Politics, Money, and State Sovereignty: The Judicial Role

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From 1936 to 1976 Congress determined the allocation of governmental power in the federal system virtually without judicial interference.[1] The vast array of domestic programs initiated during this period signaled an expanding national attempt to promote social and economic activity, protect public health and welfare, redistribute resources, and facilitate participation in public decisionmaking. Many of these programs involved transfers of authority from the states to the national government and imposed new obligations on subnational governments to share in the costs and administrative burdens of mandated public services. The expansion of federal domestic spending has been accompanied, therefore, by even more dramatic growth in state and local government activity, much of it attributable to the requirements of federal policies.[2] The result has been not only a sizeable expansion of the public sector, but also a vastly more complicated system of federalism characterized by shared costs, complex bureaucratic arrangements, and intersecting regulatory authority.

Except in the area of protection of individual rights,[3] the expansion of the public sector and the attendant changes in the face of our federalism have occurred with substantial judicial approval. First anticipating and then adhering to Professor Herbert Wechsler's admonition that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states," [4] the Supreme Court regu-

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1. Before 1937, the Supreme Court had interpreted the commerce clause to preclude Congress from regulating private business activities that had only an indirect effect on interstate commerce. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Hammer v. Dagenhart, 247 U.S. 251 (1918). This trend was reversed by the decisions in Helvering v. Davis, 301 U.S. 619 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). *See* Stern, *The Commerce Clause and the National Economy, 1933-1946* (pt. 2), 59 HARV. L. REV. 883 (1946). Between 1937 and 1976, no federal commerce regulation was invalidated on state sovereignty grounds. The only successful challenge to congressional action based on the states' reserved powers was in Oregon v. Mitchell, 400 U.S. 112 (1970), when Justice Black's deciding vote upheld congressional power to set the voting age at eighteen for federal elections, but found that power exceeded by the attempt to reduce the minimum age for voting in the state and local elections.

2. In fiscal 1976 state and local governments raised $249 billion from their own sources and received $55.6 billion from the federal government. BUREAU OF THE CENSUS, GOVERNMENTAL FINANCES IN 1975-1976. At the state level alone, revenue increased from $32.8 billion in 1960 to $185.2 billion in 1976. THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1978-1979, at 276-77 (1978) [hereinafter cited as BOOK OF THE STATES].

3. Legislation otherwise within the congressional power under the commerce clause, for example, has been invalidated because it interfered with the sixth amendment's guaranty of a jury trial, United States v. Jackson, 390 U.S. 570 (1968), or the fifth amendment's protection of due process, Leary v. United States, 395 U.S. 6 (1969).

4. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954).

larly rejected challenges to the exercise of federal legislative power under the spending, commerce, and war clauses of the Constitution when those challenges were based upon an asserted interest in state autonomy. So long as the Constitution conferred upon Congress the power to regulate the underlying subject, the Court deemed it irrelevant whether the regulated object involved public or private activity. The courts and the country grew comfortable with the nationalization of public policy, and the states were obliged to seek vindication of their interest in autonomy through the political process. Finally, after four decades, the Supreme Court invalidated an Act of Congress in the name of protecting state sovereignty in 1976. In *National League of Cities v. Usery*,[5] the Court struck down the 1974 amendments to the Fair Labor Standards Act,[6] which extended minimum wage and maximum hour regulations to state and local government employees. A bare majority of the Justices found in the constitutional structure of federalism a barrier against federal regulations that "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." [7]

While the ultimate reach of *National League of Cities* is unknown, its effects already puzzle legislators, executive officials, and judges.[8] Whether the decision augurs new limits on the expansion of national legislative power and a revival of judicial solicitude for the autonomy of the states is not yet known. Nor is it yet possible to assess the effects of the case on public policy decisions or decisionmakers. What may be said with assurance is that as Congress considers proposals for energy regulation, environmental protection, no-fault insurance, federal regulation of municipal finance, and numerous other federal initiatives, the issue presented in *National League of Cities* is certain to recur.

The majority's performance in *National League of Cities* has been the target of wide-ranging criticism.[9] Justice Rehnquist's opinion makes light of precedent and offers little guidance for the resolution of subsequent cases. It articulates no principle of sufficient generality to aid lawmakers or lower

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5. 426 U.S. 833 (1976).

6. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (pertinent sections codified in 29 U.S.C. §§ 203(d), 203(s)(5), 203(x) (1976)).

7. 426 U.S. at 852.

8. *See, e.g.*, Marshall v. City of Sheboygan, 577 F.2d 1 (7th Cir. 1978); Usery v. Bettendorf Community School Dist., 423 F. Supp. 637 (S.D. Iowa 1976); Usery v. Salt Lake City Bd. of Educ., 421 F. Supp. 718 (D. Utah 1976) (Age Discrimination in Employment Act upheld); Christiansen v. Iowa, 417 F. Supp. 423 (N.D. Iowa 1976) (equal pay provisions of FLSA upheld). During congressional hearings on legislation to regulate municipal securities, the applicability of *National League of Cities* was vigorously contested. *Municipal Securities Full Disclosure Act of 1976: Hearings on H.R. 15205, H.R. 10523, 10530, H.R. 10606 and H.R. 11534 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 19, 41, 43-44, 49-50, 91-93, 96-97 (1976).

9. *See, e.g.*, Choper, *The Scope of National Power* Vis-à-Vis *the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U.L. REV. 1, 19-25 (1978); Tribe, *Unravelling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

federal courts in testing federal regulations of state activity.[10] The constitutional roots of the judicial protection afforded state autonomy remain ambiguous.

But however unsatisfying the Court's effort in *National League of Cities,* its renewed interest in protecting the states' independent status is not misguided. Nor is the case without links to other recent decisions limiting the power of the federal judiciary to intrude on the political functions of state and local governments.[11] The Fair Labor Standards Amendments may well have been an inappropriate vehicle for this particular revival of judicial activism in the service of the values of federalism. But the proliferation of federal legislation imposing significant obligations on the states—"federalizing" the machinery of state government to serve the ends of national policy—warrants some broader measure of judicial supervision than the courts have recently supplied. The political branches in 1979 may no longer be as well suited as they once were to the task of safeguarding the role of the states in the federal system and protecting the fundamental values of federalism. Changes in both political practices [12] and the direction and breadth of national initiatives [13] suggest a new basis for judicial intervention. The task is to determine at what point the allocation of authority effected by Congress so imperils these values as to warrant the extraordinary intervention of the courts against the judgments of the political branches. This Article, therefore, will explore the developments in the political process supporting a renewed judicial role safeguarding constitutional federalism, discuss the problem of defining a standard for judicial review of federal actions affecting the states, and suggest the consequences of applying that standard to a variety of enacted and proposed programs.

I. STATE SOVEREIGNTY—ITS NATURE AND IMPORTANCE

A. *The Constitutional Concept of Sovereignty*

As Professor Wechsler observed, the framers of the Constitution were compelled to accept and protect the separate existence of the states—as their autonomy was the "means and the price" of forming the nation.[14] Yet the blue-

10. As Professor Wechsler put it in his classic formulation, constitutional decisions should rest on "reasons that in their generality and their neutrality transcend any immediate result." H. WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 27 (1961). Professor Cox criticizes the *National League of Cities* majority for showing "scant concern with building a body of law for the instruction of lower courts and its own guidance upon related issues." Cox, *supra* note 9, at 25.

11. *See, e.g.,* Paul v. Davis, 424 U.S. 693 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

12. *See* notes 99-125 and accompanying text *infra.*

13. *See* notes 126-28 and accompanying text *infra.*

14. Wechsler, *supra* note 4, at 543. This is not to say necessarily that the federal form was a goal of the Revolution. That cause was liberty, achieved though self-government. Commentators have debated whether it was self-government or limited government which the framers sought. *Compare* Beer, *Federalism, Nationalism and Democracy in America,*

print for union they devised included a compound of national and federal features clearly impinging upon the states' separate sovereignties. Thus, the Constitution imposed specific political responsibilities on the states to participate in the selection of the President[15] and members of both Houses of the national legislature,[16] and to act on amendments initiated by the Congress.[17] It provided a set of guarantees, from the specific guaranty against invasion,[18] assurance of full faith and credit to state court judgments,[19] and the requirement of interstate rendition of fugitives from justice,[20] to such general proclamations as the guarantee of a republican form of government,[21] the declaration of reserved governmental jurisdiction,[22] and the assurance of territorial integrity.[23] At the same time, the charter imposed drastic limitations on state authority to interfere with the critical national responsibilities for defense, foreign relations, and the promotion of the national economy. With the adoption of the Reconstruction amendments,[24] the states were further constrained from impairing national authority in order to protect individuals against state actions infringing basic human rights. Further, all of these specific limitations were subsumed by the general provision that federal authority, when properly exercised, would be superior to inconsistent actions by the sovereign states.[25]

The historical materials supply little guidance, however, about the nature of the state sovereignty that was to be preserved. Neither the concept of a state nor its intended functions were described in the Constitution. A geographic entity with a discrete territory was no doubt an element of the conception, but not a sufficient definition, since boundaries could be modified and nonstates shared the quality of territorial administration. Then, too, the framers must have assumed that states would have their separate governments, since they allocated responsibilities to the state legislatures and presupposed the existence of state executive and judicial authorities.[26] But the pertinent sources belie a simple equation of a state with its government in

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72 AM. POL. SCI. REV. 9, 11 n.4 (1977), *with* A. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 5 (1935). The issue may be critical to one's perception of federalism as a scheme for mutual influence and representation or for dual sovereignties. No doubt Professor Wechsler's brief comment reflects both the political reality in the states in 1787 and the framers' notion that a Union could be fused of separate states if the nation and the states shared and acted upon the same electorate. *See* THE FEDERALIST No. 46 (J. Madison); Diamond, *The Federalist on Federalism: "Neither a National Nor a Federal Constitution, But a Composition of Both,"* 86 YALE L.J. 1273 (1977).

15. U.S. CONST. art. II, § 1, cl. 2-3.
16. *See* text accompanying notes 67-77 *infra.*
17. U.S. CONST. art. V.
18. *Id.* art. IV, § 4.
19. *Id.* art. IV, § 1.
20. *Id.* art. IV, § 2.
21. *Id.* art. IV, § 4.
22. *Id.* amend. X.
23. *Id.* art. IV, § 3, cl. 1.
24. *Id.* amends. XIII, XIV, XV.
25. *Id.* art. VI, cl. 2.
26. *E.g., id.* art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.").

eighteenth-century political theory, tending more often to center the concept of sovereignty in the ancient notion of the body politic: the community, or the aggregate of all inhabitants of the specific territory.

This view of the state as a community of persons in whom ultimate sovereignty collectively resides is reflected as well in various early Supreme Court opinions. Not surprisingly, occasions to consider the essence of the concept arose most pointedly in the aftermath of a civil war brought on by the attempt of some members to sever ties with the union. In *Texas v. White*,[27] for example, the reconstructed government of Texas sued to reclaim certain bonds of the United States then held by purchasers from the insurgent government, and the defendants contended the state was disabled from maintaining the action because it had renounced allegiance to the United States. In rejecting this claim, Chief Justice Chase reflected on the nature of a state: "[T]he primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government or united by looser and less definite relations, constitute the state." [28] This passage echoes the conclusion of Justice Paterson more than a half-century earlier that it was not possible to distinguish between *"a state* and *the people of the state."* [29] The acts of states "forming a Republic," he declared, are not acts of the legislature, executive, or judiciary, but of *"all the citizens which compose that State."* Sovereignty resides in them, not as individuals but as a "body politic." [30]

Though the records of the Constitutional Convention and the nineteenth-century opinions by the Court supply shadowy suggestions of an original conception, they furnish little aid in defining the contemporary role of the state. As a starting point, however, it is not difficult to describe some of the attributes of sovereignty related to separate existence in the twentieth century. To function as a state, the body politic must have at least a minimum of its powers protected against outside interference, including control over the structure of government, the distribution of administrative responsibilities, the process of selecting popular agents, and the capacity to tax and spend. This is but another way to say that the characteristic integral to separate identity in contemporary terms is a power to make choices—about how to use public monies and direct public attention, and about how to vary the choices as the needs of the community change. Though the range of choices available to a state—the range of needs to which it may respond or services it may choose to provide—also varies over time, within the zone

27. 74 U.S. (7 Wall.) 700 (1869).
28. *Id.* at 720.
29. Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 3, 93 (1799) (emphasis in original).
30. *Id.* (emphasis in original). It is a simple step to infer from its sovereignty the capacity of a body politic to structure and form the government of a state, to select its representatives, to describe its powers in a constitution, and to perform or authorize its representatives to perform the mundane but significant tasks associated with visible formation of a government, such as locating a capitol or designating a flag.

of its sovereign authority its assessments and elections as to public wants and needs must control. In short, sovereignty can have little modern significance unless within its domain a state is free to prefer health services over highways or public colleges over correctional facilities and to use its sovereign powers to effectuate those preferences. Similarly, to the extent it is not preempted by federal institutions, the state must be free to determine what kinds of constraints it will impose on private activity and what business activities it will regulate, as well as how it will regulate them and structure its regulatory agencies to implement the decisions it has made.

A core concept of sovereignty rooted in the notion of choice does little to illuminate what a state will actually do with its sovereign powers at any particular time, or how its functions will relate to those of the national government. The Constitution assumes dual institutional structures of government, but does not determine either the method or extent of cooperation.[31] The purposes of and relationships between these different levels of government, moreover, have surely changed significantly over time.

The purposes of the national government at the time of its formation were decidedly limited. Responding to the perceived jeopardy to state sovereignty, Madison defended the grant of national authority by emphasizing the balance in favor of state power. The delegated objects of the national government "are few and defined," he wrote, "exercised principally on external objects, as war, peace, negotiation and foreign commerce," [32] and the power to tax the individuals of the states, a siguificant nationalizing step beyond the Articles of Confederation, would "for the most part" be exercised in service of the national power over foreign commerce. By contrast, the states' powers were "numerous and indefinite . . . extend[ing] to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." [33]

True to Madison's prophecy, the agenda of the Federalists in power included the development of a credible defense, a foreign policy designed to earn the respect of other nations, and a series of measures to build a national economy.[34] Under this program, the states were left with much of the responsibility commonly associated with government. The states, and the substate governments in cities or counties they created and controlled,[35]

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31. *See* Elazar, *Federal-State Collaboration in the Nineteenth Century United States*, 79 POL. SCI. Q. 248, 250-51 (1964).

32. THE FEDERALIST No. 45, at 328 (J. Madison) (B. Wright ed. 1961).

33. *Id.*

34. *See* Shklar, *Publius and the Science of the Past*, 86 YALE L.J. 1286 (1977).

35. This Article does not distinguish between states and municipal governments, except to note that one of the trends in federal fiscal relations is toward direct grants from the national government to cities and towns. *See* text accompanying note 165 *infra*. In general, states are responsible for the creation of local units of government and for their control. *See* Trenton v. New Jersey, 262 U.S. 182, 187 (1923); Atkin v. Kansas, 191 U.S. 207, 221 (1903); 1 E. MCQUILLAN, MUNICIPAL CORPORATIONS § 1.58 (rev. ed. 1971). But there are some limits to the ways states may deal with their creatures. *See generally* F.

determined which services to provide their inhabitants, and the form, level, and means of providing them. Public safety, education, welfare, economic development, control of private business activity, protection of natural resources—the definition of collective or social goods, and the allocation of fiscal and administrative responsibility for their provision, both between public and private sector and among levels of public administration within the state—were all matters of state determination. The states, accordingly, used their governmental powers to tax, spend, and regulate to implement the basic decisions made in these matters.

B. *The Importance of State Sovereignty*

The search for a point at which limitation of a state's freedom of choice jeopardizes its integrity or separate existence must begin with some identification of the basic goals or values that support a federal system. Delegates to the Constitutional Convention in 1787 tended to focus on the national needs requiring them to form a more effective union,[36] debating less the question of the broader goals than the extent of national power necessary to serve them. The result, as many have observed, was a constitutional structure combining national and federal features, drafted with a wary eye on the state legislatures and the electorate who would determine whether to accept it. Notwithstanding occasional references in debate to the advantages of a single sovereign unit of government, popular sentiment obliged the delegates to ensure adequate protection for state sovereignty.[37] However little choice there may have been at the time, subsequent experience furnishes an independent defense of the virtues of a federal system, virtues that will now be considered.

1. *Improved Governmental Processes.* One clear value of the federal form resides in its potential to provide maximum opportunities for participation in government. Inevitably, governmental choices must be made through representatives, but decisionmaking in smaller units makes possible more direct public participation in both the process of representative selection and the process of policy determination by the delegates chosen. This participation is critical to any viable notion of accountability. Representative govern-

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MICHELMAN & T. SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS 197-375 (1970). There is also considerable debate about the relative effectiveness of states and municipalities as "instruments of popular government" or efficient deliverers of basic services. *See, e.g.,* Dahl, *The City in the Future of Democracy,* 61 AM. POL. SCI. REV. 953 (1967). The subject is one to which I hope to return, but is beyond the scope of this Article.

