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DISSECTING THE STATE: THE USE OF FEDERAL LAW TO FREE STATE AND LOCAL OFFICIALS FROM STATE LEGISLATURES' CONTROL

Roderick M. Hills, Jr.*

In discussions about American federalism, it is common to speak of a "state government" as if it were a black box, an individual speaking with a single voice.¹ State governments are, of course, no such thing. Rather, a "state" actually incorporates a bundle of different subdivisions, branches, and agencies controlled by politicians who often compete with each other for electoral success and governmental power. In particular, these institutions compete with each other for the power to control federal funds and implement federal programs.²

This article explores one aspect of this intrastate competition — the extent to which federal law can delegate federal powers to specific state or local institutions even against the will of the state legislature.³ Must the federal government take state institutions as it finds them, or can it expand these institutions' powers even in the teeth of state laws that seem to bar the institutions from exercising such federally derived powers?

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1. See Daniel B. Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, 14 YALE L. & POLY. REV. 149, 155 (1996).

2. For a discussion of such competition, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 875-86 (1998).

3. In the interest of conserving space, I will not discuss the ways in which judicially-imposed remedies such as consent decrees might be used to expand the powers of state or local agencies or officers. The effect of judicial orders and decrees on state or local officers' powers, however, is closely related to the issues raised in this article. In *Missouri v. Jenkins*, 495 U.S. 33 (1990), for instance, the Supreme Court held that a federal district court could desegregate public schools by authorizing the school district — nominally a defendant in the litigation — to raise property taxes in excess of the millage limits contained in the state constitution. By allowing such a remedy for a constitutional violation, the Court effectively allowed a federal district court to dissect the state by liberating a subdivision of a state from the control of state law.

Such an issue can arise in two contexts. First, Congress or a federal agency might simply delegate powers to some nonfederal governmental institution created by state law — say, a city — while state law might prohibit the nonfederal institution from exercising such powers. For instance, the City of Tacoma and the State of Washington became entangled in a lengthy power struggle during the 1950s when the Federal Power Commission licensed the city to build a dam on the Cowlitz River, a tributary of the Columbia River. The State of Washington sought to prevent the construction of the dam to protect state-owned hatcheries from being flooded. Washington invoked a state law barring the city from constructing the proposed dam, but Tacoma successfully argued before the U.S. Court of Appeals for the Ninth Circuit that its federal license preempted state law.⁴ In effect, the city — a creature of the state — had invoked federal law to defeat the will of the state government, its creator.

The federal government, however, rarely attempts so crudely to override state law. Instead, the issue of nonfederal officials' federally derived powers typically arises more subtly in the context of ambiguous federal grants. When the federal government bestows federal grants-in-aid on some category of state or local officials — say, county commissions or the governor of a state — the state legislature sometimes attempts to appropriate the revenue in order to control how it is allocated, either by directly ordering the federal money to be spent according to state priorities or by reducing state aid by the amount of the federal grant, thus effectively converting federal funds to state purposes. In response to these conversion attempts, federal grant law may then give the initial recipient the power to resist the state legislature's attempt to appropriate or offset the federal funds. The question then arises: Who controls the federal money?

For instance, at issue in *Lawrence County v. Lead-Deadwood School District*⁵ was Congress's bestowal of federal funds on county governments to compensate them for tax losses resulting from the presence of federally owned, tax-exempt land (national parks, for

4. See *Washington Dept. of Game v. Federal Power Commn.*, 207 F.2d 391, 396 (9th Cir. 1953). The Washington Supreme Court reached a different conclusion in *City of Tacoma v. Taxpayers of Tacoma*, 262 P.2d 214, 229 (Wash. 1953) [hereinafter *City of Tacoma I*], a decision that the U.S. Supreme Court reversed on the grounds that it was precluded by the Ninth Circuit's earlier decision of the same issue, see *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340 (1958) [hereinafter *City of Tacoma III*]. I discuss this convoluted controversy at *infra* notes 19-22 and accompanying text and *infra* section III.A.

5. 469 U.S. 256 (1985).

instance) located within their boundaries. To control this federal money, the South Dakota legislature had enacted a statute requiring the county to pay over sixty percent of the federal revenues to the local school district.⁶ The county, however, successfully argued that the federal grant preempted state law by giving the county unfettered and final authority to dispose of the federal revenue as it chose.⁷

A similar conflict arises when state legislatures attempt to appropriate federal grant revenue that has been awarded by the federal government to the governor. Several state supreme courts have wrestled with the question of whether state legislatures may appropriate such federal funds. Invoking state constitutional separation of powers doctrine, some state courts have held that the state legislature cannot exercise appropriation power over the money, at least absent clear federal authorization for such appropriation.⁸

This article attempts to answer the thorny constitutional and statutory questions that arise whenever the federal government uses either its regulatory power or its spending power to dissect the state, unpacking the black box of "the state" to liberate certain state or local institutions from the control of state laws. Should Congress be permitted to insulate local governments and state agencies from the control of the state legislature through preemptive regulatory legislation? And when Congress uses its spending power to dissect the state, how should courts construe ambiguities in the grant programs? Should courts construe federal statutes and state constitutions to protect the freedom of the state's subparts — its local governments, agencies, governor, etc. — from the centralizing power of the state legislature? To retard it and encourage legislative control? Or is there no intelligible way to generalize about these institutional questions across different grant programs?

As Part I of this article explains, neither precedent nor policy provides any clear guidance on these issues. Many courts and commentators seem to assume without argument that the federal government may not bestow powers on local governments when those powers are forbidden by the relevant state statutory or constitu-

6. See S.D. CODIFIED LAWS §5-11-6 (Michie 1993 & Supp. 1998).

7. See *Lawrence County*, 469 U.S. at 269. I discuss *Lawrence County* at *infra* notes 104-19 and accompanying text.

8. See *Navajo Tribe v. Arizona Dept. of Admin.*, 528 P.2d 623 (Ariz. 1975); *Mac Manus v. Love*, 499 P.2d 609 (Colo. 1972); *Opinion of the Justices to the Senate*, 378 N.E.2d 433 (Mass. 1978); *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975 (N.M. 1974). I discuss these cases in more detail at *infra* notes 155-156 and accompanying text.

tional law.⁹ Under this theory, mayors, governors, city councils, or county commissions can act as the agents of the federal government only if state law does not forbid it. I call this view the "principle of state supremacy." Notwithstanding conventional opinion to the contrary, there are no precedents from either the Supreme Court or any lower court explaining why or even whether the principle of state supremacy is actually part of established constitutional doctrine. As I argue in section I.A, one can make colorable arguments that the principle of state supremacy is implied by the Court's "state autonomy" precedents such as *New York v. United States*¹⁰ and *Printz v. United States*.¹¹ But these are merely plausible arguments, and there are plausible arguments on the other side.

Considerations of sensible policy also do not unambiguously resolve this impasse in the precedents. On one hand, there is a respectable argument (which I lay out in section I.B) that the principle of state supremacy helps promote cost-effective and politically accountable local governance. Congress is probably not as well-suited for designing institutions for local governance as state legislatures. But, on the other hand, the principle of state supremacy has costs as well as benefits: it could conceivably pose a threat to cooperative federalism.¹² As I suggest in section I.C, the danger of state supremacy is that state laws might inefficiently prevent nonfederal officials and institutions — governors and state legislatures, counties, cities, special districts, and other state agencies — from competing with each other for federal funds. This intergovernmental competition is useful, because it allows Congress to bypass nonfederal officials who fail to implement federal policy faithfully and instead to delegate power to other nonfederal officials who demonstrate greater fidelity to federal policies. But such intergovernmental competition vanishes if the principle of state supremacy allows the state legislature to centralize the structure of state government and bar nonfederal officials from implementing federal policy.

9. See *infra* note 21.

10. 505 U.S. 144 (1992).

11. 521 U.S. 98 (1997).

12. "Cooperative federalism" refers to intergovernmental cooperation between the federal and state or local governments, under which nonfederal officials implement federal policy, frequently receiving federal grant revenue in return. For general accounts of such intergovernmental relations, see TIMOTHY CONLAN, *NEW FEDERALISM: INTERGOVERNMENTAL REFORM FROM NIXON TO REAGAN* (1988); DAVID WALKER, *THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON* (1995); DEIL S. WRIGHT, *UNDERSTANDING INTERGOVERNMENTAL RELATIONS* (3d ed. 1988).

The question, therefore, arises whether there is some mechanism by which the costs and benefits of the principle of state supremacy might be correctly balanced. In Part II, I propose such a device — a canon of construction that I shall call “the presumption of institutional autonomy.” Federal grant programs and state statutes and constitutions are frequently ambiguous about the role of the state legislature in controlling access to state and local institutions. The presumption of institutional autonomy instructs courts to construe this ambiguity to maximize the ability of state and local governmental institutions to spend such federal revenue free from state legislative supervision. The presumption of institutional autonomy preserves federal access to nonfederal officials by allowing these officials to carry out federal policies absent a clear statement to the contrary in state laws. Such a “plain statement” rule is analogous to federal-preserving canons of construction used in decisions like *Gregory v. Ashcroft*.¹³ The plain statement rule in *Gregory* protects federalism through the *national* political process by barring federal intrusions into state sovereignty absent a clear congressional statement to the contrary.¹⁴ Likewise the presumption of institutional autonomy protects *nationalism* through the *state* political process by barring state intrusion into federal intergovernmental relations absent a clear state-law provision to the contrary.¹⁵

In Part II, I explore how such a presumption might affect the judicial construction of federal grants to local governments¹⁶ and governors.¹⁷ Finally, in Part III, I explore whether the presumption of institutional autonomy might be used to protect local governments from state control outside the context of federal grant programs. The article examines two famous cases — Bridgeport’s petition for bankruptcy, which was resisted by Connecticut’s state government,¹⁸ and the City of Tacoma’s effort to build a dam on the Cowlitz River, which was resisted by Washington’s state government¹⁹ — to explore whether the federal government should be

13. 501 U.S. 452 (1991).

14. See *Gregory*, 501 U.S. at 461.

15. For a general account of how canons of statutory construction might be viewed as devices for advancing important policies or constitutional values, see William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989).

16. See *infra* section II.B.1.

17. See *infra* section II.B.2.

18. See *In re City of Bridgeport*, 128 B.R. 688 (Bankr. D. Conn. 1991).

19. The litigation surrounding the Cowlitz dam was convoluted and protracted, involving one decision by the Ninth Circuit, four decisions by the Washington Supreme Court, and one decision by the U.S. Supreme Court. See *Washington Dept. of Game v. Federal Power Comm.*, 207 F.2d 391 (9th Cir. 1953); *City of Tacoma v. Taxpayers of Tacoma*, 371 P.2d 938

permitted to bestow powers on cities using regulations rather than grants.

I. THE PRESUMPTION OF STATE SUPREMACY:
PROMOTING INTERGOVERNMENTAL COMPETITION
THROUGH LIMITS ON FEDERAL POWER

As a matter of either precedent or sensible policy, what sort of role should the federal government play in defining the powers of nonfederal governmental institutions? Courts and commentators frequently suggest without much elaboration that Congress simply cannot authorize state or local officials to perform acts forbidden by state law.²⁰ I call this theory the "principle of state supremacy." The difficulty with this theory is that it is impossible to make an unambiguous determination of whether support exists for this principle in either precedent or policy.

As I explain in section I.A, the Supreme Court has never clearly embraced the principle that the federal government cannot dissect the state and liberate state and local officials from the state legislature's control. Considerations of sensible policy might provide a stronger basis for a rule against dissection of the state: as explained in section I.B, there are good reasons to believe that when Congress dissects the state and liberates state or local officials from the constraints of state law, Congress weakens those institutions for the purpose of local self-governance. By "local self-governance," I mean the cost-effective delivery of local public goods in a manner that is politically accountable to local residents. Congress is simply not as well-suited as the states for creating institutions that deliver local public goods to the residents of a state in a politically accountable and cost-effective way. Therefore, one might insist on the principle of state supremacy as a way to protect nonfederal institutions from being undermined by ill-advised federal efforts to liberate them from state law.

But even this policy-based defense of the principle must be qualified: section I.C explains, the principle of state supremacy has costs as well as benefits. It is conceivable that the principle of state supremacy might lead to greater centralization of the state, thereby increasing the state government's capacity to engage in strategic be-

(Wash. 1962) [hereinafter *City of Tacoma IV*]; *City of Tacoma v. Taxpayers of Tacoma*, 307 P.2d 567 (Wash. 1957) [hereinafter *City of Tacoma II*], *revd.*, *City of Tacoma III*, *supra* note 4, 357 U.S. 320 (1958); *City of Tacoma I*, *supra* note 4, 262 P.2d 214 (Wash. 1953); *State ex rel. City of Tacoma v. Rogers*, 203 P.2d 325 (Wash. 1949).

20. See *infra* note 21.

havior when bargaining with the federal government. Both federal and state officials frequently try to deceive each other about their available resources, need for assistance, willingness to terminate intergovernmental grants, and likelihood of future noncompliance with grant conditions. This willingness to provide misinformation to the other level of government can obviously make intergovernmental relations more costly. It is possible that the principle of state supremacy might increase the states' willingness to engage in such strategic bargaining, thereby undermining useful intergovernmental arrangements.

In short, the question of whether the federal government ought to be permitted to dissect the state creates an apparently stark dilemma. Either allow such dissection, and undermine the efficacy of nonfederal institutions for the purposes of state and local governance, or forbid it, and undermine the possibility of cooperative federalism. In Part II, I suggest a way to escape this dilemma. The purpose of Part I, however, is simply to show that neither precedent nor policy offers an easy way out.

A. *The Ambiguous Case in Precedent for State Supremacy*

At first glance, one might take the principle of state supremacy to be a truism. After all, there is a widespread assumption among courts, politicians, and political scientists that the federal government must take nonfederal governmental institutions as it finds them, accepting the limits that state law imposes on such institutions.²¹ So, for instance, in rejecting the idea that the City of Tacoma could use its license issued by the Federal Power Commission to condemn state-owned land in violation of state law, the Washington Supreme Court stated:

If it be held that the Federal government may endow a state-created municipality with powers greater than those given it by its creator, the

21. For an early judicial statement of this proposition, see *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513, 531 (1936). *Ashton* held that the Municipal Bankruptcy Act of 1934 was unconstitutional because it regulated municipalities' power to declare bankruptcy, a matter that the Court held must be reserved to the state governments. The logic of *Ashton* was, however, somewhat strained: although the Court relied on the proposition that the state government had the exclusive right to control its own subdivisions, the federal act in question did not deprive any state of such control, as no municipality could file under the Act without permission from its state government. Thus, *Ashton* can be seen as limiting not merely the power of the federal government but also the power of the states to consent to any enlargement of federal powers. See generally MARTHA DERTHICK, *THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS* 16 (1970) (describing tradition that federal government can have access to local governments only by securing consent of state governments). Deil Wright refers to this view as the "coordinate authority" model of federalism. See WRIGHT, *supra* note 12, at 40-43.

state legislature, a momentous and novel theory of constitutional government has been evolved that will eventually relegate a sovereign state to a position of impotence never contemplated by the framers of our constitutions, state and Federal.²²

More recently, the New Mexico Supreme Court expressed a similar sentiment when it rejected the possibility that federal law could give a governor the power to ignore contrary state law.²³ The New Mexico Governor asserted that the federal Indian Gaming Regulatory Act (IGRA) gave him authority to form compacts with Indian tribes concerning gambling on reservations even if state law prohibited him from entering into such compacts. The court doubted whether "Congress, in enacting the IGRA, sought to invest state governors with powers in excess of those that the governors possess under state law."²⁴ In any case, the court was also "confident that the United States Supreme Court would reject any such attempt by Congress to enlarge state gubernatorial power."²⁵

Why such confidence? An inspection of precedent suggests that the basis for such assurance is hardly obvious. This is not to say that the principle is indefensible, but only that courts have not yet provided a coherent justification. One might try to defend the principle of state supremacy by invoking the notion that local governments are "creatures of the state," agencies that the state government is free to destroy or alter as it pleases. This doctrine is most frequently associated with the Court's decision in *Hunter v. City of Pittsburgh*,²⁶ in which the Court upheld Pennsylvania's consolidation of the town of Allegheny with the City of Pittsburgh, declaring that the "number, nature and duration of the powers conferred upon these [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State."²⁷ But one can trace such a view back at least to *Trustees of Dartmouth College v. Woodward*,²⁸ in which Justice Story distinguished between private and municipal corporations, stating that only the former were protected from state law by the Contract Clause of Article I, Section 10.²⁹ *Hunter* simply extends Justice

22. *City of Tacoma II*, *supra* note 19, 307 P.2d at 567.

23. See *State ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995).

24. *Johnson*, 904 P.2d at 26.

25. *Johnson*, 904 P.2d at 26.

26. 207 U.S. 161 (1907).

27. *Hunter*, 207 U.S. at 178.

28. 17 U.S. (4 Wheat.) 518 (1819).

29. *Dartmouth College*, 17 U.S. (4 Wheat.) at 668, 682-83. For a discussion of the origins and history of this distinction between private and municipal corporations, see Joan C. Wil-

Story's argument to hold that, unlike private corporations, local governments are not protected from state legislation also by the Fourteenth Amendment.

The *Hunter-Dartmouth College* doctrine, however, is a poor source for the idea that Congress cannot enlarge the power of local governments without the state legislature's consent. *Hunter* states only that state or local officials' loss of office or power is not a "taking" of property, impairment of contract, or loss of liberty or property without due process of law within the meaning of Article I, Section 10 or the Fourteenth Amendment.³⁰ To be sure, such a doctrine might place a limit on some congressional powers: Congress arguably cannot invoke Section 5 of the Fourteenth Amendment to enlarge the powers of local governments, because local governments would have no Fourteenth Amendment right for Congress to enforce.³¹ But there is no compelling reason why such a doctrine would have any effect on Congress's other powers, such as its power to regulate interstate commerce, that do not depend on a preexisting constitutional right.³²

One might argue that, under *Hunter*, the state legislature is constitutionally entitled to speak for the subdivisions, departments, and agencies of the state, because such subparts of the state simply have no legal identity apart from the state legislature. Under this reasoning, the state legislature must be able to veto its subdivisions' or departments' participation in federal regulatory schemes, because such subparts of the state lack the power to speak for themselves. But the Court has never accepted such a formalistic equation of a

liams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369 (1985).

30. See *Hunter*, 207 U.S. at 178-81.

31. See *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). To the extent that the voting rights of citizens are affected by a state's allocation of power among its municipalities, the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment might limit state control of its subdivisions. See, e.g., *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982); *Gomillion v. Lightfoot*, 364 U.S. 341 (1960). Congress might, therefore, have the power to limit states' control over their municipalities as an appropriate way to enforce the voting rights of citizens under the Fourteenth and Fifteenth Amendments. See, e.g., *City of Richmond v. United States*, 422 U.S. 358 (1975) (requiring city's proposed annexation of county territory to be precleared by the Department of Justice pursuant to § 5 of the Voting Rights Act).

32. Several lower courts have suggested that the *Hunter* doctrine does not limit Congress's powers to bestow statutory rights on local governments. See *Rogers v. Brockette*, 588 F.2d 1057, 1064 (5th Cir. 1979); *San Diego Unified Port Dist. v. Gianturco*, 457 F. Supp. 283 (S.D. Cal. 1978). Such a doctrine might be rooted in fears that the courts are institutionally incapable of deciding the difficult questions of institutional design raised by disputes about local governments' powers and territorial jurisdiction. See Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339 (1993).

state and its subdivisions. To the contrary, the Court has expressly rejected such a view: according to the Court, counties and municipalities do not enjoy immunity from lawsuits under the Eleventh Amendment, because the Eleventh Amendment protects only "one of the United States" from suits in federal court, and counties and cities are not agents of the state governments but rather independent corporations that speak for themselves and not the state.³³ If local governments really are independent corporations, as the Court's Eleventh Amendment "arm-of-the-state" jurisprudence implies,³⁴ then the federal government should be able to delegate federal responsibilities to them just as it delegates federal duties to private nonprofit corporations (for example, Howard University, the Red Cross, etc.), preempting in the process all state legislation that might interfere with the federal license of the federal agent.

Rhetoric about municipalities being "creatures of the state" is especially unhelpful given that the federal government frequently authorizes *private* corporations to administer federal law, even though such private organizations are creatures of state law. So, for instance, few would doubt that if a private electrical utility cooperative obtained a federal license to build a dam on a navigable waterway, then that license would preempt state laws barring the construction of the dam.³⁵ This would be so, even though the cooperative is in some sense a "creature of the state," because state laws ordinarily determine how one goes about forming cooperatives. Likewise, when the Resolution Trust Corporation (RTC) takes over failed savings and loans (S&L) as their receiver and is subrogated into the rights of the S&L, no one doubts that the RTC can effectively extend the powers of the private S&L by preempting some state-law defenses — usury, etc. — that might otherwise be asserted against the RTC's claim.³⁶ This is so even though the S&L is a creature of the state, and its organization is rooted in state law. Extending this reasoning, federal agencies should be able to convert willing municipalities into federal agents, despite the fact that the

33. See, e.g., *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658 (1978).

34. For an overview of the jurisprudence, see Alex E. Rogers, Note, *Clothing State Governmental Entities in Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243 (1992).

35. See *First Iowa Hydro-Electric Coop. v. Federal Power Commn.*, 328 U.S. 152, 164 (1946) ("To require [the co-op] to secure . . . a state permit . . . as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in [the state] a veto power over the federal project.").

36. Of course, Congress would still have to authorize such preemption, and a presumption against wholesale creation of federal common law might lead courts to reject implicit preemption of state-law defenses. See *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994).

municipalities are “creatures of the state.” This challenge is especially powerful given that several prominent legal scholars have argued that municipalities *ought* to enjoy the same powers as private corporations.³⁷ Even if one agrees with the dominant view that public corporations ought not to enjoy the same protection enjoyed by private organizations as a matter of federal *constitutional* law,³⁸ one might still give Congress the discretion to bestow a sort of federal home rule on municipalities as a matter of federal statutory law.

A second and apparently more promising basis for the principle of state supremacy is the doctrine of state autonomy.³⁹ The Court has recently revived its state autonomy jurisprudence with two decisions, *New York v. United States*⁴⁰ and *Printz v. United States*,⁴¹ both of which struck down federal laws that imposed on nonfederal officials affirmative duties — to take title to low-level radioactive waste, and to regulate the purchase of firearms, respectively. In the somewhat colorful language of *New York*, “Congress may not simply ‘commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”⁴² One might argue that, when the federal government insulates state or local officials from the limits imposed by state law, the federal government somehow commandeers the state governments’ regulatory processes by forcing the state government to make its officials available to enforce the federal government’s regulatory scheme.

But this sort of argument faces an obvious initial difficulty: federal law does not require anyone to *do* anything when it preempts state laws that limit the powers of state or local officials. At most, such federal laws simply require the state to *remove* certain restrictions on the power of subordinate officials so that those officials can *voluntarily* assume federal duties. Such federal preemption of state-law limits on state or local governmental institutions differs

37. The most famous exposition of this position remains Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980). For a criticism of Frug’s argument that cities are powerless, see Richard Briffault, *Our Localism* (part II), 90 COLUM. L. REV. 346 (1990).

38. For some defenses of the distinction between public and private corporations, see Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982).

39. This “state autonomy” jurisprudence was the basis for the New Mexico Supreme Court’s assertion that Congress could not enlarge the power of the governor to negotiate compacts with Indian tribes. See *supra* note 8.

40. 505 U.S. 144 (1992).

