

State Law and "Industrial Policy" in American Development, 1790-1987

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In the contemporary debate on industrial policy, it is only very recently that scholars and policy experts have shown much concern for the role of the states. This is attributable to the fact that the policy dialogue has centered on monetary and fiscal matters, international trade diplomacy and the protective tariff structure, and national labor relations issues. These are questions that have been framed and pursued mainly by the national government. They are not questions that focus attention, except in peripheral ways, on the states.¹

Some commentators on industrial policy issues have sought out the

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1. See, e.g., the list of elements of industrial policy provided in Jolmson, *Introduction: The Idea of Industrial Policy*, in THE INDUSTRIAL POLICY DEBATE 3, 7 (C. Johnson ed. 1984).

This is not to say that ignoring analysis of the states' role is a weakness only in recent writing. In his summary view of government interventions that have been influential in shaping American economic development, the late distinguished economist and student of economic history Simon Kuznets acknowledged the importance of the states' role in shaping economic growth, but he failed to list even a single state policy as decisive. S. KUZNETS, *ECONOMIC GROWTH AND STRUCTURE: SELECTED ESSAYS* 108 (1965). Yet economic historians today uniformly deal with state policy and law as critical in shaping both institutions and the dynamics of economic change. See, e.g., J. HUGHES, *THE GOVERNMENTAL HABIT: ECONOMIC CONTROLS FROM COLONIAL TIMES TO THE PRESENT* (1977); Hughes, *Transference and Development of Institutional Constraints Upon Economic Activity*, in 1 RESEARCH IN ECONOMIC HISTORY 45 (P. Uselding ed. 1976); McCurdy, *Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America*, 10 LAW & SOC'Y REV. 235 (1976); Scheiber, *Regulation, Property Rights, and Definition of 'The Market': Law and the American Economy*, 41 J. ECON. HIST. 103 (1981); Woodman, *Post-Civil War Southern Agriculture and the Law*, 53 AGRIC. HIST. 319 (1979).

"lessons of history," but even they have given scant attention to the role that state law and administration have played in shaping policy.² Quite typical of analysis in this genre is an overview of American policy history by Richard N. Nelson,³ in which he tries "to tease out from the historical record clear-cut lessons that are applicable to future policy decisions." Nelson treats the states and their role only insofar as he touches upon the activities of the agricultural experiment stations. He concerns himself almost exclusively with national policy and institutions.⁴

Similarly, in a review of the American experience with industrial policy, Chalmers Johnson⁵ discusses the 1862 Land-Grant College Act. Then his analysis leaps forward in time to the World War II and postwar eras to treat the GI Bill, the 1956 Highway Act, and the 1958 National Defense Education Act.⁶ Johnson's capsule overview makes only one reference to state policy—the Texas Railroad Commission's record of regulating petroleum marketing between 1930 and 1970. "On the evidence from Texas," he notes, "it would not necessarily be disastrous" if it became necessary to devolve industrial policy to the states in the future.⁷ His is a slim evidentiary basis for even a tentative policy assessment of that sort. In any event, Johnson's brief survey gives scant credit to state policy of any sort prior to 1930 in shaping American industrial institutions and dynamics.

The same neglect of state policy in American history characterizes Aaron Wildavsky's treatment⁸ of industrial policy in relation to political ideology. He contends that the historical record reveals an "exceptional American belief . . . that the competitive individualism of markets, pursued without fear or favor, would lead to something like equal outcomes." He argues further that this became a matter of political-sectarian orthodoxy.⁹ But he does not examine, even cursorily, the evidence available on governmental activity in the states from 1790 to the present. He fails to do so despite the existence of important and well-recognized scholarly literature that explores state-level policy processes historically, precisely for the purpose of learning about ideology.¹⁰ Even

2. A welcome exception is the excellent study by Frank Mauro, *State and Local Promotion of Innovation*, in LEGAL STRATEGIES FOR INDUSTRIAL INNOVATION 321 (R. Givens ed. 1982).

3. Nelson, *Government Stimulus of Technological Progress: Lessons from American History in GOVERNMENT AND TECHNICAL PROGRESS: A CROSS-INDUSTRY ANALYSIS* 451, 454 (R. Nelson ed. 1982).

4. *Id.* at 452.

5. Johnson, *supra* note 1, at 18-19.

6. *Id.*

7. *Id.*

8. Wildavsky, *Squaring the Political Circle: Industrial Policies and the American Dream*, in THE INDUSTRIAL POLICY DEBATE, *supra* note 1, at 27.

9. *Id.* at 43.

10. This literature includes significant contributions by legal scholars and political scientists, as

in a recent study specifically devoted to the topic of the states and industrial policy, the authors appear innocent of the fact that state interventions ever mattered historically.¹¹

Withal, the reader of recent literature on industrial policy would gain scarcely any sense of whether state law and administration historically have mattered in the ordering of economic affairs. There is little to be learned in recent studies as to the specific ways in which the states may have made a difference either in the development of the economy or in the relationships of ideology and legal process to the adoption of specific policies.

This is not a very satisfactory state of affairs if we are to examine the position and prospects of the states in industrial policy with any sense of what they have done, how well or badly they have performed, and what their future role and problems might reasonably be expected to be. In this Article, I offer a brief appraisal of the historical record of state law and the mobilization of state governmental resources to foster, channel, and regulate economic growth and readjustment. The study begins early in American history, at a time when the major policy concerns of intervention in economic affairs were agriculture and farm-related commerce. Hence, the analysis will deal broadly with law, state policy, and the entire process of "economic change" rather than with what is embraced in the more limited, modern-day term "industrial policy."¹²

The record will be depicted here as one of substantive policy diversity—but with consistency over time in the sense that intervention has

well as by economic and legal historians. For a review of the literature, see Scheiber, *Public Economic Policy and the American Legal System: Historical Perspectives*, 1980 WIS. L. REV. 1159.

The most important study of state policy by a political scientist is L. HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA 1776-1860* (1948); see also Shields, *The American Tradition of Empirical Collectivism*, 46 AM. POL. SCI. REV. 104, 109 (1952). For views of state policy in the context of federal-state relations, see D. ELAZAR, *THE AMERICAN PARTNERSHIP: INTERGOVERNMENTAL COOPERATION IN THE NINETEENTH-CENTURY UNITED STATES* (1962). *Contra* Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663 (1980). See also sources addressing the federal bargain listed at *infra* note 20.

Hartz's study is one volume in a series of important works examining state policy in the antebellum United States. Other volumes in the series include classic works by historians Oscar Handlin and Mary Flug Handlin, O. HANDLIN & M. HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861* (rev. ed. 1969), and by economist Milton Heath, M. HEATH, *CONSTRUCTIVE LIBERALISM: THE ROLE OF THE STATE IN ECONOMIC DEVELOPMENT IN GEORGIA TO 1860* (1954). A comprehensive overview and analysis of state policy in transport is provided by the economic historian Carter Goodrich, C. GOODRICH, *GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890* (1960).

11. Dubnick & Holt, *Industrial Policy and the States*, 15 PUBLIUS: J. FEDERALISM 113 (1985). They note in passing, however, that not since 1933 have the states "played any significant role in national economic policy discussions." *Id.*

12. On industrial policy as a rubric in common use today, see Johnson, *supra* note 1.

been continuous. That is to say, at any given moment, there have been significant variations in policy goals and instruments employed from one state to another; and over time, individual states and clusters of states have changed their objectives and styles. But positive intervention by states has been present continuously.¹³ At no time since 1787 does one find that laissez faire ideology pervasively stood in the way of either promotional or regulatory intervention by the states. Nor does one encounter much evidence of the kind of ideological adherence to individualism or egalitarian orthodoxy—uniformly at the expense of other objectives such as planning—that Professor Wildavsky infers must have prevailed.¹⁴ The striking range of diversity in state law, policy, and administrative practice comprises a richly complex record.¹⁵ After examining this history and current national industrial policies, it becomes clear that state industrial policies have had a significant impact and can be effective in important respects so long as they are not impeded or counteracted by national industrial policies.

I

FEDERAL STRUCTURE AND DECENTRALIZED POLICY ARENAS: DIFFUSION OF POWER AND ITS IMPACT ON ECONOMIC POLICY

Both the nation's federal structure, mandated by the 1787 Constitution, and its heritage of state mercantilism were legacies of colonial American experience that have proved important throughout American legal and political history.¹⁶ Despite the impact of "nationalizing" doctrines and constraints set in place by the Constitution, state governments retained significantly autonomous policy responsibilities in relation to economic affairs when the Republic went into operation under its new

13. Cf. Nash, *State and Local Governments*, in 2 *ENCYCLOPEDIA OF AMERICAN ECONOMIC HISTORY* 509-23 (G. Porter ed. 1980) (stresses the continuity of state involvement, not only as to presence and impacts, but also as to content and style—a different approach than the one I take in this Article).

14. See *supra* notes 8-9 and accompanying text.

15. The complexity and richness of the record makes it curious indeed to rest a judgment of the states' competence or historical performance on so idiosyncratic an episode as the record of the Texas Railroad Commission regulating petroleum marketing, for example. See *supra* text accompanying notes 5-7.

