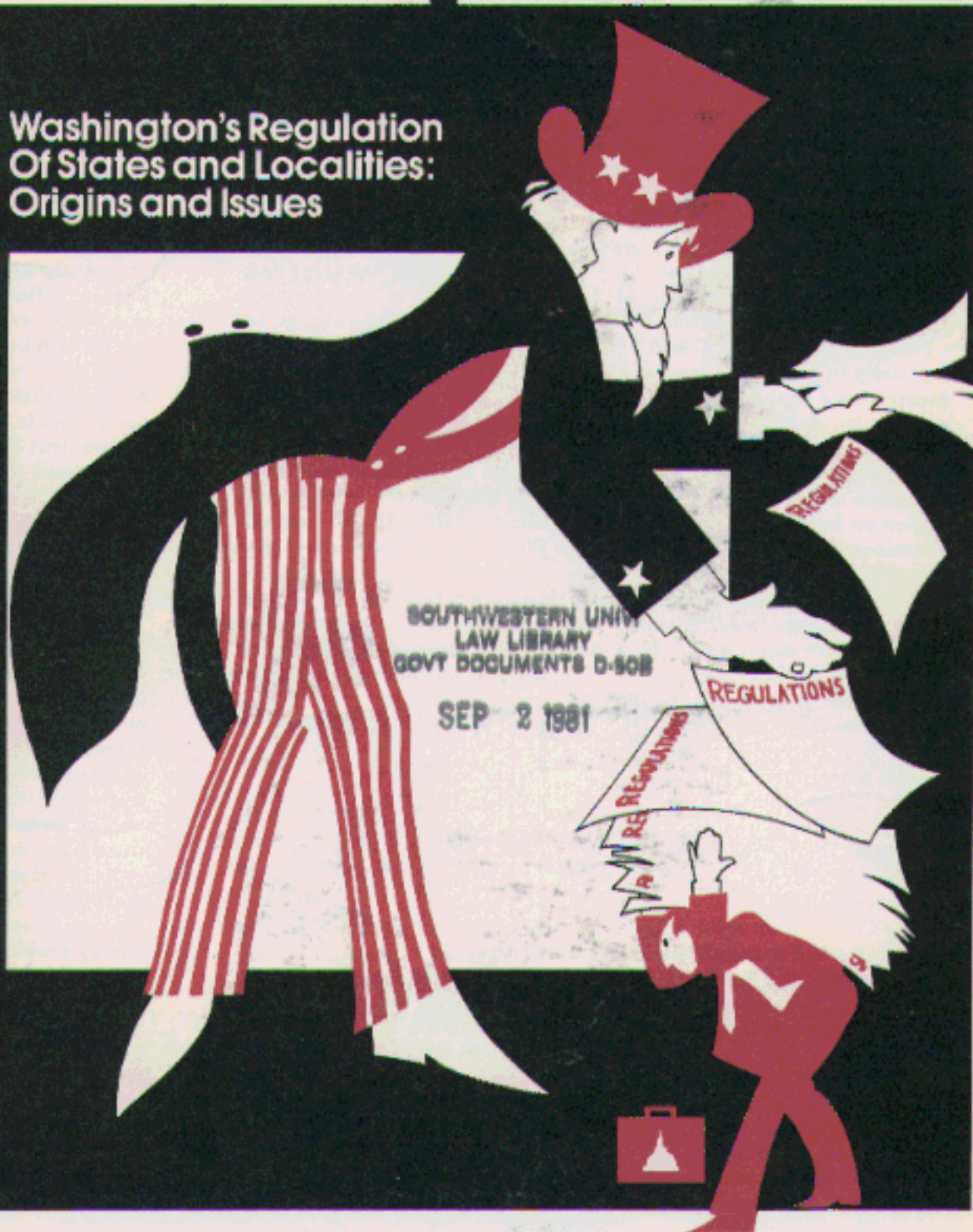


Intergovernmental **PERSPECTIVE**

Washington's Regulation
Of States and Localities:
Origins and Issues



View From The Commission

Dear Reader:

This is an exciting era of dramatic changes in American government.

One of the most important of these changes is in the relationship of the federal government with the states and local governments.

For far too long, power has been flowing from state and local governments to Washington, DC.

People across America, and especially in my native west, are demanding a change. That is why I enthusiastically accepted the opportunity when President Reagan asked me to serve as chairman of the Advisory Commission on Intergovernmental Relations. The Administration looks upon ACIR as a major instrument to help reverse the power flow, to carry out President Reagan's commitment to revitalizing the federal system.

Following its three-year study of our federal system, the ACIR reported in December 1980: "The federal government's influence . . . has become more pervasive, more intrusive, more unmanageable, more ineffective, more costly, and above all, more unaccountable."

The Commission resolved at its meeting in January 1981, prior to President Reagan's inauguration, to set as its highest priority to assist the new Administration and Congress in their efforts to restore balance to the federal system.

President Reagan shares ACIR's conclusion that American federalism is in serious trouble. In his message to the

National Conference of State Legislatures last December, President-elect Reagan discerned an historic opportunity. "For half a century," he said, "power has flowed steadily, seemingly irresistibly, from the state governments to the federal government. Our nation of sovereign states has come dangerously close to becoming one great national government, instead of the true federal system called for in our Constitution."

We are going to correct the distortion that has taken power from the government units closest to the people and lodged it in the hands of federal authorities in the nation's capital. We are going to strive to achieve a proper federal-state-local balance.

The need for rebalancing was evident long before I became a member of the President's Cabinet, but the urgency of the need became even more apparent to me when I began reviewing Department of the Interior policies, programs, and attitudes to determine how to relieve the pent-up hostilities against my agency and to reduce unnecessary spending in line with the President's Economic Recovery Program.

In the past there has been a tendency for federal agencies, including the Interior Department, to implement laws and programs in ways which enlarge the federal bureaucracy and agency budget, which leave little or no discretion to state and local jurisdictions, and which provide excessive red tape

for state and local governments as well as for citizens and businesses. Federal agencies traditionally look for ways to do as much as possible—whether the effect is beneficial or not—rather than to do as little as possible to achieve national goals. Too many times federal agencies arrogantly interpret laws as license to dictate to all other units of government.

This will be changed.

We are now looking at federal responsibilities and federal expenditures in a new light.

President Reagan has told us to examine, first of all, whether functions now being carried out by federal agencies really should be carried out by government at any level. Where the answer is no, we will eliminate functions.

Where we determine a function is the legitimate concern of government, we are then asking if the job could not be done as well or better by state or local government. We are searching for every opportunity to return responsibilities of governing, as well as revenue resources, to these partners.

At Interior, I have met with state and local officials to discuss land, water, mineral, and energy problems. I have requested that state and local officials identify Interior regulations they find unnecessary, burdensome, or counterproductive, and to recommend specific changes, and I have invited state and local officials to identify modest-size blocks of fed-

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Intergovernmental **PERSPECTIVE**

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Intergovernmental Focus

Federalism Committee Meets, Discusses Impact of New Proposals

At the first meeting of the Presidential Advisory Committee on Federalism on June 23, the Reagan Administration's plans to restructure federalism took center stage. The 52-member committee, made up of federal, state, and local government officials, and representatives from the public, spent the morning debating how the federal government's scarcer and scarcer resources should be allocated within the federal system.

Perhaps not surprisingly, there was no unanimity of opinion as to how this should be accomplished. Mayor William Hudnut of Indianapolis, IN, President of the National League of Cities, expressed the fears of many urban officials that "all the action is going to the states." Mayor Margaret Hance of Phoenix, AZ, shared his opinion: "We're told to go to the state. We're told to have a happy attitude. But happy attitudes in the past have not buttered our parsnips."

The governors on the committee, while pleased to get more of the "action," voiced their concern that roles and functions are not being sufficiently delineated. Governor Richard Snelling of Vermont asked, "how are we ever going to be able to persuade the federal part of federalism to let go?" Georgia Governor George Busbee, President of the National Governors' Association, agreed that it is now time to begin a long-term sorting out process. The Governors' Association has argued for more flexibility in the use of federal funds in exchange for a 10% cut in aid. The 25% cut in major federal-state programs proposed by the Reagan Administration will present problems for many states. The governors have also urged federal assumption of welfare as a trade-off for state assumption of costs of education and transportation. Fiscal austerity has placed this exchange on the back burner, at least for the foreseeable future.

Tensions between localities and their states surfaced again and again as Administration department

heads explained their federalism proposals. Although the proposed block grants to the states mostly consolidate programs that were already going to states, not local governments, they do raise issues fundamental to the federal system. Sen. Paul Laxalt, the Committee's Chairman, reacted to the many comments about state-local problems: "A lot of people view state government with more alarm than they do Washington. I find it hard to believe, but it's true."

The Committee met just a few days before the House and Senate neared completion on the budget reconciliation process which included many of the Reagan Administration's block grant proposals. If the first meeting is any indication, it will serve as a high-level forum for airing opinions of how the restructured and reduced federal aid packages are faring at all three levels of government.

Municipal Immunity, Severance Tax Subject of Recent Court Decisions

Municipal immunity and severance taxes were addressed in several recent U.S. Supreme Court decisions. Regarding municipal immunity, the Court refused to extend the reading of Section 1983 of the Civil Rights Act of 1971 which protects citizens against the denial of rights "secured by the Constitution and laws." In a major case involving energy taxation, the Court upheld Montana's state severance tax, saying it did not violate the Supremacy or Commerce clauses of the Constitution.

Municipal Immunity

Following two decades of court decisions which have steadily broadened the scope of Section 1983 of the Civil Rights Act of 1971, the Supreme Court in its recently completed 1981 term moved cautiously to avoid any further judicial liberalization of the act. 42 U.S.C. 1983 which protects citizens against the denial of rights "secured by the Constitution and laws" of the United States became the center of immense intergovernmental contro-

versy as the result of two precedent-setting 1980 decisions. One, *Maine v. Thiboutot*, extended the act's protections to rights secured by federal statutory law including grants-in-aid. The other, *Owen v. Independence*, for the first time denied the use of the "good faith" defense to municipalities found guilty of 1983 violations. While opinions handed down during the 1981 term have, for the most part, left those decisions intact, the Court, apparently sensing the fiscal plight of state and local governments, refused to further extend Section 1983's reach.

The greatest sigh of municipal relief was caused, no doubt, by the 6-3 *Newport v. Fact Concerts, Inc.* (No. 80-396) opinion. In that case, musical promoters Fact Concerts argued that their Section 1983 civil rights had been violated when city officials of Newport, RI, refused to allow a performance by Blood, Sweat, and Tears on grounds that the group was likely to "attract a rowdy and undesirable audience to Newport." The district court agreed with the promoters and awarded Fact Concerts \$72,000 in compensatory damages. Had it stopped at that award, the decision would have constituted little more than a business-as-usual approach to municipal liability cases. However, Fact Concerts also asked for and was granted punitive damages of \$200,000 against the city and an additional \$75,000 against city officials. Even though the city did not object to the punitive damages at the trial level, the Supreme Court decided to consider the issue, ruling, on June 26, that "(a) municipality is immune from punitive damages under Section 1983."

According to preliminary estimates of the National Institute of Municipal Law Officers (NIMLO), 199 local jurisdictions across the nation remain, under pending cases, liable for approximately \$4.2 billion in 1983 damage claims. Nevertheless, the Court's decision offers considerable relief for 38 localities previously facing over \$1 billion in punitive damages.

In other action, the Court refused Section 1983 relief to a Nebraska state prisoner for the loss by prison officials of a hobby kit valued at \$23.50. In *Parratt v. Taylor* (No. 79-1734), the Court ruled that although the prisoner had "been deprived of property under color of state law," he failed to make the case that the state had deprived him of due process. Rather, the Court found that the prisoner's deprivation had occurred as a "result of the unauthorized failure of state agents to follow established state procedures." Moreover, the Court contended that the prisoner's claim could have been satisfied through Nebraska state tort claim procedures—procedures which he failed initially to pursue.

Finally, in what appeared to be an attempt to put some limits on the volume of Section 1983 suits in the wake of *Thiboutot*, the Court in *Middlesex County Sewerage Authority v. National Sea Clammers Association* (No. 79-1711), ruled that "(w)hen the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate Congressional intent to preclude the remedy of suits under Section 1983."

Severance Taxation

At the close of the last session, the Supreme Court, ruling in *Commonwealth Edison v. Montana*, affirmed the Constitutionality of the Montana state severance tax, but recognized the authority of Congress to act if it judges the tax to be contrary to the national interest. Several midwestern electric utilities and Montana coal companies had alleged that the Montana tax, levied on the production of coal at a rate of 30% of value, was excessive and in violation of the Supremacy and Commerce clauses of the Constitution.

Justice Marshall, writing for the Court, dealt with the Supremacy clause challenge by concluding that there is nothing in the *Mineral Leasing Act* or various other federal energy or environmental statutes

that requires the Court to find that the state's right to tax is preempted.

The Court rejected the contention that the tax violated the Commerce clause by applying the four-pronged test, first articulated in *Complete Auto v. Brady* in 1977 and now firmly established, that a state tax is Constitutional so long as "it is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the state."

The appellants had contended that the tax was discriminatory in that the burden fell almost entirely on out-of-state consumers and that the amount of tax collected by the state bore no relation to the value of the services provided.

- The Court ruled that the tax was not discriminatory because the tax applied to all coal regardless of destination; it therefore provided for even-handed treatment of in-state and out-of-state consumers. In this respect the Montana tax is easily distinguished from the Louisiana First Use Tax on Natural Gas recently declared unconstitutional by this Court. In that case, Louisiana had enacted a complex system of exemptions and credits to ensure that in-state consumers were free of any burden imposed by the tax.
- The fair relation test was interpreted as requiring only that the measure of the tax base be related to the level of activity of the taxpayer within the state. There need be no balance between the taxes collected and the specific benefits provided to the interstate business. The court reaffirmed that states have great latitude in determining how to finance general government and apportion the burden among taxpayers.

The rate at which an otherwise Constitutional tax is levied is not a

matter for court review: "... questions about the appropriate level of state taxes must be resolved through the political process. Under our federal system, the determination is to be made by state legislatures in the first instance and if necessary, by Congress when particular state taxes are thought to be contrary to federal interests."

Three Justices joined in a dissent, contending that the appellants should have been granted a trial to factually determine whether coal is being made to pay more than its fair share of the cost of running Montana's government. The dissenters suggest that the interpretation of the fair relation test offered in the Court's opinion leaves little basis for rejecting taxes which may in fact unduly burden interstate commerce. So long as a state chooses a proper measure of the tax base, it may tax an interstate business at a rate which yields sufficient revenue to support its entire public sector and thereby relieve residents of any tax burden, and still not trigger a review by the Court. Justice Blackmun, author of the dissenting opinion, suggests an alternative standard: When a tax is tailored to fall on interstate commerce and its burden can be exported, then the Court should rule it unconstitutional if it results in a payment larger "than the fair share of the general costs of government as well as the specific costs attributable to the commerce itself."