41. 521 U.S. 898 (1997).

42. *New York*, 505 U.S. at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 288 (1981)).

from other types of federal preemption. Maybe Congress cannot “commandeer” — that is, force — county sheriffs to perform background checks on gun purchasers. But suppose such sheriffs *want* to perform such background checks and state law prohibits them from doing so. Why cannot federal law *liberate* such officials from the constraints of state law by authorizing them to do what state law forbids?

Moreover, state autonomy jurisprudence seems even more inapplicable if, as *New York* suggests, such jurisprudence is rooted in the need to protect political accountability.⁴³ One can perhaps argue that Congress would deflect the voters’ hostility from itself onto state legislatures by forcing state legislatures to locate sites for low-level radioactive waste. In such a case, Congress forces an unwilling political body to take a highly visible and very unpopular action; voters arguably might misattribute responsibility for such an action to the state legislature, its immediate and visible cause, rather than to Congress, its remote but actual cause. But such an argument based on political accountability seems much harder to make when Congress simply authorizes a state or local official to undertake some action in violation of state law. In that case, the state legislature is not required to take any visible action that might invite retribution from affected voters; the only visible actor is the state or local official who chooses to act pursuant to congressional authorization and therefore is properly accountable for the costs of the action.

One might make a stronger argument for the principle of state supremacy by abandoning the rhetoric of political accountability — never a persuasive rhetorical trope in any case — and instead focusing on the distributive injustice and inefficiency of “commandeering” legislation. As I have argued elsewhere,⁴⁴ “commandeering” legislation is analogous to a regulatory taking: in effect, such legislation confiscates state and local governments’ resources, placing them at the disposal of the federal government.

If one views “commandeering” legislation as analogous to a regulatory taking and abandons the theme of political accountability,

43. See *New York*, 505 U.S. at 168.

44. See *Hills*, *supra* note 2. Such confiscation of public organizations’ resources, like confiscation of private organizations’ property, is distributively unjust and economically inefficient: it forces public organizations (and the coalitions of voters that control them) to bear the costs of federal programs serving needs that state and local governments do not create, and it erodes the value of state and local political involvement to voters and politicians, reducing their incentive to vote, run for office, or otherwise engage in state or local political activity.

then the case for the principle of state supremacy seems much stronger. The federally empowered state or local official, after all, necessarily cannot undertake any official federal action — for example, gas up the squad car, deposit a paycheck, boot up the computer, post a letter, turn on a light in her office — without consuming tax dollars authorized or appropriated for other purposes. So, for instance, if the federal government authorized county sheriffs to perform background checks on gun purchasers, then such sheriffs would necessarily expend nonfederal tax revenue for such federal duties: background checks require activities — telephone calls, staff time, office supplies, computers — that all consume either state or county tax revenue. If the county sheriff expends such revenue for purposes prohibited by the legislative body that appropriated the revenue, then the county sheriff effectively confiscates such revenue for federal purposes just as surely as if he or she were a Federal Bureau of Alcohol, Tobacco, and Firearms agent who occupied state buildings to perform background checks.

In short, by authorizing state or local officials to implement federal programs in violation of state policies, the federal government effectively confiscates state resources and uses them for the benefit of the federal government. To the extent that *New York* and *Printz* forbid Congress from confiscating state tax revenue and regulatory capacity for federal ends, one might argue that they should also bar the federal government from authorizing subordinate state or local officials to engage in such forbidden confiscation.⁴⁵

Yet even this analogy to regulatory takings does not conclusively entail the principle of state supremacy. The difficulty with such an argument is that, when the federal government authorizes some subordinate state or local officer to implement a federal program, it does not merely redistribute power and money to itself; it also redistributes power among state institutions. One can argue that such federal arbitration among competing governmental entities is more consistent with the purpose of a federalist system than purely federal aggrandizement of power at the expense of the state as a whole. Take, for instance, federal laws that enable cities to ignore limits imposed on them by state law: such federal laws vio-

45. Indeed, the conflict in *New York* can be regarded as an intrastate quarrel between the governor and the state legislature in which the federal government took the side of the governor. The Low-Level Radioactive Waste Policy Act Amendments of 1985 had been endorsed by Governor Cuomo (and the National Governors' Association); it was the New York state legislature that balked at implementing the federal law by choosing actual waste sites.

late the principle of state supremacy, but they also might promote the very policies that federalism is said to advance by empowering local governments. It is frequently said that federalism broadens opportunities for political participation.⁴⁶ But one would think that federal empowerment of local governments would be well-calculated to promote such an end even better than control of local governments by state governments. Elected city officeholders, after all, are elected from smaller constituencies than state officeholders, and there are many more local elected officials than state elected officials. Cities rather than states, therefore, might arguably be a more natural home for small-scale democracy that is "close to the people."

Put more generally, federal laws that redistribute power among state and local governmental institutions do not unambiguously weaken nonfederal institutions and thereby undercut the purpose of a federal system of government. Such laws, therefore, might be distinguishable from the laws struck down in *New York* and *Printz*, which simply supplanted nonfederal power with federal power. To continue the analogy to regulatory takings, one might draw an analogy here between federal laws that allocate powers among nonfederal institutions and land-use regulations that arbitrate between the claims of competing landowners. As Joseph Sax notes, when government performs the function of arbitrating between landowners, the courts are much less likely to find an unconstitutional taking than when the government acts as an "entrepreneur" and simply takes over private land for its own purposes.⁴⁷ Likewise, one also might argue that the courts should distinguish between federal laws that arbitrate between competing nonfederal institutions and federal laws that commandeer such institutions for federal purposes.

*Missouri v. Jenkins*⁴⁸ suggests that the Court might accept precisely such a distinction between federal laws that commandeer nonfederal officers' services and federal laws that preempt state-law limits on nonfederal officers' authority. The *Jenkins* Court held that a district court could enjoin a state constitutional limit on millage so that a school district — nominally a defendant — could raise property taxes sufficiently to cover the cost of the judicial remedy for segregated schools. In distinguishing this remedy from a

46. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (stating that the federal structure "increases opportunity for citizen involvement in democratic processes").

47. See Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 67 (1964).

48. 495 U.S. 33 (1990).

direct judicial order to raise taxes (which, according to the Court, exceeded the district court's equitable discretion), the Court noted that, by simply preempting state-law limits on the school district's powers, the district court gave "proper respect for the integrity and function of local government institutions" that were "ready, willing, and — but for the operation of state law curtailing their powers — able to remedy the deprivation of constitutional rights themselves."⁴⁹ In other words, the Court distinguished between a federal command that a state raise taxes — "commandeering" of a state — and a federal command that a state allow one of its subdivisions to raise taxes — dissection of the state — forbidding the former but allowing the latter.

Of course, the state in *Jenkins* had been found to have deprived individuals of equal protection through de jure segregation of public schools.⁵⁰ Under these circumstances, the federal court would have been justified in "commandeering" the state's regulatory processes to create a remedy for the violation if no less intrusive remedy were available.⁵¹ This holding, therefore, is distinguishable from situations in which Congress attempts to dissect the state where the state is innocent of any constitutional violation. However, *Jenkins's* willingness to distinguish between federal judicial decrees that compel state taxation and decrees that enjoin state limits on local taxes suggests that dissection might be regarded by the Court as less intrusive than "commandeering." Such a holding cautions against an easy inference that, because Congress cannot commandeer a state's regulatory processes, therefore, Congress also cannot liberate a subdivision from the control of the state government.

In short, the argument rooted in state autonomy precedent is not groundless, but it is also not overwhelmingly persuasive. Its force depends on whether the federal government should play a role in allocating power among state and local political institutions. If the federal government should play such a role, then the case against federal empowerment of state or local officials is weak. If not, then the case is much stronger. It is no good to pretend that such an issue can be resolved by parsing a handful of state autonomy (or any other) judicial decisions; the question of the proper

49. See *Jenkins*, 495 U.S. at 51.

50. See *Jenkins*, 495 U.S. at 37.

51. See, e.g., *Spallone v. United States*, 493 U.S. 265, 276 (1990) (holding that contempt sanctions can be imposed by judge against city to enforce consent decree remedying constitutional and statutory violations).

role of the federal government in defining local political institutions is fundamentally a policy question. Therefore, it is to this policy question this article now turns.

B. *The Case for State Supremacy in Terms of Policy:
How Dissection of the State Unnecessarily Undermines
Local Self-Governance*

What policy argument can be made in favor of the principle of state supremacy? As I shall argue below, there are reasons to believe that the federal government's dissection of the state tends to undermine the efficacy of nonfederal governmental institutions for the purpose of local self-governance. The natural place to begin this inquiry is to examine the federal government's track record in creating institutions for local self-governance. Although the evidence is admittedly sketchy and anecdotal, this track record does not inspire confidence.

The federal government's main efforts in creating local governments have been in conditions attached to grants-in-aid, requiring cities and states to set up functionally specialized agencies staffed by professionals who deliver a single service — for example, housing, income maintenance, or education — insulated from control by elected policy generalists like mayors, legislators or governors.⁵² How sensible were these institutional choices? It became a cliché of the late 1960s and early 1970s to denounce such arrangements as immune from democratic control, inefficient, uncoordinated, chaotic, and generally unaccountable.⁵³ Commentators have repeatedly complained that such federally sponsored governments led to fragmented policymaking because each state or local agency pursued its specialty — housing, education, environmental protection — in isolation from other state or local policies.⁵⁴ In addition, it has been a common complaint that such functionally specialized state and local agencies were often more loyal to the federal agency from which they received their federal funding than to the local or

52. See Hills, *supra* note 2, at 860 & n.167.

53. For a summary of the literature, see Thomas J. Anton, *Intergovernmental Change in the United States: An Assessment of the Literature*, in PUBLIC SECTOR PERFORMANCE: A CONCEPTUAL TURNING POINT 15 (Trudi C. Miller ed., 1984).

54. Such fragmentation prompted the late Edward Muskie, then chair of the Senate Subcommittee on Intergovernmental Relations, to hold hearings in 1966 to investigate whether the bureaucracies created by federal grant programs were inefficient and uncoordinated, concluding that indeed they were. See *Creative Federalism Hearings: Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Govt. Operations*, 89th Cong. (1966).

state governments for whom they ostensibly worked.⁵⁵ Exploiting their close relationship with the counterpart federal agency and their greater familiarity with the federal grant process, such agencies would use federal policies to resist oversight by state or local politicians, arguing — sometimes misleadingly — that the demands of state or local politicians were inconsistent with federal law and would result in the forfeiture of federal funds. The ACIR dubbed such arrangements “creative feudalism” to highlight the manner in which each functional bureaucracy guarded its fiefdom from political control.⁵⁶ A spate of implementation studies decried the federally sponsored structures of cooperative federalism as inefficient, self-defeating, dysfunctional, and ungovernable.⁵⁷

A preliminary word of caution is in order at this point: it is important to separate measured analysis from hyperbole. More recent empirical research suggests that many conventional criticisms of the intergovernmental bureaucracy sponsored by the federal government are overstated.⁵⁸ More importantly, the structural inefficiencies of creative federalism were not gratuitous. The federal government imposed various “single agency” and “qualified personnel” requirements on the states because they feared — with good reason — that state politicians were likely to be disloyal to certain national goals, such as the provision of public goods to non-residents or the redistribution of wealth. It is a familiar point that nonfederal politicians have structural incentives to disregard certain national goals. For instance, state and local officials have an incentive to undermine federal policies that redistribute wealth to low-income groups, because such federal policies attract households

55. See, e.g., Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POLY. REV. 187, 211-12 (1996) (discussing the danger that informal relations among state and federal intergovernmental bureaucracy might suppress opportunities for citizen involvement in politics).

56. See DONALD H. HAIDER, WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING 60 (1974). For other accounts of the hostility to the complexity and redundancy of the intergovernmental system of categorical grants in the 1960s and early 1970s, see CONLAN, *supra* note 12, at 45-50; GARTH L. MANGUM, THE EMERGENCE OF MANPOWER POLICY 70-81 (1969).

57. For examples of such implementation literature, see EUGENE BARDACH, THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES LAW (1977); MARTHA DERTHICK, NEW TOWNS IN-TOWN: WHY A FEDERAL PROGRAM FAILED (1972); JEFFREY L. PRESSMAN & AARON B. WILDAVSKY, IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND (2d ed. 1979). For colorful examples of how such federal regulatory requirements might create obvious inefficiencies, see TERRY SANFORD, STORM OVER THE STATES 90-96 (1967).

58. See PAUL E. PETERSON ET AL., WHEN FEDERALISM WORKS 216-17 (1986) (noting that typical attacks on Johnson's Creative Federalism and Nixon's New Federalism frequently “substitute flamboyant rhetoric for careful analysis”).

with low capacity to contribute to the tax base of the city and increase the need for costly governmental services. In particular, elected officials will have a greater incentive to divert federal funds away from the federally mandated redistributive purposes much more than the nonelected policy professionals employed by state and local agencies — so-called “policy specialists.”⁵⁹ Likewise, state and local politicians have an incentive to be profligate with national funds because their residents do not bear the full tax burden of raising federal revenue.⁶⁰ I will return to these points in section I.C, when I discuss the costs of state supremacy.

Nevertheless, whatever their advantages for the pursuit of national goals, there is little doubt that the structures imposed by the federal government were not well-suited for local self-governance. That is, these structures did not ensure the cost-effective delivery of local public goods in a manner politically accountable to local residents.⁶¹ In short, the federal government seems to have certain tendencies toward unnecessary bureaucratic sclerosis. Such a conclusion should hardly be a surprise: there are several institutional reasons to expect that the federal government will perform less effectively than state governments in supervising local agencies, whether they be field offices or municipalities.

First and most important is the problem of governmental overload: the federal government has an insufficient number of elected policy generalists to monitor effectively 39,000 local governments.⁶²

59. The classic statement of these state and local incentives to avoid redistribution of wealth is PAUL E. PETERSON, *CITY LIMITS* 71-82 (1981). Peterson and Mark Rom provide empirical evidence suggesting that state governments struggle to avoid becoming “welfare magnets” in PAUL E. PETERSON & MARK C. ROM, *WELFARE MAGNETS* (1990). According to Peterson and Rom, states cut their AFDC and Medicaid benefits by \$30 per recipient for every \$100 of benefits paid by the state in the preceding year above the level of benefits paid by the average contiguous state. *See id.* at 75-83. For more recent findings confirming these results, see Mark Carl Rom et al., *Interstate Competition and Welfare Policy*, *PUBLIUS*, Summer 1998, at 17. A decade after Senator Muskie’s hearings denouncing the inefficiency of federal bureaucratic intrusion into state and local governments, William Proxmire held hearings to denounce local politicians’ habitual diversion of Community Development Block Grant money from assistance of low-income neighborhoods to economic development. For an account of such hearings, see MICHAEL J. RICH, *FEDERAL POLICYMAKING AND THE POOR: NATIONAL GOALS, LOCAL CHOICES, AND DISTRIBUTIONAL OUTCOMES* 341-42 (1993).

60. For an instance in which control of federal grants by federal agency specialists may have been necessary to prevent waste of federal money, see Martha Derthick, *Professional Fiefdoms Appraised: The Case of Social Services*, *PUBLIUS*, Spring 1976, at 121-34.

61. Even Peterson, Rabe, and Wong note that the intergovernmental system of the 1960s and 1970s suffered initially from excessively detailed regulations, tight audits, and overly complex evaluations that were relaxed only in response to complaints by state and local politicians about excessive federal interference with nonfederal political structures. *See id.* at 140-47.

62. In 1987, the Bureau of the Census reported 3,042 counties, 19,205 municipalities, 16,691 townships, 14,741 school districts, and 29,487 special districts. *See* VINCENT OSTROM

Five hundred thirty-five Members of Congress simply lack the time, attention span, or incentive to consider the details of how local governments (or other nonfederal institutions) ought to be designed and controlled.

To appreciate how daunting this task of supervising local governments can be, consider a simple hypothetical federal law that dissects the state. Suppose that Congress were to enact a federal statute authorizing "home-rule municipalities" to adopt and enforce antidiscrimination ordinances prohibiting discrimination on the basis of sexual orientation. This hypothetical federal law dissects the state by expressly preempting any state law or state constitutional doctrines that interferes with municipalities' adoption of such ordinances.

Congress reasonably cannot be expected to consider adequately the difficult questions of institutional design that such a hypothetical law would present. Whether a home-rule municipality ought to enact laws regulating employment will depend critically, for instance, on how easily home-rule municipalities can be incorporated or chartered and how easily they can annex land. In states where such incorporation and annexation is largely controlled by local residents, one tends to see dozens — perhaps hundreds — of municipalities crammed cheek by jowl into a single metropolitan area, each governing a small population and tiny fragment of territory.⁶³ This promiscuous creation of local governments might be perfectly sensible if there is some institution with greater geographic jurisdiction that has the time and incentives to monitor the local governments' regulations to ensure that the municipalities do not impose external costs on each other. Under normal circumstances, this institution would be the state legislature. Our hypothetical federal statute, however, preempts such state legislative control over a category of local ordinances. Unless Congress has time and incentives to perform the state legislature's supervisory function, there is a significant likelihood that the local governments will run amok with their new federal powers. Some municipalities will use their federal authority to overregulate (because they can export the costs of their antidiscrimination laws to neighboring jurisdictions where the employers' main offices are located), while others will underregulate

ET AL., *LOCAL GOVERNMENT IN THE UNITED STATES* 3 (1988) (citing 1987 CENSUS GOVTS. prelim. rep., at 1).

63. For a recent study of (and attack on) the "fragmentation" of metropolitan areas into large numbers of competing municipalities, see DAVID RUSK, *CITIES WITHOUT SUBURBS* 34 (1993). For a more favorable assessment of such fragmentation, see generally MARK SCHNEIDER, *THE COMPETITIVE CITY: THE POLITICAL ECONOMY OF SUBURBIA* (1989).

(because the employees who would be protected by such laws are nonvoting commuters). In short, Congress's delegation of power to local governments could result in regulatory incoherence, simply because local governments are not well-designed for the federal duties that have been bestowed on them.

Congress can avoid this danger of mismatching federal duties to local structure only by carefully considering how local governments are created, enlarged, and supervised in each state whenever it bestows federal authority on local governments. But it is inconceivable that Congress could give sufficient attention to such minutiae of state-local relations, given that different states have radically different laws⁶⁴ and political cultures⁶⁵ that affect state-local relations. Moreover, it is unlikely that individual members of Congress, representing districts of roughly 600,000 people, will have the same electoral incentive to consider small-scale intrastate externalities as do state legislators, who represent an average of 50,000 persons (as low as 2,900 persons in New Hampshire).⁶⁶ Fifteen thousand state elected officials simply have greater capacity to consider the mundane arcana of interlocal bickering than do 535 congresspersons burdened by a plethora of other issues.⁶⁷

64. For some recent surveys of state-local legal relations in different states, see *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 60-70 (Virginia Gray & Herbert Jacob eds., 6th ed. 1996); *A DECADE OF DEVOLUTION: PERSPECTIVES ON STATE-LOCAL RELATIONS* (E. Blaine Liner ed., 1989).

65. According to Daniel Elazar, different states and regions have different political cultures, meaning different attitudes toward government, the marketplace, democratic control, and bureaucracy. Elazar characterizes these cultures as "traditionalistic," "individualistic," or "moralistic." See DANIEL ELAZAR, *AMERICAN FEDERALISM: THE VIEW FROM THE STATES* 110-31 (3d ed. 1984). "Moralistic" cultures tend to believe that the government serves the public welfare; that professionalized bureaucracies ought to deliver public services; that citizens ought to participate widely in political deliberation; and that such debate should be based on the issues rather than partisan affiliation. By contrast, "individualistic" cultures tend to distrust government, regard politics as "dirty," and wish to limit governmental activity to regulation of imperfections in the marketplace. Massachusetts tends toward "moralistic" politics, whereas Arizona tends toward an "individualistic" political culture. See *id.* at 124-25. Subsequent research confirms that different political cultures create different voter attitudes toward government and different networks of political connections even between otherwise geographically, ethnically, culturally, and socially similar municipalities. See Arthur R. Stevens, *State Boundaries and Political Cultures: An Exploration in the Tri-State Area of Michigan, Indiana and Ohio*, *PUBLIUS*, Winter 1974, at 111. For more recent literature exploring Elazar's "subculture" thesis, see generally Symposium, *State Political Subcultures: Further Research*, *PUBLIUS*, Spring 1991, at 1.

These political cultures can affect the degree to which a state supervises local governmental activity. See ELAZAR, *supra*, at 219-20. "Moralistic" political cultures in Massachusetts, for instance, tend to encourage localism. "Traditionalistic" regimes in the Southeast tend to discourage such autonomy. See *id.* at 118.

66. See National Conference of State Legislatures, *Constituents per State Legislative District* (visited Feb. 13, 1999) <<http://www.ncsl.org/programs/legman/elect/cnstprst.htm>>.

67. Of course, Congress could theoretically create its own regionally elected agents — what one might call federal prefects — to supervise the actions of federal field offices. But

Second, the diversity of constituencies within the United States and their conflicts at the national level prevent national agencies from taking clear and decisive actions to supervise field offices or other local structures.⁶⁸ Political polarization at the national level prevents any consensus about enforcement from developing in the national legislature, leaving field offices free to pursue their own agendas.⁶⁹ By contrast, state and local politicians govern smaller, more homogeneous populations and therefore face fewer problems of polarization in supervising federal field offices within their jurisdiction. The evidence suggests that they use their influence aggressively to affect field office operations.⁷⁰

Finally, Congress, unlike state legislatures, is relatively invulnerable to the pressures of intergovernmental competition, pressures that may give elected representatives an additional incentive to monitor and reduce inefficient implementation of policy by bureaucrats. According to the hypothesis first posed by Charles Tiebout's landmark article and subsequently developed by voluminous theoretical and empirical literature, to the extent that residents can freely enter and exit governmental jurisdictions, governments have an incentive to behave like firms in supplying local public goods: they compete with each other for residents and their tax dollars.⁷¹

Congress historically has been reluctant to delegate broad policymaking discretion to elected officers, in part because members of Congress like to take credit for performing casework for their constituents and jealously guard this prerogative from rival politicians. Several commentators have noted that Congress has been reluctant to bestow unrestricted revenue on state and local politicians because such revenue sharing would enable state and local politicians to take credit for federal policies, eliminating opportunities for ribbon-cutting and other visible credit-taking by Congress. See, e.g., CONLAN, *supra* note 12, at 37-38, 41-43 (noting reluctance of Congress to yield control of categorical programs because such grants are "the porkiest of pork" for which Congress can claim credit at election time, and arguing that "block grants pose a threat to the self-interests of congressmen . . . because they diminish opportunities for advertising, credit claiming, and casework"); MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 73-74 (2d ed. 1989); HAIDER, *supra* note 56, at 66 (describing reluctance of Congress to enact a revenue-sharing plan and to provide open-ended grants of revenue to its "rivals and adversaries"); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 128-29 (1974).

68. See John T. Scholz et al., *Street-Level Political Controls Over Federal Bureaucracy*, 85 AM. POL. SCI. REV. 829, 833-34 (1991).

69. See DERTHICK, *supra* note 21, at 196 (noting that political conflict prevents federal government from aggressively pursuing policies); RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 77 (1973) (describing partisan conflict on Congressional Education and Labor Committees). For a popular account of the propensity of the federal government toward gridlock, see JONATHAN RAUCH, DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT (1994).

70. See Scholz et al., *supra* note 68, at 842-48; B. Dan Wood, *Modeling Federal Implementation as a System: The Clean Air Case*, 36 AM. J. POL. SCI. 40, 56-59 (1992).

71. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). For a nicely written summary of recent literature in layperson's terms, see WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 254-69 (1995). For a

Empirical literature suggests that such competition constrains the size of urban bureaucracies.⁷² Other literature suggests that the absence of intergovernmental competition resulting from centralization of functions in the federal government increases the size of the federal bureaucracy implementing the function.⁷³ In short, state legislators might run a leaner, more efficient operation because intergovernmental competition makes them more tax-conscious than Congress.

All of these considerations suggest that Congress is unlikely to be the best institution for allocating power among nonfederal governmental institutions *for the purpose of promoting local self-governance*. The italicized phrase suggests an important caveat: the structural characteristics listed above — a high ratio of elected-to-appointed politicians, homogeneous populations, and intergovernmental competition — are beneficial only if one's goal is the cost-effective delivery of local public goods. If one has other goals in mind, then these characteristics can be harmful, not beneficial. So, for instance, if one's goal is redistribution of wealth to low-income households, interjurisdictional competition for tax base will likely impede this goal. Likewise, if one's goal is to provide benefits to persons residing outside a municipality — say, interstate transit — then the dominance of the municipality by elected officials who are highly responsive to local residents will hardly ensure accomplishment of one's goal. To the contrary, one would expect the local officials to divert federal money away from the goal of benefiting nonresidents. Thus, the very facts that make state and local governments so efficient and politically responsive for the provision of local public goods — a high ratio of elected officials to constituents, low monitoring costs, and high levels of intergovernmental competition — also give such governments an incentive to undermine the accomplishment of federal goals when they are assigned federal re-

more detailed analysis and empirical confirmation of this neo-Tiebout position, see MARK SCHNEIDER ET AL., *PUBLIC ENTREPRENEURS: AGENTS FOR CHANGE IN AMERICAN GOVERNMENT* (1995), and SCHNEIDER, *supra* note 63.

72. See ROBERT M. STEIN, *URBAN ALTERNATIVES: PUBLIC AND PRIVATE MARKETS IN THE PROVISION OF LOCAL SERVICES* (1990); Mark Schneider, *Intermunicipal Competition, Budget-Maximizing Bureaucrats, and the Level of Suburban Competition*, 33 AM. J. POL. SCI. 612 (1989). For a debate about whether evidence for such competition exists, see Albert Breton, *The Existence and Stability of Interjurisdictional Competition in Competition Among States and Local Governments: Efficiency and Equity in American Federalism* 37-63 (Daphne A. Kenyon & John Kincaid eds., 1991), and John E. Chubb, *How Relevant Is Competition to Government Policymaking?*, in *COMPETITION AMONG STATES AND LOCAL GOVERNMENTS*, *supra*, at 37-63.

73. See, e.g., David Joulfaian & Michael L. Marlow, *Centralization and Government Competition*, 23 APPLIED ECON. 1603 (1991).

sponsibilities. But, to the extent that one is interested in creating institutions for *local self-governance*, one can plausibly argue that state governments are better suited for designing institutions to accomplish this goal than the federal government.

One might respond that this comparative advantage of state governments provides no policy justification for the principle of state supremacy. After all, why should we adopt constitutional principles that promote state goals of local self-governance at the expense of rival national goals? But there are three reasons why, when one is dealing with nonfederal institutions, one should give paramount weight to the pursuit of local self-governance.

First and most obviously, the primary goal of nonfederal institutions is, well, nonfederal. The *raison d'être* of these institutions is local self-governance, not delivery of national programs. To be sure, they have an important secondary role in delivering various nationally funded goods ranging from unemployment insurance to assistance for needy families. But these are still their secondary purposes: the bulk of nonfederal institutions' revenue — seventy to eighty percent, depending on the state — is not derived from federal grants, and the bulk of their duties have nothing to do with delivery of nationally mandated services.⁷⁴ It would be odd to give Congress the power to liberate nonfederal institutions from the control of state legislatures when state legislatures are better suited for defining those institutions' primary purpose.

Second, one can safely assume that nonfederal institutions' suitability for local self-governance remains important even when they are carrying out federal law. After all, if the purpose of a national program did not require local self-governance (that is, the delivery of local public goods to the local population), then there would be no reason to use nonfederal institutions to implement the program: instead, Congress would be well-advised to create a purely federal agency to implement the national program. Congress does not delegate to state or local governments the responsibility to create or supervise the Foreign Service or the Marines because diplomacy and national defense are pure national services, the benefits of which are intended to be spread evenly throughout the nation. By contrast, when the national government declines to create a purely national bureaucracy, it is a safe bet that there is some aspect of the

74. Federal grants constituted 26.5% of state-local outlays in 1978. Between 1978 and 1987, federal grants declined precipitously to only 18.2% of state-local outlays. See TIMOTHY CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM 148 (1998).

national program requiring institutions that are good at local self-governance. Therefore, even if one regards national policymaking as paramount, one might want to adopt constitutional doctrines under which the peculiar advantages of nonfederal institutions for local self-governance would be preserved.

Third and most important, it is plausible to believe that any federal interest in altering nonfederal institutions' structure to serve national goals can be accommodated through Congress's power to induce state cooperation with federal grants-in-aid: Congress arguably needs no further power to dissect the state. In section I.C, I will offer an important qualification to this assertion. For now, however, consider why voluntary intergovernmental bargains might be the best way to balance the relative weight of national goals against local self-governance. Congress can induce state governments to waive what I call "state supremacy" and alter their structure by offering federal revenue to state governments.⁷⁵ One might argue that the states' willingness to accept or reject such federal revenue provides an accurate measure of whether nonfederal institutions should be used for local self-governance or other rival national goals. The revenue proffered by the federal government, after all, might be regarded as a reasonably reliable measure of how much the federal government really values the assistance of nonfederal governments. If state governments decline to alter the structure of their government and thereby forgo these federal grants, this is a good sign that the state people (represented by the state legislature) value local self-governance more than the national people (represented by Congress) value pursuit of national goals.⁷⁶ Federal unwillingness to pay the states' asking price suggests that the national government really did not value nonfederal assistance enough to justify intrusion into state structure.⁷⁷ One might infer that, whenever the federal government cannot get states to cooperate with bribes of federal revenue, then the federal government should not use nonfederal structures at all: instead, the federal gov-

75. See, e.g., *Oklahoma v. United States Civil Serv. Commn.*, 330 U.S. 127, 143 (1947) (requiring Oklahoma to forgo federal grant revenue if it refused to comply with federal demands that state officials be governed by merit system).

76. See Hills, *supra* note 2, at 871-93. Contrary to the popular myth that state officials cannot say "no" to federal money, there is considerable evidence that nonfederal officials carefully compare the costs and benefits of federal grants, declining grants where the costs of the conditions outweigh the value of the money. See WRIGHT, *supra* note 12, at 91; Hills, *supra* note 2, at 858-65; Helen Ingram, *Policy Implementation Through Bargaining: The Case of Federal Grants-in-Aid*, 25 PUB. POL. 499 (1977).

77. See Hills, *supra* note 2, at 872-75.

ernment should provide the service in-house with purely federal bureaucrats and avoid erosion of local self-governance.⁷⁸

In short, the principle of state supremacy ensures that decisionmakers most capable of designing and monitoring nonfederal governmental institutions retain control of such institutions unless the federal government compensates those decisionmakers for such loss of control. This is a logical rule, and, although judicial precedent provides no sensible explanation for it, both Congress and the Court have consistently respected it.⁷⁹

C. *The Case Against State Supremacy: State Centralization and Strategic Behavior in (not so) Cooperative Federalism*

There is an undefended assumption in the defense of state supremacy provided in section I.B above. I assume that if the federal government wants state governments to alter their structure, then the federal government can simply bribe the states to do so, without any fear that transaction costs will impede the proposed intergovernmental bargains.⁸⁰ But this assumption of no transaction costs is false, and the falseness of this assumption suggests how the principle of state supremacy might be a potentially dangerous threat to cooperative federalism.

78. One might compare this federal decision to forgo cooperative federalism in the face of recalcitrant states to the decision of a firm to use vertically integrated divisions rather than incur the additional costs of monitoring independent contractors that are likely to be faithless agents. For an analysis of how the costs of multiple contracts and agency costs might drive a firm to produce goods and services "in-house" rather than through contract with other firms, see OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975).

79. One might respond to these arguments by arguing that state *creation* of local governments need not entail state *supremacy* over those governments after they are created. Even if one assumes that state governments initially ought to create local governments, one might argue that the federal government could still use such state-created localities to carry out federal programs, preempting any state laws that interfered with such federal duties. This response, however, assumes that the federal government can somehow preserve the structure of local governments while delegating duties to them that are inconsistent with state law. But a moment's consideration suggests that this is an implausible position: the jurisdictional limits on local governments are a crucial part of their structure, and federal delegation of powers to local governments would necessarily interfere with the structure of local government. For instance, a school district would be structurally a different entity altogether if its jurisdiction were enlarged to cover, say, land-use regulation: limiting school districts to educational matters was a deliberate structural decision designed to limit the role of partisan politics in school matters.

80. "Transaction costs" loosely refers to the cost of striking bargains to transfer an entitlement. In the context of this article, the relevant transactions are the intergovernmental agreements whereby states and local governments agree to implement federal policy in return for federal revenue. I include in the term "transaction costs" the costs of strategic misrepresentation of beliefs, preferences, willingness to abide by an agreement, etc. See Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 225 (1990).

Intergovernmental bargaining is like any other bargaining: it is costly. In particular, as explained below, both federal and nonfederal officials frequently try to deceive each other about their available resources, need for assistance, willingness to terminate intergovernmental programs, and likelihood of future noncompliance. One can conveniently divide such strategic deception into two categories.⁸¹

First, there is the deception that can occur during the lobbying process by which Congress first creates grant programs. So, for instance, intergovernmental lobbying organizations may exaggerate the costs to nonfederal governments of complying with conditions on federal funds in an effort to obtain fewer conditions or more revenue. In this respect, state and local officials engaging in "tin-cup federalism" behave exactly like budget-maximizing federal agencies that submit oversize budget requests to the Office of Management and Budget or to Congress: in either case, the descriptions of the cost of implementing federal programs might be colored by the implementers' desire to receive as large an appropriation as possible.⁸² Unfortunately, Congress might lack an independent source of information with which to correct distorted budget requests by either federal agencies or state and local governments.⁸³

Second, deception can occur in the process of enforcing the grant program after specific states have accepted federal funds. It is a familiar point that state and local officials frequently act as faithless agents of the federal government, violating conditions attached to federal funds whenever the federal government fails to monitor their compliance.⁸⁴ Moreover, the federal government cannot perfectly monitor its nonfederal agents, because monitoring is expensive. The federal government cannot easily measure outputs produced by federal programs, because such outputs (healthy or well-educated children, safer streets, accurate yet timely adjudica-

81. By "strategic deception," I mean the withholding of information by a bargaining party in order to increase his or her share of the gains from trade at the expense of the other parties to a bargain. See A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 18 (1983).

82. For the standard description and analysis of such bureaucratic behavior, see WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

83. Cf. Robert D. Putnam, *The Political Attitude of Senior Civil Servants in Western Europe: A Preliminary Report*, 3 *BRIT. J. POL. SCI.* 257, 257-60 (1973).

84. See, e.g., Edward A. Tomlinson & Jerry L. Mashaw, *The Enforcement of Federal Standards in Grant-In-Aid Programs: Suggestions for Beneficiary Involvement*, 58 *V.A. L. REV.* 600 (1972) (describing instances of state failure to abide by federal rules in administering AFDC program).

tion of benefits claims) are difficult to measure.⁸⁵ But close federal supervision of inputs can destroy the flexibility in program implementation that presumably was the reason for using nonfederal governments in the first place.⁸⁶ Even if the federal government could carefully monitor the actions of nonfederal agencies to detect when the agencies are violating congressional intent, it is difficult for Congress to correct those violations through ex post amendments of the original legislation: the original coalition of interests that enacted some intergovernmental arrangement might not be able to muster the votes to change the new status quo established by the nonfederal governments' actions.⁸⁷

The absence of effective remedies for breach of intergovernmental agreements can lead the federal and nonfederal governments to engage in a wasteful game of bluffing.⁸⁸ The federal government's ultimate sanction is to withdraw the grant and terminate a nonfederal government's involvement in the program. If, however, the federal agency's personnel were hired on the assumption that the street-level implementation of the program would be provided by a nonfederal agency, then the federal government might have extremely limited capacity to replace the services provided by nonfederal governments with federally provided services.⁸⁹ Therefore, the sanction of withdrawing federal funds from noncomplying state or local officials is usually too drastic for the federal government to use with any frequency: withdrawal of funds

85. See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 165-68, 175, 247-51 (1989) (explaining constraints on congressional control of "craft agencies" and "procedural agencies" where agency outputs are difficult to measure or agency activities are highly technical and therefore invisible to outsiders).

86. So, for instance, the federal government might insist that school districts avoid the commingling of federal funds for special education with ordinary state and local education funds in order to prevent the former from being converted to purposes other than aid to the handicapped. Unfortunately, rigorous separation of such funds can undermine the purpose of educating disabled children, by placing them in classes that are physically separate from other students.

87. Cf. Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 435-40 (1989) (explaining how, "[b]y establishing a new status quo, a noncomplying agency has broken apart the coalition that gave rise to its initial mandate" and has prevented ex post sanctions of agency misbehavior even if the legislature can perfectly monitor agency noncompliance).

88. See BARDACH, *supra* note 57, at 224 (stating that intergovernmental negotiations about the shape of cooperative programs can be impeded by parties' awareness that "they will find it difficult if not impossible to enforce the terms of any agreement they reach once resources are committed and the program is under way").

89. See Michael J. Scicchitano & David M. Hedge, *From Coercion to Partnership in Federal Partial Pre-emption: SMCRA, RCRA, and OSH Act*, *PUBLIUS*, Fall 1993 at 107, 114 (noting that "revoking state primacy" in the enforcement of federal regulations "is an empty threat" because "federal agencies lack the personnel" to carry out the law directly).

will injure the very clients that the federal government wishes to serve.⁹⁰

Lacking a real capacity to terminate funding to punish noncomplying states, the federal agency might instead feign such a capacity, threatening to terminate funds unless noncompliance is remedied, in hopes that the nonfederal policymakers are ignorant of the federal agency's real inability to do so.⁹¹ Since state and local legislators are frequently ill-informed about the workings of federal agencies, they might be deceived by the federal agency's threats and comply with the federal agency's demands out of a mistaken fear that the agency will actually terminate federal funding.⁹² On the other hand, the nonfederal policymakers might simply match one deception with another: they might feign willingness to turn down the federal money and thereby dissuade the federal agency from enforcing the condition.⁹³ In short, intergovernmental programs may be afflicted with pervasive and costly gamesmanship — strategic deception that leads to delay and waste both when the programs are initially designed and enacted by Congress and when they are implemented by the states.

Nevertheless, the system of intergovernmental relations shows remarkable persistence and effectiveness despite these obstacles. As I have argued elsewhere, one reason for such success is that the existence of intergovernmental competition among nonfederal institutions substantially reduces the dangers of strategic behavior.⁹⁴

90. William Janklow, governor of South Dakota between 1979 and 1987, notoriously exploited the federal government's inability to enforce its AFDC regulations against noncomplying states. As he candidly observed, "[i]t took me about four years to figure out that I could really ignore a lot of the federal rules and wouldn't have to face the sanctions. . . . Frankly, I just started ignoring all the federal rules and it made a remarkable difference in our ability to do things." MARSHALL KAPLAN & SUE O'BRIEN, *THE GOVERNORS AND THE NEW FEDERALISM* 47 (1991).

91. See DERTHICK, *supra* note 21, at 115-18.

92. See DERTHICK, *supra* note 21, at 210-11 (describing Massachusetts legislature's inability to gauge whether the Social Security Administration would actually carry out its threat to withdraw federal funds in case of state noncompliance).

93. In administering the Federal Emergency Relief Act, Harry Hopkins was repeatedly confronted by governors who refused to provide state matching funds after receiving federal grants requiring a state match, knowing that Hopkins would be reluctant to cut off aid to the unemployed. See JAMES T. PATTERSON, *THE NEW DEAL AND THE STATES: FEDERALISM IN TRANSITION* 136-37 (describing Eugene Talmadge's refusal to appropriate state matching funds and daring federal officials to cut off federal money); CHARLES H. TROUT, *BOSTON, THE GREAT DEPRESSION, AND THE NEW DEAL* 158-62, 309-10 (1977) (describing Boston Democratic machine's tendency to ignore Hopkins's threats to cut off federal relief money if federal conditions were not obeyed). As Hopkins complained, in such federal-state conflicts, "who gets licked? The unemployed. They always get licked." PATTERSON, *supra*, at 72.

94. See Hills, *supra* note 2, at 875-86. Eugene Bardach makes a similar point in BARDACH, *supra* note 57, at 98-100.

Under ordinary circumstances, various nonfederal governments with overlapping territorial jurisdiction — municipalities, counties, state agencies, etc. — compete with each other for control of federal grants-in-aid. If any nonfederal institution exaggerates the costs of implementing federal law, then other competing nonfederal institutions stand ready to provide a rival cost estimate and supplant the strategic institution as the recipient of federal funds.⁹⁵ Moreover, nonfederal governments also monitor rival nonfederal governments' compliance with federal grant conditions after nonfederal governments receive federal grants, reporting noncompliance to Congress in hopes that such noncompliance will persuade Congress to reallocate implementing authority and federal revenue to the monitoring nonfederal institution.⁹⁶ In short, the dissection of "the state" into competing institutions with overlapping territorial jurisdictions might play an important role in allowing the intergovernmental system to function free from strategic behavior.

But these considerations also suggest why the principle of state supremacy might be a threat to intergovernmental bargains: in theory, the principle of state supremacy gives the state government a monopoly over all nonfederal governmental institutions.⁹⁷ If the federal government cannot dissect the state by granting powers to any state subdivision or agency that are denied by state law, then there is a danger that the state legislature will simply swallow the competition. This worry about the state government's monopolization of nonfederal institutions is not merely academic. State governments become increasingly centralized as they assume greater responsibility for service delivery and financing of local governments' operations.⁹⁸ Why this trend toward state centralization? One theory maintains that, like their federal counterparts, state politicians have little interest in increasing the wealth or power of rival politicians. Rather, they have an incentive to maximize their own opportunities for patronage and constituent service by depriving lo-

95. So, for instance, Donald Haider reports that the National Governors' Association sponsored studies showing that state governments were just as capable of administering the Safe Streets program as municipalities. See HAIDER, *supra* note 56, at 248.

96. For instance, the National Conference of Mayors eventually persuaded Congress to end governors' control of funds from the Law Enforcement Assistance Administration by insisting that governors' use of such funds be carefully monitored. See HAIDER, *supra* note 56, at 206-07.

97. Of course, state governments might still compete with each other for federal revenue; however, because state governments do not have overlapping territorial jurisdiction, each state would have a monopoly over nonfederal governmental resources within its territory.

98. See G. Ross Stephens, *State Centralization and the Erosion of Local Autonomy*, 36 J. POL. 44 (1974); Jeffrey M. Stonecash, *Paths of Fiscal Centralization in the American States*, 13 POLY. STUD. J. 653 (1985).

cal politicians of discretionary control over policymaking and local budgets.⁹⁹

But, whatever its cause, state centralization makes federal use of nonfederal institutions more difficult. As Deil Wright has observed, this trend "increas[es the] difficulty of any national government efforts to target or channel funds to local governments for purposes that are independent of, or contrary to, state policies."¹⁰⁰ So, for instance, if the state legislature barred any municipality from applying directly for federal aid, such a measure would have a significant effect on the federal government's ability to use cities as competitors against the states. Congress might still enact "pass-through" grants to state legislatures, but the state legislatures might impose significant conditions on such funds, limiting Congress's ability to harness the policymaking capacity of localities.¹⁰¹ Likewise, if state legislatures reduced state aid to municipalities by precisely the amount of the federal grants that such cities received, the state legislature might also effectively bar Congress from using municipalities as contractors for federal purposes. In effect, the state's vertical integration would eliminate Congress's access to whole categories of nonfederal institutions.

II. THE PRESUMPTION OF INSTITUTIONAL AUTONOMY: PROMOTING INTER- AND INTRAGOVERNMENTAL COMPETITION THROUGH LIMITS ON STATE GOVERNMENTS' POWER OVER FEDERAL GRANT REVENUE

The arguments in Part I leave the constitutional lawyer facing a dilemma. If one insists on the principle of state supremacy, then one may promote local self-governance, but only at the expense of

99. See PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 73-75 (1995). The history of state-local relations during the nineteenth century reflects some of these incentives. State legislatures were notorious during the nineteenth century for using "ripper" legislation to strip local governments of control over local administrative posts in order to maximize their ability to distribute jobs to political supporters. The wave of state constitutional amendments prohibiting "special legislation" or protecting "home rule" were ratified in response to this tendency. See David O. Porter, *The Ripper Clause in State Constitutional Law: An Early Urban Experiment* — Part I, 1969 UTAH L. REV. 287, 299-306. More recently, state governments have exhibited a tendency to impose mandates on local governments that seem to confirm Peterson's analysis of state political incentives. See ADVISORY COMM. ON INTER-GOVERNMENTAL RELATIONS, REPORT M-173, MANDATES: CASES IN STATE-LOCAL RELATIONS 14 (1990); CONLAN, *supra* note 74, 259-60.

100. WRIGHT, *supra* note 12, at 319.

101. The evidence from state administration of the Small Cities Block grant program suggests that state governments would "re-categorize" federal monies to be passed through to localities by attaching elaborate state-law conditions to such funds. See RICH, *supra* note 59, at 119.

cooperative federalism. On the other hand, if one simply gives Congress unlimited power to dissect the state, then one might endanger the usefulness of nonfederal institutions for local self-governance. In short, precedent and policy do not provide certain guidance about the proper role of the state and federal governments.

There are two conventional solutions to this dilemma. First, one might simply assume that members of Congress will have adequate electoral incentives to promote effective local self-governance in order to win the approval of their constituents. Relying on this assumption, one might give Congress an unlimited power to liberate state and local officers from the constraints of state law, confident that Congress will exercise prudent discretion in their use of this power. Second, if one has less confidence in the national political process, then one might want to use some sort of a "plain statement" rule to ensure that Congress adequately deliberated about the structure of state and local government. Under this approach, one might allow Congress to reallocate power among state or local officials, but only if Congress did so with a statute plainly and unequivocally calling for such a reallocation of power.

Neither of these solutions, however, is entirely satisfactory. "Political process" theories of federalism seem to rest on heroic assumptions about voters' level of information concerning government structure.¹⁰² "Plain statement" rules might encourage more deliberation in Congress about the structure of state and local government. But such a device for encouraging deliberation seems curiously unrelated to the institutional capacity of Congress. As noted in section I.B, Congress simply lacks the time and incentives to deliberate carefully about local self-governance, which is, after all, the main purpose of nonfederal institutions. Why, then, try to force Congress to deliberate about the technical arcana — for example, annexation, incorporation, local governments' subject-matter jurisdiction, and so forth — that Congress is patently unsuited to consider?

102. Of course, voters may well feel irked by the inefficient delivery of governmental services. But it is hardly self-evident that voters will blame Congress for such inefficiencies. It is at least as likely that voters will simply blame the bureaucrats themselves for inefficiencies in service delivery, without asking how the overall structure of the agency set up by Congress contributes to the agency's shortcomings. Indeed, it has even been suggested that individual members of Congress can profit electorally from the ineptitude of governmental agencies: when bureaucrats bungle in service delivery, then incumbent congresspersons can win their constituents' gratitude by performing casework for constituents who are aggrieved by bureaucratic decisionmaking. See BRUCE CAIN ET AL., *THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE* 205-06 (1987).

