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Item 5

SHIFTING POWER FROM THE FEDERAL GOVERNMENT TO THE STATE OF ALASKA

Final Report

Harold A. Hovey
Economic and Management Consulting
September, 1982

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correctional institutions. The federal government also plays a major role in regulating such private sector activities as transportation, manufacturing, and banking -- at times preempting state regulation of the same subjects. The scope of federal regulation of private activity does not reflect any consistent philosphy or principles regarding appropriate roles for the federal government and state and local government.

Much of the federal control over state and local government is extended through grant programs, which finance nearly a quarter of state and local government spending. Grant requirements dictate how federal funds and state and local matching funds are used and are the basis for federal requirements such as the 55 mile an hour speed limit, payment of "prevailing" wages on state and local construction projects, preservation of historic structures, and other federal mandates. The administration of federal grants has long been a subject of complaint by state and local officials who object to red tape and paperwork and the mandated use of federal funds in projects which they consider to be of low priority. Regulations in grant programs often force program administration to cost more than it should and are sometimes inconsistent from agency to agency.

Alaska citizens and government officials share with citizens of other states problems with federal regulations and grant conditions and are especially affected by the federal government's role as an employer and major landowner in Alaska. While the federal government does not pay state and local taxes, it makes a variety of payments to Alaskan governments in the form of shared revenues and impact aid for education that are particularly important in Alaska and are threatened by potential federal budget cutbacks. It is particularly important to Alaska that these federal payments, that substitute for the payment of state and local taxes, be treated separately from grants, particularly during the present period of reductions in grant funding. The federal government's control of large quantities of land can cause conflicts with state policies relating to economic development and management of fish and wildlife. The prospects that the federal government will cede lands, beyond the cessions required by the Statehood Act, to the state are very limited. There is, however, a significant probability that the federal government would relinquish to Alaska responsibility for the Alaska Railroad and the development and management of hydroelectric projects.

Certain federal policies, such as the requirement for shipping on U.S. vessels and the prohibition of export of Alaskan oil, clearly have strong negative impacts on Alaska. However, the subjects of these policies are appropriately a federal responsibility, so that

EXECUTIVE SUMMARY

The Alaska Statehood Commission concluded in its preliminary report that many of the concerns that Alaskans have with their relationship with the federal government are concerns shared by citizens of other states. The commission sponsored this study to examine alternatives for the transfer of power (devolution) from the federal government to the states in general and Alaska in particular.

The United States was formed by the thirteen colonies as a result of problems each had in operating in a loose confederation. While the states ceded some major powers in regulating commerce and foreign relations to the new federal government, they retained substantial powers including a basic power to legislate on any subject not covered by the Bill of Rights or expressly given to the new federal government under the Constitution. Over nearly two centuries, however, the powers of the federal government have been increased at the expense of the states, to the point where there are almost no legal limits on what the federal government can do in areas previously controlled by the states.

With no legal bounds to federal power, the question becomes whether there are general principles for division of responsibility between the federal government and the states. As a practical matter, federal action is triggered on the basis of a majority of the Congress believing that such action is a good idea, regardless of impact on the general roles of state and federal governments. Other tests for when states should be free to act, such as whether one state's action could adversely affect citizens of another state, are not often applied in practice. As a result, federal regulations and/or grant programs cover such obviously local matters as cock fighting, libraries, and rat control. This federal role has developed even though there are no compelling arguments that federal action is necessary or that the federal government is any more competent than state and local governments to handle the problems involved. The situation does not, however, admit to simple solutions as many of the subjects addressed by federal action have some elements that are so local as to make total federal control absurd combined with some elements so national as to make no federal action unthinkable. The possibility of change is suggested by experiences in Australia, West Germany, and Canada where the division of state and federal responsibility is much more clearcut than in the United States.

The federal government affects Alaska citizens in three primary ways: (1) as a lawmaker and regulator, (2) as a source of funds and regulations through federal grants to state and local government, and (3) as an employer and large landowner. Federal laws and regulations are very pervasive, affecting state and local policies in civil rights, criminal law, and management of schools, hospitals, mental health and improvements in policies involve changes in federal policy rather than a shifting of control from the federal government to the states. Alaska, somewhat more than other states, also experiences the problem that federal laws and regulations are often insensitive to unique circumstances in Alaska.

Reducing the role and costs of the federal government is an objective widely supported by American citizens and political leaders. However, translating this general feeling into specific actions to shift power to the states is extremely difficult. Often business interests support larger, rather than smaller, federal roles and, at times, are joined by state and local government leaders in supporting more federal power. Many of the most vocal complainers about federal power are concerned with single issues such as abortion, school prayer, and busing and are not likely allies in a general strategy of shifting power from Washington to the states. Individual federal programs are defended by strong combinations of interest groups and federal bureaucrats. However, elected officials at the national, state, and local levels are showing increasing interest in shifting power away from the federal government. Current and likely future federal budget problems will limit growth of federal power through grant programs and is causing retrenchment in existing programs.

Concern over excessive federal intervention in state-local affairs and the lives of American citizens has triggered a wide variety of proposals to restrain federal power. Some have proposed that the Constitution be amended either to create specific constraints on federal action or to establish processes, such as veto of federal actions by state legislatures, that would operate to block federal intrusions into state and local affairs. However, the use of the constitutional convention to alter the federal Constitution has been avoided throughout our history by absence of agreement on the rules for such a convention, suggesting the need for action to establish such rules.

There is widespread support, from the president and many state and local leaders, for a "sorting out" of our federal system. Such a sorting out would reduce ambiguities in state federal relations by giving some of the activities that are now funded and controlled by a combination of state and federal governments unambiguously to the states and some to the federal government. The president's "New Federalism" proposal is an attempt to implement this sorting out concept, but faces a number of practical problems, including making the proposal equitable for every state. Some sorting out is occurring simply by federal budget reductions, including the reduction or elimination of federal programs in areas such as law enforcement, economic development, and libraries. There has also been discussion of turning back some federal program responsibilities to the states along with some current federal revenue sources, although specific proposals have yet to emerge.

The proposals for sorting out offer major advantages in terms of increased accountability and program effectiveness, not to mention reduced federal intervention. However, there are some pitfalls for Alaska, which receives more federal grants per capita than any other state. Some of the pitfalls can be avoided if payments related to federal land leasing and impact aid for schools are kept outside the group of programs that might be returned to the states.

There are also proposals for less sweeping changes in federal and state roles than envisioned in the sorting out proposals. These include block grants, regulatory reform, and a variety of measures to reduce the red tape and administrative costs associated with federal grants. One possibility is to give state officials limited authority to transfer funds from one federal grant program to another. In areas where the federal government is likely to retain responsibility, such as leasing of public lands and the Outer Continental Shelf for resource development, there are also possibilities for enhanced procedures for consulting with state and local officials. However, the effectiveness of consultative procedures fundamentally depends upon the willingness of federal officials to consult, rather than formal requirements which can be satisfied by merely "going through the motions." Congress in general, and the Alaska delegation in particular, can have considerable impact in urging federal officials to consult with state officials before taking action.

With major sorting out proposals under serious consideration, proposals for reforms of existing grant programs are not receiving high priority as many people view the problem as requiring wholesale reduction of the federal role, rather than trying to make that role slightly more palatable.

There are many actions that the government and people of Alaska might take to encourage a reduction of federal intrusion into their lives. It does not appear likely, however, that Alaska will receive special treatment by being able to assume powers from the federal government that are not offered to other states. Thus, improvements in the Alaska situation will generally involve improvements in the situation in all states. The report suggests sixteen different proposals that might be endorsed by the Statehood Commission for enhancement of the role of the states relative to the federal government. These include:

- Coalitions with other states built around such concerns as federal land management,
- A legal defense fund to fight in the courts against infringements on state roles,
- A convocation on federalism,
- Formal establishment of procedures by which state legislatures can call a constitutional convention,
- A requirement that the federal government reimburse state and local governments for costs forced on them by federal law and regulation,
- A veto power over federal legislation in the hands of state legislatures,
- The president's regulatory reform efforts,
- Proposed regulatory reform legislation,
- Opposition to new intrusions by the federal government,
- Reduction on the requirements Alaska must meet to take over responsibilities from the federal government,
- Possible Alaska withdrawal from some grant programs
- New Federalism policies that turn back some federal responsbilities to the states,
- Block grants to replace narrow categorical ones, and
- Other grant management reforms.

Support of New Federalism proposals for a sorting out of state and federal assumptions could be particularly significant in promoting devolution of federal powers, assuming that the proposals would replace lost grants with savings resulting from federal assumption of certain income security (welfare and Medicaid) programs now partly paid for by the state and by allocations from a new federal trust fund. This could result in the turnover of more than 100 separate federal activities to the state. If sorting out measures fail, there are still ways to improve the administration of grant programs, including block grants and other reforms.

However, the status quo is defended both by powerful interests and inertia, which means that change will not come without substantial and persistent effort.

INTRODUCTION

The Alaska Statehood Commission was established by a vote of the people of the State of Alaska in August of 1980. The mission of the commission is "to study the status of the people of Alaska within the United States and to consider and recommend appropriate changes in the relationship of Alaska and the United States."

The commission presented its preliminary report in January of 1982. The report, consistent with the commission's charter, considered such questions as possible independence of Alaska from the United States and dropping status as a state to become some sort of territory. The commission concluded that these alternatives were unwise and is not considering them further.

The commission's very existence grew out of frustrations of Alaska's citizens in dealing with the federal government. One thing the commission found was that these frustrations were not unique to Alaska. As the commission put it in its preliminary report:

> Alaska's short history as a state also happens to coincide with a 20-year national diminution of the power of all the states through actions of the federal government. Some Alaskans, aware of the heavy federal hand in Alaskan affairs, perhaps thought that the interference was unique to this state, a holdover from the paternalistic days of territorial status. Our studies on the status of Alaska within the United States have shown us, however, that the penetration of the federal government into the farthest corners of American life is the rule, not the exception. We share the burden with others.

The commission's report places heavy emphasis on problems that Alaska shares with other states. The transmittal letter notes that the commission expects "to reach conclusions on ways to improve our federal system for we do feel that the federal-state balance is seriously askew." The Executive Summary of the report describes the current relationship between the states and the federal government as having grown into a "wild garden" and suggests that "The entire system begs for conscientious tending and vigorous pruning." The report concurs with other observers in noting that "now is the critical time to attempt redistribution of powers from the federal to the state level."

Having discovered the commonality of Alaska's problems with those of other states, the commission understandably became interested in the many proposals that have been made to reform our federal system. To provide background for their consideration of alternatives, the commission decided to contract for a report dealing with those alternatives.

The commission's interests coincide with my own. In serving as the top budget official in Ohio and Illinois in the early 1970's, I concluded that many of the problems of state and local government were being caused by the federal government. Experience as a consultant to state and local governments and various deral agencies since that time has reinforced this view. However, recognition of a problem does not lead inevitably to its solution. Our federal system has evolved as it has for reasons that must be understood if proposed solutions are to be feasible politically.

Alaska's need for information on ways to improve the federal system meshed with my own desire to stand back from the day-to-day skirmishes that characterize federal-state relations and to examine potential solutions in a somewhat broader context.

This report owes a great deal to the decades of work on the federal system by the Advisory Commission on Intergovernmental Relations (ACIR). ACIR has been an excellent source of information on everything from financial flows and grant reform to philosophy and constitutional law. Particular thanks is owed to Dave Walker of the commission's staff. John de Yonge and Jim Chiles of the Statehood Commission staff were particularly helpful in assisting me in understanding the specific concerns of Alaska's citizens, as were state staff members and the staff of the Alaska congressional delegation. However, all sins of omission and commission are my own. The commission will be using this report as one of many sources of information for recommendations that it will be presenting in its final report. Perhaps some of the conclusions and recommendations of this report will find their way into the commission's final conclusions and recommendations, but readers should not assume this.

This report is divided into three major parts. Part One provides background for the material that follows. It covers the historical and legal evolution of the present federal system, federal-state relations in other nations, and an examination of fundamental principles for evaluating the relationship between a national government and state governments. Part Two provides a discussion of the current state of state-federal relations. Part Three provides a comprehensive inventory of proposals for changing state-federal relations and an assessment of those proposals against various criteria including workability and political feasibility. It also provides my recommendations for positions that could be adopted by the commission.

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Arlington, Virginia

PART ONE: BACKGROUND

CHAPTER ONE: HISTORICAL AND LEGAL DEVELOPMENT OF FEDERAL-STATE RELATIONS

INTRODUCTION

This report is about American federalism -- the relationships between national and state governments. The topic is not a new one, concerns over the relationship mark the major points in our national history. The Articles of Confederation, the Revolutionary War, the framing of the Constitution, and the Civil War were all situations in which the stakes were the relation of a national government to American states. More recently, federalism was at issue in the policies of the New Deal and is currently at issue because of President Reagan's "new federalism" proposals.

In the case of federal issues today the past is more than prologue. For some, federal issues should be decided pragmatically, based solely on what appears likely to work at the time. However, many participants in federal issues view the legal framework of the Constitution, the legal interpretations of the Supreme Court, and the history of the United States as appropriate sources of guidance for current issues. Whether one argues for the devolution of federal power to the states on historical or legal grounds or not, an understanding of the historical and legal background is necessary to understanding why things are as they are today. It is also necessary for understanding why some people feel as they do about the issues involved.

This chapter is intended as a summary. Persons seeking more detailed treatment of the subject should consult such documents as the ACIR report, THE FEDERAL ROLE IN THE FEDERAL SYSTEM: DYNAMICS OF GROWTH, The Condition of Contemporary Federalism: Conflicting Theories and Collapsing Constraints (ACIR, 1981) and a report prepared for the Statehood Commission by Birch, Horton, Bittner and Monroe, THE CONCEPT OF STATEHOOD WITHIN THE AMERICAN FEDERAL SYSTEM (1981).

THE EARLY YEARS

When our founding fathers declared independence from Great Britain, they did so as leaders of individual states, not as a nation. The Declaration of Independence refers to united colonies, not to united states. The Declaration says that the colonies are free and independent states, not united states or a state, and that these states (plural) have the power to levy war, contract alliances, etc.

