For example, the Court held in *Hammer v.*

⁵⁰ U.S. CONST. art. I, § 8.

⁵¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (upholding the constitutionality of the Bank of the United States under the Necessary and Proper Clause); *United States v. Comstock*, 560 U.S. 126 (2010) (affirming Congress’s power under the Necessary and Proper Clause to authorize federal courts to order the Federal Bureau of Prisons to confine “sexually dangerous” prisoners indefinitely).

⁵² *Comstock*, 560 U.S. at 132.

⁵³ U.S. CONST. amend. X.

⁵⁴ *Gibbons*, 22 U.S. 1 (1824).

⁵⁵ *Id.* at 196, 197.

⁵⁶ *See, e.g., Hammer*, 247 U.S. 251 (1918); *Schechter Poultry*, 295 U.S. 495 (1935); *Carter*, 298 U.S. 238 (1936).

Dagenhart⁵⁷ and Schechter Poultry v. United States,⁵⁸ that Congress's commerce power did not extend to the regulation of mining, manufacturing, and production, which were constitutionally protected areas of state sovereignty.

After roughly forty years, the Court once again ruled that the Tenth Amendment was not a limit on Congress's power, but instead a reminder that Congress must have constitutional authority in order to legislate. In *United States v. Darby*, the Court famously declared that the Tenth Amendment "states but a truism that all is retained which has not been surrendered."⁵⁹ This view prevailed with only one exception until the "Federalism Revolution" of the 1990s. In that exceptional case, *National League of Cities v. Usery*, the Court ruled that the Fair Labor Standards Act violated the Tenth Amendment as applied to the states because it interfered with traditional state functions.⁶⁰ The majority declared: "there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or regulate commerce."⁶¹ But the Court overruled *National League of Cities* nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*, in which it concluded that the "traditional governmental functions test" of *National League of Cities* was unworkable, and that the political process itself was sufficient to protect the states from federal encroachment.⁶²

Since the 1990s, the Court has often relied on the Tenth Amendment to check federal power, ruling in case after case that a federal law that imposes a substantial burden on a state government will only be enforced if Congress clearly intended that result;⁶³ that Congress may not "commandeer" state governments by compelling them to enact or administer a federal program;⁶⁴ and generally, that federal laws that affect areas of traditional state sovereignty are more constitutionally vulnerable than other laws.⁶⁵

National Federation of Independent Business v. Sebelius, the Court's decision upholding most of the provisions of the Affordable Care Act, is the best exposition of the limits on Congress's legislative power and demonstrates how the Tenth Amendment interacts with and informs the Court's construction of other constraints on Congress's power, such as the Commerce Clause and Taxing and Spending Clause. In *Sebelius*, the Court held that the individual mandate provision was unconstitutional under the Commerce Clause because the power to regulate commerce "presupposes the existence of commercial activity to be regulated" and the individual mandate did not regulate existing commercial activity.⁶⁶ However, a bare majority sustained the provision under

⁵⁷ *Hammer*, 247 U.S. 251 (1918).

⁵⁸ *Schechter Poultry*, 295 U.S. 495 (1935).

⁵⁹ *Darby*, 312 U.S. at 124.

⁶⁰ 426 U.S. 833 (1976).

⁶¹ *Id.* at 842.

⁶² 469 U.S. 528 (1985). The *Garcia* Court basically adopted the political safeguards theory. See Wechsler, *supra* note 9; CHOPER, *supra* note 9.

⁶³ *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

⁶⁴ *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

⁶⁵ See, e.g., *Morrison*, 529 U.S. 598 (2000).

⁶⁶ *Sebelius*, 132 S. Ct. at 2586-87.

the Taxing and Spending Clause, reasoning that the “shared responsibility payment” was far less than the price of health insurance, not punitive, and collected by the Internal Revenue Service just as any other revenue raising tax, and thus the individual mandate imposed a valid tax.⁶⁷ Still a bare majority found that the Act’s Medicaid expansion provision violated the Tenth Amendment and was not a valid exercise of the Spending Clause because it was coercive—states did not have a genuine choice whether to accept Medicaid funding and the accompanying conditions because Congress threatened to withhold all future Medicaid funding if states refused to accept the changes.⁶⁸ Thus, a spending condition may not be coercive or it will be found to violate the Tenth Amendment. Whether a spending condition is unconstitutionally coercive, however, remains unclear.

Sebelius illustrates that the constitutional constraints on Congress are not entirely or always toothless, and that in at least some cases, the Court will find that a law exceeds the outer boundaries of Congress’s constitutional authority.⁶⁹ All the same, it remains the case that none of the constraints on Congress’s power are especially constraining, and that while historically they have ebbed and flowed, they have mostly ebbed. Consider that despite the seemingly robust defenses of federalism since the 1990s, the Court has never categorically insisted that the national government could not act. Even as it overturned federal law, it suggested that Congress could pursue its objectives in other, often creative, ways that would pass constitutional muster.⁷⁰

In sum, although the Supreme Court has placed some limits on the Congress’s enumerated powers, Congress still retains wide latitude to govern. Indeed, the Court has acknowledged so few limits on Congress’s powers that some have suggested that there is a “federal police power,” much like the states’ police power, which enables Congress to legislate the health, welfare, safety, and morals of every American.⁷¹

2. State Governments and State Politicians

In contrast to the federal government, which is a government of limited powers, the states are governments of general powers, and thus have much greater latitude to govern within their jurisdictions. Still, the states’ power is far from absolute. For example, states may not place an “undue burden” on interstate commerce, the regulation of which falls to the federal government, for example, by taxing only out-of-state

⁶⁷ *Id.* at 2595-96, 2600.

⁶⁸ *Id.* at 2605-06, 2608.

⁶⁹ *Id.* at 2606. For example, the Court refused to decide at what point a grant condition becomes unconstitutionally coercive because, according to the justices, it is “enough for today that wherever that line may be, this statute is surely beyond it.” *Id.*

⁷⁰ *See, e.g., New York*, 505 U.S. at 174.

⁷¹ *See, e.g.,* John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 678 (1999); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 30 (1998); Alan N. Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1021 (1988).

goods.⁷² States also may not discriminate against out-of-state citizens in their exercise and enjoyment of their fundamental rights and certain economic activities.⁷³

Further, the Constitution's Supremacy Clause⁷⁴ and the Supreme Court's related federal preemption doctrine⁷⁵ are powerful constraints on the states' police powers. This is because a state law may not contradict or undermine a valid federal law.⁷⁶ Later in this Chapter, it will become clearer that federal preemption shapes the relationship between the federal and state governments in critical ways. For now, suffice it to say, the doctrine of federal preemption often has been invoked to quash states' attempts to divert federal money away from their intended recipients—local governments—into the states' coffers.⁷⁷

Lastly, states are constrained by the federal Bill of Rights, insofar as its provisions have been incorporated against them through the Constitution's Fourteenth Amendment,⁷⁸ as well as by their own constitutions and laws, which can be both more numerous and restrictive than federal law. For example, most state constitutions greatly restrict the governor's formal administrative and supervisory authority, for example, by requiring elections for certain executive branch officers that the governor might

⁷² U.S. CONST. art. I, §8 (The Congress shall have the power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

⁷³ U.S. CONST. art. IV, §2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

⁷⁴ U.S. CONST. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

⁷⁵ *See, e.g.*, *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) (invalidating Massachusetts' regulation prohibiting government agencies from purchasing goods and services from companies that do business with Burma); *Cipollone v. Liggett Group, Inc.* 505 U.S. 504 (1992) (preempting state law tort awards for failure to warn and fraudulent misrepresentation); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (preempting state common law claim under the Employee Retirement Income Security Act of 1974); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (endorsing preemption where the federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (holding that the Alien Registration Act preempted a similar state law).

⁷⁶ The Supreme Court's federal preemption doctrine is broader than the Supremacy Clause.

⁷⁷ *Lawrence County v. Lead-Deadwood School District No. 40-1*, 469 U.S. 256, 260-61 (1985) (holding that a South Dakota statute regulating the distribution of federal funds given to a county was preempted by language in the federal law that authorized the use of funds for “any” governmental purpose).

⁷⁸ U.S. CONST. amend. XIV (“No state shall . . . deprive any person of life, liberty, or property, without due process of law”).

otherwise appoint.⁷⁹ Many states also impose limits on the number of terms elected officials may serve, as well as restrictions on revenue raising, deficit spending, and borrowing.

Of the constraints on the exercise of state power that are grounded in the federal Constitution, only the constraints imposed by the Supremacy Clause and federal preemption doctrine are of great consequence for federal-state relations in particular. Mainly, this is because a broad view of federal preemption “leaves less room for governance by state and local governments.”⁸⁰ However, for reasons that are reasonably straightforward, federal preemption is not a relevant constraint on state power where the federal government encourages the states to legislate in service of specific federal goals. Because, constitutionally, the states are almost completely free to legislate, and the federal government is relatively constrained, federal officials often rely on state officials for administrative and other support.

3. Local Governments and Local Politicians

Although local governments are formally a part of the states that created them, they function basically independently.⁸¹ Local governments may not have a lot, or indeed, any formal constitutional power, but they exercise a great deal of power nonetheless. This is partly because Americans value local self-government⁸²—sometimes called local home rule⁸³—and partly because it is hard for states to control hundreds or thousands of local governments, for practical and legal reasons, without

⁷⁹ U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE INVOLVEMENT IN FEDERAL-LOCAL GRANT PROGRAMS: A CASE STUDY OF THE “BUYING IN” APPROACH (1970); Christopher Berry & Jacob Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1386 (2008).

⁸⁰ CHEMERINSKY, *supra* note 21.

⁸¹ Briffault, *supra* note 12, at 1318 (“Most local governments are primarily accountable to their local electorates.”).

⁸² ROSCOE C. MARTIN, THE CITIES AND THE FEDERAL SYSTEM 22-23, 29-30 (1965) (“But practice often departs from law, either by blinking legal dogma or by modifying it in application. . . . The right of local self-government is among the hardest of American traditions.”). *Id.* at 30.

⁸³ Professor David Berman notes that cries of local home rule despite their having little formal legal recognition function much like cries of “states’ rights” as far as challenging state control. DAVID R. BERMAN, STATE AND LOCAL POLITICS 52 (8th ed. 1997). *See also* ANN O’M. BOWMAN & RICHARD C. KEARNEY, STATE AND LOCAL GOVERNMENT 272 (8th ed. 2011) (“Over time, most states have gradually relaxed their control over localities through grants of home rule, which give local governments more decision-making power.”); MARTIN, *supra* note 82, at 32; Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 11 (1990). As of 1990, forty-eights states granted some form of local home rule to at least some of their local governments. U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE LAWS GOVERNING LOCAL GOVERNMENT STRUCTURE AND ADMINISTRATION 60 (1993).

simply dissolving them.⁸⁴ According to Richard Briffault, “Local governments and local interests are often far more powerful than their limited legal status would suggest. There is a ‘cultural bias toward local self-government’ in addition to the disposition to identify with state citizenship.”⁸⁵

There are other reasons why local governments wield greater power than their constitutional status would suggest. First, the main impetus for the creation of local governments is the people themselves; and it is relatively easy in most states to create a local government or special district. It is also exceedingly difficult for states to change the boundaries of local governments—to consolidate, annex, or abolish them—typically because most states require the consent of all those governments involved.⁸⁶

Second, local governments enjoy almost exclusive authority over local affairs, including land use planning and school finance, and it is very rare for state officials to withdraw authority over those issue areas, or even to try. Richard Briffault explains that “state legislatures make only limited use of their formal authority to pre-empt local lawmaking in areas of fundamental local concern. The states have been reluctant to supersede local land use regulations, redistribute local resources, redraw local boundaries or control local government formation decisions.”⁸⁷ In other words, state legislatures are loath to interfere with truly local affairs, and in the few states on the few occasions where that did happen, state courts have generally protected local autonomy.⁸⁸ “Most state courts have treated the devolution of state power to local governments as more than a contingent political arrangement for the local discharge of state responsibilities.”⁸⁹ Even the Supreme Court “has been supportive of the interests of local governments,” although as Briffault notes, it has never found a right to local government.⁹⁰

Lastly, Dillon’s Rule, although technically still in effect in many states, is largely a thing of the past. “Under Dillon’s Rule, local governments may exercise only those powers ‘granted in *express words*,’ or ‘those *necessarily or fairly implied* in or *incident* to, the powers expressly granted,’ or ‘those *essential* to the declared objects and purpose of the [municipal] corporation—not simply convenient, but indispensable.”⁹¹ Even though Dillon’s Rule states that local governments must not act unless expressly authorized by their states to do so, in actuality, the reverse is more common: today local governments are able to legislate freely unless expressly denied the power to act. Briffault has noted that, “[s]tate governments rarely consider, let alone adopt, measures that directly constrain local legal authority.”⁹² Thus, practically speaking, “cities have played a

⁸⁴ See MARTIN, *supra* note 82, at 47. For example, in 1962 there were 91,236 local government units. *Id.* at 36. See also Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in the Federal System*, 115 YALE L.J. 2542, 2556-62 (2005).

⁸⁵ Briffault, *supra* note 12, at 1347.

⁸⁶ *But see* Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364 (2012).

⁸⁷ Briffault, *supra* note 83, at 114.

⁸⁸ *Id.* at 1, 3-4, 16-18.

⁸⁹ *Id.*, at 113.

⁹⁰ *Id.*

⁹¹ *Id.*, at 9.

⁹² *Id.* at 114.

significant part in the functioning of the federal system for many years. . . . ‘Local governments—rural, urban, and suburban—are part and parcel of the American federal system.’ . . . Thus they have been accorded *de facto* recognition as members of the federal partnership, though denied constitutional status.”⁹³ Dillon’s Rule has also been formally abandoned by many states.⁹⁴ Courts have sometimes even protected the right of local governments to act in ways that defy state law.⁹⁵ In short, local governments exercise great power, although this power does not necessarily come from and is not protected by the federal or a state constitution. There are a variety of factors, including tradition, custom, and norms that give local governments credible commitments to govern regardless of federalism.

To be sure, cities and other localities have at times been treated as mere municipal corporations, consistent with Dillon’s Rule,⁹⁶ and therefore do not enjoy sovereign immunity, as do the states.⁹⁷ The Supreme Court in *Hunter v. City of Pittsburgh*, which affirmed the power of the Pennsylvania legislature to consolidate contiguous municipalities, explained that they are “created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.”⁹⁸ The “number, nature and duration of the powers conferred upon [them] and the territory over which they shall be exercised rests in the absolute discretion of the State.”⁹⁹ The Court has even gone so far as to explain that “the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.”¹⁰⁰ But *Hunter* was decided in 1907, and it is doubtful that even the current, pro-federalist, Court would use such broad language, or affirm such an exercise of state power as against a local government. It is even more difficult to imagine that a state would try to exercise such powers now.

Moreover, the Court has found that the Constitution protects localities from state interference, at least to some extent. The Court has found, for example, that cities and localities can be insulated from state control through their relationship with the federal government and the Supremacy Clause. The federal government can shield or empower localities through federal licenses, permits, and grants-in-aid, and barring abolition of the localities themselves, there is little a state can do to influence these types of federal-local

⁹³ MARTIN, *supra* note 82, at 33.

⁹⁴ *Id.*

⁹⁵ *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 325 (1958).

⁹⁶ Dillon’s Rule, the theory of state preeminence over local governments, is named for Iowa Judge John F. Dillon, a well-known expert in municipal law in the late-nineteenth and early-twentieth centuries. Judge Thomas Cooley of Michigan proposed the competing view, namely the inherent right to local self-government; however, the majority of courts have not adopted Judge Cooley’s position. BERMAN, *supra* note 83, at 212-13.

⁹⁷ *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). *See also* MARTIN, *supra* note 82, at 29-30.

⁹⁸ *Hunter*, 207 U.S. at 178.

⁹⁹ *Id.* at 178.

¹⁰⁰ *Id.*, at 179.

interactions.¹⁰¹ Thus, the Court has found that where the federal government grants a license to a locality to pursue a task prohibited by state law, the state is federally preempted from enjoining that locality's action.¹⁰² Similarly, the Court has held that states may not require localities to divert or pay federal grants to the states where the terms of the federal grant are ambiguous or allow the locality to use federal monies "for any purpose."¹⁰³ Consequently, over time the federal government has come to rely on the local governments in addition to, and sometimes instead of, the states to execute and enforce many federal initiatives.¹⁰⁴

b. The Mechanics of American "Federalism"

"Constraints," as the term is used in the previous section, is shorthand for institutional rules that set the parameters within which politicians in the federal system act. The above discussion of constraints provides a necessary framework for explaining the decisions and interactions of federal, state, and local politicians because these institutional rules incentivize and dis-incentivize specific behavior. The description of American intergovernmental relations that follows strongly suggests that the institutional rules that govern the federal system are insufficient to discourage politicians, particularly at the state level, from acting in their self-interest, and in some cases, may actually encourage them to act in their self-interest.

American politicians generally have a short time horizon for decision-making because they are motivated in most of what they do by a desire to be re-elected. Most of them, especially at the state level where terms tend to be short, think only as far ahead as their next election. That explains why most politicians have "too weak . . . incentives to take actions and invest in policies with future returns."¹⁰⁵ For example, members of Congress rarely concern themselves with Congress's "institutional maintenance"¹⁰⁶; they are preoccupied mainly with attaining their own electoral goals. Mayhew has argued, "[F]rom the member point of view, the maintenance of the institution is a collective good . . . What is needed is a system of 'selective incentives' to induce at least some

¹⁰¹ *But see* MARTIN, *supra* note 82, at 179 (noting that many states refused to pass enabling legislation to permit the local governments from working with the federal government in various ways).

¹⁰² *City of Tacoma*, 357 U.S. at 325.

¹⁰³ *Lawrence County*, 469 U.S. at 260-61 (holding that a South Dakota statute regulating the distribution of federal funds given to a county was preempted by language in the federal law that authorized the use of funds for "any" governmental purpose).

¹⁰⁴ MARTIN, *supra* note 82, at 47 ("It is a central conviction of this study that this precondition to success does not now obtain in America in that the states have not been able or willing to assume their share of federal responsibilities, particularly during the last three decades, and that the national government has been compelled to develop active relations with local governments in order to make the American system operationally effective.").

¹⁰⁵ Alessandra Bonfiglioli & Gino Gancia, *Uncertainty, Electoral Incentives and Political Myopia*, 123 *ECON. J.* 373, 373-75 (2013).

¹⁰⁶ DAVID MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 134 (1974).

members to work toward keeping the institution in good repair.”¹⁰⁷ In other words, at the congressional level, politicians lack incentives to care more about their institutions than themselves. What holds for members of Congress also applies to state and local politicians.

Notwithstanding federal politicians’ preoccupation with winning elections, the interests of federal institutions and federal politicians are fairly closely aligned. Because the Constitution, at least purports, to limit the federal government’s power, and both federal institutions and federal politicians benefit from having “more” power, their interests are seldom in conflict. Federal institutions benefit from an expansive interpretation of their powers because it promotes their longevity and expands their sphere of influence; federal politicians benefit because it enables them greater latitude to undertake initiatives that increase the loyalty of the American people. Further, only presidents must concern themselves with term limits. Members of Congress may hold office for as long as their constituents allow. The potential to make “congressperson” a life-long career encourages congresspeople, more than other kinds of politicians, to adopt a longer view, which in turn can translate into better outcomes for federal institutions.

In contrast, state institutions’ and state politicians’ interests are terribly misaligned. It is in the interest of state institutions, for example, to refuse conditional federal aid, which compromises their financial independence, and thus, their sovereignty and autonomy. State politicians benefit greatly, though, from accepting federal conditional grants that support innovation or social services that their constituents want and demand.¹⁰⁸ This is generally true, regardless of political party affiliation, because state a state politician must secure her re-election before she is in a position to pursue her party’s agenda.¹⁰⁹ First, in most states, elected officials must run for re-election every two or four years; therefore, if an official is to remain in office, he or she must always be thinking about the next campaign. Second, in recent years, state officials in many states have been prohibited from running for multiple or consecutive terms, both of which distract and discourage them from making long-term investments and protecting state institutions. State politicians, in other words, have little to lose and much to gain from trading off institutional power for conditional federal aid.

Lastly, local institutions’ and local politicians’ interests are well matched, for most of the reasons that apply to federal institutions and federal politicians. Federal aid makes it possible for local politicians to succeed at their jobs by, for example, enabling them to re-pave local, pothole-ridden streets;¹¹⁰ the solutions to such problems are often obvious but expensive and thus intergovernmental aid is critical. Thus, local politicians will accept whatever federal aid is offered to them, whether by partisan allies or foes—there is no Democratic or Republican way to pave a street. Further, because local governments lack sovereignty and federal aid can liberate both them and local politicians

¹⁰⁷ *Id.* at 135.

¹⁰⁸ Types of conditional grants are discussed in the next section.

¹⁰⁹ Further, relative to other countries, political parties in the United States are weak.

¹¹⁰ MARTIN, *supra* note 82, at 40.

from the states,¹¹¹ the risks associated with accepting federal aid are minimal at most. As Bowman and Kearney have shown, local governments “suffer the frustration of having to cope with rising expenditure demands from their residents while their authority to raise new monies is highly circumscribed by state law. No wonder they turn to . . . the national government . . . to bail them out when times are tough.”¹¹²

Because state and local politicians are perpetually in competition with each other for their citizens’ loyalty and so benefit from federal aid, they are inclined to accept federal aid whether or not it is encumbered with conditions. Indeed, because state and local politicians compete for this loyalty, they often compete bitterly for federal aid. Federal aid not only enables politicians to solve constituent problems and provide social services, for which they presumably will take credit, it enables them to govern according to their particular preferences.¹¹³ State politicians have an important interest in promoting uniformity and coordination between jurisdictions across the state.¹¹⁴ In contrast, local politicians may find an approach somewhat or completely divorced from local needs to be an unwelcome intrusion, and thus resist state mandates that affect local recreation, economic development, and general government administration, or that are expensive to implement.¹¹⁵ Because of this intrastate rivalry between state and local politicians, local politicians will want to maximize local discretion, whereas state politicians will want to minimize it.

Increasingly since the turn of Twentieth Century, Americans have turned to government for social services and solutions to a wide array of contemporary social and economic problems. Federal, state, and local politicians’ electoral success therefore largely turns on how well they are able to deliver social services and solve problems, both of which can require substantial financial outlays. The challenge and necessity of satisfying these informal prerequisites for holding and staying in office are most acute at the state and local levels. Americans tend to expect more of state and local politicians in this regard, even though there are more constraints on their ability to raise revenue and assume debt.¹¹⁶ Relative to their federal counterparts, state and local politicians may find it more difficult to raise taxes from their constituents, who may punish them at the

¹¹¹ See generally Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials From State Legislatures’ Control*, 97 MICH. L. REV. 1201 (1999).

¹¹² BOWMAN & KEARNEY, *supra* note 83, at 376. Further, all states have some sort of balanced budget requirement, whether constitutional, statutory, or traditional/historical. See U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM: BUDGET PROCESSES AND TAX SYSTEMS, VOL. 1 (1991); Tamim Bayoumi & Paul R. Masson, *Fiscal Flows in the United States and Canada: Lessons for Monetary Union in Europe*, 39 EUROPE ECON. REV. 253, 259.

¹¹³ *Id.*, at 329-31.

¹¹⁴ *Id. supra* note 83, at 329.

¹¹⁵ *Id.* See generally Schragger, *supra* note 80.

¹¹⁶ See notes accompanying *infra* note 119.

polls,¹¹⁷ or move to a neighboring jurisdiction with a lower tax rate.¹¹⁸ Further, in contrast to federal law, state law often prohibits officials from running deficits and incurring certain kinds of debt.¹¹⁹ Given these circumstances, state and local politicians may think of federal aid as an extremely attractive option.

Just as Americans look to states and localities for social services, they look to the federal government for innovation; and in contrast to states and local governments, the federal government generally possesses the financial resources to support such innovation, in large part because there are so few constraints, both formal and informal, on Congress's power to tax and spend.¹²⁰ For most of the Twentieth Century, the federal government's revenues exceeded its expenditures, granting it "greater access to uncommitted revenue" that enabled it to take "the lead in expending large sums for the introduction of new programs managed by any level of government in the United States."¹²¹ What the federal government often lacks, though, is the manpower to implement innovative national programs, something states and localities possess in spades. It is this co-dependence that has often led to intergovernmental collaboration, which is sometimes referred to in the literature as "cooperative federalism."

Some of the federal government's earliest forays into new areas of governance were genuinely cooperative intergovernmental enterprises. In the two chapters that follow, some of these efforts are described. Modernly, though, federal aid comes at a high price—in the form of onerous "conditions," which most state and local politicians

¹¹⁷ MARTIN, *supra* note 82, at 69. See also WALLACE E. OATES, FISCAL FEDERALISM (1972); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 70. All states have some sort of balanced budget requirement. See U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM: BUDGET PROCESSES AND TAX SYSTEMS, VOL. 1 (1991); Bayoumi & Masson, *supra* note 112, at 259. See RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 635-49 (4th ed. 1992).

¹²⁰ BOWMAN & KEARNEY, *supra* note 83, at 371 (asserting that "the national government can essentially tax and spend as it wishes"). Uncommitted federal revenue has been less plentiful in recent decades. According to the Congressional Budget Office, "[b]etween 1973 and 2012, discretionary spending fell from 53 percent of total federal spending to 36 percent. Relative to the size of the economy, discretionary spending declined from 9.6 percent of GDP to 8.0 percent." NOAH MEYERSON & SAM PAPENFUSS, CONG. BUDGET OFFICE, FEDERAL SPENDING FOR EVERYTHING OTHER THAN MAJOR HEALTH CARE PROGRAMS, SOCIAL SECURITY, AND NET INTEREST (2013).

See also MARTIN, *supra* note 82, at 69-70; D. ANDREW AUSTIN, CONG. RESEARCH SERV., RL 34424, THE BUDGET CONTROL ACT AND TRENDS IN DISCRETIONARY SPENDING 23-25 (2014).

¹²¹ U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CATEGORICAL GRANTS: THEIR ROLE AND DESIGN (1978) (quoting Daniel J. Elazar). Likewise, Professor Martin has referred to the federal government as the "chief instigator and supporter of cooperative federalism" in the United States in the nineteenth and twentieth centuries. MARTIN, *supra* note 82, at 39.

are willing to accept, and in the case of state politicians, at their states' peril. Local politicians' embrace of federal conditional aid is relatively easy to explain: again, local governments do not possess sovereignty, and thus cannot jeopardize it; and second, federal aid can ease budget pressures and liberate local governments from their states.¹²² "Simply put, what localities want most is *more money*."¹²³ State politicians' embrace of federal aid is more challenging to explain given the possible, harmful, long-term institutional consequences discussed below, but intrastate competition goes a long way toward doing so.

Federal politicians are aware of the often-dire situation in which rival state and local politicians find themselves, as well as the power of federal aid to manipulate their behavior. When state politicians appear unable or unwilling to facilitate the implementation of a federal program, federal politicians can threaten to or actually bypass them completely, by appealing to and working with local politicians instead. According to a report of the Advisory Commission on Intergovernmental Relations ("ACIR"), "The federal government often [is] willing to entrust program responsibility to any entity, public or private, that [holds] promise of doing the necessary job."¹²⁴ For example, around the turn of the Nineteenth Century through World War II, the states "were regarded as unrepresentative and unresponsive to urban needs, encouraging the development of direct federal-local project grant programs."¹²⁵ Many of these programs were administered by the Department of Housing and Urban Development's ("HUD") predecessor agencies, which existed to advocate for and funnel federal assistance of various kinds to liberal, big cities, and ultimately facilitated strong federal-local ties. HUD's predecessor agencies—created during the Great Depression era and reinvented under different names every few years until HUD was established in 1965—both constituted the federal government's formal acknowledgement of big city issues and politicians and gave those leaders a seat at the national table, at a time when state leaders would not do the same at the state level; the creation of cabinet-level department, HUD, during the Johnson administration made this arrangement permanent, and also, institutionalized the federal-to-local aid pipeline.

Likewise, in the 1960s, billions of federal dollars were sent directly to local governments, and the growth of federal aid to cities was more than three times the rate for states during the same period.¹²⁶ By 1963, federal direct aid to cities represented nearly twelve percent of total federal grants-in-aid, representing a substantial proportion of local governments' budgets.¹²⁷

The existence of local politicians, who are typically willing to implement federal programs and are eager for federal aid, then, is an important factor in federal-state

¹²² Hills, *supra* note 111; BERMAN, *supra* note 83 (noting that sometimes the federal government will liberate localities from their state governments by giving them express authority to do things that clearly violate state law).

¹²³ BOWMAN & KEARNEY, *supra* note 83, at 377.

¹²⁴ U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CATEGORICAL GRANTS: THEIR ROLE AND DESIGN 31 (1978).

¹²⁵ *Id.* at 54.

¹²⁶ MARTIN, *supra* note 82, at 113.

¹²⁷ *Id.*

relations because federal politicians can plausibly leverage local relationships to encourage the cooperation of reticent state politicians.¹²⁸ State politicians have “little interest in increasing the wealth or power of rival [local] politicians. Rather they have an incentive to maximize their own opportunities for patronage and constituent service by depriving local politicians of discretionary control over policymaking and local budgets.”¹²⁹ Thus, although it may not be in their states’ institutional interest to accept conditional federal grants, most state politicians will accept them because of the opportunity they afford to advance their re-election goals and wrest control over program implementation and federal grants from rival local politicians.¹³⁰

For all of these reasons, rational state politicians prefer federal-state collaboration to federal-local collaboration, and will give up an increment of state power—for the right price—to maximize their control over the implementation of federal programs and the distribution of federal grants within the state.¹³¹ The long-term consequences of this behavior can be dire as far as state institutions and state budgets are concerned. When state politicians initially accept federal aid, that aid can positively affect state budgets. Over time, however, federal conditional aid can be ruinous, straining state budgets and compromising state institutions. This is because federal aid often fosters new constituencies and heightened expectations, both of which consume resources and may cause state expenditures to exceed what they were before state politicians accepted the federal government’s “help.”¹³² State politicians, then, again, confront budget shortfalls, which cause them to, again, turn to the federal government for yet more conditional aid.¹³³ The longer this cycle continues, the more leverage the federal government has to exert control over the states through the imposition of new conditions on, now, desperately needed federal grants. This is the reason that, in many of the cases where state politicians initially rejected federal money or resisted the imposition of certain grant conditions, they eventually accepted the money on the federal government’s terms.¹³⁴ Indeed, it is also the reason that many states are now “heavily dependent on

¹²⁸ In the 1960s and 1970s, many state politicians lobbied the federal government not to send aid directly to local governments, but instead to send it to the states for distribution. BERMAN, *supra* note 83, at 24.

¹²⁹ Hills, *supra* note 111, at 1229-30. Further, Berman explains that federal involvement in areas of traditional state and local control such as education and land-use planning have resulted in increasing state centralization and that states have complied with federal programs in areas of traditional state sovereignty partly because they encouraged greater state supervision of local personnel. BERMAN, *supra* note 83, at 24.

¹³⁰ The federal government’s habit of direct federal-local collaboration was worrisome to these state leaders because they feared the states were being made obsolete.

¹³¹ See BERMAN, *supra* note 83, at 24.

¹³² MARTIN, *supra* note 82, at 67-68.

¹³³ *Id.*

¹³⁴ Recently, Governor Mike Pence in Indiana. Also, nearly every state that threatened to reject aid under No Child Left Behind.

intergovernmental aid to balance their budgets, pay their employees and satisfy local demands for basic public services.”¹³⁵

A recent example will clarify this dynamic. Many conservative Republicans during the Obama administration publically denounced what became the Patient Protection and Affordable Care Act of 2010, a mostly Democratic-led initiative that expanded health care coverage to millions of under and uninsured Americans. A number of these conservatives, including a handful of state governors, claimed that they would refuse federal aid under the new program, which they not so affectionately called “Obama-care.” In the end, however, just about every state capitulated, including Indiana, where Governor Mike Pence had publically declared that his state would never sign on, only to later admit that it, in fact, was desperate for the money. All that is to say, the rhetoric that suggests federalism is a paramount concern to the states is just that—rhetoric. After more than half a century of accepting federal aid, the states are addicted.¹³⁶ The intractability of this problem is what has doomed American federalism.

c. Hypotheses

The above discussion of the theory and mechanics underlying the work of this dissertation leads to multiple hypotheses, which are empirically supported through the qualitative case studies presented in the two chapters that follow.

First, if state politicians accept federal money for “X” in the present, they will be less likely to refuse federal money for “X” in the future. Federal money nurtures constituencies that make it difficult for state politicians to eliminate federally initiated or federally supported programs; the longer such programs continue, the more difficult they are to eliminate because interests become entrenched. This promotes state dependence on federal revenue sources because state budgets cannot accommodate such programs without continued federal aid, which, in turn, makes it less likely that state politicians will refuse federal money in the future.

Second, if state politicians accept federal money for “X” in the present, federal politicians are more likely to impose more numerous and burdensome conditions on state politicians use of federal money for “X” in the future. We should observe increasingly numerous and burdensome regulations governing the states’ use of federal money because the more dependent the states become on federal revenue sources, the more leverage federal politicians have over state politicians to influence their behavior.

Third, if state politicians seem to be unwilling to cooperate with the federal government in implementing federal program “Y,” federal politicians will be more likely

¹³⁵ Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 350 (1990). Briffault also implies that big cities depend on intergovernmental grants because they must keep taxes low and assure the availability of land for economic development if they want to compete for businesses and affluent residents. *Id.* at 351. However, he distinguishes between cities and suburbs because many cities are “large, complex, heterogeneous and fiscally dependent” in contrast to many “smaller, more homogeneous ‘suburbs’ with greater resources and fewer needs.” *Id.* at 354.

¹³⁶ *Id.* at 351, 366-67 (explaining that “[f]ederal largess can be a life saver” and that citizens consistently want government to provide more or at least the same level of goods and services but are not willing to raise taxes to pay for them).

to bypass the states and work directly with local politicians. Because federal politicians are largely indifferent to which government implements federal law and programs, they will appeal to local politicians directly—usually the target of federal money and programs anyhow—when state politicians appear unable or unwilling to cooperate.

Fourth, if the federal government evidences a willingness to bypass the states if state politicians do not cooperate in implementing federal program “Y,” state politicians will be more likely to cooperate with the federal government in implementing federal program “Y.” Federal, state, and local politicians are repeat players in an iterative game. Thus, where federal officials have evidenced a willingness to bypass the states—for example, by having done so in the past with respect to similar programs—and collaborate directly with rival local politicians, state politicians will be more likely to cooperate in implementing federal programs.

Last, if two states have equal economic need, state politicians from those states are equally likely to cooperate with the federal government and/or accept federal money, regardless of political ideology. State politicians accept federal money based on economic need, not ideology. Therefore, Democrat-majority and Republican-majority states with roughly equal economic need should accept federal money with roughly equal frequency.

These hypothesized features of American intergovernmental relations, once satisfactorily demonstrated, militate against the conclusion that federalism continues to function in the United States. To the contrary, they invite us to consider the ways that federal, state, and local politicians’ choices defy the framers’ political logic and put the entire federal system in jeopardy. Most importantly, for federalism to “work,” politicians at every level of government must be hyper-vigilant about protecting their constitutional power; but rational, self-interested state politicians, since at least the 1960s, have been giving their states’ power away to remain in office. State politicians’ willingness to cede state power for control over federal money and local politicians (and for continued political relevance) is among the most important causes of America’s political and institutional transformation. Their decisions, especially those that fostered the states’ long-term dependence on federal revenue sources have diminished state power and promoted nationalization. The looming threats of political obsolescence and being voted out of office have incentivized this state-destructive behavior, which reinforces the states’ dependence on the federal government and continually forces state politicians to choose between protecting their states’ power and protecting their jobs.

d. Summary

Short-term thinking may serve a politician’s self-interest, but this shortsighted desire to please can have disastrous consequences for government institutions, and the federal system. This behavior limits the options available to future administrations because it fosters constituencies that make federally funded programs difficult to eliminate, and it encumbers government institutions with federal mandates.

Briefly, then, the problem states face is this: rational state politicians will cede power to the federal government for money, which alleviates budget problems in the short-term, but exacerbates them in the long-term and causes other problems. As states become increasingly dependent upon federal aid, rational federal politicians will make

more demands on the states in exchange for the same or sometimes even less money. According to one report,

Almost all public (and private) educational institutions were, indirectly if not directly, recipients of federal support, and therefore, subject to a range of federal requirements. The conflicts engendered gave an ironical twist to an old phrase, ‘cooperative federalism,’ and yet the traditional means for resolving these tensions—a refusal to accept funds and the attached conditions—was unrealistic, given the continually increasing fiscal and programmatic interdependency among the levels of government.¹³⁷

This is not just the problem of the states; it is the problem of American federalism generally.

The next Part gives an historical overview of American intergovernmental relations, which makes the theory described above more concrete and lays the foundation for the education and crime control case studies presented in Chapters 2 and 3.

Part III: Historical Foundations

Intergovernmental relations and federalism are related but distinct concepts. Only federalism connotes first-order principles and a specific institutional structural arrangement agreed upon by sovereigns. The concept of intergovernmental relations is broader, by contrast, and describes the interactions of all governments in a political system, rather than only those governments that are deemed sovereign.¹³⁸

Intergovernmental grants are an essential but understudied component of American intergovernmental relations, which hold the potential to explain much of the evolution of the American political system. This Part describes, at a high level, American intergovernmental relations from the founding to the present, with a focus on governmental receipts and expenditures and the explosion of intergovernmental grants in the mid-Twentieth Century.

¹³⁷ U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *CATEGORICAL GRANTS: THEIR ROLE AND DESIGN* 40 (1978).

¹³⁸ Because intergovernmental relations is a much more general concept than federalism, and thus includes interactions between governmental units in a federal political system, intergovernmental relations and federalism often are conflated and confused in the legal literature. This problem of legal academics discussing intergovernmental relations and federalism as though they were the same idea is especially acute in the scholarly literature on so-called “cooperative federalism” or “marble-cake federalism”—that brand of federalism that supposedly describes the collaborative and sharing relationship of sovereign governments in the American political system. See MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* (1966); Daniel J. Elazar, *Cooperative Federalism*, in *COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM* 65-86 (Daphne A. Kenyon and John Kincaid ed., 1991).

A. American Intergovernmental Relations, 1789 to 1848

At the time of the founding, the federal government was small and poor compared to the states.¹³⁹ Moreover, the federal government had few responsibilities and obligations.¹⁴⁰ Even still, the federal government was “stretched to the limits of its governing capacities.”¹⁴¹ Most Americans thus “experienced” government at the state level, where most laws that directly acted on them originated.¹⁴²

During this early period through the start of the Civil War, the federal and state governments collaborated in limited ways but with some regularity.¹⁴³ According to Daniel Elazar, “virtually all the activities of government in the nineteenth century were shared activities, involving federal, state, and local governments in their planning, financing, and execution.”¹⁴⁴

One of the first and most important early examples of intergovernmental collaboration was the federal government’s assumption of the states’ Revolutionary War debt, which largely obviated the need for the states to collect taxes. The federal and state governments collaborated most often, however, through the joint stock company and the cooperative survey.¹⁴⁵

To a lesser extent, the federal and state governments collaborated with respect to banking, internal improvements, education, and welfare. The federal government shared with the states its resources, such as Army engineers, and sometimes, it reimbursed the states for engaging in projects that served mutually beneficial ends.¹⁴⁶

B. American Intergovernmental Relations, 1848 to 1913

During and after the Civil War, intergovernmental collaboration between the federal and state governments mainly took the form of the land grant, a tool through which the federal government conveyed federal land to the states for a limited specified purpose, subject to conditions.¹⁴⁷ The land grant was popular, mainly because the federal government possessed ample land, but not cash.¹⁴⁸

¹³⁹ KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* (2004); DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928* (2001); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES: 1877-1920* (1982).

¹⁴⁰ SKOWRONEK, *supra* note 139, at 16.

¹⁴¹ *Id.*

¹⁴² ALICE M. RIVLIN, *REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES & THE FEDERAL GOVERNMENT* 8-10 (1992).

¹⁴³ Daniel J. Elazar, *Federal-State Collaboration in the Nineteenth-Century United States*, 79 *POL. SCI. Q.* 248 (1964). *See also* Daniel J. Elazar, *The Shaping of Intergovernmental Relations in the Twentieth Century*, 359 *ANNALS AM. ACAD. POL. & SOC. SCI.* 10 (1965).

¹⁴⁴ Elazar, *supra* note 143, at 291.

¹⁴⁵ *Id.* at 253-65.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 265-74.

¹⁴⁸ *Id.*

Post offices and post roads, river and harbor improvements, and a wide variety of governmental installations provide examples. So do the activities of such agencies as the Departments of Commerce and Labor, the Federal Bureau of Investigation, and the Federal Communications Commission.¹⁴⁹

Among the most important land grant acts enacted during this period were the Morrill Acts, which were intended to support the development of public education in the states¹⁵⁰ and are described in detail in Chapter 2, “Federalism and Education.” The federal government also provided land and surveying assistance to the states for infrastructure development (e.g., canals, roads, and railroads). Almost every state participated in one or more land grant programs either directly or indirectly during these years. The federal and state governments, increasingly, collaborated through informal means, expanding the reach of jointly managed programs, even as popular, political, and judicial support mounted for “dual federalism,” or a rigid separation of federal and state powers and responsibilities.¹⁵¹

Local governments were affected by and an important influence on the changing federal-state relationship in this “middle” period. Roscoe Martin has pointed out, “[M]any of the federally inspired and supported programs that [were] administered by the states have direct and significant impact on the cities. Among these [were] the several public assistance programs and the federal state highway program.”¹⁵² Martin suggests that federal aid to local governments was largely undifferentiated from federal aid to states, however, because state and local problems were shared, or were basically the same problems. The largest cities did not begin to distinguish themselves from their states in meaningful ways until urban development intensified and population growth exploded in the early-to-mid-Twentieth Century.

C. American Intergovernmental Relations, 1913-present

By the early Twentieth Century, unified partisan control and a new federal income tax, enacted in 1913, engendered the rise of the modern national administrative state.¹⁵³ It was around this time that the federal cash grant began to beat out the land grant as the most prevalent form of intergovernmental collaboration and resource sharing. Congress enacted the Weeks Act in 1911 (aid for fire protection through intergovernmental cooperation),¹⁵⁴ the Smith-Lever Act in 1914 (aid for vocational education),¹⁵⁵ and a smattering of other grant-in-aid programs for highway building, vocational training, and public health, to name a few, by the 1920s.

By the 1930s, the Great Depression era, many states were desperate for financial relief due to their reliance on sales and property taxes, both of which were in decline or

¹⁴⁹ MARTIN, *supra* note 82, at 47.

¹⁵⁰ First Morrill Act of 1862, Pub. L. No. 37-108, 12 Stat. 503; Second Morrill Act of 1890, Pub. L. No. 37-130, 12 Stat. 503.

¹⁵¹ Elazar, *supra* note 143, at 265-74. *See also* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

¹⁵² MARTIN, *supra* note 82, at 47.

¹⁵³ Elazar, *supra* note 143, at 274-75, 277-79.

¹⁵⁴ Weeks Act of 1911, Pub. L. No. X, 36 Stat. 961.

