

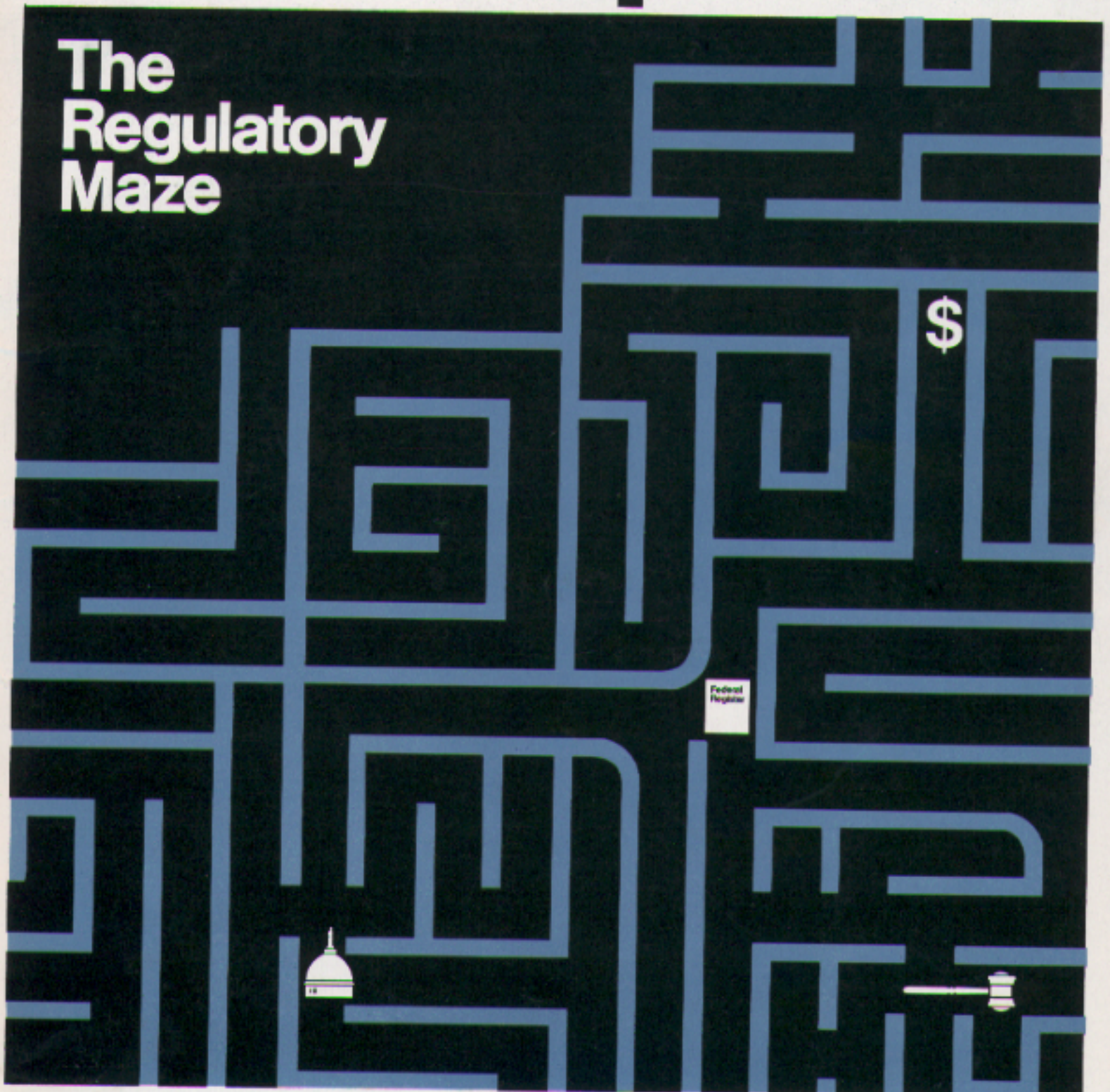
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Intergovernmental

Spring 1983, Vol. 9, No. 2

PERSPECTIVE

The Regulatory Maze



ADVISORY COMMISSION ON INTERGOVERNMENT RELATIONS



Dear Reader,

Understanding the federal regulatory maze is a "must" for elected officials at every level of our federal system. What might appear to be an admirable national goal in the committee rooms and on the floor of Congress can (and often does) go awry when agencies try to translate these goals into practical guidelines for state and local officials to follow.

Over the past year and a half, the Advisory Commission on Intergovernmental Relations has explained how the intergovernmental regulatory system has grown and has identified a major trend towards increased use of new, and especially coercive regulatory techniques. As a result of these explorations, the Commission adopted a series of recommendations for reform.

The need for regulatory reform became obvious by the beginning of this decade. With the national treasury under duress, it was apparent that federal grants could no longer be increased as they were in the 1960s and most of the 1970s. Reduction of the regulatory burden on states and localities was an important *quid pro quo* with reduced federal urban aid.

I supported this approach and the City of Phoenix identified some 27 separate areas as prime candidates for regulatory reform. The President's Task Force on Regulatory Relief, chaired by Vice President Bush, reviewed the recommendations of the City of

Phoenix and others and did achieve a substantial measure of success. The Task Force estimated that modifications resulting from its review saved state and local governments \$4 to \$6 billion in one-time expenses and an additional \$2 billion in annually recurring costs.

One of the suggestions submitted to Vice President Bush was to permit internal borrowing to be acceptable as interest for cost recovery. Our experience had been that the time required for grant approval and payment by the Urban Mass Transit Administration forced the City to borrow money from the general fund to pay the Federal Government's share of operating costs. This delay coupled with the apparent reluctance of the agency to provide definitive interpretations of its regulations had brought about a situation in which confusion, lack of firm approval early in the program, and further delay had compounded the difficulty of meeting operating costs and maintaining service to the public. By using several hundred thousand dollars in general funds to cover expenditures until federal money was in hand meant that the City was losing the interest it could have received if City funds had otherwise been available for investment. UMTA has now agreed to accept this loss of interest as an eligible reimbursable cost.

The City of Phoenix is participating in two Housing and Urban Development Department regulatory relief efforts. In January 1982, HUD launched a

View From The Commission

"Joint Venture for Affordable Housing." One component of this program is an "Affordable Housing Demonstration" involving a three-way partnership of HUD, the National Association of Home Builders, and local communities. The purpose of this demonstration is to review all aspects of home building to find ways of reducing construction costs. Phoenix is one of ten communities selected nationwide for this demonstration. This project should underscore the cost savings possible from relaxation of regulatory requirements to the home builder as well as the City.

The City is also participating as a model city in a HUD-sponsored program to assist local governments in streamlining regulations to stimulate housing rehabilitation, and housing, commercial and industrial development. With this project, the City of Phoenix will be sharing its experience with regulatory reform, extensive use of citizen expertise and participation in deregulation processes, and efficiency and productivity in City operations.

In addition to participating in the federal regulatory relief effort, I launched my own program in Phoenix. Historically, the City of Phoenix had avidly pursued regulatory relief and operational innovation since the beginning of the modern city manager era in the early 1950s. Our most recent effort enlisted the support of numerous community groups and City staff in identifying areas for review. Over 50 regulatory relief

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Intergovernmental Focus

New Federalism Legislation Transmitted To Congress

Shortly after the January 1983 State of the Union Address in which President Reagan promised a comprehensive federalism reform package, the Administration transmitted its legislative proposal to Congress. The 1983 federalism initiative did not deal with the much-publicized "swap" of functional responsibilities involving Medicaid and Aid to Families with Dependent Children. Rather, the package consisted of four large block grants—quickly termed "megablocks"—that consolidate many categorical programs, general revenue sharing, one old block grant and eight of the nine block grants enacted in 1981.

In all, the four new megablocks would consolidate 34 programs, with a total fiscal year 1984 funding level of approximately \$21 billion, a level to be maintained through fiscal year 1988. The proposals are:

The State Block Grant to states, combining 22 health, social services, education, and community development programs (including eight of the nine block grants authorized in 1981—all but Primary Care), and involving approximately \$11 billion annually—10% to 20% below fiscal year 1983 amounts—to be financed by federal excise tax revenues on alcohol, tobacco and telephones. Under this grant, a state may choose to take over one or more of the programs between fiscal years 1984 and 1988. Any program not designated for acceptance by the state would continue to be administered by the federal government. States could use the funds only for the purposes of the programs assumed. They would be able, however, to transfer funds from any one program to another program included in the block from 20% the first year up to 80% the fifth year, the transfer flexibility increasing in 20% annual increments. States would be required to pass through to local governments and Indian tribes the same proportion of funds that they did in fiscal years 1981 through 1983.

The Local Block Grant to cities, counties, towns and townships, which combines General Revenue Sharing (GRS) and the entitlement portion of the Community Development Block Grant (CDBG), involving approximately \$7 billion annually. Funds would be held at fiscal year 1983 levels. A local government could choose to take over either GRS or the CDBG entitlement program, or both. Programs that are not assumed would continue to be administered at the national level.

The Transportation Block Grant to states which consolidates six highway programs, covering urban and secondary systems, bridges other than primary, and safety activities, totaling some \$2 billion annually. Funds would be distributed among the states in accordance with formulas in current statutes, and would be financed by a portion of federal gas tax revenues. A state could assume responsibility for the block grant in any of the five years, but would have to take over all six programs, rather than having the ability to assume selected ones.

The Rural Housing Block Grant to states which consolidates four programs for low-income rural housing construction and repair, totaling \$850 million annually. Allocations to states will be based on each state's percentage of the national total of occupied substandard housing units in rural areas; its percentage of national rural population; and, its percentage of the national number of rural households with income not above 50% of the state's medium income, with all three factors having equal weight. Unlike the other three block grants, there would be no option of independent federal administration; a state would be required to assume the block grant to receive funds.

As with the nine block grants authorized by the Omnibus Reconciliation Act of 1981, the Administration has attempted to keep federal "strings" at a minimum. The only crosscutting regulations specifically included are ones concerning antidiscrimination, public par-

ticipation, financial practices and audits.

Although legislation has been introduced in the Senate, as this issue of *Intergovernmental Perspective* went to press, comparable measures had not yet been sponsored in the House where, by some estimates, as many as 15 committees could claim jurisdiction over at least part of the proposal.

Joint Economic Committee hearings on the new federalism package, conducted in March, revealed little support for the megablocks. Governor Richard Snelling (VT), testifying on behalf of the National Governors' Association, expressed disappointment: "... I am disappointed that the President has decided not to submit his landmark proposal for the federalization of Medicaid, though I do recognize the difficult issues involved." The new megablocks deserve consideration, Governor Snelling pointed out, "but they do not in themselves constitute federalism reform." Testifying on behalf of the National League of Cities, Mayor George Latimer of St. Paul, MN, told the Joint Economic Committee that the proposal was "misdirected," and that "the need of thousands of St. Paul's poor and near-poor, a growing number due to the recession, are simply not addressed by the President's New Federalism." Without the strong support of state and local officials, the outlook for the new megablocks appears bleak. Senator David Pryor (AK) summed up his view of the proposal's prospects in a January 29, 1983, issue of *Congressional Quarterly*. It is, he said, "an idea whose time has not come."

General Revenue Sharing Renewal

The current authorization for General Revenue Sharing—the program that provides financial assistance to the state-local sector with relatively few strings attached—expires at the end of the current (1983) federal fiscal year. Congress must soon decide whether and in what form to reauthorize the program.

After its first year, 1972, at a \$5.3 billion level, funding ranged from \$6

billion to \$6.8 billion until fiscal year 1981. Congress reauthorized the program, for fiscal years 1981-1983, but severely restricted the terms on which state governments could participate. No funds, in fact, have been appropriated for them. Since 1981, local government funding has continued at a \$4.6 billion annual rate. Meanwhile, inflation continued to eat away at the purchasing power of revenue sharing dollars.

Future funding levels and the participation of state governments are now issues before Congress. Numerous bills have been introduced that take different approaches. Least controversial are measures that simply extend the current program (at \$4.6 billion per year, state governments excluded); examples and their Congressional sponsors are S. 41 (Senator Durenberger), H.R. 616 (Representative Horton), H.R. 1404 (Representative St. Germain) and H.R. 2096 (Representative Walker). Friends of revenue sharing may also be supporting other bills, but at a minimum, they are sponsoring simple extensions of the current program. More ambitious proposals would restore state government participation, increase funding, accelerate payments, or provide some combination of these features. For example, accelerating payments from the end to the beginning of each calendar quarter is included in H.R. 1386 (Representative Frank), H.R. 1979 (Representative Rinaldo), and for 1983 only, S. 525 (Senator Heinz, et al.). Representative Weiss, Chairman of the House subcommittee with jurisdiction over the reauthorization, proposes in H.R. 1930 to restore state government participation (+ \$2.65 billion) and to further increase funding for both state and local governments by 16%, to reflect inflation since 1980.

The length of any reauthorization is also an issue. Representative Weiss proposes a five-year extension; Senator Durenberger, in S. 41, proposes a three-year one.

Changing the distribution formula is considered divisive by many local officials. Minor changes may, however, be considered. One bill, H.R. 1605 (Representative Frank), pro-

poses that a state not be penalized if its tax effort measurement declines because it has imposed a tax limit.

One measure encompassing far-reaching changes is S. 700, sponsored by Senator Durenberger, Chairman of the Senate Subcommittee on Intergovernmental Relations. S. 700 would bring state governments back into the program; raise total funding to about \$11.5 billion; finance the program by earmarking 4% of the individual income tax; authorize the program permanently; and, make certain formula changes. Funds to pay for a higher appropriation would come from additional federal revenues raised by limiting the extent to which federal income taxpayers can deduct state and local taxes in arriving at their taxable income.

The formula for interstate distributions would be shifted from the

complex three and five-factor options, that include tax effort measurements, to a simpler two-factor formula using population and tax capacity. Tax capacity would be measured by the representative tax system technique, as developed by the ACIR staff. S. 700 also includes other lesser changes in the interstate allocation formula that would affect local governments. Local governments would be "held harmless" from any loss of funds that might occur due to formula changes.

The Administration's New Federalism package also proposes major changes to the GRS program. The package proposes four major grant consolidations. One consolidation would combine General Revenue Sharing with the "entitlement" (that portion which applies to all but small cities) portion of Community Development Block grants.

Elections 1983: Focus on City Hall

Over 700 mayoral elections will be held this year, according to the National League of Cities. A number of these contests have already been decided. Chicago's highly publicized mayoral contest was decided April 12, with Harold Washington becoming the city's first black mayor.

In Texas, former Dallas Mayor Wes Wise was defeated on April 2, by A. Starke Taylor in his first bid for elected office. San Antonio Mayor Henry Cisneros handily won reelection in the city's April elections.

Austin's top city position is still open with a run-off between the two leading contenders scheduled for April 30.

Earlier this year, March elections in Kansas City (MO) kept Mayor Richard Berkley in office. March elections in San Diego, CA, failed to produce a majority for any candidate and a May 3 runoff is scheduled. San Francisco Mayor Dianne Feinstein won easily in the April 25 recall election but must face the voters again in the November 8 general election. Mayoral races ahead include:*

	Primary	General or Run-Off
Indianapolis	May 3, 1983	Nov. 8, 1983
Denver	May 17, 1983 (open election)	
Philadelphia	May 24, 1983	Nov. 8, 1983
Columbus	June 7, 1983	Nov. 8, 1983
Boston	Sept. 13, 1983	Nov. 8, 1983
Baltimore	Sept. 13, 1983	Nov. 8, 1983
Nashville	No Primary	Aug. 4, 1983
Salt Lake City	Oct. 4, 1983	Nov. 2, 1983
Memphis		Oct. 4, 1983
Phoenix	Nov. 1, 1983	Dec. 13, 1983
Houston	Nov. 8, 1983	
Miami	Nov. 8, 1983	Nov. 15, 1983

*This list was provided by Political Profiles, Inc.

In its spring 1983 meeting, the ACIR reaffirmed its longstanding support of the General Revenue Sharing program. The Commission passed a resolution emphasizing three principles: that both state and local governments should participate; that these jurisdictions should be assured of funding certainty; and that some mechanism should be used to ensure funding adequacy and growth.

House Subcommittee Marks Up GRS Legislation

On April 21, the House Subcommittee on Intergovernmental Relations completed marking up legislation reauthorizing General Revenue Sharing. The Subcommittee bill would extend the program for five years and would increase the entitlement portion to local governments by about \$700 million to \$5.297 billion. State participation was not ruled out but would only occur if funds are appropriated for that purpose. Subcommittee members rejected amendments to delete Davis-Bacon prevailing wage requirements and also failed to approve a provision to accelerate GRS payments. They did, however, change audit procedures to an annual (or, every two years for recipients with biennial budgets) basis from the current three-year audit. Formula changes were not adopted by the Subcommittee but are expected to be proposed when the full House Government Operations Committee considers the measure, scheduled for early May.

Debate Continues on Revised Intergovernmental Consultation Process

The transition from OMB Circular A-95 to new intergovernmental consultation procedures under Executive Order 12372 is continuing to unfold but, at this time, it remains unclear what form the final regulations will take. As reported in earlier issues of *Intergovernmental Perspective* (Summer 1982 and Winter 1983, issues), the OMB Circular (A-95) previously guiding this process has been rescinded, and proposed federal

agency regulations to take its place have been published for comment in the *Federal Register*. Initial comments raised so many issues that the rulemaking record was reopened until May 19th, and the projected effective date for final regulations has been moved from April 30 to September 30.

March was a busy month for considering the appropriate form of final regulations. On March 2, 1983, the U.S. Office of Management and Budget held an all-day meeting to hear the views of affected parties concerning the proposed federal regulations. The next day, the Senate Subcommittee on Intergovernmental Relations, chaired by Senator Dave Durenberger, held a formal hearing on the new regulations. Then on March 10, 15 Senators and two Representatives joined in a letter to OMB which stated four "serious concerns" and recommended that the regulations be modified substantially before going into effect. This letter was to be incorporated into the rulemaking records of the 26 federal agencies proposing regulations on this subject. Three ACIR members were among the letter's signatories—Senators Durenberger and Sasser and Representative Weiss.