From the signing of the Declaration until the adoption of the Articles of Confederation in 1781, the states operated as sovereign entities. They adopted constitutions, raised armies, and regulated the conduct of their citizens. The Treaty of Peace with Great Britain recognized the former colonies as "free sovereign and independent states."

The Articles established a national government with powers that were quite limited, so limited that individual states were negotiating with each other on such subjects as regula. .on of trade. The national government did not even have the power to tax, having to rely instead on state appropriations. Dissatisfaction with this situation led to the Constitutional Convention and the lengthy debate over whether to ratify the new instrument, out of which tracts such as THE FEDERALIST PAPERS developed.

Opposition to the new Constitution was based upon fears of a strong national government. One compromise was agreement to adopt ten amendments, generally known as the Bill of Rights. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, a.e reserved to the States respectively, or to the people."

THE CONSTITUTION

The Constitution represented an attempt to create a framework in which a national government would have enough powers to function while leaving state governments control of those matters that could be handled without a national government's involvement. This objective was handled by providing specific, enumerated, powers for the national government in Article I, Section 8. These powers included powers associated with defense, the power to raise taxes and coin money, the power to make treaties, the power to make bankruptcy laws, the power to establish patents and copyrights, and the power to tax. Congress was also given power to regulate commerce with foreign nations and among the several states. The Article's prefatory language indicates that Congress shall have the power to tax to provide for the "general welfare" of the United States. The concluding phrase in the Article indicates power "to make all laws which shall be necessary and proper for carrying into execution , foregoing powers..."

.RLY TESTS OF FEDERAL POWERS

The power of the new federal government proved equal to the variety of tests it faced, ranging from the Whiskey Rebellion, which challenged the power to tax, to various cases which established the supremacy of federal treaties over state law. The Judiciary Act of 1789 assured the supremacy of federal courts in interpretation of the Constitution by creating federal jurisdiction over cases decided on constitutional grounds in state courts. The Supreme Court supported various exercises of federal power, such as the establishment of a national bank.

An 1824 Supreme Court case (GIBBONS v. OGDEN, 9 Wheaton 1) dealt with the meaning of the Commerce Clause. The Court upheld the power of Congress to regulate steamship transport and, if necessary, to override state legislation in the process.

However, the issues of the day showed how much emphasis those involved placed on limiting the scope and power of the national government. Despite obvious problems being caused by state currency issuance, whether to have a national bank was hotly disputed in Congress. Legislation to create a permanent improvements (public works) fund was vetoed by President Madison on the grounds that such activity exceeded the appropriate scope of national government action. In 1854, President Pierce vetoed a bill to provide federal assistance to the indigent insane noting prophetically:

> (If) Congress is to make provision for (paupers) the fountains of charity will be dried up at home, and the several states, instead of bestowing their own means on the social wants of their own people may themselves, through the strong temptations, which appeals to states as individuals, become humble supplicants for the bounty of the federal government, reversing their true relation to this Union.*

THE COMMERCE CLAUSE AND STATE POLICE POWERS

The Supreme Court accepted a number of cases in the pre-Civil War period that raised the question of overlapping state and federal powers in dealing with commerce. The holdings in these cases indicated that while there were some actions that states could not take (e.g., taxing arriving passengers), states were free to regulate commerce in the absence of conflicting federal regulation. These cases are the legal basis for the many overlapping state and federal rules which characterize much economic activity today.

THE CIVIL WAR AND ITS LEGAL AFTERMATH

The Civil War established the power, and presumably the right, of the United States to prevent secession of states from the Union. It also produced the Reconstruction period during which the Fourteenth

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*ACIR, CONDITION OF FEDERALISM, p. 47.

Amendment was passed. That amendment states, in relevant part, "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." In the Slaughter-House Cases in 1873, the Supreme Court was asked to decide whether this amendment went beyond the protection of civil liberties of individual citizens by also covering economic rights. In a divided vote, the Court refused to apply tne amendment to alleged economic discrimination through a government created monopoly. In 1877 the Court refused to overturn an Illinois law regulating grain elevators, despite claims that the regulation deprived operators of Fourteenth Amendment rights.

FEDERAL JUDICIAL PROTECTION OF BUSINESS

Gradually, the federal courts moved to reverse the doctrines in the Slaughter-House and grain elevator cases in order to overturn various forms of state regulation. The landmark case (CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY COMPANY v. MINNESOTA, 134 U.S. 418, 1890), invalidated railroad regulation by Minnesota. The case was followed by a variety of others striking down state regulation of such subjects as the hours of work of bakers.

Although these cases, which carried controversial economic doctrines into constitutional law, were eventually to be rejected by later decisions, they represent a major intrusion of the federal government into matters that had, for nearly 100 years, been considered appropriate subjects for action by the states.

In addition to these Fourteenth Amendment cases, the Supreme Court invoked the Commerce Clause to invalidate state regulation of railroad long haul and short haul rates. Congress acted to fill this regulatory void with the Interstate Commerce Act of 1887 which established the Interstate Commerce Commission. This was quickly followed by the Sherman Antitrust Act of 1890. In these pieces of economic regulation, the federal government was clearly dealing with multi-state companies in situations where it would be difficult for state action to accomplish the regulatory results intended.

THE PROGRESSIVE ERA

Teddy Roosevelt assumed the Presidency in what was termed "the progressive era." Politics at the time was oriented to a "can do" philosophy of government and the common view was that government regulation could cure a number of perceived abuses in American society. What were perceived as regulatory voids would be filled. In a 1910 speech, Roosevelt outlined some of the principles of the New Nationalism:

> The state must be made efficient for the work which concerns only the people of the state; and the nation for which concerns all the people. There must remain no neutral ground to serve as a refuge for lawbreakers, and especially for lawbreakers of great wealth, who can hire the vulpine legal cunning which will teach them how to avoid both jurisdictions...The New Nationalism puts the national need before sectional or personal advantage. It is impatient of the utter confusion that results from local legislatures attempting to treat national issues as local issues.*

The Supreme Court began consistently to uphold federal statutes which arguably entered areas reserved to the states. The Commerce Clause was used to uphold a statute that prevented the interstate shipment of lottery tickets despite a contention that the power to regulate commerce did not include the power to prohibit it. The taxing power was used to sustain legislation that for decades protected the butter industry from competition from artificially colored margarine. Congress entered the fields of food and drug inspection and meat inspection under the Commerce Clause. The Commerce Clause was also used to sustain the Mann Act which made it a federal offense to ship women across state lines for immoral purposes. The common link in these cases is that Congress was acting to restrain the physical movement of something across state lines.

However, the connection with physical movement was replaced with the concept of a "stream of commerce". This doctrine was used to apply antitrust laws to sales of cattle within a single state on the grounds that the sales were part of a continuing stream of activity that was part of interstate commerce.

THE BEGINNINGS OF THE GRANTS ECONOMY

Although the federal government had provided "grants" in earlier periods, through such actions as grants of public land to promote construction of railroads, the grant system as we know it today began with the passage of the Weeks Act of 1911. That legislation, which covered protecting forested watersheds, was soon followed by the Smith-Lever Act establishing the Agricultural Extension Service. By 1925 federal grants totaled about $93 million, covering these functions

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*ACIR, CONDITION OF FEDERALISM, p. 64.

plus public health, highways, vocational education, and maternity care. The grants economy was beginning.

A challenge by the State of Massachusetts to one of the programs indicated that the Supreme Court would not likely accept challenges to grants on both procedural grounds and on the basis that the state's participation in grant programs and adherence to grant conditions was voluntary.

CONSTITUTIONAL AMENDMENTS AFFECTING FEDERAL-STATE RELATIONS

A series of constitutional amendments in the early 1900's had significant implications for evolving relationships between the states and the federal government. The Sixteenth Amendment provided the federal government with access to the income tax, now the most significant single source of federal revenue. The Seventeenth Amendment ended the practice of selection of senators by state government, replacing it with the popular election method. No longer would senators be emissaries from state government; they became political figures with direct ties to the electorate. The Eighteenth Amendment (Prohibition) reflected use of police power at the national level in an area previously under the control of states, which was why a constitutional amendment was considered necessary to permit federal action.

THE TWENTIES

A group of civil rights cases in the period from 1919 through 1927 brought protection of the federal Bill of Rights to citizens dealing with state action through the concept that the Fourteenth Amendment made these protections applicable to the states. While this enlargement of federal control was taking place in civil rights, the Supreme Court began to void federal action dealing with economic regulation. Most notable, in light of previous cases on lottery tickets and meat packing, was a decision invalidating congressional action to regulate child labor. In response, Congress passed new child labor legislation based upon the taxing power. The Supreme Court rejected this legislation also on the theory that an invasion of state powers was involved. However, the Court rejected an Arizona labor relations statute on the grounds that it involved unequal protection of the laws and rejected a Kansas arbitration statute as contravening the due process requirements of the Fourteenth Amendment.

DEPRESSION AND RECOVERY

The Depression had a massive impact on the history of federalism. As the Advisory Commission on Intergovernmental Relations put it:

> By the end of the Depression, the American governmental system was transfigured. Whether or not conscious of its plunge into modernity, the nation had modified its view of economy, realigned itself politically, and amended its attitudes on poverty and unemployment. Yet...the Constitution stood practically if not formally transformed. When the clouds of depression lifted, the remaining constitutional constraints to the growth of the central government had been eroded. The character of American federalism was thenceforth forever changed.*

The Depression saw the enactment of the first federal welfare program, which used the mechanism of funneling funds through state governments. Public works projects were also funded for economic relief but, unlike more recent versions of such programs, the funds were spent directly by the federal government rather than by state and local governments. An entirely new type of federal institution, the Tennessee Valley Authority, was established with a charter to provide power and economic development to a designated geographic area. The president also entered economic regulation in great detail, resulting in a running battle between the administration and Supreme Court. The president's agricultural program was scrapped on the grounds that it invaded the power of the states. Other key parts of the New Deal were held invalid. However, by 1937 the Court had backed down from these decisions and began to uphold federal economic regulation on a broad front. In the cases that resulted, the Court generally upheld the concept that the federal government was empowered to tax and spend generally in the pursuit of the general welfare. Prior decisions prohibiting federal child labor laws were overruled. By the end of World War II, the previous constitutional bounds on federal action potentially infringing on the powers of states had been almost totally rejected both in the courts and by the nation's political leadership.

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* ACIR, CONDITION OF FEDERALISM, p. 76

MORE RECENT DEVELOPMENTS

Over the past 20 years, little attention has been paid to the moribund historical relationship of the state and national governments. Instead, decision-makers, including many state officials, fell into a pattern of decision making which assumed fundamental national responsibility for essentially all domestic functions. That responsibility might be shared with state and local governments. The primary cost responsibility might be carried by state and local governments. But the legitimacy of a federal role was rarely challenged.

Federal grant programs were provided in such areas as fire protection, coastal zone management, rat control, domestic water supplies, sewage treatment plant construction, repair of rural bridges, bilingual education, libraries, arts and culture, police protection, and just about every governmental activity known. Federal legislation protected the rights of the physically handicapped, the aged, drug abusers, and others, and sought to improve the status of minorities.

The extension of federal power and roles suffered only one legal setback. In 1976 in NATIONAL LEAGUE OF CITIES v. USERY (426 U.S. 833), the Court, in a 5-4 decision, held that the federal government could not apply its wage and hour regulations to state and local government employees. The majority opinion noted that "states as states stand on quite different footing than an individual or corporation when challenging the exercise of Congress's power to regulate commerce...Congress may not exercise that power so as to force directly upon the states its choices as to how essential decisions regarding the conduct of intergovernmental functions are to be made." The minority opinion called the decision a judicial redistribution of power and argued that "the extent of federal intervention into the states' affairs in the exercise of delegated powers shall be determined by the states' exercise of political power through their representatives in Congress.."

The Usery decision deals only with one instance of regulating state and local governments directly by legislation, as distinct from federal regulation of private conduct that state or local governments may also seek to regulate. In addition, the holding stands side-by-side with other holdings making the same legislation applicable to certain state and local functions considered to be of a proprietary (businesslike) nature and decisions applying age and sex discrimination statutes to state and local employment policy. More important, it is generally agreed that the policy that Congress cannot apply as a regulation under the Usery decision could be applied through the spending power by conditioning federal grants on compliance with the policy.

THE RELEVANCE OF HISTORY AND CONSTITUTIONAL LAW

In the day-to-day decisions that determine the relationship of Alaska and the federal government, most of the legal and constitutional materials discussed in this chapter do not make much difference. As a practical matter, neither history nor current interpretations of the Constitution prevents the federal government from entering areas that traditionally were handled by state and local governments.

The American history of federalism certainly provides the basis for claims that the founding fathers did not contemplate the degree of federal involvement in regulation and grant programs that has developed since World War II. However, the counterclaim is that the founders did contemplate the Constitution as a living document and that increased federal roles reflect real changes such as easier transportation, greater mobility of people and goods, and the development of a truly national economy that cannot be effectively regulated by a single state.

As politically salient arguments, "states rights" and appeals to the principles of the founding fathers have simply lost whatever effectiveness they may have had in an earlier day. One indication of this is that state officials themselves rarely make historical or legal arguments against federal action, and often support federal actions that would be inconsistent with such sweeping arguments. Another indication is the way in which the Reagan administration has handled the effort to reduce the scope of the federal government and put more power into the hands of state and local officials. This argument is normally put pragmatically, not legally or historically. federal action is criticized as being too costly, too remote from the problem, having too many unintended consequences, destroying individual initiatives, and being overly intrusive into the lives of citizens. While the rhetoric includes occasional mention of historical background or the principles of the founding fathers, the key arguments for state and local power are basically pragmatic.

Chapter 2 thus turns attention to the pragmatic question of the circumstances under which national action may be more appropriate than state and local action and when national action should be avoided.