¹⁵⁵ Smith-Lever Act of 1914, Pub. L. No. 63-95, 38 Stat. 372.

steady, and in any event, were inadequate to accommodate their citizens' growing demand for social services.¹⁵⁶ Federal revenues, in contrast, were growing due to the federal income tax and, for the most part, uncommitted.¹⁵⁷ Cash grants proliferated beginning in this period, just as the federal government's ambitions began to exceed its constitutional power, and the states' expenses began to exceed their revenue.¹⁵⁸ President Franklin D. Roosevelt's administration and its "New Deal," for example, supplied critical federal relief to state and local governments for housing and employment. Under the next three presidential administrations—Truman, Eisenhower, and Johnson—the federal government initiated many new grant programs, such as the interstate highway program; President Lyndon Johnson's administration alone witnessed an increase in federal grants from \$10.1 billion to \$18.6 billion, an increase greater than the total of all previous federal grants to states and localities combined.¹⁵⁹

Federal cash grants came in a variety of "flavors," including formula grants—further sub-divided into categorical and block grants—and general revenue sharing. Categorical or project grants, which funded only specific programs and activities were the most common aid tool for many years and tended to be the most restrictive of the aid recipient's discretion. Block grants, a type of general-purpose grant with relatively limited federal oversight, and general revenue sharing, a type of grant with even less federal oversight, did not come into favor until many decades later.¹⁶⁰ The various types of federal grants differed, then, in terms of the degree of federal control over which entities received aid;¹⁶¹ the degree of discretion of recipients in using the aid; and the type, number, and specificity of grant conditions.¹⁶²

¹⁵⁶ Elazar, *supra* note 143, at 274-75, 277-79. Today, states raise revenue mainly through sales taxes; local governments raise revenue through property taxes. BOWMAN AND KEARNEY, *supra* note 83, at 350. Moreover, according to available data, since roughly the 1940s, American states' revenue has been comprised of roughly thirty-nine percent sales taxes, twenty-three percent federal grants and subsidies, thirteen percent income taxes, and ten percent other user fees. MARTIN, *supra* note 82, at 67-68.

¹⁵⁷ MARTIN, *supra* note 82, at 67-68.

¹⁵⁸ See Elazar, *supra* note 143, at 253-65; RIVLIN, *supra* note 142. See Appendix, Table 1.

¹⁵⁹ BEN CANADA, CONG. RESEARCH SERV., RL 30705, FEDERAL GRANTS TO STATE AND LOCAL 7-8 (2003).

¹⁶⁰ In contrast to block grants for which the underlying premise was facilitating the resolution of national problems, general revenue sharing arguably provided general support to state and local governments and equalized their financial resources to a degree.

¹⁶¹ Although the federal government rarely withheld aid for non-compliance, according to Daniel Elazar, it withheld land grants for non-compliance with some regularity. Elazar, *supra* note 143, at 274-75, 277-79.

¹⁶² ROBERT JAY DILGER & EUGENE BOYD, CONG. RESEARCH SERV., R 40486, BLOCK GRANTS: PERSPECTIVES AND CONTROVERSIES 2 (2013). These three grant-types can be further broken down into six types: project categorical grant, formula categorical grant, formula-project categorical grant, open-end reimbursement categorical grant, block grant, and general revenue sharing. However, some economists prefer to distinguish only two types of grants: conditional and unconditional. Both categorical and block grants are considered conditional grants.

Federal cash infusions, mainly in the form of lucrative conditional categorical grants, were difficult for state and local politicians, at the helm of financially vulnerable government institutions, to resist. For most of them, the decision to accept or reject conditional federal grants was not a hard one to make given the potential electoral consequences of disappointing their respective constituencies. In 1902, federal aid had represented less than two percent of state revenue. Two decades later, federal aid represented nearly eight percent of state revenue. The federal income tax contributed to the federal aid explosion and partially explains the predominance of the cash grant over other once-popular aid mechanisms. In 1913, the first year it collected the tax, the federal government collected \$622 million from income taxes alone; it collected \$2.8 billion and \$4.3 billion in 1917 and 1918, respectively.

Between 1930 and 1940, federal grants to states rose 650 percent from \$147 million to \$945 million.¹⁶³ Federal aid as a percentage of state revenue climbed steadily throughout the Twentieth Century. It receded a modest amount from 26.8 to 24.6 percent during the Reagan administration, but increased again in the 1990s and reached 34.8 percent in 2010.¹⁶⁴ State and local indebtedness climbed as well. Between 1953 and 1963, state indebtedness almost tripled from \$33.8 billion to \$87.5 billion; it grew another \$29 billion by the century's end. These trends both encouraged and signified the states' growing dependence on federal aid.¹⁶⁵

State politicians' short-sightedness in accepting conditional federal grants, particularly in the years during and after World War II, contributed to state dependence on federal aid that continually compromises the autonomy of state institutions. Even as the growth rate of federal grants has decelerated, federal revenue has continued to comprise an increasingly large proportion of state budgets. According to *The Washington Post*, as of 2013, "states [found] themselves relying on the federal cash infusions more than ever before."¹⁶⁶ The federal government, since the mid-Twentieth Century, has supplied a quarter (and sometimes more) of state revenue.¹⁶⁷ This is true of Democratic and Republican-dominated states. Federal grants accounted for more than one-third of state revenue.¹⁶⁸ Because of this financial dependence, most state politicians have been willing to accept most any condition on grants-in-aid to keep the federal spigot open.

¹⁶³ \$945 million in 1940 dollars is roughly equal to \$15.4 billion in 2009 dollars.

¹⁶⁴ Between 1940 and 2015, federal grants to states and local governments increased from \$15.4 billion to \$568.2 billion in 2009 dollars.

¹⁶⁵ The same general pattern is evident with respect to federal and state aid as a percentage of local revenue, although there is more fluctuation in the data. Local government debt more than doubled during the same period, from \$23.3 million to \$58.8 million.

¹⁶⁶ Reid Wilson, *State Reliance on Federal Dollars Near All-Time High*, WASH. POST, Sept. 23, 2013, available at <http://www.washingtonpost.com/blogs/govbeat/wp/2013/09/23/state-reliance-on-federal-dollars-near-all-time-high/>.

¹⁶⁷ BOWMAN & KEARNEY, *supra* note 83, at 350.

¹⁶⁸ Wilson, *supra* note 166. In 2011, federal grants accounted for 34.7% of total revenue. *Id.*

D. Summary

Federal, state, and local collaboration is not a recent phenomenon. There is evidence of intergovernmental collaboration going back to the founding era. What is a recent phenomenon, however, is state and local dependence on federal grants-in-aid, which became a pronounced feature of American intergovernmental relations in the mid-Twentieth Century. This period is often celebrated as an era of “cooperative federalism,” and for that reason, it is one of the most studied by American federalism scholars. This period is also one of the least well understood in terms of the complete transformation of the American political system. Indeed, most scholars writing about this period have failed to recognize that, largely due to the effects of federal aid, the language of federalism, as opposed to intergovernmental relations, no longer fairly describes the American political system.

Part IV: Implications and Contributions

Most of the contemporary federalism scholarship lacks an underlying positive theory. This work not only supplies a positive theory, but it is the first to consider institutional design as a source of instability in a federal system. The theory specifically identifies incompatible institutional and individual incentives as a potentially fatal institutional design flaw, and in the American context, explains the role of state and local political rivalries and fiscal pressures in causing, or at least exacerbating, American federalism’s dysfunction. American federalism’s institutional design assumes competition between federal and state officials, and neglects to consider exogenous changes that alter those officials’ incentives to act as expected. Once the effects of such changes are considered, it becomes clear that state institutions and politicians’ incentives are mismatched, and also, that, for that reason, the “political safeguards” of federalism are inadequate to perpetuate the federal system.

Political safeguards theory, in its modern form, claims that states will protect themselves through their integration into federal institutions like Congress. The difficulty with the theory, quite simply, is that they do not. States are represented in both chambers of Congress, where theoretically they could launch a concerted effort to revive federalism in some form. The truth of the matter is that (1) this is not in their interest (they are motivated by the same electoral incentives as state-level representatives); (2) they are federal or national representatives, insofar as their campaigns are funded by national parties and donations from across the United States; (3) and they are responsible for enacting the federal legislation that contributed to the current state of affairs.¹⁶⁹ This is why many states have retained resident Washington, D.C. lobbyists and maintained their involvement in private organizations like the National Council of State Legislatures, which advocate for their interests. It is worth noting, as well, that the mere representation of states in Congress is not definitive evidence of federalism, and in fact, it has more to do with local democracy than federalism. In other words, that a national government grants its local sub-divisions representation in national institutions does not render it federal necessarily; rather, it means that the national government values local democracy. Many unitary democratic countries permit local stakeholders a formal or institutional role

¹⁶⁹ Political safeguards theory arguably was much more plausible when state legislatures selected state senators. Today state senators are popularly elected.

in national affairs. Representation in national institutions does not a federal country make.

The theory presented in this Chapter leads to the conclusion that American federalism is fake federalism. American federalism bears few of the characteristics of a federal political system other than decentralization, a feature common to both federal and non-federal systems. Moreover, as the case studies of education and crime control in Chapters 2 and 3 show, American politicians do not care about federalism in the abstract, and their selective invocation of federalism language belies their commitment to perpetuating the federal system. Rather, perpetuating the federal system is, at most, a secondary priority.

A prominent segment of the contemporary federalism scholarly community directly contradicts the claim that American federalism is fake federalism; it adopts the view that federalism is different, not dead.¹⁷⁰ This group argues for an unconventional understanding of federalism that dispenses with concepts such as state sovereignty and autonomy in order to leave room for America under federalism's tent. This group contends that federal statutes, national norms, and the like can perpetuate a federal system by creating space for local stakeholders to influence the course of public affairs. In so doing, however, this work conflates federalism, a formal structural arrangement, which decentralization, a functional, management strategy.

A feature that is common to most of the *New New Federalism* (“NNF”) or local federalism literature is its attempt to make sense of and assign value to the vestiges of a formal structural arrangement that no longer serves any useful function. That is, the local federalism scholars have tried to determine how the component parts of the American federal system evolved together to produce a well-functioning democracy. What they miss completely—no doubt because of their preoccupation with reverse engineering American democracy—is the possibility, and likelihood, that American democracy thrives, not because of, but in spite of, federalism's functionless remains. Put differently, in privileging the status quo as they do, the local federalism scholars neglect to consider whether American democracy could be better.

This dissertation directly challenges the local federalism scholars' work, first and foremost, because it is impossible to distinguish federal from non-federal systems under their non-traditional or flexible definition of federalism. Federalism is a *formal* structural arrangement that *requires* a center and constituent units that possess sovereignty and autonomy over one or more agreed upon areas of governance. Decentralization and local elections, alone, are insufficient; given such a loose definition of federalism, unitary governments like France might be surprised to learn they have had federalism all along. Indeed, unitary governments like France, Italy, and Spain all devolve power to semi-autonomous regional and functional governments and local stakeholders. Relatedly, state

¹⁷⁰ See, e.g., Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2014); Abbe Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1998 (2014); Cristina M. Rodriguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L. REV. 2094 (2014); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014); Heather Gerken, *Our Federalism(s)*, 53 WILLIAM & MARY L. REV. 1549 (2012); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).

influence over and discretion in implementing national policy is insufficient to constitute federalism. The “power” the states wield as the federal government’s agents is the result of the federal government’s “generosity”; if the federal government preferred, it could bypass the states, as it often has, and rely on the local governments in their stead. There is nothing particularly federal about a system of government like America’s, in which federal politicians call most of the shots and state politicians capitulate for fear of state economic or personal ruin. Nor is there anything federal about a governmental system in which the states’ core purpose is to promote national goals like a “well-functioning national democracy,”¹⁷¹ whether or not those goals are objectively a good thing.¹⁷²

In contrast, a small number of other federalism scholars, amongst whom I count myself, have published work that tries to show that the “intellectual case” for federalism—arguments for federalism grounded in the values or objectives it supposedly promotes—“celebrates the virtues of political decentralization.”¹⁷³ Richard Briffault, for example, has argued that, “if federalism is associated primarily with a set of values, such as the pursuit of democratic ends, that are linked to decentralization, then federalism is not particularly about the states at all.”¹⁷⁴ In other words, the values and advantages of federalism that animate the local federalism literature’s commitment to federalism are not unique to federal systems, and as the experience of many countries shows, they can be achieved, and may be even more robust, without it.¹⁷⁵

Ultimately, the local federalists’ rejection of state sovereignty and autonomy is understandable in a modern world where Americans’ political identities transcend state borders. The qualitative case studies in Chapters 2 and 3 show, however, that when the state politicians fail to exercise their states’ constitutional rights, the federal government can exert substantial control that, as a practical matter, reduces the states to quasi-autonomous federal subsidiaries in a top-down hierarchy. Moreover, when the federal government devolves control to local governments, something local federalists would

¹⁷¹ Gerken, *supra* note 170, at 1893 (“Federalism can be a tool for improving national politics, strengthening a national polity, bettering national policymaking, entrenching national norms, consolidating national policies, and increasing national power. State power, then, is a means to achieving a well-functioning *national* democracy.”).

¹⁷² See Rubin & Feeley, *supra* note 6, at 908 (“To put the argument more generally, true federalism cannot be regarded as a means of favoring any specific, first-order norm because its essence is to permit a multiplicity of norms. It favors only the second-order norm that no first-order norm should dominate the polity.”).

¹⁷³ Briffault, *supra* note 12, at 1311 (“much of the ‘intellectual case for federalism’ often converges with the case for decentralization, or localism.” *Id.*, at 1304.). See also FEELEY & RUBIN, *supra* note 6; Rubin and Feeley, *supra* note 6.

¹⁷⁴ *Id.* at 1317. However, it is questionable whether federalism promotes those values or achieves those goals as its proponents claim. See Rubin & Feeley, *supra* note 6; Briffault, *supra* note 12, at 1322 (“Even when the values associated with federalism are unchallenged by rivals, the role of federalism in promoting the values attributed to it—prevention of tyranny, representing minorities, and providing additional opportunities for participation and innovation—remains debatable.”).

¹⁷⁵ Briffault, *supra* note 12, at 1304.

presumably applaud, it tends to augment federal power and local discretion and diminish state power.

Having described some of the theoretical contributions of this work, the next Part previews its descriptive and normative contributions through a detailed roadmap for the remainder of the dissertation.

Part V: Organization of the Dissertation

The two chapters that follow apply the theory of Chapter 1 to two areas of traditional state sovereignty, education and crime control. These case studies demonstrate the transformation of American intergovernmental relations I described and help to explain why it occurred.

Chapter 2, “Federalism and Education,” shows how the federal government came to exert control over education policy-making and state education agencies. The Chapter is divided into three periods, and it suggests that it was not until the middle of the second period, roughly spanning the Twentieth Century, in which the federal government became heavily involved in education. The Chapter explains that the on-set of the Cold War precipitated the expansion of the federal role because it allowed the federal government to sell federal involvement in education and the National Defense Education Act of 1958 (“NDEA”) as a way to fight the Soviet Union. The passage of the NDEA, coupled with growing demands on state education budgets and the threat of direct federal-local relations, paved the way for the Elementary and Secondary Education Act of 1965 (“ESEA”) that radically changed the federal role. The ESEA engendered state dependence on federal money, which allowed the federal government to exert control over education through the continued use of conditional grants. Ever since, education policy-making has become increasingly hierarchical, with the federal government generating education policy from the top and relying on states and localities to implement it. The states have not regained control, despite some legitimate substantive objections to federal policies in the Twenty-First Century, because self-interested, shortsighted state politicians would not want to jeopardize state education funding, and thus their re-election prospects, over the principle of state sovereignty.

Chapter 3, “Federalism and Crime Control,” explains how the federal government came to exert control over state and local criminal justice policy-making and law enforcement agencies in the Twentieth Century, despite states’ and localities’ strong interest in controlling this area. The Chapter divides American history into roughly three periods. In the first period, federal involvement was almost non-existent. The scope of federal criminal jurisdiction was narrowly circumscribed, even after the Civil War (although the War did lead to increased involvement). It was only at the end of the Nineteenth Century that the federal government began to develop the administrative apparatus to play a significant role in this area. In the second period, federal involvement increased gradually for the first few decades of the Twentieth Century, and then rapidly beginning in the 1960s, due to increases in crime, race riots, and high-profile political assassinations that culminated in Congress’s enacting the Omnibus Crime Control and Safe Streets Act of 1968. The Safe Streets Act required states to cede administrative power to the LEAA in exchange for federal funding for criminal justice and law enforcement programs and resulted in the states’ dependence on federal funding. In the

third period, the federal government leveraged this dependence to exert increasing control over criminal justice policy-making and law enforcement. The War on Drugs and War on Terrorism are used as examples. Ultimately the Chapter shows that federal involvement in crime control has changed at different rates over time, but always in the same direction: toward greater federal control.

Lastly, Chapter 4, “Our Fake Federalism,” restates the theory of federalism Chapter 1 introduced, highlighting aspects of the qualitative case studies of Chapter 2 and Chapter 3. The Chapter revisits some of the work on federalism being done today and identifies flaws in it, all stemming from the failure to recognize the difference between federalism and managerial decentralization. The Chapter considers and rejects specific reforms, including reforming the Supreme Court’s Commerce Clause, Taxing and Spending Clause, Tenth Amendment, and Supremacy Clause jurisprudence and changing state laws concerning term limits/term lengths and expenditure and revenue raising limits. The Chapter concludes by arguing that the United States has outgrown federalism, and explaining why this is not necessarily as problematic as it seems.

Chapter 2 Federalism and Education

Part I: Introduction

The federal government has always played a role in public education, but until recently, it was a minor and distinctly supporting role. Consistent with the American tradition of local control, states and localities bore the lion's share of responsibility for financing and delivering public education. For the first century and a half of America's history, the federal government's relative un-involvement enabled states and localities to promote the beliefs and values they regarded as most important¹⁷⁶ and affirmed their supremacy in the field of education. This belief that states and localities should dictate how and what America's children are taught in school has persisted, notwithstanding the substantial nationalization of public education in the United States.

There are a number of reasons why this view of state dominance came about and lasted, not least of which is the Tenth Amendment and the Constitution's lack of anything to say on the subject;¹⁷⁷ because of both, the Supreme Court recognized the states' primacy and limited federal involvement in the field. Maybe more significantly, the United States' long history of locally controlled, community-based schools reinforced the view that the states *should* dominate where education policy-making is concerned.

Education was one of the last bastions of state sovereignty when the federal government began to significantly increase its involvement in different substantive policy-making areas in the mid-Twentieth Century. For that reason, the nationalization of the field is both a valuable example and hard case for my positive theory of federalism. If state politicians were committed to defending state institutions, they would have defended them where state control over education policy-making was in danger. Instead, they made short-sighted decisions that advanced their interests first, allowing the federal government to exert substantial control over education policy-making and contributing to the nationalization and destabilization of the federal system.

¹⁷⁶ Federalism prioritizes allowing "normative disagreement among the subordinate units so that different units can subscribe to different value systems." MALCOLM FEELEY & EDWARD RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 173 (2000). Education is a vehicle for inculcating and preserving those value systems that prevent the nationalization of the federal system.

¹⁷⁷ In *The Great Education Debate: Washington and the Schools*, Stickney and Marcus suggest that the delegates to the Constitutional Convention of 1787 believed a national role in education was implicit in the General Welfare Clause. James Madison's notes from the Convention lend some credibility to this view. However, Madison's notes were not published until 1840, and it generally was assumed that the Constitution's framers intended for education to be state-controlled because there is no mention of education in the Constitution. See BENJAMIN STICKNEY & LAURENCE MARCUS, *THE GREAT EDUCATION DEBATE: WASHINGTON AND THE SCHOOLS* 6, 104 (1984). Alexander Hamilton's *Report on Manufactures* also supports Stickney's and Marcus's interpretation. Hamilton stated: "[T]here seems to be no room for doubt that whatever concerns the general interests of learning . . . are all within the sphere of the national councils." *THE WORKS OF ALEXANDER HAMILTON*, VOL. 4 151-52 (1904).

This Chapter explains how the federal government came to exert control over education policy-making and state institutions, with a specific emphasis on the roles of state and local politicians and federal funding. The remainder of the Chapter is organized as follows. Part II describes the federal role in education in the Eighteenth and Nineteenth Centuries. It discusses the federal government's efforts to participate in the education arena and why they were unsuccessful, as well as the emergence of a small federal education bureaucracy. Part III spans roughly the Twentieth Century, and is subdivided into before and after 1958, and before and after 1965. Both 1958 and 1965 marked the enactment of key federal education legislation—the National Defense Education Act of 1958 and the Elementary and Secondary Education Act of 1965—that both reflected and facilitated the transformation of the federal role vis-à-vis the states. This Part also describes other major congressional enactments and the growth of the federal education bureaucracy, all evidence of the centralization of control over education financing and policy-making in the federal government. Part IV considers the No Child Left Behind Act of 2001, the latest example of the federal government's unprecedented involvement in education and of the consequences of short-sighted state-level decision-making. Part V briefly concludes.

Part II: Federal Involvement in Education, 1789 to 1900

States and local governments played the dominant role in educating America's children both at the beginning and the end of the Nineteenth Century.¹⁷⁸ This Part describes the federal government's efforts to increase its involvement in public education from the founding to the turn of the century and the reasons why those efforts generally failed. There were plenty of reasons why federal politicians would take an interest in public education in the Eighteenth and Nineteenth Centuries, but even more roadblocks—legal, financial, and cultural—that stood in their way. The federal role was far from transformed during this early period; however, federal politicians' failures and small successes in the education arena shaped their strategy in the periods that followed.

a. Congressional Enactments

The federal role in public education was recognized as being limited from the beginning; the Constitution did not mention education, let alone confer power to control it upon the federal government. That did not keep federal politicians from trying to expand the federal role. Education was both a valuable public service, for which federal politicians wanted credit, and a tool for achieving strategic federal objectives. Delegates to the Constitutional Convention of 1787 proposed establishing a national university.¹⁷⁹ The idea was rejected, according to some accounts, because the delegates thought the

¹⁷⁸ The United States Department of Education's website claims, "Education is primarily a State and local responsibility in the United States . . . The structure of education finance in America reflects this predominant State and local role." *The Federal Role in Education*, U.S. DEP'T OF EDUC. (Feb. 10, 2014), <http://www2.ed.gov/about/overview/fed/role.html>.

¹⁷⁹ GEORGE THOMAS, *THE FOUNDERS AND THE IDEA OF A NATIONAL UNIVERSITY* 63-64 (2014).

power to establish a national university was implicit in the Constitution's General Welfare Clause.¹⁸⁰ Delegates including James Madison, Alexander Hamilton, George Washington, Benjamin Rush, Noah Webster, and Samuel Knox supported establishing "a national system of education."¹⁸¹ Finally, the Northwest Ordinance of 1787 carved out a small space for federal involvement in education by reserving public lands in the territories for educational institutions to be established.¹⁸²

Members of the first Congresses also sought to expand the federal role in education. The earliest bills were failures.¹⁸³ For example, the first proposed land grant, which Representative Justin Smith Morrill (R-VT) introduced in 1857, passed in Congress but failed to become law. President James Buchanan vetoed the bill because it violated the federal government's policy of leaving education matters to the states.¹⁸⁴ Morrill's second attempt in 1861 succeeded due to a confluence of factors, including the beginning of the Civil War, the exit of the Southern Democrats from Congress, and the addition of a provision requiring land grant colleges to teach military tactics.¹⁸⁵ The Civil War created an opening that Representative Morrill and his fellow Republicans played to their advantage in Congress. It likely also helped that the bill only affected higher education.¹⁸⁶

The first land grant act, the First Morrill Act of 1862, was important in effect but narrow in scope and compelling in purpose once it was reconceived as a Civil War-related bill. The bill distributed land grants to the states to encourage them to expand their higher education curricula to include practical subjects that would directly or indirectly assist the Union in the War. The Act's stated purpose was to assist the states with the

endowment, support, and maintenance of at least one college where the leading object shall be . . . to teach such branches of learning as are related to agriculture and the mechanic arts, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.¹⁸⁷

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 39-40.

¹⁸² An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, July 13, 1787. TIMOTHY J. CONLAN, INTERGOVERNMENTALIZING THE CLASSROOM: FEDERAL INVOLVEMENT IN ELEMENTARY AND SECONDARY EDUCATION 8 (1981).

¹⁸³ President George Washington proposed creating a national university in the first Congress, unsuccessfully. THOMAS, *supra* note 179, at 64.

¹⁸⁴ Carl F. Kaestle and Marshall S. Smith, *The Federal Role in Elementary and Secondary Education, 1940-1980*, 52 HARV. EDUC. REV. 384, 391 (1982).

¹⁸⁵ *Id.* at 390-91.

¹⁸⁶ Higher education seems to be qualitatively different from elementary and secondary education where federal versus local control over education is concerned. The land grant colleges are only one example. In all likelihood, this is because higher education policy implicates a smaller, older, and less impressionable population than elementary and secondary education policy.

¹⁸⁷ First Morrill Act of 1862, Pub. L. No. 37-108, 12 Stat. 503.

With few exceptions, the Act basically conferred upon the states gifts of unencumbered land. To be sure, recipient states were required to “provide, within five years from the time of . . . acceptance . . . not less than one college” and to follow certain rules for selling, distributing, and investing federal money.¹⁸⁸ But the law lacked the hallmarks of federal control common to later federal grants-in-aid such as minimum standards, reporting requirements, matching requirements, and regular audits and inspections.¹⁸⁹ In this respect, the Second Morrill Act of 1890 was similar, helping to finance land grant colleges through the sale of public lands with few restrictions on how states managed the money.¹⁹⁰ In this way, neither law transformed or even substantially increased federal involvement in public education, although both significantly increased farmer and industrial class Americans’ access to higher education and facilitated their entry into the workforce.¹⁹¹

Bolder proposals to enact federal legislation that impinged upon state sovereignty had virtually no chance of success during this period, even after Congress passed the First Morrill Act. For example, in 1870 Representative George Hoar (R-MA) introduced a comprehensive federal education bill known as the “Hoar Bill.”¹⁹² Representative Hoar explained: “The purpose of this bill, by which it is for the first time sought to compel by national authority the establishment of a thorough and efficient system of public instruction throughout the whole country, is not to supersede, but to stimulate, compel, and supplement action by the state.”¹⁹³ In actuality, the bill authorized the federal government to intervene any time a state failed to meet national standards, appoint a federal superintendent of state schools, build new schools, produce textbooks for classroom instruction, and collect an education tax from state and local governments.¹⁹⁴ Although “[r]eaction to the Hoar Bill was ‘of small proportions’ it was ‘universally unfavorable’ and ultimately defeated on Tenth Amendment grounds.”¹⁹⁵

¹⁸⁸ *Id.*

¹⁸⁹ U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CATEGORICAL GRANTS: THEIR ROLE AND DESIGN 15 (1978) (citing Harry Scheiber).

¹⁹⁰ The Act was similar in most respects to the First Morrill Act but required recipient states to show that race and color played no role in admissions decisions or to establish separate land grant colleges for black Americans.

¹⁹¹ The Hatch Act of 1887 was another federal law that sought to promote agricultural research and development in the states. Under the law, states were each provided \$15,000 annually for specific purposes related to agriculture. In turn, the recipient states were required to submit detailed reports to the Secretaries of Agriculture and the Treasury, and to subject themselves to periodic federal audits. ROBERT JAY DILGER AND EUGENE BOYD, CONG. RESEARCH SERV., R 40486, BLOCK GRANTS: PERSPECTIVES AND CONTROVERSIES 17 (2013); U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CATEGORICAL GRANTS: THEIR ROLE AND DESIGN 15 (1978).

¹⁹² U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, INTERGOVERNMENTALIZING THE CLASSROOM: FEDERAL INVOLVEMENT IN ELEMENTARY AND SECONDARY EDUCATION 13-14 (1981).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

For those who sought to increase federal involvement in education, the late-Eighteenth and Nineteenth Centuries were mostly full of disappointment. Many federal education bills came and went, some passing out of one chamber or the other, but never both in the same session. Despite a few small successes like the Morrill Acts, federal-aid-to education remained a politically charged topic and practical impossibility. States and localities were thought to be sovereign in the realm of education, and the threat of federal control over school administration and curricula content loomed large.

Thus, although federal involvement increased a modest amount before the turn of the Nineteenth Century, the federal government's involvement was still minimal at most. Congress had enacted only a few of the many proposed aid-to-education bills, and generally, they were among the most limited in terms of scope of federal involvement, purpose, and population of students affected. By 1902, federal intergovernmental expenditures for education amounted to an unremarkable \$1 million dollars—roughly \$28 million in today's dollars—and representing less than one percent of state and local government revenue.¹⁹⁶

b. Federal Agencies

After the Civil War, the United States government experimented with the creation of new agencies, the Bureau of Refugees, Freedmen and Abandoned Lands (“Freedmen’s Bureau”) within the Department of War and the Department of Education. Both agencies were fleeting; but their creation and fraught histories reveal a great deal about the federal government’s limited role and cautious approach to expansion in the area of education. This section focuses on the birth, life, and death of those agencies.

i. The Freedmen’s Bureau

Two months before the Civil War’s end and one month before President Abraham Lincoln’s murder, Congress enacted legislation establishing the Freedmen’s Bureau. Formally an office within the federal War Department, the Freedmen’s Bureau was created to facilitate the transition of ex-slaves to freedom for the duration of the Civil War and for one year after. In 1866, Congress enacted, over President Johnson’s veto, legislation to extend the Bureau’s life and give it more power.

The Bureau, headed by Union General Oliver Otis Howard, employed 900 agents at its peak and received “very meager funding” relative to what was expected of it.¹⁹⁷ Richard Kluger describes the “unimaginable number of chores” that were “heaped” upon the Bureau, which included

provision of food, clothing, and medical care for refugees both white and black; their resettlement on abandoned or confiscated lands where available; overseeing the transition of freedmen to the status of workingmen with full contractual rights in dealing with landlords; and the establishment of schools to achieve at least marginal literacy as rapidly and as widely as possible.¹⁹⁸

¹⁹⁶ U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CATEGORICAL GRANTS: THEIR ROLE AND DESIGN 15 (1978) (citing Harry Scheiber).

¹⁹⁷ RICHARD KLUGER, SIMPLE JUSTICE 43 (2nd ed. 2004).

¹⁹⁸ *Id.*

The last of these “chores” were among the Agency’s most important, and signified the federal government’s greatest intrusion into the education sphere to that point.

In the 1860s, the demand for free, public education had reached new heights and states across the South had begun to establish schools systems of their own. Most of those states, however, were reluctant to enroll black Americans, compelling the federal government, through the Freedmen’s Bureau, to set up schools across the South. In all, the Bureau was responsible for establishing more than 4,000 small schools that enrolled about 250,000 over a period of five years on a budget of about \$5 million or \$1.25 per capita.¹⁹⁹ Despite the Bureau’s modest successes and important accomplishments, Congress dissolved it in 1872 as support for Reconstruction waned and the Ku Klux Klan rose to prominence.

ii. The Department of Education

Like the Freedmen’s Bureau, the first Department of Education was short-lived. The Department was first established as a non-cabinet level department in President Andrew Johnson’s administration on March 2, 1867, the same day Congress created the House Committee on Education and Labor.²⁰⁰ Far from being empowered with great responsibility, the Department was tasked with “collecting such statistics and facts as shall show the condition and progress of education in the several states and territories, and of diffusing such information” in order “to promote the cause of education through the country.”²⁰¹ Congress gave the Department only a modest budget and staff. Indeed, the first Commissioner of Education, Henry Barnard, was given only three staff and two small rooms in the Capitol. The Department’s meager powers and resources were in part to placate President Johnson, who would not sign the bill without “assurances that centralization of education was not intended.”²⁰² The watering-down of the proposed Department’s powers coupled with Republican control of Congress during Reconstruction facilitated the law’s passage; it also ensured that the Department would play almost no role in education policy-making, although it did, briefly, distribute grants under the Second Morrill Act of 1890.

Despite the concessions that the bill’s sponsor Representative James Garfield (R-OH) made to weaken the Department, the Department remained controversial throughout its existence. Some federal officials believed it had been made too weak and clamored for a stronger agency that could set and enforce minimum national standards; others opposed the existence of any such agency on the basis of the Tenth Amendment and states’ rights. Still others believed the agency was a drain on national resources. The

¹⁹⁹ *Id.* at 50.

²⁰⁰ Congress divided the Committee into two committees, the Committee on Education and the Committee on Labor, in 1883, and merged the two into the Committee on Education and Labor in the Legislative Reorganization Act of 1946. Congress established the Senate Committee on Education in 1869, which was renamed the Education and Labor Committee in 1884.

²⁰¹ U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, INTERGOVERNMENTALIZING THE CLASSROOM: FEDERAL INVOLVEMENT IN ELEMENTARY AND SECONDARY EDUCATION 13 (1981).

²⁰² *Id.*

controversy culminated in the Department's being reduced to a bureau within the Department of the Interior, where it remained until 1939 "as a kind of bastard child, an object of bureaucratic ridicule in Washington, skeleton-staffed by third-rate 'educationists' that compiled obscure statistical reports that gathered dust."²⁰³ The Department's design essentially ensured this fate and left federal politicians that desired a greater federal role without the administrative apparatus or resources to see their vision through to fruition.

c. Supreme Court Decisions

The Supreme Court's interpretation of the Constitution, to some extent before, but to a great extent after the Civil War shaped what federal politicians could accomplish (and probably sought to accomplish) in the Nineteenth Century. From roughly Reconstruction to the New Deal, the Court regularly used the Tenth and Fourteenth Amendments, as discussed in the previous Chapter, to invalidate laws viewed as harmful to states' interests. Few education-specific cases were litigated in the Court during this period, but the Court's Tenth and Fourteenth Amendment jurisprudence generally suggested that any federal efforts to control the public schools would not be upheld if they were challenged.²⁰⁴

Moreover, the Court decided in 1895 *Pollock v. Farmers' Loan & Trust Co.*,²⁰⁵ which shaped federal-state dynamics, and thus the future of public education, in key ways. *Pollock* involved a challenge to the Wilson-Gorman Tariff Act of 1894. Appellant Charles Pollock sued to prevent the Farmers' Loan & Trust Company, in which he held stock from paying taxes under the federal law. The Court ruled in Pollock's favor, holding that the tax was an unconstitutional direct tax. Although the decision did not directly bear on education, it limited the federal government's potential revenue, and thus its ability to initiate innovative domestic programs at any level. Without the ample uncommitted revenue the federal income tax would have supplied, the federal government was not in a position to either fund educational services directly or to encourage state and local governments, through conditional grants-in-aid, to shape education policy. The states and local governments with their relative wealth—mostly from property and sales taxes—lacked a compelling reason to cooperate with or tolerate federal initiatives that smacked of federal usurpation.

d. Summary

Despite some federal officials' efforts and ambitions, federal involvement in public education was minimal both at the beginning and end of the Nineteenth Century. A culture of state and local control of the public schools and a legal tradition that favored state over federal governance generally played a role in that. Congress thus struggled to enact any education legislation and only experienced minor success with the First and

²⁰³ HUGH DAVIS GRAHAM, *THE TRANSFORMATION OF FEDERAL EDUCATION POLICY: THE KENNEDY AND JOHNSON YEARS* 12 (1983).

²⁰⁴ The Court decided *Plessy v. Ferguson*, which announced the "separate but equal" principle that shaped in key ways the development of public education in the United States. 163 U.S. 537 (1896).

²⁰⁵ 157 U.S. 429 (1885).

Second Morrill Acts. These laws had important consequences for Americans and the higher education in the United States, but their effects generally were not felt until the Twentieth Century.

Moreover, the federal administrative state was weak and federal financial resources were thin; in contrast to the states, whose budgets were plush with revenue from property and sales taxes, the federal government lacked the wealth that might have convinced state politicians to put up with federal intervention. Lastly, federal officials had only a distant relationship with local governments, those governments that most directly administered and financed schools.²⁰⁶

Part III: Federal Involvement in Education in the Twentieth Century, 1900 to 2000

The federal government was minimally involved in public education at the beginning of the Twentieth Century, but the Sixteenth Amendment and Revenue Act of 1913, world war, and the Cold War catalyzed the transformation of the federal role. These events were impactful in part because they exacerbated the tension between the states' economic and constitutional interests. This Part focuses, although not exclusively, on these events and their consequences, including how they set the stage for the National Defense Education Act of 1958 and Elementary and Secondary Education Act of 1960. This Part discusses both of these laws at length and how their enactment both signaled and facilitated the nationalization of education. Finally, this Part discusses other major congressional laws and federal agencies that followed the passage of the landmark Elementary and Secondary Education Act.

a. Federal Involvement in Education Before 1958

In the early years of the new century, the federal government did little to increase its involvement in and control over the public schools; and there was little appetite for sweeping change. Congress had demoted the Department of Education to a small office within the Department of the Interior that lacked the budget and personnel to implement a major federal program. The Supreme Court's Tenth and Fourteenth Amendment jurisprudence suggested hostility toward federal power, and its striking down the income tax deprived the federal government of an important source of revenue for educational programs. Race relations complicated everything.

The Sixteenth Amendment and the Revenue Act of 1913 that implemented it were important catalysts for change. The Sixteenth Amendment authorized Congress to enact an income tax without apportioning it and exempted it from the Constitution's requirements (effectively overruling *Pollock*) regarding direct taxes. The Revenue Act implemented Congress's power under the Sixteenth Amendment to enact a federal income tax. The Act's effects on federalism were significant, but not felt immediately; it

²⁰⁶ Michael Pagano, *United States of America, in* LOCAL GOVERNMENT AND METROPOLITAN REGIONS IN FEDERAL COUNTRIES 378 (John Kincaid and Nico Steytler ed. 2009). *See also* Robert Agranoff, *Relations Between Local and National Governments, in* THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT 27-28 (Haider-Markel ed. 2014).

set the stage, though, for a stronger federal-local partnership as well as impressive federal grants that would nudge state politicians to betray their states' interest.²⁰⁷

Between Congress's passing the Revenue Act and the start of World War II, Congress enacted only a couple of laws directly affecting public education. The first of these laws, the Smith-Lever Act of 1914, created the Agricultural Extension Service to distribute \$4,580,000 annually.²⁰⁸ Although the federal government had funded vocational education previously, the law was among the first to include a dollar-for-dollar state-matching requirement—what would become an important nationalizing tool. The second, the Smith-Hughes Act of 1917, which came after many similar bills failed, authorized \$1.7 million to support high school vocational education and home economics programs.²⁰⁹ Like Smith-Lever, the Act created an oversight board, the Federal Board of Vocational Education; recipient states were required to submit vocational education plans to the Board for approval. The Act also incorporated a matching requirement. Other bills were introduced in Congress in the years after Smith-Hughes, including the proposed Smith-Towner Act, which would have created a cabinet-level department of education and appropriated \$100 million annually to states on a matching basis.²¹⁰

Congress did not enact any other education laws until the 1940s but a few laws enacted in the 1930s bore on education indirectly.²¹¹ Part of the explanation for this was President Franklin Delano Roosevelt's opposition to federal aid-to-education. Although FDR believed in a right to a good education,²¹² as a former governor, he also believed in

²⁰⁷ Before the income tax was passed, Congress relied on excise taxes, custom duties, and public land sales. By 1922, the income tax comprised roughly 60% of federal revenue. U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *THE INTERGOVERNMENTAL GRANT SYSTEM: AN ASSESSMENT & PROPOSED POLICIES* 17 (1978).

²⁰⁸ Smith-Lever Act of 1914, Pub. L. No. 63-95, 38 Stat. 372.

²⁰⁹ *Id.*

²¹⁰ DAVID B. TYACK, ROBERT LOWE, & ELISABETH HANSOT, *PUBLIC SCHOOLS IN HARD TIMES* 104 (1984).

²¹¹ In 1927, President Herbert Hoover convened a National Advisory Commission to study the federal role in education policy-making and issue recommendations on the subject. The Commission was comprised of fifty educators, who eventually issued a report calling for greater federal control over education. Ultimately, nothing came of the Commission's report and recommendations because of the financial turmoil of the 1930s.

²¹² In his 1944 State of the Union address, FDR advocated for a "Second Bill of Rights" that emphasized economic rights, including the right to a good education. FDR's belief in a right to education is not necessarily at odds with his undermining federal aid-to-education bills; he believed that every American had a right to an education, and also that the states and local governments should provide it. Tyack, Lowe, and Hansot helpfully have summed up FDR's view, explaining that

FDR's conservative impulse to leave institutions intact was tempered by his humanitarian desire to help the needy. One pragmatic way to preserve the structure of public education while assisting those on the bottom of society was to create alternative educational agencies to help the "underprivileged," and this is precisely what the New Dealers did through the NYA, the WPA, the CCC, and other new ventures. . . . [S]uch ad hoc organizations gave the president more

local control of the public schools. He questioned the wisdom of federal control of education and worried that federal aid-to-education would consume an increasing portion of the federal budget.²¹³ Moreover, the President apparently did not think highly of the education establishment or his own Commissioner of Education, John Studebaker, and the Office of Education; he thus preferred to route aid through his new relief agencies, which helped to build new school buildings and keep existing schools' doors open.²¹⁴ Lastly, FDR likely did not want to go out on a limb to support federal aid-to-education and "endanger[] his coalition of urban liberals—many of them Catholic and opposed to a bill that did not help parochial schools—and southern conservatives, many of whom feared disrupting the racist system in their states."²¹⁵ Indeed, FDR not only did not support federal aid-to-education, but he reduced the size and budget of the United States Office of Education and is believed to have quietly killed every federal aid-to-education bill during his administration.²¹⁶

It was not until the 1940s and the start of World War II that both Congress and the President had the political will and support to enact federal legislation directly concerning education. The legislation Congress adopted was intended to bolster the war effort and compensate those Americans who had contributed to it. The Lanham Act, for example, became law in 1941 and was intended to alleviate the burden of military families and wartime factory workers sending their children to local schools and not paying local taxes. The "impacted areas law," as it was called, was popular, and generally viewed as the federal government's taking responsibility for "disrupting community services." Further, the Act did not bare any of the hallmarks of federal control like matching grants that held the potential to incite resistance in Congress and the states. Much of the aid was distributed directly to impacted localities, bypassing state education departments and nurturing relationships with school administrators at the local level.

Congress enacted the Serviceman's Readjustment Act ("GI Bill") shortly after, in 1944. The GI Bill was intended to address the widespread unemployment that the Department of Labor projected would follow the conclusion of World War II. Following the recommendation of the National Resources Planning Board, the GI Bill offered veterans federal assistance to continue their education, purchase homes, and seek medical treatment. In all, roughly eight million veterans benefited from the GI Bill's education provisions; millions attended institutions of higher education or received vocational

control over budgets and programs and recipients while he and his party reaped more political advantages than they would through costly general aid.

TYACK, LOWE, AND HANSOT, *supra* note 210, at 104.

²¹³ *Id.*

²¹⁴ *Id.* at 108. Much federal aid at this time was direct federal-local aid, a response to the lobbying efforts of liberal big city mayors, with whom the federal government began to form a partnership. AM. COUNCIL ON EDUCATION AND NAT'L ED. ASSOC. OF THE U.S. AND THE AM. ADMINISTRATION OF SCHOOL ADMIN., *FEDERAL-STATE RELATIONS IN EDUCATION* 8 (1945). Many schools cut back services or closed entirely due to the Depression. *Id.*

²¹⁵ TYACK, LOWE, & HANSOT, *supra* note 210, at 104.