The members of Congress fear that the proposed regulations: (1) would not implement Section 204 of the *Demonstration Cities and Metropolitan Development Act of 1966* requiring metropolitan planning reviews for a wide variety of physical development programs; (2) would not fully implement Section 401 of the *Intergovernmental Cooperation Act of 1968* requiring intergovernmental consultation with all levels of government on an even wider array of federal activities; (3) would allow too little time for effective consultations and issue resolution; and, (4) would center the process on state governments where only modest interest in the process has been shown previously, thus tilting the procedures and the substance of any comments toward a state view. According to the letter, "Such a result is clearly contrary to the intent of Congress and the laws of the United States."

This Congressional response came

as a result of the Senate hearing on March 3, 1983, and an earlier Senate hearing on this subject in 1982. At the most recent hearing, OMB stressed its intention to simplify the process; to give greater discretion to state and local governments in procedural matters; to expand the list of direct federal activities subject to the consultation process; and to ensure that federal agencies will accommodate state and local views more faithfully than in the past. OMB also stated its belief that 49 states were planning to designate official state systems for consulting with federal agencies by the April 30, 1983, date, after which the earlier A-95 procedures would no longer be followed.

The National Association of Regional Councils' (NARC) Senate testimony stressed that the proposed regulations would not fully implement existing federal laws and that the states would need more time to develop their own procedures in place of the federal one. In response to questions from Senator Durenberger, NARC spokesmen indicated that the Association would seek relief in the courts, although reluctantly, if a substantial number of states significantly abridged the rights of local officials and regional councils to participate in consultations with federal agencies.

NARC's concerns were shared at the Senate hearing by a panel of city, county and public planning officials. Three state officials at the hearing also revealed that they would like more time to make an orderly transition to the new procedures.

In the *Federal Register* of April 11, 1983, the President amended E. O. 12372 (by issuing E.O. 12416) which provides additional transition time and incorporates the Section 204 consultation requirements. Under this amendment, revised federal regulations will be published on June 30, 1983, and become effective on September 30.

From Law To Rule: Exploring the Maze of Intergovernmental Regulation

by David R. Beam

Beginning in the mid-1960s, and at an accelerating pace thereafter, national domestic policy took a new twist. From almost sole reliance on the traditional instrument of federal intergovernmental policy—the grant-in-aid—Washington turned to new, more coercive regulatory techniques to obtain state and local acceptance of many national goals and standards. ACIR research has identified more than 35 major regulatory statutes aimed at or implemented by state and local governments. Prominent examples include the *Civil Rights Act of 1964*, the *National Environmental Policy Act of 1969*, the *Occupational Safety and Health Act of 1970*, the *Clean Air Act Amendments of 1970*, Section 504 of the *Rehabilitation Act (1973)*, and the *Education for All Handicapped Children Act of 1975*. Ironically, many of these statutes were adopted during the hey-day of the Nixon and Ford Administrations' "New Federalism" policies, which were intended to reduce federal "red tape" and control. Many even enjoyed at least some degree of Presidential support.

Laws adopted by Congress are not self-executing, however. In between final passage and the final product—be it new roads or new jails, clean air or clear water—is an elaborate administrative process that requires garnering resources (including funds and personnel) and establishing procedures (rules, forms, and contact points). At this stage, a lot can go wrong.¹ Consistent with "Murphy's Law," study after study has documented serious programmatic shortcomings.² There can be a big difference, as one analyst notes, between what governments choose to do and what, in the end, they actually do.³

The new types of regulatory programs,⁴ like the grants that preceded them, have experienced many such difficulties. Consequently, they generally have not eliminated and—in some cases, not even markedly reduced—the social or environmental problems that they addressed. At the same time, they have exacerbated intergovernmental tensions. Mayors, governors and other state and local officials protest the growth of a "mandate millstone" that imposes on them heavy financial burdens and inflexible federal rules and requirements.⁵

Just why regulatory performance has been disappointing and troublesome, after a "trial period" of more than ten years, is the focus of this article. Like the programs themselves, the reasons for their shortcomings are many and varied, ranging from overly vague or overly prescriptive statutory language, to federal agency delays and mismanagement, to weak enforcement. This analysis of how good intentions can and often do go awry draws upon the ACIR's major study of **Regulatory Federalism**. It points up the need for thoroughgoing regulatory reform, as advocated by the ACIR and many others.

Writing Rules: Easier Said Than Done

The rule-making process—that is, the set of formal procedures through which a statute adopted by the Congress and signed by the President is translated into a set of specific requirements to be carried out and enforced by executive branch agencies—is much less widely understood than the more frequently probed legislative process. Yet, it is just as important. Administrative agencies must resolve statutory vagaries and ambiguities that become apparent as they develop rules and regulations. Depend-

¹Walter Williams, *The Implementation* (Berkeley, CA: University of California Press, 1980), p. 1.

²See, for example, Martha Derthick, *New Towns In-Town: Why a Federal Program Failed* (Washington, DC: The Urban Institute, 1972) and Jeffrey L. Pressman and Aaron B. Wildavsky, *Implementation* (Berkeley, CA: University of California Press, 1973).

³Alfred A. Marcus, *Promise and Performance: Choosing and Implementing an Environmental Policy* (Westport, CT: Greenwood Press, 1980), p. 3.

⁴For a history, description and discussion of intergovernmental regulatory programs, see David R. Beam, "Washington's Regulation of States and Localities: Origins and Issues," *Intergovernmental Perspective* (Summer 1981), pp. 8-18. The Commission's research identified four relatively new types of regulatory programs aimed at, or implemented by state and local governments: crosscutting requirements, cross-over sanctions, partial preemption and direct orders.

⁵Edward I. Koch, "The Mandate Millstone," *The Public Interest* 61 (Fall 1980), pp. 42-57.

ing upon the area in question, rule-making may require a high degree of technical expertise as well as sound legal judgment. Because affected parties often attempt to influence regulation outcomes, the process itself is deeply embedded in politics.

The basic procedures governing the rule-making process were laid down by the Congress in the **Administrative Procedure Act (APA)**, adopted in 1946 in the wake of the burst of New Deal regulatory initiatives. Among other things, the APA was intended to assure an ample degree of openness and public participation in agency deliberations. Recent Presidents have embellished the APA's rule-making procedure with additional requirements stipulated by executive order including cost-benefit analyses. Many steps are involved. The cumulative effect is that, before a final rule is adopted and published in the **Code of Federal Regulations**, there are numerous opportunities for problems to arise.

Delay. The tasks involved in rule-making are often substantial and the time taken to complete them is generally measured in years, not months. A prominent example is Section 504 of the **Rehabilitation Act**, adopted by Congress in 1973 to prohibit discrimination against the handicapped in federally assisted programs. Interpreting this 45-word statutory requirement required determining who could be considered "handicapped" within the meaning of the law—does it include alcoholic and drug addicts for example?—and the detailed specification of what actions (or inactions) constitute unlawful forms of discrimination. The Department of Health, Education, and Welfare's regulations implementing this provision were not issued until 1977. Moreover, although the HEW rules provided some general guidance, similar determinations had to be made separately by each federal department and agency for its assistance programs, adding to delay and complexity. The rules prepared by the Department of Transportation were some 34 pages in length. The 504 rules prepared by the Treasury Department for the revenue sharing program did not take effect until the summer of 1981, eight years after enactment.

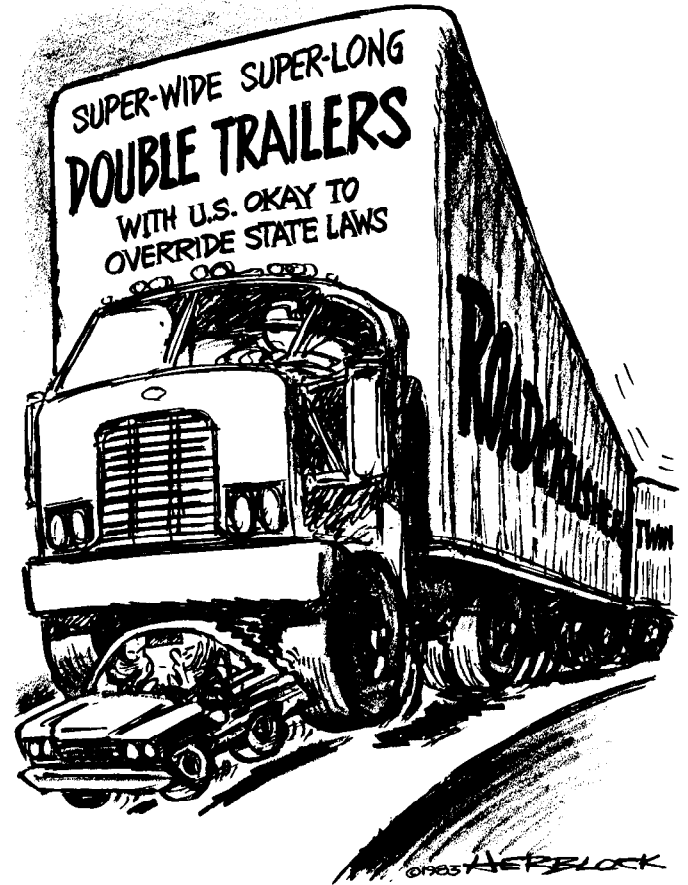
Such extended regulatory delays are by no means unusual. Rather according to a study prepared by the U.S. Senate Committee on Governmental Affairs,

Most federal regulatory proceedings are characterized by seemingly interminable delays. It is widely thought that the regulatory process takes far too long to accomplish too little; that it is plagued by lethargy and inefficiency; and, that it steers a rudderless course unassisted by plan or priority.⁶

That study focused principally on the rule-making procedures of such "old style" regulatory commissions as the Civil Aeronautics Board and the Federal Communications Commission. Its conclusions could have been written about intergovernmental regulatory issues, however, as substantiated by a comprehensive Office of Manage-

⁶U.S. Congress, Senate, Committee on Governmental Affairs, **Delay in the Regulatory Process**, 95th Cong., 1st sess., 1977, **Study on Federal Regulation**, Vol. IV, p. v.

"REMEMBER THAT TALK ABOUT GETTING THE FEDERAL GOVERNMENT OFF OUR BACKS?"



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ment and Budget study of federal crosscutting requirements.⁷ (For a definition of crosscutting and other types of regulations, see boxed item on page 10 of this **Perspective**.) Problems of delay have also affected the development of federal rules on health planning, endangered species, handicapped education, sex discrimination, hazardous waste disposal, occupational health and safety, strip mining control, and historic preservation.

No single cause explains these difficulties. Rather, a variety of factors—internal as well as external, substantive as well as procedural—seem to slow down the workings of the regulatory machinery. Bureaucrats, legislators, judges and political interest groups all share responsibility for regulatory delays and uncertainties. The best that can be said, on the basis of available evidence, is that there is enough blame to go around.

⁷Office of Management and Budget, **Managing Federal Assistance in the 1980s, Working Papers**, Volume I (Washington, DC: U.S. Government Printing Office, 1980), p. A-3-27.

Mismanagement. Given the central role played by the executive branch in rule-making procedures, it is not surprising that bureaucrats are a principal target of criticism. The Senate committee study of regulatory delay noted a series of contributory agency practices, including too much emphasis on "trial-type" procedures, inadequate planning and leadership by top management, too little effort in setting and enforcing deadlines, and extra and unnecessary layers of review.⁸

In some instances, various managerial shortcomings do appear to have contributed to delays in the issuance of intergovernmental regulations. One detailed study of Title IX sex discrimination requirements deemed that

"The two years it took to develop the proposed regulation was inexcusably long. An internal DHEW management system that provided inadequate oversight over [the Office of Civil Rights] combined with poor administration and the lack of strong leadership in OCR itself contributed to the slow speed at which the regulation was developed."⁹

The Environmental Protection Agency, according to a General Accounting Office assessment, was similarly disorganized during the crucial early stages of implementing the **Toxic Substances Control Act**.¹⁰ As a result, GAO charged, neither the public nor the environment were much better protected four years after the passage of what President Ford described as "one of the most important pieces of environmental legislation that has been enacted by the Congress."¹¹

Complexity. The problem is more complicated than the foregoing discussion suggests. Some analysts believe that bureaucrats are too often made the scapegoats for regulatory delays and shortcomings. One researcher stressed problems inherent in the process itself:

Much of what appears to be the result of bureaucratic ineptitude, agency imperialism, or political meddling is the result of the sheer magnitude of many regulatory tasks.¹²

In some cases, the rapidly expanding duties and shifting national priorities of recent years would have taxed any organization. Both the Office of Civil Rights and the Environmental Protection Agency,¹³ whose administrative shortcomings were noted above, have been burdened with an ever-expanding array of new regu-

latory statutes to be interpreted, implemented and enforced.

Still, the size of the regulatory workload is not the sole source of delay and confusion. Certain tasks are difficult and time-consuming by their very nature. Much of the new social regulation, and particularly those programs that call for setting health and safety standards, requires specialized knowledge at or beyond the limits of contemporary scientific research.¹⁴ To illustrate, the officials of the Occupational Safety and Health Administration, established by law in 1970, were by and large strongly committed to the agency's goals and the success of their new program.¹⁵ This commitment was reflected in the agency's promulgation of some 300 pages of "consensus" safety and health standards in the first months of its operation.¹⁶ But since then, the rate of issuance for new standards has been glacial. By the end of the 1970s, the agency had issued less than ten final health standards and an equally small number of safety ones. At this rate, it appears that OSHA might take over a century to develop standards for substances already known to be toxic.¹⁷

To a considerable degree, this slow pace of action has resulted from the technical complexity of the tasks involved. A review of scientific evidence usually does not provide clear or definitive answers to the questions of risks, benefits and costs that regulators must address.¹⁸ Instead, the information available is usually partial, sometimes contradictory, and as Kelman describes it, "shockingly poor."¹⁹ Examples of similar analytical difficulties may be found in such areas as hazardous waste regulation,²⁰ pollution control²¹ and the protection of endangered species.²²

Imprecision. Legislative imprecision is another important factor that can slow or complicate rule-making. Although some kinds of regulatory tasks are, by their nature, quite demanding, their "complexity is compounded when the mandate to be carried out is unclear or controversial or when possible methods for doing so are uncertain."²³

Such lack of clarity was one of the principal reasons

¹⁴Stephen Breyer, *Regulation and Its Reform* (Cambridge, MA: Harvard University Press, 1982), p. 109.

¹⁵Frank J. Thompson, *Health Policy and the Bureaucracy: Politics and Implementation* (Cambridge, MA: MIT Press, 1981), p. 223.

¹⁶*Ibid.*, p. 232.

¹⁷*Ibid.*, p. 239.

¹⁸Robert W. Crandall and Lester B. Lave, eds., *The Scientific Basis of Health and Safety Regulation* (Washington, DC: The Brookings Institution), p. 4.

¹⁹Steven Kelman, "Occupational Safety and Health Administration," in *The Politics of Regulation*, ed. James Q. Wilson (New York, NY: Basic Books, 1980), p. 249.

²⁰Selim M. Senkan and Nancy W. Stauffer, "What to do with Hazardous Waste," *Technology Review*, November 1981, p. 40.

²¹Charles T. Stewart, Jr., *Air Pollution, Human Health, and Public Policy* (Lexington, MA: D.C. Heath and Company, 1979), p. 121.

²²Steven Lewis Yaffee, *Prohibitive Policy: Implementing the Federal Endangered Species Act* (Cambridge, MA: MIT Press, 1982), pp. 75-85.

²³Laurence E. Lynn, Jr., *Managing the Public's Business: The Job of the Government Executive* (New York, NY: Basic Books, 1981), p. 29.

⁸U.S. Congress, Senate, *Delay*, p. iv.

⁹Andrew Fishel and Janice Pottker, *National Politics and Sex Discrimination in Education* (Lexington, MA: D.C. Heath and Company, 1977), p. 133.

¹⁰U.S. General Accounting Office, *EPA is Slow to Carry Out its Responsibility to Control Harmful Chemicals* (Washington, DC: U.S. Government Printing Office, 1980).

¹¹*Ibid.*, p. 1.

¹²James Q. Wilson, ed., *The Politics of Regulation* (New York: Basic Books, 1980), p. 392.

¹³Jane S. Shaw and Charlene Canape, "Is the EPA Saddled with More Than It Can Handle?," *Business Week*, May 26, 1980, p. 148, and Charles S. Bullock III and Joseph Stewart, Jr., "When You Can't Do Everything At Once: Policy Implementation Under Conditions of Growing Responsibilities," paper prepared for delivery at the 1978 Annual Meeting of the American Political Science Association, New York City, August 31, 1978, pp. 2, 32.

New Regulatory Techniques

An element of compulsion is one key feature that distinguishes new intergovernmental regulatory techniques from the more usual conditions that are attached to federal grants. ACIR has identified four relatively recent types, including:

Crosscutting Requirements. 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 nondiscrimination provision included in Title IV of the **Civil Rights Act of 1964**. 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 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 Office of Management and Budget inventory.

Direct Orders. In a few instances, federal regulation of state and local government takes the form of direct orders that must be compiled 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. **Wage and hour provisions imposed on state and local governments by the 1974 amendment to the Fair**

Labor Standards Act—subsequently partially overturned by the Supreme Court—are another instance where direct orders have been employed.