16. For overviews and general analyses of economic policy in relation to both state law and national law, see L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985); J. HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* (1977); S. SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* at 19-35 (1982); G. TAYLOR, *THE TRANSPORTATION REVOLUTION 1815-1860* (1951); Mauro, *supra* note 2; Nash, *supra* note 13; Scheiber, *Doctrinal Legacies and Institutional Innovation: Law and the Economy in American History*, 2 *LAW IN CONTEXT* 50, 50-59 (1984-85); Donald Pisani, *Regulation and Promotion* (forthcoming in *J. AM. HIST.*) (on file with author).

organic law.¹⁷

Constitutional doctrine in the period from 1790 to the Civil War, moreover, gave the states ample room in which to define their economic goals and engage in wide-ranging interventions to shape economic change. Although the Supreme Court gave vigor to the contract, the commerce, and the supremacy clauses, the states maintained their designated spheres of action—and Congress chose not to exercise its power in many of the areas where the Marshall Court's nationalistic doctrines would have permitted it to act.¹⁸ With respect to the classic trinity of sovereign powers—taxation, the police power, and eminent domain—the states enjoyed broad autonomous authority, which they exercised vigorously.¹⁹ Indeed, property law, commercial law, corporation law, and many other aspects of law vital to the economy were left almost exclusively to the states. Even the matter of free labor or slavery was left to state discretion, as a central element in the "federal bargain" of 1787.²⁰

Federalism thus provided a receptive structure for expressions of state autonomy and pursuit of state-oriented economic objectives, not only as a matter of constitutional theory and the distribution of formal authority but also as a matter of real power. As a working system, federalism gave the states room for intervention in areas that truly mattered. The political realities of the nation from 1790 to 1861 made "dual federal-

17. See, e.g., Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 *LAW & SOC'Y REV.* 57 (1975).

18. *Id.*, *passim*; see also Scheiber, *Law and Political Institutions*, in 2 *ENCYCLOPEDIA OF AMERICAN ECONOMIC HISTORY*, *supra* note 13, at 487. Christopher Tomlins, a historian of labor policy has recently summarized the historical situation as follows:

Although the Constitution equipped the nation with a new central government, it simultaneously rendered 'the focal point of state activity' ambiguous by carefully creating structured conflicts among that government's key institutions. Equally important, the Constitution settlement embraced federalism, ensuring the survival of eighteenth-century regional governments alongside the central government and thereby further inhibiting the development and extension of central power. While state authority was hardly absent from nineteenth-century America, therefore, it was diffused to an extent unparalleled in Europe.

C. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 22 (1985) (quoting S. SKOWRENEK, *supra* note 16, at 19-35).

19. See B. SCHWARTZ, *A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, PART II, THE RIGHTS OF PROPERTY* (1965); Sax, *Taking of Property*, in 4 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1855* (L. Levy, K. Karst & D. Mahoney eds. 1986); Scheiber, *State Police Power*, in *id.* at 1744; Scheiber, *Eminent Domain*, in 2 *id.* at 630.

Reference to the "trinity of powers," all equally available to the state in pursuit of one common purpose, "to protect the health, safety, and general welfare of the public," is found in *Muller v. New York City Hous. Auth.*, 270 N.Y. 333, 339-40, 1 N.E.2d 153, 155 (1936).

20. On the "federal bargain" see W. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* (1964); Scheiber, *Federalism and the Constitution: The Original Understanding*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 85 (L. Friedinan & H. Scheiber eds. 1978). On economic policy and the constitutional understanding, see F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985) (examining the common law heritage, especially in regard to matters bearing on economic policy).

ism" (with significant authority remaining in the states) an accurate description of the governmental system, in addition to being an accurate description of the prevailing constitutional doctrine.²¹

Active pursuit of state interests through interventionist policies was entirely consistent with the colonial legacy of provincial mercantilism. Beginning with the earliest period of settlement in the seventeenth century, the provincial legislatures and administrations had intervened to shape economic institutions and the dynamics of growth through labor regulations, marketing controls, warehouse requirements, transportation improvement, and land-grant policies. These efforts bespoke the diversity and vigor of interventionism, as did the variety of substantive law on land, inheritance, labor (including slavery), and other matters that went to the heart of the economic system.²²

During the seventeenth and eighteenth centuries, there was a powerful element of competitiveness among the colonies, pitting one colony's interests against another's in these policies.²³ The colonies' objectives were to maximize immigration, to foster settlement and capital formation in new agricultural areas, to encourage urban investment and growth, and to develop trade in ways that enhanced the various natural advantages that individual colonies enjoyed. These objectives were also abundantly present in the policies of the new states following the Revolution. Under dual federalism, competitiveness and a spirit of rivalry continued to animate the system from 1790 to 1861.²⁴

In the active promotion of states' economies, New York was the undisputed leader by virtue of its Erie Canal project. This great public works project was the first infrastructural investment on so large a scale in the new nation's history. No government enterprise of any sort, except the mobilization of the armies, had ever involved such costs, labor, or organizational demands. Begun in 1817, the Erie Canal, together with its ramifying system of branch canals, served as a model

21. This argument is set forth in Scheiber, *supra* note 17; see also D. WALKER, TOWARD A FUNCTIONING FEDERALISM 52-54 (1981). *Contra* M. GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES (D. Elazar ed. 1966) (denying the validity of dual federalism model); D. ELAZAR, *supra* note 10.

22. See, e.g., L. FRIEDMAN, *supra* note 16; J. HUGHES, *supra* note 1; N. JONES, *Weights, Measures, and Mercantilism: The Inspection of Exports in Virginia, 1742-1820*, in THE OLD DOMINION 122, 123 (D. Rutnan ed. 1964).

23. Of course, the colonies as a group had similar concerns, and applied pressure on the British government to change basic imperial policy which affected them all. See e.g., J. ERNST, MONEY AND POLITICS IN AMERICA 1755-1775 (1973); M. KAMMEN, DEPUTYES & LIBERTYES: THE ORIGINS OF REPRESENTATIVE GOVERNMENT IN COLONIAL AMERICA (1969).

24. See E. JOHNSON, THE FOUNDATIONS OF AMERICAN ECONOMIC FREEDOM: GOVERNMENT AND ENTERPRISE IN THE AGE OF WASHINGTON (1973); R. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA (1946); Johnson, *Federalism, Pluralism and Public Policy*, 22 J. ECON. HIST. 427 (1962).

for similar state transport enterprises elsewhere in the nation.²⁵

New York pioneered not only in bold engineering enterprise, with transforming effects on the state's economy, but also in governmental organization. The commission it established to oversee bond issues and the sister agency that it created to supervise construction and operation of the canal system became models for other states.²⁶ The Erie Canal officials managed the enterprise resourcefully so as to maximize the benefits to their own state over rivals. Thus at the very outset of their canal system's operations, they instituted schedules of tolls that blatantly discriminated against out-of-state producers of corn, wheat, flour, and salt, giving advantages to New York producers of the same commodities. This effectively allocated markets within New York and controlled the terms of trade between the City of New York and the Great Lakes basin, beyond the Buffalo entry point, for many commodities.

In sum, the conscious and systematic promotion of local economic interests quickly came to characterize the states' transport policies. Other states soon emulated New York's tolls policy, sometimes retaliating directly against the Erie Canal tolls policy by disadvantaging New York products when New York tolls had harmed their own trade. This became the functional equivalent of tariff protectionism in the national policy arena, and it was in startling contrast to the "free internal market" pretensions of the Marshall Court's commerce clause decisions.²⁷

Because of its unique financial success, the Erie Canal generated large surpluses and provided the fiscal basis for additional bond issues that financed extensions of the system throughout New York. But the surpluses also became what has been termed a "bank for development." The revenues on hand were systematically deposited in banks throughout the state. The banks then drew upon the state funds to extend credit to millers in Buffalo and Rochester, salt manufacturers in the Syracuse region, land developers and farmers in the central-western region, and urban commercial interests in Albany and other transshipment cities.²⁸

25. See C. GOODRICH, *supra* note 10, *passim*; see also Goodrich, *State In, State Out—A Pattern of Development Policy*, 2 J. ECON. ISSUES 365 (1968); Lively, *The American System: A Review Article*, 29 BUS. HIST. REV. 81 (1955).

26. N. MILLER, *THE ENTERPRISE OF A FREE PEOPLE: ASPECTS OF ECONOMIC DEVELOPMENT IN NEW YORK STATE DURING THE CANAL PERIOD, 1792-1838* (1962).

27. H. SCHEIBER, *OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820-1861*, at 254-59 (1969). The Marshall Court's basic commerce clause doctrine was set out in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

28. N. MILLER, *supra* note 26, at 115-54. For analysis of the more limited, but comparable, management of canal funds in Ohio, where the fund commissioners doubtless sought to emulate New York's model, see the discussion in Scheiber, *Public Canal Finance and State Banking in Ohio, 1825-1837*, in 65 IND. MAG. HIST. 119 (1969). Unfortunately, there are no studies of comparable policies in fund management of other states, though studies of the Indiana, Illinois, Georgia, and Michigan cases would be valuable to an understanding of this important dimension of state policy in the canal era.

Moreover, when New York City suffered a devastating fire in 1835, the Erie Canal Fund was drawn upon for more than \$1.3 million in loans for reconstruction of destroyed buildings.²⁹

Ohio, Pennsylvania, Indiana, Georgia, Michigan, and Illinois were the most important "follower" states that emulated New York's example in sponsoring public transportation enterprises. In each case, the policy debates evoked explicit concern for rationalized, systemic planning for state needs—something very different from undisciplined economic individualism. The objectives of planning sometimes were overwhelmed, to be sure, by localistic pressures. Nonetheless, the debates focused on programs designed to provide the facilities necessary to develop commercial agriculture on a profitable basis, to link emergent urban commercial entrepôts and processing centers with the rural producing areas, and to develop areas of the state that were as yet sparsely settled. To a remarkable degree, the state engineers who planned these systems engaged in cost-benefit analysis and attempted to develop rational priorities for extensions of the systems.³⁰

The canal states also sought to increase their manufacturing through design of their canal works. As reservoirs and aqueducts for navigational water supply were being laid out, plans for the construction of millpower sites were included. The result was a significant increase in manufacturing capacity along the canal lines.³¹ This active planning of energy development constituted a variant of policies for manufacturing development dating from colonial days. Under the older policies, continued in the early national period in many states, "milldam acts" had devolved the power of eminent domain to private entrepreneurs. These individuals, first taking the land at sites they had chosen and paying compensation to original owners based on administrative appraisal by the courts or local governments, then built milldams and established milling facilities with their private capital.³²

29. N. MILLER, *supra* note 26, at 172-93.

30. *Id.* at 40-73; L. HARTZ, *supra* note 10; M. HEATH, *supra* note 10; INDIANA HISTORICAL SOCIETY, *TRANSPORTATION IN THE EARLY NATION* (1982); H. SCHEIBER, *supra* note 27; *see also* S. SALSURY, *THE STATE, THE INVESTOR, AND THE RAILROAD: THE BOSTON AND ALBANY, 1825-1867* (1967) (discussing public debate of state charters and late state aid to private enterprise in Massachusetts).