36. The experience under the Articles of Confederation had been, in Hamilton's words, "a national humiliation . . .. a mimic sovereignty . . . . We have neither troops nor treasury nor government." THE FEDERALIST No. 15, at 91 (A. Hamilton) (B. Wright ed. 1961). Morris urged the delegates to create a government capable of "supporting the dignity and splendor of the American Empire." *See* W. MURPHY, THE TRIUMPH OF NATIONALISM: STATE SOVEREIGNTY, THE FOUNDING FATHERS AND THE MAKING OF THE CONSTITUTION (1967); Schreiber, *Federalism and the Constitution: The Original Understandings,* in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 87 (L. Freedman & H. Schreiber, eds. 1978).

37. *See* note 14 *supra.*

ment depends upon the maintenance of the connection between the governors and the governed, not merely in the sense that elected officials will then reflect the popular will, but also because there is then some assurance that public preferences are communicated to the public officials whose own expressions help shape popular opinion. A fundamental advantage of local government is the opportunity it affords for this kind of communication. Simply put, proximity increases accountability by increasing access.[38]

Experience also supports the traditional claim that federalism promotes variety in political choice and counters the impulse toward social and ideological homogeneity by allowing cultural differences to find expression in different places. Despite the homogenizing effects of media and mobility on twentieth-century American life, the existence of separate state and local governmental units still provides avenues for expression of the variations in style in different parts of the country. Tax burdens, public services, habits of living, and patterns of tolerance do vary as one moves from Maine to Alabama or New York to New Mexico, reflecting in part the differences in the political choices made by subnational governmental authorities. Thus one state opts for an elaborate system of subsidized postsecondary education[39] while another spends far less on this service; one state chooses to permit the use of marijuana while others continue to prosecute for possession;[40] and one state appeals to retired persons by supplementing the natural advantage of climate with tax preferences, while another discourages this type of migration.[41]

The aphorism that a federal system permits the states to serve as laboratories for experimentation[42] has also been borne out in our experience. Traditionally, federal government initiatives have drawn on the experience in the States. Unemployment compensation insurance began in Wisconsin in 1931,[43] and programs of income assistance to dependent families grew out of earlier state efforts to provide general relief to supplement private philanthropy.[44] Program performance budget techniques, and the more recent

38. On this perception of the advantages of local government, see *e.g.*, J.S. MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 225-29 (Evergreen's ed. 1950); Dahl, *supra* note 35. For an example of the impact of the notion of local control on the Supreme Court, see James v. Valtierra, 402 U.S. 137 (1971).

39. On the California system of public higher education, see P. PASSELL & L. ROSS, STATE POLICIES AND FEDERAL PROGRAMS 76-91 (1978); N. SMELSER & G. ALMOND, PUBLIC HIGHER EDUCATION IN CALIFORNIA (1974). In 1976, state and local governments spent about $19 billion on higher education, of which almost 15% was spent in California. *See* BOOK OF THE STATES, *supra* note 2, at 297.

40. *See, e.g.*, N.Y. PENAL LAW § 221 (McKinney Supp. 1978-1979).

41. *Compare* FLA. CONST. art VI, § 5 *and* Department of Revenue v. Golder, 326 So. 2d 409 (1976) (legislature without power to levy estate tax that increases burden upon estate of resident of Florida), *with* N.Y. TAX LAW § 249-n (McKinney 1966).

42. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

43. *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 587 (1937).

44. *See* Carstens, *Social Security Through Aid For Dependent Children in Their Own Homes*, 3 LAW & CONTEMP. PROB. 246 (1936).

variation of "zero-base budgeting," were tested and used in state capitols before they were adopted by the national government.[45] The Wagner Act was framed with the aid of experience under state laws protecting employee rights of organization and collective bargaining.[46] More recently, state experiments in matters as diverse as public financing of political campaigns,[47] regulation of hospital facilities,[48] protection of health and safety on the job,[49] and requirements for open meetings by public agencies and public access to official records[50] have laid the foundation for similar national legislative actions. And as Congress today considers proposals to implement no-fault insurance,[51] consumer advocacy agencies,[52] voter registration by mail,[53] national health insurance,[54] hospital cost containment,[55] and financial disclosure in municipal securities,[56] it can look to the states for evidence of the effects of alternative approaches. Even on issues affecting the distribution of power among the federal branches—for example, the recent debate over executive input into administrative rulemaking[57]—the states' experiences can provide guidance.

2. *Individual Liberty.* Beyond these values of participation, accountability, diversity, and experimentation in government, however, the case for a federal form rests most fundamentally on the capacity of a federal system to enhance and protect individual liberty. If the sole purpose of forming a nation had been to promote economic progress or efficient government, there would have been no need for federalism, then or now. But if national goals are to be attained in ways consistent with the integrity of the individual, efficiency must be tempered by safeguards for liberty. The ultimate justification for federalism, therefore, must be found in its potential to merge the advantages of localism for enhancing liberty with the necessity of a national government to cope with threats to security and prosperity. Preservation of the states' separate identities may have been a truism to the delegates

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45. *See* D. OTT & A. OTT, FEDERAL BUDGET POLICY (1977); A. SCHICK, BUDGET INNOVATION IN THE STATES (1971).

46. J. COMMONS & J. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 388-419 (4th ed. 1967).

47. *See, e.g.,* Campaign Contributions and Expenditures Reporting Act, N.J. STAT. ANN. § 19:44A-27 to -44 (West Supp. 1978-1979).

48. *See, e.g.,* Health Care Facilities Planning Act, N.J. STAT. ANN. § 26:2H-1 to -52 (West Supp. 1979-1980).

49. *See generally* NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, REPORT, G.P.O. Doc. No. 477-053 (1972).

50. *See, e.g.,* Open Public Meetings Act, N.J. STAT. ANN. § 10:4-6 to -21 (West 1976).

51. *See* text accompanying notes 292 & 293 *infra.*

52. H.R. 6805, 95th Cong., 1st Sess. (1977).

53. *E.g.,* H.R. 2347, 95th Cong., 1st Sess. (1977) (introduced by Rep. Rangel).

54. *E.g.,* S. 3, 95th Cong., 1st Sess. (1977) (introduced by Sen. Kennedy).

55. *E.g.,* H.R. 8337, 95th Cong., 1st Sess. (1977) (introduced by Rep. Rostenkowski).

56. *E.g.,* S. 2969, 94th Cong., 2d Sess. (1976) (introduced by Sen. Williams); S. 2574, 94th Cong., 2d Sess. (1976) (introduced by Sen. Eagleton). *See generally* Note, *The Constitutionality of Federal Regulation of Municipal Securities Issuers: Applying the Test of* National League of Cities v. Usery, 51 N.Y.U.L. REV. 982 (1976).

57. *See* Bruff, *Presidential Power and Administrative Rulemaking,* 88 YALE L.J. 451 (1979).

to the Constitutional Convention; it was also their enduring contribution to our reconciliation of the classic tension between order and freedom.

The concept of liberty here at issue requires some greater specification. In one sense, of course, individual liberty is merely the absence of public or official constraint on individual action. This kind of personal liberty —liberty as license—looks not to social order, but rather to the freedom available to an individual to think and act as he pleases.[58] The kind of liberty more pertinent to the values inherent in a federal system of government, however, is not the freedom to be left alone but the freedom to become involved in the public life of a polity. Political liberty—the freedom to participate in the community's political life[59]—is the core of democratic government. This distinction, a staple of political philosophy since Aristotle,[60] remains vital. To cite a familiar example, the first principle in John Rawls's theory of justice is a requirement of the greatest degree of equal liberty, defined to include principally the political liberty recognized in guarantees constituting the right of political participation.[61] This kind of liberty is said to be primary, and superior in social value, to simple freedom from external constraints on individual action. Rawls describes other "basic liberties," including rights of freedom of conscience and freedom of the person, but it is instructive that his theory of justice requires actual equality only in the distribution of political liberty, and permits its limitation only for the sake of liberty itself.[62]

The political liberty of the individual secured by our Constitution is a freedom to influence that same process of political choice that defines the essence of sovereignty. As discussed above, the effectiveness of this political participation turns on accountability, the connection between the representative and the represented. In our system, the connection is reinforced by rights that need not be absolute to be fundamental to democratic government, such as access to the voting booth and ballot, rights of expression through lobbying, and contributions of time and money. But beyond such

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58. The individual's right to personal autonomy is secured by various provisions in the Constitution. These provisions include the guarantee of free speech and association, the protection against unreasonable search or seizure, and the preservation of privacy. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-1 to -36, 15-1 to -21 (1978).

59. In constitutional terms, this form of liberty encompasses the rights of franchise and candidacy, *see, e.g.*, Lubin v. Panish, 415 U.S. 709 (1974); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). In Wesberry v. Sanders, 376 U.S. 1, 17 (1964), the Court stated: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." But the concept of political liberty is used here in the broader sense of an effective opportunity for involvement and influence in decisionmaking by a variety of techniques, of which the franchise is only one. Political liberty is a right to government based on "a consent that closely and actively [joins] voter and representative." *See* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 172-75 (1967); L. HARTZ, THE LIBERAL TRADITION IN AMERICA (1955); Beer, *supra* note 14, at 10.

60. *See* M. WHITE, PHILOSOPHY OF THE AMERICAN REVOLUTION (1978).

61. J. RAWLS, A THEORY OF JUSTICE 124 (1971). *See also* Hart, *Rawls on Liberty and its Priority*, 40 U. CHI. L. REV. 534 (1973).

62. J. RAWLS, *supra* note 61, at 250-302.

guarantees, political liberty requires a level of awareness in the electorate. Information about the process of choice, including the range of alternatives and their probable effects, is a critical means of assuring accountability. Realistically, a legislator who supports a bill is accountable to the people he serves, both individually and through their association with others of like interest, to the extent that they know the options he discarded as well as the decision he adopted. In the press, the campaign fund, or the ballot box, the voter may or may not view the particular matter as critical to his ongoing support for the representative; he may judge an unwelcome decision outweighed by other decisions that he supports, or by the shortcomings of the available alternatives. The critical point, however, is that he must at least know whom to hold responsible.

To the extent accountability is diminished by reason of the electorate's lack of knowledge or understanding of the lines of authority, the value or effectiveness of participation is necessarily reduced, and the protection of political liberty is necessarily jeopardized. By fostering participation and accountability in the political process, a state's autonomy thus serves a primary constitutional value, and judicial protection of state sovereignty in circumstances where the political branches fail to safeguard it adequately is thus seen as an essential part of the traditional judicial assignment to protect the individual's right to liberty against majoritarian abuse.[63]

These are some of the benefits of our federal system. In the contemporary political process, however, many factors combine to undermine the capacity of the separate states to realize these advantages. The following section illuminates some of these factors.

II. THE DECLINE OF STATES' INFLUENCE UPON THE FEDERAL GOVERNMENT

Congressional sensitivity to the states' autonomy turns not only on the external relationships between state officials and the federal government, but also on various internal factors, such as the structure of government as defined by the Constitution and the rules of procedure developed by the Congress for its own governance. Thus, the method of selecting members of Congress, the standards of voter eligibility, and the design of boundaries for election districts,[64] as well as the rules governing selection of legislative leaders, all affect the state role in the selection and composition of the national legislature. Congressional representation of state interests is also in-

63. Professor Stewart suggests how state sovereignty relates to individual rights. *See* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1210-11 (1977).

64. Professor Wechsler emphasizes these factors to support his conclusion that by virtue of their role in the congressional selection process for both Houses, the states' position is secure: they are "the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics." Wechsler, *supra* note 4, at 546.

fluenced by political factors that contribute to legislative choice, including the effects of the media, campaign expenditures, seniority, incumbency, and party loyalty. In addition, the values and aspirations of the individuals who comprise the expanding bureaucracies in both the federal and state governments exert a significant influence upon federal actions.

Any examination of the extent to which a particular concern for state sovereignty is reflected in the Congress requires some examination of the impact of these forces. My argument, admittedly based more on impressions than the results of systematic empirical testing,[65] is that recent changes in this internal political process have also diminished the likelihood that congressional action will be guided by special sensitivity to state autonomy.[66]

A. *The Historical Background*

1. *The Structural Elements.* The traditional tilt toward localism in the national political process has strong roots in the structure of constitutional government.[67] In particular, three elements combined to make the national legislature sensitive to state autonomy. Even after the Constitution was amended to provide for the popular election of Senators, the equality of representation among the states in the upper House of Congress meant that sentiment in twenty-six states, if reflected in the voting of their elected officials, could block action supported by a majority of the population.[68] Theoretically, if that group of twenty-six states, with only 16.76% of the population,[69] opposes an initiative otherwise commanding national support, the states' interest will prevail. This power is enhanced by Senate rules governing debate[70] and by the traditionally disproportionate representation of

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65. There are some good studies of factors influencing congressional voting. *See, e.g.*, A. CLAUSEN, HOW CONGRESSMEN DECIDE: A POLICY FOCUS (1973); J. KINGDOM, CONGRESSMEN'S VOTING DECISIONS (1973); Miller & Stokes, *Constituency Influence in Congress*, 57 AM. POL. SCI. REV. 45 (1963). However, I have been unable to find empirical data in existing studies on the extent to which the states, particularly state sovereignty interests, influence congressional action.

66. This Article does not attempt to examine the intricacies of the pluralist process or the interactions of state claimants with other interest groups. Rather, it only points out how some particular factors—structural and political—influence the weight likely to be ascribed to state sovereignty in the congressional decisionmaking process.

67. In tracing those roots, Professor Wechsler again put it best: "National action has thus always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case." Wechsler, *supra* note 4, at 544. The variety of recent programs concerning social welfare and natural resources should properly suggest how far we have traveled from this point—which is not at all to say that the states' effectiveness has been nullified, but only that their political discretion is imperiled in ways requiring judicial protection.

68. In the 1950 census, which Professor Wechsler used, a majority of the forty-eight states then in the Union included only 19% of all state residents, and was allotted 86 Representatives out of a House of 435. Wechsler, *supra* note 4, at 547 & n.12.

69. This percentage is calculated from 1970 Census data on population.

70. *See* UNITED STATES SENATE, RULES AND MANUAL, S. DOC. NO. 95-1, 95th Cong., 1st Sess. 20 (1977); Wolfinger, *Filibusters: Majority Rule, Presidential Leadership and Senate Norms*, in CONGRESSIONAL BEHAVIOR 111 (N. Polsby ed. 1971).

smaller Southern States in positions of influence on critical Senate committees.[71]

Further, the Constitution was thought to give the states substantial control over the qualification of voters for congressional elections by specifying that the electorate would consist of those persons who met the standards "requisite for Electors of the most numerous Branch of the State Legislature." [72] And, while the states enjoyed their discretion as to apportionment at the sufferance of Congress pursuant to Article I, section 4,[73] control over congressional election districts was left to the state legislatures until 1964.[74] Even the earlier requirements set in federal law that districts be compact, contiguous, and include "as nearly as practicable an equal number of inhabitants" [75] were eliminated in 1929, and studies cited by Professor Wechsler in 1954 showed deviations from numerical equality up to 129.8% above the average in Texas and 51.3% below in South Dakota.[76] Traditionally, such districting discrepancies combined with limitations on voter participation such as the poll tax to increase state and local party control over the selection process and heighten the effect of local interests on congressional policy.[77]

Districting patterns favoring rural areas over urban centers or suburbs further magnified the impact of localism in the national legislature. The instinctive opposition of rural representatives to proposals for national programs may well have been based more on opposition to the expansion of the public sector than on any commitment to local control, but often enough the two sentiments coincided to produce an effective states' rights block to federal action.

2. *Political Forces.* The structural elements drawn from the Constitution were complemented by political forces that tended to ensure a strong hearing for claims of local autonomy in national legislative deliberations. Political parties were organized locally, and political clubhouses maintained their influence as providers of local services and organizers of social life in small towns and city neighborhoods.[78] While the local political leader, then

71. Southern Congressmen occupied two-thirds of the major committee chairmanships in the 84th Congress. By the 94th, only one-third of the chairmen were southerners. Compiled from M. BARONE, G. UGIFUSA & D. MATTHEWS, THE ALMANAC OF AMERICAN POLITICS (1978).

72. U.S. CONST. art. I, § 2. This state control of the electorate for House Members was subject to the prohibitions in the fifteenth and nineteenth amendments against denial of the franchise based on race or sex. *See* United States v. Classic, 313 U.S. 299 (1941).

73. The Constitution provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4.

74. Wesberry v. Sanders, 376 U.S. 1 (1964).

75. Act of June 18, 1929, ch. 28, § 22, 46 Stat. 26 (language derived from Act for the Apportionment of Representatives to Congress, ch. 11, § 2, 17 Stat. 28 (1872)).

76. Wechsler, *supra* note 4, at 551 & n.29 (citing Todd, *The Apportionment Problem Faced by the States,* 17 LAW & CONTEMP. PROB. 337 (1952)).