Crossover Sanctions. A crossover sanction is one that imposes federal fiscal sanctions in one program area or activity to influence state and local policy in another. The distinguishing feature here is that failure to comply with the requirements of one program may result in a reduction or termination of funds from another separately-authorized program. The penalty thus “crosses over.” A good example of crossover sanctions occurred 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 “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. Unlike traditional preemption statutes whereby the federal law simply takes the place of state and local authority, preemption in some 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. The **Water Quality Act of 1965** is an example of this strategy. The statute was the first to establish a national policy for controlling pollution. Although 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.

for the five-year delay and intense controversy involved in devising regulations for Section 504. In contrast with other nondiscrimination legislation, the one-sentence provision adopted in 1973 failed to indicate whether regulations were necessary to implement the law and, if so, which agency was to be responsible for preparing and enforcing them.²⁴ Moreover, the provision lacked *any* legislative history to assist in its interpretation.

Not surprisingly, the bureaucracy took its time in responding.²⁵ The following year, Congress did provide (in a Senate report) an *ex post facto* legislative history indicating Section 504 was to be regarded as a civil rights law and vigorously enforced by regulation. But progress was still slowed by HEW's (and almost everyone else's) uncertainty about what practices constituted discrimination against the handicapped and what remedies were appropriate.

²⁴Mark F. Engebretson, “Administrative Action to End Discrimination Based on Handicap: HEW's Section 504 Regulation,” *Harvard Journal on Legislation* 16 (Winter 1979), p. 60, 63.

²⁵Steven Leon Abrams, “The Significance of Congressional Change for American Public Policy” (B.A. honors thesis, Harvard College, 1980), p. 30.

After two more years, in May 1976, the Department proposed rules to guide grant recipients, and a group of handicapped persons—dissatisfied with the pace of events—obtained a court order commanding then-Secretary of HEW David Mathews to sign them. But Mathews demurred, saying that he wanted to be sure that the regulations followed Congressional intent.²⁶ According to the account of his successor, Joseph A. Califano, Jr., Mathews considered Section 504 to have been “one of the most irresponsible and thoughtless” acts of Congress and was dismayed by the proposed rules that called for elaborate structural changes in schools, hospitals, nursing homes, and other facilities, at the cost of billions of dollars. On his next to the last day in office, the Secretary sent the 185-page text to Congress asking in essence if they had correctly interpreted a law Congress had passed with “not one day” of hearings or debate and no guidance for its implementation.²⁷

²⁶“Regulations on Handicapped,” *Congressional Quarterly*, January 22, 1977, p. 131.

²⁷Joseph A. Califano, Jr., *Governing America* (New York: Simon and Schuster, 1981), pp. 258-59.

The impasse was left for the incoming Carter Administration to resolve. Secretary Califano wanted to restructure the rules to focus on accessibility rather than physical structural changes, thus reducing excessive costs. But he was brought under pressure by handicapped persons who, wearing "Sign 504" buttons, staged protests in front of his home, in HEW regional offices, and at departmental headquarters. Final regulations were issued on April 28, 1977, just in time to avoid another round of demonstrations.²⁸

Although it dramatically illustrates the kinds of confusion and delays statutory imprecision can create, the Section 504 case is by no means unique. Indeed, limited consideration during the legislative stage has confounded the implementation of many major regulatory statutes.

Even statutes that otherwise provide clear (or even overly-explicit) instructions to administrators sometimes have left crucial concepts or conditions undefined. The **Clean Air Act**, for example, has been said to be "too detailed in some sections and too vague in others."²⁹ Similarly, "the roughly 30 pages that comprise the heart of the [national health] planning law . . . vacillate between precision and ambiguity."³⁰

Its frequency suggests that statutory vagueness is more than a happenstance occurrence. Rather, it may reflect a basic conflict in the expectations and requirements of politicians and bureaucrats.³¹ Regulators, if they are to be able to perform effectively, need a certain degree of specificity and guidance. A clear legislative history helps them resolve hard cases and provides protection against political and legal challenges that can complicate and delay their work. Legislators, on the other hand, may prefer the vague phrase to the clear one, or the lofty statement of goals to the careful balancing of priorities, because such language promotes compromise. The problem is that executive agencies must "cope with the confusion. The top officials must somehow untangle the knots and devise a program that is workable," one observer wrote.³²

Political conflict. Rule-making is by no means a straightforward technical task of translating statutory language into a series of more detailed requirements to be applied in specific circumstances. On the contrary, it is frequently the occasion for intense political disputes among contending interests.

The passage of a statute seldom resolves all major issues. Often the field of combat simply shifts to the executive branch. Health planning legislation, for example, was adopted in 1974 by large Congressional majorities despite heated opposition from both medical inter-

ests and state and local officials. The battle continued unabated during the implementation phase, and federal officials received thousands of letters opposing their initial guidelines. Progress was slowed as HEW attempted to navigate this complicated political environment.³³ **PL 94-142**, the handicapped education statute, is another case in point. The same groups involved in its passage strove mightily to shape the content of its regulations.³⁴

In these and other cases, political disputes continued unabated after a controversial statute was adopted. However, the political controversies that erupt during the rule-making stage are frequently *more* intense than those occasioned by an act's passage. **OSHA**, for example, was adopted in 1970 by highly one-sided votes: 384 to 5 in the House and 83 to 3 in the Senate. Over the next year, however, business opposition grew so intense that more than 100 bills were introduced to amend or even repeal the law.

The intense political debates surrounding rule-making are understandable. Often, it is only during the rulemaking stage that the potential costs and possible problems are clearly recognized. Those whose interests may be harmed—or who have to pay the bills—can mobilize for action. Even members of Congress sometimes become skeptical about their own handiwork. For example,

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. . . . It was only years later, after DHEW had drafted the regulation to implement the law, that Congress finally came to understand what Title IX actually meant in terms of changes in educational policies and practices. When the implications became known, many members of the Congress realized that they disagreed with the impact of the law for which they had previously voted.³⁵

Similarly,

Before the 1970 and 1972 pollution control acts were passed, benefits appeared to be diffused among the public at large and costs seemed to be concentrated on specific industries and localities; however, once these acts were implemented benefits that seemed intangible and distant had to be balanced against costs that appeared tangible and immediate. The motorist's immediate desire to get to work and to use his automobile without restrictions had to be balanced against the long-term and intangible costs of an unhealthy environment. When benefits appeared less tangible and more distant than the costs, the public was not willing to make significant sacrifices for the sake of pollution control.³⁶

²⁸*Ibid.*, pp. 259-261.

²⁹Lester B. Lave and Gilbert S. Omenn, **Clearing the Air: Reforming the Clean Air Act** (Washington, DC: The Brookings Institution, 1981), p. 49.

³⁰Thompson, **Health Policy**, p. 47.

³¹Richard J. Tobin, **The Social Gamble: Determining Acceptable Levels of Air Quality** (Lexington, MA: D.C. Health and Company, 1979), pp. xiv-xv.

³²Lynn, **Managing the the Public's Business**, p. 30.

³³Thompson, **Health Policy**, pp. 54-62.

³⁴Erwin L. Levine and Elizabeth M. Wexler, **PL 94-142: An Act of Congress** (New York, NY: Macmillan Publishing Co., 1981), p. 123.

³⁵Fishel and Pottker, **Sex Discrimination**, p. 123.

³⁶Marcus, **Promise and Performance**, p. 167.

In some instances, rule-making becomes embroiled in controversy because legislators seemed unwilling to make hard choices that might offend or dissatisfy certain constituent groups. Vague wording and poorly defined phrases could prevent those whose interests would be harmed from realizing what is at stake and transfer popular antagonism from the legislative to the executive branch.³⁷

The judicial branch, like the executive, also plays an important role in resolving post-enactment conflicts. Those who are unable to win their way during the rule-making stage often turn to the courts for another try. However, the prospect of court action adds to uncertainties and further delays translating laws into concrete action.

Regulation: Too Broad, Too Narrow

What the regulatory process lacks in speed it more than makes up in breadth. Indeed, a second widespread criticism of federal regulation is that it is *too extensive* in scope and *too specific* in detail. Although the major aims of regulation—such as assuring a healthy environment, eliminating segregation or discrimination, and protecting workers from industrial dangers—enjoy broad support, there is also a feeling that in pursuing these objectives regulators have intruded into areas in which narrow and specific requirements are unnecessary, ever counterproductive and sometimes silly.³⁸

Identification of foolish rules—issued, for example, by the Occupational Safety and Health Administration—has almost reached the status of a national parlour game.³⁹ Often-ridiculed OSHA requirements (later retracted) included rules on toilet seat shapes, standards for the height at which fire extinguishers must be placed, and specifications limiting the size of knotholes in the rungs of wooden ladders.⁴⁰ Vocal critics also derided the idea that requiring girls (but not boys) to wear brassieres, or boys (but not girls) to keep their beards trimmed constituted a form of gender discrimination meriting federal scrutiny under civil rights laws.⁴¹ These rules were opposed by top officials during the Ford, Carter and Reagan Administration and, it should be noted, were finally revoked in July 1982. Halting construction on the TVA's Tellico Dam to preserve the habitat of the snail darter is often presented as another case of regulatory excess.

Although it is easy to lampoon some rules, there are more fundamental issues at stake. Former HEW Secre-

The Theory Gap

"In recent years a vast literature on regulation has emerged, a literature to which many professional disciplines have contributed. . . . Very little of this analysis, however, bears upon the question that policy-makers most need to answer: How well is a regulatory program likely to be implemented in the real world? . . . To begin to address questions of regulatory implementation, one must first possess a theory . . . of how regulation . . . works. Such a theory must be grounded not only in a knowledge of economics but in a knowledge of law, of politics, and of history; in short, it must be interdisciplinary in nature. Perhaps for that reason no such theory yet exists."

From Peter H. Schuck, "Regulation: Asking the Right Questions," *National Journal*, April 28, 1978, p. 711.

tary Joseph A. Califano, Jr., believes that his department's civil rights enforcement effort was "undermined by the pursuit of issues that many people regarded as frivolous, matters which tended to infuriate many communities and subject HEW to ridicule."⁴² From a financial point of view, there also is reason to believe that the benefits obtained from some detailed or stringent regulations cannot justify the costs they impose.⁴³

Finally, rule-making takes time and energy, and spinning out excessively demanding standards can result in further delays. Indeed, environmental health and safety regulation can be "characterized not only by too much control but also by too little, and the former problem is one reason for the latter."⁴⁴ Major backlogs may have developed in such areas as toxic substances control because OSHA and EPA opted for the strictest possible standards that can be upheld in court. But the need to develop substantial evidence in support of such standards—which are almost certain to be challenged—has consumed time and staff resources. Meanwhile, dozens of other potentially hazardous substances remain unregulated. EPA's efforts to regulate hazardous waste streams under the **Resource Conservation and Recovery Act** "may actually make the public less safe than it would be with no regulation at all."⁴⁵ The large number of wastes defined as hazardous, coupled with the shortage of appropriate disposal sites, seem likely to raise disposal costs—thus encouraging illicit dumping and increasing rather than reducing environmental threats.

³⁷Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* (New Haven, CT: Yale University Press, 1977), p. 48.

³⁸See Herbert Kaufman, *Red Tape: Its Origins, Uses, and Abuses* (Washington, DC: The Brookings Institution, 1977), pp. 5, 8.

³⁹Lester C. Thurow, *The Zero-Sum Society* (New York, NY: Penguin Books, 1981), pp. 131-32.

⁴⁰See "The 'Facts' About OSHA's 1,100 Revoked Regulations," *National Journal*, August 12, 1978, p. 1298 and Timothy B. Clark, "What's All the Uproar over OSHA's 'Nit-Picking' Rules," *National Journal*, October 7, 1978, pp. 1594-196.

⁴¹See Charles R. Babcock, "Pesky School Dress Code Role Lingers On," *The Washington Post*, June 1, 1982, p. A15 and "Dress Codes Decoupled," *Regulation*, September/October 1982, pp. 12-13, 26.

⁴²Califano, *Governing America*, p. 223.

⁴³Eugene Bardach and Robert A. Kagan, *Going By the Book: The Problem of Regulatory Unreasonableness* (Philadelphia, PA: Temple University Press, 1982), pp. 6-7.

⁴⁴John Mendeloff, "Does Overregulation Cause Underregulation? The Case of Toxic Substances," *Regulation*, September/October 1981, p. 47.

⁴⁵Malcolm Getz and Benjamin Walter, "Environmental Policy and Competitive Structure: Implications of the Hazardous Waste Management Program," *Policy Studies Journal* 9 (Winter 1980), p. 412.

Bilingual Education: Making (and Unmaking?) a Controversial Mandate

Federal policy concerning bilingual education—that is, teaching such subjects as mathematics, geography, or science to limited or non-English speaking students in their native tongue—rests upon two different (but inter-related) statutory enactments. The first, Title VI of the **Civil Rights Act of 1964**, prohibits discrimination according to national origin, as well as race and color, in any program receiving federal financial assistance. Although the act did not mention bilingual education issues, the Department of Health, Education, and Welfare six years after its adoption issued a memorandum suggesting that school districts should take “affirmative steps” to aid students whose English language deficiencies hampered their educational progress. The second foundation, known as the **Bilingual Education Act of 1968**, provides grant funds for “new and innovative programs” intended to meet the “special educational needs” of children with limited English-speaking abilities. As initially adopted, the act encouraged some form of action to assist these groups of students, but said nothing about teaching basic subjects in any language other than English.¹

A crucial change in the legal environment occurred with the Supreme Court's 1974 decision in *Lau v. Nichols*. This case involved a suit brought by members of San Francisco's Chinese-speaking community, with the aid of Legal Service attorneys, who argued that their children had a Constitutional right to special instructional assistance. This contention was denied by both the federal district and appeals courts. However, the Supreme Court held unanimously for the plaintiffs on the basis of the 1970 HEW memorandum interpreting Title VI. The Supreme Court did *not* find that the Constitution required such action.²

The *Lau* decision did not indicate what specific remedies might be most appropriate, and the remedy the parents had sought was additional instruction in English. Later in 1974, however, Congress amended the **Bilingual Education Act** to place federal financial support behind the bilingual approach. These amendments stressed that such instruction was intended to help non-English speaking students identify with and maintain their cultural heritage, as well as to advance their education. The amendments also provided a foundation for greatly expanding the number of language groups to be served by the program.³ The following year, HEW produced a report establishing bilingual instruction as the favored strategy for remedying *Lau*-type violations; thereafter, it negotiated compliance agreements with some 500 school districts charged with, or suspected of discrimination on the basis of national origin.⁴

Although subsequent amendments to the **Bilingual Education Act** adopted in 1978 showed increasing Congressional disenchantment with bilingual instruction, sparked in large part by doubts about its efficacy, the concept and principle were well established. In August 1980, the Department of Education proposed new Title VI rules which formalized and expanded its *Lau* guidelines.

The proposed regulations brought howls of protest from many in the education community, as well as some ethnic groups. Organizations of state and local officials challenged federal efforts to impose national requirements regarding how schools should teach. The Supreme Court, they argued, had intended that the choice of remedies be left to local school systems.⁵ They believed that the rules intruded on states' rights and were Constitutionally suspect on civil rights grounds as well.⁶ Many education experts contended that bilingual education was in no way educationally superior to other possible methods of instruction, including special classes in “English as a second language.”⁷

Given these widespread objections and its own philosophy of regulatory relief, the Reagan Administration withdrew the proposed regulations in February 1981.

Although some commentators heralded the action, others doubted that it would make a real difference.⁸ A substantial network of other policy memos, guidelines, and court decisions was left untouched, and federal funding under the **Bilingual Education Act** continues to exclude alternative methods of satisfying Title VI requirements.⁹ It seems unlikely that Secretary Terrel Bell's rescission of regulations that were never implemented will have any real effect on the continuing controversy, one observer concluded.¹⁰ The President of the American Federation of Teachers was even harsher: “When it comes to getting the public schools out from under some of the costly, cumbersome and unpopular federal ‘regs,’ Reagan's people talk loudly and carry a wet noodle.”¹¹

Partly in response to such concerns, the Administration submitted, in March of this year, amendments to the **Bilingual Education Act** that would provide school districts with federal funds for a variety of alternative approaches to serve language-minority children.

¹“Bilingual Education: The New Accent in Civil Rights Regulation,” *Regulation*, November/December 1980, p. 6; Abigail M. Thernstrom, “E Pluribus Plura—Congress and Bilingual Education,” *The Public Interest* 60, Summer 1980, pp. 4-5, 11-12.

²Tom Bethell, “Against Bilingual Education,” *Harper's*, February 1979, p. 31.

³Thernstrom, “E Pluribus Plura,” pp. 14-15.

⁴“Bilingual Education,” p. 6.

⁵See “Education Groups Talk About the Bilingual Regulations,” *Education Times*, September 8, 1980, p. 2.

⁶Lucy Tirk, “Bilingual Education Rules Intrude on States' Rights,” *State Government News*, October 1980, pp. 13-14.

⁷Adriana deKanter and Keith Baker, “Bilingual Education May Not Be Best Way to Educate Limited-English Children, Report Says,” *Education Times*, October 5, 1981, p. 2.

⁸Dan Baltz, “Bilingual Education Lives: Despite Outrage Over Dropping of Regulations, Programs Are Expected to Continue Expanding,” *Washington Post*, February 7, 1981, p. A8; “Bilingual Education Lives,” *Regulation*, March/April 1981, p. 11.

⁹Baker, “The Deregulation That Wasn't,” p. C2.

¹⁰Elaine Yaffe, “Ambiguous Laws Fuel Debate on Bilingual Education,” *Phi Delta Kappan* 62, June 1981, p. 741.

¹¹Albert Shanker, “Schools Still Pressed to Go Bilingual,” *New York Times*, April 10, 1983, p. E9.

Regulatory dynamics. A variety of factors can push the process of regulations toward an ever-broader and more rigid network of standards, rules, and requirements. As is discussed below, each of the crucial actors—the Congress, administrators, and the judiciary—sometimes has good reason to favor stringent outcomes. It also appears, however, that one critical factor is inherent in the process of regulation itself: regulations must be applied in a wide variety of settings and circumstances, but to be clear, enforceable, and seemingly unbiased, they must also be written in regular, uniform language.