31. H. SCHEIBER, *supra* note 27, at 199-200; B. MCKELVEY, *ROCHESTER: THE WATER-POWER CITY, 1812-1854*, at 231-34 (1945).

32. On the milldam acts in Massachusetts, *see* O. HANDLIN & M. HANDLIN, *supra* note 10 and W. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 159, 165 (1975). For an example from the South, *cf.* Water-Mills Act, 22 Geo. II cap. 26 (1748), *reprinted in AN EXACT ABRIDGEMENT OF ALL THE PUBLIC ACTS OF ASSEMBLY OF VIRGINIA IN FORCE AND USE*, 400 (1758) (provided for administrative procedures to take on payment of specified compensation for lands alongside streams used for construction of mills, and also for regulation of mills in the public interest as to tolls and service to the public).

State policy also placed promotional considerations at the forefront in establishing favorable conditions for capital formation and exchange. There was enormous diversity from one state to another in banking law and policy. In some, the state's own funds were invested in wholly state-owned banks or in mixed (public and private) banking corporations. Others permitted a policy of general incorporation privilege, while still others allowed both incorporated and unchartered banking. Regardless of which particular organizational forms a given state authorized, the twin objectives were to encourage capital investment and to foster the supply of stable currency, commercial credit, and agricultural land loans.³³

Not until foundation of the national bank system in 1863 did note issue become the function of a centralized system. Prior to that time, therefore, the state-chartered banks provided nearly all of the nation's currency, so that state banking regulations had an enormous impact on the antebellum economy.³⁴ A few states, led by New York and Massachusetts, created safety funds that helped to maintain public confidence in their chartered institutions and their note issues. Other states created bank commissions with investigatory and auditing powers. Still others included various specie-reserve and other requirements designed to stabilize the system in special charters granted to banking institutions.³⁵

The record of the state judiciary in advancing and channelling economic growth was mixed, but in general state judges used their common law powers to assert priorities and promote one type of entrepreneurial interest or another. Typically, they justified assigning priorities by reference to the "general policy" that they discerned from the pattern of preferences of the legislators.³⁶ Thus many states' appellate courts aided investment in transport and other new enterprise by interpreting broadly

33. See, e.g., B. HAMMOND, *BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* (1957); J. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970*, at 13-57 (1970).

34. G. TAYLOR, *supra* note 16, at 311-23.

35. See, e.g., B. HAMMOND, *supra* note 33, at 549-630; A. OLMSTEAD, *NEW YORK CITY MUTUAL SAVINGS BANKS, 1819-1861*, at 6-12 (1976); see also G. GREEN, *FINANCE AND ECONOMIC DEVELOPMENT IN THE OLD SOUTH: LOUISIANA BANKING, 1804-1861* (1972) (analyzing the causal relationship between changing state policies and the expansion of financial facilities, as well as the regulatory system established under the famous Louisiana Banking Act of 1842, which gave way to free banking under legislation of 1853).

36. See, e.g., Justice Shaw's opinion in the landmark case of *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851), discussed in Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CALIF. L. REV. 217, 222-24 (1984).

My own view is that judges in antebellum America's state courts generally shaped tort, eminent domain, and other doctrine to fit what was the clear trend of legislative preferences and priorities—with legislatures always free, of course, to enact statutes to amend or reverse the resulting common law assignment of priorities. Scheiber, *Back to the "Legal Mind"? Doctrinal Analysis and the History of Law*, 5 REV. AM. HIST. 458 (1977) (book review essay); Scheiber, *Public Rights and the Rule of Law in American Legal History*, *supra*. Other have characterized the drift of judicial style

the language of statutes and charters that gave private firms the right to take private property.³⁷ In addition, nineteenth-century courts seldom assigned liability for tort damages to business firms in cases involving smoke and fire hazards from industrial plantsites or from the operation of railroad engines. In this way, judges extended legal protection to employers with the effect of reducing their costs and risks; such protection effectively subsidized private enterprise.³⁸

This kind of solicitude for entrepreneurial interests was balanced, however, by the state courts' concern for what they termed "rights of the public" to be protected against such dangers as obstructions to river or harbor navigation or hazards that were either common law nuisances or the subject of legislation.³⁹ In sum, when the courts confronted issues that bore on the conditions of industrial development in the large—eminent domain, torts, commercial law—sometimes "the imperatives of progress" were the controlling principle of decision. In other instances, judges gave low priority to progress-oriented pragmatic goals associated with growth, instead assigning priority to the "rights of the public" or the "public interest."⁴⁰

The foregoing examples of state intervention form only a partial list: The variety and extent of legal ordering which affected economic development belies any notion of principled laissez faire.⁴¹ Each state had its own configuration of rules, advantages, and burdens for industrial and

and action in such matters as exploitative, antideмократич, and subversive of popular interests and wishes. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

37. See Freyer, *Reassessing the Impact of Eminent Domain in Early American Economic Development*, 1981 WIS. L. REV. 1263. Freyer's article discusses the strength of localist interests. It serves as a corrective to my own assertions on eminent domain proceedings as a subsidy for enterprise to the extent that Freyer finds that local juries and courts often acted to protect the interests of victims of compulsory purchases.

38. Kurtz, *Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions—Avoiding the Chancellor*, 17 WM. & MARY L. REV. 621 (1976); Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946).

39. For example, see Chief Justice Taney's famous phrase in the Charles River Bridge case opinion, that "the public also have rights." *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 419 (1837). For a discussion of this case and its larger significance for state policy, see S. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* (1971).

40. See Scheiber, *Public Rights and the Rule of Law in American Legal History*, *supra* note 36; see also C. TOMLINS, *supra* note 18, at 23-24; Krier & Gillette, *The Un-Easy Case for Technological Optimism*, 84 MICH. L. REV. 405 (1985).

41. For examples of the variety of state intervention, see L. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* (1965); L. FRIEDMAN, *supra* note 16, at 177-201, 258-79; G. NASH, *STATE GOVERNMENT AND ECONOMIC DEVELOPMENT: A HISTORY OF ADMINISTRATIVE POLICIES IN CALIFORNIA, 1849-1933* (1964); Donald Pisani, *supra* note 16. For case studies of specific policy, see Freyer, *supra* note 37; Hartog, *Because All the World Was Not New York City: Governance, Property Rights, and the State in the Changing Definition of a Corporation, 1730-1860*, 28 BUFFALO L. REV. 91 (1979); Scheiber, *Land Reform, Speculation, and Governmental Failure: The Administration of Ohio's State Canal Lands, 1836-60*, 7 PROLOGUE: J. NAT'L ARCHIVES 85 (1975).

other enterprises. Choices were made—by courts, by legislatures, and occasionally even by the electorate directly through constitutional amendment or revision.⁴² By these means, priorities were established that served to distinguish different economic activities and express a variety of policy objectives. There was, in sum, a multiplicity of legal environments. There were as many "industrial policies" as there were states. As Justice Story asserted: "[I]n our government the coentrifugal [sic] force is far greater than the centripetal. . . ."⁴³

II

STATE POLICY AND THE MODERN CONSTITUTIONAL ORDER

Both the constitutional order and the policymaking structure changed radically in the Civil War period.⁴⁴ The enactment of the national banking law, the vast expansion of congressional land-grant programs, the adoption of a national excise tax, and other measures served to centralize the locus of public economic policymaking swiftly. In addition, scarcely more than twenty years after the war, the national government undertook administrative regulation of railroad rates and operating practices.⁴⁵ The Sherman Act passed in 1890, marking the advent of a national corporations policy.⁴⁶ By the end of the ensuing decade, major federal conservation and reclamation programs had been instituted.⁴⁷

42. For a regional study, see F. GREEN, *CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860: A STUDY IN THE EVOLUTION OF DEMOCRACY* (1930).

43. J. STORY, *AN ADDRESS BY MR. JUSTICE STORY ON CHIEF JUSTICE MARSHALL* 46 (1852) (reprint ed. 1900) (discussing development of common law in the states).

44. See M. KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 37-283 (1977); see also S. SKOWRONEK, *supra* note 16. On the Civil War, see H. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* (1975); Scheiber, *Economic Change in the Civil War Era: An Analysis of Recent Studies*, 11 *CIV. WAR HIST.* 396 (1965).

45. See Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887); see generally, A. HOOGENBOOM & O. HOOGENBOOM, *A HISTORY OF THE ICC: FROM PANACEA TO PALLIATIVE* (1976). State regulation served as a model for the Interstate Commerce Act of 1887. See G. MILLER, *RAILROADS AND THE GRANGER LAWS* (1971); see also Scheiber, *Public Policy, Constitutional Principle, and the Granger Laws: A Revised Historical Perspective*, (Book Review of G. MILLER, *supra*) 23 *STAN. L. REV.* 1029 (1971).

46. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890). See generally J. FLYNN, *FEDERALISM AND STATE ANTITRUST REGULATION* (1964) (continues analysis of state antitrust regulation beyond 1890 and the advent of federal regulation); W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA* (1965) (provides the background of common law on restraint of trade); Hawley, *Antitrust*, in 2 *ENCYCLOPEDIA OF AMERICAN ECONOMIC HISTORY*, *supra* note 13, at 772-87; McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 *BUS. HIST. REV.* 304 (1979) (describing the states' efforts to police corporate monopolistic practices).