CHAPTER TWO: GUIDING PRINCIPLES OF FEDERAL-STATE RELATIONS

INTRODUCTION

The preceding chapter suggested that historical and legal approaches to federal-state relations are likely to have little current political saliency. Americans have either forgotten their history or choose to reject historical precedents and the courts no longer stand as major guardians of federalism. If history and law are not to guide policy, then other guides must be found. This chapter is the quest for those guides.

In broad terms, the issue is at what level of government should there be lodged responsibilities for social welfare, economic regulation, provision of services, and financing all of these. This is by no means a new issue. Plato's REPUBLIC and Aristotle's POLITICS both address the appropriate size and scope of governmental units.

In its study of this subject, THE FEDERAL ROLE IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH: AN AGENDA FOR AMERICAN FEDERALISM: RESTORING CONFIDENCE AND COMPETENCE (1981), the Advisory Commission on Intergovernmental Relations suggested that a test of national purpose be applied to determine when the federal government could legitimately act. The concept of national purpose is, in substance, a replacement for the former legal tests of appropriate spheres of federal action. It can be seen as one of two possible approaches to issues raising questions of state-federal relations.

One approach is to bring to the table no theory at all about appropriate spheres of responsibility, letting each case be decided on its own merits. ACIR calls this approach the "timely contribution" test. That is, if federal action can make a timely contribution to a worthwhile objective, then the action should be taken.

The national purpose test applies the added concept that the federal government should consider overall division of labor among governments and the effect of any proposed specific action on that general division of labor in deciding when federal action is appropriate

Despite its concern that a national purpose test be applied, ACIR concedes that in practice, one is not:

> According to the national purpose criteria, grants-in-aid should be employed to advance major national objectives in the principal fields of federal concern, with other functional fields being left to state and local

governments alone. In practice, however, most commentators believe that the federal grant system has never -- at any stage of its development -- embodied a clear conception of national purpose or priorities. The specific activities selected for assistance seem to have reflected short-term political judgments, rather than careful assessment of basic needs.

ACIR does not do a convincing job of articulating a national purpose test. The most specific test that it offers is one of "irreconcilable conflict" which would require actual head-on conflict between state action and a nationally articulated goal before federal action was taken. This approach is hard to apply as it is difficult to know a "head-on conflict" when one sees one. Whether or not the federal government should regulate the hunting season on federal lands and whether or not there should be federal legislation on drunk driving are important issues, but notions of national purpose seem to add little insight to the analysis of these issues.

As a practical matter, anyone advocating federal action can couch the advocacy in terms of national purpose. Federal action is needed because there is a problem that needs to be solved which is not being adequately solved by state and local action. This is the premise on which practically all federal domestic legislation is based. The national purpose test does not dispose of the issue but simply changes the vocabulary by which it is addressed. Thus, more specific prescriptions of when federal action might be appropriate must be considered. These include concepts based upon fiscal equalization, externalities and spillovers, economies of scale, service and tax competition, and political accountability. These concepts are discussed in the sections that follow.

FISCAL EQUALIZATION

Different governmental units differ in their fiscal capacity as measured by such indicators as property value per pupil in public schools or per capita income. Different governmental units also differ in the needs for public spending as measured by such indicators as percentage of persons in poverty, percentage of persons in public schools, etc. The cost of providing services also differs from government to government due to differing prevailing wages and prices.

The concept of fiscal equalization is that an appropriate role for higher levels of government is to equalize, in whole or part, fiscal disparities among lower levels of government. The concept is illustrated by the financing of elementary and secondary education in most states.

There is general agreement in society that there should be a system of free public schools and that the actual provision of the service should be at the local level.

Organizing educational responsibility into local school districts and, in some states, with general purpose local governments which rely heavily on property taxes creates considerable disparities in financial capacity among the districts. It is not unusual for some districts to have high concentrations of industrial and commercial property and very few pupils. Other communities are essentially bedroom communities, with large numbers of pupils to educate and little or no industrial and commercial property to tax. As a result, a property tax of 1% of value may suffice to provide public education in one community while a 4% tax might be required in another to provide the same teacher salaries and pupil-teacher ratio.

Most states deal with this problem through equalization programs of school assistance. These equalization programs generally seek to supply state aid so that the same level of local tax effort will produce the same minimum expenditure level in each district.

Equalization can be considered through both how the federal government raises money and how it spends money, recognizing that there is not general agreement on the appropriate measures of equalization for either.

The federal tax system is inherently equalizing with respect to income. That is, citizens in a state with high per capita income will pay a greater proportion of their income in federal income taxes than will persons in a lower income state.

Federal expenditure programs may or may not be equalizing depending on the characteristics of each program. Aid to schools based upon the number of disadvantage pupils would generally be considered as equalizing. Programs, such as revenue sharing, which consider per capita income as an allocation factor, would also be considered as equalizing. However, programs which provide a federal match for state and local spending, such as welfare (AFDC) and Medicaid, may not be equalizing as states with high fiscal capacity will tend to spend more and draw larger amounts of federal money than poorer states.

Equalization is logically a more relevant criterion for aid to local governments than for aid to state governments, as fiscal disparities among local governments are much greater than fiscal disparities among states.

Furthermore, fiscal disparities among states have been decreasing throughout the 20th Century, at least when measured by the traditional test of per capita personal income. The American economy permits free movement of workers, goods, and employers. Persons in low income areas tend to migrate to higher income areas, increasing per capita income where they left and decreasing it where they go. This can be seen in the major migrations from the rural South to the Midwest in the 1940's and 1950's and in current migration to Western states, including Alaska. At the same time, centers of employment can migrate to where low income (and low wage) workers are to be found. The wholesale shift of the garment industry from the New York area to the South and of furniture manufacturing from North to South are examples. This movement decreases income in the states giving up the firms and increases income in the new locations.

Although there are occasional gyrations in the secular trend, the convergence of personal incomes is continuing. In 1967 regional per capita income in the Southeast was 79% of the national average, the lowest of any region. By 1977, however, it had increased to 86% of the national average. The two highest regions in 1967, with 113% of the national average, were the Far West and the Middle Atlantic. By 1977 the Middle Atlantic had dropped to 106% of the average, while the Far West maintained its position. In terms of individual states, Mississippi was the lowest state in 1967 at 62% of the national average, but moved to 70% in 1977. Connecticut, which led in 1967 with 129% dropped in ten years to 114%.*

Fiscal capacity can also be measured through a representative tax system which seeks to reflect the comparative yield of a national average of state tax rates for each of the states. This measure will indicate more capacity than the personal income measure for states with major natural resources (e.g., Alaska and Oklahoma), a strong tourist industry (e.g., Nevada), or a major corporate tax base (e.g., Delaware) and generally lower capacity for states lacking these assets. This measure also shows convergence over time for all regions and most states. The most notable exceptions are low population high resource states, such as Wyoming and Alaska, which improved their fiscal capacity, by this measure, from 1967 to 1979.

Thus fiscal equalization considerations are a diminishing factor in the design and evaluation of federal financial roles.

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*ACIR, TAX CAPACITY OF THE FIFTY STATES: METHODOLOGY AND ESTIMATES (1982), pp. 20-21.

Fiscal equalization is only a theoretical purpose of federal grants. In actual practice, the current system of federal grants is not particularly equalizing. While states such as California, Rhode Island, and New York get a smaller percentage of costs in large programs such as Medicaid and AFDC (welfare) paid by the federal government, their benefit levels are sufficiently higher so that per capita federal assistance in these states is higher than in the states with lower fiscal capacity.

Thus, if fiscal equalization were the only criterion for measuring the federal role, there would be little if any such role. Fiscal capacity disparities among states are relatively small and generally diminishing and there is clear proof that federal aid, in total, is not equalizing.

EXTERNALITIES AND SPILLOVERS

The theory of externalities and spillovers is easily understood. Individual firms provide "private" goods, such as automobiles and magazines where the enjoyment (benefit) is confined to the person making the purchase and where that person bears the total cost of the purchase. Governments provide public goods which inherently can be enjoyed, without specific charge, by many persons. Economically optimal decisions about what public goods and services to provide at what cost are most likely to occur when the voters of the decision-making unit receive all of the benefits and pay all of the costs. In this sense, the national defense function is appropriately at the federal level because all U.S. citizens receive the benefits and all of them pay the costs. Provision of defense services by a state would involve externalities as the citizens of that state would be providing defense capabilities benefiting citizens of surrounding states.

A major example of externalities is pollution control. If all the costs and benefits of pollution control were confined to a single state, then the citizens of that state would presumably, through their elected representatives, reach a decision on the optimal level of pollution control spending. However, if many of the costs of pollution fall into a downstream or downwind state, the citizens could be expected to "underspend" on pollution control as they would not bear the full costs of pollution created in their state.

The theory of externalities sounds attractive when applied to grant programs. For example, suppose that 40% of the benefits of a particular state program accrued to persons out-of-state, but that all the costs were borne in-state. The voters of the state could be expected to "underspend" on this program. The optimal policy would be for the national government to share the costs of the program, specifically to pay 40% of the costs. Given this incentive, the state decision-makers would presumably act optimally. Thus, the notion of externalities fits well with the actual structure of many federal grant programs which do involve federal percentage matching.

However, the theory becomes tenuous when applied to practical situations. Theoretically, the citizen of Alaska has some interest in education provided to citizens of Mississippi. The Mississippi student may, for example, migrate to Alaska or be part of the pool of persons from which armed forces are drawn. However, who is to say that national taxes, justified on this basis, should be used to pay 1%, 5%, or 30% of Mississippi's educational costs?

The externalities argument is quite strong for certain federal financing, such as financing of an Interstate Highway System and a national system of airports. The argument is ridiculously weak when applied to such activities as local fire and police protection, rat control, solid waste disposal, urban gardening, home insulation, and pothole repair. As economist Lester Thurow puts it, the concept of externalities:

> ... is simply not a convincing explanation of the provision of most domestic public goods. Once a society gets beyond basic public health measures and communicable diseases, medical care does not generate externalities. Death is the most private of all activities, and an individual's health has no nonmarket economic effects on the general population. Neighborhood externalities certainly exist in housing, but internalizing these externalities does not lead to the types of housing programs that have been legislated. The externalities have nothing to do with minimum housing standards for each family. Similarly, I find the arguments that education generates exernalities unconvincing once one gets beyond elementary education (literacy, etc.). Fire protection is like medical care. Some limited amount of fire protection and code enforcement is necessary to prevent conflagrations, but beyond this a donor has no more interest in his neighbor's fire protection than in his neighbor's fire insurance.*

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*ACIR, RESTORING CONFIDENCE, pp. 53-54

Although the economic criteria of equalization and externalities give some indication of appropriate national roles, particularly in regulation, they do not match well with the existing federal grant system. As ACIR concludes:

> Existing grant-in-aid programs have not been a very effective instrument in achieving national equity goals. In general, the grant-in-aid system is not strongly targeted to the least advantaged states or localities, has not substantially altered the distribution of income or economic opportunity, and has not been consistent with theoretical prescriptions based upon externalities criteria.*

ECONOMIES OF SCALE

Governmental activities vary in the extent to which they require large service areas to be performed most effectively. Where an activity is less expensively or more effectively carried out on a national scale, there is a strong argument that the federal government should be performing the function. Conducting a space program and providing for the national defense are examples of such functions. The only government that can provide national copyright and patent protection is clearly a national government.

While notions of economy of scale provide some clear examples of functions that should be performed at the national level, they provide little guide to what functions should be performed at the local level. If there are diseconomies of scale in performance of a particular function, one option is decentralizing the function to state and/or local governments. Another option, however, is decentralizing the function to federal field offices or private providers operating on contract at the appropriate scale.

There is very little hard evidence to show that there are significant diseconomies of scale in government functions. While some major federal functions, such as welfare, social services, and education, are carried out through state and local governments, the federal government itself conducts such programs as the maintenance of

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*ACIR, RESTORING CONFIDENCE, p. 60

decentralized park system (National Parks), the management of a hospital program (Veterans Administration), the making of loans (Farm Credit System), and the patrol of waterways (Coast Guard). As state and local service delivery systems go, some of these are generally considered to be relatively efficient.

An example of a situation in which local control is cherished in the United States is local law enforcement. However, we have no real evidence that there are diseconomies of scale in this function. Some functions are clearly better performed on a large scale than a small one. Examples are the maintenance of records on vehicle registrations, specialized training, fingerprint records, and files on persons wanted by the law. We have no real proof that small city police departments are more effective (however measured) than those of large cities, nor that persons in rural areas who get local police protection from state police forces, as is the case in some states, are less well protected than those served by county agencies. Some European police forces, generally conceded to be effective in comparison to ours, are national forces.

There are reasons, discussed below, why the notion of local police forces is widely accepted, but diseconomies of scale do not account for this view.

SERVICE, POLICY, AND TAX COMPETITION

Individual governments can adopt quite different patterns of regulatory policy, provision of service, total governmental cost, and the division of financial responsibility in the tax structure. This leads to the possibility of competition, which can be viewed both as good and bad.

The concept of competition is recognized at the local government level in both the public finance literature and in the popular mind. In many American metropolitan areas, one can find a number of suburban communities with quite different characteristics. Some are well known for the quality of their public schools and often have high property tax rates. Others, often called working class communities, maintain relatively low (inexpensive) levels of public service and have lower tax rates. People can, by decisions on where to reside, pick and choose among jurisdictions. In this sense, having decision-making at the local level maximizes individual choice of Americans.

This concept can also be applied at the state level. President Reagan used this concept when answering questions about potential uneven distribution of gains and losses under his new federalism proposal, noting that people could always vote with their feet if they did not like the results in their own state.

While the notion of governments competing to draw residents has some appeal, it also has limitations. For many persons, moving even within a metropolitan area is not an option -- they may not live in a metropolitan area at all or may be locked into current residential choices by high interest rates associated with new mortgages, by friendship with neighbors, proximity to work, or a desire to avoid switching schools of their children. Of course, for competition to have effects it is not necessary that all the customers need to be free to switch suppliers, just enough of them to influence the behavior of the suppliers.