77. *See generally* J. SALOMA & F. SONTAG, PARTIES: THE REAL OPPORTUNITY FOR EFFECTIVE CITIZEN POLITICS (1972).

78. *See generally* J. SALOMA & F. SONTAG, *supra* note 77.

as now, was more involved in the affairs of the courthouse or county administration building than in events in the White House or the committee rooms of Congress, his hold on the precinct workers and the electorate, and particularly the primary electorate, contributed to the local sensitivity exhibited by members of Congress, many of whom traced their political roots to the local clubhouse. Local party leaders dominated the traditional instruments of public persuasion: the local press, the meeting hall, and the election day "palm card." In Washington, the strict seniority system and leadership control over the pace of legislation multiplied the influence of long-standing members from rural areas, especially in the Southern States.

3. *The Scope of Federal Government Activity.* Finally, except for the burst of social democratic legislation after the Depression, federal involvement in programs affecting the states was relatively modest. This was itself in part a product of local sensitivity to intrusions from the center, but it was as well a reflection of a more narrow definition of the set of problems requiring national attention. Federal subventions to the states and local governments in 1952 amounted only to $1.8 billion.[79] The initiatives adopted by the post-Depression Congress at the prodding of President Roosevelt had set up a basic cluster of programs intended to maintain minimal levels of subsistence for needy Americans, including old age insurance, welfare, and unemployment compensation. Beyond these, federal domestc spending remained focused on highway aid and higher education, the modern variations of the earliest models of federal spending by which the proceeds of land sales were used to build a transportation network and a system of land-grant colleges.

B. *The Contemporary Scene*

In the last quarter century, many of the structural and political factors affecting sensitivity to localism in the Congress have changed dramatically, with the result that opposition to "federalization" of the state governmental process in the name of state sovereignty is less likely to prove compelling in congressional debates.

1. *The Structural Elements.* Some of the changes in the structural elements of federalism are by now familiar. Commencing with *Wesberry v. Sanders* in 1964,[80] the Supreme Court began to limit the states' ability to control the process of congressional election districting. District lines must now be drawn to approach numerical equality among the constituencies.[81] Neither municipal boundaries nor attempts to avoid political gerrymandering will excuse even slight deviations from mathematical equality.[82] The courts

79. U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, at 727 (1960).

80. 376 U.S. 1 (1964).

81. *See* Kirkpatrick v. Preisler, 394 U.S. 526 (1969), in which the Court invalidated a Missouri plan with deviations 2.8% below and 3.1% above mathematical equality.

82. *Id. See also* Wells v. Rockefeller, 394 U.S. 542 (1969).

have also scrutinized state plans to ensure contiguity and prevent use of the districting power to exclude minorities from political representation.[83] At a minimum, the political effect of the decisions mandating substantial equality of congressional districting has been to diminish the influence of state parties on the composition of the Congress, and to shift a measure of political power from the previously overrepresented rural areas to the cities and, more recently, to the increasingly populous suburbs.[84]

Next, the Court, the Congress, and the constitutional amendment process combined to limit state control over the qualifications of voters in elections for Congress. The first recent blow to state efforts to restrict electoral participation through this means was the decision in *Harper v. Virginia State Board of Elections,*[85] an event that ended, in one swoop, years of fruitless congressional debate over proposals to abolish the poll tax.[86] Soon after the *Harper* decision, the Congress widened the electorate even more drastically through the Voting Rights Act of 1965,[87] facilitating the registration of black voters and the creation of new black voting strength throughout the South. The Act suspended the application of literacy tests and other qualification devices in specific states[88] and authorized the designation of federal officials to register persons meeting the minimal requirements of state law. Although ten years later the United States Commission on Civil Rights reported only limited success[89] in achieving the objectives of the Act, much of the change in Southern politics and the pattern of representation from the "New South" both in Congress and in the states reflects the impact of this critical legislation.[90]

In 1970 Congress attempted to broaden the electorate still further by extending the franchise for federal and state elections to persons over eighteen

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83. In United Jewish Organizations v. Carey, 430 U.S. 144 (1977), Hasidic Jews challenged a race-conscious districting plan that divided their community to assure black voters representation. The Court rejected the challenge, although the Justices divided on the question whether absent the pressure from Congress with the Voting Rights Act of 1965, the state could have discriminated against Hasidim to the advantage of blacks. *See also* Wright v. Rockefeller, 376 U.S. 52 (1964).

84. *See generally* G. BAKER, THE REAPPORTIONMENT REVOLUTION (1966); REAPPORTIONMENT IN THE 1970's (N. Polsby ed. 1971).

85. 383 U.S. 663 (1966).

86. Abolition proposals in the 1940's regularly passed the House but were not brought to a vote in the Senate. Professor Wechsler speculated that the members' votes might have been "partly influenced by knowledge that they [were] foredoomed to failure in the Senate." Wechsler, *supra* note 4, at 549 n.19.

87. 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (1976).

88. The suspension of literacy tests was upheld in Katzenbach v. Morgan, 384 U.S. 641 (1966). The Court rejected a challenge to the basic design of the Act, including the selective application of its provisions on the basis of registration statistics alone. In South Carolina v. Katzenbach, 383 U.S. 301 (1966), the Court further concluded that the fifteenth amendment left "Congress . . . chiefly responsible for implementing the rights created." 383 U.S. at 326. A subsequent amendment has extended the ban on literacy tests nationwide. *See* 42 U.S.C. § 1973aa (1976).

89. UNITED STATES COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT TEN YEARS AFTER 330 (1975). The Commission reported that "for the minority citizen, the right to vote is still a precious right. . . . They bear the burden of mastering the intricacies of the political process in the face of persistent hostility."

90. *See* D. STRONG, NEGROES, BALLOTS AND JUDGES 90-92 (1968).

years of age.[91] In the subsequent challenge to this legislation, eight members of the Supreme Court divided equally on the question whether the statute exceeded Congress's constitutional power to regulate the time, place, and manner of elections and to effectuate the equal protection guarantee of the fourteenth amendment.[92] Justice Black broke the impasse, upholding the eighteen-year-old vote in federal elections, but finding a prohibition on congressional determination of voting qualifications for state ballots based on state sovereiguty.[93] The consequence was, of course, prompt submission and ratification of the twenty-sixth amendment, guaranteeing for the eighteen-year-old the right to vote in all elections.[94]

Congress has also recently considered proposals for national standards to ease voter registration.[95] Enactment of requirements that states permit registration by mail, or even automatic registration such as exists in some European countries,[96] would further diminish the significance of both local party organizations and the major interest groups such as labor unions, who have a history of involvement in registration efforts. While the national legislation has not yet been adopted, the drive for easier registration has been successful in the state legislatures; several states now provide some form of mail registration.[97] Other changes at the state level facilitating participation in a party's primary elections without regard to a voter's prior membership or involvement in party affairs have further contributed to the decline of party control and the development of personal constituencies by successful candidates for Congress.[98]

2. *The Political Forces.* The effects of the various structural modifications tending to erode sensitivity to state interests have been intensified by more subtle changes in the political process affecting national election campaigus and the internal workings of Congress. The last twenty-five years have brought enormous changes in the types of persons elected to the Senate and House, and in the techniques used in their successful campaigns. The core element in this transformation has been the decline in importance of state party organizations,[99] itself a product of several related forces—the

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91. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315 (codified at 42 U.S.C. §§ 1973b, 1973c, 1973aa to 1973bb-4 (1976)).

92. Oregon v. Mitchell, 400 U.S. 112 (1970). *See* Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975).

93. Oregon v. Mitchell, 400 U.S. 112, 117-18 (1970).

94. The data is incomplete, but so far it does not appear that the 18-year-old vote ban had significant political effects, although younger voters do participate at lower rates, and tend to be more independent of party ties.

95. H.R. 2347, 95th Cong., 1st Sess. (1977) (introduced by Rep. Rangel).

96. *See, e.g.*, the Election Code of France, Art. L.1, 2, 9, 11, 16 in DALLOZ, CODE ADMINISTRATIF 381-84 (1971).

97. *See, e.g.*, N.J. STAT. ANN. § 19:31-6.3 (West Supp. 1979-1980).

98. Cover & Mayhew, *Congressional Dynamics and the Decline of Competitive Congressional Elections*, in CONGRESS RECONSIDERED 60-70 (L. Dodd & B. Oppenheimer eds. 1977).

99. The weakness in state party organizations may be traced in part to the introduction of direct primaries. J. SALOMA & F. SONTAG, *supra* note 77, at 157-58. *See also* R. CARR M. BERNSTEIN & W. MURPHY, AMERICAN DEMOCRACY (1968).

effect of money on politics, the changing use of media in campaigns, the phenomenon of celebrity success in politics, and the substitution of welfare state programs for the community service functions of the neighborhood political organization. The consequences are varied, but clearly point in one direction. As Senators and Members of the House develop independent constituencies among groups such as farmers, businessmen, laborers, environmentalists, and the poor, each of which generally supports certain national initiatives, their tendency to identify with state interests and the positions of state officials is reduced.

The role of money in politics has been well documented.[100] In 1972, candidates for the House spent 40.0 million dollars on their races.[101] By 1976, this figure had risen to 60.9 million.[102] Laws regulating campaign finances have checked these trends to some extent.[103] Disclosure requirements and individual contribution limits discourage some contributors, but the Supreme Court struck down an attempt by Congress to set overall spending limits for legislative races.[104] The effect has been to increase the importance in congressional races of two sources of large sums: the candidate's own resources, which are not subject to the statutory limit on contributions; [105] and the political committees organized by special interest groups, particularly trade organizations, business corporations, and labor unions.[106] Money from either of these sources makes a candidate more independent of traditional state party organizations, and more likely to respond to issues based more on national constituency pressures or personal preferences than on the positions taken by state officials.

Statutory limits on contributions tend to aid incumbents, as well.[107] One recent study explained this effect as follows:

> Even though incumbents raise money more easily from all sources, limits on contributions will not help challengers because the problem is *not* equalizing spending between candidates but rather simply getting more money to challengers so that they can mount competitive races. Anything that makes it harder to raise campaign funds is to their detriment.[108]

Proposals for combining public subsidies with spending limits would probably

100. *See generally* D. MAYHEW, CONGRESS, THE ELECTORAL CONNECTION (1978); Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 AM. POL. SCI. REV. 469 (1978); Welch, *The Economics of Campaign Funds*, 20 PUB. CHOICE 83 (1974).

101. *House Races: More Money to Incumbents*, 35 CONG. Q. WEEKLY REP. 2299, 2299 (1977).

102. *Id.*

103. *E.g.*, Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections of 2, 18, 47 U.S.C. (1976)).

104. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

105. *Id.* at 51-54.

106. *See Interest Groups' Campaign Gifts to House Leaders Doubled in '78*, N.Y. Times, Dec. 25, 1978, at 1, col. 1.

107. Jacobson, *supra* note 100, at 489. The study also shows that incumbents who spend more do less well, a fact readily explained by the theory that only a perceived electoral threat influences an incumbent's spending. *Id.* at 469.

108. *Id.* at 489.

have varying consequences, depending on the political circumstances and the subsidy formula.[109] The availability of public funds aids challengers, while an accompanying limit on campaign spending tends to favor incumbents. The study cited above indicates that the result of public financing would have been to increase the number of successful challenges to incumbents in 1974, when Watergate supplied a decisive partisan issue favoring Democrats, but to diminish challengers' prospects in the 1972 election.[110] Public subsidies of the sort being debated in the last Congress would have had the effect of "exaggerat[ing] whatever trends exist at the time of the election," aiding incumbents whenever the effects of short-term issues are relatively weak.[111]

Much of the large sums expended in contemporary political campaigns is used to project the candidate through media techniques still novel and unfamiliar to the congressional politics of the 1950's. Richard Nixon's successful use of television to respond to charges threatening his place on the Republican ticket in 1952 represented one of the first such events in politics. By 1960, television debates and spot advertising were a critical part of Presidential campaigns, and during the sixties the use of media by legislative candidates became more widespread, more sophisticated, and more expensive.[112] Today a candidate's first step toward election may be to pay a retainer to a media adviser.[113] Most students of media effects on politics agree that television, the most expensive media form, is the most influential, both to develop a candidate's recognition and to prompt a favorable public response to the candidacy.[114] While it is too simplistic to conclude that television politics substitutes image for ideology or personal character—in fact, there is some evidence that television advertising accentuates rather than distorts basic public perceptions of the candidate, his concerns, and his character—it is likely that media politics allows the well-financed candidate to bypass party channels and build his support by communicating directly with the public. It also means that service to one's party or community may be less important than either personal financial capacity or public recognition earned from celebrated achievements in other fields.

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109. *Id.* at 489-90.

110. "Incumbents may be given an added margin of safety in election years when short-term forces are weak, but when these forces are strong, the turnover in congressional seats should be greater." *Id.* On the Watergate effect in 1974 elections, see Burnham, *Insulation and Responsiveness in Congressional Elections*, 90 POL. SCI. Q. 411 (1975). *See also* Nelson, *The Effect of Incumbency on Voting in Congressional Elections, 1964-1974*, 93 POL. SCI. Q. 665 (1978). On the trend to close contests, see Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 POLITY 295 (1974).

111. Jacobson, *supra* note 100, at 490.

112. *See* E. COMSTOCK, S. CHAFEE, N. KATZMAN, M. MCCOMBS & D. ROBERTS, TELEVISION AND HUMAN BEHAVIOR 328-80 (1978); S. KRAMS & D. DAVIS, THE EFFECTS OF MASS COMMUNICATION ON POLITICAL BEHAVIOR (1976). *See also* J. KINGDOM, *supra* note 65.

113. Professional media consultants like David Garth, Gerald Rafshoon, and John Deardoorf have themselves become familiar personalities and campaign issues. Recently, they have provided media advice to candidates in other countries as well. For example, the 1978 Presidential election in Venezuela found two American media advisers working for the major opposing candidates.

114. *See* note 112 *supra*.

The potential of outsiders to succeed in political campaigns for high office adds to the decline in state party strength.[115] The political ingenue is also aided in his quest for high public office by the widespread public disenchantment with government and politics, and the resulting attraction to the "nonpolitical" candidate. The result is evident in the class of new Senators elected in 1978, which includes many first-time officeholders. As legislators, these persons seem less likely than their counterparts in the 1950's to respond to state concerns merely because voiced by state officials or state parties and significantly more likely to pursue an independent course. When the legislator's own positions happen to coincide with the interest of state autonomy, he may cite that interest as well to explain his vote, but he is less likely to be moved by it or to view it as a decisive influence. Indeed, while prior state government service is still common to many members of Congress, the proportion with this background has declined significantly. In the Eightieth Congress, twenty-eight Senators had served formerly as Governor of their states, while only sixteen former Governors sat in the Ninety-fifth Senate.[116] Even when the new Senator comes to Washington from a state capitol, his sensitivity about national intrusions into state affairs may well be tempered by his primary involvement with problems of national magnitude such as energy, inflation, or environmental protection. He is more likely to defend his regional interest in the design of formulae affecting the distribution of federal aid than he will be to set aside his preferences because their achievement risks injury to state autonomy.

Once in Washington, the same characteristics that have distinguished the new Congressman from his predecessors have also contributed to changes in the internal procedures of the national legislature. These modifications in congressional rules and practices also tend to reduce the force of the proposition that the separate states generally acquiesce in acts of Congress interfering with their sovereignty. On the desirability of reelection, there is little to distinguish the contemporary Congressman. Most want to stay and their wish is seldom denied.[117] But the same strains of independence that mark their election have also characterized the Congressmen's service in Washington. The old rule that "to get along in the House, you go along," while still of some importance, belies the increasing assertiveness of junior

115. Consider the 1978 election examples of Bill Bradley in New Jersey and Gordon Humphrey in New Hampshire, both of whom were elected without traditional party support. Of course, their backgrounds are quite different, with Bradley an example of a person who transfers celebrated achievement in another field to political success, and Humphrey a model of the lone outsider with an ideological image striking a responsive chord in the electorate. Bradley's opponent in the general election, Jeffrey Bell, fit the Humphrey model in his primary defeat of Senator Clifford Case. *See Senate: Slightly More Conservative,* 36 CONG. Q. WEEKLY REP. 3244, 3245 (1978).

116. For the 80th Congress, see A. HOLCOMBE, OUR MORE PERFECT UNION 205-06 (1950). The statistic for the 95th Congress was compiled from M. BARONE, G. UGIFUSA & D. MATTHEWS, *supra* note 71.

117. Since 1956, 94% of incumbent candidates have been reelected, and the number involved in closely contested races continues to decline. Nelson, *supra* note 110. In 1976, only 9% of incumbents seeking to return to Congress were reelected with less than 55% of the votes. *See also* Mayhew, *supra* note 110.