47. See J. CAMERON, *THE DEVELOPMENT OF GOVERNMENTAL FOREST CONTROL IN THE UNITED STATES* (1928); S. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920*, at 36, 135 (1959); D. PISANI, *FROM THE*

Meanwhile, beginning in the late 1880's, the federal courts used the fourteenth amendment as a vehicle for censorship of state regulatory measures, centralizing still further the locus of economic policymaking power.⁴⁸

Although the federal government still accounted for only a small fraction of the share of GNP that it would take in the New Deal years and thereafter, there was a steady and impressive growth of bureaucracies and corps of scientific experts in the civil service. Bureaucratization gave the federal government more adaptability and greater capacity for undertaking new functions, including such complex regulation as was involved in food and drug oversight.⁴⁹

Nonetheless, the United States did not yet have "big government" on the post-New Deal model. The hallmarks of the modern regulatory and welfare state were as yet dimly seen, if seen at all. Even as late as 1930, the federal government was mainly a watchdog, regulator, steward of natural resources, and balancer of contending interests. It was not yet a "manager" of the economy in the contemporary sense, despite the establishment of the Federal Reserve System with its attendant nationalization of fiscal operations.⁵⁰ Prior to the New Deal, the states were in large measure still setting their own agendas on industrial policy matters, despite centralizing tendencies in constitutional doctrine and in national policy. In some respects, the powers they enjoyed were sufficient to be controlling or nearly controlling; in other respects, the states' powers fell short.⁵¹

Two great obstacles to effective state intervention after 1865 can be

FAMILY FARM TO AGRIBUSINESS: THE IRRIGATION CRUSADE IN CALIFORNIA AND THE WEST, 1850-1931 at 283-334 (1984); Pisani, *State vs. Nation: Federal Reclamation and Water Rights in the Progressive Era*, 51 PAC. HIST. REV. 265 (1982).

48. Charles McCurdy has written several important articles on constitutional change in relation to policy innovation and the transformation of the economy. See McCurdy, *supra* note 46; McCurdy, *American Law and the Marketing Structure of the Larger Corporation, 1875-1890*, 38 J. ECON. HIST. 631 (1978); McCurdy, *Justice Field and the Jurisprudence of Government Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975).

49. S. SKOWRONEK, *supra* note 16, at 248-84.

50. See C. SCHULTZE, *THE PUBLIC USE OF PRIVATE INTEREST* 7 (1977). In 1976, 83 federal agencies regulated some aspect of the private economy. Only 18 of these agencies existed in 1930. See generally R. GORDON, *ECONOMIC INSTABILITY AND GROWTH: THE AMERICAN RECORD* 15-16 (1974) (description of United States macroeconomic policy after World War I); A. SHONFIELD, *IN DEFENCE OF THE MIXED ECONOMY* (1984) (discussion of public intervention in the modern mixed economy and of the institutions necessary for effective policy); A. SHONFIELD, *MODERN CAPITALISM: THE CHANGING BALANCE OF PUBLIC AND PRIVATE POWER* (1965) (describes the expansion of the American civil service and the advancement of public regulatory activity); Jones, *Government Management of the Economy*, in 2 *ENCYCLOPEDIA OF AMERICAN ECONOMIC HISTORY*, *supra* note 13, at 808.

51. That is to say that the structure and dynamics of the federal system, along with the rapid development of private-sector interests, made it difficult for the states to retain real control.

noted briefly here: rapid change in the private sector and the resulting problems of the states in imposing regulatory regimes, and the invalidation of state laws by the federal judiciary. As to the first, private-sector change, the dynamism and scope of transformations in the private sector (especially with regard to large-scale corporate organization) made it difficult for states to respond effectively with new policies to forces generated by industrialization or by corporate and fiscal reorganization of giant firms. The rapidity and sweep of private-sector transformation meant that state jurisdictional lines were no longer congruent with the boundaries of the economic developments that the states might seek to control.⁵² National and international market forces emerged which proved to be beyond the reach of the states. These forces included the "nationalization" of business corporations, labor force, and marketing, amidst a spectacular industrialization process following the Civil War.⁵³ When states did seek to regulate industrial interests—with stringent safety requirements, pollution controls, limits on exploitation of natural resources, and the imposition of transport rate limitations—they risked loss of investment, flight of industry, or disadvantage to their own producers in national and international markets.⁵⁴ To resist the pressure to move toward the lowest common denominator—as the New England and Mid-Atlantic states resisted it in the fight over child labor regulation—meant to accept the costs in industry flight. Hence uniform national standards were of great importance.⁵⁵

The second obstacle to effective state intervention was federal judicial oversight of state laws.⁵⁶ Invoking the fourteenth amendment's due process clause, the commerce clause, and the judicially created doctrine of liberty of contract, the Supreme Court overturned a significant range of state legislation regarding railroad commissions, regulation of labor hours and working conditions, and health and tax matters.⁵⁷ The era of across-the-board "preemption" of policy fields by congressional legislation commenced only with the New Deal. Much earlier, however, the

52. See M. KELLER, *supra* note 44, at 418. On the problem of "congruence" (the "fit" of jurisdictional boundaries and the dimensions of regulatory and other problems), see generally J. FESLER, *AREA AND ADMINISTRATION* (1949); Fesler, *Approaches to the Understanding of Decentralization*, 27 J. POLITICS 536 (1965) (arguing that most organizations include areas of centralization and decentralization); Scheiber, *supra* note 17; Willbern, *The States as Components in an Areal Division of Powers*, in *AREA AND POWER* (A. Maas ed. 1959).

53. See A. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 112-376 (1977).

54. See Scheiber, *supra* note 17, at 115-16.

55. See M. KELLER, *supra* note 44, at 409-38; S. WOOD, *CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW* (1968).

56. See *supra* note 48 and accompanying text.

57. See B. SCHWARTZ, *supra* note 19 at 1-91; Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737, 741-53 (1922).

institution of national railway regulation in 1887 served as precedent for formal legislative preemption, significantly augmenting the federal courts' scrutiny of state regulatory action.⁵⁸ On similar constitutional grounds, the Supreme Court hedged and questioned the legitimacy of what today would be recognized as the most forthright elements of an "industrial policy"—measures for tax-supported subsidy to business enterprises (both manufacturing and commercial) that legislatures implemented to bring jobs and income to their states and local communities.⁵⁹

The states' agenda-setting capacity and effectiveness remained unaffected, however, in many areas of policy.⁶⁰ This was true, for example, of their power to establish the terms of corporate charters and to frame the terms of business and property taxation. The terms on which "foreign" capital came into a state could be defined substantially by the state legislature without federal interference.⁶¹ Each state government set its own policies concerning taxation rates and exemptions, the rules of eminent domain takings and compensation, and factory and mine regulation. Although a national competition policy was instituted with the Sherman Antitrust Act of 1890, there continued to be diversity of substance and variety of purpose, from one state to another, in corporation law. Notorious indeed were the records of New Jersey and Delaware in "charter

58. See P. BENSON, JR., *THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970*, at 48-51 (1970); S. FINE, *LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865-1901* at 464 (1956); see also Doezman, *Railroad Management and the Interplay of Federal and State Regulation, 1885-1916*, 50 *BUS. HIST. REV.* 153 (1976); Martin, *Uneasy Partners: Government-Business Relations in Twentieth-Century American History*, 11 *PROLOGUE: J. NAT'L ARCHIVES* 91, 100-05 (1979) (analyzing changing historical interpretations of regulation); Purcell, *Ideas and Interests: Businessmen and the Interstate Commerce Act*, 54 *J. AM. HIST.* 561 (Dec. 1967).

59. The Supreme Court determined what a "public purpose" was with respect to taxation, in *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1875). See generally B. SCHWARTZ, *supra* note 19, at 251-54; McAllister, *Public Purpose in Taxation*, 18 *CALIF. L. REV.* 137 (1930); Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 *PERSP. AM. HIST.* 327, 385-90 (1971).

60. See, e.g., Galambos & Sass, *An Appraisal of Some Recent Developments in the History of Economic Institutions in America*, 3 *RES. ECON. HIST.* 347, 347-60 (1978).

61. This power went so far as to restrict alien land holding, either by maximum extent of acreage or length of time which aliens might be allowed to hold land before selling it or settling it with an intent to become citizens. See P. GATES, *LANDLORDS AND TENANTS ON THE PRAIRIE FRONTIER* (1973); Clements, *British Investment and American Legislative Restrictions in the Trans-Mississippi West, 1880-1900*, 42 *MISS. VALLEY HIST. REV.* 207 (1955).

Antiforeign sentiment, especially Anglophobia, figured heavily in such legislation. Discriminatory measures, however, such as the antiforeign miners' tax in California, were blatantly racist. See 1850 Cal. Stat. 222; 1852 Cal. Stat. 84; 1853 Cal. Stat. 62; see also W. GREEVER, *THE BONANZA WEST: THE STORY OF THE WESTERN MINING RUSHES, 1848-1900*, at 71-72 (1963).

Similar racist motivations lay behind the California constitutional provision of 1879, which prohibited employment of Chinese labor by corporations or public entities. CAL. CONST. art. XIX, §§ 1-4 (1879), invalidated by *In re Parrot*, 6 Sawyer 349 (C.C.D. Cal. 1880). See, e.g., C. SWISHER, *MOTIVATION AND POLITICAL TECHNIQUE IN THE CALIFORNIA CONSTITUTIONAL CONVENTION, 1878-1879*, at 86-92 (1930).

mongering"—encouraging firms to domicile their operations within their borders with special advantages that other states were unwilling to give away.⁶²

The record of the Old South's state governments indicates dramatically how autonomous state policy could be. It also reflects vividly the potentially devastating effects of state policies on public services and social welfare.⁶³ The state and local governments of the Deep South took advantage of the autonomy in "industrial policy" afforded them by federalism: They offered up the region's natural resources and its labor on terms highly destructive to southern welfare in the long run. In effect, they bartered away southern resources and the natural environment, while binding the poorest agricultural workers to the land—and to the region—on harsh terms enforced by criminal sanctions. Through common law decisions by their courts, and through statute as well, they gave industry broad license to pollute and otherwise to externalize the costs of manufacturing, lumbering, and mining at great expense to the community interest. The educational and social welfare allocations in southern states' budgets revealed both the effects of racism and the notorious readiness of the regional elite to sacrifice education, public health, and other humane concerns for short-term pecuniary profit and, especially, for enduring white supremacy. As C. Vann Woodward has written, the tragedy of such uses of public policy and law was that they institutionalized irresponsible social attitudes and callousness to human suffering.⁶⁴

In the nation as a whole, however, the states used various forms of promotional policy to stimulate development and to improve public services. For example, from 1865 to the 1890's, there was widespread state subsidization of railroads through bond-supported aid, direct subscriptions, and land grants. Many state legislatures also authorized their municipalities to extend cash or subscription subsidies to railroads.⁶⁵ State autonomy did not, however, reach so far as to permit the state to repudiate such financial obligations on any grounds except outright bankruptcy. When financially stressed local governments tried to slip the knot of their commitments to railroad firms, often either to companies that had never built the promised roads or to bond-aid creditors, the

62. J. HURST, *supra* note 33, at 69-72; Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232 (1973).

63. This paragraph draws on my article *Federalism, the Southern Regional Economy, and Public Policy Since 1865*, in *AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH* 69, 84 (D. Bodenhamer & J. Ely, Jr. eds. 1984).