²¹⁶ *Id.* at 108.

training.²¹⁷ Importantly, neither of Lanham Act or GI Bill, like the many education bills that had died in Congress, dictated how states and localities were to use federal money or run their schools. Indeed, under the GI Bill, most federal assistance went directly to veterans. Still, they helped acclimate Americans and the states to the idea of a federal role, albeit a small one, in education in America.²¹⁸

World War II was important in terms of carving out a federal role aside from its creating an opening for modest, targeted federal education legislation. Around this time, American parents were enrolling their children in school and for longer—an average of 11 years in 1959, compared to 8.4 years in 1940—thus putting pressure on the nation’s school systems.²¹⁹ The War effectively forced states and localities to defer needed school improvement and expansion projects to deal with higher priorities, all but guaranteeing they would eventually experience fiscal strain or crisis. Once the War was over, there was a new sense of urgency to fulfill the school systems’ unmet needs; thousands of new classrooms and teachers were needed—desperately. According to Ronald Steel, “Old problems as well as new haunt[ed] the schools. The neglect of the depression thirties and the wartime forties [was] still to be made good, and the end [was] not in sight.”²²⁰ Although issues like race and religion fueled the debate over general federal aid-to-education and stalled the passage of a general aid law, these post-war conditions softened some of the resistance and gave momentum to the cause. Local politicians in particular, who bore most of the financial burden of providing educational services, began to look to the federal government for aid, which by then had “c[o]me to dominate the nation’s revenue system.”²²¹

In the wake of World War II, the state of the schools continued to deteriorate and Americans’ support of a federal role in education rose; consistent majorities of Americans favored general federal aid-to-education.²²² School enrollments increased by more than eleven million in the 1950s, and were expected to increase by nearly that much in the 1960s.²²³ Annual school expenditures grew from \$5.8 billion in 1949 to \$15.8

²¹⁷ SUZANNE METTLER, *SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION* 62 (2005).

²¹⁸ See Melissa Murray, *When War is Work: The G.I. Bill, Citizenship, and the Civic Generation*, 96 CAL. L. REV. 967, 972-74, 978 (2008). The article, a review of Mettler’s book *Soldiers to Citizens*, suggests that the G.I. Bill’s generous support of veterans’ education and living expenses helped foster positive feelings toward the federal government. *Id.* In this respect, the bill probably played a key role in acclimating Americans to federal involvement in education.

²¹⁹ RONALD STEEL, *FEDERAL AID TO EDUCATION* 12 (1961).

²²⁰ *Id.* at 15.

²²¹ W. ELLIOT BROWNLEE, *FEDERAL TAXATION IN AMERICA: A SHORT HISTORY* 96-97 (1996).

²²² Roughly 65% of Americans favored general federal aid-to-education in the 1940s and 1950s. U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *INTERGOVERNMENTALIZING THE CLASSROOM: FEDERAL INVOLVEMENT IN ELEMENTARY AND SECONDARY EDUCATION* 72 (1981).

²²³ Most of the increase was the result of huge increases in the population.

billion in 1959 and were predicted to double in the next decade.²²⁴ The Office of Education estimated that the nation confronted a classroom shortage of 142,000 in 1961, and would require an additional 600,000 classrooms and 437,000 teachers by the end of the decade.²²⁵ Still there was not much pressure for a general federal aid bill and there was great controversy at the intersection of every proposed education bill and race and religion. The next federal education law of consequence that Congress enacted, thus, was again spurred on by the crisis of war—this time the Cold War. Because this law, the National Defense Education Act of 1958, was of great consequence to the soon-after enacted general federal aid law, a longer discussion of it follows.

i. The National Defense Education Act of 1958

The Cold War and the threat of creeping Communism created a critical opportunity for federal education aid supporters to galvanize support for federal aid-to-education. After the Soviet Union launched *Sputnik* into orbit successfully in 1957, even President Dwight Eisenhower, who generally opposed big government and privately disliked the idea, encouraged Congress to pass a law that would help to improve America's failing schools. In the 1958 State of the Union address, President Eisenhower proclaimed, "[W]e have tremendous potential resources . . . to help in countering the Soviet threat: education, science, research, and not the least, the ideas and principles by which we live. . . . [R]edoubled exertions [in these areas] will be necessary . . . if we are to rise to the demands of our times."²²⁶

With President Eisenhower's reluctant support, Congress enacted the National Defense Education Act of 1958 ("NDEA"), which was expressly framed in terms of the Soviet threat and made federal aid available on a temporary basis to promote a host of at least ostensibly Cold War-related purposes.²²⁷ Indeed, NDEA's opening statement declared,

The Congress hereby finds and declares that the security of the Nation requires the fullest development of the mental resources and technical skills of its young men and women. The present emergency demands that additional and more adequate educational opportunities be made available. The defense of this Nation depends upon the mastery of modern techniques developed from complex scientific principles.²²⁸

In other words, federal officials used *Sputnik* to play up the Soviet threat and leveraged Americans' fear of Communism to overcome the race and religion-related hurdles that had plagued (and would continue to plague) other failed education aid bills. In Senator Lister Hill's (D-AL) words, no member of Congress would "dare vote against both

²²⁴ P. Michael Timpane, *Reform Through Congress, Federal Aid to Schools: Its Limited Future*, 38 LAW AND CONTEMPORARY PROBLEMS, 493, 496 (1974). Annual education expenditures hit \$26.2 billion in 1965. *Id.*

²²⁵ Steel, *supra* note 219, at 15.

²²⁶ Dwight D. Eisenhower, President of the U.S., State of the Union Address (January 9, 1958).

²²⁷ National Defense Education Act of 1958, Pub. L. No. 85-865, 72 Stat. 1580.

²²⁸ *Id.*

national defense and education when joined in the same bill.”²²⁹ The NDEA’s strategic timing and narrow focus helped to clear the way for the bill in Congress, which despite its unprecedented scope was adopted by comfortable margins—66-15 (D 37-7; R 29-8) and 212-85 (D 140-30; R 72-55) in the Senate and House, respectively.²³⁰ Ultimately, the NDEA would help to make federal education funding a fixture of federal, state, and local budgets beyond funding national defense and higher education.

Under the NDEA, federal money was appropriated through categorical grants, many with matching requirements; these included grants for college loans scholarships for students in defense-related fields and those who intended to become teachers, fellowships for those who intended to become teachers, to encourage states to implement testing and counseling programs in secondary schools, and to promote and improve the teaching of science, mathematics, and foreign languages.²³¹ It also allotted money for research grants and to create the Science Information Service within the National Science Foundation and to improve state education agencies.²³² In total, the NDEA authorized \$887 million over four years and represented Congress’s first successful attempt to enact a major education assistance bill. Not including impact aid and the federal school lunch and milk programs,²³³ federal spending increased from \$140 to \$225 million as a result of the NDEA.²³⁴ Whether the NDEA accomplished all of its objectives, it represented a milestone in the fight for federal involvement in education and helped to bring about the nationalization of education.

Indeed, the NDEA’s consequences long outlasted the four years for which Congress authorized it. First, the NDEA unleashed a variety of federal grant-in-aid programs whose growing list of beneficiaries made the discontinuation of federal education aid difficult. In the years after the law was enacted, support for federal aid grew; a growing majority of Americans favored federal involvement in the public schools,

²²⁹ U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, INTERGOVERNMENTALIZING THE CLASSROOM: FEDERAL INVOLVEMENT IN ELEMENTARY AND SECONDARY EDUCATION 24 (1981). Lister Hill was chairman of the Senate Labor and Public Welfare Committee. *Id.*

²³⁰ National Defense Education Act of 1958, Pub. L. No. 85-865, 72 Stat. 1580. There also was no notable resistance in any of the states, even though at least forty governors had publically opposed the President’s failed school construction assistance bill.

²³¹ *Id.*

²³² *Id.*

²³³ Congress and President Harry S. Truman enacted the National School Lunch Act, which included the school milk program, in 1946. The Act provided grants to states on a matching basis for equipment and food purchases for elementary and secondary school lunches. Although the federal government had offered aid to states and localities for school lunches and milk previously, it was offered haphazardly via federal relief agencies, on a non-continuing basis.

²³⁴ U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, INTERGOVERNMENTALIZING THE CLASSROOM: FEDERAL INVOLVEMENT IN ELEMENTARY AND SECONDARY EDUCATION 25 (1981).

although resistance to specific types of federal aid persisted.²³⁵ Accordingly, Congress amended and reauthorized the NDEA multiple times after its expiration in 1964, allocating increasingly large amounts of money for higher education. Second, the NDEA provided aid proponents an important education in how to get federal education legislation through Congress. It suggested that the path of least resistance involved framing proposed legislation in terms of popular, strategic national objectives and to disavow any intent to exert control over the public schools.

b. Federal Involvement in Education After 1958

NDEA grants paved the way for open-ended federal support across all education sectors. In this way, the NDEA was critical in bringing about the Elementary and Secondary Education Act of 1965 (“ESEA”), the legislation that fundamentally transformed American federalism in the area of education. This part describes the hurdles that stood in the way of meaningful federal involvement in education even after the NDEA and how federal officials maneuvered around them. Lastly, it considers the transformation of the federal role that followed the law’s enactment, which included the enactment of yet other federal education legislation.

i. The Elementary and Secondary Education Act of 1965

The NDEA marked a huge step toward substantial federal involvement in and control over public education in the United States; nonetheless, those seeking a greater federal role faced an uphill climb. Unlike President Eisenhower, who was “reluctantly thrust into a national role in education,”²³⁶ President John F. Kennedy made education reform a central plank in his campaign platform and a top-five domestic priority once in the White House. He sought not the targeted and temporary programs of the Eisenhower administration, but long-term, general federal aid for elementary and secondary schools and a meaningful and substantive federal role in public education. The issues of race and religion dogged nearly every aid bill during the Eisenhower and Kennedy administrations and ultimately doomed JFK’s proposed \$2.3 billion general federal aid program in 1961.²³⁷ Ultimately, it was President Lyndon Johnson, who through luck, timing, and draftsmanship would be a party to the enactment of the first major general aid bill.

1. Race and Religion

Until 1964, race posed a great challenge for proponents of federal aid-to-education; indeed, the Southern states’ reluctance to educate black Americans after the Civil War necessitated the federal government’s direct involvement in the schools through the Freedman’s Bureau and contributed to the Hoar Bill’s defeat in Congress.

The racial issue continued to loom large in the 1950s and 1960s, leading up to the passage of the historic Elementary and Secondary Education Act, dooming most every

²³⁵ FRANK J. MUNGER & RICHARD F. FENNO, NATIONAL POLITICS AND FEDERAL AID TO EDUCATION 91-93 (1962).

²³⁶ MAURICE R. BERUBE, AMERICAN PRESIDENTS AND EDUCATION 44 (1991).

²³⁷ GARETH DAVIES, SEE GOVERNMENT GROW: EDUCATION POLITICS FROM JOHNSON TO REAGAN 17 (2007).

bill Congress considered.²³⁸ Even relatively liberal Southern congressmen—generally from the states most likely to benefit from federal aid—worried that the federal government would use federal aid-to-education to prohibit segregation. This worry was especially acute after the Supreme Court declared “separate but equal” unconstitutional in 1954 in *Brown v. Board of Education*; desegregation was inevitable but Southern states were dragging their feet to integrate.²³⁹ Representative Adam Clayton Powell’s (D-NY) regularly adding an amendment to every aid bill to prohibit federal aid to segregated institutions played a primary or major role in the defeat of nearly every aid bill during this period. Southern legislators refused to vote for a bill that contained the Powell Amendment; liberal Northern legislators were reluctant to vote for any bill that did not contain such a prohibition against aid to segregated schools—the official position of the National Association for the Advancement of Colored People (“NAACP”) since about 1949.²⁴⁰ By the time the ESEA was under consideration in Congress in 1965, the race issue had become irrelevant by virtue of Title VI of Civil Rights Act of 1964, which prohibited aid to institutions that engaged in racial discrimination.²⁴¹

Religion posed a much greater challenge for proponents of federal aid, particularly during the Kennedy administration.²⁴² President Kennedy, the nation’s first Catholic president, was insistent that no federal money would be provided to parochial schools and was unwilling to negotiate.²⁴³ Kennedy’s hard line position on aid-to-parochial schools, in conjunction with the extremely controversial Supreme Court decisions *Everson v. Board of Education*,²⁴⁴ *Engle v. Vitale*,²⁴⁵ and *Abington School District v. Schempp*,²⁴⁶ mobilized a forceful opposition to his education reform agenda. Whether to include aid for parochial schools remained a challenge during the Johnson administration and one the Johnson administration managed indirectly through clever framing, which is discussed in the section that follows.

2. Designing the ESEA

Most accounts of the ESEA’s enactment imply that the law was adopted suddenly and unexpectedly. More likely, as Kaestle explains, although there seems to have been “a great disjunction between Kennedy’s failed attempts at legislation for elementary and secondary education, and Johnson’s swift dramatic victory in 1965 . . . various elements of that victory had been ‘incubating’ in the Kennedy years . . . [like] the idea of tying the education legislation to the economic and social health of the nation.”²⁴⁷

²³⁸ *Id.* at 9-10.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 34.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ 330 U.S. 1 (1947) (applying the Establishment Clause against the states).

²⁴⁵ 370 U.S. 421 (1962) (prohibiting non-denominational prayer in public schools).

²⁴⁶ 374 U.S. 203 (1963) (prohibiting Bible-reading in public schools).

²⁴⁷ Carl F. Kaestle, *Federal Aid to Education Since World War II: Purposes and Politics*, 10, in *THE FUTURE OF THE FEDERAL ROLE IN ELEMENTARY AND SECONDARY EDUCATION* (Jack Jennings, ed., 2001).

The ESEA, the federal government's first major foray into public education, was largely the result of clever draftsmanship and salesmanship that emphasized the need to support America's impoverished communities—an idea borrowed from Johnson's Presidential Task Force on Education²⁴⁸—and skirted the parochial schools issue.²⁴⁹ President Johnson trumpeted the ESEA as a means of facilitating disadvantaged students' upward mobility and thereby achieving social and economic equality; and he avoided the religion landmine by making aid available to students rather than schools.²⁵⁰ Moreover, to help the bill along in Congress and alleviate concerns about pork, the bill's drafters adopted a formula that guaranteed almost every school district would receive federal funds.²⁵¹ With these ingredients and the race issue out of the way, the ESEA moved relatively easily and swiftly through Congress, passing by a vote of 263-153 (D 227-56; R 36-97) in the House and 73-18 (D 55-6; R 18-12) in the Senate. Representative Carl Perkins's (D-KY) comment likely explains why many legislators voted for the bill: "The 1965 bill, in all candor, [did] not make much sense educationally; but it [made] a hell of a lot of sense legally, politically, and Constitutionally. This was a battle of principle, not substance, and that is the main reason I voted for it."²⁵²

None of this is to suggest that there was no controversy surrounding the bill; it faced an aggressive but ultimately weak opposition in Congress. First, despite the administration's repeated denials that federal aid would lead to federal control, some congressmen were apparently not convinced. (Although it is plausible that the "federal control" mantra was a convenient way for conservative legislators to disguise their opposition to federal grants and/or desegregation.) In one exchange between Education Commissioner Francis Keppel and members of Congress, Keppel explained that the [f]ederal role in the actual administration of this program [would be] restricted to obtaining written assurances from the states that they will comply with the intent of the legislation; establishing an allocation to each county or school district; establishing regulations to determine the eligibility of school districts under the provisions relative to effort, percentage of current expenditure budget, and numbers of qualifying children; [and] preparing regulations establishing the basic criteria to be applied by State educational agencies in approving local plans.²⁵³ Despite such assurances, Representative Charles Goodell (R-NY) opposed the bill, commenting that,

²⁴⁸ The Task Force, led by John Gardner, produced a report that favored general federal aid-to-education, in part, as a means to eradicate poverty. U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, INTERGOVERNMENTALIZING THE CLASSROOM: FEDERAL INVOLVEMENT IN ELEMENTARY AND SECONDARY EDUCATION 32 (1981).

²⁴⁹ Kaestle, *supra* note 247.

²⁵⁰ *Id.*

²⁵¹ DAVIES, *supra* note 237, at 35.

²⁵² U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, INTERGOVERNMENTALIZING THE CLASSROOM: FEDERAL INVOLVEMENT IN ELEMENTARY AND SECONDARY EDUCATION 35 (1981).

²⁵³ U.S. Senate, Jan.-Feb., 1965, Comm. on Labor and Public Welfare, Subcomm. On Education, Hearings, Elementary and Secondary Education Act of 1965, Part 2, p. 638.

I have read and reread in every single education measure . . . this nice, high-sounding, sweet little paragraph that there will be no control. Then you go right into the center of this bill where the power is, and it is right on page 8. The Commissioner sets the basic criteria for every State plan. The State gets the money only if they have a plan that meets the Commissioner's basic criteria You can say it is not control, but they are telling them exactly how to go about it.²⁵⁴

Congressman John Williams (R-DE) similarly commented in a 1965 Labor and Public Welfare Committee hearing,

Make no mistake about it, this bill, which is a sham on its face, is merely the beginning. It contains within it the seeds of the first federal education system[,] which will be nurtured by its supporters in the years to come long after the current excuse of aiding the poverty is forgotten The needy are being used as a wedge to open the floodgates, and you may be absolutely certain that the flood of federal control is ready to sweep the land.²⁵⁵

Second, as alluded above, there was controversy over the form federal grants for education would take (i.e., categorical versus block grants). Counter-intuitively, Congress resolved this problem, in part, by using categorical rather than block grants, and by adopting a distribution formula that brought roughly ninety-five percent of school districts under the federal government's auspices. Categorical grants, though more restrictive than block grants, were likely believed to limit federal involvement in education and thus the potential for control; although categorical grants were more limited in terms of how states and localities could use them, they also limited federal oversight to the specific areas and programs to which the grants flowed. Further, the generous distribution formula was essential to the bill's success; it was adopted to ensure that every legislator could bring federal money home. This aspect of the bill suggests, if not confirms, the degree to which federalism concerns were relevant (or irrelevant) in Congress.

Ultimately, under the ESEA as enacted, most of more than \$1 billion federal dollars would be distributed directly to localities based on the number of educationally underserved students in a district's schools.²⁵⁶ Title I contained the relevant language but no specific enforcement provision.²⁵⁷ Titles II through IV reserved a small amount of federal money for specific projects, such as providing library and classroom resources and funding state supplemental education programs.²⁵⁸ Title II, specifically, contained a controversial "escape clause" that permitted the federal government to directly administer grant programs in states where state law prohibited the state from administering it

²⁵⁴ CHARLOTTE A. TWIGHT, FOUNDATION FOR ECONOMIC EDUCATION, ORIGINS OF FEDERAL CONTROL OVER EDUCATION (1994).

²⁵⁵ JAMES L. SUNDQUIST, POLITICS AND POLICY: THE EISENHOWER, KENNEDY, AND JOHNSON YEARS 215 (1968).

²⁵⁶ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

See also Kaestle, *supra* note 247.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

itself.²⁵⁹ Title V appropriated twenty-five million dollars for state departments of education to grow and improve. Given that as late as 1960 the mean size of state education agencies was 208,²⁶⁰ and the federal government could not fully implement or enforce the law without the states' help, Title V was thought to be especially critical to the law's ultimate success.²⁶¹ Title V also helped to minimize the appearance of federal control because it at least ostensibly empowered state education agencies. The Department of Health, Education, and Welfare ("HEW") was assigned responsibility for promulgating implementing regulations and overseeing their enforcement. HEW's first round of regulations were distributed to the states in December 1965, and required the states to comply with the ESEA's basic purposes and objectives. ESEA-funded projects were to "serve areas with high concentrations of low-income children"; "be based on careful assessment of these children's needs and characteristics"; "focus on children's most important needs"; "be offered in locations that can best serve children"; "be of sufficient size, scope and quality to 'give reasonable promise of substantial progress'; "consider preschoolers' needs"; "consider handicapped children's needs"; "provide opportunities for the participation of private school children (but leave control over Title I funding and property with the public school systems)"; "give consideration of the capacity of community agencies to serve Title I children"; "include appropriate evaluation procedures"; and "include provisions for the LEA [Local Education Agency] to make an annual evaluation report as required by the state."²⁶²

3. Resistance to the ESEA

Although purported fears of federal control had plagued federal aid-to-education bills in Congress for decades,²⁶³ there was relatively little state and local opposition to the ESEA once it became law. No states or state lobbying organizations publically opposed the bill or apparently lobbied President Johnson or Congress to kill it. The only notable resistance to the bill was local, concentrated in relatively wealthy communities that were no doubt able to generate ample tax revenues to fund their own schools. For example, half a dozen towns in New Hampshire, according to *The Wall Street Journal* in January 1966, turned down \$30,000 of the \$2.5 million appropriated for the state. Their

²⁵⁹ U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, INTERGOVERNMENTALIZING THE CLASSROOM: FEDERAL INVOLVEMENT IN ELEMENTARY AND SECONDARY EDUCATION 35 (1981).

²⁶⁰ 208 is the mean for 48 states. John W. Meyer, W. Richard Scott, David Strang, & Andrew L. Creighton, Bureaucratization Without Centralization: Changes in the Organizational System of U.S. Public Education, 1940-80 144, in INSTITUTIONAL PATTERNS AND ORGANIZATIONS: CULTURE AND ENVIRONMENT (Lynne G. Zucker, ed., 1988). The mean climbed from 208 in 1960, to 318 the year after Congress enacted the ESEA, to 448 in 1974. *Id.*

²⁶¹ *Id.*

²⁶² Beth R. Sanders, School Leaders and the Challenge of the Elementary and Secondary Education Act, 1960-1968 38 (January 2010) (unpublished Ph.D. dissertation, University of Michigan) (on file with University of Michigan).

²⁶³ Munger and Fenno question this fear of federal control. MUNGER AND FENNO, *supra* note 235.

governing boards refused the funds, designated for remedial education programs, because they were “simply afraid of governmental control of their state and local school systems.”²⁶⁴ One month later, *The New York Times* reported that ten New Hampshire towns had turned down their designated share of Title I funds.²⁶⁵ Similarly, in California, a handful of wealthy school districts refused federal money, although their resistance was short-lived. *The New York Times* reported in January 1966 that although some districts had refused funding under the ESEA, many other strongholds of anti-federal aid throughout California had voted to accept their full share of federal funding.²⁶⁶ One such district in Arcadia, California voted to accept \$92,602, according to Board President Harold Lietz because, “this type of program could not be assimilated in our budget and we must provide the best education we can.”²⁶⁷ Other districts in Los Angeles County did the same. *The Los Angeles Times* reported: “School districts, long prone to skirt the issue of federal aid, are taking new looks as Congress moves further into the field of education and offers millions of dollars as persuasion.”²⁶⁸ District leaders justified accepting federal “enticements” as taking “what’s due.”²⁶⁹

In short, resistance to federal intervention in education under the ESEA was minimal; indeed, it was virtually non-existent. From a federalism perspective, it is not surprising that there was resistance in a few scattered jurisdictions across the country; what is surprising is just how little resistance there was. Most state and local politicians appear to have prioritized their jurisdictions’ economic interests, which generally furthered their re-election goals, above keeping the federal government from controlling state and local institutions. These officials not only benefited from bringing home “pork,” they avoided being punished by the voting electorate for refusing to accept federal funding to which many Americans felt entitled. Moreover, in the years leading up to the ESEA, “[l]arge urban districts increasingly appealed directly to the federal government for help (and often viewed state education agencies as adversaries or competitors in the

²⁶⁴ *A Small Revolt in New Hampshire*, Wall Street Journal, Jan. 13, 1966, available at <http://search.proquest.com/docview/133161922/fulltextPDF?accountid=14496>.

²⁶⁵ John H. Fenton, *New Englanders Spurn School Aid: 10 New Hampshire Towns Reject Federal Funds 50 Towns “in the Bag” Foe of Federal Aid*, N.Y. TIMES, Feb. 6, 1966, available at

<http://search.proquest.com/docview/117137147/fulltextPDF?accountid=14496>.

²⁶⁶ Lee Austin, *Resistance to U.S. School Aid Fades: Some Strongholds Now Take Share of Federal Funds*, L.A. TIMES, Jan. 30, 1966, available at

[http://search.proquest.com/docview/155356029/fulltextPDF/\\$N/1?accountid=14496](http://search.proquest.com/docview/155356029/fulltextPDF/$N/1?accountid=14496).

²⁶⁷ *Id.*

²⁶⁸ Helen Johnson, *School Districts Change Attitudes on Federal Aid: Federal Aid to Schools*, L.A. TIMES, Mar. 6, 1966, available at

<http://search.proquest.com/docview/155451013/fulltextPDF?accountid=14496>.

²⁶⁹ *Id.* Leaders explained that local taxpayers contributed to federal treasury and thus were entitled to take money back out of it. Other leaders stated that they believed taking federal money was what was best for their community’s children.

pursuit of federal resources.)²⁷⁰ Organizations like the United States Conference of Mayors and the Great Cities Program for School Improvement, a lobbying group comprised of the country's fourteen largest school districts, sought federal aid for localities, cutting out the states completely.²⁷¹ State politicians' cooperation with the federal government enabled them to play a direct role in allocation and other administrative decisions that rival local politicians otherwise would have played, and to centralize control of a valuable public service, education, at the state level.

In the late-1960s and early 1970s, stronger state and local resistance to the ESEA occurred where law and race intersected, but it was limited almost entirely to the South. Race had been temporarily side-lined as a concern during the debates over the ESEA by virtue of Congress's enacting the Civil Rights Act in the previous legislative session. Once the bill became law, however, the ESEA elevated the importance of Title IV of the Civil Rights Act, which prohibited the recipients of federal aid from engaging in discrimination, because now at stake was much more federal money.

In the early years of the ESEA, Education Commissioner Keppel and HEW used Title IV to pressure Southern school districts to desegregate. Although the agency did not require immediate desegregation, it mandated that school districts file plans to desegregate within four years or agree to allow black students to enroll in any school of their choosing that was not oversubscribed. Thousands of districts filed such plans, many of which the Department rejected. Ultimately, the Department withheld the distribution of hundreds of millions of dollars of federal aid (including Title I aid) to Southern schools that failed to desegregate to an acceptable degree.²⁷² This use of the ESEA and Title IV as a tool of federal control and nationalization was controversial in some parts of the country but highly effective; indeed, a 2010 study confirmed the school districts that tended to desegregate the fastest tended to be those with the most federal money to lose.²⁷³

²⁷⁰ *Federal Education Policy and the States, 1945-2009, The Kennedy Years: Urban Education*, N.Y. STATE ARCHIVES (Apr. 8, 2016),

http://www.archives.nysed.gov/edpolicy/research/res_essay_kennedy_urban_ed.shtml.

²⁷¹ The Great Cities Program for School Improvement became the Council of Great City Schools.

²⁷² U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, INTERGOVERNMENTALIZING THE CLASSROOM: FEDERAL INVOLVEMENT IN ELEMENTARY AND SECONDARY EDUCATION 39-40 (1981); *The Big Federal Move to Education*, TIME MAGAZINE, Apr. 30, 1965, available at <http://eds.b.ebscohost.com/eds/detail/detail?vid=9&sid=845e483f-aa8f-4109-ab4e-ee7966f2b6fb%40sessionmgr112&hid=111&bdata=JnNpdGU9ZWRzLWxpdmU%3d#AN=54030650&db=edb>.

²⁷³ Elizabeth Cascio, Nora Gordon, Ethan Lewis, & Sarah Reber, *Paying for Progress: Conditional Grants and Desegregation of Southern Schools*, 125 Q.J. ECON. 1, 25-26 (2010). See also Elizabeth U. Cascio, Nora Gordon, & Sarah Reber, *Local Responses to Federal Grants: Evidence from the Introduction of Title I in the South*, 5 AM. ECON. J. POL. 126, 127-28 (2013).

4. The Aftermath of the ESEA

The more the federal government became involved in education as the ESEA unfolded, the more the federal government became involved in education. This section addresses the fundamental transformation of the federal role in education that followed the ESEA's enactment. It focuses on major congressional enactments, many of them reauthorizations of and amendments to the ESEA, and the growth of the federal education bureaucracy.

The ESEA solidified the federal government's role in education financing and policy-making. Within two years, what little resistance to it had vanished, and for the first time federal aid-to-education began to attract bi-partisan advocates at every level of government.²⁷⁴ "The beneficiaries of federal aid to education—particularly teachers' unions, parent groups, and state and local education agencies—quickly became a powerful political force in Washington and fought hard to protect existing programs and to create new ones."²⁷⁵ The ESEA was designed to expire in 1966, but instead Congress reauthorized and amended the Act repeatedly. Each time it extended the federal role and eroded state power.

Congress extended the ESEA for two years in 1966, and again in 1968. The 1966 reauthorization amended the ESEA to include Title VI, which created grants for the education of children with disabilities.²⁷⁶ The law also established the Bureau for Education and Training of the Handicapped and the National Advisory Committee on Handicapped Children to monitor state compliance and report to Congress.²⁷⁷ The 1968 reauthorization similarly amended the ESEA to include a new title, Title VII, which created conditional grants for the education of children with disabilities and established the Advisory Committee on the Education of Bilingual Children.²⁷⁸ Both the 1966 and 1968 acts required more of states and localities than the 1965 act to qualify for an increasing amount of federal money. Federal appropriations steadily increased from approximately \$1 billion in 1965 to \$2.4 billion in 1967 to \$3.5 billion in 1970. The number of pages of federal legislation rose from 80 in 1964 to 360 in 1976; the number of federal regulations from 92 in 1965 to 1,000 in 1977.²⁷⁹

Congress continued to reauthorize and amend the ESEA throughout the 1970s, imposing new requirements and nurturing new constituencies that would ensure the federal government would always play a role in education financing and policy-making.

²⁷⁴ See EUGENE EIDENBERG AND ROY D. MOREY, AN ACT OF CONGRESS: THE LEGISLATIVE PROCESS AND THE MAKING OF EDUCATION POLICY (1969).

²⁷⁵ Patrick McGuinn and Frederick Hess, *Freedom From Ignorance? The Great Society and the Evolution of the Elementary and Secondary Education Act 7*, in THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM (Sidney Milkis & Jermone Mileur, ed., 2005).

²⁷⁶ Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191.

²⁷⁷ COURTNEY A. COLLINS, MERCATUS CENTER, WORKING PAPER NO. 14-24, READING, WRITING, AND REGULATIONS: A SURVEY OF THE EXPANDING FEDERAL ROLE IN ELEMENTARY AND SECONDARY EDUCATION POLICY 17 (2014).

²⁷⁸ *Id.*

²⁷⁹ DIANE RAVITCH, THE TROUBLED CRUSADE, 1945-1980 312 (1983).

Likewise, HEW (and a growing cadre of federal committees, commissions, and bureaus) promulgated new and increasingly specific requirements to reduce non-compliance among recipient governments. According to John Chubb, federal education policy “[came] to be carried out by increasingly detailed, prescriptive, legalistic, and authoritarian means.”²⁸⁰ The means Chubb described contained “no explicit provisions . . . for the involvement of [state] governors or legislators.”²⁸¹

Not all state and local non-compliance was willful however. After the ESEA was adopted, most states “reissued the federal regulations and guidelines [from the Office of Education] to the LEAs [local education agencies] as their own”²⁸² and requested even “more specific regulations for the size, scope and quality of Title I programs, and that those regulations be available prior to the start of each school year.”²⁸³ Rather than objecting to federal guidelines, most state education agencies “actually welcomed the USOE [United States Office of Education] guidance as a way of providing the services that educationally disadvantaged children needed.”²⁸⁴ These agencies not only embraced federal involvement in education, they adopted the federal government’s guidelines and affirmatively sought out ways to better comply.²⁸⁵ In a few cases, the ESEA had mandated that the grant recipient violate state constitutional or statutory law, by requiring, for example, that it make equal aid available to public and private and parochial school students. In the case of equal aid to public and private parochial school students, nearly every state obeyed notwithstanding the conflict, thus subordinating their political identities to the federal law.²⁸⁶

c. Major Congressional Enactments After 1965

The ESEA’s passage opened the floodgates. Almost every year since 1965, Congress enacted some ESEA reauthorization or amendment or entirely new education law. In total, Congress would amend the ESEA seven times between 1965 and 2002, and enact more than thirty statutes—each comprised of multiple acts—directly affecting education. This, in contrast to the many years before the ESEA, 1787 to 1964, in which Congress enacted fewer than thirty laws affecting education. Moreover, as a percentage of state and local expenditures, federal aid increased from 15.3% in 1965 to 23.4% in 1970. This section describes several of the most significant legislative victories for advocates of a substantial federal role in education. Because the legislative controversies involved so many of the same players and so many of the same issues, this section does

²⁸⁰ John E. Chubb, *Excessive Regulation: The Case of Federal Aid to Education*, 100 POL. SCI. Q. 287, 287 (1985).

²⁸¹ Sanders, *supra* note 262, at 42.

²⁸² *Id.* at 41.

²⁸³ *Id.* at 53.

²⁸⁴ *Id.* at 42.

²⁸⁵ Notwithstanding the states’ efforts to achieve substantial compliance, a 1972 study found that roughly three quarters of the states were technically non-compliant.

²⁸⁶ Jonathan Spivak, *Education’s Challenge: Anti-Poverty School Aid Poses Problems, Opportunities*, WALL ST. J., Apr. 19, 1966, available at <http://search.proquest.com/docview/133131593/fulltextPDF?accountid=14496>.

not emphasize legislative history, but the continuous expansion of federal power at the states' expense.

i. The Education for All Handicapped Children Act of 1975

Congress enacted the Education for All Handicapped Children Act (“EAHCA”) in 1975, nearly a decade after Congress first expanded the ESEA to include aid specifically for the education of children with disabilities. The EAHCA was prompted in part by federal judicial decisions like *Pennsylvania Association for Retarded Citizens (“PARC”) v. Pennsylvania* and *Mills v. Board of Education*, which addressed the rights of disabled students.

PARC v. Pennsylvania, decided in 1971, invalidated a Pennsylvania law that permitted public schools to deny educational services to children “who have not attained a mental age of five years” by the first grade. The resulting consent decree ordered Pennsylvania to provide a free public education to any child with a mental disability until age twenty-one.²⁸⁷ *PARC* established the “standard of appropriateness,” that is, that each child must be given an education appropriate to her abilities. The decision also established a preference for educating disabled children in the least restrictive environment.

Mills v. Board of Education, decided shortly after *PARC*, involved seven disabled children between ages eight and sixteen who sued the District of Columbia public school system for refusing to enroll and expelling students based solely on their disabilities.²⁸⁸ The court held that the District of Columbia’s policy violated the Fourteenth Amendment, and it declared a constitutional right of every child to receive an education “on equal terms” and one tailored to her specific needs. The court retained jurisdiction to “allow for implementation, modification and enforcement of th[e] Judgment and Decree as may be required.”²⁸⁹

PARC and *Mills* both required a great deal from the states, financially and otherwise; so, too, did at least thirty other similar federal court decisions that declared state policies and practices unconstitutional and required the states to stretch their tight budgets further. The District of Columbia in *Mills*, for example, conceded that nearly 13,000 disabled children did not receive any education in the 1971-72 school year because it did not have sufficient funds. District officials claimed they could not provide those children an education unless “Congress . . . appropriates millions of dollars to improve special education services in the District of Columbia.”²⁹⁰ The court, unconvinced, ordered the District to “find” the money or change its budget, and Congress, in turn, extended civil rights protection to disabled students in the Rehabilitation Act of 1973. The Rehabilitation Act defined a handicapped person as one with a physical or mental impairment that “substantially limits one or more . . . major life activities” and prohibited the exclusion of an “otherwise qualified handicapped individual” . . . from

²⁸⁷ *Pennsylvania Association for Retarded Citizens (PARC) v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1971).

²⁸⁸ *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972).

²⁸⁹ *Id.* at 883.

²⁹⁰ *Id.* at 875.

participation in any program or activity receiving federal financial assistance.”²⁹¹ The Act did not, as the District of Columbia had requested, include additional funding. This was in part due to the economic slowdown of the mid-to-late 1970s, which resulted in a reduction in the growth of federal aid.²⁹²

Congress followed up the Rehabilitation Act with the EAHCA two years later, codifying *PARC* and *Mills* by requiring all public schools receiving federal funds to provide disabled students with the resources necessary to their academic success and at least one free meal per day. The legislation was prompted in part by a congressional investigation that revealed that only 3.9 million out of 8 million “with handicapping conditions requiring special education and related services . . . [were] receiving an appropriate education”; “1.75 million handicapped children [were] receiving no education services at all”; and “2.5 million handicapped children [were] receiving an inappropriate education.”²⁹³ The EAHCA was meant address these conditions by ensuring that there was a “process by which State and local educational agencies [could] be accountable for providing educational services for all handicapped children.”²⁹⁴

Once enacted, “[a]larm bells went off just about everywhere . . . [because of] widespread concern that already tight budgets could not be stretched to provide the comprehensive services” the legislation required.²⁹⁵ It was predicted that compliance with the EAHCA would cost the states up to \$3,000 per year per disabled student, twice the average spending per year per non-disabled student.²⁹⁶

In actuality, the cost of providing special education was hundreds of millions, and eventually billions, of dollars: \$680 million in 1966, \$2.7 billion in 1972, and \$7 billion in 1978.²⁹⁷ The states bore most of the financial burden. Several contemporaneous studies of the law revealed that many state education agencies were struggling to implement it, largely because of the cost. One study found that, largely due to insufficient financial resources, many disabled students had not benefited from the EAHCA. The study also identified as obstacles the challenges of training personnel and administrators; implementing “individualized educational programs (“IEPs”); and identifying students with disabilities. Another study, which the DOE commissioned in 1981 found that many state education agencies were having difficulty evaluating programs for disabled students and that “the allocation of a relatively high proportion of

²⁹¹ Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355.

²⁹² Interestingly, despite the declining availability of federal grants, “state and local governments ended the New Federalism era more dependent on federal assistance than they had been at its beginning.” U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *THE INTERGOVERNMENTAL GRANT SYSTEM: AN ASSESSMENT & PROPOSED POLICIES* 34 (1978).

²⁹³ Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355.

²⁹⁴ *Id.*

²⁹⁵ Ernest L. Boyer, *Public Law 94-142: A Promising Start?* 36 *EDUC. LEADERSHIP* 298, 298 (1979).

²⁹⁶ *Id.*

²⁹⁷ William H. Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis* 48 *L. & CONTEMP. PROBLEMS* 1, 18 (1966).

SEA resources, time, and effort . . . were only marginally effective.”²⁹⁸ A twenty-five year retrospective on the law later confirmed that “[t]he 1975 legislation required states and school districts to do things they had never done before and to contribute significant resources of their own to this effort.”²⁹⁹

ii. The Education Consolidation and Improvement Act of 1981 and the Improving America’s Schools Act of 1994

Congress enacted a host of federal education legislation initiating hundreds of federal programs related to education in the years after it enacted the EAHCA. These included several more acts reauthorizing and amending the ESEA and the Child Development and Education Act of 1989, and legislation creating several new federal administrative agencies that are discussed in the next section. The late-1970s and 1980s also were characterized by the creation of the United States Department of Education as a freestanding cabinet department and persistent but relatively unsuccessful efforts by the federal government, ironically, to minimize its role. This section discusses these efforts in order to contextualize the next major expansion of the federal role, the Improving America’s Schools Act of 1994.

Prompted by something other than state and local resistance, of which there was virtually none, presidential candidate Ronald Reagan ran on a platform of returning power to the states, consolidating the federal bureaucracy, and reducing the size of the federal budget. President Reagan’s first budget proposal, the Omnibus Budget Reconciliation Act, reflected these priorities, as did his proposal to eliminate the newly created DOE.

The Education Consolidation and Improvement Act of 1981 (“ECIA”), the proposed reauthorization of the ESEA, was included in the 1981 omnibus budget bill. The bill, which renamed the ESEA, was meant to “simplify the administration of Federal elementary and secondary education programs by the Elementary and Secondary Education Act of 1965, as amended, in order to eliminate unnecessary paperwork and undue Federal interference in our Nation’s schools.” The law, as enacted, reimagined the ESEA, with its multiple titles and tens of categorical grants. In their place, ECIA authorized two block grants: the first, a roughly \$3 billion block grant to replace the former Title I (“Chapter 1”), and the second, a \$456 billion block grant to replace the former Titles II through IX (“Chapter 2”). Chapter 1 left Title I’s distribution formula largely in tact; Chapter 2, on the other hand, prescribed a new distribution formula that required at least 80% of federal grant money to be “passed through” to local education agencies. Chapter 3, which concerned the DOE’s regulatory authority, authorized the Secretary of Education to promulgate regulations in a few specific areas and prohibited

²⁹⁸ Charles Blaschke, *P.L.94-142: A Study of the Implementation and Impact at the State Level, Vol. I, Final Report* 11 (1981).

²⁹⁹ AM. YOUTH POL. FORUM AND CENTER ON ED. POL., TWENTY-FIVE YEARS OF EDUCATING CHILDREN WITH DISABILITIES: THE GOOD NEWS AND THE WORK AHEAD 13-14 (2002). The report also noted that, twenty-five years later, “[s]tates and districts continue to struggle with competing pressures and complex issues, and teachers and principals must invest considerable time and effort to comply with federal regulatory requirements.” *Id.*

the Secretary from promulgating regulations “in all other matters relating to the details of planning, developing, implementing, and evaluating programs and projects.”³⁰⁰

Although the ECIA was intended to return power to the states, and reduce federal involvement, an evaluation of the law’s implementation suggested that ECIA had not accomplished its goals, including significantly reducing the federal government’s contribution to education. The study found, for example, based on interviews with state and local officials, that the ECIA would decrease some administrative burdens, but increase others because

- (1) LEAs must now include nonpublic schools in a greater variety of planning activities and services under Chapter 2;
- (2) in the absence of clear record-keeping requirements, states and local districts must anticipate the information that will be requested by Department of Education officials and General Accounting Office auditors; and
- (3) states and localities do not know what degree of authority they have to set their own policies and standards.³⁰¹

In other words, “the amount of deregulation in the new law [was] minimal” and, according to the study’s authors, in some ways “increase[d] the importance of centralized decisionmaking because it [was] being administered through a policy of nonregulation, i.e., nonspecificity, rather than deregulation.”³⁰² Education officials in many of the states studied confirmed that this was the case, explaining that “the presumed return of authority to the states was ‘ironic,’ since LEAs have decisionmaking power under Chapter 2. ‘The state is asked to audit and evaluate LEA programs without any control over them.’”³⁰³ In this sense, for a law intended to empower the states, the ECIA was indeed ironic; simultaneously, it held states responsible for ensuring local compliance, instituted budget cuts that made doing so almost impossible—most state education departments were almost halved as a result—and failed to clarify their power to sanction local noncompliance.³⁰⁴

With respect to state budgets, state and local officials in red and blue states alike were “lukewarm or hostile”³⁰⁵ toward federal redistribution and budget cuts, which resulted in thousands of layoffs and reductions in educational services. In some states, the state legislature took over the appropriation of federal grant money, seeking to avoid programs with matching or similar requirements. According to officials interviewed for

³⁰⁰ Education Consolidation and Improvement Act of 1981, Pub. L. No. 98-211, 97 Stat. 1412.