Members. The most notable consequence has been the rising influence of the party caucus in the House and the consequent decline of strict seniority in the selection of major committee chairmen. In 1974, three senior committee chairmen were defeated, in each case following the negative response of freshman Members to their appearances before the newcomers' caucus.[118] In part as a result of the changes in seniority rules, there has been a trend away from southern states'-rights oriented domination of committee leadership positions. In the Ninety-fifth Congress, only five of twenty major House committee chairmen and five of fifteen Senate committee chairmen were from the South;[119] not many years before, the ratio of southern to nonsouthern representatives in the leadership was significantly higher.[120]

Recent studies of the relationship of incumbency to party loyalty in congressional elections demonstrates further the decline of state party influence. A steadily increasing proportion of voters—from nine percent in 1956 to eighteen percent in 1974—have departed from their usual party line in congressional elections.[121] One political scientist explains this increase in defection by concluding that "incumbency has become a more important voting cue and party identification a correspondingly less important cue."[122] The rate of defection to support an incumbent averages three times that of defection to vote for a challenger.[123] Incumbency also counts as a more critical factor in the "less salient, less visible off-year congressional elections."[124] Finally, incumbency tends to be more important to voters lacking strong party affiliations. As the group of independent voters increases, their tendency to prefer incumbents adds to the political advantages enjoyed by persons already in office. These political effects occur even though the incumbent's traditional advantages, including traveling privileges, the availability of polling data, and easier access to the press and media, have not arrested declining recognition among voters—awareness of the incumbent congressmen declined from fifty-one percent in 1964 to thirty-four percent in 1974.[125] The combined effects of incumbency, direct access to

118. *Democrats Oust Hebert, Poage; Adopt Reforms*, 33 CONG. Q. WEEKLY REP. 111, 114 (1975). The seniority principle has been applied consistently in the Senate since the last century and in the House since the reorganization of 1910. B. HINCKLEY, THE SENIORITY SYSTEM IN CONGRESS (1971); Abram & Cooper, *The Rise of Seniority in the House of Representatives*, 1 POLITY 52 (1968); Polsby, *The Growth of the Seniority System in the House of Representatives*, 23 POL. SCI. REV. 787 (1969). Hinckley reports only four examples when the traditional rule was broken: Senate Progressives who broke with the Republicans in 1924 lost seniority the next year; Senator Wayne Morse lost his committee rank when he became an independent in 1953; two Democratic Members of the House were stripped of seniority after supporting Senator Barry Goldwater's candidacy in 1964; and Adam Clayton Powell lost his seniority for conduct that also led to an effort to remove him from the House. Hinckley, *Seniority 1975: Old Theories and New Facts*, 6 BRIT. J. POL. SCI. 383, 385-86 (1975). *See* R. FENNO, CONGRESSMEN IN COMMITTEES 82-83, 290-91 (1973).

119. Compiled from M. BARONE, G. UGIFUSA & D. MATTHEWS, *supra* note 71.

120. *Id.*; Hinckley, *supra* note 118, at 41.

121. Arseneau & Wolfinger, *Turnout and Defection in House Elections*, 1973 PROCEEDINGS AM. POL. SCI. A. 13.

122. Nelson, *supra* note 110, at 666.

123. *Id.*

124. *Id.* at 668.

125. *Id.* at 671.

the electorate, and declining adherence to seniority in the Congress contribute to the relative independence of Congressmen from the state party and state officials.

3. *The Expansion of the Federal Government.* In the years between 1932 and 1960, the interrelationships between the states and the national government multiplied, but the political process continued to facilitate state influence in the Congress. In the 1970's, the federal system has assumed a very different cast. The vast expansion in the scope of federal domestic programs has produced a new class of public administrators, in both Washington and state regional offices of federal agencies, commissioned to monitor state activities.[126] The enlarged requirements of federal law and federal largesse have in turn expanded and altered the roles of the states, and stimulated a corresponding growth of state bureaucracies responsible for program implementation.[127] As a result of the pervasive intermingling of functions and responsibilities among the different levels of government in the federal system, the "layer cake" of federalism has become increasingly "marbled," with local, state, and federal governments sharing responsibility for a multitude of public services. The "marbling" reflects an effort to reconcile competing political priorities—the interest in preserving the diversity and pluralism of local administrative control, and the need to achieve a greater measure of equity through transfer of fiscal obligations to successively larger units of government. Attempts to blend these objectives have yielded relationships of increasing complexity, in which revenue is raised and standards of service are set nationally, but administration, eligibility review, and enforcement are often left to local officials.

From these developments there has emerged a new system of representation and mutual influence in the federal system, comprised of two classes of public administrators who work closely with the interest groups and constituencies affected by the programs they administer as well as with individual legislators and committee staff. Collectively, they shape and implement legislation that imposes administrative obligations and fiscal burdens on the states in return for increased federal aid.[128] Individuals in the federal

126. Professor Samuel Beer has studied both the new influence of public administrators or, as he calls them, the "professional bureaucratic complex," Beer, *The Modernization of American Federalism*, 3 PUBLIUS, Fall, 1973, at 49, 74-80, and the effect of the intergovernmental lobby on federal policy, particularly in such new areas as general revenue sharing. Beer, *The Adoption of General Revenue Sharing: A Case Study in Public Sector Politics*, 24 PUB. POL. 127 (1976). *See generally* Beer, *supra* note 14.

127. Some see the expansion of federal programs as an indication of the decline of federalism. M. REAGAN, THE NEW FEDERALISM (1972); J. SANDQUIST, MAKING FEDERALISM WORK: A STUDY OF PROGRAM COORDINATION AT THE COMMUNITY LEVEL (1969). Others favor reviving the federalist ideal by increasing local autonomy, an objective of such programs as general revenue sharing. R. NATHAN & C. ADAMS, REVENUE SHARING: THE SECOND ROUND 131, 164 (1977). *See also* Elazar, *Cursed by Bigness or Toward a Post-Technocratic Federalism*, PUBLIUS, Fall, 1973, at 239, 284-92 (1973).

128. Harold Seidman has called this increasingly important political combination the "iron triangle." H. SEIDMAN, POLITICS, POSITION AND POWER 37 (1970). Professor Beer argues that the increased lobbying activity by state and local government elected officials is in fact a product of growing influence asserted by public administrators in agencies at all

and state administrative bureaucracies often move back and forth between them, and share common backgrounds and ambitions, most particularly the commitment to maintain and expand the public services they supervise. Though Governors may testify at public hearings and speak with members of the Cabinet and Congress from time to time, the day-to-day contact between the states and the federal government is maintained through their administrative network—the routine, ongoing communication between health, education, or transportation officials in Washington, for example, and their counterparts in the state capitols. Thus, in the central process of federal policymaking, a state's views are increasingly represented by public officials with a direct stake in ever-expanding national programs, even if expansion entails greater regulation and the imposition of more onerous burdens on the state.

4. *Summary.* Taken together, the new relationship of the states and state administrators to the federal government and the new politics of congressional representation have dramatically changed the workings of the process of federalism. It is now far less likely that the states' interest in their continuing autonomy will consistently receive expression within the political branches of the federal government, or that the political process will yield dependable lines of accountability between the governed and the government. As Congress increasingly implements national policy by directing the governmental activity of the states, the people in whom sovereignty ultimately resides are left without a clear sense of the persons they may call to account—the national legislators who conceived and ordered a program, or the state officials charged with its implementation. And as the states find their resources and energies increasingly consumed in meeting obligations imposed by the national government, they confront a system of federalism more coopting than cooperative, in which the basic values of pluralism, creativity, participation, and liberty are progressively undermined. This becomes evident when recent federal legislation affecting the states is examined.

III. Federal Intrusions Upon State Interests—Some Examples

During the 1970's Congress enacted numerous federal programs that show the declining influence of states' interests upon Congress. They involve both regulatory directive commands to state governments and federal grants with conditions attached. The extent of their interference with the states' freedom to choose among alternatives and allocate resources is evident in the following sample of their provisions.

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levels of government. Beer, *supra* note 14, at 18. On the phenomenon of intergovernmental lobbying, see S. Farkas, Urban Lobbying: Mayors in the Federal Area (1971); D. Haider, When Governments Come to Washington: Governors, Mayors, and Intergovernmental Lobbying (1974).

A. *Direct Commands to the States*

Recent federal initiatives have imposed obligations on the states directly by exercise of the commerce power, or have attempted to induce a state response in order to avoid the assertion of federal regulatory authority. For example, environmental controls in the Surface Mining Control and Reclamation Act of 1977 [129] encourage legislatures in coal-producing states to enact enforcement machinery according to national standards so as to avoid elaborate federal controls. Similarly, the original proposals for national no-fault automobile liability insurance would have required the states to adopt no-fault regulations.[130] Constitutional objections raised in 1975 by Attorney General Levi prompted committee amendments providing for the implementation of a federal no-fault system in states that failed to accept no-fault "voluntarily." [131] Another example of a federal regulation directing a state governmental response is the Natural Gas Policy Act of 1978,[132] under which administrative agencies in states producing natural gas must implement federal pricing policies for intrastate sales.

Forms of federal intervention affecting the governmental processes of the states are perhaps best illustrated in the Clean Air Act.[133] In 1970, Congress authorized the Environment Protection Agency to set air quality standards for both direct and indirect sources of pollution. The EPA promulgated these standards, but left to the states the initial responsibility to design plans for their implementation.[134] As air quality is influenced by virtually every kind of activity occurring in an area, the scope of these implementation plans was vast, covering matters as diverse as emission equipment for factories, power plants, and other direct sources of pollution; transportation facilities intended to reduce utilization of private automobiles or encourage use of mass transit; and regulatory actions to control specific sources of pollution, such as automobiles. If the EPA disapproved part of a state plan, it was authorized to promulgate revised plans with which the state was obliged to comply.[135] According to the Agency's initial

129. 30 U.S.C. §§ 1201-1328 (Supp. I 1977).

130. S. 354, 94th Cong., 1st Sess. (1975).

131. *National Standards No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 496-501 (1975) (statement of U.S. Att'y Gen. Edward H. Levi) [hereinafter cited as *Hearings on S. 354*]. *See id.* 510-11 (letter from U.S. Att'y Gen. Levi to Sen. Warren G. Magnuson, June 10, 1975).

132. 15 U.S.C.A. §§ 3301-3432 (West Supp. 1979).

133. 42 U.S.C. §§ 7401-7642 (Supp. I 1977). *See generally* Chernow, *Implementing the Clean Air Act in Los Angeles: The Duty to Achieve the Impossible*, 4 ECOLOGY L.Q. 537 (1975); Stewart, *supra* note 63.

134. The District of Columbia was treated as a state. 42 U.S.C. § 7602(d) (Supp. I 1977).

135. For example, the EPA in 1973 promulgated a transportation control plan that required governments in the District of Columbia region, including parts of Maryland and Virginia, *inter alia*, to purchase 475 buses; to construct exclusive bus lanes and bicycle paths according to federal specifications; to adopt a specified regulatory system for automobile inspection and maintenance to control emissions; to equip state vehicles with certain emission control devices; and to provide space for bicycles in all parking facilities. *See* 40 C.F.R. §§ 52.490-.492, 52.494-.495 (1978). *See also* 40 C.F.R. § 52.476(g) (1976), *rescinded*, 42 Fed. Reg. 7957 (1977).

interpretation of the law, failure of the states to comply with such regulations could have subjected state officials to a variety of civil and criminal penalties.[136]

For all their diversity of method, what these provisions share is the feature of "federalizing" or "commandeering" the basic decisionmaking processes of state governments, obliging subnational legislators and executive officials to enact statutes or adopt administrative regulations according to the design and standards set by the federal government. This "federalizing" effect on state lawmaking is significantly different both from the negative constraints of federal laws that preclude inconsistent state rules or practices in an area properly subject to preemption under the commerce power, and from the imposition of specific standards to be applied by states and by private groups engaged in similar activities. It is a technique appealing to federal policymakers because it offers the opportunity to achieve their national purpose without expanding the federal bureaucracy. Perhaps more importantly, it offers the appearance of cooperative federalism, a sharing of authority with the states over important areas of national concern.

In fact, the appearance may be deceiving, for the technique of directing the exercise of a state's legislative and administrative processes to achieve a rational purpose has the effect of diminishing a critical zone of discretion otherwise available to state officials. Any government has limited resources, not just in conventional financial terms, but also in the attention and energy of its principal agents.[137] When a part of this pool of resources is commandeered to the service of a federal direction—as when a state is ordered to pass a law, establish a regulatory agency, promulgate a regulation, or expend an allocation of funds according to federal design in ways described above—this fundamental capacity for choice is inevitably reduced.[138] Taken alone, the effect of any individual regulation or condition to a federal grant upon state discretion may be so small as to be negligible. But taken as a whole, the crucial characteristic of contemporary federalism is the enormous extent to which state government capacities are consumed with the task of responding to directives from above.[139]

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136. The EPA subsequently conceded that it lacked the authority to compel states to enact laws or regulations. *See* EPA v. Brown, 431 U.S. 99, 103 (1977). However, it still maintains that it may order states to enforce plans that it promulgates for a particular state. For a discussion of this issue and the recent amendments to the Clean Air Act, which apply additional indirect pressures upon the states in this area, *see* Henderson & Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429, 1463-68 (1978).

137. Increasing demands of public sector politics as well as public functions heighten this perception that the governmental process involves competition not just for scarce fiscal resources but also for limited time and personal resources.

138. The use of such practices in the environmental area has been criticized as an ineffective method of achieving the cooperation of the states. Henderson & Pearson, *supra* note 136, at 1462-68.

139. In my own experience in the New Jersey government, about one-half of the time of principal state officials including the Governor involves federal relations and the responsibility for adjusting to the obligations imposed by federal law. I have not found any more precise measurement of this phenomenon in state and local government.

B. *Federal Grants*

Any assessment of the range of choices available to the states requires consideration not only of direct federal commands to the states, but also of federal grants-in-aid and the conditions attached to them.

1. *The Development of Grant Programs.* Transfers of funds from the national government to subnational units began in the early 1800's [140] when Congress provided that a portion of the proceeds from land sales be granted to the states, first for road construction [141] and later for "the encouragement of learning." [142] Between 1887 and 1916 grants were made for agricultural improvement, forest fire protection, highways, and vocational education.[143] It was in those years that Congress for the first time imposed requirements of advance grant approval, state reporting, and federal monitoring of state programs.[144] The federal role in state finances increased dramatically with the introduction of public welfare programs through the Social Security Act of 1935,[145] including grants to the states for old age assistance,[146] child dependency payments,[147] and unemployment security.[148] Still, federal intergovernmental transfers in 1948 amounted to only $1.581 billion,[149] a far cry from the more than $84 billion transferred three decades later.[150]

The federal grant-in-aid system that now occupies so significant a place

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140. *See generally* J. MAXWELL & J.R. ARONSON, FINANCING STATE AND LOCAL GOVERNMENTS 46-76 (3d ed. 1977).

141. In 1802, when Ohio was admitted to the Union, Congress provided that five percent of land sale proceeds be applied to road construction. *See id.* at 46.

142. *See, e.g.*, Act of Apr. 18, 1818, ch. 67, § 6, 3 Stat. 428, providing for the admission of Illinois into the Union as a state. Congress provided for five percent of land sales in Illinois to be returned to the state, with three percent to be used "for the encouragement of learning."

143. *See* J. MAXWELL & J.R. ARONSON, *supra* note 140, at 47.

144. The Hatch Act of 1887, ch. 314, 24 Stat. 440 (codified as amended in scattered sections of 7 U.S.C. (1976)), required annual financial reports from the agricultural experiment stations supported by the aid, and the Weeks Law of 1911, ch. 186, 36 Stat. 961 (codified in scattered sections of 16 U.S.C. (1976)), imposed an obligation for advance approval of state plans for forest fire protection.

145. Ch. 531, 49 Stat. 620 (1935) (current version codified at 42 U.S.C. §§ 301-1397f (1976)).

146. Title II of the Act provided old age benefits, ch. 531, tit. II, §§ 201-232, 49 Stat. 622-25 (1935) (codified at 42 U.S.C. §§ 401-432 (1976)), and title VIII imposed an excise tax on employers, ch. 531, tit. VIII, §§ 801-811, 49 Stat. 636-39 (1935) (current version codified at I.R.C. §§ 31, 35, 62, 68, 72, 78).

147. The original welfare grants provided reimbursement for one-third of state grants up to a maximum of $18 monthly for the first child and $12 thereafter. Ch. 531, tit. IV, §§ 401-460, 49 Stat. 627-29 (1935) (codified at 42 U.S.C. §§ 601-660 (1976)).

148. Titles III and IX imposed an excise tax on employers, with a compensating credit for qualified taxes paid to a state for unemployment insurance, ch. 531, tit. III, §§ 301-304, 49 Stat. 626-27 (1935) (codified at 42 U.S.C. §§ 501-504 (1976)), *id.*, tit. IX, §§ 901-910, 49 Stat. 639-44 (1935) (current version codified in scattered sections of 11, 26, 42 U.S.C. (1976)).