In this Part of the article, I propose a third method for reconciling the values of local self-governance and cooperative federalism. I argue that the courts might solve this dilemma with a canon of construction that I call a "presumption of institutional autonomy." This presumption is simply a canon requiring courts to construe ambiguous federal grant legislation and state laws to maximize the ability of nonfederal institutions to compete with each other for federal money. Under this presumption, state and local officers would be presumed to be authorized by state law to use federal grant dollars for a federally specified purpose unless the state legislature clearly and unequivocally has barred them from undertaking such federal responsibilities.

The presumption of institutional autonomy is exactly the opposite of the "plain statement" rule used to promote federalism in, say, *Gregory v. Ashcroft*. Rather than construe ambiguities in federal statutes to favor the interests or autonomy of the states, the presumption of institutional autonomy construes ambiguities in state law to help the federal government dissect the state. Put another way, the federalism-promoting canon of construction in *Gregory* helps protect federalism through the national political process in Congress. By contrast, the presumption of institutional autonomy defended here helps protect *nationalism* through the political processes of *the states*. As I shall explain below, the presumption allows the federal government to exploit competition between nonfederal institutions to reduce the risk that any nonfederal institution will be a faithless agent. By requiring a "plain statement" from the state legislatures before barring a nonfederal officer from bargaining with the federal government, the presumption helps ensure that state legislatures will not withhold access to nonfederal institutions for improper — that is, strategic — reasons.

But, while *Gregory's* federalism-promoting canon of construction and the presumption of institutional autonomy are mirror images of each other, they both use the same approach to vindicating constitutional values. In both cases, courts might worry that they lack the capacity to resolve difficult empirical questions concerning the utility of federalism or cooperative federalism. The theory underlying both the *Gregory* canon and the presumption of institutional autonomy is that, by requiring well-informed political branches to act by a clear statement, the courts can strike the right balance between competing structural values. But, apart from these considerations of policy, I shall also argue that the presumption of institutional autonomy makes sense as a matter of conven-

tional legal reasoning (though here the case for the presumption is admittedly more ambiguous). In particular, the presumption helps promote understanding of some otherwise mystifying judicial opinions.

A. *Construing Federal Grant Conditions and Remedies to Promote Intergovernmental Competition*

Consider two sorts of ambiguities that might afflict a federal grant to a local government. First, the federal statute might be ambiguous about whether the local recipient of the grant must have control over the money free from state oversight. This ambiguity raises a question of federal law — how to determine the substantive conditions attached to federal money. Second, assuming that the federal grant is interpreted to exclude state control of the federal-local grant law, there might be ambiguities about the proper remedies to use if the state government nevertheless attempts to dictate the use of the federal money. On one hand, the court might simply enjoin state laws that attempt to control the grant to the local government, allowing the local government to exercise exclusive control over the money. On the other hand, the court might simply declare the local government ineligible to apply for the federal money, implicitly finding that the state in which the local government is located does not consent to the conditions in the federal grant. As I shall explain in more detail below, this question concerning remedies is largely a question of *state law*: to resolve this issue, the court must decide whether a state government would rather waive its laws controlling the federal grant or instead cease to be eligible for federal money.

I will argue in this section that, in a broad range of circumstances specified below, courts should resolve both sorts of ambiguities in favor of local control over federal money: using what I call a “presumption of institutional autonomy,” courts should construe the federal-local grant to exclude state control of the federal money. The proper remedy for state laws that violate local control ought to be injunction of the state laws rather than local ineligibility for the grant. Before I attempt to justify this view, I will define this position more carefully in section II.A.1, using the Supreme Court’s decision in *Lawrence County v. Lead-Deadwood School District*¹⁰³ as an illustration. Then, in section II.A.2, I will provide a justifica-

103. 469 U.S. 256 (1985).

tion for the rule rooted in policy, precedent, and the structure of intergovernmental relations.

1. *Defining the Presumption of Institutional Autonomy in the Context of Federal-Local Grant Programs*

In *Lawrence County v. Lead-Deadwood School District*, Lawrence County had received over \$100,000 from the federal government to provide compensation for the county's loss of tax revenue resulting from the existence of tax-exempt federal lands within the county's boundaries. The federal statute creating the grant program stated that local governments would have discretion to spend such funds on "any governmental purpose." A South Dakota statute, however, required the county auditor to distribute both federal and state payments in lieu of taxes in the same ratio as the county's general tax revenues were allocated. Because the county distributed sixty percent of its general tax revenue to its school districts, this state statute effectively required sixty percent of the payment in lieu of taxes to be allocated to the school districts. The county argued that this state requirement violated the terms of the grant program, because the federal government intended to provide the county with unfettered discretion to spend the federal grant on any purpose, free from state interference.¹⁰⁴

The Supreme Court agreed with the county, relying on the PILOT statute's language allowing the county to spend the PILOT funds on "any government purpose."¹⁰⁵ But this language resolves very little: it might simply mean that Congress wished to preclude federal limits on county activities, not that Congress intended to liberate counties from state supervision. So the Court also relied on the legislative history of the PILOT statute. According to the Court, Congress had explicitly decided that PILOT funds should not "pass through" the state governments for the state governments to distribute to local governments. Instead, in light of the experience with state-county rivalries in the general revenue sharing program, Congress had deliberately chosen to disburse the PILOT money directly to local governments without state intermediation. For the Court, this decision to bypass state governments entailed the conclusion that a state government also could not enact general legislation governing PILOT funds even after the county received such funds.¹⁰⁶

104. See *Lawrence County*, 469 U.S. at 258-59.

105. See *Lawrence County*, 469 U.S. at 260.

106. See *Lawrence County*, 469 U.S. at 261-68.

It is important to see that *Lawrence County* involves two legal ambiguities, only one of which the Court addresses. First, there is the federal statutory ambiguity — the issue of whether the federal PILOT statute bars the state legislature from interfering with Lawrence County's discretion to allocate the PILOT grant. Second, there is a further ambiguity that the Court ignores — the ambiguity in the remedy that ought to be granted for South Dakota's violation of the conditions of the grant program.

Even though the Court addresses the first issue, its resolution of the issue of statutory construction is unsatisfying. As Justice Rehnquist (joined by Justice Stevens) noted in dissent, "the system of laws that regulates [county] activities" presupposes that counties can be altered or destroyed entirely by their parent state government.¹⁰⁷ While this rule might not constrain Congress's powers, it seems odd to construe the PILOT grant as "somehow emancipat[ing] the county from the state regimen as to what is and is not a proper governmental purpose for a county."¹⁰⁸ Admittedly, the legislative history cited by the Court indicates that the cash was to be granted directly to the county and not to the state, and that Congress wished for the county to have the same discretion to spend the money as it would have to spend any other funds at its disposal, free from federal strings. It hardly follows, however, that Congress intended to displace the state legislatures' traditional prerogative to define the powers and responsibilities of its counties.

Indeed, if one took the majority's logic seriously, then Lawrence County should be permitted to use its federal PILOT grant to define and punish felonies, annex territory from neighboring local governments, create a militia, or modify the state's commercial code. True, state laws generally prohibit counties and other local governments from pursuing these ends.¹⁰⁹ But, if it is true that the state cannot place limits on how the county should spend its federal PILOT funds, then it logically follows that no state-law limits on the powers of counties can be invoked to limit the county's discretion to spend its PILOT funds as it pleases. The problem with the Court's reasoning, in short, is that it ignores how the very definition

107. See *Lawrence County*, 469 U.S. at 256, 270-71.

108. *Lawrence County*, 469 U.S. at 272.

109. Unlike municipalities and like cities, counties cannot annex land from neighboring local governments. See Briffault, *supra* note 37, at 361. Moreover, local governments generally do not obtain the power to define and provide for the punishment of felonies as a result of "home rule" powers. *e.g.*, COMM. ON HOME RULE OF THE AMERICAN MUNICIPAL ASSN., MODEL CONSTL. PROVISIONS FOR MUNICIPAL HOME RULE § 6 (1953); NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONST. § 8.02 (rev. ed. 1968).

of a "county" presupposes a network of state laws that define and limit the purposes that counties can pursue. Of course, it is unlikely that the Court intended to invalidate all state-law limits on county power. But nothing in the reasoning of the Court explains why South Dakota's law allocating the county's federal PILOT funds differs from South Dakota's laws barring counties from annexing other counties, condemning the state house, or enacting a general criminal code.

While the *Lawrence County* Court's resolution of the federal statutory question is unsatisfactory, the Court's attention to the remedial issue is nonexistent. The majority notes that, pursuant to its power to spend federal revenue, "Congress may impose conditions on the receipt of federal funds"¹¹⁰; it concludes from this proposition that any state law interfering with such conditions "runs afoul of the Supremacy Clause."¹¹¹ But it is well-settled that Congress has the power to change a state government's structure by spending federal revenue only if the state government actually accepts the revenue and thereby "knowingly and voluntarily accepts the terms of the contract."¹¹² By setting aside South Dakota's law because it was inconsistent with the conditions on the federal PILOT grant, the Court must therefore be assuming that South Dakota has somehow knowingly and voluntarily waived (some of?) its state laws defining county powers in order for its counties to continue to be eligible for federal PILOT grants. This implicit conclusion, however, is odd, given that South Dakota never repealed the law being challenged in the case and never applied for the federal grant, which was awarded directly to Lawrence County without the state government's intermediation. The Court never explains why the proper remedy in this case is not simply to find that, because South Dakota's laws do not comply with the conditions attached to the federal PILOT grant, Lawrence County is ineligible to participate in the PILOT program and must return its federal PILOT grant.

My criticism of *Lawrence County* is not intended to suggest that the holding of the decision is incorrect: as I shall explain below,

110. *Lawrence County*, 469 U.S. at 269-70.

111. *Lawrence County*, 469 U.S. at 270.

112. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.") (citations omitted); see also *Oklahoma v. Civil Serv. Commn.*, 330 U.S. 127, 143-44 (1947); *Steward Machine Co. v. Davis*, 301 U.S. 548, 589-90 (1937); *Massachusetts v. Mellon*, 262 U.S. 447, 482-83 (1923).

there is a powerful case to be made that the case is rightly decided. The inadequacy of the Court's reasoning, however, requires one to look deeper for an explanation of the case. One explanation is that this case is an instance of extreme judicial nationalism that abrogates the principle of state supremacy. Under this reading, *Lawrence County* might provide Congress with a right to use willing local governments as its agents even when state laws prohibit such a relationship and bar the local governments from accepting federal money.¹¹³ Such a reading would effectively eliminate the principle of state supremacy by enabling the federal government to "liberate" nonfederal institutions from state law simply by bestowing unrestricted federal funds upon them. As Professor Engdahl correctly notes, any such holding would be inconsistent with the reasoning of the entire Spending Clause jurisprudence, which has always assumed that a state government must voluntarily accept a federal grant in order for the grant to create any state obligations.¹¹⁴

Another explanation is that the *county's* voluntary acceptance of the grant constitutes acceptance by the state for the purposes of *Pennhurst*¹¹⁵ and other spending power decisions. But this reasoning would effectively allow one part of the state to bind the whole. In effect, such a reading of *Lawrence County* makes the concept of "consent" meaningless by allowing Congress to redefine which official is entitled to "consent" to federal demands on behalf of the state. It is as if Congress purported to purchase a subsidiary owned by a private joint-stock corporation by obtaining the consent of the subsidiary's CEO (or, for that matter, its mailroom personnel or secretarial pool). If Congress can so freely define what it means for an institution to consent, then the concept of consent loses its justificatory force.

Rather than accept such radical reworkings of spending clause jurisprudence, I offer a more modest explanation for the result in the case. As explained below, one can reconcile *Lawrence County* with the more general spending power jurisprudence by viewing the decision as an instance in which the Court enforced the presumption of institutional autonomy.

To understand this presumption, it is necessary to distinguish between two different limits that state law might impose on state or

113. See David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 74-76 (1994) (criticizing *Lawrence County* as implicitly assuming that Congress can use grants to enlarge powers of local government).

114. See *id.*

115. See *supra* note 112.

local officials. First, state law might prohibit certain types of activities because the states' lawmakers (by which I mean constitutional conventions as well as the state legislature) believe that the local government is unfit to pursue the activity, regardless of how the activity is funded. For the sake of convenience, I shall refer to these limits as "regulatory limits" on local discretion. So, for instance, a state's constitution might bar public school teachers from entering the physical premises of private parochial schools to provide those private schools' students with special educational services. Such a prohibition would apply regardless of how the teacher's services were financed: the state simply regards such mixing of public school teachers and private religion as an undesirable mixing of church and state. Likewise, a state may refrain from bestowing the power to enact zoning ordinances on county governments in order to avoid excessive regulation of land use. Again, the source of the funds used by a county for zoning enforcement is irrelevant to this prohibition: the state prohibits all such activity regardless of how it is funded.

One can usefully distinguish such regulatory prohibitions on local governments' activities from a second type of limit on local discretion, in which the state lawmakers have no particular objection to any local activity but instead wish to redirect federal revenues so they are expended on activities favored by the state lawmakers. I shall refer to such limits as "revenue-enhancing" limits on local discretion, because their purpose is simply to enhance the state's fiscal condition. The classic example of "revenue-enhancing" state laws is the state offset rules reducing state aid to school districts by precisely the amount of federal "impact aid" that such school districts receive.¹¹⁶ These state offset rules do not identify any specific policy as inefficient or inappropriate: the school districts can still pursue any policy they please — just with less federal money. The purpose of the state offset rules, therefore, is not the regulatory supervision of local discretion but rather simply the state legislature's desire to confiscate federal grant revenue.

Lawrence County presents a harder case. On one hand, one could argue that the state redirection of federal PILOT money was merely revenue-enhancing: nothing in the state law regulating county use of PILOTs suggested that there were substantive poli-

116. See *Carlsbad Union Sch. Dist. v. Rafferty*, 300 F. Supp. 434 (S.D. Cal. 1969); *Hergenreter v. Hayden*, 295 F. Supp. 251 (D. Kan. 1968); *Triplett v. Tiemann*, 302 F. Supp. 1244 (D. Neb. 1969); *Douglas Indep. Sch. Dist. v. Jorgenson*, 293 F. Supp. 849 (D. S.D. 1968); *Shepherd v. Godwin*, 280 F. Supp. 869 (E.D. Va. 1968).

cies with which counties could not be entrusted, for the state law did not bar counties from pursuing any policy with county revenue. On the other hand the state law did not single out federal grant revenue alone for state control: it applied to state PILOT revenue as well.¹¹⁷ One might, therefore, characterize the state law as a regulatory measure designed to constrain county discretion over all nonsource revenue. In general, one can distinguish between regulatory and revenue-enhancing limits on local governments' power with the following rule of thumb: if the state law limits local governments' actions only to the extent that those actions are funded by federal grants and not otherwise, then the state law is a revenue-enhancing measure. Otherwise, the state law is a regulatory measure.

This distinction between regulatory and revenue-enhancing state laws defines the scope of the presumption of institutional autonomy in the following ways. First, as a matter of construing federal grant legislation, when the federal government bestows federal revenues directly on local governments (for instance in the form of community development block grants, revenue sharing, impact aid, or payments in lieu of taxes), then courts should presume that, by bypassing the state legislature and bestowing federal revenue directly on the local government *recognized by the state constitution*,¹¹⁸ Congress intended to exclude state legislatures from imposing revenue-enhancing limits on local discretion over federal funds. So, for instance, federal district courts were correct to disregard state laws offsetting state aid by the amount of federal impact aid that such districts received. Likewise, although it is a closer case, the *Lawrence County* Court may have acted properly by presuming that Congress intended to bar the South Dakota legislature from redistributing sixty percent of the federal grant from the county to school districts, because South Dakota's law was a revenue-enhancing measure and the South Dakota Constitution recognized the county government as a constitutionally protected policymaking institution.¹¹⁹ Second, concerning remedies for violations of grant conditions, the presumption of institutional autonomy would presume that local governments should have standing to

117. S.D. CODIFIED LAWS § 5-11-6 (Michie 1993 & Supp. 1998).

118. I explain the reason for limiting the presumption to constitutionally recognized local governments at *infra* notes 123-25 and accompanying text.

119. See S.D. CONST. art. IX, § 2 (authorizing counties to adopt home-rule charters). The constitutional recognition need not involve immunity from legislative action: it is sufficient that the state constitution simply create the institution and bestow powers on it that, absent state legislative action, can be exercised to initiate policies.

challenge such state-law limits and that courts should not simply declare the local government ineligible to receive federal funds but should instead enjoin the revenue-enhancing state law that interferes with local discretion. Thus, *Lawrence County* correctly held that the revenue-enhancing state law reallocating the federal PILOT grant should simply be set aside.

2. *The Justification for the Presumption of Institutional Autonomy in the Context of Federal-Local Grants*

Why adopt such a construction of grant programs? The presumption can be defended in terms of policy, legislative context, and precedent, although the argument rooted in policy is the least ambiguous of the arguments.

As argued in section I.B, the intergovernmental system benefits from intergovernmental competition between state and local governments. The trend toward state centralization, however, reduces such competition, in part for such pernicious reasons as maximization of state governments' patronage opportunities, prestige, budget, etc. The presumption in favor of institutional autonomy would counteract this trend by giving local governments greater control over federal grant revenue, free from state regulation that would redirect such revenue to projects chosen by the state legislature. By bestowing federal revenue on local governments, the federal government creates a constituency — local politicians and their intergovernmental organizations — with a vested interest in lobbying to preserve control of such revenue.

The system of federal grants, in other words, is not merely the effect of lobbying of various nonfederal governments and organizations: it is also a *cause* of such lobbying. Such federal revenue pays the salaries of local officials who then become a potent force to continue the program; it pays benefits to local constituents who also lobby for the continuation of the program.¹²⁰ Federal-local grants

120. See, e.g., THOMAS J. ANTON, *AMERICAN FEDERALISM AND PUBLIC POLICY: HOW THE SYSTEM WORKS* 68-70 (1989) (describing how federal grants create local capacity for local governments to participate in intergovernmental system by improving their ability and incentive to apply for further federal aid); DERTHICK, *supra* note 21, at 56-58 (describing how a federal social security old-age program stimulated the creation of a lobby in Massachusetts to expand the program). For a recent example of this tendency, see Stephen Glass, *Anatomy of a Policy Fraud: The Hollow Crime Bill*, *THE NEW REPUBLIC*, Nov. 17, 1997, at 22, 23-24 (describing how federal grants for extra police gives municipalities an incentive to hire lobbyists to extend life of program). The multiplication of intergovernmental lobbies with an interest in federal programs need not increase the total amount of intergovernmental aid. To the contrary, by dividing aid among several levels of nonfederal governments, Congress can encourage nonfederal governments to lobby against the other nonfederal institutions' access to aid. For instance, municipalities' efforts to redirect federal revenue sharing from state gov-

thus give intergovernmental organizations and nonfederal officials a reason to focus their attention on Washington, D.C.¹²¹ So, for instance, the National Conference of Mayors arose in part because the Roosevelt administration offered federal aid directly to cities, giving big city mayors like Frank Murphy and Fiorello LaGuardia a political incentive to lobby in Washington.¹²² County commissioners who receive federal PILOT funds likewise have a greater incentive to monitor congressional activities to ensure that they do not lose control of such funds.

Why is it desirable to multiply the intergovernmental organizations interested in federal largesse? One hypothesis of this article is that such participation of different nonfederal institutions in the intergovernmental lobbying game is a useful way to constrain any single set of nonfederal institutions from acting strategically. As each category of nonfederal institutions develops a capacity to administer federal programs and an interest in lobbying for control over federal revenues, Congress becomes less dependent on any single governmental entity for information about the costs of intergovernmental programs. If any single entity becomes recalcitrant, then Congress can redirect federal money to a different and more compliant nonfederal institution. If this hypothesis is correct — and admittedly it must be taken as merely plausible absent rigorous empirical confirmation — then grant systems that diffuse federal revenue among competing nonfederal institutions might also plausibly cultivate the sort of intergovernmental competition that makes the system of cooperative federalism function most efficiently.

One must be careful, however, to qualify this argument in favor of encouraging fragmentation of state institutions and subdivisions. There will obviously come some point at which the costs of fragmentation and intergovernmental competition will exceed their benefits. In particular, there is a danger that, if any state agency or field office could compete for federal revenue, then the state government's central supervising agencies — the governor or key legislative committees — would be deprived of the capacity to engage in

ernments to themselves led them to be sharply critical of state management of such aid — criticism which led to the termination of such aid for *all* nonfederal governments. See Stephen Farber, *Federalism and State-Local Relations, in A DECADE OF DEVOLUTION: PERSPECTIVES ON STATE-LOCAL RELATIONS*, *supra* note 64, at 27, 39-40.

121. See ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, REPORT A-54, THE INTERGOVERNMENTAL GRANT SYSTEM AS SEEN BY LOCAL, STATE, AND FEDERAL OFFICIALS 113 (1977) (noting that “the greater the agency’s Federal aid dependency, the more contacts exist [between the state and federal agency]”).

122. See MICHAEL I. GELFAND, *THE NEW DEAL AND THE CITIES* 23-70 (1975) (describing the founding of the National Conference of Mayors during the 1930s).

comprehensive budgeting.¹²³ One might be confronted by the spectacle of district attorneys, state agencies' field offices, subagencies, and even individual state officers applying for and receiving federal grants without any preclearance from the governor or state budget director. In theory, such individuals or agencies could then use the conditions in the federal grant legislation to prevent the requisite supervising agent or agency from asserting centralized control over the federally funded institution, eliminating the possibility of comprehensive budgeting by the only institutions capable of surveying all of the states' programs and establishing some sort of priority among them.¹²⁴

To avoid such a disintegration of the state into a bundle of uncoordinated bureaucratic fiefdoms, one must limit the scope of the presumption of institutional autonomy: not just *any* state or local official should be authorized to apply for federal grants and then use the conditions in the grant to liberate him- or herself from state control. The easiest rule might be to limit the presumption to state subdivisions or departments the existence of which is recognized by the state constitution — for instance, counties, townships, school districts, municipalities, and a few state executive agencies like state universities, the state fish and game commissions, and elected state officials such as the attorney general.¹²⁵ As a practical matter, such a rule would ensure that the presumption applied only to those

123. For examples of this worry, see ASSEMBLY WAYS & MEANS COMM., NEW YORK STATE LEGISLATURE, APPROPRIATING FEDERAL FUNDS: A PROPOSAL FOR NEW YORK STATE (Dec 6, 1976), reprinted in *Role of State Legislatures in Appropriating Fed. Funds to States, Hearing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Govt. Affairs*, 95th Cong. 9-11 (1977) [hereinafter *Hearings*](describing instances in which highly specialized state agencies will liberate themselves from comprehensive budgeting through grant applications).

124. For defenses of comprehensive budgeting as a way to promote express consideration of the relative merits of old and new programs, see AARON WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* 136-37 (4th ed. 1984). For an example of a state law promoting comprehensive budgeting, see ALA. CODE §§ 41-19-1 to 41-19-12 (Michie Supp. 1994) (Alabama Budget Management Act). At the federal level, comprehensive budgeting has been promoted by various statutes and legislative rules. For a review of these mechanisms, see Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593 (1988).