³⁰¹ LINDA DARLING-HAMMOND & ELLEN L. MARKS, RAND CORP., *THE NEW FEDERALISM IN EDUCATION: STATE RESPONSES TO THE 1981 EDUCATION CONSOLIDATION AND IMPROVEMENT ACT 11* (1983).

³⁰² *Id.* at 12.

³⁰³ *Id.* at 48.

³⁰⁴ See *id.* at 45, 49.

³⁰⁵ Timothy J. Conlan, *The Politics of Federal Block Grants: From Nixon to Reagan*, 99 POL. SCI. Q. 247, 263 (1984). President Reagan’s proposals faced bipartisan opposition in both the Republican-controlled Senate and Democrat-controlled House due to the extreme nature of the budget cuts and a lack of federal control over the administration of block grant programs. *Id.* at 261-62.

Linda Darling-Hammond and Ellen Marks's study, they, like state education officials generally,

feared that federal funds would be reduced and the state would be left with the fiscal responsibility for a program that had developed its own constituency. One state education department official . . . declared that 'federal funds are the next best thing to heroin,' implying that he and his department would prefer doing without federal funds to suffering withdrawal symptoms later.³⁰⁶

In this vein, although most states affected did not have the capacity to increase state funding for affected areas, the study found that "many [of them] are making at least modest efforts to offset the redistributive consequences of the [ECIA] by targeting funds to established program areas and to federally dependent school districts."³⁰⁷ Rather than weaning the states off of federal funding, the ECIA whet their appetite and left them hungry for it.

The Improving America's Schools Act of 1994 ("IASA") was the first reauthorization of the ESEA since 1988 and reflected an effort by the Clinton administration to once again expand the federal role in education financing and policy-making. The law emerged against the backdrop of a Republican resurgence in Congress and Executive Order 12,875, titled "Enhancing the Intergovernmental Partnership," that sought to limit the imposition of unfunded federal mandates on state and local governments.³⁰⁸ Although framed in the Reagan-esq language of giving control to the states, the IASA established national standards and priorities for educating "all children," including

(1) higher standards for all children . . . ; (2) a focus on teaching and learning; (3) flexibility to stimulate local school-based and district initiatives, coupled with the responsibility for student performance; (4) links among schools, parents and communities; and (5) resources targeted to where needs are greatest in amounts sufficient to make a difference.³⁰⁹

These standards and goals expressly built upon the eight goals set at the 1989 Education Summit of State Governors organized by the first Bush administration in Charlottesville, Virginia, as well as President Clinton's Goals 2000, a federal grant program initiated in 1994 to encourage standards-based reform.³¹⁰

³⁰⁶ DARLING-HAMMOND & MARKS, *supra* note 301, at 41-42.

³⁰⁷ *Id.* at 52.

³⁰⁸ In 1998, President Clinton issued Executive Order 13,083, which revoked President Reagan's Executive Order 12,612. Executive Order 13,083 claimed to embrace federalism, but "weakened substantially [relative to Executive Order 12,612] the language purporting to limit national authority." Executive Order 13,132 replaced it in 1999, and reinstated much of Executive Order 12,612.

³⁰⁹ Richard W. Riley, *The Improving America's Schools Act and Elementary and Secondary Education Reform*, 24 J. L. & ED. 513, 518 (1995).

³¹⁰ Then-Governor Bill Clinton of Arkansas was in attendance and played a major role in the two-day summit, helping to build bi-partisan consensus. The eight goals agreed upon at the Summit were, by the year 2000,

1. all children will start school ready to learn;
2. the high school graduation rate will increase to at least 90 percent;

Once the IASA was enacted, nearly every state applied quickly for a share of the roughly \$11 billion of available federal money, despite IASA's restoring some of the red-tape and application requirements with which the Reagan administration had tried to dispense. Under the law, states were required to submit an application to the Secretary of Education demonstrating that the jurisdiction "has developed or adopted challenging content standards and challenging student performance standards that will be used by the State, its local educational agencies, and its schools to carry out [Title I]." The law also required states to implement "assessments" between grades 3 and 5, 6 and 9, and 10 and 12 and restored some categorical grant programs to ameliorate the growing problem of drug use and violence, foster professional development, and assist charter schools, to name a few. The IASA included a waiver provision, section 14401, which authorized the Secretary of Education at his or her discretion to waive specific IASA requirements, an outgrowth of Goals 2000's efforts to foster educational outcomes through flexible administration. Schools that failed to perform could be targeted for federal intervention. By 1997, three years into IASA's implementation, an interview-based study reported that the majority of state, district, and school-level administrators thought IASA's shift from targeted to school-wide aid, as well as its movement toward standards-based reform, were positive changes, notwithstanding the challenge of implementation; many of those who reported feeling negatively about the law had lost funds as a result of its new distribution formula.³¹¹

Ultimately, the IASA marked a shift towards standards-based reform. Instead of holding states accountable for complying with federal regulations, the law held states accountable for generating specific education-related outcomes. The states' failure to meet many of the law's requirements for aid, however, encouraged the Department of Education to become increasingly proactive and prescriptive throughout the 1990s.

-
3. American students will leave grades 4, 8, and 12 having demonstrated competency in challenging subject matter, including English, mathematics, science, history, and geography, and every school in America will ensure that all students learn to use their minds well, so that they may be prepared for responsible citizenship, further learning, and productive employment in our modern economy;
 4. U.S. students will be first in the world in mathematics and science achievement;
 5. every adult American will be literate and will possess the skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship; and
 6. every school in America will be free of drugs and violence and will offer a disciplined learning environment conducive to learning.

Alyson Klein, *Historic Summit Fueled Push for K-12 Standards*, EDUC. WEEK, Sept. 23, 2014, available at <http://www.edweek.org/ew/articles/2014/09/24/05summit.h34.html>.

³¹¹ Shelley H. Billig, *Title I of the Improving America's Schools Act: What It Looks Like in Practice*, 2 J. ED. FOR STUDENTS PLACED AT RISK 329, 332-34 (1997). Further, about one-third of both district and state-level participants in the study expressed a preference for "more parameters for performance, more advice and guidance, and more assurance that they [were] doing the 'right' thing." *Id.* at 336.

d. Federal Agencies

The federal government's evolving role in education policy-making was manifest in the creation of new federal agencies like the Department of Education in 1980. Up until this point, Congress had authorized the creation of a host of education-related committees and bureaus to assist with the administration and supervision of federal education programs and grants;³¹² but none were so significant as the first freestanding, cabinet-level Department of Education ("DOE"). It is to the creation and operation of the DOE that this section turns.

As discussed briefly earlier, the first federal department of education was created in 1867 as a non-cabinet level department, and shortly after demoted to a small office within the Department of the Interior. The Bureau of Education, as it was then called, resided in that Department under different names until 1939. In 1939, the then Office of Education was reorganized and moved to the Federal Security Agency. In 1953, the Office was again relocated, this time to the Department of Health, Education, and Welfare, a newly created cabinet-level Department.

By the time Jimmy Carter was running for President, federal aid-to-education education advocates had long fought against the White House's disinterestedness for a freestanding department of education to be added to the President's cabinet. Candidate Carter pledged to establish such a department, some accounts claim, to reward the electoral support of the education lobby, namely, the Council of Chief State School Officers, the National Education Association, and others.³¹³ Some accounts go so far as to suggest that Carter promised the National Education Association he would find a way to establish an independent education department in exchange for their endorsement. Many state and local agencies and organizations also supported Carter's proposal, although it was controversial and barely made it out of Congress. In 1979, then President Carter signed into law the Department of Education Organization Act, thus creating the Department of Education.

Initially, Congress appropriated \$14 billion for the DOE; it provided for 4,000 federal employees, all of them transferred from other federal departments and offices.³¹⁴ The DOE's primary responsibilities included student and program assessment, promulgating policies for administrators, and administering and supervising federal grant-in-aid programs. Shirley Hufstедler, President Carter's first Secretary of Education, brought to the fledgling Department her own agenda that included "elevat[ing] the

³¹² These included the Bureau for Education and Training of the Handicapped, the National Advisory Committee on Handicapped Children, the Advisory Committee on the Education of Bilingual Children, the National Institute of Education, the National Commission on Financing Postsecondary Education, the Bureau of Occupational and Adult Education, the Office of Indian Education, and the National Center for Education Statistics, to name a few.

³¹³ Carter's proposal was also endorsed by the National Association of State Boards of Education, the National School Boards Association, the Council of Great City Schools, and the American Association of School Administrators.

³¹⁴ Department of Education Organization Act of 1979, Pub. L. No. 96-88, 93 Stat. 668.

consciousness of Americans about the good work³¹⁵ of America's teachers. Hufstедler began the process of setting a national education agenda and helped "to make education important to the nation again."³¹⁶

Shortly after its creation, the DOE faced a strong opponent in President Reagan, who campaigned on a platform of shrinking the federal administrative state in part by eliminating the agency. President Reagan's first budget proposal included significant cuts to the DOE's budget and staff and the complete elimination of federal grants and programs. The 1981 reauthorization of the ESEA, the Education Consolidation and Improvement Act, discussed above, reduced funding under the reformed "Chapter 1" (formerly Title I) by seven billion dollars; overall, the Reagan administration cut the federal share of education expenditures in half.

President Reagan's proposal to reduce the size of the federal education bureaucracy and budget, and ultimately, to dissolve the DOE was met by resistance at every level of government. Then Secretary of Education, Terrel Bell, opposed the President's plan, as did state and local politicians, who benefited from federal aid-to-education. In the end, the President and congressional Republicans who favored state control over education abandoned their plan to eliminate the DOE after the National Commission on Excellence in Education published the 1983 report, *A Nation At Risk*, which described the United States' "rising tide of mediocrity." In light of the publicity it generated, federal officials, Democrat and Republican alike, began to champion education, prompting Secretary Bell to state that "[a]fter its sound defeat at the Republican National Convention, dissolution of the Department will not, in my opinion, ever again be a serious issue."³¹⁷ And once the dust from the controversy over the DOE's elimination settled, "the federal government began to re-assert its own priorities and control over the spending of federal education funds . . . [and] ask for evidence of achievement in exchange for federal aid."³¹⁸

e. Summary

Coupled with the federal income tax, the Great Depression, World War II, and the Cold War transformed intergovernmental relations in the first half of the Twentieth Century. The conditions precedent for the nationalization of education emerged in this context.

The Great Depression and World War II led most states to neglect education at a time when more Americans were enrolling in school and for longer and expecting to get more out of it. (Many southern states also were struggling to shoulder the burden of maintaining separate school systems for black and white children.) Although the United States emerged from World War II in solid financial health, most states and localities did not; indeed, the end of the War exacerbated their struggles, in part because the baby boom supplied a continuous stream of millions of new students to the schools every year,

³¹⁵ D. T. STALLINGS, CENTER FOR CHILD AND FAMILY POL., A BRIEF HISTORY OF THE UNITED STATES DEPARTMENT OF EDUCATION: 1979-2002 4 (2002).

³¹⁶ *Id.*

³¹⁷ *Id.* at 5.

³¹⁸ N.Y. STATE ED. DEP'T, FEDERAL EDUCATION POLICY AND THE STATES, 1945-2009, THE REAGAN YEARS 48 (2009).

putting great stress on state and local budgets that “did not expand apace with needs.”³¹⁹ The Cold War that soon followed supplied the compelling justification federal officials needed after years of stalemate to begin moving the ball forward toward meaningful federal involvement in education. The modest but unprecedented federal aid program that was the NDEA set the stage for the transformative legislation of the 1960s by cultivating key relationships with state and local officials, culling favor with beneficiaries, and acclimating Americans and the states to the idea of federal aid.

The ESEA represented a landmark change in the federal government’s role in education, eventually multiplying federal grants-in-aid several-fold and securing for the federal government a permanent place in the field. In the seven year period after the ESEA was enacted, congressional appropriations for education nearly doubled—from \$2 to \$3.7 billion. Although federal education spending only accounted for a relatively small proportion of all education spending, federal aid was impactful; according to one analysis, the ESEA could add anywhere from ten to fifty percent to a local school districts’ expenditures, depending on the number of impoverished students in the district.³²⁰ This federal aid planted the seeds of new constituencies and nurtured their growth into powerful blocks that made it difficult to eliminate old programs and demanded more money for new ones. Ultimately, state politicians, compelled to choose between protecting state institutions and protecting state budgets almost uniformly chose the latter. This choice, which advanced those politicians’ short-term interests in reelection, centralization, and control, also largely accounted for the transformation of the federal system. State politicians gave up state administrative power for federal money; they traded federalism for managerial decentralization.

Part IV: Federal Involvement in Education, 2000 to present

The evolution of the federal role in education is not perfectly linear; but for the most part, it has always moved in the same direction albeit at different rates over time. To say, then, that the No Child Left Behind Act of 2001, the most significant federal education legislation ever in terms of coverage and dollars appropriated, was destined to be is too simple. Certainly, though, it was the culmination of decades if not more than a century of advocacy, and it radically changed the education landscape in the United States. This Part focuses on the No Child Left Behind Act’s enactment and implementation, emphasizing the ways in which it fundamentally transformed the federal role and supplanted state and local with federal administrative power.

a. The No Child Left Behind Act of 2001

The No Child Left Behind Act (“NCLB”), the 2001 reauthorization of the ESEA, was the brainchild of the George W. Bush administration. Like the first President Bush, President George W. Bush promoted himself as America’s “education president,” proposing the controversial law shortly after his inauguration in January 2001.

NCLB was unprecedented in many ways, but especially in terms of bi-partisan support and federal control; it carved out for the federal government a role in establishing

³¹⁹ Timpane, *supra* note 224, at 496.

³²⁰ *Id.* at 495.

testing, professional, and curriculum standards, measuring state and school level accountability, and improving schools. NCLB also “place[d] extraordinary responsibilities on state education agencies” and “reverse[d] the traditional relationship between the federal and state agencies from one of federal aid and incentives in grant programs to one of federal requirements for producing unprecedented educational gains under the pressure of serious sanctions.”³²¹

Among NCLB’s most controversial provisions were those pertaining to testing and “failing schools.” One such provision required the states to test students in reading and mathematics annually in grades 3-8 and once in grades 10-12, and in science once in grades 3-5, 6-8, and 10-12. These test results were to be reported both in the aggregate and for specific targeted populations to ensure that all students were “proficient” in grade-level reading and mathematics by 2014. NCLB authorized the states to define “proficiency” and “adequate yearly progress,” and thus to enabled them to continually lower these standards to meet the Act’s requirements. Another provision required states to assist “failing schools” immediately, a costly requirement, and also imposed sanctions on such schools like the withholding of federal funding. Further fueling the controversy over the law was another provision requiring all teachers to be deemed “highly qualified,” that is, certified or licensed by the state, and to demonstrate knowledge of their subject.

NCLB represented a significant federal intrusion in the area of education, and many national interest groups, states, and schools publically opposed it. Their opposition was not grounded in federalism concerns, however. Rather, most opponents claimed that the law would cost too much to implement relative to congressional appropriations for education, and that without substantially more financial aid, it would cause “a financial crisis for state and local education agencies.”³²² In this vein, the Government Accountability Office (“GAO”) estimated NCLB would cost the states between roughly \$1.9 to \$5.3 billion to implement between 2002 and 2008.³²³ Individual states conducted their own cost assessments. Connecticut estimated it would cost the state \$17 million; Virginia estimated \$20 million.³²⁴ Ohio estimated that NCLB would cost it an additional \$1.5 billion per year. These costs included more than just developing and administering newly mandated assessments; for example, a 2006 report published by the Office of Management and Budget estimated that “NCLB had increased the annual paperwork burden on state and local communities by 7 million hours, or \$140 million.”³²⁵ A Pew Center analysis published in 2008 found that annual state spending for standardized

³²¹ Gail L. Sunderman & Gary Orfield, *Massive Responsibilities and Limited Resources: The State Response to NCLB* 124-25, in HOLDING NCLB ACCOUNTABLE: ACHIEVING ACCOUNTABILITY, EQUITY, & SCHOOL REFORM (Gail L. Sunderman, ed. 2008).

³²² No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

³²³ U.S. GENERAL ACCOUNTABILITY OFFICE, GAO-03-389, TITLE I: CHARACTERISTICS OF TESTS WILL INFLUENCE EXPENSES: INFORMATION SHARING MAY HELP STATES REALIZE EFFICIENCIES 3-4 (2003).

³²⁴ DAN LIPS & EVAN FEINBERG, HERITAGE FOUNDATION, ED. MEMO 1406, THE ADMINISTRATIVE BURDEN OF NO CHILD LEFT BEHIND 1-2 (2007).

³²⁵ Jennifer Marshall, A Decade After No Child Left Behind, Time for a Right Turn in Education, DAILY SIGNAL, Jan. 9, 2012, available at <http://dailysignal.com/2012/01/09/a-decade-after-no-child-left-behind-time-for-a-right-turn-in-education/>.

testing alone increased 16% between 2002 and 2008, from \$423 million before NCLB was enacted to \$1.1 billion in 2008.³²⁶

In a move that ostensibly protected state sovereignty and mitigated NCLB's associated costs, Congress included a provision permitting states to apply for a waiver from one or more of NCLB's requirements. Section 7861 of the law authorized the Secretary of Education, the head of the DOE, to consider and grant or deny waiver applications, and thus to permit states to opt out of specific NCLB provisions without compromising their federal funding.³²⁷ The Secretary could "waive any statutory or regulatory requirement [with the exception of certain provisions] . . . for a State educational agency, local educational agency, Indian tribe, or school through a local educational agency" that meets the DOE's waiver eligibility requirements.³²⁸ Because waivers were discretionary, however, the DOE and the Secretary of Education could use the waiver application process to re-shape NCLB and compel state action in the realm of education; and arguably, they did.

State and local education agencies, to qualify for a waiver, were required to provide a notice and comment period, and then to submit to the DOE a formal request explaining how a waiver, if granted, would improve the quality of school instruction and academic achievement. Such a request was to include "specific, measurable . . . educational goals . . . and the methods to be used to measure annually such progress for meeting such goals and outcomes."³²⁹ If the waiver were granted, the requesting jurisdiction would be required to submit to the DOE regular reports explaining how the waiver opportunity was being used to advance the jurisdiction's goals. The DOE retained the authority to terminate a jurisdiction's waiver if the jurisdiction's compliance were deemed inadequate.

In 2010, President Barack Obama and the DOE changed the NCLB waiver process so substantially and in a way that is likely coercive, such that some publically accused them of acting unconstitutionally. The changes followed Congress's rejection of President Obama's NCLB-reform proposal, and arguably were so different and more burdensome than the underlying law that they constituted a distinct law, unconstitutionally adopted by the Executive Branch. According to Derek Black, for example,

States only acceded to these new and unforeseeable terms because their impending non-compliance with NCLB put so much at stake financially, practically, and politically. By the time Secretary Duncan announced the conditions, states were out of options and left in a position where the Secretary could compel them to accept terms that, under most any other circumstances, they would reject. The administration took the states' vulnerability as an opportunity

³²⁶ Pauline Hawkins, *A Brief History on NCLB and Common Core (Part I)*, Huffington Post, June 30, 2014, available at http://www.huffingtonpost.com/pauline-hawkins/nclb-and-common-core_b_5236016.html.

³²⁷ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 107-110, 115 Stat. 1425.

³²⁸ *Id.*

³²⁹ *ESEA Flexibility*, U.S. DEP'T OF EDUCATION (Apr. 8, 2016), <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html>.

to unilaterally impose policy that had already failed in Congress. In doing so, the administration unconstitutionally coerced states.³³⁰

That is to say, although the process of applying for a waiver was time-consuming and expensive, and the likelihood of receiving one was uncertain, almost every state quickly requested one because it mitigated the risk of losing federal funding for non-compliance with NCLB. The Obama administration thus was in a position use waivers to dictate state education policy, and in so doing, catalyzed the federalization of education.³³¹

Another wrinkle in the administration’s NCLB waiver program and source of controversy in recent years was the Common Core State Standards Initiative, or “Common Core.” The Council of Chief State School Officers (“CCSSO”) and the National Governors Association (“NGA”), created the Common Core, a set of math and English language arts/literacy standards, in 2009.³³² Despite the Common Core’s not being a federal initiative, the Obama administration was very supportive of it, with its heavy emphasis on national standards and goals, standardized testing, and accountability. To support the initiative and encourage states to adopt the standards, the administration permitted states to obtain NCLB waivers—and other lucrative grants through the separate “Race to the Top” program—in exchange for signing on to the initiative. Although forty-two states, the District of Columbia, four territories, and the Department of Defense Education Activity eventually adopted Common Core, many state officials have objected to the administration’s “manipulation.” In Vermont, where officials decided to withdraw their NCLB waiver application for this reason, a Department of Education official reportedly said, “It has become clear that the U.S. Education department is interested in simply replacing one punitive, prescriptive model with another.”³³³ In California, the Superintendent of Public Instruction, Tom Torlakson, objected “to switching out one set

³³⁰ Derek W. Black, *Federalizing Education by Waiver?* 68 VAND. L. REV. 607, 679 (2015). See also David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013).

³³¹ But see generally Martin A. Kurzweil, *Disciplined Devolution and the New Education Federalism*, 103 CAL. L. REV. 565 (2015).

³³² According to the Initiative’s website, the standards are:

1. Research- and evidence-based;
2. Clear, understandable, and consistent;
3. Aligned with college and career expectations;
4. Based on rigorous content and application of knowledge through higher-order thinking skills;
5. Built upon the strengths and lessons of current state standards; and
6. Informed by other top performing countries in order to prepare all students for success in our global economy and society.

There are also subject-specific standards for mathematics and English language arts/literacy in history/social studies, science, and technical subjects for grades K-12. *Read the Standards*, COMMON CORE STATE STANDARDS INITIATIVE (Apr. 8, 2016), <http://www.corestandards.org/read-the-standards/>.

³³³ *No Child Left Behind Waivers*, TRUTH IN AMERICAN EDUCATION (Apr. 8, 2016), <http://truthinamericaneducation.com/elementary-and-secondary-education-act/child-left-waivers/>.

of onerous standards, No Child Left Behind, for another set of burdensome standards,” Common Core.³³⁴ Somewhat of an aside, it is interesting that the supposedly state-led response to NCLB was another bureaucratic program that closely resembled the federal program, imposed national standards and goals, and was federally supported with financial incentivizes.

Since NCLB was enacted, several studies have sought to determine which states support or oppose the law, and why.³³⁵ One such study published in 2006 found that “[s]tates that tend to support NCLB are red states in presidential elections, score in the very bottom or top quartiles of NAEP, serve student populations that are more than 21.1% African American or less than 13.6% Hispanic, exhibit narrower than average black-white test score gaps, receive more than 8.3% of K-12 revenue from the federal government, and are located in the South.”³³⁶ In contrast, “[s]tates that are opposed tend to be blue states in presidential elections, fall in the middle quartiles of NAEP scores, have relatively small African-American or relatively large Hispanic populations, exhibit larger than average black-white test score gaps, receive less than 8.3% of K-12 revenue from federal sources, and are located in the East, Midwest, or Western regions of the country.”³³⁷

However counter-intuitive it may be that liberal states tend to oppose, and conservative states tend to support NCLB, the study’s results can be straightforwardly explained by considering how NCLB dovetails or does not with politicians’ self-interest. First, although NCLB is arguably in no state’s interest, because of the degree to which it supplants state with federal power, it is clearly in some states’ economic best interest; those states tend to be red and tend to support the legislation. Given the pressure that legislators are under in those states to provide educational services on a tight budget, their support for the legislation is unremarkable.

Second, NCLB augments state governments’ power to centralize education at the state level, and to implement reforms that might otherwise never get through the state legislature. For example, NCLB empowers state politicians “to sanction educators based on students’ test scores, power that in many states was held exclusively, if at all, by local schools and school districts.”³³⁸ Likewise, NCLB empowers state officials to create and administer standardized tests, evaluate student proficiency, set teacher quality standards, and force districts to implement reforms, all traditionally local functions. These provisions of NCLB were especially attractive to legislators in red states, where the competition between state and local legislators is uniquely fierce, and state politicians have historically sought to exert a great deal of control over education. “State officials who impose[d] unpleasant and unpopular consequences on low performing schools

³³⁴ *Some States Skeptical of NCLB Waiver: Big Strings Attached to Bid for Flexibility*, EDUC. WEEK, Jan. 11, 2012, available at <http://www.edweek.org/ew/articles/2012/01/11/17waivers.h31.html>.

³³⁵ Tom Loveless, *The Peculiar Politics of No Child Left Behind 21*, in STANDARDS-BASED REFORM AND THE POVERTY GAP: LESSONS FOR NO CHILD LEFT BEHIND (Adam Gamoran, ed. 2007).

³³⁶ *Id.* at 21.

³³⁷ *Id.*

³³⁸ *Id.* at 15.

[could] say, “Sorry, the feds made us do it.”³³⁹ It should come as no surprise, then, that southern states, generally the most conservative, have been more compliant than northern and western states.³⁴⁰

Notwithstanding the controversy NCLB inspired, no one seriously questions that the federal government should play a substantial role in education financing and policy-making. Even those states that vigorously opposed NCLB or sued the federal government did so, not because the federal government violated their constitutional sovereignty, but because it imposed on the states an illegally un-funded or under-funded mandate. This was the issue in *Pontiac v. Spellings*, a lawsuit filed by National Education Association, ten of its state affiliates, and school districts in Michigan, Texas, and Vermont.³⁴¹ A few states and school districts have gone a step further, disagreeing with the substance of federal policy, such as frequent standardized testing. Utah and Louisiana, for example, based their suits on the states’ constitutional right to dictate education policy. Most states, like Connecticut, just want more federal money.

Participation in NCLB, nominally, is voluntary. State politicians could avoid many of the burdens the law imposes, and arguably protect their states’ constitutional rights by simply opting out. But opting out is not so simple, and the incentives for state politicians, especially those seeking reelection, to refuse all federal money are just not there. Years of the federal government’s financial and other involvement in education have cultivated constituencies and expectations to which state politicians must cater, and they need the federal government’s money especially to do so.

b. Summary

Half a century of increasing federal involvement in public school financing and policy-making culminated in the unprecedented federal education legislation that was NCLB. NCLB, although a reauthorization of the relatively modest ESEA, radically expanded federal control over public education at the expense of state power and arguably state budgets.

Many state and local politicians since 2001 have objected to specific aspects of NCLB. A few have claimed NCLB, the Obama administration’s waiver program, or both violate the federal law or the federal Constitution. Generally those objections are manifest in public speeches but a small number of states and localities have formalized their objections by filing lawsuits against the federal government. Nonetheless, no state or locality, and only seven of 14,383 school districts, has turned down all NCLB funding—evidence that no matter how much states and localities may dislike the federal

³³⁹ *Id.* at 17.

³⁴⁰ Loveless also suggested that the “complacency of high achieving states can be plausibly explained by the fact that they have little to lose from sanctions based on test scores,” *id.* at 17, whereas that of low achieving states can be explained by the unprecedented authority the Act gives to state officials to impose reforms on persistently failing schools. *Id.*

³⁴¹ The GAO concluded NCLB is not an unfunded mandate because the requirements NCLB imposes are a “condition of federal financial assistance.” U.S. GENERAL ACCOUNTABILITY OFFICE, GAO-04-637, UNFUNDED MANDATES: ANALYSIS OF REFORM COVERAGE 22 (2004).

law and federal control of education, they are in no position to do anything about it.³⁴² States and localities that fail to comply with NCLB's provisions risk all federal education funding; money that they sorely need after a more than sixty years of cultivating and nurturing an addiction to federal aid.

Part V: Conclusion

Federal politicians have always sought to play a role in education financing and policy-making, but to varying degrees of success. Some of the most prominent founders and first members of Congress sought, unsuccessfully, to establish a national system of schools, a national university, and the like. Nineteenth and early-Twentieth Century federal legislators, too, hoped to carve out a federal role in education, only to find that race, religion, and the somewhat illusive fear of "federal control" tended to stand in the way of significant progress.

Nonetheless, federal involvement in education has continually expanded throughout the nation's history. Such expansion, at least until the 1950s, occurred slowly and sporadically; at times, it seems to have had a one step forward, two steps back like quality about it. Since the 1950s, the expansion and, indeed, radical transformation, of the federal role has occurred much more quickly and consistently, leaving little room for doubt that the federal government will always exert a degree or more of control in education.

The transformation of the federal role was the product of many factors, not the least of which was wealth disparity between the federal government and state and local governments, the latter of whom were then principally responsible for financing school systems they could hardly afford. The federal government's willingness to throw money at one of the states' gravest problems, coupled with the threat of its bypassing the states altogether, motivated state politicians to embrace federal involvement. Federal aid and its attendant strings, although not necessarily in the states' long-term interests, furthered state politicians' short-term interests in getting re-elected, centralizing control of education at the state-level, and competing with rival local politicians for their citizens loyalty. In accepting that aid, though, state politicians effectively traded state administrative power for mere discretion, and as the story of NCLB demonstrates, their successors are continuing to deal with the consequences. Federal money dolled out under the Elementary and Secondary Education Act and its progeny had a "snow ball" effect: It fostered new constituencies that state politicians were hard-pressed to abandon, even when in the 1980s, federal money seemed to be drying up. Consequently, state politicians since at least the 1970s have never favored the federal government's withdrawal from the education arena. They literally and figuratively cannot afford it.

³⁴² Those districts that have opted out of NCLB are, on average, wealthier and less dependent on federal revenue than other districts. Moreover, although state governors in a handful of states have threatened, at one time or another, to opt out of NCLB at the state level, those governors have turned down, on average, less than three percent of the federal money to which their state is entitled. BRYAN SHELLY, *MONEY, MANDATES, AND LOCAL CONTROL IN AMERICAN PUBLIC EDUCATION* 137, 159 (2011).

Chapter 3 Federalism and Crime Control

Part I: Introduction

The Supreme Court's role in nationalizing criminal law has been investigated to the exclusion of the states' and localities' roles in nationalizing criminal justice policy-making and law enforcement. Before the Court got involved in the 1960s, the federal government with the help of states and localities, had already begun to exert great control over the whole field, which only grew after the Court's criminal procedure "revolution" fizzled out in the 1970s. This Chapter fills this gap by examining the role of those neglected participants, and federal money, in the nationalization of the field.

Crime control is the quintessential police power. In the Supreme Court's words, there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."³⁴³ Daniel Richman has noted, "Everybody knows to call the local police when reporting or complaining about violent crime. And those who forget will be reminded by the ever-increasing stream of movies and television programs celebrating the exploits of local police officers and prosecutors."³⁴⁴

However, even more than in education, the federal role in crime control has grown significantly—from almost no involvement in the Eighteenth and Nineteenth Centuries to substantial involvement in a matter of decades. Whereas early federal administrations investigated and prosecuted only a handful of federal crimes, later ones investigated and prosecuted thousands of federal criminal cases involving new federal crimes, assisted local law enforcement in individual cases, gave states and localities substantial financial aid, and commandeered state and local officials.³⁴⁵

That there are similarities vis-à-vis the federal role in education and crime control is not coincidental. The Framers did not anticipate substantial federal involvement in either area, and they rejected a national police force just as they rejected a national university.³⁴⁶ Indeed, Congress established the Office of the Attorney General in 1789, but it did not establish the Department of Justice until 1870, after the Civil War.³⁴⁷ For decades after the Department's inception, it had a decidedly minor law enforcement role.

This Chapter follows a similar format to the previous chapter. Part II explores how and why the federal government's involvement in crime control changed in the Eighteenth and Nineteenth Centuries. Part III similarly looks at the changing federal role, but in the Twentieth Century and with greater attention to how states and localities facilitated it. Part IV discusses federal involvement in crime control in the late Twentieth Century through the present. Part V concludes.

³⁴³ *Morrison*, 529 U.S. at 618 (invalidating the Violence Against Women Act).

³⁴⁴ Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 *CRIME & JUSTICE* 377, 378 (2006).

³⁴⁵ *Printz*, 521 U.S. 898 (1997) (invalidating the Brady Handgun Prevention Act).

³⁴⁶ Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 *HASTINGS L.J.* 1135, 1138 (1995).

³⁴⁷ *About DOJ*, U.S. DEP'T OF JUSTICE (Oct. 21, 2015), <http://www.justice.gov/about>.

Ultimately, this Chapter, like the previous Chapter, attributes the decline of federalism partly to self-interested state officials' acquiescence to federal involvement, which resulted in the states' long-term fiscal dependence on the federal government. Officials at the local level played a role as well because it was their willingness to engage in direct federal-local projects that often mobilized state officials to participate in federal programs in the first place. Tightening budgets at both the state and local levels have increasingly diminished state power by making it nearly impossible for state officials to both offer a minimum standard of service and walk away from federal money regardless of the conditions placed on their acceptance of it. In this way, the states have been complicit in federalism's undoing with respect to crime control.

At this point, two things must be clarified. First, to reiterate a point made earlier, fiscal "dependence" cannot be evaluated in a vacuum. Even where federal money constitutes only a small percentage of a state or local government's budget for a specific government function, that government may be fiscally dependent. It might be the case, for example, that without federal money for one function the state or local government would have to make significant changes in the budget to compensate for the loss. In this way, a government might not be dependent on federal money for a specific function, but might be dependent on federal money in general.

Second, I highlight the states' complicity in federalism's undoing because it provides a counter-intuitive counter-narrative to the common perception that a self-aggrandizing and overweening federal government transformed American federalism. To be sure, I am not claiming that the states' complicity was the singular cause of federalism's decline; I am making only the modest claim that state officials' failure to jealously guard their states' sovereignty, i.e., their complicity in the federalization project, made American federalism less stable and thus likely to fail.

Part II: Federal Involvement in Crime Control, 1789 to 1930

This Part explores the federal government's role in crime control from roughly 1789 to 1930. It explores the major congressional enactments of the period, including the Civil Rights Act of 1866, the Interstate Commerce Act, and the Sherman Anti-Trust Acts, each of which extended the federal government's power generally, as well as its criminal jurisdiction. This Part also considers Supreme Court decisions upholding the constitutionality of other, new, federal criminal laws under the Commerce Clause, which emboldened Congress to enact yet new federal criminal laws. Lastly, this Part considers the creation of new federal agencies, specifically the Department of Justice and the Bureau of Investigation, which both reflected the federal government's changing role in crime control and facilitated its further expansion in the Twentieth Century.

a. Congressional enactments before the Civil War

The federal government's role in crime control was virtually non-existent before the Civil War. The Constitution created a federal government of limited powers; it expressly empowered Congress to punish only a handful of crimes that directly affected federal interests, such as counterfeiting,³⁴⁸ piracies and felonies committed on the high

³⁴⁸ U.S. CONST. art. I, sec. 8.

seas,³⁴⁹ and treason.³⁵⁰ The later-adopted Bill of Rights, which conferred on individuals rights during criminal investigations and prosecutions also implied a role for the federal government in crime control, as the Bill of Rights initially applied only to the federal government.³⁵¹ Because there were few federal crimes, those protections were applicable in only a small number of cases.

Consistent with the federal government's limited role, the first Congress proceeded cautiously in enacting legislation concerning crime and federal criminal jurisdiction. The legislation Congress enacted executed Congress's constitutional powers to create a system of federal courts and punish certain conduct. First, Congress enacted the Judiciary Act of 1789, key legislation that established the Office of the Attorney General, as well as established the federal courts and defined their jurisdiction.³⁵² Congress conferred upon the district and circuit courts concurrent jurisdiction in all federal criminal cases "where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted."³⁵³ Congress conferred upon the circuit courts exclusive jurisdiction in all other federal criminal cases.³⁵⁴

Second, Congress enacted the Federal Crimes Act of 1790.³⁵⁵ The Act implemented Congress's constitutional power to punish counterfeiting,³⁵⁶ piracies and felonies committed on the high seas,³⁵⁷ and treason.³⁵⁸ The Act also established as federal crimes murder, manslaughter, mayhem, and larceny in any place "under the sole and exclusive jurisdiction of the United States," acts of violence against foreign ambassadors,³⁵⁹ theft or falsification of court records, perjury, bribery of federal judges, interference with the judicial process, and liberation of federal prisoners.³⁶⁰

Each of the above enactments either executed Congress's express constitutional power to punish certain conduct, or criminalized conduct that directly harmed federal interests.³⁶¹ Sara Sun Beale has summarized the "principal antebellum federal crimes" as follows: "(1) acts threatening the existence of the federal government (e.g., treason); (2) misconduct of federal officers (e.g., bribery); (3) interference with the operation of the federal courts (i.e., perjury); and (4) interference with other governmental programs (e.g.,

³⁴⁹ *Id.*

³⁵⁰ U.S. CONST. art. III, sec. 3.

³⁵¹ U.S. CONST. amend. IV, V, VI, VII, VIII.

³⁵² DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: SUBSTANTIVE ISSUES IN THE FIRST CONGRESS, 1789-1791* 93 (1997).

³⁵³ § 9, 1 Stat. 73, 76-77.

³⁵⁴ § 11, 1 Stat. 73, 78-79.

³⁵⁵ CURRIE, *supra* note 352, at 94.

³⁵⁶ *Id.* at 96.

³⁵⁷ *Id.* at 95.

³⁵⁸ *Id.* at 94.

³⁵⁹ *Id.* at 96.

³⁶⁰ *Id.* at 96-97. During this period, Congress also enacted legislation punishing unloading ships in the dark or without a license, and census takers' failing to report census data.

³⁶¹ Brickey, *supra* note 346, at 1139.

theft of government property and revenue fraud.”³⁶² Accordingly, there was almost no overlap between federal and state crimes before the Civil War.³⁶³

b. Congressional enactments after the Civil War

The federal-state dynamic fundamentally transformed in the years after the Civil War. Facilitated by the North’s victory in the War, Congress enacted a flurry of new federal statutes creating a host of new federal crimes.³⁶⁴

The Civil Rights Act of 1866,³⁶⁵ which was enacted over President Andrew Johnson’s veto, was one of the broadest and most transformative laws—in terms of federal-state relations—that Congress enacted. Section 1 of the law declared:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . .³⁶⁶

Subsequent sections specified criminal penalties for depriving any person of any right conferred or protected by the Act and conferred upon the federal courts exclusive

³⁶² Sara S. Beale, *Federal Criminal Jurisdiction 775-79*, in 2 *ENCYCLOPEDIA OF CRIME AND JUSTICE* (Sanford H. Kadish, ed., 1983).

³⁶³ Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 *AZ. ST. L.J.* 825, 830 (2000).

³⁶⁴ The Suspension Clause, Article I, section 9, states: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. ART. I, § 9, CL. 2. The Civil War and Reconstruction provided occasion for the earliest suspensions of the “great writ.” The federal government contemplated suspending the writ on a number of occasions before; however, rebels and domestic terrorists were tried for treason in civil courts, rather than being held indefinitely and tried in military tribunals. In 1861, President Lincoln suspended it for the first time ever, and without Congress’s blessing. Lincoln reasoned suspension was necessary because it was the only way to effect preventive arrests constitutionally. Congress, two years later, formally suspended the writ. Congress, again, authorized the writ’s suspension to enable President Grant to control the Ku Klux Klan in the South. Under the Ku Klux Klan Act of 1871, Congress authorized President Grant to suspend the writ where “the conviction of . . . offenders and the preservation of the public safety shall become in [a] district impracticable.” This included “portions of the South, where several states were ‘unable to provide even the semblance of criminal law enforcement.’” Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause* 125 *HARV. L. REV.* 901, 976, 987-88, 996-97 (2011).

³⁶⁵ 14 Stat. 27-30.

³⁶⁶ § 2, 14 Stat. 27-30.

jurisdiction in cases “affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section.”³⁶⁷ The Civil Rights Act signified the first great departure from Congress’s earlier criminal statutes, but one that many states were powerless to resist. According to Kathleen Brickey, “[C]ivil rights acts thus indelibly altered the role of federal criminal jurisdiction and signaled the coming presence of a national police power.”³⁶⁸

The Reconstruction Congress also enacted the Interstate Commerce Act of 1887³⁶⁹ and the Sherman Anti-Trust Act of 1890, federal laws of unprecedented scope.³⁷⁰ Each of these laws were notable for expanding the federal government’s power and criminal jurisdiction pursuant to the Commerce Clause. The Interstate Commerce Act was enacted to regulate the railroad industry.³⁷¹ It established a five-member Interstate Commerce Commission vested with the power to investigate and prosecute companies that violated the law.³⁷² Violating the Act, a misdemeanor, could be punished by fine not exceeding five thousand dollars.³⁷³ The Act “opened up a new door for the federal government to regulate . . . activities and behaviors related to the transportation of men, women, and children across state lines” and thus brought within the federal government’s orbit “the shipment of illegal drugs, child abduction, carjacking, shipment of pornographic and obscene materials, and terrorism.”³⁷⁴

The Sherman Anti-Trust Act regulated business and prohibited harmful monopolistic business practices.³⁷⁵ The Act declared it a felony to “contract . . . or conspir[e], in restraint of trade or commerce”³⁷⁶ and to “monopolize, or attempt to monopolize, or . . . conspire . . . to monopolize any part of the trade or commerce among the several States, or with foreign nations.”³⁷⁷ Violations of the Act were punishable by fine not exceeding five thousand dollars, imprisonment not exceeding one year, or both.³⁷⁸ The Clayton Anti-Trust Act of 1914 expanded the Sherman Anti-Trust Act’s coverage to prohibit price discrimination, certain types of agreements, and mergers and acquisitions that reduce market competition.³⁷⁹ It also created the Federal Trade Commission to investigate potential anti-trust violations.³⁸⁰

³⁶⁷ §§ 2-3, 14 Stat. 27-30.

³⁶⁸ Brickey, *supra* note 346, at 1141.

³⁶⁹ 24 Stat. 379.

³⁷⁰ 26 Stat. 209.

³⁷¹ 24 Stat. 379.

³⁷² *Id.*

³⁷³ § 10, 24 Stat. 379.

³⁷⁴ SHAHID M. SHAHIDULLAH, *CRIME POLICY IN AMERICA: LAWS, INSTITUTIONS, AND PROGRAMS* 57 (2008).

³⁷⁵ 26 Stat. 209.

³⁷⁶ § 1, 26 Stat. 209.

³⁷⁷ § 2, 26 Stat. 209.

³⁷⁸ §§ 1-3, 26 Stat. 209.

³⁷⁹ Clayton Anti-Trust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730.

³⁸⁰ *Id.*

Congress's power under the Commerce Clause provided the source of constitutional authority for many other federal criminal laws that Congress enacted at the turn of the Nineteenth Century. These criminal laws prohibited, for example, using the mails to defraud or to send lottery tickets or obscene matter (Post Office Act of 1872),³⁸¹ and later, transporting a woman across state lines for immoral purposes (Mann Act of 1910),³⁸² transporting a stolen vehicle across state lines (Dyer Act of 1925).³⁸³ Most famously, the commerce power provided the source of Congress's power to prohibit the production, sale, and transport of "intoxicating liquors" (Volstead Act of 1920).³⁸⁴

The reason for the growing number of federal criminal statutes during the Reconstruction era is not entirely clear. The end of the Civil War and the necessity of enforcement acts like the Civil Rights Act were likely one important cause. Congress's sense that the states were not doing enough to address crime within their jurisdictions, and Congress's "discovering" the power of the Commerce Clause is likely another. Note, however, that the federal government moved slowly and cautiously in enacting new federal criminal laws. Federal criminal statutes generally were narrowly tailored to respond to a specific, contemporary problem, like the "variety of fraudulent schemes that bilked large numbers of victims . . . by use of the mails,"³⁸⁵ or were directed at conduct that was directly injurious to a federal facility like the Post Office.³⁸⁶ Such new federal crimes would not likely offend even states' rights advocates because they were sufficiently narrow in scope, and they addressed inter-state crimes the states could not effectively prosecute because of criminals' increasing mobility.³⁸⁷ In that way, new federal criminal laws helped the states to enforce their own criminal laws.

c. Federal Agencies

To implement and enforce new federal criminal statutes, Congress created new executive agencies that laid the foundation for the rise of the federal "Administrative State" in the Twentieth Century. The most notable agency Congress created in the last decades of the Nineteenth Century was the Department of Justice, in 1870.³⁸⁸

Until the Department's creation under the Act to Establish the Department of Justice, federal law enforcement was highly decentralized with the Attorney General exercising no control over district attorneys or the process for their appointment.³⁸⁹ Each government department had its own legal staff, which made intra-governmental cooperation difficult.³⁹⁰ The Act creating the Department attempted to mollify this

³⁸¹ Post Office Act of 1872, 17 Stat. 283.