149. U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, at 22 (1960).

150. OFFICE OF MANAGEMENT AND BUDGET, SPECIAL ANALYSES—BUDGET OF THE U.S. GOVERNMENT FISCAL YEAR 1979, at 175-99. By 1978 federal aid amounted to 26.7% of state and local government spending. For fiscal 1980 the President proposed to reduce payments to state and local governments. OFFICE OF MANAGEMENT AND BUDGET, SPECIAL ANALYSES—BUDGET OF THE U.S. GOVERNMENT FISCAL YEAR 1980, at 212-46.

in state and local government finances is rooted in the power conferred upon Congress by article I, section 8 to "provide for the . . . general Welfare of the United States." [151] As a result of limitations on standing to challenge spending programs, historical disagreements about the scope of this power were not finally resolved until 1936. In *United States v. Butler*,[152] the Supreme Court struck down a taxing and spending scheme embodied in the Agricultural Adjustment Act of 1933 [153] as an intrusion into state control of the "local matter" of farm production, and in so doing resolved two critical issues. The power to provide for the general welfare, said the Court, was a power to *spend* moneys raised by the taxes authorized in the same clause, and not a general power to *regulate* for the general welfare. However, this spending power was not, as Madison had supposed, "confined to the enumerated legislative fields committed to the Congress"; rather "its confines [were] set in the clause which confers it." [154] To pass constitutional muster, a spending program need only be "general" in the sense of achieving some common benefit as distinguished from some merely "local" purpose.[155]

2. *The Present System.* The constitutional interpretation expressed in *United States v. Butler*, together with economic, social, and political developments, has facilitated the development of a multifaceted grant-in-aid system. At the present time, the concept of "common benefit" accommodates a wide variety of federal programs. National spending in the form of grants-in-aid to the states can generally be justified as the purchase of a collective good, with benefits extending beyond the boundaries of the particular recipient.[156] In many spending programs, the national purpose may also be to use the relatively more efficient federal tax system to fund needed services, returning part of the proceeds to the states to correct for their comparative fiscal inefficiency. Another objective of federal aid in recent years has been to stabilize or stimulate the national economy: [157] along with tax

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151. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

152. 297 U.S. 1 (1936).

153. Ch. 25, tit. I, §§ 1-21, 48 Stat. 31 (1933).

154. 297 U.S. at 65-66.

155. Whether the payments to farmers who contracted to reduce production were "general" or not was not decided, since the Court found that the scheme of the act invaded an area reserved to the states. 297 U.S. at 72-73. That part of the opinion has no continuing importance. Justice Frankfurter commented in International Ass'n of Machinists v. Street, 367 U.S. 740 (1961), that "the dissenting views [in *Butler*] of Mr. Justice Stone, concurred in by Brandeis and Cardozo, JJ., may surely be said to have won the day." *Id.* at 807 n.13 (Frankfurter, J., dissenting).

156. Professor George Break has described such a system of "optimizing grants." G. BREAK, INTERGOVERNMENTAL FISCAL RELATIONS IN THE UNITED STATES 62-79 (1967). *See generally* F. MICHELMAN & T. SANDALOW, *supra* note 35, at 984-1002.

157. The use of federal monetary, tax, and spending policies to influence the economic cycle is, of course, familiar. But beginning in 1976 the Congress enacted a series of programs expressly designed to stabilize the economies of subnational governments by providing stimulus payments to offset the effects of recession on local government revenues and unemployment. The Economic Stimulus Program at its peak provided approximately $9.2 billion in aid for fiscal 1978, including three separate programs for public service jobs, Emergency

policies, federal subventions have become increasingly common instruments of national fiscal policy, with large sums of federal funds used to aid subnational governments in meeting service demands and maintaining employment levels to counter the effects of a national economic slowdown.[158] Finally, federal spending is sometimes intended to redistribute fiscal resources or equalize fiscal capacity among the states.[159] In programs serving this goal, funds are provided on the basis of formulae measuring local need as defined by Congress. However, although the goal of "equalization" is commonly cited in support of grants-in-aid, the record indicates relatively little income redistribution as a result of federal spending.[160] Grant programs are generally divided into general revenue sharing, block grants, and categorical aid [161] based mainly on the extent of local discretion over the use of federal funds.[162] But the system in fact defies a neat typology. Grants vary widely according to the discretion vested by Congress in the federal execu-

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Job Programs Extension Act of 1976, Pub. L. No. 94-444, 90 Stat. 1476 (codified at 29 U.S.C. §§ 815-816, 842-843, 845, 881, 961-963, 965-982, 984 (1976)); local public works, Youth Employment and Demonstration Projects Act of 1977, Pub. L. No. 95-93, 91 Stat. 627 (codified at 29 U.S.C. §§ 891-895f, 993 (Supp. I 1977)); and countercyclical revenue sharing, Public Works Employment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999; Pub. L. No. 94-447, tit. II, § 201, 90 Stat. 1498 (codified at 42 U.S.C. §§ 6701-6709, 6721-6735 (1976)).

158. City governments, however, chose to depend on these funds, disregarding their "emergency" status. As a result, the expiration of the program in fiscal 1979 and fiscal 1980 has caused widespread anguish among mayors and led to calls for incorporating this authority as a permanent feature of the revenue sharing program. *See Proposed Supplementary Fiscal Assistance Act of 1978: Hearings on S. 2975 Before the Subcomm. on Revenue Sharing of the Senate Comm. on Finance,* 95th Cong., 2d Sess. (1978).

159. Equalization is a product of both taxing effects and spending formulae. The redistribution effected by the tax system is greater than the influence of federal grants. *See* J. MAXWELL & J.R. ARONSON, *supra* note 140, at 67-71.

160. *See generally* 1 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, FISCAL BALANCE IN THE AMERICAN FEDERAL SYSTEM (1967). Unlike other federal systems in Canada, Australia, and West Germany, the United States has no grant system specifically aimed at equalization of either income or fiscal capacity. *See* R. NATHAN & C. ADAMS, REVENUE SHARING: THE SECOND ROUND (1977).

161. Among the 492 separate categorical aid programs are specific project grants such as the one provided by the Urban Mass Transit Act; open-end reimbursement and programs such as medicaid and Aid to Families with Dependent Children; and formula-based assistance, such as the interstate highway grants. *See* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE INTERGOVERNMENTAL GRANT SYSTEM: AN ASSESSMENT AND PROPOSED POLICIES, SUMMARY (1978).

162. The general revenue sharing program, for example, distributes approximately $7 billion, of which one-third goes to the states and two-thirds to local governments. In all, 38,000 separate governmental units receive revenue sharing funds. The most important goal of the program was to preserve decentralized or local discretion over services, by eliminating most conditions to federal aid. Other objectives were to assure provision of important services and to stabilize tax burdens—goals of tax relief and spending which are mutually inconsistent. Studies indicate that the funds are used in part to reduce taxes and in part to increase services, but that revenue sharing has had relatively little effect on citizen participation or the influence of elected officials in the political process. *See* R. NATHAN & C. ADAMS, *supra* note 160. Proponents of revenue sharing also argue that it would reduce fiscal disparities, although the equalizing effects of the formula are slight. In addition, the stabilizing influence on suburban tax rates may actually hurt the cities' competitive position. In 1976 Congress extended the program for four years, but the extensive debates emphasized issues of procedure and accountability, and the new legislation did not adjust the distribution formula. The debate over the program continues—some legislators have proposed eliminating the states' share entirely, while others point to revenue sharing as a target of budget reduction if the movement to require a balanced federal budget were successful. N.Y. Times, Jan. 21, 1979, § 1, at A1, col. 1.

tive, the discretion allowed recipient state or local governments, and the range and nature of conditions imposed by Congress.[163]

Nonetheless, some general trends are discernible. Overall, the transfers have become a more significant part of the federal budget, increasing from 4.7% in 1955 to 16.3% in 1978.[164] As the total amount of aid has increased, the proportion bypassing the states and going directly to substate governments has also increased, from 9.1% in 1952 to 28.6% in 1978.[165] This change has been spurred by the effort in the 1970's to decentralize control over federal funds through the introduction of general revenue sharing and various block grant programs.[166] Notwithstanding this significant development in fiscal federalism, however, categorical programs still account for 80% of all federal aid.[167] Two-thirds of the total number of these are project grants, but formula-based aid accounts for 69.1% of all categorial spending.[168] There is a clear trend toward more reliance on statutory formulae for the distribution of federal funds, a development that emphasizes both the legislative competition over formula design and the sense of continuing state entitlement to the payments.[169]

3. *Grants with "Strings" Attached.* The most dramatic change in the grant-in-aid system has come from the proliferation of conditions attached to federal grants. Some grant conditions, including requirements for annual reports, audits, and specifications regarding the use of the funds, are designed to insure that the recipients' performance meets the requirements and purposes of the grant statute, and have been a familiar feature of federal spending laws throughout this century. However, a closer look at some representative federal aid programs enacted under the authority to spend for the general welfare reveals that Congress has recently attached a much more elaborate range of conditions and penalties for noncompliance to its bounty to the states. Taken together, these measures, and others like them, have altered the shape of the federal system.

The Urban Mass Transportation Act (UMTA) [170] provides grants for capital improvements for transit facilities, including construction of new

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163. *See generally* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE INTERGOVERNMENTAL GRANT SYSTEM: AN ASSESSMENT AND PROPOSED POLICIES (series of reports 1975-1978).

164. OFFICE OF MANAGEMENT AND BUDGET, SPECIAL ANALYSES—BUDGET OF THE U.S. GOVERNMENT FISCAL YEAR 1978, at 265-89.

165. *Id.*

166. *See* note 162 *supra.* The recent tendency in federal policy to recognize the independent status of substate governments has not translated into greater fiscal support for major urban areas. In fact, the spreading effect of distributing aid to a greater number of governmental units is another feature of recent national policy. The President's effort to "target" aid has generally been rebuffed by the Congress.

167. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 161, at 4.

168. *Id.*

169. The legislative process is increasingly concerned with the intricacies of formulae for grant programs. This is the source of much of the new regional animosities reflected in debates over major aid programs. *See, e.g., Proposed Amendments to the Comprehensive Employment and Training Act: Hearings on S. 1242 Before the Subcomm. on Employment, Poverty and Migratory Labor of the Senate Comm. on Human Resources,* 95th Cong., 1st Sess. (1977).

170. 49 U.S.C. §§ 1601-1613 (1976).

systems and equipment, purchase and rehabilitation of privately operated systems, and additions to existing operations. In addition, UMTA provides operating subsidies both to public operators and to state subsidized systems. In fiscal 1979 appropriations for these programs amounted to $3.5 billion.[171] Among conditions attached to the Secretary of Transportation's determination to make a grant, the law requires certification by the Secretary of Labor that "fair and equitable arrangements are made . . . to protect the interests of employees affected by such assistance."[172] These labor protective arrangements must be included in the contract of assistance executed by the recipient state or local agency with the federal government. Further, UMTA specifies minimum standards for the content of the labor protective agreement.[173] Without such protective arrangements, no mass transit grants for capital improvements or annual operating subsidies may be made. Though it is apparent that the original aim was to protect employee interests against the effects of investment in automation or labor-saving technology, the requirements of the statute have been interpreted to extend beyond this purpose, even when the grant is used to avoid service reductions or termination through bankruptcy of a private transit operation, rather than to purchase labor-saving equipment.[174]

In the Highway Beautification Act of 1965,[175] Congress sought to promote control of billboard advertising by inducing the states to implement regulatory programs meeting the standards set by the Secretary of Transportation. The Secretary's regulations oblige the states, *inter alia,* to pay just compensation to owners who remove their sigus, and the federal government provides grants for seventy-five percent of the removal costs.[176] A state's failure to establish such a program subjects it to a ten percent reduction in all categorical federal highway aid.[177]

In *Vermont v. Brinegar*[178] the state asserted that this action fell within its police powers, and issued directives for the removal of signs without com-

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171. BUDGET OF THE UNITED STATES, FISCAL 1979. The same amount—$3.5 billion—was recommended for fiscal 1980. *Only Modest Increases Made in Transportation Spending; Safety Stressed,* 37 CONG. Q. WEEKLY REP. 149, 150 (1979).

172. 49 U.S.C. § 1609(c) (1976).

173. The labor protective agreement, popularly known as a section 13(c) contract, must contain a number of provisions, including:

(1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;

(2) the continuation of collective bargaining rights;

(3) the protection of individual employees against a worsening of their positions with respect to their employment;

(4) assurances of employment to employees of acquired mass transportations systems and priority of reemployment of employees terminated or laid off; and

(5) paid training or retraining programs.

Id.

174. *See* City of Macon v. Marshall, 439 F. Supp. 1209 (M.D. Ga. 1977), *discussed in* text accompanying notes 302-06 *infra.*

175. 23 U.S.C. §§ 131, 135, 319 (1976).

176. *Id.* § 131(g).

177. *Id.* § 131(b).

178. 379 F. Supp. 606 (D. Vt. 1974).

pensation. The Secretary applied the penalty and withheld the ten percent in highway aid. The federal district court sustained the Secretary, concluding that control of advertising was a legitimate national objective, that payment of compensation was reasonably related to that aim, and that in view of the federal contribution to the compensation provided sign owners, the penalty amounted to lawful inducement and not duress or coercion of the state's participation. "[W]e cannot say," Judge Coffrin stated, "that [the statutory scheme] irresistibly compels a state under threat of economic catastrophe to embrace the federal plan." [179]

The Food Stamp Act of 1964 [180] provides federal payments for part of the cost of food stamp coupons that are redeemable for food at retail stores. Congress delegated the responsibility for administration of the program to the states, with federal grants reimbursing the states for fifty percent of administrative costs.[181] Among the conditions imposed on states participating in the program is a prohibition against "decreas[ing] welfare grants or other similar aid" as a consequence of their participation.[182] When municipalities in Maine sought to reduce general relief payments for food to the purchase price for food stamps, the recipients obtained an order from a federal district court enjoining the state practice and directing payments to the class of eligible food stamp purchasers equal to the assistance deducted as a result of their receipt of federal stamps.[183]

The Rehabilitation Act of 1973 [184] authorizes federal grants to the states for the cost of specific vocational services for handicapped persons. The program was enacted by and receives continuing support from a political alliance of legislators and subcommittees with a special interest in the area, a national lobbying organization committed to rehabilitation services, and public administrators specializing in this service in both the federal and state governments.[185] The Act follows a typical pattern: states electing to participate must submit to the Secretary of Health, Education, and Welfare an annual plan that meets nineteen separate requirements.[186] As with other grant statutes, including Aid to Families with Dependent Children,[187] and Vocational Educational Aid,[188] these conditions require the Governor to designate a "sole State agency" to administer the plan for rehabilitation services.[189] The Rehabilitation Act, however, goes further to require either that the sole state agency must be "primarily concerned" with rehabilitation, or that it

179. *Id.* at 617.
180. 7 U.S.C. §§ 2011-2025 (1976).
181. *Id.* § 2024.
182. *Id.* § 2019(d).
183. Dupler v. City of Portland, 421 F. Supp. 1314 (D. Me. 1976).
184. 29 U.S.C. §§ 701-794 (1976).
185. The lobby group was the National Rehabilitation Association, Inc.
186. 29 U.S.C. § 721 (1976). These requirements are the subject of mounting tension between the states and the federal government. *See Governors and Congress Battling Over Centralizing Aid Programs*, N.Y. Times, Mar. 5, 1979, § 1, at A1, col. 3.
187. 42 U.S.C. § 602(a)(3) (1976).
188. 20 U.S.C. § 2304(a)(1) (1976).
189. 29 U.S.C. § 721(a)(1)(A) (1976).

be the state education agency or "a State agency which includes at least two other major organizational units each of which administers one or more of the major public education, public health, public welfare, or labor programs of the State." [190] In addition, if the state agency is not limited to rehabilitation services, it must include a unit primarily concerned with this work, with a full-time director and staff.[191]

When the state of Florida chose to designate its Department of Health and Rehabilitative Services as the "sole State agency" [192] for the purpose of the Act, the Commissioner of the Rehabilitation Services Administration in HEW disapproved that state's plan for fiscal 1976, because of the lack of a full-time program director and a lack of adequate authority for the program director over the state's district officials, who were responsible not to the rehabilitation director but to an Assistant Secretary for Operations in the Florida Department. The State then challenged these requirements, contending *inter alia* that they unconstitutionally infringed state autonomy. The National Rehabilitation Association, the lobby for rehabilitation services, intervened as a party defendant. In *Florida Department of Health v. Califano,*[193] the federal district court upheld application of the requirement, again relying on the choice ostensibly available to the states of whether or not to participate in the grant-in-aid program. The court found that the grants-in-aid for rehabilitation services were an inducement to participation but were not coercive, since "any state which objects to the 'strings' attached to receipt of the federal funds has the option to refuse both the grants-in-aid and the objectionable conditions." [194]

The medicaid program provides federal matching funds to pay part of the cost of a wide range of medical services for persons receiving welfare and others whose level of resources qualifies them as "medically needy." [195] About one-half the states opt to include the medically needy in the program. Some states, including New York and California, offer services at state expense to others deemed "medically indigent" even though their income exceeds the level qualifying for federal contributions. Under the medicaid legislation, a state participating in the program is compensated at rates ranging from fifty to eighty percent of the actual cost of payments for eligible services.[196] The law obliges the state to include certain services such as doctor and hospital care and permits coverage under the same formula for other "optional" services, including nursing home services for the elderly. The program is open ended, in that once the federal match is determined, the

190. *Id.* § 721(a)(1)(B).
191. *Id.* § 721(a)(2)(A).
192. FLA. STAT. ANN. § 20.19 (Harrison 1976).
193. 449 F. Supp. 274 (N.D. Fla.), *aff'd per curiam,* 585 F.2d 150 (5th Cir. 1978).
194. The court went on to say that "The Act does not impose a set of coercive, mandatory requirements such as were involved in *National League of Cities." Id.* at 284.
195. 42 U.S.C. §§ 1396-1396j (1976).
196. *Id.* §§ 1396-1396g. On the medicaid program generally, see Stevens & Stevens, *Medicaid: Anatomy of a Dilemma,* 35 LAW & CONTEMP. PROB. 348 (1970).

government pays that proportion for all qualifying services to all eligible persons who choose to participate.