Justice White joined with the majority in the case, despite his feeling expressed in a concurring opinion that the Montana tax might indeed unduly burden interstate commerce. He nevertheless felt it best for the Court to defer to Congress on this issue.

It is possible that Congress may pick up where the Court left off. It has before it two bills (S. 78 and H.R. 1313) which would place a limit of 12.5% on the rate at which states could levy taxes on the production of coal. Senator Durenburger (MN), Commission member and chairman of the Senate Inter-governmental Relations Subcom-

mittee, held hearings on this issue in mid-July.

The Taxation and Finance Section of the ACIR currently has a study underway of state energy taxes and royalties. The purpose of the study is to determine whether the flow of revenues to energy producing states will result in large fiscal disparities, unfair competition and inefficient resource allocation among states, excessive tax exporting or inequitable distribution of windfall gains. The desirability of alternative policy responses will be evaluated, including, among others, voluntary state action, changes in royalty distribution, and federal limits on state taxing powers.

States, Localities Confront Bleak Fiscal Outlook

While the debate surrounding federal budget and tax cuts has captured the nation's headlines, state and local governments are girding for what promises to be one of the most fiscally trying periods in modern times.

At the state level, according to the National Association of State Budget Officers, the federal cuts are occurring just when state budget balances are lower than normal. And, as a recent study released by Congress' Joint Economic Committee revealed, cities of all sizes are confronting worsening fiscal pressures and revenue shortfalls. The study concludes that even local tax hikes and spending reductions will not completely offset the increasing number of local deficits likely to occur this year.

Against the backdrop of major reductions in federal assistance, state and local lawmakers across the country are cutting services and programs, invoking personnel freezes and trimming payrolls, and searching for alternative revenue sources. In some cases, policymakers are bucking the tax reduction trend signaled by California's Proposition 13 and actually are seeking tax increases in order to preserve services and forestall more dire financial consequences.

A sampling of recent developments indicates how voters and governments are responding to the fiscal realities of the 1980s.

Last month, **Detroit MI**, voters approved one percent increases in the city income tax for both residents and commuters. The tax increases were part of a fiscal package designed to help the city avoid almost certain bankruptcy. The tax increase is expected to raise about \$94 million. An additional \$125 million from the sale of bonds and a \$76 million savings from city employee wage concessions are expected to help the city through the financial crisis due, in part, to the worst automobile industry slump since the Great Depression.

Just a few weeks earlier, however, **Michigan** voters statewide declined to endorse a set of proposals that would have cut the local property tax while raising the state's sales tax by 1.5 cents. The plan was perceived as exacerbating the state's fiscal problems, and merely shifting, rather than actually reducing, the taxpayers' burden.

In **February, Cleveland, OH**, residents bolstered that city's financial recovery efforts by approving a 33% increase in the local income tax. The higher tax rate is expected to raise an additional \$35 million in annual revenues, some of which will be used to help offset the city's \$50 million deficit over the next three years.

In other actions:

- Last month, local banks came to the rescue of **Providence, RI**, by extending nearly \$15 million in loans to help meet city operating expenses. The loans were necessary when the city council rejected the mayor's proposed budget plan that included a property tax rate increase of \$1.95. The rate increase would have been added to an emergency rate hike of \$11.43 that had been approved earlier in the year in order to prevent a similar situation from occurring.
- In **Minnesota**, the state auditor's office has developed an

index of 30 economic indicators to help measure the fiscal health of cities in an effort to help identify and prevent local financial emergencies.

- The **New York** Legislature has voted again to delay implementation of court-ordered fair value property assessment. The measure extends the moratorium on reassessments through October of this year.
- In **Tennessee**, a recent proposal for a 70 cent rate hike, together with a proposed 37 cent school tax increase, has reactivated interest in consolidating the Memphis and Shelby County governments in an effort to hold down government costs.

On the tax and expenditure limit front, state and local governments are continuing to cope with the "taxpayers' revolt." Most national attention has been focused on **Massachusetts** where Proposition 2-1/2 went into effect on July 1. While less restrictive than California's property tax lid, the Massachusetts measure is expected to be far more disruptive than its West Coast counterpart for two major reasons. First, the lid reduces the state's most important local tax but does not provide for any other state or local revenue source. And second, there is no state surplus to replace the lost local revenues.

In **New Jersey**, officials in nearly 100 localities (a record number) sought voter approval to exceed the 5% spending cap. The voters agreed in only slightly more than one-third of the jurisdictions. The cap law is scheduled to expire at the end of next year.

A "New Dakota Proposition" property tax limit has been filed with **South Dakota's** secretary of state and will appear on next year's ballot. It is a revised version of a lid amendment that was defeated last year. The measure retains a 1% limit of the true valuation, but changes the base year for valuations from 1977 to 1980 and raises the inflationary rate from 2 to 4%.

Even in oil-rich Alaska, the legislature meeting in special session approved the governor's proposal for a constitutional state spending lid to go to voters in November 1982. The governor maintains that the lid is necessary to curb the "runaway spending" of revenues obtained from the taxes and royalties on oil production and to invest money in the state's future when energy-related revenues may not be available. The state has spent more money during the past two years than it did during the 20 years since becoming a state in 1959.

In a move against the tax and spending limit tide, the chief sponsor of Kentucky's 4% property tax ceiling law has announced that he will introduce legislation next year to remove the cap because it is unduly restrictive. Earlier in the year, New Hampshire voters in a series of town meetings soundly rejected a plan to place a 5% lid on tax and expenditure increases.

Budget Bill Creates New Programs, Including Several Block Grants

That the federal budget process for Fiscal Year 1982 is taking a big bite out of the amount of funds available for grants to state and local governments is widely known. Yet, perhaps even more importantly, and certainly with less fanfare, it is also dramatically restructuring the grant system.

The dust still has not settled, so it is impossible (as we go to press) to say just how many grant programs are being terminated, and how many are being folded into block grants. It is clear now, however, that there will be several terminations and brand new blocks grants, plus important modifications of many existing programs.

It is highly unusual for the budget bills to contain so much new program legislation. Normally, program changes are made throughout the year by careful and painstaking considerations in the various authorizing committees, followed by separate floor action on each program bill. This year, however, the

budget process is forcing a dramatic speed-up in this activity. Since program restructuring has been made an integral part of budget cutting for FY 1982, the budget schedule controls the pace. And this year, because of the Administration's urgency about reshaping the nation's economy, the budget process has been speeded up even more than usual—with final reconciliation coming in mid-summer instead of in the fall.

It seems certain now that at least six new block grants will emerge from this budget:

- a block grant to the states for community development in small communities;
- a block grant to states replacing six existing Community Services Administration programs.
- a limited block grant for elementary and secondary education (excluding the basic Title I program for special needs of the disadvantaged and the program for educating the handicapped);
- a health services block grant;
- a preventive health block grant; and
- a maternal and child health block grant;

The block grants that emerged from the reconciliation conference committee were a much watered down version of President Reagan's original proposal to eliminate 95 categorical grants, replacing them with six block grants in the areas of preventive health, health services, social services, energy and emergency assistance, elementary and secondary education, and community development.

Although by some accounts the block grants consolidated some 60 categorical grants, many of the largest programs were deliberately excluded, notably Title I, a major educational program for the disadvantaged. In addition, many block grants limit the amount of recipient discretion by specifying that certain block grant monies must be spent on

specific "earmarked" programs such as provisions in the health services block grant requiring states to retain alcohol and drug abuse programs.

Some confusion also exists due to the fact that the term "block grant" is applied in the budget bills to some existing programs which would not be consolidated, but would be stripped of some present restrictions and paperwork requirements. In this category are community development for the large entitlement jurisdictions, home energy payments, Title I ESEA grants for educating the disadvantaged, and food stamps for Puerto Rico.

The conference committee agreed to a requirement for public hearings on state plans to distribute block grant funds and extended the block grant start-up date from Oct. 1, 1981, to Oct. 1, 1982, although states may take part in the new programs sooner if they complete early work on their plans.

In a speech before the National Conference of State Legislatures July 30, President Reagan said he had "not lost faith in this dream" and that he would continue to go "back and back and back" to the Congress until he won all the block grants he needed and in the flexible form he desired. He also once again pledged support for the second stage of decentralization—"turning back to the states the taxing authority necessary to finance them."

Washington's Regulation of States and Localities: Origins and Issues

by David R. Beam

During most of this past decade, the major issues of intergovernmental relations revolved almost exclusively around the difficulties of managing the burgeoning system of categorical grants-in-aid. Fragmentation was the rallying cry; consolidation, under the banner of "New Federalism," was the most trumpeted response. Presidents Nixon and Ford in particular—but even their Democratic successor, Jimmy Carter—urged policy devolution through block grants as a way to reduce federal red tape and excessive national control. Despite their efforts, however, many of these same problems still remain, with some 200 new aid programs established since 1969.

All of this is, of course, well known. What is less widely recognized is that this period also was characterized by a second intergovernmental trend: the growth of new forms of intergovernmental regulation. This movement was in precisely the opposite direction—toward Washington, rather than away. While there was an effort to reduce federal leverage as exercised through the "carrot" of narrow-purpose categorical grants, there was a substantial increase in the use of the tougher and more intrusive federal regulatory "stick." Thus, the decade of the 1970s left two quite different, even contradictory, legacies. Overall, federal control did not decline. From the state and local vantage point, what one hand gave, the other took away.

Regulation Old and New

Federal regulation, in itself, is nothing new. The national government has regulated important aspects of the behavior of business firms since the formation of the Interstate Commerce Commission in 1887. Especially during the New Deal, federal controls—typically administered by other similarly constituted independent commissions—were extended over the conditions of entry and prices charged in a variety of other fields. Examples include the Federal Trade Commission (1914), the Federal Power Commission (1930), the Federal Communications Commission (1934), the Securities and Exchange Commission (1934), the Federal Maritime Commission (1936), and the Civil Aeronautics Board (1938).

More recently, federal controls have been instituted over the nonmarket behavior of business firms as well. Among the major "new social regulatory agencies" are the Equal Employment Opportunity Commission (1964), the Environmental Protection Agency (1970), the Occupational Safety and Health Administration (1970), and the Consumer Product Safety Commission (1972).¹

Furthermore, although most federal regulation traditionally was directed at the private sector, state and local governments have long been faced with certain kinds of constraints:

- First, they are bound by the Fourteenth Amendment to respect the rights of individuals to "due process of law" and "equal protection of the laws." Many of the major legal struggles of federalism over the past half-century have involved the extension of individual rights under the Constitution to states and localities, with the Supreme Court serving as the ultimate arbiter.
- Secondly, state and local governments bind themselves to certain kinds of federal regulations when they accept federal grants-in-aid. Here, as elsewhere, there is no free lunch. Federal grants

¹David B. Frohmyer, "Regulatory Reform: A Slogan in Search of Substance," *American Bar Association Journal*, 66, July 1980, pp. 871-72. See also William Lilely, III and James C. Miller, III, "The New 'Social Regulation,'" *The Public Interest*, 47, Spring 1977, pp. 49-61.

universally have program conditions or "strings" attached: planning requirements, administrative procedures, auditing standards, and so forth.

Although both of these regulatory forms have expanded in recent decades, the fundamental principles involved are old hat.

What is quite new, and a sharp departure from traditional practices, is the growth of a host of federal regulatory programs aimed at or implemented by state and local governments. Beginning in the mid-1960s, and more notably during the 1970s, the federal regulatory presence has spilled over from the traditional economic sphere to include the nation's states, cities, counties, school districts, colleges, and other public jurisdictions. What was quite unthinkable (and seemingly politically impossible) a few decades ago has both been thought of and come to pass.

Many of the most important of these regulatory statutes are listed in *Figure 1*. Much, though not all, of the "new social regulation" falls into this intergovernmental category. Though certain programs remain wholly national responsibilities, the states and localities have been conscripted into the battles against pollution and for civil rights. In some areas, they have been charged with regulating the conduct of private business firms. In others, they have been obliged to remedy perceived shortcomings of their own.

An examination of this figure will demonstrate the substantial growth of intergovernmental regulation, especially during the early 1970s. Although the initial forays occurred earlier, 18 of these 30 regulatory statutes—including nearly all of the most far-reaching ones—were adopted during 1969-75, when the "New Federalism" also was at its height. Though few stressed it at that time, this period saw a dramatic shift in the character of intergovernmental relations. Just as the mid-1960s were marked by an "explosion" of categorical grants-in-aid, the past decade was characterized by the proliferation of major new regulatory programs.

Other evidence in support of this conclusion is provided by the findings of a recent ACIR study, *The Federal Role in the Federal System: The Dynamics of Growth*. Case studies profiling the development of national policy in the fields of elementary and secondary education, higher education, and environmental protection, in particular, noted a dramatic increase in regulatory initiatives.² Federal pollution policy, for example, turned from research (inaugurated in the late 1940s) to construction grants (beginning in the 1950s and expanded in the 1960s) to mandatory national standards in the 1970s. In-

²For a detailed history of policy changes in these fields, see the following Commission reports: *Protecting the Environment: Politics, Pollution, and Federal Policy*, A-83, 1981; *Intergovernmentalizing the Classroom: Federal Involvement in Elementary and Secondary Education*, A-81, 1981; and *The Evolution of a Problematic Partnership: The Feds and Higher Education*, A-82, 1981.

Figure 1

**Major Statutes Of
Intergovernmental Regulation,
1960-80**

- 1964 Civil Rights Act (Title VI)**
- 1965 Highway Beautification Act
Water Quality Act**
- 1967 Wholesome Meat Act**
- 1968 Civil Rights Act (Title VIII)
Architectural Barriers Act
Wholesome Poultry Products Act**
- 1969 National Environmental Policy Act**
- 1970 Occupational Safety and Health Act
Clean Air Amendments**
- 1972 Federal Water Pollution Control Act
Amendments
Equal Employment Opportunity Act
Education Act Amendments (Title IX)
Coastal Zone Management Act**
- 1973 Flood Disaster Protection Act
Rehabilitation Act (Section 504)
Endangered Species Act**
- 1974 Safe Drinking Water Act
Hazardous Materials Transportation
Act
National Health Planning and
Resources Development Act
Emergency Highway Energy
Conservation Act
Family Educational Rights and
Privacy Act
Fair Labor Standards Act Amendment**
- 1975 Education for All Handicapped
Children Act
Age Discrimination Act**
- 1976 Resource Conservation and
Recovery Act**
- 1977 Surface Mining Control and
Reclamation Act**
- 1978 National Energy Conservation Policy
Act
Public Utility Regulatory Policy Act
Natural Gas Policy Act**

Source: ACIR staff computations.

tergovernmental tensions rose simultaneously. According to James Krier and Edmund Ursin,

Whereas past policy reflected a sort of "cooperative federalism" consisting in some national but also considerable state authority, that of the present underscores "federal" and . . . is distinctly uncooperative. Pollution policy is national policy, and the states are little more than reluctant minions mandated to do the dirty work—to implement federal directives often distasteful at the local level. . . . The fact that federal policy of today is simply the culmination of a slow but steady trend that began years ago should not obscure the essential difference between old policy and new, between federalism and federalization.³

Similar trends were noted in the other fields studied.