³⁸² 18 U.S.C. §§ 2421-2424.

³⁸³ 18 U.S.C. § 2311.

³⁸⁴ 41 Stat. 305-323.

³⁸⁵ Sara S. Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS 39, 41 (1996).

³⁸⁶ Post Office Act of 1872, 17 Stat. 283.

³⁸⁷ *Id.*

³⁸⁸ Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870).

³⁸⁹ Jed Handelsman Shugerman, *The Creation of the Department of Justice*, 66 STAN. L. REV. 121, 128, 131 (2014).

³⁹⁰ *Id.* at 133, 134, 140.

coordination problem by abolishing the use of outside counsel and placing all government attorneys under the Attorney General's supervision. It also established the new Office of the Solicitor General to manage and litigate cases argued in the Supreme Court.³⁹¹ The Department of Justice's creation did not do as much to facilitate inter-agency coordination as some had hoped, as it failed to designate a single location for staff offices, appropriate sufficient resources for personnel and other expenses, and repeal legislation assigning responsibility for government attorneys to other federal departments.³⁹²

The Act to Establish the Department of Justice also instructed the Attorney General to establish a departmental subdivision to "detect[] and prosecut[e] . . . those guilty of violating federal law."³⁹³ The Department could have functioned as a powerful tool for federal law enforcement, but Congress appropriated insufficient funds to establish and support it.³⁹⁴ Instead, the Department relied primarily on investigators from other federal agencies such as the Department of the Treasury and private investigators such as the Pinkerton Detective Agency.³⁹⁵

The Department of Justice's creation was notable for another reason: control of fledgling federal prison system was transferred to the Department. This included control of the three federal prisons Congress established in 1891 under the Three Prisons Act,³⁹⁶ as well as the four other prisons Congress created before the Bureau of Prisons was established under the Department's auspices in 1930.³⁹⁷ The Three Prisons Act identified sites at Leavenworth, Atlanta, and McNeil Island in Washington for United States penitentiaries, the first of which—Leavenworth—did not open for many more years.³⁹⁸ Until 1895, there were no federal prisons, only a small number of facilities for soldiers and sailors convicted of certain offenses.³⁹⁹ Leavenworth, and then Atlanta and McNeil, which opened in 1902 and 1909, respectively, housed the fewer than 2000 federal prisoners at the time, and "made up the entire system for many years."⁴⁰⁰ The Department's existence and supervision of federal prison administration facilitated the construction of seven federal facilities between 1891 and 1930.⁴⁰¹

³⁹¹ Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870).

³⁹² Shugerman, *supra* note 389, at 165-67.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ The Department contracted with the Pinkerton Detective Agency for investigative services from 1871 to 1892 when Congress passed a law prohibiting federal agencies from hiring private investigators.

³⁹⁶ MARY F. BOSWORTH, *THE U.S. FEDERAL PRISON SYSTEM* 4 (2004).

³⁹⁷ *Id.*

³⁹⁸ Congress opened Leavenworth not because of an increase in the number of federal prisoners, but because of an 1877 act of Congress prohibiting the states from contracting out federal prisoners' labor, which prompted the states to charge the federal government a *per diem* for every offender in state custody.

³⁹⁹ BOSWORTH, *supra* note 396.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

Lastly, the Department of Justice, through the maneuvering of Attorney General Charles Bonaparte, effectively created what would become the Federal Bureau of Investigation—a controversial federal law enforcement agency. In 1908, Bonaparte created a special investigative unit within the Department, comprised of ten former Secret Service agents. The unit was named the Bureau of Investigation in 1909, and by then had grown to include thirty-four investigators who reported to the “chief” of the bureau.⁴⁰² Although there were relatively few federal crimes when the Bureau was created, the Bureau’s existence, like the Department of Justice’s generally, likely encouraged Congress to enact new federal criminal laws. The Bureau, which grew to several hundred special agents within a few years, provided the apparatus Congress needed to investigate and enforce them.

d. Supreme Court Cases

Congress’s power to enact many of the federal criminal laws discussed was challenged before the Supreme Court in a series of cases whose outcome likely reassured Congress of the Commerce Clause’s great potential as a source of federal power.⁴⁰³

In one case, *Champion v. Ames* (“The Lottery Case”), the Court held that Congress could regulate the transport of lottery tickets by independent carriers pursuant to the Commerce Clause, and thus affirmed the defendants’ convictions for sending and conspiring to send lottery tickets in interstate commerce.⁴⁰⁴ The decision reaffirmed the power of the states to regulate their “completely internal affairs,”⁴⁰⁵ but it declared the commerce power “is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it.”⁴⁰⁶

Similarly, the Court in *Hoke v. United States* affirmed the convictions of a man and woman under found to have violated the Mann Act, rejecting the defendants’ claims that the Act unconstitutionally infringed upon the states’ police power.⁴⁰⁷ The Court announced “there is unquestionably a control in the states over the morals of their citizens” that extends to criminalizing prosecution, but upheld the Act because it regulated activity “the states cannot reach and over which Congress alone has power.”⁴⁰⁸

For the same reasons as in *Hoke*, the Court in *Brooks v. United States* upheld the Dyer Act, which criminalized transporting a stolen vehicle across state lines.⁴⁰⁹ Chief Justice Taft emphasized that the automobile had made it possible for “evil-minded persons” to escape the states’ jurisdiction, and thus “greatly encouraged and increased

⁴⁰² *A Brief History of the FBI*, THE FBI (Apr. 8, 2016), <https://www.fbi.gov/about-us/history/brief-history/brief-history>.

⁴⁰³ The Supreme Court generally ruled in favor of the railroads in cases involving the Interstate Commerce Act—the railroads prevailed in fifteen of the sixteen cases before the Court between in the Interstate Commerce Commission’s first few years.

⁴⁰⁴ 188 U.S. 321 (1903).

⁴⁰⁵ *Id.* at 357.

⁴⁰⁶ *Id.* at 353.

⁴⁰⁷ 227 U.S. 308 (1913).

⁴⁰⁸ *Id.* at 321.

⁴⁰⁹ 267 U.S. 432 (1925).

crimes.”⁴¹⁰ The Court did not perceive the Dyer Act as violating the states’ right to control crime because criminals could easily escape the states’ jurisdiction by simply driving over state lines.⁴¹¹ The decisions ratifying Congress’s enactments emboldened Congress and further facilitated its continual expansion of federal criminal jurisdiction.

Not every case the Court decided went the federal government’s way. In *United States v. E. C. Knight Co.* in 1895, the Court found that one of the defendants—the American Sugar Refining Company—did not violate the Sherman Anti-Trust Act even though it controlled roughly ninety-eight percent of American sugar refining.⁴¹² Although *E. C. Knight Co.* struck a blow to Congress and the statute, the Court did not declare the statute unconstitutional—a small victory for the federal government. Later, in 1904, the Court ruled in favor of the federal government in *Northern Securities Co. v. United States*, which resulted in the dissolution of the Northern Securities Company.⁴¹³ In 1911, the Court similarly found in favor of the federal government in *Standard Oil Co. of New Jersey v. United States* and ordered the dissolution of Standard Oil Company.⁴¹⁴

e. Summary

Before the Civil War, there were only a handful of federal criminal statutes, almost all of which punished conduct identified in the Constitution or directly harmful to the federal government and not punished by state law. The changes wrought by the Civil War’s end made it possible for the federal government to enact civil rights and other laws that imposed criminal penalties on offenders. So, too, did Supreme Court decisions ratifying Congress’s use of the commerce power to criminalize new kinds of conduct. In retrospect, such seemingly small extensions of federal criminal jurisdiction began to “pave[] the way for the enactment of much broader provisions.”⁴¹⁵ By the end of the Nineteenth Century, there were seventeen federal criminal statutes, as well as a new albeit weak Justice Department to detect and prosecute federal crimes and supervise the small but growing network of federal penitentiaries. By the first decade of the new century, there was also a new federal investigative arm of the Department that made it considerably easier for the federal government to enforce the growing number of criminal laws it passed.

In many ways, the federal government’s introduction into the crime control arena resembles its introduction into the education arena at the turn of the Nineteenth Century. At first, the federal government was hesitant to become involved; the narrow scope of its first enactments is a testament to that fact. Moreover, the federal government had neither the appetite for nor the resources to enact bold laws that would draw it further into the states’ sovereign territory. Indeed, it was not until after Congress created the Department of Justice that it began to enact new federal criminal laws with some frequency, and even then, the Department lacked the tools to pose a real threat to state power.

⁴¹⁰ *Id.* at 438.

⁴¹¹ *Id.*

⁴¹² 156 U.S. 1 (1895).

⁴¹³ 193 U.S. 197 (1904).

⁴¹⁴ 221 U.S. 1 (1911).

⁴¹⁵ Beale, *supra* note 385, at 41.

Part III: Federal Involvement in Crime Control, 1917 to 1984

This Part considers the federal government's evolving role in crime control in the Twentieth Century, with a particular focus on the Omnibus Crime Control and Safe Streets Act of 1968, which radically transformed American intergovernmental relations by encouraging state and local dependence on federal money. Federal involvement changed at different rates over time, but always in the same direction: toward greater involvement. Lastly, this Part addresses the significance of the federal government's assumption of leadership over crime control through new federal agencies like the Federal Bureau of Investigation and the Bureau of Prisons, and through existing agencies like the Department of Justice.

a. Federal crime control initiatives before 1960

If Reconstruction provided the impetus for Congress's first foray into crime control, World War I provided the impetus for its second in the early decades of the Twentieth Century. After enacting the Selective Service Act in 1917, the year the United States joined the war effort, Congress passed the Espionage Act of 1917 and the Sedition Act of 1918 to quash mostly left-wing opposition to the draft and the war.⁴¹⁶ The Bureau of Investigation was responsible for investigating potential violations of these new statutes.⁴¹⁷

The Espionage Act criminalized conveying information in order to interfere with the United States armed forces or help the nation's enemies.⁴¹⁸ This crime was punishable by death or imprisonment not exceeding thirty years, or both.⁴¹⁹ The Act also criminalized conveying false reports or statements in order to interfere with the United States armed forces or help the nation's enemies; causing or attempting to cause insubordination, disloyalty, mutiny, refusal of duty; and willfully obstructing recruiting or enlistment.⁴²⁰ These acts were punishable by fine not exceeding ten thousand dollars, imprisonment not exceeding twenty years, or both.⁴²¹ The Sedition Act was adopted as an amendment to the Espionage Act and prohibited "any disloyal, profane, scurrilous, or abusive language" about the United States, the flag, or the armed forces.⁴²² The Sedition Act was repealed in 1921, but parts of the Espionage Act were codified in the United States Code.⁴²³

The Eighteenth Amendment and the Volstead Act, which enforced it, both increased federal involvement in crime control in the 1920s. The Amendment prohibited the manufacture, transportation, and sale of alcohol. By the time it went into effect, at least thirty-three states had already adopted prohibition legislation. Federal enforcement

⁴¹⁶ SHAHIDULLAH, *supra* note 374.

⁴¹⁷ *A Brief History of the FBI*, THE FBI (Apr. 8, 2016), <https://www.fbi.gov/about-us/history/brief-history/brief-history>.

⁴¹⁸ Espionage Act of 1917, Pub. L. No. 23, 40 Stat. 217.

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553.

⁴²³ Espionage Act of 1917, Pub. L. No. 24, 40 Stat. 217; Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553.

was weak and inconsistent. All the same, prohibition substantially increased the number of federal prosecutions and drew national attention to the problem of organized crime.

In the 1930s, the American public's growing concern about prohibition and organized crime prompted yet another wave of new federal initiatives that further expanded the federal government's involvement in crime policy-making. In 1929, Congress had established pursuant to the First Deficiency Act the National Commission on Law Observance and Enforcement ("The Wickersham Commission"), under the leadership of Attorney General George W. Wickersham.⁴²⁴ The Commission was the first federal commission of its kind, tasked with studying crime and policing and issuing policy recommendations. The Commission, in the 1930s, published fourteen reports on topics such as police misconduct and the justice system, but was of limited effectiveness largely due to anti-prohibition sentiment, poor timing, and the Great Depression.⁴²⁵

A subcommittee of the Senate Committee on Commerce, in a series of hearings held by Senator Royal S. Copeland, advocated for greater federal involvement in crime control as well. The hearings explored the problem of organized crime and racketeering. The Committee based its subsequent recommendations largely on state and local law enforcement's apparent inability to control crime. According to Sara Beale, "As a result of the Committee's work, a large number of new federal laws were adopted in the 1930s, many of which dealt for the first time with crimes of violence against private individuals and businesses."⁴²⁶ The Committee affected substantive policy-making, in contrast to the Wickersham Commission, which did not, likely because of its direct line to influential lawmakers and focus on violent crime as opposed to prohibition.

Additionally, highly publicized crimes like the Lindbergh baby kidnapping in 1932 made more apparent local law enforcement's ineffectiveness and prompted federal law enforcement to aid local investigations and Congress to enact laws that overlapped with state laws.⁴²⁷ For example, after local police failed to find the Lindbergh baby, President Roosevelt ordered the Bureau of Investigation to take over the high profile case; the Bureau ultimately solved the case. The incident demonstrated the Bureau's efficacy and encouraged increased federal participation in crime control initiatives. The administration's handling of the incident reflected a profound change in the federal government's approach to governing, however, that arguably impinged upon state sovereignty. The federal government not only took over the case, but Congress enacted the Federal Kidnapping Act of 1932 ("Lindbergh Law"), which authorized federal law enforcement to do the same in future, similar cases.⁴²⁸ The incident also showed that

⁴²⁴ NAT'L COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 1 (1931).

⁴²⁵ Lawrence W. Sherman, *Research and Policing: The Infrastructure and Political Economy of Federal Funding*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 156, 160 (2004).

⁴²⁶ Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1280 (1994).

⁴²⁷ *The Lindbergh Kidnapping*, THE FBI (Apr. 8, 2016), <https://www.fbi.gov/about-us/history/famous-cases/the-lindbergh-kidnapping>. See also MALCOLM M. FEELEY & AUSTIN D. SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, 1968-1978 (1980).

⁴²⁸ Federal Kidnapping Act of 1932 (Lindbergh Act), Pub. L. No. 72-189, 47 Stat. 326.

while the federal government had much to gain from cultivating a reputation as a leader in difficult cases, so did state and local law enforcement officers, who were under the national spotlight and lacked adequate resources.

Still, the Bureau of Investigation, which became the Federal Bureau of Investigation (“FBI”) in 1935, was a hard pill for some states and localities to swallow, although they eventually did. For example, in 1907 police departments refused to share fingerprint data with the Bureau of Investigation; they, instead, created their own centralized repository controlled by the International Association of Chiefs of Police.⁴²⁹ After a few years, most police departments capitulated and began sharing fingerprint data with the Bureau.⁴³⁰

Similarly, in 1956 law enforcement officers from eight states and twenty-six agencies met in secret to coordinate a response to the problem of “traveling criminals.” These officials launched the Law Enforcement Intelligence Unit (“LEIU”), a collective of mostly western states intent on sharing information with each other but not the FBI. According to a former LEIU member, LEIU’s founder wanted “to take police intelligence away from the FBI . . . [H]e formed LEIU to circumvent the FBI’s network. It was established to form an intelligence network independent of any Federal agency.”⁴³¹ Despite the LEIU’s mission to keep information out of FBI-hands, the organization integrated its intelligence systems with the more comprehensive National Crime Information Center’s (“NCIC”) system, which Director Hoover created in 1967. The lure of lucrative federal grants played a key role: “[T]he LEAA had to sweeten interagency cooperation with hearty federal grants and the promise of subsidized technology transfers from the military. . . [B]y the mid seventies all fifty states were plugged into the NCIC grid.”⁴³² LEIU received \$2 million between 1971 and 1978 to automate its Interstate Organized Crime Index (“IOCI”), a data repository that was meant to reduce the police’s use of the FBI’s files; this was a huge incentive to cooperate because IOCI was LEIU’s most significant project.⁴³³ The benefits of having access to comprehensive NCIC files, coupled with millions of federal dollars, encouraged LEIU to abandon its anti-FBI mission. LEIU’s caving to the pressure to share its data, like the police departments that did the same in 1907, showed how weak-willed were the states and localities that comprised the organization.

Congress created another key law enforcement agency in 1930, under the Justice Department’s auspices—the Federal Bureau of Prisons (“BOP”).⁴³⁴ The Bureau was tasked with the “management and regulation of all Federal penal and correctional

⁴²⁹ *A Brief History of the FBI*, THE FBI (Apr. 8, 2016), <https://www.fbi.gov/about-us/history/brief-history/brief-history>.

⁴³⁰ *Id.*

⁴³¹ CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 20-21 (1999).

⁴³² *Id.* at 21.

⁴³³ Linda Valentino, *The LEIU: Part of the Political Intelligence Network*, FIRST PRINCIPLES, Jan. 1979, available at <http://www.cnss.org/data/files/resources/FirstPrinciples/FirstPrinciplesVol4No5.pdf>.

⁴³⁴ *Historical Information*, FEDERAL BUREAU OF PRISONS (Oct. 21, 2015), <https://www.bop.gov/about/history/>.

institutions.”⁴³⁵ By the end of 1930, the Bureau managed the administration of fourteen federal prisons housing 13,000 federal prisoners.⁴³⁶ That number nearly doubled by the 1940s.⁴³⁷ The Bureau played an important role in expanding the number of federal prisons and “professionalizing” prison administration by promulgating best practices in the decades that followed.

What most changed in these early years of the Twentieth Century, Congress enacted new federal criminal laws with increasing frequency, many of which criminalized conduct the states already prohibited. Moreover, the creation of new federal law enforcement agencies like the FBI and the BOP both reflected and facilitated the federal government’s expanding role.

b. Crime control between 1960 and 1984

Some accounts suggest the federal role in crime control changed radically and permanently in the years following the First World War. More likely, there were multiple turning points that drew the federal government deeper into the area of crime control. The election of John F. Kennedy to the presidency in 1960 was one turning point that cultivated the federal government’s interest and involvement in crime control. The creation of the Law Enforcement Assistance Administration under the Omnibus Crime Control and Safe Streets Act of 1968 was another, major turning point, and thus is the main focus of this Part.

President Kennedy turned the nation’s attention to organized and juvenile crime and sought broader authority for federal law enforcement. In his 1962 State of the Union Address, President Kennedy appealed to Congress for more tools to combat crime at the federal level. Congress adopted six of the eight federal laws President Kennedy’s administration proposed.⁴³⁸ Nancy Marion has credited the Kennedy administration with

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ Some Kennedy-proposed (or supported) bills that were enacted to combat organized crime:

1. A law to “[o]utlaw interstate travel or use of interstate facilities (including the mail) to establish, promote, deliver the proceeds of, or commit a violent crime to further illegal gambling, liquor, narcotics, or prostitution business”;
2. A law to “[a]mend the federal Firearms Act to prohibit the shipment of firearms to or by any felon”;
3. A law to “[b]roaden the Fugitive Felon Act, which makes it a crime to flee interstate from prosecution, to make it apply to any felony”;
4. A law to “[o]utlaw interstate transportation of all types of gambling machines such as pinball machines and roulette wheels”;
5. A law to “[o]utlaw the use of interstate telephone or telegraph wire communications facilities by persons in the gambling business to transmit bets or betting information”; and
6. A law to “[p]rohibit interstate transportation of paraphernalia (that is, betting forms and devices) to be used for bookmaking or wagering pools or numbers or

expanding the federal government's role in this area of traditional state sovereignty, in part because the Kennedy-proposed legislation enacted during this period was among the first to "influence . . . state law enforcement behavior."⁴³⁹

President Johnson advocated for greater federal involvement in law enforcement after President Kennedy's assassination in 1963. President Kennedy's murder, coupled with rising crime rates, anti-war demonstrations, race riots, and other high profile assassinations like that of Attorney General Robert F. Kennedy, cultivated the perception that state and local law enforcement could not keep America's streets safe. Violent crime increased from an estimated 288,460 to 738,820 crimes per year between 1960 and 1970.⁴⁴⁰ Roughly forty-nine percent of Americans reported feeling "more uneasy" than a year ago due to violent crime; that number was sixty-five percent in 1970.⁴⁴¹ Thirty-four percent of Americans in 1965 reported being afraid to walk at night compared to forty-one percent in 1972.⁴⁴²

Presidential candidate Barry Goldwater had capitalized on these fears of "violence in our streets" during the 1964 presidential campaign.⁴⁴³ Although Goldwater lost by a large margin to incumbent President Johnson, his emphasis on the growing crime problem helped elevate criminal justice policy and crime control to a prominent place on the national agenda in Johnson's second term.

In 1965, President Johnson established by executive order the Presidential Commission on Law Enforcement and Administration of Justice, known as the "Crime Commission." Unlike the Wickersham Commission's reports in the 1930s, the Crime Commission's 1967 report, "The Challenge of Crime in a Free Society," was hugely influential. The report made upward of 200 recommendations for improving state and local law enforcement,⁴⁴⁴ and "urge[d] that [federal initiatives in the area] be intensified and accelerated."⁴⁴⁵ It also recommended federal appropriations to supplement the "information, advice and training [Congress has given] to State and local law enforcement agencies."⁴⁴⁶ According to Robert Diegelman, "It was clear that something

similar games." NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960-1993 30 (1994).

⁴³⁹ *Id.* at 32.

⁴⁴⁰ BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1994 305 (1994).

⁴⁴¹ TERRY BAUMER & FRED DUBOW, U.S. DEP'T. OF JUSTICE, 82422, FEAR OF CRIME IN THE POLLS – WHAT THEY DO AND DO NOT TELL US 4 (1976).

⁴⁴² *Id.*

⁴⁴³ Feeley and Sarat note that the "crime issue was, however, part of a larger complex of campaign themes aimed to exploit fear of rapid social change, themes of racial competition, moral conventionality, and defense against the 'new morality.'" FEELEY & SARAT, *supra* note 427, at 35.

⁴⁴⁴ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF CRIM. JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 634 (1967).

⁴⁴⁵ *Id.* at 283.

⁴⁴⁶ The report noted "[i]n many towns and counties . . . the Federal Bureau of Investigation's on-site training programs for police officers and sheriffs are the only systematic training programs available. The Department of Justice, under the Law

had to be done to improve crime control efforts. It also was clear that local law enforcement was not effective and that greater resources, including those of the federal government, had to be applied to the problem.”⁴⁴⁷ The Commission’s work mobilized a vast network of law enforcement officials at every level of government to assist the federal government in combating crime, and primed the nation for the introduction of President Johnson’s sweeping anti-crime bill in 1968.

1. The Omnibus Crime Control and Safe Streets Act of 1968

In 1968, Congress enacted the Omnibus Crime Control and Safe Streets Act, likely the most crucial turning point for federal involvement in crime control and inter-governmental dynamics. The forerunner to the Safe Streets Act, the Law Enforcement Assistance Act of 1965, influenced the form the Safe Streets Act later took, and therefore, is worthy of brief discussion.

The Law Enforcement Assistance Act of 1965 established the Office of Law Enforcement Assistance (“OLEA”) within the Justice Department to supervise a modest federal categorical grant program. Congress intended federal grants to spur research and innovation in local law enforcement and improve local law enforcement. The Attorney General had almost unfettered authority to approve roughly \$20 million in federal grants between 1966 and 1968.⁴⁴⁸ Because the Act permitted the Attorney General to make grants to any public or private non-profit agency or unit, he could use federal funds to cultivate relationships with liberal localities that supported the administration’s agenda, or with influential private organizations like the International Association of Chiefs of Police.

The Act, with its small amount of available grant money, failed to reduce violent crime. In this way, Congress’s cautious approach resembled its approach to entering the education field before 1965. Still, the Act was significant. First, OLEA nurtured key relationships with localities and police and prosecutors organizations that proved helpful in 1968 when the newly created Law Enforcement Assistance Administration (“LEAA”) required representatives of those interests to be incorporated into State Planning Agencies (“SPAs”). Second, OLEA alerted Republicans in Congress and the National Governor’s Association, an influential lobbying group, to the threat direct federal-local relations could pose.

The Omnibus Crime Control Act of 1968 followed OLEA’s termination, and as envisioned by the Johnson administration, would have replicated OLEA’s categorical grant program on a substantially greater scale. The administration’s bill distributed categorical grants primarily to big cities,⁴⁴⁹ and centralized grant distribution in the

Enforcement Assistance Act of 1965, has begun to give State and city agencies financial grants for research, for planning, and for demonstration projects.” *Id.*

⁴⁴⁷ Robert F. Diegelman, *Federal Financial Assistance for Crime Control: Lessons of the LEAA Experience*, 73 J. CRIM. L. & CRIMINOLOGY 994, 997 (1982).

⁴⁴⁸ FEELEY & SARAT, *supra* note 427, at 41.

⁴⁴⁹ Arlen B. Coyle & Shannon Deen Turner, *The Federal Commitment to Crime Control and its Influence on the Mississippi Judicial System*, 46 MISS. L.J. 817, 820 (1975).

Under Johnson’s proposal, federal grants would be distributed to cities with populations

Justice Department, bypassing the states altogether.⁴⁵⁰ It gave the Attorney General discretion to promulgate guidelines and make grants to any government unit with a population of at least 50,000. This discretion would allow the administration to circumvent Republican state governors,⁴⁵¹ and thus deliver federal dollars directly to liberal big city mayors and local police chiefs, whose beliefs it shared and with whom it had cultivated relationships through OLEA.⁴⁵²

The controversy over President Johnson's bill in Congress centered on the form federal involvement would take, not whether it was appropriate. Democrats like Emanuel Celler (D-NY) in the House tended to favor the administration's proposal, which empowered the Attorney General to exercise broad discretion make grants directly to local governments. Republicans and conservative Southern Democrats, such as Representatives William Cahill (R-NJ) and Tom Railsback (R-IL) and Senator John McClellan (D-AK), opposed the proposal, preferring to limit the Attorney General's control of the distribution of federal grants through block grants.⁴⁵³ The controversy over the Safe Streets Act thus concerned how and to whom Congress would distribute federal money.

The law Congress enacted—a heavily edited version of the administration's proposal—utilized mostly block grants and relied mainly on state-level officials for the administrative heavy lifting.⁴⁵⁴ Congressional Republicans, assisted by the National

larger than 50,000, and most funds would be distributed at the attorney general's discretion. *Id.*

⁴⁵⁰ H.R. 5037, 90th Cong., 1st Sess. (1967).

⁴⁵¹ In 1967, Republican governors controlled half of the fifty states; Southern Democrats, who tended to favor states' rights, controlled another eight.

⁴⁵² Not every local law enforcement official was so easily enticed by federal money. Although most law enforcement agencies accepted federal money for training, a few, like the Houston Police Department, refused it. Chief Herman B. Short of HPD, known for being perpetually embroiled in race-related controversies in Texas, refused all federal aid indiscriminately. Chief Short believed federal aid would invite federal scrutiny of his agency and eventually federal control over it; federal officials, he said, would "try to run [my] department." Still, the Houston Police Department did eventually accept federal aid. Texas's efforts to reform its law enforcement agencies, which were prompted by race riots and high crime rates, were expensive. Thus, when a new mayor was elected in Houston, he was careful to replace Chief Short with a police chief who would seek out federal aid. According to Dwight Watson, "HPD had avoided federal aid, but now it began to covet it. However, along with the aid came federal oversight and guidelines. The department's negative image, shaped by its brutal legacy and criminal acts by some of the force, attracted the attention of federal authorities." DWIGHT WATSON, RACE AND THE HOUSTON POLICE DEPARTMENT, 1930-1990: A CHANGE DID COME 102-03 (2005).

⁴⁵³ Local law enforcement and some officials within the Johnson administration were "lukewarm" about the President's direct grant-in-aid program, which raised the specter of a national police force. FEELEY & SARAT, *supra* note 427, at 42.

⁴⁵⁴ Act of June 19, 1968, Pub. L. No. 90-351, 82 Stat. 197. Seventeen governors, in response to a congressman's request for comments on the bill, expressed in a letter a preference for block grants. Barry Mahoney, *The Politics of the Safe Streets Act, 1965-*

Governor's Association, successfully mobilized congressional opposition to the President's bill.⁴⁵⁵ According to one source, "[T]he dominant concern of legislators [in Congress] became how to implement the Act while minimizing the federal role."⁴⁵⁶

The final law employed a mix of mostly block and only a few program grants to achieve this objective, as block grants were a less intrusive vehicle for monitoring the use of federal funds.⁴⁵⁷ Eighty-five percent of federal grants under Title I of the Act were designated as block grants to states, forty-percent of which were to be "passed through" to local jurisdictions through SPAs.⁴⁵⁸ States would receive a basic planning grant and some funds based on population to establish and support their SPAs.⁴⁵⁹ LEAA could distribute the remaining fifteen percent at its discretion, but seventy-five percent of these grants were to be passed through to localities.⁴⁶⁰ Although the law no longer resembled the President's bill, he signed it because "it contained more good than bad."⁴⁶¹

1973: A Case Study in Evolving Federalism and the National Legislative Process 126 (1976) (unpublished Ph.D. dissertation) (on file with Columbia University).

⁴⁵⁵ It aided their cause that many congressmen personally disliked Attorney General Ramsey Clark and thought he was "soft on crime."

⁴⁵⁶ Jay N. Varon, *A Reexamination of the Law Enforcement Assistance Administration*, 27 STAN. L. REV. 1303, 1314 fn. 72 (1975).

[One] factor, almost guaranteed to alarm Congressional conservatives in both parties, was the proposed direct and large-scale involvement of the Federal government in crime control activities at the local level. The spectre of Federal control of local police forces, the possible requirement that there be some non-white officers required in police departments . . . and the possibility that Attorney General Ramsey Clark could impose some of his concepts of criminal justice upon local government agencies, were chilling to some of the conservative solons. To other legislators and interested parties, sometimes more thoughtful and less emotional, there were serious concerns about maintaining a traditional, constitutional, and appropriate division of responsibilities between the Federal and state governments in crime control and criminal justice.

Id. (quoting Charles Rogovin, *The Genesis of the Law Enforcement Assistance Administration: A Personal Account*, 5 COLUM. HUMAN RIGHTS L. REV. 9, 12-15 (1973)).

⁴⁵⁷ Congress also sought to roll back the Supreme Court's criminal rights jurisprudence by taking aim at *Miranda v. Arizona*. *Miranda* is an important example of the Court's weakening state sovereignty by imposing demanding constitutional requirements on the fifty state criminal justice systems. *See Miranda v. Arizona*, 384 U.S. 436, 476-77 (1966).

⁴⁵⁸ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197.

⁴⁵⁹ Initially, each state received between \$118,225 (Alaska) and \$1,387,900 (California), forty percent of which was passed through to local government agencies. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, FIRST ANNUAL REPORT OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION 3 (1969).

⁴⁶⁰ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197.

⁴⁶¹ FEELEY & SARAT, *supra* note 427, at 46.

In some ways, the Act marked a departure from the federal government’s pattern of using categorical grants, as with the Law Enforcement Assistance Act of 1965 and the Elementary and Secondary Education Act of 1965; however, the Act did include some categorical-like features. First, the Act included state buy-in and matching requirements. Although initially states were slow to allocate money to meet federal matching requirements,⁴⁶² many of them disenchanted by the 1970s with President Johnson’s Great Society,⁴⁶³ by 1976 states had allocated more than nine million dollars in state matching funds for Part B planning grants (over thirty-eight million dollars in 2015 dollars).⁴⁶⁴ The 1971, 1973, 1974, and 1976 amendments to the Act gradually increased those requirements and eliminated in-kind matching, thus forcing states to forgo the benefits of federal money or change their budgets to reflect Congress’s priorities.⁴⁶⁵ The amendments also made some grants available only for specific initiatives, like improving the quality of juvenile justice, courts, and corrections. These amendments transformed the program into something much closer to the categorical program President Johnson favored. According to an LEAA administrator, “[B]lock grants gave way to an increase in discretionary and categorical grants.”⁴⁶⁶ Indeed, in LEAA’s final years, the federal government even considered reorganizing the program as a categorical or project-based grant program.⁴⁶⁷ It is interesting to note that the National League of Cities, an influential lobbyist in Washington, preferred to increase federal supervision and federal-local cooperation rather than to increase general revenue sharing and devolve responsibility to states and localities.⁴⁶⁸

⁴⁶² As of 1970, twenty-one states had allocated \$791,945 to meet federal matching requirements, whereas no state allocated any amount for building construction, apparently one of Congress’s lower priorities. This number does not so much reflect the states’ overriding commitment to the federal agenda—surely it does not—but rather the usefulness of matching requirements as a tool for influencing state decision-making.

⁴⁶³ FEELEY & SARAT, *supra* note 427, at 42.

⁴⁶⁴ U.S. House of Representatives, Feb.-Apr. 1976, Comm. On the Judiciary, Subcomm. On Crime, Part 2, p. 1390. A fifteen-month budget for most states is included. *Id.*

⁴⁶⁵ A number of states reverted federal funds back to the federal government because changes in the state matching requirements that increased the amount states were required to match made participation in LEAA too expensive. According to a 1976 LEAA report to Congress, fourteen states reported “some difficulty” and seven states “great difficulty” obtaining legislative approval for matching funds. The report attributed the challenges these twenty-one or so states were facing to “increasingly tight state budgets, as well as a lack of understanding by the legislature of the consequences of a cutback in buy-in or matching funds.” *Id.* at 1434.

⁴⁶⁶ U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, LEAA/OJP RETROSPECTIVE: 30 YEARS OF FEDERAL SUPPORT TO STATE AND LOCAL CRIMINAL JUSTICE 4 (1996).

⁴⁶⁷ CONG. BUDGET OFFICE, THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION: OPTIONS FOR REAUTHORIZATION (1980).

⁴⁶⁸ NATIONAL LEAGUE OF CITIES, ANALYSIS OF STATE ADMINISTRATION OF PLANNING FUNDS ALLOCATED UNDER THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1969 (1969).

Second, LEAA's Guideline Manual reflected the Johnson administration's preference for direct federal-local cooperation and categorical grants. For example, one of the Act's supposed innovations, each state was required to establish an SPA that would then create a comprehensive state plan and distribute federal money. The Act specified only that SPAs "shall be created or designated by the chief executive of the State and shall be subject to his jurisdiction" and "shall be representative of the law enforcement agencies of the State and of the units of local government within the State."⁴⁶⁹ LEAA's Guidelines were substantially more dictatorial. LEAA required states to establish new agencies within the executive branch that consisted of a supervisory board and full-time administrator and staff.⁴⁷⁰ Further, LEAA required supervisory boards to include:

- (1) Representation of State law enforcement agencies;
- (2) Representation of units of general local government by elected policymaking, or executive officials and their designated law enforcement representatives;
- (3) Representation of each major law enforcement function—police, corrections, court systems—plus, where appropriate, representation identified with the Act's special emphasis areas, i.e., organized crime and riots and civil disorders;
- (4) Representation of juvenile delinquency as well as adult crime control competencies;
- (5) Representation of community or citizen interests; and
- (6) Representation that offers reasonable geographic and urban-rural balance and regard for the incidence of crime and the distribution and concentration of law enforcement services in the state.⁴⁷¹

Lastly, representation on the board was to "approximate or generally reflect relative State and local expenditures for law enforcement," which meant that local law enforcement and local governments occupied a majority, or at least many, of the seats in most states.⁴⁷² If a state failed to comply, LEAA would work directly with local agencies. Faced with this unsettling prospect, every state complied.⁴⁷³

⁴⁶⁹ § 203, 82 Stat. 197.

⁴⁷⁰ MAHONEY, *supra* note 454, at 184.

⁴⁷¹ *Id.* (quoting the LEAA Guidelines Manual).

⁴⁷² In all but six states in 1975, local and public representatives made up half or more than half of the membership on state planning agency supervisory boards. U.S. House of Representatives, Feb.-Apr. 1976, Comm. On the Judiciary, Subcomm. On Crime, Part 2, p. 1391-92.

⁴⁷³ All states created their SPA by gubernatorial action—executive order or some other executive action. Although the SPA in most states operated mostly autonomously and reported directly to the governor, over time this changed. A 1979 National Academy of Public Administration study found that at least three of the nine states it studied had relocated their SPA to newly created consolidated criminal justice departments, thereby "elevat[ing it] from a role of having responsibility principally for the LEAA grant program to that of providing general planning and analysis staff support for the secretary of the department involving all of the functions over which he or she has responsibility." NAT'L ACADEMY OF PUB. ADMIN., DEP'T OF JUSTICE, CRIMINAL JUSTICE PLANNING IN THE GOVERNING PROCESS, A REVIEW OF NINE STATES 16 (1979).

Further, LEAA's Guidelines instructed states to include specific information in their grant applications. LEAA required applications to include background information on the states' resources, needs, priorities, and plans, as well as to address "10 specific functional categories":

- a. Upgrading law enforcement personnel
- b. Prevention of crime (including public education);
- c. Prevention and control of juvenile delinquency;
- d. Improvement of detection and apprehension of criminals;
- e. Improvement of prosecution and court activities, and law reform;
- f. Increased effectiveness of correction and rehabilitation (including probation and parole);
- g. Reduction of organized crime;
- h. Prevention and control of riots and civil disorders;
- i. Improvement of community relationships;
- j. And research and development (including evaluation).⁴⁷⁴

These requirements "dilute[d] the block grant concept and move[d] the program somewhat more toward the traditional categorical grant pattern"⁴⁷⁵ that the Johnson administration and congressional Democrats preferred. For context, consider that there were almost 400 categorical grant programs and only two block grant programs in 1969.⁴⁷⁶

Third, LEAA's power to approve state plans before dispensing federal money to SPAs allowed the agency to wrest power from state legislatures, governors, and SPAs. If LEAA disapproved of a state plan and could not settle with the state through voluntary negotiations, LEAA would dispense federal funds conditioned on the state's agreeing to change its plan. LEAA's power to use special conditions after failed negotiations with a state was a useful tool for influencing state behavior. Although LEAA was reticent to withhold funds, it regularly used special conditions to influence the states' comprehensive plans.

In the end the LEAA grant program looked a lot like a categorical program. Also, despite Congress's efforts to give some control of program planning and grant allocation to the states by passing money through SPAs, SPAs had little influence and did little actual planning. SPAs were mostly pre-occupied with a seemingly endless stream of new statutory requirements and agency guidelines, the number of which grew almost exponentially during LEAA's fourteen-year life. According to a report of Executive Management Service, Inc., SPAs spent less than twenty-five percent of their time planning.⁴⁷⁷ A 1977 ACIR report observed: "[I]n practice, as more of the money is

⁴⁷⁴ MAHONEY, *supra* note 454, 184 at 185-86 (quoting the LEAA Guidelines Manual).

⁴⁷⁵ *Id.* at 186.

⁴⁷⁶ U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, IMPROVING FEDERAL GRANT MANAGEMENT 93 (1977).

⁴⁷⁷ JOHN K. HUDZIK, FEDERAL AID TO CRIMINAL JUSTICE: RHETORIC, RESULTS, LESSONS 89 (1984). SPAs spent an estimated thirty-eight percent of their time on "the grant process" and seventeen percent on "auditing and financial assistance." *Id.*

earmarked by Congress, there is less room for the state to set its own priorities.”⁴⁷⁸ One study of LEAA concluded, “LEAA was probably the most evaluation-conscious of all the social programs with the 1960s and 1970s . . . [envisioning] the states as ‘laboratories’ . . . to simulate experimentation with innovative ideas.”⁴⁷⁹ It is worth noting, here, that if we take seriously the “states as laboratories” metaphor, the idea of the federal government’s facilitating multiple, semi-controlled, state experiments in order to identify which of them to replicate nationally is fundamentally incompatible with federalism.⁴⁸⁰

In 1980, Congress disbanded LEAA, and in 1982 it allowed LEAA’s funding to run out.⁴⁸¹ LEAA had become “increasingly unpopular” in the 1970s as the crime rate climbed;⁴⁸² it developed a reputation for being too expensive and burdensome to justify its continued existence.⁴⁸³ Congress appropriated \$60 million in 1969, \$850 million in 1973, and \$648 million in 1979.⁴⁸⁴ Between 1968 and 1980, LEAA’s average annual funding was \$850 million,⁴⁸⁵ about \$8 billion total.⁴⁸⁶ No amount of funding appeared to affect the crime rate. Further, the Justice System Improvement Act of 1979 greatly reduced LEAA’s responsibilities: it relocated its research wing, the National Institute of Law Enforcement and Criminal Justice, to the National Institute of Justice, and it established the Bureau of Justice Statistics.⁴⁸⁷

LEAA’s phase out, and ultimately, its elimination, forced states and localities to terminate many popular and even successful programs, and affected an estimated 30,000 state and local, and 500 Department of Justice, jobs.⁴⁸⁸ According to a New York Times editorial published in 1982: “LEAA may be dead, but the need for such help is greater than ever.”⁴⁸⁹ The same editorial noted that, “the program, like the cities, is the victim of cash shortages and anti-inflationary budget slashing.”⁴⁹⁰ Still, at the time of LEAA’s

⁴⁷⁸ U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *SAFE STREETS RECONSIDERED: THE BLOCK GRANT SINCE 1968-1975, PART B* (1977).

⁴⁷⁹ FEELEY & SARAT, *supra* note 427, at 130-31.

⁴⁸⁰ *See* Rubin and Feeley, *supra* note 6, at 924-25.

⁴⁸¹ U.S. House of Representatives, July 1980, Comm. On the Judiciary, Subcomm. on Crime, Phasing Out the Law Enforcement Assistance Administration, p. 1.

⁴⁸² HUDZIK, *supra* note 477, at 90. Crime climbed 57% percent between 1968 and 1977. *Id.*

⁴⁸³ Ellen Dwyer & Ronak Shah, *Law Enforcement Assistance Administration Initiatives*, in *ENCYCLOPEDIA OF COMMUNITY CORRECTIONS* 229 (Shannon M. Barton-Bellessa, ed., 2012).

⁴⁸⁴ CONG. BUDGET OFFICE, *FEDERAL LAW ENFORCEMENT ASSISTANCE: ALTERNATIVE APPROACHES*, 34 (1979).

⁴⁸⁵ THOMAS G. BLOMBERG & KAROL LUCKEN, *AMERICAN PENOLOGY: A HISTORY OF CRIME CONTROL* 168 (2nd ed., 2010).

⁴⁸⁶ MARION, *supra* note 438, at 240.

⁴⁸⁷ Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167.