64. See C. WOODWARD, *ORIGINS OF THE NEW SOUTH, 1877-1913*, at 61-62 (1951); see also R. ELLER, *MINERS, MILLHANDS, AND MOUNTAINEERS: INDUSTRIALIZATION OF THE APPALACHIAN SOUTH, 1880-1930*, at 210-11, 234-35 (1982); W. NICHOLLS, *SOUTHERN TRADITION AND REGIONAL PROGRESS* 106-14 (1960); Dowd, *A Comparative Analysis of Economic Development in the American West and South*, 16 J. ECON. HIST. 558 (1956).

65. C. GOODRICH, *supra* note 10, at 236-55.

Supreme Court required that they pay.⁶⁶ The rhetoric of states' rights and anticentralism was reminiscent of Jefferson Davis at his most doctrinaire in the court arguments and public debates in which these issues arose in the late nineteenth century.⁶⁷

Some states also extended direct cash aid or other benefits, on the model of modern "industrial development commissions," to favored forms of industrial or commercial enterprise. In this area, too, the Supreme Court placed limits on what the states might constitutionally do. Nevertheless, a pattern of subsidies survived judicial scrutiny.⁶⁸

In the quest to maximize comparative advantage, the arid-land states pushed aggressively to harness available water and promote agriculture on lands that otherwise would remain unsettled or be used only for grazing. The irrigation districts, formed under state authority, funded by taxes, and often operated by public commissions, were the rural counterparts of the public utilities and urban transit companies that provided infrastructural investment in the urban areas. Leadership in western irrigation came initially from the national government, but by the last quarter of the nineteenth century, the states were forging new legal and administrative instruments for irrigation development.⁶⁹ States in the humid regions undertook drainage projects as a counterpart of the arid states' irrigation projects. In the 1890's, New York and other states extended special powers and privileges to drainage companies and entrepreneurs.⁷⁰

Irrigation and drainage, like road building, were activities that involved clearly "capturable" benefits: The states had the power to capture for their own citizens the benefits that these activities generated. It was then, as it is now, a more difficult matter to contain the benefits of state-supported education and research. A great state university and its libraries, laboratories, and classrooms might well support the industrial enterprises of a state. Yet it would also generate research and educate students for use or employment in out-of-state, often directly competi-

66. *Gelpcke v. Dubuque*, 68 U.S. (1 Wall.) 175 (1864).

67. Thus, counsel in a case concerning the constitutionality of the Legal Tender Act argued that "the limited and localized system of government established by our fathers," was in danger of "pass[ing] irretrievably into a centralized, consolidated, absolute government." C. FAIRMAN, *RECONSTRUCTION AND REUNION*, 1864-88, at 757-59 (1971) (citation omitted). Similar sentiments were expressed in the railroad aid cases. *See id.* at 968-71.

68. *See supra* note 59 and accompanying text; *see also* C. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* 129-59 (1954).

69. *See* D. PISANI, *supra* note 47, at 250-380.

70. The most important New York drainage measure, a revision of the constitution in 1894, declared agricultural drainage a "public use." The state could therefore take private property by eminent domain to build drainage facilities. The state's courts struck down this provision six years later. *In re Tuthill*, 163 N.Y. 133, 57 N.E. 303 (1900).

tive, markets. Traditionally the American states have been willing to accept such spillovers in order to enjoy the benefits of university-based research or education, which enrich the wealth of enterprise and quality of life within their own borders.⁷¹

This is not to say that pragmatism and concern for local interests have been absent from state-sponsored research. Indeed, it was the quest for comparative advantage that led to major institutionalized research efforts by the states. The states with coal, iron, copper, and other mineral resources established the earliest geological surveys and most of the early schools of mining engineering, and the land-grant agricultural colleges' research programs reflected each state's agricultural specialties.⁷²

This is not to say, either, that the perception and pursuit of research opportunities are reflexive phenomena, occurring uniformly. Some states were leaders, others were not. For example, though commercial ocean fishing had been a mainstay of the Atlantic coastal region's economy since colonial times, it was California that first developed a major state program in marine fisheries research. By the 1920's, the scientific research on ocean fisheries in the state Fish and Game Division's laboratories and at sea was at the forefront of commercial marine biology and fisheries management sciences. Moreover, after World War II, state-sponsored marine research in California led to one of the major developments in modern ocean science—the reunification of oceanography and marine biology, which set in place the conceptual and methodological basis for modern marine ecological systems research.⁷³ The State of Washington also was a leader in scientific and applied education and in

71. Mauro notes that from the nineteenth century to 1960, state subsidies and programs designed to promote growth were "more in the nature of positive sum approaches." The programs from 1960 to the present have been designed to attract a larger share of a finite pie, in a zero-sum game. Mauro, *supra* note 2, at 359.

For a negative side to the nineteenth-century policy debates, with some evidence of "zero sum game" thinking, see Scheiber, *Xenophobia and Parochialism in the History of American Legal Process: From the Jacksonian Era to the Sagebrush Rebellion*, 23 WM. & MARY L. REV. 625 (1982).

72. Mauro, *supra* note 2, at 325-29; Kirkland, *Industry Comes of Age: Business, Labor, and Public Policy, 1860-1897*, in ECONOMIC HISTORY OF THE UNITED STATES 143-48 (H. David ed. 1961); A. TRUE, A HISTORY OF AGRICULTURAL EXPERIMENTATION AND RESEARCH IN THE UNITED STATES 1607-1925, at 12-18, 67-82 (1937). The fullest history of one state's research and educational efforts in agriculture is by Gould Colman, G. COLMAN, EDUCATION AND AGRICULTURE: A HISTORY OF THE NEW YORK STATE COLLEGE OF AGRICULTURE AT CORNELL UNIVERSITY (1963).

Vinicultural and veterinarian studies were inaugurated in California, New York, and other state universities. Massachusetts and several southern states sponsored textiles research and technical education as early as the 1880's. Mauro, *supra* note 2, at 325-29.

73. See Scheiber, *Pacific Ocean Resources, Science, and Law of the Sea: Wilbert M. Chapman and the Pacific Fisheries, 1945-70*, 13 ECOLOGY L.Q. 381, 390-95, 405-27 (1986); see also McEvoy & Scheiber, *Scientists, Entrepreneurs, and the Policy Process: A Study of the Post-1945 California Sardine Depletion*, 44 J. ECON. HIST. 393 (1984) (analyzing work of California Marine Research Committee).

research on fisheries management and technology, with its great school of fisheries at the University of Washington.⁷⁴

Other states have similarly taken the lead in the last sixty years in specific applied or basic scientific research. New York, which pioneered in aviation and later in auto safety in the Cornell aeronautical laboratory, is one outstanding example. Environmental and mine-safety research in other states has also been of comparable importance. Whether pursuing relatively narrow, practical goals or sponsoring research of much broader scope, the states have been far ahead of both the federal government and the private sector in some areas of scientific research.⁷⁵

From 1865 to the modern era, the states have also proved innovative in playing the role of "laboratories of democracy" that Justices Holmes and Brandeis viewed as one of their vital functions.⁷⁶ In the Progressive period, New York led in insurance regulation, Wisconsin in tax reform and industrial safety legislation, and California in direct-democracy constitutional reform. Other progressive states led in fields ranging from home rule for cities to public parks and prison reform.⁷⁷ Among the most enduringly important innovations was the effort to improve civil service management and upgrade technical expertise in state government administration. Although political influence, outright corruption, administrative incompetence, and ineffectiveness remained hallmarks of administration in some states, the foundations for more efficient and responsible government were set in place during the Progressive years.⁷⁸

With the advent of the New Deal in 1933, the centralization of power in the federal government intensified. This occurred in counterpoint to the post-1935 "constitutional revolution" that removed the Supreme Court as a censor of state initiatives and transformed other cen-

74. Van Cleve, *The School of Fisheries [University of Washington]*, 14 PROGRESSIVE FISH CULTURIST 159-64 (1952) (describing school's history, research, and curriculum).

75. Mauro, *supra* note 2, at 325-29.

76. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). One state's exemplary record in this regard can be seen in Gerald Nash's study of California government and policy, G. NASH, *STATE GOVERNMENT AND ECONOMIC DEVELOPMENT: A HISTORY OF ADMINISTRATIVE POLICIES IN CALIFORNIA, 1849-1933* (1946). This work covers the spectrum of state intervention over nearly a century.

77. H. GRANT, *INSURANCE REFORM: CONSUMER ACTION IN THE PROGRESSIVE ERA* 3-54 (1979); S. KIMBALL, *INSURANCE AND PUBLIC POLICY: A STUDY IN THE LEGAL IMPLEMENTATION OF SOCIAL AND ECONOMIC PUBLIC POLICY, BASED ON WISCONSIN RECORDS, 1835-1959* (1960) (describing development of Wisconsin insurance law) G. MOWRY, *THE ERA OF THEODORE ROOSEVELT, 1900-1912*, at 59-84 (1958).