125. The number of executive offices created by the state constitution will tend to vary with the age of the constitution and political culture of the state. State constitutions that are older or derive from what Elazar calls "traditionalistic" or "individualistic" political cultures will tend to have numerous independent and elected state executive officials, reflecting populist distrust of executive power. See, e.g., ALA. CONST. § 112-114 (creating eight elected state-wide executive offices); ARK. CONST. art. VI, § 1 (creating seven elected state-wide offices). By contrast, constitutions that have been recently updated, especially in "moralistic" political cultures that are more trustful of vigorous governmental action, tend to create a unified executive branch with power concentrated in a single elected governor assisted by a lieutenant governor. See, e.g., HAW. CONST. art. V, §§ 1-6. On the definition of political cultures among the states, see ELAZAR, *supra* note 65, at 112-31.

agencies that are normally assumed by state legislators to have a presumptive power to apply for federal funds and generally initiate policymaking within their jurisdiction. Of course, assuming that the state constitution permitted such legislation, the state legislature could impose stricter limits by requiring even constitutionally recognized state and local institutions to preclear grant applications with the state government.

Why should the presumption apply only to state laws that attempt to redirect federal grant revenue to state-favored interest groups? The reason is rooted in the fact that these revenue-enhancing laws are least likely to be related to the efficient supervision of local governments. As argued in Part I, local governments require considerable supervision, because their regulations can easily impose external costs on nonresidents. State governments are simply more capable than the federal government of providing the best level of supervision. To presume that state governments cannot place *any* limits on local governments' use of federal grants would be to eliminate such useful supervision. Therefore, it is prudent not to employ the presumption of institutional autonomy to state laws that absolutely and unconditionally prohibit local governments from engaging in certain activities deemed undesirable by the state government. If, for instance, state law withholds from counties the power to enact zoning regulations, then the counties should not obtain such a power simply because the federal government has bestowed an unrestricted grant on the county: the federal government is not as well-suited as the state government to assess the likelihood that counties will use such a power to impose external costs on nonresidents (through, say, so-called "exclusionary zoning" that eliminates opportunities for affordable housing).

These considerations about preserving state supervisory control do not apply as strongly, however, to revenue-enhancing regulations that do not prohibit any local activity as inefficient or otherwise undesirable. If the state law constrains local government discretion only to the extent that the local government's activities are funded by federal revenues, then the natural inference is that the state legislature is motivated by a desire to control federal revenue, and not a desire to correct some institutional weakness of the local government. For instance, state offset rules that effectively deprive school districts of their federal impact aid do nothing to restrict school districts' power over own-source revenues generated by the local millage. If there were some institutional flaw in school district governance that needed correcting, then one would expect

that the state legislature would more systematically reform the local government. But, if the state legislature simply deprives the school districts of their federal money, then one reasonably infers that the state legislature is not concerned about any weakness in local governments' structure or incentives but instead wishes only to confiscate federal grants for its own purposes. Such state rules represent the needless centralization of control over federal revenue, and courts should construe federal law to bar such centralization.

One might agree that the presumption is sensible as a matter of policy. But why is it good law? What conventional sources of legal authority support such a canon of construction?

The legislative context of direct federal-local grant programs supports the presumption of institutional autonomy. The congressional decision to bypass state legislatures and send federal funds directly to local governments during the New Deal¹²⁶ and later during the Johnson and Nixon administrations was a fundamental transformation of American federalism.¹²⁷ The fight among governors, mayors, counties, and townships for federal dollars has always been highly partisan (Republicans favoring the states and Democrats favoring the cities),¹²⁸ mapping onto the politics of race and poverty. In the words of Senator Muskie, state governments were thought to be "unsympathetic [to] the problems of urban areas."¹²⁹ Congressional decisions to use local rather than state agents are, in short, deliberate and well-informed, and they usually are accompanied by intense intergovernmental controversy. Given this legislative context, it seems sensible to employ the presumption of institutional autonomy as a default rule for construing federal-local grant programs: when Congress specifies localities as the recipients of federal money, it really means *localities* and not the state generally. In this respect, Justice White's analysis of the federal PILOT program in *Lawrence County* more accurately captures the flavor of such federal-local relations than does Justice Rehnquist's dissenting opinion involving *Hunter*.

126. See GELFAND, *supra* note 122.

127. See Catherine Lovell, *Community Development Block Grant: The Role of Federal Requirements*, PUBLIUS, Summer 1983, at 85.

128. The controversy is most famously illustrated by the struggle between the governors and mayors during the 1970s for control over block grants and revenue sharing funds. For a summary of this controversy, see CONLAN, *supra* note 12, at 59; HAIDER, *supra* note 56, at 77-117; Farber, *supra* note 120, at 27-49.

129. *Hearings*, *supra* note 123, at 63. The tendency for Democrats to distrust state governments and favor cities continued into the Reagan administration. See REAGAN AND THE CITIES (George E. Peterson & Carol W. Lewis eds., 1986).

What about the remedies for violation of grant conditions provided by the presumption of institutional autonomy? Even assuming that federal grants to local governments ought to be construed to exclude revenue-enhancing state regulations, why should the remedy for such state laws be invalidation of those laws? Why should not courts instead declare that the local government is ineligible for federal funds?

The answer to this objection is rooted in the definition of the presumption of institutional autonomy — the application of the presumption only to revenue-enhancing state laws. By definition, such laws are not enacted because the lawmaker has any objection to the local program authorized by the federal government and implemented by the local government. The state law is not designed to stop any pernicious local behavior but simply to expropriate federal funds for goals that the state government values more highly. Given these assumptions, it is eminently reasonable to presume that, if faced with the choice between the loss of federal grant revenue altogether and the loss of the power to redirect such revenue for purposes rejected by Congress, the state lawmakers would prefer the loss of the latter and would waive its revenue-enhancing conditions on the federal grant. After all, if the state were to lose the federal grant altogether because of noncompliance with grant conditions, it would *a fortiori* lose its power to reallocate the grant for the purpose of enhancing state revenues. Therefore, the default rule that most accurately captures the state lawmakers' probable intent is the rule that such lawmakers would sooner surrender their capacity to impose revenue-enhancing measures on local governments than prevent their local governments from obtaining any federal grant revenue at all.

When state laws serve regulatory rather than revenue-enhancing purposes, however, the presumption of institutional autonomy is inappropriate: rather than enjoin such regulatory state limits on local discretion when they are inconsistent with federal grant conditions, the Court should remand the case to the trial court to give state officials an opportunity to withdraw from the federal grant program. So, for instance, in *Wheeler v. Barrera*,¹³⁰ the Court was confronted with the question of whether Missouri's refusal to allow public school teachers to provide special education services in parochial schools violated the terms of Title I of the Elementary and Secondary Education Act. The Court held that Missouri could

130. 417 U.S. 402 (1974).

achieve compliance with the federal grant program either by providing comparable special education services to students of private and public schools or by simply withdrawing from the federal program and declining federal special education money.¹³¹ In such a case, there is a genuine question about whether state lawmakers — either the state legislature or the state constitution's framers — would prefer to receive federal revenue or would rather maintain regulatory restrictions on school districts. The appropriate response of the courts, therefore, is to remand the case to the trial court so that the responsible state officials litigating the case have an opportunity to withdraw from the federal program rather than waive a restriction that they might value more highly than federal revenue.¹³²

By failing to recognize the distinction between regulatory and revenue-enhancing state laws, courts may unwisely allow local governments to liberate themselves unilaterally from state control simply by accepting federal grants inconsistent with such control. The dangers of this misguided approach toward federal grant programs is well-illustrated by the decision of the U.S. Court of Appeals for the Second Circuit in *United States v. City of New Haven*.¹³³ In *New Haven*, the City of New Haven accepted a \$750,000 grant from the Federal Aviation Administration to extend an airport clear zone into the territory of the neighboring town of East Haven. The Second Circuit held that the federal grant authorized New Haven to extend the clear zone even though Connecticut law expressly prohibited such airport expansion unless the governing body of the town in which the land was located consented to the expansion.¹³⁴ The regulatory purpose of the prohibition was obvious: airport expansions impose extraordinary costs on neighbors, and cities that

131. See *Wheeler*, 417 U.S. at 425.

132. This is not to say that courts should never enjoin state laws inconsistent with federal grant conditions. If the state government itself, through statute enacted by the state legislature, has expressly acceded to such conditions, then it might be perfectly appropriate to enjoin state laws inconsistent with the terms under which federal money has been awarded to the state government. In *King v. Smith*, 392 U.S. 309 (1968), for instance, the Court enforced federal grant conditions governing Aid to Families with Dependent Children (AFDC) by simply enjoining Alabama's "substitute father" rule limiting eligibility for AFDC assistance. In *King*, the Alabama legislature had already assented to participate in the AFDC program by submitting a plan to the Department of Health, Education, and Welfare (HEW) and accepting federal revenue even after the HEW had promulgated the "Flemming Ruling" outlawing the "substitute father" regulation. In effect, the Court simply enforced the "contract" between Alabama and the federal government with the remedy of specific performance. See Allanson S. Willcox, *The Function and Nature of Grants*, 22 ADMIN. L. REV. 125, 133 (1969).

133. 447 F.2d 972 (2d Cir. 1971).

134. See *New Haven*, 447 F.2d at 973.

expand airport facilities into neighboring municipalities may well be subsidizing their own economic development by effectively confiscating property values from nonvoting nonresidents. Nevertheless, the Second Circuit reasoned that, under the Supremacy Clause, state law could not interfere with this federal-local agreement governing the use of navigable airspace.¹³⁵

This article maintains that *New Haven's* holding was wrong as a matter of law and policy. The power of the federal government to preempt state laws under the Supremacy Clause depends on the state's voluntary acceptance of federal money, and Connecticut had never accepted any federal grant. Moreover, there is no reason to assume that Connecticut would prefer to waive its regulatory limit on towns' condemnation powers to enrich one town at the expense of another.¹³⁶ The Second Circuit should have followed the procedure later suggested by *Wheeler*: it should have remanded the case to the trial court with instructions that the state government should be permitted to intervene so that the state, not the city, could decide whether or not to forfeit the grant or waive the state law limiting New Haven's powers. Once the State of Connecticut determines that the costs of airport expansion exceed the benefits, the final decision concerning the powers of the City of New Haven ought to have been reserved to the State of Connecticut: the presumption of institutional autonomy, after all, is only a presumption and not an irrebuttable one.

The presumption of institutional autonomy also helps answer a second question that occasionally excites judicial controversy — the issue of whether local governments should have standing to enforce the terms of federal grant programs against the state government. Courts sometimes hold that local governments should lack such standing because they are “creatures of the state” that are incapable of asserting rights against the government that created them.¹³⁷ This reasoning, however, is confused. As noted above in section I.A, while *Hunter* might bar local governments from asserting fed-

135. See *New Haven*, 447 F.2d at 973-74.

136. State governments were acutely aware of the danger that municipal airports might impose spillover effects on nonresidents. During the 1945 hearings on the Civil Aeronautics Act, the Council of State Governments urged that federal money for airports be channelled through the states to ensure that an impartial level of government would arbitrate such disputes. See ROSCOE C. MARTIN, *THE CITIES AND THE FEDERAL SYSTEM* 95 (1965).

137. See *Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk*, 91 F.3d 1240, 1242 (9th Cir. 1996); *City of East St. Louis v. Circuit Court*, 986 F.2d 1142, 1144 (7th Cir. 1993); *Village of Arlington Heights v. Regional Transp. Auth.*, 653 F.2d 1149, 1152 (7th Cir. 1981) (holding that the municipality lacks standing to challenge state law under Fourteenth Amendment).

eral constitutional rights against the state government, this conclusion hardly implies that local governments cannot enforce federal statutes against state governments. If Congress intends local officials to serve as federal agents responsible for implementing federal law, then there is no sensible reason why such officials cannot enforce the federal grant program against the state. They are, after all, the officials with the greatest vested interest in protecting their discretion under the federal grant program: federal agencies may likely underenforce federal grant conditions relating to local autonomy, either because they lack the resources to monitor state compliance or because they wish to preserve their resources for other battles deemed more important to the success of the program. Therefore, whenever the federal government gives local governments a role to play in implementing federal programs, courts should presume that those local governments have standing to protect this role.

One might argue, however, that such a rule for construing federal-local grant legislation flies in the face of Supreme Court precedents like *Gregory v. Ashcroft*,¹³⁸ which require federal statutes to be construed to preserve rather than erode state autonomy. In *Gregory*, the Court refused to construe ADEA's ban on mandatory retirement to invalidate state laws requiring the retirement of state judges at the age of seventy. Given the importance of state autonomy as an element of constitutional structure, the Court reasoned that it could not construe ADEA to work such an intrusion into state governments' internal structure unless such a result was required by ADEA's plain language.¹³⁹ In short, the Court normally interprets ambiguous federal statutes to favor rather than limit state autonomy. Why, then, should one construe ambiguous grant statutes to restrict the powers of state legislature to impose revenue-enhancing laws?

One might answer this question by noting that the presumption of institutional autonomy is rooted in precisely the same sort of reasoning as *Gregory*. The conventional defense of *Gregory* is that, by requiring Congress to overrule state autonomy expressly and clearly with a plain statement, *Gregory*'s "plain statement" rule helps to protect federalism through the national political process — congressional markup, debates, committee reports, etc. The Court might deploy such an indirect strategy for protecting federalism be-

138. 501 U.S. 452 (1991).

139. See *Gregory*, 501 U.S. at 470.

cause the Court might lack a clear legal standard for determining when intrusions on state autonomy go too far, and the Court also might lack confidence in the judicial capacity to make the complex empirical judgments necessary to evaluate whether judicially imposed doctrines of state autonomy will excessively impede Congress's legitimate national powers. By encouraging Congress to confront these issues, *Gregory's* "plain statement" rule allows the Court to sidestep these difficulties, in effect delegating their solution to interest groups seeking national action, who must make the case before Congress for express intervention in state political structure.¹⁴⁰

But one can defend the presumption of institutional autonomy with a mirror image of this reasoning: while *Gregory* uses a plain statement rule to protect federalism through the national political process, the presumption of institutional autonomy uses a plain statement to protect *nationalism* through the *states'* political processes. The presumption, after all, does not give Congress an unlimited power to dissect the state and liberate local officials from the control of the state legislature. The state legislature remains free to bar cities and counties from applying for federal grants if the state constitution permits such a prohibition: the only requirement is that the state legislature must speak clearly by specifying that local governments' failure to comply with state law should render those local governments ineligible for federal money. As with *Gregory*, the presumption of institutional autonomy can be justified as a way to ensure that the political process — the *state* political process — carefully considers an important constitutional value — effective national spending programs — before foreclosing local participation in those programs.

Moreover, the same concerns that motivate indirect protection of federalism through a plain statement rule in *Gregory* also suggest similar indirect protection of *nationalism* through a plain statement rule. After all, just as the Court might be reluctant to give the states the power to resist generally applicable laws such as the ADEA, so too, as explained in sections I.A and B, the Court might be reluctant to give Congress an unlimited power to dissect the state. The precedential basis for such a power is uncertain and the

140. For a defense of this sort of reasoning, see Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 1006-07 (1993). For a less sanguine opinion about *Gregory*, see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 629-45 (1992).

empirical consequences of such dissection of the state might be harmful. The Court can avoid such a potentially dangerous extension of national power by requiring state legislatures to speak plainly if they wish to exercise their prerogative to withdraw their local governments from federal intergovernmental arrangements. Thus, just as *Gregory* allows the Court to avoid the controversial extension of federalism norms by requiring Congress to exercise its powers of *national* supremacy with a plain statement, so too does the presumption of institutional autonomy allow the Court to avoid the controversial extension of Congress's powers by requiring state legislatures to exercise their powers of *state* supremacy — their supremacy over local governmental institutions — with a plain statement.¹⁴¹

Such a “plain statement” rule provides a powerful protection to Congress. In theory, a state legislature might require its local governments to preclear all applications for federal money with some central state agency. Likewise, state legislatures might simply enact a blanket rule that local governments shall be ineligible for federal grants whenever they fail to comply with *all* state laws. In practice, however, one would expect state legislatures to be extremely reluctant to limit local governments' capacity to engage in “grantsmanship,” as any such limit will impose onerous financial burdens on the state's citizens: local government initiative in seeking federal money is an important source of revenue for the state.¹⁴² Especially if the state legislature has merely a revenue-enhancing motive for controlling federal-local grants, one would expect that the state legislature would prefer to waive such controls rather than confess to the electorate that it wished to deprive the voters of federal money.¹⁴³

141. For a helpful discussion of the relationship between “substantive” constitutional limits and “procedural” requirements that legislative bodies make findings or otherwise deliberate about constitutional matters, see Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695 (1996).

142. Local officials' support for intergovernmental transfers is frequently critical for inducing Congress to enact such measures. See, e.g., TIMOTHY CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM 67–68, 222 (1998) (describing importance of Mayors' lobbying efforts for enacting General Revenue Sharing and defeating Clinton's block grant proposals).

143. There have been several instances in which state legislatures have decided to eliminate legislative preclearance for grant applications simply because such preclearance presented too great an administrative headache for the legislature. See Carol S. Weissert, *State Legislatures and Federal Funds: An Issue of the 1980s*, PUBLIUS, Summer 1981, at 67, 72–73.

Admittedly, the presumption of institutional autonomy has not been expressly defended in any judicial opinion (although it is implicitly suggested by *Lawrence County*). Nevertheless, such a "plain statement" rule bears a family resemblance to other judicially created "plain statement" rules governing local governments' immunities from federal law. Consider, for instance, local governments' immunity from antitrust liability under *Parker v. Brown*.¹⁴⁴ In a series of opinions, the Supreme Court has held that the *Parker* doctrine, which exempts state legislative programs from the scope of federal antitrust laws, does not automatically protect local governments from antitrust liability.¹⁴⁵ In order for local governments to enjoy such an exemption from federal antitrust laws, local governments must act pursuant to a "clearly articulated" state policy "to displace competition with regulation or monopoly public service."¹⁴⁶ In effect, the Court has held that, while Congress has conferred immunity from antitrust lawsuits on state governments, state governments cannot delegate this immunity to their local governments unless the state legislature issues a plain statement clearly endorsing local governments' anticompetitive conduct.¹⁴⁷

The presumption of institutional autonomy provides an analogous "plain statement" rule, albeit one that enhances, rather than detracts from, local governments' powers. The presumption defended here provides that local governments should enjoy the benefit of federal-local grants, absent clear state laws denying such local authority. By contrast, *City of Boulder* provides that, absent clear state laws authorizing local anticompetitive policies, local governments do *not* enjoy the federal benefit of antitrust immunity.¹⁴⁸ While the two "plain statement" rules cut in opposite directions, both address the same fundamental issue: the level of state legislative supervision of nonfederal governmental officials that is consistent with those officials' exercise of federally derived powers. It

144. 317 U.S. 341 (1943).

145. See *City of Columbia Adver., Inc. v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986), *rehg. denied*, 475 U.S. 1150 (1986); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (plurality).

146. See *City of Lafayette*, 435 U.S. at 413; see also *City of Boulder*, 455 U.S. at 52.

147. Admittedly, recent opinions make clear that the state legislature's "plain statement" need not be all that plain. For instance, the Court has held that the state has articulated local governments' exclusion of competition against existing billboard owners when the state legislature simply enacts a zoning enabling act authorizing the regulation of land uses such as billboards. See *Omni Outdoor Adver.*, 499 U.S. at 372.

148. See *City of Boulder*, 455 U.S. at 52-55 (holding that authorization in state constitution's home rule provision was insufficiently precise to bestow *Parker* immunity on city).

should hardly be surprising that the proper default rule should vary with the purposes of the federal program. In the context of federal antitrust policy, the Court best protects the federal program by requiring close state legislative supervision of local governments. After all, as Justice Brennan noted repeatedly in *City of Lafayette*, local governments pursuing "maximum benefits for the community constituency"¹⁴⁹ are likely to regulate "without regard to extra-territorial impact and regional efficiency,"¹⁵⁰ in pursuit of "their own parochial interests."¹⁵¹ By contrast, when Congress bestows money directly on local governments, the proper background assumption is that Congress's policy will be best advanced by presuming exclusion of state control of the money.

But note that, whether the "plain statement" rule encourages or discourages state legislative control of local governments' exercise of federal powers, the default rule preserves the principle of state supremacy. Regardless of the default rule, the state legislature remains free to deprive its subdivisions of both *Parker* immunity and the power to apply for federal grants-in-aid. Both presumptions, in short, preserve the essential element of state supremacy over nonfederal governments while simultaneously promoting the national interest in cooperative federalism.

In sum, the result in *Lawrence County* makes sense as an example of the presumption of institutional autonomy. When local governments receive federal revenue directly from the federal government, the courts ought to presume that the state government has no right to enhance its own revenues by regulating the allocation of the federal grant. The proper remedy, moreover, ought to be injunction of the state revenue-enhancing law. This presumption of local control, however, ought not to apply to any regulatory state laws that define the powers and jurisdiction of local governments without regard to the source of revenue funding local government activities. The principle of state supremacy requires the courts to give state lawmakers the last word about whether local governments will act as agents of the federal government, and the presumption of institutional autonomy is well-calculated to give the state such control.

149. *City of Lafayette*, 435 U.S. at 403.

150. *City of Lafayette*, 435 U.S. at 404.

151. *City of Lafayette*, 435 U.S. at 408.

B. *Construing Federal Grant Programs and State Constitutional Provisions to Protect Intragovernment Competition Between State Executive and Legislative Branches*

The federal government does not dissect the state simply by liberating local governments from state law. Federal grants-in-aid have also liberated state executive officials from the control of state legislatures. As explained below, such federal empowerment of governors has its uses: it can increase intragovernmental competition for federal revenue, which can, in turn, reduce the ability of state governments to engage in inefficient strategic behavior when negotiating over the content and implementation of intergovernmental regulatory schemes.

1. *The History of Struggles Between Legislatures and Governors for Control Over Federal Grants*

Before one attempts any evaluation of executive control over federal grants, it is important to have a brief overview of how the federal government has historically dissected the state, freeing state agencies from the control of state law. During the 1960s, both Congress and federal agencies generally preferred to bestow grant funds on nonelected professionals — officials who specialized in the delivery of a particular service and, although nominally under the control of state politicians, were insulated from political control by civil service rules as well as by professional loyalties that often made them more loyal to their federal counterpart agency than to the state legislature or governor.¹⁵² Throughout the 1960s and 1970s, mayors and governors struggled against such insulation of appointed agency experts from their control. Swallowing many of their differences with each other, state and local executive politicians succeeded in persuading both Congress and the President to give them greater control over federal funds.¹⁵³ Nixon's successful promotion of block grants and revenue sharing effectively gave elected executive "generalists" new power over federal revenue at the expense of the appointed policy "specialists."

152. For instance, the grant programs of Johnson's creative federalism strongly encouraged such control of federal funds by state agency "specialists" with "single-agency" requirements, thus requiring federal grants to be controlled by an agency specializing in the delivery of the particular service that Congress wished to encourage. See WRIGHT, *supra* note 12, at 83-86.

153. See CONLAN, *supra* note 74, at 67 (describing "lingering suspicions and bitterness" that afflicted relations between governors and mayors).

The success of the elected executive officials, however, ushered in a new stage of intragovernmental competition among elected policy generalists: by the mid-1970s, state *legislators* began to fight with governors for greater control of federal grant revenue.¹⁵⁴ Typically, state legislatures asserted such control by appropriating federal grants with varying degrees of specificity and barring governors (or other state executive officials) from expending any federal revenue above the amounts specifically appropriated for purposes approved by the state legislature.