⁴⁸⁸ U.S. House of Representatives, July 1980, Comm. On the Judiciary, Subcomm. on Crime, Phasing Out the Law Enforcement Assistance Administration, p. 3.

⁴⁸⁹ HUDZIK, *supra* note 477, at 111.

⁴⁹⁰ Ernest E. Allen, *LEAA and State and Local Governments*, in *ENCYCLOPEDIA OF COMMUNITY CORRECTIONS* 203 (Shannon M. Barton-Bellessa, ed., 2012).

termination, between \$600 million and \$1 billion in grants remained “in the pipeline,” some of which states and localities were permitted to “reprogram” or reallocate to administrative functions LEAA would no longer support. Another \$500 million in categorical grants and \$128 million in federal contracts also remained to be distributed. These sources helped to tide over states and localities during LEAA’s phase out until OJP and other federal programs ramped up a short few years later.⁴⁹¹

Even more telling, perhaps, than the states’ embracing the Safe Streets Act was their response to the LEAA’s elimination. The Office of Justice Assistance, Research, and Statistics (“OJARS”) briefly replaced LEAA from 1982 to 1984, when the Office of Justice Programs (“OJP”) replaced it.⁴⁹² The OJARS, and subsequently OJP, assumed some of LEAA’s programs and many of its responsibilities, as well as absorbed some of its staff.⁴⁹³ Their budgets were small relative to LEAA’s budget at its peak. State and local law enforcement, however, had by then become dependent on federal grants, and within just a few years, OJP’s budget ballooned. By 1996, OJP’s budget had grown to \$2.7 billion, and one year later, its budget was \$3.2 billion.⁴⁹⁴ OJP, like its predecessor, assumed responsibility for handing out federal money under various federal anti-crime statutes, including as the Comprehensive Crime Control Act of 1984.⁴⁹⁵

⁴⁹¹ Federal aid for crime control had substantially returned by 1987; it doubled from 1986 to 1995, and quintupled from 1994 to 1996. Vesla M. Weaver, *The Significance of Policy Failures in Political Development: The Law Enforcement Assistance Administration and the Growth of the Carceral State*, in *LIVING LEGISLATION: DURABILITY, CHANGE, AND THE POLITICS OF AMERICAN LAWMAKING* 249 (Jeffrey A. Jenkins & Eric M. Patashnik, ed., 2012). Federal executive officials attempted to ease some of the fiscal burden on states and localities by distributing several million dollars of reverted formula grant money. U.S. House of Representatives, July 1980, Comm. On the Judiciary, Subcomm. on Crime, Phasing Out the Law Enforcement Assistance Administration, p. 18.

⁴⁹² *Law Enforcement Assistance Administration*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* 5 (J. Price Foster & Christopher Hughes, ed. 2014). Congress created the OJP “to restructure Justice Department criminal law enforcement programs.” The OJP oversees six bureaus and offices: the Bureau of Justice Assistance; Bureau of Justice Statistics; National Institute of Justice; Office of Juvenile Justice and Delinquency Prevention; Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking; and Office for Victims of Crime. Most of these offices and bureaus administer grant programs, which distribute funds to governmental agencies. *The Office of Justice Programs*, NAT’L CENTER FOR JUSTICE PLANNING (Apr. 8, 2016), <http://www.ncjp.org/saas/ojp>.

⁴⁹³ Some of the programs that survived LEAA’s demise were the Office of Juvenile Justice and Delinquency Prevention and the police and firemen survivors’ death benefits programs. U.S. House of Representatives, July 1980, Comm. On the Judiciary, Subcomm. on Crime, Phasing Out the Law Enforcement Assistance Administration, p. 1.

⁴⁹⁴ OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, *LEAA/OJP RETROSPECTIVE: 30 YEARS OF FEDERAL SUPPORT TO STATE AND LOCAL CRIMINAL JUSTICE* 1-2 (1996).

⁴⁹⁵ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

LEAA's contribution to the story of American federalism and crime control was substantial. First, the Safe Streets Act's legislative history demonstrates the states' willingness to compromise their constitutional power for what turned out to be only marginally greater control over the distribution and management of federal grant money. State leaders preferred to give up abstract power than have the federal government work directly with localities, and preferred to jump through countless bureaucratic hoops than tackle the crime problem alone. Despite their concerns about "federal control," every state applied for the LEAA funding. "Overnight the attitudes of state governments toward federally funded law enforcement assistance shifted from indifference to a race for the gold."⁴⁹⁶ Director Daniel Skoler of LEAA's Office of Law Enforcement Planning memorably told *The Nation* in 1970 that the states "responded . . . with the zeal of ballplayers just offered cold beer."⁴⁹⁷

Second, the Act compelled states to create entirely new institutions, under the governor's supervision, from whole cloth. In many states, the view of the SPA as a "conduit" for federal money limited the agency's effectiveness; but many SPAs "carved out valuable roles for themselves in state government" and "continue[d] with state funding" after federal funding ended.⁴⁹⁸ There are few better examples of how the federal government can undermine state sovereignty than deciding the structure of state institutions. State politicians' willingness to go along despite this is evidence of the great expansion of federal power in the Twentieth Century, as well as the states' role in facilitating it.

Third, by requiring states to distribute federal money in specific ways and requiring state buy-in and matching, the Act and LEAA affected both state criminal justice priorities and budgets. In some cases, "reform efforts were nothing more than shrewd ploys to extract funding from the federal government rather than sincere attempts to implement change."⁴⁹⁹ Nonetheless, most states and localities went to great lengths to obtain federal aid. Edward Loucks offers a relevant anecdote about a small city, El Monte, California:

Dealing directly with the federal government has been eased upon El Monte through this device [block grants], and council members often express the feeling that they have been hoodwinked, bemoaning the decision to accept the federal funds, but realizing that they cannot survive without them [sic]. Antifederal rhetoric is heard in the council chamber, while in the same meeting, council members are urging the staff to get more grants.⁵⁰⁰

Thus, even though state politicians often complained about the LEAA bureaucracy, and some of them clearly resented it, complaints and resentment never amounted to resistance because LEAA controlled the purse strings.

Finally, the history of LEAA and the Safe Streets Act exhibits a pattern that reveals a lot about American federalism. As in other areas such as education that once

⁴⁹⁶ Coyle & Turner, *supra* note 449, at 822.

⁴⁹⁷ Joseph Goulden, *The Cops Hit the Jackpot*, THE NATION, Nov. 23, 1970.

⁴⁹⁸ Diegelman, *supra* note 447, at 1002 fn. 53.

⁴⁹⁹ WATSON, *supra* note 453, at 103.

⁵⁰⁰ Edward A. Loucks, *The New Federal and the Suburbs*, 9 GROWTH & CHANGE 2, 6 (1978).

were new to federal regulation, federal officials proceeded cautiously, giving state and local officials wide latitude to implement federal programs until it deemed their approach “non-compliant” or “ineffective.” Then, federal officials sought to constrain state and local choice. No state or locality appears to have been too bothered by this pattern. Crime control was then, and is now, a popular political platform, and the more money a politician promises to throw at it, the better. In the words of LEAA administrator Charles Rogovin:

Anti-crime performance was seen by local officials as an increasingly important factor for attracting voters, and new Federal money with local autonomy could be important in shaping positive political images.⁵⁰¹

However, accepting federal money had consequences for state and local budgets, engendering dependence on federal aid. Many of the programs LEAA supported continued after federal funding expired, with states and localities assuming most or all of their cost. A 1977 ACIR report found that “on average 64% of the LEAA-initiated programs were assumed; counties and cities responded that on the average 78% and 83%, respectively, were being assumed.”⁵⁰² In 1979, the Senate Judiciary Committee cited a 60% assumption rate and declared it “indicative of the value of the program.”⁵⁰³ Another study estimated an “assumption rate . . . closer to 80% in the later years of the program.”⁵⁰⁴ An LEAA retrospective found that “[e]ighty percent of the LEAA-funded projects . . . were actually carried forward” and remained in place.⁵⁰⁵ Although many, or perhaps even most, of these programs would never have existed without the Safe Streets Act and LEAA,⁵⁰⁶ many were retained because officials did not want to be seen as soft on crime and because the programs themselves were incorporated into the fabric of local communities. One might view this as either a bug or a feature of federal grants—their effects on state budgets, priorities, and policies can be felt long after they are gone.

2. Nationalizing state and local police and prisons

Congress and federal agencies played a key role in shaping state and local police practices and prison administration in the latter half of the Twentieth Century. Although the topic deserves greater attention than I can devote to it here, it should be mentioned briefly. The Supreme Court’s criminal procedure revolution in the 1960s almost certainly played a role too—mostly a complementary one—but others have already studied it closely. The key things to note about the criminal procedure revolution that are relevant to the forthcoming discussion are that it likely accelerated the pace of state and local reform and it spurred Congress and federal agencies to become further involved in criminal justice policy-making at the state and local level. Indeed, despite visible

⁵⁰¹ Rogovin, *supra* note 456, at 11.

⁵⁰² HUDZIK, *supra* note 477, at 91.

⁵⁰³ *Id.* at 183.

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.* at 223.

⁵⁰⁶ Even though federal money made up a modest three to five percent of state and local crime budgets, federal revenue sources made up most of the money for “innovative” programs. U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SAFE STREETS RECONSIDERED: THE BLOCK GRANT SINCE 1968-1975, PART B 189 (1977).

backlash in Congress in response to the Court’s decisions in *Escobedo*,⁵⁰⁷ *Miranda*,⁵⁰⁸ *Mapp*,⁵⁰⁹ and other cases, Congress did not impede the process of nationalization but instead relocated the federal change agent from the Court to federal agencies like DOJ.

The movement toward national standards in criminal justice and law enforcement began long before the 1970s; but it accelerated and made great progress in that decade. LEAA played a major role. At a high level, LEAA’s funding decisions—affected by congressional amendments to the Safe Streets Act—both “reflect[ed] and, to a degree, help[ed] shape prevailing ideas about best practices in policing”⁵¹⁰ and prison administration. At a more granular level, LEAA initiated and funded a number of smaller units that furthered the nationalization project. For example, LEAA created the National Institute of Law Enforcement and Criminal Justice to distribute grants to agencies, universities, and scientists for projects related to criminal justice and law enforcement research. LEAA also jump-started the Law Enforcement Education Program, still operational in 2016, in order to distribute grants for criminal justice education and management training at the state and local level.

LEAA also sponsored and funded the Department of Justice-led National Advisory Commission on Criminal Justice Standards and Goals. Appointed in 1971 by LEAA Head Jerris Leonard, the Commission was directed to study criminal justice and law enforcement at the state and local levels, and to develop a “national strategy” for reform. The Commission cost nearly \$2 million and issued six reports in 1973 that included hundreds of specific recommendations—many of them structural and organizational—for improving state and local law enforcement and prison administration and reducing crime by 1983.

The success of these LEAA-sponsored initiatives is hard to measure, although there is some evidence that they made a difference, including that a number of states began to centralize corrections. In some places, such changes were already taking place; but the Commission’s work seems to have expedited them.

Congress also played a significant role in the nationalization project. Congress created the National Institute of Corrections (“NIC”) in the Bureau of Prisons in 1974 to create best practices for state and local prison administration. Unlike some of the other standards-setting initiatives of the 1970s, NIC has proven relatively influential. Feeley and Rubin comment on some of NIC’s success:

[V]irtually every corrections administrator agrees that its standards have become increasingly accepted as the prevailing norm. one measure of this effort’s success is that the ACA’s [American Correctional Association—now funded by NIC] “Division of Standards and Accreditation” had approved and published nineteen sets of standards as of 1994, for “Small Jails,” “Juvenile Facilities,” “Boot Camps,” “Correctional Administration,” and the like, and was active in performing accreditation reviews in many of them.⁵¹¹

⁵⁰⁷ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

⁵⁰⁸ *Miranda*, 384 U.S. 436 (1966).

⁵⁰⁹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵¹⁰ DAVID ALAN SKLANSKY, NATIONAL INSTITUTE OF JUSTICE, *THE PERSISTENT PULL OF POLICE PROFESSIONALISM 2* (2011).

⁵¹¹ FEELEY & RUBIN, *supra* note 176, at 371.

Likewise, NIC's National Corrections Academy in Colorado and other training programs strongly influenced state and local practices. "It is in every state's economic self-interest to spend as little money as possible on training,"⁵¹² and thus even today NIC offers some of the only training state and local corrections officers in many places receive.

Finally, despite Congress's apparent indignation at the courts for trying to impose national standards, Congress enacted the Civil Rights of Institutionalized Persons Act of 1980 ("CRIPA") to the same end.⁵¹³ CRIPA authorized the Department of Justice to bring lawsuits against state and local prisons, juvenile detention facilities, mental hospitals, and the like, that demonstrated a "pattern or practice of resistance by state officials." The legislation also incentivized states to create internal grievance systems, like allowing a state to delay a prisoner suit if its grievance system satisfies DOJ's minimum standard.

c. Summary

Federal involvement in crime control increased substantially during the Twentieth Century—slowly at first, and then rapidly, after Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968. This was shown in a number of ways, including the growing number of federal laws and regulations carrying criminal penalties, the increasing pace with which Congress enacted new federal criminal laws, the creation of new federal law enforcement agencies, and the increasing amount of federal money and personnel dedicated to crime control initiatives.

LEAA was specifically created to increase the federal role in crime control, without increasing federal control. Over time, its block grant program transformed into an almost categorical program because of agency guidelines and congressional amendments that strengthened federal oversight to encourage states to allocate their grant distributions to federal priorities, and to discourage state non-compliance and political corruption.

Whether LEAA was a policy success, it caused a federal funding feeding frenzy, which regardless of congressional intent diminished state power. LEAA was costly and burdensome for states and localities, and it did not always address their needs; nevertheless, federal money was valued, and thus states and localities continued to apply for it, regardless of what would be required. When the federal government started to pull back by dissolving LEAA, states and localities (especially localities) clamored for federal aid. Demands for federal money from the "many state and local beneficiaries of the LEAA program [who] objected vociferously"⁵¹⁴ to its elimination prevented the federal government from withdrawing from the crime control arena. Congress instead substituted for LEAA new agencies like OJP and equipped them with substantially larger budgets than LEAA's.

In the end, what the states fought for in Congress amounted to somewhat greater control over a program that hooked localities on federal money. This dependence on federal money enabled the federal government to dictate local resource allocation, and to

⁵¹² James B. Jacobs & Kerry T. Cooperman, *A Proposed National Corrections College*, 38 CRIM. & CIVIL CONFINEMENT 57, 68 (2012).

⁵¹³ Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, 94 Stat. 349.

⁵¹⁴ HUDZIK, *supra* note 477, at 111.

leverage localities' cooperation to encourage their states' "cooperation." All of this tended to lessen the states' power over crime control and their localities. Moreover, many states are themselves reliant on federal funding to supplement their budgets. Indeed, federal spending for crime control out-paced both state and local spending, despite federal spending cuts in the late-1970s and 1980s. Average federal spending between 1982 and 2003 increased ten percent compared to eight and seven percent for the states and local governments.⁵¹⁵ In other words, because of their dependence on federal money, state politicians, like local politicians, had no incentive to change.

Part IV: Federal Involvement in Crime Control, 1970 to present

This Part explores the major changes in the federal role in crime control policy-making, mainly after the Safe Streets Act's expiration. Of the roughly 4,000 federal crimes, a third to half of them became crimes after 1970; because it is impossible to address them all, this Part examines a few of the major laws, such as the Comprehensive Drug Abuse Prevention and Control Act, Anti-Drug Abuse Act, and Violent Crime Control and Law Enforcement Act, which Congress enacted to fight the War on Drugs. These statutes were "major" in the sense that they significantly expanded the federal government's involvement in crime control, and they made substantial federal funding available to states and localities. That is, they were important in terms of both coverage and dollar value. Because the congressional debates about block and categorical grants have been fairly consistent since the 1960s, I do not emphasize legislative history here. This Part also includes an analysis of significant, related, changes in the federal administrative state.

Finally, this section briefly describes the federal government's expanded role in crime control since the attacks on the World Trade Center in 2001. Few would question the federal government's legitimate interest in fighting terrorism. But the federal government has leveraged states' and localities' dependence on federal money to compel them to support initiatives that do not support their priorities and sometimes interfere with them. The federal government's War on Terror is still in its infancy. Thus, this work is only a start in terms of understanding how it has affected American intergovernmental relations.

a. The War on Drugs

The federal government's evolving role in crime control since World War I, and especially since the Safe Streets Act of 1968, paved the way for the War on Drugs—an aggressive campaign the White House initiated to end drug abuse and stifle the drug trade that has been the focal point of the federal crime agenda for decades. So, too, did the American public's growing anxiety about the increasing national crime rate, which was largely attributable to drug-related crime. By the time President Richard Nixon declared drug abuse "public enemy number one" in 1971,⁵¹⁶ most state and local officials had

⁵¹⁵ KRISTEN A. HUGHES, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NCJ 212260, JUSTICE EXPENDITURE AND EMPLOYMENT STATISTICS, 2003 2 (2006).

⁵¹⁶ Richard Nixon, President of the U.S., Special Message to the Congress on Drug Abuse Prevention and Control (June 17, 1971).

already accepted federal involvement. Indeed, once the federal government made aid available to state and local law enforcement agencies to fight the War on Drugs (and not before), many state and local agencies embraced it.⁵¹⁷

1. Congressional enactments

The War on Drugs exemplified the federal government's increasing control of crime and the role of money in facilitating state and local "cooperation." Congressional statutes of great scope that were enacted at a high frequency characterized the first two decades of the War on Drugs. Because these new laws were sweeping, they mostly criminalized conduct already addressed at the state-level. The Controlled Substances Act of 1970, for example, "established virtually unlimited federal jurisdiction for all drug offenses as a way to protect public morals—without even the pretense of regulating interstate commerce."⁵¹⁸ The Act was only one part of the Comprehensive Drug Abuse Prevention and Control Act ("CDAPCA"), a law of even greater scope that criminalized manufacturing, distributing, dispensing, and possessing drugs described in five categories of controlled substances.⁵¹⁹ This was new territory for the federal government in most respects, but not the states.

The Anti-Drug Abuse Act of 1986 ("ADAA"), signed into law by President Ronald Reagan, was even broader in scope than the CDAPCA.⁵²⁰ It increased penalties for existing drug offenses and established mandatory minimum sentences. It also established the Edward Byrne Memorial State and Local Law Enforcement Assistance Programs to reduce violent crime and illegal drugs. The programs initially consisted of two discretionary funding programs and one formula grant program. States received most of their funding through the latter and were required, as they were under the Safe Streets Act, to allocate a large percentage for localities. Congress authorized a staggering \$1.7 billion under the Act, including \$97 for prison construction, \$200 million for drug education, and \$240 million for drug treatment.⁵²¹

New federal anti-crime laws like the CDAPCA and ADAA (which Congress enacted nearly every few years by this point) were significant, in part because they effectively supplanted state law.⁵²² Although states could decriminalize drug crimes or

⁵¹⁷ See generally Bruce L. Benson, David W. Rasmussen, & David L. Sollars, *Police Bureaucracies, Their Incentives, and the War on Drugs*, 83 PUB. CHOICE 21 (1995).

⁵¹⁸ Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1166 (1994). See Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

⁵¹⁹ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

⁵²⁰ See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

⁵²¹ *Id.*

⁵²² In 1984, Congress enacted the Sentencing Reform Act, which implemented federal sentencing guidelines designed to bring consistency to sentencing. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987. Research has shown that, despite these efforts, external factors, including jurisdiction, race, religion, and gender are correlated with huge disparities in sentencing. Moreover, the Supreme Court in *Blakely v. Washington* and *Booker v. United States* held that federal and state mandatory sentencing

punish them less severely than the federal government, in practice federal law replaced state law because federal law binds every citizen, regardless of the law of the states in which they reside.⁵²³ Consider California in 1996, after it legalized medicinal marijuana: in response to Proposition 215, the federal government amped up prosecution of medicinal marijuana possession in California, and the Drug Enforcement Administration (“DEA”) sought to deputize state and local officers to enforce federal drug laws there.⁵²⁴ One study even found that the War on Drugs not only encroached upon the states’ police power, it actually cost the California a lot of money.⁵²⁵ According to the California State Board of Equalization, Proposition 19, which would have completely legalized marijuana in California would have saved the state \$154 million and raised \$1.4 billion in tax revenue.⁵²⁶

The War on Drugs culminated in the Violent Crime Control and Law Enforcement Act of 1994 (“VCCLEA”),⁵²⁷ which represented years of congressional hearings, countless drafts, and another substantial expansion of federal authority. The law authorized \$30 billion “to help State and local enforcement agencies fight crime,”⁵²⁸ providing \$8.8 billion for the Community Oriented Policing Services (“COPS”) programs to add 100,000 new law enforcement officers, \$9.7 billion for prisons, and \$6.1 billion for “prevention programs.” The Act included \$1 billion for Byrne Programs, \$1.6 billion for Violence Against Women Act programs, and more than \$1 billion more to help states and localities cover expenses associated with implementing the law. It authorized \$2.6

guidelines violate the Sixth Amendment and declared them “advisory.” *Blakely v. Washington*, 542 U.S. 296 (2004); *Booker v. United States*, 543 U.S. 220 (2005).

⁵²³ Guerra, *supra* note 518, at 1179.

⁵²⁴ *DEA May Deputize State, Local Officers for Marijuana Arrests*, L.A. TIMES, Dec. 3, 1996, available at <http://infoweb.newsbank.com/resources/doc/nb/news/0FB32DD79D2AA7D7?p=AWNB>.

This is not the only instance in which the federal government has deputized state and local law enforcement officials to enforce federal law. The DEA similarly deputized Evansville, Indiana police officers in 2004 to help fight a growing methamphetamine problem there. Associated Press, *Feds Target Evansville ‘Meth’ – DEA Doubles Staff, Deputizes Local Police*, Journal Gazette, May 9, 2004, available at

<http://infoweb.newsbank.com/resources/doc/nb/news/102875DC928CA8B1?p=AWNB>.

Similarly, the FBI deputized Denver, Colorado police in 1988 to fight gangs and drug crime. Associated Press, *FBI to Deputize Denver Police to Fight Gangs*, CO Springs Gazette, Nov. 23, 1988, available at

<http://infoweb.newsbank.com/resources/doc/nb/news/0F34BCF85E783A43?p=AWNB>.

⁵²⁵ David B. Kopel & Trevor Burrus, *Reducing the Drug War’s Damage to Government Budgets*, 35 HARV. J.L. & PUB. POL. 543, 561-62, 566 (2012) (“The modern misuse of federal power severely impedes a state’s ability to effectively tax legalized marijuana within its borders.”).

⁵²⁶ CAL. STATE BD. OF EQUALIZATION, STAFF LEGISLATIVE BILL ANALYSIS, BILL NO. AB 390, at 6 (July 15, 2009) available at <http://www.boe.ca.gov/legdiv/pdf/ab039-1dw.pdf>.

⁵²⁷ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. See also Richman, *supra* note 344, at 399.

⁵²⁸ *Id.*

billion for federal law enforcement agencies, the judiciary, and the Treasury Department. The law included billions for states and localities conditioned on their increasing the average length of sentences for violent offenders, increasing drug testing and incarceration of drug offenders, and ensuring “sufficiently severe” punishments for violent offenders.⁵²⁹

Finally, Congress conferred on the Department of Justice under section 14141 the power to sue police agencies for injunctive or equitable relief where they show a “pattern or practice” of unconstitutional misconduct.⁵³⁰ The threat of these civil suits allowed the federal government to force state and local agencies to comply with federal law, and resulted in some of the largest police departments in the country entering into memoranda of agreement or consent decrees with the DOJ to avoid civil suits that could include many years of federal monitoring.⁵³¹ Since 1994, the DOJ has used section 14141 to investigate and file suit against police departments in, for example, Newark, Pittsburg, Cincinnati, Washington, D.C., and New Orleans.⁵³² In total, the DOJ has initiated fifty-five formal investigations under section 14141, twenty-four of which have resulted in negotiated settlements.⁵³³ Twelve jurisdictions have agreed to “full-scale” structural reform, including external monitoring that has ranged from five to nearly twelve years.⁵³⁴

Federal anti-drug laws like CDAPCA, ADAA, and VCCLEA made it easier for state and local officials to do their jobs, but they also redefined their jobs by incentivizing them to reallocate their limited resources. For example, some federal laws such as the

⁵²⁹ *Violent Crime Control and Law Enforcement Act of 1990: Factsheet*, U.S. DEP’T OF JUSTICE (Apr. 8, 2016), <https://www.ncjrs.gov/txtfiles/billfs.txt>. The Violent Crime Control and Law Enforcement Act included other notable provisions that directly expanded the federal government’s power. The law expanded the federal government’s authority to address crimes caused by or involving aliens; it authorized \$1.2 billion for border control, \$1.8 billion to reimburse states for incarcerating criminal aliens, and made it easier for the federal government to deport or punish alien criminal offenders. The law represented the largest federal crime law in America’s history and hastened the federalization of crime control. It banned assault weapons, prohibited gun sales to and possession by certain individuals, made licensing requirements for gun dealers more stringent, created new federal crimes, dramatically upped the penalties for certain existing federal crimes. *Id.*

⁵³⁰ 42 U.S.C. §§ 14141(a), (b). *See also* Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORD. L. REV. 3189 (2014).

⁵³¹ Police departments in Pittsburg, Los Angeles, Cincinnati, Detroit, and Buffalo, for example, have entered into such memoranda of agreement or consent decrees to avoid litigation. Lance Eldridge, *All Law Enforcement is Local: The Federalization of Local Law Enforcement*, Police One, Jan. 3, 2011, available at <http://www.policeone.com/patrol-issues/articles/3139476-The-federalization-of-local-law-enforcement/>. *See also* Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 817, 817-18, 823 (1999).

⁵³² Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1347 (2015).

⁵³³ *Id.* at 1371.

⁵³⁴ *Id.* at 1392.

amended Federal Highway Apportionment Act of 1992 made funding available to states that committed to perform drug testing on or to suspending or revoking drug offenders' driver's licenses.⁵³⁵ States could lose ten percent of their total federal highway funding for failing to comply, no small amount of money considering states received billions of dollars a year in federal highway grants.⁵³⁶ Other laws such as the Crime Control and Law Enforcement Act of 1990 made funding available to states that agreed to distribute much of it to localities for specific purposes, like the Safe Streets Act, and thus limited the states' actual control over the money. This limited discretion to make allocation decisions is often confused for state power or autonomy. The ways in which federal money redefined state and local law enforcement priorities is discussed in greater detail below in the context of the Drug Enforcement Administration ("DEA").

Federal crime legislation also influenced both directly and indirectly how crimes were prosecuted and punished. By enacting broader federal drug laws and punishing drug crimes more severely than their state law counterparts, federal prosecutors could influence criminal justice policy-making by plucking the best cases from the states and leaving local officials to handle the rest. Where a state refused to prosecute or punish severely enough, or where a state's handling of a case might undermine federal priorities, the federal government could simply take the case. Although technically the "separate sovereigns" doctrine would permit the state to prosecute the individual for the same crime, in most cases it would not do so.⁵³⁷ Thus, the federal government through selective prosecution could effectuate the federal agenda at the expense of states priorities and "prevent states from implementing policies that contravene[d] federal preferences."⁵³⁸ The number of federal drug prosecutions has skyrocketed since the 1970s, partly for this reason.⁵³⁹

⁵³⁵ There is generally an opt-out process for states, but until recently few actually took advantage of it. Generally, the process requires the state legislature and governor to adopt a resolution opting-out, which must subsequently be approved by the Federal Highway Administration. Assuming the FHA determines the state properly opted-out, the state may change state law to reflect the change without a financial penalty.

⁵³⁶ Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 814 (2002); CHERYL H. LEE, TERESE DYSON, MATTHEW PARK, CALVIN HANDY, & MARQUITA BUCHANAN REYNOLDS, U.S. CENSUS BUREAU, G13-ASFIN, STATE GOVERNMENT FINANCES SUMMARY: 2013 3 (2015).

⁵³⁷ Guerra claims that in at least some cases, the federal and state governments prosecute the same defendant for the same crime, even where both have collaborated extensively in the initial prosecution. This occurs most often where either the state or federal case has hit a roadblock, and the alternative forum offers a second bite at the apple. See Guerra, *supra* note 518, at 1198; Susan N. Herman, *Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror*, 41 Willamette L. Rev. 941, 945, 945 fn. 17 (discussing the Rodney King prosecution). *But see* Bartkus v. Illinois, 359 U.S. 121 (1959) (discussing an exception to the "separate sovereigns" doctrine).

⁵³⁸ O'Hear, *supra* note 536, at 810.

⁵³⁹ Under Attorney General Eric Holder's leadership, the number of federal non-violent drug prosecutions has declined. In 2014, there was a 6.3 percent decline in federal non-violent drug prosecutions. This downward trend is the result of the DOJ's efforts to

2. Federal agencies

In addition to enacting sweeping drug legislation that enabled the federal government to reach the farthest corners of the states' criminal jurisdiction, the federal government established new agencies, offices, and bureaus to amp up drug law enforcement and bring states and localities into the federal fold. Indeed, since the 1970s, the federal law enforcement bureaucracy has grown to dozens of governmental units, many of them drug-related like the Bureau of Narcotics and Dangerous Drugs, Office of Drug Abuse Law Enforcement, Drug Enforcement Administration, and the Office of National Drug Policy. The United States Customs Service and Central Intelligence Agency have expanded roles that include drug law enforcement as well.

Of all the federal agencies mentioned, the Drug Enforcement Administration or DEA was among the largest and most integral to the federal drug agenda, and thus deserves greater attention. Congress established the agency in 1973 expressly to coordinate with state and local governments to enforce federal drug laws.⁵⁴⁰ Since the 1970s, the DEA has used joint state-local task forces for this purpose.⁵⁴¹ In 1973, the DEA initiated the first of what would be many DEA-State and Local Task Forces.⁵⁴² These task forces are run at a high level by federal officials and are funded with federal money.⁵⁴³ The amount of money involved has increased steadily to entice state and local participation. In 1991, the federal government spent \$45.7 million dollars to fund seventy-one state and local task forces; in 1999, the amount more than doubled to \$105.5 million for 131 task forces.⁵⁴⁴ Federal money for DEA task forces has been used to pay overtime and other expenses related to drug investigations, including paying informants and buying illegal drugs from suspects, and to supply vehicles and surveillance equipment.⁵⁴⁵

ameliorate prison crowding and other problems with the justice system. Richard A. Serrano & Ian Duncan, Federal Authorities Eased Up On Drug Cases in 2014, Baltimore Sun, Feb. 23, 2015, *available at* <http://www.baltimoresun.com/business/federal-workplace/bs-md-federal-drug-cases-20150217-story.html>.

⁵⁴⁰ *DEA History*, THE DEA (Apr. 8, 2016), <http://www.dea.gov/about/history.shtml>.

⁵⁴¹ U.S. House of Representatives, Nov. 2001, Comm. On Gov't Reform, Subcomm. on Crim. Justice, Drug Pol. and Human Resources, Subcomm. On Gov't Efficiency, Fin. Management, and Intergovernmental Relations, Subcomm. On Nat'l Security, Veterans Affairs, and Int'l Relations, Law Enforcement: Are Federal, State, and Local Agencies Working Together Effectively?.

⁵⁴² JAN CHAIKEN, MARCIA CHAIKEN & CLIFFORD KARCHMER, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NO. 126658, MULTIJURISDICTIONAL LAW ENFORCEMENT STRATEGIES: REDUCING SUPPLY AND DEMAND 44-47 (1990).

⁵⁴³ *See Guerra, supra* note 518, at 1187.

⁵⁴⁴ Budget numbers are in constant 1999 dollars. U.S. GENERAL ACCOUNTING OFFICE, GAO/GGD-99-108, DRUG CONTROL: DEA'S STRATEGIES AND OPERATIONS IN THE 1990S 34 (1999).

⁵⁴⁵ JAN CHAIKEN, MARCIA CHAIKEN & CLIFFORD KARCHMER, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NO. 126658, MULTIJURISDICTIONAL LAW ENFORCEMENT STRATEGIES: REDUCING SUPPLY AND DEMAND 45 (1990).

Likewise, Organized Crime Drug Enforcement Task Forces,⁵⁴⁶ also under the DEA's auspices, operate mostly according to federal guidelines; they are yet another example of the federal government conscripting state and local law enforcement into the federal government's service.⁵⁴⁷ This is not purely rhetorical: since the 1970s, the federal government has deputized task force members as United States Marshals, thereby empowering them to investigate and make arrests, anywhere in the country, on its behalf.⁵⁴⁸ The number of state and local deputies has grown from a small number when the first task forces were created to around 2,000 today.⁵⁴⁹

Moreover, seized asset forfeiture sharing has been used to attract state and local task force participants.⁵⁵⁰ Laws that include seized asset forfeiture sharing have been a powerful tool for shaping drug policy and law enforcement at the state and local level. One study that looked at the Comprehensive Crime Act of 1984 ("CCA"), which authorized seized asset sharing found that the program caused police departments to reallocate substantial resources to increasing drug arrests.⁵⁵¹ Federal asset seizure forfeiture programs such as the 1984 program were attractive because many states prohibited their departments from reaping the benefits of seized assets.⁵⁵² The federal program enabled law enforcement agencies to "circumvent state laws by having federal authorities 'adopt' their seizures."⁵⁵³ Drug law enforcement thus was lucrative because the federal government would return seized assets—i.e., large sums of discretionary, extra-budgetary money—to the seizing agency, regardless of state law.⁵⁵⁴

Whether through lucrative grants or seized asset sharing, money has undergirded much of state and local law enforcement's participation in the War on Drugs. States and localities benefited financially from promoting the federal government's anti-drug agenda, which then overshadowed other law enforcement priorities. States have received

⁵⁴⁶ The first was created in 1982.

⁵⁴⁷ JAN CHAIKEN, MARCIA CHAIKEN & CLIFFORD KARCHMER, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NO. 126658, MULTIJURISDICTIONAL LAW ENFORCEMENT STRATEGIES: REDUCING SUPPLY AND DEMAND 47-48 (1990). These task forces are more ad hoc and state and local participation is "the exception rather than the rule." *Id.* at 47.

⁵⁴⁸ *Id.* at 46.

⁵⁴⁹ U.S. GENERAL ACCOUNTING OFFICE, GAO/GGD-99-108, DRUG CONTROL: DEA'S STRATEGIES AND OPERATIONS IN THE 1990s 35 (1999). There were 1,548 as of 1998. *Id.*

⁵⁵⁰ JAN CHAIKEN, MARCIA CHAIKEN & CLIFFORD KARCHMER, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NO. 126658, MULTIJURISDICTIONAL LAW ENFORCEMENT STRATEGIES: REDUCING SUPPLY AND DEMAND 41 (1990).

⁵⁵¹ Benson, Rasmussen, & Sollars, *supra* note 517, at 23.

⁵⁵² *Id.*

⁵⁵³ *Id.* at 23, 29.

⁵⁵⁴ Although many states have adopted their own forfeiture laws, many of those laws are "not . . . as accommodating to police as the federal statute, and inter-bureaucratic cooperation in drug enforcement also still pays off, leaving the federal law a useful vehicle by which some police bureaucracies can enhance their discretionary budget." *Id.* at 38-39.

hundreds of millions of dollars in grants since the 1980s, \$811 million in 1995 alone for anti-drug programs.⁵⁵⁵ State and local law enforcement received about \$225 million in 1994 and \$1.6 billion in the preceding decade through the seized asset-sharing program.⁵⁵⁶ “[O]ver half of the money received by states for drug control,” well over a billion dollars in 1990, came from federal sources.⁵⁵⁷

Direct enforcement of federal drug laws poses a real albeit limited threat to state sovereignty due to the inherent constraints on the expansion of the federal government’s power in this area. These constraints exist because, as a practical matter, the federal government has the resources and expertise to police major, interstate and international distributors, whereas the states and localities have the ability to police local drug dealers and users. Moreover, there are only about one hundred thousand federal law enforcement officers, in contrast to the nearly one million state and local law enforcement officers across the United States.⁵⁵⁸ Because the federal government must rely so heavily on state and local law enforcement for information and manpower, the federal role in crime control cannot expand forever, despite state and local dependence on federal dollars. That said, the scope of the federal government’s involvement in crime control by the late-Twentieth Century was great compared to even a few decades earlier, a fact which should have caused state and local officials to see red, not dollar signs.

b. The War on Terror

The federal government has a clear interest in national security. Still the 9/11 attack on the World Trade Center in New York City and against other domestic targets precipitated the federal government’s growing role in crime control. This was a big albeit natural extension of federal power. However, to the extent the federal government has used conditional federal grants to exert control over states and localities, the story of the War on Terror is consistent with the idea that the carrot of federal money is often more valuable to state and local officials than formal sovereignty or autonomy.

9/11 was tragic and redefined priorities at every level of American governance; however, it also created opportunities. For the federal government, 9/11 created an opportunity to play a larger role in crime control. For the states and localities, 9/11 created an opportunity to relieve some of the stress on their budgets. Federal money, thus, played a key role in shaping intergovernmental relations after 9/11.

Since 9/11, the federal government has made billions of dollars available to states and localities for counter-terrorism initiatives—\$23 billion by 2008.⁵⁵⁹ This amount has grown every year. During roughly the same period, 2001 to 2008, states and localities have struggled with severe and growing budget shortfalls. According to the Center on

⁵⁵⁵ Guerra, *supra* note 518, at 1187.

⁵⁵⁶ *Id.* at 1188.

⁵⁵⁷ *Id.*

⁵⁵⁸ KRISTEN A. HUGHES, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NCJ 212260, JUSTICE EXPENDITURE AND EMPLOYMENT STATISTICS, 2003 1 (2006).

⁵⁵⁹ Eric Schmidt & David Johnston, *States Chafing at U.S. Focus on Terrorism*, N.Y. Times, May 26, 2008, available at http://www.nytimes.com/2008/05/26/us/26terror.html?pagewanted=print&_r=0.

Budget and Policy Priorities, the combined deficit of all fifty states was a staggering \$191 billion in 2010.⁵⁶⁰

In every state where budgets are tight and the threat of tax hikes or spending cuts looms large, federal grants for national security hold the promise of easing budget pressures. Thus, federal money has become a powerful tool for shaping state and local crime control efforts. According to a 2008 New York Times article, although states and localities like Massachusetts prioritized “gun violence, narcotics trafficking and gangs,” large federal grants for national security compelled them to allocate their scarce resources to counter-terrorism initiatives that did not serve their communities’ needs.⁵⁶¹

Massachusetts homeland security advisor Juliette N. Kayem told the New York Times that,

[she] regarded a potential grant this year [2008] of \$20 million in federal homeland security money as too important to pass up, even though she said that technically one-quarter of it had to be spent on I.E.D.’s [improvised explosive devices] to qualify for the money. So, Massachusetts officials wrote a creative proposal, pledging to upgrade bomb squads in many of the state’s 351 cities and towns. It also proposed buying new hazardous-material suits, radios to communicate between law enforcement agencies and explosive-detection devices.⁵⁶²

Budget pressures, in other words, have made it extremely difficult in places like Massachusetts to refuse federal money, even when it requires officials to sacrifice higher, local, priorities.

The federal government has exerted control over states and localities in other ways as well. Seized asset forfeiture programs and Joint Terrorism Task Forces (“JTTFs”), both reminiscent of tools used in the War on Drugs, are the two most prominent examples.

Seized asset forfeiture originated during the War on Drugs (as discussed previously), but expanded significantly after 9/11. The federal government strongly encouraged this expansion. The Washington Post reported that after 9/11,

The Departments of Justice and Homeland Security paid private firms millions to train local and state officers in techniques of an aggressive brand of policing known as ‘highway interdiction.’ That training . . . included methods for ferreting out suspicious drivers and coaxing them into granting warrantless searches of vehicles [and] emphasized the importance of targeting cash.⁵⁶³

⁵⁶⁰ PHIL OLIFF, CHRIS MAI, & VINCENT PALACIOS, CENTER ON BUDGET POLICY AND PRIORITIES, STATES CONTINUE TO FEEL RECESSION’S IMPACT (2012).

⁵⁶¹ See Schmidt & Johnston, *supra* note 559.

⁵⁶² *Id.*

⁵⁶³ Robert O’Harrow, Jr., Sari Horwitz, & Steven Rich, *Holder Limits Seized-Asset Sharing Process That Split Billions With Local, State Police*, Wash. Post, Jan. 16, 2015, available at http://www.washingtonpost.com/investigations/holder-ends-seized-asset-sharing-process-that-split-billions-with-local-state-police/2015/01/16/0e7ca058-99d4-11e4-bcfb-059ec7a93ddc_story.html.

However, this method of policing “terrorism” is far more likely to result in the identification of low-level offenders, and thus it has become another source of indirect federal control over criminal justice policy-making and law enforcement.

Highway interdiction, and seized asset forfeiture generally, is a useful tool for incentivizing states and localities to advance the federal government’s agenda; it allows state and local law enforcement to recover the value of seized assets in proportion to their participation in an investigation, and to spend that money freely regardless of state law. Because seized asset sharing can be so lucrative, 7,600 of 18,000 police and sheriff’s departments participate in the federal program. Studies have suggested that the program’s existence can strongly affect state and local case selection.⁵⁶⁴

To some degree, however, it is questionable whether the 7,600 participating departments’ and task forces’ participation in the federal seized asset forfeiture program is really voluntary. Seized asset revenue accounts for more than twenty percent of the annual budget in many places.⁵⁶⁵ In Texas, for example, some departments rely on forfeitures for up to a thirty-three percent of their annual budgets.⁵⁶⁶ According to an Institute for Justice study, “[m]any departments collect more in forfeiture revenues than their yearly operating budget.”⁵⁶⁷ The same study quoted a survey of 770 police managers and executives that “found that almost 40 percent of respondents agreed or strongly agreed with the statement that civil asset forfeiture is ‘necessary as a budget supplement.’”⁵⁶⁸ Indeed, many state and local agencies lobbied aggressively against changes to the seized asset forfeiture laws that would have subjected seized asset revenue to state law.⁵⁶⁹

The other commonly used federal tool, JTTFs, coordinates intelligence and law enforcement operations among federal, state, and local law enforcement. They are controlled at a high level by federal law enforcement agencies like the FBI. State and local participation in the roughly 100 JTTFs now in operation is voluntary; however, refusal to participate is uncommon. First, “[l]ocalities are offered the expertise and intelligence gathering capabilities of federal anti-terrorism agents,” which may be attractive to some police departments.⁵⁷⁰ Second, in many places, political pressure to participate in JTTFs may be high.⁵⁷¹

JTTFs confer on the federal government great power to control state and local law enforcement because voluntary Memoranda of Understanding (“MOU”) between federal and participating agencies grant the federal government “considerable control over any

⁵⁶⁴ INSTITUTE FOR JUSTICE, PART I: POLICING FOR PROFIT, 2010, *available at* <http://ij.org/report/policing-for-profit-first-edition/part-i-policing-for-profit/>.

⁵⁶⁵ *Id.*

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.*

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.*

⁵⁷⁰ Herman, *supra* note 537, at 967.