Congress delegated to the states the administrative responsibilities for medicaid, to be fulfilled pursuant to regulations issued under detailed requirements set by the Secretary.[197] Among these regulatory conditions is a provision that states choosing to include nursing home care in their medicaid plan must provide for licensing of nursing home administrators by a board on which no "single profession or category of institution" supplies a majority of the members.[198] Florida's plan as submitted entrusted licensing of nursing home administrators to a board of examiners required by state law to include a majority of licensed administrators. Again, the condition disallowing this arrangement was challenged by the state on the ground that it interfered with the state's autonomy over its own governmental structure. The lower federal courts rejected the challenge, arguing that "[o]nce a state chooses to participate in a federally funded program, it must comply with federal standards."[199] The effect of the regulation, which the court found within the Secretary's power under the statute, was "to induce, but not require, a state to license its nursing home administrators in a specified manner."[200]

In the National Health Planning and Resources Development Act of 1974,[201] Congress also attempted to influence the governmental structure of the states, but it provided harsher penalties for noncompliance. This legislation represented an initial congressional response to the inflation in health care costs brought on in part as a result of the federal contribution to medicaid, and the increasing perception that costly health care facilities, including hospitals and nursing homes, were not distributed in a manner reflecting local need. It was found that some areas had considerable excess supplies of certain facilities, while in other places serious shortages remained. Unregulated and unplanned development had caused competition in specialized equipment, techniques, or services among facilities in close proximity. For example, acquisition of brain scanning technology by one hospital might induce acquisition of the same equipment by another hospital in the same community.

Once again, the national initiative embodied in the Health Planning Act was supported by a combination of political forces, including congressional proponents, a national lobby of persons with a special concern for health planning, and health specialists in federal, state, and local government

197. 42 U.S.C. § 1302 (1976). The Congress merely authorized the Secretary to "make... such rules and regulations . . . as may be necessary to the efficient administration of the functions with which [he] is charged under this chapter."

198. 42 C.F.R. § 431.706(a)(1) (1978).

199. Florida v. Mathews, 526 F.2d 319, 326 (5th Cir. 1976).

200. *Id.*

201. Pub. L. No. 93-641, 88 Stat. 2225 (1975) (codified at 42 U.S.C. §§ 300k-300t (1976)). *See* Atkinson & Grimes, *Health Planning in the United States: An Old Idea with a New Significance*, 1 J. HEALTH, POL., POL'Y & L. 295 (1976); Note, *Emerging Concepts of Federalism: Limitations on the Spending Power and National Health Planning*, 34 WASH. & LEE L. REV. 1133 (1977).

agencies.[202] In section 2 of the Act, Congress stated that its purpose was "to facilitate the development of recommendations for a national health planning policy, to augment areawide and State planning for health service, manpower, and facilities, and to authorize financial assistance for the development of resources to further that policy." [203] Among the techniques adopted to achieve this purpose was a series of conditions obligating the states to organize a new structure of agencies for health planning and resource allocation, each with a system of governance and responsibilities specified in the legislation and accompanying regulations. A state's failure to comply jeopardizes its entitlement not just to planning funds available under the Act, but also to other categorical grants for health resources. Thus, a state must designate a Health Planning and Development Agency (HPDA)[204] responsible for state health planning and for the administration of a required regulatory program known as the "certificate of need" program, under which only institutional health services certified "to be needed" may be "offered or developed in the State." [205] Further requirements include a State Health Coordinating Council (SHCC),[206] which must approve the state plan required by the Act, advise the HPDA, and review all applications for federal grants for health care; and local Health Systems Agencies (HSA)[207] organized in regions designated by the state, subject to federal approval, and responsible for health planning functions at the local level. The statute and regulations thereunder determine with specificity the composition of these agencies and their relationship to other governmental bodies.

In the five years since its enactment, challenges claiming unconstitutional infringements upon state sovereignty have been addressed to various aspects of this scheme. Thus, suits have been brought in North Carolina [208] and Oklahoma [209] seeking to invalidate the requirement of the certificate of need program. Similarly, Montgomery County, Maryland, took issue with the extent of authority over grants and certificates of need for institutional services it was obliged to cede to local HSA's and the SHCC.[210] The county prevailed in its contention that a regulation obliging the local government to relinquish control over health planning decisions to the special governing body set up as the HSA [211] exceeded the Secretary's power under

202. Here, the American Association for Comprehensive Health Planning, Inc. played a key role in the legislative process and in the subsequent litigation.

203. 42 U.S.C. § 300k(b) (1976).

204. *Id.* §§ 300m to 300m-2.

205. *Id.* § 300m-2(a)(4)(B).

206. *Id.* § 300m-3.

207. *Id.* § 3001-1 to -5.

208. North Carolina v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd mem.*, 435 U.S. 962 (1978).

209. Goodin v. Oklahoma, 436 F. Supp. 583 (W.D. Okla. 1977).

210. Montgomery County v. Califano, 449 F. Supp. 1230 (D. Md. 1978). This case followed the contemporary pattern of federal-state relations in that the national lobby, the American Association for Comprehensive Health Planning, Inc., intervened in the lawsuit as a party defendant, aligned with HEW on all issues.

211. 42 C.F.R. § 122.109 (1978).

the statute. But its sovereignty-based challenges, like those of the states,[212] were rejected on the strength of the familiar recitation that federal legislation properly enacted under Congress's power to spend for the general welfare, which induces the states to act in a particular way by the promise of federal funds, offends neither the tenth amendment, the guaranty provision of article IV, nor the constitutional structure of federalism.[213] Since the states had the option to forego the federal payments rather than meet the federal standards, the statute induced but did not compel the state response.[214]

A final illustration of congressional use of the power to spend to mold the administrative structure of state government is afforded by the Education for All Handicapped Children Act of 1975.[215] Like others discussed above, this statute was enacted in response to prodding from a combination of legislative proponents, national groups interested in special education, and public administrators in Washington and in the states. In this instance, however, Congress was also responding to court decisions establishing a right secured by the fourteenth amendment to equal educational opportunity for handicapped children.[216] The Act provides formula grants to participating states that develop and submit plans meeting federal requirements based on the number of handicapped children requiring educational services.[217]

Conditions for receipt of the funds include compliance with standards for their in-state use, an obligation to provide individualized programs of education for the handicapped in the least restrictive environment suitable to the child, observation of specified procedures for classifying handicapped children and for administrative and judicial review of classifications and other determinations made by education officials, designation of the state education agency as the body responsible for education services for handicapped children, and appointment by the Governor of an advisory council including categories of members set forth in the statute, as well as detailed provisions controlling the relationship between the state agency and local education officials.[218] If a state or local agency fails to comply either with the general obligation to provide all handicapped children "a free appropriate public education," [219] or with the specific requirements of the statute, regula-

212. *See* notes 208 & 209 *supra*.

213. Montgomery County v. Califano, 449 F. Supp. 1230, 1247-50 (D. Md. 1978).

214. It should be noted that in the case of this Act, however, the funds at risk for a noncomplying state are not merely the aid provided for state health planning, but also various other categorical grants for health care. Section 21(d) of the Act provides that in the absence of state compliance leading to an agreement within four years,

> the Secretary may not make any allotment, grant, loan, or loan guarantee, or enter into any contract, under this chapter, the Community Mental Health Centers Act, or the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 for the development, expansion or support of health resources in such State until such time as such an agreement is in effect.

42 U.S.C. § 300m(d) (1976).

215. 20 U.S.C. §§ 1232, 1401, 1405-1406, 1411-1420, 1453 (1976).

216. *See, e.g.*, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).

217. The U.S. Office of Education estimated 7,886,000 handicapped children aged 0-19 in 1974-1975. S. REP. No. 168, 94th Cong., 1st Sess. 8 (1975).

218. 20 U.S.C. §§ 1413, 1415-1416 (1976).

219. *Id.* § 1401(18).

tions, and state plan, the Secretary may withhold from the grant recipient not only the funds available under the Act, but also the portion of federal funding provided under certain other education aid programs that pay for services to the handicapped.[220]

4. *Evaluating the Conditions.* The seven illustrations treated above suggest a typology of the conditions that have recently been attached to the exercise of the federal spending power. First and least objectionable are requirements with independent justifications derived from the Constitution, such as the antidiscrimination provisions in the State and Local Fiscal Assistance Act of 1972 [221] or the mandate to provide educational opportunity in the Education for All Handicapped Children Act of 1975.[222] A second group may be assigned conditions that lack such independent constitutional authorization but are reasonably related to the legitimate purpose of the national action, and are imposed as requirements that the states must fulfill to receive the federal funds available under the particular program.

The second category may be further divided by distinguishing between conditions controlling state policies with respect to the provision of a particular service and those affecting the structure or organization of state agencies involved in the programs at issue. Many of the examples emphasized above fall within the latter group, such as the "sole state agency" and unit organization requirements of the Rehabilitation Act; [223] the state agency, advisory council, and local educational agency relationships required in the Education for All Handicapped Children Act of 1975; [224] or the licensing board membership specified in the Medicaid Act.[225] Conditions controlling substantive policy content appear in at least two varieties: those requiring a state agency to perform a new function pursuant to federal decree, such as the obligation of State Health Planning and Development Agencies to implement a certificate of need regulatory process,[226] and conditions setting a specific rule or standard to be applied by the state, such as the obligation to pay compensation to owners of signs removed under the Highway Beautification Act,[227] or the specific rules applicable to schooling for the handicapped.[228] Conditions within this second category may also be classified by reference to the magnitude of their fiscal impact on the states and the extent to which the impact is mitigated by federal subventions.[229]

Finally, there is a category of federal standards with which a state must

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220. *Id.* § 1416.
221. 31 U.S.C. §§ 1221-1265 (1976). *See, e.g.,* United States v. Chicago, 549 F.2d 415, (7th Cir.), *cert. denied,* 434 U.S. 875 (1977).
222. 20 U.S.C. §§ 1232, 1401, 1405-1406, 1411-1420, 1453 (1976).
223. *See* text accompanying notes 189-91 *supra.*
224. *See* text accompanying notes 217 & 218 *supra.*
225. *See* text accompanying note 198 *supra.*
226. *See* text accompanying notes 204 & 205 *supra.*
227. *See* text accompanying note 176 *supra.*
228. *See* text accompanying notes 218-20 *supra.*
229. *See* text accompanying notes 232-34 *infra.*

comply or risk a penalty extending beyond the particular grant in question to the loss of funds available under other federal aid programs. This is the pattern of the Highway Beautification Act, which imposes a ten percent highway aid penalty on noncomplying states,[230] and the scheme of the National Health Planning and Resources Development Act, which, more drastically, withdraws from a noncomplying state not only the Planning Act funds themselves but also grants-in-aid and federal fiscal assistance under a variety of health programs.[231]

In addition to restricting state choices, the complex set of arrangements and relationships created by this legislation often results in some distortion in state fiscal decisions. For example, once a state enlists in an open-ended reimbursement program such as medicaid, it is committed to paying its share of the costs regardless of their amount. Since the cost of health care increases more rapidly than the general cost of living, the result is an escalating call on state resources. If the state provides the services to eligible persons or expands them to include other services or other recipient groups, the fiscal burden increases.[232] Similarly, the availability of federal operating subsidies for public transit no doubt affected the states' decisions to provide their own subsidies for passenger railroad and bus services[233] in the first instance, but the provision of an incremental cost subsidy for a service area in which fare revenue is relatively inelastic means a steadily increasing need for subsidy payments to maintain existing levels of service. Federal efforts to stabilize the economy through temporary countercyclical assistance cause another type of fiscal distortion at the state level. If this aid proves temporary, its withdrawal creates added pressures on subnational governments that have accommodated their own service plans to the new source of revenue. This has been the result in 1979 as distressed cities adjust to the reduction in economic stimulus programs first implemented in 1977.[234] Similarly, as states respond to the incentive of federal aid designed to induce broad expansion of state programs in areas such as local education programs for the handicapped, the federal funding determines priority against competing claims to state resources not recognized in a grant program.[235]

230. *See* text accompanying note 177 *supra*.

231. *See* note 214 and accompanying text *supra*.

232. Medicaid program costs in New Jersey, for example, increased 37% from fiscal 1976 to fiscal 1979. Half the burden falls on the state treasury. *See* N.J. STAT. ANN. § 30:4D-1 to -33 (West Cum. Supp. 1979-1980); STATE OF NEW JERSEY EXECUTIVE BUDGET, FISCAL YEAR 1978-1979, at 238-39 [hereinafter cited as N.J. BUDGET].

233. In New Jersey, the federal government grant amounted to $51 million in fiscal 1979, and the state added $66 million. N.J. STAT. ANN. § 27:1A-28.7 (West Cum. Supp. 1978-1979); N.J. BUDGET, *supra* note 232, at 189.

234. *See, e.g.*, 29 U.S.C. §§ 815-816, 842-845, 961-963, 965-982, 984 (1976); *id.* § 993 (Supp. I 1977); 42 U.S.C. §§ 6721-6735 (1976).

235. Federal aid of any kind inevitably influences state and local budget decisions. R. NATHAN & C. ADAMS, *supra* note 160, at 109-30. The continuing debate over general revenue sharing reflects widely disparate views on such questions as the relative capacity and desirability of federal as opposed to state or local influence over the priorities of public sector spending. *See generally Hearings on Revenue Sharing and its Alternatives Before the Subcomm. on Fiscal Policy of the Joint Economic Comm.*, 90th Cong., 1st Sess. (1967-1968); W. HELLER, NEW DIMENSIONS OF POLITICAL ECONOMY (1966); R. NATHAN, A. MANVEL & S. CALKINS, MONITORING REVENUE SHARING (1975).

And when Congress amends the Comprehensive Employment and Training Act to reduce the salary ceiling and enforce a time limitation on federally subsidized public jobs, one consequence is to compel changes in city budget allocations and personnel policies to maintain continuity among CETA employees performing important tasks.[236]

A program combining federal funding and state administration satisfies several objectives important to federal policymakers. By delegating responsibility to local officials, such a program offers at least superficial consistency with a version of the federalist ideal. It takes advantage of the efficiency of the federal tax system to purchase public benefits, and it avoids expansion of the federal bureaucracy and federal payroll. Given these virtues, it is easy to overlook the risk to state autonomy and local control over the critical processes of governmental decisionmaking, particularly the allocation of state resources and the determination of state priorities. And when such programs accumulate and expand in the course of ten or twenty years, it is easy to forget that the more the machinery of state government is federalized the less real is the separate existence guaranteed by the Constitution.

IV. JUDICIAL PROTECTION OF STATE SOVEREIGNTY

A. *The Traditional Judicial Response*

The Supreme Court has afforded Congress a wide berth in imposing conditions upon the receipt of federal fiscal benefits, including requirements that the states respond affirmatively by enacting new regulatory programs according to federal specifications. Judicial approval of such conditions has traditionally required two findings: that the requirement imposed on the states is reasonably related to a legitimate national purpose; and that the states have an option to fail to respond, so that the program may be said to induce but not coerce participation. This standard actually first evolved in cases challenging conditions attached to credits against federal taxes awarded in order to encourage state development of a particular program. Thus, when Congress sought to encourage state implementation of unemployment compensation systems by imposing a federal payroll tax with a ninety percent credit for employer contributions to a state unemployment fund,[237] the Court sustained the measure in *Steward Machine Co. v. Davis*[238] on the ground that the tax and credit in combination were not "weapons of coercion, destroying or impairing the autonomy of the states."[239] The technique was deemed permissible because it was related to the national purpose of aiding distressed unemployed persons, and because the states had the option

236. CETA Amendments of 1978, Pub. L. No. 95-524, 92 Stat. 1909.

237. Social Security Act of 1935, ch. 531, tit. IX, 49 Stat. 620 (1935) (current version codified at 42 U.S.C. §§ 1101-1108 (1976)).