As a practical matter, however, the bulk of the competition among local and state governments is likely to occur over ensuring the location of firms considered to provide attractive employment opportunities. This competition now has practically all states and major cities offering industrial development revenue bonds; many states and cities providing tax abatements and/or loan funds; local government cooperation in providing site improvements for new firms, etc. This competition can tend to reduce the taxation of persons and firms considered mobile (primarily firms and high income taxpayers) relative to all other taxpayers. Whether this result is considered desirable or not depends upon one's tax policy views.

If one accepts the idea of competition among jurisdictions as an appropriate mechanism for popular control of sub-national governments, then the competition criterion would suggest making sure that key governmental functions are both performed and financed by the smallest governmental units possible.

However, this conclusion definitely has its critics. Their fear is that competition will produce socially undesirable results. If, for example, unemployment compensation and workers' compensation are controlled by the states, it can be argued that benefits are held to low levels so that states can maintain a competitive business climate. If states are left on their own to set welfare benefits, it is argued that the more generous states will be hurt by less generous ones, either by the migration of persons to the more generous state or by the migration of firms to the less generous states with lower taxes.

POLITICAL ACCOUNTABILITY

In deciding what levels of government should perform what functions, ACIR suggests a criterion of political accountability. The concept is that functions should be assigned to jurisdictions that are "controllable by, accessible to, and accountable to their residents

(ACCESS AND CONTROL) and that maximize the conditions and opportunities for active and productive citizen participation (CITIZEN PARTICIPATION)."

ACCESS AND CONTROL: Notions of voter access and control of public officials and of accountability are difficult to translate into quantifiable terms. As a legal matter, all citizens of local, state, and national government in the United States have the trappings of access, control, and accountability. Governments are controlled by officials who are elected by any adult who wants to vote. Elected representatives at all levels are accessible to just about any constituent. Decisions are normally arrived at in open forums. Procedures are available for petitioning bodies of elected officials, and public hearings are common at all levels of government.

It is difficult to say how one would judge comparative access and control between state and federal governments or between local governments and the states. In a mathematical sense, the individual citizen has more power to influence decisions when smaller numbers of citizens are involved in making those decisions. Thus, a voter who is one of a hundred residents of a town would be expected to have more influence in town affairs than he or she would in a state of two million people or a nation of 220 million. Furthermore, the individual enjoys a greater likelihood of knowing the elected officials and the appointed personnel of the government. Other things being equal, the criteria of access and control would thus seem to favor conducting governmental functions at the lowest possible governmental level.

CITIZEN PARTICIPATION: So long as there are not systematic differences in barriers to citizen participation, the discussion above would seem to apply to citizen participation, suggesting that more meaningful participation is likely to take place at lower levels of government. This is certainly mathematically the case. If a decision is made by federal legislation, some 535 elected representatives will be involved. If the same decision is made at the state level roughly 10,000 decision makers will be involved. If made at the local level, literally hundreds of thousands will make the decision.

The assumption that citizen participation opportunities are inversely a function of the number of citizens covered by a government is clearly invalid if lower levels of government systematically deny certain categories of citizens access to their political processes. At times when state legislatures were unrepresentative of state populations because of failure to reapportion on a timely basis, this could easily be the case. It can also be the case if certain groups, such as blacks in the South or Native Americans, are systematically denied access at the state or local level.

However, times have definitely changed in the representation of minorities. State legislatures have much smaller districts than those of U.S. representatives or senators. As a result, any ethnic group that is concentrated in a particular area will have state legislative representation before it will have representation in the U.S. Congress. For example, the percentage of black members of Congress is well below the percentage of black state legislators.

At the local level, the impact is even more pronounced. For example, blacks now control county and city government in many areas in the South and city governments in many Northern cities.

At any point in time, groups will probably tend to prefer that power be concentrated at the level of government at which they feel they are most effective in getting their policies implemented. This would suggest a pragmatic approach to federalism in which groups that have a lower proportion of members in some areas (e.g., blacks in Alaska) would tend to prefer policies of a government covering more persons with their background (e.g., the national government). Groups with a higher proportion of membership in an area (e.g., Alaskans who fish or hunt) would, on the same logic, prefer that decisions of interest to them be made on a state rather than a national basis.

While this analysis of political self-interest seems reasonable enough and has some basis in observed political conduct, the situation is distorted somewhat in consideration of devolving power from the federal government to the states. Practically every significant group in America is represented in the nation's capital, usually with headquarters there. The persons in leadership positions in these groups have a vested interest in decisions being made in Washington, D.C. rather than in state capitals. To the extent that government power is devolved, power will devolve in private groups as well, as organizations will be more dependent on their state leadership and less dependent on their national leadership. For this reason alone, the organized leadership of political interest groups are likely to represent one of the groups of opponents to devolving federal power.

INFORMATION AND COMPLIANCE COSTS

INFORMATION COSTS: Decentralization of authority for decision-making puts more people into the act of making decisions. This was discussed above as a valuable result in connection with citizen participation. However, significant costs are imposed in the process. Some of these costs are simply overheads. It clearly costs more to have a Congress, legislatures in 50 states, and numerous county commissions and city councils than it would simply to have a Congress and some sort of local government body in each community.

However, these information costs multiply through the administrative machinery of state and local government. State legislatures must be informed on such matters as possible locations for highways and means of financing them. However, state transportation agencies then make specific decisions on such matters as specifications for construction materials, selection of contractors, and the like. Having to make policy decisions on these matters in 50 states is clearly more expensive than making the decisions once for the nation would be. The costs of this decentralized activity are clearly substantial.

COMPLIANCE COSTS: Once decisions have been made on a decentralized basis, then individuals and firms must find out what those decisions have been and find ways to comply with them. As any driver in the Lower 48 states during the 1970's knows, even such things as deciding when one can turn right on red become confusing in the absence of national standards. The situation can be equally difficult for a trucker seeking to move semi-hazardous cargo across the United States by truck.

In some cases, the differences in regulations that develop on a state-by-state basis are difficult to defend. One example is trucking with vehicles that have two trailers attached to one tractor (double-bottoms) and weight limits for trucks. The construction of roads, most of which are federally-aided roads built to uniform national standards, and weather conditions among the states would suggest that there is no significant physical difference in road conditions and maintenance criteria among the states. Yet, weight and length restrictions differ considerably. As a result, truckers are driven into patterns of travel that are clearly non-optimal in an economic sense. It may be that the most restrictive states have taken the correct view, and that other states are incurring excessive maintenance costs by permitting heavy trucking. It may be that the gains from more efficient transportation outweigh the safety and maintenance implications of heavy trucking. What cannot be the case is that both groups of states could be correct at the same time. The resulting inconsistencies cause significant compliance costs.

Significant information and compliance costs are the other side of the argument that concentrating power at state and local levels lets policy be tailored to the particular needs and policy preferences of the local population.

RELATIVE COMPETENCE OF LEVELS OF GOVERNMENT

Many discussions of state and federal roles have concentrated attention in alleged systematic failings of one level of government or the other. Much of the court intervention in state and local policy has been based upon apparent systematic discrimination by many states, particularly Southern ones, against black citizens. Many of the national grant programs are premised on notions that state and local governments provide inadequate attention to the needs of the poor. Many of the administrative restrictions in grant program presume the necessity to guide state and local government in such matters as avoiding conflicts of interest, procurement procedures, personnel practices, etc.

The criticisms of federal involvement in domestic programs also deal with competence questions. The federal government is viewed as being bureaucratic, overly involved in paperwork, incapable of understanding local situations, etc. This section examines the question of whether state and local government are inherently more or less competent than the federal government.

Because there is disagreement about appropriate policies in such areas as transportation, land use, social services, and recreation, one cannot judge the competence of governments by the policies they adopt, at least in many important instances. Thus, the question of relative competence is discussed in terms of what those discussing it consider proxies for competence, such as the number of staff members available to a legislative body. These are inherently poor measures, but are the only ones available.

REPRESENTATIVENESS: There can be no question that state governments, before the decision of the Supreme Court in the reapportionment cases, were unrepresentative of the citizens in each state, simply because voters had unequal voting power. In some areas, usually rural ones, a much smaller number of voters had a single representative in the legislature than in rapidly growing urban and suburban areas. However, the holding in BAKER v. CARR that such systems were unconstitutional has meant that state legislatures are reapportioned at least every ten years and that both houses of the legislature are reapportioned in proportion to population.

Interestingly enough, this leaves the federal government with a system that is less representative of population than state governments. As each state gets two senators, persons in smaller states have more representation than persons in larger states. Thus, a believer in "one person -- one vote" would be more comfortable with the representativeness of state legislatures and local governing bodies than with the national legislative machinery.

CORRUPTION: Because one suspects that only a small percentage of corruption at any level of government is uncovered and prosecuted, it is not possible to make quantitative comparisons of corruption at various levels of government. Thus, one is left with impressions which may not reflect reality, but which are themselves a reality because they affect the political environment in which federalism issues are considered.

During the expansion of the federal role in domestic policy ranging from the 1930s to early in the 1970s there was a widespread impression that the federal government was much less corrupt than state and local governments. Machine politics were seen as dominating the politics of many cities, and state legislators were seen as being in the pockets of various special interest groups. Petty corruption in such matters as local purchasing and inspection functions was believed to be widespread. Meanwhile, the federal government was viewed as offering a superior civil service system and a general history of avoidance of corruption.

These views have been shaken considerably by recent events. The Watergate scandal shook public confidence in the integrity of officials at the very top of the Executive Branch. A crusading press, rightly or wrongly, has not treated the federal Executive Branch image kindly. In 1982 alone, a Secretary of Labor was under investigation for alleged ties to racketeering, an Attorney General was under fire for allegedly taking tax breaks that he did not deserve, and the White House was criticized for policies on the acceptance of gifts.

The situation is not much better in Congress. Recent years have seen the forced resignation of a Senator and indictment of several House members in the Abscam investigations. Memories are fresh of the resignation of the Chairman of the House Ways and Means Committee in a scandal involving alcohol and sexual escapades. Campaign contribution information shows massive contributions to key members, even when they do not face serious election fights. After setting stricter standards, Congress recently relaxed its standards on receiving outside income for lecturing to outside groups, typically groups with a strong interest in legislation being considered by the person being paid.

However, the state and local government picture does not provide major contrasts. Federal indictments are being made in the area of highway contracting in many states and there is considerable reason to believe that similar situations may exist in other states. Corruption is often a major issue in gubernatorial contests at the state level. While the federal government can be criticized for policies regarding acceptance of outside income by members of the legislative body, many states have much lower standards. In fact, with legislative service being part-time, many legislators have business dealings (e.g., legal services) with persons and firms that have a direct interest in influencing their conduct as legislators.

At the level of the individual government worker, there periodically appear exposures of conduct problems. At all levels of government, many of these concentrate in the procurement function, with the federal GSA and its state and local counterparts being the object of suspicion. Persons who can benefit or harm individual firms substantially through the use of discretion -- tax auditors, tax assessors, building inspectors, safety inspectors, etc. -- are always subject to temptation. While few public complaints appear about federal officials' corrupt conduct in fields such as mine inspection and occupational health and safety, considerable suspicion is directed to building and other compliance inspectors at the local level.

In summary, we have no way to measure corruption at the various levels of government. We do know, from the tip of the iceberg that reaches the stage of publicity, that the problems seem to exist at all levels of government. This is not surprising, as officials often start their careers at the local government level and work their way through state government to federal service. Certainly, there is no basis for asserting that the federal government is consistently or inherently less subject to corruption problems than state or local government.

STAFFING: Another argument which was often used in the years of expanding grant programs to justify growing federal involvement in decisions previously made by state and local governments was that the federal government was better staffed than state and local governments.

As applied to the legislative body, the argument consisted of contrasting state legislatures with Congress. State legislators were much more likely than members of Congress to have additional occupations, as most state legislative service was, and is, not considered full time. State legislators often did not even have offices assigned to them and legislative staff was quite limited, particularly when contrasted with the staff support available to members of Congress.

This situation has changed considerably. Legislators are still not, in most states, full time bodies. However, legislative pay and expenses have been increased and more time is spent on legislative business as sessions have become more frequent and longer, and intra-session special committees and commissions more common. Legislative staffing has increased in practically every state by substantial margins, as have the legislative counterparts of the Congressional Research Service.

Perhaps as important as legislatures moving to meet an implicit staffing standard, is the increasing questioning of the standard itself. The bureaucracy supporting Congress now costs over a billion dollars a year, but it is not clear that this level of staffing has improved legislative decision-making.

Within the Executive Branch, state governments have sharply increased the top level staff of the governors. Typically, in 1982, governors are supported by a budget staff, some sort of planning staff, and enough personal staff members to handle functions such as press, legislation, etc. and usually additional staff specialized in such areas as health, transportation, and education.

At the level of the government worker, state and local workers in a "spoils" system were often contrasted with federal workers in a "merit" system. A typical stereotype of a state or local worker was as a "hack" whose career was launched through political connections. This stereotype never was totally accurate, as some of the strongest civil service systems in the country were in state government.

However, by 1982, the contrasts between federal and state and local governments were reduced. Merit-type systems cover hiring and promotion in major government services such as teaching and police and fire protection. Practically all states have also gone to non-patronage systems for all functions, even including traditionally patronage positions such as those involving highway maintenance and support services in state institutions.

Perhaps more important is that the rigid civil service standard itself is less respected than it once was. Some critics point out that such a system makes it more difficult to provide opportunities to minorities. For higher level positions, the criticism is that the system prevents political leaders from making the bureaucracy responsive. This criticism has been strong enough to cause the federal government to move away from a strict system for higher level employees. Thus, it is not clear what the current standard should be for comparing the personnel systems of state and federal governments, but the federal system no longer is regarded as clearly exemplary.

RED TAPE AND PAPERWORK: Rightly or wrongly, the federal government has acquired the reputation of having become highly bureaucratized, with all the symptoms that implies -- excessive preoccupation with paperwork, slow procedures, complicated forms, etc. There is substantial evidence for this view For any given action that is comparable between federal and state government (e.g., building a road, providing a grant to local government), the paperwork associated with federal action is normally substantially greater than that associated with state action.