⁵⁷¹ *See id.* Not every jurisdiction has participated in a JTTF. Detroit, Michigan and Portland, Oregon ended their involvement in their local JTTFs. In Portland’s case, this was only temporary, however.

operations that run through [JTTFs].”⁵⁷² Under the terms of a typical MOU, state and local participants will be deputized as Special Federal Officials and will be immunized from liability in cases involving violations of state or local law. They also will be prohibited from revealing classified or sensitive information, even from their direct superiors and state and local legislatures, without the FBI’s express permission.⁵⁷³ That means that except in places where states and localities have negotiated different terms, JTTF participants can violate state and local law. Even where different terms have been negotiated, states and localities may never learn about violations because JTTFs are shrouded in secrecy.⁵⁷⁴ JTTFs do not inherently violate federalism principles; but many of the terms of state and local participation do.

Some JTTFs have been used to conduct non-terrorism related activities, an extension of federal power that more clearly crosses the line. According to a 2003 Syracuse University study, only about half of the 6,400 “terrorist and anti-terrorist” cases the federal government referred to prosecutors between 2001 and 2003 involved terrorism.⁵⁷⁵ Most of those cases instead involved immigration, drug, and fraud-related offenses.⁵⁷⁶ A GAO study similarly found that about half of the convictions the Department of Justice classified as “terrorism-related” in 2002 involved terrorism.⁵⁷⁷ According to Dennis Kenney, an observer at a meeting of federal and local officials in Las Vegas,

[T]he assistant chief from Las Vegas pointed out that, just as he was buying into the Patriot Act and telling his citizens about its value, federal prosecutors began employing their increased authority in run-of-the-mill domestic violence cases and in investigating city officials . . . [T]he thing was sold as a way of catching terrorists, but local folks started to see it as a means to catch everyone else.⁵⁷⁸

That is, regardless of the federal government’s legitimate interest in national security, JTTFs sometimes act as extensions of federal law enforcement in low-level criminal cases that are unrelated to the JTTFs’ counter-terrorism function.

More than ten years after September 11, 2001, the conversation about federalism and national security is ongoing.⁵⁷⁹ The discussion typically is framed in terms of the federal government’s unprecedented expansion of power. While the federal government’s power has grown in the wake of the attacks, it is a natural extension given

⁵⁷² Matthew C. Waxman, *Police and National Security: American Local Law Enforcement and Counter-Terrorism after 9/11*, 3 J. NAT’L SEC. L. & POL. 377, 389 (2009). See also Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TX. L. REV. 1715, 1743-44 (2010).

⁵⁷³ *Id.*

⁵⁷⁴ See *id.*

⁵⁷⁵ SYRACUSE UNIVERSITY, A SPECIAL TRAC REPORT: CRIMINAL TERRORISM ENFORCEMENT SINCE THE 09/11/01 TERRORIST ATTACKS (2003).

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.*

⁵⁷⁸ Jeffrey Rosen, *Prevent Defense*, NEW REPUBLIC, Sept. 5, 2004, available at <http://www.newrepublic.com/article/prevent-defense>.

⁵⁷⁹ See, e.g., Rascoff, *supra* note 572; Waxman, *supra* note 572.

the federal government's steadily increasing power over crime since at least the beginning of the Twentieth Century. In some respects, however, the federal government has used national security as a pretense for increasing its control over the way states and localities police low-level offenses, a sign that federal power has grown even more than we may realize. Coupled with more and more federal money for national security, the trend toward nationalization is likely to continue unabated.

c. Summary

Federal involvement in crime control seems to be a one-way ratchet. The temptation to respond to politically salient "events" like the growing problems of drug abuse and trafficking, and terrorism, in addition to states' and localities' increasing demands for federal aid, have made it virtually impossible for the federal government to withdraw from the arena. To the contrary, both the federal law enforcement bureaucracy and federal aid have grown considerably, with Congress enacting new federal anti-crime laws of greater and greater scope and with even greater regularity. States and localities may benefit from this trend in the short-term, but in the longer-term, their institutions, and American federalism, will suffer.

Part V: Conclusion

The realities of electoral politics often compel state politicians to make choices that diminish state power. This applies to crime control. Before the 1960s, most federal laws either dealt with narrow federal issues or highly salient ones, or helped states to enforce their own laws.

Things changed radically around the 1960s when the federal government began to carve out a more substantial role in the crime control area. The states' acquiescence, not only to the Safe Streets Act of 1968 itself, but to the federal government's gradual reshaping of the law into a tool of federal control, facilitated state and local dependence on federal aid. Ever since, federal officials often have imposed expensive and intrusive conditions on acceptance of that aid, which requires states and localities to deflect resources, such as the capacity to conduct investigations, away from top priorities, such as reducing gun, drug, and gang-related violence. Then again, a state politician's highest priority is being reelected, a sobering reality that reduces the attractiveness of choosing state power over federal money.

Local governments played a key role in destabilizing American federalism as well; but they were not formally part of the federal system. Their status had two consequences: local governments had both fewer reasons than the states to care about state power, and more incentives to collaborate with the federal government. Direct federal-local relations (and the threat of them) liberated localities from the states and plumped up their budgets. They also indirectly encouraged the states to help the federal government implement its anti-crime agenda, which set the states, along with localities, on the path to financial dependence and federal control.⁵⁸⁰

⁵⁸⁰ To be clear, by "dependent" I mean only that it is increasingly difficult for states and localities to backtrack due to continuing strains on their budgets—not necessarily that they are reliant on the federal government for increasing shares of their criminal justice and law enforcement budgets. Some of this strain is accounted for by the steadily

State and local dependence on federal aid has never been greater. The only thing that seems to prompt resistance and feelings of indignation are the federal government's occasional efforts to kill federal anti-crime programs, reduce federal aid, and minimize their involvement in the arena.

escalating crime rate—a reported increase of over sixty percent between 1968 and 1977, according to a Congressional Budget Office Report. THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION: OPTIONS FOR REAUTHORIZATION, U.S. CONG. BUDGET OFFICE xiv (1979). The same report estimates that federal funds and other external sources of criminal justice funding (General Revenue Sharing) accounted for 3.1% of state and local criminal justice budgets in 1971 and 12.4% just five years later, which reinforces the point that federal funds are an important source of revenue for state and local criminal justice systems. *Id.* at 21.

Chapter 4 Our Fake Federalism

Part I: Introduction

The Constitution's framers never meant for the United States to have real federalism. They adopted only parts of federalism, such as state sovereignty, that advanced specific ends, including convincing reluctant states to ratify the Constitution in the first place. The framers also embraced nationalism. The United States government was never anything more than federalism-like. Today, it is barely that.

The primary work of this dissertation was to suggest a positive theory of federalism that explains why, to the extent the Constitution embraced federalism, federalism has been, in practice, supplanted with nationalism and decentralization. Most United States "federalism" scholarship does not acknowledge this shift, and instead insists on both using the language of federalism and eschewing concepts integral to federalism (e.g., sovereignty and autonomy). The reason this body of work devalues these concepts is because its authors, at their core, are pragmatists, who value such things as democracy and liberty, and believe that the United States government, whatever kind of government it is, can generate them. One of the objectives of this Chapter, then, is to show that the distinction between federalism and decentralization, far from being purely academic (or semantic), is consequential; not because the United States should strive for an Originalist interpretation of the Constitution—that is, to be somewhat more federal—but because even a mostly linguistic commitment to federalism can get in the way of important, national, objectives.

This work also offered a resolution to the long-standing debate about the so-called "political safeguards of federalism." It suggested political safeguards theory is wrong, and thus could not reasonably be expected to maintain the federal bargain. Political safeguards theory, first suggested by James Madison, is based on the idea that rival federal and state politicians will vigorously protect federal and state institutions, respectively, and thus preclude either the federal or state governments from accreting too much power. In the Twentieth Century, Herbert Wechsler and Jesse Choper updated the theory, suggesting that the states' integration into federal institutions would accomplish the same.⁵⁸¹ When we interrogate the underlying assumption that federal and state politicians will vigorously defend their respective institutions, however, the theory loses its force. Politicians, being human, will defend federal and state institutions only when their institutions' interest is aligned with their own. When the two are somehow in tension, rational politicians will choose the path that serves their interests rather than their institutions' interests. Further, political parties, another important institution in contemporary American society, are irrelevant to the extent they interfere with politicians' interest in re-election. This dissertation showed that the incompatibility or misalignment of state institutions' and state politicians' interests, beginning in the early-Twentieth Century, facilitated the destabilization and deterioration of the federal system.

This Chapter is organized as follows. Part II revisits the positive theory of federalism of Chapter 1, highlighting key aspects of the qualitative case studies of Chapter 2 and Chapter 3. Part III discusses some of the work being done on federalism

⁵⁸¹ Wechsler, *supra* note 9; CHOPER, *supra* note 9.

today and explains why it is flawed. Part IV explains why it is problematic, from a pragmatic standpoint, that federalism language is often misused, whatever the justification (e.g., for political gain, ignorance). Part V suggests and rejects specific reforms. Lastly, Part VI concludes.

Part II: A Positive Theory of Federalism, Revisited

Polities choose federalism for different reasons, and thus federalism looks different in different places. All federations share some defining features, however, including two or more co-equal sovereigns ruling over the same land and people, each with final decision-making power over at least one substantive area of law. In those areas, interactions between sovereigns resemble interactions between foreign nations. Neither sovereign derives its existence from the other. The constituent governments possess rights that they can wield against the center. Some degree of collaboration is expected because the existence of some shared interest always animates the decision to form a federation. In areas of law in which the constituent governments have final decision-making power, only collaboration that is voluntary preserves the constituent governments' power vis-à-vis the center. None of this is meant to imply that federalism requires separate spheres, dual sovereignty, mutual independence or the like; however, some definitional rigor is important to those who care about institutional design and view federalism as a tool societies can wield and not a goal to which they should aspire.⁵⁸²

Until recently, the majority of work about federalism sought to determine the reasons why federations form, and why they succeed or fail. Among those writing in the field were William Riker, Kenneth Wheare, and Thomas Franck, who each produced influential work that identified some of the conditions for success and causes of failure in federal systems.⁵⁸³ This body of work prioritized issues of institutional design in trying to discern a generally applicable positive theory of federalism. For example, Riker explained that federalism becomes unstable when the existential threat or opportunity that led to the federation's creation dissipates. In the United States, the two-party system, which promoted decentralization and ideological diversity could help to maintain the federal bargain. Franck, who studied emerging federations in developing countries, claimed one of the conditions for success and causes of failure in federal systems was a "shared national ideological commitment," or lack thereof, to the federation.⁵⁸⁴ More recently, Mikhail Filippov, Peter Ordeshook, and Olga Shvetsova took up the cause of identifying the conditions for "self-sustainable federal institutions,"⁵⁸⁵ building on Riker's theory of the significance of the two-party system to maintaining the federal bargain. Filippov et al.'s work makes explicit some of the most critical and overlooked conditions for success in a federation, including what they refer to as "Level 3"

⁵⁸² See generally FEELEY & RUBIN, *supra* note 6; Rubin and Feeley, *supra* note 6.

⁵⁸³ RIKER, *supra* note 5; KENNETH C. WHEARE, *FEDERAL GOVERNMENT* (1963); THOMAS M. FRANCK, *WHY FEDERATIONS FAIL: AN INQUIRY INTO THE REQUISITES FOR SUCCESSFUL FEDERALISM* (1968).

⁵⁸⁴ FRANCK, *supra* note 583, at 180.

⁵⁸⁵ MIKHAIL FILIPPOV, PETER C. ORDESHOOK, & OLGA SHVETSOVA, *DESIGNING FEDERALISM: A THEORY OF SELF-SUSTAINABLE FEDERAL INSTITUTIONS* 15 (2004).

constraints that promote “incentive compatibility” between institutions and constitutional rules.⁵⁸⁶ To their great credit, they recognize that “the meaning of institutions cannot be discerned without understanding the incentives of people to abide by them or to interpret them one way or the other.”⁵⁸⁷ However, their discussion of incentives focuses almost exclusively on the party system and policy-making.⁵⁸⁸

In contrast to the great majority of federalism work being done in the mid-Twentieth Century, most of the work being done today addresses specific features of the United States model or specific policies at the expense of a generalizable positive theory of federalism that prioritizes issues of institutional design. This literature—the local federalism or *New New Federalism* literature—is narrowly focused on the United States and prioritizes identifying the features of federalism that survived the passing of dual sovereignty.⁵⁸⁹ This work is discussed in Part III of this Chapter. For now, it will suffice to point out that none of this work gives sufficient consideration, or any consideration in some cases, to issues of institutional design; and none of this work gives any consideration to the specific issues of institutional design that formed the basis of the theory of this dissertation.

The failure of the federalism literature broadly to study how the interests of institutions and their representatives converge and diverge over time, and to theorize its significance, is a critical omission. Chapter 1 described this failing, and explained why federations must be designed to account for the reality that “the state” is a legal fiction, which at every level is controlled by complex, self-interested, human beings. Where the institutional interests of “the state” diverge from those of the state’s human manifestation—individual politicians—the federal system should be sufficiently flexible to adjust to those changing circumstances; where it is not, the federal system is susceptible to failure. Chapter 1 also introduced a set of five hypotheses:

H1: If state politicians accept federal money for “X” in the present, they will be less likely to refuse federal money for “X” in the future.

H2: If state politicians accept federal money for “X” in the present, federal politicians are more likely to impose more numerous and burdensome conditions on state politicians use of federal money for “X” in the future.

⁵⁸⁶ *Id.* at 38.

⁵⁸⁷ *Id.* at 15.

⁵⁸⁸ Daniel Ziblatt has written at length about why federalism comes about, arguing that federalism results when political leaders want to establish a federal system and the potential sub-units have sufficient “infrastructural power” to be (1) credible negotiation partners and (2) to govern their sub-units after the federal government is established. Where political leaders seek to establish a federal system and the potential sub-units are weak, Ziblatt argues nationalization will result. Ziblatt does not address the reasons why federal systems fail, only noting that many others have written about this subject; but a potential extension of his theory is that federal systems fail when the sub-units no longer possess sufficient infrastructural power to remain credible negotiation partners or to govern. This is a variation on my positive theory of federalism. See DANIEL ZIBLATT, *STRUCTURING THE STATE: THE FORMATION OF ITALY AND GERMANY AND THE PUZZLE OF FEDERALISM* (2008).

⁵⁸⁹ Corwin, *supra* note 151.

H3: If state politicians seem to be unwilling to cooperate with the federal government in implementing federal program “Y,” federal politicians will be more likely to bypass the states and work directly with local politicians.

H4: If the federal government evidences a willingness to bypass the states if state politicians do not cooperate in implementing federal program “Y,” state politicians will be more likely to cooperate with the federal government in implementing federal program “Y.”

H5: If two states have equal economic need, state politicians from those states are equally likely to cooperate with the federal government and/or accept federal money, regardless of political ideology.

The careful analysis of historical and contemporary events that followed in Chapters 2 and 3 tended to support these hypotheses about American intergovernmental relations and political behavior.

The United States generally exemplifies the phenomenon Chapter 1 described, and that I described above, in which the divergence of certain interests in a federal polity can destabilize the entire system. In the United States, the federal government’s (i.e., federal politicians’) impulse to extend its constitutional grant of power is supposedly controlled by the states’ (i.e., state politicians’) at least equally strong impulse to protect their constitutional power. This logic figures prominently in the aforementioned political safeguards theory; but it is flawed. The states, that is, state politicians, will only protect state institutions where it is in their self-interest. Since the early-Twentieth Century, there have been a growing number of reasons for state politicians to jeopardize state institutions, including increasing demands on state budgets and the always-looming threat of being made obsolete.

It is important to clarify the distinction between what is in the state’s economic interest, and thus probably the state politician’s interest, and what is in the state’s interest. An example will clarify this. The citizens of a financially struggling state like Indiana might greatly benefit from Indiana’s participation in a federal program such as the Affordable Care Act, and thus Indiana politicians might benefit at the polls from welcoming federal subsidies. However, because the Affordable Care Act requires the recipients of subsidies to comply with a host of conditions, and the potential for fiscal dependence is high, Indiana’s long-term interest probably requires the state to decline the money. Indeed, this situation exactly played out in Indiana after the Affordable Care Act was enacted in 2010, with mostly Republican state politicians grandstanding against the controversial law, until they caved in under Republican Governor Mike Pence’s leadership in 2014.⁵⁹⁰ What happened in Indiana exemplifies American federalism’s

⁵⁹⁰ Adrianna McIntyre, *Another Red State Just Caved On Obamacare*, Vox, May 15, 2014, available at <http://www.vox.com/2014/5/15/5716350/indianas-expanding-medicaid-thats-a-big-deal>. See also Christopher Berry & Jacob Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008). Berry and Gersen distinguish single and plural executive regimes, which are defined in terms of number, from bundled and unbundled executive regimes, which are defined in terms of structure. “The unbundled executive,” the regime for which they advocate, “is a plural executive regime in which discrete authority is taken from the president and given to a directly elected executive official.” *Id.* at 1386. Unlike the federal executive regime, many state and local governments are

greatest dilemma and flaw: even where the state should reject federal money, state politicians think they must, and thus, will take it. The problem is not the fact of the state's accepting federal money, or even "too much" federal money; it is state politicians who make many and big concessions in exchange for any amount of federal money, which allow the federal administrative state to erode state administrative power, and make it increasingly difficult for the state to extricate itself from federal programs. In other words, the problem is not federal money per se; it is the lack of administrative control that results when state politicians engage in this behavior repeatedly and over time.⁵⁹¹

Chapter 2 showed how the federal government came to influence, and then control, much of education policy-making, as well as state education agencies. This event history lent support to the hypotheses outlined in Chapter 1. Although federal officials long sought a greater role in setting the education agenda, it was not until the middle of the Twentieth Century that federal politicians made substantial progress in this realm. The on-set of the Cold War was a critical turning point in this regard; it enabled federal officials to promote federal involvement in education as a means to combat the Soviet Union and communism. The passage of the National Defense Education Act of 1958, which helped acclimate Americans to the federal presence in the realm, as well as increased demands on state budgets and intra-governmental competition, paved the way for the landmark Elementary and Secondary Education Act of 1965. Consistent with my first hypothesis, having accepted federal aid for education previously, state politicians were predisposed to accept federal aid for education under the ESEA for a variety of self-interested albeit legitimate reasons. The ESEA, in turn, had a similar effect. The legislation encouraged state dependence on federal money, which enabled the federal government to leverage federal conditional grants-in-aid to increase its role, as my second hypothesis predicted. State politicians, their political fates having been tied, to an extent, to the continuation of federal grant programs, were at the federal government's mercy. Further, as my fifth hypothesis stated, the only evidence of any resistance to federal aid involved wealthy local communities that could afford to abstain. Controlling for economic need, in other words, party politics was virtually irrelevant. Since that time, education policy-making in the United States has become more and more centralized, with the federal government generating standards and policy from the top and requiring states and localities, in exchange for federal money, to comply. Despite what may be their legitimate objections to federal education policies like No Child Left Behind and Common Core, the states have not regained control over education because few state politicians are willing to risk federal education funding, and thus their careers, over the principle of states' rights or an abiding commitment to federalism. Since the 1990s and

organized in this manner. Many state attorneys general and other executive officers are directly elected, rather than appointed by the state governor or through a similar process.

Id.

⁵⁹¹ Feeley and Rubin have distinguished between state administrative power and state political power. Their discussion is both illuminating and applicable here. No one questions whether states should continue to be recognized and to elect their own representatives (i.e., political power). It is the states' administrative power that has steadily eroded. FEELEY & RUBIN, *supra* note 176, at 190.

2000s, Republican-controlled states and localities have been the most strident in their opposition to federal education policies. Still, as my fifth hypothesis predicted, economic need, rather than party politics, has taken precedence in state decision-making with respect to participation in federal education programs.

Chapter 3 described the federalization of another traditional area of state sovereignty—crime control. Crime control is a quintessential police power, and for mainly pragmatic reasons it remains highly fragmented, notwithstanding the undeniable pull toward federalization. The Chapter demonstrated that, regardless of the states’ strong interest in controlling crime, the federal role in crime control has grown substantially since the founding. Federal politicians and state politicians alike benefited from small federal incursions, especially after the turn of the Nineteenth Century. These incursions acclimated state politicians to federal involvement and paved the way for incursions of greater frequency and magnitude in the Twentieth Century. Given state officials’ initial disinterest or perceived incompetence, federal officials approached local politicians to assist them in implementing the first significant federal crime-related aid program, consistent with my third hypothesis. Subsequently, as my first hypothesis predicted, the threat of direct federal-local relations and tightening state budgets conspired to motivate state politicians to welcome significantly greater federal involvement. Further, as my fourth hypothesis suggested, state officials were more likely to participate in federal grant programs once the federal government demonstrated a willingness to bypass the states to accomplish its goals. Not only were state politicians more likely to participate, they actively sought to participate in the implementation of the Omnibus Crime Control and Safe Streets Act. State lobbying organizations and officials viewed it as a big victory for the states when they successfully sought to change the bill to maximize the state and minimize the local government role. Thereafter, federal money funneled through the Law Enforcement Assistance Administration (“LEAA”) offered state politicians a chance to garner constituents’ good will, and to wrest control of federal money from rival local politicians. But federal money had the unintended consequence of engendering state and local fiscal dependence on federal funding that gradually destabilized state institutions. For the reasons my second hypothesis suggested, today, federal politicians enjoy a great deal of control over the criminal justice and law enforcement agenda, and over state and local law enforcement agencies. The lesson of the Chapter was how crucial it is to design flexible institutions capable of accommodating changing circumstances like those that characterized the mid-Twentieth Century, which can result in the misalignment of a state’s and its politicians’ interests and facilitate federal control.

The drift of criminal justice and law enforcement policy-making toward the center has not gone unnoticed by academics. The Supreme Court’s 1960s criminal procedure “revolution” and Congress’s adding thousands of crimes to the United States Code is well-explored territory. Missing from the literature was a discussion of the nationalization of crime control broadly, and of state and local institutions, as well as a discussion of the underlying institutional design flaws that precipitated this great change. Chapter 3 filled this gap by offering an unconventional narrative about federal, state, and local politicians’ mutual interest in expanding federal control of criminal justice and law enforcement policy-making, and how state and local politicians, maybe unintentionally,

colluded with federal politicians to dilute state administrative power. Federal money figured prominently in this narrative, as in Chapter 2.

To be sure, it is possible that other factors not explored here played a role in the United States' trend toward nationalization, particularly since the 1960s. Indeed, many of the most significant events that set America on the path toward nationalization occurred in the 1960s, and it is possible that other conditions, specific to that decade, played a more substantial role than I have identified in defining the contours of the American political system. That said, the evidence presented in Chapters 2 and 3 lends support to the theory that federalism tends to break down where government institutions are represented by politicians who do not share, and thus do not prioritize, their institutional interests.

Having suggested a theory of federalism that recognizes the significance of institutional design, and identified flaws in the institutional design of federalism in the United States, the next Part identifies flaws in some of the federalism work being done today.

Part III: Local Federalism and the *New New* Federalists

The work of the *New New* Federalists reflects a move in the federalism literature toward identifying the vestiges and benefits of federalism in the United States; it ignores the issues of institutional design this dissertation identified and instead apologizes for what the Supreme Court has affectionately referred to as “Our Federalism.”⁵⁹² This work is a descriptively robust, but theoretically lacking account of American government, deploying phrases like “Our National Federalism” as if calling something “federalism” somehow makes it real.

One of the biggest weaknesses of this literature, almost none of it defines federalism; most of it only describes which of the characteristics that are commonly associated with federalism, federalism does not actually require (e.g., sovereignty, autonomy). On the rare occasion when federalism is defined, often it is defined so narrowly that it only includes the American government—sometimes self-consciously.⁵⁹³ Instead of asking, “what does federalism require, and does the American government possess those qualities?,” those writing in the field too often ask, “what qualities does the American government possess, and are they enough to constitute federalism?” This approach leads to their conflating federalism and decentralization.

Failing to define federalism in language that is abstract and generalizable has consequences. Besides being of little value to the study of federalism broadly, work that fails to define federalism is likely to confuse federalism with the related idea of decentralization, and to think about federalism purely instrumentally. This is the so-called “intellectual case for federalism.”⁵⁹⁴ Defining federalism makes apparent,

⁵⁹² *Younger v. Harris*, 401 U.S. 37, 44 (1971).

⁵⁹³ Hills, *supra* note 12, at 197 (2005) (“My narrow definition of ‘federalism’ serves the purpose of focusing attention on the issue most relevant to American constitutional law: How well does federalism *in the United States* protect local autonomy?”).

⁵⁹⁴ Briffault, *supra* note 12, at 1304 (“[T]he intellectual case for federalism’ often converges with the case for decentralization, or localism.”). *But see* Gerken, *supra* note

however, that “the core of federalism is the formal legal position of the states in the federal structure, and not the values conventionally associated with federalism.”⁵⁹⁵ That is, whereas decentralization is a management tool, federalism is an end in and of itself. The distinction between means and end is key. Federalism may be correlated with particular benefits like “a well-functioning national democracy,”⁵⁹⁶ but those benefits can be better achieved through other means, and they are not the point. *Federalism* is the point.⁵⁹⁷

Federalism, first because of slavery, and then because of Jim Crow, was once a critical tool for preserving the federal Union. Since the death of those institutions, however, the formal structural arrangement that is federalism has become wholly unnecessary, and in most respects, it has disappeared. What is left behind is mostly states’ rights rhetoric and nostalgic feelings, as Malcolm Feeley and Edward Rubin have powerfully argued in their book *Federalism: Political Identity and Tragic Compromise*. The United States is a fairly decentralized, nearly unitary system that values local democracy, and thus permits, and sometimes celebrates, local variation where there is no apparent normative, national consensus. As Feeley and Rubin explain, on issues that have a high “normative profile,” such as “race relations, women’s rights, environmental protection, or anything that the majority of people regard as a moral issue,” variation is considered “intolerable.”⁵⁹⁸ Their explanation goes a long way toward explaining why variation with respect to state laws and policies that involve few, if any, costs—unlike education and crime control—do not evidence federalism (i.e., the death penalty). Federalism is dead with respect to high and low cost policies alike: When costs are high, the federal government is in a strong position to dictate state affairs through conditional federal grants; and when costs are relatively low, state-by-state variation exists, essentially, at the federal government’s sufferance. Once a national consensus emerges, most political issues tend to become constitutional ones, and the federal government then tugs, and sometimes drags, recalcitrant states along.

The *New New Federalism* literature ignores these differences between federalism and local decentralization, and thus sees federalism where there is only decentralization.⁵⁹⁹ For example, some of the literature emphasizes that many federal schemes grant the states administrative discretion when the states implement them. This has led Abbe Gluck to claim that federalism now “comes from” nationalism because Congress, in relying on the states to implement federal law, compels the states to exercise

170, at 1893 (arguing American federalism’s main objective is “a well-functioning democracy”).

⁵⁹⁵ *Id.* at 1352.

⁵⁹⁶ Gerken, *supra* note 170, at 1893.

⁵⁹⁷ See FRANCK, *supra* note 583; FEELEY & RUBIN, *supra* note 6. See also Rubin and Feeley, *supra* note 6.

⁵⁹⁸ FEELEY & RUBIN, *supra* note 6, at 116.

⁵⁹⁹ To the extent the NNFs reject the premise that federalism is a formal structural arrangement, and believe that federalism can survive through federal statutes and national norms, their work and mine talk passed each other. But for the reasons I identified, it is key that sovereign units in a federation derive their existence from a political bargain or constitution, not from each other.

their constitutional sovereignty.⁶⁰⁰ The states' role in implementing the federal agenda boils down to compelling evidence that the states continue to be relevant, as a tool of decentralized government. The notion that Congress can *compel the states to exercise their sovereignty*, and that "federalism . . . mostly comes—and goes—at Congress's pleasure"⁶⁰¹ is theoretically incoherent, and only reinforces that the United States has a top-down, hierarchical administrative state, in which the states play a significant role on the front-line. In fact, the states' role in implementing federal programs, in many cases, shows not their power but their weakness.

There is a corollary to the claim that new federalism work should reject traditional ideas of sovereignty, autonomy, and separate spheres, and instead recognize the non-traditional role of states in American government. That is, new federalism work should emphasize "cooperative federalism." Cooperative federalism highlights the ways in which the federal and state governments work together to achieve mutually shared objectives.⁶⁰² Some federal-state collaboration could fairly be called "cooperative";⁶⁰³ however, the greatly under-valued foundation of cooperative federalism is the voluntariness of both the federal government *and the states'* involvement. This dissertation suggested some of the reasons why the states' "cooperation" often is compelled notwithstanding its appearance of being voluntary. The forces at work may be indirect (i.e., direct federal-local relations), or direct (i.e., a federal financial inducement is too great for a rational, self-interested state official to give up). The longer the history of the "cooperative" program, the harder it becomes for state politicians to walk away, and thus the harder it becomes to gauge voluntariness.

Additionally, it is questionable whether the states' involvement in a federal program is voluntary in any meaningful way, where the federal government determined "the 'choice architecture' within which the states ma[d]e the decision to join or reject [the] cooperative program[]." ⁶⁰⁴ That is to say, even where states benefit from and thus "like" federal programs, the federal government's control of the states' internal decision-making processes can "harm[] the state as a procedural matter."⁶⁰⁵ Bridget Fahey has explained that where the state agrees with the policy at issue, "the procedural harm [is] less salient" and "discourages [the] state[] from seeking remediation."⁶⁰⁶ The federalism literature neglects voluntariness almost entirely when discussing "cooperative federalism," and therefore fails to recognize how often state sovereignty is violated, and how much the states' administrative power has been diluted since the beginning of the Twentieth Century.

⁶⁰⁰ Abbe Gluck, *supra* note 170, at 1998 ("federalism now comes from federal statutes").

⁶⁰¹ *Id.* at 1996.

⁶⁰² See Daniel J. Elazar, *supra* note 138, at 65-86; Daniel J. Elazar, *supra* note 143. See also Daniel J. Elazar, *supra* note 143; Greve, *supra* note 48, at 596.

⁶⁰³ See generally Elazar, *supra* note 602.

⁶⁰⁴ Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561, 1565 (discussing Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. (Papers & Proc.) 175 (2003)).

⁶⁰⁵ *Id.* at 1596.

⁶⁰⁶ *Id.* at 1596.

This discussion of voluntariness exposes an ostensible tension between formalism and functionalism. On the one hand, federalism requires some definitional rigor, i.e., a formal definition, against which we measure the United States system of government. On the other hand, voluntariness seems to both demand formal consent and abhor functional coercion. There are two responses to this observation: first, to the extent this tension is real, we should embrace it; and second, this tension is more apparent than real.

To the first point, the purpose of federalism as a tool of institutional design is to preserve some minimal formal boundaries among constituent units in order to keep the tenuous nation-state from falling apart. Edward Rubin has explained the choice to embrace federalism as predicated on “a basic lack of national unity, an unwillingness of some groups to submit themselves to centralized control, to regard themselves as members of a single polity that must, for better or worse, reach collective decisions.”⁶⁰⁷ In other words, some degree of formalism is inherent in the federal bargain.

The second response, there is a difference between political power, a concept grounded in formalism, and administrative power, one grounded in functionalism—both of these concepts were discussed above. Federalism requires that states possess both of these types of power, just as voluntariness should require both an expression of formal consent and a lack of coercion as a practical matter. A state’s participation in a federal program should be studied for both.

Just as the literature confuses influence and discretion with power, it confuses the ability to express disagreement with power.⁶⁰⁸ The ability to disagree is a necessary but insufficient condition. For example, consider Jessica Bulman-Pozen’s work on California’s dispute with the Bush II administration over the Clean Air Act. Bulman-Pozen claims that when California wanted to implement the Act differently than the administration and subsequently was denied a waiver, “California insisted that it was attempting to faithfully implement the Clean Air Act while the federal executive disregarded the statute.”⁶⁰⁹ Bulman-Pozen claims that this example demonstrates that the states’ greatest “claim of right” when they disagree with a federal law “comes from an appeal to the underlying statute—and not arguments about state power as such.”⁶¹⁰

[T]he Clean Air Act . . . example[] suggest[s], when states want to carry out federal law differently from the federal executive, their most powerful objection sounds not in federalism, but rather in the separation of powers: they try to tar the federal executive’s choices as inconsistent with the statute that governs state and federal action alike.⁶¹¹

For federalism to be real (or at least somewhat real), however, the states’ “greatest claim of right” should be the Constitution, not federal law. The Constitution’s significance is

⁶⁰⁷ Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SCI. 37 (2001).

⁶⁰⁸ See Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism* 118 (2009). This is even more the case given state institutional representatives’ lack of incentives to dissent in the first place. See Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427 (2013).

⁶⁰⁹ Bulman-Pozen, *supra* note 608, at 1936.

⁶¹⁰ *Id.* at 1937.

⁶¹¹ *Id.*

not that the document embodies federalism, but that the states' power derives from it and not from the federal government. In this way, Bulman-Pozen's story is not about the states' power, but their subordination.⁶¹²

"Opt-out" and waiver allow the states to officially "disagree" or "dissent from" federal law. However, opting-out or applying for a waiver is often just as time-consuming and costly as implementing the underlying policy or law. This was the case with the Department of Education's No Child Left Behind Act waiver program, which I discussed in Chapter 2. There, the program required the states to satisfy so many conditions that some questioned whether the entire program violated the No Child Left Behind Act and the Constitution. Additionally, it is again at least questionable whether the federal government's waiver program, and opt-out requirements generally, violate state sovereignty by dictating the states' internal procedures. Bridget Fahey has argued, for example, that the federal government violates state sovereignty when it includes "consent procedures" in cooperative federalism statutes that dictate who within the state gets to accept the federal offer to collaborate, and how.⁶¹³ Opt-out and waiver, then, rarely allow the states to wield constitutional power, but often reflect the states' diminishing power.

Contrary to its express purpose, the *New New Federalism* work on the whole shows that there is no longer anything "state-y" about the states; the states' value is largely instrumental. To the extent what the states have left is political power (i.e., the power to choose elect their own officials and the like), influence, and discretion, they are no more powerful than the National Rifle Association or the head of any federal agency.⁶¹⁴ The *New New Federalism* work does not see the difference between these things and power, so it can both live with the states' new position and claim to value federalism.

In all its efforts to find signs of life in our federalism, the federalism literature ultimately fails to consider the reasons why real federalism requires sovereignty, autonomy, and the like. Those things allow distinct communities to live together and work together, when necessary, and to maintain their distinctiveness in the face of exogenous pressures to change. Our fake federalism cannot fulfill the last of these purposes, though, because the states' lack power and either cannot or will not assert their constitutional rights against the federal government.

The next Part unpacks some of the consequences of using the language of federalism to describe the United States.

Part IV: What's in a Word?

The commitment to "Our Federalism," even as Our Federalism slips away, has serious consequences, semantic nit-picking aside. The misuse of federalism language, just like the misuse of metaphors, can "impede sound analysis by serving up images that

⁶¹² It also supports my claim that the states' go along to get along where it is in state politicians' interest to implement a federal program.

⁶¹³ Fahey, *supra* note 604, at 1564.

⁶¹⁴ See Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953 (2014).

are attractive, but misleading.”⁶¹⁵ This section addresses only some of the legal, political, and policy consequences that follow from a half-hearted, or even mostly linguistic, commitment to federalism, and suggests that, given these consequences, the pragmatic *New New Federalists* should eschew federalism and not just its constituent parts.

a. Legal Consequences

Lingering federalism language has enabled the Supreme Court, at times, to invalidate federal legislation that furthered important national objectives like regulating agricultural monopolies⁶¹⁶ and hours and wages,⁶¹⁷ expanding religious liberty,⁶¹⁸ and controlling nuclear waste.⁶¹⁹ Indeed, not only did the Court’s invocation of states’ rights in some of these cases impede national objectives, it undermined the states’ interests as well.

For example, in *New York v. United States*, the Court invalidated the “take title” provision of the Low-Level Radioactive Waste Management Act Amendments that held states liable for waste within their respective jurisdiction. In a 6-3 decision, the Court found this crucial provision of the Act to violate the Tenth Amendment and declared the “anti-commandeering” rule, notwithstanding that the states had suggested the framework for the statute to the federal government to “ensure the federal government would not assume power over siting decisions [for dumps]” and “that the sited states would not become national dumping grounds.”⁶²⁰ The stricken provision also allowed the states to enter into regional compacts with other states to coordinate waste disposal, something they are constitutionally prohibited from doing without congressional approval. Sited states argued on the Act’s behalf in amicus briefs filed with the Court, arguing that the Act advanced their interests and staved off a national solution to a local problem.⁶²¹ David Barron has argued in this vein that the Court’s invocation of federalism constrained state autonomy in this case by prioritizing “a state’s decision to provide no means of disposing of locally generated waste” over a state’s “decision to decline to provide for such disposal” regardless of externalities.⁶²² Purporting to vindicate states’ rights in such cases, in short, paradoxically undermines the states’ interests and the national interest, to the extent they even differ.

Moreover, Erwin Chemerinsky has shown that mostly conservative state politicians and Supreme Court justices have historically used federalism rhetoric in order

⁶¹⁵ James A. Gardner, *The “States-As-Laboratories” Metaphor in State Constitutional Law*, 30 VALPARAISO UNIV. L. REV. 475, 475 (1996).

⁶¹⁶ *United States v. Butler*, 297 U.S. 1 (1936).

⁶¹⁷ *Hammer*, 247 U.S. 251 (1918).

⁶¹⁸ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁶¹⁹ *New York v. United States*, 505 U.S. 114 (1992).

⁶²⁰ *Id.*

⁶²¹ Brief for the States of Washington, Nevada and South Carolina at 4-9, *New York* (Nos. 91-543, 91-558, 91-563).

⁶²² David Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 418 (2001).

to constrain, rather than enhance, individual liberty.⁶²³ Chemerinsky studied the Court’s decisions limiting the scope of Congress’s commerce power, Congress’s power under section 5 of the Fourteenth Amendment, expanding the scope of state sovereign immunity, and using the Tenth Amendment to constrain Congress. On the basis of these decisions, he makes a compelling case that “overwhelmingly, the Supreme Court’s federalism decisions are ‘rights regressive’” and “the traditional explanations for why the vertical division of powers enhances liberty do not withstand scrutiny.”⁶²⁴ What Chemerinsky describes as using federalism to advance rights regressive goals should not be confused with real federalism, however. There is a difference between federalism rhetoric, which is ubiquitous because of the nostalgic feelings and imagery of the simpler time that it evokes,⁶²⁵ and federalism as a formal institutional arrangement, which is not. Further, the Court’s occasional resuscitation of “federalism” and “states’ rights,” if examined more closely than I can do here, is doctrinally incoherent, and has little to do with “Our Federalism” and a lot to do with our politics.

b. Political Consequences

Continually misappropriating the language of federalism gives state politicians license to justify rights regressive state laws and policies on states’ rights grounds.⁶²⁶ In other words, federalism gives state politicians a language to use when they want to justify discriminatory, rights regressive laws and policies, and practically absolves them from having to give “real” justifications for their decisions. This is true, to a lesser extent, about the Supreme Court. For example, Erwin Chemerinsky, in another context, pointed out that in the 1950s and 1960s, Southern states objected to *Brown v. Board of Education* and other Court decisions mandating desegregation, and federal civil rights efforts generally, “less on the grounds that they were desirable practices and more in terms of the states’ rights to choose their own laws concerning race relations.”⁶²⁷ Recognizing a place in our everyday and constitutional vernacular for federalism enables such abhorrent political positions and decisions to be justified on such pyric grounds as states’ rights. We should demand more of our elected officials and our Court.

c. Policy Consequences

Preserving the veneer of federalism can get in the way of a potentially successful federal policy intervention that could advance both national and local goals, enhance local decision-making capabilities, and “ease local pressures.”⁶²⁸ The principle case studies in Chapters 2 and 3—the Elementary and Secondary Education Act and the Omnibus Crime Control and Safe Streets Act—provide evidence that state and local government can be more effective when empowered with federal resources, and

⁶²³ Erwin Chemerinsky, *Does Federalism Advance Liberty*, 47 WAYNE L. REV. 911 (2002).

⁶²⁴ *Id.* at 913.

⁶²⁵ FEELEY & RUBIN, *supra* note 6, at 73, 125, 149.

⁶²⁶ *But see* Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terrorism*, 69 BROOK. L. REV. 1277 (2004).

⁶²⁷ *Id.* at 6. *See also* Chemerinsky, *supra* note 623.

⁶²⁸ *See* Barron, *supra* note 622, at 410.

moreover, imply that federal control can lead to better outcomes. In both case studies, more federal control is at least correlated with less mismanagement and better allocation of resources. That is not to conclude that federal control causes those things, but to beg the question of whether more federal control and less concern about federalism would enhance coordination and the dissemination of information, and ultimately lead to better policy outcomes, as defined by the federal program's objectives.

Whether more federal control might be linked to more successful national programs is closely related to another idea that is not often discussed in this context, the metaphor of the states as laboratories.⁶²⁹ The metaphor originated in Justice Brandeis's dissent in *New State Ice Company v. Liebmann*—a decision that “in every other respect [is] an undistinguished and typical ruling of the *Lochner* era.”⁶³⁰ In one of probably the most quoted sentences in constitutional history, Justice Brandeis stated: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁶³¹ James Gardner has claimed that Justice Brandeis's famous quote has been misunderstood and misappropriated to defend federalism and the states' right to conduct economic policy experiments;⁶³² regardless of what Justice Brandeis meant, the metaphor does not work as a defense of federalism.⁶³³ To the contrary, if the metaphor is taken seriously, it better explains why robust federal intervention might be more likely than federalism to produce desirable policy outcomes.⁶³⁴ One reason from Susan Rose-Ackerman's work is the free rider problem that unless compelled by the federal government states will tend not to adopt policies that have not already been implemented elsewhere.⁶³⁵ According to Rose-Ackerman, “The better other governments

⁶²⁹ See *New State Ice Co. v. Liebmann*, 285 U.S. 280, 311 (1932) (Brandeis, J., dissenting).

⁶³⁰ Gardner, *supra* note 615, at 476.

⁶³¹ *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting).

⁶³² Gardner, *supra* note 615, at 479-80. Gardner suggests that Brandeis was arguing only that “states must have the power to implement the specific policy at issue in the case” because the policy was a reasonable response to an economic emergency. He further claims that because “the functional outcome of the Court's decision would be to disable all levels of government from implementing a type of badly needed economic regulation,” Brandeis's metaphor of the states as laboratories should be understood as “a kind of last-ditch plea to the Court to limit the impact of its decision.” *Id.*

⁶³³ See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980); Rubin and Feeley, *supra* note 6.

⁶³⁴ Feeley and Rubin have argued that, “the most significant ‘experimental’ programs in recent years have in fact been organized and financed by the national government.” FEELEY & RUBIN, *supra* note 176, at 187. There is good reason to believe that such experimental programs might have been more successful than they were if were not for the United States' largely superficial commitment to federalism and states' rights.

⁶³⁵ Rose-Ackerman, *supra* note 633, at 593. This is because “[i]f one government completes a successful project, all other governments can costlessly copy their idea without compensating the government which carried out the project.” *Id.* at 604.

are expected to do, the less incentive any politician has to initiate projects.”⁶³⁶ That is, without strong federal intervention, the probability is low that states will engage in any beneficial risk taking or “experimentation.”⁶³⁷ Moreover, as Feeley and Rubin have argued, “the most significant ‘experimental’ programs in recent years have in fact been organized and financed by the national government.”⁶³⁸ There is good reason to believe, especially when the case studies of the proceeding chapters are considered that such experimental programs might be better executed and more successful if were not for America’s largely superficial commitment to federalism and states’ rights.