238. 301 U.S. 548 (1937).

239. *Id.* at 586.

not to participate. In fact, many states had invited the national action, since their reluctance to impose an unemployment insurance system reflected not opposition but apprehension about putting themselves "in a position of economic disadvantage as compared with neighbors or competitors" for job-producing investment.[240]

The tax-credit method was thus an expedient way of avoiding constitutional objections to a direct compulsion of state action under the commerce power.[241] Presaging future developments in federalism, its adherents argued that the operation of the statute was not a constraint, but "the creation of a larger freedom, the states and the nation joining in a cooperative endeavor to avert a common evil." [242] The distinction between persuasion and compulsion is no more convincing now than it was then, however. The state retains the nominal choice as to whether to participate, but the price of opting out is that its employers pay an equivalent tax without any comparable benefit. Experience has shown that it was not an option likely to commend itself even to the most parochial state government.[243]

If the tax-and-credit scheme of such statutes did not exceed federal power so long as related to a proper national purpose, it was predictable that the Court would find little difficulty in upholding conditions upon the receipt of federal grants. Economically, the distribution of fiscal benefits through the spending power is similar to the effects of tax expenditures. And in *Oklahoma v. Civil Service Commission* [244] the Court did apply the same test to sustain a requirement that state officials involved in highway programs using federal aid respect the Hatch Act prohibitions against political activity. Although it was clear to the Court that Congress had no power directly to regulate the political activities of state officials, the requirement was thought sufficiently related to the purpose of the federal grant program.[245] As in other contexts [246] the demand for a rational relationship between the government's purpose and the means adopted has proved to be easily satisfied. Thus the *Steward-Oklahoma* test for evaluating conditions attached to the distribution of fiscal benefits by the federal government has generally led lower federal courts mechanically to reject challenges to federal conditions on the theory that the availability of a nominal option of "not yielding" means that the statute induces but does not coerce participation. In the cases mentioned earlier involving state challenges to some of the elaborate

240. 301 U.S. at 588 (citing H.R. REP. No. 615, 74th Cong., 1st Sess. 8 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 11 (1935)).

241. *Id.*

242. *Id.* at 587.

243. 301 U.S. at 587-88. The Wisconsin statute implementing unemployment insurance was adopted in 1931. Four states passed similar programs on the eve of passage of the 1935 Social Security Act. By the time of the Supreme Court decision in 1937, thirty-eight other states had enacted unemployment compensation statutes.

244. 330 U.S. 127 (1947).

245. *Id.* at 143. The Court emphasized that the state retained the option to decline the aid rather than meet the condition.

246. *See generally* L. TRIBE, *supra* note 58, §§ 16-1 to -4.

conditions to federal aid imposed in the food stamp [247] and medicaid [248] programs, the Rehabilitation Act,[249] the Urban Mass Transit Act,[250] the Health Planning Act,[251] and the Highway Beautification Act,[252] this has been the uniform result.

B. *The Supreme Court's Renewed Interest in State Sovereignty*

The post-1937 judicial view of state sovereignty has generally required the states to look outside of the courtroom for protection of their interests. However, sensitivity to state sovereignty has become a frequent, if somewhat erratic, reference point for the Supreme Court in the 1970's. The increasing importance of state autonomy to the Court has been reflected in the construction of substantive constitutional guarantees and in the pace of judicial intervention.

The theme is clear, for example, in decisions requiring restraint when a federal court is asked to enjoin state court proceedings in order to protect individual constitutional rights.[253] Federal abstention from adjudication of the merits of such claims is justified in such circumstances by a concern for comity—"a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." [254] First invoked only to avoid federal interference with ongoing state criminal proceedings, the principle has been extended so as to block federal intrusion into certain types of civil litigation [255] as well as to limit federal interference with the other branches of state and local governments.[256] In other cases, a reinvigorated notion of federalism has been invoked to support restrictive interpretations of the scope of constitutional protections in areas where a finding that a state had violated rights protected by the fourteenth amendment would have cast the federal courts into conflict with continuing state governmental activities.[257] Sensitivity to the potential effects of federal decisions on state government is also revealed in the Court's approach to remedies for other constitutional violations.[258]

247. Dupler v. City of Portland, 421 F. Supp. 1314 (D. Me. 1976). *See also* King v. Smith, 392 U.S. 309 (1968) (welfare); Arizona State Dep't of Pub. Welfare v. HEW, 449 F.2d 456 (9th Cir. 1971) (welfare), *cert. denied*, 405 U.S. 919 (1972).

248. Florida v. Mathews, 526 F.2d 319 (5th Cir. 1976).

249. Florida Dep't of Health v. Califano, 449 F. Supp. 274 (N.D. Fla.), *aff'd per curiam*, 585 F.2d 150 (5th Cir. 1978).

250. City of Macon v. Marshall, 439 F. Supp. 1209 (M.D. Ga. 1977).

251. Montgomery County v. Califano, 449 F. Supp. 1230 (D. Md. 1978).

252. Vermont v. Brinegar, 379 F. Supp. 606 (D. Vt. 1974).

253. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971).

254. *Id.* at 44.

255. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434 (1977) (attachment action); Juidice v. Vail, 430 U.S. 327 (1977) (civil contempt); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

256. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

257. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

258. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974); Sixty-Seventh Minn. State Senate v. Beens, 406 U.S. 187 (1972). *See also* White v. Weiser, 412 U.S. 783 (1973).

Despite the insistence of the theme, the Court typically invokes notions of comity and solicitude for state sovereignty as a basis for restricting constitutional protection or deferring federal adjudication of individual rights without much explanation of what it is about the states' functions that warrants judicial sensitivity, or why it is that deference is required. Instead, the paeans to federalism appear in contexts that make it plain that the question at issue can be resolved upon another ground.[259]

The Court's renewed solicitude for state sovereignty reached its height in 1976. The decision in *National League of Cities v. Usery*[260] struck down the extension of the minimum wage and maximum hour standards of the Fair Labor Standards Act (FLSA)[261] to state and local government employees. Previous decisions had effectively remitted the states to the protection of the political branches whenever Congress sought to exercise its commerce power to regulate them.[262] As long as the subject of a regnlation was within the reach of the commerce power, the federal directive could be applied to the states in the same manner as to private persons engaged in similar activity. In the cases prior to *National League of Cities,* however, the Court opened the door slightly to a more substantial judicial role. Thus in *Maryland v. Wirtz,*[263] Justice Harlan stated that the judiciary retained "ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity' "; [264] and Justice Marshall, upholding the application of wage and price controls to the states in *Fry v. United States,*[265] found a constitutional policy barring the exercise of congressional power "in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." [266]

When the Court pursued this theme to invalidate the application of labor standards to public employers, it had only the inadequate materials of the cases dealing with states' immunity from federal taxation[267] and the general incantations to comity in other areas upon which to draw to define the attributes of state sovereignty and the circumstances justifying judicial intervention. Thus Justice Rehnquist tracked Chief Justice Stone's *New York v. United States*[268] test for state tax immunity: a commerce regulation of state activity will be barred if it interferes unduly with the performance

259. *See generally* Cox, *supra* note 9.

260. 426 U.S. 833 (1976).

261. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974) (pertinent parts codified at 29 U.S.C. §§ 203(d), 203(s)(5), 203(x) (1976)).

262. *See, e.g.,* Fry v. United States, 421 U.S. 542 (1975); California v. Taylor, 353 U.S. 553 (1957); United States v. California, 297 U.S. 175 (1936).

263. 392 U.S. 183 (1968).

264. *Id.* at 196. *But see* Justice Brennan's dissent in *National League of Cities,* 426 U.S. at 860 n.3.

265. 421 U.S. 542 (1975).

266. *Id.* at 547 n.7. *But see* Justice Brennan's dissent in *National League of Cities,* 426 U.S. at 861 n.4.

267. Most notably, New York v. United States, 326 U.S. 572 (1946). *See also* Sims v. United States, 359 U.S. 108 (1959); Wilmette Park Dist. v. Campbell, 338 U.S. 411 (1949); Alabama v. King & Boozer, 314 U.S. 1 (1941).

268. 326 U.S. 572, 588 (1946) (Stone, C.J., concurring). The Stone opinion did not command a majority, however.

of the state's major functions, accepting the standard of *Coyle v. Smith* [269] that sovereign functions are those "essential to separate and independent existence." [270]

The *National League of Cities* majority evoked Justice Stone's historical standard to limit the scope of state immunity, concluding that a regulation would be outside the federal commerce power insofar as it would "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." [271] With respect to the case at bar, the determination of employment conditions was to Justice Rehnquist an "undoubted attribute of state sovereignty," [272] and a survey of the fiscal and organizational impact on public choices resulting from the FLSA amendments disclosed that the determination here was accomplished in a manner that interfered with the states' separate existence.[273] These limitations on the holding in *National League of Cities* were necessary to enable the majority to distinguish it from past cases sustaining the application of regulations of commerce to state activities. By invoking a static historical concept of the boundaries of state sovereignty, the Court found a means for *National League of Cities* to coexist, however uncomfortably, with the application of federal safety regulations, tort liability, and employment standards to state operated railroads.[274]

It need hardly be observed that this reworking of Justice Stone's test for tax immunity suffers the same weaknesses as the original. If only the state is available to operate a railroad, and it chooses to do so because of public necessity, it is difficult to see why its choice should be deemed any less sovereign. Conversely, if a state operates a college or a hospital in competition with private institutions, it is similarly hard to argue that its function in the economy is any different due to the happenstance that the proprietor is a public agency. Nonetheless, as the *National League of Cities* majority would have it, the railroad is subject to federal commerce regulations, while the state hospital or school is immune. Further, if the validity of a federal regulation is tied in any measure to the level of costs imposed on the state or the extent to which it channels state policy choices, the Court should have explored the actual burdens imposed by the FLSA amendments, rather than disclaiming reliance on fiscal impact data altogether. Of course, if fiscal effect *is* relevant, *National League of Cities* is all the more difficult to reconcile with many federal spending programs that currently have significant impact on state budgetary choices.

Even more troublesome for Justice Rehnquist's conclusion was *Fry v.*

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269. 221 U.S. 559 (1911).
270. *Id.* at 580.
271. 426 U.S. at 852.
272. *Id.* at 845.
273. *Id.* at 846-47.
274. *See* Parden v. Terminal Ry., 377 U.S. 184 (1964) (liability standards); California v. Taylor, 353 U.S. 553 (1957) (collective bargaining rules); United States v. California, 297 U.S. 175 (1936) (safety standards). *National League of Cities* also made clear that the FLSA could be applied as well to state-run railroads. 426 U.S. at 854 n.18.

United States,[275] which upheld Congress's power to include state employees within the national wage freeze. He referred to several differences between *Fry* and the labor standards at issue in *National League of Cities*: the wage and price controls were temporary in duration, negative in direction (and thus without adverse fiscal impact on the state budget), and responsive to an evident national emergency.[276] But the extent of the interference with state choices flowing from a wage freeze may be quite as significant as the interference incident to requirements respecting overtime and the minimum wage; during the period of controls, at least, the state's personnel policy is no less constrained. And to look only to the vector of budget impact ignores the more important effects of a wage freeze on advancement, mobility, recruitment, worker satisfaction, and other aspects of employee relations. Moreover, if the extent of the national justification influences the reach of the commerce power with respect to the states, their sovereignty may be deemed secure only so long as conditions permit, since absent the emergency, it appears the regulations in *Fry* would have been found to interfere unduly with functions essential to separate existence.

Justice Blackmun's concurrence in *National League of Cities* understood the majority to have adopted a balancing test, whereby extent of interference with state autonomy would be weighed against the national justification offered to support the type and extent of intrusion at issue.[277] His vote determined the result, and his proposal has the virtue of aiding a distinction between *Fry* and *National League of Cities*. In the end, however, it seems no more helpful than the majority opinion, as well as wrong on the facts. No analysis was offered in *National League of Cities* of the national justification supporting minimum wage regulations. Neither the customary economic arguments nor the humanitarian-based concern for adequate conditions of labor were even mentioned by the majority. The opinion does not encourage courts and legislatures to compare the impact of regulations on national and local needs, but rather proposes a substantive constitutional limitation on the commerce power. In any event, a balancing test is not the solution here —beyond the general objection that such an approach invites judicial excess, in this context it would oblige judges to "weigh" interests that are essentially different without the aid of any principled basis for determining the measures that are appropriate or the type of scale to use.[278]

The dissenters do not contribute much either to the goal of a workable rule of decison. Justice Brennan would have generally left the states to the political process to safeguard their autonomy, but admitted that the Court could intercede if the states' separate existence were indeed in peril. The sole clue to the circumstances that might give rise to that peril is the familiar

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275. 421 U.S. 542 (1975).
276. *National League of Cities*, 426 U.S. at 853.
277. *Id.* at 856 (Blackmun, J., concurring).
278. *See generally* Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978).

example of *Coyle v. Smith*,[279] which struck down a congressional attempt to dictate the location of a state capitol. Does Justice Brennan disagree with the majority's standard, or merely with its application to the facts of the FLSA amendments? Are the techniques available to Congress under the commerce power without limitation except when challenged on grounds relating to individual rights constitutionally protected against state action? And most important, how would the dissenters resolve other cases involving more drastic intrusions on state government? If, as asserted here, political factors make it increasingly likely that Congress will achieve its social ends by the technique of coopting the states, and that the claim of state autonomy has a diminished effect on the legislative process, Justice Brennan's failure to define the Court's role more precisely is a serious shortcoming.

The Court's renewed sensitivity to state interests is an encouraging development, although its struggle to articulate a doctrine that allows a more meaningful consideration of state sovereignty when federal regulations are challenged has not yielded satisfactory results. What follows is an attempt, however tentative, to develop standards that federal courts can use in order to decide whether federal decisionmakers have given proper regard to states' interests.

C. *Standards for Judicial Review*

In our federal system, the states' discretion over public policies is always subject to the constricting influence of the federal government's exercise of its delegated powers. As the national need has been defined and pursued over an ever-broadening range of subjects, the states have relinquished part of their historic responsibilities; thus, health care, welfare, transportation, energy, and environmental protection have all recently become the objects of national attention.

Under the Constitution, the states must—and do—adapt their activities to these changes in federal priorities. But within the limits imposed by federal initiative, they continue to exercise the sovereign power of choice, and must be free to conduct their political processes and use their fiscal, political, and personal resources in ways determined internally. The continuing integrity of this freedom of choice, subject only to political constraints and the constitutional safeguards for individual rights, is essential to all the values that underlie the concept of federalism—the diversity, participation, accountability, and political liberty that are the touchstones of government based on consent. In Alexander Bickel's words, "coherent, stable—and *morally supportable*—government is possible only on the basis of consent, and . . . the secret of consent is the sense of common venture fostered by institutions that reflect and represent us and that we can call to account."[280] State

279. 221 U.S. 559 (1911).
280. A. BICKEL, THE LEAST DANGEROUS BRANCH 20 (1962).

autonomy is important precisely because it fosters, facilitates, and secures the advantages of local government for enhancing political liberty.[281]

1. *Direct Commands to the States.* It is one thing for the federal government to assume a function previously performed by the states, as would be the case, for example, if Congress authorized a national no-fault system of automobile liability insurance or a national program for automobile emission testing. The state's zone of authority is of course constricted by such a federal initiative, but its capacity for political choice within the residual area remains intact. By contrast, when the Congress achieves its purpose by directing the states to adopt an emission inspection system or a no-fault insurance plan, then the political processes have been in part coopted to serve the federal government. A state is no longer free to determine its own priorities; its legislative and executive resources as well as its fiscal capacity are now occupied with an agenda set by Congress, and the use of its governmental powers is pro tanto determined by the federal government. Furthermore, the state's capacity to maximize the political liberty of its citizens is that much reduced. This is true in part simply because of the limitation on political choice available to the state officials, but also because the people are necessarily unsure which of their representatives may be called to account: the federal officials who issued the directive, or the state officials who responded to it.

Common sense as well as a proper regard for the constitutional role of the courts suggests that only rarely will these factors coincide to oblige the courts to invalidate a federal regulation of state activity. Only when a federal program coopts the state's political processes by interfering with legislative and executive direction in a significant way should the courts have to intervene. Such an effect can not be determined solely by fiscal impact; although the extent of disruption to budgetary choices available to the state is one measure of interference, the effect on organizational structure and the allocation of nonfiscal resources are other important criteria.