These conflicting operational realities can influence decisions at every stage of the regulatory process. First, many regulations are initially adopted in response to some perceived crisis or catastrophe. Under these circumstances, there is a tendency toward tough, uncompromising action. For example, a 19th century Massachusetts legislature, after hearing about an accident in which a train fell into a gully, immediately passed a law requiring that all trains make a full stop before entering onto any drawbridge!⁴⁶ The same “crisis” atmosphere, backed by broad public support, has affected the development of some contemporary health, safety, and environmental legislation.⁴⁷

A second factor is that most regulatory systems are created in reaction to the misdeeds or shortcomings of a few “bad apples.”⁴⁸ Both legislators and bureaucrats attempt to devise techniques for preventing “that kind of thing”—whatever it may be—from ever happening again. Rules are written to prevent the worst possible abuses, even though the number of actual or potential miscreants and probable catastrophes may be quite small. Because there are many ways to go wrong, a host of detailed rules seems to be called for. Since rules by their nature apply to the “good” firms or jurisdictions as well as the “bad,” however, many requirements will be unnecessary or unreasonable in particular cases.

Once a regulatory system is established, it tends to be self-perpetuating and self-complicating. Regulation begets more regulation because the inevitable shortcomings of one set of requirements suggest additional areas demanding control.⁴⁹ Indeed, “given a relatively well-developed administrative state, the primary impetus for new regulatory legislation may come from the results of old programs and the initiatives of old agencies.”⁵⁰ Frequently, regulations in one field are readily applied, by analogy, to others. Civil rights regulations—which have been extended almost verbatim from blacks to other ethnic groups, women, the handicapped and the elderly—are a case-in-point.⁵¹ In

much the same way, transportation controls were extended from railroads to aircraft and trucks; environmental rules have successively targeted water, air, solid waste, noise and pesticide pollution; and, consumer protection legislation has broadened from food and drugs to automobiles, toys, credit and a variety of other products and services.

Passed to be tough—and stay that way. In some specific instances, federal rules are extremely extensive because Congress intended them to be so. Although many of the early economic regulatory statutes were cast in broad, flexible terms—leaving much to the discretion and expertise of agency administrators—some of the “new social regulation” had acquired a considerable degree of rigidity or specificity before it left Capitol Hill.

In part, Congress shifted in the late 1960s toward more stringent statutory requirements because it was dissatisfied with past regulatory performance. The traditional regulatory commissions have long been criticized by scholarly analysts for their hesitancy to take strong actions against the industries they were supposed to be regulating.⁵² The commissions’ formal, legal independence seemed to be overshadowed by excessive political dependence on interest group support.

During the 1960s, this “capture” theory was popularized in a number of studies by Ralph Nader and his “raiders.” By 1970, it had become conventional wisdom, and sparked a new style of lawmaking. Legislative goals were often stated in absolute, unqualified terms. Consideration of economic factors was minimized or barred, and the severity and speed of sanctions were increased to enhance deterrence.⁵³

Stringent regulatory statutes served Congressional needs in a second respect. The public supported strong actions directed toward social and environmental improvements, but few elected leaders favored greatly increased expenditures. Far reaching new regulatory controls seemed to promise dramatic results at comparatively low costs. In short, tough regulatory standards became a useful political symbol:

Since it is virtually costless or at least much cheaper for legislators to deal in grand gesture and symbolic ambiguity rather than the difficult and costly process of accumulating data, weighing costs and benefits, and assessing alternative means, they have a clear incentive to choose the symbolic path.⁵⁴

The major environmental statutes adopted in 1970-72 illustrate these points well. Dissatisfied with the rate of progress under previous legislation, and spurred on by the aroused public consciousness that followed “Earth Day,” legislators vied with President Nixon and each other for leadership of the emerging environmental

⁴⁶Bardach and Kagan, *Regulatory Unreasonableness*, pp. 24-25.

⁴⁷Jack L. Walker, “Setting the Agenda in the U.S. Senate: A Theory of Problem Selection,” *British Journal of Political Sciences* 7 (1977), pp. 423-45.

⁴⁸Bardach and Kagan, *Regulatory Unreasonableness*, pp. 64-69.

⁴⁹Charles L. Schultze, *The Public Use of Private Interest* (Washington, DC: The Brookings Institution, 1977), pp. 56-57.

⁵⁰Jerry L. Mashaw, “Regulation, Logic, and Ideology,” *Regulation*, November/December 1979, p. 47.

⁵¹Bardach and Kagan, *Regulatory Unreasonableness*, p. 21.

⁵²See Samuel Huntington, “The Marasmus of the ICC: The Commission, the Railroads and the Public Interest,” *Yale Law Journal* 61 (April 1952), pp. 467-509.

⁵³See Bardach and Kagan, *Going by the Book*, pp. 44-56.

⁵⁴Stone, *Regulation*, p. 186. See also Timothy J. Conlan and Steven L. Abrams, “Federal Intergovernmental Regulation: Symbolic Politics in the New Congress,” *Intergovernmental Perspective* (Summer 1981), pp. 19-26.

movement. The 1970 **Clean Air Act Amendments**, for example, attempted to make air quality an overriding national value. In contrast with previous legislation, pollution was to be eliminated regardless of the costs imposed on the national economy, specific regions or communities.⁵⁵ The 1972 **Federal Water Pollution Control Act Amendments** were, in many crucial respects, modeled on the **Clean Air Act**. Like its predecessor, it too attempted to mandate specific requirements and deadlines. "Congress enacted and EPA implemented uniform *national* legislation rather than a flexible *federal* law," noted one environmental expert.⁵⁶

Bureaucrats also have some reason to favor ever more stringent and extensive regulations. In contemporary mythology, it is conventional to find a bureaucrat bent on aggrandizing his or her own agency's power lurking behind every costly, foolish or intrusive requirement.⁵⁷

This appraisal may have a degree of validity. Certainly many bureaucrats are committed, by professional norms or agency ethos, to the goals of their programs. For example, many of the first civil rights staffers in the Office of Education were strict moralists, even "zealots," who viewed their official responsibilities as "a 20th century crusade."⁵⁸ Similarly, biologists within the Office of Endangered Species generally perceive themselves as environmental advocates, and often "have been accused of letting these private values influence their biological judgment."⁵⁹ The Architectural and Transportation Board, which sets standards governing access for handicapped persons to public facilities, for a time was dominated by members who strongly favored regulation. The staff also included many persons with handicaps, among them militant advocates. Not surprisingly, this group produced far reaching and extremely detailed rules applying to transit facilities, post offices, and other federally-financed buildings.⁶⁰

Although cases of this kind cannot be ignored, other motivations may be more customary. Government agencies probably are more risk averse than imperialistic.⁶¹ Regardless of their personal values and political credos, bureaucrats have a vested interest in avoiding charges of malfeasance and in protecting their agency's reputation. Rules and regulations proliferate, because regulators are anxious to avoid scandals or crises that might threaten their status.⁶² "Playing it safe"

may require that regulators also "play it tough."

EPA has been viewed as striving to avoid sins of omission rather than commission in controlling hazardous wastes under the **Resource Conservation and Recovery Act**. If EPA labels "safe" some waste that does, in fact, pose hazards, it "will face an angry Congress, a distraught public, and a torrent of journalistic exposes."⁶³ In contrast, EPA has much weaker political and fiscal incentives to avoid the opposite kind of error by labeling a harmless waste stream as "hazardous." "Although real resources will be expended in battling harmless residues" in such cases,

these costs will not explicitly appear as items in EPA budgets and Congressional appropriations. Rather, they will be passed on to consumers in higher prices, lower real wages, and to investors in lowered rates of return on their capital. Those adversely affected are not likely to be aware of the cause of their loss or its extent.⁶⁴

Judicial scrutiny. In the realm of inter-governmental regulation, the Supreme Court has played an activist role. Although judicial review theoretically could limit both legislative and administrative policymaking, in practice "the record of judicial review of regulatory activity . . . is in many ways the record of failed attempts to interdict the progressive logic of regulation."⁶⁵

It is possible to point to a few areas in which the courts have applied a restraining hand—but these are comparatively few in number and quite limited in scope. Instead, the judicial branch has given the "green light" to many types of rules and regulations, and sometimes has prodded agencies and Congress into more forceful action, adding considerably to the sum total of regulation on its own. One observer commented that as the range of federal activities has enlarged,

as the number of programs funded by federal dollars has grown, as the courts have become more open to the complaints of citizen groups, *legal*, not political, action has become the chief means by which local officials are made to act in accordance with somebody's version of federal standards.⁶⁶

This judicial stance has persisted up to the present day, even though the Burger Court is generally regarded as more "conservative" than its predecessor, and despite a shift on the part of the Congress and the White House from regulatory expansionism to regulatory relief. The judiciary seems to be marching to a different drummer: "While the President moves to ease regulations and Congress isn't far behind, government regulators have won almost every case they had in the Supreme Court this term."⁶⁷ Indeed, from the stand-

⁵⁵See Advisory Commission on Intergovernmental Relations, **Protecting the Environment: Politics, Pollution, and Federal Policy**, Report A-83 (Washington, DC: U.S. Government Printing Office, 1981), pp. 23-25, 52.

⁵⁶Marcus, **Promise and Performance**, p. 97.

⁵⁷Harvey Lieber, **Federalism and Clean Waters** (Lexington, MA: D.C. Heath and Company, 1975), p. 193.

⁵⁸See Herbert Kaufman's discussion of "The Scapegoats" in **Red Tape**, pp. 23-28.

⁵⁹Radin, **Implementation, Change and the Federal Bureaucracy**, pp. 94-95.

⁶⁰Yaffee, **Prohibitive Policy**, pp. 108-9.

⁶¹See Timothy B. Clark, "Here's One 'Midnight Regulation' That's Slipped Through Reagan's Net," **National Journal**, February 7, 1981, pp. 220-4 and "Building Access: Cost No Barrier?" **Regulation**, September/October 1982, pp. 5-8.

⁶²Wilson, **Politics of Regulation**, p. 377.

⁶³*Ibid.*, p. 378.

⁶⁴Getz and Walter, "Environmental Policy," p. 406.

⁶⁵*Ibid.*, pp. 406-7.

⁶⁶Mashaw, "Regulation," p. 47.

⁶⁷James Q. Wilson, **American Government: Institutions and Policies** (Lexington, MA: D.C. Heath and Company, 1980), p. 63.

point of the states and localities, the federal judiciary can aptly be described as part of the problem as the accompanying article by Thomas J. Madden indicates.⁶⁸ Furthermore, the explosion of litigation challenging rules has made bureaucrats even more hypercautious and protective.

Enforcement: The Weakest Link

Federal regulations often appear to be extremely detailed, demanding, and intrusive. And so they are, when viewed in literal—or legal—terms. The practical effect, however, is very frequently much smaller than a reading of the fine print might suggest. When it comes to regulatory enforcement, Washington's monster often ends up looking like a paper tiger.

The environmental field, to cite an important example, is marked by extremely tough-minded and uncompromising statutes. Yet, "it appears that . . . regulation involving everything from drinking water to public lands management tends to break down at the point of enforcement."⁶⁹ With both the clean water and safe drinking water programs, EPA's enforcement actions have been found to be lacking or minimal and were neither as timely nor as effective as they should have been.⁷⁰ The federal-state pesticide control program has also been assessed as being enforced inadequately.⁷¹ A similar story may be told in field after field.⁷² As a general rule, then, federal intergovernmental regulations have proven difficult to enforce, and compliance has often been limited although it is probably better than one might expect, given the haphazard character of federal supervision.

This is not to say that such requirements are always ineffective. Desegregation of Southern schools in conformance with Title VI of the **Civil Rights Act** is a good example of regulatory accomplishment.⁷³ Unfortunately, school desegregation may be the "exception that proves the rule." Many Northern schools have be-

“ Sheer numbers provide one indication of the magnitude of the enforcement problems. There are some 32,000 potentially hazardous waste sites to be monitored, some 15,000 sewage treatment plants to be upgraded, nearly 300 species of plants and animals to be protected, and more than 3.5 million workplaces—with more than 40 million employees—to be inspected for health and safety. ”

come *more*, not less, segregated over this same period. Title VI has not achieved dramatic results in other kinds of federal assistance programs.⁷⁴ One study found that some federal agencies did not appear to know which of their programs were subject to the law and - sometimes did not know (and could not determine) if non-discrimination requirements were being carried out by their grantees.⁷⁵

Such shortcomings account for the Doctor Jekyll and Mr. Hyde reputation of the Office of Civil Rights (OCR) and many other federal regulatory agencies. OCR has been regarded as a hotbed of regulatory zealots by one set of critics and as a timid, lumbering bureaucracy by another. Both are probably correct because each is looking at a different aspect of the process:

Those who fault the agency's excessive zeal generally point to the ambitious reach of its formal regulations and official statements of policy—often without noticing that it has rarely enforced those demanding standards in practice. Conversely, OCR's constituents have directed the bulk of their criticism at its undeniably poor enforcement record. . . .⁷⁶

Administrative and technical infeasibility. One reason that regulatory efforts bog down at the enforcement stage has to do with the scope of the task. Washington's reach, to put matters bluntly, has often exceeded its grasp.

Sheer numbers provide one indication of the magnitude of the enforcement problem. There are some 32,000 potentially hazardous waste sites to be moni-

⁶⁸Stephen Wemeil, "Regulators Do Better Than Business in High Court Rulings This Term," *Wall Street Journal*, June 29, 1981, Section 2, p. 1. See also "Supreme Court Upholds Regulatory Powers," *Congressional Quarterly*, June 20, 1981, pp. 1115-16.

⁶⁹For another review of recent court cases affecting state and local governments, see Cynthia Colella, "The Supreme Court in 1982: Retelling the Tenth Amendment Death Knell?" *Intergovernmental Perspective*, Winter 1982, pp. 16-17.

⁷⁰"Enforcement May be Weakest Link in States," *Conservation Foundation Letter*, November 1980, p. 1.

⁷¹U.S. General Accounting Office, *Costly Wastewater Treatment Plants Fail to Perform as Expected* (Washington, DC: U.S. Government Printing Office, 1980) and U.S. General Accounting Office, *State's Compliance Lacking in Meeting Safe Drinking Water Standards* (Washington, DC: U.S. Government Printing Office, 1982).

⁷²U.S. General Accounting Office, *Stronger Enforcement Needed Against Misuse of Pesticides* (Washington, DC: U.S. Government Printing Office, 1981).

⁷³See for example, a report submitted to the U.S. Commission on Civil Rights by its 51 State Advisory Committees, *The Unfinished Business: Twenty Years Later . . .* (Washington, DC: U.S. Government Printing Office, 1977), p. 4, and U.S. General Accounting Office, "Unanswered Questions on Educating Handicapped Children in Local Public Schools," (Washington, DC: U.S. Government Printing Office, 1981), pp. 94-102.

⁷⁴See Gary Orfield, "Why It Worked in Dixie: Southern School Desegregation and Its Implications for the North," in *Race and Schooling in the City*, ed. Adam Y. molinsky, Lance Liebman, and Corinne S. Schelling (Cambridge, MA: Harvard University Press, 1981), pp. 24-44.

⁷⁵U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974* (Washington, DC: U.S. Government Printing Office, 1975), pp. 756-7.

⁷⁶U.S. General Accounting Office, *Agencies When Providing Federal Financial Assistance Should Ensure Compliance With Title VI* (Washington, DC: U.S. Government Printing Office, 1980).

tored, some 15,000 sewage treatment plants to be upgraded, nearly 300 species of plants and animals to be protected, and more than 3.5 million workplaces—with more than 40 million employees—to be inspected for health and safety. The vast majority of the nation's population is entitled to special protection against discrimination on the basis of race, ethnicity, sex, age or handicap in employment or in projects financed by some 400-odd federal aid programs. Moreover, these individuals, workplaces, species and dumps are scattered across a nation of continental proportions. It is no wonder that Washington has increasingly relied on state and local governments to carry out its regulatory policies. But even here there are 50 of the former and more than 80,000 of the latter.

In reality, then, the chances of a federal inspector knocking on your door are pretty small, whether you are a business owner, a public official, or a private citizen. Under OSHA, for example, the average workplace is likely to be inspected only once in several decades; this fact, some believe, accounts for its failure to have much impact on work-injury rates.⁷⁷ In dealing with grant recipients, federal agencies are forced to rely on program reports that often are

nothing more than sketchy, self-serving statements about the grantees' progress in achieving its goals and commitments. . . . Deficiencies could be spotted by on-site program reviews, but most grantees are never audited or inspected⁷⁸

And,

assessment of compliance with the national ambient air quality standards depends entirely upon a monitoring system that is in shambles. Methods are unreliable, siting is arbitrary, quality control is lax, and localities can manipulate the monitoring to serve their ends.⁷⁹

Sheer numbers, then, are a part of the problem. Indeed, in some cases "the number of entities may be so great as to make it difficult or impracticable for the regulator even to *identify*, much less regulate them all."⁸⁰ The handicapped education law, **PL 94-142**, offers an illustration. The Department of Education believes that there are about 6.2 million children requiring services under that act, but state screening efforts have identified only 3.9 million such students.⁸¹ Both sides contend that their total is the more accurate one.

The volume of regulations also can hamper enforcement and compliance because of inconsistencies in specific provisions or even because of conflicting aims.

⁷⁷Jeremy Rabkin, "Office of Civil Rights," in **The Politics of Regulation**, ed. James Q. Wilson (New York, NY: Basic Books, 1980), p. 305.

⁷⁸Albert L. Nichols and Richard Zeckhouser, "Government Comes to the Workplace: An Assessment of OSHA," **The Public Interest** 49 (Fall 1977), p. 53.

⁷⁹Richard B. Cappalli, **Rights and Remedies Under Federal Grants**, (Washington, DC: Bureau of National Affairs, 1979), pp. 65-66.

⁸⁰Lave and Omenn, **Cleaning the Air**, p. 46.

⁸¹Peter H. Schuck, "Regulation: Asking the Right Questions," **National Journal**, April 28, 1979, p. 712.