The next Part explores some of the possibilities for bringing federalism to the United States, and explains why, in a country as politically homogeneous as the United States, we should not bother. It argues, further, that pragmatists like the *New New* Federalists would do more to advance “federalism values” like democracy and liberty if they were to reject not just federalism’s defining features, but the language of federalism altogether.

Part V: Bringing Federalism to the United States

There are two questions we must consider that are related to reform. The first question is, *can we* reform the American system so that it more closely approximates federalism? The second question is, *should we*? This Part considers each of these questions separately. It argues that reform would be difficult to affect, but also not worth it. Moreover, drawing primarily from the qualitative case studies in Chapter 2 and Chapter 3, it suggests a few of the ways in which misusing federalism language negatively affects national values and objectives that “Our Federalism” supposedly advances.

a. Is Reform Possible?

No matter which theory of the founding is “right,”⁶³⁹ most people agree that the states retained their sovereignty when the United States was founded. Over time, though, that sovereignty has been steadily eroded by the rise of the modern administrative state, which transformed federalism into decentralization. Federalism and decentralization are often confused because they share some of the same characteristics like a center and

⁶³⁶ *Id.* at 605.

⁶³⁷ Rose-Ackerman points out that federal politicians, for the same reasons as state politicians, may also shy away from risky or experimental programs. *Id.* at 616.

⁶³⁸ Rubin & Feeley, *supra* note 176, at 187.

⁶³⁹ For example, “compact theory”—the idea that the federal government derives its existence from a compact of state governments—was prominent in the years leading up to the Civil War. Those who believed in compact theory, including most prominently John C. Calhoun of South Carolina, thought that the Constitution was merely a compact between sovereign states, and that the power to interpret the meaning of the Constitution resided in the states, rather than the Supreme Court. Moreover, individual states could interpose their authority between the national government and their citizens to nullify unconstitutional legislation. They could freely succeed from the Union as well.

subordinate units governing autonomously the same land and people; however, while decentralization predominates today, federalism is mostly a thing of the past. This is partly because, for a variety of reasons this dissertation explored, the states allowed the federal administrative state to supplant their administrative power. Any viable strategy for reform thus requires us first to acknowledge both the diminution of state power and the states' role, and then to impose constraints on the administrative state or encourage the states to adopt measures that force state politicians' interests into alignment with the states' interests. The first section of this Part explores each of those alternatives.

The first of the two alternatives is to impose constraints on the administrative state. This does not just mean containing the growth of the administrative state but trimming down the existing administrative state to allow more room for the states to exercise their administrative power. However, because of the Supreme Court's interpretation of the Constitution, many of the Constitution's provisions are impediments to this objective.

The Court's Commerce Clause case law, for example, has encouraged the growth of the administrative state by placing almost nothing beyond of the federal government's reach.⁶⁴⁰ As far back as the Nineteenth Century the Court found Congress's power under the Commerce Clause to be "plenary" and relied on the Clause to uphold far-reaching federal laws like the Sherman Anti-Trust Act that enlarged the scope of federal power and promoted the growth of the administrative state.⁶⁴¹ Almost nothing the Court has done since those early cases has stemmed this growth. The Court has almost always ratified Congress's use of the commerce power,⁶⁴² and even the Court's fairly recent cases invalidating congressional laws like the Gun Free School Zones Act and the Violence Against Women Act, which Congress enacted under the Commerce Clause, reveal the great pains to which the Court has gone to ensure the Constitution does not impede important national objectives.⁶⁴³ Malcolm Feeley and Edward Rubin have suggested that there may even be an inverse correlation between the relative significance of a federal law and the Court's invocation of federalism.⁶⁴⁴ Indeed, what many people thought in the 1990s was indicative of an imminent federalism revolution turned out not to be much of a revolution at all. But that is what it will take to reestablish federalism in the United States: a revolution. The Commerce Clause is an easy target, but it is not a promising one.

The same can be said for the Taxing and Spending Clause⁶⁴⁵ in terms of the development of pro-federal government doctrine in the Supreme Court, the importance of the Clauses to a federalism revival, and the improbable nature of that happening. The Court has recognized almost no limits on the federal government's taxing and spending power. The Court has held that Congress can tax and spend relatively freely for the

⁶⁴⁰ U.S. CONST. art. I, §8.

⁶⁴¹ See e.g., *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

⁶⁴² See e.g., *Gibbons*, 22 U.S. 1 (1824); *NLRB*, 301 U.S. 1 (1937); *Darby*, 312 U.S. 100 (1941); *Wickard*, 317 U.S. 111 (1942).

⁶⁴³ See e.g., *Lopez*, 514 U.S. 549 (1995); *Morrison*, 529 U.S. 598 (2000). See also *Sebelius*, 567 U.S. 1 (2012).

⁶⁴⁴ FEELEY & RUBIN, *supra* note 176, at 179.

⁶⁴⁵ U.S. CONST. art. I, §8.

“general welfare,” not only in implementing its enumerated powers.⁶⁴⁶ Moreover, the Court has held that Congress can use the taxing power to “regulate” because all taxes are in some sense regulatory,⁶⁴⁷ and can use the spending power to “encourage” states to act as the federal government wants them to act. It has found Congress to be constitutionally prohibited from imposing vague conditions on the states’ acceptance of federal money,⁶⁴⁸ and also from using money in a way that is “coercive” rather than “a mild encouragement.”⁶⁴⁹ But the Court has never clarified where the line is between what is coercive and merely encouraging, and that is where much of the potential for a resurgence of federalism lies. The Court could limit Congress’s power to tax and spend to what is necessary to implement Congress’s enumerated powers, or it could specify at what point conditional federal grants to the states are coercive. The former possibility is not only wildly unlikely, it would destroy the administrative state, and thus many of the benefits (i.e., liberty and others) that it provides. The latter possibility would be exceedingly difficult to accomplish, because as I have explained in previous chapters, the states are so dependent on federal money that even a seemingly “mild encouragement” could be coercive. This is a blind spot in the Court’s Spending Clause case law, the Court’s evaluating financial incentives in the context of the relevant statute only, instead of in the context of the relevant state or local budget. If the Court were to change its approach in these cases, it would likely find that these incentives pass the point of compulsion well before the point the Court has suggested.

This last idea is closely related to another area of potential constitutional reform, the Tenth Amendment.⁶⁵⁰ The Supreme Court has rarely relied on the Tenth Amendment as a means of protecting state sovereignty, and indeed, it has often dismissed it as a “truism” that the states retain whatever power the federal government does not possess.⁶⁵¹ Occasionally, though, the Court has found federal laws to violate the Tenth Amendment as it did in *National Federation of Independent Business v. Sebelius* in 2010.⁶⁵² The Court in *Sebelius* explained that where a condition on federal money is “coercive,” it both exceeds the Spending Clause’s limits and violates the Tenth Amendment. In this way Congress’s spending power and the Tenth Amendment are closely related. Thus, for the Constitution to protect state sovereignty and federalism, by means of the Tenth Amendment, the Court would have to recognize that even mild inducements can be coercive and articulate a clear standard for discerning on which side of the line a condition on federal money will fall.

The Supreme Court’s preemption doctrine, partially arising under the Supremacy Clause⁶⁵³ and partially a creation of the Court’s imagination, has also proven an obstacle to federalism. Preemption allows the federal government to partially or completely

⁶⁴⁶ *Butler*, 297 U.S. at 65.

⁶⁴⁷ *Sonzinsky*, 300 U.S. at 513.

⁶⁴⁸ *Pennhurst State School and Hospital v. Haldernan*, 451 U.S. 1, 20 (1981).

⁶⁴⁹ *South Dakota v. Dole*, 483 U.S. 203, 212 (1987). *See also Sebelius*, 567 U.S. ___ (2012).

⁶⁵⁰ U.S. CONST. amend. X.

⁶⁵¹ *Darby*, 312 U.S. at 124.

⁶⁵² *Sebelius*, 567 U.S. ___ (2012).

⁶⁵³ U.S. CONST. art. VI.

“evict” the states from an area of regulation where federal and state law conflict. The Court has interpreted the Supremacy Clause extremely broadly to also prohibit the states from enacting laws that create obstacles to the implementation of federal laws, even where the state law is animated by the same objectives as the federal law.⁶⁵⁴ Moreover, although the Court has recognized a “federalism canon” that directs courts to construe ambiguous federal statutes not to impinge upon areas of traditional state sovereignty,⁶⁵⁵ and a “presumption against preemption,” neither tends to affect the outcome in any case.⁶⁵⁶ Particularly, because the Court’s self-fashioned test for preemption prioritizes whether Congress intended to preempt the state law, a very unscientific determination the Court usually must make through educated guesswork, the Court has essentially abrogated the judicial role to Congress, a federal institution that has few if any incentives to protect the states or federalism.

Preemption has been one of the greatest obstacles to federalism in the Twentieth and Twenty-first Centuries, not only because the Supreme Court has found many state laws to be preempted by federal law. To be sure, the power of both the federal government and the states have grown almost exponentially since the turn of the Nineteenth Century, preemption notwithstanding. What has been more problematic for federalism is the way the Court has relied on preemption to find that the federal government can engage directly with localities without the states’ consent, and that the states cannot meddle in the federal-local relationship.⁶⁵⁷ Indeed, it was largely because the federal government could leverage direct federal-local relations that the states gave into the national agenda in the first place. Reviving federalism requires, then, that the Court narrow preemption doctrine in one or more ways. The Court could narrow the scope of “preempt-able” state laws to those that directly conflict with federal laws. Alternatively, it could give the federalism canon and the presumption against preemption some teeth by both vigorously interrogating whether Congress possesses the power to regulate and upholding the state law in every case where Congress’s intent to preempt state law is not absolutely clear. A complete reformation of the Court’s preemption doctrine, without some exogenous force for change like a constitutional amendment, is just as unlikely to occur as the other constitutional reforms discussed.

⁶⁵⁴ *Gade v. National Solid Waste Management Association*, 505 U.S. 88, 98 (1992). *See also* Cecilia Kang, *F.A.A. Drone Laws Start to Clash With Local Rules*, N.Y. TIMES, Dec. 27, 2015, available at <http://www.nytimes.com/2015/12/28/technology/faa-drone-laws-start-to-clash-with-stricter-local-rules.html>. Recently, federal and state and local officials have clashed over state and local drone regulations, which the Federal Aviation Administration has regulated, so far, in only a limited way. State and local governments, prompted by what they viewed as the F.A.A.’s failure to regulate adequately, adopted their own regulations; but the F.A.A. has argued that it has total control over the skies and thus argued that such regulations are preempted. *Id.*

⁶⁵⁵ *Gregory*, 501 U.S. 452, 460 (1990).

⁶⁵⁶ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1985); *Rice*, 331 U.S. 218, 230 (1947). *See also* CHEMERINSKY, *supra* note 21, at 226 (arguing the Court’s preemption decisions, “[a]t the very least, . . . are inconsistent” with the presumption against preemption.). *But see*, *Bond v. United States*, 564 U.S. ___ (2001).

⁶⁵⁷ *See e.g., Lawrence County*, 469 U.S. at 260-61; *City of Tacoma*, 357 U.S. at 325.

The Supreme Court seems like an unlikely source of a real federalism revolution, but what about the states themselves? The states could effect a federalism revival perhaps. What might such a state-led federalism revival look like?

The root cause this dissertation identified for federalism's decline is the divergence of interests between states and state politicians, the same state of affairs that makes the political safeguards theory fundamentally unworkable in practice. Although electoral politics exacerbates the problem by incentivizing state politicians to make decisions that jeopardize state sovereignty, eliminating elections is neither a viable nor smart option, particularly given that "democracy" is one of the most common justifications offered federalism in the United States. The states' remaining options would require them, probably through the states' citizenry, to make changes that encourage their elected representatives to make decisions based on longer-term strategic thinking.

For example, Chapter 1 explained how brief terms and term limits incentivize politicians to make shortsighted decisions that harm state institutions. In every state (except Nebraska, where there is a unicameral legislature), senators and representatives serve for either a two or four-year term. Legislators serve for four years in thirty-eight state senates and five state houses. The remainder serves for two years. Additionally, as many as twenty-one states have limited the number of times a politician may serve in the same elected office.⁶⁵⁸ Frequent elections and caps on the number of terms politicians can hold office, which are motivated by democracy-related concerns, may be worth having; but as long as elected officials must perpetually campaign and can make shortsighted decisions to improve their chances of re-election, there will always be a difference between what is in the interest of the state and what is in the interest of rational, self-interested, utility-maximizing politicians.⁶⁵⁹

Another possibility for reviving federalism relates to state law-based expenditure limits, like balanced budgets, that put state governments at a fiscal disadvantage relative to the federal government. Depending on the source, as few as forty-six and as many as forty-nine states have balanced budget requirements that are prescribed by the constitution or statute, or are grounded in limits on state indebtedness, other statutes, or custom. These requirements vary by state, but generally require the state legislature to balance the state's operating budget (usually the general fund budget). In many states, executives can only acquire long-term debt (i.e., longer than a year) with legislative approval, or the state can only acquire long-term debt with voter approval. That means,

⁶⁵⁸ *Legislative Term Limits: An Overview*, NAT'L CONF. STATE LEG. (Apr. 8, 2016), <http://www.ncsl.org/research/about-state-legislatures/legislative-term-limits-overview.aspx>.

⁶⁵⁹ Some state politicians may aspire to national political offices, and thus make decisions that reflect a different kind of strategic thinking. For example, a state politician seeking national office might vote to refuse federal grant money to bolster his or her campaign message about reducing the federal government's size, even though that vote might not be in the state's economic interest. This sub-set of state politicians is likely too small to make a difference in the context of the entire federal system; but their example shows that state politicians may be motivated by a variety of electoral (and non-electoral concerns) and are not monolithic in terms of how they approach decision-making.

as a practical matter, that the federal government has substantially greater financial flexibility than the states and is often in a position to leverage financial resources it does not necessarily have to mobilize state participation in federal programs. Amending these expenditure limits may alleviate this power differential, although it is worth noting that in most states the most powerful enforcer of balanced budget requirements is not any law, but custom.⁶⁶⁰ Raising limits on state indebtedness or eliminated balanced budget requirements at the state level, then, might not change the states' position vis-à-vis the federal government; norms often are more difficult to change than formal rules.

In a similar vein, states could eliminate some or all of the revenue raising limits on local governments specifically, which motivate localities to look to the federal government to supplement the budget. According to an American Progress report, forty-seven states as of 2013 had limits on property taxes, the principle source of revenue for most localities. These limits included "limits on the maximum rate of growth for total revenue or spending, caps on total property tax collections, and caps on the share of property considered taxable."⁶⁶¹ The same report noted that many states "sharply" limit local sales taxes by limiting the amount of the tax or requiring voter approval before the tax can be implemented.⁶⁶² Consequently, many localities find it virtually impossible to offer a minimum standard of goods and services without at least some income from federal sources. This inevitably puts the states in the unenviable position of either entangling themselves in a new federal scheme in order to obtain some control over federal income, or embracing the same federal-local engagement that facilitates the states' increasing obsolescence. Neither of these options is particularly appealing, but given the state elected officials' incentives, the first option will usually seem to be the better of the two.

b. Is Reform Worth It?

Whether constitutional or statutory reform is likely (no) or possible (probably no) are separate questions entirely from the question of whether any reform is prudent. The answer to that question, like the other two, is no.

Whereas some form of federal system was necessary at the founding to achieve Union, federalism is not necessary today. As Malcolm Feeley and Edward Rubin have argued, federalism is irrelevant.⁶⁶³ What is necessary instead is decentralization, a management tool that makes the vast United States govern-able. Some differences persist among the states,⁶⁶⁴ but those differences are too few and minor to consider the

⁶⁶⁰ NAT'L CONF. STATE LEG., NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS 2 (2010). *See also* Bert Waisanen, *State and Tax Expenditure Limits*, NAT'L CONF. STATE LEG. (Apr. 8, 2016), <http://www.ncsl.org/research/fiscal-policy/state-tax-and-expenditure-limits-2010.aspx>.

⁶⁶¹ CENTER FOR AMERICAN PROGRESS FUND, *CITIES AT WORK: PROGRESSIVE LOCAL POLIES TO REBUILD THE MIDDLE CLASS* 167 (2014).

⁶⁶² *Id.*

⁶⁶³ FEELEY & RUBIN, *supra* note 176, at 175.

⁶⁶⁴ *See generally* Ernest Young, *The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System?* (Duke Law Sch. Working Paper, 2015), *available at* http://scholarship.law.duke.edu/faculty_scholarship/3431.

states distinct political communities. To the contrary, the United States has one political community, the national political community, that agrees generally on the wisdom of specific objectives despite sometimes-aggressive disagreement in the states regarding strategy.

Ernest Young has claimed in a long and careful recent article *The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System* that “reports of the death of state identity are greatly exaggerated.”⁶⁶⁵ Young describes all manner of demographic and other differences that characterize the fifty states in an effort to assess the familiar empirical claim that the United States is mostly homogenous. Still, it is possible that the differences Young identifies are grounded not in state-based affective communities with distinctive political identities, but in political parties, community organizations, religion, race, and class. Moreover, it is plausible, maybe even likely, that the differences Young identifies are not sufficiently important to maintain the federal bargain, in part because they seem hardly important enough to have made the federal bargain necessary in the first place.⁶⁶⁶ Lastly, that there are differences among decentralized units in a national polity is not necessarily a justification for federalism. In countries with unitary governments like France (and arguably Italy and Spain), where there is a high degree of decentralization, many local governing units are tasked with managing communities that are far more culturally, ethnically, and religiously distinctive than most of the states in the United States.⁶⁶⁷

When federalism’s most ardent American apologists claim that federalism today “comes from” Congress, or that the states most powerful claim of right in federal-state battles is an appeal to federal law, what they are implicitly recognizing is the merger of the national and state political communities into one political community. Recognizing our country’s abiding commitment to one or more national objectives, and a multiplicity of views regarding strategy, these scholars recognize the singularity of our nation’s political identity and the need for decentralization. Federalism has nothing to do with it.

Whether it works the way it was intended, the American system of government works for Americans, for the most part. The states advance albeit in a limited way the pursuit of goals commonly associated with federalism, even if there are better ways of achieving those goals. The states also satisfy the practical need to decentralize, even if decentralization could be achieved in some other, non-geographically based way. Lastly, the states are integral to America’s identity, not because the states are necessarily distinctive, but because the very ideas of “states” and “federalism” are an important part of what most Americans think America is. That is why, even as the states’ administrative power withers away, their political power—i.e., their power to select their own leaders and the like—should be left in tact.

⁶⁶⁵ *Id.*

⁶⁶⁶ E.g., “the latte gap” (referring to Starbucks per capita), West Virginia is the “most toothless” state, etc..

⁶⁶⁷ See Alitair Cole, *France between Centralization and Fragmentation*, in THE OXFORD HANDBOOK OF LOCAL AND REGIONAL DEMOCRACY IN EUROPE (John Loughlin, Frank Hendriks, & Anders Lidstrom, ed., 2011); THE OXFORD HANDBOOK OF LOCAL AND REGIONAL DEMOCRACY IN EUROPE (Loughlin, John, Frank Hendriks, & Anders Lidstrom, ed., 2011).

But leaving the states' political power in tact does not mean saving the states either from the federal government or themselves. Federalism in the United States should be abandoned insofar as it is an obstacle to achieving national objectives. This statement applies with particular vigor to the Supreme Court.

As I have already suggested, the Supreme Court generally has not been on the states' "side" in federal-state disputes; although every once in a while, the Court invokes federalism and state sovereignty to invalidate a federal law. In most cases where the Court has invoked federalism to strike down a federal law, it has not mattered much because the law at issue duplicated state law or only constituted a small and relatively unimportant part of a much bigger federal scheme. On rare occasions, however, the Court has invalidated important federal laws based on federalism and created a bar to achieving national goals, such as prohibiting child labor, regulating monopolies, and expanding religious freedom.⁶⁶⁸ This is not only objectionable on its own terms, but if the Court only infrequently and inconsistently polices the exercise of federal power, such "one-off" decisions can confuse matters and impede progress, which is increasingly hard to come by in our polarized political environment.

To be sure, I do not suggest that we abolish the states, only that, as Jesse Choper suggested decades ago, the Supreme Court should declare federalism issues non-justiciable.⁶⁶⁹ This is not because, as Choper suggested, federalism cases are "hard cases" or because the Court has limited resources, but because federalism does not matter. Indeed, insisting on federalism not only hurts progress, it potentially undermines democracy by forcing social change to occur at the whim of activist, policy-making judges like those Malcolm Feeley and Edward Rubin describe in *Judicial Policy Making and the Administrative State*.⁶⁷⁰ As Feeley and Rubin suggest, judges sometimes do a fairly competent job affecting such changes, but they are not democratically elected or politically accountable, and the change they affect is slow and inconsistent.

None of this is to disparage federalism as a theory or method of government or to suggest that the states should not, where they can, protect themselves. When the states have resisted the expansion of federal power, or more commonly, when the states have resisted the federal government's approach to a mutually agreed upon end, it has resulted in national programs that are better tailored to local needs and encouraged local participation in government, both generally "good" things. But we should eschew the constitutional formalism that occasionally results in the Supreme Court's throwing a ratchet in some national program that most Americans and likely most states believe to be beneficial for the country. Our federalism may be special in many ways to many people, but it is also fake, and we should let it go.

Part VI: Conclusion

This Chapter drew out some of the lessons of this dissertation, identified flaws in

⁶⁶⁸ ERWIN CHERMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE TWENTY-FIRST CENTURY 159 (2008). See also *Hammer*, 247 U.S. 251 (1918); *E. C. Knight*, 136 U.S. 1 (1891); *City of Boerne*, 521 U.S. 507 (1997).

⁶⁶⁹ See generally CHOPER, *supra* note 9.

⁶⁷⁰ See generally FEELEY & RUBIN, *supra* note 176.

the work of those writing in this area today, and suggested how the United States might go on with or without federalism. This work broadly challenged the familiar trope of the over-reaching federal government expanding its power at the expense of the unwilling states; it suggested instead that the states for decades have been complicit in federalism's undoing, and that the federal government's role in diminishing the states' power is only partially to blame for the current state of "Our Federalism."

In the end, it is not my aim to advocate for real federalism. This work was animated only by a desire to demonstrate that the United States no longer has a federal system of government and to explain how and why that change took place. To be sure, the Constitution's framers never imagined the United States government to be wholly federal; it was to be partly federal, partly national. However, even those aspects of the United States government that made it partly federal in the beginning have largely withered away, re-constituting it as a pseudo-unitary albeit decentralized government.

It is also not my aim to disparage real federalism. There are important advantages that distinguish federalism from other forms of government, like allowing ideologically distinct communities to live and work together, and federalism has worked well in many countries.

If the United States is to have a federal system of government, the first step is to recognize that it does not have a federal system of government now. But before that, it must be determined whether federalism is worth having in the first place. In a country where most people identify first with their country and "progress" is defined similarly in most places, the answer is that it probably is not. There are plenty of countries that enjoy federalism's supposed benefits without federalism. The United States should join them.

Selected Bibliography

- Agranoff, Robert. "Relations Between Local and National Governments." In *The Oxford Handbook of State and Local Government*, ed. Haider-Markel. Cary: Oxford University Press, 2014.
- Amanda L. Tyler. "The Forgotten Core Meaning of the Suspension Clause." *Harvard Law Review* 125: 901 (2011).
- Anderson, Michelle Wilde. "Dissolving Cities." *Yale Law Journal* 121:1364 (2012).
- Baker, Jr., John S. "State Police Powers and the Federalization of Local Crime." *Temple Law Review* 72:673 (1999).
- Barron, David J. and Todd D. Rakoff. "In Defense of Big Waiver." *Columbia Law Review* 113:265 (2013).
- Barron, David. "A Localist Critique of the New Federalism." *Duke Law Journal* 51:377 (2001).
- Bayoumi, Tamim and Paul R. Masson. "Fiscal Flows in the United States and Canada: Lessons for Monetary Union in Europe." *Europe Economics Review* 39:253 (1993).
- Beale, Sara S. "Federal Criminal Jurisdiction." In *Encyclopedia of Crime and Justice*, ed. Sanford H. Kadish. New York: Free Press, 1983.
- Beale, Sara S. "Federalizing Crime: Assessing the Impact on the Federal Courts." *Annals* 543:39 (1996).
- Beale, Sara Sun. "Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law." *Hastings Law Journal* 46:1277 (1994).
- Benson, Bruce L., David W. Rasmussen, and David L. Sollars. "Police Bureaucracies, Their Incentives, and the War on Drugs." *Public Choice* 83:21 (1995).
- Berman, David R. *State and Local Politics*. 8th ed. Pub City, State: Pub, 1997.
- Berry, Christopher and Jacob Gersen, "The Unbundled Executive." *University of Chicago Law Review* 75:1385 (2008).
- Berube, Maurice R. *American Presidents and Education*. New York: Greenwood, 1991.
- Billig, Shelley H. "Title I of the Improving America's Schools Act: What It Looks Like in Practice." *Journal of Education for Students Placed at Risk* 2:329 (1997).
- Black, Derek W. "Federalizing Education by Waiver?." *Vanderbilt Law Review* 68:607 (2015).
- Blomberg, Thomas G. and Karol Lucken. *American Penology: A History of Crime Control*. 2nd ed. New York: Hawthorne, 2010.
- Bonfiglioli, Alessandra and Gino Gancia. "Uncertainty, Electoral Incentives and Political Myopia." *Economics Journal* 123:373 (2013).
- Bosworth, Mary F. *The U.S. Federal Prison System*. Thousand Oaks, Sage Publications, 2004.
- Bowman, Ann O'M. and Richard C. Kearney. *State and Local Government*. 8th ed. Boston: Wadsworth Cengage Learning, 2011.
- Boyer, Ernest L. "Public Law 94-142: A Promising Start?." *Educational Leadership* 36:298 (1979).
- Brickey, Kathleen F. "Criminal Mischief: The Federalization of American Criminal Law." *Hastings Law Journal* 46:1135 (1995).

- Briffault, Richard. "Our Localism II: Part II—Localism and Legal Theory." *Columbia Law Review* 90:346 (1990).
- Briffault, Richard. "Our Localism: Part I—The Structure of Local Government Law." *Columbia Law Review* 90:1 (1990).
- Briffault, Richard. "What About the 'Ism'? Normative and Formal Concerns in Contemporary Federalism." *Vanderbilt Law Review* 47:1303 (1994).
- Brownless, W. Elliot. *Federal Taxation in America: A Short History*. New York: Cambridge University Press, 1996.
- Buchanan, James M. and Gordon Tullock. *The Calculus of Consent*. Ann Arbor: University of Michigan Press, 1962.
- Bulman-Pozen, Jessica and Heather Gerken. "Uncooperative Federalism." *Yale Law Journal* 118:1256 (2009).
- Bulman-Pozen, Jessica. "Partisan Federalism." *Harvard Law Review* 127:1077 (2014).
- Carpenter, Daniel. *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928*. Princeton: Princeton University Press, 2001.
- Cascio, Elizabeth U., Nora Gordon, and Sarah Reber. "Local Responses to Federal Grants: Evidence from the Introduction of Title I in the South." *American Economic Journal: Economic Policy* 5:126 (2013).
- Cascio, Elizabeth, Nora Gordon, Ethan Lewis, and Sarah Reber. "Paying for Progress: Conditional Grants and Desegregation of Southern Schools." *Quarterly Journal of Economics* 125:1 (2010).
- Charles M. Tiebout. "A Pure Theory of Local Expenditures." *Journal of Political Economy* 64:416 (1956).
- Chemerinsky, Erwin. "Does Federalism Advance Liberty." *Wayne Law Review* 47: 911 (2002).
- Chemerinsky, Erwin. *Constitutional Law: Principles and Policies*. 2nd ed. New York: Aspen Publishers, 2002.
- Chemerinsky, Erwin. *Enhancing Government: Federalism for the Twenty-First Century*. Stanford: Stanford University Press, 2008.
- Choper, Jesse H. *Judicial Review and the National Political Process*. Chicago: University of Chicago Press, 1980.
- Chubb, John E. "Excessive Regulation: The Case of Federal Aid to Education." *Political Science Quarterly* 100:287 (1985).
- Clune, William H. and Mark H. Van Pelt. "A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis." *Law and Contemporary Problems* 48:1 (1966).
- Conlan, Timothy J. "The Politics of Federal Block Grants: From Nixon to Reagan." *Political Science Quarterly* 99:247 (1984).
- Cooter, Robert C. *The Strategic Constitution*. Princeton: Princeton University Press, 2000.
- Corwin, Edward S. "The Passing of Dual Federalism." *Virginia Law Review* 36:1 (1950).
- Coyle, Arlen B. and Shannon Deen Turner. "The Federal Commitment to Crime Control and its Influence on the Mississippi Judicial System." *Mississippi Law Journal* 46:817 (1975).

- Currie, David P. *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*. Chicago: University of Chicago Press, 1997.
- Daniel J. Elazar, Daniel J. "Cooperative Federalism." In *Competition Among States and Local Governments: Efficiency and Equity in American Federalism*, ed. Daphne A. Kenyon and John Kincaid. Washington, DC: Urban Institute Press, 1991.
- Davies, Gareth. *See Government Grow: Education Politics from Johnson to Reagan*. Lawrence: University of Kansas Press, 2007.
- Diegelman, Robert F. "Federal Financial Assistance for Crime Control: Lessons of the LEAA Experience." *Journal of Criminal Law and Criminology* 73:994 (1982).
- Edward A. Loucks. "The New Federal and the Suburbs." *Growth and Change* 9:2 (1978).
- Ehrlich, Susan A. "The Increasing Federalization of Crime." *Arizona State Law Journal* 32:825 (2000).
- Elazar, Daniel J. "Federal-State Collaboration in the Nineteenth-Century United States." *Political Science Quarterly* 79:248 (1964).
- Elazar, Daniel J. "Federalism vs. Decentralization: The Drift from Authenticity." *Publius* 6:9 (1976).
- Elazar, Daniel J. "The Shaping of Intergovernmental Relations in the Twentieth Century." *Annals* 359:10 (1965).
- Elazar, Daniel J. *Exploring Federalism*. Tuscaloosa: University of Alabama Press, 1987.
- Fahey, Bridget A. "Consent Procedures and American Federalism." *Harvard Law Review* 128:1561 (2015).
- Feeley, Malcolm and Edward Rubin. *Federalism: Political Identity and Tragic Compromise*. Ann Arbor: University of Michigan Press, 2008.
- Feeley, Malcolm and Edward Rubin. *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*. New York: Cambridge University Press, 2000.
- Feeley, Malcolm M. and Austin D. Sarat. *The Policy Dilemma: Federal Crime Policy and the Law Enforcement Assistance Administration, 1968-1978*. Cambridge: Cambridge University Press, 1980.
- Fillippov, Mikhail, Peter C. Ordeshook, and Olga Shvetsova. *Designing Federalism: A Theory of Self-Sustaining Federal Institutions*. New York: Cambridge University Press, 2004.
- Foster, Price J. and Christopher Hughes. "Law Enforcement Assistance Administration." In *Encyclopedia of Criminology and Criminal Justice*, ed. Gerben Bruinsma and David Weisburd. New York: Springer, 2014.
- Franck, Thomas M. *Why Federations Fail: An Inquiry into the Requisites for Successful Federalism*. New York: New York University Press, 1968.
- Gardner, James A. "The 'States-As-Laboratories' Metaphor in State Constitutional Law." *Valparaiso University Law Review* 30:475 (1996).
- Gerken, Heather K. "Dissenting by Deciding." *Stanford Law Review* 57:1745 (2005).
- Gerken, Heather K. "Federalism as the New Nationalism: An Overview." *Yale Law Journal* 123:1889 (2014).
- Gerken, Heather. "Our Federalism(s)." *William and Mary Law Review* 53:1549 (2012).
- Gluck, Abbe. "Our [National] Federalism." *Yale Law Review* 123:1996 (2014).
- Graham, Hugh Davis. *The Transformation of Federal Education Policy: The Kennedy and Johnson Years*. Washington, DC: National Institute of Education, 1983.

- Greenspan, Alan N. "The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism." *Vanderbilt Law Review* 41:1019 (1988).
- Greve, Michael S. "Against Cooperative Federalism." *Mississippi Law Journal* 70:557 (2000).
- Greve, Michael S. *Real Federalism: Why It Matters, How It Can Happen*. Washington, DC: AEI Press, 1999.
- Greve, Michael S. *The Upside-Down Constitution*. Cambridge: Harvard University Press, 2012.
- Grodzins, Morton. *The American System: A New View of Government in the United States*. Chicago: Rand McNally, 1966.
- Guerra, Sandra. "The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy." *North Carolina Law Review* 73:1159 (1994).
- Herman, Susan N. "Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror." *Willamette Law Review* 41:941 (2005).
- Hills, Jr., Roderick M. "Dissecting the State: The Use of Federal Law to Free State and Local Officials From State Legislatures' Control." *Michigan Law Review* 97:1201 (1999).
- Hills, Jr., Roderick M. "Is Federalism Good for Localism?." *Journal of Law and Policy* 21:187 (2005).
- Hudzik, John K. *Federal Aid to Criminal Justice: Rhetoric, Results, Lessons*. Washington, DC: National Criminal Justice Association, 1984.
- Jacobs, James B. and Kerry T. Cooperman. "A Proposed National Corrections College." *Criminal and Civil Confinement* 38:57 (2012).
- Kaestle, Carl F. "Federal Aid to Education Since World War II: Purposes and Politics." In *The Future of the Federal Role in Elementary and Secondary Education*, ed. Jack Jennings. Washington, DC: Center for Education Policy, 2001.
- Kaestle, Carl F. and Marshall S. Smith. "The Federal Role in Elementary and Secondary Education, 1940-1980." *Harvard Educational Review* 52:384 (1982).
- Kleinerman, Benjamin. "William Riker's 'Rationalist' Federalism." In *The Ashgate Research Companion to Federalism*, ed. Ann Ward and Lee Ward. Burlington: Ashgate, 2009.
- Kluger, Richard. *Simple Justice*. 2nd ed. New York: Notable Trials Library, 1994.
- Kopel, David B. and Trevor Burrus. "Reducing the Drug War's Damage to Government Budgets." *Harvard Journal of Law and Public Policy* 35:543 (2012).
- Kramer, Larry D. "Putting the Politics Back into the Political Safeguards of Federalism." *Columbia Law Review* 100:215 (2000).
- Kurzweil, Martin A. "Disciplined Devolution and the New Education Federalism." *California Law Review* 103:565 (2015).
- Livingston, Debra. "Police Reform and the Department of Justice: An Essay on Accountability." *Buffalo Criminal Law Review* 2:817 (1999).
- Loveless, Tom. "The Peculiar Politics of No Child Left Behind." In *Standards-Based Reform and the Poverty Gap: Lessons for No Child Left Behind*, ed. Adam Gamoran. Washington, DC: Brookings Institution Press, 2007.
- Mahoney, Barry. *The Politics of the Safe Streets Act, 1965-1973: A Case Study in Evolving Federalism and the National Legislative Process*. Ph.D. Dissertation. 1976.

- Mansfield, Harvey C. "Functions of State and Local Governments." In *The 50 States and Their Local Governments*, ed. James W. Fesler. New York: Knopf, 1967.
- Marion, Nancy E. *A History of Federal Crime Control Initiatives, 1960-1993*. Westport: Praeger, 1994.
- Martin, Roscoe C. *The Cities and the Federal System*. New York: Atherton Press, 1965.
- Mayhew, David. *Congress: The Electoral Connection*. New Haven: Yale University Press, 1974.
- McGuinn, Patrick and Frederick Hess. "Freedom From Ignorance? The Great Society and the Evolution of the Elementary and Secondary Education Act." In *The Great Society and the High Tide of Liberalism*, ed. Sidney Milkis and Jermone Mileur. Amherst: University of Massachusetts Press, 2005.
- Mettler, Suzanne. *Soldiers to Citizens: The G.I. Bill and the Making of the Greatest Generation*. New York: Oxford University Press, 2005.
- Meyer, John W., W. Richard Scott, David Strang, and Andrew L. Creighton. "Bureaucratization Without Centralization: Changes in the Organizational System of U.S. Public Education, 1940-80." In *Institutional Patterns and Organizations: Culture and Environment*, ed. Lynne G. Zucker. Cambridge: Ballinger Publication Company, 1988.
- Munger, Frank J. and Richard F. Fenno. *National Politics and Federal Aid to Education*. Syracuse: Syracuse University Press, 1962.
- Murray, Melissa. "When War is Work: The G.I. Bill, Citizenship, and the Civic Generation." *California Law Review* 96:967 (2008).
- O'Hear, Michael M. "Federalism and Drug Control." *Vanderbilt Law Review* 57:783 (2002).
- Oates, Wallace E. *Fiscal Federalism*. New York: Harcourt Brace Jovanovich, 1972.
- Orren, Karen and Stephen Skowronek. *The Search for American Political Development*. New York: Cambridge University Press, 2004.
- Pagano, Michel. "United States of America." In *Local Government and Metropolitan Regions in Federal Countries*, ed. John Kincaid and Nico Steytler. Montreal: McGill Queens University Press, 2009.
- Parenti, Christian. *Lockdown America: Police and Prisons in the Age of Crisis*. New York: Verso, 1999.
- Posner, Richard. *Economic Analysis of Law*. 4th ed. Boston: Little, Brown, 1992.
- Rascoff, Samuel J. "The Law of Homegrown (Counter)Terrorism." *Texas Law Review* 88:1715 (2010).
- Ravitch, Diane. *The Troubled Crusade, 1945-1980*. New York: Basic Books, 1983.
- Richman, Daniel. "The Past, Present, and Future of Violent Crime Federalism." *Crime and Justice* 34:377 (2006).
- Riker, William H. *Federalism: Origins, Operation, Significance*. Boston: Little, Brown, 1964.
- Rivlin, Alice M. *Reviving the American Dream: The Economy, the States & the Federal Government*. Washington, DC: Brookings Institution Press, 1992.
- Rodriguez, Cristina M. "Negotiating Conflict Through Federalism: Institutional and Popular Perspectives." *Yale Law Review* 123:2094 (2014).
- Rose-Ackerman, Susan. "Risk Taking and Reelection: Does Federalism Promote Innovation?." *Journal of Legal Studies* 9:593 (1980).

- Rubin, Edward L. "Puppy Federalism and the Blessings of America." *Annals* 574:37 (2001).
- Rubin, Edward L. and Malcolm Feeley. "Federalism: Some Notes on a National Neurosis." *UCLA Law Review* 41:903 (1993).
- Rushin, Stephen. "Federal Enforcement of Police Reform." *Fordham Law Review* 82:3189 (2014).
- Rushin, Stephen. "Structural Reform Litigation in American Police Departments." *Minnesota Law Review* 99:1343 (2015).
- Sanders, Beth R. *School Leaders and the Challenge of the Elementary and Secondary Education Act, 1960-1968*. Ph.D. Dissertation. 2010.
- Schragger, Richard C. "Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in the Federal System." *Yale Law Journal* 115:2542 (2005).
- Seifter, Miriam. "States as Interest Groups in the Administrative Process." *Virginia Law Review* 100:953 (2014).
- Shahidullah, Shahid M. *Crime Policy in America: Laws, Institutions, and Programs*. Lanham: University Press of America, 2008.
- Shelly, Bryan. *Money, Mandates, and Local Control in American Public Education*. Ann Arbor: University of Michigan Press, 2011.
- Sherman, Lawrence W. "Research and Policing: The Infrastructure and Political Economy of Federal Funding." *Annals* 593:156 (2004).
- Shugerman, Jed Handelsman. "The Creation of the Department of Justice." *Stanford Law Review* 66:121 (2014).
- Skowronek, Stephen. *Building A New American State: The Expansion of National Administrative Capacities: 1877-1920*. New York: Cambridge University Press, 1982.
- Steel, Ronald. *Federal Aid to Education*. New York: H. W. Wilson Company, 1961.
- Stickney, Benjamin and Laurence Marcus. *The Great Education Debate: Washington and the Schools*. Springfield: C. C. Thomas, 1984.
- Sunderman, Gail L. and Gary Orfield. "Massive Responsibilities and Limited Resources: The State Response to NCLB." In *Holding NCLB Accountable: Achieving Accountability, Equity and School Reform*, ed. Gail L. Sunderman. Thousand Oaks: Corwin Press, 2008.
- Sundquist, James L. *Politics and Policy: The Eisenhower, Kennedy, and Johnson Years*. Washington, DC: Brookings Institution Press, 1968.
- Thomas, George. *The Founders and the Idea of a National University: Constituting the American Mind*. New York: Cambridge University Press, 2014.
- Timpane, P. Michael. "Reform Through Congress, Federal Aid to Schools: Its Limited Future." *Law and Contemporary Problems* 38:493 (1974).
- Tyack, David B, Robert Lowe, and Elisabeth Hansot. *Public Schools in Hard Times*. Cambridge: Harvard University Press, 1984.
- Varon, Jay N. "A Reexamination of the Law Enforcement Assistance Administration." *Stanford Law Review* 27:1303 (1975).
- Watson, Dwight. *Race and the Houston Police Department, 1930-1990: A Change Did Come*. College Station: Texas A&M University Press, 2005.

- Waxman, Matthew C. "Police and National Security: American Local Law Enforcement and Counter-Terrorism After 9/11." *Journal of National Security Law and Policy* 3:377 (2009).
- Wechsler, Herbert. "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government." *Columbia Law Review* 54:543 (1954).
- Wheare, Kenneth C. *Federal Government*. 3rd ed. London: Oxford University Press, 1953.
- Yoo, John C. "Sounds of Sovereignty: Defining Federalism in the 1990s." *Indiana Law Review* 32:27 (1998).
- Young, Ernest A. "A Research Agenda for Uncooperative Federalists." *Tulsa Law Review* 48:427 (2013).
- Young, Ernest A. "Two Cheers for Process Federalism." *Villanova Law Review* 46:1349 (2001).
- Young, Ernest A. "Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terrorism." *Brooklyn Law Review* 69:1277 (2004).
- Young, Ernest. "The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System, ?." *Working Paper* (2015).
- Ziblatt, Daniel. *Structuring the State: The Formation of Italy and Germany and the Puzzle of Federalism*. Princeton: Princeton University Press, 2008.

Appendix

Table 1: Federal, State, and Local Government Finances, 1902-2015

Year	Total Grants (2009 dollars, in billions)	Percent of Total Federal Outlays	Total Federal Expenditures (in billions)	Total State/Local Government Expenditures (in billions)	Federal Grants as Percent of State Revenue
1902					1.6
1913					1.6
1922					7.9
1932					9.2
1940	15.4	9.2			15.2
1945	11.7	0.9			
1950	21.9	5.3	42.6	20.4	20.2
1955	27.1	4.7	68.4	30.4	
1960	51.5	7.6	92.2	45.2	23.2
1965	75.4	9.2	118.2	65.9	
1970	141.5	12.3	195.6	106.6	24.8
1975	214.5	15.0	332.3	175.2	
1980	264.1	15.5	590.9	266.9	26.8
1985	217	11.2	946.3	403.8	
1990	224.3	10.8	1,253.0	623.2	24.6
1995	318.3	14.8	1,515.7	845.1	
2000	366.1	16.0	1,789.0	1,081.1	26
2005	480.1	17.3	3,951.6	1,479.7	28.9
2010	602.9	17.6	5,254.2	1,817.1	34.8
2015	568.2 (estimate)	16.7	5,463.4*	1,957.3*	

***2014**