78. H. CHUDACOFF, *THE EVOLUTION OF AMERICAN URBAN SOCIETY* 148-78 (1975); MOWRY, *supra* note 77, at 59-84; Holli, *Urban Reform in the Progressive Era* in *THE PROGRESSIVE ERA* 133-52 (L. Gould ed. 1974); see also B. ROSENKRANTZ, *PUBLIC HEALTH AND THE STATE: CHANGING VIEWS IN MASSACHUSETTS, 1842-1936* (1972) (a study of change in one area of policy and administration, indicative of professionalization and reform).

tral elements of constitutional doctrine.⁷⁹ It is from the New Deal, therefore, that we date the modern interventionist national government, with its comprehensive labor and welfare policies, its extended web of national regulatory measures covering vital economic sectors formerly outside the scope of federal controls, and its far-reaching fiscal and monetary policies linked to international trade and monetary programs. The New Deal programs altered both the basic distribution of power between the federal government and the states and the substantive policies pursued at the national level.⁸⁰

The evidence of this multifaceted shift during the 1930's is a litany of governmental transformation. Agriculture became a managed sector of the economy during the New Deal era, to remain substantially so—with varying combinations of price support measures and output controls linked to soil conservation programs—until the present day. In 1935, the Wagner Act⁸¹ instituted a permanent federal presence in labor-management relations. This presence was modified by the Taft-Hartley Act⁸² to allow state "right-to-work" laws. Federal power was augmented, however, with minimum-wage legislation and subsequent extensions of the minimum-wage provisions in the late 1930's.⁸³ The Tennessee Valley Authority was inaugurated in the first hundred days of the New Deal, instituting a new mode of federal action designed to support integrated regional development. Moreover, the modern welfare state took form after 1935 with Congress's enactment of the Social Security and unemployment-compensation systems.⁸⁴

79. The constitutional development of the period is surveyed comprehensively and insightfully by Paul Murphy, P. MURPHY, *THE CONSTITUTION IN CRISIS TIMES 1918-1969* (1972); see also W. LEUCHTENBERG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* 238 (1963); Feeley, *Judicial Activism Since 1933: A Half Century Perspective*, in *THE NEW DEAL LEGACY AND THE CONSTITUTION: A HALF CENTURY RETROSPECT 1933-1983*, at 23 (1985) (Proceedings of a Conference at Boalt Hall School of Law, University of California, Berkeley, April 16, 1983); Scheiber, *From the New Deal to the New Federalism 1933-1983*, in *THE NEW DEAL LEGACY AND THE CONSTITUTION: A HALF CENTURY RETROSPECT 1933-1983*, *supra*, at 1; Berger, *The Activist Legacy of the New Deal Court*, 59 WASH. L. REV. 751 (1984); Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723 (1984); Parrish, *The Hughes Court, the Great Depression, and the Historians*, 40 HISTORIAN 286-308 (1978).

80. See NATIONALIZING GOVERNMENT: PUBLIC POLICIES IN AMERICA (T. Lowi & A. Stone eds. 1978); D. WALKER, *supra* note 21 at 65-95; Beer, *The Modernization of American Federalism*, 3 PUBLIUS Fall, 1973, at 49, 69-73; Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619, 644-48 (1978).

81. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169).

82. Labor Management Relations Act of 1947, ch. 120, § 1, 61 Stat. 136 (codified as amended at 49 U.S.C. §§ 141-144).

83. See I. BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* (1950); J. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS AND THE LAW* (1974); J. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937-1977* (1981).

84. Although these programs, embodying new national minimum standards, centralized power

By the end of the 1930's, the federal government had extended its influence over the economy even further with its commitment to Keynesian anticyclical fiscal policy. This policy's efficacy was vastly enhanced by the massive rise in federal expenditures, both absolutely and as a proportion of GNP, that was the other major fiscal legacy of the New Deal. The rise in expenditures was financed not only by an increasing national debt, but also by expansion of federal income tax revenues. Federal income taxes increased to the point where the states were left with relatively little room, in practical political terms, to impose their own income taxes. States were also left with a political problem as to feasible aggregate tax levels.⁸⁵

III

THE BALANCE SHEET ON EXPERTISE, BUREAUCRACY, AND PERFORMANCE

The historical balance sheet on state performance indicates that the efforts to foster industrial growth and regulate economic development were not uniformly effective. In the pre-1861 era, despite some remarkable successes,⁸⁶ the public enterprises and regulatory regimes of the states fell short of ideal standards. Generally, the state governments lacked the expertise, depth of bureaucratic staffing, or legislative vision to plan for growth on a long-term basis. Short-term goals dominated, many state legislatures bent easily under pressure from special interests, and administrative integrity was often lacking.⁸⁷

Even after the Civil War, the administrative capacity of the states only gradually improved. Their ability to resist interest-group pressures and formulate long-term policy objectives with a view to the public interest remained attenuated.⁸⁸ When states delegated their regulatory authority, as, for example, by granting extraordinary powers to such agencies as the cattlemen's associations in the Rocky Mountain states, the result was to enhance local elite groups' stranglehold on natural resources. Many of the emerging agencies for occupational licensing,

and authority even further in a vital area of policy, they did leave room for significant state variation under cooperative provisions allowing the states both a general administrative role and some discretion in setting unemployment-benefits levels. For the early history of grant-in-aid programs and their administrative and political contexts, see J. PATTERSON, *THE NEW DEAL AND THE STATES: FEDERALISM IN TRANSITION* (1969).

85. See J. MAXWELL & J. ARONSON, *FINANCING STATE AND LOCAL GOVERNMENTS* 10-21, 98 (3d ed. 1977).

86. See discussion of the Erie Canal, *supra* text accompanying notes 25-29.

87. See, e.g., J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* (1979). For a discussion of Pennsylvania's disastrous experience with administration of the state transportation system, see L. HARTZ, *supra* note 10, at 129-80.

88. J. HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915*, at 560 (1964).

including the bar associations in some states, had similar defects. Even without such institutionalization of interest-group power, the railroads in California, mining companies in the Rocky Mountain states, and coal and chemical companies in many Northeastern states had their way through manipulation of the political process.⁸⁹ Once modernization of the states' governmental administration finally began, however, it was dramatic and far-reaching.⁹⁰

Since World War II, the states have made significant advances in their administrative performance levels, with important consequences for industrial policy implementation. These advances include constitutional reform, upgrading of management practices, improved staffing of legislatures and agencies, and structural reform such as introduction of special-district governance and creation of administrative authorities which in many respects help to make jurisdiction and policy dimensions more congruent.⁹¹ Federal officials have faulted state governments for having "an extremely limited ability to plan and direct on a long-term basis for the total needs of their particular jurisdiction[s]."⁹² But the weaknesses which, according to this view, account for state failures are qualitatively different from the flaws and failures that have been identified here and in other analyses as having hampered state performance in earlier eras of American history.⁹³

IV

PRESSURE POINTS: THE PROBLEMATIC AREAS OF LAW AND POLICY

Given that there have been significant improvements in administrative organization and efficiency in the states generally, what are the pressure points and problematic areas in their current efforts to seize some measure of initiative in industrial policy?

89. See, e.g., J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); L. FRIEDMAN, *supra* note 16, at 139-66; E. OSGOOD, *THE DAY OF THE CATTLEMAN* 114-75 (1929).

90. BUECHNER, *STATE GOVERNMENT IN THE TWENTIETH CENTURY* (1967); D. GRANT & H.C. NIXON, *STATE AND LOCAL GOVERNMENT IN AMERICA* (3d ed. 1975). But compare the caveats of James W. Fesler, leading student of public administration and federalism, in *The Editors Interview James W. Fesler*, 2 *NEW ENG. J. HUM. SERV.*, Fall 1982, at 6, 8.

On reform efforts and some of their results before 1920, see S. SKOWRONEK, *supra* note 16.

91. See, e.g., WALSH, *THE PUBLIC'S BUSINESS: THE POLITICS AND PRACTICES OF GOVERNMENT CORPORATIONS* (1978).

92. STUDY COMM. ON POLICY MANAGEMENT ASSISTANCE, *STRENGTHENING PUBLIC MANAGEMENT IN THE INTERGOVERNMENTAL SYSTEM* vii (1975) (report prepared for the Office of Management and Budget).

93. See *supra* text accompanying notes 52-59.

A. "Our Federalism"⁹⁴ and the Nation of States

The first pressure point is the enduring dilemma of federal structure: Many of the policy areas in which the states seek to have an impact involve issues and problems whose dimensions transcend state boundaries. It is the old dilemma of congruence—the difficulty of "fit" in bringing state authority and resources to bear when the sources of an industrial problem and its optimal solution require national authority. The Texas Railroad Commission's success in regulating petroleum marketing,⁹⁵ for example, does not offer much of a lesson on this score because it applies only to the regulation of resources that are limited in their geographic distribution and whose markets are susceptible to significant leverage from an individual state or small number of states containing the resource. Severance taxes for mineral fuels during the energy shortages of the 1970's serve as an example of a small number of states using their leverage. The advantaged states managed nicely to impose special imposts on the rest of the nation.⁹⁶

Uniform minimum national standards have been the most effective and equitable solution to this dilemma.⁹⁷ Resort to uniform standards, such as the minimum national wage, meant that states were no longer free to play certain chips in the timeless game of competitive indulgence of their respective "home" industries.