“Few agencies possess either the personnel or the funding levels necessary to effectively meet the standards anticipated—a shortcoming that may surprise those critics who believe that federal agencies are “bloated” with thousands of unnecessary bureaucrats.”

The former problem, that of inconsistency, has been a major problem with many crosscutting requirements. Agency interpretations of the same statutory language often differ markedly, and OMB lacks the authority to standardize them.⁸² Conflict arises when school districts are required to scatter ethnic students among local schools to achieve integration, but are forced to group them by language categories to comply with bilingual education rules. This kind of situation, observed one expert, can only result in poor state and local implementation of federal programs.⁸³

But numbers are only one administrative consideration. In many instances, specific statutes were enacted without much concern for future implementation and enforcement. In adopting the **Clean Air Act Amendments of 1970**, a Congressional desire for dramatic action led to a disregard of possible technical obstacles—including the question of whether national air quality standards could be attained under even the best circumstances.⁸⁴ The history of the program has been characterized as attempting to “implement policy beyond capability.”⁸⁵ Similarly, the **Clean Water Act** required municipalities to construct (or upgrade) wastewater treatment plants to meet national water quality goals, and more than \$28 billion dollars has been expended toward this objective. Yet many of the new plants have seldom or never worked as expected. Deficiencies in design account for many of these shortcomings.⁸⁶ Technical difficulties also have hampered the operation of lift-equipped buses intended to serve those in wheelchairs, and the health planning agencies mandated by federal law may well be quite incapable of controlling hospital costs.

Limited resources. Few agencies possess either the personnel or the funding levels necessary to effectively meet the standards anticipated—a shortcoming that

⁸²GAO, **Unanswered Questions**, pp. 8-28.

⁸³See Office of Management and Budget, “Proposed Circular on Managing Generally Applicable Requirements for Assistance Programs,” **Federal Register**, November 7, 1980, Part VIII, p. 74416.

⁸⁴Lorraine McDonnell and John Pincus, **Federal Aid to Education: An Intergovernmental Perspective** (Santa Monica, CA: Rand, 1977), pp. 18-19.

⁸⁵ACIR, **Protecting the Environment**, p. 52.

⁸⁶Charles O. Jones, **Clean Air: The Policies and Politics of Pollution Control** (Pittsburgh, PA: University of Pittsburgh Press, 1975), pp. 211-75.

In its study, **Regulatory Federalism: Policy, Process, Impact and Reform**, the Advisory Commission on Intergovernmental Relations examines and seeks to explain the growth and operation of new forms of intergovernmental regulation. As a result, the Commission urges a series of corrective measures to reduce the regulatory burden and to restore a sense of balance to American federalism. The Commission's reform agenda does not address the goals of major intergovernmental regulatory programs—goals that are, for the most part, unassailable—but challenges the means chosen to achieve them.

General Operational Principles

Changes in intergovernmental regulation over the past two decades convinced the Commission of the need to establish criteria Congress can use in determining appropriate scope and methods of federal regulation over the state and local activities.

The Commission therefore recommends that, as a general principle, the federal government strive to confine its regulation of legitimate state and local government activities to the minimum level consistent with compelling national interests. Enactment of federal intergovernmental regulation may be warranted to:

- 1) protect basic political and civil rights guaranteed to all American citizens under the Constitution;
- 2) ensure national defense and the proper conduct of foreign affairs;
- 3) establish certain uniform and minimum standards in areas affecting the flow of interstate commerce;
- 4) prevent state and local actions which substantially and adversely affect another state or its citizens; or,
- 5) assure essential fiscal and programmatic integrity in the use of federal grants and contracts into which state and local governments freely enter.

Even when these criteria are met, however, the Commission warns that federal intergovernmental regulation is warranted only when a clear and convincing case has demonstrated both the necessity for such intervention and a marked inability of state and local governments to address the regulatory problem involved.

Further, when it has been determined that the national government's involvement in a regulatory area is appropriate, the Commission urges that the national government choose the least intrusive means of intergovernmental regulation consistent with the national interest, allowing state and local governments the maximum degree of flexibility permissible.

ACIR developed these operational guidelines to encourage Congress to "stop and think" before it passes legislation regulating state and local governments. To further encourage careful deliberation, the Commission recommends that Congress establish a system that guarantees full federal reimbursement to state and local governments for all additional direct expenses legitimately incurred in implementing new federal statutory mandates. Congress took a step in this direction when it enacted the **State and Local Cost Estimate Act of 1981** that established a "fiscal note" process detailing the anticipated state and local financial costs of federal legislation. Taking the second step, reimbursing mandated costs, would slow regulatory proliferation, particularly during this period of high federal deficits.

The Federalism Context

The founders of the U.S. Constitution established a federal system as a fundamental institutional arrangement. The division of authority between the national government and the states was regarded as critical in designing a Constitutionally limited government. In the Commission's view, these relatively new forms of federal intergovernmental regulation raise serious questions about the Constitutional limits of national authority.

To remedy this problem, the Commission recommends that the national legislative, executive and judicial branches reassess the legal doctrines that delimit the boundaries of national Constitutional authority vis-a-vis the reserved powers of the state.

Specifically, the Commission looked at current interpretations of the commerce and spending powers as they apply to the newer and more intrusive forms of federal regulation.

Direct orders. Because direct orders—although rarely used—directly pit the legal authority of Congress against the rights of the states, they raise the most serious Constitutional issues and are the only one of the relatively new regulatory techniques that has thus far been limited by the Supreme Court. In 1976, the Supreme Court partially invalidated extending the direct order that applied the wage and hour provisions of the **Fair Labor Standards Act** amendments to state and local employees. In its landmark decision, **National League of Cities v. Usery**, the Court held that "Congress may not exercise its power to regulate commerce so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral government functions are to be made." Subsequently, however, the Department of Labor classified eight state and

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local functions as "non-traditional" and therefore subject to FLSA provisions. The Commission finds that certain of these so-called non-traditional functions are "integral" state and local activities and recommends that the Labor Department's rules (direct orders) be rescinded.

Further, because several recent Supreme Court decisions and many lower court judgments have eroded the basic Tenth Amendment principles expressed in NLC, the Commission hopes that the federal judiciary will revive and expand upon the principles embodied in the NLC case, especially those addressing the "basic attributes of state sovereignty" and the "integral functions" of state and local governments.

Partial preemptions. In recent years, the federal government has turned increasingly to the partial preemption device to achieve regulatory goals. The partial preemption device, theoretically based on the concept of "cooperative federalism," has been accepted by the Supreme Court as a proper exercise of the national government's power to regulate interstate commerce without abridging the Tenth Amendment. In practice, however, partial preemption programs have been a source of intergovernmental conflict, rather than encouraging the cooperation they were supposed to foster. To improve their operation, the Commission recommends that, where the states are expected to assume a co-regulatory role, the Congress and the President provide a system for improved consultation and coordination between the states and the national government.

To assure that opportunities for state participation are extended on a truly voluntary and cooperative basis, the Commission further recommends that states be authorized to elect the option of direct federal administration without incurring any other legal or financial penalty.

Finally, the Commission recommends that, in those few program areas in which rigid, uniform national standards and implementation systems are clearly necessitated, the Congress consider full federal preemption, standard-setting, and administration, allowing the state administration under contract.

Crossover sanctions. The Commission recommends that Congress repeal the provisions of grant statutes that authorize crossover sanctions. The Commission believes that crossover regulatory techniques exceed the proper limits of the Congressional spending power because they go beyond the traditional quasi-contractual relationship embodied in the grantor-grantee arrangement. The Commission recognizes that crossover sanctions have been upheld in federal courts, but deems the legal doctrines on the federal spending power developed in the 1920s and 1930s (and still referred

to in recent cases) no longer adequate for today's complex web of intergovernmental fiscal transfers. Crossover sanctions, the Commission finds, violate the spirit—if not also the legal foundations—of cooperative federalism.

Crosscutting requirements. Because crosscutting requirements apply nearly universally to grant programs, they have created significant administrative and fiscal burdens on state and local governments. Many of these requirements address important national goals—yet there is a need to ensure that they advance these goals effectively and do not outlive their usefulness. Therefore, the Commission recommends that the President and Congress examine all applicable statutes and regulations and modify or eliminate, by statutory action where necessary, crosscutting requirements that have been proven excessively burdensome, impracticable or no longer worth the effort to implement.

Further, the Commission reiterates its support for assigning each crosscutting requirement to a single federal agency and for standardizing compliance guidelines for all affected federal agencies.

Consultation and Flexibility

Regulatory reform, in the Commission's view, requires that state and local concerns be appropriately weighed at each step in the regulatory process. Therefore, the Commission proposes a series of changes to increase state and local participation in the rulemaking process and to ensure flexibility in implementing federal rules, including:

- amending the **Federal Advisory Committee Act** to exempt state and local elected officials—and their representative organizations—from its restrictive provisions;
- requiring that any proposed rule may be evaluated for its economic and noneconomic effects on the state and local governments.

To provide greater flexibility for state and local governments when complying with federal regulations, and to reduce unnecessary duplication, the Commission recommends that state and local regulations, procedures, recordkeeping and reporting requirements be more frequently certified as meeting federal standards.

Further, the Commission recommends fully considering alternative means of regulation when implementing federal legislation that regulates state and local government activities. Alternative regulatory means include performance standards, special provisions for small governments, marketable rights, economic incentives, and compliance reforms.

may surprise those critics who believe that federal agencies are "bloated" with thousands of unnecessary bureaucrats. In fact, the growth of national responsibilities has greatly outpaced the rise in federal personnel, in both regulatory areas and others. To cite just one case, EPA regional offices have lacked adequate staff to authorize, review and monitor state hazardous waste programs, according to a GAO analysis. EPA officials themselves indicated that they would require from four to six times the number of aides to carry out their responsibilities effectively.⁸⁷

Similar observations could be made about staffing shortfalls for a great many other environmental, civil rights and health regulation programs. And these shortfalls are not surprising, given the budgetary constraints of the past half-decade, as well as the traditional Congressional opposition to enlarging the federal workforce.⁸⁸ Finally, although a "crisis" may precipitate strong regulatory action, continuing support may be hard to maintain when the crisis atmosphere has subsided.

Sheer personpower is one consideration; expertise is another. Inadequate training and a lack of specialized knowledge have also been identified as obstacles to federal monitoring and enforcement.⁸⁹

A lack of adequate resources may also keep state and local governments from meeting regulatory standards. In a comprehensive survey of five major programs, the GAO found that state environmental agencies are plagued by staffing problems and budgetary difficulties.⁹⁰ Because of comparatively low salaries, states cannot compete successfully in the marketplace for professional engineers. Consequently, program continuity is hampered by high levels of turnover and staff vacancies. Although Washington provides grant funds to help implement many environmental programs, uncertainties about federal funding levels make program planning difficult, and annual program grants are often issued late, sometimes resulting in the termination (or threatened termination) of state employees.

A lack of resources also has limited compliance with the requirements of the **Education for All Handicapped Children Act, PL 94-142** required that an "appropriate education" be made available to *all* handicapped children by September 1, 1978. However, a shortage of funds needed for personnel, space and supplies has been the principal barrier to full implementation. Federal grants have been significantly below au-

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thorized amounts, and most state education funding is not increasing rapidly enough to serve all handicapped children in the near future.⁹¹

Small jurisdictions, in particular, are hindered by a lack of resources. For example, the development of new sewage treatment plants by small communities has been difficult, GAO found because

the sewer district officials were primarily local residents having little or no sewer system expertise. Many of these officials were highly frustrated by the lack of state and EPA help with their construction efforts. Unfortunately, state and EPA officials typically do not have time to help small communities.⁹²

Political liabilities. Enforcement and compliance also may be hindered by political considerations. Although the objectives of a program may be popular, the threat or imposition of sanctions almost universally is not. No one—from a member of Congress to the mayor or the proverbial "man in the street"—likes to hear that his or her community is about to lose education, highway or other grant funds. History clearly shows that such penalties are very seldom imposed.⁹³

It is understandable that few federal officials relish being tough enforcers, even when their own personal commitment to program goals may be strong. Because they depend upon state and local governments to achieve their agency's mission, federal officials need to maintain some kind of a working partnership. Harsh sanctions undermine the bonds needed to make programs work and, if they result in grantee withdrawal, can totally frustrate national objectives. Furthermore,

whenever a fiscal sanction is imposed the individual program beneficiaries are the losers. . . . The paradox is, of course, that the grantor has ended up punishing the very persons that it sought to aid through the federal standards and enforcement.⁹⁴

⁸⁷GAO, *Costly Wastewater Treatment Plants*.

⁸⁸U.S. General Accounting Office, *Hazardous Waste Management Programs Will Not Be Effective: Greater Efforts Are Needed* (Washington, DC: U.S. Government Printing Office, 1979), p. 11.

⁸⁹Advisory Commission on Intergovernmental Relations, *An Agenda For American Federalism: Restoring Confidence and Competence*, Report A-86 (Washington, DC: U.S. Government Printing Office, 1981), p. 6.

⁹⁰See, for example, U.S. General Accounting Office, *Health Systems Plans: A Poor Framework For Promoting Health Care Improvements* (Washington, DC: U.S. Government Printing Office, 1981), p. 18, and Fishel and Pottker, *National Politics and Sex Discrimination*, p. 131.

⁹¹U.S. General Accounting Office, *Federal-State Environmental Programs—The State Perspective* (Washington, DC: U.S. Government Printing Office, 1980), pp. 56-80.

⁹²GAO, *Unanswered Questions*, pp. 71-78.

⁹³U.S. General Accounting Office, *EPA Should Help Small Communities Cope With Federal Pollution Control Requirements* (Washington, DC: U.S. Government Printing Office, 1980), p. 18.

⁹⁴An earlier ACIR survey found that, of 264 federal aid administrators responding, only 26% had actually withheld funds from a state or local government because of a lack of compliance with program requirements during the previous five years. See Advisory Commission on Intergovernmental Relations, *The Intergovernmental Grant System as Seen by Local, State, and Federal Officials*, Report A-54 (Washington, DC: U.S. Government Printing Office, 1977), p. 196.

In the **Clean Air and Clean Water Acts** as well as certain other regulatory programs, federal requirements are backed by a dual sanction. The threat of withholding funds is tied to federal assumption of state program implementation. But federal officials are reluctant to take this step because (in the case of EPA, for example):

withdrawing federal aid places EPA officials in the position of performing pollution control activities for the states when EPA is no better equipped with adequate resources (funds and personnel) than the states and is certainly ill-equipped to deal politically with either governmental or private polluters in the states. If EPA officials had to carry out pollution control and abatement for a state, it would slow down activities both in the state and nationally, because EPA officials would have to put aside their own work to do the state's work.⁹⁵

Perversely, as these comments might imply, the larger the sanction, the more damage may be done to programmatic goals; hence, the less likely it is to be imposed. This same principle lies behind nuclear deterrence, giving rise to what some program analysts describe as the "atom bomb" effect.⁹⁶ Initially, the 55 mph speed limit law required withholding *all* construction grants from non-complying states. In practice, the economic and political repercussions of such a funding cut-off would be so severe that state officials regarded the provision as an "empty threat." Still, it was a threat they resented. GAO recommended that enforcement would be improved if the law took a more cooperative approach,⁹⁷ and the penalty was in fact reduced in 1978. In the case of the **National Health Planning Act**, many states appear to have gone along with federal requirements simply to avoid losing public health grants, but without making a real commitment to the success of the program. Some analysts believe that Washington would be better off encouraging, rather than coercing, state participation.⁹⁸

As a general rule, it is probably true that federal officials have a stronger commitment to the principal objectives of their programs than to the multitude of secondary goals added on through crosscutting and other kinds of new regulatory requirements. Highway officials, for example, might reasonably be expected to be more concerned with building and maintaining the nation's roads than with worrying about whether contractors have an appropriate race-age-sex mix among their employees, or whether a new road might damage an interesting archeological site, or whether traffic

“ Over the past decade or more, the nation has undertaken a new experiment in social policy and entered a new stage in its intergovernmental relationships. ”

loads will add to air pollution, or if a particular state has removed enough of its billboards or is enforcing the 55 mph speed limit adequately. The simple fact, as OMB has stressed, is that requirements of these kinds compete with an agency's primary mission for limited amounts of time, manpower and funds.⁹⁹

Finally, federal officials, being political creatures, cannot afford to ignore the possible impact of tough actions on their status and careers. Enforcement of school desegregation in the North ran aground when the Office of Education, in 1965, threatened to cut off grant funds to the City of Chicago. As the story goes, Mayor Daley—then one of the nation's most powerful local political leaders—threatened to pull Congressional votes from the **Highway Beautification Act** (which was one of Lady Bird Johnson's favorite programs) if the sanctions were imposed.¹⁰⁰ President Johnson barred OE action, showing that

political pressure could be used to stop desegregation efforts. School districts could push resistance to federal implementation outside the education profession. . . . The message was clear: . . . If HEW officials did not want to be burned, they were wise to handle the northern and western states with care and some distance.¹⁰¹

Lessons Learned

Over the past decade or more, the nation has undertaken a new experiment in social policy and has entered a new stage in its intergovernmental relationships. In the late 1960s, and through at least the mid-1970s, Washington turned increasingly to programs based more upon the "stick" of regulation rather than the "carrot" of financial subsidy in its dealings with state and local governments.

How has this effort succeeded? Measurement of results is very difficult. But, if any credence is given to the many program reviews summarized in this article, and examined in far more detail in the Commission's study, the answer is "not very well." Many intergovernmental regulatory programs, to summarize briefly, tend to be overly detailed, poorly enforced and slow to get off the ground. Consequently, almost no

⁹⁵Cappalli, **Rights and Remedies**, p. 86.

⁹⁶Robert D. Thomas, "Intergovernmental Coordination in the Implementation of National Air and Water Pollution Policies," in **Public Policy Making in a Federal System**, ed. Charles O. Jones and Robert D. Thomas (Beverly Hills, CA: Sage Publications, 1976), p. 131.