By these standards, most of the regulations of commerce applied to state activities, including the imposition of minimum wages and maximum hour restrictions, do not present a convincing claim for judicial intervention. Neither the fiscal nor the governmental impact of fair labor standards, nor the temporary incomes policy tested in *Fry*, significantly alters a state's political process. Similarly, requirements that state enterprises affecting commerce comply with safety standards, bargaining practices, or liability rules applicable to private groups engaged in the same type of activities do

281. The notion that localism enhances participation and liberty has been often articulated. *See, e.g.*, J.S. MILL, ON LIBERTY 225-29 (Everyman's ed. 1950); 1 A. TOCQUEVILLE, DEMOCRACY IN AMERICA 92-96 (Vintage Books ed. 1945). It is an idea that draws heavily on Montesquieu's philosophy, *see* C. MONTESQUIEU, THE SPIRIT OF LAWS bks. VIII-IX (T. Nugent trans. 1977). Montesquieu actually proposed a confederation of small republics, but Madison adapted this conception to Hume's view of the advantages in diversity and pluralism that would flow from a large republic composed of smaller sovereign states that nonetheless exercised certain powers common to unitary national governments. D. HUME, ESSAYS: MORAL, POLITICAL AND LITERARY (1949); THE FEDERALIST No. 37 (J. MADISON).

not have the effect of constraining the discretion available to state government institutions in the manner thus proscribed. In terms of interference with state choices there is a significant difference, however, between a directive subjecting a state-operated railroad to the jurisdiction of the Railway Labor Act and the National Mediation Board, and a regulation commanding the state legislature to establish a new agency with powers described by Congress and to staff it and authorize it to regulate labor relations among the units of local government according to congressional standards.[282] In the one case, the state executive officials need only conduct their activities in an area they have freely selected in the manner applied to private groups. In the other, Congress controls the performance of a uniquely sovereign power: the authority to enact laws for the regulation of conduct by public or private interests.

This distinction is clearly reflected in the variety of regulations imposed on the states under the Clean Air Act amendments discussed above.[283] One category of regulation, exemplified by the requirements that all parking lots include space for bicycles and all vehicles be fitted with emission control devices, represents federal standards for specified activities, whether engaged in by government agencies or private groups. The regulation compelling the installation of an emission control device on a public vehicle obviously obliges a state government to expend a part of its resources in order to comply. Like the tax on mineral water sold by the state of New York,[284] however, it is imposed in a nondiseriminatory manner; without more evidence of adverse effects, it cannot be said to distort the process of political choice any more than other examples of federal remedial orders compelling state expenditures.

The type of regulation illustrated by the obligation that the states purchase buses or construct special bus lanes similarly directs an expenditure according to federal requirements, but a federal order mandating expenditures by a state is not unknown. Federal courts regularly oblige local government units to purchase buses to meet desegregation orders, or to reallocate funds to assure equal treatment in the distribution of public benefits.[285] The effect of a similar commerce regulation on state autonomy may be more significant than an order directing an expenditure to secure constitutional rights, but it still does not touch the core of political discretion.[286]

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282. *See, e.g.*, H.R. 1987, 95th Cong., 1st Sess. (1977).

283. *See* notes 133-36 and accompanying text *supra.*

284. *See* New York v. United States, 326 U.S. 572 (1946).

285. The basis here is generally a finding that the state has violated the constitutional rights of individuals by the extent of or techniques used in delivery of services. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Griffin v. County School Bd., 377 U.S. 218 (1964); Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y.), *aff'd in part*, 507 F.2d 333 (2d Cir. 1974); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt 503 F.2d 1305 (5th Cir. 1974). *See generally* Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978).

286. Regulation of the states' transportation system is a valid exercise, too, of the federal power to regulate "indirect" sources of pollution, whether public or private. *See generally* Stewart, *supra* note 63.

A third category of clean air regulations, exemplified by the EPA requirement that the states adopt automobile inspection and retrofit regulatory programs, specifically directs the states to organize new administrative machinery in order to satisfy the federal requirements. Here, finally, is an example of the federal government commandeering the political apparatus of the states, narrowing significantly the state's discretion over the uses to which its governmental resources can be put. The inspection and retrofit regulations constitute, in the view of the Court of Appeals for the District of Columbia, " 'drastic' intrusions on state sovereignty." [287] As Judge MacKinnon observed, "A federal regulation which compels the states to enforce federal regulatory programs clearly 'impairs the States' integrity' and 'their ability to function in a federal system.' " [288] In explaining his disagreement with the Third Circuit,[289] which had upheld similar regulations on the ground that direct federal enforcement of such programs would not "represent less of an intrusion upon state sovereignty," [290] Judge MacKinnon thought "[t]he principle at work" was "not that the states have an interest in keeping the federal government from regulating vehicles owned by their citizens but rather that they are to be protected from federal compulsion to exercise state governmental functions in an area where they choose to remain inactive." [291]

The proposed no-fault insurance act as first drafted similarly compelled the states to enact and implement state no-fault laws through state regulatory agencies. States that failed to enact no-fault insurance plans acceptable to the federal government would have been required to implement an alternative plan imposing even higher standards than those applied to voluntary state action.[292] The Justice Department quite properly expressed constitutional doubts concerning "the authority of Congress to employ a regulatory scheme that requires the States to donate their funds and personnel, and to create agencies or facilities to administer a federal law, regardless of local feeling." [293]

It may in fact be possible to define more precisely the area of constitutional protection by distinguishing between federal directives that order existing state agencies to apply federal regulatory standards, and those that oblige

287. District of Columbia v. Train, 521 F.2d 971, 994 (D.C. Cir. 1975). *See also* Brown v. EPA, 521 F.2d 827 (9th Cir. 1975). Both cases were vacated and remanded by the Supreme Court. EPA v. Brown, 431 U.S. 99 (1977) (per curiam).

288. District of Columbia v. Train, 521 F.2d 971, 994 (D.C. Cir. 1975), *vacated per curiam sub nom.* EPA v. Brown, 431 U.S. 99 (1977).

289. Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974).

290. *Id.* at 263.

291. District of Columbia v. Train, 521 F.2d 971, 994 n.27 (D.C. Cir. 1975), *vacated per curiam sub nom.* EPA v. Brown, 431 U.S. 99 (1977).

292. S. 354, 94th Cong., 1st Sess. (1975).

293. *Hearings on S. 354, supra* note 131 (statement of U.S. Att'y Gen. Edward H. Levi). *See also id.* at 497. Levi's statement makes clear that it is not the proscription of state authority but the coercive use of state officials to implement a federal regulatory program that raises a question of constitutional power. As a result, the Justice Department proposed an amendment providing for a national no-fault system administered by the Department of Transportation in those states that failed to adopt plans that met the federal standards. *Id.* at 510-11.

the states to create new regulatory mechanisms. For example, the Natural Gas Policy Act of 1978,[294] now being challenged by the states of Texas, Oklahoma, and Louisiana on constitutional grounds, requires existing state agencies to implement and enforce the pricing provisions in the federal statute.[295] Such a regulation does limit the discretion available to those state officials charged with rate setting for intrastate sales of natural gas, but the extent of interference differs significantly from a mandate to create, staff, and fund a new agency to administer a national program.[296] On this basis the Act would be immune from constitutional challenge.

2. *Conditions Attached to Federal Grants.* A more troubling problem is raised by one of the questions expressly avoided in *National League of Cities,* to wit: is there any comparable sovereignty constraint on the authority of Congress to attach conditions to federal grants enacted pursuant to the spending power? [297]

At times, the lower courts do seem to suggest that the extent of economic pressure to participate in a federal program is pertinent to the validity of a condition. Rejecting a challenge to the organizational structure required of recipients of aid under the Health Planning Act, Judge Kaufman of the Maryland District Court observed:

> The Act imposes no civil or criminal penalties on such states or their officials. While the withholding of federal funds in some instances may resemble the imposition of civil or criminal penalties and while economic pressure may threaten such havoc to a state's well-being as to cause the federal legislation to cross the line which divides inducement from coercion, that line is not crossed in this case. Nor does the Act displace local initiative with federal directives. The Act mandates essentially a cooperative venture among the federal government and state and local authorities.[298]

Although no court has yet found that Congress has crossed the line between inducement and coercion, this comment is suggestive in various ways. It recalls Justice Cardozo's statement in *Steward Machine Co.* that "the location of the point at which pressure turns into compulsion, and ceases to be inducement, [is] a question of degree,—at times, perhaps, of fact," as

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294. 15 U.S.C.A. §§ 3301-3432 (West Supp. 1979).

295. *See* note 132 and accompanying text *supra.*

296. An analogy exists, perhaps, in the power of Congress to require that state courts adjudicate claims under federal statutes, at least where the state courts exercise local jurisdiction over similar actions. Testa v. Katt, 330 U.S. 386 (1947). Of course, the duty of state courts to entertain actions enforcing rights enacted by Congress is grounded in the provision of article VI, § 2 that since federal laws are supreme, "the Judges in every State shall be bound thereby." Still, being bound by the federal standard is not quite the same as an obligation to make the state forum available to federal claimants. In this sense of measuring the extent of interference with local discretion, the comparison seems appropriate between this principle and a federal requirement that the state utility board or insurance commissioner apply federal standards related in kind to those within his customary jurisdiction.

297. 426 U.S. at 852 n.17.

298. Montgomery County v. Califano, 449 F. Supp. 1230, 1247 (D. Md. 1978).

well as his suggestion that achieving a federal end by inducing a state program is a means of cooperative federalism, not coercion.[299]

At least as a matter of policy, recourse to a federal statutory mandate to determine the structure of state and local government seems a dubious form of "cooperation."[300] While the delegation of health planning to the states with the aid of federal funds does indeed seem cooperative, the accompanying detailed specification of means by which the state is to perform that function—through what agencies, with what membership, and with what relationships to the substate units of government that are themselves creatures of the state—seems less the mark of an effort in tandem than displacement of state discretion over its structure of government. And subjecting the state to loss of various forms of health care aid if it fails to meet these elaborate standards certainly resembles a "civil penalty" imposed on the "state or its officials." Nonetheless, it cannot suffice simply to distinguish between the sanction of withdrawal of grants under the particular program and that of withdrawal of other aid in the health care area.[301] If only a "rational relationship" between the condition and the grant program is required, Congress could easily amend the legislation that established the other health care grant programs to include the condition of health systems planning according to the specifications of the Health Planning Act.

Nor is it an adequate solution simply to bar any federal direction of the exercise of state governmental functions as a condition of a spending program. When the federal government contributes to the cost of a service such as medical care for the poor, it must be able to delegate administrative responsibility to the state, and the state is then necessarily obliged to respond by adjusting its exercise of governmental powers to qualify for the funds. At least where the adjustments required involve such elementary matters as assigning the task to an executive agency, adopting state legislation and regulations, and appropriating the state share of the cost, the conditions of the federal initiative must be deemed unobjectionable. This is true even though, as a practical matter, participation is not realistically "voluntary": every state has opted to participate in the medicaid and welfare programs, and the possibility of withdrawal is not a tenable alternative. On the other hand, simply to require that a condition bear a rational relationship to the purpose of the grant-in-aid provides no protection at all for state control over its governmental processes. Virtually any condition is likely to pass such a test no matter how intrusive the compelled accommodations of state processes, or how extensive the fiscal penalty for nonparticipation.

A solution to the problem may be considered by looking at the facts of *City of Macon v. Marshall*.[302] In 1973 the City of Macon assumed control

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299. 301 U.S. 548, 590-91 (1937).

300. *See generally* W.B. GRAVES, AMERICAN INTERGOVERNMENTAL RELATIONS: THEIR ORIGINS, HISTORICAL DEVELOPMENT AND CURRENT STATUS (1964).

301. *See* Stewart, *supra* note 63, at 1250-62.

302. 439 F. Supp. 1209 (M.D. Ga. 1977).

of a financially troubled private bus company in order to avert a threatened loss of services. The buses continued operating under municipal control with the same equipment, employees, and facilities previously managed by the private owner. Macon applied to the federal government for capital and operating assistance authorized by Congress in the Urban Mass Transportation Act. As noted earlier, the labor protection provisions of federal statutes required that the municipality assure continuation of collective bargaining rights.[303] The City of Macon, however, refused to recognize the union that had previously represented the employees,[304] relying on the prohibition of public sector bargaining in Georgia.[305] When the Secretary of Labor refused to issue the necessary certification, the city challenged the validity of the condition. The district court simply followed the conventional standard and found that the statute induced but did not require Macon to comply with the condition; since participation remained "at their option," the inducement did not " 'infringe upon any power reserved to the state.' " [306] The court apparently assumed without discussion that the condition was rationally related to the purpose of the transit aid program.

The issue is more complex than the cursory opinion suggests. If the federal government could lawfully impose the requirement directly on the states by regulation, it should be no less acceptable when imposed as a condition to federal aid. That is to say, if the commerce power independently supports a federal directive that states afford collective bargaining rights to public employees, the state can no more object to this imposition than to the antidiscrimination regulations applied by the general revenue sharing statute. Even after *National League of Cities,* for example, a state-operated railroad is subject to the jurisdiction of the Railway Labor Act and to other federal regulations. But the directive that the state establish machinery for securing collective bargaining rights may be beyond the congressional commerce power after *National League of Cities,* at least if the Congress undertook to oblige the state to administer the federal mandate. If the national legislature need only attach its regulation to some spending program to avoid the sovereignty constraint on the commerce power, the effect of *National League of Cities* may be nullified without difficulty. Thus, Congress could make compliance with the Fair Labor Standards Act a condition to receipt of revenue sharing funds, and all 38,000 recipient units of government would be subject to minimum wage and maximum hour regnlations.[307]

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303. *See* note 172 and accompanying text *supra.*

304. When the bus drivers became municipal employees they were no longer subject to the National Labor Relations Act. *See* 29 U.S.C. §§ 151-166 (1976).

305. The state law seems ambiguous. *See* Davis v. Howard, 404 F. Supp. 678 (N.D. Ga. 1975), *vacated and remanded on other grounds,* 561 F.2d 565 (5th Cir. 1977); Local 574, Int'l Ass'n of Firefighters v. Floyd, 225 Ga. 625, 170 S.E.2d 394 (1969).

306. 439 F. Supp. at 1217-18 (quoting Florida v. Mathews, 526 F.2d 319, 326 (5th Cir. 1976)).

307. After *National League of Cities* proposals were made to that effect, but no action was taken.

The *Oklahoma* standard, which makes the validity of a condition lacking independent constitutional support turn on the state's option to escape the mandate by refusing the aid, may have had some plausibility at a time when federal aid amounted to a small fraction of all state and local government spending, and most federal funds were distributed for specific projects. But given the drastic increases in the amounts of federal funds and the formula-based entitlements in aid programs enacted since 1960, it is unrealistic for anything to depend on the state's nominal right not to participate. Nor does the requirement that the condition be rationally related to the purpose of the grant program afford significant protection for state sovereignty. In *Macon,* for example, the rational relationship test would oblige the federal government to show that securing collective bargaining rights is related to the purpose of transit aid. Virtually any condition, no matter how intrusive, is likely to pass.[308]

At the other extreme, to oblige the Congress to explore all alternatives and select the means of achieving its purpose in the manner least restrictive of state sovereignty interests would invite an excessive level of judicial interference with the federal political process. For example, if Congress judges it important to the integrity of the medicaid program that states license nursing home administrators, the courts are poorly equipped to determine whether some evaluation short of licensing would have been sufficient. However, when the federal law goes further and obliges the state to structure a new agency composed according to federal mandate to perform that licensing function, or to administer rehabilitation services funded in part by federal aid through an agency with a structure of authority set by HEW regulations, the extent of interference with the political choices made by state officials justifies the imposition of a greater burden on the Congress than is provided by a simple test of rational relationship.

In these circumstances, when the condition is of the type that would exceed the congressional power under the commerce clause because of its interference with state autonomy, the Court may properly oblige Congress to demonstrate that the requirement is related to the achievement of an important governmental objective. This level of justification has been used, for example, to test classifications favoring women in the distribution of governmental benefits.[309] Four Justices suggested it in the *Bakke* case [310] as an equal protection standard for evaluating "benign" or compensatory

308. Actually, in the particular case the connection may not be immediately apparent, since it is only the federal aid which permits any job security for the bus drivers. Generally, however, the legislature has little difficulty showing a rational relationship between the condition and the federal funds. Perhaps if Congress attempted to use an unrelated aid program to induce compliance with the condition, as would be the case if health funds were tied to satisfying labor protection conditions in the transit statute, the relatedness standard would become significant.

309. *E.g.,* Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977). *See also* Craig v. Boren, 429 U.S. 190 (1976).

310. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 355-79 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

racial classifications. Whatever its merits in those circumstances,[311] it may provide a reasonable formula for protecting the states' political processes against the coopting effects of certain types of grant conditions without unduly interfering with the basic capacity of the national political process to distribute authority in the federal system.[312]

CONCLUSION

The makers of the Constitution had to assume the separate existence of the states, and it may be conceded that they intended to do so largely by means of a governmental structure designed to preserve the states' influence in the selection of members of the Congress. But the core of the federal conception is less an immutable structure for the allocation of power than a political process capable of surviving both changing needs, national and local, and changing modes of political action. As long as means exist to enforce the underlying values of political participation and liberty central to the charter's design, the relative importance of political and judicial protections of state autonomy may evolve with the needs and habits of the nation.

311. *See, e.g.*, Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581 (1977).

312. Many questions regarding this standard of judicial review require further exploration. This Article merely suggests an available route, and exposes some of the issues to consider. It is a subject to which I hope to return.