Imposing uniform national standards constitutes, of course, a political solution that requires all the states to play by the same rules on important matters of policy. For states intent upon providing their citizens with high levels of educational, cultural, and other infrastructural facilities, the stakes are high indeed. Uniform minimum standards save them from the baneful effects of "competition in laxity" and debasement of standards. Alternatively, a mandated national standard pulls the rug out from under the states that would lower the level of public goods and services they provide to their citizens in the quest for presumed short-term or even long-term advantage.⁹⁸

94. Justice Black used the phrase "our federalism" in *Younger v. Harris*, 401 U.S. 37, 44 (1971) (regarding federal injunctions affecting proceedings in state courts). Justice Brennan, dissenting in *Judice v. Vail*, 430 U.S. 327 (1977), also referred to "our federalism," but in highly nationalistic terms. He asserted that the intention of Congress in 42 U.S.C. § 1983 and the Judiciary Act of 1875 was to permit removal of civil rights suits to a federal forum "without regard to the pendency of [a] state suit." *Id.* at 343-44. See Sedler, *Younger and its Progeny: A Variation on the Theme of Equity, Comity and Federalism*, 9 U. TOL. L. REV. 681, 729-30 (1978).

95. See *supra* text accompanying notes 5-8.

96. Address by Richard D. Lamm, *Some Reflections on the Balkanization of America*, Vail, Colorado (August 18, 1978) (unpublished).

97. The regulation of child labor and collective bargaining in the past through the enactment of uniform national standards exemplifies this approach. See S. WOOD, *supra* note 55.

98. This type of policy was pursued, with tragic results, by the coal barons of Appalachia, who sacrificed human resources in their region both by manipulating the tax structure and by opposing

B. *The Preemption Conundrum*

The issue of federal preemption as a constitutional doctrine and policy alternative is ineluctably at the forefront of the debate on state industrial policy. Historically, preemption has been the principal instrument for establishing minimum standards. For example, the Wagner Act preempted state powers in vital ways, thereby assuring labor of certain minimum collective bargaining rights. Since enactment of the Interstate Commerce Act⁹⁹ and the Pure Food and Drug Act,¹⁰⁰ various regulatory measures concerning health, safety, and business competition have centralized authority in those fields.¹⁰¹

Recently, however, the Reagan administration appointees on several regulatory commissions have preempted state laws in order to reduce regulatory standards or eliminate regulation altogether.¹⁰² Again, we come back to politics. States that want to regulate in the interests of worker or consumer health and safety—states that resist “competition in laxity”—will either prevail or lose on this question of the “new-style preemption” on the basis of their effectiveness in Congress and the national political arena.

Even when preemption is used to deregulate,¹⁰³ however, there are still opportunities for the states to pursue industrial policy goals. Today, in state politics and policy debate, there is as much attention as ever being given to the matter of “business environment” and “investment climate.” Thus, there is continuing concern with how environmental and zoning regulations, state tax policies, and other regulatory legislation will affect business profits relative to the policies of other states. States also still place great importance on that familiar panoply of promotional incentives and immunities extended to attract both domestic and foreign investment. Moreover, numerous states today are pursuing research and development strategies that are in the tradition of agricultural extension research in the land-grant colleges a century ago and the path-breaking work done by California’s state commercial fisheries laboratory earlier in

mining safety and workers’ compensation legislation and increased expenditures for schools and other public services. This extreme ease is chronicled in R. ELLER, *supra* note 64. On the South, see also Scheiber, *supra* note 63, at 69-105.

99. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended at 29 U.S.C. §§ 501-507, 522, 523, 525, 526, 3101-3104, 10101-11916).

100. Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768 (repealed by Act of June 25, 1983, ch. 675, § 902(a), 52 Stat. 1059).

101. On preemption, see generally, Cox, *The Supreme Court and the Federal System*, 50 CALIF. L. REV. 800 (1962); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

102. Foote, *Regulatory Vacuums: Federalism, Deregulation, and Judicial Review*, 19 U.C.D. L. REV. 113 (1985); Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 VA. L. REV. 1429 (1984)

103. See M. DERTHICK & P. QUIRK, *THE POLITICS OF DEREGULATION* (1985).

this century.¹⁰⁴

C. *Coalitional Politics: The States as Political Actors*

As industrial-policy issues come to the fore, we can expect states with similar interests to form coalitions on matters such as preemption of their autonomy in industrial tort liability or taxation policy. They have already successfully engaged in such coalition-building in the Sunbelt-Snowbelt confrontation during the energy crisis, in the 1986 debate on federal tax-revision proposals, and in the fight that the states and big-city governments mounted (with mixed success) against the nearly forgotten, and potentially devastating, "swap" proposals, under the rubric of the "New Federalism," of the Reagan Administration in 1981 and 1982.¹⁰⁵

The 1986 debate over deductibility of state and local taxes was a particularly dramatic example of the coalition phenomenon. The tax reform proposals that came out of Congress and the White House had the potential to undermine seriously the state fiscal capacity. On the one hand, federal tax cuts which ineluctably would reduce the national government's ability to expand domestic programs or channel fiscal aid anew to the states meant that the federal cornucopia was solidly capped. On the other, the proposed loss of deductibility of state and local tax payments meant that political efforts to take up the slack in the provision of public services at those levels would confront taxpayer resistance that was heightened measurably by the loss of the deductibility cushion. This pincers movement against the states—a kind of "Whiplash Federalism," palpably damaging to the capacity of the states for autonomous action—came at the end of a period when there had been a volatile, stop-and-go pattern of federal grants.¹⁰⁶

The states' successful coalition-building to protect their common institutional interests bears out Madison's prediction in *The Federalist No. 46*—that "ambitious encroachments" by the national government on state authority would be perceived by the states as a common threat.¹⁰⁷ Consequently, Madison wrote, "every [state] Government would espouse

104. Mauro, *supra* note 2; Nelson & Langlois, *Industrial Innovation Policy: Lessons from American History*, 219 *SCIENCE* 814 (Feb. 18, 1983).

On agricultural extension research, see, e.g. F. SHANNON, *THE FARMER'S LAST FRONTIER: AGRICULTURE, 1860-1897*, at 280-82 (1945); G. COLMAN, *supra* note 72; Evenson, *Agriculture, in GOVERNMENT AND TECHNICAL PROGRESS: A CROSS-INDUSTRY ANALYSIS*, *supra* note 3, at 264-68 (chapter on agricultural research and development); Rasmussen, *The Impact of Technological Change on American Agriculture, 1862-1962*, 22 *J. ECON. HIST.* 578, 584, 590 (1962).

105. See Scheiber, *Some Realism About Federalism: Historical Complexities and Current Challenges*, in *EMERGING ISSUES IN AMERICAN FEDERALISM* 41-64 (U.S. Advisory Committee on Intergovernmental Relations 1985); see generally, Peterson, *When Federalism Works*, in *id.* at 23 (discussing New Federalism plan).

106. Scheiber, *supra* note 105, at 52-53.

107. *THE FEDERALIST NO. 46*, at 320 (J. Madison) (J. Cooke ed. 1961).

the common cause. A correspondence would be opened. . . . One spirit would animate and conduct the whole."¹⁰⁸ The uncanny accuracy of Madison's prediction was proven by the mobilization of state interests both during the 1981-83 crisis of threatened "swaps" and "turnbacks" of functions to the states (by which the Reagan administration sought to relieve the national government of major fiscal and policy responsibilities) and during the tax-revision debate of 1986. In each instance, the Council of State Governments, the Governors' Conference, and other organizations reinforced the initiatives in Congress to rally successfully against the imposition of policies that threatened to destabilize state fiscal capacity. At the same time, the history of the defense of state interests in these crises gives substance to the constitutional theory of Wechsler,¹⁰⁹ Choper,¹¹⁰ and Justice Blackmun,¹¹¹ that the "structural elements" of the federal system—which permit the states to express their interests and defend themselves politically in Congress and in ordinary politics—provide a powerful instrument of action and bulwark of protection for the states' collective and individual interests.¹¹²

108. *Id.*:

But ambitious encroachments of the Foederal Government, on the authority of the State governments, would not excite the opposition of a single State or of a few States only. They would be signals of general alarm. Every Government would espouse the common cause. . . . Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combination in short would result from an apprehension of the foederal, as was produced by the dread of a foreign yoke. . . . But what degree of madness could ever drive the Foederal Government to such an extremity?

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

110. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171-259 (1980); Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1557-60 (1977).

111. *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1984), *reh'g denied*, 471 U.S. 1049 (1985) ("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.")

112. *But cf.* Howard, *Garcia: Federalism's Principles Forgotten*, INTERGOVERNMENTAL PERSPECTIVE, Spring/Summer 1985, at 12-14 (U.S. Advisory Commission on Intergovernmental Relations Publication) (criticizing *Garcia* and arguing that the Supreme Court should actively defend state interests).

Some political analysts insist that Senators and Representatives in Congress tend not to represent the interests of "states as states," but rather the interests of highly localized factions. The importance of modern intergovernmental grant-in-aid programs and of conventional national programs with differential impacts on localities and states to state and local finances is said to have reinforced this tendency:

Naturally, members of Congress always have functioned as the representatives of local opinion within the national government, particularly given our decentralized party system. However, the erosion of traditional notions of intergovernmental roles and the mass acceptance of federal activism have enhanced the temptations for Congressmen [sic] to assume the functions of local government as well.

U.S. Advisory Commission on Intergovernmental Relations, *The Condition of Contemporary Federalism: Conflicting Theories and Collapsing Constraints*, 2 THE FEDERAL ROLE IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH 126 (1981); *cf.* M. FIORINA, CONGRESS: KEYSTONE OF THE

D. State Autonomy and Fiscal Realities

Dealing creatively with the problem of declining, depressed, and bankrupt industries is not something the states have routinely done in the past. Typically, in this nation's history, a "slash and burn" approach has prevailed: When a natural resource has been worked to exhaustion or an industry meets new competition from other regions, large-scale capital and technology moved on and exploited newly discovered or newly opened resources elsewhere.¹¹³ Today, many states confront the systemic problem of declining industries. Unless the necessary fiscal support is forthcoming from national government, it is difficult to see how the states can hope for any real success in developing rehabilitative strategies, in building new infrastructures that will create investment and employment opportunities, or in extending humane levels of assistance for an unemployed or distressed labor force.

