

ACADEMIE DE DROIT INTERNATIONAL  
FONDÉE EN 1923 AVEC LE CONCOURS DE LA  
DOTATION CARNEGIE POUR LA PAIX INTERNATIONALE

RECUEIL DES COURS  
COLLECTED COURSES OF THE HAGUE  
ACADEMY OF INTERNATIONAL LAW

1997

*Tome 263 de la collection*



1997

MARTINUS NIJHOFF PUBLISHERS  
The Hague/Boston/London

## TABLE OF CONTENTS

Chapter I. The interest of regulatory federalism: what is at stake ? . . . . .	19
Chapter II. The different distributions of regulatory power: means and ends . . . . .	26
Chapter III. Ensuring respect for regulatory federalism: instruments and controls . . . . .	50
A. Federalism guidelines . . . . .	50
B. Federal structural solutions . . . . .	53
C. Federal procedural solutions . . . . .	54
D. Non-judicial review of federalism or subsidiarity . . . . .	57
E. Executive controls on federal or Community action . . . . .	60
F. Judicial review . . . . .	61
Chapter IV. The evolution of regulatory federalism in the European Union . . . . .	64
A. Original understandings . . . . .	64
B. Court of Justice contributions . . . . .	66
C. Reforms of the EC Treaty . . . . .	67
D. Political reactions . . . . .	68
E. The Draft Amsterdam Treaty of 1997 . . . . .	70
F. Looking to the future . . . . .	72
Chapter V. The future of subsidiarity . . . . .	73
A. Substantive guidelines for application of the subsidiarity principle . . . . .	74
B. Procedural requirements for application of the subsidiarity principle . . . . .	77
C. Strengthening the political safeguards of federalism . . . . .	79
D. Monitoring the application of the subsidiarity principle . . . . .	80
E. Judicial review of the conformity of legal measures with the subsidiarity principle . . . . .	81
Chapter VI. The evolution of regulatory federalism in the United States . . . . .	89
A. The historical background of the current debates . . . . .	89
B. Federalism re-examined . . . . .	91
(a) Executive initiatives . . . . .	91
(b) Congressional initiatives . . . . .	94
(c) The State and local government lobby . . . . .	96
(d) The private sector . . . . .	97
C. The Supreme Court: toward a new jurisprudence of federalism . . . . .	97
Chapter VII. The future of United States regulatory federalism . . . . .	100
A. The limits of the interstate commerce clause . . . . .	100
B. The Tenth Amendment and the ban on "commandeering" State resources . . . . .	104
C. The Eleventh Amendment and State sovereign immunity . . . . .	109
D. Other constitutional limits on federal regulatory power . . . . .	111
E. What lies ahead ? . . . . .	114
Chapter VIII. The example of environmental regulation . . . . .	117
A. The United States . . . . .	117
(a) The ages of environmental regulatory federalism . . . . .	117

(b) The rationales for centralized environmental regulation . . . . .	121
(c) The legal framework and instruments of current environmental federalism . . . . .	122
B. The European Union . . . . .	126
(a) New regulatory techniques . . . . .	132
(b) Easing of regulatory requirements . . . . .	133
(c) Subsidiarity-oriented procedures . . . . .	134
(d) Leaving enforcement to the Member States . . . . .	134
Chapter IX. General conclusions: prospects for regulatory federalism . . . . .	139
A. Analysis versus operationalism . . . . .	139
B. The best of both worlds . . . . .	142
(a) Toward better "matching" . . . . .	142
(b) Toward greater operationalism . . . . .	143
C. The alternatives: dogmatism and swings of the pendulum . . . . .	144
Bibliography . . . . .	147