One of the main reasons for this is that the federal government systematically covers more cross-cutting issues in much of what it does. Thus, a federal policy designed to deal with highways will also cover such subjects as affirmative action, highway beautification, protection of the environment, payment of prevailing wages, avoiding barriers to the handicapped, historical preservation, promotion of small business, etc. State and local programs, other than those where terms are dictated by the federal government, have these complex cross-cutting features much less often than federal ones.

PUBLIC OPINION ABOUT COMPARATIVE COMPETENCE: Current public opinion does not accord much credit to the federal government's competence compared to that of state governments. A Gallup poll taken in September 1981 asked a representative sample of Americans the question: "Which do you think is more likely to administer social programs efficiently -- the federal government in Washington or the government of this state?" Seventy-two percent of the respondents indicated that the state government would do better; only 19% indicated the federal government, with 9% suggesting their performance would be about the same. In response to the question "Which do you think is more understanding of the real needs of the people of this community -- the federal government in Washington or the government of this state?", 74% picked state government. Another question asked was "Which theory of government do you favor -- concentration of power in the federal government or concentration of power in the state government?" When this question was asked in 1936, 56% preferred the federal government, but in 1981 only 36% preferred the federal government, while 64% preferred concentration of power in state government.

SUMMARY: COMPETENCE: Because there are no accepted tests of what constitutes good public policy, and no reliable comparative measures of how well policy is carried out, the question of the relative competence of state and federal government will not ever be settled. However, such evidence as we have leads to the conclusion that there is no clear competence advantage for either level of government. Put another way, the centralization of power in Washington will not necessarily improve administration, but the devolution of power to the states won't necessarily do so either. This suggests that criteria of relative competence are not relevant to key decisions about federalism in the modern context.

TOWARD A THEORY OF FEDERALISM

INTRODUCTION: As a nation, we now have enougn experience with the "timely contribution" theory of federal action to know that we are dissatisfied with the results. Decisions that federal action would make timely contributions to such subjects as local law enforcement, rat control, library finance, and other subjects have now been rejected by budget decisions in the administration and Congress. Other "timely contributions" such as the small area economic development programs are also being dropped rapidly.

More important, the pattern of ad hoc federal decisions on individual domestic grant and regulatory programs has obscured the relative responsibilities of state and federal governments, has caused the creation of new local government bodies such as planning commissions, manpower consortia, and professional standard review boards that have littered the administrative landscape with little apparent gain to the effectiveness of our governmental system and substantial loss in political accountability. Also, federal intervention has substantially affected the way in which states deal with their local governments and the functions performed by various local governments. Finally, the policies have been expensive -- perhaps too expensive to sustain along with such federal responsibilities as income security, Social Security, defense, and an irreducible minimum of clearly national functions, such as care of veterans, national parks, and the airways system.

The public vote in Alaska to examine the statehood relationship through the Statehood Commission is but one manifestation of strong and widespread feelings that something major is wrong with the current system. The fact that the President can propose sweeping changes in the federal system and receive criticism primarily on the grounds that the proposals were designed to divert attention from the country's economic system, rather than that the proposals were wrong, suggests widespread desire for change. The fact that the nation's governors and legislators have endorsed in principle a sorting out of federal and state and local functions also suggests that the times may be ripe for change.

For the collection of ad hoc policies that currently characterize state-federal relations to be replaced by a system that makes some degree of overall sense requires some agreement on the basic concepts that will determine what revisions are to take place. Thus, there is a need for a theory of federalism that can command widespread acceptance and guide major policy decisions.

NATIONAL FUNCTIONS: The Constitution provides a reasonable starting point for the elaboration of national functions. The list of functions in Article 1, Section 8 includes:

(1) regulating commerce with foreign nations,
(2) establishing naturalization rules,
(3) providing uniform bankruptcy laws,
(4) fixing standards for weights and measures,
(5) providing the money supply and prohibiting counterfeiting,
(6) establishing post offices,
(7) maintaining a patent and copyright system,
(8) maintaining jurisdiction over offenses committed on the high seas, and
(9) providing for armed forces.

In addition to this incomplete list of functions, the federal government clearly needs powers and functions that are necessary to exercise the powers listed above. These include the power to tax, the power to establish a court system and law enforcement personnel to enforce federal laws, the power to own property and regulate its use, the power to pay personnel including retirees and veterans, etc.

To this list of widely accepted constitutional functions must be added the protection of the civil rights of Americans. There is considerable controversy over the definition of these rights, for example, whether enforcement of them requires bussing and whether they extend to a right to have an abortion. However, the concept that these questions should be addressed at the federal level in the context of a nationally uniform concept of citizen rights is widely accepted. Also widely accepted is the concept that as a nation we do not favor entrusting enforcement of these rights to individual states and cities.

Other functions also seem to be lodged in the federal government by general consensus. One of these is the general research and information collection function. The benefits from space research, health research, economic data collection, etc. are national in scope and the costs are appropriately financed on a national basis.

There are also certain "systems" which are designed to serve all citizens and are appropriately financed nationally, although there may be state or local roles in the implementation of some nationally defined systems. Whether some or all of the services in such systems are provided privately or publicly, the decision making on the systems can be national in scope, if there is to be government decision making at all. Examples of such systems, besides the postal system, include the air transportation system, multi-state systems of water supply and navigation, a system of roads connecting population centers, a system of parks of national value and interest, a weather prediction system, a mapping system, a system of insurance for financial institutions, a system of check clearance and credit regulation, and a nationally uniform pension system (Social Security and Medicare).

REGULATION OF COMMERCE: The commercial motivations of the founding fathers were substantial. Having a strong national government was seen as protecting commerce by making uniform national rules on the avoidance of contract by bankruptcy, preventing internal tariffs and other limits on trade, providing a national standard of value for currency and goods (weights and measures), and providing a postal and post road system.

Many of these motivations would seem relevant, and consistent with the intent of the Framers, today. They would seem most relevant to the notion of inter-state movement of goods and services where national action may be the only way to protect citizens of one state from individuals or firms resident in another state. Federal regulation that can easily be justified on this basis includes regulation of inter-state land sales, regulation of drugs and cosmetics, regulation of food (e.g., meat inspection standards), and regulation of transportation of products in support of state laws prohibiting use or sale or restricting use (e.g., narcotics, alcohol, gambling devices, prostitutes). This regulatory approach can also easily be seen as covering securities regulation and the currency power as extending to the creation of currency through bank loans and other financial transactions.

The scope of federal activity affecting commerce is, of course, much more substantial than that described above. Some examples are federal regulation of wages, hours, and working conditions and federal regulation of collective bargaining. The federal government seeks to prevent anti-trust violations and enforce trade practices. It also regulates particular industries, such as mining and railroads, and influences business conduct heavily through the tax laws. The question is how much of this type of federal activity is appropriate and how much should be left for state and local government. Here, and elsewhere in the report, whether the activity should be regulated is not being considered. Instead, we are assuming that regulation of the current type will continue to be provided and asking the appropr te level of government to provide it.

The strongest argument for regulation by the federal government in such areas as labor relations, occupational health and safety, unemployment compensation, compensation for industrial injuries, mine safety, pollution control, and product safety is that, without federal regulation, competition among the states would undermine regulatory effectiveness. States wishing to attract industry and/or states whose politics were dominated by persons favoring industry positions, or totally opposed to regulation of these subject matters, would presumably maintain quite low (inexpensive) standards. This would encourage some movement of firms from high cost to low cost states, provide an advantage for firms in the low cost states, and put considerable pressure on the states with higher standards to drop them.

At the same time, many of the activities that could be reached by federal standards are de minimus in the impact of standards on persons living in other states. For example, the impacts of a 2,000 employee plant producing brakes are much different from those of the corner ice cream store. Using the test of externalities discussed above, the costs and benefits of the ice cream store regulation all fall on the citizens of the state with the store.

This combination of circumstances would seem to indicate concurrent state and federal jurisdiction. Federal law would provide minimum standards for firms or plants with significant impacts on interstate commerce. Federal power could be delegated to states that met federal minimum standards. States would be free to set their own standards for smaller firms where there would be no externalities (e.g., wages and hours of local business) and would have to meet federal standards where there were externalities (e.g., most air pollution). State regulation could be accepted as taking the place of federal regulation when minimum federal requirements were met. In such a case, there would be a federal payment to the regulating state that would be roughly equal to what the federal cost would be if the federal government administered the regulations being taken by the states.

This regulatory model is quite close to current policy in many areas. In unemployment compensation, the federal government establishes the basic principles of the program and collects a payroll tax that is returned to the states for the administrative costs of the program and the state employment security offices. The states have considerable flexibility in setting benefit levels and tax rates. Comparable arrangements exist for pollution control, workers' compensation, and a variety of other economic regulatory programs.

INCOME SECURITY: Currently, the most controversial portion of the federalism debate concerns state and federal roles in income security programs. However, there is some consensus on these programs. It is generally agreed that the federal government should continue to maintain a nationally uniform retirement system (Social Security) and an accompanying medical program (Medicare) as well as to assume its responsibilities for former employees (Veterans and civil service annuitants). The federal government also provides a minimum income for the aged, blind, and disabled under the Supplemental Security Income program, although this payment is still supplemented by some states.

Beyond this point consensus disappears. State governors and legislators have long argued that the federal government should have primary responsibility for programs of substantial money or goods transfer to poor persons. The Reagan administration's New Federalism proposal would shift the basic welfare (AFDC) program to the states in return for federal assumption of all or part of the income-tested medical program (Medicaid).

The issue of which level of government should handle income security can be viewed on both a static and a dynamic basis. On a static basis, viewing the subject at single points in time, there are significant disparities among states in potential needs for income security programs. Table 1 shows comparative poverty rates in 1975, the last year for which state-by-state data are available. The data are based upon a nationally uniform definition of poverty. If they were adjusted for the higher cost of living in some states, such states, including Alaska, would show higher percentages of persons in proverty.

TABLE 1: COMPARISONS OF POVERTY RATES
Percent in Poverty, 1975

	Persons	Children (5-17)
Alaska	6.7%	6.4%
UNITED STATES	11.4	14.5
Connecticut	6.7	8.4
West Virginia	15.1	18.9
Mississippi	26.1	32.6

The sharp disparities in poverty population shown in Table 1 are not totally reflected in participation in social welfare programs. States, such as Mississippi and West Virginia, with high poverty populations also have low fiscal capacity and tend to have low welfare payment levels and stricter eligibility standards than more affluent states. Thus, the national average for public aid recipients (AFDC and

SSI) as a percentage of population was 6.5% in 1980. In Alaska, the percentage was 4.6%; in Mississippi, the highest state, 11.4%; and in Nevada, only 2.3%. On a national average basis, the percentage of persons receiving food stamp assistance in 1980 was 9.7% while it was 8% in Alaska and 20.6% in Mississippi.

Currently, the amount of income security assistance a United States citizen receives is highly variable with the state of residence. All citizens are eligible for Food Stamps on a nationally equal basis. The availability of housing assistance varies with the willingness of local housing authorities to participate in federal programs. The coverage of free medical care under the Medicaid program varies, both in terms of services that can be provided and eligibility for the program, from state to state, with the more affluent states tending to provide loser eligibility criteria and more services. Welfare eligibility also varies with some states permitting assistance to "intact families" (two parents in the home) and some not. Payment levels vary considerably as well, with 1980 average monthly payments of $280 nationally, $359 in Alaska (which has a substantially higher cost of living than the national average), $399 in California, and $88 in Mississippi.*

On a dynamic basis, there are significant changes over time in income security needs in various parts of the United States. This is most obvious in the case of unemployment. Employment and unemployment tend to gyrate substantially in the industrial Midwest. Employment in other areas, such as the rural South, experienced decline for many years. New technology and tastes are likely to shift the burdens of unemployment from state to state in ways that cannot now be predicted.

State leaders believe that the disparities among states in poverty and welfare dependency rates, the potential future variability of those rates, accompanying disparities in state fiscal capacity, and the fact that unemployment and dependency relation to national economic trends over which they do not control all suggest that responsibility for "safety net" programs should be federal. This would suggest full federal financial responsibility for Social Security (now federal), Medicare (now federal), Food Stamps (now federal with state sharing of administrative costs), subsidized housing (now federal), Supplemental Security Income (federal with state supplements), AFDC (shared state and federal), and Medicaid (shared state and federal).

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*All data in the paragraph above are from STATISTICAL ABSTRACT OF THE UNITED STATES, 1981, various tables.

The Reagan administration is clearly interested in returning responsibility for relief and related income-tested programs to the states. Actual proposals have fallen short of this target mainly because the costs of full state assumption would be extremely high and politically unacceptable. A discussion of the proposal now under consideration will be found in a later chapter of this report.

One principle is that the government that is responsible for causing poverty is responsible for any safety net programs to deal with it. This suggests federal responsibility for poverty and unemployment associated with federal actions, such as tariff reduction, and an uncertainty about responsibility when poverty and unemployment are associated with national economic fluctuations. The states clearly do not control these fluctuations, but the national government's control is, at best, incomplete. As a practical matter, much of the poverty in the United States is not caused by short-term economic fluctuations but by longer term economic changes and various demographic circumstances that have persisted for generations. In the case of some native populations, life-styles centuries old are now defined as poverty through contrast with modern life-styles elsewhere in the United States. In other cases, as in Appalachia, large populations were drawn to areas by economic opportunities which were later sharply reduced by changes in technology and tastes for goods and services. Unless one takes a very activist view of the role of governments, this poverty is not necessarily caused by any level of government.

Another approach to the subject is to consider responsibility for poverty in terms of which government has the tools to deal with poverty. This criterion produces highly ambiguous results. State and local governments control education, one clear route out of a life of poverty. However, the federal government is the primary source of funds for manpower training programs, a presumed route out of poverty for adults. State and local governments control preventive health programs, but with substantial federal financial participation. State governments control employment services, but under a federal program with federal standards, and would be the logical administering agencies for any working requirements (workfare) associated with income transfer programs.