Thus, the character of American federalism has been substantially altered over the past decade. Although in prior years, the problems of intergovernmental relations revolved almost exclusively around federal aid—whether it should be provided and, if so, how—these regulatory programs present new issues which can no longer be ignored. Indeed, as Mel Dubnick and Alan Gitelson have commented,

Our federal system has evolved through a number of stages, each given appropriate labels by analysis. If we were to label the current trend, perhaps it should be best described as regulatory federalism.⁴

The New Kit of Techniques

An element of compulsion is one key feature of the new intergovernmental regulation that distinguishes it from the usual grant-in-aid conditions. The requirements traditionally attached to assistance programs may be viewed as part of a contractual agreement between two independent, coequal levels of government. Cooperation is sometimes said to be the motivating force. In contrast, the policies which the new intergovernmental regulation imposes on state and local governments are more nearly mandatory. They cannot be avoided, without incurring some federal sanction, by the simple expedient of refusing to participate in a single federal assistance program. In one way or another, compliance has been made difficult to avoid.

A variety of legal and fiscal techniques has been employed by the national government to encourage acceptance of its regulatory standards. Four major strategies—direct orders, crosscutting requirements,

crossover sanctions, and partial preemption—are described below.

Direct Orders

In a few instances, federal regulation of state and local government takes the form of direct legal orders that must be complied with under the threat of civil or criminal penalties. For example, the **Equal Employment Opportunity Act of 1972** bars job discrimination by state and local governments on the basis of race, color, religion, sex, and national origin. This statute extended to state and local governments the requirements imposed on private employers since 1964.

For the most part, however, Washington has exempted governments from many of the kinds of direct regulatory statutes that apply to businesses and individuals. Thus, although state governments may administer the **Occupational Safety and Health Act**, they (and local governments) are exempt from its provisions in their capacity as employers. Politics often has dictated this course, but there also are some Constitutional restrictions on the ability of Congress to regulate directly. The wage and hour requirements imposed by the 1974 amendments to the **Fair Labor Standards Act** were overturned by the Supreme Court in **National League of Cities v. Usery** (1976).⁵ The Court's ruling held that the law interfered with the "integral functions" of state and local governments, and thus threatened their "independent existence."

Much more commonly, then, Washington has utilized other regulatory techniques to work its will. These may be distinguished by their breadth of application and the nature of the sanctions which back them up.

Crosscutting Requirements

First, and most widely recognized, are the crosscutting or generally applicable requirements imposed on grants across the board to further various national social and economic policies. One of the first and most important of these requirements was the non-discrimination provision included in the Title VI of the **Civil Rights Act of 1964**, which stipulated that

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving federal financial assistance.

Since 1964, crosscutting requirements have been enacted for the protection of other disadvantaged groups (the handicapped, elderly, and—in education programs—women). The same approach was utilized in the environmental impact statement process created in 1969, and for many other environmental

³James A. Krier and Edmund Ursin, *Pollution and Policy*, Berkeley, CA, University of California Press, 1977, pp. 297-98.

⁴Mel Dubnick and Alan Gitelson, "Intergovernmental Relations and Regulatory Policy," paper presented at a Symposium on Regulatory Policy, Houston, TX, November 19-20, 1979, p. 30

⁵*National League of Cities v. Usery*, 426 U.S. 833, 1976.

“ An element of compulsion is one key feature of the new inter-governmental regulation that distinguishes it from the usual grant-in-aid conditions. ”

purposes, and has also been extended into such fields as historic preservation, animal welfare, and relocation assistance. A total of some 36 across-the-board requirements dealing with various socioeconomic issues, as well as an additional 23 administrative and fiscal policy requirements, were identified in a recent OMB inventory.⁶ Of the former group, the largest number involve some aspect of environmental protection (16) and nondiscrimination (9). Two-thirds of the 59 requirements were adopted since 1969.

Crosscutting requirements have a pervasive impact because they apply “horizontally” to all or most federal agencies and their assistance programs. In contrast, two other new forms of intergovernmental regulation are directed at only a single function, department, or program. These are sometimes referred to as “vertical” mandates.⁷

Crossover Sanctions

One approach relies upon the power of the purse. It imposes federal fiscal sanctions in one program area or activity to influence state and local policy in another. The distinguishing feature here is that a failure to comply with the requirements of one program can result in a reduction or termination of funds from another separately authorized program. The penalty then “crosses over.”

The history of federal efforts to secure the removal of billboards from along the nation’s major highways illustrates the use of the traditional financial “carrot” along with this new financial “stick.”⁸ Beginning in 1958, the federal government offered a small bonus in the form of additional highway funds to states that agreed to regulate billboard advertising along new interstate highways. By 1965, however, only half of the states had taken advantage of this offer—not enough to suit the Johnson White House.

A dramatic change occurred with the adoption of the **Highway Beautification Act of 1965**. The bonus system was dropped, and Congress substituted

the threat of withholding 10% of a state’s highway construction funds if it did not comply with newly expanded federal billboard control requirements. Despite the bitter opposition of the outdoor advertising industry, 32 states had enacted billboard control laws by 1970, though only 18 of these were judged to be in full compliance. Nearly all of the rest fell quickly into line when Congress made appropriations to compensate partially for the cost of removing nonconforming signs, and the Federal Highway Administrator stepped up his pressure on them.

A similar strategy has been employed since in a number of other programs. In the wake of the OPEC oil embargo, federal officials urged the states to lower their speed limits, and the Senate adopted a resolution to that effect. Twenty-nine states responded to this effort at “moral suasion.” But these pleas were quickly replaced by a more authoritative measure: the **Emergency Highway Energy Conservation Act of 1974** prohibited the Secretary of Transportation from approving any highway construction projects in states having a speed limit in excess of 55 mph. All 50 states responded within two months.

Partial Preemption

These fiscal sanctions, as well as the crosscutting requirements, are both tied directly to the grant-in-aid system. Federal power in these cases derives from the Constitutional authority to spend for the general welfare. A final innovative technique has another basis entirely. It rests upon the authority of the federal government to preempt certain state and local activities under the Supremacy clause and the Commerce power.

This is preemption with a twist, however. Unlike traditional preemption statutes, preemption in these cases is only **partial**. While federal laws establish basic policies, administrative responsibility may be delegated to the states or localities, provided that they meet certain nationally determined standards.

James B. Croy offers the **Water Quality Act of 1965** as an initial example of this strategy, which he terms the “if-then, if-then” approach. The statute was the first to establish a national policy for controlling pollution. While the law allowed each state one year to set standards for its own interstate waters, the Secretary of Health, Education, and Welfare was authorized to enforce federal standards in any state which failed to do so. That is, in Croy’s words,

if a state does issue regulations acceptable to the U.S., then a federal agency or department will do so, and if the state does not adopt and enforce these regulations, then the federal level of government will assume jurisdiction over that area.⁹

This same technique—which others have called

⁶Office of Management and Budget, **Managing Federal Assistance in the 1980s, Working Papers**, Volume I, Washington, DC, U.S. Government Printing Office, 1980.

⁷Catherine H. Lovell, *et al.*, **Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts**, Riverside, CA, Graduate School of Administration, University of California-Riverside, 1979, p. 35.

⁸Roger A. Cunningham, “Billboard Control Under the Highway Beautification Act of 1965,” **Michigan Law Review**, 71, June 1973, pp. 1295-1374.

⁹James B. Croy, “Federal Supersession: The Road to Domination,” **State Government**, 48, Winter 1975, p. 34. Emphasis added.

“Especially in the past two years, the growing federal regulatory presence has become a major concern of intergovernmental policymakers.”

the “substitution approach” to federalism¹⁰—has since been extended to a variety of other areas. For example, the OSHA law asserts national control over workplace health and safety but permits states to operate their own programs if their standards are “at least as effective” as the federal ones.

The most far-reaching application, however, is in the Clean Air Act of 1970. This path-breaking environmental statute set national air quality standards throughout the nation, but requires that the states devise effective plans for their implementation and enforcement. The compass is great: EPA can, for example, require that states change their own transportation policies (perhaps by giving additional support to mass transit), or that they regulate private individuals (as in establishing emission-control requirements and inspection programs for automobiles).¹¹ Dubnick and Gitelson comment:

Of all the intergovernmental mechanisms used to nationalize regulatory policy, none is more revolutionary than the approach first applied in the Clear Air Act Amendments of 1970. It is an approach minimizing both the voluntariness of state and local participation and the substantive policy discretion provided for officials in subnational governments. In fact, it is a mechanism which challenges the very essence of federalism as a non-centralized system of separate legal jurisdictions and instead relies upon a unitary vision involving hierarchically related central and peripheral units [I]t is an approach allowing national policymakers and policy implementors to mobilize state and local resources on behalf of a national program. As preliminary measures, these resources can be mobilized using technical, financial, or other forms of assistance, but underlying this mechanism is the ability of national officials to formally and officially “draft” those resources into national service. We call this legal conscription.¹²

These four techniques—direct legal orders, cross-cutting requirements, crossover sanctions, and partial preemption—are the major new statutory tools

in the federal government’s kit for intergovernmental regulation. Separately and together, they pose important new problems of policy, law, administration, and finance.

Issues and Impacts

Especially in the past two years, the growing federal regulatory presence has become a major source of concern of intergovernmental policymakers. State and local officials, in particular, have sounded the alarm against costly federal mandates and unreasonable federal intervention into local affairs. Even erstwhile liberals have objected to the fiscal strains and policy controls imposed on hard-pressed cities and states, while conservatives—who had always warned that federal controls would follow federal dollars—seem to have been proven right.

A *New York Times* editorial, “Fighting Federal Mandates,” observed that

Local governments are feeling put upon by Washington. Each new day seems to bring some new directive from Congress, the courts or the bureaucrats: cities must make public buildings accessible to the handicapped, states must extend unemployment compensation to municipal and county workers, and on and on. The mandates are piling up so fast that liberal governors and mayors are enrolling in a cause once pressed only by arch-conservatives.¹³

Mayors and county officials—responding to the double-whammy of federal as well as state mandates¹⁴—have been especially vocal, and the major research studies to date all have examined the impact of federal regulations on the nation’s cities and counties. New York’s Mayor Ed Koch estimates that federal and state mandates over the next four years will cost the city \$6.25 billion in expense-budget dollars, \$7.11 million in capital expenditures, and \$1.66 billion in lost revenue.¹⁵ While Koch indicated his general support of the broad policy objectives which mandates are meant to serve, he warned of the “lack of comprehension by those who write them as to the cumulative impact on a single city, and even the nation.¹⁶ Federal “mandate mandarins,” he charged, have hung a “mandate millstone” around the necks of the nation’s cities.

Koch’s views have much support among his municipal, county, and state colleagues. City officials responding to a recent survey identified federal wastewater treatment, environmental impact, handicapped access, and safe drinking water regulations as especially burdensome and most urgently in need of modification. (See *Figure 2*.) Reforms also were

¹⁰Frank J. Thompson, *Health Policy and the Bureaucracy: Politics and Administration*, Cambridge, MA, The MIT Press, 1981, p. 240.

¹¹Congressional Budget Office, *Federal Constraints on State and Local Government Actions*, Washington, DC, U.S. Government Printing Office, 1979, p. 7.

¹²Mel Dubnick and Alan Gitelson, “Nationalizing State Policies,” *The Nationalization of State Government*, in Jerome J. Hanus, ed., Lexington, MA, D.C. Heath and Company, 1981, pp. 56-57.

¹³“Fighting Federal Mandates,” *New York Times*, August 16, 1980, p. 20.

¹⁴Advisory Commission on Intergovernmental Relations, *State Mandating of Local Expenditures*, A-67, Washington, DC, U.S. Government Printing Office, 1978.

¹⁵Edward I. Koch, “The Mandate Millstone,” *The Public Interest*, 61, Fall 1980, p. 42.

¹⁶*Ibid.*

Figure 2

How City Officials View U.S. Regulatory Programs

Question: How important is it that the Administration act to alleviate the burdens caused by present federal regulations or requirements on the following subjects?"

	Percent Saying Urgent or Important
Wastewater Treatment	86%
Environmental Impact Review	80%
Accessibility for the Handicapped	77%
Safe Drinking Water	74%
Air Pollution Control	70%
Occupational Safety and Health	68%
Prevailing Wages	68%
Nondiscrimination or Affirmative Action	64%
Public Education for Special Groups	58%
Flood Disaster Protection	56%
Historic Preservation	56%
Uniform Relocation Assistance	49%

SOURCE: Based upon Clint Page, "NLC Surveys Members on Federal Rules," *Nation's Cities Weekly*, April 6, 1981, p. 10.

called for in a great variety of other areas.¹⁷ That county officials share these perspectives is suggested by the fact that the National Association of Counties selected "Controlling Mandates" as the theme for its 1981 annual conference. A joint statement issued last November by the executive committees of the National Governors' Association and the National Conference of State Legislatures pushed for the enactment of fiscal note procedures as a first step in controlling federal mandates, and also contended that

if a situation is of such compelling national concern as to prompt enactment of a federal program to respond to it, the federal government should normally fund that program.¹⁸

National officials, too, have been disturbed by the rising tide of regulatory efforts. Joseph A. Califano, an HEW Secretary during the Carter years, recalls that "Our big trouble wasn't with the old Great Society programs. It was with the explosion of regula-

tion from the 1970s."¹⁹ And the view of many in the Reagan Administration has been aptly summarized by Murray L. Weidenbaum, the chairman of the Council of Economic Advisers and a noted expert in the regulatory field. "In the past decade," Weidenbaum has written,

we have seen a boom in social regulation with devastating consequences for the federal system. The federal government, through many of its regulatory actions, has reduced the autonomy of state and local governments and centralized the responsibility for many important programs. This loss of autonomy has weakened the states and reduced their independence, while the centralization of responsibilities better handled at the state and local levels has limited the effectiveness of the federal government.²⁰

Seven Problems

Although particular problems vary from program to program, critics have leveled at least seven frequent charges against federal intergovernmental regulations singly and as a whole. The new mandates, they believe, are too often **expensive, inflexible, inefficient, inconsistent, intrusive, ineffective, and unaccountable**. Each of these interrelated concerns is illustrated, with a single example, in the discussion below.