⁹⁷Rabkin, "Office of Civil rights," p. 1.

⁹⁸U.S. General Accounting Office, **Speed Limit 55: Is It Achievable?** (Washington, DC: U.S. General Accounting Office, 1977).

⁹⁹William J. Waters and John T. Tierney, "Health Planning: The Next Step," **New England Journal of Human Services** (Spring 1982), p. 40.

¹⁰⁰OMB, **Managing Federal Assistance**, p. A-3-2.

¹⁰¹Radin, **Implementation, Change**, p. 62.

one—including the advocates and opponents of federal efforts—is satisfied with the final product. A good summary of experience is reflected in a critique by the executive director of the Sierra Club, one of the largest and most active environmental organizations:

What I think is clear as the '80s began is that the country has not yet translated either our beliefs or our programs into tangible results. We have lots of laws on the books. We have a great many people working on programs with billions of dollars being spent, but the pattern of results is still very spotty. One can point to limited success in terms of improving air and water quality, . . . but we've probably moved only 15% to 30% of the way toward our goal. On some issues, such as hazardous waste dumps and toxic chemicals, we are still pretty much spinning out words with very little tangible action.¹⁰²

Of course, assessments do differ from program to program and area to area. But, most are mixed at best. One of the most positive is offered in the National Advisory Council on Women's Educational Programs, which compares Title IX to a glass that is "half full or half empty, depending upon one's outlook."¹⁰³ At the other extreme, the **Highway Beautification Act** has "largely been a failure" in the view of even its strongest supporters.¹⁰⁴

At the same time, state and local governments continue to protest the fiscal burdens of meeting federal requirements. They cite "nit picking" rules poorly suited to their own, often quite varied, circumstances. They challenge (both in and out of court) federal regulations that have stretched the Constitutional commerce and spending powers and statements of statutory intent to or beyond the breaking point, while seriously constraining the scope of the Tenth Amendment. The old ideal of cooperative federalism has too often been replaced by new patterns of attempted coercion and protracted conflict. Thus, a new critique, rooted in considerations of intergovernmental relations, must be added to the already voluminous criticism of regulatory performance.

Although federal intergovernmental regulation does have a role to play in national affairs, such programs need to be designed with great care if they are to work effectively. In addition, existing programs require careful review and scrutiny by both the Congress and the Executive Branch. To this end, the Commission in December 1982, adopted a series of twelve recommendations offering both general guidelines and some specific prescriptions for reform (see box, pages 18-19).

¹⁰²*Ibid.*, p. 15.

¹⁰³Frances Gendlin, "A Talk With Mike McCloskey," *Sierra*, March/April 1982, p. 39.

¹⁰⁴National Advisory Council on Women's Educational Programs, **Title IX: The Half Full, Half Empty Glass** (Washington, DC: U.S. Government Printing Office, 1981).

¹⁰⁵Charles F. Floyd, "Billboard Control Under the Highway Beautification Act—A Failure of Land Use Controls," *American Planning Association Journal* 45 (April 1979), pp. 115-26.

“ A regulatory maze grown too large and intricate wastes resources that otherwise could be devoted to attaining priority national goals. ”

If there is a silver lining in this otherwise generally dark cloud, it is that it may well be possible to make changes that will both improve program performance and reduce state and local objections to federal heavy-handedness. A regulatory maze grown too large and intricate wastes resources that otherwise could be devoted to attaining desired national goals.

Regulatory relief and reform efforts are presently under way in both the Administration and on Capitol Hill. Because state and local governments now bear much of the burden of regulatory implementation, they must be considered full partners in these deliberations. Furthermore, many jurisdictions are now strongly committed to protecting civil rights, the environment, and to achieving other objectives that once were entrusted chiefly to Washington. With close attention to the shortcomings in past performance, we might devise a more collaborative approach to intergovernmental regulation that would improve results and be more consistent with the best traditions of American federalism.

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The Courts and the Administration: Marching to Different Drummers

by Thomas J. Madden and
David H. Remes

During the past year, the Administration continued its efforts to transfer authority for federal grant administration to state and local governments. One purpose of these efforts is to lighten the obligations of federal grantees. At the same time, however, the federal courts have—almost without exception—continued to interpret federal substantive law in a manner that extends and intensifies those obligations.

As this article will discuss, a number of recent federal court decisions drew the grant law issue sharply into focus. Put succinctly, the problem is that the federal judiciary and the federal executive branch are marching to different drummers.

Four Categories of Grant Law Decisions

The most noteworthy recent judicial decisions in federal grant law may be broadly divided into four categories. First are those cases that define the reach of federal law—that is, who is benefitted or burdened. Second are the cases that declare who may invoke the federal judicial power to enforce federal assistance legislation. Third are the cases defining the specific obligations imposed by federal grant law. And fourth are the cases that bear directly on federal-state relations in federal grant administration.

Who Benefits and Who Is Burdened— Expanding the Universe

In the first category of cases—those defining who is benefitted or burdened—five decisions seem worthy of comment.

In *Grove City College v. Bell*, a federal appeals court held that a Title IX ban on sex discrimination applied to an institution of higher education because its *students* were the beneficiaries of federal grants.¹ The court concluded that the private coeducational institution was a “recipient” of federal financial assistance within the meaning of the federal law, even though the assistance was received indirectly through its students. The school itself, it should be noted, had refused all federal assistance! Similarly, in *North Haven Board of Education v. Bell*, the Supreme Court last spring held that the same federal law bars gender-based discrimination against employees as well as against students in programs or activities that receive or benefit from federal funds.²

These two cases are striking in their non-obvious applications of anti-discrimination principles embodied in federal law. Further, the aggressive application of an anti-gender-bias law contrasts with the more restrained approach of Title VI race-discrimination cases—perhaps a reminder of the different lengths to which Congress is thought to have gone to withhold the stamp of its approval from gender discrimination, on the one hand, and racial discrimination, on the other.

Another, more striking, extension of federal benefits and burdens to unexpected parties came in *United States v. Hinton*, in which a federal appeals court held that the employees of a private nonprofit corporation receiving federal funds as a subgrantee under the *Housing and Community Development Act of 1974* qualified as “public officials” within the meaning of a

¹687 F.2d 684 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983). In this case, the roles of “beneficiary” and “grantee” were, in effect reversed: the school, although it may be viewed here as a “third-party beneficiary” of federal assistance, was made to assume the responsibilities normally borne by a direct grantee.

²102 S. Ct. 1912 (1982).

federal bribery law.³ The court noted that the salaries paid by the corporation to the defendants derived directly from the City of Peoria (which had awarded the corporation a contract to administer the housing rehabilitation funds). But the court concluded that the employment of the defendants by the state subdivision "[did] not preclude a determination that they were acting on behalf of the United States."

The decision in **Hinton** contrasts rather sharply with another case decided last year by the Supreme Court—**Blum v. Yaretsky**. In that case, the Court considered whether certain actions taken by private nursing home administrators and attending physicians in homes housing Medicaid patients constituted "state actions" under the Fourteenth Amendment. The "state action" doctrine, in essence, holds that any individual may be sued for violating Fourteenth Amendment rights, whether or not that individual is actually *employed* by a state government or one of its political subdivisions, if that individual's conduct may fairly be imputed, for one reason or another, to the state itself. In contrast to the courts' readiness in **Hinton** to find that the employees there were "public officials," the Court in **Blum** held that decisions of the nursing home personnel to discharge or transfer Medicaid patients did not constitute "state action." The Court reasoned that "the mere fact that a private business is subject to state regulation does not by itself convert [the companies'] action into that of the State for purposes of the Fourteenth Amendment."⁴

One may wonder whether the same administrators and physicians whose actions were deemed *not* to constitute "state action" in **Blum** would be considered to be "public officials" for purposes of the federal bribery laws under **Hinton**. **Hinton** says that you may be considered a federal official if you are a private subcontractor doing business with a state political subdivision on a federally-funded project. This result surely surprised those who were taught that criminal statutes are to be narrowly construed. The decision seems especially surprising in light of the Supreme Court's 1976 holding in **United States v. Orleans** that the **Federal Tort Claims Act**—making the United States liable for the common law torts of its employees—does *not* "reach employees or agents of all federally funded programs that confer benefits on people."⁵

More predictable was the federal appeals court decision last year in **Kramer v. New Castle Area Transit Authority**. There the court held that a local transit authority receiving funds under the **Urban Mass Transportation Act of 1964** was subject to the wage and hour provisions of the **Fair Labor Standards Act (FLSA)**.⁶ This decision was to be expected in light of **National League of Cities v. Usery** and **United Transportation Union v. Long Island Rail Road (LIRR)**. In **Usery**, the Supreme Court had held that the Tenth Amendment barred the application of the

provisions of **FLSA**—an exercise by Congress of its constitutional power to regulate interstate commerce—to employees of states and their political subdivisions who were engaged in traditional government functions.⁷ But the Court held in **LIRR** that the operation of mass transit systems "is not among the functions traditionally performed by state and local government."⁸ (See boxed article on page 27 of this **Perspective**.)

Thus, the decision in **Kramer** was plainly preordained. Nevertheless, one may perhaps be excused for breathing a small sigh of regret that the case did not present the appeals court with an occasion to confront a significant issue—the question left open by **Usery** as to whether Congress could indeed, in authorizing mass transit grants, have achieved under its power to control federal spending, or under its power to enforce the Fourteenth Amendment, what it might not accomplish in the exercise of the commerce power, the use of which was struck down in **NLC**. We may never learn the answer to this question, however, for in March of this year the Supreme Court all but overruled **Usery**, holding in **EEOC v. Wyoming** that a federal law barring age discrimination in employment does not impair a state's ability to structure integral operations in areas of traditional governmental functions.⁹ (See boxed article on page 26 of this **Perspective**.)

Broadening the Right to Sue

The continued general extension of federal assistance statutes to benefit or burden unexpected parties was mirrored in 1982 by several decisions that further broaden the right to seek federal judicial enforcement of federal aid legislation. For example, at least two decisions last year held that beneficiaries of federal assistance need not look to the relevant aid statute itself to find a right to sue for judicial redress of alleged violations of the law. These cases held that such parties may bring suit instead under the Fourteenth Amendment, Section 1983, or other federal civil rights laws. The Fourteenth Amendment, as noted above, forbids state action that violates the guarantees of equal protection or due process, and Section 1983 bars state action that violates federal constitutional or statutory law.

This broader interpretation was the result, most notably, in **Balf Co. Inc. v. Gaitor**, where a federal district court held that a private corporation may sue under Section 1983 to enforce its rights under a federal highway grant program.¹⁰ The court ruled that the corporation could sue under Section 1983 without establishing that it had an implied right to sue under the statute setting up the grant program itself—if the corporation could show that it was deprived of a right secured under the joint federal-state cooperative highway program, and that it was an intended beneficiary of the program. **Gaitor** bears out the prophecy of Supreme Court Justice Lewis Powell that litigation will burgeon

³683 F.2d 195 (9th Cir.), *cert. granted*, 103 S. Ct. 567 (1982).

⁴102 S. Ct. 2777 (1982) cited at 50 *LW* 4859.

⁵42 U.S. 807 (1976).

⁶677 F.2d 308 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 786 (1983).

⁷426 U.S. 833 (1976).

⁸102 S. Ct. 1349 (1982).

⁹51 U.S.L.W. 4219 (U.S. Mar. 1, 1983).

¹⁰534 F. Supp. 600 (D. Conn. 1982).

if Section 1983 is allowed to serve as a veritable "font" of constitutional tort claims."¹¹

Comparable problems may be suggested by a federal appeals court decision last year in **Hudson Valley Freedom Theatre, Inc. v. Heimback**, holding that a grantee may sue county officials under the Fourteenth Amendment and under federal civil rights legislation for denying the grantee's application for CETA funds, even though no such right of action is available under the CETA legislation itself.¹² Expansion of the right to sue was also evident in **Council of Large Public Housing Authorities v. HUD**, in which a federal district court tacitly held that the **United States Housing Act of 1937** confers upon an organization representing governmental units that are direct beneficiaries under the act an implied right to sue the Department of Housing and Urban Development.¹³ To allow such a representative organization to sue is in some real sense to recognize a *new* class of beneficiary. Given the leverage over a federal agency that is conferred upon a party simply by virtue of the party's ability to sue the agency, the decision to expand further the right to sue is of no small moment.

Decisions such as these may well prove to be the rule, rather than exceptions, in coming years. The tendency to resort to the courts is encouraged by every decision that recognizes new remedies for alleged violations of federal grants laws, or makes existing remedies more readily available. One decision of the latter type was the federal appeals court ruling in **Miener v. Missouri** that individuals may sue for alleged discrimination *without regard to prior resort to administrative remedies* under Section 504 of the **Rehabilitation Act of 1973**, as well as under the **Education for All Handicapped Children Act of 1975**.¹⁴

Needless to say, resort to the courts is nothing to be decried where the wrongs alleged are violations of the constitutional rights of those upon whom the framers of the Constitution feared temporary political majorities would be tempted to prey. Rather, criticism arises in the grant law area because all too often those who have *won* in the political arena—namely, the beneficiaries or recipients of federal grants—are turning ever more quickly to the federal courts to enforce their gains.

Such reliance on the federal courts will only be encouraged by such decisions as **Nunez v. Bergland**.¹⁵ There, the federal appeals court awarded attorney fees to plaintiffs' counsel under Section 1988, even though the case had been *mooted* by subsequent legislation—because the court considered the plaintiffs' suit a spur to the legislative reform.

To be sure, it is the intent of Congress, as perceived by a federal court, that is responsible for such results as these. But it is only natural to question how much longer the federal judiciary can withstand the increasing burden before the system "literally break[s] down," as Chief Justice Warren E. Burger has warned it is in danger of doing.¹⁶ In such an event, the deeper mission of our federal courts—protecting those least able to fend for themselves in our political system—could be sacrificed as well.

Defining State-Local Obligations: The Court Exercises Caution

As the foregoing discussion suggests, most of the decisions handed down in the recent past appear to broaden the application of federal grant statutes. In its 1981 decision in **Pennhurst State School and Hospital v. Halderman**, however, the Supreme Court pointedly injected caution in the federal judicial decisionmaking process.

In **Pennhurst**, the Supreme Court declared, in essence, that it must not be too lightly assumed that Congress has imposed burdensome obligations on recipients of federal funds in a given case: an explicit expression of an intention to do so must be found. Such caution was most conspicuous in **Board of Education v. Rowley** in which the Supreme Court itself last term held that a hearing-impaired child was not entitled to a sign language interpreter for all of her academic classes, notwithstanding the **Education for All Handicapped Children Act's** mandate of "free appropriate public education."¹⁷ Justice Rehnquist, writing for the Court, concluded that this reading of the Act followed from the Court's approach in **Pennhurst**.

The exercise of such caution, of course, does not necessarily leave parties claiming discrimination out in the cold. Thus, in **Dopico v. Goldschmidt**, a federal appeals court held that federal law in fact *did* require grantees to assume certain affirmative remedial obligations under the **Rehabilitation Act of 1973**.¹⁸ The court concluded that Section 504 of the 1973 act requires local and federal authorities administering federal aid to urban mass transit programs to take "modest, affirmative steps" (emphasis added) to make mass transit accessible to wheelchair-bound individuals. This decision—that the Court was careful to reconcile with **Rowley**—is especially significant in view of previous decisions that had held more fundamental and costly affirmative steps beyond the scope of Section 504.

If the influence of **Pennhurst** is being felt in such cases as **Rowley** and **Dopico**, the question remains whether **Pennhurst's** teaching will carry over to the other categories of cases discussed above—those in-

¹¹Powell, "Are the Federal Courts Becoming Bureaucracies?" 68 *A.B.A.J.* 1370, 1371 (1982).

¹²671 F.2d 702 (2d Cir.), *cert. denied*, 103 S. Ct. 127 (1982).

¹³No. 82-1210, slip op. at 4-6 (D.D.C. July 16, 1982), *appeal dismissed per stipulation*, No. 82-2068 (D.C. Cir. Feb. 7, 1983).

¹⁴673 F.2d 969 (8th Cir.), *cert. denied*, 103 S. Ct. 215 (1982).

¹⁵Nos. 79-1704/05, slip op. at 7-8 (10th Cir. Aug. 3, 1981), *cert. denied*, 102 S. Ct. 1452 (1982).

¹⁶Remarks by Warren E. Burger, Chief Justice of the United States, at Arthur T. Vanderbilt Dinner sponsored by New York University and the Institute of Judicial Administration, New York, New York, November 18, 1982, p. 10.

¹⁷102 S. Ct. 3034 (1982).

¹⁸687 F.2d 644 (2d Cir. 1982).

EEOC v. Wyoming: Whither the NLC Defense?

Congress may not exercise its power to regulate commerce so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.

So ruled the Supreme Court of the United States nearly seven years ago in **National League of Cities v. Usery (NLC)**. Greeted at the time with considerable enthusiasm by state and local officials, NLC was heralded as the long-awaited resurrection of the Tenth Amendment and as a means to ending national, commerce-based forays into the fundamental decision making processes of subnational governments. For those who so viewed the case, the intervening years have not been kind.

In 1981, the Court made clear its intention that NLC defenses would not easily stand when it fashioned from NLC a fairly stringent three-pronged test, *each* portion of which a jurisdiction's claim must meet in order for it to invalidate Congressional legislation based on the commerce power:

- First, there must be a showing that the challenged statute regulates the "States as States;"
- second, the federal regulation must address matters that are indisputably "attributes of state sovereignty;" and,
- third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

Thereafter, in case after major case the Court struck down NLC-type defenses—defenses invoked over surface mining regulations (**Hodel v. Virginia Surface Mining and Reclamation Association**, 1981); over the right to strike by public employees (**United Transportation Union v. Long Island Rail Road**, 1982); and over the regulation of public utilities (**FERC v. Mississippi**, 1982). Though increasingly disappointed, NLC enthusiasts were not yet fully daunted. Full-fledged discouragement, however, may well be warranted following the Court's decision of March 2, 1983.