Such legislative efforts to control federal money met with mixed success, for both practical and legal reasons. In four states, the state supreme courts ruled that state legislatures were legally barred from appropriating such federal grant revenue.¹⁵⁵ The state courts were not completely clear about whether the source of this limit on state legislatures' powers was the state constitutional "separation of powers" doctrine, federal grant conditions, or some combination of both.¹⁵⁶ In any case, state legislators lobbied Congress to amend federal grants to ensure that state legislatures exercised ultimate control over the federal funds.¹⁵⁷ But, despite these pleas and a significant 1977 decision in favor of state legislative control by the Pennsylvania Supreme Court,¹⁵⁸ Congress has done little to clarify the role of state legislatures in appropriating federal grants.¹⁵⁹ Moreover, even in states where state legislative appropri-

154. See WRIGHT, *supra* note 12, at 276.

155. See *Navajo Tribe v. Arizona Dept. of Admin.*, 528 P.2d 623 (Ariz. 1975); *MacManus v. Love*, 499 P.2d 609 (Colo. 1972); *Opinion of the Justices to the Senate*, 378 N.E.2d 433 (Mass. 1978); *Sego v. Kirkpatrick*, 524 P.2d 975 (N.M. 1974).

156. These decisions' reasoning tended to be ambiguous as to the precise source of the limit on state legislative power: they reasoned that such appropriation was barred by state constitutional "separation of powers," because the grants came impressed with a federal purpose that the executive branch was charged with executing. Such a "separation of powers" argument, however, seemed to collapse into an argument about the federal conditions attached to the federal grant by Congress: in effect, the state courts seemed to argue that Congress intended the revenue to be controlled exclusively by governors. For a summary of such arguments, see George D. Brown, *Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs*, 28 AM. U. L. REV. 279, 285-87 (1979).

157. In 1977, Edmund Muskie, chair of the Senate Subcommittee on Intergovernmental Relations held hearings on legislative oversight of federal funds at which the majority of witnesses — primarily state legislators and the Advisory Commission on Intergovernmental Relations — called for greater state control of federal grant revenue. See *Role of State Legislatures in Appropriating Federal Funds to the States: Hearing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Govt. Affairs*, 95th Cong. (1977).

158. See *Shapp v. Sloan*, 391 A.2d 595 (Pa. 1978).

159. The state legislatures' most salient victory occurred in 1995, when, at the urging of the National Conference of State Legislatures, U.S. Senator Hank Brown successfully sponsored the "Brown Amendment" to the Temporary Assistance for Needy Families (TANF) block grant program, a provision providing that state legislatures could appropriate federal block grant revenue for temporary assistance or for child care. The Brown Amendment pro-

ation might be legally permissible, many states use only the vaguest open-ended appropriations to allocate federal grants, relying on executive agencies to allocate the funds among subprograms.¹⁶⁰

State legislators typically defend a greater state legislative role in the allocation of federal grants as a way to ensure that some state agency comprehensively compares and ranks competing specialized state agencies' proposals for expenditure of grant revenue.¹⁶¹ Absent a requirement of state legislative appropriation, state officials might continue programs with federal funds even after the state legislature has terminated state funding for such programs.¹⁶² Worse yet, such state agencies might even practically commit the state legislature to continue to provide state funds for such programs because the existence of federal funding would create a class of program beneficiaries and officials who would lobby on behalf of continued state matching funds in order to retain federal money.¹⁶³ Based on these concerns, both the Advisory Commission on Intergovernmental Relations (now defunct) and state legislatures have

vided that "[a]ny funds received by a State under the provisions of law specified in [TANF] shall be subject to appropriation by the State legislature, consistent with the terms and conditions required under such provisions of [TANF]." See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 § 901, 110 Stat. 2105, 2347 (1996), quoted in 42 U.S.C. § 601 app. (1998). This provision did not conclusively resolve all of the ambiguity concerning state legislative control even in the narrow context of the TANF program: at most, it declared that state legislatures could "appropriate" TANF funds, without specifying how much or what sort of appropriation was "consistent with the terms and conditions of [TANF]."

160. Five state legislatures — Arizona, Colorado, Connecticut, Delaware, and New Mexico — still do not appropriate federal grant revenue at all but rather allow the governor or executive agency to apply for federal grants and spend it free from direct legislative oversight. An additional seven states — Alabama, Idaho, Indiana, Iowa, North Carolina, West Virginia, and Wisconsin — provide only open-ended authorizations for executive agencies to spend federal funds: these states place no cap on the federal grant revenue that an agency can expend, and they do not appropriate federal grant revenue to specific subprograms administered by the grant-obtaining agency. Minnesota sometimes appropriates specific amounts of federal grant revenue for specified federal programs. Minnesota, however, provides an "open and standing" authorization for state agencies to expend federal funds. Texas and Utah allow the expenditure of unanticipated federal funds. See LEGISLATIVE FINANCE PAPER NO. 98: LEGISLATIVE OVERSIGHT OF FEDERAL FUNDS 6-7, 9 (1995) (written by Arturo Perez for the National Conference of State Legislatures).

161. See *Hearings*, *supra* note 123, at 79-85 (statement of the U.S. Advisory Commn. on Intergovernmental Relations).

162. See, e.g., ASSEMBLY WAYS & MEANS COMM., *supra* note 123, at 9-12. This state report describes instances in which the state legislature terminated state funding for various agency activities — travel expenses for state university researchers, high school instructional projects, psychiatric treatment for youth, etc. — only to have the agencies make up the shortfall with federal grant revenue.

163. See *Hearings*, *supra* note 123, at 22-26 (noting that "employees, local organizations, recipients of services" funded by federal matching grants form a "constituency" that lobbies against discontinuing the program).

recommended legal reforms to increase the power of state legislatures over federal funds.¹⁶⁴

I argue that these proposals for total legislative control over federal grant revenue are overstated. Comprehensive budgeting might well be needed, but there is no reason why governors and state budget officers cannot provide it in as competent a manner as legislative finance committees.¹⁶⁵ This is not to say that state legislatures should not play a significant role in controlling federal grants — they should. As explained in section II.A of this article, however, the intergovernmental system may work best when no single state institution exercises a monopoly over federal money. When state institutions compete with each other to secure federal revenue, one improves the odds of faithful state adherence to state-federal bargains. In sections II.B.2 and 3 below, I explain how the presumption of institutional autonomy might be used to construe the powers of governors over federal grants. As suggested below, such a presumption might enable the federal government to exploit competition between state legislators and governors to minimize strategic behavior by either institution.

2. *The Definition of the Presumption of Institutional Autonomy in the Context of Federal Grants to Governors*

Before one attempts to justify the presumption, it is helpful to explain more fully what the presumption would require. What exactly does it mean to promote the diffusion of power among state institutions where federal grants are concerned? Consider, first, how courts could increase the power of governors through their construction of state constitutional principles: courts could allow governors to disregard state legislative appropriations of federal grant revenue that are inconsistent with the implementation plan

164. ACIR recommended a model state bill and model state constitutional amendment, requiring that the state legislature appropriate federal grant funds to specific subprograms and prohibit agencies from expending grant funds above these appropriated amounts without legislative approval. See *Hearings*, *supra* note 123, at 98-111. The state legislatures concurred with these recommendations — but they also argued that federal statutes be amended to include state legislatures as the co-recipient of federal grant revenues so that courts would not construe federal grant programs to give governors exclusive control over federal funds. See *id.* at 59 (statement of Representative James Ritter, Chair, Federal-State Relations Comm., Pa. House of Representatives).

165. See ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, *supra* note 121, at 96-100 (cataloguing the ways in which state budget officers and governors review executive agencies' grant applications). ACIR's survey showed that, out of 34 state budget officers responding to the survey, 13 precleared all grant applications, while 20 precleared some grant applications of subordinate state agencies. Typically, state governments do not preclear the grant applications of the state's public universities.

submitted by the governor to obtain the grant. Such a rule would benefit governors simply because the governor is the official most responsible for drafting and submitting implementation plans to federal agencies: state legislatures typically play little role in the grant application process. By binding the state to adhere to the plan, the presumption of institutional autonomy would enable governors to use the implementation plan as a way to appropriate federal grants for purposes that would trump later contrary legislative appropriation.

So, for instance, suppose that a governor submits an implementation plan to the Department of Health and Human Services (HHS) in order to obtain a block grant under the Temporary Assistance for Needy Families (TANF) program. The TANF statute gives states the option of seeking an exemption from work requirements for mothers with children younger than one year.¹⁶⁶ If the state plan provides that the state applies for this exemption and state law is otherwise silent on the issue of the exemption, then, after the state receives the block grant, the state legislature ought to be barred from appropriating the TANF block grant revenue in ways that would require mothers with infants to seek employment in order to receive assistance.¹⁶⁷ The presumption of institutional autonomy, in other words, would allow the governor's plan to deprive the state legislature of an appropriation option that would otherwise be allowed to the legislature by federal law. In effect, the governor and not the state legislature would speak for "the state."¹⁶⁸

It is important to emphasize that the practical effect of such a limit on the state legislature's appropriation power would probably depend on the remedy available for illegal appropriations. The remedy of merely withholding federal funds from noncomplying state legislatures might be entirely ineffective: one can imagine that few governors or federal agencies would be willing to scuttle federal funding for a program in order to enforce implementation plans against recalcitrant state legislatures. If the federal agency could *enjoin* the inconsistent appropriation measure and simply bestow the federal grant on the governor as, in effect, a lump-sum appro-

166. Pub. L. No. 104-193, §103.A.407(b)(5), 110 Stat. 2105, 2131 (1996).

167. This precise controversy occurred in Colorado when Governor Roy Romer sought the exemption for mothers with infants, over the objections of key legislators in the State Assembly. Eventually, the governor backed down and withdrew the application of the exemption.

168. I discuss the ambiguities of the TANF legislation at *infra* notes 169-172.

priation, then the limit on the legislature's power to appropriate federal grants would be quite significant.

It is important as well to note that, despite the proposed limit on the state legislature's power to appropriate federal grant revenue, state legislatures would still have at least three different ways to control federal grants. First, the state legislature would retain the power to enact substantive legislation requiring the inclusion or exclusion of elements — exemptions from work requirements for mothers with infants in TANF plans submitted to the HHS — in any state implementation plan submitted to a federal agency.¹⁶⁹ Thus, the governor could not commit the state to the implementation of federal law in ways that contradicted substantive state legislation. Second, the state legislature still could appropriate federal grant revenue in ways that did not contradict the implementation plan submitted by the state government. If the governor, therefore, submits a vague implementation plan to the federal agency, then the legislature will have plenty of room to control the allocation of federal funds in the interstices of the state's plan. Finally, the state legislature still could control any federal grants for which the federal government required matching state dollars, simply by refusing to appropriate the required state contribution and thereby prevent federal dollars from being directed to programs to which the state legislature objected.¹⁷⁰

These means of legislative control are significant, but they do not render nugatory the gubernatorial power provided by the presumption of institutional autonomy. The state legislature in theory could prevent the governor from ever submitting an implementation plan contrary to the state legislature's views simply by enacting a substantive statute barring such an application. In practice, however, it will be practically and legally difficult for a state legislature — a multi-member body with multiple contending factions — to use substantive statutes to determine the multitude of operational details of federal programs. The governor will, therefore, have significant power to fill in the gaps of substantive legislation in his or

169. This technique has been used primarily with federal assistance dollars. Under both the AFDC and the recently enacted TANF, federal law provided states with the option of applying for "waivers" from federal requirements and seeking "exemptions" from certain otherwise applicable requirements — say, the requirement that women with children under the age of one year obtain employment. Governors and state legislatures have fought major political struggles over whether or not to apply for such relaxation of federal regulatory standards.

170. This is how Colorado legislature controls all federal grants awarded on a matching basis. The Colorado legislature has no power to appropriate federal grants directly under the state constitution.

her administration of the federal grant.¹⁷¹ The state legislature may attempt to reduce obstacles to collective action by delegating oversight of grant applications to a special committee of key legislators. Under many state constitutions, however, such a delegation would violate principles of separation of powers.¹⁷²

3. *The Justification for the Presumption of Institutional Autonomy in the Context of Grants to Governors*

Why use the presumption of institutional autonomy to give governors the power to constrain state legislative power over federal grant revenues? As with the presumption of local autonomy defended in section II.A.2, I justify the presumption of gubernatorial autonomy in terms of sensible policy, judicial doctrine, and the legislative history of grant programs.

As suggested in section II.A, competition between nonfederal governmental institutions can sometimes promote efficiency in the intergovernmental system by reducing the costs of monitoring nonfederal agents of the federal government. I maintain that the presumption of institutional autonomy might produce precisely this sort of efficiency by allowing the federal agency to pit the governor and legislature against each other, lending weight to one or the other institution depending on their fidelity in implementing federal policies. If the governor is willing to submit a detailed implementation plan to the federal agency, then, under the presumption of institutional autonomy, such a plan would trump the appropriation; moreover, the remedy for illegal appropriations would be injunction of the appropriation measure and award of the grant directly to the governor as an unallocated lump sum. Thus, if the federal agency supports the governor's plan, then the federal agency can enjoin later state legislative appropriations that the agency deems to be less faithful to the goals of the federal program.

On the other hand, if the governor submits a vague or unsatisfactory plan to the federal agency, then the federal agency can re-

171. The governor also has a greater power to veto a piece of substantive legislation than a state appropriations measure allocating federal grants. By vetoing an appropriations measure, the governor would be depriving the federal grant program's beneficiaries of federal dollars. This consequence makes gubernatorial use of such vetoes politically unpalatable. By contrast, given the default rule that governors do not require express state authorization to apply for federal grants, if the governor vetoes substantive legislation, the availability of federal (or, for that matter, state) revenue is unaffected. In the substantive context, in other words, the default rule is gubernatorial power.

172. See, e.g., *Opinion of the Justices*, 532 A.2d 195 (Mass. 1987); *General Assembly v. Byrne*, 448 A.2d 438 (N.J. 1982); *People v. Tremaine*, 168 N.E. 817, 822 (N.Y. 1929); *Tucker v. South Carolina Dept. of Highways and Pub. Transp.*, 424 S.E.2d 468 (S.C. 1992).

frain from enforcing the plan and instead allow the state legislature to appropriate the grant for its own purposes. In effect, the presumption allows the federal agency to choose whether to give federal funds to the state legislature or governor, based on which institution most faithfully proposes to carry out the federal program. Moreover, the competition for control of federal funds provides the federal agency with a practical sanction: rather than simply withdraw federal funds from the noncomplying state — a course of action that would actually undermine the federal program — the agency can simply accept or preempt the state legislature's appropriation, delivering the federal funds to the state branch most willing to carry out the program according to terms acceptable to the federal agency, without harm to the federal program's beneficiaries.

The presumption of institutional autonomy, therefore, promises significant advantages in preventing strategic behavior by state governments. But, apart from its benefits as a matter of policy, what is the basis for the principle in federal or state law? Is this presumption a plausible way to construe either federal grant legislation or state constitutions in light of judicial doctrine, statutory or constitutional text, and legislative history?

Candor requires one to acknowledge the ambiguity of the usual sources of authority: the presumption is neither obviously required nor precluded by either the text, or judicial interpretations, of federal statutes or state constitutions. Moreover, the answer would vary immensely depending on the particular grant program or state constitution that one analyzes. Nevertheless, the presumption of institutional autonomy makes at least as much sense as rival accounts: federal grant statutes and state constitutions do not expressly give state legislatures any absolute right to appropriate federal grant dollars in disregard of the governor's plan, but neither do they deprive state legislatures of all power over such grant revenue.

Federal statutes typically bestow federal grants on state executive agencies or governors; outside the context of general revenue sharing, these laws are usually silent about the role of state legislatures.¹⁷³ But such silence should not be read to exclude state legis-

173. The recent exception to this practice has been the so-called Brown Amendment, which provides that two block grants "shall be subject to appropriation by the State legislature, consistent with the terms and conditions required under [the block grant provisions]." Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 901, 110 Stat. 2105, 2347 (1996), *quoted in* 42 U.S.C. § 601 app. (1998). Congress repeated similar language in 29 U.S.C. § 2941(a) (1998), providing that block grants for job

latures' role in appropriating federal revenue. Federal agencies have occasionally taken such an extreme view, arguing that the statute's reference to the governor as the applicant for federal funds precludes legislative involvement in the allocation of such money.¹⁷⁴ This extreme position, however, is hard to justify: nothing in the legislative history suggests a conscious congressional decision to exclude legislative involvement. Rather, the evidence suggests that Congress accidentally overlooked state legislatures rather than deliberately excluded them. As the OMB noted in 1980, Congress and federal agencies simply find it easier to locate a single state executive official in charge of policymaking relevant to some federal grant.¹⁷⁵ Because the "interface" between federal and state governments takes the form of a state executive official, it is natural for federal agencies and Congress to assume that such an official really constitutes the state government when designing federal grant programs.

Therefore, there seems little reason to exclude all legislative appropriation of federal grants as a matter of federal law. Congress simply has no history of deliberately favoring governors over state legislatures in the same way that Congress has favored local governments over state governments with certain direct federal-local grant programs. But, at the same time, it would be equally odd to argue that the state legislature has some unlimited power to appropriate federal grants, regardless of the terms of implementation plan submitted by the governor. The grant program, after all, is analogous to a fee-for-service contract under which the state government undertakes to advance some federally favored goal in return for federal money. No court has ever doubted that the state is bound to honor the terms of this "contract" when it accepts federal money.¹⁷⁶ But the terms to which the state agrees when it accepts the money are most obviously embodied in the implementation plan submitted to and accepted by the federal agency.¹⁷⁷ Of course, the effects of

training "shall be subject to appropriation by the state legislature, consistent with the terms and conditions required under [the Workforce Investment program]."

174. See COMPTROLLER GENERAL (GAO), *FEDERAL ASSISTANCE SYSTEM SHOULD BE CHANGED TO PERMIT GREATER INVOLVEMENT BY THE STATE LEGISLATURE* 23-27 (GGD-81-3 Dec. 15, 1980).

175. See Letter from Wayne G. Granquist, Associate Dir., Management & Regulatory Policy, OMB, to William J. Anderson, Director, GAO (Aug. 11, 1980), in App. IV, COMPTROLLER GENERAL, *REPORT TO THE CONGRESS: FEDERAL ASSISTANCE SYSTEM SHOULD BE CHANGED TO PERMIT GREATER INVOLVEMENT BY STATE LEGISLATURES* app. IV (GGD-81-3 Dec. 15, 1980).

176. See, e.g., *Oklahoma v. Civil Serv. Commn.*, 330 U.S. 127, 143 (1947).

177. As the Court has noted, "there would be no reason to require a State to submit assurances to the [federal agency] if the statute did not require the State's findings to be

the presumption of institutional autonomy would depend on the actual language of the particular federal grant legislation. The presumption is, after all, only a rule of construction. In unusual cases such as the Block Grants Section of the TANF program,¹⁷⁸ it might be extremely difficult to argue that the governor's plan should limit the state legislature's power to appropriate the grant. Section 417 of the TANF legislation, after all, provides that "[n]o officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part."¹⁷⁹ One might argue that this provision bars any federal agency or court from enforcing the governor's implementation plan against the contrary wishes of the state legislature.¹⁸⁰ Even in the case of TANF, however, there remains ambiguity about which branch of the state government truly speaks for "the state." If the governor wishes to enforce his or her own implementation plan against a contrary state legislative appropriation, it is not obvious that the federal agency must regard the appropriation rather than the plan as the authoritative voice of the state. Congress certainly wanted to bar federal agencies from interfering excessively with state administration of the TANF program.¹⁸¹ It is a little more ambiguous whether Congress intended to bar governors from exercising primary control over federal monies.¹⁸²

In short, one can make a respectable — but not irrebuttable — argument that, at least absent language like section 417 of TANF, federal grant programs permit state legislatures to appropriate federal grant dollars — but only in ways that are consistent with the implementation plan submitted by the state. But what about state

reviewable in some manner by the [federal agency]." *Wilder v. Virginia Hosp. Assn.*, 496 U.S. 498, 514 (1990).

178. Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2112-61 (1996).

179. § 103.A.417, 110 Stat. at 2159.

180. See Carl Tubbesing & Sheri Steisel, *Answers to Your Welfare Worries*, STATE LEGISLATURES, Jan. 1997, at 12 (arguing that "[t]he state plan does not have the effect of law and can be modified at any time").

181. See Cynthia R. Farina, *On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act*, 50 ADMIN. L. REV. 591, 620 (1998) (noting that welfare reform "was lobbied for by, and sold to, the states as a devolution of control over program content from the national to the local level").

182. While the TANF legislation includes the Brown Amendment authorizing state legislative appropriation of TANF money, this authorization is limited to appropriations "consistent with the terms and conditions required under [the Block grant provisions]." See *supra* note 173. One such term and condition is that the state submit a plan to implement the TANF program.

constitutions? Should they be construed to bar or limit legislative appropriation of federal grants?

State courts have offered two extreme answers to this question, both of which (I argue) are equally mistaken. One answer, provided by the Pennsylvania Supreme Court, is that the state legislature's power to appropriate federal grants is unlimited. According to this view, the state legislature can appropriate federal grants even in ways that are inconsistent with the implementation plan submitted by the governor to obtain the grant from a federal agency.¹⁸³ The second answer, provided by four other state courts, is that state constitutional "separation of powers" doctrines prohibit *any* legislative appropriation of federal grants.¹⁸⁴ As I argue below, both of these theories are not required by law and make terrible policy.

Consider, first, the position of *Shapp v. Sloan*¹⁸⁵ that state legislatures ought to have unlimited powers to appropriate federal grants. In *Shapp*, the State Justice Commission, appointed by Governor Milton Shapp, filed a law enforcement plan with the Federal Law Enforcement Assistance Administration in order to receive a block grant under the Law Enforcement Assistance Act (LEAA). The commission's plan called for the continued funding of the Pennsylvania Office of Special Prosecutor, an official who was then conducting a grand jury investigation into allegations of political corruption in Philadelphia.¹⁸⁶ The state legislature, however, enacted statutes barring any expenditure of federal grant revenue without a specific legislative appropriation of such revenue for a particular program.¹⁸⁷ The legislature then failed to appropriate any of the federal grant to fund the Office of the Special Prosecutor.¹⁸⁸

The Pennsylvania Supreme Court held that the legislature's refusal to appropriate funds for the special prosecutor did not violate the terms or conditions under which the grant had been awarded.¹⁸⁹ The court apparently reasoned that the proposals contained in the state's law enforcement plan did not constitute conditions on the

183. See *infra* notes 185-93 and accompanying text.

184. See *infra* notes 194-98 and accompanying text.

185. 391 A.2d 595 (Pa. 1978).

186. See *Shapp*, 391 A.2d at 610 (Roberts, J., dissenting).

187. See *Shapp*, 391 A.2d at 600-01.

188. See *Shapp*, 391 A.2d at 601.

189. See *Shapp*, 391 A.2d at 606 ("As long as . . . the terms and conditions *proscribed* by the Congress are not violated, there is no inconsistency between the provisions of the federal programs and state legislative administration of the funds." (emphasis added)).

expenditure of federal funds that the state was bound to honor. But, as noted above, this is an odd way to regard the state's implementation plan: there is little point to the plan if it can be casually disregarded by the state once the state obtains the money. The court also noted that the state constitution required all funds to be deposited in the state's general fund and be expended only according to an appropriation.¹⁹⁰ But this provision — common in state constitutions¹⁹¹ — hardly suggests that the legislature's power of appropriation should be unlimited by other principles of law — say, the state constitution, federal grant conditions, or the governor's implementation plan. Finally, the *Shapp* Court worried that, if the legislature could not appropriate federal funds, then the governor could "use federal funds to establish and finance one system of agencies . . . without the approval or authorization of the very body which is constitutionally empowered to set up and finance state plans for education or law enforcement."¹⁹² This is certainly a justifiable worry that I discuss below,¹⁹³ but, again, it is not obvious that the legislature can avoid executive tyranny only by ignoring state implementation plans.