Cost. Given the fiscal pinch caused by an unstable economy, the federal aid slowdown, and taxpayer revolts, it is not surprising that the costs imposed by federal mandates have been a major, perhaps even preeminent, concern. Simply put, state and local government officials object to footing part of—or, in some cases, most of—the bill for someone else's program. What Washington wants done, many believe, Washington also should be willing to pay for.

Accurate information on the total cost of implementing federal mandates nationwide simply is not available. However, of the five major programs examined in an Urban Institute report, the 1977 **Clean Water Act** imposed by far the largest fiscal costs on seven cities and counties studied.²¹ This act, which supplemented and modified the far-reaching **Water Pollution Control Act Amendments of 1972**, requires the development and implementation of wastewater treatment management plans which meet pollution discharge standards set by the Environmental Protection Agency for 1983. While the act also authorized a very large construction grant program covering 75 to 85% of construction and conversion costs, the balance is borne by local (and, in some instances,

¹⁹Suzanne Garment, "Califano's Memoir: Washington Before the 1980 Flood," *The Wall Street Journal*, May 29, 1981, p. 24.

²⁰Murray L. Weidenbaum, "Let States Decide How to Muffle Garbage Trucks," *Washington Star*, May 6, 1981, p. A14.

²¹Thomas Muller and Michael Fix, "The Impact of Selected Federal Actions on Municipal Outlays," in U.S. Congress, Joint Economic Committee, **Special Study on Economic Change**, Volume 5, **Government Regulation: Achieving Social and Economic Balance**, 96th Cong., 2d Sess., December 8, 1980, p. 327.

¹⁷Clint Page, "NLC Surveys Members on Federal Rules," *Nation's Cities Weekly*, April 6, 1981, p. 1.

¹⁸"Statement on Federalism Reform Adopted by the Executive Committees of the National Conference of State Legislatures and the National Governors' Association," *State Legislatures*, February 1981, p. 7.

“Closely following cost as a concern of state and local officials are problems of inflexibility in federal regulatory programs.”

state) governments. No aid is provided for operating and maintenance expenses.

According to the Urban Institute report, the cost of meeting these requirements ranged from zero in Burlington, VT—where a new plant already was under construction to meet state standards—to \$51.8 million in capital outlays, plus an additional \$10.4 million in operating expenses, in Newark, NJ. Here, as in many other states, a portion of this cost is borne by the state government. However, local outlays totalled \$62.54 per capita for capital improvements and \$31.42 per capita for operating expenses.²²

As this example shows, the costs of implementing federal regulatory programs can vary widely from place to place. But nationwide, according to EPA estimates, cities will have to spend nearly \$120 billion to build additional wastewater treatment plants to comply with the 1983 Clean Water Act standards.²³ Even then, it is not certain that the objectives of the program will be realized. GAO audits have concluded that, as a result of design and operating deficiencies, many of the plants built so far are unable to meet national performance standards. These failures, according to the GAO, “may represent the potential waste of tens of millions of dollars in federal, state, and local moneys.”²⁴

Inflexibility. Closely following cost as a concern of state and local officials are problems of inflexibility in federal regulatory programs. Washington, they believe, has neglected the old adage, “there’s more than one way to skin a cat.” Instead, federal officials too often have prescribed rigid policies and performance standards, regardless of the varying circumstances in which they are to be applied.

Perhaps no area better illustrates state and local concerns about federal inflexibility than the bilingual education regulations proposed by the Carter Administration and withdrawn by the Reagan Administration early this year. Although Washington has encouraged bilingual education with federal aid for over a decade, a strong regulatory role dates from the 1974 decision of the Supreme Court in *Lau v. Nichols*. Responding to a complaint of some Chinese-

American parents in San Francisco, the Court held that the Civil Rights Act of 1964 prohibited school districts from taking a “sink or swim” approach to the education of non-English speaking students.

The Court instructed HEW to develop appropriate regulations, but specified no particular approach. Indeed, the decision states that, “Teaching English to the student of Chinese ancestry is one choice. Giving instruction to this group in Chinese is another. There may be others.” However, the regulations drafted by the Department of Education required that students with limited proficiency in English be offered subject-matter courses in their native language wherever there were 25 or more students in two consecutive grades. Alternative approaches, including “English as a Second Language” (ESL) instruction, were generally precluded. A failure to conform to national standards could result in a cutoff of education aid.

The proposed regulations were greeted with vociferous opposition from many state, local, and education groups. Many of these critics supported the use of bilingual education in certain areas—for example, in innercity or southwestern school districts with large Spanish-speaking populations. And cost was not the major issue, because most schools already provided special instruction for their non-English speaking students.²⁵ What was objectionable was the federal stipulation of a particular instructional technique, to the exclusion of others, in areas where it might well be inappropriate. Where, they asked, can a city find qualified subject matter teachers fluent in Vietnamese or Ilokano (a language of the Philippines)?²⁶ Why should Fairfax County, VA, not be allowed to continue its program of special instruction in English for its students of more than 50 different foreign language backgrounds?

To many state and local officials, there was no satisfactory answer. A statement prepared by the National Governors’ Association, the National Conference of State Legislatures, the Council of Chief State School Officers, and the National Association of State Boards of Education charged that “a national prescription of a single approach to instruction to the exclusion of other alternative methods is educationally without merit and would be a disservice to many children who can benefit more from other methods of instruction.”²⁷

Inefficiency. Efficiency is a matter of bang for the buck. To be “efficient” in economic terms, the benefits from a program should exceed its costs. Furthermore, the efficiency criterion dictates that a choice between two or more equally effective means should be decided in favor of the least expensive one.

²² *Ibid.*, p. 335.

²³ U.S. Environmental Protection Agency, **1980 Needs Survey: Cost Estimates for Construction of Publicly Owned Wastewater Treatment Facilities**, Washington, DC, U.S. Government Printing Office, 1971, p. 4.

²⁴ Comptroller General of the United States, **Costly Wastewater Treatment Plants Fall to Perform As Expected**, Washington, DC, U.S. General Accounting Office, 1980.

²⁵ Rochelle L. Stanfield, “Are the Federal Bilingual Rules a Foot in the Schoolhouse Door?”, **National Journal**, October 18, 1980, p. 1736.

²⁶ *Ibid.*, p. 1739.

²⁷ “State-Based Groups Urge Congressional Hearings on Bilingual Education Rules,” **Governor’s Bulletin**, November 31, 1980.

Too often, critics believe, Washington has ignored these obvious prescriptions. The benefits of regulations have been poorly specified, while the likely costs to be imposed have sometimes been wholly ignored. Federal officials have locked onto very costly techniques or standards as the one-and-only way to meet national goals, even when more economical approaches were available.

Perhaps no regulatory policy has come under as much criticism on efficiency grounds as the Department of Transportation's regulations written to carry out Section 504 of the **Rehabilitation Act**. This crosscutting requirement, intended to bar discrimination against the handicapped, has been interpreted by DOT to require full access to existing transit systems, while prohibiting the use of much cheaper and more flexible paratransit alternatives.

This decision was a costly one and was greeted with protests from transit officials around the nation. Chicago's hardpressed Regional Transit Authority claimed that retrofitting its system would cost more than all the capital invested in it since 1890, while the shaky New York Metropolitan Transportation Authority spoke of the dangers of bankruptcy.²⁸ An independent study by the Congressional Budget Office also has warned of inefficiency. It noted that the rules

require transit systems to equip buses with lifts for wheelchairs, to install elevators in many underground and aboveground rail stations, and to modify rail cars to accommodate the wheelchairs. While the program would be very expensive—\$6.8 billion over the next 30 years—relatively few handicapped persons would benefit from it.²⁹

The CBO study estimated that the cost of providing full wheelchair access to mass transportation would average about \$38 per trip.³⁰ It indicated that alternative approaches—such as special taxi service or helping the severely disabled to purchase and equip their own cars—could serve many more handicapped persons at lower cost.

Inconsistency. The problem of inconsistency is a special curse of the crosscutting requirements. While most of these stem from a single statutory enactment, the requirements are interpreted and enforced by each grant-awarding agency, usually with some guidance from a designated "lead agency." As a result, there may be significant differences in the manner in which federal requirements are applied in particular programs. An OMB study noted:

In too many cases, a single generally applicable requirement has been implemented differently for several assistance programs. The result is that a

²⁸Timothy B. Clark, "Regulation Gone Amok: How Many Billions for Wheelchair Transit?", *Regulation*, March/April 1980, p. 49.

²⁹Congressional Budget Office, *Urban Transportation for Handicapped Persons: Alternative Federal Approaches*, Washington, DC, U.S. Government Printing Office, 1979, p. xi.

³⁰*Ibid.*, p. xii.

““ The benefits of regulations have been poorly specified, while the likely costs to be imposed have sometimes been wholly ignored.””

recipient of several agencies may receive inconsistent or conflicting instructions for meeting a single requirement.³¹

William G. Colman, a governmental affairs consultant and former ACIR executive director, has made the same point more strongly, testifying that

delegation of enforcement powers to each granting agency for governmentwide statutory environmental, civil rights, affirmative action, planning, and other requirements presents recipient state and local governments with administrative chaos defying description.³²

Questions of policy and administrative coordination have been an important issue in the drive to eliminate discrimination against blacks, ethnic minorities, the elderly, women, and the handicapped. Individual agencies have followed different patterns in the interpretation of such across-the-board requirements as Title VI of the **Civil Rights Act** and Section 504 of the **Rehabilitation Act**. Furthermore, in addition to the series of nine crosscutting requirements in this field, separate civil rights protections have been written into many particular programs, including **General Revenue Sharing** and the **Housing and Community Development Act**. As a consequence, state and local officials have been faced with a confusing array of sometimes conflicting goals, standards, procedures, and timetables. "Serious problems of coordination and effective compliance," an earlier ACIR study noted, "clearly remain unresolved."³³

Intrusiveness. It is one thing, of course, for the national government to tell state and local governments what they must do. That, very often, has been objectionable enough. But it is yet another thing to tell them not only what they must do but exactly how they should do it. Many intergovernmental regulatory programs do in fact carry with them rather detailed organizational and procedural standards. At times, state and local officials believe,

³¹Office of Management and Budget, "Proposed Circular on Managing Generally Applicable Requirements for Assistance Programs," *Federal Register*, November 7, 1980, p. 74416.

³²Advisory Commission on Intergovernmental Relations, *Hearings on the Federal Role*, A-87, Washington, DC, U.S. Government Printing Office, 1980, p. 76.

³³Advisory Commission on Intergovernmental Relations, *Categorical Grants: Their Role and Design*, A-52, Washington, DC, U.S. Government Printing Office, 1978, p. 247.

Washington has intruded into areas that, by tradition and even the Constitution, are their own business.

The **National Health Planning and Resources Development Act of 1974** (P.L. 93-641) is a case in point. This act both created a new health planning and regulatory network at the state and local levels and prescribed, in great detail, that network's structure and functions. Born out of Washington's concern with the inflationary impact of rising health care costs, P.L. 93-641 required in each state the designation of a State Health Planning and Development Agency (SHPDA), the delineation of local health service areas, and the formation in each area of a consumer-and-provider controlled Health Systems Agency (HSA).

Most importantly, every state also was required to enact certificate-of-need (CON) legislation meeting minimum federal standards. These CON programs set up a review process whereby the SHPDA must approve all major capital development projects undertaken by health care facilities. Moreover, states were empowered to periodically review the "appropriateness" of institutional health services. The HSAs are authorized to review and approve or disapprove a variety of federal health funds coming into their areas.

This highly prescriptive and extremely detailed statute also was backed by an unusually harsh fiscal sanction. A state's failure to comply jeopardizes its entitlement, not just to the planning funds made available under the act, but to a variety of programs for public health services, community mental health, and alcohol abuse as well. For these reasons, attorney Thomas J. Madden has declared that "the Health Planning Act intrudes upon state and local operations to a greater degree than almost any other grant program."³⁴

State and local opposition to some provisions of the **Health Planning Act** resulted in a series of political and legal confrontations, including arguments that the law is unconstitutional. The State of North Carolina protested that it was being forced to regulate the actions of private health care institutions—contrary to its own state constitution—or forego participation in some 42 federal assistance programs. This, it believed, represented unlawful coercion and was a violation of basic states' rights protected by the Tenth Amendment. Similarly, Montgomery County, MD, challenged the provisions that allow local HSA's to make decisions which cannot be overruled by local county governments.

Neither case was successful, however. In **North Carolina v. Califano** (1978), the U.S. Supreme Court upheld the act as a valid exercise of the spending power, and a U.S. District Court reached the

same conclusion in **Montgomery County, Maryland v. Califano** (1979). Both regarded the law as essentially a "cooperative venture" between governments, offering inducements for state action, but not coercing it.

Ineffective. As the foregoing suggests, state and local officials have raised a variety of objections to the federal regulations which have been imposed upon them. But another sort of concern has been voiced chiefly by others. These critics doubt that the mounting paperwork and red tape, the mandated expenditures, and the federal intrusions into local decisionmaking have reaped commensurate benefits in the quality of human life.

Many policy analysts—particularly, many economists—believe that regulatory programs have been rather ineffective in achieving social and environmental objectives, and argue that alternative implementation strategies might prove more successful.³⁵ Members of the intended beneficiary groups, on the other hand, frequently protest that Washington has failed to follow through adequately on the commitments enshrined in law. For different reasons, then, both sets of critics argue that, in practice, intergovernmental regulatory programs have not worked very well.

The **Occupational Safety and Health Act** (OSHA) would be high on many people's list as an example of an ineffective regulatory program. Launched with high hopes—one sponsor expected a 50% reduction in job-related accidents by 1980—OSHA has instead become a symbol of bureaucratic red tape and bumbling. Its thousands of detailed regulations and standards have in fact done little to improve working conditions. According to a Congressional analysis;

it is clear that OSHA's impact on injuries has been minimal. Most studies have been unable to find any statistically significant improvement. The most optimistic estimate, based on a study of "preventable" accidents in California, suggests a 2 to 3% reduction in injuries and a 5 to 10% decline in deaths. There is no evidence that injury rates decrease after a firm is inspected. No reliable data are available on OSHA-induced trends in occupational illnesses, but there is little reason to believe that there have been significant improvements given the limited attention devoted to health hazards by OSHA in the past.³⁶

Unaccountability. A final problem posed by intergovernmental regulation relates to the democratic process itself. "Who is responsible?" is the basic question. "Not me" often is the official reply.

³⁴Charles L. Schultz, **The Public Use of Private Interest**, Washington, DC, The Brookings Institution, 1977.

³⁶Richard Zeckhauser and Albert Nichols, "The Occupational Safety and Health Administration—An Overview," in U.S. Congress, Senate, **Study on Federal Regulation: Appendix to Volume VI: Framework for Regulation**, 95th Cong., 2d Sess., December 1978, p. 165.