In fact, during the Reagan years the national government (despite "New Federalism" rhetoric) has sought to take away from the states decisionmaking power over resource use when the benefits tend to be national and the costs and risks localized—for example, in drilling for offshore oil.¹¹⁴ Meanwhile, the administration has left the states on their own to deal with the intractable problems of deindustrialization and depressed industries, just as it has sought to transfer burdensome welfare responsibilities to the states in its "swap" and "transfer" proposals. Behind the rhetoric of giving the states additional "responsibility" is the reality of giving them additional burdens. The policies of reducing state control over valuable resources while transferring expensive social program responsibilities to them are policies damaging both to the autonomy and to the welfare of the states. It is impossible to escape the force of what one western governor wrote in 1983, amidst debate of "New Federalism" and proposals for swaps and "turnbacks": "Simply put, states are not able to control levels and distribution of poverty or unemployment since federal tax, monetary, regulatory, fiscal and foreign policies are the major determinants of the economic climate in individual states."¹¹⁵

WASHINGTON ESTABLISHMENT 46, *passim* (1977); D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION ch. 2, *passim* (1974).

113. See, e.g., H. SCHEIBER, H. VATTER & H. FAULKNER, AMERICAN ECONOMIC HISTORY (9th ed. 1976).

114. See Cicin-Sain, *Offshore Oil Development in California: Challenges to Governments and to the Public Interest*, 27 PUB. AFF. REP., Feb.-April 1986, at 1; Cicin-Sain & Knecht, *The Problem of Governance of U.S. Ocean Resources and the New Exclusive Economic Zone*, 15 OCEAN DEV. & INT'L L. 289 (1985); Cicin-Sain & Knecht, *Federalism Under Stress: The Case of Offshore Oil and California*, paper presented to the 1986 Berkeley Seminar on Federalism, Nov. 13-14, 1986 (on file with author) (forthcoming in *Proceedings of the 1986 Berkeley Seminar on Federalism*, published by the Institute of Governmental Studies, U.C. Berkeley).

115. Matheson, *New Federalism: A Balance of Responsibilities*, ENTERPRISE, Dec. 1982-Jan.

Some analysts have proposed that states and localities build into their industrial policies loan and retraining programs and tax concession provisions to be linked to prior notice and financial contributions to the community in case of labor-force cuts.¹¹⁶ However, such an approach offers only limited protection to communities that might be affected at some future juncture. Protection is assured only if the business firms which agree to such terms are fiscally capable of meeting their obligations when they seek to make cutbacks.

A creative departure from the routine responses, or nonresponses, of the states to "deindustrialization" crises has been the creation of a Steel Valley Authority ("SVA"), chartered by the Pennsylvania state legislature. This agency was formed at the initiative of a coalition of organized labor and local business organizations, religious associations, and other community-activist political groups in the "rust belt" steel district of Ohio, Pennsylvania, and West Virginia.¹¹⁷ The organizers of SVA regard its Pennsylvania charter as giving it the authority to use the eminent domain power to take over steel plants from private owners when they threaten closings. Funds for compulsory purchases under eminent domain takings procedures must be raised from community and outside sources in order for this highly unusual agency to be effective.¹¹⁸

Champions of this approach to industrial crisis see SVA as a first step toward establishing the principle that industries owe a responsibility to their communities. When industries receive subsidies or privileges of any kind as part of an "industrial development" package, they must agree to a minimum term of years during which they will stay in place, must accept job-retraining and severance costs in the event of subsequent departure, and must give subsidizing government agencies liens over their property that will apply against damages in eminent domain proceedings. Even enthusiasts for such a policy, however, recognize that success "depends on national action":¹¹⁹

To make it work, Congress would have to withhold Federal development assistance from any local government that were to subsidize private firms without establishing the companies' legal obligation to the community. To limit international capital flight, companies abandoning their local responsibilities could be barred from U.S. markets, or at least from

1983, at 5; see also Yago, Korman, Wu & Schwartz, *Investment and Disinvestment in New York, 1960-1980*, 475 ANNALS 28-38 (1984) [hereinafter cited as Yago].

116. Blakely & Shapira, *Industrial Restructuring: Public Policies for Investment in Advanced Industrial Society*, 475 ANNALS 96, 104-09 (1984).

117. Plotkin & Scheuerman, *The Lesson of Monongahela Valley: Get Them Before They Get You*, 243 THE NATION, Oct. 4, 1986, at 309. The labor-business-community coalition mentioned in the text is the Tri-State Conference on Steel.

118. *Id.*

119. *Id.* at 310.

receiving government contracts.¹²⁰

Alice Rivlin has offered a different perspective on how states ought to respond to the parlous new situations that accompany "deindustrialization."¹²¹ She argues that "economic development is a potential battleground among states and localities," just as it has been in the past, "but it has a more positive side. If states and localities begin competing more and more to get business by improving their services rather than by lowering their taxes—by having better education services or more effective manpower training—there might be major national benefits."¹²² One example of this sort of positive, rather than defensive, response to industrial policy challenges is the educational reform movement that has taken hold in the last few years. The building of research parks, grants to universities, creation of networks and consortia for targeted research and development, and application of state pensions funds for in-state high-technology business development all demonstrate that what some analysts term (perhaps optimistically) "full-fledged industrial policies" are in effect in many states.¹²³

Creating "the environment for the same type of phenomenon as Silicon Valley"¹²⁴ became a key objective, for example, of the Michigan Venture Capital fund, which invested \$48 million in twenty-three companies from 1982 to 1986. The legislature authorized the fund to invest up to five percent of the state's \$10.5 billion public-employee pension fund as venture capital in private firms. New Jersey and New York established similar funds in the early 1980's.¹²⁵ In Pennsylvania, four public funds for venture capital investments were inaugurated in 1983, with public funds authorized in a statewide referendum, matched by private funds. Indiana established a public corporation for "innovation development" to help finance new ventures. Its direct-investment efforts were supported by private banking, utility, and industrial companies, which took advantage of a thirty-percent write-off opportunity on state taxes.¹²⁶ Massachusetts began construction of a "biotechnology park" office and research-laboratory project at Worcester in late 1985. This project is one of a cluster of such ventures sponsored as "incubators" for key high-technology industries, underwritten by a combination of state and private

120. *Id.* at 311; see also S. Lynd, *The Genesis of the Idea of a Community Right to Industrial Property in Youngstown and Pittsburg, 1977-1986*, forthcoming in *J. AM. HIST.* (on file with author).

121. Rivlin, Comment in *EMERGING ISSUES IN AMERICAN FEDERALISM*, *supra* note 105, at 73.

122. *Id.* at 78.

123. Pierce, Comment in *EMERGING ISSUES IN AMERICAN FEDERALISM*, *supra* note 105, at 82-83.

124. *N.Y. Times*, June 23, 1986, at 1, col. 3; *id.* at B11, col. 1.

125. *Id.*

126. *Id.*, at B11, cols. 1-3.

funds.¹²⁷ Ohio is also among the states serving as "the pathfinders of new industrial policy,"¹²⁸ with its Thomas Alva Edison Partnership, a \$32 million enterprise based on state, private, and university investment devoted to building six advanced technology centers in a variety of high-technology fields.¹²⁹

There are also worries, however, about the survival or effectiveness of such policies in an atmosphere of national politics that forces states to pay a high price for instituting such measures.¹³⁰ Empirical research on disinvestment and "deindustrialization" in New York has shown, moreover, that incentive programs for industry can backfire when states subsidize large, multi-branch firms which often are owned or controlled largely from out of state. They are predictably the most likely to leave the state in hard times.¹³¹

Thus, the classic dilemmas of state effectiveness in a federal system clearly remain. Competition among states can all too easily lead to "beggar-thy-neighbor" tactics or to adoption of policies that beggar their own citizens by decreasing public services in order to subsidize industry. When the national government is willing to establish floors and accept broad responsibility for minimum services and regulatory standards, the competition among states is placed on a basis that is not damaging to social policy objectives other than the objective of industrial growth itself. Today, however, the states confront the harsh reality of a national administration hostile to uniform national standards except when they reduce or eliminate regulatory powers, hostile to state autonomy when states prefer conservationist over developmental standards, and hostile to federal tax-deductions policy which would encourage the states to play their traditional role as "laboratories of democracy."

In this political context, it seems utterly chimerical to assert that "states have more control than liberals care to admit over their economic and social destinies,"¹³² or that "the road to social progress lies more

127. N.Y. Times, Nov. 3, 1985, at E5, cols. 1-4.

128. Lepkowski, *States Launch High-Tech Program to Bolster Industrial Economy*, CHEMICAL AND ENGINEERING NEWS, Sept. 17, 1984, at 9 (quoting Gov. Bruce Babbitt).

129. *Id.*

130. See Lucke, *Rich States—Poor States: Inequalities in Our Federal System*, INTERGOVERNMENTAL PERSPECTIVE, Spring 1982, at 22 (U.S. Advisory Commission on Intergovernmental Relations Publication). For evidence of the impact of Reagan administration grant-in-aid cutbacks, see Nathan & Doolittle, *Federal Grants: Giving and Taking Away*, 100 POL. SCI. Q. 53 (1985).

Frank Mauro argues that state promotion of industrial innovation is beneficial in two ways: First, it produces beneficial effects on the state economies; second, it has positive effects on the national economy. But Mauro's appeal is essentially altruistic, and it does not directly address the issue of how a state is to undertake the costs of subsidizing spillover advantages, especially in the context of hostile national policy. See Mauro, *supra* note 2, at 359.

131. Yago, *supra* note 115, at 33.

132. This quotation is from a Wall Street Journal editorial, much quoted in recent years in the

with Howard Jarvis than with the partisans of active government.”¹³³ Active state intervention will be effective, equitable, and consistent with a fair and just distribution of income and resources only so long as the overriding national policies encourage them to be.

industrial policy debate, quoted in *REGIONAL GROWTH: INTERSTATE TAX COMPETITION* March 1981, at 27 (U.S. Advisory Commission on Intergovernmental Relations).

133. *Id.*