Another approach to the subject is to consider the best level of government to administer the income-tested programs. State and local governments now administer the AFDC program, the costs of which are shared with the federal government. The federal government could administer this program just as it now administers Social Security and the income tax. Alternatively, the federal government could pay for the program and have state and local governments handle the administration, which is now what happens with Food Stamps. However, the result of such an arrangement is constant disputes between the federal government and state and local governments. The federal position is that state and local governments do not have adequate interest in tight administration of the program because they do not bear any of the program costs associated with loose enforcement of eligibility criteria.

If the American public approached this subject anew, it might be that they would have hit upon an arrangement in which the federal government made payments to the states for dealing with low income persons. These payments would be based upon a measure of need (e.g., number of persons in poverty) so that the national government would provide more assistance to those states where the income security needs were greatest. However, the program might also incorporate some measure of fiscal capacity, reflecting a concept of shared state and federal responsibility. The federal government would meet only the needs that could not be met with reasonable effort on the part of the states. The selection of programs for assisting the poor would, in this scheme, be left with the states. Although some of the arrangements currently under discussion might lead in this direction, all levels of government have become so locked into existing programs that this is not now a politically realistic alternative.

CATEGORICAL ASSISTANCE PROGRAMS: The current network of federal domestic assistance programs grew in an envii nment where concerns about the overall relationships of national and state and local governments were basically ignored. In an environment in which such concerns were paramount, it is unlikely that the present large numbers of categorical grants would have developed.

ADMINISTRATIVE FEATURES OF THE RELATIONSHIP: If one were designing a federal system from scratch, it is likely that the current loss of political accountability would be avoided. For reasons discussed in detail in later chapters, the categorical grant system tends to place power in the hands of non-elected lower level state and federal officials. To avoid this situation, one would need much clearer definitions of national and state and local roles. In some of the regulatory areas discussed above, this would probably consist of some national minimum standard with states exercising options beyond the minimum and having considerable flexibility in administrative arrangements. In some areas, this would mean simply having no federal involvement at all. In still others, it might mean categorical grant programs administered on a formula basis with state participation contingent on statutorily defined performance minimums.

SUMMARY

This chapter has reviewed various methods by which one might find some guiding principles for dealing with the relationship of the national government to the states. This quest can be viewed as mostly a failure. Constitutional and historical approaches lead to results that are not controlling precedents today and are inconsistent with the issue-by-issue positions of many state and local officials, not to mention Members of Congress. Criteria, such as those suggested by ACIR, are not easily applied to real world situations, and most suggest lines of argument rather than presenting definitive prescriptions for action. Considering alternative theories, as is done in the latter part of the chapter, also produces ambiguous results when applied to such fields as pollution control and regulation of the workplace. The fundamental problem is that some subjects of governmental action include elements that are so local as to make total federal control absurd and elements so national as to make no federal action unthinkable.

Thus, the federal system is likely to continue to be characterized by ambiguities in the divison of responsibility among governments. It is not practical to eliminate these ambiguities. It may be practical to limit them and to adopt policies which diminish their negative effects.

FEDERALISM IN OTHER NATIONS*

CONDUCTING INTERGOVERNMENTAL RELATIONS: In the United States, there are essentially no organized mechanisms for state-federal consultation, although considerable consultation takes place on an ad hoc basis. In other federal systems some of the consultative mechanisms are more formal. For example, in Australia there is an annual Premiers' Conference which brings leaders of the national government together with the state leaders. This is simpler in Australia than the United States because Australia's parliamentary system means that executive and legislative leadership are the same, so that each state can be represented with a single voice. The Conference does not have any legal authority but has become an institutionalized forum in which national leaders present their proposed programs affecting states. There is also a Loan Council in which the six states each have a vote and the national government has two votes and the capability to break ties. The Council

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*The subjects covered in this section are covered in more detail in ACIR reports on federal systems in West Germany, Australia, and Canada, and a summary report, STUDIES IN COMPARATIVE FEDERALISM: AUSTRALIA, CANADA, THE UNITED STATES AND WEST GERMANY (1981), dealing with comparisons of the United States and those three countries.

has jurisdiction over non-defense long term borrowing of all the governments involved, thereby permitting coordination of this aspect of government impact on credit markets. Australia also has a grants commission, with three part-time lay members, that has no formal powers but is highly effective in influencing legislative actions on grants. Canada, like the United States, lacks formal consultative mechanisms such as the Australian Premiers' Conference. However, Canadian intergovernmental relations is characterized by large numbers of conferences, 782 of them in a recent year, involving primarily career officials of national and provincial governments.

The West German Constitution, basically that dictated to the Germans by the occupying powers at t · end of World War II, was designed to reduce the power of the central government and place considerable power in the states. One of the ways by which this is done is through a bicameral legislature with one house representing the states. Representatives in this house can be recalled by the states that send them. The concurrence of this house is needed on many important national matters handled by legislation.

In the late 1960's, Germany began a state-federal fiscal planning process designed to permit state and federal officials to coordinate their budgeting processes. This has resulted in the creation of two state-federal planning bodies, but these bodies do not have substantial power.

RESPONSIBILITIES FOR TAXATION: The responsibilities for taxation in Australia are similar to those in the United States, with the federal and state governments having power to tax the same sources. However, in practice the governments use separate tax sources. The payroll tax is levied at a nationally uniform rate but all proceeds go to state governments. The national government relies on sales taxation and customs. State governments administer sin taxes (e.g., liquor, gambling) and, by tradition, local governments use the property tax.

Canadian federal and provincial governments have overlapping taxing authority. Income taxes, which account for 38% of governmental revenues, are generally collected by the national government for both levels of government, but the provinces set the rate for that portion of the tax that is turned over to them. In Canada the provinces own the natural resources, so that revenues from resources are a significant item for some of the provinces.

Most German government revenue is obtained from shared taxes. The shared taxes are the personal and corporate income tax, the value added tax, and the business tax. Thus, the financial position of the state governments is secured in large part through shared taxes rather than grants from the federal government.

INTERGOVERNMENTAL TRANSFERS: Australia provides equalization grants to its financially weaker states, and only to them. The distribution is based upon the concept that those states should receive enough federal assistance so that they can provide the same services as "standard states" where most of the population resides with the same level of taxes as those states. Australia also has specific purpose (categorical) grants but has been reducing reliance on these since 1977.

The Canadian national government makes equalization payments to many, but not all, of the provinces using the equalization logic described above for Australia. The federal government also provided 50-50 cost sharing of provincial programs for hospital insurance, medicare, and higher education for many years. In 1977 Canada changed this system from open-ended matching of provincial costs to a program that is independent of provincial costs, but does require provinces to meet nationally defined minimum standards for these programs. The total grant amount is defined as a base year amount plus an escalator related to economic growth. Part of the grant is cash and part is raised by the provinces which were yielded the right to take a portion of the income tax. This shift to unconditional grants with minimum standards reduced the detailed federal day-to-day involvement in these programs.

As noted above, a large portion of German revenues are shared among the various levels of government. In addition, Germany provides equalization payments from the federal government. There is also a unique system which results in shifts of resources from the richer states to the poorer ones. Germany also maintains some relatively small programs of categorical grants, but the level of federal dictation of state and local conduct under these grants is not nearly as high as in the United States.

CONCLUSIONS FROM THE COMPARISONS: ACIR reached three basic conclusions from its study of federalism in the three countries discussed above:

(1) Fiscal federalism as organized in the United States is less formally structured, more fragmented, and consequently less neat and orderly than in any of the other three countries.

(2) The United States grant system is more complicated and extensive than is the case abroad.
(3) The United States pays less attention to the goal of fiscal equalization than do Australia, Canada and West Germany.*

Intergovernmental relations in the United States is clearly "messier" than in the three countries studied. Part of this results from the fact that at each level of government in the U.S., three branches of government are involved. In the three countries, with parliamentary systems, the executive and legislative leadership are the same and the courts play a lesser role in federalism issues than in the United States. There are also many more actors in the United States because the United States has more states and local government is a more significant factor here than in the three countries.

However, the constitutional apportionment of responsibilities in Germany, the various consultative bodies in Australia and, to a lesser degree, the conferences in Canada all tend to give intergovernmental relations in the three countries more structure than in the United States.

The American grant system is considerably more complicated than those in the three countries. More grants are involved, more money per capita is involved in categorical grants, and the administrative mechanisms are more cumbersome.

While the American general revenue sharing program is oriented toward fiscal equalization and some grant programs take fiscal capacity into account, ACIR concludes that "The United States ... pursues equalization to a lesser extent and measures fiscal capacity in a less rigorous manner than do the federal systems of Australia, Canada, and West Germany." As ACIR sums it up:

> Fiscal equalization, however, is the exception rather than the rule in the United States. Even in equalizing programs, measures of fiscal ability are combined with factors designed to represent program need so that no program in this country distributes aid with the exclusive purpose of lessening fiscal disparities. It thus follows that, unlike the other countries studied, the U.S. has no targeted program of equalization aid under which the richer states do not receive any financial assistance.

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*COMPARATIVE FEDERALISM, p. 93.

PART TWO: CURRENT STATE-FEDERAL RELATIONS

CHAPTER THREE: FEDERAL LAW AND REGULATION

INTRODUCTION

The federal government interacts with state and local government in three basic ways. First, the federal government operates as national lawmaker. It affects state and local government through interpretations of the Constitution by the Supreme Court and by the passage of laws affecting them by Congress. Second, the federal government is grantmaker, affecting state and local government actions by providing money and guidelines on how to use it, and sometimes cross-cutting requirements forcing these governments to do or refrain from doing something in order to continue to be eligible for grants. Finally, the federal government as an entity has important impacts. It is a large employer, particularly in Alaska, a large land owner, particularly in Alaska, maintains many facilities, and may impact significantly on state and local government through its relationships with Native Americans and foreign governments.

An understanding of how the federal government now operates in these three modes is essential to consideration of potential changes. Thus, this part of the report describes and analyzes current federal operations, providing a chapter on each of the aspects of federal operation discussed above.

Historically, federal-state activities have been basically cooperative. That is, when the federal government desired to induce certain conduct by state and local officials it would typically offer them a grant in return for that conduct. Federal restrictions were closely tied to the grant. What the private sector knows as regulation, instructions from the federal government with no accompanying federal grant, was largely confined to the private sector.

However, federal regulation is an extremely important aspect of state-federal relations. In some cases, the federal government regulates the private sector, but in ways that preempt or interfere with state regulation. In other cases the federal government regulates state and local government directly and outside of the context of any grant program. Finally, the regulation is handled by many different actors including the courts and federal regulatory agencies.

PROTECTING THE RIGHTS OF CITIZENS

There has been a long history of federal preemption of the decisions of state and local government in civil rights. The areas in which the most regulatory activity has taken place have been in protecting the rights of the criminal defendant and minorities. While there are still substantial controversies in both fields, there now seems to be widespread acceptance of federal involvement in them.

The acceptability of this form of intervention probably relates to a number of historical factors. The first of these was that a civil war was fought specifically over the question of whether the federal government could intervene to protect civil rights, specifically by ending slavery. This question having been decided, the Fourteenth Amendment was passed which specifically applied civil rights tests -- such as not abridging the privileges and immunity of citizens, depriving a person of life, liberty, or property with due process or denying equal protection of the laws -- to state governments. By interpretations through the years, that amendment is seen as giving protection from state action for all the rights of U.S. citizens stated in the Bill of Rights.

The federal courts have shown little hesitancy in accepting jurisdiction of civil rights cases even when what they were doing was requiring actions by state and local officials. Federal court decisions in the name of civil rights mandate spending for improving prison conditions, patient-staff ratios in mental health institutions, and various other expenditures in each.

The most widely known situations where judicial activism in civil rights makes major changes in the conduct of state and local functions is the implementation of school desegregation. Judicial decisions have required not only busing within the same school district, but have overridden the geographic scope of school districts for the purpose of finding pupils outside of a district to promote racial balance within it.

Federal constitutional law has also had major impacts on the pattern of law enforcement. Federal rules, derived by the courts from interpretation of constitutional requirements cover investigatory procedures, arrest procedures, questioning and incarceration, procedures at trial, and sentencing.

Constitutional interpretations by the Supreme Court have also created some of the most emotional issues in American politics. Two current examples are abortion and school prayer.

The protection of constitutional rights has been extended by statute through a variety of enactments. For example, age discrimination was prohibited by the Age Discrimination Act of 1975. Anti-discrimination requirements are applied directly to state and local governments through federal law and are also applied through the provisions of specific grant programs. For example, general revenue sharing -- which goes to all general purpose local governments -- has an anti-discrimination requirement and the block grants authorized by the Omnibus Budget and Reconciliation Act of 1981 contain a prohibition against discrimination on the basis of race, color, national origin, sex, age, and physical handicap.

The continuing evolution of judicial protections of civil rights is moving fast enough so that it is possible that regulatory impacts on state and local government will increase even at a time when discrimination is becoming less and less of a problem. A good example of this is the litigation that has developed out of Section 1983, an 1875 amendment to the Civil Rights Act of 1871. The section provides that a person who "under color of" state law causes the deprivation of civil rights shall have personal liability to that person for damages.

Both the protection of state governments from suit provided by the 11th Amendment to the Constitution and defenses available through acting in good faith meant that the section was not a significant source of litigation affecting state and local government until 1961. In that year, the Supreme Court allowed the application of the statute to individual Chicago police officers involved in an illegal search. In a 1978 case, the Supreme Court decided that the governments involved in such actions, as well as the individual persons, were subject to suit, with some restrictions. The key restrictions were lifted two years later when the Court eliminated good faith as a defense. This created a substantial liability potential for municipalities. For example, one leading case involved a Chief of Police who was dismissed without a formal written reason or hearing. Such a dismissal was found to create a civil rights violation by a Supreme Court case decided AFTER the officer was fired. In a subsequent opinion, the Court extended the capability to sue municipalities to violations of federal laws, not just the Constitution. Litigation of this type permits recovery of attorney's fees in certain circumstances. The combination of these factors has resulted in litigation with over $4 billion at issue.*

The potential impact of continued judicial activism in the civil rights area on state and local government is indeed substantial. Civil rights issues have reached the Supreme Court in the context of decisions such as controlling the location of adult movie theatres', rezoning for low and moderate income housing, and whether zoning can prevent occupancy of housing units by non-related persons or extended family members such as grandparents. Civil rights decisions also, of course,

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*Cynthia Colella, "The Mandate, the Mayor, and the Menace of Liability" in INTERGOVERNMENTAL PERSPECTIVE, Fall 1981.

affect state and local governments in dealing with their employees, with decisions involving such questions as whether cities can require a larger pension contribution from women than men on the grounds that women live longer.