³⁴Thomas J. Madden, "The Law of Federal Grants," in Advisory Commission on Intergovernmental Relations, **Awakening the Slumbering Giant: Intergovernmental Relations and Federal Grant Law**, M-122, Washington, DC, U.S. Government Printing Office, 1980, p. 17.

To many critics, regulatory policies seem to bring out the worst in both federal legislators and bureaucrats.³⁷ It is too easy for them to consider only the broad objectives of a program and ignore operational realities. It is simpler to frame standards to fit the few worst cases, but neglect the impact upon other jurisdictions. And it is tempting to forget about the costs of achieving national goals when the money being spent must be raised by a lower level of government, rather than Washington itself.

Furthermore, the complex chain of events from enactment, to administrative interpretation, to adjudication, through final implementation at the state and local level (or both) diffuses policy responsibility. In one too-common scenario, Congressmen blame bureaucrats for overzealous interpretations of legislative intent; bureaucrats blame Congress for either over-specificity or a lack of adequate guidance; state and local officials charge that their hands are tied by national requirements, and Washington points a finger at them for improper performance. Everyone, as often as not, blames the courts, while judges reply that they were only reading the law.

The problems of accountability in regulatory programs are aptly illustrated by the Clean Air Act. The joint federal-state system employed to establish and enforce air quality standards means that most voters find it difficult to know whom to blame for unpopular or unsuccessful policies. In this and similar programs, according to Joseph F. Zimmerman,

the relationship between the levels of government has become so complex and intertwined . . . that the average citizen is unable to comprehend the system or to determine who is responsible for failure to achieve goals. The lack of citizen understanding and the failure of the system to achieve Congressionally mandated goals suggests that consideration should be given to the relative advantages of alternative methods of achieving national goals.³⁸

Reauthorization of the 185-page Clean Air legislation promises to be "as complicated as rewriting part of the Talmud" since "major policies are hidden in small phrases, subordinate clauses and fine print . . ."³⁹ Because of the intricacy of the issues involved, it is likely that neither the nation's citizens nor most of its legislators will play an effective role in the deliberations:

"It's the kind of thing where a Congressman is going to say to the staff guy, 'Just tell me how to vote,' and the third-level bureaucrat is the one who's going to get the pressure because the agency administrator will have to take his word for it,"

³⁷See Koch, "The Mandate Millstone," pp. 43-44.

³⁸Joseph F. Zimmerman, "Frustrating National Policy: Partial Federal Pre-emption," in Hanus, ed., p. 98.

³⁹Joanne Omang, "The Clean Air Act: Straightening Out a Regulatory Maze," *The Washington Post*, February 22, 1981, p. A28.

“The substantial growth of inter-governmental regulation during the 1970s has brought to the fore a whole new set of complex, difficult, and controversial policy issues.”

said a former Senate staff worker. Only the few who care very much will be involved in the decisions.⁴⁰

Conclusion

The substantial growth of intergovernmental regulations during the 1970s has brought to the fore a whole new set of complex, difficult, and controversial policy issues. As this review shows, state and local officials object to mandated federal costs and protest the inflexibility, inefficiency, inconsistency, and intrusiveness of new forms of federal regulation. Other critics wonder if the new regulatory programs are very effective in accomplishing their objectives, and whether national policies accurately reflect the views and preferences of the voting public and its elected representatives.

Because of this development, the battle to strengthen American federalism must now be fought on two fronts simultaneously. Grant consolidation cannot fully accomplish its objective of devolution unless the burden of intergovernmental regulation is reduced simultaneously. Recent and projected declines in the level of federal aid make reforms aimed at increased efficiency and flexibility in meeting federal, state, and local priorities all the more urgent.

In the past three years, the Advisory Commission on Intergovernmental Relations has offered its own initial recommendations on certain regulatory issues. In 1978, it called upon the Congress to review all crosscutting statutes for the purpose of consolidating those that are related to each other and of simplifying or terminating those that have proven to be excessively burdensome or impractical to implement. The Commission also proposes a series of measures to standardize and simplify the administration of the remaining generally applicable requirements.⁴¹ This past year, it further urged that Congress

- require the Congressional Budget Office to prepare a "fiscal note" estimating the impact of proposed statutes on state and local governments;
- enact legislation requiring federal agencies to prepare a detailed analysis of the effects likely to result from any major new rule they propose;

⁴⁰ *Ibid.*

⁴¹ ACIR, A-52, pp. 316-19.

- authorize the President to suspend temporarily the implementation of crosscutting requirements when it becomes clear that serious or unanticipated costs or disruptions will otherwise occur.⁴²

At that time, the Commission also recommended that state and local officials join together to form a mutual legal defense organization adequately staffed and financed to challenge excessively coercive and intrusive federal regulations in the courts.⁴³ And, at its first meeting in 1981, the Commission directed staff to begin a more comprehensive analysis of the federal "mandating" issue.

The incoming Reagan Administration also has begun a major review of regulatory requirements and procedures, including many of the most controversial intergovernmental ones. Two days after taking office, the President announced the creation of a Task Force on Regulatory Relief, chaired by Vice President George Bush and charged to review pending regulations, study past regulations with an eye toward revising them, and recommend appropriate legislative remedies. A week later, President Reagan put a temporary freeze on some last-minute regulations promulgated at the end of the Carter Administration. And, less than a month thereafter, he issued Executive Order 12291, which specified that:

- Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action.
- Regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society.
- Regulatory objectives shall be chosen to maximize the net benefits to society.
- Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen.
- Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.⁴⁴

Although these policies reflect the Administration's view that excessive regulation has damaged the nation's economic performance, the intergovernmental dimension has not been neglected. The Bush task force has sought advice on regulatory reform

from state and local government officials. And a number of major intergovernmental regulations, including bilingual education requirements, the **Education for All Handicapped Children Act**, the **Davis-Bacon Act**, the **Clean Air Act**, health planning and cost control procedures, and the **Surface Mining Control and Reclamation Act**, are now being reviewed.

Other regulatory reform proposals are being developed independently by the Congress as well as state and local government organizations, and recent court actions suggest that federal intergovernmental regulation may come under more intensive judicial scrutiny than it has in the past. Thus, just as the problems and disappointments of the Great Society gave rise to the New Federalism agenda of the early 1970s, so a new reformist "paradigm" now seems to be emerging. Although experience shows that it is difficult to predict the outcomes of political confrontations, the years ahead do promise to be a second important era in the history of federal intergovernmental regulation.

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⁴²Advisory Commission on Intergovernmental Relations, **In Brief: The Federal Role in the Federal System: The Dynamics of Growth**, B-4, Washington, DC, U.S. Government Printing Office, 1980, pp. 40-41.

⁴³*Ibid.*, pp. 42-43.

⁴⁴Executive Order 12291, February 17, 1981, **Weekly Compilation of Presidential Documents**, February 23, 1981, p. 125.

Federal Intergovernmental Regulation: Symbolic Politics In The New Congress

by Timothy J. Conlan and Steven L. Abrams

Traditionally, politics has been conceived of as a process for deciding "Who Gets What, When, and How."¹ The "legislative struggle"—to use the phrase of one influential book²—has been viewed as a clash among contending interest groups. Yet, public policymaking involves symbolism as well as substance. Often, appearances matter as much as tangible results.

¹Harold Lasswell, *Politics: Who Gets What, When, How*, Cleveland, OH, Meridan Books, 1958.

²Bertram Gross, *The Legislative Struggle: A Study in Social Combat*, New York, NY, McGraw-Hill, 1953.

Though policies of every sort may be imbued with symbolic content, there appears to be a special association between federal regulation and symbolic politics.³ Especially in recent years, symbolic legislation has become a vehicle for enacting tough but often very vague regulatory mandates. Besides contributing to mass support for policy, legislative symbols promising to "do something" increasingly are used to circumvent traditional painstaking means of building legislative support in Congress. Often such policies gain virtually unanimous approval in their initial passage. Moreover, this symbolic process has been used effectively, not only by established legislative leaders, but also by the independent policy entrepreneurs who inhabit the modern decentralized Congress. Some of the most vexing recent acts of regulation have been largely products of relatively few individuals in Congress, whose seemingly uncontroversial regulatory goals have blossomed into major new forms of federal intervention in state and local affairs.

The Nature of Symbolic Politics

A symbol is defined as "something that stands for another thing, especially an object used to represent something abstract."⁴ Symbolic legislation draws the bulk of its appeal by appearing to respond to a particular problem. It tends to be associated with the abstract goal expressed as legislative purpose rather than evaluated for the program structure or policy alternative employed. According to one Congressional observer:

The term *symbolic* can . . . usefully be applied where Congress prescribes policy effects but does not act [effectively] so as to achieve them. . . . Position-taking politics may produce statutes that are long on goals but short on means to achieve them.⁵

Reliance on symbolic goals to generate support for legislation in Congress, with little consideration of how the goals will actually be achieved, is a distinctive approach to Congressional policymaking. It contrasts with more traditional means of fashioning support for legislation, like compromising over the provisions of an act in order to gain majority support, or logrolling many different benefits and programs into one bill, or relying on the deference of Congress to the expertise of legislative specialists. Compared with these methods, symbolic politics is a less expensive, faster means to win support. To be successful, it must strike a rich pre-existing vein of sympathy, but it does not presuppose that advocates possess a reservoir of power or resources for bargain-

³See Murray Edelman, *The Symbolic Uses of Politics*, Urbana, IL, University of Illinois Press, 1964, Chapter 2, and David Mayhew, *Congress: The Electoral Connection*, New Haven, CT, Yale University Press, 1974, p. 134. Mayhew states that, "probably the best examples of Congressional symbolism are those arising out of efforts to regulate business," but both he and Edelman viewed such symbolism as a substitute for truly effective regulation.

⁴*Webster's New World Dictionary*, Cleveland, OH, World Publishing, 1962.

⁵Mayhew, p. 134.

ing with a broad array of interests. So long as Congress' attention can be focused on some widely held goal of legislation rather than on more complex questions of which program approach is most appropriate to address the goal, coalition-building can be greatly simplified. Congressmen may feel politically compelled to vote for legislation of this type, as former Rep. Edward Koch describes:

I do not for a moment claim immunity from the mandate fever of the 1970s. As a member of Congress, I voted for many [mandates] . . . The bills I voted for in Washington came to the House floor in a form that compelled approval. After all, who can vote against clean air and water, or better access and education for the handicapped?⁶

Symbolic Politics in Environmental Regulation

Several pieces of environmental regulation represent superb examples of symbolic legislation. For instance, passage of the **National Environmental Policy Act (NEPA)** has been described like this:

NEPA was enacted when public interest in the environment was rising . . . Clearly a gesture of Congressional concern was in order. For many legislators, undoubtedly, a vote for NEPA was symbolic—akin to a vote for motherhood and apple pie.⁷

Subsequently, the program encountered a political backlash when serious implementation problems arose. This is a common occurrence in symbolic legislation, since careful scrutiny and understanding of the substantive provisions of such policy is often sacrificed in the focus on goals and intentions. As Richard Liroff notes in the case of NEPA: "Little did [legislators] realize . . . that in voting to enact NEPA, they were placing a potent weapon in the hands of citizen activists."⁸ A Congressional staff member even asserted, "if Congress had known what it was doing, it would not have passed the law."⁹

Symbolic Politics in the New Congress

Apart from the symbolic basis of coalition-building, the legislative process that gave rise to NEPA appeared conventional. The act was the product of Congressional committee specialists and was subject to committee hearings. Interest groups were given an opportunity in committee to register their views. However, other recent acts of symbolic regulation have been products of a less traditional policy process, which is more in keeping with the growing individualism of the Congress in the 1970s. The extreme decentralization of that institution appears to be associated with increased symbolic regulation.

⁶Edward Koch, "The Mandate Millstone," *The Public Interest*, Fall 1980, p. 44.

⁷Richard Liroff, *A National Policy for the Environment: NEPA and Its Aftermath*, Bloomington, IN, Indiana University Press, 1976, p. 5. Added emphasis.

⁸*Ibid.*, p. 5.

⁹*Ibid.*, p. 35.

“Symbolic politics, however, has provided an alternative avenue for independent legislative activists, especially in the realm of regulatory policy.”

Congress in Transition

Older portraits of the Congress, common in the 1950s and early 1960s, portray an institution often dominated by an "inner club" of aging committee barons. Legislation in this period was viewed, in large part, as the special province of Congressional committees. Chairmen and other senior members largely ruled these committees, possessing expertise in policy and controlling other resources needed to develop programs and provide a basis for bargaining. Competing interests could be reconciled in committee, and, if necessary, the powerful committee chairmen could use their position to negotiate with recalcitrant members. However, nonspecialists in Congress tended to defer to each committee's realm of expertise.

In recent years, much attention has been paid to changes in this portrait. Today's Congress is characterized by a more equal and independent membership, by the erosion of traditional norms like apprenticeship and deference, by the growth and dispersion of Congressional staff, by increased workload, and by the rise of "subcommittee government." Some of these changes have sprung from procedural reforms in Congress that were instituted in the early 1970s. Others reflect more deeply seated changes in the environment of Congress, including the decline of political parties, the growth of government, and the rise of single-issue organizations.

In terms of policy, this new Congress is composed of growing numbers of legislative activists and policy entrepreneurs. Michael Malbin writes that recent changes in Congress have:

increas[ed] the opportunities for entrepreneurial Senators and Representatives to develop their own policy initiatives. . . . Congressional structures were adapted to serve self-promoting, individualistic legislative styles. Many members thought the new style worked politically in an age of declining party power and expanding media coverage.¹⁰

The role of these legislative activists was amply

¹⁰Michael Malbin, "Who Rules America?," *Smithkline Forum for a Healthk American Society*, Vol. 3, May 1981, p. 1.

¹¹*The Federal Role in the Federal System: The Dynamics of Growth* stur concluded that: "It is the individual member of Congress, manifesting him or herself in the role of policy entrepreneur, who has had the most profound and constant influence upon the growth of government." ACIR, *An Agenda for American Federalism: Restoring Confidence and Competence*, Report A-86, Washington, DC, U.S. Government Printing Office, 1981, Chapter 2.

demonstrated in ACIR's recent study on *The Federal Role in the Federal System*.¹¹ In most cases, entrepreneurs have sought to use existing committee structures to enact their legislative initiatives. The growth of categorical grants is one expression of their efforts, as is the increased use of omnibus legislation.¹²

Symbolic politics, however, has provided an alternate avenue for independent legislative activists, especially in the realm of regulatory policy. As independent Congressmen, or even as subcommittee chairmen, modern entrepreneurs usually lack the bargaining resources owned by yesterday's committee chairmen, as well as the obeisance paid to them. The often irresistible appeal of symbolic legislation offers an alternative path for their initiatives, as members yield to the power of an abstract idea rather than to the influence of position. In fact, members of the modern Congress may be more susceptible to symbolic voting than were members in the past. As one account reports:

Labor lobbyists . . . sense that newer members may be less committed to deciding an issue on its merits than to compiling a balanced voting record "Too many new members don't have any anchors," said Rep. Abner J. Mikva, D-IL . . . "New members are much more concerned than older members with their public image and are more responsive to what the media have to say," [a lobbyist] said.¹³

Several recent acts of regulation clearly show the imprint of this policy individualism in their legislative origins, followed by symbolic coalition-building leading to enactment. As the following case studies illustrate, the modern legislator finds it hard to vote against symbolic measures, such as those which deal with the right to privacy or discrimination against sympathetic groups. The cases show that regulatory entrepreneurs will use a subcommittee position, if available, to advance their aims. However, they are also capable of striking out alone in the politics of intergovernmental regulation—with success.