In **Equal Employment Opportunity Commission (EEOC) v. Wyoming** the Court considered a challenge to the 1974 amendments to the **Age Discrimination in Employment Act (ADEA)**. Those amendments expanded the definition of "employer" to include state and local governments. Accordingly, it became unlawful for states or their

political subdivisions to discriminate against employees or potential employees between the ages of 40 and 70 solely on the basis of age, except in instances where age is a "bona fide occupational qualification." For all practical purposes, then, a decision to retire a state or local employee prior to age 70 must be made on an individualized, case-by-case basis.

At issue in **EEOC v. Wyoming** was the ADEA-based complaint of a state game warden whose continued employment after age 55 was conditioned under Wyoming law upon "the approval of [his] employer"—in other words, a mandatory retirement law of the sort used by more than half the states in regulating the employment of public safety officers. Wyoming responded that the extension of ADEA to state governments violated the Tenth Amendment because it "regulates the states as states, attempts to regulate the conditions of employment of state employees, and will lead to the restructuring of the retirement system for [certain employees]." The U.S. District Court for Wyoming agreed with the state's contention and the case was appealed to the Supreme Court.

In a 5-4 decision requiring four separate opinions, the Court ruled that "[t]he extension of [ADEA] to cover state and local governments is a valid exercise of Congress' powers under the Commerce Clause . . . and is not precluded by virtue of external constraints imposed on Congress' commerce powers by the Tenth Amendment." Conceding that the management of state parks "is clearly a traditional state function" and that ADEA does indeed "regulate the States as States," the Court nonetheless based its decision on a finding that the state failed to demonstrate that the law would directly impair its ability to structure integral operations:

We conclude that the degree of federal intrusion in this case is sufficiently less serious than it was in **National League of Cities**. . . . [T]he Act requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case, but it does not require the State to abandon those goals, or to abandon the public policy decisions underlying them.

Thus, the Court hinged its decision on the *degree of federal intrusiveness* as opposed to the simple *fact of federal intrusiveness*.

Writing the lead opinion for the dissent, the Chief Justice branded the decision "the antithesis of what

the authors of the Constitution contemplated for our federal system”:

The reserved powers of the states and Justice Brandeis' classic conception of the states as laboratories . . . are turned on their heads when national rather than state governments assert the authority to make decisions on the age standard of state law enforcement officers . . . Nothing in the Constitution permits Congress to force the states into a Procrustean national mold that takes no account of local needs and conditions.

Perhaps, however, the most interesting opinion was that written by Justice Stevens concurring with the Court. Deploring the original NLC decision as “pure judicial fiat,” Stevens called for the plain

rejection of the 1976 ruling on the grounds that it was “inconsistent with the central purpose of the Constitution itself . . . and a modern embodiment of the spirit of the Articles of Confederation.”

To those who continue to believe that somewhere there exists a “key” to unlocking the secrets of NLC (the perfect case or a miraculous one-justice change of heart), Justice Stevens' appeal may be greeted with some amount of alarm. The Court has not overruled NLC and, barring a dramatic judicial transformation, is hardly likely to do so in the near future. Outright admissions of legal misjudgment, after all, have been rare occurrences in the history of the Supreme Court. Thus, the NLC defense remains—to what purpose, however, it is increasingly difficult to imagine, for while it has not been declared legally dead, in 1983 it appears to be mortally wounded.—Cynthia Cates Colella

NLC v. Usery Revisited (Again)

The years since the 1976 Supreme Court decision in *National League of Cities v. Usery* have not meant the resurrection of the Tenth Amendment that many foresaw. For those who hoped NLC would turn the tide against national intrusion into state and local decision-making, disappointment has been the rule in case after case.

One exception occurred in San Antonio, TX, last February when U.S. District Court Judge Fred Shannon decided for the second time that the *Fair Labor Standards Act (FLSA)* wage and hour provisions do not apply to public transit workers because local public mass transit systems constitute integral operations in areas of traditional governmental functions. In NLC, the Court exempted from the FLSA only those state and local functions that were “integral.” According to subsequent regulations promulgated by the Department of Labor, public mass transit was not considered an “integral” local function and therefore, transit workers (along with others) were not exempt from FLSA wage and hour rules.

The Labor Department's classification of transit workers has been upheld in a number of other decisions at both the district and appellate levels on the grounds that transportation is *traditionally* a private service that has only recently become public. Judge Shannon, however, has refused to let the matter rest. He issued his first opinion in November 1981, saying that Labor's interpretation was “null and void” with regard to transit workers. Federal attorneys appealed the case but the Supreme Court, instead of considering the appeal, asked that Judge Shannon look again at his decision in light of

another case, *Long Island Rail Road v. United Transportation*. In the *Long Island* case, the Court ruled that federal authority, if clearly established in an area, took precedence over state or local authority, thus subjecting Long Island Rail Road workers to federal law.

Judge Shannon found nothing in the *Long Island* decision to dispute his earlier ruling. Public transit systems, in his opinion, meet criteria to be judged as “integral” municipal functions and transit workers should be treated the same as state or local employees performing police, fire, sanitation, health, recreational or other traditional services.

The *Fair Labor Standards Act's* trials and tribulations are not likely to be over soon. Already, the Justice Department has filed notice of intent to appeal Judge Shannon's decision. In light of other federal (including Supreme Court) decisions, however, it would be overly optimistic to think that Judge Shannon's decision will stand.

In December 1982, the Advisory Commission on Intergovernmental Relations found that “several recent Supreme Court judgments have eroded the basic Tenth Amendment principles expressed in the *National League of Cities* case” and, therefore, expressed its hope that the federal judiciary would revisit the NLC case to review and expand upon the principles expressed there, especially those addressing the “basic attributes of state sovereignty” and “integral functions” of state government. In addition, the ACIR called upon the Labor Department to rescind its regulations (29 C.F.R. Section 775.3) that classify certain functions as non-traditional state or local activities.—Stephanie Becker

Should State and Local Governments Be Treated Like Businesses When Engaging in Proprietary Activities?

A message, if not a warning, is coming out of a growing body of Supreme Court decisions that local governments and, to a lesser degree, state governments should expect to be treated like businesses by the courts when engaging in business-like activities.

Up until recently this judicial intent related only to local governments. The Supreme Court's ruling in *City of Lafayette v. Louisiana Power & Light Co.* (1978) limited the assumed antitrust immunity of local governments. The states, however, continued to enjoy their traditional protection from antitrust action. In *Lafayette*, the Court held that a local government retained immunity from antitrust litigation only when its actions were an exercise of traditional governmental functions. Proprietary activities would no longer be covered. The distinction between proprietary and traditional governmental functions, and the shield of immunity contained within that distinction, disappeared with the Court's ruling in *Community Communications Company, Inc. v. City of Boulder* (1982). There, the Court held that states could confer immunity on local units only through a "clear articulation and affirmative expression" on a case-by-case basis.

Since *Boulder*, about seventy antitrust suits have been filed against local governments. Lower court rulings in those cases appear uneven, reflecting the lack of precise guidance in the Court's ruling or any corrective legislation. Due to the high costs of winning—nevermind losing—many governments have settled out of court.

On a related front, another recent Supreme Court ruling has injected some confusion into the states' understanding of their own antitrust immunity. In the case of *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories* (decided on February 2, 1983) the Court, by a 5-4 majority, held that the State of Alabama is not exempt from the proscriptions of the *Robinson-Patman Act*—a section of federal antitrust law specifically directed at price discrimination—when selling pharmaceutical products to government hospitals for resale in competition with private pharmacies.

Read in the narrow sense in which he intended it, Justice Powell's majority opinion makes this case one that will primarily concern state purchasing agents. States purchasing at a discount—using, among other advantages, high-volume buying and freedom from taxation—and subsequent reselling of discounted products in what may be competition with private suppliers are now liable to antitrust suits.

Even viewed from this narrow perspective, the decision has important implications. Although the Court did not decide whether states could continue to negotiate discount prices, the decision may serve to limit these practices. In many instances, states make large purchases without knowing exactly where each item will go or whether it will be resold. Further,

once a private supplier contracts with a state, the former must sell at the same price to all state agencies. If a state agency does resell at discount, the supplier can be held liable, and is likely to be named when antitrust action is brought. Moreover, unlike the states which are protected by the Eleventh Amendment, suppliers may be open to treble damages. Observers, therefore, fear this decision will impede or undermine competitive bidding and bring higher prices to states.

The case could have broader implications. In the sixth footnote of the majority opinion, Justice Powell cites *Parden v. Terminal Railway* (1964) and *Lafayette*. The former, a Tenth Amendment case, basically said that when a state operates as a business it should be treated like one. In *Lafayette*, the same message was sent to local governments. Taken together, these cases may be a warning, or at least may provide the precedent that states may be found liable to antitrust laws in more proprietary instances than the narrow one on which *Jefferson County* turned. In this light, the case could just turn out to be the camel's nose under the tent.

Importantly, as noted above, the State (in this case represented by the Board of Trustees of the University of Alabama) was found liable only to injunction, not monetary damages. The fifteen pharmaceutical manufacturers and the county hospital pharmacy named in the suit do not have such protection, and may face monetary damages later. The differing status of states and their political subdivisions is well illustrated in the *Jefferson County* case—within the same decision, and for comparable violations, both the local and the state governments must change their relevant policies, but only the former faces the possibility of monetary damages.

Further, the Court raised, but did not decide, whether there would be "special solicitude" for the poor. In other words, can states still, without fear of suit, buy and sell at discount prices to help poor people? The majority opinion, in footnote seven, seems to leave the door open for a case with facts showing an adverse impact on the poor absent the power to buy and sell at discount.

In sum, though the final verdicts are not yet in, and may still be a long time coming, two messages do come through clearly in these cases: (1) while no one has yet provided a crisp differentiation between actions that are proprietary and those that are traditional governmental functions, where local and, now, state governments engage in actions that look like the former, they can expect to be sued and, in some cases, lose; and, (2) the direct costs are greater in such cases to local governments and to government suppliers because they do not enjoy Eleventh Amendment protections from monetary damages. The indirect cost to states, however, may be egregious.—Jerry Fensterman

volving the extent of federal benefits and burdens under grant law, and those defining the right to judicial redress in federal grant cases. Even if the affirmative obligations understood to be imposed by those federal aid statutes are, in the future, only reluctantly acknowledged, the thrust of **Pennhurst** will surely be blunted to the extent that the *classes* of grant beneficiaries continue to be judicially extended, along with the right to judicial *enforcement* of assistance statutes.

Federal-State Relations in Federal Grant Law

The last category of cases worthy of note involves federal-state relations in the federal grant law area. One of these cases—**South Eastern Human Development Corp. v. Schweiker**—may be viewed as subordinating a federal agency's view of its mandate to a local grantee's entitlement claim.¹⁹ Ruling that Secretary Schweiker's interpretation of the governing statute was "clearly wrong," and thus entitled to "no weight," the federal appeals court directed that the Secretary of Health and Human Services be ordered to distribute certain block grant funds to a community action agency. In this emphatic rebuff to the agency, the Court held that a state that chose not to administer its Community Services Block Grant for fiscal 1982 was entitled to have its allotment for that fiscal year distributed by the Secretary through the programs established by the repealed **Economic Opportunity Act of 1964**.

Two federal circuit court decisions this year, however, strongly reaffirmed more enduring federal enforcement authority over grantees. In **United States v. Lutheran Medical Center**, the Eighth Circuit affirmed the right of the United States under the **Community Mental Health Centers Act** to recover grant-funded construction costs where the grantee ceased to provide covered services within 20 years of a facility's completion.²⁰ And, in **Delaware Valley Citizens' Council v. Pennsylvania**, the Third Circuit affirmed the imposition of a contempt judgment against state officials for failing to implement an automobile emissions inspection and maintenance program pursuant to the **Clean Air Act Amendments of 1970**.²¹ Of course, the program in this case had been mandated under an earlier consent decree, so the contempt sanction itself was hardly remarkable. What was noteworthy was the district court's means of enforcing its sanction—that is, by prohibiting the Department of Transportation from approving various projects and grants.

Such decisions as these operate to vindicate federal enforcement of federal statutory grant conditions, and this is as it should be. It would turn federalism upside-down for federal courts to leave the national government, in Justice Mahlon Pitney's memorable phrase, "less than supreme in the exercise of its own appropriate powers."²²

At the same time, cases in this fourth category, like those in the other categories discussed above, plainly work at cross-purposes with the Reagan Administration's drive to transfer grant administration discretion to the states. As Comptroller General Bowsher has noted, the **Omnibus Budget Reconciliation Act of 1981** was "silent" on "crosscutting national policy requirements which were enacted through [other] legislation," and these requirements "apply to a wide range of activities receiving Federal financial assistance."²³ It is these requirements, enshrined in substantive federal aid statutes enacted in the past half-century, that are now being applied to grantees in the cases discussed above—notwithstanding the Administration's central aim of transferring control in grant administration to the states.

Conclusion

Thoroughgoing transfer of control would ultimately require extensive revision of the substantive federal assistance statutes themselves, and such changes do not appear to be in the offing. The Administration may in the end be frustrated in its aim of transferring truly meaningful grant control to state and local governments. The substantive grant statutes that come before the federal courts will undoubtedly continue to explode in the Administration's path like long-buried charges. Meanwhile, state and local governments—as well as other grantees and beneficiaries—must try as best they can to make sense of the mixed signals they receive from Congress, the White House, and the federal courts.

²³See *Block Grant Implementation, Hearing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs, 97th Cong., 2d Sess. (1982)* (statement of Charles A. Bowsher, Comptroller General of the U.S.) (prepared statement p. 9).

¹⁹687 F.2d 1150 (8th Cir. 1982).

²⁰680 F.2d 1211 (8th Cir. 1982).

²¹678 F.2d 470 (3d Cir.), *cert. denied*, 103 S. Ct. 298 (1982).

²²*Newberry v. United States*, 256 U.S. 232, 281 (1921) (Pitney, J., joined by Brandeis & Clarke, JJ., dissenting).

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A Special Report

Charleston Program Highlights State-Local Relations

by
Jane F. Roberts

"We, like every other state, are contending with the metamorphosis which our current federal system is undergoing—the shifting of roles and responsibilities from the federal level to the State and local levels of government. That metamorphosis has created both problems and opportunities." These opening comments by South Carolina Governor Richard Riley are reflective of a recurring theme in the statements presented at the Commission's public hearing on state-local relations held in Charleston (SC) on March 11.

The hearing was part of a two-day program, hosted by Charleston Mayor Joseph P. Riley, Jr., an ACIR member, that also featured the first national gathering of state-level ACIRs and similar intergovernmental advisory groups and the Commission's regular spring business meeting. Fourteen speakers, representing 11 states, participated in the hearing.

Mayor Riley, expanding upon Gov. Riley's comments, called for creating a "Magna Carta" in each state as a way to help cope with the changes occurring in the intergovernmental system. The mayor explained: "The great void in the partnership is the relationship that is necessary between the state and local governments. . . . The last 50 years saw a development of federal interest and action in solving local problems. Admittedly, there were many excesses; there were many successes as well. It is my hope that the next generation will see a similar interest develop within our states toward local governments."

Earl Campbell, Jr., deputy commissioner of the Kentucky Department of Local Government, added that a greater understanding of government functions was necessary, before attempts could be initiated to alter or to reassign those functions. This lack of understanding includes not only state government, he explained, "but also federal involvement in the filter-down effect to local governments."

In addition to the fundamental need to sort out roles and responsibilities, two other specific concerns were identified by nearly every speaker: public physical infrastructure and state-local finances.

Public Physical Infrastructure: A Costly Problem

The challenge of repairing, rebuilding and extending the nation's bridges, highways, sewer systems, and other "bricks and mortar" public works clearly is uppermost on the minds of public officials. Indeed, seemingly overnight, the term "infrastructure" and the phrase "pothole politics" were added to the list of most-frequently used terms in American political lexicon.

By some accounts, the cost to the nation of rebuilding the public physical infrastructure will be about \$700

billion over the next 20 years. State and local officials are asking how they can finance that level of investment, how to make priority decisions, and how to match public works projects with business development and job-creation strategies.

In some jurisdictions, the cost dimensions of the problem are staggering. For example, in New York, the cost of repairing that state's public physical infrastructure has been estimated at over \$100 billion. According to Paul Moore, staff director of the New York State-Local Relations Commission, more than 7,000 bridges are considered structurally deficient; one-fifth of the highway bases and one-seventh of the surfaces are in poor condition; and, 100 million gallons of water are lost each day through leaks in the system. A number of funding alternatives are under consideration in New York including user fees, privatization of certain functions, special leasing arrangements, using dedicated revenues, and combining bond proceeds with receipts from the federal gasoline tax.

The problems of rebuilding and upgrading public works and facilities are not confined to the highly urbanized sections of the northeast corridor. Of special concern to many jurisdictions is the task of maintaining and providing a high quality water supply. According to Representative Charles Smith, chairman of the Florida ACIR, local governments in his state face a wastewater treatment backlog that will cost over \$1 billion to eliminate.

In North Carolina, state officials estimate that over \$600 million will be needed by 1987 to upgrade and keep pace with expanding water supply needs and that an additional \$1.7 billion will be needed for wastewater systems. But, as Mayor Andrew Kistler, II, chairman of the North Carolina Local Government Advocacy Council, warned: ". . . we have successfully used multi-million dollar statewide bond issues in years past, but approval of bond issues by the voters in the amounts now required may not be possible in the future. What are the alternatives? And what are the consequences if states and their local governments fail to provide public water and wastewater systems which attempt to comply with acceptable water quality standards?"

State-Local Finances

"In short, the buck stops at the local government level," according to County Commissioner Bob Honts, chairman of the Texas ACIR, as he described the "local perspective" on the problems facing cities and counties.