REGULATION RELATING TO NATIONAL DEFENSE

Another area of federal regulation is that related to the national defense, about which there is also little argument. Clearly, if the nation's defense will depend in part upon the National Guard, state guardsmen will have to train in ways set by the federal government and be subject to federal regulation. Clearly, the federal government will need authority to conscript persons, take property, etc. in time of military emergency.

The consensus on clearly military regulation does not necessarily extend to other regulation done in the name of national security. Responses to various energy crises have included federal rules governing allocation of supply, changes in speed limits on state and local roads, changes in local traffic regulations (e.g., right turn on red), and mandates from the federal government to state utility commissions. These economic regulations are probably best understood as coming from factors other than national defense.

COMMERCIAL REGULATION

INTERSTATE TRANSPORTATION: The federal government has long regulated companies engaged in the inter-state transportation of goods and persons. Over a century ago, the courts established that strictly intra-state transportation could be regulated incident to this power. For example federal regulations can prohibit unreasonable railroad charges for short hauls, where there are no competing carriers, to cross-subsidize longer hauls.

The federal government maintains exclusive jurisdiction over the airways system and regulates the aspects of state and local airports that are related to flight safety. Federal laws preempt state laws on such matters as the alcoholic beverage regulations applied to planes in flight.

The federal government has the power to regulate water-borne inland navigation. The Corps of Engineers does this for commerce that could affect the navigability of the waterways. Rates for waterborne commerce are not regulated by the federal government or the states. Ports and terminals for inland water-borne commerce are normally provided by the private sector and state and local port authorities, which are not regulated by the federal government. The regulation of ocean shipping safety and rates is federal.

The federal government is the primary instrument for the regulation of railroad rates and terms of service through the Interstate Commerce Commission. The federal government has also undertaken some responsibilities in the area of railroad safety, duplicating regulations in some states without preempting them. There are some overlapping state and federal responsibilities in such matters as the management of grade crossings.

The federal government has also been active in the regulation of interstate trucking, including moving companies and bus companies. However, states maintain jurisdiction over the licensing of the vehicles, which can include safety requirements that overlap the federal requirements. States can make their own regulations on what kinds of vehicles can use the highways, and do set separate standards on such subjects as permissible truck weight and hazardous cargos. There is also some state regulation of intra-state trucking and bus operations.

States set licensing requirements for motor vehicles and can set standards affecting car design, as California has done in the case of emission standards. However, the federal government can also set vehicle design standards and has done so both as part of pollution control and energy conservation efforts, and has also set standards relating to such factors as bumper strength under the Motor Vehicle Information and Cost Savings Act. The states have authority to set speed limits, determine whether or not to have inspection programs, etc., but much of this authority has effectively been shifted to the federal level because of provisions which the states must accept in order to continue to receive federal highway funds.

COMMUNICATIONS: The federal government has totally preempted the field of broadcasting by television and radio using the airways. The broadcast spectrum is allocated by the Federal Communications Commission which regulates everything from ham operators to major TV stations.

Cable TV, which does not use the airways, is subject to licensing and regulation by state and local government although legislation is pending in Congress to limit state and local roles in regulating cable operations.

The federal government also regulates telephone communications that are interstate, while local phone service is regulated by the states.

PUBLIC UTILITIES: Regulation of gas and electric utilities, like telephone service, is split between the states and the federal government. In terms of rates, the federal government regulates interstate rates, while states regulate rates for gas and electricity (and water, which is not regulated by the federal government) sold within a state. As a practical matter, the federal control extends to wholesale contracts provided to municipalities and cooperatives that resell power.

Federal control over the navigable waterways gives the federal government authority to veto proposed powerplants using impoundments (hydro) or significant withdrawals of cooling water (which all do). Federal control over atomic energy gives the federal government the power to license nuclear plants. Conventionally powered plants do not require licensing, but federal pollution control requirements must be met.

Under the Natural Gas Pipeline Act of 1968, the federal government is also involved in the regulation of pipeline safety.

Periodically, proposals are made at the federal level to preempt a variety of state and local laws relevant to public utilities. Power plant siting proposals involve a national finding that a particular site should be set aside in the national interest and would preempt state police powers relative to site development. The proposed coal slurry pipeline legislation would override state law regarding the taking of private property and other local zoning and land use restrictions.

PRODUCT SAFETY AND LIABILITY: The Consumer Product Safety Commission is empowered to enforce safety standards for products such as lawnmowers, bicycles, and power saws. This legislation does not preempt stricter state standards, although as a practical matter states do not normally regulate product safety. Under the Flammable Fabrics Act the federal government regulates the flammability of fabrics such as children's sleepware. Federal law also regulates the contents and labeling of bedding materials.

The liability of manufacturers to users for product defects is covered by state law. However, there has been serious consideration of federal laws to set uniform product liability laws.

The Food and Drug Administration regulates food additives, cosmetic ingredients, medical appliances, and drugs. The agency also regulates radiological products. States can legislate in these areas, but generally do not do so. Federal regulations also cover the production and distribution of meat and poultry. These laws and regulations do not preempt state and local regulation, but as a practical matter have generally discouraged state regulatory programs.

LABOR RELATIONS: The federal government regulates labor relations in all firms of significant size and there are periodic attempts to apply the national labor relations law to the relations between state and local governments and their employees. Federal regulations set a minimum wage for firms affecting interstate commerce and have provisions relating to maximum hours, migratory labor, child labor, when overtime must be paid, etc. The federal government also regulates private employer pension plans.

The Workers' Compensation system provides compensation for injuries in the workplace. It overrides state tort laws whch previously set the liability of employees injured on the job. Special laws are applicable to longshoremen and coal mine workers. The Occupational Safety and Health program regulates working conditions to ensure safety of workers.

FINANCIAL INSTITUTIONS: The prime federal influence on the banking system and related financial institutions is not, strictly speaking, the exercise of regulation through the passage of federal laws requiring specific conduct. The Federal Reserve Board handles clearing transactions and the flow of credit on a short term basis in the banking system. Pursuant to this function, the Board regulates banks that are a member of the system. The Federal Deposit Insurance Corporation and Federal Savings and Loan Insurance System provide insurance for depositors. Membership in these systems, which is not required by federal law, brings certain regulatory consequences. Other credit mechanisms exist for consumer cooperatives and credit unions.

The federal government also preempts state legislation dealing with money and credit. The most recent example is legislation dealing with state usury laws, which effectively repealed such laws unless reinstated by actions of the state legislatures subsequent to the passage of the federal legislation. There has been preemption by court decision of state laws relative to the assumption of home mortgages. The securities exchanges and sales of financial instruments are regulated by the Securities and Exchange Commission. Some states have "little SECs" that pursue comparable regulation for securities not sold across state lines. While states charter corporations and set rules for their functioning, considerable recent litigation has developed challenging state laws designed to prevent unfriendly corporate takeovers.

ENVIRONMENTAL PROTECTION: Acting under their police power, state governments and local governments given the power to do so by the states, can adopt widespread rules governing the use of land and water, air, and noise pollution. The federal government has entered this field with various cooperative state-federal programs relating to air pollution, solid waste disposal, noise pollution, water pollution and safe drinking water. As a legal matter, federal regulations do not preempt state ones, but as a practical matter the state control of pollution is generally handled through the cooperative state-federal program in which the federal government exercises considerable control through the grant mechanism. The laws in the pollution field generally require state plans that meet certain federal minimum standards. The consequences of having an unacceptable state plan include the possibility of the federal government doing its own enforcement and the loss of federal environmental protection funds to state goverment.

State law generally governs the use of land for solid waste disposal and states can license operators of landfills. However, federal preemption of some of this authority has been discussed, and regulations enforced through grant programs influence how this authority is used at the state level. Much the same situation exists in the handling of hazardous waste.

The federal government regulates water supply through the Pure Drinking Water Act.

Federal legislation preempts state legislation respecting endangered species. Federal legislation also involves the Corps of Engineers in water diversions affecting navigable waterways, including the diversion of water from nearby wetlands and construction such as docks.

ANTITRUST AND TRADE PRACTICES: Federal law governs the anti-trust field and certain aspects of unfair trade practice law. State regulations are permissible in this field, but antitrust law can be applied to state actions, as it has been in professional licensing situations which discourage professional advertising.

LANDLORD-TENANT LAW: The federal government does not currently directly regulate the relationship of landlords and tenants except in federally assisted housing. However, proposals are under serious consideration in Congress that would use the grant mechanism to preclude local rent control laws.

SAFETY IN THE WORKPLACE: The Occupational Safety and Health Act is one of many areas where federal legislation is designed to permit state participation in the regulatory function while not precluding the effect of state laws regulating the same subject matter.

MINING: The federal government has long had mine safety requirements for deep mining, and more recently has regulated surface mining. These regulations do not preclude state regulations on the same subject.

AGRICULTURE: Most of the federal regulation of agriculture takes place through grant agreements with state and local governments and agreements between farmers and the federal government on acreage restrictions in relation to ability to use various farm subsidy arrangements. Federal regulation of the function also occurs through the foreign policy and trade powers. The Department of Agriculture is responsible for preventing the entry of diseased plants and animals into the country, has certain powers relative to the movement of farm goods in interstate commerce, enforces laws relative to humane slaughter and the research use of animals, and even is responsible for the prevention of cock fights. Meat and poultry inspection laws are enforced through cooperative state and federal programs in states that have chosen to participate, and are federal administrative responsibilities in the other states. The Department also enforces the U.S. Warehouse Act designed to protect farmers against warehousemen and maintains inspections of products containing eggs. Federal seed inspectors inspect seeds sold in interstate commerce. Also commission brokers and others handling perishable farm products are subject to a federal licensing procedure. The federal government also regulates the wholesale price of milk.

FISH AND WILDLIFE: The federal government regulates migratory bird taking and the Marine Mammal Protection Act as well as the Endangered Species Act, all of which preempt state legislation dealing with the same subject matter. Fishing in territorial waters of the United States is controlled through treaty agreements negotiated by the federal government and federal rules for fishing outside the three mile limit.

CRIMINAL LAW: Some federal regulation simply takes the form of declaring various activities to be criminal. For example, it is a federal offense to rob a bank, to transport women across state lines for immoral purposes, to smuggle cigarettes, to transport narcotics, etc. In general, the federal criminal offenses are consistent with state law in the sense that crimes under federal law are also crimes under state law. In general, duplication in this area is more of a problem for the criminals than for law enforcement officials, as the commission of many crimes makes one liable for state and federal prosecution and subjects one to the attention of law enforcement personnel from both levels of government.

FEDERAL REGULATION OF STATE AND LOCAL ACTIVITY

The bulk of federal regulation, as described above, is concerned with the regulation of conduct of individuals and firms, not governments. It is well established that when state and local governments undertake enterprises usually undertaken by firms (e.g., electric and gas utilities, Virginia's railroad, North Dakota's cement plant, South Dakota's bank) these governments are subject to the same federal regulation applicable to private firms.

The extent to which the federal government can regulate governmental functions is more controversial, as is the exact definition of governmental functions. In NATIONAL LEAGUE OF CITIES v. USERY (426 U.S. 833 (1976)) the Supreme Court ruled in a divided vote that the federal government could not apply the national wage and hour legislation to state and local governments. This decision and the principle above regarding businesslike functions have caused controversy between Department of Labor and state and local officials over the subjects excluded from the protection afforded by the Usery case. The Department contends that such functions as the maintenance of state stores for the sale of alcoholic beverages, off-track betting, local mass transit, electric power generation and distribution, and certain other functions are "non-traditional" and are not government functions protected under the Usery decision.

These definitional conflicts arise in other areas as well. For example, New York State runs the Long Island Railroad. A conflict of laws exists between New York's Taylor Act which forbids public employees from striking and the Federal Railway Labor Act which guarantees to railroad employees the right to strike.

Another regulatory conflict arises out of the federal regulation of the structure of private pension plans. This federal regulation is carried out through the tax code which defines employer contributions to pension plans as non-taxable to the employee and deductible to the employer when various conditions are met, such as not discriminating against lower paid workers. The Internal Revenue Service has contended that these provisions are applicable to state and local pension plans. Many state and local officials have argued that they are not and have refused to qualify their plans through IRS, which has taken no major enforcement action to date.

The magnitude of direct federal regulation of state and local government is quite small in comparison with the regulation implemented through grant programs discussed in the next chapter.

SUMMARY: FEDERAL LAW AND REGULATION

The primary mechanism by which the federal government regulates state and local government is through grant programs. The limited attempts at direct federal regulation are of doubtful constitutionality under the Usery decision, so disputes over federal regulation of state and local government will probably continue to center on regulation through grants. The exception is federal civil rights enforcement where broadened definitions of what rights are protected have triggered federal court involvement in state and local law enforcement, corrections, mental health, education, personnel administration, and other areas.

The current level of federal regulatory activity relative to the private sector is substantial by any standard. In some cases, the federal regulation touches subject matters not regulated at the state level. In other cases, no grant programs are involved nor is there formal coordination, but state and federal programs operate side-by-side as is the case in public utility and wage and hours regulation. In many cases, attempts have been made to develop cooperative regulatory programs through the grant mechanism. Pollution control, occupational health and safety, and meat and poultry inspection are examples. In still other cases, federal regulation is designed to preempt state and local regulation.