Symbolic Politics and the Entrepreneur: Two Case Studies

Section 504 of The Rehabilitation Act of 1973

Section 504 of The Rehabilitation Act of 1973 forbids discrimination against handicapped persons in all federally assisted programs. Its legislative his-

tory was summarized this way by Martain LaVor, a former staff member of the House Committee on Education and Labor:

Section 504 did **not** have one day of Congressional hearings, **not** one word was mentioned in the Senate Committee Report, **not** one word was spoken about it on the floor when the original bill passed, and there was **no** explanation in the statement of managers following the House-Senate conference.¹⁴

Yet, it resulted in 26 pages of regulations from just one of the departments to which it applies. As one Congressman concluded: "This [lack of hearings and debate] was a serious lapse on the part of Congress . . . and [a] clear example of well-meaning intentions reduced to statutory language producing unworkable and . . . unintended consequences."¹⁵

Legislative History. Section 504 was conceived in 1971 following a meeting between Rep. Charles Vanik (OH) and local members of the Council of Parents of Handicapped Children. In response to their concerns about inadequate government involvement in the problems of the handicapped, he promised to take some type of action and instructed his staff to "do something."¹⁶ Accordingly, his staff devised two anti-discrimination measures which were copied directly from Title VI of the Civil Rights Act. Since Rep. Vanik was not a member of the House committees having jurisdiction over civil rights or rehabilitation programs, he asked Sen. Hubert Humphrey (MN) to exert his leadership in both these fields on their behalf. Sen. Humphrey introduced S. 3044 and S. 3458, dealing with discrimination against handicapped persons in employment and federally subsidized activities, respectively, which were referred to the Judiciary Committee since they amended Titles VI and VII of the Civil Rights Act.

Meanwhile, hearings were being held in the Senate Subcommittee on the Handicapped concerning legislation—already passed by the House—to reauthorize vocational rehabilitation programs. Despite the fact these hearings did not focus on problems of discrimination against handicapped persons, Sen. Humphrey proposed S. 3044 and S. 3458 as amendments to the subcommittee bill. The amendments were incorporated into the bill and subsequently approved by the Senate. Members of the House accepted them in conference, as LaVor recalled in his memo:

Very tough negotiations took place [on a compromise bill]. As the conferees concluded, there

¹²Thomas Wolanin writes that "An increasingly common technique for legislating . . . is via omnibus bills. . . . By a process of logrolling, all committee members with a pet idea . . . can find a home for it under the broad umbrella of the omnibus bill." Thomas Wolanin, "Congress, Information and Policy Making for Postsecondary Education: 'Don't Trouble Me with the Facts,'" *Policy Studies Journal*, Vol. 4, Summer 1976, p. 387. This process was abundantly demonstrated in *The 1972 Education Amendments*, for example, and in Senate manpower legislation.

¹³James Singer, "Labor and Congress: New Isn't Necessarily Better," *National Journal*, March 14, 1978, p. 352.

¹⁴Martin LaVor, "Section 504 of The Vocational Rehabilitation Act," Memorandum to All Minority Members, House Committee on Education and Labor, June 14, 1979, unpublished, p. 1.

¹⁵Rep. Henry Hyde, Committee on Education and Labor, *Oversight Hearings on The Rehabilitation Act of 1973*, 95th Cong., 2nd Sess., p. 501.

¹⁶Telephone interview with William Vaughan, former legislative assistant to Rep. Charles Vanik.

“Given Congress’ initial silence about the intent of Section 504, debate about the implications and operation of the law followed rather than preceded its passage.”

were a few items left. The very last was Section 504. Although members were tired, they all agreed that there should not be any discrimination against the handicapped. Section 504 stayed in the final version and became law.¹⁷

The conference report was approved unanimously by the Senate and House, but it was pocket vetoed by President Nixon, who considered it too costly. Section 504 was not at issue in this conflict. The bill was subsequently passed again by Congress and vetoed by the President because of its expense. One account explained the powerful emotions that animated the debate:

The rehabilitation bill struck a sympathetic note in most members of Congress. During Senate debate on the veto April 3, many crippled and blind persons, representing 30 organizations for the handicapped, crowded Senate corridors . . .

Sen. Robert A. Taft, Jr. (OH) complained that the President had been portrayed as a man, “callously drawing a line through programs for the handicapped with the heartless pen of parsimony.”¹⁸

Since Congress failed to override the second veto, members of both chambers met with Administration officials to discuss a scaled-down version of the bill. The two vetoes had delayed the reauthorization of rehabilitation legislation, and the existing programs were set to expire shortly, so the new bill, H.R. 8070, which still preserved the antidiscrimination provisions, was reported from the House Committee one day after it was introduced. The bill soon passed the House overwhelmingly, 384-13. Only Rep. Vanik, its author, briefly mentioned the antidiscrimination part.¹⁹ In the Senate debate and the following statement of conference committee managers, isolated references to Section 504 were equally perfunctory. The provision was simply swept along to passage with more visible portions of *The Rehabilitation Act* and was finally made law when the President signed the compromise bill a few days later.

Analysis. The legislative history of Section 504 indicates that Congress failed to consider the provision’s implications. Some believe that members of

the Senate Labor and Public Welfare Committee knew what they were doing by inserting Section 504 into the massive rehabilitation bill.²⁰ They argue that handicapped rights groups did not request hearings on the subject and Congress did not provide such a forum on the matter in the likelihood that opposition groups would be aroused. Several observers agree that if Section 504 had been considered in its original form as a single bill and its full implications explored, it would have been controversial and might not have passed.²¹ In fact, a member of Vanik’s staff was “amazed” at its passage. “I did not think it would be passed,” he said. “Clearly, people didn’t realize the enormity of its potential.”²²

With the possible exception of a handful of committee members, staffers, and handicapped rights lobbyists, few perceived the full implications of Section 504. Even Rep. Vanik, its initial author, has stated that Congress “never had any concept that it would involve such tremendous costs.”²³ Congress was caught up in the immediate sensitivity of the issue. Support for the discrimination measure rested on unstated abstract sentiments. There simply was no controversy involved in its passage. Politically, nearly all Congressmen felt obliged to vote for *The Rehabilitation Act*, and the vast majority were unaware of Section 504.

Implementation. Once the law was signed, HEW discovered that there was no clear mandate to issue or enforce regulations. Following calls for action by Rep. Vanik and continued HEW delay, a Senate report on *The Rehabilitation Amendments of 1974*—which did not alter Section 504 but supplied a retroactive legislative history for it—stated that regulations were intended, even though they were not specifically required in the law.²⁴ Under intensive pressure from handicapped rights groups, President Gerald R. Ford finally issued an executive order in 1976 requiring the issuance of regulations for Section 504 by HEW and, subsequently, other federal agencies.²⁵ The regulations were caught in the change of administrations, however, and eventually became the responsibility of the new HEW Secretary, Joseph Califano. He sought time to carefully review the complex regulations, but active demonstrations by handicapped groups, including occupation of several HEW offices, forced them to be rapidly promulgated. On May 4, 1977, the agency issued regulations affecting state and local governments, schools, hos-

²⁰Interviews with William Gaul, House Committee on Education and Labor, and John Phillips, National Association of Independent Colleges and Universities.

²¹Interview with Joseph Boward, Council for Exceptional Children.

²²Interview with William Vaughan.

²³Quoted in Timothy Clark, “Access for the Handicapped,” *National Journal*, October 21, 1978, p. 1673.

²⁴Committee on Labor and Public Welfare, *Senate Report 93-1297*, November 26, 1974, pp. 39-40. See also Rep. Charles Vanik, “A Law Isn’t Enough,” *Hearing and Speech News*, March-April, 1974, p. 13.

²⁵Executive Order 11914, April 28, 1976.

¹⁷LaVor, p. 2

¹⁸“Senate Sustains President on Spending Priorities,” *Congressional Quarterly Weekly Report*, April 7, 1973, pp. 3-4.

¹⁹*Congressional Record*, June 5, 1973, p. 18137.

pitals, colleges, and other areas receiving HEW assistance.

Consequences. Given Congress' initial silence about the intent of Section 504, debate about the implications and operation of the law followed rather than preceded its passage. In general, Congress remained reluctant to explore these complex issues.²⁶ Despite the ambiguity surrounding Section 504, Congress has sought to clarify portions of it only twice. In **The Rehabilitation Act Amendments of 1974**, Congress broadened the definition of "handicapped person" in the act. However, more elaboration of Section 504 was included in the Senate report than in the legislation. One commentary on the 504 regulations notes that this reliance on a nonstatutory approach may have been a conscious move by "groups representing the handicapped and by some Congressional staff members to avoid the risk of a full debate on the issue."²⁷ In 1978, Section 504 was modified once more in its application to drug addicts and alcoholics. Despite compliance costs of billions of dollars, Congress has avoided further explicating its intent in Section 504, placing the burden on HEW and other executive departments.²⁸

The Family Educational Rights and Privacy Act of 1974

As much as any law enacted in the last decade, **The Family Educational Rights and Privacy Act (FERPA)** was the product of one legislator, Sen. James L. Buckley (NY). In fact, the law is commonly referred to as the "Buckley Amendment." FERPA provides student and parental access to educational records, while limiting the disclosure of such records to others. Congress passed the law without hearings or substantial debate, only to find its unexpected impact on higher education necessitated immediate revisions.

Legislative History. FERPA was a manifestation of Sen. Buckley's long-established concern with the issue of government intrusion into the lives of private citizens. The immediate impetus for FERPA was an article in a 1974 issue of *Parade* magazine, a national Sunday newspaper supplement, which highlighted abuses in the keeping of elementary and secondary school records.²⁹ John Kwapisz, a member of Sen. Buckley's staff, called the article to the attention of the Senator, who instructed Kwapisz to contact two organizations cited in the article, to discuss possibilities for legislative action.

During the first two weeks of April, 1974, Kwapisz

²⁶Joseph Califano, *Governing America*, New York, NY, Simon and Schuster, p. 259.

²⁷Mark Engebretson, "Administrative Action to End Discrimination Based on Handicap: HEW's Section 504 Regulation," *Harvard Journal on Legislation*, Vol. 16, 1979, p. 66.

²⁸See the accompanying article, "Washington's Regulation of States and Localities: Origins and Issues," for additional details of these effects.

²⁹Diane Divoky, "How Secret School Records Can Hurt Your Child," *Parade*, March 31, 1974, p. 15.

“The immediate impetus for FERPA was an article in a 1974 issue of *Parade* magazine . . . which highlighted abuses in the keeping of elementary and secondary school records.”

worked with the two groups to develop FERPA. The legislation initially addressed elementary and secondary school problems, but later drafts included references to higher education.³⁰ At this point, the staff consulted with higher education associations, but they "were focusing on other issues" and so did not participate in formulating the bill's provisions.³¹ By the end of April, Sen. Buckley introduced S. 3205, the "Family Educational and Privacy Rights" bill, and it was referred to the Committee on Labor and Public Welfare, of which Sen. Buckley was not a member. Since the chairman of the Education Subcommittee, Sen. Claiborne Pell (RI), showed no inclination to hold hearings on the bill, Sen. Buckley offered it instead as an amendment to the upcoming reauthorization of the **Elementary and Secondary Education Act**. By introducing his proposal as a floor amendment, he hoped to "force ideas up front" and avoid "hearing the bill to death." He believed that "harder scrutiny later on the House side" could correct any fundamental defects in the legislation.³²

Five days after it was introduced, the amendment was called up, and less than full debate on the measure followed. Sen. Buckley focused his remarks on the amendment's status as a human rights proposal, stating

My amendment broadens the protection of civil rights to include the civil rights of parents and students vis-a-vis the schools. . . . I am not so much concerned about the workload or convenience of the educational bureaucracy but, rather, with the personal rights of America's children and their parents.³³

In response, several Senators expressed sympathy with the legislation's intent but stated their concern about the lack of scrutiny. Sen. Philip Hart (MI) noted the amendment's lack of legislative history: "I have [difficulty] . . . in considering and understanding the reach of the bill without hearings. Of course, everyone is for protecting privacy: that is great. However, what do we do . . . ?"³⁴ Sen. Pell

³⁰"Buckley Describes How His Amendment Came Into Being," *Nation's Schools and Colleges*, January 1975, p. 31.

³¹Interview with Jean S. Frohlicher, Counsel, Senate Subcommittee on Education.

³²Interview with Sen. James Buckley.

³³*Congressional Record*, May 14, 1974, p. 14581. Added emphasis.

³⁴*Ibid.*, p. 14588.

followed in a similar vein: "We are concerned here not with what the Senator from New York intends the language he proposes to accomplish. It is what the language would do."³⁵

Despite these caveats, the amendment was adopted with only modest changes on a voice vote. During the remainder of debate on the complex education bill, further mention of the Buckley Amendment was made only once, in a summary of the bill's provisions.

The limited consideration devoted to the Buckley Amendment on the Senate floor was not redressed in subsequent stages of the legislative process. The House had already passed its elementary and secondary education bill when the Buckley Amendment was attached to the Senate version of the legislation. Thus, the potential for further scrutiny centered on the conference committee established to resolve the many differences between the two bills. Once again, the legislation's scope limited opportunities for extended deliberations on the amendment. Without a careful exploration of its operational effects, few Representatives could quarrel with the purpose of the act. As on the Senate floor, the broad appeal of FERPA to Representatives of all ideologies was such that it acquired "a life of its own in conference."³⁶ Attempts by higher education lobbyists to dissuade sympathetic members from supporting the provision were hampered by the fact that they had been "caught off guard by the suddenness" of Senate approval.³⁷ Their attempts to substitute future hearings for the amendment failed to overcome its attractions, and FERPA was enacted into law as a portion of the multifaceted education bill of 1974.

Epilogue. Serious defects in the structure of the law, especially in its application to postsecondary education, soon became apparent. For example, as originally passed, the Buckley Amendment prevented schools from disclosing grades and other information to the parents of students over 18 years old without the student's consent. Naturally, parents who supported financially dependent students objected strongly to this limitation. Even more controversial was the amendment's provision concerning confidential letters of recommendation. The law enlarged student access to previously confidential student evaluations, and it appeared to jeopardize the future usefulness of recommendations. Colleges reported purging files of confidential letters prior to the act's effective date. Finally, higher education institutions complained that FERPA interfered unnecessarily in their administrative processes and recordkeeping and imposed substantial costs of compliance.