Going to the opposite extreme, four state supreme courts have held that state legislatures cannot appropriate federal grants *at all*, even in ways that are consistent with the implementation plan submitted by the governor to the federal agency.¹⁹⁴ Such courts reason that federal grant revenues are "custodial" funds that are "impressed with a trust" imposed by Congress, a trust with which the state legislature cannot interfere.¹⁹⁵

This view that all appropriation must be prohibited is as misguided as the opposite view of *Shapp* that all appropriation must be allowed. The implicit assumption of these decisions seems to be that the governor somehow has the exclusive role of ensuring that federal grants are spent in compliance with federal conditions. Although the state courts are vague about the basis for this doc-

190. See *Shapp*, 391 A.2d at 600-01.

191. See *infra* note 204.

192. *Shapp*, 391 A.2d at 605.

193. See *supra* notes 166-72 and accompanying text.

194. See *Navajo Tribe v. Arizona Dept. of Admin.*, 528 P.2d 623 (Ariz. 1975); *MacManus v. Love*, 499 P.2d 609 (Colo. 1972); *Opinion of the Justices to the Senate*, 378 N.E.2d 433 (Mass. 1978); *Sego v. Kirkpatrick*, 524 P.2d 975 (N.M. 1974).

195. See, e.g., *Opinion of the Justices*, 378 N.E.2d at 436. For a general discussion of the decisions' reasoning, see George Brown, *Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs*, 28 AM. U. L. REV. 279, 288-90 (1979).

trine,¹⁹⁶ one might infer that these courts regard the implementation of Congress's grant conditions as an inherently administrative task. By using appropriation to define how the governor must use federal funds, the state legislature is, therefore, usurping the governor's prerogative to control administration of government. The judicial prohibition on legislative appropriation of federal grants, therefore, resembles judicial doctrines barring appropriation measures that micro-manage executive departments and thereby deprive governors or executive agencies of all meaningful discretion in the carrying out of legislative instructions.¹⁹⁷

This view of grant administration, however, flatly ignores the broad policymaking discretion that Congress bestows on state governments when it provides them with federal revenue. One cannot deem this discretion to be merely "administrative" discretion because, in some abstract sense, Congress imposes some general purpose on the federal revenue: Congress's specification of some general purpose in the grant legislation — especially block grant legislation — leaves enormous room for state policymaking. Thus, it is hardly surprising that even state courts that generally bar legislative appropriation of federal grants have not adhered faithfully to their own "nonappropriation" doctrine.¹⁹⁸

The presumption of institutional autonomy provides an alternative to such rigid and unworkable distinctions between "administrative" and "legislative" tasks. Rather than try to allocate control over federal grants according to such formulae, the presumption allows *both* the legislature and the governor to compete for control over such revenue, just so long as each uses the means appropriate to its institution. So, for instance, the state legislature has the

196. For instance, the Massachusetts Supreme Court stated conclusorily that "the [federal] money is impressed with a trust and is not subject to appropriation by the Legislature." *Opinion of the Justices*, 378 N.E.2d at 436. The court made no effort to explain why the legislature would be incapable of carrying out the "trust."

197. See, e.g., *Chaffin v. Arkansas Game & Fish Commn.*, 757 S.W.2d 950 (Ark. 1988) (stating that legislative appropriation for state game and fish commission cannot dictate to commission how much money to spend on magazine); *Communications Workers of Amer. v. Florio*, 617 A.2d 223 (N.J. 1992) (holding that state legislature cannot use appropriations to define which categories of government employees should be laid off).

198. See, e.g., *Colorado Gen. Assembly v. Lamm*, 738 P.2d 1156 (Colo. 1987) (stating that governor has exclusive power to allocate federal grants among programs but legislature has exclusive power to transfer portions of block grants between departments). This decision is rooted in the Court's earlier decision, *Colorado Gen. Assembly v. Lamm*, 700 P.2d 508 (Colo. 1985). When confronted with the enormous discretion possessed by state governments in managing federal funds, the Colorado Supreme Court has attempted to cabin the implications of its anti-appropriation doctrine by barring governors from transferring federal block grant revenues between different state departments without authorization from the state legislature.

power to enact substantive legislation prohibiting or requiring particular elements in the governor's application for federal grants. Assuming that the legislature can override the governor's veto, the principle of state supremacy provides that such control through substantive legislation is the prerogative of the legislature. On the other hand, if the state legislature is silent concerning the governor's application for grants, then the governor should have the prerogative to control the federal grant according to the terms of the implementation plan that he or she submitted: in such a case, the governor's choices can be deemed "administrative," for they do not offend any properly enacted legislative policy but rather fill the gaps of legislative silence.¹⁹⁹

Under this theory of competitive joint control, the state legislature's later appropriation of the federal revenue obtained by the governor should not be precluded out of hand. Nor should courts attempt to divine some ideal division of responsibility over the funds based on some *a priori* theory of gubernatorial or legislative competence. Instead, the appropriation should be evaluated according to the plan submitted by the governor. If the plan does not leave the decision open, then the appropriation should be enjoined. If the plan leaves the choice open, then there is no reason to preclude legislative control. Indeed, such an opportunity for later appropriation gives the federal agency an opportunity to compare the governor's "bid" for control of federal revenue with a rival "bid" — the state legislature's appropriation measure — to decide which proposal best advances federal purposes. Such intragovernmental competition is not calculated to violate the federal "trust" but rather to ensure that state officials more faithfully execute their federal responsibilities.

Such a procedural resolution of the clash between the governor and state legislature is consistent with the way in which state constitutions normally allocate executive and legislative powers. Rather than define which decisions are "administrative," state courts typically limit legislative interference with governors' decisions by enforcing nondelegation doctrines analogous to the Supreme Court's

199. Such a theory of gubernatorial powers is analogous to the state-law doctrine followed in "strong governor" states, like New York, that when the legislature fails to specify how revenues are to be allocated, the governor can determine the allocation among sub-programs. See *Alliance for Progress v. New York State Div. of Hous. & Community Renewal*, 532 N.Y.S.2d 821 (N.Y. Sup. Ct. 1988); *New York Pub. Interest Group v. Carey*, 390 N.Y.S.2d 236 (N.Y. Sup. Ct. 1976).

doctrines in *INS v. Chadha*²⁰⁰ and *Bowsher v. Synar*:²⁰¹ they bar the state legislature from delegating review of governors' choices to special committees or legislative officers.²⁰² Furthermore, the presumption of institutional autonomy does not prevent the state legislature from forbidding or requiring the governor to apply for federal grants in a particular way; rather, the presumption requires only that the state legislature exercise such a prerogative in a particular manner — through substantive legislation or appropriations consistent with the state's implementation plan.

To be sure, such a doctrine limits legislative appropriation of federal grants in troubling ways. As Kate Stith has noted, the barring of any executive expenditure without express appropriation forces legislators to oversee executive officials closely so as to prevent unauthorized governmental actions.²⁰³ By allowing governors to receive federal grants without such appropriation, the presumption of institutional autonomy eliminates such oversight. Of course, even if the state legislatures do not appropriate federal grants, Congress does: it is possible that such congressional oversight would satisfy the state constitutional requirement that any money withdrawn from the state treasury be an appropriation "made by law" (or words to this effect).²⁰⁴ But even if congressional appropriation is legally sufficient, one might doubt whether it is practically effective at stopping executive abuse: as suggested in section I.B, there are good reasons to believe that such federal supervision would be less effective than supervision by the state legislature.

Nevertheless, there are at least three reasons to believe that such a limit on state legislatures' power of the purse is consistent with state constitutional notions of separation of powers. First, the governor can achieve such independence from the state legislature

200. 462 U.S. 919 (1983).

201. 478 U.S. 714 (1986).

202. See, e.g., *General Assembly v. Byrne*, 448 A.2d 438 (N.J. 1982); *Tucker v. South Carolina Dept. of Highways and Pub. Transp.*, 424 S.E.2d 468 (S.C. 1992) (barring county's legislative delegation from exercising legislative veto over governor's highway projects within county); *West Virginia v. Hechler*, 462 S.E.2d 586 (W. Va. 1995) (barring legislative veto of agency rules).

203. See Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1356-60 (1988).

204. See, e.g., ALA. CONST. art. IV, § 72; ALASKA CONST. art. IX, § 13; ARK. CONST. art. V, § 29; CAL. CONST. art. XVI, § 7 (West's Ann. 1996). Only two of these clauses — in the Constitutions of New Mexico and Delaware — suggest that the "law" in question must be enacted by the state legislature rather than by Congress. See DEL. CONST. art. VIII, § 6 (requiring appropriation by "Act of the General Assembly"); N.M. CONST. art. IV, § 30 (requiring appropriation by "the legislature"). The practice in both states, however, is not to appropriate federal grants. Indeed, the New Mexico Supreme Court seems to bar such appropriation. See *New Mexico ex rel. Segó v. Kirkpatrick*, 524 P.2d 975 (N.M. 1974).

only by submitting an implementation plan that is sufficiently detailed to preclude later state appropriations. If the governor submits a vague plan to maximize his or her discretion, then the legislature's ability to appropriate the grant will not be substantially affected, because such appropriations will likely be consistent with the nebulous terms of the plan. But governors will likely be reluctant to sacrifice their discretion by submitting an overly detailed plan; there are, therefore, political pressures that preserve the legislative power to appropriate the grant revenue. Second, even if the governor's plan is extraordinarily detailed, the federal agency may choose not to enforce the plan if the later legislative appropriation is deemed to be equally consistent with federal policies. Assuming that the federal agency has exclusive power to enforce the plan, governors will be unable to use the plan to constrain legislative appropriations when the appropriations do not depart substantially from federal policies. Third, the state legislature can always bar the governor from carrying out policies that the legislature opposes simply by enacting substantive legislation that constrains the governor's ability to apply for federal funds or bars specific gubernatorial policies. At most, the presumption of institutional autonomy simply creates a default rule under which the governor can apply for and control federal grant revenue if the state legislature is silent. This is a significant power, but it does not free the governor from state legislative control if there is a consensus among legislators that gubernatorial policies are excessively costly.

In short, the presumption of institutional autonomy's basic requirement that state legislative appropriations of federal grants comply with state implementation plans is probably consistent with the best reading of both federal grant programs and most state constitutions. Given the diversity of both federal grants and state constitutions, one must be careful of overgeneralizing.²⁰⁵ Nevertheless, to the extent that any generalization is possible, the presumption seems consistent with federal and state law.

The more difficult issue is how to remedy legislative departures from the state's implementation plan. Should the court enjoin the illegal appropriations measure and allocate the federal grant as a lump-sum appropriation to the governor? Or should the court instead simply withhold some percentage of federal funds? The arti-

205. For instance, in states with traditions of strong gubernatorial offices — such as New Jersey and New York — the limit on state legislative appropriation may seem trivial. In states like Colorado, where the governor has few powers over the budget, the limitation may be more significant.

cle has already noted that, as a matter of policy, the remedy of injunction is crucial: without it, the federal agency's power to enforce the state's implementation plan could be an empty power, as few federal agencies would withdraw federal funds from noncomplying state legislatures. But why is such a remedy consistent with the prevailing doctrines governing grant programs? The withholding of the federal revenue might be a more legally appropriate sanction, given that the state has no obligation to participate in the federal scheme at all — and, indeed, has a constitutional entitlement not to participate.

The short answer to this question is that the Court has frequently enforced conditions on federal grants simply by enjoining state laws inconsistent with those conditions.²⁰⁶ In effect, such a remedy is analogous to the remedy of specific performance in the context of breach of private contracts. One might argue that having accepted the federal funds, the state is obliged to carry out its part of the intergovernmental bargain and not merely provide restitution of the money that it accepted.²⁰⁷ But, as with *Lawrence County*, this answer is a bit unsatisfactory: the contractual analogy is problematic, because the governor rather than the state legislature accepted federal funds. Why, then should the legislature's appropriations measure be set aside to accommodate the gubernatorial plan that the legislature never approved?

To resolve this question, one should look to the purpose of a legislative appropriation. Using the terminology laid out in section II.A.1, one might ask whether the appropriation of federal grants is intended to be regulatory or revenue-enhancing. The principle of state supremacy guarantees to the legislature the power to escape conditions attached to federal funds by forgoing those funds. Therefore, if the state legislature intends to withdraw from a federal grant program by appropriating the funds in ways inconsistent with the state's own implementation plan, then the proper remedy would be simply to deprive the state of the grant. This, however, would be an odd way to interpret a measure appropriating a federal grant: the very point of an appropriations measure is to retain federal money, not abandon it. If the legislature were actually confronted

206. See *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968).

207. In cases where the state legislature has agreed to participate in a federal program but has failed to appropriate either federal grant revenue or state matching funds, state courts have occasionally argued that the state legislature is obliged to appropriate the necessary revenue. See *Coalition For Basic Human Needs v. King*, 654 F.2d 838 (1st Cir. 1981); *Kimble v. Solomon*, 599 F.2d 599 (4th Cir. 1979); *Knoll v. White*, 595 A.2d 665 (Pa. Commw. 1991).

with the choice of seeing the state lose the federal grant altogether or foregoing its power to appropriate the grant, the state legislature might choose the latter alternative. If so, the remedy most consistent with state legislative intent would be to ignore the appropriation.

Given the ambiguity of appropriations measures, the ideal remedy would help clarify whether the legislature intends to withdraw from the federal program and forgo federal funds when it appropriates grant revenue in ways inconsistent with the state's own plan. But this consideration suggests that withholding grant revenue is a poor sanction with which to enforce state implementation plans. The problem with such a remedy is that, as explained in section II.A, it is so draconian that it would likely deter both governors and federal agencies from filing lawsuits to enforce the state implementation plans. After all, the withholding of federal revenue would damage the very program that the federal agency is trying to advance. The court would, in effect, destroy the state's implementation plan in the course of enforcing it. This possibility might encourage canny legislatures to appropriate federal grants in ways inconsistent with the state's plan, in hopes that the federal agency would be deterred from challenging the noncompliance by the severity of the sanction. In short, far from helping to clarify the state legislature's intentions, the sanction of withholding federal funds might actually encourage state legislatures to conceal strategically their willingness to comply with the terms under which federal revenue is awarded to the state.

By contrast, the remedy of awarding the grant directly to the governor free from the state legislature's appropriation would eliminate the federal agency's and the governor's disincentive to enforce the implementation plan. Such a remedy does not force the state legislature to participate in the federal program against its will: if the legislature wishes to withdraw from the federal program, then it can do so with substantive legislation barring the governor from applying for or accepting the federal grant.

In sum, allowing the federal government to dissect the state in the administration of federal grant programs has some advantages. By playing local governments off against the state, or the governor off against the state legislature, the federal agency can reduce the possibility that any nonfederal officer responsible for federal programs will violate the terms of their intergovernmental agreement. Such dissection need not violate the principle of state supremacy, just so long as state lawmakers designated by the state constitution

can ultimately refuse to participate in some scheme of cooperative federalism. The presumption of institutional autonomy defended here only limits the *needless* centralization of the state to ensure that, absent the clear command of state law, federal agencies will be able to take advantage of competition for federal revenue between state and local officials.

III. CONSTRUING LOCAL GOVERNMENTS' POWERS TO ACT AS FEDERAL AGENTS

Federal grant programs are not the only context in which the federal government dissects the state. Controversies about whether and how federal law can liberate state or local officials from the constraints of state law arise whenever federal law authorizes nonfederal officials to undertake actions that are unauthorized by state law. As argued in section I.B, when state law unambiguously prohibits the actions, then the principle of state supremacy bars such actions. The question, however, is more difficult when state authorization is ambiguous. Some state-law doctrines such as Dillon's Rule²⁰⁸ would suggest that, absent express state authorization, the local officials' action ought to be barred. Should such doctrines apply to official action that is expressly authorized by federal law when state law authorization is ambiguous?

In this final Part of this article, I examine two controversies involving such ambiguity: first, the dispute between the City of Tacoma and the State of Washington over the City's construction of a dam that would flood the State's fish hatchery,²⁰⁹ and second, the State of Connecticut's efforts to prevent the City of Bridgeport from filing for bankruptcy under Chapter IX of the federal bankruptcy statute.²¹⁰ In both of the controversies, the cities successfully invoked federal law to preempt state laws or policies limiting their discretion. I argue that these results make sense, because narrow construction of local governments' powers are inappropriate when the federal government has authorized local action. This is not to say that the state legislature should not be able to veto such federal-local cooperation. One can argue on the basis of both policy and doctrine, however, that local officials should be presumptively entitled to implement federal law just so long as state law does not expressly forbid the local action.

208. See *infra* note 222.

209. For the complex series of decisions, see *supra* note 19.

210. *In re City of Bridgeport*, 128 B.R. 688 (Bankr. D. Conn. 1991).

A. *Federal Authorization for Municipal Projects That
Impose Spillover Costs Outside the Municipality:
The City of Tacoma's Dam and
Other Unneighborly Behavior*

In 1948, the City of Tacoma applied to the Federal Power Commission for a license to build two dams on the Cowlitz River, a tributary of the Columbia. The two dams were significant projects.²¹¹ But the smaller dam (measuring 240 feet above bedrock) caused the most controversy, because it would flood a salmon hatchery owned by the State of Washington. Accordingly, the Washington State Fish and Game Departments, represented by the State Attorney General, intervened before the Federal Power Commission to oppose the City's application for a license. The State argued that Washington's statutes required Tacoma to obtain permission from the State to construct any dam storing more than ten acre-feet. Moreover, state law also prohibited the construction of any dam over twenty-five feet high if the dam would block the migration of anadromous fish. Finally, the State argued that Tacoma simply lacked the power to condemn the State's hatchery by flooding it, because state law did not confer upon cities the power to condemn state-owned land already dedicated to a public use.²¹²

The Federal Power Commission disagreed in an opinion that was later upheld by the U.S. Court of Appeals for the Ninth Circuit and affirmed by the Supreme Court.²¹³ To the Ninth Circuit, the case presented a simple matter of the supremacy of federal law over state law: since *Gibbons v. Ogden*, it was well settled that state law could not interfere with the rights of a federal licensee to exercise the rights provided by a federal license on a navigable waterway.²¹⁴ The Ninth Circuit conceded that the City of Tacoma was a creature of the State that normally could not act without authorization from state law. The court of appeals noted, however, that *private* licensees could invoke federal law to preempt state law inconsistent with the federal license, even when the private licensee — an electrical co-op — was arguably a creature of state law.²¹⁵ The court of ap-

211. The combined cost of the two dams would equal \$146 million and generate 465,000 kilowatts of power. The larger dam measured 510 feet from the bedrock and was expected to inundate 10,000 acres of land as far as 21 miles upstream. See *State of Washington Dept. of Game v. Federal Power Commn.*, 207 F.2d 391, 393 (9th Cir. 1953); *City of Tacoma I*, *supra* note 4, 262 P.2d at 216-17 (Wash. 1953).

212. See *State of Washington Dept. of Game*, 207 F.2d at 395.

213. See *State of Washington Dept. of Game*, 207 F.2d at 398.

214. See *State of Washington Dept. of Game*, 207 F.2d at 396.

215. See *State of Washington Dept. of Game*, 207 F.2d at 396.

peals apparently saw no reason to distinguish between municipal and private corporations.

While the Ninth Circuit appeal was pending, the Washington Supreme Court got an opportunity to revisit the issue: the City filed an action in state court seeking a declaration that the City's revenue bonds financing the dams' construction were valid. The State contested the action on largely the same grounds that it raised before the FPC, and, after procedural maneuvers too tedious to recount, the Washington Supreme Court agreed with the State, holding that the State had not conferred the power to condemn the hatcheries upon the City and that the FPC's effort to confer such powers on a city would constitute "a momentous and novel" transformation of constitutional federalism.²¹⁶ The State's victory, however, was short-lived: the Supreme Court granted certiorari and held that the Washington Supreme Court's decision was barred by the doctrine of *res judicata*, as the issue of municipal power had already been litigated before the Ninth Circuit.²¹⁷

On its surface, therefore, the *Tacoma* case presents an admirably clear conflict between the Ninth Circuit and the Washington Supreme Court concerning the principle of state supremacy: the Ninth Circuit apparently rejected the principle, while the Washington Supreme Court embraced it, and the federal tribunal won because its decision came first. But a closer examination of the case suggests more ambiguous reasoning: the Ninth Circuit's opinion can be read not so much as rejecting outright the idea of state supremacy over local governments, but rather as qualifying this principle with a presumption of local autonomy, a presumption that makes eminent sense as a matter of doctrine and policy.

To understand the *Tacoma* case, it is crucial to realize that the case was about how to construe the state legislature's *silence*. Neither the Ninth Circuit nor the Washington Supreme Court held that any state law expressly prohibited the City of Tacoma from building its proposed dams. To be sure, the Fish Sanctuary Act prohibited *all* dams that blocked the migrations of salmon.²¹⁸ But even the Washington Supreme Court agreed that this state statute was not intended to govern dams approved by the Federal Power Commission.²¹⁹ The real difference of opinion between the Washington

216. See *City of Tacoma II*, *supra* note 19, 307 P.2d at 577.

217. See *City of Tacoma IV*, *supra* note 19, 357 U.S. at 341.

218. See *City of Tacoma I*, *supra* note 4, 262 P.2d at 218.

219. The Washington Supreme Court reasoned that this state law did not prevent private utilities from constructing a dam if the private utility held a federal license to construct the

Supreme Court and the Ninth Circuit rested on whether the Federal Power Commission could bestow the power to condemn state-owned land on the City of Tacoma even though state statutes were silent on the question of whether the City possessed this power.

The Washington Supreme Court started from the premise that "[a] municipal corporation does not have an inherent power of eminent domain" and can exercise such a power "only when it is expressly authorized to do so by the *state legislature*."²²⁰ The court then concluded that the City of Tacoma lacked the power to condemn the State's fish hatchery, because no state statute expressly provided cities with the power to condemn state-owned land. The court also addressed what it called "the subsidiary question" of whether federal legislation could bestow eminent domain powers on the City of Tacoma, even if state law did not do so. In a curiously conclusory opinion, the Court asserted that "[t]he Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator," because allowing cities to exercise federally derived powers would "relegate a sovereign state to a position of impotence never contemplated by the framers of our constitutions, state and Federal."²²¹

The Washington Supreme Court's view that cities could not exercise powers of eminent domain without express state authorization is not novel: it is merely a narrower version of Dillon's rule — the rule that the powers bestowed on municipalities by state legislatures ought to be narrowly construed.²²² Moreover, one can argue

dam: the state law would be preempted by the federal license governing a navigable waterway. The issue, then, was whether the Fish Sanctuary Act should be construed to prohibit municipal dams even if federal law preempted its application to private dams. As the dissenters on the Washington Supreme Court noted, this was a state-law question of severability, a question that even a majority of the Washington Supreme Court answered in favor of the City: according to the state supreme court, there was no indication in the Fish Sanctuary Act that the state legislature intended to place municipalities in a position inferior to private utilities, by stripping them of powers that the private utilities would continue to enjoy. See *City of Tacoma I*, *supra* note 4, 262 P.2d at 229. Both courts reasoned that, if the Fish Sanctuary Act was preempted as to private entities, then purely as a matter of state law, it ought to be preempted as to municipalities as well.