Financing public services, especially since the taxpayers' revolt in 1978, remains a top local priority. As a result, there has been an upsurge of interest in user

fees and other revenue sources to complement the local property tax.

Although the need for greater revenue-raising capacity may be clear to many, anti-tax sentiment remains a strong impediment to broadening local fiscal authority. One such example was cited by Edwin Griffin, Jr., executive director of the Kentucky Municipal League. That state's constitution prohibits cities from imposing a sales or income tax. As a further complication, the legislature enacted a property tax lid in 1979. "The monumental problem of convincing the voters to pass a constitutional change, much less a taxation measure, is complicated even further by the length of time required to obtain an amendment from a legislature that meets for 60 days every two years," Griffin told national ACIR members. Kentucky's local governments are not alone in encountering revenue-raising roadblocks.

In Maine, according to the Commissioner of Transportation George Campbell, Jr., who also serves as state liaison for the Governor's Municipal Advisory Council, property taxes account for 99.4% of all local tax revenues, well above the 76% national average. Campbell stressed that excessive reliance on the property tax— together with fewer federal dollars—has increased pressure on Maine localities to diversify their revenue bases, but authority to do so is limited. In the hope of easing at least some of the fiscal pressure, Governor Joseph Brennan has proposed a modest expansion of taxing authority, as well as increased state aid.

However, Kentucky Representative Mark O'Brien, a member of the National Conference of State Legislatures' (NCSL) Task Force on State-Local Relations, did not project an optimistic outlook for increased state financial assistance to localities: "Since state aid is more than four times the amount of federal aid to localities, it is natural that local governments would look increasingly to states to make up the shortfall. But the cupboard is bare in the statehouses as well."

State aid increases to local governments may become the exception rather than the rule, according to a survey by the NCSL completed in January. Twelve states projected ending balances of one percent or less in their general fund accounts; 19 more predicted deficits. Thirty-five states already have cut budgets for this year, and 14 states reported that revenues were flowing below projections.

State aid is of critical importance to local governments across the country, constituting over 60% of their revenues (from own sources) in 1981. For municipalities alone the measure was 32%, and for counties, 63%. Not surprisingly, local officials are concerned about the adequacy of state aid and the fairness with which it is allocated.

Funding for education remains a special area of concern. However, efforts to increase state education funds are being stymied, in some cases, by fiscal conditions. One such situation was described by Judge William Beach, chairman of the Tennessee ACIR. Governor Lamar Alexander proposed an increase in sales taxes to pay for a ten-point, \$200 million program to upgrade



South Carolina Governor Richard Riley and Charleston Mayor Joseph P. Riley, Jr., testify before the ACIR on State-Local Relations.

public education. As Judge Beach noted: "Naturally, this recommendation has caused a great deal of conversation and consternation among legislators in a state that as of January 1983, had an unemployment rate of 13.7% and a revenue shortfall of \$53.893 million."

Another dimension of the state-local fiscal equation is the cost that localities must bear in complying with state-imposed expenditures, programs and regulations. And indeed, few issues cause more concern among local officials than state mandates because of their restrictions on local autonomy and the strain they put on local budgets. As Senator Heyward McDonald, chairman of the South Carolina ACIR, observed, "We have a fixed habit in the General Assembly of adopting legislation which requires increased local expenditures, (but) we do not furnish the funds."

Currently, only 12 states have constitutional or statutory provisions for reimbursing mandates. Even in these jurisdictions, legal provisions do not guarantee consensus. One such example is Michigan, where— according to John La Rose, chairman of the Michigan Council on Intergovernmental Relations—mandates and state preemptions of local powers are "in the forefront" of political issues, even though a constitutional amendment was approved in 1978 and implementing legislation was enacted the following year to reimburse localities for the cost of complying with state mandates. La Rose attributed much of the continuing problems to the precarious fiscal position of the State and its localities.

Although only a handful of states have acted on the reimbursement front, many others have adopted the practice of attaching fiscal impact statements to local bills or have undertaken cataloging efforts or special studies. Georgia will soon expand its efforts in this important public policy area as the newly formed Com-



Commission members listen to witnesses at the Charleston hearing.

mission on State Growth Policy tackles the mandate issue. According to Gerald Horton, commission chairman, state mandates cost Georgia localities about \$250 million a year.

State Intergovernmental Panels Meet: A "First"

The national ACIR's Charleston program opened on March 10, with the first nationwide gathering of state intergovernmental advisory panels, co-hosted by the South Carolina ACIR. State ACIRs and comparable organizations have become increasingly important vehicles in recent years for discussing and studying state-local issues and for proposing solutions to statewide problems. Currently, 19 states have a functioning intergovernmental advisory group, 11 of which are patterned after the national ACIR model. Three of the organizations were established within the last year.

Members and staff from 12 of the organizations discussed their work programs, operating strategies, and current issues. The possibility of developing a network among the panels also was considered and the desirability of greater information exchange was affirmed.

Participants urged better communications between and among the state organizations and with the national ACIR, including more frequent contacts, greater mutual assistance efforts, and more help in identifying data and technical resources. The national ACIR will explore ways to strengthen its assistance efforts to the state panels such as providing technical services, expanding its clearinghouse role, and publishing a periodic newsletter for the state organizations.

Summary

The Charleston program brought renewed attention to ACIR's longstanding work in the state-local arena. Over the years, the Commission has formulated and adopted over 200 recommendations to strengthen state

and local governments; published nearly 150 pertinent information and policy reports; and, developed more than 100 model bills for those states interested in implementing ACIR recommendations.

In 1981, the Commission completed its most recent and comprehensive analysis of state and local government roles in the federal system. The Commission concluded that states and localities must make hard fiscal, functional and structural choices if they are to avoid further encroachment on their discretion, and—at the same time—cope effectively with fiscal retrenchment, cutback management, and need-resource mismatches.

The statements presented at the Charleston hearing, as well as the discussions among the state advisory panels, confirm this conclusion. Given their responsibilities for financing and administering major public services and for overseeing local governments, the states' commitment and capacity to respond to these challenges are paramount. Working together, the adaptability, creativity, resilience and forbearance of state and local officials will be tested to the fullest in the years ahead.

During its business sessions in Charleston, the national ACIR reaffirmed its commitment to help state and local governments address many of their most pressing concerns. The research agenda the Commission adopted there includes several topics discussed at the hearing on state-local relations. ACIR staff will review and analyze current assessments of the public physical infrastructure problem and ways of financing capital improvements; will update its research on local revenue diversification and city financial emergencies; and, will continue its examination of state financial and other aid to distressed communities.

ACIR Reaffirms Support for General Revenue Sharing

At its Spring meeting in Charleston, SC, on March 12, 1983, the Advisory Commission on Intergovernmental Relations reaffirmed its longstanding support of the General Revenue Sharing program that sends relatively "string free" money to localities and, until 1981, the states. The Commission's policy rests on its belief that the program should be made permanent and that the states' share should be restored.

On March 16, ACIR Chairman Dr. Robert B. Hawkins told members of the House Subcommittee on Intergovernmental Relations of the Commission's recent reaffirmation of support for the revenue sharing program. In his testimony, Dr. Hawkins stated, "General Revenue Sharing (should) be reenacted because it is a vital part of our fiscal federalism." Dr. Hawkins outlined the Commission's policy on General Revenue Sharing and expressed the Commission's willingness to work with Congress, as it has in the past, to analyze various possible alternatives to the current distribution formula.

In testimony before the Senate Subcommittee on Intergovernmental Relations on April 6, ACIR Assistant Director John Shannon told Senate subcommittee members of the Commission's March policy on General Revenue Sharing.

On the subject of proposed changes to the GRS distribution formula, Dr. Shannon emphasized that the Commission had not recommended any basic changes to the current formula. "However," Shannon testified, "many persons interested in formula changes have suggested, among other things, a switch from the current per capita income measure to the representative tax system approach for estimating the tax capacity of the states." In his testimony, Shannon explained the representative tax system concept and why it is considered superior to per capita income measurements of state tax capacity.

New ACIR Members Named

In March, four members were appointed to the Advisory Commission on Intergovernmental Relations.

Representatives Ted Weiss (NY), Barney Frank (MA) and Robert Walker (PA) were appointed by House Speaker Tip O'Neill, Jr.

President Reagan appointed James S. Dwight, Jr., to serve as a private citizen member of the Commission.

Each appointee brings considerable intergovernmental experience to ACIR. Prior to his election to Congress in 1976, Representative Weiss was on the New York City Council for 14 years and served as New York's Assistant District Attorney for four years.

Representative Frank has been an ACIR member since September 1982, and was reappointed by the Speaker. His intergovernmental background spans seven years as a Massachusetts legislator; two years as administrative assistant to Representative Michael Harrington and four years as executive assistant to Boston Mayor Kevin White.

Representative Walker was first elected to Congress in 1976. He was former Representative Edwin Eshleman's legislative and administrative assistant for ten years prior to his election.

All three Representatives are members of the House Government Operations Committee. Representative Weiss is Chairman of that Committee's Subcommittee on Intergovernmental Relations and Human Resources. Representative Walker is the Subcommittee's ranking minority member. The subcommittee has oversight responsibility for the ACIR and legislative jurisdiction over General Revenue Sharing. Representative Frank was on the Intergovernmental Relations Subcommittee but had to relinquish his position when he became chairman of the Subcommittee on Manpower and Housing in the 98th Congress.

Mr. Dwight is currently a partner with the accounting firm of Deloitte

Haskins and Sells. Before joining that firm in 1975, Mr. Dwight held a number of high-level posts in both the federal government and the State of California. He was Administrator of the Social Rehabilitation Service of the U.S. Department of Health, Education and Welfare from 1973 to 1975. From 1972 to 1973, he was Associate Director of the Office of Management and Budget. At the state level, Mr. Dwight served under Governor Ronald Reagan from 1966 to 1972 as Chief Deputy Director of California's Department of Finance. In recent years, Mr. Dwight has been an advisor to President Reagan and was a member of the President's Cabinet Council Working Group on Federalism.

Next ACIR Meeting June 16, 17

The Commission's next meeting will be held on Thursday and Friday, June 16 and 17, in Washington, D.C. The meeting will begin with a public hearing on local jails. Commission consideration of the findings, conclusions and recommendations stemming from its study on the intergovernmental aspects of local jail reform will follow the hearing.

Leading Intergovernmental Fiscal Indicators

For the first time, total government spending topped the one trillion dollar mark in 1982, a 10% increase over the previous year. The national government, accounting for 70% of the 1982 total, was the dominant force behind the rise in public spending. In per capita and constant (1972) dollar terms, federal expenditures were \$1,588 in 1982, compared to \$1,531 in 1981. On the other hand, state spending per person (also adjusted for inflation) has remained constant at \$365 for the past four years while local government spending has increased only modestly.

Another "first" for 1982 was the percentage of Gross National Product represented by total government spending—over 35% for the first time since World War II, two percentage points over the 1981 proportion.

For the first time in more than two decades, federal aid to states and local governments fell in current dollars terms—from \$87.7 billion in 1981 to \$83.7 billion in 1982.

Federal intergovernmental aid fell not just in dollar amounts but also as a percentage of total federal expenditures, from a peak of 17% in 1978 to 11% in 1982. As a percentage of state-local expenditures, federal aid payments also declined, from 26% to 21% over the same time period.

Federal debt continues to climb after breaking the one trillion dollar mark. The federal debt for FY 1982 rose to a total of \$1.147 trillion from the FY 1981 total of \$1.004 trillion. Figures for state and local governments for 1981 (the latest year for which data are available) are \$135 and \$229 billion, respectively.

There have been a significant number of increases in state personal income and sales tax rates since January 1, 1983, as states offset unanticipated revenue losses caused by the recession.

Five states have increased their income taxes and eight states have increased their general sales taxes since the first of the year. These increases, in many cases, were in addition to tax hikes made in the two previous years. States raising their personal income taxes since January 1, 1983, are Michigan, New Mexico, Ohio, Rhode Island, and West Virginia. States increasing their general sales taxes are California (but only if revenues fall below a prescribed level), Colorado, Idaho, Iowa, New Mexico, North Dakota, Utah and Washington.

Total government employment dropped for the first time in the post-World War II period. In 1981 (the latest year for which data is available), government employment in the United States was 15,968,000, down from 16,213,000 in 1980. The federal civilian work force declined by 1.1% while state and local employment roles fell by 0.7% and 1.9%, respectively.

Federal government expenditures varied widely among regions and states. The New England region had a per capita federal expenditure figure of \$3,089, a full 19% above the U.S. average. On the other hand, federal spending in the Great Lakes region was \$1,984, or 23% below the U.S. per person average. On a state-by-state basis, federal spending ranged from a high of \$4,533 (Alaska) to a low of \$1,792 (Iowa). These expenditure figures include not only grants to state and local governments and direct transfer payments to individuals, but salaries of federal employees and procurement contract awards as well.

These figures are a sampling of the public finance information available in the recently-released ACIR publication, Significant Features of Fiscal Federalism, 1981-82 Edition. Single copies are available free-of-charge for federal, state and local government officials and their staffs as well as the general public. Additional copies can be ordered from ACIR at nominal cost.—Michael Lawson

Summary of Leading Government Indicators

	Total Expenditure ¹ (in billions of current dollars)		Total Expenditure ¹ Per Capita, (in 1972 \$)		Total Expenditure ¹ as a Percentage of GNP		Government Employment (in thousands) as of October	
	1981	1982	1981	1982	1981	1982	1980	1981
Total Government	\$985.5	\$1,084.8	\$2,193	\$2,257	33.5%	35.5%	16,213	15,968
Federal Government	688.2	863.4	1,531	1,588	23.4	25.0	2,898	2,865
State-Local	297.3	321.4	660	669	10.1	10.5	13,315	13,103
State	164.3	175.2	365	365	5.6	5.7	3,753	3,726
Local	133.0	146.2	295	304	4.5	4.8	9,562	9,377

¹From own sources. Expenditure figures based upon National Income and Product Accounts. Separate state and local expenditures allocated on the basis ratios computed from data in U.S. Bureau of the Census, *Governmental Finances*, published annually.

And Briefly Books

(from page 2)

measures have been identified and reviewed. Some business licenses and development regulations have already been modified or eliminated.

Yet, as this issue of *Perspective* illustrates, the Reagan Administration's goal to provide federal grantees with regulatory relief is frequently thwarted in the courts. In case after case, states and localities were big losers—the most striking example perhaps being that elected officials may now be liable for treble damages under antitrust suits.

As I look at the array of issues confronting mayors and other governmental officials today—from legal liabilities to the “infrastructure crisis” to unemployment and poverty to environmental pollution—I am dismayed by the degree of conflict that has come to characterize inter-governmental relations. Whether in the courts, the bureaucracy, or the Congress, we have become more like adversaries than partners working toward common goals. It is time to reverse this negative trend. Airing inter-governmental tensions in forums like the ACIR is certainly a step in the right direction.

Margaret T. Hance

Mayor Margaret Hance
Phoenix, Arizona

The following publications are recent reports of the Advisory Commission on Intergovernmental Relations, Washington, DC 20575. *Significant Features of Fiscal Federalism 1981-82 Edition (M-135)*.

This year's edition of *Significant Features* provides updated information on federal, state and local revenues and expenditures, employment, earnings and tax rates. The first section presents state-by-state information on specific public finance topics. The second section provides in-depth analyses of public finance topics for individual states. New additions to this year's edition include a glossary of public finance terms and an index.

“Intergovernmental Consultation Changes Provide Opportunities.” *Information Bulletin No. 82-3*.

This *Information Bulletin* provides an overview of the transition from OMB Circular A-95 to Executive Order 12372.

“State Mandates: An Update.” *Information Bulletin No. 82-2*.

This *Information Bulletin* highlights the efforts of three states—Florida, Georgia and New York—to catalogue their state mandates and the initiatives of two other states—California and Illinois—to address the question of mandate reimbursements.

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

Antitrust and Local Government, Perspectives on the Boulder Decision, James V. Siena, ed., published for the National League of Cities by Seven Locks Press, Cabin John, MD 20818. \$32.95.

Federal Grant Law, M. Mason, ed., American Bar Association, 1155 East 60th Street, Chicago, IL. \$25.

Federal Grants and Cooperative Agreements: Law, Policy, and Practice, by Richard B. Cappalli. Callaghan and Company, Wilmette, IL.

CETA: Accomplishments, Problems, Solutions, by William Mirengoff, et al. The W. E. Upjohn Institute for Employment Research, 300 South Westnedge Avenue, Kalamazoo, MI 49007. \$7.95 paper.

The Reagan Experiment: An Examination of Economic and Social Policies Under the Reagan Administration, by John L. Palmer and Isabel V. Sawhill. Urban Institute Press, 2100 M Street, NW, Washington, DC 20037. \$12.95 paper.

Suggested State Legislation, 1981. Council of State Governments, Iron Works Pike, P.O. Box 11910, Lexington, KY 40578. \$15.00.

Book of the States, 1982-83. Council of State Governments, Iron Works Pike, P.O. Box 11910, Lexington, KY 40578. \$35.00.

Creative Capital Financing for State and Local Governments. Municipal Finance Officers Association, 180 N. Michigan Avenue, Suite 800, Chicago, IL 60601. \$21.50.

Goodbye to Good-Time Charlie: The American Governorship Transformed. 2nd Edition. By Larry Sabato. CQ Press, 1414 22nd Street, N.W., Washington, DC 20087. \$8.95 paper.

State Mandates on Local Governments in Iowa. University of Iowa, Institute of Public Affairs, Iowa City, IA 52242.

State Elective Officials and the Legislatures, 1983-84. Council of State Governments, P.O. Box 11910, Iron Works Pike, Lexington, KY 40578. \$15.00.

Prospects for Financing Elementary and Secondary Education in the States. School Finance Project, 1200 19th Street, N.W., Room 725, Washington, DC 20208.

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