Such consequences led to rapid realization that the act was "badly drafted" and "did not sufficiently account for the difficulty of legislating in this

“Given their highly individualistic origins and the absence of committee scrutiny, FERPA and Section 504 depart strikingly from the traditional model of Congressional policymaking.”

area.”³⁸ "Higher education was an afterthought" in FERPA, said an HEW official, and the Department found itself unable to issue regulations until Congress modified the law.³⁹ Congress was thus forced to amend FERPA within months of its enactment. With the 93rd Congress drawing to a close, many of the changes were developed in a "crash session" between Senators Pell and Buckley on December 12, 1974. The law was altered to permit the disclosure of records to the parents of dependent students and to permit students to waive their access to confidential recommendations. These amendments were rushed through Congress with minor alterations and were signed by President Ford on December 31, 1974.⁴⁰ Nonetheless, colleges and universities remained disgruntled over what seemed to them an unnecessary and annoying federal mandate.

Symbolic Politics and Subcommittee Government

Given their highly individualistic origins and the absence of committee scrutiny, FERPA and Section 504 depart strikingly from the traditional model of Congressional policymaking. The legislative histories of several other recent regulations suggest that they are not mere exceptions but reflect the structure of the Congress of the 1970s. In cases where regulatory entrepreneurs are fortunate enough to occupy a subcommittee chair, however, they have utilized this position as a launching pad for their symbolic initiatives.

Age Discrimination

The Age Discrimination Act of 1975 (ADA) outlawed "unreasonable" discrimination in federally assisted programs on grounds of age. The ADA was formulated by Jack Duncan, counsel of the House Select Subcommittee on Education, acting on instructions by then Subcommittee Chairman John Brademas (IN). Lacking jurisdiction over the Civil Rights Act, Chairman Brademas inserted his proposal into the Older Americans Act, which his committee was reauthorizing in 1975. There were no explicit hearings on the ADA's effects, and it was

³⁵ *Ibid.*

³⁶ Interview with Jean Frohlicher.

³⁷ Chester Finn, Jr., *Scholars, Dollars and Bureaucrats*, Washington, DC, The Brookings Institution, 1978, p. 151-52.

³⁸ Merle Steven McClung, "Student Records: The Family Educational Rights and Privacy Act of 1974," *Inequality in Education*, Vol. 22, July 1977, p. 10.

³⁹ Interview with Edward Gleiman, former Director, Fair Information Practices, DHEW.

⁴⁰ P.L. 93-568.

approved by the entire House without extensive clarification.

Following its passage by the House, several executive branch agencies objected to the vagueness of the act. HEW Secretary Caspar Weinberger told the Senate that:

H.R. 3922 as written would leave to the executive branch the formulation of momentous policy decisions in wholly uncharted areas without the benefit of any specific legislative guidance. . . . [It] bars only "unreasonable" discrimination on account of age. . . . Neither the bill nor its legislative history indicated what factors would be "unreasonable."⁴¹

Consequently, the Senate acted to delay inclusion of the antidiscrimination provision in the **Older Americans Act**, substituting for it a requirement that the U.S. Civil Rights Commission study the issue and report its findings to Congress. This proved unacceptable to the House authors of the provision, and the Senate eventually gave in on the issue in a conference committee. As Sen. Eagleton explained: "We wanted to be statesmanlike and ask for evidence of discrimination, but the [elderly] organizations were pressing—it was hard to vote against the aged."⁴²

As finally written, the legislation included both the age discrimination prohibition—effective immediately—and a subsequent study of the age discrimination issue to precede the issuance of regulations. President Ford signed the legislation but complained that, "The delineation of what constitutes unreasonable age discrimination is so imprecise that it gives little guidance in the development of regulations."⁴³ Once the Civil Rights Commission study was produced, Sen. Eagleton argued that it showed the ADA to be unnecessary:

Not only was there no record showing discrimination originally, but the subsequent Commission report failed to demonstrate age discrimination in any methodical way—and even if there were problems of age discrimination, they should not have been addressed in such a broad swipe.⁴⁴

Nevertheless, the act remains on the statute books, and 28 federal agencies have been required to promulgate regulations implementing it.

Title IX

Title IX of the **Educational Amendments of 1972** prohibits sex discrimination practices by educational institutions receiving federal funds. Like FERPA and Section 504, it was also to a large extent the product of one primary Congressional spon-

“ Because it is so easily perceived in terms of simple but powerful expressions of morality, regulatory policy may be uniquely susceptible to symbolic politics in Congress.”

sor—Rep. Edith Green (OR). Although Title IX received somewhat more legislative scrutiny than several other recent regulatory acts, this prior consideration was dwarfed by the debate that followed its enactment. The authors of a study of its passage emphasize that Title IX shares many of the traits of legislative symbolism. Andrew Fishel and Janice Pottker write that:

When Congress passed Title IX in 1972, it was voting for a general principle of equality; the specific implications of the law were understood by few members of Congress. . . . Congress made no attempt to provide a clear and complete definition of what constituted sex discrimination in education. As a result, the real public debate on the issues involved in eliminating sex discrimination followed, rather than preceded, the passage of the law.⁴⁵

In fact, legislative intent on Title IX was so unclear that HEW was granted great flexibility in promulgating regulations. To quote Fishel and Pottker again: "Because of the absence of any kind of consensus, DHEW policymakers felt free to decide issues as they thought best from legal and policy perspectives."⁴⁶ Once the regulations were developed, the chief author of the statute in the House disassociated herself from the result, stating:

If I or others in the House had argued that [Title IX] was designed to do some of the things which HEW now says . . . I believe the legislation would have been defeated. I myself would not have voted for it, even though I feel very strongly about ending [sex] discrimination.⁴⁷

Epilogue: The Future of Regulatory Symbolism in Congress

Because it is so easily perceived in terms of simple but powerful expressions of morality, regulatory policy may be uniquely susceptible to symbolic politics in Congress. Spending programs may also draw

⁴⁵Andrew Fishel and Janice Pottker, **National Politics and Sex Discrimination in Education**, Lexington, MA, Lexington Books, 1977, p. 132. Joseph Califano also stresses the symbolic character of the issue in **Governing America**, p. 264.

⁴⁶*Ibid.*, p. 115.

⁴⁷Former Rep. Edith Green, quoted in Ralph Kinney Bennett, "Colleges Under the Federal Gun," reprinted in **Congressional Record**, June 6, 1976, p. E3596.

⁴¹Reprinted in **Senate Report 94-255**, p. 37.

⁴²Interview with Sen. Thomas Eagleton.

⁴³Executive Office of the President, **Weekly Compilation of Presidential Documents**, November 28, 1975, pp. 1326-27.

⁴⁴Interview with Sen. Eagleton.

“ . . . symbolic politics may also become an engine of governmental retrenchment. ”

support from symbols, but the lack of careful deliberation associated with symbolic legislation may be intensified with regulation because it circumvents much of the added legislative scrutiny provided by the appropriations process.

The politics of regulation and the federal budget may interact in other ways. Some observers believe that recent growth of federal regulation is partially a function of increased budgetary constraints on spending programs. Samuel Halperin maintains that

[15] years ago, money was Washington's antidote for problems. Now, the new fiscal realities . . . mean that Congress provides fewer dollars. Still determined to legislate against problems, Congress uses sticks instead of carrots.⁴⁸

Similarly, former HEW Secretary Joseph Califano argues: "In a time of tight government budgets, enacting civil rights statutes had become a 'free' means of evidencing federal concern. In short order, the Congress passed legislation prohibiting discrimination on the basis of sex, handicap, and age."⁴⁹

Under different circumstances, however, symbolic politics may also become an engine of governmental retrenchment. The recent pace of change in Congress may continue, stimulating further shifts in policy. For instance, some Congressional support for the Reagan Administration's economic and budgetary proposals has been motivated chiefly by an abstract identification with the broad intent of the proposals. One description of the House's passage of the recent Reconciliation Bill stated:

The battle was over perception as much as reality. The Reagan Administration cast it this way: You were either for the President and economic recovery, or you were against it. Cool deliberation took a back seat. . . . Congress simply didn't have time to do a good job. Substance gave way to symbolism.⁵⁰

Certainly, symbolic regulation has not been the sole province of either the political left or right, as is affirmed by the prominent regulatory roles already cited of members ranging in ideology from former Sen. James Buckley to former Rep. John Brademas.

Under any circumstances, Congressional consider-

ation of complex legislation based mainly on general appearance or vague intent makes attainment of effective and workable policy very difficult. Given the apparent correlation between Congressional reliance on symbolic legislation and the ever growing scope and complexity of Congressional workload, perhaps the best hope for improving the deliberative process is to simplify the federal role overall. Implementing ACIR's recommendations calling for a sorting out of governmental roles and responsibilities would enhance the current limited opportunities that Congress now has to subject proposed intergovernmental regulations to more searching scrutiny.⁵¹ Adoption of the Commission's recommendation that newly proposed mandates be accompanied by fiscal notes estimating their likely costs to states and localities, and by regulatory impact analyses, would also be useful in limiting unanticipated regulatory effects. In the end, however, a greater degree of Congressional discipline in resisting the lure of attractive but ill-considered regulation will be needed to employ such opportunities.

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⁴⁸Samuel Halperin, "Federal Takeover, State Default, or Family Problem?," in Samuel Halperin, ed., *Federalism at the Crossroads: Improving Educational Policy Making*, Washington, DC, Institute for Educational Leadership, 1976, p. 19.

⁴⁹Califano, p. 225.

⁵⁰Bill Peterson, "Billions in Days: Frenzy on the Hill," *The Washington Post*, June 28, 1981, p. D5.

⁵¹ACIR, *In Brief: The Federal Role in the Federal System: The Dynamics of Growth*, B-4, Washington, DC, U.S. Government Printing Office.

Gov. Alexander, Robert Hawkins Recently Named to Commission

Tennessee Governor Lamar Alexander and Californian Robert B. Hawkins, Jr., were named to the Advisory Commission on Intergovernmental Relations in June.

Governor Alexander was elected governor in 1978. His governmental experience includes working as an aide to U.S. Sen. Howard Baker and executive assistant to the White House counselor in charge of Congressional relations. He founded and became co-chairman of the Tennessee Citizens for Revenue Sharing in 1971 and was the first chairman of the Tennessee Council on Crime and Delinquency in 1973.

Robert Hawkins of Loomis, CA, is president of the Sequoia Institute, a Sacramento-based nonprofit research corporation. He served as program director for the State and Local Government Program of the Woodrow Wilson International Center of Scholars at the Smithsonian Institute and chaired the California Governor's Task Force on Local Government Reform in 1973.

Both are members of the Presidential Advisory Committee on Federalism.

ACIR Assistant Director Testifies On Block Grant Issues, Policies

In spite of the widespread use of the term "block grant," there continues to be considerable confusion about what it actually means and how it compares with other forms of intergovernmental fiscal transfers such as categorical grants and revenue sharing.

In testimony before the Congressional Joint Economic Committee July 15, ACIR Assistant Director David B. Walker explained the differences among the three major grant types and highlighted several intergovernmental issues arising out of the use of block grants.

"The block grant philosophy is more like one of shared objectives and responsibilities, equal partnership and mutual trust among the levels of government," said Walker.

"In short, it represents a more nearly cooperative concept of federalism. It recognizes the interdependencies among the levels of government, and it works best when each of the levels of government is capable and committed to similar goals in the functional program area addressed by the block grant."

Two considerations in determining which grant form to adopt should be national purpose and locus of accountability, according to Walker. Block grants should be used when:

- The federal government's own program priorities are such that it desires to supplement the service levels in certain broad program areas traditionally provided under state and local jurisdiction.
- It seeks to establish nationwide minimum levels of service in these areas.
- Broad national objectives are consistent with state and local program objectives.
- The federal government is satisfied that state and local governments know best how to set subordinate priorities and administer the program.

In discussing the state-local tensions related to state use of block grants, Walker highlighted a lesson learned from the experience with existing block grants: namely, that when they are given first to states for eventual use by local recipients, the tendency is for them to lose their block grant features before they reach the local level. If Congress desires the ultimate recipients to receive funds under the block grant format, it probably should consider specifying this intent in the law," he said. Yet, he urged caution in enacting federal guidelines and earmarking funds, saying, "Too much of this will have the effect of recategorizing the block grant. Congress should carefully consider and clearly state its intent in this regard."

The Administration's proposals for restructuring the grant system, although mostly described as block

grants "really fit the revenue sharing model much more closely than ACIR's model of block grants," said Walker. The design features of the block grants currently included in the Senate and House omnibus Reconciliation Bills run the gamut from revenue sharing to enlarged categorical grants.

"Clarity and consistency are not among the hallmarks of these bills," Walker said. "And questions legitimately may be raised regarding the national purposes and pattern of accountability reflected in them. Hopefully the approaching final phase of the reconciliation process will clarify these crucial questions."

ACIR Staff and Scholars Pick Similar Top IGR Events, Trends

A recent poll of over 400 political scientists revealed basic similarities between their choices for most significant intergovernmental events, trends, and societal events and the choices of ACIR's professional staff.

The survey, conducted by ACIR and Richard Cole, director of the Institute of Urban Studies at the University of Texas at Arlington, asked a group of 1,000 scholars of American government and politics to rank the most important intergovernmental events and trends of the past 20 years. The survey was based on one administered to ACIR's professional staff in 1979. The survey asked scholars to rank the top five intergovernmental events, the top five intergovernmental trends, and the top five social and political events affecting the course of intergovernmental relations in the past 20 years. In each category a number of possible responses was provided but respondents were encouraged to include others as well.

When considering the important intergovernmental events, trends, and issues, scholars—at least as revealed by this study—and ACIR staff tend to rank as most significant those events initiated at the national level and to a large extent those associated with the Presidencies of Lyndon Johnson and

Richard Nixon. State and regional events and activities were not seen as particularly important, although ACIR staff tended to find them more important than did scholars.

The top five events as ranked by these scholars were:

- passage of the **Civil Rights Acts of 1964, 1966, and 1968** and the **Voting Rights Acts**;
- enactment of **General Revenue Sharing in 1972**;
- Baker v. Carr** and **Reynolds v. Simms** court cases;
- passage of **Medicare/Medicaid** in 1965; and,
- The Economic Opportunity Act (War on Poverty)**.

ACIR's top five differed in that the staff included passage of California's Proposition 13 as number four and ranked Medicare/Medicaid as number 11. (ACIR's high score may have been skewed slightly by the fact that its poll was taken within a year and a half of the passage of Proposition 13. The scholars' poll was taken nearly three years after its passage.) ACIR staff included **Serrano v. Priest**, and the peaking of federal aid among the top ten events while scholars give them only 20th and 18th place respectively.