220. *City of Tacoma II*, *supra* note 19, 307 P.2d at 575.

221. *City of Tacoma II*, *supra* note 19, 307 P.2d at 577.

222. Dillon's Rule was first formulated by Judge John Dillon, sitting on the Iowa Supreme Court in *City of Clinton v. Cedar Rapids & Mo. R.R.*, 24 Iowa 455 (1868). Dillon incorporated the rule in his 1872 treatise on municipal corporations, stating that:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation.

that such a narrow construction of municipal power makes sense as a matter of policy as well as doctrine. The vast majority of municipalities govern relatively small territorial jurisdictions and therefore have both the capacity and incentive to impose external costs on nonresidents immediately outside their sharply circumscribed boundaries. The City of Tacoma, for instance, has an incentive to construct hydroelectric plants to benefit their own residents even if these plants destroy fish populations enjoyed by nonresident sports-persons, the fishing industry, and environmentalists.²²³

Given these well-known dangers of spillover costs, it makes sense to require some larger jurisdiction — say, the state legislature — to monitor municipal actions and ensure that they are not efforts to exploit nonresidents or internal minorities. Dillon's rule and analogous doctrines serve such a purpose: they require state legislatures to review each category of municipal action and expressly authorize it. Of course, such broad rules tend to be crude: they do not isolate the particular types of municipal actions that tend to result in the greatest injustice. But there is no easy way to define these actions with judicially manageable rules. Absent such a definition, there is a plausible argument that no local government ought to be permitted to undertake a category of governmental action until the state legislature has reviewed the category to ensure that the action will not impose unnecessary costs on outsiders.²²⁴ So, for instance, there is a sensible argument for barring the City of Tacoma from condemning a state-owned fish hatchery until the state legislature expressly approves such condemnations of state-owned property. One simply cannot trust local governments to protect nonresidents when they condemn state facilities designed to benefit

JOHN DILLON, COMMENTARIES ON THE LAWS OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911). For a discussion of the role that the rule continues to play in city government, see Richard Briffault, *Our Localism* (pt. I), 90 COLUM. L. REV. 1, 8 (1990).

223. Indeed, the laws governing the incorporation of municipalities tend to allow the promiscuous creation of municipal corporations even when such incorporation gravely injures the welfare of persons who are carved out of the cities' boundaries by the incorporators.

224. For a different defense of Dillon's Rule in terms of policy, see Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959 (1991). Professor Gillette argues that Dillon's Rule is not well-designed to prevent external costs, as it does not distinguish between municipal actions that impose such costs and those that do not. I suggest, however, that there will tend to be a high correlation between those activities that municipalities have clearest authority to perform based on state statute and tradition, and those activities that are least likely to impose external costs. To the extent that a municipality has performed some function uncontroversially for centuries, it is likely that the activity is one the municipality is well-suited to perform.

nonresidents until the state legislature has some opportunity to consider the issue.²²⁵

But this conventional argument against local autonomy does not resolve the question at issue in *Tacoma*. The issue is not whether cities ought to be able to exercise novel powers solely on their own initiative and without state authorization. Rather, the issue is whether the federal government (in the form of the Federal Power Commission) ought to be permitted to delegate powers to municipalities without state authorization. The Washington Supreme Court did not need to trust the City of Tacoma to police itself: it need only trust the Federal Power Commission to police the City of Tacoma.

There are three reasons why one might sensibly allow the federal government to delegate powers to municipalities without express state authorization, even though one might not allow municipalities to exercise such powers on their own initiative. First, because the powers must be delegated by either Congress or some federal agency, burdened nonresidents have an opportunity to protect themselves from the municipal action by lobbying federal officials. Unlike municipal politicians, federal officials receive their revenue and jurisdiction from Congress, the members of which are elected from both residents and nonresidents of municipalities. Nonresidents, therefore, have a preliminary line of defense against municipal governments' attempting to use a federal delegation of power to impose spillover costs on nonresidents: they can ask their congressperson to raise objections with the appropriate federal agency.

So, for instance, when the City of Chicago entered into an interstate compact with Gary, Indiana, to build an airport, the project came under fire from Representative Henry Hyde, a senior representative of Illinois suburbanites who would be affected by the noise from the proposed airport's runways.²²⁶ Chicago's mayor, Richard Daley, cannily entered into the interstate compact with Gary because such a compact would be protected by federal law from being revoked by the Illinois State Legislature: in effect,

225. The Washington legislature arguably had not had such an opportunity. The Washington Supreme Court had held that cities could condemn state-owned property when such property was not currently being used by the state for some public purpose. But the court had never suggested that cities could condemn state-owned property actively used by the state. See *City of Tacoma v. State*, 209 P. 700, 701 (Wash. 1922); *Roberts v. City of Seattle*, 116 P. 25 (Wash. 1911).

226. See Henry J. Hyde, Letter to the Editor, *Daley's Airport Gambit Won't Fly*, CHI. TRIB., May 24, 1995.

Daley hoped to use federal law to liberate Chicago from the constraints of the (Republican- and suburb-dominated) state government.²²⁷ But, because Congress would have to approve such a compact, Daley would not be able to impose costs on the suburbs without at least some oversight by a legislative body — Congress — that, in the form of Henry Hyde, represented those suburbs. This is not to say that such federal oversight is perfect. Indeed, as noted in section I.B, the premise underlying the principle of state supremacy is that such oversight is inadequate. Nevertheless, when cities exercise delegated federal powers, they exercise powers that have been screened and debated by the federal representatives of affected nonresidents. This reduces (but does not eliminate) the possibility that nonresidents will be unjustly injured.

There is a second reason to permit local governments to exercise such federally derived powers without express state authorization: there is greater need, because the federal government might need the assistance of the state's subdivisions to prevent the state itself from imposing *interstate* spillover effects on persons outside the state. The federal government, after all, has the constitutional authority to delegate regulatory powers to cities generally because such powers address some "substantial effect" that crosses state boundaries — say, the regulation of interstate waterways or the creation of airports serving interstate travelers.²²⁸ If the federal government could not make use of municipalities for such purposes until the state legislature expressly authorized such use, then the state government's indifference to effects felt outside the state's boundaries could foreclose federal-local bargains: sheer legislative inertia might prevent the required state authorization for federal-local action from ever emerging, even when the external costs of local action were small.²²⁹

227. For an overview of the controversy over Daley's effort to protect Chicago's proposed airport from state oversight, see Karen Pierog, *Chicago, Gary, Ind., Want Illinois Lawsuit Thrown Out*, BOND BUYER, Aug. 31, 1995, at 5. Illinois's efforts to bar the Gary-Chicago pact through litigation failed when Federal District Court Judge Leinenweber ruled that the plaintiff, the state of Illinois, failed to state a federal claim and lacked standing. See *Illinois ex rel. Edgar v. Chicago*, 942 F. Supp. 366, 373-74 (N.D. Ill. 1996).

228. The most commonly invoked justification for Congress's regulatory power is the need for federal regulation of activities that impose costs — "substantial effects" — outside the jurisdiction of the state in which they occur, making regulation of the activities by individual states impractical. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

229. So, for instance, in opposing the proposed airport of the City of Chicago, the State of Illinois might not have been motivated exclusively by a desire to prevent the City from imposing external costs of noise on the suburbs. It might also have been motivated by a less benign desire to exercise exclusive control over the patronage provided by construction contracts and jobs.

Of course, the federal government could stimulate legislative interest in the proposed enabling legislation by offering federal grants-in-aid to state governments that provide the necessary authorization to their municipalities. As noted above in section II.A, state legislatures and governors might act strategically in response to such offers: they might misrepresent the costs of complying with federal requests in hopes of reaping a larger amount of federal grant revenue for themselves. As suggested in section II.B, legal doctrines, such as Dillon's Rule, that centralize state government can be expected to exacerbate this tendency toward strategic behavior, because such doctrines reduce the intergovernmental competition between state and local governments. Such competition gives the federal government alternative routes with which to implement federal law, depriving any nonfederal institution of a "lock" on nonfederal personnel and policymaking capacity. A default rule that deprives local governments of the power to act as federal agents absent express state authorization gives state legislatures precisely such a monopoly over their local governments.

By giving municipalities a presumptive power to carry out federal policies, the default rule proposed here would mitigate this danger of overcentralization of state government. This is not to say that the presumption would prevent the state government from barring local governments from carrying out federal programs. But such centralization would be much more difficult to achieve: it would require the state legislature to enact a statute rather than simply to block a statute from being enacted. There are good reasons to believe that the municipalities within a state would find it easier to lobby to preserve the powers that they presumptively have than to obtain new powers that are presumptively denied to them.²³⁰ By giving municipalities a presumptive right to act as federal agents, the presumption of institutional autonomy would place preservation of the federal government's access to a state's local governments on the agenda of both the state legislature and the state's municipal lobbying organization: the default rule might well create an incentive among a state's municipalities to join together to preserve an existing power even if they would not exert the same effort to obtain such a power with a new statute. Such a default rule, in short, makes it easier for the federal government to mobilize local governments as proxies for federal interests — a goal that

230. For such an argument, see Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. Rev. 780, 808-09 (1997).

may produce significant efficiencies by giving the federal government multiple nonfederal institutions from which to seek assistance.

The presumption that local governments can serve federal interests serves a third purpose: it acts as a "penalty default," giving state legislatures an incentive to resolve political disputes about the costs of local action.²³¹ State legislatures may have an incentive to avoid political controversies that pit suburbanites against city residents, because any resolution of such struggles invariably entails electoral risk for at least some state legislators. In order to avoid this risk, the state legislature may simply adopt a posture of inaction on the theory that adherence to the status quo will have less chance of arousing voter hostility. This incentive, however, may prevent the best decisionmaker from squarely addressing contentious conflicts that require resolution: there are good reasons to believe that the state legislature is the institution best suited for resolving such struggles. This institutional fact, indeed, is what justifies the principle of state supremacy in the first place.

It is useful, therefore, to give the state legislature an incentive to deliberate (or bargain) about conflicts between residents of different local governments. A default rule allowing local governments' action can provide such an incentive, simply because such a rule disrupts interest groups' settled expectations that might otherwise be protected through legislative passivity. Interest groups that benefit from the status quo have an incentive to lobby the state legislature to prevent the local government's action, while municipalities (and the interest groups who control them) have an incentive to preserve the powers bestowed upon them by the default rule. For instance, the decision in the *Tacoma* case gives environmentalists, sport fishing groups, and others interested in salmon hatcheries an incentive to clarify the rules governing local governments' powers to construct hydroelectric plants: rather than rely on a combination of legislative silence and Dillon's Rule to control the spillover costs of utilities, they must lobby for a specific statute detailing the types of municipal actions that they find objectionable. To the extent that one believes that the state legislature should actively engage in debate to resolve such issues, a default rule that allows local govern-

231. Penalty default rules are rules construing contractual terms against the interest of the person most capable of changing the rules even when such a construction is inefficient because the parties would bargain for a different rule. The function of the penalty default is to give the person most capable of changing the rule an incentive to reveal his or her preferences. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 95-107 (1989).

ments to alter the status quo might best promote such active debate.

For these three reasons, a court might favor a default rule promoting local governments' autonomy to serve as agents of the federal government even if the court would not adopt such a rule when the local government acted purely on its own initiative. These considerations do not, of course, establish such a default rule as a good idea. They suggest, however, that the Washington Supreme Court committed a logical non sequitur in inferring that the City of Tacoma could not act as a federal licensee from the rule that the City lacked sufficient state authorization to act without federal authorization. State law might well adopt different default rules for local power depending on whether or not the local government acted pursuant to a federal delegation of power. There is nothing legally bizarre about doctrines that allow local governments to exercise powers pursuant to intergovernmental contracts that such governments would not be permitted to exercise by themselves. The so-called "power of one" doctrine, for instance, permits local governments to engage in activities pursuant to intergovernmental agreements that such governments would be barred from exercising on their own initiative.²³² The presumption of institutional autonomy is an analogous "power of one" doctrine for federal-local relations.

B. *Federal Authorization for Municipal Adjustment of Bonded Indebtedness: The Case of Bridgeport's Bankruptcy*

Like federal licenses to construct dams or airports, municipal bankruptcy also raises the issue of how the federal government can dissect the state. Section 109(c)(2) of the federal bankruptcy law provides that local governments can file a petition seeking protection from their creditors — but only if the local government is "generally authorized" to do so under state law. Bridgeport's 1991 petition for bankruptcy illustrates how contentious this question of general authorization can be. Over the objection of the Connecticut government, the federal bankruptcy court held that the Connecticut State Assembly's general delegation of power to its cities to sue or be sued sufficed to provide Bridgeport with the requisite authorization. Thus, like the Ninth Circuit in *Tacoma*, the

232. See ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, INTERGOVERNMENTAL SERVICE ARRANGEMENTS FOR DELIVERING LOCAL PUBLIC SERVICES: UPDATE 1983, at 9 (1985); CHARLES SANDS ET AL., LOCAL GOVERNMENT LAW §§ 6.04, 18.11 (1981); see also *Goreham v. Des Moines Metro. Area Solid Waste Agency*, 179 N.W.2d 449, 455 (Iowa 1970).

bankruptcy court generously construed the municipality's power to act pursuant to federal law, effectively allowing Bridgeport to use federal law to resist the will of the state government.

Did the bankruptcy court err in such a generous construction of Bridgeport's powers? The question illustrates the statutory ambiguity endemic to the issue. On one hand, as Michael McConnell and Randall Picker note, the state statutory framework at issue in *Bridgeport* arguably suggested that the state government intended to occupy the field of municipal debt relief and to preclude municipal resort to federal legislation.²³³ Because Bridgeport's government had proved incapable of making the politically difficult taxation and expenditure decisions necessary to curb the City's debt burden, the Connecticut State Assembly had created a special agency — the Bridgeport Financial Review Board — to monitor the City's fiscal decisions, restore the beleaguered city to fiscal stability, and ensure that the City paid off its accumulated debt. Toward this end, the State Assembly granted the Board wide-ranging powers to limit the City's fiscal autonomy: the City was required to submit its budgets to the Board and, if the budget did not meet the requirements of the state legislation, then the Board was authorized to reject the budget and promulgate its own budget for the City.²³⁴ It is certainly a plausible construction of this statutory scheme that Connecticut implicitly intended to bar municipal debt avoidance through resort to federal bankruptcy law — after all, the point of the state statute was to pay off municipal debts, not default on them.²³⁵

On the other hand, one also can reasonably argue that the State Assembly's silence on the question of whether Bridgeport had the power to file under Chapter Nine suggests that the City retained the power to file its petition. Indeed, the State Assembly considered a statute expressly barring such petitions, but the statute was not enacted.²³⁶ While one must be cautious about drawing ambitious inferences from such failure to enact legislation, there is no obvious reason to believe that a consensus existed in the Connecticut General Assembly to forbid Bridgeport from filing a Chapter

233. See Michael W. McConnell & Randall C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 460 (1993).

234. For a useful statement of the facts in the *Bridgeport* case, see Dorothy A. Brown, *Fiscal Distress and Politics: The Bankruptcy Filing of Bridgeport as a Case Study in Reclaiming Local Sovereignty*, 11 BANKR. DEV. J. 625 (1995).

235. See, e.g., McConnell & Picker, *supra* note 233, at 458-61.

236. See Rachael E. Schwartz, *This Way to the Egress: Should Bridgeport's Chapter 9 Filing Have Been Dismissed?*, 66 AM. BANKR. L.J. 103, 127 (1992).

Nine petition. This statutory silence is not peculiar to Connecticut: only seventeen states have expressly authorized petitions under Chapter Nine, and only one state (Georgia) has ever expressly prohibited such petitions.²³⁷

The important question under section 209(c)(2), therefore, is how to construe such silence. The presumption of institutional autonomy defended in this article sheds some light on this general question. Contrary to the views of McConnell and Picker, it suggests that the *Bridgewater* Court's ruling makes sense as a matter of policy, for the same reasons that such a presumption might be a sensible way to resolve the controversy in *Tacoma*.

As with municipal eminent domain, it is important to distinguish between federally authorized municipal actions and municipal actions that the local government takes on its own initiative. There are respectable reasons to construe narrowly a municipality's power to avoid its debts when federal authorization is absent, because there is a danger that cities will use a broad power to impose external costs on nonresidents. The external costs of projects like dams and airports are easy to see: as noted above, they can generate noise, flooding of ecosystems, and loss of valuable fish populations. But municipal bankruptcy filings also can impose external costs: one city's filing can increase the borrowing costs for other municipalities within the same state, as bond purchasers become wary that other cities might follow the defaulting city's example. Just as state governments representing all municipalities within its boundaries may be more likely to consider the costs suffered by persons residing outside the condemning municipality, so too, the state may have a greater incentive to consider the creditworthiness of the state's municipalities as a whole.

But two reasons suggest that these considerations apply with less force when the federal government has authorized the adjustment of municipal debt. First, such federal authorization suggests that municipal debt relief will impose fewer costs on unrepresented interests: as with federal licensing of dam construction, the federal government's oversight provides some modest assurance that the municipality will not impose external costs on neighboring cities. Congress, after all, represents bondholders and other public creditors, such as public employee unions, as well as other public bond issuers who might fear that one city's default would injure their own creditworthiness.

237. See *id.* at 122 n.107.

Indeed, Congress might be better suited to regulate municipal debt than the state legislature. Given that municipal bonds are traded on a national market, state legislatures might undervalue the costs of default on municipal obligations: after all, the costs of such default would be broadly spread among debtors and creditors throughout the nation while the benefits would be concentrated among the state's municipalities. Therefore, one might argue that, to ensure the marketability of municipal bonds throughout the national market, it is essential that there be a federal law protecting the interests of creditors and adjusting municipal debts in an orderly fashion.²³⁸

Second, as with municipal dams or airports, federal authorization of municipal debt adjustment may be a useful way to prevent the state government from abusing its power over local politics for partisan reasons. As argued in section I.B, state governments are better suited for monitoring and supervising their municipalities than the federal government. There is nevertheless a significant risk that state officials will misuse their control over local governments to maximize their own opportunities for patronage or rent-seeking. The facts of *Bridgeport* illustrate this danger. The immediate motivation for Bridgeport's Chapter Nine petition was the Financial Review Board's insistence that the City of Bridgeport raise property taxes by eighteen percent to cover the costs of the City's collective bargaining agreements. The City invoked Chapter Nine largely to obtain an automatic stay of all litigation regarding its contracts with its public employee unions — especially litigation concerning the Board's order to raise taxes.

On the surface, one might view such state oversight as benign: the State was sternly demanding that the City honor its obligations and exercise fiscal responsibility, while the City was apparently cast in the role of the prodigal municipality, using bankruptcy law to avoid making politically tough decisions to increase taxes. The facts, however, could bear another interpretation. Occurring only six months before the mayoral elections, the Board's tax hike would jeopardize the chances of Bridgeport's Republican Mayor, Mary Moran, to win reelection. This effect may not have been an accident. The Board was composed exclusively of Democrats who had little political incentive to see Moran reelected: they might have

238. Cf. Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 286 (1988) (explaining why the Contract Clause limits power of state legislatures but not power of Congress).

insisted on the tax increase to ensure the downfall of a political rival. This interpretation of the Board's action is suggested by one piece of circumstantial evidence: when Moran *was* defeated and a Democratic mayor was elected, the Board dropped its insistence on a property tax hike and simply made up the City's shortfall with state assistance.²³⁹

In short, it is unclear whether the Financial Review Board's opposition to Bridgeport's petition was judicious state intervention to alleviate local fiscal irresponsibility or partisan manipulation that exacerbated Bridgeport's fiscal distress. The presumption of institutional autonomy provides a useful way to resolve such uncertainties: by presumptively allowing Bridgeport to take advantage of federal law, the default rule gives rival interest groups an incentive to lobby the state legislature and provoke debate on how best to address municipal debt crises. If there were a genuine danger that Bridgeport's efforts at debt adjustment would endanger municipal creditworthiness, then Connecticut's bondholders, underwriters, public employee unions, and suburban municipalities could be enlisted to bar Chapter Nine petitions. On the other hand, if the Board opposed Bridgeport's petition simply for reasons of partisan advantage, then the absence of any public-regarding reason for opposing debt adjustment under federal law would presumably make it more difficult to assemble a coalition sufficient to limit municipal power. Placing the burden of changing the status quo on the opponents of municipal debt adjustment might provide a sensible "penalty default," if only because such opponents will, more likely than not, predominate in the state legislature and have the greatest ability to clarify the law.

In short, the result in *Bridgeport* can be justified by considerations similar to the arguments provided in relation to *Tacoma*. In either case, it might be sensible to presume that municipalities can act pursuant to federal authorization because (1) the need for state oversight is somewhat reduced by the presence of federal oversight, and (2) the dangers of excessive state centralization might best be mitigated by a default rule requiring the state legislature to specify why the federal government's empowerment of local government is inefficient. Such a presumption does not overturn the state government's ultimate power to allocate power among its municipalities. But it encourages the state government to exercise such power with

239. See Brown, *supra* note 234, at 637.

greater regard for the federal government's interests in municipal autonomy.

IV. CONCLUSION

The presumption of institutional autonomy and the principle of state supremacy together define an uneasy balance between Congress's need to dissect the state into competing nonfederal institutions and the rival need to ensure that nonfederal institutions remain under the control of state law. On one hand, state lawmakers — including state constitutional draftspersons — are best situated to develop institutions for local governance: they ought to have the final word in creating such institutions. On the other hand, the federal government often needs to use such institutions: presuming that such institutions maintain their independence and can compete with each other to act as agents of Congress helps protect the federal government's access to these institutions.

In effect, the presumption of institutional autonomy operates as a "plain statement" rule: it does not prevent the state government from asserting control over nonfederal governmental institutions but simply demands that such assertions be accompanied by a plain statement of the evil that such control is intended to avert. So, for instance, in the context of federal grants-in-aid, the state legislature cannot simply appropriate funds initially awarded by the federal government to local governments and governors. Instead, the state legislature must describe the categories of local or executive action that it regards as harmful and bar those actions. Likewise, the state legislature cannot preclude local governments from carrying out federal policies simply by invoking generalized limits on local power such as Dillon's Rule. Instead, the state legislature must specify the category of local actions that the state deems to be too harmful to permit.

Such a "plain statement" rule serves a purpose analogous to the various "plain statement" rules invoked by the Court to promote federalism in cases like *Pennhurst* and *Gregory v. Ashcroft*. Such federalism-promoting canons of construction are sometimes defended as ways of protecting federalism through the national political process: they encourage members of Congress to consider the values of federalism and take state powers seriously. The presumption of institutional autonomy has an analogous defense. It serves the purpose of protecting *nationalism* through the *state governments'* political processes: the presumption fragments the state to facilitate federal use of nonfederal institutions, reducing the neces-

sity for federal legislation that would violate the principle of state supremacy.

This analogy between federalism-promoting canons of construction and nationalism-promoting canons of construction illustrates an important ambiguity of so-called "political process" theories that is frequently ignored by commentators and courts who embrace such theories. Such theories can be deployed on behalf of state power just as easily as they can be used to vindicate congressional discretion. It is, of course, possible that the national political process ensures that the interests of state officials will be sufficiently respected in the halls of Congress without judicial invalidation of federal legislation. But it is equally possible that the interests of Congress will be adequately protected in the halls of state legislatures without judicial validation of sweeping federal legislation: Congress may be able to obtain through agreement what it is barred from obtaining through outright command. Only by careful examination of the internal workings of state and local government can one determine whether outright federal preemption of state and local powers is really necessary to advance the national interest. This article is an attempt to begin this inquiry.