While some of the regulation described in this chapter fits with the general principles, such as externalities and economies of scale, outlined in Chapter 2, much does not. Current controversy over a proposed Federal Trade Commission order dealing with the conduct of funeral directors provides an example of a situation in which state governments already regulate the industry, as do proposed standards for used car sales. Certainly, federal regulation of cock fighting does not represent a situation dealing with externalities or in which a uniform national policy is essential.

Federal regulation of the private sector comes about because a group of people get concerned about a situation and muster enough power to get a law passed. The test of whether such laws can be passed is whether a majority can be obtained for passage. Throughout much of our history, neither members of Congress nor state and local officials were much concerned about the abstraction of the federal system as they faced specific issues such as aversion to cock fighting. The predictable result, as shown in this chapter, is that the scope of federal regulation of private activity does not reflect any consistent philosophy or principles on appropriate roles for the federal government and state and local governments.

CHAPTER FOUR: FEDERAL GRANT PROGRAMS

INTRODUCTION

Grants represent the cornerstone of the current system (or non-system) of federal-state relations. It is through grants that the federal government controls state-local administration of programs such as Food Stamps, Aid to Families with Dependent Children, Medicaid, Urban Mass Transit, Highways, and many others. It is through conditions attached to grants that the federal government can set the speed limit on every local road in the United States.

Procedures associated with grants have been, for most state officials, the single most important source of concern about federal policy affecting states. For example, in 1976 the National Governors' Association issued a publication FEDERAL ROADBLOCKS TO EFFICIENT STATE GOVERNMENT, which is an inventory of federal policies which hampered the effectiveness of state administration. The publication contains 44 pages of examples, almost all of which are from grant administration, rather than regulation.

Alaska's situation, however, does not mirror those of other states. Alaska is one of the states where federal land ownership is a massive factor in the state's development. Federal policies in dealing with Native Americans affect Alaska in major ways, as well. As a non-contiguous state, Alaska is much more affected by the Jones Act (requiring shipping among states to be in U.S. bottoms) than most other states. High reliance on oil revenues makes the state sensitive to energy policy and taxation. High reliance on fishing makes international treaties more important in Alaska than other states. Thus, federal grant problems may not dominate consideration of state-federal relations for Alaska as they do for many other states.

However, an understanding of grant program problems and potential solutions is critical to the work of the Statehood Commission for two reasons. The first is that while grant problems may be comparatively less significant in Alaska, they are still significant, as Alaskans suffer the same problems as people in other states, and have non-grant problems on top of them. Second, to be feasible politically, action to reform the federal system will have to build on a broad base of support throughout the United States. For Alaska's concerns to be acted upon in the context of a major revision of the federal system, that revision will have to include enough grant reform to satisfy those for whom grant reform is the primary motivation for considering changes in the state-federal relationship.

Grant spending by the federal government in the fiscal year ending in September of 1982 will be about $91.2 billion, down somewhat from $94.8 billion the previous year. Grant spending will account for about 13% of total federal spending in the current year and for a little less than a fourth of state and local spending. There are literally hundreds of federal government grant programs for state and local government.

THE LEGAL STANDING OF FEDERAL GRANT REQUIREMENTS

In 1923, the Supreme Court decided a landmark case that still controls the law of federal grants (MASSACHUSETTS v. MELLON, 262 U.S. 447, 1923). The Court viewed a potential grant as an offer of assistance by the federal government that could be accepted or rejected through voluntary decisions of individual states. It followed that the grants did not require the states to do anything or yield anything. The state could defeat any alleged ulterior purpose by "the simple expedient of not yielding", not accepting the grant and the conditions that went with it.

From this logic it followed that when a state entered into an agreement with the federal government to accept a grant it was validly bound by whatever conditions were attached to the grant. This condition could be one that the federal government could not impose directly through regulation. For example, it is widely conceded that if the Court follows past precedents, the federal regulation of state and local working hours rejected in the Usery case as regulation could be imposed as a grant condition.

In a companion case to the Mellon decision, the Court held that an individual did not have standing to challenge the use of general tax funds for a particular grant. Subsequent cases have held grant conditions valid that would require a state to amend its constitution to accept the grant, to shift public health responsibilities from county elected officials to a planning board, and to undo a part of a major reorganization of state government. Thus, there is little legal limitation on what grant conditions may include.*

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*For more detailed discussions of this topic, see David B. Walker, "Federal Judges and Federal Grants: A Dimension of Today's Dysfunctional Federalism (processed, 1979) and Thomas J. Madden, "The Law of Federal Grants" (processed, 1979).

DISSATISFACTION WITH GRANT ADMINISTRATION

State officials, and their local counterparts, have experienced numerous frustrations in trying to serve citizens effectively throughd grant programs. Some of the major problems today were identified by the governors in 1976 in their report on federal "roadblocks" to efficient state government. The six major problems identified in that publication were:

(1) Lack of coordination among federal departments or agencies limits the effectiveness of programs in solving problems and increases the administrative burden on the states;

(2) The federal executive branch exceeds its proper authority in some areas, encroaching on matters which are within the proper jurisdiction of the states;

(3) Federal regulations are prescriptive in methodology rather than oriented toward results;

(4) Excessive reporting and paperwork requirements must be met by states participating in federal programs;

(5) Funding and program implementation are delayed by lengthy approval procedures, absence of program guidelines, and other administrative practices which cause serious dislocation and inequities at the state level; and

(6) Lack of federal coordination and consistency in implementing indirect cost determination procedures creates continuing administrative confusion for states.

Comments such as these continue to be made by officials of both state and local government.*

These problems are also cited in reports from a variety of federal agencies that have examined the grants system. For example, Congressional Budget Office has considered federal mandates in FEDERAL

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*See, for example, "Federal Grants Management Reform." Hearings before the Subcommittee on Intergovernmental Relations of the Committee on Governmental Affairs, U.S. Senate (1979) and Office of Management and Budget, MANAGING FEDERAL ASSISTANCE IN THE 1980'S: PUBLIC COMMENTS ON THE DRAFT WORKING PAPERS ISSUED AUGUST, 1979 (OMB, 1980).

CONSTRAINTS ON STATE AND LOCAL ACTIONS (1979); the Commission on Federal Paperwork provided IMPACT OF FEDERAL PAPERWORK ON STATE AND LOCAL GOVERNMENTS: AN ASSESSMENT BY THE ACADEMY FOR CONTEMPORARY PROBLEMS; and the General Accounting Office has produced a number of reports on the grants system including FUNDAMENTAL CHANGES ARE NEEDED IN FEDERAL ASSISTANCE TO STATE AND LOCAL GOVERNMENTS (1975). ACIR has published extensively on reforming the grants system including a comprehensive report, IMPROVING FEDERAL GRANTS MANAGEMENT (1977).

The concerns of state officials have been reflected in the attitudes of Presidents Carter and Reagan. Both of these former governors have concurred in the need for grant reform. In 1977, President Carter wrote to the heads of federal departments and agencies: "Both my own experience in State and local government and the advice and comments I have received from State and local officials over the past seven months have convinced me of the need to simplify and streamline the administration of the Federal aid system."*

PROBLEMS WITH REGULATION IN GRANT PROGRAMS

QUALITY STANDARDS AND GOLDPLATING: State and local officials feel that federal regulations often force them to conduct activities in a more expensive fashion than they would conduct those same activities if using their own funds. In a derogatory sense, this is often called "goldplating." State and local officials know that it is generally more expensive to do something within a federal program than to do the same thing with state or local funding. This knowledge is based upon the experience of those officials in doing the same things (e.g., building airports and highways, providing social services) with federal funds in some cases and without in others.**

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*This memorandum and other documents dealing with Carter administration activities in this field will be found in FEDERAL AID SIMPLIFICATION: WHITE HOUSE STATUS REPORT (1978).) President Reagan has made sweeping proposals for changes in federal grant programs, which are discussed in Chapter 8 of this report.

**A good example is the direct comparison of comparable road projects, some with federal assistance and some without. See Los Angeles County Road Department, RED TAPE (1973) and RED TAPE II (1973) for graphic examples.)

Besides the cross-cutting requirements discussed below, there are some systematic reasons for higher cost in federal programs including:

(1) Federal programs add another level of reporting, as a federal agency will insist on reports of how its funds are being used;

(2) Federal programs involve delays, during which costs mount as people are underutilized;

(3) Federal programs require the establishment of new public consultation devices (e.g., mandatory advisory committees, special publication of notices and public hearings) which are overlayed on existing state and local consultative devices;

(4) Federal programs have very extensive appeal procedures;

(5) Federal programs have special administrative requirements governing purchasing, personnel, accounting, etc.;

(6) Federal programs generally involve extra paperwork for elaborate plans, quarterly reports, exception reports, etc.;

(7) Federal programs have audit requirements that overlay existing state and local auditing procedures, and, most important,

(8) Besides the procedural standards listed above, federal programs generally have higher "quality standards" than state and local governments have when using their own funds.

"Quality standards" are not simple issues because both sides of controversies about them are correct. At the federal level, line agency officials want to make sure that state and local officials do things right -- meeting the highest standards for everything from road construction to health services. Congress, by delegation to these line agency personnel, lets them insist on the standards in federal programs. However, Congress does limit the funding, which is why quality standards can safely be delegated from a congressional pespective. As a result, federal programs generally have a "do it right or not at all" characteristic.

A classic example is the Section 8 housing program, where new Section 8 construction, like new public housing construction before it, costs more than comparable housing provided in the private market because of quality standards (and paperwork). This reduces the number of persons assisted with any given federal appropriation, but does mean that those assisted get high quality buildings.

While federal officials can mandate a good job in dealing with part of the problem and ignore the rest, state and local officials generally do not have the luxury of dealing with problems this way. ALL roads must be maintained and all significant population concentrations must have roads, but limited resources mean that roads will not be perfectly built or maintained. ALL persons requiring institutional mental health care will get some kind of service, but limited resources mean that not all will receive care equal to that in private psychiatric hospitals. ALL school age children who want to attend public schools will be provided education. Thus, in most of their activities, state officials do not have the option of meeting the best (and most costly) standards for some part of the population and leaving the rest totally unserved. Federal officials do have this option in many programs.

The conflict between a federal approach of "do it right or not at all" and a state and local approach of "do the best you can with the resources you have available" emerges in a variety of programs.

A typical situation involves the staffing of day care centers, which has been an issue for many years. Obviously, other things being equal, the lower the ratio of children to staff the better the care. At least that is the conventional wisdom in this field. The federal government supports day care through Title XX (social service) and WIN (employment for welfare recipients) programs. Final new day care regulations released in early 1980 reduced the allowable child-to-staff ratio from six to five in facilities that serve infants as well as other children.*

Clearly, the regulations were designed to increase the quality of care by increasing the cost of care. In the absence of funding increases, which did not occur, the effect is also to reduce the number

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*The specific examples used in the remainder of this chapter are from a survey of states made by the National Governors' Association. Results are summarized in ELIMINATING ROADBLOCKS TO EFFICIENT STATE GOVERNMENT: THE GOVERNORS' GREEN BOOK (1981).

of persons who can be provided any care at all. Furthermore, because many day care facilities combine children funded with federal money with children whose parents pay, some of the higher costs will fall on the parents.

Another example of the quality standard situation is associated with federal support of highway rehabilitation. State highways generally are in bad condition. Much maintenance has been deferred and a considerable number of older roads do not meet current standards on permissible sharpness of curves and width of bridges. State highway officials have "logics" by which they determine which problems to solve first on what roads based upon such factors as accident records, the severity of the problem, the amount of traffic, etc. Federal officials are insisting that when federal funds are used for maintenance (e.g., resurfacing) that other work be undertaken so that the whole road meets quality standards. This requires state officials to deviate from their priority lists to "do it right or not at all".

CROSS-CUTTING REQUIREMENTS: Federal assistance is greatly complicated for federal administrators and grantees because the federal assistance programs have been chosen as the vehicle for implementing a wide variety of federal concerns unrelated to the purpose of the grant. These requirements apply both to the uses of the federal funds involved and to any state matching funds. They all increase cost, increase paperwork, and cause delays.

The Office of Management and Budget has recently identified some nearly 60 separate requirements of this type. They include:

- Nine different anti-discrimination requirements covering race, sex, age, architectural barriers to the handicapped, creed, national origin, alcoholism, and drug abuse,
- 15 different environmental protection provisions covering clean air, clean water, drinking water, endangered species, floodplains, wetlands, fish and wildlife, historic preservation, coastal zones, etc.,
- Three different provisions regarding "protection and advancement of the economy", such as the Cargo Preference Act,
- Three different health and safety provisions, including the Animal Welfare Act and protection of human research subjects,
- Two minority participation provisions, one for women and one for Indians,
- Three different labor standards provisions including the Davis-Bacon Act, an anti-kickback provision, and the Contract Work Hours and Safety Act,

- Two standards regarding public employee personnel policy,
- 10 standards on general administrative and procedural requirements,
- Nine "recipient-related administrative and fiscal requirements", and
- Two freedom of information requirements.*

Even assuming that these requirements were administered consistently by a single agency for each, which is not currently the case, these requirements involve adding costs to federal programs that would not develop in the case of state or local spending for the same purpose. Administrative costs are involved in certifications, studies of impact, etc. Real costs are imposed by requiring contractors to pay more for labor than they otherwise would (Davis-Bacon) and modifying plans based upon requirements.

PAPERWORK: In a report to the Commission on Federal Paperwork, the Academy for Contemporary Problems concluded from its examination of federal aid paperwork:

> If, as we suspect, the costs of this kind of paperwork are closer to five percent of total program costs, the annual cost is a little over $5 billion. Further, these estimates represent the minimum cost of Federal paperwork in federally-assisted programs operated by State and local governments. They include only the costs to the primary governments and do not include costs that can be passed on to other governments, to private businesses, or to citizens. The General Services Administration has estimated that such administrative costs may accumulate to as much as 35 percent of program costs. If the costs absorbed by individuals are included, the Federal paperwork burden may approach 50 percent of some program budgets.**

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*Office of Management and Budget, MANAGING FEDERAL ASSISTANCE IN THE 1980'S (1980), pp. 20-26.
**THE IMPACT OF FEDERAL PAPERWORK, p. 7.