The responses of both groups to the top intergovernmental trends were very similar. The growth in size, scope, and intrusiveness of federal aid, increased public dissatisfaction with government, the growing dependence of local governments on federal and state aid, the continued loss of population by many innercities, and the emergence of regional competition for federal funds were ranked high by both groups.

The most important societal or political event affecting intergovernmental relations of the past 20 years was seen by scholars as the Vietnam war and the inflationary spiral it initiated. Next in importance was ranked the energy crisis and Johnson's Great Society. ACIR

respondents felt that the Great Society was the most important societal event affecting the course of intergovernmental relations in the past 20 years. Interestingly, the election of Richard Nixon and the resultant New Federalism was not rated highly on either list—six of seven by ACIR; nine of 14 by scholars.

The scholars' survey also examined the possible effect of various other variables on the responses, namely partisanship, age, year education was completed, government employment, region, and city size. Partisanship, region, size of city seemed to have the greatest impact on opinion. Strong Democrats tended to view events associated with the Democratic Presidencies as having more consequence than did strong Republicans who viewed events associated with the Nixon Presidency as somewhat more important.

Scholars from larger cities appeared somewhat more impressed by such events as the poverty programs and various civil rights acts.

The most important variable distinguishing among the scholars appeared to be regional. Scholars tended to rate most important those events having greatest impact for the region in which they live or have lived most of their life.

Commission to Meet in October

The next meeting of the Advisory Commission on Intergovernmental Relations will be on October 5, in Washington. The Commission will return to its consideration of research findings and recommendations stemming from its investigation into state taxation of multijurisdictional businesses. The Commission will also hear staff progress reports on federal regulations impacting state and local governments and state assistance to their distressed communities.

As a follow-up to its recommendations to "sort out" the intergovernmental grant system, made last year as part of ACIR's look at the federal role in the federal system, the Commission will consider a report

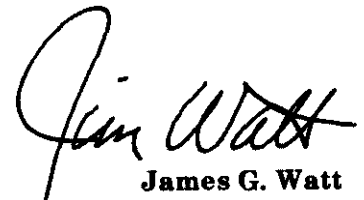
identifying major issues raised by revenue/tax turnback proposals. President Reagan has said that block grants are an intermediate step, for which he would substitute the turning back to local and state governments of tax sources pre-exempted by the federal level. In the Spring 1981 issue of *Perspective*, four possible approaches to turning back revenues to the state and localities were described.

(Continued from page 2.)

eral land for potential transfer to state or local ownership in the public interest. We at Interior are moving to implement President Reagan's proposals to reverse the power flow.

We are stressing respect for and confidence in state and local government, and in the people themselves. At Interior we call it a "Good Neighbor" policy which replaces the old "Uncle Knows Best" attitude of the past.

Major steps already have been taken to accomplish this Administration's goal of decreasing needless federal intervention and of returning power to state and local governments. Much more remains to be done. The challenge of chairing ACIR will be made easier by the high caliber of those who will be serving with me. Together, we can create a new beginning for a form of government that has served Americans well, and will do so once again, as this nation rededicates itself to the sound principles of federalism.



James G. Watt
Chairman

And Briefly: Books

The first publication is a recent report of the Advisory Commission on Intergovernmental Relations, Washington, DC 20575. Single copies of this report are free.

An Agenda for American Federalism: Restoring Confidence and Competence (A-86).

This volume is the centerpiece of ACIR's recent study entitled **The Federal Role in the Federal System: The Dynamics of Growth**. It provides an analysis of where the federal system stands today, the cause of its major problems, and the Commission's recommendations for restoring balance to federalism.

The federal government's activities and influence, the study found, have become bigger from the standpoint of expenditures, broader in their operational inclusiveness, and deeper in their intergovernmental intrusiveness. The present maze of programs does not seem to reflect any clear ordering of national priorities and rates poorly against standards of fiscal equity, economic efficiency, administrative effectiveness, and political accountability.

The following publications are available directly from the publishers cited. They are not available from ACIR.

Federalism and the Organization of Political Life: Canada in Comparative Perspective, by Herman Bakvis, Institute of Intergovernmental Relations, Queen's University, Kingston, Ontario, Canada.

Federal Assistance System Should be Changed to Permit Greater Involvement by State Legislatures, U.S. General Accounting Office, Document Handling and Information Services Facility, P.O. Box 6015, Gaithersburg, MD 20760.

Setting National Priorities: The 1982 Budget, edited by Joseph A. Pechman, The Brookings Institution, 1775 Massachusetts Avenue, N.W., Washington, DC 20036. \$7.95

State Mandates: Background Review, The Pennsylvania Intergovernmental Council, Inc., P.O. Box 1288, Harrisburg, PA 17108.

Trends in the Fiscal Condition of Cities: 1979-81, a staff study prepared by Deborah Matz and John Petersen for the use of the Joint Economic Committee, U.S. Government Printing Office, Washington, DC 20402.

The Impact of Local Tax Policy on Urban Economic Development, prepared by Roy Bahl, National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22061. \$6.50.

Management Policies in Local Government Finance, edited by J. Richard Aronson and Eli Schwartz, International City Management Association, 1140 Connecticut Avenue, N.W., Washington, DC 20036. \$30.

Current Approaches to Risk Management: A Directory of Practices, by Paula R. Valente, International City Management Association, 1140 Connecticut Avenue, N.W., Washington, DC 20036. \$12.50.

Public Personnel Management: Problems and Prospects, edited by Steven W. Hayes and Richard C. Kearney, Bureau of Governmental Research and Service, University of South Carolina, Columbia, SC 29208.

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Moving Money: An Empirical Analysis of Federal Expenditure Patterns, by Thomas J. Anton, Jerry P. Cawley and Kevin L. Kramer, Oelgeschlager, Gunn and Hain, 1278 Massachusetts Avenue, Cambridge, MA 02138. \$20.

The Economics of VAT: Preserving Efficiency, Capitalism, and Social Progress, by Richard W. Lindholm, Lexington Books, D.C. Heath and Co., 125 Spring Street, Lexington, MA 02173. \$19.95.

The Power to Tax: Analytical Foundations of a Fiscal Constitution, by Geoffrey Brennan and James W. Buchanan, Cambridge University Press, 32 E. 57th Street, New York, NY 10022. \$22.50.

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State Elective Officials and the Legislatures, 1981-82: Supplement One to the Book of the States, Council of State Governments, Iron Works Pike, Lexington, KY 40578. \$12.

Social Indicators, III: Selected Data on Social Conditions and Trends in the United States, U.S. Department of Commerce, Bureau of the Census, U.S. Government Printing Office, Washington, DC 20402.

Capacity-Building (Management Improvement) for Local Governments: An Annotated Bibliography, U.S. Department of Agriculture, Economics and Statistics Service, U.S. Government Printing Office, Washington, DC 20402.

Relocation and Real Property Acquisition: Special Report 192, proceeding of a conference sponsored by the Federal Highway Administration and conducted by the Transportation Research Board, National Academy of Sciences, 2101 Constitution Ave., N.W., Washington, DC 20418. \$5.80.

New Tax Wealth Estimates Reveal An Increased Regional Disparity

The comparative ability of governments to finance public services has typically been measured by per capita income. However, income actually measures the economic well-being of a jurisdiction's residents, not the resources it could tax. The ACIR staff has now completed preliminary estimates of 1979 tax capacity among the states. The 1979 estimates update a series prepared consistently since 1975. These tax capacity estimates are more comprehensive measures of state fiscal capacity than income, because they account for all tax bases available to states and localities such as property, income, sales, motor fuels, and the value of extracted natural resources.

Tax capacity is calculated by using the "representative tax system," (RTS) to estimate the amount of revenue that each state would raise if it used an identical set of tax rates. The rates used for the calculations are "representative" in the sense that they are the national average tax rates for each base. Because the same tax rates are used for every state, estimated tax yields vary only because of differences in the underlying bases. Thus, the resulting differences in tax yields reflect the differences in overall tax base, even though the bases available are diverse and otherwise difficult to measure on a comparable basis.

All bases that are commonly subject to state and local taxation are used in the RTS calculation of tax capacity.¹ The representative tax rates are applied in every state regardless of whether a given state actually taxes a particular base. Otherwise, tax capacity would be understated in states that choose not to employ a full spectrum of

taxes. For example, Connecticut does not have an income tax but income is included in Connecticut's tax wealth; similarly, Oregon does not have a retail sales tax, but retail sales are included in its tax capacity computation.

Because the same set of rates is used for all states, an individual state's decision to stress one type of tax or another does not affect the measurement of its tax base relative to other states. The RTS is neutral among high and low tax states in its calculation of tax capacity. Thus, a high tax state can have low measured capacity (New York) or high capacity (Alaska). Conversely, a low tax state can have low capacity (Alabama) or high capacity (Nevada).

The table on the opposite page presents estimates for tax wealth (as a percent of national average) for 1979 and 1975. For comparison, the resident per capita income indices for the same years are also exhibited.

According to the 1979 estimates, Alaska now has the largest tax base per capita—more than twice (213%) the nation's average. The top five states in per capita tax wealth are Alaska (213%), Wyoming (190%), Nevada (164%), Texas (121%), and California (116%), and their strength reflects the growing economies of the western states. In contrast, the southern states of Mississippi (71%), Alabama (76%), South Carolina (77%), and Arkansas (78%) have the smallest tax bases per capita and have shown only average growth in recent years.

Tax Wealth Trends

In recent years the western states have shown strong growth in their tax capacity. Between 1975 and 1979, all the western states, except Hawaii, have shown higher than average tax base growth. By region, the southwest has grown nine percentage points, the Rocky Mountain states by seven points, and the Far west by six points. Alaska and Wyoming have experienced the largest tax base gains in the country since 1975. The biggest factor in the

western growth trend has been the property tax base; home prices in the west have grown by 102.7% while the national average has risen by only 64.6%.² In Alaska, Wyoming, and Texas, the growth in the value of energy resources has also played a large role in increasing their overall tax base through severance taxes.

In contrast, the states in the northeast have been experiencing a relative decline in tax capacity. New York, New Jersey, Connecticut, and Massachusetts have all experienced a relative weakening in their fiscal bases. As a group, the New England states have fallen by four percentage points since 1975, the mideastern states have declined by eight points. Delaware and New York have shown the largest declines in the country.

Both the midwestern and southeastern states have remained stable over the period. Most states experienced small gains and losses but have generally maintained their relative standing. State capacities have fluctuated according to the extent that their economies have been affected by national business cycles.

Disparities in state tax capacities have widened in the late 1970s. One summary indicator of this trend is the standard deviation of the tax capacity estimates which measure the average distance among all states from the national average tax capacity. When weighted by population, the standard deviation suggests growing disparities, increasing from 10.3% of the mean in 1975, to 14.2% in 1979. This development is masked by the per capita income measure that shows states becoming more equal.

A Comparison to Per Capita Income

Comparisons of the two series for 1979 reveal that for 27 states the per capita income and tax capacity indices are essentially the same—they differ by five percentage points

¹In 1979, about 5% of total state-local collections were excluded because they were from atypical sources, or their base could not be measured for each state.

²National Association of Realtors, *Existing Home Sales*, Washington DC, August 1980.

**COMPARISONS AMONG THE STATES—RELATIVE TAX
CAPACITY AND PER CAPITA INCOME** (percent of national average)

State	1979		1975	
	Per Capita Tax Capacity	Per Capita Income	Per Capita Tax Capacity	Per Capita Income
New England	93%	102%	97%	103%
Connecticut	105	115	108	116
Maine	79	80	84	81
Massachusetts	90	101	95	104
New Hampshire	97	95	103	93
Rhode Island	83	97	88	97
Vermont	86	84	94	84
Mideast	92	104	100	109
Delaware	110	106	125	112
District of Columbia	107	120	115	124
Maryland	98	106	100	109
New Jersey	100	111	107	116
New York	86	104	96	111
Pennsylvania	93	98	98	100
Great Lakes	102	104	103	103
Illinois	111	112	112	115
Indiana	97	98	97	96
Michigan	102	107	99	103
Ohio	99	99	103	98
Wisconsin	95	97	96	96
Plains	101	98	100	98
Iowa	106	100	105	101
Kansas	107	105	107	102
Minnesota	103	101	97	99
Missouri	95	94	95	93
Nebraska	96	99	102	100
North Dakota	106	94	100	101
South Dakota	93	85	93	85
Southeast	89	87	89	86
Alabama	76	79	78	79
Arkansas	78	79	79	77
Florida	104	97	104	96
Georgia	83	87	87	86
Kentucky	89	84	88	83
Louisiana	109	86	104	82
Mississippi	71	70	71	69
North Carolina	81	84	85	84
South Carolina	77	80	78	80
Tennessee	82	84	84	82
Virginia	93	98	94	98
West Virginia	101	84	92	85
Southwest	116	98	107	93
Arizona	99	96	96	92
New Mexico	109	86	92	83
Oklahoma	112	97	101	89
Texas	121	100	112	95
Rocky Mountain	110	95	103	95
Colorado	112	104	107	102
Idaho	92	86	91	89
Montana	113	88	102	92
Utah	91	82	89	84
Wyoming	190	113	156	105
Far West	115	113	109	111
California	116	115	110	112
Nevada	164	120	151	113
Oregon	104	102	100	98
Washington	102	109	98	107
Alaska	213	128	156	165
Hawaii	105	105	109	115
U.S. Average	100%	100%	100%	100%

Sources: Income: U.S. Department of Commerce, Bureau of Economic Analysis, Survey of Current Business, Washington, DC, August 1980.

Tax Capacity: 1975, National Institute of Education, Tax Wealth in Fifty States, Washington, DC 1978 (Revised by ACIR staff); 1979, ACIR staff estimates.

**Robert B. Lucke
Albert J. Davis**

or less. However, in 15 states and the District of Columbia, the series diverge by more than ten points; seven states differ by more than 20, with Alaska and Wyoming showing the least similarity. Of the ten states where tax capacity is ten points or more above per capita income, nine are net energy exporters; the lone nonenergy state (Nevada) has an extensive tourist trade. The six states where RTS tax capacity is ten percentage points or more below per capita income are all in the northeast.

The differences in per capita income and RTS tax capacity show a distinct regional pattern. Of the northeast states, Vermont, Delaware, and New Hampshire have an RTS tax capacity in excess of their income. Conversely, all western states, with the exceptions of Washington and Hawaii, have tax capacity in excess of their income. This pattern reflects the generally higher per capita farm, residential, and natural resource values in the western states.

Because the tax capacity measure includes all tax bases, whether from resident or nonresident sources, it is a more comprehensive index than personal income of a state's ability to finance public services. Thus, the tax capacity index provides state policymakers with a single measure of their overall tax base in comparison to other states.

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July 15, 1981**

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